

# DIALOGUE REFERENCE GROUP

## Reconciling and Restoring Kenya Through Structured Dialogue

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### A SCORE CARD ON THE IMPLEMENTATION OF CONSTITUTION OF KENYA 2010 TEN YEARS LATER

August 27, 2010 - August 26, 2020

#### I. EXECUTIVE SUMMARY

1. The Dialogue Reference Group (DRG) was established in 2016 to advance good governance, peace, cohesion and stability of the country with a focus on ensuring free, peaceful and credible elections in 2017. In the wake of the crisis that emerged post 2017 elections, the DRG has focused on addressing seven issues<sup>1</sup> that have a big impact on the nation, and which are detailed in the Framework for National Dialogue<sup>2</sup> that was published by the DRG in February 2018.
2. This Score Card on the implementation of the Constitution of Kenya 2010 by the Religious leaders who convene the DRG was developed to mark the tenth anniversary of the promulgation of the constitution as a tool to assess the extent to which the country has been faithful in implementing the Constitution. We have reached the conclusion that the State has made efforts to implement the Constitution in form but has failed to implement it in substance in order to honor the spirit and essence of the very Constitution. Whereas many institutions have been set up, laws have been enacted, policies have been adopted, and county governments have been established, most of these institutions and structures have not aligned to the constitution.
3. As we mark the tenth anniversary of the promulgation of the Constitution, it seems that the words of Prof Okoth Ogendo that countries have constitutions without constitutionalism ring true in our context. The culture of constitutionalism has not yet taken root. What has inhibited the move towards constitutionalism? We think that vested interests in state institutions, structures, processes and society have continued to undermine the emerging of the constitutional culture that upholds and engenders the national values and principles outline in Article 10 of the Constitution. These vested interests benefit from the current status quo and are likely to be threatened by the leveling off of the

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<sup>1</sup> Electoral reforms & justice, Constitutional and institutional reforms, National Cohesion and reconciliation, Combating corruption, Security sector reforms, Economy and service delivery and Strengthening Devolution;

<sup>2</sup> See the Framework for National Dialogue that was launched by the DRG on 27<sup>th</sup> of February 2018 weeks before the announcement of the “Handshake” between President Uhuru Kenyatta and Rt Hon Raila Odinga

ground and the consolidation of a democratic constitutional culture that upholds due process, the rule of law and where impunity is not tolerated.

4. This Score Card report reports concludes that that there is need for constitutional review for refinement of the constitution but there has not been any honest dialogue among Kenyans on what needs to be reviewed, why and how and what needs to replace what is currently provided. The ruling elites are convinced that what they consider ought to be amended is what ought to be reviewed. This contradicts the very spirit of the constitution which requires that the values in Article 10 guide any public process and those values be upheld.
5. We also conclude that the timing for these amendments is inappropriate. The National Dialogue Conference of September 11-12, 2018 strongly urged the country to carry out and conclude any post election constitutional, legal and administrative review and reforms by December 2019 to allow for the implementation of the reforms and processes. The COVID-19 pandemic negative effects on the economy, governance and civic processes and social services including the closure of worship houses and education institutions have further complicated the scenario. **Any reforms that should be carried out before the 2022 elections must be parliamentary driven in order to avoid a referendum at all costs.** We also recommend strongly that any of these reforms be carried out through a consultative and inclusive process by all stakeholders to foster and promote national cohesion, peace and solidarity.
6. The Faiths Community leaders call on various sectors of society to play their rightful role by taking priority steps to ensure consolidation and faithful and transformative implementation of the constitution, enhancing of the culture of constitutionalism, rule of law, and democratic and inclusive governance. These various stakeholders include the people of Kenya, the three arms of government, security sectors, commissions and independent offices among others.

## II. BACKGROUND AND INTRODUCTION

The Dialogue Reference Group has since its formation in 2016 played a key role in resolving conflicts among various institutions and political players that pose a direct threat to good governance, peace, cohesion and stability of the country.

In the wake of the post 2017 election the DRG has focused on addressing the seven issues that have a big impact on achieving the stated goals of good governance, peace, cohesion and stability as these seven areas were also outlined in the Framework for national Dialogue<sup>3</sup> that was published by the DRG in February 2018.

This Score Card on constitution implementation is issued by the Religious leaders who convene the DRG to mark the tenth anniversary of the promulgation of the constitution. The central question of

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<sup>3</sup> See the Framework for National Dialogue that was launched by the DRG on 27<sup>th</sup> of February 2018 weeks before the announcement of the “Handshake” between President Uhuru Kenyatta and Rt Hon Raila Odinga

this Score Card is to assess the extent to which we as a country have been faithful in implementing the constitution. The related questions are the following:

- i) Whether the culture of constitutionalism has taken root? If yes, what has enabled this? If No, what has inhibited the move towards constitutionalism? This analysis is found in section three of this Score Card report.
- ii) Whether the call for constitutional amendments is justified? Is the call based on any audit? Is the timing for these amendments appropriate? This question is handled in the conclusions subsection of this report.
- iii) What needs to be done for the faithful and transformative implementation of the constitution and the enhancing of the culture of constitutionalism, rule of law, and democratic and inclusive governance to take root and be secured? These questions are answered in the recommendations sub-section of this report.

