



Association of Professional Societies in East Africa

# A Policy Brief on the Role of Professionals in the Implementation of the Constitution of Kenya

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Developed by:  
The Public Affairs Committee of the  
Association of Professional Societies  
in East Africa (APSEA)  
May, 2011



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# Abbreviations and Acronyms

<b>AG</b>	Attorney General
<b>APSEA</b>	Association of Professional societies of East Africa
<b>CDF</b>	Constituency Development Fund
<b>CJ</b>	Chief Justice
<b>DT</b>	District Treasury
<b>ESP</b>	Economic Stimulus Programme
<b>IEBC</b>	Independent Electoral and Boundaries Commission
<b>LAs</b>	Local Authorities
<b>LATF</b>	Local Authorities Transfer Fund
<b>MP</b>	Member of Parliament
<b>RMFLF</b>	Road Maintenance Fuel Levy Fund
<b>OP</b>	Office of the President
<b>PM</b>	Prime Minister

# Foreword

## Message from the Chairman, Association of Professional Societies in East Africa (APSEA)



The Association of Professional Societies in East Africa (APSEA) is the joint forum of professional associations and societies and was established in 1961 as a membership umbrella body that brings together professional societies of diverse disciplines (medicine, law, accounting, engineering, architecture, public and corporate administration, geology, meteorology, veterinary science, planning, procurement, banking, and marketing among many others). The core objectives of the association include promoting and upholding highest standards of professionalism at individual and institutional levels; adherence to the highest levels of competence and professional conduct; adherence to ethics and personal integrity at the highest possible levels; promotion of reliability and honesty among professionals; provision of equal opportunities for all regardless of gender, disability, race or creed; enhancement of social responsibility among professionals and the society at large; and promotion of the public good.

APSEA having participated in all the stages in the making of the Kenya Constitution, and to demonstrate the seriousness with which APSEA emphasizes its core values, the association through its National Advocacy Program for Governance Reforms, is greatly interested in seeing that the implementation of the Constitution of Kenya is undertaken in a timely and ethical fashion. It is in line with this that this Policy Brief Document was developed to ensure that the constitution is implemented and

enforced according to the letter, spirit and timelines set within it. It is our hope and prayer that this policy document will be a guiding light for all professionals in our beautiful country as they engage and interact with the Kenya Constitution they fought so hard to achieve.

Thank You and May God Bless Kenya.

**Daniel W. Ichang'i, Ph.D. (McGill), R. Geol, FGSK, OGW.  
Chairman, APSEA**



**Message from the Chairman of  
the Public Affairs Committee  
(PAC),  
Association of Professional  
Societies in East Africa (APSEA)**

On behalf of members of the Public Affairs Committee (PAC), through the National Advocacy Program for Governance Reforms of APSEA, I would like to invite all professionals to read the findings of this research which was conducted to find out the ways in which professionals in Kenya could and should become more actively involved in the implementation of the Kenya Constitution. The mandate of the PAC is to, among other areas, monitor, document and report on the progress being made in the implementation of the constitution. In order to achieve the objectives of the program, APSEA has developed a policy document to guide professionals in the implementation of the Constitution.

This Policy Brief sets out the challenges that have faced Kenya in her constitutional journey, the challenges that are likely to arise in the new constitutional dispensation, as well as the opportunities for professionals to engage in this key process. It is our desire that this document shall serve professionals countrywide and act as a template for professional engagement in the process. It is expected that through this Policy Brief, professionals will be able to not only theoretically understand their role and responsibility, but to also actualize it through practical means in their own specific and individual capacities for the greater good of the Kenyan People and the country as a whole.

**Felix O. Okatch,**  
***Chairman of the Public Affairs Committee, APSEA***

## Executive Summary

The new constitution of the republic of Kenya came into force on the 27th of August 2010. It is a product of protracted and acrimonious engagements between different stakeholders over a period spanning 20 years. The fundamental concerns of many Kenyans for during this period was on how the old constitution had become such an incrementally exclusive document to the extent that public life ended up revolving around limited institutions and oftentimes at the whims of individuals. Numerous issues indicating the abuse of basic constitutional principles; the front running of the non responsive instruments of the state ahead of peoples' aspirations; nonchalant placement of parallel policies and legislations against the very constitution; and the wide space for informal decrees dotted the last 46 years.

The new constitution undoubtedly comes into force against an unpleasant past for a vast majority while at the same time portending an uncertain future for a small minority. It fundamentally changes the state governance by setting an objective which state organs must strive to achieve; broadens the space for the citizens in relation to governance and their individual rights; provides broad and specific principles for public accountability, leadership codes, financial probity, clear governing structures; and levels with distinct and clearly demarcated functions.

