



FACT SHEET ON THE PROPOSED CONSTITUTIONAL AMENDMENTS

FROM THE BUILDING BRIDGES INITIATIVE (BBI) REPORT (OCTOBER 2020)

CHAPTER TWO OF THE CONSTITUTION OF KENYA – THE REPUBLIC

OVERVIEW AND CONTEXT:

Chapter two of the Constitution of Kenya covers the Republic of Kenya. It declares Kenya as a sovereign Republic that is multi-party democracy founded on the national values and principles of governance which include patriotism, national unity etc. It also recognises culture as foundation of the nation. The BBI Report notes the need to address regional integration, cohesion, shared prosperity and the centrality of economy and therefore proposes changes to enhance the harnessing of regional trade and investment, and improve people to people links to increase prosperity, opportunities for investment and enhance security.

PROPOSED CONSTITUTIONAL REFORM:

- **The amendment proposed to article 10 includes adding an article 10A on Regional integration and cohesion** which states that the Constitution embraces the goals of African Unity and political confederation of the Eastern Africa region as integral towards attainment of sustainable development, prosperity for all and stability.
- **The amendment proposed to article 11 includes adding article 11A. Economy and shared prosperity** which recognizes the need for an economic system that provides equitable opportunities for all the people of Kenya to benefit from economic growth in a comprehensive, fair and sustainable manner. It states that the State shall promote productivity through protection of intellectual property rights; investment, enterprise and industrialization for sustainable economic development; sustainable agriculture; support small and micro enterprises; support the digital economy; and application of science and technology in the production system.

CHAPTER THREE OF THE CONSTITUTION OF KENYA – CITIZENSHIP

OVERVIEW AND CONTEXT:

Chapter Three of the Constitution of Kenya focuses on the entitlements of citizens, retention, acquisition revocation of citizenship and legislation on citizenship. The BBI report identifies the need to strengthen the national ethos by outlining the responsibilities of citizens.

PROPOSED CONSTITUTIONAL REFORM:

- **The proposed amendment is the adding of 18A. Responsibilities of a citizen.** Citizen responsibilities, will also apply to non-citizens were possible, will include cultivating national; promoting and protecting the well-being of the family including respect for their parents and elders; combating corruption; fulfilling parental responsibilities;



developing one's abilities and skills; honestly declaring and paying taxes; respecting private property and protecting public property from waste and misuse; serving in defence of the country; and promoting the unity and dignity of Africa and her people.

CHAPTER FOUR OF THE CONSTITUTION OF KENYA – BILL OF RIGHTS

OVERVIEW AND CONTEXT:

Chapter Four of the Constitution of Kenya focuses on the Bill of Rights, their application, implementation, enforcement and their limitations. The BBI report acknowledges the advancements in technology and seeks to provide constitutional protection of the privacy of citizen's private data.

PROPOSED CONSTITUTIONAL REFORM:

- **The proposed amendment is the adding of clause (e) to Article 31** to include the right not to have personal data infringed.

CHAPTER SIX OF THE CONSTITUTION OF KENYA – LEADERSHIP AND INTEGRITY

OVERVIEW AND CONTEXT:

Chapter Six of the Constitution of Kenya focuses on leadership and integrity, responsibilities of leadership, oath of office, conduct, financial probity, and restrictions on activities of State officers and legislation on leadership. The BBI report recognises the need to intensify the fight against corruption by strengthening the relevant institutions and providing a mechanism for more expeditious conduct of investigations, prosecution, and trial of corruption-related matters.

PROPOSED CONSTITUTIONAL REFORM:

- **The proposed amendment is the adding of Article 80(aa)** which provides for Parliament to pass laws for the quick investigation, prosecution and trial of cases on leadership and integrity.

CHAPTER SEVEN OF THE CONSTITUTION OF KENYA – REPRESENTATION OF THE PEOPLE

OVERVIEW AND CONTEXT:

Chapter Seven of the Constitution of Kenya focuses on the electoral system and processes, legislation on elections, registration as a voter and voting, electoral disputes, candidates, the IEBC, delimitation of boundaries, allocation of party seats and political parties. The BBI report notes the need to resolve issues of divisive elections arising from electoral processes and proposes reforms to the IEBC, electoral disputes, allocation of party list seats and political parties.