It is our hope that this score card on Constitution implementation ten years later will activate conversations across the country and also enhance the DRG's Agenda setting/Advocacy role in the coming days. Similarly this Score Card report shall form the basis of awareness creation and education to the rest of the country mainly through our religious forums. It is also intended to strengthen our role of agreement promotion through diplomacy, negotiation for institutional reform towards competent and credible processes; and finally to strengthen accountability efforts. We are hopeful that each institution and process shall be monitored and evaluated to ensure that it is according to the constitutional standard and principles in the constitution and that they uphold the provisions of Article 10 of the Constitution.

### **III. CHAPTER BY CHAPTER ASSESSMENT ON CONSTITUTION IMPLEMENTATION SO FAR**

In this section, a scan through all the seventeen chapters of the constitution has been carried out to give a general view and assessment of the constitution implementation since the promulgation on August 27, 2010.

#### **CHAPTER 1: SOVEREIGNTY OF THE PEOPLE AND SUPREMACY OF THE CONSTITUTION**

Chapter one of the constitution calls on all to defend the constitution and our nationhood. The citizens of Kenya and various constitutional and public agencies have tried to promote this ideal. Many court cases have been filed to check acts by the executive and parliament that have been interpreted as undermining the constitution. Most of the time however Kenyans have shown partisanship and come out to defend their political party leaders, their tribesmen and women, their allies and friends as opposed to defending constitutional values and principles.

## CHAPTER 2: THE REPUBLIC

Chapter 2 establishes Kenya as a multi-party democracy. This has not progressed well over the last ten years. Political parties are not getting institutionalized. Pre and post election alliances and coalitions seem to be ad hoc and not based on anything more than an attempt at winning election or sharing the spoils.

Chapter 2 also outlines the National Values in Article 10. These include patriotism, national unity, sharing and devolution of power, rule of law, democracy and participation of the people, human dignity, equity, social justice, inclusiveness, human rights, non-discrimination, protection of the marginalized, good governance, integrity, transparency, accountability and sustainable development. Professors Yash and Jill Cottrell Ghai have observed as follows;

*“Much of the Constitution is woven around them, and the authors of these articles often turn to them. The values are divided into four categories: the nature of the state; the rights of the people; mode of governance; and sustainable development. The state is based on patriotism (rather than ethnicity), national unity, sharing and devolution of power, democracy, participation of the people, and the rule of law. People’s rights are shown in the stress on human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised. Governing the country requires good governance, integrity, transparency and Accountability”<sup>4</sup>. These values have not received keen attention.*

There is need to:

- i. Cultivate a culture of upholding national values and transforming Kenya into a value based and value-driven nation and society.
- ii. Develop a curriculum in schools and for all public servants that engenders the national values. As Faith Leaders, we have called for the investment in civic education. A civic education, ethics and Values Commission is needed urgently.
- iii. Relook at Kenya’s reward system through a transitional justice framework that deals with the past, promotes integrity and ethical conduct, punish corruption and abuse of office and finally ensures non-repetition of these egregious violations of the moral and ethical code in the past.
- iv. Disputes with neighboring countries as regards borders and territories still persist and need to be resolved. All Kenyan territories especially counties that were historically marginalized ought to be developed for all citizens to feel and be proud of their Kenyanness.

## CHAPTER 3: CITIZENSHIP

Chapter 3 deals with citizenship and provides the entitlements of citizens, how citizenship is acquired and the options for dual citizenship. The government of Kenya has made significant steps to implement the

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<sup>4</sup> Katiba 2010: Achievements and Challenges, Katiba Institute (2019), Eds Yash, Jill and Emily

chapter on citizenship as outlined in the constitution. The access to passports and national Identity cards has improved with the decentralization, digitization and other policy and administrative actions that the government has taken since 2010.

We note, unfortunately, that the provision of these documents and immigration services continues to be a loophole for corrupt tendering and the diversion of key resources into projects such as Huduma Number, various generations of IDs and Passports, digitization of Birth Certificates etc. Since 2001, it has been recommended that all these documents including registration as a voter should be centralized and streamlined.

Similarly, Kenyans in the Diaspora have often times been under-served by the Kenyan government especially those who fall into distressful situations in foreign countries. The Kenya government has generally been slow and unresponsive to act to bail out and serve these citizens as it should naturally be the case. Kenyans in the Diaspora have not fully been recognized especially in their right to vote.

There is need to ensure:

- i. Establishment of immigration departments in all embassies and diplomatic missions and offices.
- ii. Make the dual citizenship processes and the granting of citizenship to children of Kenyan mothers with non Kenyan fathers easier and faster in observing the principle of equality.
- iii. That every citizen upon attaining the age of majority is accorded the necessary documents and instruments including a copy of the Constitution in order to enable Kenyans to participate in the political economy but also to know their responsibilities and rights.

