

Bringing the constitution into effect: Transitional Issues

1. Introduction

When a new constitution is introduced, a range of provisions is needed to ensure that the move from the old order to the new order is smooth, and, in particular, that the changes expected by the new constitution are implemented effectively and that institutions that are retained under the new constitution continue to function properly. The ‘transitional’ provisions that do this are usually not included in the body of the constitution because they have a temporary lifespan. Instead they are included in a schedule which is part of the constitution but, because it is appended at the end of the constitution, its provisions will not interfere with the ‘permanent’ provisions of the constitution in the future.

Most of the provisions dealing with transitional matters are very technical – they ensure that existing laws continue to have force, that the public service continues to operate and that public servants continue to receive their pay, that courts continue to operate, etc.

However, there are some transitional provisions that have significant policy implications. In identifying contentious issues the Committee accordingly stated:

“With respect to bringing the new constitution into effect, there is consensus that:

- a) A new Constitution should create a fresh start for Kenya establishing the rule of law, protection of human rights, and respect for everyone irrespective of their gender, ethnicity, disability, age, religion, culture or political persuasion.

- b) The institutions and office bearers in the new Constitution must have the confidence of the people and be accountable to them.
- c) All government action and every exercise of power should be based on the new Constitution.

The issues which are contentious or not agreed upon are:

- i. How should the adoption and coming into force of the new Constitution affect holders of political constitutional positions or offices, such as the President, Vice-President, Prime Minister, Deputy Prime Ministers, Cabinet, and Members of Parliament? Should these office holders complete their terms?
- ii. How should the adoption and coming into force of the new Constitution affect holders of unelected constitutional positions or offices, such as the Auditor-General, the Attorney-General, and Judges?
- iii. A new Constitution will require many new laws. What measures can be put in place to ensure that Parliament will pass these laws?"

This paper discusses each of these issues under the following headings: (i) implementing a new system of government; (ii) the judiciary; (iii) commissioners and other appointed constitutional office holders; and (iv) adopting new laws. In addition, implementing a new system of devolved government will be a considerable task. This is also discussed.

2. A preliminary matter: Oaths and the register of interests

Like the three drafts that preceded it, the new Constitution is likely to require public representatives, constitutional office holders and public officials to swear an oath to uphold the Constitution and also, for certain categories of state office holder, to submit a statement of interests for inclusion in a register of interests.

Following the Bomas draft (Sixth Schedule items 10 and 13) and Wako (Sixth Schedule item 7(6)) we propose that, whatever approach is taken to the continuation of their offices once the new constitution comes into force, all the office holders discussed below (MPs, members of the executive, judges etc) should be required to submit a statement of interests and, to mark the fresh start that the new constitution is intended to represent, renew their oaths.

3. Implementing a new system of government

The question here is ‘what should happen to existing elected representatives and the current power sharing arrangements when the new constitution comes into force?’

Under Article 47A(7) of the current Constitution of Kenya, a new Constitution will come into effect no more than 14 days after the referendum results are declared but the new Constitution itself may suspend the operation of any of its provisions.

The Kenya National Accord and Reconciliation Act adds to this by stating that it ceases to apply on enactment of a new constitution. This means that the power sharing arrangements secured in the Accord Act will cease to apply unless the new constitution explicitly protects them.

There are two options:

- (i) To have all the provisions in the new constitution come into effect immediately. This would involve the abolition of the current power sharing arrangements and the best way of doing this would probably be to hold a new election immediately.
- (ii) To delay implementation of the provisions of the new constitution that relate to the executive and the legislature until the next (2012) elections.

There are obvious attractions in the first option: Kenyans have waited a long time for a new constitution and one of the key demands of Kenyans is for executive arrangements under which power is better controlled through good checks and balances. Accordingly the implementation of new arrangements for the exercise of executive power may seem urgent. But, this approach is also likely to be more disruptive and to raise opposition to the new constitution. On this approach MPs with a legitimate expectation that they are in office until 2012 would have to fight an election earlier than expected. The carefully balanced power-sharing arrangements captured in the Accord would be set aside. On balance, then, it seems that it would be in the interests of political stability to suspend the operation of those provisions of the new constitution that concern the executive and legislature until current incumbents have completed their terms and to extend the operation of the Accord until those elections. This follows the approach in both the Bomas and Wako drafts (Bomas Seventh Schedule item 3; Wako Sixth Schedule item 3).