PROPOSED CONSTITUTIONAL REFORM:

- **The proposed amendment to Article 87(1)** to provide for Parliament to pass laws to set up ways to resolve disputes on political party nominations.
- **The proposed amendment to Article 87(3)** to provide for the service of a petition through electronic means.
- **Amending those eligible to be appointed to the Independent Electoral and Boundaries Commission -Article 88(2)(a)** to exclude those who have in the past stood as a President, Deputy President, a county governor, a deputy county governor, a member of Parliament or a member of county assembly.
- **Amending Article 88 by adding clause (3A) and (3B)** to state that the Commission shall have seven members, four of whom shall be representatives of political parties within parliament and that they shall have a single four-year term.
- **Amending Article 88(4)** to remove the role of resolving nomination disputes from the IEBC and adding that the IEBC is responsible for regulating political party nominations in a way that ensures the not more than two thirds gender principle and progressive inclusion of PWDs is complied with.
- **Amending article 90(1) by** removing the nominated members of the National Assembly and Senate and providing for party lists of men and women in alternating order and that would include women, youth, persons with disabilities, ethnic and other minorities and marginalised communities as per the votes won by a political party and not the seats won.
- **Amending article 91(1)** so that each political party complies with the not more than two thirds gender principle and progressive inclusion of PWDs.

CHAPTER EIGHT OF THE CONSTITUTION OF KENYA – THE LEGISLATURE

OVERVIEW AND CONTEXT:

Chapter Eight of the Constitution of Kenya covers the establishment and role of Parliament. The BBI report notes the need to have clarity on the roles of the two houses of Parliament with regards to bills and resource allocation and to bring back Government into the National Assembly.

PROPOSED CONSTITUTIONAL REFORM:

- **Amend article 97(1) to change the composition of the National Assembly** from two hundred and ninety (290) elected members to three hundred and sixty members (360) elected from 290 single and multiple constituencies. Removing the 47-woman representatives and nominated Members of the National Assembly. Bringing into the National Assembly the Prime Minister, Deputy Prime Ministers, Cabinet Minister, the Attorney General and leader of Official Opposition.
- **Amend article 98 to change the composition of the Senate** from 47 elected senators and nominated Senators to 94 elected Senators one being male and the other female from each county. With no nominated Senators.
- **Amend article 99(2)** to remove the disqualification of an MCA being able to be elected an MP.



- **Introduction of a Leader of Opposition** who shall be the person with the second greatest votes in a presidential election and whose political party or coalition has at least 25% of all the members of the National Assembly.
- **Amend article 108 on the order of precedence in the National Assembly** to remove party leaders and replace with the order of precedence with the Speaker of the National Assembly, the Prime Minister and the Leader of Opposition.
- **Amending article 113 on Mediation Committees** to state that instead of the National Assembly referring the Bill to the President within 7 days it will be done by the House which originated the Bill within 14 days.
- **Repealing article 123 on decisions of the Senate.**

CHAPTER NINE OF THE CONSTITUTION OF KENYA – THE EXECUTIVE

OVERVIEW AND CONTEXT:

Chapter Nine of the Constitution of Kenya focuses on the principles and structures of the National Executive which includes the President, Deputy President, Cabinet, the Attorney General, and the Director of Public Prosecutions. The BBI report notes the need to expand the Executive to promote greater inclusivity.