## **CHAPTER 4: THE BILL OF RIGHTS**

Chapter 4 is a very progressive and detailed bill of rights. There has been little or no implementation towards full realization of the bill of rights in practice. The laws have been passed practice however lags behind. The Executive continues to misuse the police and other disciplined forces to quell dissenting voices. The rights to fair administrative action, right to access justice and rights of arrested persons are severely abused. The Executive continues to use arrest as a tool for quelling dissent, and the carefully planned Friday arrests are designed to keep one behind bars throughout the weekend as a punishment. Arrests are made in private residences in the middle of the night where the person being arrested is not a flight risk. The right to picket has been gravely clawed back. The high-handed crackdown on demonstrations during the Saba Saba of 2020 and against demonstrations across the country petitioning government to arrest the COVID-19 millionaires and their facilitators in government does not augur well. The right to information is hardly adhered to. The socio-economic rights to health, water, sanitation, housing and fair employment opportunities have been affected by corruption.

There have been strides in securing the rights of children, women, PWDs, the elderly, minorities and marginalized. Policies are in place to cushion these groups, loan products targeting these groups have been created, hospital insurance and monthly cash tokens for the elderly is in place, the rights to inherit

land equally for men and women, brothers and sisters has taken root firmly. Despite the fact that Article 27(8) that requires all elective and appointive bodies to be comprised of not more than 2/3 of the same gender has not been fully implemented, there are more women, youth, PWDs, minorities and marginalized in elective and appointive bodies.

There is need for the state to:

- i. End extra judicial killings. The Kenya National Commission on Human Rights has proved tame and toothless in securing the right to life of many Kenyans who have fallen victim to this scourge. If we cannot end this trend of extra judicial killings, torture and inhumane treatment, then our institutions and the covenants that we proclaimed in the Constitution shall remain empty and hollow.
- ii. Ending the discrimination of women, PWDs, minorities and marginalized citizens needs to be renewed across the state and society. The principle of Equality and the dignity of the human person is the touch stone of our democracy.
- iii. To ensure that Health care especially in emergency situations is reviewed. The COVID-19 crisis has exposed fundamental short-comings in our healthcare system.
- iv. Develop policies and programs and fund these to improve access to education, healthcare, housing, water, food and employment opportunities.
- v. There is need to have a national conversation on how a country with fifty million people without industries worthy talking about shall build its economy in order to create opportunities for incomes through employment, businesses, innovations, internationalization of trade and through other strategies.
- vi. Barriers to accessing political and civil rights including the right to access to information, and the right to picket should be removed.
- vii. Ensure greater vigilance in protecting consumer rights. Too often there are incidences of substandard products in the market, including food such as sugar laced with mercury, and maize flour that has aflatoxin. Medicines have also been affected. This endangers the lives of citizens and is prompted by greed and corruption.
- viii. The Executive needs to exercise fidelity to the Constitution and stop using backdoor tactics to quell dissenting voices, frustrate citizens and democracy by carrying out illegal and improper arrests. The threat of arrest hangs like the Damocles sword.
- ix. Strictly implement Article 27(8) of the COK which that requires all elective and appointive bodies to be comprised of not more than 2/3 of either gender.

## CHAPTER 5: LAND AND ENVIRONMENT

Land continues to be an emotive issue for Kenyans. The registration of Land continues to be a challenge and the possession of a title deed is no longer sacrosanct. We continue to witness demolition of buildings in land disputes, double registration of property, squatter invasions, forest invasions.

The TJRC unearthed historical injustices related to land in several parts of the Country, and these issues need to be addressed. The allocation of Government land to individuals has been shrouded in secrecy and for the benefit of the connected few, mining rights have been granted to private individuals, mostly foreigners with no regard to community interests, and in certain places people from other communities live under the constant threat of being attacked and evicted.

Environmental issues such as pollution, deforestation, encroaching on game reserves and parks, land degradation continue to occur due to ineffective implementation of laws and policies by the oversighting authorities.

There is need to:

- i. Implement the recommendations in the TJRC report, which will result in recognition of community rights over land and shall also address historical injustices.
- ii. Undertake a complete audit of all land registration in the Country.
- iii. Strictly implement without favour laws and policies that protect land and the environment from pollution, deforestation, degradation and invasion of game reserves.

## **CHAPTER 6: LEADERSHIP AND INTEGRITY**

This chapter creates the principle of servant leadership, and requires leaders and civil servants to ensure their actions are consistent with the purposes and objects of the Constitution, demonstrates respect for the people, brings honour to the nation and dignity of the office and promotes public confidence in the integrity of the office. Kenyan leaders have failed dismally at this. Their conduct is dishonourable and does not evoke confidence in their integrity. Kenyan leaders have no respect for the people of Kenya but expect to be overly respected. They do not understand the principle of servant leadership, they demonstrate lordliness.

Chapter six also intends to curb corruption, this has not been achieved. Kenya is losing nearly Kenya Shillings 1 trillion annually to looting, grand corruption going mainly to tenderpreneurs who never supply goods, services and works worth the value of the money they fetch from the public coffers. seems to have been whole sabotaged by the bureaucrats and those in power. Many corrupt and Kenyans with dubious backgrounds are getting cleared by political parties and IEBC to contest for elective positions and are getting elected to continue the looting and abuse of office from within. Investigations are commenced and never see the light of day. Cases are kept going for too long. The prosecution seems unable to rapidly and regularly secure high-level convictions probably due to interference from the Executive.

