

# BILLS UPDATE

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## 1. 0 INTRODUCTION

The implementation of the constitution is still a major challenge. Recently, a conference to discuss the progress and challenges of implementing the Constitution was held recently by the by the CIC. This conference was supported by the University of Nairobi and the German foundation Friedrich Ebert Stiftung was aimed at bringing the key implementers of the constitution together. The conference aimed at taking a stock of the implementation process 15 months after the constitution was promulgated.

The conference discussed issues like judicial reforms, administration of justice, electoral reforms and the opportunities created by the constitution. Issues that also cropped up for debate were debates on transition from the current local authorities to the county government and take off mechanisms after the

next years` general election. The cabinet has also found itself in a tight spot on how to push through the constitutional amendment bill. This has been informed by the large number of members of parliament that have been opposing the bill.

## 2.0 BILLS

The Parliament is supposed to pass five Bills of Constitution implementation in a rush to beat the 18 months time frame provides for in the sixth schedule of the Constitution of Kenya. Sources from the House claim that members of parliament have raised concern over the delay by the government to take the Bills to the house. This would automatically result to a repeat of what happened in august when parliament hurriedly passed 15 Bills in attempts to beat deadlines.

Some of the above Bills passed hurriedly have been declared unconstitutional by the CIC while others have been referred back by the speaker for more audits since they contain errors. Members of parliament have also been claiming that there may lack enough time to pass the bills as Christmas holiday recess is near.

The Bills which must be enacted by February 28 2012 include; the Bills on land, power sharing and devolved government, removal of county governors, vacation of office by a

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member of a county assembly and another on funds for county governments. The speaker on Thursday 31<sup>st</sup> November 2011 gave directions to the leader of government business in the house requiring him to bring to the house a schedule of all pending Bills in the floor of the house in the shortest time possible.

### **3.0 JUSTICE**

The events that occurred during 2007/08 post election violence made it clear that our country is a nation still on making. The events that transpired during the early months of 2008 clearly demonstrated that it is hard to deny the fragility of our country. This was a time when the country realized that the foundations of the state and the various institutions within it lived in a very precarious situation. A single election threatening the existence of this country showed clearly that the Kenyan sense of nationhood is far from solid.

There has been failure to address the deep social and historical cleavages in the traditional human rights areas that touch on civil and political rights and justice. The governments have not been able to address pertinent issues such as poverty and land grievances thus denying the society social cohesion. Over the last four decades we have seen the country being held captive by narrow and unsympathetic political elite that lacked a vision for nationhood and development in this globalized world.

The same political elite has been preferring ambiguity over liberal democracy, impunity over accountability, injustice over justice and myopia over true vision for Kenyans. In view of

this state of affairs, the political class has to abandon this nihilism. The Constitution of Kenya provides the only way for this moment. The document if implemented for the sake of Kenyans without any arm twisting from the political elite will create a just compact where the relationship between the state and the citizens will proceed from a nobler and more idealistic calculus. This will also bring on board the concept of transitional justice.

The idea of justice is currently indispensable in building sound nationhood, peace building and construction of nations emerging out of abusive authoritarian and oppressive authorities. In emerging democracies, solving the grievances of the past is cardinal step in ``slaying the demons`` and laying the foundation for a better legitimate future. However, an effective justice process must strike a balance between justice for victims and retribution against the offenders.

### **3.1 ACTS ON JUSTICE**

According to the Kenya law review reports, during the month of November there was no bill on justice that was signed into law.

### **3.2 BILLS ON JUSTICE**

#### **(A) THE CAMPAIGN FINANCE BILL**

This is a law that is intended to make provisions that will clean up elections by eliminating bribery of politicians by some self centered people. It also makes provisions to cap the amount of money that politicians will be allowed to use in campaigns. It will also shut doors for politicians who have been using state resources to campaign.

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The bill, if enacted into law, will have force at both the national and county governments, is intended to reduce the funding gap between political parties, curb corruption, limit special interest limits, limit the impact of money on elections outcome and increase accountability of political parties to the members.

The bill also will give provisions that will give the Independent Electoral and Boundaries Commission a far reaching legitimacy in enforcing the tough laws on campaign spending. Penalties for non compliance would range from disqualification of a candidate to a shilling 2 million fine or a minimum of five years jail.

The bill also provides that parties must establish campaign accounts which shall be subject to audit by the controller and audit general. The Bill is currently being discussed by the Commission for the Implementation of the Constitution.

### **(B) TRANSITION TO DEVOLVED GOVERNMENT BILL.**

This is the Bill that seeks to give provisions for the process of transiting to counties. The Bill provides that the transition will be done by an authority which will oversee a coordinated transition to the first elected county governments in two phases. The first phase of transition shall start upon immediately the Bill becomes an act to the first election under the Constitution.

