

Commentary on the Kenya Constitution (consolidation of 15 articles in the East African Standard)

I

The Background to the Referendum

Origins of the review

Kenyans have long struggled for constitutional reform. They struggled because they suffered under an oppressive system of government. Their human rights were suppressed. The power of the state was concentrated in one person, the president. First regions and then local governments were stripped of all their powers. At the centre, the president dominated all institutions of the state. Cronyism substituted for politics. Merit counted for little. The law was frequently abused by the government and the exercise of power was unpredictable and arbitrary. The judiciary had failed to protect the constitution and the rights of the people. The civil service and other executive organs lost independence. There was corruption, plundering both of the state and a captive private sector, on a massive scale

When the CKRC went around the country to receive the views on reform, the people everywhere complained of being marginalized. Many of them suffered from heart-rending poverty; even government statistics showed that nearly 60% of Kenyans lived below the poverty line. They felt abandoned by the government and lost all confidence in its will or the capacity to listen to the people, much less to relieve their poverty and sense of helplessness. It seemed as if the whole nation was alienated from the state.

Experts as well as ordinary people attributed their misery to the centralization of power in the president and the lack of his accountability. The sense of their own helplessness was more than reflected in the usurpations by the central government of powers that they considered they should exercise through their local councils and communities. The struggle for constitutional reform was driven by the need for the recognition of their dignity and rights, by the vision of a democratic and caring society, empowerment of local communities, and public participation in the affairs of the state.

Kenyans, as is well known, made many sacrifices (of life, limb, freedom, property) in their struggle for reform. In this struggle a critical role was played by the ordinary people, civil society organizations and religious leaders. Some politicians later joined the struggle but the leadership remained with civil society groups until the battle to initiate a review process was won. The terms of the review were influenced by the form of the struggle. The review was to be inclusive of the diversities of the country. It was to be democratic and transparent. Above all, it was to be ‘people- driven’, and the constitution was to faithfully reflect the recommendations of Kenyans to be made to an independent commission. All the organs of review (the CKRC, the National Constitutional Conference and the National Assembly) were to be accountable to the people. Agreement

was also reached on a wide ranging reform agenda which more or less dictated a radically different document from the existing constitution.

After almost exactly five years after the formal review process began (and countless hours of the engagement of the energy, intellect and emotions of the people, and the expenditure of billions of shillings), the people will have the opportunity to decide whether to adopt a draft constitution prepared by a faction of the government. This is the first time in Kenya's history that the people will participate in a referendum. This is to be welcomed. A referendum is an important device for the expression of the consent of the people. But we ought to remind ourselves that referendums can be manipulated and have been used by dictators to bolster their regimes. The referendum offers a choice between yes and no; it does not give the people the right to make decisions. Nor is a referendum necessarily a constructive device in multi-ethnic societies, as it tends towards ethnic polarisation.

So while Kenyans should welcome this opportunity, they must also use it sensibly and constructively. They must try to fully understand the provisions of the draft constitution and ponder over how they will actually work in practice. They will need to consider questions like: What does the draft constitution offer us? Does it reflect the views that Kenyans expressed to the CKRC? How does the draft differ from the Bomas draft which was made in accordance with the procedure in original agreement of all Kenyans? Will we be better off under it than under an alternative constitution? What will be the political and legal consequences of defeat or success? What are the prospects of getting a better constitution? How will we move from the present constitution to a new constitution?

I intend, through a series of articles, to help Kenyans to understand these issues so that they can make informed decision for their vote on 21 November. The political campaigns by the Banana and Orange teams have failed so far to focus on the provisions of the draft constitution (and have perhaps confused the people). The campaign has been dominated by politicians whose personal interests may be in conflict with what is good for the country.

So let me explain the origin of the draft constitution that will be voted on next month. The CKRC examined the present constitution ('current' constitution) and analysed the many submissions made by the people, individually and collectively. Then it drafted a constitution ('CKRC' draft) to reflect people's recommendations and the reform agenda inscribed in the Review Act. After prolonged public debate, the National Constitutional Conference ('NCC') met to debate and adopt it. The NCC took its own time to consider the draft, endorsed it on the whole, but made some modifications and additions. Towards the end of its work, a faction of the government took exception to some provisions of the draft or decisions of the NCC. Having been defeated on one or two of its motions, it members walked out. The NCC continued its proceedings and adopted a draft in accordance with the law, by two-thirds majority vote ('Bomas' draft).

The opponents of the draft, with the assistance of the courts, prevented the submission of the Bomas draft to the National Assembly for formal enactment as provided in the

Review Act. Subsequently the National Assembly amended the Review Act to give itself additional powers to change the Bomas draft before submitting it to a referendum. In meetings of parliamentarians at Naivasha and Kilifi amendments were proposed (although there was subsequent disagreement as to what exactly had been agreed). The Attorney General was deputed to revise the Bomas draft to incorporate the Naivasha agreement which without further scrutiny was to be submitted to the referendum. This is usually called the 'Wako' draft, but I shall call it the 'Referendum draft'. Even since the end of Bomas, only a handful of politicians have been involved in the changes to the Bomas draft.

In subsequent articles I will compare the provisions of the current constitution and the CKRC, Bomas and Referendum drafts, to explain the key provisions of draft which the people have to vote on. My intention is not to take sides in the controversies between political groups or other protagonists and opponents of the Referendum draft. I realize that one cannot be fully objective in matters like this (and perhaps that is harder for me than many others, given my involvement in the process up to Bomas) but I intend to be as objective as possible.

In concluding this article, I want to make a general point. Although I will deal in each article with separate topics, it is important to read and understand the constitution as a whole. Almost every article of a constitution depends in some sense on all other provisions. The system of the executive depends on its relationship with, and the powers of, the legislature. The legitimacy of the legislature depends on the electoral system. The effectiveness of the bill of rights depends on the transparency of the government and the methods of accountability. It does not therefore make much sense to say, as many people have said, that the Referendum draft is 80% the same as the Bomas draft. It is the 20% that is omitted or modified that may be crucial. How seriously rights are taken, how resources are distributed, how much public participation there is, and other fundamental issues may all depend on, for example, whether there is a parliamentary or presidential system. Imagine an architect who, asked to reproduce a much admired building, says that her plans are an exact copy (down to the window frames), save for a few details. Imagine now that the few details which are left out concern the firmness of the foundations to hold up the building. So it can be with a constitutional system.

II

Constitutional Values, Principles and Rights

Values and Principles

A constitution's primary task is to set up the principal institutions of the state. In recent decades it has become customary for a constitution to state in addition the values and principles to which the nation commits itself. The most fundamental values are briefly stated in the preamble. A more detailed statement of national values and the principles underlying the organization and operation of the state are stated in a separate chapter (sometimes called Directive Principles of State Policy, or Principles of State). The bill of rights and freedoms also gives a good indication of the orientation of the state. Some

constitutions state the responsibilities of citizens. These provisions can be either strictly legally binding, imposing obligations, especially on the state, while others are a guide for policies and legislation. In either case, the conduct of the state is to be judged by these standards. Referring to the Indian constitution, a scholar has called such provisions ‘the soul and conscience of the nation’. In this article I set out the values expressed in the Referendum Draft. In subsequent articles I shall assess whether the institutions and procedures established by that draft are likely to promote these values.

The current constitution is concerned almost entirely with institutions. It expresses no philosophy of the state or government. It does not even have a preamble. That is not to say that it is not based on certain philosophy or values. But these must be gathered indirectly from the design and functions of the institutions. Thus one can identify several assumptions behind the constitution at independence. Underlying the entire constitution was fear of the abuse of power. The emphasis therefore was on a democratic political system in which power was divided between the central government and provinces. The provincial system was also for the protection of minorities. Central government powers were to be exercised by a cabinet responsible to the legislature; this form of collective government was considered also suitable for a multi-ethnic society. A bill of rights, enforceable in the courts, was to limit the power of state institutions.

By contrast, the CKRC 2002 Draft explicitly highlighted constitutional values. The reason for this emphasis on values was the concern of the people and organizations that the exercise of power had been completely unprincipled and arbitrary, driven by personal greed. It was important to state the purposes for which alone state power could legitimately be used. The CKRC draft has a brief preamble and a chapter on national goals, values and principles. The principles include national unity, recognition of cultural diversity, democracy, devolution, public participation (particularly of women, the disabled and marginalized communities), open and accountable government, human rights, social justice and basic needs, protection of the environment, and equitable development throughout the country. Bomas added an additional chapter on the culture and traditions of Kenya’s communities, and placed an enhanced importance on science and indigenous technologies. The Referendum Draft is similar to the Bomas draft. But it has removed the reference to marginalized communities in the principles.

The Bill of Rights

The CKRC Draft also introduced a strong and comprehensive bill of rights (in contrast to the rather limited one in the current constitution). It contains a number of rights which are missing from the current constitution, including rights to official information, environment, food, water, sanitation, health, education, privacy, fair administration, and rights of consumers, prisoners and linguistic communities. The CKRC Draft strengthens rights by limiting the restrictions that may be placed on rights and by establishing a strong mechanism for the enforcement of rights. It also provides for an independent commission of human rights to protect and promote rights and freedoms.

Most commentators welcomed the CKRC’s bill of rights. Bomas adopted the chapter with a few significant amendments (including an article on the rights of youth). The right

of women, in respect of which the Referendum Draft follows Bomas, will be discussed in another article.

The right to life

The CKRC repeals the death penalty; Bomas removed this clause. In the same article a definition of life was introduced at Bomas to say that life begins at conception. The motive was to prohibit abortion in principle, but an escape clause is provided if abortion is necessary to save the life of the mother. The Referendum Draft retains the statement that life begins at conception. On abortion, it says that it is not permitted except as provided for in an Act. This opens up the *possibility* of expanding the grounds for abortion, but leaves the discretion to Parliament. But another clause of that article effectively removes the guarantee to the right to life, for it says that ‘every person has the right to life except as may be prescribed in an Act of Parliament’. This formulation, which gives to Parliament to determine the extent to which we shall enjoy this right, was in the Kilifi Draft. *The right to life is the most basic of all rights, and derogation from it in the Referendum Draft is a great deficiency in the constitution.*

The right to family

In accordance with international standards, the CKRC Draft guarantees the right to marry, ‘based upon the free consent of the parties’. At Bomas amendments were made to specify that a person could only marry a person of the opposite sex. The Referendum Draft retains this restriction.

Meeting basic needs

Meeting basic needs such as of food, shelter and health was mandated in the Review Act and strongly urged upon the CKRC by the people. The Referendum Draft following the CKRC and Bomas Drafts, gives the rights to social security, health, education, housing, food, water and sanitation. However, the Referendum Draft differs from the other two in the method of implementing these rights (which require considerable resources). The earlier drafts requires Parliament and the Commission on Human Rights to set standards for the fulfillment of these rights, an approach that has been advocated by the UN and found to be effective in some countries. The Referendum Draft dispenses with this provisions designed to put pressure on the government to take these rights seriously. Instead it says that these rights should not be interpreted as imposing obligations beyond the resources of the state. The lowering of the obligations on the state was not in the Kilifi Draft and it is not clear what its source is, but it certainly comes from an approach that does not regard these rights significant.

Rights of prisoners

The CKRC Draft included rights of prisoners to humane treatment, which was adopted at Bomas. The Referendum Draft retained the concept of prisoners’ rights, but removed provisions which defined the rights. The Bomas Draft explains what are generally accepted standards of reasonable treatment for prisoners. The Referendum Draft leaves the matter to Parliament which shall ‘take into *account* the relevant international human rights instruments’.

Rights of members of armed forces

The Referendum Draft improves rights of members of the armed forces. Under the existing Constitution they are excluded from the protection of most human rights; the Referendum Draft removes this limitation. Of course the usual possibility of reasonable restrictions applies – for example, it may be more justifiable to place restrictions on the freedom of speech of members of the forces, in the interests of discipline, than of other members of the public. The Referendum Draft also makes it clear that members of the forces must also respect the human rights of others.

Marginalised groups and communities

Bomas introduced, with enthusiastic support of delegates, special provisions to assist marginalised groups and communities, who suffer discrimination and other disadvantages, to realise all the rights given in the bill of rights. In particular they were to be fully represented in governance and in all spheres of national life, to be accorded special opportunities in education and economy, have access to health, water and transport facilities, and be assisted to develop their cultural values, languages and practices. The Referendum Draft removes this article and denies people who are among the most disadvantaged in Kenya the opportunity to enjoy the same rights as others.

The Human Rights Commission

It seems that the Commission on Human Rights has been weakened in the Referendum Draft. The Bomas Draft says that, among the members of the Commission, should be one with special responsibility for the rights to Fair Administration (really an ombudsman), one with special responsibility for the rights of minorities, and one should be a person with disability and with knowledge of the rights of person with disability, and so on. These details have gone – meaning that if the Commission has no member with special knowledge of the rights of children, for example, there is no breach of the Constitution. Yet the Review Act specially mentioned the need to identify ways to enforce the rights of children. This change may have been introduced on principle to reduce detail (though in some other places unnecessary detail is still there), perhaps it was a feeling that in practice it would be difficult to operate. But the result is unfortunate. There is no constitutional requirement to have an ombudsman – an official who will take complaints in an informal ways about public services. It is unclear to me who was responsible for this change.

Summary

The Referendum Draft repeats the provisions of the Bomas Draft on values and principles (which are admirable). However, its bill of rights is weaker than in the Bomas Draft. It derogates from the principle of the dignity of individuals and communities by failing to protect the right to life and the interests of the disadvantaged communities. It somewhat downgrades It fails to live up to the concept of a caring society that the Values and Principles chapter prescribes.

III

Citizenship and the Political Community

Citizenship is fundamental to the idea of a state. Citizens are those people who, in a special sense, belong to the state, over and above other residents. In the Draft, some rights are restricted to citizens, particularly the rights to vote and to stand for elections, the right to leave and enter the country, and move freely within it, the right to access to information, and the right to own land. But as among citizens, a fundamental principle of citizenship is the equality of all citizens, even for immigrants who may have recently acquired citizenship. Citizens have rights which the state must protect, but citizens also have responsibilities and duties towards the state. Thus citizenship constitutes a special relationship between a person and the state. It marks an important aspect of the identity of a person.

The bonds of citizenship are crucial in developing a sense of being part of a political community. It is the broadest identity in a state, which can exist alongside more specific identities, such as a region, profession, religion, gender, or language. A good constitution tries to balance all these identities, but gives special status to citizenship as the identity that all Kenyans share. But the significance of that special status as a unifying factor can only be realised if all citizens are treated equally. Many Kenyans complained to the CKRC that they were discriminated against on grounds of race, ethnicity or gender. Many had difficulties in obtaining passports or identity cards. Some of the discrimination was based on law, such as that children born abroad to a Kenya woman would not be citizens but those born to a Kenya man would. Foreign wives of Kenyans had the right to become Kenyan but not the foreign husbands of Kenyan women. Other forms of discrimination were the result of administrative practice, like the difficulties Somalis had in obtaining passports and IDs. Discrimination against a citizen or a community can no doubt affect their full commitment to Kenya.