There is need to:

- i. Carry out a lifestyle audit on all public servants and elected leaders and require them to explain the source of their wealth, every six months.
- ii. Require all newly elected leaders and newly appointed officers to declare their wealth on taking up office, explaining the source of their wealth.
- iii. Establish a six-month timeline for concluding corruption cases in courts specially set to handle corruption. This will need the increase of the capacity of the courts to prosecute these cases effectively to show that corruption and crime does not pay in Kenya.
- iv. Increase the number of anti-corruption courts, and ensure they are in all parts of the country. There is no need to bring all cases to Nairobi which causes a backlog while courts outside Nairobi are not so busy.
- v. Publicize persons/companies found engaging in corruption, especially those related to procurement, and have them blacklisted for five or more years.
- vi. For every tender publish in the newspaper list of all those who applied including details of the directors, list of Company/person awarded stating reasons, value of the tender.
- vii. Enact a law that permits the public to challenge the value of any tender.
- viii. Delete Article 99(3) which shields individuals who are under investigation and prosecution from being excluded from vying for public office. Any person who is suspected of corruption or a criminal conduct should be barred from contesting. This will ensure those who want leadership steer clear of corrupt deals and will also ensure speedy disposal of cases so as not to unfairly bar a person from contesting.
- ix. Enact law requiring the executive to give monthly updates to the nation, with names, value and data of all corruption cases being investigated, prosecuted and concluded. We need to maintain a national corruption database, and it should be available online for all to access and aid with due diligence. Anyone with a pending case should in addition not being permitted to contest, and also not access jobs or new tenders.

## **CHAPTER 7: REPRESENTATION OF THE PEOPLE**

### **PART 1- Electoral System and Process**

Kenya is still grappling with holding elections that meet the international Standards as outlined in Article 81 of the constitution. Elections in Kenya are very expensive, violent and never transparent or fair.

Our electoral system known as the first past the post (FPTP) with sprinkling of proportional representation through nominations to parliament and the County Assemblies has its strengths and weakness.

There is need to:

- i. Make provisions for both automated and online voting which are cheaper.



- ii. Demystify vote counting and tallying by employing electronic counting as votes are cast. The count should be made public as votes are cast. The person voting will be able to verify that their vote has been credited correctly. This will be a check on the vote count.

## **Part II: IEBC and delimitation of electoral units**

The delimitation of electoral boundaries that created 290 constituencies and 1450 Wards has been seen to have addressed the injustices caused by the KANU gerrymandering fairly extensively. However, Kenyans think that 290 constituencies are too many and the 47 counties has resulted in more government and not better governance.

The IEBC has failed to inspire confidence among Kenyans from across the board. It still is an institution that has not earned the trust of Kenyans. The Country is months into the next general elections and there is little that has been done to promote the independence, accountability and capacities of the IEBC. The commission is not even well constituted to begin with after the resignation of four of its six Commissioners including the vice chairlady.

There is need to:

- i. Rethink the process of appointment of members of the Commission.
- ii. Establish processes that will ensure independence of the Commission and shield it from manipulation by the Executive and Political Parties. This should include financial guarantees from the exchequer, security of tenure for members of the commission, ensure the Executive has no role in the appointment of the members of the Commission and require all members of staff to report both functionally and administratively to the Commission who should have power to recommend reassignment and sacking of members of staff.
- iii. We need to lower the cost of holding elections by dealing with the corruption in tendering for materials and technology but also by getting Kenyans to be honest people who do things honestly and with integrity. The security features needed to conduct elections in Kenya remain too high.

## **CHAPTER 8: THE LEGISLATURE**

### **Part 1 – Establishment and role of parliament**

The Constitution creates a parliament that truly represents Kenyans, carries out oversight and enacts legislation. The current parliament has failed fundamentally in this regard.<sup>5</sup> Parliament has tolerated partisan practices and acts to protect party interests and not national interests. Parliament has failed to effectively act as a check on the Executive and have contributed to massive corruption, increase of the Kenya's debt burden, the appointment of persons known to be corrupt or in cases do not have required

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<sup>5</sup> See Wamere G. and Musila J, *The vulnerable Guardian Angel: Kenya's Parliament in the Post 2010 Constitution* in Katiba 2010: Achievements and Challenges

qualifications to top Government positions, enacting legislation that are not in the best interest of the country, such as the Security Laws Amendment Act of 2014 which seemed to undo substantially the constitutional provisions that empowered the National Police Service Commission. The amendments effectively gave massive powers back to the President to among others appoint the Inspector General and the two Deputies, the Director of DCI and the Members of the National Police Service Commission itself. This eroded the independence of the institution of policing in Kenya.