4. The judiciary

Submissions to the Committee on the judiciary were virtually unanimous on one point: the judiciary must be reformed. The Committee received a number of submissions on how this should be done. These submissions can be classified into three groups: those that propose that all judges remain in office; those that propose that they remain in office but are required to take a new oath etc and to undergo a ‘vetting’ process; and those that propose that the entire judiciary should be reappointed, all judges would be treated as having lost their jobs but could reapply.

4.1 Judges

Option 1: Retention of the status quo

On this approach, the constitution would simply say that judges continue in office on the same terms and conditions as before the constitution is brought into effect.

Option 2: Judges remain in office but are subject to a ‘vetting’ process

On this approach, every judge would be given an opportunity to resign (with appropriate benefits). Those that remain in office would be ‘vetted’ by an independent commission (possibly an Interim Judicial Service Commission). The main aim of this process would be to ensure that any serious complaints against sitting judges are properly considered. If, on an initial review of the record of a judge, including any complaints against him or her, the commission were to find that further investigation is warranted, the matter would be referred to the process established in the constitution for investigating complaints against judges.

The constitution would guide the process to be followed by the commission but the commission would establish its own procedure and develop criteria for the process within a framework provided by the constitution.

Once ‘cleared’ in the vetting process, the judge would continue in office, and be free to be considered for more senior judicial positions.

Option 3: Reappointment of Judges

On this approach, all judges would lose office when the constitution comes into effect but, to ensure that the court system continues working, they would continue working in an acting (or ‘interim’) capacity. A process would then be followed which allowed judges to reapply for positions on the bench. (Those that chose not to reapply would be provided with suitable retirement benefits once they had completed all outstanding work.) The process of reappointing judges would be done by the Judicial Service Commission at the same time as filling new positions in the judiciary.

Assessment

Each of these approaches has advantages and disadvantages. The weight of opinion in submissions and the approach taken in the CKRC and Bomas drafts suggests that simply to allow judges to continue in office would not be acceptable. But, the experience of the ‘radical surgery’ of 2003 must also be kept in mind. It is crucial to have a process which respects the independence of the judiciary and the integrity of legal processes and builds public confidence in the superior courts (ie the High Court and Court of Appeal).

Options 2 and 3, the ‘vetting’ process and an approach that requires judges to reapply for office, achieve the same purpose: judges with problematic records will not be able to remain on the bench. The ‘vetting’ approach may be more acceptable than the more radical option of removing judges and then reappointing them. However, it does have some disadvantages - a special ‘vetting’ commission would be needed and there is a danger that the process will be perceived as a witch hunt. The ‘reappointment’ approach, on the other hand, may be more disruptive as more judges may choose resignation. On the other hand, it would allow all positions in the superior courts to be filled by the same body, following the same process.

4.2 Magistrates and other subordinate court judges

Generally, there is not a call for the replacement of magistrates and members of other subordinate courts. The approach that seems to command most support in this regard is that the newly composed Judicial Service Commission should have the authority to investigate complaints against them (whether the complaint arose before or after then new constitution comes into effect) but that no special process should be adopted to vet every subordinate judge. This approach also reflects the fact that decisions of the subordinate courts are reviewable by higher courts and so these judicial officers are subject to control by judges of the superior courts.

5. Commissioners and other appointed constitutional office holders

The new constitution includes a range of commissions and constitutional office holders. Some of these are included in the existing constitution (eg the Attorney-General); others already exist but are established by an Act of Parliament and not included in the Constitution (eg the Human Rights Commission); yet others are new (eg the Land Commission).

Arrangements concerning the new positions are relatively simple. The new constitution can set a time period within which they must be established. Arrangements concerning existing positions are more complicated. The Constitution will have to include provisions concerning what happens to people serving in existing bodies and when these bodies start operating under the new constitution.

