KENYANS FOR
PEACE WITH TRUTH AND JUSTICE (KPTJ)

THEMATIC ANALYSIS OF THE DRAFT CONSTITUTION OF KENYA

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Overall: The Draft Constitution- termed the Harmonized Draft Constitution- has many things that could be improved; the unevenness of the language, the level of detail, the style of drafting and there are specific issues of content that need to be addressed. The content issues are analyzed in this analysis. However, the key question is not whether one approves fully of the Draft Constitution. It is to remember that the alternative is the status quo. The spirit of this analysis is that there are specific changes that can be incorporated into the existing draft that would help it become a superior alternative to the current Constitution.

Introduction

The analysis does not include a detailed assessment of institutional design issues: a) should Kenya adopt a presidential; semi-presidential or parliamentary system of government; b) does the electoral system proposed in the Draft Constitution deal with the historical problems of elections in Kenya and c) is the devolution scheme appropriately designed? These questions have not been tackled not because they are not salient, but because they will open up old discussions that will, in all probability, energize those who want to hold onto the existing Constitution. Moreover, the Committee of Experts that produced the draft also considered that their primary responsibility was to harmonize the polarized positions articulated in the various drafts prepared in the run-up to the referendum in 2005. No whole sale redesign of the Constitution outside the parameters of those drafts was envisioned in their legal mandate.

The spirit of this analysis is that there are specific changes that can be incorporated into the existing draft that would help it become a superior alternative to the current Constitution.

This analysis is divided into three: a) general matters that are tackled thematically chapter by chapter; b) the design of oversight and monitoring and c) the design of ethics and integrity and d) some general observations.

a. Sovereignty of the people and unlawful governments: Chapter One

There are a number of areas that need technical attention. The key ones are:-

Article 1(1) “sovereignty resides in the people and is to be exercised only in accordance with this Constitution.” But article 3(2) says that attempts to establish a government not in “compliance with this Constitution is unlawful.” Can the people’s sovereignty be exercised in a manner not complying with the constitution if:-

1. They are trying to resist an attempt to overthrow lawful authority;
2. Steps have been taken to use the processes of the constitution in order to destroy it e.g. FIS in Algeria wanted to use the democratic process to acquire power and then outlaw democracy.

What do other constitutions say about illegal attempts to destroy the constitution or establish government in a manner not consistent with the constitution?

Article 3 of the Uganda Constitution provides for "the defence of the Constitution" and in sub-section 4 enacts that all citizens of Uganda shall have the right and duty at all time "to defend this Constitution and, in particular, to resist any person or group of persons seeking to overthrow the established constitutional order" and "to do all in their power to restore this Constitution after it has been suspended, overthrown, abrogated or amended contrary to its provisions."

This provision echoes the German Constitution. Article 20 enacts the basic institutional principles of the constitutional one element of which is "defense of the constitutional order." Under 20(4), "all Germans shall have the right to resist any person seeking to abolish this constitutional order, if no other remedy is available."

It seems rather burdensome to require citizens to comply with the constitution while there are usurpers trying to illegally overthrow the constitution.

Recommendation: The right to resist overthrow of the constitutional order should a) be included under sovereignty and b) not be hemmed in by an obligation on the part of the citizens to comply with the provisions of constitution.

b. Citizenship and residence: Chapter Four

1) Article 18 (1): Citizenship and marriage

The Draft Constitution does well to eliminate the current discriminatory practice whereby women are not able to confer citizenship on their spouses by marriage. However, as drafted the provision in the Draft imposes very unreasonable new conditions. Article 18(1)) provides that a spouse who marries a citizen is only entitled to apply for citizenship after 7 years of marriage.

There are two reasons why this may be problematic:

i. First, there is no reason why the period in which a spouse is entitled to apply for citizenship should be equal to the durational residency requirement of 7 years under Article 19. (*See the note on naturalization below*).
ii. Second, often there are very severe disabilities associated with lack of citizenship and it seems particularly odious that somebody married to a citizen should be able to get children who immediately become citizen by birth but that he or she remains ineligible for citizenship for 7 years. This severely undermines the principle enunciated in article 42(1) that "the family is the natural and fundamental unit of society and the necessary basis for social order."

Recommendation: The durational residency requirement for spouses should either be a) altogether eliminated or b) limited to a reasonable period like two years.

2) **<u>Article 19: Citizenship by Naturalization</u>**

Article 19 provides for a durational residence requirement of 7 years before one is eligible to apply to be a citizen of Kenya. This clause appears to have been bench-marked against Constitutions such as those of Uganda and Zambia where the durational residency requirement is 10 years. This seems unconscionable and inconsistent with best practice. In Australia it is 4 years and the UK is 5 years. And yet it must be borne in mind that these are countries trying to shut out immigrants.

Recommendation: There are three possibilities to deal with this:

a. One approach, which is probably best, is to leave the determination of the relevant durational residence requirement to parliament. This is the case in the Eritrean and the South African Constitutions.
b. However, if a durational residency requirement is deemed important enough to be included in the Constitution; it ought to be limited to 3-5 years.
c. A third alternative might be to specify a threshold level of investment which eliminates the need for a lengthy durational residency.

3) **<u>Article 23: Residence</u>**

Article 23 limits the right of residence to a) a former citizen; b) a foreign wife or widow or foreign husband or widower of a citizen and c) a child of a citizen. This article should be amended to reflect the recent commitment of the Kenya Government under the East African Common Market Protocol. The Protocol commits the five EAC partner countries to the four freedoms of movement, residence, free movement of goods and services and the right of establishment. A country should not legislate in a manner that is inconsistent with its international obligations.

The question whether a legislative enactment made by a state after it has already acquired an international obligation changes that state's international responsibility arose for decision by the United States District Court for New York in the case of <u>*United States v. Palestine Liberation Organisation*</u>.[1] Under the 1987 *Anti-Terrorism Act* all Palestine Liberation Organisation, PLO, offices in the United States were to be shut down. The then Attorney General interpreted this stipulation to include the office of the PLO Mission to the United Nations. Such an action would have been in breach of the United States obligations under the United Nations Headquarters' Agreement. The District Court ruled that it could not be clearly and unambiguously established that the *Anti-Terrorism Act* intended to violate an obligation arising under the Headquarters' Agreement.