Parliament has also failed to enact critical legislation like the one requiring Parliament to be comprised of no more than 2/3 of the same gender. Senate has also failed to guard citizens interests in devolution and sits by as corruption continues unabated in the Counties. Cases of corruption in the counties that are brought to their attention are treated as party contests, and they act to protect one of their own from prosecution, rather than as custodians of the Constitution and devolution.

There is need for:

- i. Greater citizen vigilance on the conduct and performance of individual members of Parliament, that results in a public rating that affects their re-election. This will make members of Parliament accountable to the people.
- ii. Civic education on the recall clause, that shall enable citizens recall errant members of Parliament.

## **Part 2- Composition and membership of Parliament.**

Article 81 requires Parliament to be comprised of not more than 2/3 of the same gender. To date Parliament has failed to meet this Constitutional requirement. This is a big low to equality, gender parity and representation.

There is need to:

- i. Enact provisions that give life and meaning to Article 81 of the Constitution.

## **CHAPTER 9: THE EXECUTIVE**

Chapter 9 establishes the Presidency, Cabinet and the Office of the Director of Public Prosecutions. It states that the President may appoint Cabinet Secretaries, Attorney General, Secretary to Cabinet, Permanent Secretaries, Principal Secretaries, High Commissioners, ambassadors, and diplomatic and consular representatives and any other state or public officer whom the constitution empowers him to appoint. The President cannot therefore purport to create a position known as CAS and appoint them. That is unconstitutional. This is a backdoor way of rewarding party loyalists who failed to get elected and amounts to abuse of the constitution and flagrant wastage of the country's resources.

There is need to:

- i. There is need to address the rampant and notorious tendency by the Executive to rule through Executive orders and decrees that have seen impunity become a culture. The skewed

appointments, awarding of tenders and contracts by the executive departments, the shadowy operations of the numerous of State Parastatals and agencies among others have largely rendered the COK 2010 hollow and the promise of transformation a mirage.

- ii. To have a prosecutor who upholds national values and the constitution. The public prosecutor remains one of the most consequential offices in promoting constitutionalism, the rule of law and good governance in Kenya. Unfortunately, this Department continues to be slow and unable to sustain prosecution until their logical conclusion. This has created the climate of impunity where those who are close to the powers that be seem to act with impunity and to get away with gross criminal acts.

## CHAPTER 10: JUDICIARY

The Constitution establishes the judiciary as an arm of Government and its independence is enshrined. The Executive and Parliament have however used the power of the purse (parliament) and the power of the sword (the Executive- in executing and upholding court orders and judgments) to undermine the independence of the judiciary. The Judiciary has been blamed for slowing down the war against corruption. However, the Chief Justice has consistently stated that the problem lies elsewhere<sup>6</sup>. The Chief Justice has argued that the problems are caused by the agencies that present weak and sham investigations and weak evidence to the courts but still expect judgements based on that weak evidence and shoddy investigations and secondly on the executive and Parliament failing to resource the judiciary adequately to employ judges and magistrates to handle the more than 400,000 cases that the judiciary has to handle annually leading to a backlog of cases exceeding one hundred thousand annually.

**Religious leaders and other non-state actors have been accused of failing to stand with the judiciary on principle hence leaving the judiciary exposed to the politics of the “revisiting” of the judiciary, slander and a vicious attack from the executive and parliament.** The implementation of the judiciary fund has not been effected in the manner the constitution requires that it be operationalized.

Corruption continues to thrive in the judiciary .

There is need to;

- i. Urgently establish the judicial fund.
- ii. Secure and guarantee the judiciary vote from the exchequer.
- iii. Require the JSC to hasten hearing of discipline cases and complaints against judicial officers and make the proceedings and outcome public for awareness.

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<sup>6</sup> See the Chief Justice Maraga,D, Presentation to the Multi-Sectoral Conference on Combating Corruption at Bomas of Kenya on 24-25<sup>th</sup> January 2019.

## CHAPTER 11: DEVOLVED GOVERNMENT

Devolved governments have overall activated the counties and to a certain extent enabled citizens' participation, service delivery and spurred economic growth in the counties as provided for under the principles of devolved governance. In some counties, it is the first time since independence for tarmacked roads and other basic infrastructure to be built. Corruption, incompetence, nepotism and clan/ethnic/political party-based discrimination in the devolved governments needs to be addressed urgently in order to ensure that devolution delivers the promise it holds for Kenya's transformation.

There is need to:

- i. allocate more resources based on an accurate costing of functions;
- ii. the creeping trend of recentralization of resources and delayed release of funds to the devolved governments ought to be addressed;
- iii. Address corruption and all the negative vices thriving in the counties.
- iv. Address the failure by County governments to further decentralize to the village and Wards. The County Head quarters have become the new center of capturing and spending most of the devolved funds leaving the villages largely underserved.
- v. The discrimination against women and other disadvantaged groups has not been addressed. Most national and constitution agencies established to address these maladies have not been effective in ensuring the national and county governments uphold the constitutional values and principles.

## CHAPTER 12: PUBLIC FINANCE

The Constitution has elaborate provisions on public finance, public debt, revenue allocation, budgets and spending and controls of money. It provides for equitable sharing of national resources and establishes the equalization fund which is to improve infrastructure in marginalized areas. Parliament oversees all financial activities including budgets, revenue allocation, national debt and audits.

