**COMMITTEE OF EXPERTS**

**FACT SHEET ON SEPARATING THE MYTHS FROM THE FACTS.**

**FREQUENTLY ASKED QUESTIONS.**

1. **Is Abortion allowed in the draft?**
2. **Absolutely Not**. S26 of the Proposed Constitution provides that Abortion is illegal except in times of emergency or where the life or health of the mother is critically in danger There are not many doctors in Kenya, so to ensure that poor women are not excluded from emergency treatment, it is necessary to widen the scope to health professional who serve Kenyans in remote parts of Kenya. This treatment can therefore be given by a trained health professional who is a doctor, nurse or clinical officer who is trained by the Ministry of Health. The word emergency extends to treatment of rape and emergency contraception. The words “any other written law” includes the Penal Code which criminalizes abortion and the Sexual Offences Act which provides for treatment for rape victims. Abortion on demand is **NOT** allowed.

Issues like death penalty and other circumstances in which life can be taken away by the State can also be provided by “any other written law”. All these provisions are already provided for under the current law. However, the statement that life begins at conception can only be found in the Proposed Constitution and not in the current laws.

**Q. Will the Proposed Constitution take away land from people?**

 **A. No way.** In fact the Proposed Constitution gives additional protections to those who hold property and land. The Government can only take land if it needs it for public use and it must compensate the owner of the land fully and at market rates. The only people who cannot benefit from these protections are those who have unlawfully acquired land. These persons will however be given a chance for a fair hearing to prove that they have lawfully acquired it; but if they cannot show legal proof of this, they will have to surrender their titles to the Government. The intention of this provision is to ensure that those who have grabbed public land in the past do not continue to benefit from it. **It is important to note that all the provisions in the Land Chapter are already contained in the National Land Policy which has been passed by Parliament and which is already being applied. Its inclusion in the Proposed Constitution is simply to enhance constitutional protection.**

**Q. What is ancestral land and is it true that communities who lived on land a long time ago can come back and take it from those who are currently occupying it?**

**A. Not at all**. Community land is especially protected, for example the national parks are held in trust for the Maasai peoples and shrines that are protected for communities such as the Kaya or Mji Kenda. Community land is held by a group, clan or other organized community group which uses the land for benefit for all the members of that community. This land already exists and is held in trust by designated communities; the clause in the proposed constitution is simply to provide them with added protection. Community land is not public land or private land that is already held by individuals, so no one can come and take land from those who already own it. **It is important to note that all the provisions in the Land Chapter are already contained in the National Land Policy which has been passed by Parliament and which is already being applied. Its inclusion in the Proposed Constitution is simply to enhance constitutional protection.**

**Q. Will land be taken away from foreigners like it was done in Zimbabwe?**

**Nothing can be further from the truth**. Under our laws most Kenyans hold leases of 99 years which are renewable. At independence some special provisions allowed foreigners to hold freehold leases of 999 years. The Proposed Constitution unlike Zimbabwe will not take these leases away but simply reduce them to 99 year renewable leases like those of most Kenyans. However Kenyans or Kenyan owned companies who have 999 year leases will not be affected. Foreigners also have the option of becoming Kenyans if they wish to keep the 999 year lease.

**Q. What happens to the Provincial Administration? Will Chiefs be retrenched? What happens to councilors?**

**Oh no**. The Chiefs will definitely still remain in place. PC’s, DC’s, DO’s and Chiefs remain appointed in the Office of the President. However, under the new devolved Government system, the Provincial Administration will be restructured within 5 years. This only means that the Provincial Administration will remain in place but will be leaner as it will only implement what the National Government does in Schedule 4. For example the National Government will be still charged with security, police, armed forces, prisons, courts, Labor standards, Education, Educational institutions, Sports, National Transport and Communication, immigration and citizenship (including the issuance of ID cards)etc. This means the Provincial Administration, from the Provincial level to the Chief will still exist to carry out these tasks. However, the Provincial Administration will no longer be charged with matters allocated to the County Governments such as Agriculture, County health services, County transport, Trade, County public works and services etc. These tasks will be done by the Elected Governor and Civil service at the County. Councilors will still continue to work as they do now, as the devolved government does not affect their work.