The second process will kick start after the elections and will include capacity building, transfer of functions from national governments to the county, continuous review of performance of county governments,

evaluation and reporting on the progress of the implementation of the devolution.

The said authority will carry out its duties in consultations with the CIC and the Commission on Revenue Allocation. The Commission will carry out civic education to Kenyans on devolved governments, help in preparing county budgets, prepare county profiles and assist in clarifying cities, municipalities and towns. This bill is one of the legislation that the parliament is supposed to pass by 28<sup>th</sup> February 2012. The bill is currently under review by the CIC.

### **(C) THE CONSTITUTION AMENDMENT BILL.**

The date for the 2012 elections has been a bone of contention both inside and outside parliament with MPs and the civil society taking opposite positions on the matter. Those opposed to the change on the date of elections argue that every institution involved must operate within the timelines stipulated in the Constitution and not just change the date because it was inconvenient.

The Constitution amendment Bill seeks to change the 2012 elections date from august 14 as provided for in the Constitution to December 19 of the same year. Apart from the date of elections, the Bill also seeks to amend Articles 97 and 98 to make the one third gender provisions attainable.

The Bill also has an amendment that seeks to do away with Article 89(4) of the constitution so that the 80 new constituencies can be included in next year's elections without some legal challenges. The Bill also seeks to make provisions on the hitch brought by the

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country's current financial cycle which as provided in the Constitution begins in June 30.

Elections expert, Koki Muli, in a current interview claimed that the goal of having more women MPs remains elusive unless we have new structures put in place. Her advice was that unless articles 97 and 98 in the Constitution were amended it was hard to get the mandatory one-third women in parliament. She said the only way to attain it was through adoption of block voting as is the case in countries that have proper women representation.

#### **(D) THE INTERNALLY DISPLACED PERSONS BILL, 2011**

One of the greatest challenges facing Africa is the intra- state conflict and resultant internal population displacement. This intra-state conflicts have led to many atrocities such loss of human life, property, displacement of very large portions of society, disruption of socio-economic activities and lives, increased hatred between communities, degrading the environment and water catchments areas, increase in economic hardships caused by loss of lives and a great abuse of human rights to mention just a few. Since the medieval eras, governments were formed with the cardinal purpose of protecting their citizens.

Currently in Kenya we have approximately 300,000 unsettled IDPs as a result of the post election violence and other conflicts especially in the Northern Rift valley and North Eastern parts of Kenya. This Bill is aimed at making clear provisions on how the displaced will be protected so as not to repeat the current scenario of some internally displaced Kenyans

still languishing in IDPs camps three years down the lane after the conflicts.

The Bill is also meant to give effect to the Great Lakes Protocol on the protection and assistance to internally displaced persons and the UN guiding principles on internal displacement. KHRC is part of the protection team that discussing the bill and awaiting to present it to the ministry of special programmes.

#### **(E) THE PUBLIC SERVICE COMMISSION BILL.**

This is a Bill that will provide for the public service commission. It clearly defines who public officers are and also defines what bodies are public bodies.

The bill identifies the following to be public bodies; a state corporation, statutory commission, public university and other institutions of higher learning, Attorney General's office, director of public prosecutor, controller of budget department, Auditor General department, National Intelligence Service, prisons and all other departments and commissions established under the Constitution or legislation and is not exempted under Article 243(3) of the Constitution.

Our concern with this bill as KHRC is the wide spread use of public resources during election campaigns and therefore we saw it necessary to try to list what public offices and public resources entail.

## **(F) THE NATIONAL SECURITY COUNCIL BILL, 2011**

This Bill seeks to establish the top security organs in the country as well as a similar arrangement at the county level. As per the proposal, the National Security Council is to be chaired by the president, cabinet secretaries for defense, foreign affairs and internal security, the Attorney General, the Chief of Kenya Defense forces, the Inspector General of the National Police Service and the National Security Intelligence Service Director General.

At the County level, the county security committee is to be chaired by a person appointed by the NSC, and has as members, county bosses of Kenya police service, the Administration police, the Criminal Investigations Department, an NSIS representative who will serve as the secretary to the committee and a representative from the national government.

The Bill is meeting a lot of resistance before even it gets into the floor of the house. This has been caused by failure to include the county governors as part of the security committee. The office of the president and the ministry of justice have also raised concerns about the Bill with the concerned ministers claiming to have been kept in the dark on the Bill.

Members of parliament are advocating for inclusion of the governor in the Bill with claims that the crafters of the Bill (the intelligence people) never shared it with the office of the president. The NSC which will also be in charge of security matters at the national level will also have powers to declare war but with approval from parliament.