We have discussed above that Parliament has failed in its oversight role, that has led to runaway national debt, corruption and stalemate on revenue allocation.

The Chapter establishes the Salaries and Remuneration Commission that seems to have had little impact on rationalizing public spending on the wage bill.

There is need to:

- i. Enact timelines for approval of budgets and revenue allocation by Parliament.
- ii. Overhaul the public procurement system to ensure that it is not captured by a few individuals who inflate prices of supplying services, goods and works and therefore denying Kenyans the

value for money. This is a key driver of poverty and the inability to provide services across the country.

- iii. Require Parliament to take its role in overseeing public expenditure seriously.
- iv. Rationalize and establish a national wage bill that sets out job groups, earnings and benefits, that will apply to everyone including Parliamentarians, Cabinet Ministers and the Presidency so that they cannot wantonly increase their salaries, and also to ensure uniformity in earnings for all people that are paid from the exchequer.

## **CHAPTER 13: THE PUBLIC SERVICE**

Chapter 13 sets out the values and principles of public service. These include professionalism, high ethical values, efficient and economic use of resources, responsive and prompt service, accountability, transparency and ensuring people participation in processes. This has not been broadly achieved although there is marked improvement in the delivery of services, especially through the Huduma Centre's.

The chapter establishes the Public Service Commission and the Teachers Service Commission. The Public Service Commission is delivering on its mandate, job opportunities are advertised, and fair recruitment practices are in place. The Teachers Service Commission is still playing cat and mouse with its employees the teachers, several agreed upon salary increments are yet to be implemented this affects learning in our schools.

There is need for:

- i. A thorough audit of the diversity in the public service especially at the senior levels to ensure that nepotism, tribalism and other discriminatory practices do not take root.
- ii. Sanctions for public servants who do not uphold the values and principles for public service.
- iii. The teacher's income to be provided for by the Salaries and Remuneration Commission according to scale so that there is no discrimination against teachers.

## **CHAPTER 14.: NATIONAL SECURITY**

The Constitution provides that national security is subject to the authority of the Constitution and should be pursued in compliance with the law and with utmost respect for the rule of law, democracy, human rights and fundamental freedoms. Security organs are not to act in a partisan manner, further interests of a political party or prejudice a political interest or cause that is legitimate under the Constitution.

Our security organs have greatly failed to live by the Constitution. Rule of law, respect for human rights and fundamental freedoms are unknown to them, and they frequently violate rights and the rule of law, in the manner of arrest, in dispersing picketers and in providing all round security to all Kenyans.

Security organs also frequently act in a partisan manner that further the interests of certain individuals and political parties. This is especially visible during elections, and in the recent arrest of senators.

There is need to:

- i. Hold the Inspector General accountable for unconstitutional acts of his officers.
- ii. Demand IPOA takes keener interest in pursuing unconstitutional acts by security organs. They need to be proactive and vigilant; they do not have to wait for a complaint, and they should publicize and communicate actions they are pursuing, establish an online database accessible to the public and give monthly updates.
- iii. Enact penal consequences for officers who flout the constitution and violate citizens rights.
- iv. Depoliticize the police department by giving the Police department its autonomous budget for equipping, kitting, housing, providing medical insurance and other essentials for an effective and accountable service. The control of the Police Service by the Office of the President/Interior has generally made the police to become a regime police force not a police for secure the rights of all Kenyans regardless of their status, political affiliation or creed.

## **CHAPTER 15: COMMISSIONS AND INDEPENDENT OFFICES**

The Constitution establishes several independent commissions with a duty to promote constitutionalism, secure the observance by all state organs of democratic values and principles, protect the sovereignty of the people and to work for advancing the Kenya “Tuitakayo”. The Constitution provides that the commissions shall consist of at least three, but not more than nine members.

The Auditor General and Controller of Budget are named as independent offices. The Independent Commissions are subject only to the Constitution and the Law. In reality however there is a lot of interference from the Executive and Parliament. Parliament at times misuses its oversight role to subtly threaten office bearers to back down on certain investigations or to carry out certain activities. An instance is where the former auditor general had to drop an investigation into funding for a parliamentary trip to avoid his office being defunded by the National Assembly.

There is need to:

- i. Provide a definite percentage of the national revenue to independent commissions and offices so that they are not at the mercy of Parliament.
- ii. Reduce the number of members in each independent commission to three as their role is to steer policy and the actual work is done by the Secretariat.

## **CHAPTER 16: AMENDMENT OF THIS CONSTITUTION**

This chapter provides instances where an amendment of the constitution must be done through a referendum. It also provides that the amendments can be done through popular initiative or by a parliamentary initiative. Amendments that touch on the supremacy of the Constitution, the territory of Kenya, the sovereignty of the people, the national values and principles of governance, the bill of rights, the term of office of the President, the independence of the judiciary, the commissions and independent offices, the functions of Parliament, the objects, principles and structure of devolved governments, and the parts of the constitution that relate to its amendments, can only be done through a referendum.