The CKRC draft removed the legal discrimination based on gender and tried to remove administrative discrimination by specifying that every citizen 'is entitled to the rights, privileges and benefits of citizenship' and to 'a Kenyan passport and to any document of registration and identification issued by the State to citizens'. These provisions were retained in the Bomas draft. However, in the Referendum draft, the right to citizenship was reduced in some respects, but not the principle of gender equality. Differences between the various drafts are identified in the following account.

A person will become a Kenyan citizen in a number of ways. All persons who are citizens will continue to keep their citizenship. In future citizenship will be acquired by birth, registration or naturalisation (the distinction between the last two is rather technical). A person born in Kenya one of whose parents is a citizen will automatically become a citizen ('citizenship by birth'). Similarly a person born outside Kenya will become a citizen if one of his or her parents is Kenyan by birth or registration or naturalisation. This last rule is designed to prevent citizenship passing to people with no real connection to the country. A person who is a registered or naturalised citizen has made a deliberate choice to be a Kenyan. If this restriction were not there, Kenyan citizenship could have been passed from generation to generation of people who perhaps never set foot in the country (especially now that it will be possible to hold more than one citizenship).

Incidentally, the concept 'citizen by birth' is a bit odd and was not used in the previous constitutions. Anyone born before independence was not born Kenyan – not even President Kibaki!

A child who is found in Kenya whose nationality is not known (for example because his or her parents are unknown) will be presumed to be a citizen. This rule is consistent with international law, and designed to avoid the terrible position of a child without a nationality.

Under the Bomas Draft, if a Kenyan adopted a child that child would become Kenyan 'by birth'. But the Referendum Draft takes away the right to be a citizen, and says the child may apply to become a citizen 'by registration'. This is a reasonable change. Such a child may want to retain its previous citizenship to maintain affiliations with another country. The procedure of application makes it possible to impose conditions to avoid abuse of the system and to check that the child is protected.

As regards the rights of spouses married to Kenyans, under the existing Constitution there is a *right* for wives to be registered as a citizen; it says they 'shall be *entitled* upon registration...' The Bomas draft (following the CKRC) simply gave husbands the same right as the wives of Kenyans. But here the Referendum Draft seems to have cut down the rights of women marrying Kenyans. That draft says that husbands and wives of Kenyans *can apply* to be registered as citizens. They are given equal rights – but the rights of wives of Kenyans have been reduced. This change seems to have come in with the 'Kilifi draft'. And under the Draft a spouse may apply after being married to a Kenyan for seven years; under the current Constitution there is no minimum period. Some spouses may lose a right they had under the current Constitution.

Dual nationality

The most controversial issue regarding citizen concerned the right of a Kenya to acquire citizenship of another state while remaining Kenyan. Many overseas Kenyans had petitioned the CKRC and Bomas for such a right to ease the difficulties of travel and employment when abroad. Others considered that this rule would help to draw skilled persons and investments to Kenya. It encourages people to retain a connection with Kenya even if they have another nationality. It reflects the realities of modern life, as more people travel, live abroad often when they are young and of child bearing age. Such a rule does not normally lead to a conflict of loyalties, as many countries which now allow dual nationality have discovered.

The current constitution does not give this right. The Referendum draft (following the other drafts) allows this but in restrictive manner. It says that a Kenyan who becomes a citizen of another country can remain a Kenyan, but a foreigner who becomes a Kenyan cannot remain a citizen of the other country. This discrimination is also in the Bomas draft (but not in the CKRC draft). So a person who goes to the UK, say, and lives there long enough to become British can still keep his or her Kenyan passport. But a person who comes from the UK and lives in Kenya long enough to become a Kenyan, cannot keep his/her British passport. Is this fair?

A new unfairness was introduced after Bomas: the Referendum Draft says only Kenyans *by birth* can keep Kenyan citizenship if they take another nationality. I have a personal interest in this. Because neither of my parents was born in Kenya, I did not automatically

become a Kenyan at independence (but had a right to registration as citizen). By choice, I became Kenyan, and at the first available opportunity. Under the Referendum Draft I could not choose, for whatever reason, to take another nationality without losing my Kenyan citizenship, but my fellow citizens would have that right. Similarly the Referendum draft provides that only a citizen by birth may apply to regain citizenship if that person had lost it in the process of applying for another citizenship.

This rule is discriminatory and unfair. There is another instance of discrimination between citizens in the Bomas draft; only citizens by birth could be an MP or President. Under the Referendum Draft there is only the second restriction. This rule is perhaps copied from the US – where, interestingly, there is some pressure to change the Constitution to allow citizens born abroad to become President. The Referendum Draft provision creates two classes of citizens. It is irrational: a Kenyan by birth may be a person who has never been to the country. A candidate for Presidency must not have dual nationality ('not owing allegiance to another country').

All drafts recognise the possibility of rights of residence for non-citizens (another improvement on the current constitution). They say that law must provide for this status of a permanent residence or other rights of residence – which will allow non-citizens who have a genuine link with the country to have some security about their right to stay, rather than constantly applying for visas. The law would allow the status to be removed from someone who abuses it, and for the status to be lost if a person ceases to have a real connection with Kenya. More and more countries are now allowing such arrangements.

In summary, all the drafts are better than the current constitution. They recognise the realities of modern times. They give better protection against having one's Kenyan citizenship taken away. But, unfortunately, some discrimination between citizens remains, including one example introduced by the Referendum draft.

IV

The system of government- I

The most important decision in making a constitution is the design of the system of government. The system of government is defined by the composition and powers of the executive and the legislature, and the relations between them. It also includes rules and institutions for devolution (left for another article).

The system of government determines who has access to the powers and resources of the state. It affects politics, the organization of parties, how ethnicity is respected or manipulated, the efficiency of the executive, and the participation of the people in it. On it depends on whether people feel involved in or alienated from the business of government. In many countries today politics are largely about getting control of the apparatus of the state, to fulfil personal or ethnic agenda. Yet the system of government can be structured to achieve and enhance values of the nation, promote democracy, strengthen national unity, ensure efficiency of administration, facilitate economic growth, and increase the accountability of the government and its officials.

It is therefore not surprising that while the people are greatly concerned about the impact of the system of government on the public good, politicians' horizons are limited to personal considerations of acquiring and exercising power, largely for their own personal or party interests. Although the people gave the CKRC very clear views on the subject, the debate on the system of government has been dominated by politicians, especially after the hijacking of the Bomas Draft. Politicians believe, quite wrongly, that they have a monopoly of decision making on the system of government, that it is a matter of horse trading among them, and that they can completely disregard public views.

If we examine the changing views of key politicians on the structure of the government, it becomes clear at once that their interests are narrow and personal. For example, during the review, the old KANU vehemently supported a strong presidency, while Mr. Kibaki, then leader of the opposition, and his party equally vehemently denounced what he called the 'imperial presidency'. After the elections, the positions of both these groups changed! The present crisis we face today is the result of the inability of politicians to agree on how they distribute powers (and its fruits) among themselves, not with any real issue of governance. So it is appropriate to get to the basic issues in the design of the system of government as a means to assess the Referendum Draft.

What the people told the CKRC

The principal reason that Kenyans struggled for reform was to change fundamentally the system of government. Of course not many people are familiar with different systems of government but they were clear on values and principles of government. It is possible to construct a system based on what they told the CKRC. They constantly criticized the presidential nature of the regime, with huge and untrammelled powers in one person's hands, which led to corruption, cronyism, and the suppression of human rights. Many were critical of the way in which the government seems to have become the monopoly of one ethnic community. They wanted to limit the power of the president (as well as how many times a person can hold that office). They wanted greater accountability of the government, particularly through a stronger parliament. They also wanted to check power by dividing it between national, provincial and district governments. Many expressed a preference for 'coalition' government, consisting of members of different communities and regions, so that the government does not become the preserve of a single community, but has a national character. Of those who expressed their views in terms of formal systems, many urged curbs on presidential power and the introduction of greater accountability. But the majority asked for parliamentary system, a cabinet government headed by a prime minister responsible to, and removable, by the legislature.

Types of government system

At independence Kenya got a parliamentary system of government in which the head of the state is different from the head of the government. The head of state represents the nation and symbolizes its unity; for this purpose many of his or her functions are ceremonial (but important nevertheless). But he or she also has the responsibility to ensure the smooth operation of the constitution, particularly regarding the formation of government by appointing the prime minister and ensuring continuity of government and administration. Executive powers are vested in the prime minister and his or her cabinet,

and are exercised collectively. The government must always have the support of a majority of members of parliament and can be removed by them.

But Kenya had little opportunity to practise this system since it was replaced by a presidential system after one year. The president is head of both state and government. Executive power is vested in the president, and exercised with the assistance of ministers of his or her choosing regardless of their support in parliament. Kenya's presidential system is different from that in the US, as the Kenya president has much greater control over parliament than the US president has over Congress. The Kenyan president also appoints most of the important public officers. Consequently there are fewer checks and balances on the exercise of presidential powers.

The presidential system

Those who support the presidential system say that it provides for a strong government, which ensures stability and efficiency. They believe that strong government comes from giving a lot of powers to one person. But history has shown that strong government does not come from having many powers, but from the way they are exercised. It comes from the participation of the public, and the government having to persuade rather than to coerce the people. The presidential system provides fewer incentives for the government to listen to the people and to try to persuade them by reason. Consequently, the government is ineffective. And stability is of little value if the government cannot carry out its policies because it has become authoritarian and corrupt, a likely result of enormous powers. Kenya's experience under presidential system has been unhappy: it has suppressed freedoms and dissent, corruption and cronyism have destroyed our economy, infrastructure and environment, and alienated the people. Despite all the vast powers vested in President Kibaki, his government has been ineffective and has achieved little.

Parliamentary cabinet system

Those who support the parliamentary system say that it is more democratic and accountable because it is always responsible to the legislature. Although the prime minister is not directly elected, he or she has to have the support of the elected representatives of the people. The general elections are often an indirect form of election of the prime minister, as people vote for that party whose leader they support as head of government. And because power is exercised collectively by the cabinet, it is more inclusive than the presidential. Also there are greater pressures towards a consensual system of decision making. For this reason they claim that it is particularly suitable for a multi-ethnic society. However, even the prime ministerial systems can become authoritarian, as in India when Mrs Indira Gandhi was prime minister. But there are greater opportunities to control such tendencies, as India's experience also shows. However, a particular weakness also arises from what is supposed to be its strength—constant accountability to parliament. This can lead to votes of no confidence and frequent changes of government—accompanied by political intrigues, especially if parties are not well disciplined (as we all know they are not in Kenya). Some countries have tried to limit the instability in government, for example by adopting the German system where a motion of no confidence must also nominate the incoming prime

minister. Instability can be compounded by possible tensions between the prime minister and the head of state (although this is less of a problem than some politicians in Kenya suggest; the tension can be creative).

Kenya's choice

No system of government is perfect; each has strengths and weaknesses. Some countries have tried to combine the presidential and parliamentary systems to capture the strengths of both systems. The danger is that unless the mixed system has coherence (which it inherently does not have), it can end up by reflecting the weaknesses of both systems. Kenya has to adopt a system which responds to its own situation. Kenya desperately needs greater democracy, accountability and integrity, the participation of people in public life, greater attention to 'nation building' (strengthening our national identity and unity), and social justice. Not being able to rely on a 'natural majority', its government has to be either broad based, consensual and 'coalitional', or coercive. In the next article I shall compare the CKRC, Bomas and Referendum drafts within the framework that I have sketched now.

V

Systems of Government II-Comparing the Drafts

The CKRC considered that a parliamentary system came closest to the views of the public as well as its own assessment of what Kenya needed. In the structure of the executive (i.e., the President, Prime Minister and the cabinet), formation of the government (i.e., the leader or nominee of the largest party or coalition must be appointed Prime Minister), accountability of the cabinet to Parliament (i.e., the prime minister and ministers must be approved by Parliament, can only be removed by Parliament and must justify and defend its policies in Parliament), and the organisation of government through the cabinet (presided over by the Prime Minister and operating on the principle of collective responsibility), the principles of classical parliamentary systems are followed. But it did not allow for the dissolution of parliament before its regular term expired (unlike other constitutions which allow dissolution as a way to resolve conflicts between the executive and the legislature).

All these features were true of Bomas also. The difference lies in the relationship between the President and the Prime Minister in the CKRC Draft, which had been controversial.

The CKRC Draft was innovative in giving the President greater role and authority than is customary in parliamentary systems. In addition to the formal or ceremonial role usually given to presidents (or monarchs), the CKRC Draft granted some powers that gave more meaning to the idea of the President as the symbol of the sovereignty of the state (promoting national unity and respect for diversity) and the guardian of the constitution (protecting human rights and the rule of law). Most of these functions are advisory, consultative or facilitative and the Draft was careful not to give President responsibilities which would overlap or conflict with the powers and functions of the cabinet (and create

two centres of powers, as in France). In Bomas most of these powers were reduced or removed.

Under the CKRC the President would chair the National Security Council and the Defence Council, could declare war or emergency (after consulting the Cabinet and Defence Council), propose legislative bills to the cabinet or a parliamentary committee, could send bills passed by parliament back for reconsideration, could request the advisory opinion of the Supreme Court on the constitutionality of a bill, award honours in consultation with the Prime Minister, appoint ambassadors with the consent of Parliament, and set up a commission of enquiry (with the consent of the cabinet). He or she had the responsibility to ensure that requirements regarding people's participation in the legislative process are met, and that the independence of courts and commissions was maintained, and to report on the achievement of the national goals.

Under Bomas, the President could propose to the National Assembly the dismissal of the Prime Minister, although the final decision depended on the Assembly—which could cause tension between the two. The report of the President on progress on national goals had now to be prepared, and the duties in connection with international obligations and that independence of courts and commissions performed, in consultation with the Prime Minister (probably an improvement on the CKRC Draft). Power to propose bills and to refer bills to the Supreme Court disappeared, though the power to refer laws back to Parliament remained. Also removed was the power to set up a commission of enquiry and the authority to appoint ambassadors on his own. Under Bomas the President must follow the advice of the cabinet on the declaration of war or emergency, though he must still be consulted. The President still chaired the the National Security Council. Most other powers remained the same, but overall the President had become more purely ceremonial. There was no whiff of two centres of power.

Under the Bomas Draft the Prime Minister is to co-ordinate the work of ministries and the preparation of legislation. The CKRC leaves the organisation and procedure of the cabinet to itself, but the Bomas draft prescribes how often it should be meet as well as its quorum. This draft makes him or her the manager of the cabinet rather than merely its chair.