Recommendation: Given how difficult it will be to amend the Draft Constitution once it is enacted, it is important that the draft take account of Kenya's current international obligations. This could be done in either of two ways: a) by leaving the matter to ordinary legislation or b) by

[1] *USA v. Palestine Liberation Organisation*, 695 F. Supp. 1456 (1988)

adopting the proposed EAC residence requirements. The better option seems to be to leave the matter to general legislation.

c. Culture: Chapter Five

The chapter on culture and in particular some discrete provisions- such as Article 27- are rather problematic. Culture is always contested terrain and communities such as ours experiencing rapid modernization and transformation are likely to have very robust disagreements about a) what constitutes their culture; b) whether it is worth protecting and c) what role, if any, the government should have in cultural promotion. Moreover, once things like a) traditional medical practices (article 27(d); b) compensation for use of culture and cultural heritage (article 27(g) or c) use of traditional foods and drinks (article 27(h) become subjects of state policy all manner of quackery will acquire legitimacy.

One particularly problematic issue is the fact that the Draft Constitution does not make it explicit that the cultural principles "*of this part are not enforceable by any court.*" This is a significant omission because similar provisions- especially directive principles and national values- in other constitutions have often been held to have interpretative value in giving meaning to the enforceable parts of the constitution. In India, Courts have long regarded such principles as embodying the spirit of the Constitution. A line of decisions[2] from the Indian Supreme Court have held that principles such as these are useful in supplementing the bill of rights. The court has even been willing to allow Parliament to amend fundamental rights in order to give effect to these principles so long such amendments do not attack the core of the right. Other general provisions in the Constitution could also be construed in light of such principles. As one commentator has observed:

> "the Indian experience has shown that the value and influence of constitutional principles can largely be determined by the willingness of the courts to apply the principles."[3]

Recommendation: The chapter on culture should be eliminated. Instead, its provisions should condensed into two or three succinct national principles and values and articulated as such. Alternatively, this Chapter should make it explicit that it is not enforceable whether <u>as is</u> or <u>as an interpretive guide</u> in the application of other provisions of the Draft Constitution.

d. Rights and their enforcement: The Bill of Rights: Chapter Six

Overall: The bill of rights is very detailed and an improvement in terms wording over the one in the current Constitution. Moreover, it has a combination of a) civil; b) political and c) socio-economic rights. Unfortunately, even though, it is progressive it is also rather equivocal on the use and application of international human rights (Indeed it is altogether silent on the status of

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[2] see *State of Kerala v. Thomas*, A.I.R. 1976 S.C. 389; *Mukesh v. State of M.P.* A.I.R. 1985 S.C. 537; *Laxmi Khanna v. Union of India*, A.I.R. 1987 S.C. 232; *Chief Justice v. Dikshitulu*, (1979) 2 S.C.C. 34; *A.B.K. Singh v. Union of India*, A.I.R. 1981 S.C. 298.

[3] See Bertus de Villiers, *The Constitutional Principles: Content and Significance* in <u>Birth of a Constitution</u>, ed. Bertus de Villiers.

international law in Kenya or even how these instruments acquire legislative force - article 158 talks about signing of these instruments and of the state president and prime-minister's duties to ensure that the international obligations of the country are honoured.)

i. International human rights instruments and interpretation and application of the bill of rights Articles 29 and 30:

Under article 29 (4) international treaties are not interpretive guides – for courts, Human rights and Gender Commission or other bodies- in the enforcement of the bill of rights. However, under article 30(6), the state is obligated to implement legislation in a manner that facilitates "the fulfillment of its international obligations in respect of human rights and fundamental freedoms." In fact the state has three positive obligations here: a) to report to human rights bodies on time; b) to publish the reports before it submits them and c) to disseminate the general comments of treaty bodies. If these instruments have no constitutional status, why should the state have a constitutional obligation to spend money on their promotion? It appears that the Committee may have skirted the issue in order to avoid provoking controversies related to a) abortion; b) homosexuality and c) the death penalty all of which are the subject matter of a substantive body of international jurisprudence.

In a sense, the Draft Constitution seems to hark to an era already gone by. Emerging best practice from Australia - or even South Africa - is that the contents of rights protected by the Constitution can be determined, if there is ambiguity or a gap, by interpreting rights against the international obligations that a country has voluntarily assumed. The South African Constitutional Court has used this approach to fill gaps in the Constitution or to remedy a dearth of local judicial authorities on particular provisions. The court has justified the use of international law on the grounds that to grant "individuals the full measure"[4] of the bill of rights, it is necessary to interpret the rights therein generously.

There is, of course, an important difference in that the South African Constitution specifically declares that customary international law and self–executing international treaties are binding. However, the Constitutional Court has ruled that even those treaties that are not binding -because not enacted by Parliament- they "may be used as tools of interpretation."[5] The rationale for this is that:

> "International agreements and customary international law…. provide a framework within which [the bill of rights] can be evaluated and understood, and for that purpose, decisions of tribunals dealing with comparable instruments such as the United Nations Committee of Human Rights, the Inter American Commission on Human Rights, the Inter American Court of Human Rights, the European Commission on Human Rights and the European Court of Human Rights and, in appropriate cases, Reports of specialized agencies such as the International Labour Organisation may provide guidance as to the correct interpretation of the provisions of [the bill of rights]." [6]

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[4] See *Minister of Home Affairs (Bermuda) v. Fisher* [1980] AC 319 at 328-329. Quoted in *State v. Makwanyane*, *infra*, note 40.
[5] *The State v. Makwanyane*, CCT/3/1994.
[6] Chaskalson J, *id*. at para. 35.

The Constitutional Court was not only willing to borrow this international jurisprudence for the purpose of giving life to the bill of rights, it was prepared to go even further. Chaskalson J argued that experiences from other countries with a longer history of rights jurisprudence would be invaluable in interpretation of the bill of rights in the South African Constitution. He had not doubt that:-

> "[C]omparative bill of rights jurisprudence will no doubt be of importance, particularly in the early days of the transition where there is no developed jurisprudence in this branch of law on which to draw."[7]

Recommendation: Given the parlous condition of Kenya's human rights jurisprudence and, at times, even quite delinquent case-law, international law would have a very important ameliorative role in the protection and enjoyment of rights in Kenya. A specific Constitutional obligation to use international jurisprudence to improve the bill of rights should be imposed on the courts. Moreover, it is also important that the Draft Constitution clarify the status of International Law.

ii. Authority of the Court to uphold and enforce the bill of rights Article 32:

There seems to be some confusion about the exact nature of the jurisdiction to enforce rights. Under article 32, the constitutional court and the high court have jurisdiction to hear applications for redress for a violation of rights. In effect, this is the new section 84 jurisdiction. Article 32(2) requires parliament to enact legislation to give original jurisdiction to sub-ordinate courts to hear applications to enforce the bill of rights.