PROPOSED CONSTITUTIONAL REFORM:

- **Amend article 130(1) on the composition of the National Executive** to include a Prime Minister and 2 Deputy Prime Ministers.
- **Amend article 131(1)(b)** to include the Prime Minister and Deputy Prime Minister as those assisting the President to exercise executive authority and replacing Cabinet Secretariat with Cabinet Ministers.
- **Amending article 132(1)** on the Presidential address to include a status report on economic and social rights.
- **Amending article 138(8) on procedure at presidential election** to remove the cancelling of a presidential election if a Deputy President dies.
- **Amending article 140(2)** to increase the time for hearing a presidential election petition to thirty days from 14.
- **Adding article 151A, B, C on the Office of the Prime Minister** who is appointed by the President and shall be the leader of government business in the National Assembly. One must be a member of the National Assembly and leader of the majority party or coalition of parties in the National Assembly to be eligible to be nominated as the Prime Minister. One may cease being a Prime Minister if they are dismissed by the President, cease to be a member of the National Assembly, resign or is impeached by half of the National Assembly members.
- **Adding article 151(D) The Deputy Prime Ministers** to be appointed by the President from among the Cabinet Ministers and shall deputise the Prime Minister. One ceases being a Deputy Prime Minister if they are dismissed by the President, cease to be a member of Parliament, resign or cease being a Cabinet Minister.
- **Amending article 152 on the Cabinet** by stating that the President may appoint Cabinet Ministers from the National Assembly who do not have to be approved by the National Assembly.



- **Amending article 154 on the Secretary to the Cabinet** by stating that the President shall appoint the Secretary to the Cabinet without the approval of the National Assembly.
- **Amending article 155(3) on Principal Secretaries** to state that the President shall appoint Principal Secretaries from among persons recommended by the Public Service Commission but who do not have to be approved by the National Assembly.
- **Amending article 156(4)(c) on the Attorney General** to give the Attorney General functions of a Cabinet Minister.
- **Amending article 157(3) Director of Public Prosecutions** by increasing the qualifications from those of a High Court judge to a County of Appeal judge.
- **Amending article 158 to remove the article on the removal and resignation of Director of Public Prosecutions.**

CHAPTER TEN OF THE CONSTITUTION OF KENYA – THE JUDICIARY

OVERVIEW AND CONTEXT:

Chapter Ten of the Constitution of Kenya covers the Judiciary and the Judicial Service Commission. The BBI report notes the need to ensure that the Judiciary is accountable in a clear manner to Kenyans.

PROPOSED CONSTITUTIONAL REFORM:

- **Amending article 164(1) on the President of the Court of Appeal** to limit their term to a single term of five years.
- **Amending article 164 on the jurisdiction of the Court of Appeal** to state that a decision of the court of appeal on election petitions apart from the presidential will be final.
- **Amending article 165(2) on the Principal Judge of the High Court** to limit their term to a single term of five years.
- **Amending article 166(3) on the Appointment of the Chief Justice, Deputy Chief Justice and other judges** to increase the years of experience from fifteen to twenty for the Chief Justice and Supreme Court judges and **article 166(4)** to increase the years of experience for a Court of Appeal judge from ten to fifteen years.
- **Amending article 167(1) on the tenure of the office of the Chief Justice and other judges** to include that they shall also apply to the Deputy Chief Justice.
- **Amending article 171(1) on the establishment of the Judicial Service Commission** to include the Judiciary Ombudsman to the Judicial Service Commission and limiting the term of the Members of the Commission apart from the Chief Justice and Attorney General to one five-year term. The advocates elected to serve on the judicial Service Commission shall not be eligible to practice law before courts as long as they are in the Commission.
- **Amending article 172 on the Functions of the Judicial Service Commission** to include receiving complaints against judges, investigating and disciplining judges.
- **Inserting article 172A on the Office of the Judiciary Ombudsman** who shall be appointed by the President with approval of the National Assembly and have the same qualifications as a Supreme Court judge. Duties include looking into complaints against judges, magistrates and judicial staff; improving transparency and



accountability of the Judiciary; promoting public engagement with the Judiciary. The Ombudsman shall hold office for a single five-year term and submit an annual report to the President.

CHAPTER ELEVEN OF THE CONSTITUTION OF KENYA – THE DEVOLVED GOVERNMENT

OVERVIEW AND CONTEXT:

Chapter Eleven of the Constitution of Kenya covers the objects and principles of devolution, the County Assembly and County Executive committees, election and removal of the county governor, urban areas and cities, functions and powers of national and county governments and the transfer of the same, boundaries of counties, relationships between governments and suspension of a county government. The BBI report notes that there are various obstacles that hinder devolution including wastage of resources and theft, divergent views on the revenue allocation formula, spending that has failed to reach the grassroots, poor planning, misdirected priorities, inadequate capacity to implement budgets and ineffective oversight mechanisms.