There are two major differences. The CKRC proposed that ministers should be appointed from outside Parliament, to have ministers with a degree of professionalism who devote all their time to the work of the government, and MPs who devote themselves to parliament and their constituencies. Bomas says that ministerial posts must be given to MPs, but their appointment must be approved by the Senate.

The CKRC would limit the number of ministers to 18, to streamline government and save costs. Restrictions on the size of the cabinet are removed by Bomas. Yet in the Bomas system there are additional reasons for restricting numbers of ministers: to prevent there being so many ministerial appointees that Parliament cannot discharge its task of scrutiny or pursue votes of no confidence against ministers. It is no co-incidence that almost all members of the Bomas' committee on the executive were politicians!

Both these Drafts provided for direct elections of the President by the people. This was more important under the CKRC where the role was more than ceremonial. An office of this authority would also be useful to bring about ethnic balance in the executive. Direct elections for non-executive presidents, even ceremonial presidents do occur elsewhere, including the Republic of Ireland. Even a ceremonial president can and should be a voice of experience and moderation, and guidance to the government. Direct election would give the President the moral authority to underpin the substantive powers in the CKRC draft, and the guidance functions under the Bomas Draft. In neither case was it appropriate to say that the President was elected and then required to 'give his powers to the prime minister'. The President would have been elected by the people specifically to perform the assigned functions, and candidates for office ought to have been qualified in terms of experience, and moral standing to perform the role.

The Referendum Draft

The Referendum Draft, on the other hand, establishes a presidential system, vesting executive authority of the Republic in the President. The President is also the head of the government and presides over the cabinet. He cannot be a member of Parliament.

The appointment Prime Minister by the President needs the approval of a majority of MPs, but if two nominees are rejected, the President can appoint a Prime Minister without further reference to Parliament. The President appoints other Ministers, without parliamentary approval, including up to 20% of ministers who do not even have to be members of Parliament, a further attrition of the parliamentary system.

The office of the Prime Minister is unlikely to amount to much. The Prime Minister is little more than the Leader of Government business and acts always on the orders of the President. He or she has no role in the appointment or dismissal of ministers; nor in the allocation of portfolios or ministerial responsibilities. If the Deputy President is given a portfolio, this would further diminish the role of the Prime Minister. The relationship between the Deputy President and the Prime Minister is very unclear. The higher the status of the former, the lower that of the latter. It is difficult to understand why the prime ministerial post is created (which in practice can cause great confusion in administration), other than for cosmetic reasons.

Since the powers of the executive are vested in the President, the role of the cabinet is merely to assist the President. The only role specified for the cabinet is that the President must have its approval for a declaration of emergency or war. The President is equally free of parliamentary controls. His or her ministers cannot be dismissed or censured by Parliament (and so even in this indirect way the President cannot be held accountable). The statement that the 'Members of the Cabinet shall collectively and individually, be accountable to Parliament' is almost meaningless – except that they must attend to answer questions.

The vestiges in the current system that permit parliament to control the executive have been curtailed, while those that permit the executive to control parliament have been

retained. Parliament may impose a limit on the size of Cabinet - just as under the current Constitution Parliament may specify ministries. Parliament has never done this and surely will never choose to limit the number unless to spite the President. Why stop the gravy train, and limit their chances of office? So the President will be able to buy cooperation by granting office.

This Draft has shifted back to something much more like the current system. It is true that some presidential appointment powers would be curbed by requiring approval of parliament, that the president cannot dissolve parliament, and the power of clemency must be exercised in accordance with the advice of a committee. But the power of the President to constitute offices in the public service has been retained from the current Constitution (it was not in the CKRC or Bomas draft). Note that in Uganda “Subject to the provisions of this Constitution and any Act of Parliament, the President may, after consultation with the appropriate service commission, establish offices in the public service of the Government of Uganda.” And the President seems to have been given power to dismiss various public officers, despite the principle that they have security of tenure, to protect them from government pressure. These include the Inspector General of Police, Commandant of Administration Police, Director-General of Intelligence Service, and Director-General of Correctional Services.

The checks and balances of a classic presidential system have not been introduced! The only way the President can be removed is by impeachment. But successful impeachment would be almost impossible, as it requires the votes of 75% of all the members of parliament (even if the committee investigating allegations against the President finds them substantiated). In the style of Kenya politics, it would not be difficult to bribe 26% of the MPs to vote against the impeachment motion. Under the current constitution a two-thirds vote is sufficient to remove the President and no breach of the constitution or other misconduct has to be proved. This departs from almost universal practice in other constitutions, namely a two-thirds majority requirement for impeachment.

The President cannot dissolve parliament – so presumably if they are really obstructive he will have to bribe them by office or in other ways. Of course an astute president should be able to develop a good relationship with Parliament, with the cooperation of the Prime Minister. But confrontation seems as likely a scenario.

Another remarkable provision requires the Attorney-General to be a cabinet minister. The Attorney-General has security of tenure and therefore may not be in tune with the policies of the government of the day. Why should they be required to have him or her in the cabinet? The constant interaction of the Attorney-General with ministers compromises his role to give independent legal advice (which is presumably the reason for security of tenure); he may end up manipulating the law to suit the political purposes of the President or powerful ministers, instead of maintaining the rule of law.

In creating such a powerful president without any accountability to the cabinet or Parliament, the Referendum Draft goes against the goals of the Review Act and the

unanimous recommendations of Kenyans to the CKRC. It is little more than a recipe for disaster, a charter for oppression, paralysis, or both. In its face, many gains in the CKRC, Bomas and Referendum drafts will be nullified. Presidential systems tend to breed excessive arrogance and authoritarianism. “You must not be disrespectful to the President!” Why not if he is incompetent? Just like a Prime Minister, a President is the servant of the nation, but presidential systems seem to convince presidents and their hangers on that they are not really very different from monarchs.

VI

The Electoral system under the Referendum Draft

The current system (one MP to each constituency, with the winner being the person who gets the most votes, even if this is not a majority) can produce very unrepresentative results. In a parliamentary system this can have the result that a Government could be elected by a minority of voters! (Of course the Referendum Draft does not propose that the Parliament should choose the Government.) Parliament is now unrepresentative in other ways – few women, few persons with disabilities and few members of small minorities. There are just 12 nominated members, who are to represent mysterious ‘special interests’.

The Bomas Draft proposed the system used in New Zealand: there would continue to be constituencies, but there would also be further MPs – about one-third of the House – who would come from party lists and be chosen to bring the overall make-up of Parliament closer to the voters preferences. So usually if 30% of voters supported Party A, 55% supported Party B, 8% supported Party C and 7% supported Party D, the number of MPs would reflect this choice. Half of those extra MPs would have to be women. Admittedly this would not have immediately produced one-third women members.

Bomas chose a complicated system under which in addition to regular constituencies, each District would be a special constituency with a woman MP. It did not deal with the problem of ‘unproportional’ representation. And there was a provision for 14 members representing ‘marginalized communities and groups’. This included groups that suffer discrimination, like persons with disability (PWDs), but also covered smaller ethnic groups, pastoralists or isolated groups. This was intended to achieve a principle that 5% of the first house of Parliament should represent PWDs, youth and marginalized groups.

The Referendum Draft adopts another new system that draws on both the earlier ones; it refines the Kilifi Draft. There are to be mainly MPs from constituencies; and law may create some women-only constituencies (article 116). There are to be special members chosen by parties, and these are to be in proportion to the overall votes achieved by each party. One group of extra members - 5% of the total membership - must be persons with disabilities, 5% represent ‘special interests’ and one-third must be women. Let’s call these ‘extra’ MPs. Note: it is 5% of the total number of members that must be PWDs, and one-third women – not 5% or one third of the extra MPs.

At each election there will be a different number of women elected for ordinary constituencies. So in each election the total number, including the extra MPs, will be different. A computer program would help to do the calculation. I have tried by playing with numbers to see how it would work.

Suppose that there is a general election with the following results, in an election with no special seats for women, but just 220 constituencies:

Party A gets 55% of the votes but 60% of the seats	132 seats
Party B gets 30% of the votes but 25% of the seats	55 seats
Party C gets 10% of the vote but 15% of the seats	33 seats
Party D gets 5% of the votes but no seats	

There are 10 women MPs.

In order to get one-third women we shall need around 125 more (I reached this figure by trial and error). These extra MPs would be distributed between the 4 parties in proportion to their overall votes, taking account of the need to have PWDs, special interest people and women. One third of the PWD must be women – no more no less! Some of the ‘special interest’ members might also be women. The result would be 345 MPs:

Party A: 201 or 58.3% of the total

Party B: 93 or 28.4%

Party C: 45 or 13%

Party D: 6 or 1.7%

There would be 17 PWDs, 17 ‘special interest’ members and 90 extra women. Overall there would be 115 women – one third.

The result is also to bring the composition of Parliament closer to the voters’ party preferences, though not as close as the system recommended in the CKRC Draft would have done. The more the number of women MPs elected for geographical constituencies, the fewer extra women MPs there would be, and the less the tendency to approach the voter preferences – and the smaller the size of Parliament.

What would be the role of women extra MPs, since they would not have constituencies? Naturally they would have special concern for women’s issues, but they could also choose, or their parties could suggest, to concern themselves with other issues – children, or environment, or education, or health, perhaps.

The alternative system is for Parliament to create special constituencies for women. These could be on the lines proposed in the Bomas Draft: one for each district. This would require fewer extra women MPs. But there might be a decision to change the number of Districts for devolution purposes. Or Parliament could create women’s constituencies bigger or smaller units than Districts.

Women would prefer the ‘women constituencies’ approach: partly because constituency MPs have no limit, while the extra MPs can serve for only 1 term. Political parties would probably be against this: mainly because the extra MP system gives them more power. The rule that extra MPs can serve for only 1 term means that a person who agrees to be a

‘disabled MP’ or a ‘special interest MP’ would have to take leave or give up any other employment simply for one term as MP. And parties might be reluctant to appoint them ministers. We can imagine that if ‘extra’ MPs do well, they will press to be given geographical constituencies to contest at the next election. But this could only happen to a few of them.

In the end, it will surely be better if women get a footing in regular politics instead of with special arrangements. The CKRC and Bomas Drafts said that public funding for political parties should be used to provide incentives for parties to have more women MPs, but this has gone in the Referendum Draft.

The proposed system is ingenious. It is better for persons with disabilities than the Bomas Draft, but worse for marginalized communities. But it must be admitted that the Bomas Draft provisions were very unclear and inconsistent. But some things in the Referendum Draft are also unclear. Up to 20% of the ministers may be from outside Parliament, and then they sit as ex officio MPs. But the Draft does not say whether they are excluded when calculating the number of members of Parliament. And how about the Attorney-General and the Speaker who are ‘ex officio’ members? In the example earlier I assumed that ministerial ex officio members, and the AG and Speaker are not included; any other assumption is problematic as the number of such ministers may vary, and thus the total number vary after the ‘extra MPs’ have been identified.

The ‘special interests’ that 5% of the MPs would represent are unclear. They include ‘youth and workers’, but the latter word is vague, and who would the rest be? This gives the parties a lot of room for patronage (though perhaps not as much as the Kilifi draft that said ‘special party interests’!). It could be used to bring in ‘unelectables’ or even people who had failed to get elected in their constituencies.

Another problem is that there is no indication of who votes for special women’s seats, if any – just women or all the voters in the area? ??There are to be special seats for women in District Assemblies – but again the Draft does not say who is to elect them (article 209). These uncertainties were also in the Bomas Draft.

The Referendum Draft says that the extra MPs would come from ‘lists submitted by political parties’. The law should make it clear that these lists must be published by parties in advance of the elections, like the CKRC Draft. Otherwise these extra MPs could be sprung on the electorate after the results were declared.

Under the current Constitution there can be no MPs who are not members of a party. Everyone has agreed that this is wrong. Bomas required a person who wanted to stand as an independent candidate to have the supporting signatures of 500 voters. The Referendum Draft has raised that to 1000. This is one of several changes, introduced by politicians, that work to the advantage of parties.

In conclusion we can say that the electoral provisions of the Referendum Draft will be hard to understand and operate, will not necessarily lead to the representation of small

communities, and will increase the powers of political parties and the scope for inter-party intrigues as aspirants to office seek patronage of parties.

VII

Parliament and MPs: more effective, and more accountable?

Parliament plays a central role in a democracy. I have already discussed the importance of having an inclusive and representative parliament. But it is also important that it is given power, resources and procedures to exercise its functions of policy making, the enactment of legislation, and the scrutiny of the government. Rules to ensure that MPs perform their tasks diligently and fairly—and are accountable to their electorates and Kenyans more generally—are important.

The current Constitution says little about how Parliament operates, and nothing about whether the people have any say between elections. Its controls over MPs are weak. The people complained bitterly about the behaviour and integrity of MPs and the fact that they never see them between elections. They wanted to be able to sack non-performing MPs between elections. They said that educational and moral qualifications for MPs should be specified, and MPs should not fix their own salaries.

They also they wanted Parliament to have a bigger voice in controlling Government. Though Kenyans distrust their MPs, they recognise that Parliament is the body that represents them. If the MPs are ineffective, the voice of the people is muted.

Here we look at whether the Referendum Draft would make Parliament more accountable to the people, give the people more voice in Parliament, and make Parliament more effective. The original proposals in the 2002 CKRC Draft, which responded to all these concerns in a number of ways, were successively watered down as politicians got more involved, first at Bomas and then in the so-called Naivasha process.

Having better MPs

The 2002 Draft suggested that MPs should have at least Form Four – but the proposal was rejected at Bomas. But there are some required qualifications – someone with a serious earlier criminal conviction cannot be an MP, nor can someone previously found guilty of abuse of state office or breach of ethical standards. A law could impose additional moral or ethical or educational standards (it is a pity that it does not say ‘reasonable qualifications’). Oddly enough it seems that a person could now be a candidate at the age of 18 – in the 2002 draft the minimum age was 21. Incidentally, the UK is just reducing the minimum age from 21 to 18.

Enhancing the role of Parliament

A number of provisions, drawn from the CKRC and Bomas Drafts, seek to enhance the role of Parliament. An important improvement relates to the budget; Parliament must be given enough time to consider the budget, and would have the assistance of a new

official, the Controller of Budget in the consideration of government's financial proposals. Also important are the new powers of Parliament to approve various public appointments including judges. Parliament must approve all loans to Government, and any transaction giving rights to exploit any of Kenya's natural resources. Parliament would approve treaties. There are explicit provisions about Ministers' obligations to appear before Parliament to answer questions.

Control of MPs

The 2002 Draft would have enabled constituents unhappy with the performance of their MPs to recall (dismiss) them (as in Uganda). Although there were sufficient safeguards against the abuse of this power, politicians deeply resented the idea, and persuaded Bomas to eliminate it.