It is important to remember that section 84 jurisdiction under the current Constitution, like Article 32 in the proposed draft is a special jurisdiction. As a matter of law, Courts have inherent jurisdiction to enforce rights. If a Court has subject matter jurisdiction over something, it does not require an additional statute to be able to enforce any provision of the bill of rights, even if that court is a magistrate's court. The purpose of article 32- or similar provisions in other constitution- is to provide a fail-safe mechanism to provide a jurisdiction unique to rights enforcement so that there never could be a human rights violation without a remedy.

Recommendation: The provision giving parliament the authority to enact legislation to give Magistrate's Courts jurisdiction over human rights enforcement is misconceived. What is needed is general authority to enact laws to determine the jurisdiction of Magistrates' Courts- whether over human rights, land, admiralty or whatever else. Whatever jurisdiction the courts have, they will also *ipso facto* also have human rights jurisdiction over their subject matter. This would then leave article 32 jurisdiction as a special jurisdiction no different from the current jurisdiction under section 84.

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[7] *id*. para. 37.

iii. Non-derogable rights Article 34:

Article 34 of the Draft Constitution provides a list of four rights that may not be limited even in the case of a public emergency declared under article 75. These are a) the right not to be tortured or to be subject to cruel, inhuman or degrading treatment or punishment; b) freedom from slavery and servitude; c) the right to a fair trial and d) the right to an order of habeas corpus.

This list seems odd: it includes two rights which typically are (and often must be) derogable in an emergency: i) the right to a fair trial and b) the right to an order of habeas corpus. Indeed, these two rights are not on the list of non-derogable rights recognized under article 4(2) of the International Covenant on Civil and Political Rights, ICCPR, which details the rights that cannot be suspended even in a publicly declared emergency. Under article 4 of the ICCPR, the non-derogable rights include:-

a) Article 6 (right to life);
b) Article 7 (prohibition of torture or cruel, inhuman or degrading punishment, or of medical or scientific experimentation without consent);
c) Article 8, paragraphs 1 and 2 (prohibition of slavery, slave-trade and servitude),
d) Article 11 (prohibition of imprisonment because of inability to fulfil a contractual obligation),
e) Article 15 (the principle of legality in the field of criminal law, i.e. the requirement of both criminal liability and punishment being limited to clear and precise provisions in the law that was in place and applicable at the time the act or omission took place, except in cases where a later law imposes a lighter penalty),
f) Article 16 (the recognition of everyone as a person before the law), and
g) Article 18 (freedom of thought, conscience and religion).

These rights are missing from the list of derogable rights under article 34. But article 34 has two additional difficulties: i) it implies that the right to life is derogable and ii) it does not ban discriminatory derogation. Sometimes states derogate from rights in order to treat classes of citizens differently. In other words, derogation is often the excuse or the occasion for discriminatory treatment. In its General Comment[8] on article 4 of the ICCPR, the Human Rights Committee has emphasized that under article 4, paragraph 1, one of the conditions for the justifiability of any derogation from the Covenant is that the measures taken do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

Recommendation: Consistent with the recommendation made earlier[9] regarding the role of international law in interpretation of the bill of rights, article 34 should either link explicitly with the ICCPR through for example drawing on the same list of derogable rights or it should provide, in the alternative, that "derogations must be consistent with Kenya's international obligations."

[8] See Human Rights Committee, General Comment 29, States of Emergency (article 4), U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001).
[9] See Recommendation on Rights and their Enforcement, articles 29 and 30.

iv. Freedom from discrimination Article 37:

Discrimination on the basis of an inclusive list that has race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, culture, belief, conscience, dress, language or birth is barred. Because this is an inclusive list the categories can be expanded.

There are two issues here: a) private persons are barred from discriminating on any of these bases and b) the fact that a person may not be compelled to indicate their ethnicity or race.

a) Horizontal application of the Bill of Rights

Article 37 (2) barring private discrimination tries to deal with the mischief that arises when public discrimination becomes privatized so that the people who were previously discriminated against by the state suffer roughly the same discrimination but now imposed by private citizens.

It is easy to see immediate problems with this clause. Does a person discriminate by hiring a domestic servant who speaks his or her mother-tongue? There is any number of reasons why someone may want to do this. It could be that the person wants the children to learn their mother-tongue. In some countries, when race or sex or other quality is a Bona-fide Occupational Qualification, the use of that quality is not considered to be discrimination. A bona fide occupation qualification has been defined in the Canadian case of *Ontario Human Rights Commission v. Etobicoke (Borough).*[10] At issue was whether a requirement that firefighters compulsorily retire at age 60 constituted discrimination on the basis of age prohibited by the Human Rights Act.

The Supreme Court said:

> "To be a bona fide occupational qualification.. a limitation, such as mandatory retirement at a fixed age, must be imposed honestly, in good faith, and in the sincerely held belief that such limitation is imposed in the interest of the adequate performance of the work involved with all reasonable dispatch, safety and economy and not for ulterior or extraneous reasons aimed at objectives which could defeat the purposes of the code. In addition, it must be related in an objective sense to the performance of the employment concerned, in that it is reasonably necessary to assure the efficient and economical performance of the job without endangering the employee, his fellow employees and the general public."[11]

But there may also be social contexts in which discrimination is permissible, for example, selection of employees for certain types organizations. This might include charitable, religious, fraternal or social organizations that are not operated for profit. Such organizations are free to exclude people who are not members, Akorinos may not be required to employ Muslims or vice versa. In determining whether an organization is exempt from anti-discrimination scrutiny under the proposed legislation one must consider the extent to which its activities are devoted to social or fraternal purposes. There may of course be problematic cases in which fraternal purposes,

[10] [1982] 1 SCR 202

[11] *ibid.* at p.208.

which are excluded from anti-discrimination scrutiny, are intermixed with activities that are not excluded.