PROPOSED CONSTITUTIONAL REFORM:

- **Amending article 177(2) on the membership of the county assembly** with regards to the not more than two thirds gender principle, marginalised groups including persons with disabilities and youth to provide for their elections through party lists by political parties in proportion to the votes received.
- **Deleting article 177(3) on the filling of special seats with regards to the two thirds gender principle** with a clause putting a sunset clause on how long the elections through party lists of members to achieve the not more than two thirds gender principle to after the next two general elections from the start date of the Act.
- **Deleting article 177(4) on the five-year term of the county assembly** and stating that the term of the county assembly shall expire on the date of the next general election.
- **Adding a clause to article 177 on the recall of members of county assembly.**
- **Deleting article 179(7) on ceasing of holding office by members of the county executive committees** due to a vacancy in the office of the governor and replacing it with an article that states that the county governor may re-assign or dismiss a member of the county executive committee.
- **Amending article 180(5) on the election of county governor and deputy governor** by adding a clause that the governor shall consider a person of opposite gender for the position of deputy governor.
- **Amending article 200 on legislation on the chapter** by inserting a new clause that Parliament shall pass laws on the functions relating to Nairobi City County assigned to the national government under the Fourth Schedule.



CHAPTER TWELVE OF THE CONSTITUTION OF KENYA – PUBLIC FINANCE

OVERVIEW AND CONTEXT:

Chapter Twelve of the Constitution of Kenya focuses on the principles and framework of public finance, equitable sharing of national revenue, the equalization fund, public funds, revenue-raising powers and the public debt, revenue allocation, budgets and spending, control of public money and financial officers and institutions. The BBI report notes the need to increase the allocation of funds to the county governments and periodic costing of national and county functions, by the Commission on Revenue Allocation, National Treasury and Controller of Budget. The BBI report seeks to streamline public finance principles and processes to promote efficiency and ensure expenditures are directed to maximise utility.

PROPOSED CONSTITUTIONAL REFORM:

- **Amending article 202 on equitable sharing of national revenue** to include a clause to provide for the revenue sharing to be based on the most recent audited accounts.
- **Amending article 203 on equitable share and other financial laws** to add that in determining the equitable shares and in all legislation concerning county government the need to eradicate corruption and wastage, the need to ensure attainment of the economic and social rights in article 43 and that the average amount of money allocated per person to a county with the highest allocation does not exceed three times the average amount per person allocated to a county with the lowest allocation.
- **Amending article 203 on the equitable share of the revenue raised nationally that is allocated to county governments** from fifteen to thirty five percent of all revenue collected by the national government.
- **Amending article 207 on revenue funds for county governments** to include a Ward Development Fund for each county which shall have at least 5% of the county's government's revenue and be used for functions of the county government within the ward.
- **Amending article 215(2) on the Commission on Revenue Allocation** to reduce the number of Commissioners nominated by political parties represented in the Senate from five to two and have two representatives (one man and one woman) nominated by county government and one person nominated by the body responsible for the professional regulating of accountants.
- **Deleting article 218 on the Annual Division and allocation of revenue bills** and replacing it with a new clause that provides for the introduction of the division of revenue bill in the National Assembly at least four months before the end of each financial year and passed not later than two months before the end of each financial year.
- **Amending article 230(2) on the Salaries and Remuneration Commission** to change its composition to reduce it from fourteen to seven persons with extensive experience in human resource management and to adding its functions to include determining and harmonizing the pay given by national and county governments to consultants for professional services.



CHAPTER THIRTEEN OF THE CONSTITUTION OF KENYA – THE PUBLIC SERVICE

OVERVIEW AND CONTEXT:

Chapter Thirteen of the Constitution of Kenya focuses on the values and principles of public service, staffing of county governments, protection of public officers and the Teachers Service Commission. The BBI report notes that Kenyans felt that employment in the public service is not inclusive and recommended that the Public Service Commission should develop policies on workplace diversity to attract diverse communities in the public service.