The CKRC also dealt with the question of MPs not turning up for parliamentary business, which has crippled the legislative and other responsibilities of parliament. At the same time public support for parliament suffers. This is likely to become a greater problem as the Referendum Draft (like Bomas) says that the quorum is one-third of all the members! At present the quorum is 30 (out of the total of 222). Even under the current Constitution there is a rule that if an MP misses 8 days in a row with no good reason he or she loses the seat. But the President can excuse the MP. The Referendum Draft is tougher – the MP loses the seat if he or she misses any 8 days *in any period* when Parliament is sitting. The CKRC insisted in reintroducing this phrase though the published draft in March 2004 said in any 'session' (a year). If 'period' means any period between adjournments this change makes the provisions much weaker, since Parliament often sits for only 2 or 3 months, but does so about three times a year. An MP could miss 7 days in any 2/3 month 'period' without risk, and could do this for each of the periods that Parliament would sit during one calendar year. Here Bomas was better than the CKRC Draft – which has been restored by this change (but to make it effective, the Speaker would have to be more vigilant in its enforcement).

In theory an MP who leaves the party for which he or she was elected must resign. In reality this never happens – MPs do not formally leave their party, although their political allegiances change. The Speaker has frequently identified this as a serious problem in upholding the spirit of this rule, which must be addressed.

Under the Bomas Draft no bill giving any benefit to MPs could have been introduced in parliament without the approval of the Salaries and Remuneration Commission. This was removed by the CKRC in its 'verification exercise'. However, the Referendum Draft retains the provision that the Commission (and not the MPs themselves) fix their pay. And any law that financially benefits MPs cannot come into force until after the next general election. But the Salaries and Remuneration Commission's make-up is not clearly set out – and like other commissions must be approved by parliament itself!

The Referendum Draft provides that the vote of an MP who has a pecuniary interest in a matter must not be counted – in the current Constitution this is left to the rules of parliament.

Public involvement

Members of the public may petition parliament about making law – this is a new provision. There is also provision about public consultation and participation in making laws – though this is left to a parliamentary committee to decide. At least the principle is recognised. The CKRC draft said that Parliament must have a committee to encourage such participation, but this was eliminated at Bomas. Parliament must also sit in public (though it may decide not to do so when this is reasonable). Currently committees of parliament sit in private; under the Referendum Draft they are to sit in public unless there is good reason.

Will there be a more effective and more accountable Parliament? There is no requirement that Parliament sit for any minimum number of days in the year. The provision for removal of non-appearing MPs is weak. There is no way the electorate can recall MPs. Nor can the President call an early election, even if MPs are in complete dereliction of duty. There is no requirement that Parliament have certain committees (unlike the CKRC Draft). Hopefully parliamentarians would respond positively to their new responsibilities. But it is hard to be optimistic, that MPs, already overpaid and with excessive benefits they have granted themselves in the past, will be suddenly transformed. Parliament (the same one we have now) will face a major challenge in implementing the Constitution if it becomes law. Will it rise to that challenge, or simply leave everything to the Attorney-General (see the forthcoming article on the transition to a new Constitution)?

VIII

Devolution

A system of devolution divides state powers between national government and governments at a lower level. It combines ‘shared rule’ at the national level and ‘self-rule’ at the devolved level. Devolved government has more significant powers than local government and better guarantees under the constitution. The CKRC received numerous recommendations, from individuals, civic organisations and political parties, to devolve powers to provinces and districts. There were four principal reasons: to break up the concentration of power at the centre, recognise diversity, promote greater participation in public affairs, and make government more efficient, responsive and accountable. A democratic system in which power was exercised locally would replace the current provincial administration managed by the national government.

Though there was considerable controversy within the CKRC and at Bomas, the schemes in the CKRC and Bomas Drafts are broadly similar, giving significant powers to devolved governments and providing strong legal protection. Although the reasons for and the purposes of devolution are described similarly in all three Drafts (but protection of marginalised peoples is removed in the Referendum Draft) the Referendum Draft takes a much less favourable view of devolution. In fact it is not clear that the RD system will be any improvement on, or even much different from, the existing local government.

Levels and units of government

Many countries have two levels: the centre and provinces or regions. But some recent constitutions provide for a third or even a fourth level. The more levels, the more complex the overall system of government, with difficulties of co-ordination and resources. But the more the levels, the easier it is to recognise various groups, and to bring government really close to the people.

The larger the devolved unit, the greater are the likely resources and so greater the possibilities of making and implementing laws and policies. Smaller units may not be able to exercise powers effectively or stand up to the central government. But the headquarters of large units can be as remote for some people as Nairobi, and the prospects of local democracy minimised. Even a district may be too big to give each community authority over some matters it may consider critical to its wellbeing or culture, or to avoid discrimination.

There was disagreement between those who wanted to grant provinces principal powers to make laws and decide policies, retaining districts largely as administrative units and those who wanted the district to be the main unit of devolution, with significant powers. A third, compromise, suggestion was to increase the number of provinces to about 14 to 18, not so large that some areas would still be remote from decision making, yet with sufficient resources to become effective units of law- and policy-making. Another possibility canvassed was a return to the 40 odd districts at independence to increase prospects of their viability.

Both CKRC and Bomas Drafts provided for several levels of devolved government. Both made districts the principal level of devolution, with most law making powers among devolved units.

Under CKRC provinces had few direct powers, their main function being to co-ordinate matters best managed on a province wide basis (and to act basically as an agency of district governments).

Bomas would have re-organised the existing districts into 13 provinces (called regions). The role of regional government was to promote co-operation between districts, increase their capacity, and undertake some regional activities (in an effort to increase its role from that in the CKRC draft).

The CKRC recognised village and locations as basically administrative units. Bomas removed villages, but at the location level, there were to be an elected council and elected administrator.

The CKRC decided against writing existing districts into the Constitution, to leave open the possibility of re-organisation. The Draft listed and entrenched both districts and regions. Under the Referendum Draft existing districts are not listed and may be altered by simple legislation, returning to the CKRC Draft.

The Referendum Draft provides for only one level of devolved government, the district (although a special regime has to be provided for urban areas within a district). Provinces are not mentioned, and presumably they are abolished (the functions they had under the CKRC and Bomas Drafts are listed as district functions).

The government has pledged to retain existing districts and even to create more. This means the devolution system will be weak. Nigeria, with 120 million people has 31

states; Kenya with a quarter the population will have nearly three times as many lower level governments.

Division of powers

How strong lower levels of government are depends on their law and policy making powers. The CKRC Draft granted law making powers only to the national and districts governments. The national government was given powers to maintain the defence and integrity of the state, foreign affairs, the development and management of the economy (including national resources), immigration and courts. Districts had powers of local concern (including town planning, the delivery of services, police services, markets and trading centres, etc). Both had powers in relation to revenue, trade and commerce, natural resources, maintenance of public security and order, environment and ports other than declared to be major or national ports). It was also envisaged that some national legislation which principally concerned, and would be implemented in, districts would be in the nature of a framework law enabling districts to adapt it to local circumstances.

The Bomas Draft proposed three exclusive lists of powers: one each for the national, provincial and district governments. Location governments would administer but not make laws. The Referendum Draft has two lists of functions: national and district. The district list is very much the same as in Bomas, but includes items that were on the region list under Bomas, plus a few extra items.

The various Drafts deal differently with possible conflict between laws at national and district level. CKRC left it to Parliament to decide. Bomas Draft provided an elaborate (and probably unworkable) set of rules to be applied by courts, and the presumption was that district law prevailed unless there was a good reason for national law to take precedence. The Referendum Draft gives dominance to national law - in other words the districts are weaker than they would have been under Bomas..

If there is some item not listed, which level of government is to make law? CKRC left this to Parliament. Bomas said such 'residual' items were for the districts, the Referendum Draft gives the power to the national government.

Overall the districts would be far weaker under the Referendum Draft. In fact they would have no guaranteed powers at all, as everything is subject to law. And the law can be changed as easily as any other law – unlike the CKRC which would have made law on devolution less easily changeable. And the Referendum Draft has no second chamber of parliament – discussed below.

Finance

Major sources of taxation were assigned under the CKRC Draft to the national government, but the proceeds were to be distributed 'equitably' among the national and district governments through an independent commission. Other general or specific grants would also be made by the national government; and districts were to receive a 'substantial' share of revenue derived from resources within their territory. Districts would have been able to supplement these sources by limited taxing powers of their own.

The Bomas Draft strengthened financial arrangements for devolved governments. Districts would have been able to levy taxes on more items (including on any item not reserved for the exclusive use of the national government). The Referendum Draft

follows the scheme of the Bomas Draft, but changed the duty of the national government to promote 'equalization' to the vaguer 'promote fair sharing of resources'. (The Canadian constitution refers to equalization payments 'to ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public service at reasonable comparable levels of taxation'.)

The Referendum Draft has retained the Commission on Revenue Allocation to propose distribution of resources between different levels of government.

Institutions

The CKRC proposed a second chamber of the national legislature (the National Council), consisting of one elected member from each district plus 30 women elected from multi-member constituencies, for the participation of districts in national government and the protection of their interests. Bomas retained a second chamber (called the Senate). It was intended to provide a forum for negotiations between different levels of government. Its members were not to be elected directly by the people but to be chosen by district councils, except for representatives of women. There were also ten representatives of marginalised groups. On matters concerning districts, delegations from each region would vote as blocks, having one vote each, and decisions must be made by two-thirds of the vote.

The Referendum Draft has completely done away with the second chamber. Instead there will be a National Forum for District Governments with purely advisory or consultative role (except for appointment of representatives of districts to the commission on revenue allocation). Thus the lower level of government is to have no voice at the national level. This would be particularly important in connection with revenue allocation: under Bomas proposal of the Revenue Allocation Commission could be modified with the approval of both houses. Now there would be no house representing the interests of districts.

Under the Referendum Draft there will be a system of elected government within the district: a District Assembly – like a local Parliament with the power to make local laws and to supervise the local executive, and a District Council – the district executive, with a Chair and Deputy Chair and a number of members from the District Assembly. Although it says that council would be accountable to the assembly it is not clear what this means.

Relationship between national and district governments

The CKRC said little about this relationship, but assumed that some of this would be negotiated through the second chamber of Parliament (the National Council) and the commission on local government finance. Governments at different levels would consult and co-operate on policies and administration, and staffing. The national government would have the power to suspend a district government, apart from situations of war or emergency, for inefficiency or corruption, subject to tight safeguards, including an independent investigation into the conduct of the district government.

Under Bomas, inter-governmental relations were similar in principle to that in the CKRC Draft (requiring co-operation and consultation while respecting the respective powers of each level), but are stated more elaborately (drawing heavily on the South African Constitution).

The Referendum Draft also emphasises co-operation between the two levels, but provides no procedures, leaving it to legislation, which must provide for 'negotiation, mediation or

arbitration', that is not through courts. The provision in other Drafts giving the Supreme Court original jurisdiction over disputes between levels of government has been removed. Thus a critical protection of districts against the contravention of their powers by the national government is removed.

Constitutional guarantees

The CKRC and Bomas provisions on devolution were strongly entrenched. They could only be altered by votes of two-thirds of all the members of each house of Parliament and supported by a referendum. And the law establishing details of devolution could only be altered by a majority of all the members of each house. In the Referendum Draft, though the constitutional provisions are hard to change, parliament can change so much by ordinary law, that the constitutional protection is rather meaningless.

How far will the Referendum Draft proposals meet the objective of devolution? It would hardly break up the concentration of power at the centre because the system set up would be so weak. It may recognise diversity, but there would be limited ways to express this diversity. If the system is weak it will have little impact on promoting greater participation in public affairs, because people will feel that important decisions are still not taken close to home. There is little provision for active participation of the people – a respect in which local government in Kenya has been weak, and which Bomas did emphasise.

In short, the Referendum Draft has reduced the complexity of the proposed system – and to some extent that may be a good thing. But it has also greatly weakened the position of lower level government. And if the government proceeds with President Kibaki's promise to increase the number of districts, they would have even less capacity to carry out their functions. And this would add to the cost of decentralisation, cost being ironically the reason the government gave for opposing the CKRC and Bomas proposals.

Conclusion

While the CKRC and Bomas drafts tried to lay out a blueprint that would encompass the whole range of local government, the Referendum Draft deals only with districts. It has few principles for lower levels of local government, and it is not clear what the relationship between districts and other levels is, or how much responsibility districts governments will have for lower levels within the districts. The CKRC had deliberately left a good deal to legislation but set out principles, while guaranteeing that there would indeed be a system that genuinely brought government closer to the people. Bomas too guaranteed a genuine system of devolution. It is not at all clear that the Referendum Draft does this (quite apart from many loose ends in drafting).

The Referendum Draft – like earlier Drafts – would abolish the Provincial Administration. And existing local authorities will cease to exist once the new devolved system comes into effect. There is supposed to be provision in law for a shift over a five year period of responsibility from Government to the new district system. Clearly, if the Referendum Draft does become law, a good deal of thought will have to go into changing the existing laws, and drafting new ones, and perhaps amending the new Constitution. I have long advocated that we need an independent commission to study and recommend on the development of devolution.

IX

Parties and elections

Most citizens will have their only contact with national politics through casting their votes, even if a new Constitution could encourage participation in other ways. That vote depends on the electoral system – how votes are translated into power. (This is discussed in another article.) And it also depends on how far and efficient elections are, and also on political parties. These are the topics of this article.

Political parties

Parties are important in any democracy because they identify leaders, develop policies, form government, produce a coherent alternative view to that of the government, scrutinise the conduct of government, and are the main organisations for citizens to take part in politics. Above all, they are the vehicles through which state power is exercised. The way in which parties are organised have a major bearing on the effectiveness and stability of government. Parties must have the capacity to aggregate interests, mobilise support for policies, and promote public debates on economic and social issues. Therefore the health of a democracy depends fundamentally on the state of its parties. Kenyans may feel that their parties score rather poorly in these functions, offer the electorate no policies or alternatives, operating mainly as a way to get certain people into power, and to bribe or even terrorise voters at election time. Politicians change parties at their political convenience, driven only by their desire for office,

Part of the problem is a legacy of the one-party state: such a system destroys that one party as well as others. Even though the current Constitution insists that Kenya is a multi-party state, much needs to be done to produce a vibrant, effective party system.

Registration and regulation of political parties

Political parties have to be registered. Maybe many people have never asked why! This was a colonial strategy for controlling organisations (and the UK did not have registration laws until 2000). These laws can be used to block opposition parties – as they have been used in Kenya, or to achieve more worthy ends.