The exception is also particularly important in the domestic sphere. So in many places the exception will apply to domestic workers; persons employed to look after the personal and medical needs of their employers and those who look after sick children or a spouse or other relative who is unwell. One possible solution to the problem is to specify, as the United States has done, a threshold size or number of employees that an organization must have or an individual employ before anti-discrimination and equal opportunity laws can be applied. In the US a business needs to have more than 20 employees, to attract equal opportunity scrutiny.

b) A person may not be required to declare his race of ethnicity Article 37(3):

On the face of it, this makes sense. Unfortunately in the scheme of the draft constitution it seems somewhat incoherent. Under article 37(4) the state is required to take measures- including affirmative action to redress disadvantages suffered by groups or individuals as a result of past discrimination. And in the implementation provisions of article 30(5) the state needs to "understand" and public officers must "equip themselves" to deal with the needs of "minority" and "marginalized communities." Presumably this understanding and equipping entails gathering information about i) who minorities are?; ii) where they are located? iii) the history of discrimination against them?; iv) their socio-economic condition etc? How is the state to know how many members of the minority and marginalized communities exist if the individual members are under no duty to give the state this information? It seems churlish but in effect the situation is: the state must help the poor but the poor are under no duty to give the state information about their socio-economic status?

v. Older members of society Article 39:

Article 39(3) requires parliament "to enact legislation to establish a body define and advise" on policies and programmes for the elderly. This is excessive specification: the Constitution should impose a substantive duty to take care of older members of society not specify a particular means of fulfilling that duty. On research and analysis, the government may decide that it would be more efficient for the Human Rights and Gender Commission to have a commissioner for matters affecting senior elders rather than creating a new body. Indeed, article 76(2) on the Composition of the Human Rights and Gender Commission already specifies that there will be such a Commissioner?

Recommendation: The Constitution should merely specify the right and the duty and leave the choice of means to the policymaking process and legislation.

vi. Human dignity - article 45:

Article 45(2) - imposes a duty regarding the dignified treatment of the dead as part of a general duty to protect human dignity. Such provisions are completely unnecessary as a matter or law and inappropriate as a matter of policy. What problem- current or future- is the Draft Constitution trying to cure or prevent? If one should offer their body to science, then under

article 31(2)(b)- covering enforcement of rights for people who cannot act in their own name- any relative or other busy-body is free to file suit to enforce the right of the dead to human dignity under this provision. Kenya already has had too much "cadaverous jurisprudence" to start experimenting with a new source of yet more death cases.

Recommendation: This provision should be removed.

vii. Access to information Article 52:

This article gives every citizen a right to information held by the state. There are two issues here: a) why is the right to information a citizenship right at all? and b) why does the right specifically information cover information *held by the state* rather than *public information*, which is a much wider category?

a. Why is this a citizenship right at all?

Many of the articles from 31-74 to wit: articles 31 (enforcement of rights), 35 (life), 36 (equality), 37 (discrimination) 43 (disability), 45 (Human dignity), 46 (freedom and security), 48 (privacy), 49 (conscience), 50 (expression), 53 (association), 54 (assembly, demonstration, picketing and petition), 56 (movement and residence), 58 (trade, occupation and profession), 59 (property), 60 (labour relations), 61 (social security), 62 (health), 63(education), 64(housing), 65(food), 66 (water), 67 (clean environment), 68 (language and culture), 69 (consumer rights), 70 (fair administration), 72 (rights of arrested persons), 73 (fair hearing) and 74 (rights of persons held in custody) are all rights of persons not citizens.

Under article 51(2) every citizen has the right to gain access to any information held by another- including a state organ- that is required in order to enforce any right. Since all persons are protected against discrimination by article 37, it is seems odd that other persons have no right to access information that they may need in order to enjoy all these other rights that are secured to them by the Constitution.

Recommendation: The right to information is a civil right available to every person not a political right held only by citizens. This should be reflected in this provision.

b. Why information held by the state?

It is unclear what is meant by information held by the state since this phrase is not defined in the definition section of the Draft Constitution. By restricting the right of access to information to only information held by the state, the draft drastically limits the quantity of information that people will have access to and, potentially, gives the state a means to escape its obligations under this article. The right should grant access to public information, not merely information held by the state. The rationale for this wider view is the fact that there is a lot of information paid for by the state through taxes but held by private companies. On this understanding, public information should include, for example, all information required for the execution of public works. This would cover information held by private construction companies; information held by private companies doing an environmental impact assessment for a public project or even that held by a

major private project with significant public impacts. Information that a person may be unable to access under the right as defined could be raw data gathered from medical, environmental or other research conducted by a private company on behalf of the government. There is a compelling public interest argument to disclose such information to the public.

Recommendation: This right should be redrafted as a right of access to public information and then "public information" should be defined as a) information held by the state; b) information paid for by taxes or collected as part of implementing a tax-funded project or programme; c) information on environmental or epidemiological impact of any activity even if not held by the state or paid for by the state and d) information required for the exercise of a constitutional right.

viii. Freedom of association Article 53:

This freedom includes, under article 53(3) the right not "to be compelled to join an association of any kind." This could cause professional associations- lawyers, accountants, architects etc- many difficulties as they try to perform their regulatory functions.

Recommendation: Sub-section (3) should be removed.

ix. Right to property Article 59

Under subsection (4) trespassers may be paid compensation if they have been occupants in good faith. Surely the only compensation such people are entitled to relate to the improvements and fixtures on the land.

More problematic is whether this provision covers intellectual property rights. As worded, it does not appear to. The right protected is that to "acquire and own property" in any party of Kenya. Without a definition of what "property" includes, this seems limited to solid objects like land and other so-called rival rights[12]. It does not seem to cover either (a) fugitive resources like water; and (b) intangibles like debt, (or other proprietary financial rights).

Intellectual property rights- patents, copy-rights and trade-marks- are critical to ensure that people have an incentive to invent (patent) or create (copy-right) or commercialize (trade-marks) new products. But because these rights are essentially informational rights they have a problem inherent to all information: acquiring these rights can be very expensive but their consumption is non-rival, that is, the enjoyment of intellectual property by one person does not diminish its enjoyment by another.

The lack of a natural exclusion method means that without specific legal protection, intellectual property rights will be stolen and few incentives to invent and create will exist.

Recommendation: The provision should clarify the limits of the trespasser's right. More important it should provide specific protection for intellectual property rights and provide a legislative mandate for parliament to enforce these by appropriate laws.