So far this has been complied with fully. However it is emerging that the political class is planning to force amendments that favour them that may not respect the wishes of the people of Kenya for better government and not more government and for amendments that will make government more responsive to the needs of Kenyans. We, the religious leaders have insisted that any referendum or constitutional or legal amendments and reforms must be through a consultative, inclusive and not a partisan, parochial and contested path or route. A contested referendum for example will imperil the delicate cohesion and co-existence the country is experiencing. A referendum that will flare up ethnic, religious and political tensions and conflicts will in the end be counterproductive.

## **CHAPTER 17: GENERAL PROVISIONS**

Chapter 17 provides that every person has the right to institute court proceedings claiming that the constitution has been contravened or is threatened with contravention. This provision has been greatly implemented. The judiciary established constitutional courts that hear and determine matters claiming violation of constitutional rights or contravention of the constitution, and several constitutional petitions have been heard and determine, including petitions that have found the President to be in contravention of the Constitution.

This part of the Constitution has been complied with fully.

## **IV. CONCLUSIONS AND RECOMMENDATIONS**

### **CONCLUSION**

This Score Card report reports concludes that that there is need for constitutional review for refinement of the constitution but there has not been any honest dialogue among Kenyans on what needs to be reviewed, why and how and what needs to replace what is currently provided. The ruling elites are convinced that what they consider ought to be amended is what ought to be reviewed. This contradicts the very spirit of the constitution which requires that the values in Article 10 guide any public process and those values be upheld.

We also conclude that the timing for these amendments is inappropriate. The National Dialogue Conference of September 11-12, 2018 strongly urged the country to carry out and conclude any post

election constitutional, legal and administrative review and reforms by December 2019 to allow for the implementation of the reforms and processes. The COVID-19 pandemic negative effects on the economy, governance and civic processes and social services including the closure of worship houses and education institutions have further complicated the scenario. **Any reforms that should be carried out before the 2022 elections must be parliamentary driven in order to avoid a referendum at all costs.** We also recommend strongly that any of these reforms be carried out through a consultative and inclusive process by all stakeholders to foster and promote national cohesion, peace and solidarity.

Kenya has a good constitution, but a constitution without constitutionalism creates a cultural dissonance that precipitates tensions in the society and the nation as is currently seen at all levels of the State starting from the presidency. There is need to push for fidelity to the spirit and letter of the Constitution. The noted shortcomings are:

- i) Lack of civic education and a weak demand from the citizens for fidelity to the constitution and constitutionalism by the citizens of Kenya and the various institutions established for this purpose;
- ii) The Executive has used Acts of Parliament and Presidential Executive Orders to undermine the letter and spirit of the constitution in many instances. With a weakening oversight over the executive since the political opposition has become absent and on the side of the ruling party, Parliamentary oversight has nearly vanished. Impunity is on the rise and the constitution is therefore threatened with derogation.
- iii) National values: Achieving national cohesion, healing and unity, eradicating incitement, hate speech, addressing unhealed wounds and dealing with the historical injustices, addressing inequality and discrimination remain a big challenge. There has not been any serious effort at transitional justice and dealing with the past which is necessary to heal the nation and engender/legitimize national values and ethos. A mere political leader's initiative at the top shall not suffice.
- iv) Lack of ethical leadership and integrity and the existential danger posed by corruption remains evident. More will need to be done between now and the 2022 elections to reverse the impunity and disregard for Chapter 6 provisions.
- v) An overbearing executive that acts with impunity and disregards court orders and the rule of law has shown that a good constitution without being respected cannot transform governance and the economic and social conditions of our country. Even if we instituted more constitutional amendments, if there is no culture of uphold the current provisions, there is no guarantee that the amendments will lead to a better situation for Kenya.
- vi) A parliament that is as a side kick of the Executive and that merely serves as a rubber stamp has proved to be a burden more than a guardian angel of good governance.



- vii) An underfunded and under-staffed judiciary whose court orders are disregarded is the most persistent evidence that the culture of constitutionalism and the rule of law has not taken root in Kenya a clear ten years since promulgation.
- viii) Devolution has failed to fully produce the intended benefits and continues to suffer frustration from the National Government through withholding of funds, recentralization tendencies and underfunding. The devolved governments equally suffer from the curse of corruption, ineptitude management and a lack of culture of stewardship.
- ix) Commissions have under-performed and underwhelmed, probably because most of the members of the Commissions are appointed as a reward from political party cohorts and have no commitment to delivering on the mandate of the commissions.
- x) Elections are very divisive, violent, expensive and lack transparency and fairness. This has boosted antagonism and led to a lot of mistrust, including a lack of legitimacy of the State and its institutions.
- xi) The Constitution did away with Provincial and District Commissioner's but they were reintroduced as Regional Commissions and Commissioners of many levels. There has been a lot of friction between the Regional administrators and the County Governments. The duplication and wastage that remains untouched needs a whole national conversation on what is to be done. This has affected service delivery and needs to be addressed.
- xii) The Bill of Rights is largely observed in breach due to the untransformed state. the orientation of the State since independence was to serve the ruling class who have captured the State. This orientation was intended to change to make all state and public officers including police officers and security institutions and all bureaucrats at all levels embrace servant leadership. The way the COVID-19 pandemic has been handled over the last six months in Kenya seems to indict all government agencies as existing to enrich the holders of public officers and not provide service as basic need and Human Rights of the citizens of Kenya. There were reports of ten governors installing ICU beds in their homes. The COVID-19 management was seen by those in government as an opportunity to make money from the emergency tendering that ensued.