The Referendum Draft, like the 2002 and Bomas Drafts, says that parties must be democratic, respect and promote human rights, not base themselves or their policies on hatred or discrimination, and must be committed to national unity, and ‘have a national character’. The last provision may make it difficult for new parties to get going; but it could be interpreted in a reasonable way. The 2002 CKRC Draft said that a party that met the criteria had a right to be registered. Bomas was so distrustful of established institutions that it insisted on the creation of a separate state functionary to register parties. Sensibly, perhaps, the Referendum Draft follows the CKRC Draft in allocating the responsibility to the Electoral Commission. However, it is unfortunate that the CKRC requirement of fair procedures before deregistering a party have disappeared.

The CKRC Draft set out some functions of political parties (such as the promotion of national unity and practice democracy). This was removed at Bomas, only to be reintroduced by the CKRC verification process – though as duties, which would perhaps be unwise (offering too easy a way to deregister parties). The functions or duties of parties have disappeared completely in the Referendum Draft.

Earlier drafts required the setting up of a political parties fund. The idea of this is to ensure basic resources for parties, discourage them from looting the state to pay for elections, and to have a tool to use as an incentive for responsible party behaviour. In the Referendum Draft, there is no provision that the fund be used to encourage parties to have women candidates, minority candidates or candidates with disabilities. Nor is there any restriction on how the money is used. Earlier drafts were more explicit, and thus offered guidance about how the fund was to be used (for example, they it could be used primarily for civic education and election expenses, and there were provisions to prevent its use for purposes inconsistent with multi-party democracy). Provisions about parties keeping proper accounts have also been removed.

The CKRC Draft said that there must be laws about the maximum contributions that any individual or company could make to a political party; and also said that only citizens could contribute to parties. These ideas were not accepted at Bomas. The Bomas Draft said that public resources (other than the official Political Parties Fund) must not be used for party purposes, but the Referendum Draft says there must be law on this – in other words it is left to Parliament itself.

Elections

Control of parties over candidacy for elections

All Drafts state that it should no longer be necessary for a candidate, whether for presidential or parliamentary elections, to be nominated by a political party. The old rule is a relic of the one party state. Sometimes the restriction of candidacy to party members is justified on the basis that it promotes the development of parties. But if parties need this privilege, it means that something is wrong with them. The ability of a person to offer herself as an independent candidate (and to function as independent member of Parliament) is a basic democratic right, and is also valuable for society.

Since Bomas it has become more difficult for an independent candidate to stand. A presidential candidate must have the signatures of 10,000 voters, and a parliamentary one 1000. These were respectively 1000 and 500 in the earlier drafts. A new restriction introduced at Bomas also strengthens the hand of parties: a person who had been a party member within 6 months could not stand for election to parliament as an independent. But since a person could leave one party and join another (within the six months) and still stand for election as the second party's candidate, why should he or she not be allowed as an independent?

Conduct of elections

Kenyan elections have not been as disorderly or violent or disorganised as in some other countries, but many improvements in their conduct were proposed to the CKRC. The Referendum Draft, following earlier drafts, makes a few changes in the system, including

requiring continuous registration of voters and transparent ballot boxes, and counting of votes at polling stations. Some of these may cause difficulties. May be absolutely continuous registration is difficult to operate, and if Kenya followed India in using voting by computer, would counting at polling stations (as proposed now) be feasible?

There is also a provision (in the media article of the human rights chapter) requiring law about sharing broadcasting time fairly at elections and other times. But there is nothing to require law limiting expenditure on elections (there was such a requirement in the CKRC Draft which did not survive Bomas).

In the current Constitution, if a person is disqualified from voting or standing for election because of electoral misbehaviour the President can simply remove this qualification. None of the Drafts has retained this possibility of favouring one's own political supports

Conclusion

Some proposals in the earlier drafts were complex and might have been difficult in practice. But to some extent at Bomas, and even more so since, the control over parties has been weakened. Some controls are not mentioned at all, while others are left to Parliament, by passing a law. Parliament, of course, is composed of members of parties, who may have little interest in well regulated and accountable parties. Can we be confident they will pass laws that respect the spirit of the Constitution and the wishes of Kenyans?

X

Parliament and MPs: more effective, and more accountable?

Parliament plays a central role in a democracy. I have already discussed the importance of having an inclusive and representative parliament. But it is also important that it is given power, resources and procedures to exercise its functions of policy making, the enactment of legislation, and the scrutiny of the government. Rules to ensure that MPs perform their tasks diligently and fairly—and are accountable to their electorates and Kenyans more generally—are important.

The current Constitution says little about how Parliament operates, and nothing about whether the people have any say between elections. Its controls over MPs are weak. The people complained bitterly about the behaviour and integrity of MPs and the fact that they never see them between elections. They wanted to be able to sack non-performing MPs between elections. They said that educational and moral qualifications for MPs should be specified, and MPs should not fix their own salaries.

They also they wanted Parliament to have a bigger voice in controlling Government. Though Kenyans distrust their MPs, they recognise that Parliament is the body that represents them. If the MPs are ineffective, the voice of the people is muted.

Here we look at whether the Referendum Draft would make Parliament more accountable to the people, give the people more voice in Parliament, and make Parliament more effective. The original proposals in the 2002 CKRC Draft, which responded to all these concerns in a number of ways, were successively watered down as politicians got more involved, first at Bomas and then in the so-called Naivasha process.

Having better MPs

The 2002 Draft suggested that MPs should have at least Form Four – but the proposal was rejected at Bomas. But there are some required qualifications – someone with a serious earlier criminal conviction cannot be an MP, nor can someone previously found guilty of abuse of state office or breach of ethical standards. A law could impose additional moral or ethical or educational standards (it is a pity that it does not say ‘reasonable qualifications’). Oddly enough it seems that a person could now be a candidate at the age of 18 – in the 2002 draft the minimum age was 21. Incidentally, the UK is just reducing the minimum age from 21 to 18.

Enhancing the role of Parliament

A number of provisions, drawn from the CKRC and Bomas Drafts, seek to enhance the role of Parliament. An important improvement relates to the budget; Parliament must be given enough time to consider the budget, and would have the assistance of a new official, the Controller of Budget in the consideration of government’s financial proposals. Also important are the new powers of Parliament to approve various public appointments including judges. Parliament must approve all loans to Government, and any transaction giving rights to exploit any of Kenya’s natural resources. Parliament would approve treaties. There are explicit provisions about Ministers’ obligations to appear before Parliament to answer questions.

Control of MPs

The 2002 Draft would have enabled constituents unhappy with the performance of their MPs to recall (dismiss) them (as in Uganda). Although there were sufficient safeguards against the abuse of this power, politicians deeply resented the idea, and persuaded Bomas to eliminate it.

The CKRC also dealt with the question of MPs not turning up for parliamentary business, which has crippled the legislative and other responsibilities of parliament. At the same time public support for parliament suffers. This is likely to become a greater problem as the Referendum Draft (like Bomas) says that the quorum is one-third of all the members! At present the quorum is 30 (out of the total of 222). Even under the current Constitution there is a rule that if an MP misses 8 days in a row with no good reason he or she loses the seat. But the President can excuse the MP. The Referendum Draft is tougher – the MP loses the seat if he or she misses any 8 days *in any period* when Parliament is sitting. The CKRC insisted in reintroducing this phrase though the published draft in March 2004 said in any ‘session’ (a year). If ‘period’ means any period between adjournments this change makes the provisions much weaker, since Parliament often sits for only 2 or 3 months, but does so about three times a year. An MP could miss 7 days in any 2/3 month ‘period’ without risk, and could do this for each of the periods that Parliament would sit during one calendar year. Here Bomas was better than the CKRC Draft – which has been restored by this change (but to make it effective, the Speaker would have to be more vigilant in its enforcement).

In theory an MP who leaves the party for which he or she was elected must resign. In reality this never happens – MPs do not formally leave their party, although their political allegiances change. The Speaker has frequently identified this as a serious problem in upholding the spirit of this rule, which must be addressed.

Under the Bomas Draft no bill giving any benefit to MPs could have been introduced in parliament without the approval of the Salaries and Remuneration Commission. This was removed by the CKRC in its ‘verification exercise’. However, the Referendum Draft retains the provision that the Commission (and not the MPs themselves) fix their pay. And any law that financially benefits MPs cannot come into force until after the next general election. But the Salaries and Remuneration Commission’s make-up is not clearly set out – and like other commissions must be approved by parliament itself!

The Referendum Draft provides that the vote of an MP who has a pecuniary interest in a matter must not be counted – in the current Constitution this is left to the rules of parliament.

Public involvement

Members of the public may petition parliament about making law – this is a new provision. There is also provision about public consultation and participation in making laws – though this is left to a parliamentary committee to decide. At least the principle is recognised. The CKRC draft said that Parliament must have a committee to encourage such participation, but this was eliminated at Bomas. Parliament must also sit in public (though it may decide not to do so when this is reasonable). Currently committees of

parliament sit in private; under the Referendum Draft they are to sit in public unless there is good reason.

Will there be a more effective and more accountable Parliament? There is no requirement that Parliament sit for any minimum number of days in the year. The provision for removal of non-appearing MPs is weak. There is no way the electorate can recall MPs. Nor can the President call an early election, even if MPs are in complete dereliction of duty. There is no requirement that Parliament have certain committees (unlike the CKRC Draft). Hopefully parliamentarians would respond positively to their new responsibilities. But it is hard to be optimistic, that MPs, already overpaid and with excessive benefits they have granted themselves in the past, will be suddenly transformed. Parliament (the same one we have now) will face a major challenge in implementing the Constitution if it becomes law. Will it rise to that challenge, or simply leave everything to the Attorney-General (see the forthcoming article on the transition to a new Constitution).

XI

Financial control and prevention of corruption

A major reason why Kenyans struggled for constitutional reform was the prevalence of corruption at all levels of the state, particularly at the top. Kenyans suffered (and continue to suffer) great hardship as a result of the loss of public funds, lack of investments, and moral decay in society that resulted from corruption. They ascribed the prevalence of corruption to loose control over the finances of the state, lack of transparency and the absence of integrity among state officials. A major concern therefore of the CKRC was to prevent and combat corruption.

Current constitution

The current constitution has some provisions on financial accountability. State finances cannot be raised or spent without the authority of parliament. The actual release of the money has to be authorised by the Auditor-General, who also afterwards audits the expenditure. A parliamentary committee, relying largely on the Auditor-General's reports, is supposed to exercise accountability. Unfortunately this system has not worked well. MPs have little understanding of the budgetary process and government estimates were accepted without any scrutiny. There is no limit on government borrowing. The Auditor-General has a heavy load and tends to focus on audits for propriety rather than efficiency grounds, and has little time to pay attention to questions of disbursements. Audits were many years in arrears. Although an independent officer, the Auditor-General has little authority to determine his own staff and resources. And the parliamentary committee failed to live up to its mandate and even when it made recommendations on accountability, little action was taken. The Attorney-General, embedded in the cabinet, did almost nothing to enforce the criminal law against corruption, especially in high places. Many judges themselves were corrupted and the legal system hijacked to hide the crimes of the powerful and well connected, and to punish those opposed to them.

Combating corruption

The CKRC made a number of proposals to deal with this hopeless situation. Several of these proposals have been described in my previous articles. The centralised power of the presidency which facilitated corruption and protected the corrupt, was to be dismantled in the ways I have discussed. Independent institutions (particularly the Commission on Human Rights and Administrative Justice) were to be set up to investigate complaints of abuse of office. Powers of prosecution were vested in an independent director of prosecutions. Parliament's capacity to exact accountability was to be enhanced. There was to be a major reform of the judiciary (which I will discuss in a later article). Access to information held by the government which would disclose the corrupt was to be made available to citizens and organisations on request. People were given the power to remove corrupt ministers and MPs. Persons convicted of corruption were to be ineligible to become MPs and hold other public office. In this article I discuss some additional and specific provisions for greater control over state finances and the prevention of corruption.

A better budgetary process

The CKRC aimed to ensure a better budgetary process and to strengthen Parliament's capacity to deal with financial affairs. Its Draft required the government to submit

detailed fiscal and monetary strategic plans together with the budget so that its consistency with longer term economic policies could be examined. Parliament was to have the assistance of the Economic and Social Council in the analysis of the budget (and economic policy more generally). Parliament was also to be assisted by a new independent officer, the Controller of the Budget, in the review of the budgetary proposals as well as their implementation. Even when Parliament approved funds, the government could not receive them without a further authorisation of the Controller. And if the budget was not approved on time, it would be the Controller whose permission was necessary for temporary approval of funds to keep government running. The Controller has to keep Parliament informed of actual expenditure of money; this would enable Parliament to take up critical issues without having to wait for final audits. The presence of the Controller meant that the Auditor-General would now be free to concentrate on the task of audit, which now must also include assessments of efficiency. Bomas endorsed these provisions and they now also appear in the Referendum Draft. This Draft adds the useful requirement that each legislative bill should be accompanied by a memorandum explaining its financial implications, strengthening Parliament's ability to oversee public expenditure.

It is common for the budget not to be approved before the financial year begins. The CKRC proposed that an amount no greater than 20% of the previous year's budget could be released to meet government expenditure before the budget was approved. The Referendum Draft has raised this limit to 50% of the proposed budget, thus reducing the pressure on government to ensure that the budget is approved promptly, and weakening parliament's control over the whole process.

Waiving of taxes

Excusing government's friends from having to pay taxes, or reducing their taxes has been a serious problem: reducing government revenue and distorting the economy. The CKRC Draft stated that no tax could be varied or waived without the authority of a law, and any variation and waiver had to be reported, and justified, to Parliament within three months (Bomas replaced the requirement to report to Parliament with the requirement to report it to the Auditor-General). The Referendum Draft is the same as the Bomas Draft on this.

Loans

The CKRC proposed that the government could borrow unless authorised by law. The terms and conditions of loans would have to be approved by Parliament; and the money deposited into the consolidated or other approved fund. The government would have to make periodic reports on government's indebtedness and also government must explain the actual use of loans.

To ensure that the country did not become too burdened with debt, Bomas said that the total national debt must not exceed 50% of the gross domestic product. But the transitional provisions of the Bomas Draft weakened this to an objective for the Minister of Finance to achieve this, *as far as possible*, within 10 years. Recent reports (August 2005) from the Central Bank indicate that at present public debt is at about 58% of GDP.

The Referendum Draft leaves the whole matter to an Act of Parliament. So, between Bomas and 2005, there has been a shift from a *requirement* of prudent borrowing by government (if only as an objective) to a *possibility* that Parliament will impose a limit.

This may be yet another power that Parliament does not use, so the idea of financial prudence becomes a dead letter. In fact any bill on this topic would presumably be a 'money bill' and could only be introduced into parliament by a Minister – that is by the Government. Is Government likely to do this?