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[12] By rival rights we mean rights the enjoyment of which by one person is inconsistent with the enjoyment of the same right by another person.

x. Consumer Rights Article 69:

This article - 69(2) - requires Parliament to enact legislation to provide for “fair, honest and decent advertising.” This article fundamentally misconceives the nature of advertising. It assumes that all advertising is commercial and so it seems that its primary pre-occupation is to protect consumers of manufactured goods. But advertising is not, by its very nature, commercial speech. It is a general speech act: there is political advertising and religious advertising as well. This means that consumers of advertising include voters and believers who are constantly bombarded with a wide range of unwholesome, unfair and dishonest messages. Indeed, there is a significant amount of advertising that is evangelical in Kenya. These contain religious messages which those who don’t believe in the faith would consider false and indecent.

In the cases of commercial advertising, it is worth remembering commercial speech is protected speech under the freedom of expression. This is no different from political speech protected under the same clause. The test to be in all cases of free speech is the harm that the speech causes. A scheme of prior restraint – such as the one proposed here- seeks to prohibit certain types of expression on pre-determined criteria not related to the danger that the speech itself pose. Such prior restraints are constitutionally suspect and *prima facie* illegitimate. Whether speech is political or commercial, the test to be carried out to determine if it should be regulated is the same: a) Are the proposed restraints on the speech reasonably justifiable in a democratic society?; b) Can the state demonstrate a compelling public interest by the restraint proposed? and c) Does the speech pose a clear and real danger to some vital interest?

Recommendation: The provision on advertising should be removed.

xi. Human Rights and Gender Commission

Part 3-Article 76(2) details the composition of the Human Rights and Gender Commission. The specification of the responsibilities of the commissioners in this provision is difficult to decipher. The draft says that there will be a Commissioner for Minority Rights and Marginalized Communities; another for Children who must have knowledge and experience on matters related to children; a disabled Commissioner who has expertise on matters of disability and will be responsible for their issues; another must be knowledgeable about basic needs and will take charge of that portfolio and another, knowledgeable on matters of the aged, shall take charge of the needs of the elderly.

The Human Rights and Gender Commission needs specialists in human rights not discrete specialists or protectors of turf and small institutional ghettoes pricked out in terms of a) children, the elderly, the disabled and minorities. So, in this scheme, who protects the rights of refugees; of migrant workers; of people living with HIV and Aids; of albinos; of employees; of discrete categories who may be discriminated against and of gay people? The problem seems to be that the drafters of this provision have confused what should be departments of the Commission with duties and responsibilities of individual commissioners. There will never be a Commission with enough Commissioners to cover the rights in all relevant human rights categories. This means that the best approach is to find individual commissioners with broad

human rights knowledge coupled, if necessary, with subject matter knowledge in one of the many discrete areas of the Commission's mandate.

Article 76(4) deals with the anti-corruption mandate of the human rights commission… 4 (e), (i), (k), (l) and (m). This is a lot like the mandate of the Ghanaian Human Rights Commission. In article 76 4 (l) and (m) the mandate the Commission includes the duty to propose reform to legislation that is unfair or inconstant with the constitution. But how does the Commission do this given the fact that it has no power to make findings of inconsistency with the constitution? This is a judicial power.

Recommendation: There are three recommendations on this provision:-

a. The composition of the Human Rights and Gender Commission, as well as the responsibilities of individual commissioners should be changed. Commissioners should be appointed on general human rights expertise. The law would then determined what additional specifications would be appropriate in addition to that general expertise;
b. The experience of the Human Rights Commission in Ghana and the abiding conflicts between the Commission and the Serious Fraud Office suggests that the Human Rights Commission should not have an explicit anti-corruption mandate. Of course, it can be anticipated that corruption issues will come up inevitably in issues of administrative justice which the Commission will deal with but anti-corruption should not be part of the Commission's core mandate.
c. Articles 76, 4(l) and (m) should be removed. These are interpretive duties that belong to the constitutional court.

e. Land and Land management: Chapter Seven

i. Definition of public land

Article 79 (1) defines public land. Sub-clause 19(b) says that this includes "land held or occupied by any state organ" unless such land is held under a private lease. Article 79(2) adds that "such land will vest in and be held by the county government in trust for the people resident in the country and shall be administered on their behalf by the National Land Commission." In article 80 (1) land held in trust by county governments is deemed to be community land. Under article 80(4) community land "shall not be disposed of or otherwise used except in terms of legislation specifying the nature and extent of rights of members of each community individually and collectively." Though it is easy to see the devolutionary logic of this, it needs to take account of the actual realities on the ground. There is land occupied by state organs under statute in many parts of the country which should neither be treated as trust land nor vest in the county to be used as community land. There is no reason why agricultural research land should not vest in the body actually doing the research. This is one way of depoliticizing the research. It is not hard to see that if potato research is being conducted in one county but the potatoes are actually being grown in another county, the local leaders may politicize the question whether the research should be going on at all.

Recommendation: The language of this provision needs to be reworked to exclude land held by State-owned enterprises for some specified purposes like research and environmental regeneration from the definition of community land.

ii. Article 82: Landholding by Non-citizens

The draft prohibits land-holding by foreigners except under leaseholds that do not exceed 99 years. Though this is normal in many constitutions, the primary problem it raises is transitory: there are many foreigners in Kenya who own freehold land. What is to happen to these freeholds once the constitution comes into force? If they are converted into leaseholds, as the transition section proposes, this will almost certainly amount to compulsory acquisition for which compensation is payable. Before implementing this clause, it is important to establish the exact scale of freehold ownership by foreigners. This would then be a basis for the government to implement a compensatory scheme. If not, the government could find itself facing i) litigation in Kenya courts or ii) expensive arbitration at the International Centre for the Settlement of Investment Disputes, ICSID, especially as regards land held on freehold tenure by multinationals.

It is also clear that there is internal inconsistency between this clause and article 59's protection of the right to property. Article 82 requires Parliament to enact legislation to implement the holding of land by non-citizens. But article 59 makes it clear that Parliament has no power to enact a law that limits the right to property if that law has discriminatory intent as defined in article 37. The right to property is not a citizenship right. It accrues to every person, just like the right not to be discriminated against. It is impossible to see how Parliament can enact a law under article 82 without running foul of the total ban in article 59 and 37.

Recommendation: There are two recommendations here: first, there is need to remove the internal inconsistencies between the different provisions of the constitution and secondly, since during the transitions, foreign-owned freeholds will be converted into lease-holds, a provision mandating the creation of a compensatory mechanism should be included.

iii. Dispute resolution

Article 84 establishes the National Land Commission. Among its duties, specified in article 84(2) (d) is the investigation of "disputes land ownership, occupation and access to public land in any area as provided by legislation." This needs to be clarified as it seems to indicate a general responsibility to investigate land disputes as opposed to disputes affecting public land.