## **4.0 BILLS ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS**

Kenya's freedom from the colonialists was meant to provide freedom and equality to every Kenyan irrespective of race, ethnicity or socio-economic status. For the common Mwananchi, independence meant nothing unless it held out the hope for a better life. The roots of conflict in Kenya are mainly because of inequitable distribution of the fruits of mental and physical labor. This has caused imbalances in the society with a few privileged classes bettering themselves at the expense of others.

The country must put to an alt greed, corruption within the government, marginalization of communities and vulnerable groups such as women and the youth. If there are no adequate measures put in place to address the issues of economic rights, then conflicts and insecurity cannot be escaped. Improvised and unemployed youth are seeking to enrich themselves by looting, murder, extortion and through hoarding of food products and consumer goods.

Currently a lot of families in Kenya are denied the right to have decent livelihoods because of poor access to markets, low income and lack of education opportunities. The government has the obligation of intervening with this situation.

## **4.1 ACTS ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS**

For the last one month, no Bill on economic, social and cultural rights was signed into law by the president.

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## **4.2 BILLS ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS**

### **(A) THE MINING BILL, 2011**

Minerals are known to play a major role in turning around the growth of an economy. Our neighbors Tanzania and Uganda have struck rich deposits of oil and gold in same basins that they share with Kenya and this has raised speculations of finding the same minerals in Kenya as well. According to the Kenya chamber of mines, Kenya has high chances of striking big deposits of iron ore and gold. But high prospectors can be attracted by a good mining act and a sound mining policy.

The current Act that guides this industry in Kenya was put into effect in 1947 by the colonial government and some minor amendments were done on it in 1980s. For almost a decade, the mining industry has been clamoring for changes in the legislation and policies concerning the industry.

Currently, there is a mining Bill that may soon bring to an end their long wait. The mining Bill 2011 seeks to regulate the mining industry and streamline its licensing. The Bill will also make provisions on establishments of four organs that will see overall regulation of the mining industry. It will also make provisions on how royalties from the industry will be distributed. The Bill if signed into law will provide for some conditionality guiding foreign investors wishing to operate in Kenya.

With devolution on the way, mining should be well regulated since it is a very delicate and sensitive issue that has brought problems and conflicts in many parts of the world e.g. in the Niger Delta and southern Sudan.

### **(B) THE WILDLIFE BILL**

Wildlife is an important natural resource and national heritage, a public asset at both levels of government and global levels. There is basic need for an integrated ecosystem approach to conserving wildlife resources in relation to other forms of land use. The Bill seeks to provide legislation for the protection, conservation, sustainable use and management of wildlife in Kenya. It also seeks to increase compensation for human death or injuries caused by wildlife. The Bill also recognizes that wildlife should be utilized in a manner that does not curtail on cultural values, compromise the quality and value of the resources or degrade the carrying capacity of supporting ecosystem.

The Bill also seeks to introduce a coordinated and participatory approach to wildlife conservation and management that will involve collaboration between the national and county governments, communities, land owners, the private sector and the nongovernmental organizations.

### **(C) LEGISLATION TO CHECK DIVISION OF LAND IN NON-VIABLE PARCELS**

This will be a new law meant to regulate the subdivision of agricultural land in the country. Sources from the ministry of land provided that the law is under preparation. The legislation is supposed to make sure that land use in Kenya provides security to Kenyans and their property and an access to an efficient transport system. It is also supposed to ensure that land use don't cause or risk public health.

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The ministry claims that the Land Control Act had failed to regulate the manner in which land was used. The ministry argues that the division of agricultural land was haphazard since land control boards were granting consent for illegal subdivision and transfer of parcels of land that were uneconomical for agricultural use.

Further claims are that this has continuously led to increased urban slums and loss of agricultural activities making the country to rely on imported foods. Currently this legislation is being worked on at the ministry of lands and further follow ups will be made to find its differences with the other legislation on land.

The legislation seems to gain more weight from supporters such as the Architectural Association of Kenya which claims that the bill will enhance planning in the country especially in the era of county governments. The association argues that it is through proper planning that towns can be able to develop. Currently, planning in the country is poor and that the requisite capacity was lacking but the legislation if finalized and signed into law will solve these problems.

#### **(D) THE COMPANY BILL, 2010**

This Bill is meant to repeal Cap 486. It aims at making provisions that will make the business laws in Kenya more modern. By modernizing business laws, it will become easier for both local and foreign investors who would wish to start up businesses in Kenya.

This legislation will also come up with a modern law that guides companies and how they operate especially putting into account the

current trends of modernization and regional integration with a focus on the East Africa Community.