Tenders and contracts

The Bomas Draft aimed to regulate the procurement by the government of goods and services. There should be a system that is 'fair, equitable, transparent and cost-effective'. It then set out a number of considerations that should guide the procurement process, to help the disadvantaged and to prevent the corrupt or the incompetent from being awarded government contracts. The Referendum Draft has retained this provision.

Central Banking functions

The function of the Central Bank is to promote the stability of the value of the Kenya shilling, and monetary policies 'consistent with balanced and sustainable economic growth'. Central Banks may be pressured by governments to print more money than can be sustained by their reserves, or fix lending rates that could lead to inflation, in the interests of the ruling party or its clients, and against the national interest, or to make illegal payments. The CKRC, Bomas and the Referendum Drafts all provide for the independence of the Bank.

Integrity

All the Drafts have proposed an Ethics and Integrity Commission to improve and enforce standards of ethics among 'state officers' and 'public officers', and have included some specific principles of ethics. In the Referendum Draft, 'state officers' probably means the President, Ministers, MPs, Judges and so on, while public officers are public servants. You have to read the Draft very carefully to find out that these principles apply to all public servants! There are clear principles of service to the nation, fairness, and transparency set out. And there are specific requirements including not allowing personal interest to conflict with public duty, not taking bribes, not using office to obtain sexual favours and not using public property for unofficial purposes are some examples. These are perhaps too detailed; many of them are both obvious and restate the existing law. But they do indicate to the public what they have a right to expect, and in a document that the public may be aware of.

Even these details will not provide enough guidance. It would have been wise if the duties of the Commission had clearly included drawing up Codes of Practice. Readers might be interested to see the codes drawn up by the Canadian Ethics Commissioner for MPs and office holders (on the internet <http://www.parl.gc.ca/oec/en/default.asp>).

There are also provisions of a more practical nature. The Ethics and Integrity Commission would not be a policing body – so Kenya Anti-Corruption Commission will no doubt continue, though the Commission could be turned into a sort of policing body as well (rather more like the Hong Kong Independent Commission Against Corruption). But it is designed to be a strong and independent body to spearhead the battle against corruption, by taking a preventative approach, as well as carrying out investigations.

Again following the CKRC and Bomas, the Referendum Draft would require public declarations of wealth. The current government has introduced declarations of wealth –

but these are not yet to be made public. And the law could easily be repealed. So it is important to have a guarantee of this system in the Constitution.

People convicted of offences of corruption or other breaches of the responsibilities of leadership would be excluded from future public office. This has been slightly amended since Bomas, sensibly. In the Bomas Draft any person who was convicted of an offence relating to any of these guidelines would automatically have lost office! This would have been a route round the provisions designed to make it difficult to remove judges for example. Now the Referendum Draft says this is 'subject to this Constitution' which presumably means that such behaviour is grounds for beginning the removal process but does not lead to automatic removal.

District governments may be suspended for corruption, after a full inquiry. This is may be important in the case of district governments that become dominated by personal politics, and are remote from scrutiny by the press.

Conclusion

Thus we can say that all three Drafts are similar, except that there is some weakening of control mechanisms in the Referendum Draft.

XII

Religion and the Constitution

The place of religion in a multi-religious society is frequently controversial (as the difficulties surrounding the drafting of the Iraqi constitution or the wearing of religious head gear in public schools in France demonstrates). Because religion can be a fundamental cause of conflict, and yet is a source of comfort and identity to most people, the tendency is towards a secular state, in which the state and religion are kept separate. Separation means that no religion is privileged and the followers of no religion need feel that they are being marginalised. And because the state is kept out of religious affairs, all religious communities are free to pursue their religious vocation and practice without state interference, a right which is guaranteed through the freedom of religion, conscience and belief. The secular state is not anti-religion, but tolerant of religious differences (as is evident from the fact that two of the most religious and diverse countries in the world, the US and India, are secular states).

Although religion is very important to most people in Kenya, Kenyans have avoided dangerous religious controversies. On the contrary, religion has been a source of support for the country. In particular, the unity of religious groups as expressed through the Ufungamano Initiative, was instrumental in getting the review process off the ground. But religion can also be very divisive. During the Bomas process the divisiveness was sometimes more visible than the positive aspects. The divisiveness, most obvious in the discussion around Kadhi courts, was politicised and at one point threatened to thwart Bomas. The aim of the CKRC Draft was to recognise and respect the diversity of religious beliefs in ways that do not affect politics or threaten national unity.

CKRC's approach (and most provisions) have been adopted in the Bomas and the Referendum Drafts (except in relation to religious courts).

Equality of all religions

Because the CKRC Draft emphasised unity, it stressed that all religions are to be treated equally and that the state must not have an official religion. But several provisions recognised religious traditions. The law was to recognise marriages conducted under 'any tradition or system of religious, personal or family law' as well as 'systems of personal and family law under any tradition, or adhered to by persons professing a particular religion'. Persons belonging to a religion were to be able, in association with co-religionists, to practise their religion and no one was to be compelled to perform or take part in any religious practice or rite. Freedom of religion and conscience itself was very broadly defined, and included the right of every religious community, at its own expense, to establish places of education in which it could provide religious instruction. Religious education could also be provided in state or state-aided schools provided that this was done on an equitable basis, without privileging any religion, and participation was voluntary.

Thus it is wrong to suggest, as Charles Kanjama does in his interesting article (Standard October 30) that there could be no such activities in state schools. Of course it is still difficult for a child who is in a minority to insist on leaving a class or a religious service, and schools should take great care to ensure that such children are not victimised or embarrassed because they exercise their constitutional rights.

What does it mean to say that religions must be treated equally? Charles Kanjama argues that this means that religious worship or education must deal with all beliefs or not take place at all. I would read it as implying that common sense must be applied. A school with significant numbers of Muslim and Christian teachers and pupils must allow, and even provide, religious instruction in both. But it would be wrong to provide or permit one but not the other.

It is true that separation of church and state could have the corollary that there should be no prayers at state functions, as Kanjama suggests. At present there is a considerable effort to be even-handed: there is usually a Christian, a Muslim and a Hindu prayer at big state functions (although Christian rituals do dominate state occasions, like Madaraka or Jamhuri day ceremonies, and politicians make an excessive use of the pulpit for political purposes). It is true that most Kenyans believe in a supreme being - and thus having "God" in the Preamble, and having prayers at state occasions, will strike a chord with them. But beyond this, great care needs to be taken. What the Constitution tries to achieve is respect for all religions, but not favouring of one religion over another.

Some people have expressed concern that the Draft says that no-one must be refused employment or access to facilities because of their religion – "Can't the Catholic church insist on a Catholic priest, or a mosque exclude non-Muslims?" they mock! The answer is that of course it is possible to have this type of restriction/qualification, provided that it is reasonable and justifiable in a democratic society. The problem would have been less serious if the Bill of Rights had affected only the Government and public bodies – but it affects everyone – including the church, private companies, clubs and individuals. In many countries the law outlaws discrimination – but excludes genuine work requirements. Clearly being a believer is a genuine requirement for being a priest! Similarly, it would be perfectly reasonable for a law to permit a religious group to ask what religion a person believes in – which is generally not allowed.

Depoliticising religion

Political parties are the principal vehicles for propagating ethnic or religious identities and agenda. The CKRC Draft, followed in later drafts, said that political parties must have a national character and commitment to democracy and human rights (as discussed in a previous article). A political party founded on religious, linguistic, ethnic, sex, or regional basis or that engages in propaganda based on any of these matters cannot be registered.

This approach is also reflected in the judicial oath, which Kanjama unfairly implies is 'nonsense', because judges must swear that they will 'impartially do justice in accordance with the Constitution' and without any prejudice, bias or influence - including any religious influence. We all believe that judges should not be influenced by their political beliefs, and that presumably they can make some reasonable attempt to apply the law without being influenced by the political affiliation of parties, or by their own political views on the wisdom of the law. The same is true of their religious beliefs. In fact there should rarely be any serious tension. There have been Christians who have refused to become judges because they would have had to impose the death penalty. That is the right approach if a person would find the dilemmas intolerable. In fact there are few such dilemmas.

Kadhi and other religious courts

Following the current constitution, the CKRC Draft provided that Islamic law would apply to Muslims in respect of marriage, divorce, inheritance and succession, and even extended the jurisdiction of Kadhi courts to include minor contractual disputes when both parties are Muslims, and disputes over wakf (religious trust) properties. As some aspects of Islamic law probably violate the provisions on equality, the Draft provided for qualifications to equality 'strictly necessary' for application of its rules on personal matters (the current constitution exempts all regimes of personal law from the requirement of equality). The Draft even added new levels of Kadhi courts. It also made the Chief Kadhi (and a Muslim woman) members of the Judicial Service Commission.

At Bomas, these provisions ran into considerable opposition from various Christian leaders, surprisingly as no opposition to the status of Kadhi courts was expressed by any one during the submissions to the CKRC (and their existence goes back to pre-colonial times). The objection now was on the grounds that these provisions privileged Islamic law and violated the principle of the separation of state and church. Others criticised the inferior status of women under Islamic law (although most Muslim women who spoke to the CKRC declared themselves satisfied with Islamic law). Some Christian groups said that they did not mind the Muslims having Kadhi courts, but they did not want this in the Constitution. Hindus, and many Christians, had no wish to have their own courts. In fact, the general personal law in Kenya is based on Christian principles, having been received from Britain. Others complained about public money being spent on Kadhi courts. But these courts deal only with issues that would be dealt with by law whatever the religion of the parties: marriage, divorce, and inheritance. In other words, Muslim who go to Kadhi courts will not be taking those matters to regular, publicly funded, courts, so there should be no additional public expense.

Muslims felt hurt because something they had had without controversy for many years (and which was guaranteed under the treaties which granted Kenya sovereignty over the Coastal Strip) was threatened. And they felt that other communities were making no effort to understand the importance of law in their religion. They still preferred the CKRC Draft. Christian and Muslim leaders were unable to resolve their differences despite mediation both inside and outside Bomas. Resentful that a leading official of the Ufungamano Initiative publicly criticised these provisions and the attitude of Muslim leaders, Muslims withdrew from the Ufungamano Initiative, greatly damaging its legitimacy and capacity to provide leadership.

Bomas' compromise was to replace the extended text of the CKRC with the more modest provisions of the current constitution on the application of Islamic personal law and the establishment of one level of Kadhi courts, but preserving the exemption from the equality provision and the Chief Kadhi's place in the Judicial Service Commission. Some Christian leaders were not satisfied.

The Referendum Draft replaced these provisions with a scheme like that urged by some Christian leaders. It establishes 'Christian courts, Kadhi's courts and Hindu courts', and envisages courts of other religions. Judges of these courts would have to be persons professing the religion of the court. The exact effect of this article is unclear. The jurisdiction of all these courts would be confined to matters of personal law, as prescribed

by an Act (thus effectively removing the constitutional guarantee of Islamic law, leaving the matter to Parliament). The Chief Kadhi would not be a member of the Judicial Service Commission. The exemption from the equality provision for Islamic personal law remains.

Conclusion

The scope of the Kadhi courts in the Bomas Draft was not extensive, nor would Muslims have been compelled to go to them. The innovations of the Referendum Draft are ill thought out, impractical in some respects, divisive and retrogressive. Now a sharp distinction is made between religious and secular laws and tribunals. The Kenya public will be fragmented according to their religions. Countries which have a system of religious courts, such as Israel, have found such courts to be deeply divisive, hindering social integration, leading to conservative and even fundamentalist policies, resistant to social reform, and producing incoherence in the legal system. The CKRC 2002 Draft was simpler and more tolerant in its tone. The tensions at Bomas were regrettable, and the role of some religious groups more so.

XIII

A democratic people: from subject to citizen

Most of my articles have focussed on the power vested in state institutions and how it is exercised. That has indeed been the traditional approach of constitutions. But with the lack of trust in politicians and the political process, people have sought to use constitutions to set out national goals for which state power must be used (as some previous articles have demonstrated). But even that is not sufficient to ensure that politicians and governments comply. This dilemma exercised the CKRC which was all too aware of the powerlessness, for the most part, of the people in the face of state oppression.

There is great truth in the statement that the price of liberty (and I may add, democracy) is eternal vigilance. That vigilance has to come from the people. Although constitutions today pay much lip service to the 'people's sovereignty', they seldom provide an active role for the people in affairs of state. Colonial rule broke the spirit of our people. An essential purpose of the CKRC draft was the transformation of Kenyans from subjects (forced to submit to the will of others, without rights of their own) into citizens (as source of authority and bearers of rights and responsibilities). To achieve this it was important to give them a sense of their own worth and dignity. They had to be given opportunities to initiate, and take part in, decision making or influencing those who make decisions. They had to be able to associate with others of like mind and aspirations, and to lobby for support for their views, and to protest against policies or acts of the government. They had also to exact accountability from the government and hold politicians and officials to their promises and mandates. Fortunately Kenyans who spoke to the CKRC were only too eager to take part in the work of the government, and to demand accountability from

ministers and officials. Most of the proposals of the CKRC that responded to this enthusiasm were adopted by Bomas, though not all, as we shall see.

Responsibilities of the people

The CKRC Draft places great responsibility on the people for their own welfare as well as the values, unity and progress of the country. It states that they must acquaint themselves with, and protect, the constitution. They must exercise their democratic rights by voting and being involved in other forms of political participation. They must contribute to the welfare and advancement of the community where they live. They must promote rights, democracy and the rule of law. They must desist from acts of corruption and protect public property from waste and misuse. They must protect the environment and conserve natural resources. The Draft would have established various mechanisms whereby people would be enabled to play an active and continuous role in public affairs and to discharge these responsibilities.

Electoral process and participation

As I explained in a previous article, the CKRC Draft placed great importance on equal and active citizenship, the bedrock of rights and participation. Citizens participate in state affairs through the electoral process, by voting or standing in elections. The electoral process would have been improved and made more transparent. A comprehensive and strong bill of rights protected the freedom of expression. The easing of regulations on licensing of broadcasting, and the restrictions on prior censorship would open up opportunities for expression of ideas and views. The state owned media was to be independent and impartial, and to 'afford fair opportunities and facilities for the presentation of divergent views and dissenting opinions'. Law was to require the reasonable allocation of air time by all broadcasting media to political parties, particularly for election campaigns. The state was to be obliged to publish and publicise important information 'affecting the life of the nation', while citizens would have the right of obtain information held by the state. Freedoms of association, assembly, demonstration and picketing would be guaranteed. The right to associate and the right to demonstrate are critical components of a democratic system, and Kenyans are learning how to use them.

Political parties

Two principal vehicles for participation are political parties and other civil society organisations. Unfortunately, as I have shown, political parties have not allowed public participation; few have membership lists or hold internal elections, being run by small elites who keep changing their political parties for reasons of expediency. People are solicited for their vote but not their ideas. The CKRC Draft aimed to vitalise political parties, make them truly representative of groups and interests in society, increase people's participation in them and through them in the political process, to democratise parties and hold them accountable to their members.