Recommendation: It would be extremely burdensome if this dispute resolution mandate was understood to extend to private land. Already private land disputes take unconscionably long to settle. Adding another layer of investigatory delays by the National Land Commission would only make an already terrible situation worse. The Draft needs to clarify that this mandate is limited to public land.

iv. Article 85: Legislation on land.

It is not clear why this clause exists. It details out the areas of land on which Parliament should enact legislation. But surely this is exactly what the National Land Commission is supposed to advise the government on? See for instance, the NLC functions detailed in sub-clause (l) and (m) of article 84. Moreover, there are a number of issues- such as 85(1) (e) on recognition and protection of matrimonial property and 85(1) (k) on protecting the dependants of deceased persons- which are not land law issues at all. The first is a matrimonial issue to be deal with under matrimonial laws and the second is a succession issue to be dealt with under the law of succession.

Recommendation:

a. Article 85 should be redrafted – and shortened- as part of the duties of the National Land Commission.
b. Articles 85(1) (e) and 85(1)(k) properly belong to matrimonial law and the law of succession respectively not to land issues. They should be removed from this section.

v. Article 86: Housing development

The duty of the state to engage in housing development is, analytically speaking, part of its obligation to fulfill the right to housing. Unfortunately, what in effect of clause 86 does is to specify the means by which the right to housing will be realized. Unless there are compelling reasons- and as already pointed out earlier- the Constitution should only impose duties, articulate rights and create reporting mechanisms. The choice of means should be left to the political processes. Housing development is clearly one of the many means by which a state could implement the right to housing. But it is not the only- nor even the most effective - means of doing so. The question whether it is indeed the most effective way of ensuring that houses for the poor are developed is through i) a fund (as prescribed by article 86(1)(a)), or ii) through a system of vouchers to the poor or iii) even through a publicly funded low-cost housing mortgage scheme or iv) even through a private/public partnership is a matter best left to political debate and political choices. Based on these debates and choices successive governments would then choose the means- policies and laws- that, in their view, help to progressively realize the right to housing. Constitutional drafters should not second-guess the policy initiatives that would best deliver on rights.

Recommendation: This provision should be either omitted altogether or it should be rephrased in terms of giving Parliament the mandate to enact a legislative mechanism for delivering houses to the poor.

f. Elections and political parties: Chapter Ten

There are a number of issues which need attention but are not core. These include a) independent candidates (article 107) and representation of the country on international bodies, article 111. But

there are also issues that raise more substantive questions, especially part 3 of chapter 10 on political parties.

a) Independent Candidates

On independent candidates, article 107(b) bars any independent candidate who is a member of a registered political party or who has been a member over the last six months before the date of the election. The only interest that could possibly be served by this clause is to punish defectors. It is probable that the drafters wished to punish political entrepreneurs who cynically hop from party to party on the eve of the elections when they fail to secure nomination from registered parties. Such people may invite our moral disapproval but surely there is no compelling public interest to be served in stopping them from running for office as independents. Their enjoyment of rights should not be blocked merely because we think that they are being exercised irresponsibly albeit not illegally.

Recommendation: The provision barring independent candidates who have been members of a political party in the six months prior to the election should be removed.

b) Nomination to international legislative bodies

Section 111 requires parliament to enact legislation to govern "the election and nomination of representatives of the republic to international legislative bodies." Why specifically 'legislative bodies?' is this a specific response to the debacle surrounding the nomination of Kenyans to the East African Legislative Assembly?

Recommendation: Some clarification is needed in the wording of this provision.

c) Political Parties: Democratically elected governing body

Under article 114(1) (d) every party is required to have a democratically elected governing body. Why should a party that believes in monarchism be required to have a democratically elected governing body?

Recommendation: This provision is unnecessary and is, indeed, in spirit, anti-constitutional. The constitution should limit itself to a short negative list of things that political parties may not promote.

d) Prohibition of Regional Parties

In terms of founding, article 114 (2) says that a party shall not be founded on religious, linguistic, racial ethnic… regional basis. The mischief that is being addressed is parochialism, localism and the negative things that go with it. But it seems inconsistent with the commitment to regionalism and devolution more generally; why should a party interested only in the politics of only one county need to have a national outlook. In India there are only a handful of national parties but over 40 regional parties, reflecting diversified communities of interest across the federal units of the country. It seems illogical to prescribe local government but prohibit local parties.

Recommendation: The ban on regional parties is inconsistent with the principle of regional governments. It should be removed. As the experience with the Nigerian Military's ban on ethnic parties in the 1980s shows, provisions such as this often promote and sustain a political culture of mendacity where ostensibly national parties become ever more virulent purveyors of local and sub-local agendas.

e) Cessation of Party membership Article 115:

Under article 115(2) a person may not be a member of more than one political party at the same time. However, if we accept the possibility of local and national parties, there is no reason why one cannot be.

Recommendation: This provision should be amended in light of the recommendation on Article 114.

f) Members bound by party ideology

Article 115(6) provides that a person who is elected on a party's ticket is bound by the policies, ideology, philosophy and manifesto of that party. This really should be left to party discipline. The party may want to re-invigorate itself by changing its policies and ideologies and those that disagree with the leadership that wants to preserve the status quo should surely have the means to reach out to the membership.

Recommendation: This is an example of constitutional over-regulation. Whether parties want to enforce ideological coherence or would prefer a somewhat looser approach that promotes internal debate about ends and means should surely be left to them.

g. Organs of State: The Executive, the Legislature and the Judiciary

The Legislature Chapter 11:

Under article 125 (3) on membership of the senate the Draft provides that the senators elected from each region "shall collectively constitute a single delegation for the purposes of clause 141(2)(a)." There is no clause 141(2) (a) but presumably this is referring to clause 146(4)(a) which relates to decision-making in the senate on bills relating to the regions or counties. Under this clause, the senate leaders of the senators from each region become, in effect, an electoral college. One problem is whether the leader of the delegation has a bound mandate: must he or she vote according to the wishes of the delegation and if so, how does the delegation itself arrive at the common position? If the leader of the delegation does not have a bound mandate, if effect what will exist is an Electoral College dependent on the personal preferences of the leaders of delegations.