A fresh start

The CKRC (Eighth Schedule item 8(1)) and Bomas (Sixth Schedule item 7(1)) approach to existing institutions is a fresh start: they would allow people holding office under the current constitution to continue in office on an interim basis until an appointment is made under the constitution. (These drafts do not appear to deal with people who currently hold office under a law and whose position will in future be governed by the new constitution (such as the Human Rights Commission).)

Retention of status quo

The Wako/PNC draft (Sixth Schedule item 7(1)) retains existing office holders: they are to continue in office as if appointed under the new constitution. The Wako draft does not specify what happens when the new constitution imposes a term limit on such offices such as is proposed for the Attorney-General. Is the term to start running from the date the constitution takes effect or is should the term served be assessed from the actual date on which the person assumed office?

Assessing offices individually

It may be difficult to deal with all constitutional offices in a similar way: the situation of an office currently established by statute is, in many ways different from those currently established under the constitution. And, the situation in relation to offices whose incumbents currently serve a limited term is different from those offices whose current incumbents have no term limit. This suggests yet another approach: treating offices differently according to their specific circumstances now.

Assessment

Many people have suggested treating all offices alike. At first glance this sounds fair but a closer examination of the issue shows that (i) in fact there are very few constitutional offices that need transitional arrangements and (ii) very different conditions apply to each affected office (eg the Attorney-General and the office of the Controller of Budget and Auditor-General are to be split in different ways; the gender commission currently has a very specific brief etc). This suggests that serious consideration should be given to individual treatment of those offices.

6. Adopting new laws

The challenge here is to ensure that the new laws envisaged by the new constitution are promptly enacted. Not only do all the drafts propose many new laws but many of the laws that are proposed would be complex pieces of legislation.

Each of the existing drafts includes a table which identifies the Acts needed and specifies the time within which they must be adopted. The Bomas and Wako drafts take the matter a step further. Under Bomas Art 308, if Parliament fails to adopt a particular law within the time stipulated in the table, anyone may petition the High Court for a declaratory order instructing Parliament to enact the law within a specified period. If this is not done, Parliament is dissolved. The Wako draft (Art 287) offers a less radical solution. It requires such bills to be prepared by the Attorney-General and the Commission on

Implementation of the Constitution (see 7. below) and tabled in Parliament. If such a bill is not passed in time, first, the Wako draft gives Parliament the option of extending the time once. If this does not work, the bill prepared by the A-G and Commission becomes law.

Initial reactions to the Wako draft are usually negative: allowing a bill to take effect without it actually having been passed by Parliament seems undemocratic and to allow a member of the executive undue power. However, the Wako approach has real strengths. First, while the extreme measure of dissolution of Parliament in the Bomas may put the necessary pressure on MPs, in the event of the law not being passed it may also lead to a flouting of the Constitution. It puts enormous pressure on the new constitutional order. Second, under the Wako draft, the Bill tabled in Parliament will have been agreed to by an independent commission. Thirdly, the Attorney-General under the new constitution will be serving in an independent office and not be an appointee of the executive. Finally, the Bill concerned will have been tabled in Parliament. MPs will have had the opportunity to take it up if they have fundamental objections.

Another approach might be to attach different consequences to different provisions. For instance, in some cases the transitional Schedule could include 'default' provisions which will come into effect if the relevant law is not adopted. This is more easily done in relation to rights than other issues. Dissolution of Parliament may be retained in relation to devolution and other laws that affect the structure of the state in a fundamental way, and the Wako approach could apply to other cases.

7. Establishing devolved governments

Implementing a system of devolved government and, in particular, establishing new legislative and executive bodies that can respond to the needs of people and deliver services effectively is always a huge challenge. All three drafts, the CKRC, Bomas and Wako drafts, envisage a special commission to oversee

the implementation of the constitution. (CKRC Art 292; Bomas Art 299; Wako Sixth Schedule item 13). Clearly, monitoring the implementation of the system of devolved government would be a major component of the work of such a commission. A critical part of this work will be to ensure that devolved governments are not given tasks before they have the capacity to implement them – this will set them up for failure. On the other hand, it is well-known that no national government is eager to give up powers, so a system needs to be crafted to ensure that the national government cannot delay devolving power on the basis of claims of incapacity of the devolved governments.