Civil society

For want of effective and participatory parties, so many people have turned to other civic organisations, such as women's or children's lobby groups, human rights organisations,

professional associations, and think tanks like those on land or electoral reform. The Draft sought to strengthen such organisations by requiring the state to promote and encourage direct civil society participation in decision-making and in the management of public affairs at all levels of society. For the most part it would not be necessary for them to have to register but if it was necessary to register them, the registration would be the responsibility of an independent body, and de-registration could only be done after fair hearing. Civil society organisations were to be represented in state bodies like the Human Rights Commission and the Judicial Service Commission. An important advisory role was given to the Economic and Social Council whose membership was to be non-political and non-partisan.

The CKRC also aimed to facilitate the participation of groups who have been fully or partially excluded: the disabled, women, marginalised communities (like the forest and pastoral communities), and the elderly (through electoral representation or affirmative action).

Forms of participation

Various specific forms of participation were also to be established. Citizens could petition parliament directly, and submit legislative bills to it. Parliament was to involve public participation in the legislative and other procedures, including providing sufficient time for debate; and the president had to ensure that this was done. Important constitutional amendments had to be submitted to a decision of the people in a referendum. Access to courts and the human rights commission, particularly for the protection of human rights, was to be made easier, so that a person or organisation not directly involved could start proceedings on behalf of others in the public interest. A novel method was the involvement of the people in the process whereby the government reports to international human rights committees on the protection and enforcement of human rights treaties. The government has to give them an opportunity to comment on drafts of reports, and to facilitate the presentation of alternative reports to these committees.

The CKRC draft also tried to broaden formal participation: the full range of society was to be represented in elected bodies and in government. The presence of members of an individual's community, sex or age group makes it easier for that person to feel connected to government.

The Draft did not seek to set up confrontation between the government and civil society. What it aimed was to empower the people and provide opportunities for discussion and debates, so that policy making would improve, and put under scrutiny, and the national interest would always be placed above sectarian interests.

The Bomas Draft removed civil society representation on the Judicial Service Commission, and there was no requirement that parliament have a committee on public participation. On the other hand, it increased people's role in constitutional amendments by giving them the right to initiate amendments. And it added youth as a group to be protected. The Referendum Draft is less explicit on the role of people in the legislative

process, although it retains the role in constitutional amendments. The specific provisions about marginalised groups have been diluted. It is clear that both these Drafts are less enthusiastic about people's participation than the CKRC Draft, as is particularly obvious from the deletion of two provisions which the CKRC considered fundamental to such participation—recall of MPs and village government.

Village government

The principal device for the participation of the people in the CKRC Draft, apart from voting or standing in elections, was devolution, particularly village government. Village government was not only meant to be symbolic of grass roots democracy, but a vehicle for a highly engaged democracy, a training ground for the people taking responsibility for their own welfare, decision making and accountability. Unfortunately village government was denigrated by many who had little confidence in the ability of ordinary Kenyans to manage their own affairs, and was deeply threatening to, and resented by, politicians of all hues. It was removed by Bomas, a decision which is now confirmed in the Referendum Draft. I have already discussed the fortunes of devolution through the three drafts, and tried to show how the Referendum Draft has effectively taken the guts out of devolution. District government will still provide people at the district level with some decision making powers but the principal function of districts is now administrative.

Recall of MPs and district government officers

The most important accountability function given to the people was the power to recall MPs and members of district council or government who ignored their responsibility or abused their office. One of the most common complaints that people made to the CKRC was about their dissatisfaction with their representatives. They seldom spoke up for the interests of their constituents, gave the constituents few opportunities to discuss their problems, and missed large number of parliamentary meetings, necessitating frequent adjournments. People asked to have the power to recall such representatives—a power which is provided in several countries. The CKRC was sympathetic and proposed this power, but was aware that it could be abused. Accordingly it proposed various safeguards to prevent abuse and gave important powers to the Electoral Commission to ensure fairness to the MPs. Politicians at Bomas were most resistant to it, and, in committees which were dominated by politicians, the provision was removed—and not reinstated in the Referendum Draft which was even more heavily influenced by sitting MPs.

Conclusion

The ambitious agenda established in the various Drafts will not be achieved unless people participate more extensively and more directly in the political process and the affairs of the state. Kenyans have lost confidence in politicians and are seeking ways to scrutinise their conduct, and to play a greater role themselves in public life. The constitution review process showed that people understand the dynamics of the state and have positive and constructive ideas on governance and social policies. Despite the diminution of the role of the people in the Referendum Draft, people must develop the capacity to use the mechanisms provided in the Draft to protect their interests and the national interest. People are the ultimate custodians of democracy and liberty.

XIV

Drafting problems in the Referendum Draft

Politicians worry about whether a constitution gives them enough power, people worry about whether a constitution is good for the country and addresses their concerns and lawyers should worry about whether the constitution is as clear as possible, and could be interpreted and applied, including by the courts. When the AG and his team retreated to their luxurious drafting quarters, they did improve some of the technical legal drafting of the Bomas Draft. But some they left, and as they did the bidding of the government and the MPs in changing the Draft to what we call the Referendum Draft they introduced some new errors! Some of these may not matter. Others may cause confusion. Some may need to be changed – a process that is very complex.

Mismatch between terms of parliament and president

Parliamentary and presidential terms end after 5 years. Both elections must be held on the same day. The result of a Presidential election must be declared within 7 days, and the new president takes office on a Tuesday following a further 3 weeks. But Parliament first sits within 7 days after the end of the life of the previous parliament, that is maybe as long as 5 weeks after the election. If this happened, five years later, an election would be held 4 weeks before the term of parliament ends: but this would be only 3 weeks before the term of the President expired. But the new President does not take office for over three weeks. It would have been much clearer if the Draft Constitution had provided that both the President and Parliament would be sworn in on the same day fixed by law (and leave office the same day).

Presidential elections when vacancy

If a president dies when there is no Deputy President to take her place, the Speaker takes over and there must be a presidential election (art. 156(4)). The article says that the presidential election to fill the gap must be held within 60 days of the vacancy in the *office of Deputy President*. This is nonsense: if the Deputy is alive when a President dies or resigns the Deputy immediately assumes office. But if for some reason there is no Deputy President when the President dies, elections must be held within 60 days of the *death of the President* (it is conceivable that the Deputy President may have died or resigned some weeks before the death of the President (art. 159)).

'Participate in all official state functions'

The Leader of the Opposition has the right to participate in all official state functions. What does this mean? Has she to be invited to all the dinners the president may offer visiting dignitaries? Or to all the ceremonies that the president performs?

Abortion

The Referendum Draft provides for the possibility that a law may permit abortion. In the Attorney General's enthusiasm to make this possible it seems the drafters have robbed the right to life of all content: it exists 'except as may be prescribed in an Act of

Parliament! The whole point of Bills of Rights is that they limit what even parliament may do!

'Charge upon the consolidated fund'

The Referendum Draft has a considerable number of expenses that are stated to be 'a charge upon the consolidated fund'. This means that this expenditure is not to be debated in Parliament. The device is intended to protect certain offices from being debated annually by Parliament, and means the payment is automatic. In the current constitution it is used only in connection with the salary and entitlements of the President and retired presidents, of the judges and other important officers like members of the public service commission and the auditor general. But in the Referendum Draft such 'protected funds' include all the expenses of commissions, including all the benefits of members, even all the expenses of the parliamentary service commission which provides staff and facilities to MPs! This trivializes an important constitutional device, and makes problematic the task of the finance ministry.

Conversion of freehold

On the day when the Constitution would come into effect, any right that a foreigner now has in land which is greater than a 99 year lease would be taken away and returned to the government, who must then give that person a 99 year lease. There are some 999 year leases, and some land that is owned outright. At a late stage at Bomas the draft said that the 99 year lease for non-citizens would be in return for a nominal rent. But this, very fair, statement disappeared in the final stages of Bomas itself. And it might have been better for the change to a 99 year lease from a greater interest to be automatic – rather than saying the state must give a 99 year lease.

Furthermore, the Referendum Draft gives no transition time! This means that there is no time to sort out the implications of this change: would companies, for example be affected? What about Kenyan/non-Kenyan married couples where the family home is in the name of the non-Kenyan spouse, or in both names. It is not at all clear why the Attorney-General thought fit to remove the transition provision in the Bomas Draft – rather than improve it. This is one area where the Attorney-General's office ought to have had a good understanding of the law.

Land

There are other problems with the provisions on land (though they have been improved since Bomas). Under article 81 community land includes 'ancestral lands traditionally occupied by hunter-gatherer communities' - except 'public land as defined by article 80'. Article 80 defines public land as including government forests – but not including government forests that are ancestral lands under article 81! A bit circular.

Community land is to be vested in communities. Unregistered community land is to be held in trust by district governments on behalf of communities. So is it vested in the community or the district? But the article also says that it must only be disposed of or even used in accordance with an act of parliament. It is really not easy to see what

precisely will happen with this land! Parliament must pass law within 2 years. Maybe Parliament will be able to make sense of it all! 'Community' is also extremely unclear.

Parliament is required to provide 'unfettered access' to public land. But such land includes game parks. Access cannot be unfettered – or the parks would cease to be viable propositions. It really is unclear what 'unfettered access' means.

Devolution

Changes to devolution provisions has produced several examples of bad drafting. The provision that says legislation can take away any powers of the District may be the result of merging together unthinkingly the provisions about the regions (that would not now exist) and the Districts. Its effects on the position of districts is potentially disastrous (and means that districts have no constitutionally guaranteed powers), as I argued in the article on devolution.

There is some complete rubbish (probably bad copying) in the list of District powers (para. 8):

- (c) fair survey and mapping;
- (e) housing trading practices.

There is still a duty on Districts to 'devolve' services etc of government as much as possible – even though, since there is now no mention of Locations and Villages, there is no lower level of government to devolve them to. Similarly District Councils are to coordinate the functions 'of units' in the District. This makes less sense now that there are no constitutionally specified units within the District. And the transitional provisions still mention locations though they are no longer provided for.

A District Council (excluding the chair and deputy) must not have more than one third of the members of the District Assembly OR more than 10; but it does not say whether one should take the larger or higher of these figures if they are not the same. This defect was in the Bomas Draft as well.

Other problems

There are various other loose ends, inconsistencies or illogical provisions. One example is the article that defines terms (286) and refers to political parties as associations formed for the purposes contemplated by article 112 – but this article does not contemplate any purposes! Article 147 says that presidential elections must be held at the same time as parliamentary, or if a person elected dies before assuming office, but fails to mention the possibility that there may be need for an election if the president dies when there is no Deputy President.

The beginning of the president's term is stated (art. 152) in two different ways – either 21 days after the result is declared (as mentioned earlier) or when the previous president's term ends. Which is to be taken if the result is different?

It is not entirely clear when a referendum would be necessary to amend the constitution: what, for example, would be a provision that affects 'the sovereignty of the people'?

There are examples of ‘overkill’ – going too far. The culture chapter does this; the drafters tried to produce a neater version that captured the substance but more concisely but the CKRC ‘verified draft’ insisted on bringing back all the lengthy provisions. Requiring ‘all official documents’ to be in both English and Kiswahili may cover all sorts of situations in which it makes no sense to require both languages (even letters from a ministry or a district council?). Requiring all legislation to be in Braille may also be going too far – this may not be the best technology for the visually impaired.

And there are examples of inelegance, that may make no difference to the sense. For example, “the Tuesday immediately preceding the twenty-eight days...”. Talking about the presidential election the Referendum Draft says: “If a candidate is not elected a fresh election shall be held...”. Of course at least one candidate is not elected – that is the one who loses! It should simply read ‘If no candidate is elected’.

Conclusion

One can sympathise with the Attorney-General who may have considered that minimum redrafting was called for. But when the task of drafting is given to his office, one would have expected improvements in the style of the text, the removal of ambiguities, and anticipation of problems from the formulation of certain provisions. Neither in the CKRC or Bomas were professional drafters given the opportunity to produce a technically acceptable document. It is a pity that the team of drafters that the Attorney-General assembled and who had ample time to review, from a technical perspective, various drafts, did not take the opportunity to do a better job of drafting.

XIV

What happens if Kenyans vote ‘Yes’?

If the ‘No’ vote wins, the current constitution will continue in force. It will then be for the government and parliament (and ultimately for all Kenyans) to decide if and how to resume the reform process (I will discuss options in my final article). If the ‘Yes’ vote wins, the President would sign the new constitution and it will replace the current constitution immediately (although some transitional matters will be governed by the old constitution). Transitional matters are set out in the Sixth Schedule of the Draft. This article discusses some aspects of the transition from the current to the new constitution, (however, it does not deal with the most complex aspect – the introduction of district government, which I discussed briefly in a previous article).

Parliament and the next elections

Under paragraph 3 of the Sixth Schedule, the National Assembly existing immediately before the new constitution come into effect shall continue as Parliament for its unexpired term (presumably even if not all members satisfy the qualifications under the new constitution). The unexpired term ends on 9 January 2008; this is the 5th anniversary of the day this parliament first sat, to swear in members and elect a Speaker.

The election for the next Parliament will be under the new Constitution. This would be on a Tuesday immediately 'preceding the twenty-eight days' before the expiration of the term of Parliament. 9 January 2008 is Wednesday. So the elections would be on December 11th. And the new Parliament will have to meet no more than 7 days after January 9. This should work reasonably smoothly.

Some people have argued that even if Kenyans vote 'Yes' on November 21st there should be a general election. But, parliament 'shall continue' (this means it must continue) for its unexpired term; and under the new Constitution the President would no longer have the power to dissolve Parliament. In theory, the President could dissolve the National Assembly shortly before he signed the new Constitution, so that there would be an election soon. But this would be impossible in practical terms, as new laws would be necessary to bring in the electoral system and once dissolved the National Assembly could no longer pass those laws. On the other hand, if the vote is 'No', it would be possible for the President to dissolve the National Assembly, but there is no legal obligation for him to do so and he may stay in office until his current term would naturally end.

Under the 'Yes' vote, the National Assembly would immediately assume the powers, responsibilities and procedures as under the new constitution.

Political parties

New laws on registration of political parties would have to be passed within one year, and parties would then have one further year to comply with the requirements for registration for the purposes of the new constitution. If a party with members in Parliament failed to meet these requirements, its parliamentary members would be treated as independent members.

The Government

The President and Vice-President would continue in office, as President and Deputy President, in accordance with the new Constitution until the first elections under that Constitution (Sixth Schedule, para. 6(1)). So they would have their new names and powers under the Constitution. But they would also continue to be members of Parliament (which would not otherwise be the case under the new Constitution). This provision also means that it is the President who would decide on who would be the Deputy President, as under the current constitution he appoints the Vice-President. Other ministers in the cabinet before the introduction of the new constitution would also continue in office.