The new constitution has a transitional period stretching over five years. Within this period, a lot of legislation and policy changes have to be worked on unfortunately by some of the organs of the old constitution. There are over 700 existing legislations and more than 70 new legislations that must be looked at afresh to accord them constitutional harmony. These legislations and policies affect every aspect of the Kenyan society. APSEA as the umbrella body of professionals in the country should thus be part and parcel of this process.

# GENERAL OVERVIEW

## The role of APSEA

APSEA as the umbrella body of core professional associations has to be intricately and meaningfully involved in the implementation process. The legislative and policy baskets, whether private or public, are first and foremost technical and in many respects are guided by professionals. Different APSEA memberships have in one way or another been operating under some form of legislation or policy. They have both positive and negative experiences. At the face of it, all are to be affected by the new law but the professionals have multiple roles. Some of these include:

- Critical membership appraisal of the current legislations and policies against the provisions of the new constitution.
- Roles allocated to interlocutory institutions
- Search for membership inclusion, action and mandates in the constitution.
- Membership and Public education
- Advocacy, Lobbying and process influencing.
- Process monitoring. It is the professionals who have the capacity to monitor whether corporately or individually.
- Pro-action i.e. through the litigation process, initiation of bills, engaging with implementation organs, networking, among others.

## I. Potential Benefits:

- **The role of citizens.** The citizens have a wide mandate in the constitution running through the right to protecting the same constitution to participating in every aspect of governance.
- **Governance accountability.** All the organs of the state have corresponding check mechanisms while their roles are individually clearly demarcated. No state organ is on its own.
- **Public Management.** This is placed in the hands of professionals based on merit selection. Both the National and County Cabinet are not supposed to comprise of politicians any more but professionals instead.
- **Reduced load on the Capital.** Over reliance on Nairobi for everything has been a negative aspect of past governance. The

constitution now delineates functions that will be Nairobi based and those that will be placed in the devolved governments. The impact of this will be realised instantly and will touch on every aspect including road traffic, road carnage, housing, pollution, and so on.

- **New opportunities for professionals.** The constitution widens the horizons for engagement as ordinarily, the biggest consumer of professional services is governments. The constitution has created many governments and has endowed them with resources
- **Reduced cost of public administration/recurrent vote:** This will occur together with an increased development portfolio in the long run.
- **Improved Service Delivery.** It is a set constitutional principle that the state has to ensure reasonable access to its services in all parts of the republic. The principle has to be executed by both the national and county governments. The services on the other hand are listed as rights to people who in turn are mandated to go to court when the rights are threatened, denied or abused.
- **Improved livelihoods and investments.** The extent of poverty and inequalities in the past has been enemies to wealth generation. The central commitment of the new constitution is on protecting and nurturing the well being of the individual.
- **Equalization efforts.** The constitution emphasises on inclusivity of the marginalized and minority. An Equalization Fund has been established as an affirmative fund meant to uplift the historically marginalized areas to bring them to equal levels with other areas.
- **Positive competition between counties both for investments and national resource sharing.** The counties are set to compete positively for public resources and external investments. There is a set criteria for counties access to national resources which includes fiscal capacity and efficiency of a county as well as its ability in economic optimization. Counties will attract external investments based on their individual capacity to recognize the need and environment for such investments.
- **Utilization and exploitation of local resources.** Land has been an emotive issue in the country. The constitution now clearly draws land classes and ownership tenure.

- **De- ethnicization of politics.** Unlike in the past where ethnic blocs had single geographies, the new constitution encourages intra ethnic competition. Ethnic communities will find themselves in different county governments where counties will engage in performance competition. The whole idea of reciprocity and image building will reduce ethnic tensions.

## **II. Potential Challenges:**

- **Less public understanding of the constitution.** The general public have not comprehended and internalized the constitution.
- **Initial balkanization of certain areas.** Devolution when not well handled in the initial stages might leave some counties behind for along period. There will also be the temptation to throw people out of employment for those who are not indigenous of those counties.
- **Endless Litigations.** The constitution places heavy premium on the judiciary.
- **Conservatism.** Anti- reformist groups still remain in the institutions that are expected to facilitate change. They will keep slowing down the good will.  
Some are keen on maintaining the status quo in order to protect their positions, connections and at times ill acquired wealth.
- **Transition.** The transitional arrangements are fairly complex against a fairly unconducive environment. The constitution suspends implementation of changes in some structures of government to sustain the transition. The same organs are under threat of extinction in the constitution.
- **Transitional time lines not getting honoured.** Parliament and the executive are constantly at power wars. There is a divided chain of command in government yet the constitution insists on compulsory consultations between the president and the PM.
- **The place of the counties in transition.** The national government is to facilitate, build capacity and transfer county functions in phases. If there is no adequate good will combined with resistance for change expected in the state bureaucracy, devolution will be greatly challenged.