**Q.** **Why has the Proposed Constitution provided for Kadhi’s Courts?**

**A.** The Kadhi’s Court has always been in the Kenyan Constitution. It’s inclusion was part of an agreement entered into between founding father Jomo Kenyatta and the Sultan of Zanzibar allowing Kadhi’s’ courts, which are customary courts for Muslim personal law, in exchange for territory comprising the coastal strip, which was not part of Kenya before independence. The agreement guaranteed that the Courts could be set up in the Coastal strip but did not prevent there establishment elsewhere. Ordinarily our traditional panel of elders or customary courts which dealt with personal law of each tribe in Kenya, would have been at the same level as the Kadhi’s courts but they were abolished by the British Government and replaced with Native courts, which later became magistrates courts. Muslims were fortunate in retaining their customary courts because they were not under British rule before 1963. The courts are at the level of magistrates courts and are managed by an Act of Parliament. The Kadhi’s courts are not religious courts but courts set up to adjudicate disputes of personal law, matrimonial law and inheritance as provided for under the Mohammedan Marriage Act. Likewise, Christians get married under the African Christian Marriage and Divorce Act, whilst Hindus get married under the Hindu Marriage Act. Other Kenyans who have other religions or creeds get married under the Marriage Act or under customary law and their inheritance is managed by the Law of Succession Act. All these Kenyans have their personal, matrimonial and inheritance disputes adjudicated by either magistrates’ courts or the High Court, which are also provided for under the Proposed Constitution. All Christians, Muslims, Hindus, Traditionalists and even non-believers pay taxes towards the maintenance of all judicial courts that listen to their personal, matrimonial and inheritance matters, as it is the Government that regulates personal law for all Kenyans, no matter which religion they follow. As such Muslims therefore contribute to the courts that Christians go to and vice versa. The same applies to Hindus, traditionalists, and non-believers whose taxes also pay for judicial courts to which different faiths go.

**Q. Can one run for a Presidential seat and a Parliamentary seat at the same time?**

Any person is allowed to vote and to run for any office they wish to. However, the President is no longer a Member of Parliament and cannot hold another state office. This does **not** prevent one from running for both President and MP or any other elective position; but it does mean if one wins the Presidency he must resign from any other seat he might hold before he is sworn in as President.

**Q. Why are international conventions and treaties that are signed and ratified by the Government part of the Constitution?**

The government often makes international commitments at the United Nations or at the African Union, some of which may be declarations and others which may be binding. After signing these agreements, the Government returns to seek the support of Parliament to commit the country to these agreements. This commitment is called ratification. Sometimes Parliament will agree but other times it will refuse to do so. Once a country has ratified an international agreement, it is bound to domesticate or make it local by including it in its local law. By including ratified agreements in the Constitution, the Proposed Constitution is domesticating what has already been agreed to by Parliament, like any other Act of Parliament. Examples of such agreements are the African Union Treaty, the East African Community Treaty, the AU Convention on Corruption, the UN Convention against Torture, Africa Growth and Opportunities Act (AGOA), UN Convention on the Elimination of Discrimination against Women, UN Convention on the Rights of the Child, UN Convention of the Rights of Persons of Disabilities, UN Convention on the Rights of Indigenous Peoples, etc. The importance of this clause is to ensure the Government does not go ahead to sign conventions without the ratification of Parliament and the domestication of the same without undue delay. For example it took Kenya more than 10 years after signing the Convention on the Rights of the Child to domesticate it by enacting the Children’s Act.

**Q. Does the Proposed Constitution abolish Public Holidays like Christmas, Easter, Idd or Labour Day?**

**A.** **Never!** Public Holidays will continue to be provided for by an Act of Parliament. However the PC does single out National Days, which are different from Public holidays. The National days will be: Madaraka Day – 1st June, Mashujaa Day – 20th October and Jamhuri day – 12th December. National days can only be increased by amending the Constitution to prevent abuse, such as leaders who name such days after themselves, without a good underlying reason for special national acknowledgement.