PROPOSED CONSTITUTIONAL REFORM:

- **Amending article 234(1) on the functions and powers of the Public Service Commission** to increase the offices that the PSC does not have mandate over to include the national security organs which include the Kenya Defence Forces, the National Intelligence Service and the National Police Service.
- **Establishing a Youth Commission** with a mandate to advance the participation of youth in public and private life and mainstream youth perspectives in planning and decision making composed of seven members, four of whom must be youth and with equal gender representation with experience youth affairs and governance.

CHAPTER FOURTEEN OF THE CONSTITUTION OF KENYA – NATIONAL SECURITY

OVERVIEW AND CONTEXT:

Chapter Fourteen of the Constitution of Kenya focuses on the national security organs including National Security Council, the Kenya Defence Forces, the National Intelligence Service, the National Police Service and National Police Service Commission. The BBI report notes that Kenyans are faced with security issues including violent crimes, unsolved murders, terrorism, cybercrimes, runaway theft etc. and called for the modernization of police systems, improved work environment for disciplined forces and redistribution of policing, investigation and prosecution resources to address the delay in delivering justice to the poor.

PROPOSED CONSTITUTIONAL REFORM:

- **Amending article 240(2) on the establishment of the National Security Council** membership to include the Prime Minister.
- **Deleting article 243(2) on the National Police Service** which consists of the Kenya Police and the Administration Police Service.
- **Amending article 245(2) on the Command of the National Police Service** by expanding the Inspector General's independent command to include transfers, promotions and discipline and removing the leadership of the Kenya Police Service and Administration Police by a Deputy Inspector- General.
- **Deleting article 246 on the National Police Service Commission** and replacing it a Kenya Police Council primarily responsible for the policy, control and supervision of the Police Service.
- **Inclusion of the Independent Policing Oversight Commission** that shall hold members of the national Police Service accountable in the performance of their duties.



CHAPTER FIFTEEN OF THE CONSTITUTION OF KENYA – COMMISSIONS AND INDEPENDENT OFFICES

OVERVIEW AND CONTEXT:

Chapter Fifteen of the Constitution of Kenya focuses on the constitutional commissions and independent offices.

PROPOSED CONSTITUTIONAL REFORM:

- **Amending article 248(2) on Commissions** to remove the National Police Service Commission and replace it with the Independent Policing Oversight Commission.
- **Amending Article 248(3) on Independent offices** to include the Director of Public Prosecutions.

CHAPTER SEVENTEEN OF THE CONSTITUTION OF KENYA – GENERAL PROVISIONS

OVERVIEW AND CONTEXT:

Chapter Seventeen of the Constitution of Kenya covers the enforcement and interpretation of the Constitution.

PROPOSED CONSTITUTIONAL REFORM:

- **Amending article 259(1) to** provide for the replacement process of an appointive office under the Constitution to begin at least six months before the end of the term of the current office holder.
- **Amending article 260 on interpretation** to include the Prime Minister, Deputy Prime Minister and Judiciary Ombudsman as State officers.

THIRD SCHEDULE: NATIONAL OATHS AND AFFIRMATIONS

OVERVIEW AND CONTEXT:

The third schedule covers the oaths or solemn affirmations.

PROPOSED CONSTITUTIONAL REFORM:

- Addition of the Prime Minister and Deputy Minister in the oaths and solemn affirmations.

FOURTH SCHEDULE: DISTRIBUTION OF FUNCTIONS BETWEEN THE NATIONAL GOVERNMENT AND COUNTY GOVERNMENTS

OVERVIEW AND CONTEXT:

The fourth schedule covers the distribution of functions between the national government and county governments. The BBI report noted majority of stakeholders' recognition of Nairobi as the Capital City and major diplomatic hub and that its management had been neglected and its growth and development need due attention.



PROPOSED CONSTITUTIONAL REFORM:

- **Amending the functions of the National Government** to include the functions and powers of Nairobi City County on county health, county transport, county planning and development county public works and services and fire-fighting services and disaster management.