Given these ambiguities, the question arises why this cannot be a straight senate vote rather than an Electoral College vote? What problem are the drafters trying to address?

It seems that the drafters concern is that without such a provision, regions with many senators, such as the Rift Valley will overwhelm regions with fewer senators, in effect creating majoritarian dominance. But this provision overlooks an equally serious counter-majoritarian difficulty. Since Rift Valley has so many counties, a senate votes that affects 12 of those counties will be determined by other regions.

Recommendation: The appropriate solution would be a regional or county veto on matters to be specified by the Constitution. The idea is to pre-determine a set of issues on which each county or region – as the case may be- would be entitled to veto the decisions of the senate as a whole. This would allow all senators to vote on the basis of one-senator one-vote but it would safeguard all regions or counties from either majoritarian or minoritarian tyranny.

The Executive: Chapter Twelve

a. Citizenship qualifications for the state president

Article 163(2) says that a person is not qualified to be elected as state president if he or she owes allegiance to a foreign state but under article 21 dual citizenship is allowed. What does article 163 require: a) that the person elected president must never have owed allegiance to another state or b) that that person renounces the citizenship of the other country. There are some other complications; the dual citizenship clause seems to assume that second country citizenship is acquired by naturalization. But under article 17 (1) and (2) (a) (citizenship by birth) a person born outside Kenya whose one parent is Kenyan is a Kenyan by birth. But in some countries, the US included, a person born in the US to non-nationals is a US citizen by birth. Does this change the nature of the disqualification under article 162(2)?

Recommendation: This section needs to be redrafted to clarify the question of dual citizenship.

b. Removal of the President for incapacity

Article 169 outlines the process of removing the state President from office on the grounds of incapacity. But this article essentially photocopies the process in the current constitution which is very similar to the process in Uganda. That process is tedious and dangerous in that it allows an incapacitated president to remain in office for an unconscionable long time. Under the 25th amendment to the US constitution, the process is such that the president ceases to hold office almost immediately upon the report of incapacity.

Recommendation: This provision is a recipe for crisis and should be redesigned to make it easier to remove (as well as restore) a president who is incapable of exercising the functions of office. A variation on the US model[13] would be more elegant.

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[13] In full, the 25 Amendment to the US Constitution, enacted in 1967, provides as follows:-

Section 1: In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.

Section 2: Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.

c. Terms of office for PM

Article 181 -Terms of office for the Prime-Minister - the prime minister like the president serves for a maximum of two terms. Though some constitutions have similar provisions limiting the term of office for the Prime-Minister, there really is no danger of a prime-minister rigging MPs' support in perpetuity, especially in Kenya's fractious ethnic politics.

Recommendation: There is no reason to limit the terms of office of the Prime-minister. The mischief relating to the office of the state president does not exist with reference to the office of Prime-Minister.

d. Disqualification for appointment to cabinet

Article 184(4) provides that a person who stood and lost an election to either the national assembly or a county assembly cannot be appointed to the cabinet formed immediately after that election. What is the public purpose served by this clause? Implicit in this is a certain moral censure of those who try and fail to win democratic contests. For example, under this clause, Hilary Clinton would not be able to serve as US Secretary of State. Democracy will not be institutionalized if we treat losers in elections as failures.

Recommendation: This provision should be removed.

Section 3: Whenever the President transmits to the President pro tempore (*for the time being*) of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office, and until he transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Vice President as Acting President.

Section 4: Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principal officers of the executive department or of such other body as Congress may by law provide, transmit within four days to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session. If the Congress, within twenty-one days after receipt of the latter written declaration, or, if Congress is not in session, within twenty-one days after Congress is required to assemble, determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.

e. State law officers

Chapter 12, part 4 Attorney General, Director of Public Prosecutions, Public defender
Article 196 (2) provides a mechanism for a person desiring the removal of the Attorney General, the DPP or the Public Defender to present a petition to the Public Service Commission. If the Public Service Commission considers that the petition has merit, they will forward it to the President. There are problems with this provision, which also applies to judges under articles 207(2) and (3).

First, these three offices are constitutionally autonomous offices that are not answerable to the Public Service Commission. It is not clear why the Commission - which has no oversight responsibilities at all- gets involved in a disciplinary matter relating to the three offices. How is it to determine that a complaint relating to an office over which it has neither mandate nor legal right to demand information from has any merit at all?

Secondly, giving single individuals the right to petition for removal of constitutional officers risks swamping the bodies charged with oversight of those offices with unnecessary paperwork. Rather than a mechanism for petition, what is needed is a complaints mechanism that should, in the first place, go to the bodies specifically mandated to process complaints.

Recommendations:

i. Like the provision on petition for removal of Judges under article 207, this article needs to be amended. The process of petition should be amended. A member of public who wants to petition the removal of a particular officer should be required to satisfy some minimal criteria, perhaps a set number of signatures otherwise this provision will be abused.
ii. The petition should be addressed to the President directly. And if s/he makes no response, it should be forwarded to the Parliamentary Committee responsible for legal affairs.

f. Discipline and removal of State Law officers.

Article 196(4) details out the composition of the disciplinary tribunals for the attorney general, the DPP and the Public Defender. The tribunal to look into the removal of the AG will be composed of 7 persons including the speaker of the National Assembly, three judges from a common law jurisdiction and three other persons with experience in public affairs. In the case of the DPP and the Public Defender, the tribunal will consist of 7 persons appointed from among four persons who have been or qualified to be appointed judge; one advocate of 15 years standing appointed by the Law Society of Kenya and two persons with experience in public affairs. There really is no justification for a disciplinary tribunal of seven. In effect, each of these tribunals will have a larger quorum larger than the High Court or Court of Appeal.

Recommendation: A disciplinary tribunal to consider the removal of any of these state law officers should have a maximum of three senior individuals.

The Judiciary: Chapter Thirteen: Kadhi's courts, Article 209.

Articles 209(4) and (5) refers to "the former protectorate". The draft constitution succeeds a constitution of an independent country, so it is unclear what former protectorate is being referred to here. If this clause is a copy of the existing provision there should be some linguistic link with the current constitution to remove ambiguities.

Recommendation: This ambiguity needs to be cleared up.

h. Oversight and Monitoring

The primary mechanism established for effecting oversight and monitoring is the Commission. In total the draft proposes to create 11 new commissions. 14 if you add the commissioner of political parties and the new office of controller of budget.