- **The massive public service personnel.** Currently the entire public service is a central government bureaucracy consuming up to 78% of the national budget. The constitution reduces the functions of the national government, limits its tentacles and takes away a minimum of 15.5% of the budget to counties. Can the national government run its development portfolio with the remaining 6.5%? Or will the government hive out its lower level personnel to counties? Will the counties accept and at what cost?
- **The Electoral challenges.** There will be six elections in one general election. The amount of confusion on the side of voters and the management on the side of IEBC is likely to be massive.
- **The Public Administration and Local Authorities (LA's).** There is a big confusion as to the place and future of Provincial Administration and LA's. The respective ministries are indicating a stay on position. The entire personnel still go with position of the ministry heads that appear to be playing politics. It is in the reverse of the provisions of the constitution.
- **Counties bolting out after 2015.** The counties will most likely take over all the public service personnel currently at the districts and below as part of the national government facilitation to the counties. In practice, the counties might only need less than half of the number. Counties will attempt to down size which might be resisted by the national government during the three years. However by 2015, the counties will have full powers to bolt out and do as they deem fit when it comes to county public service.
- **Devolution of vices and bad practices.** Influence peddling, corruption, deals etc are likely to devolve too to the county governments.
- **Ambiguous provisions.** Several ambiguities exist such as the actual life of the current parliament, Chief Justice/Attorney General in JSC, PA, LAs, etc

### III. Recommendations:

- More in-depth interrogation and tracking of the constitution implementation process. Setting up a constitution implementation desk would be ideal.

- Identifying niches and prodding membership associations to engage either individually or collectively
- Formal engagement with the constitution implementation organs i.e. the CIC, LRC, Parliamentary oversight committee, etc
- Do research on individual legislations to isolate areas of contradiction to the constitution.
- Engage the media to be a mouthpiece, promotion of legislative suggestions and public engagement.
- Do petitions for improvement on legislations.
- Corporate action on behalf of individuals, membership and public interest concerns.
- Offer professional input either from within or outsourcing of minds to help in offering support to the complex implementation processes like devolution.
- Professional support to nascent counties from 2012. Counties will need a lot of internal strategic capacity support.
- Identify opportunities for membership engagements ie counties will be under every temptation to utilize local human resources, local companies, etc. Counties will also compete to attract investments thus offering new opportunities for professional.

# THE STUDY MECHANICS

## I. Background:

Kenya's constitutional journey has been a long and winding one and can be traced all the way back to 1890 after the British began to settle in Kenya. During the colonial period between 1890 and 1960, Black Kenyans were clamouring for freedom and land. By 1944 approached, there was heightened awareness concerning their rights among Black Kenyans and this culminated in the election of some of them to the Legislative Council (LEGCO). In addition, slight aspects constitutional law were introduced during this time particularly through the Lyttleton of 1954 and Lenox Boyd Constitutions of 1958.

This clamour only increased and between 1960 and 1962, three conferences were held in London to develop a new constitution for Kenya. In 1963, in addition to achieving independence Kenya adopted its first national constitution. At first, Kenya became partially independent by having self-government under a prime minister then later full independence while still retaining the governor as head of state representing the queen. However, within a year, the first amendment was passed to do away with the post of governor and these powers transferred to the prime minister. This first amendment represents the first of many to come in later years.

By 1969, ten amendments had been made. The constitution was totally altered at the whims of the power hungry political elite who vested so much power in a then unelected president. Other later amendments included the change to create a de jure one party state and later on return Kenya into multipartyism. The later concluded this phase as the 27th amendment of 1991.

Due to the failure inherent in the constitution as a result of several flawed amendments to an already imperfect document, the inevitable happened and Kenyans began to clamour for a change to the constitution. The period between 1992 and 2002 following the return to multipartyism was marked by numerous demonstrations and street protests for change

against the background of an anti-reformist government with former president Daniel Moi at the helm. This period was characterized by an opening up whereby citizens claimed more space and civil society pushed for an all-inclusive democratic process to rewrite the constitution. A group of reformers emerged from civil society and the opposition political parties, and they pushed for reforms on behalf of the common person.

The last phase came between 2003 and 2010. Due to the overwhelming demand by the people for a new constitution, the Constitution of Kenya Review Commission (CKRC) began the process of constitutional review in 2003. This process resulted in the development of three draft constitutions: The Constitution of Kenya Review Commission Draft submitted to Bomas Constitutional Conference (Ghai Draft), the Constitution Conference Draft (Bomas Draft) and the Proposed New Constitution 2005 (Wako Draft). The Wako Draft was put to a vote in the 2005 referendum but it was voted against a majority of Kenyans who felt it did not meet their expectations.