Some people have suggested that President Kibaki could serve two additional terms under the Referendum Draft, over and above his current term. Such fears are understandable when we recall the decision of the constitutional court that gave President Moi two new terms after the constitution was amended, and in view of the record of our courts in complying with government wishes. It is certainly most regrettable that the

Referendum Draft, like earlier drafts, does not say in crystal clear language that previous terms are to be taken into account, as for example the US and Zambia constitutions have done.

Careful reading of the draft does suggest that no honest court could give President Kibaki more than a total of two terms. The Draft says the President would *continue* to serve. But it is also clear that he would serve under the new Constitution. Whether the President's existing term is to be viewed as changed into a corresponding term under the new Constitution, or is a totally new term under the new Constitution, he could serve only one more, making a total maximum of 10 years.

An election of the President is to be held at the same time as an election for members of Parliament' according to article 147(2). Therefore President Kibaki's term would end when the winner of the election held in December 2007 was sworn in.

Some people have hinted that, if it would be a new term, it would not count as a 'term' because he would serve only just over 2 years before the next election. This argument refers to article 152: 'A person who becomes President by the operation of Article 156 and continuously serves as President for at least two and a half years shall be deemed to have served for a full term'. This would not apply: 'operation of Article 156' refers only to a president who takes over because there is a vacancy on the death, resignation or removal of a President. President Kibaki would continue in office, as we have seen; he would not be removed!

Until the first elections, the new system of government (discussed in a previous article) would not come fully into force. The office of the Prime Minister will not be established until after the elections; and some other rules about the composition and procedure of the cabinet will also not apply until then.

Existing office holders would also retain their offices under the new constitution, provided they hold an office created by the current constitution. This is unfortunate as many office holders (including even judges) have been appointed under procedures which are different from those which are prescribed in the new constitution, and some at least do not meet the high standards of competence or integrity stipulated in the new constitution.

New laws and institutions

The Draft Constitution requires the enactment by Parliament of many laws to give effect to its general principles (such as on culture, citizenship, freedom of information, environment, land, public defender, integrity of state official holders, elections and parties, and devolution). Several new institutions (such as commissions) have also to be established. Schedule 5 establishes a timetable for the enactment of these laws. The Commission on the Implementation of the Constitution is created to watch over the development of laws and procedures, and report twice a year to the President and Parliament on how implementation is going.

As some people have pointed out, the Kenyan parliament's record in passing in new laws is very poor. Bomas Draft had a procedure under which a person could go to court for an order requiring the Attorney General and the Speaker "to take steps to ensure that the legislation required ...is enacted". The CKRC 'verified version' reinforced this: if the

Attorney-General and Speaker failed to get the laws passed the Chief Justice had to advise the President to call a general election, and the President had to comply!

The 2005 Draft however, has a novel solution: the Attorney-General, consulting the Commission on the Implementation of the Constitution, must draft the necessary laws and place them before Parliament 'as soon as reasonably practicable' (Article 287(4)). If Parliament failed to pass the laws by the deadline, on the last day the law 'shall be deemed' to have been passed. In other words, the Attorney-General, in consultation with the Commission (but not necessarily agreeing with the Commission) can take over the role of Parliament!

This is softened by another new rule: that the deadline for any particular thing to be done can be extended for at the most one year. (But, as a practical matter, some legislation must not be delayed – for example that on the new election system, or registration of parties.) An extension would require a two-thirds vote of all the members of Parliament. It is assumed that even if the MPs could not manage to attend with sufficient regularity to get the laws passed, they would attend in sufficient numbers to extend the deadline once.

There is no doubt that the problem is very real (and although some legislation has already been passed, such as procedures for tenders, and declaration of assets, this will need to be reviewed for compliance with the constitution). But the Referendum Draft gives enormous power to the Attorney-General. And it is totally contrary to the spirit of the Draft – and its provisions on public participation and consultation on new laws. It would have been an improvement if the Implementation Commission, or the Supreme Court, had been required to certify that such laws met the constitutional requirements, but even that would not deal with the fundamental issue of democratic law making.

Dealing with the past

People were very concerned that past injustices should be dealt with. Some suggestions related to land and are in the chapter on land (article 86(1)(g)). This is not so much about punishment as about righting wrongs – specifically reclaiming public land that has been 'grabbed'. Relevant law must be passed within 2 years (though the Ndungu Report has already done a lot of this work).

There is a provision not restricted to land: the Commission on Human Rights and Administrative Justice must be given power to investigate past human rights abuses, and make recommendations about prosecution, compensation and reconciliation (Schedule 6 para. 16). Necessary law must be passed within 6 months.

President Kibaki is reported as having said recently "It is not the wish of the Government to compel those accused of committing past human rights abuses to account for their deeds". The Draft does not say that the government must prosecute every case – but it clearly is intended that prosecution should be used when appropriate. It would be a complete negation of the Constitution if the government took the approach the President indicated.

Overall, fears of a long gap before elections are unjustified. But there are some other problems, including especially about bringing in the District Government system (discussed in a separate article) and about making new laws.

Amendment

In these articles I believe I have shown that there are some serious problems with the Referendum Draft. How easy would it be to ‘fix it up’ after it becomes law? Any change in the Constitution would require two-thirds of the MPs to approve it. It could not be passed in a hurry – at least 90 days must pass between the formal introduction of the Bill for amendment into Parliament, and the first major debate on the bill. Some changes require a referendum also – and Kenyans know how expensive and troublesome that can be! This would apply to any change affecting, for example, the powers of Parliament or devolution. Once Parliament (and if necessary the people) have approved the President must sign it. The language used about when a referendum would be necessary is also very unclear.

It is clear that the constitution will not be fully implemented unless the government has a firm commitment to all its values and principles. Unfortunately the referendum campaigns by political parties provide little evidence of their commitment to these values and principles.

XV

To vote or not to vote, and if yes, how?

After over 10 years’ struggle for constitutional reform, Kenyans will have an opportunity to vote on the draft of a new constitution. What is on offer? Is it what people struggled for? Will it produce a more accountable system of government? Will it stop corruption? Will our legal officers and judges change their old tack and commit themselves to the safeguarding of the values, institutions and procedures of the constitution, refusing to pander to the whims and injustices of those in power?

Will it give more opportunities for ordinary Kenyans to take part in the policies and affairs of the state? Will it reduce their poverty and give them a chance to live with dignity? In particular what will it do for groups and communities who have suffered extreme discrimination or neglect—the disabled, pastoralists, forest people, Nubians and Somalis—and the poor? Will it protect our environment from the depredations of greedy companies and greedy politicians? What will it do for our national unity, and the sense of belonging to a common political community, which respects all its people and seeks justice for all? Will it put a stop to divisive and depraved politics, totally unmindful of social justice or fairness, which have marked our society ever since independence?

To put the issue in this way may betray an unjustified faith in the ability of a constitution to change the fundamentals of a society or determine the fortunes of a nation. A constitution by itself can do very little for a people. It may open up possibilities and opportunities, show the way towards peaceful and prosperous future, and try to put constraints on oppressive and corrupt conduct of the state. Indeed this is what the CKRC tried to do, and many of its proposals have survived the Bomas and the Referendum Drafts. Its draft states the purposes for which public power must be exercised (such as democracy, human rights and social justice) and the institutions and procedures for the exercise of power, including the responsibility for checking the conduct of governments and officials.

But ultimately the people must take responsibility for their own welfare, for a democratic and just political and social order, by making use of the opportunities opened up by the constitution, by participating in the political process, and by caring for their neighbours (and thus breathing life into the constitution), instead of leaving the exercise of state power to governments and politicians alone. This is the point I made in my article on a democratic people and an active and engaged citizenry. Unfortunately the Referendum Draft has seriously reduced possibilities and opportunities for Kenyans to participate in public affairs in comparison with the Bomas Draft. By vesting enormous powers in an unaccountable presidency and deleting most of the critical provisions for the devolution of powers to provinces, districts and villages, it seeks to ensure that the style and purpose of politics will not change, that the government will not effectively come under any greater controls than before, that many groups and communities will remain excluded from power and influence, and that public power will continue to be used for private and narrow ends, and not the general welfare. Most of the goals and protective provisions of the constitution will come to naught; the culture of authoritarianism will go unchecked. This is such a fundamental flaw in the Referendum Draft that many Kenyans will, and should, hesitate to vote for it—for to take up this spurious offer of President Kibaki and his political faction is to betray the long and painful struggle for democracy, rights and social justice.

II

Let us be clear. What is on offer is the handiwork of a few politicians. It represents the repudiation of the fundamental principles of the review process, including the sovereignty of the people. People were to be consulted and their views were to be taken seriously, indeed they were to be decisive. This principle was reflected in the Review Act which had the support of all political, social and religious groups (including prominently of President Kibaki and Kiraitu Murungi). People engaged massively in the process, overcoming their distrust of political and state processes. I do not wish to make exaggerated claims, but the general assessment of the review process was that it rehabilitated politics, restoring people's confidence in the possibilities of change. The CKRC Draft was a faithful reflection of the aspirations of Kenyans. They felt empowered by a process in which they were respected and listened to.

The test of this empowerment came rather more quickly than anticipated—when President Moi dissolved Parliament in October 2002 (aborting the first attempt to convene the National Constitutional Conference). It seemed at that time that the CKRC Draft would be endorsed by a large majority. Instead it became a major issue in the general elections; Kenyans were familiar with its contents which they had been debating for several weeks. The Democratic Party and then NARC fully endorsed the Draft. Mr. Kibaki said publicly that if elected, he would bring it into effect within 100 days. The victory of NARC was widely interpreted as support for the CKRC Draft. But President Kibaki and his close associates, once ensconced in power, did a 180 degree turn about. They showed little enthusiasm for a new constitution, tried to delay, and later to sabotage, the Constitutional Conference. Few of this group participated in the work of the Conference and they refused to accept the decisions of the people represented at Bomas,

which for all the attacks on it, was a perfectly proper, lawful constitutional forum for adopting the constitution.

We all know how this group hijacked the Bomas Draft, using judges and politicians (who were fearful of truly participatory politics). Showing no respect for the people and the democratic process, it went about mutilating the Bomas Draft. In the end it could not even secure a convincing majority in the National Assembly (more, it must be said, because of disagreement between them on the spoils of power than on differences of principles). Proposed amendments to the Bomas Draft were then turned over to the Attorney General to produce a new draft for submission to a referendum, without any public scrutiny of his text. I have already indicated in my previous articles that some at least of the changes were not in any of the proposals that were submitted to the Attorney General (including those which seek to place the Attorney General, totally unjustifiably, on a high pedestal, in contravention of the deliberate decisions of the CKRC and Bomas). In earlier articles I have analysed various aspects of the Referendum Draft and tried, as objectively as I could, to analyse its strengths and weaknesses. My conclusion is while there are considerable merits in that Draft, all the positive features are drawn from the CKRC and Bomas Drafts, and most changes made by the Referendum Draft are retrogressive.

But it is the process that concerns me now. Having shown cynical disregard of people's choice, the Kibaki faction is now offering the Referendum Draft to the people, extolling its virtues largely through misrepresentations (e.g., one minister said that with the defeat of the Draft, free primary education would become to an end). Yet it is the very virtues of the Draft which this faction violates every day in its campaigns. It is funding its campaigns by resources which are being illegally used or obtained. It has refused to come clean on allegations of corruption against its most senior members. It is subverting the neutrality of the civil service by conscripting it to support the 'Yes' campaign. The Chief Kadhi has been threatened with dismissal for opposing the Draft (although he was merely exercising his constitutional freedom of expression). It has shown scant regard for court orders (although it has not hesitated to use courts for its own partisan purposes) or the lawful instructions of the Electoral Commission. It is using bribery on a massive scale: offering to increase number of districts, increasing salaries of councillors and chiefs, and distorting sound principles of land and environment policies. It has done little to stop the violence that has marred the campaigns.

It is thus clear that President Kibaki and his associates have no real commitment to the values and principles of the Draft Constitution that they are asking Kenyans to support. If they are so careless of them now (when they want the support of the people), can there be any reason to expect that they would respect them once the Draft is adopted? It is abundantly evident that they are pushing the Draft because in a naïve and short-sighted manner, they think that the new constitution would enable them to stay in power and to exercise power in the unaccountable way that they have used it so far. The conception of the public good, that motivates the CKRC and Bomas Drafts, has been replaced by personalisation, and the selfishness of a few politicians.

This much is clear even in the way that the referendum campaigns have been conducted. The referendum might be seen as the expression of the sovereign will of the people. But this will be so only if people are given adequate opportunities to understand and debate the Draft. History shows that referendums can all too easily become instruments of plebiscitary politics, that is to say, by-passing established channels of public discussion, and manipulation of the people, by exciting fear, or telling untruths, or by promises that cannot be delivered. Through such a cynical exercise, politics are gravely debased, and the referendum can become the opposite of the purpose by which it is justified, the free expression of the sovereign will.

So as Kenyans vote on 21 November, they must reflect on what they are being offered. The campaigns on both sides have avoided the critical issues of the various drafts. Many key members of the 'No' campaign have as disreputable a record of the use of state power as the proponents of the 'Yes' vote (and were at one stage perfectly willing to make a deal on the constitution with President Kibaki's faction, but now find themselves out of the inner sanctum of power). So should Kenyans see the choice as between different constitutional drafts or as between different political factions (whom more unites than divides)?

III

The choice has to be between different drafts (if only because there is no real choice between different factions as their approach to politics is the same). The government is offering us the choice between the current constitution and the Referendum Draft. But these need not be the only choices. So what are the consequences of voting 'Yes' or 'No' on 21 November? Will a 'Yes' vote relieve us of the consequences of our present wretched constitution? Will a 'No' vote kill off attempts at reform for the time being? Should we settle for some improvement now or wait for a document that would serve us better?

There is considerable danger that a 'Yes' vote would endorse the cynical and manipulative approach of the government and devalue the concept of people's participation. And it will leave us with a government that has already shown that it would not honour the new constitution.

A 'No' vote will be an expression of people's strength and determination to get a better constitution; and reinforce the principle of people's sovereignty. A 'No' vote need not spell the end of the process. Instead it more likely to keep up the momentum for political and constitutional change and open up possibilities of a better draft. may open up possibilities of a better draft. But if the people reject the Referendum Draft, they would have to continue the struggle for a better constitution, by expressing, and lobbying for, their views.

Ultimately, a constitution which gives people opportunities to participate in state affairs and influence the policies and conduct of the government, allows different communities to co-operate in the management of the state, provides effective mechanisms to prevent corruption and ensures a fair distribution of resources holds out greater prospects of

democracy, human security and social justice—and with these, national unity, than what is on offer now.