General observation: Whereas it is important to create autonomous constitutional bodies that are outside political control, it is important to remember that creating many more of these bodies removes important issues from the political agenda. The risk of a democratic deficit is very real. Independent commissions should be created only when they are necessary to sustain the essential character of the constitutional system.

The trend towards creating independent constitutional commissions-other than service commissions- is very new. Only 25 of the 580 constitutions reviewed the by the Comparative Constitutions Project provided for a human rights commission and easily 70% of these are constitutions made after 1995. In Sub-Saharan Africa only 20% of constitutions provided for it. Anti-Corruption Commissions are even rarer: of the 579 constitutions from 1789 reviewed, 96% do not provide for an anti-corruption commission. But of the few that have anti-corruption commission, nearly 50% of them are constitutions made in the last two decades. Mostly these have been in Asia and Sub-Saharan Africa.

Most people would argue that both anti-corruption commissions and human rights commissions are essential. Yet even these are constitutional rarities. This makes a compelling case not to constitutionalise bodies like the Salaries and Remuneration Commission, the Teachers Service Commission and the Commissioner of Political Parties.

The salaries and remuneration commission: There is no convincing case for a salaries and remuneration commission. First, the question of compensation should never be de-linked from the question of performance. The logical place for reviewing of salaries is the relevant service commission. The only exception to this would be parliament where the service commission is composed of politicians rather than professionals. A different mechanism should be employed to set the salaries of members of parliament.

As with the attorney general, the public defender, the DPP and the judges, a process has been created through which a commissioner can be removed by way of a petition from any person. This provision is open to the same objections that were raised earlier.

i. The Architecture of Integrity: Chapter Nine

i. **Institutional mechanism for enforcing ethics**

The keystone of the integrity provisions of the draft constitution is chapter 9. Article 99 establishes the Ethics and Anti-Corruption Commission but does not specify its composition and so this is to be determined under chapter 18 where generic powers to establish commissions are set out. But chapter 18 and especially article 297 do not provide subject matter expertise or even minimum professional qualifications, merely the process through which commissioners will be appointed. This is an important omission and needs to be addressed.

A second limb of the integrity machinery is found within the Human Rights and Gender Commission. Like the Ghana Commission on Human Rights and Administrative Justice, the Commission in the draft will, under article 76 (e) (i) and (k) have an anti-corruption remit. Though some constitutions- Rwanda, Vietnam and Ghana- have adopted this practice of establishing bodies with general functions that include an anti-corruption mandate, there are a number of typical problems that arise:-

a) The first is mission over-stretch- human rights and anti-corruption reforms are huge mandates independently of each other. Combined they can render a body ineffectual.
b) The second is the risk of being side-tracked by the anti-corruption mandate. Anti-corruption is very visible and therefore tends to swamp other remits.
c) The third is the risk of turf wars between anti-corruption bodies and the human rights commission with an anti-corruption remit. This is a problem for Ghana.
d) The final problem is unequal funding depending on the political interests of the power cliques.

Recommendation: This matter has already been discussed under analysis of the mandate of the Human Rights and Gender Commission.

ii. Ethical principles

Chapter 9 also details the ethical principles that state officers must comply with. Clearly, the drafters were aware that in the past these principles have been rather hortatory. One innovation in the draft is the introduction of provisions for removing state officers who are in breach of ethical requirements. A person is disqualified from parliamentary election article 127(2)(f) if he or she has abused office of breached the principles in chapter 9. The breach of this chapter can also lead to the removal of the Attorney General, the Public Defender and the DPP.

iii. Financial probity

The draft creates a new office of controller of budget in article 264. In effect, the Office of the Controller and Auditor General has been split into two: the controller's office and the auditor general's office. This internal separation of powers is probably a good thing as it allows the Auditor-General to focus on financial regularity and value for money rather than monitoring compliance with appropriations.

iv. **Devolved governments**

One area of uncertainty is exactly how to cascade the ethical machinery down to the devolved units. Decentralization of resources will almost certainly come with decentralization of corruption. But this need not be a constitutional question but the fact that it is not specified that anti-corruption policy is a national rather than regional power, there could be difficulties in implementation. In theory, this matter can be settled under the principles in article 232 on the conflict of laws.

Recommendation: Some provisions for cascading integrity to devolved governments are needed.

v. **General matters**

Implementation issues: There is need for a transition programme for KACC and other anti-corruption bodies covering a) operations; b) staffing; c) links with new institutions etc. Some of the areas of mandate of the KACC don't coincide with the mandate of the Ethics and Integrity Commission specified in the draft even though article 99(3) allows parliament to expand the functions of the Commission.

j. General comments:

- Some articles probably should be omitted, for example article 24 on responsibilities of a citizen.
  There is need to anticipate difficulties, learning especially from other countries that have tried to implement similar provisions such as the ones we have included in the draft. This is especially so in the case of article 62, the right to health. Section 62(2) provides that no one may be refused emergency medical treatment. There is no problem with this as a normative point but 'emergency medical treatment' is not a legal concept, it's a medical term. In effect, as became clear in the case of *Subramooney v. KZN* in South Africa, even when one life is on the line the doctors may still decide that the treatment you need does not amount to emergency medical treatment. There are no judicially manageable standards to give content to this right in a way that helps the person suffering. Medical treatment has a quality that other rights like education, safe environment and health do not. In the case of these other rights, there are intermediate steps towards progressive realization. Emergency medical treatment does not have that quality.
- There are too many things in the draft that ought to be in statute. The most obvious of these are:-
  i. Article 94-98 are matters for the Public Officer Ethics Act.
  ii. Articles 115 to 122 should be in a Political Parties Act.
  iii. Articles 148, 150 and 151 should be in either legislation or in the standing orders;
  iv. Articles 257 to 260 on budgets and 261, 262, 263 on financial management should be in budget and financial management legislation.

- On the Judiciary, the draft has introduced abstract review. Article 203(4) allows the constitutional court to give advisory opinions. This is a major jurisprudential shift from the

common law tradition of concrete review to the European system of what is called abstract review. Viewed against the background of a Parliament which sometimes passes problematic laws, this is could potentially be an important positive change. However, it is not clear that Kenyan judges, trained as they are in the common law tradition, will have the necessary skills and understanding to give value to this innovation.

Recommendation: If the draft harmonized constitution is implemented, resources will have to be made available to raise the capacity of the Judiciary to exercise abstract review.

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