Other major concerns that the Bill also seeks to address include the registration and running of one Member Company, the board of directors of companies, company secretaries, trading certificates and resolutions and meeting of companies.

#### **(E) THE PYRETHRUM (AMENDMENT) BILL, 2011**

Pyrethrum is the country's fourth largest crop that brings cash into the pockets of Kenyans. Kenya has been the number producer of pyrethrum in the world for so many years. In 1992 and 1993 pyrethrum farming reached its peak when the country produced over 18,000 tones of pyrethrum products. But from that time internal inefficiencies, competition from synthetics, poor farming methods and conditions, competition arising from new markets and other factors have dropped the country's number one position to a point that in 200/10 Kenya produced only 450 tones.

Of the many factors that have contributed to the big drop in the country's production of pyrethrum is the requirement by the law that farmers sell their crop through a central board which has several marketing agencies. This denies farmers the full monetary advantages that come from the market prices of their crop. This has made several distortions which include nonpayment to farmers by the board, elimination of the bonus system to reward high quality, high deductions for improper services.

The Bill was meant to amend the pyrethrum Act so that those obstacles could be removed.

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This was to result into liberalization of the pyrethrum market. This would lead to a much competitive pricing and create the process of value addition to the cash crop. Liberalizing the market would have also resulted into a situation where high quality would be rewarded. If amendments took place, this would have been a step further in de-commercialization of the government involvement in the pyrethrum sector. Unfortunately the Bill was dropped.

### **(5) EQUALITY AND ANTI- DISCRIMINATION**

In all mature democracies, civil rights are usually viewed in terms of context of discrimination. From a very narrow perspective, discrimination can be defined as the differential treatment of people, as much as justifiable or unjustifiable the treatment might be. From a much clearer but still narrow sense, discrimination can be said to be disadvantageous treatment of some groups of people or people in a more relative way than the rest.

Within the doctrine of equality, discrimination in the sense of the denial of rights is an injustice that denies certain citizens their natural entitlements. The Bill of rights in Article 27 of the Constitution of Kenya provides for equality and freedom from discrimination. 27(3) provide that women and men have the right to equal treatment and this includes the equal opportunities which include political, economic, cultural and social spheres. 27(4) provides that the state shall not discriminate directly or indirectly any person on any ground which includes discrimination on basis of race, sex, pregnancy, marital status, health status, ethnic or social origin, color, age, disability,

religion, belief, culture, dress, language or birth.

### **5.1 ACTS ON EQUALITY AND ANTI-DISCRIMINATION**

During the month of November, no law was passed on equality and anti-discrimination.

### **5.2 BILLS ON EQUALITY AND ANTI-DISCRIMINATION.**

There is also no Bill on equality and anti-discrimination that was introduced during the month of November. However, majority of Bills that were pending in the various stages have made some progress a head while others have proposals to merge them. During a stake holders meeting with CIC on 14<sup>th</sup> to 18<sup>th</sup> the various organizations present agreed that the Births and Deaths Registration Bill should be merged with the Identification and Registration of Kenya citizens Bill since they were addressing almost similar concerns.

### **6.0 CONCLUSION: THE CONSTITUTION AS A CATALYST FOR GROWTH**

In late 80s the largest country in South America adopted a new democratic Constitution. This created the way for rapid economic and social progress in Brazil. Brazil joined the league of the few industrialized countries outside the Organization for Economic Cooperation and development.

Since Brazil did this within twenty years, Kenya can achieve the same beginning by exploiting the locked potential of the 47 counties that will champion local entrepreneur activities



facilitated by a political system that cannot be arm twisted by a central authority.

The Constitution of Kenya 2010 is not similar to the independence constitution of 1963 that come with regional governments which were vulnerable to arm twisting and could easily be broken by the excess executive.

This time round there are proper mechanisms that provide for the existence of regional governments within the 47 counties. To ensure financial viability the national government will give 15% of the national budget to county governments. There shall also be equalization fund and the constituency development fund on top of that. At the civic level there will be the local authority transfer fund. All this aimed at enhancing economic and social progress at the grassroots level.

Changing all this provisions will not be as self centered and dependent of the executive's personal desires and fears. Concern for the minority rights and provisions for equality and anti discrimination have been awarded a central place in the Constitution.

The Constitution is an opportune for minorities and the marginalized. They have their rights fully guaranteed, political space is given to the in many institutions and different forms of discrimination that make their lives difficult have been addressed. Aggrieved Kenyans have been provided with access to justice through judicial action against the state and individuals as well. But however good, the constitution of Kenya 2010 will not implement itself. Kenyans should go on keeping a close vigilante for democracy and realize that revolutionary struggle for liberty, freedom and justice is a permanent calling for the progressive mind.

**END**

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