## RECOMMENDATIONS

The Faiths Community leaders call on various sectors of society to play their rightful role by taking priority steps to ensure consolidation and faithful and transformative implementation of the constitution, enhancing of the culture of constitutionalism, rule of law, and democratic and inclusive governance. These various stakeholders include the people of Kenya, the three arms of government, security sectors, commissions and independent offices among others.

### **1. To the citizens of Kenya:**

- All Kenyan citizens are required to be guided by patriotism as opposed to *ukabila* and other consideration. Without this, constitutional implementation will never truly be faithful.
- Engage in active oversight over implementation of the Constitution at all levels of government;
- Instead of BBI, all citizens should be part of a Building Values Initiative (BVI) at all levels;
- Assure yourselves that there is need to amend the constitution, what needs to be amended, why it needs to be amended, how it needs to be amended and when it should be amended in the interest of the country. Do not be used to advance short term political objectives.
- Exercise the recall clause for Members of Parliament who derogate the Constitution and those who do not act in the best interest of Kenyans.
- Reject corrupt officials.

### **2. To the Presidency and the Executive**

- Encourage consensus on the need to amend the constitution, what needs to be amended, why it needs to be amended how it needs to be amended and when it should be amended.
- Deal decisively with corruption.
- Respect constitutionalism and rule of law.
- Promote the separation of powers and especially the independence of the Judiciary.

### **3. To Legislature**

- Shake off the rubber-stamp tag that the NA and Senate have gained under the COK 2010 by becoming serious oversight and accountability enforcers.
- Enact all outstanding laws that are necessary for constitutional implementation.
- Effect amendments that do not require a referendum.
- Ensure amendments protect Wanjiku's interests.
- Effect Article 81 that deals with the 2/3 gender rule.

#### **4. To the Judiciary**

- Protect and promote respect for the rule of law without fear or favour.
- Deal decisively with impunity.
- Play your advisory role and give directions where there are clear failures to implement the Constitution such as the 2/3 gender requirements for Parliament.
- Begin recruitment for the next Chief Justice before the current Chief Justice leaves office for a smooth transition.
- JSC should hasten conclusion and determination of complaints against judicial officers. The hearings and outcome should be made public for transparency and as part of accountability.

#### **5. To the Devolved governments.**

- Have a long-term plan for transformation in the Counties not short-term approach of doing many small projects all over the county that do not lead to a comparative edge for the counties;
- Root out corruption and nepotism in the Counties.
- Implement devolution unto the grassroots.
- Improve healthcare and delivery of other services.
- Lobby for reforms in revenue allocation.
- Protect devolution from the Executive machinations out to frustrate it.

#### **6. To the public finance institutions.**

- Audit and manage national debt.
- Ensure prudent application and investment of public funds in order to driven Kenya's socio-economic transformation.
- Take decisive steps to curb corruption and wastage of resources.
- Develop a national wage bill that applies to all persons who receive money from the Exchequer, including the Presidency, Parliament and Cabinet Secretaries.
- Publish all applicants for tenders and the subsequent successful tenderers plus the value.
- Blacklist all corrupt officials, employees and companies.

## **7. To the security organs.**

- Promote and respect the rule of law.
- Do not allow yourselves to be misused for partisan, parochial and sectarian interests.
- Take responsibility and hold errant officers accountable.
- Work for Kenyans not against Kenyans.

## **8. To the Commissions and Independent Offices.**

- Do thorough vetting of those who vie for various elective offices in order to secure the state against saboteurs and those who will undermine the Constitutional standards.
- Protect and promote respect for the rule of law and constitutionalism. This has not been evident over the last ten years in the work of Commissions and Independent Offices;
- Audit constitutional implementation and compliance and report to Kenyans. Under this Constitution its Commissions and Independent Offices that are required to ensure oversight, accountability, transparency of all agencies, public and State officials and officers. Unfortunately this has not been forthcoming in such a way as to cause state and public officers to change their dominant culture of abuse of office, abuse of processes and acting with impunity.
- Demand accountability from the three arms of Government and the Security organs.
- Form democratic alliances with the people of Kenya through their organized forms including the religious institutions and leadership, CSOs, Trade Unions, professional bodies and associations, the Private Sector and other formations.

## **9. To the Building Bridges Initiative.**

- Exercise more transparency and shun secrecy.
- Assure Kenyans the report favors *Wanjiku, Nafula, Ali etc* and not politicians.
- Advice on the best way forward, having regard to the CoVID-19 pandemic.
- Ensure you have built a bridge and not created more disunity.
- Be honest with Kenyans and with the politicians.