**Q. Is it true that the Draft Constitution ‘almost impossible’ to amend?**

**A.** **No,** **actually it is just the opposite**. It is under the current Constitution, that it is extremely difficult to amend any clause. This is because it is only Parliament who can by two-thirds majority change or amend any part of the Constitution. This has been very frustrating to many Kenyans because it means that past amendments have been towards political convenience for the consolidation of political power, rather than towards enhancing the human rights of the citizens. The Proposed Constitution addresses this problem by providing for direct public participation in amending the Constitution. It proposes three ways of amending the constitution. The first is by parliamentary initiative, where two-thirds majority is required both in the national Assembly and the Senate. The Second by popular initiative, allows any citizen who gets support of one million registered voters, and the support of half of the county governments to petition parliament to amend the constitution. A simple majority in Parliament will allow for this amendment. In a country of 40 million Kenyans, this is not a lot to ask for a popular initiative. The third is the referendum which is required if one wants to amend the protected chapters in the Constitution such as the Bill of Rights or the term of office for the President.

**Q. How does the devolution of Government work?**

**A.** The proposed Constitution provides for Kenya as a **unitary s**tate that is divided into 47 administrative units called Counties. These are based on the legal Districts established under the Districts Act of the 1992 Act. Devolution ensures a distribution of functions between the National Government and the County Government. The national Government will continue to serve its functions through the Executive and Provincial Administration, while the Counties are run by a Governor who is checked by the members of the devolved Government Assembly. A Minimum of 15% of the National Budget will go directly to the counties which will ensure that citizens at the grassroots can determine and prioritize development activities through elected leaders at the local level instead of by appointed officials working for the National Government. A sum of 0.5% of the national budget will also go to an Equalization Fund which will be used to upgrade the lives of Kenyans in marginalized areas such as slums and remote and neglected areas of the country. CDF, which is 2.5% of the national budget, will still be in existence under an Act of Parliament and applied for development in the constituencies. Local Government will also continue to do its work with LATF, and through additional funds from the counties, therefore all Councilors will remain in office.

**Q. Under the chapter on citizenship why do we allow any child 8 years or younger whose parentage is unknown, to acquire citizenship by birth? Isn’t this open to abuse by non-Kenyans?**

The reason for this clause is that there are 2 ways through which one becomes a Kenyan national’ by birth or by registration. Many children who are abandoned by birth or orphaned, do not have family members who look after them or they do not know them. Some children up to the age of 8 years do not have the memory capacity to enable them to identify parents or relatives or to know where they come from. It is these children the article is trying to protect, so that they do not become stateless. When they reach the age of 18, it will be almost impossible for them to get an ID card as they have no birth certificate or proof that they are Kenyans. However, the CoE was aware of the dangers that are posed by fraudsters and specifically provided for the revocation of citizenship of this class on three grounds: where there fraud, or misrepresentation by the child in obtaining the citizenship; Where the child’s parents are found and they are not Kenyans, and where the child is not 8 years, and therefore able to trace his origins.

**Q. At a glance, point out just ten issues that Kenyans do not have under the current constitution?**

\* Become a dual citizen, of both Kenya and another country.

\* Vote when outside the country.

\* As a candidate, one can run on an independent ticket and not be confined to a political party.

\* All Kenyans will pay taxes MP’s; in fact MP’s can no longer determine their own salaries; there is a special commission to deal with all salaries and taxes of all government officials independent of Parliament.

\* MP’s are not ministers, so they can focus much more on their constituents needs, those who don’t perform can be recalled by their constituents

\* Land policy benefits all Kenyans not just some privileged few, and, grabbers will no longer be able to benefit from their crimes.

\* Cannot be discriminated upon on by the Government or by anyone else, at work or elsewhere on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

\* Go to court to claim rights under the Bill of Rights without having to pay court fees; one can now also go to court on an issue which affects public interest

\*There is a whole lot more money ( a minimum of 15% of the budget) for services coming down to the counties where most Kenyans I live.

\* Constituency and ward boundaries are much more fairly created, which means equal representation for all.

\*Women, Youth, Persons with disabilities, minorities, workers finally have a say in decision-making bodies through affirmative action in representation and appointments.