Following the contentious Presidential elections of 2007 and the subsequent unprecedented violence that ensued, negotiations brokered by the African Panel of Eminent Persons helped achieve a consensus that led to the signing of the National Accord. In order to achieve lasting peace and prosperity, the accord under Agenda Four required that a new Constitution for Kenya to be enacted. This led to a renewed push to the search for a new constitution and two years later in August 4, 2010 following a referendum, a new constitution was finally passed by a majority of Kenyans.

Therefore, coming against the backdrop of such a protracted past, the new constitution of the republic of Kenya comes into force amidst mixed signals of a resilient past and a highly optimistic future. There are wide range of potential benefits and numerous opportunities that underlie its successful implementation. It overly changes structures of governance to enhance reach out, public accountability, professionalising public management and administration, and placing public functions where they can be best performed. The implementation of the constitution

however, might not be smooth. Its gains are under threat from reluctant transformers, old mindset, conservative forces, prevailing political situation and transitional arrangements that might clog it up. The potential challenges make it paramount for professional agencies to individually and collectively be involved and participate appropriately.

## II. Terms of Reference

The Policy Brief was developed in line with its Terms of References i.e.:

1. To clearly outline the implementation framework of the New Constitution of Kenya (to draw a roadmap towards the implementation.)
2. To discuss the role of APSEA and generally professionals as stakeholders in the implementation process.
3. To illustrate the potential economic, social and political benefits underlying the successful implementation of the New Constitution.
4. To identify both real and potential challenges facing the implementation process ahead of the General Elections in 2012.
5. To develop a suitable monitoring and evaluation framework for the implementation process by APSEA.
6. To make appropriate recommendations that will enable APSEA effectively participate in the implementation program of the new constitution and to be able to rally its members to do the same.

## III. The Rationale

Kenya has had a long- winding and tumultuous constitutional journey throughout the years. The incessant conflict that subsequently arose and the shifting of positions and view points has made many people loose track. In less than six months, between November 2009 and April 2010, four different constitutions were churned out at different times albeit for input. By the time the referendum took place on 4th August, 2010, the mental state of the people had already been distorted.

There are many people who voted during the referendum, not based on their understanding of the content, but more because they wanted the whole issue of the constitution to be behind them. The four different

constitutions had certain good elements for different people yet they altogether also had minimal differences other than semantics. The political grandstanding during the referendum campaigns swayed thoughts as politicians only isolated specific provisions that they believed would make people go their way.

It is against this background that a need for better understanding of the constitution becomes paramount. People, particularly the professionals, need to interrogate the content to see where they fit in, how the constitution relates with their professions/career and to isolate clear roles of engagement particularly during its implementation process.

#### **IV. Methodology**

The study used different approaches to arrive at the findings thus:

1. An in depth analysis of the new constitution, cross referencing and cluster coding of isolated issues relevant to APSEA.
2. Daily analysis of national developments related to reform dispensation.
3. Collection of opinions and viewpoints of different public commentators and news analysis
4. Informal peer discussions
5. Cumulative personal experiences and lessons learnt overtime.
6. Validation workshop

# BROAD LAYOUT OF THE CONSTITUTION

The Constitution has a framework that places the entire constitution into three broad areas.

- i. The first broad area deals with principles that provide for the object and purpose of setting up the constitution. These include:
  - Commitment to protecting and nurturing the well being of the individual, the family, community and the nation.
  - Guaranteeing peace, national unity and the integrity of the Republic of Kenya
  - Establishing a free and democratic system of government that guarantees good governance, constitutionalism, rule of law, human rights, gender equity and equality, and affirmative action
  - Recognizing and placing responsibility among state organs so as to enhance checks and balances and government accountability to the people
  - Promoting people's participation in government i.e. in elections, exercise of power, participation in the management of public affairs
  - Respecting ethnic and regional diversity
  - Ensuring provision of basic needs of all Kenyans
  - Promoting and facilitating of regional and international cooperation
  
- ii. The second broad area deals with the place of the individual. It defines who we are as a people, our sovereignty, who the citizens are, entitlements of individuals (*individual rights*), how the individuals are to relate to the governing institutions, the public and natural resources.
  
- iii. The third broad area is public focused. It deals with how the needs of the people of Kenya are to be fulfilled. It lays down a leadership and integrity code to enable created public institutions to work in the interest of the people.

The Constitution creates governance Institutions which are clearly demarcated as National and County governments.

### • The National Government

The National Government is charged with the following functions:

- National policy formulation
- National Legislation,
- National Standards
- National Security and Defence.
- International Relations.
- The Judiciary/Law Courts.
- Certain Social Services i.e. education, registration of persons, immigration, transport and communication.

Four fundamental organs are created to perform these functions: Parliament (*The National Assembly and the Senate*); the Executive; the Judiciary; and the Independent Commissions and State Offices.

### • The County Governments

The constitution creates 47 County governments. The number is based on the number and geography of administrative districts as at 1992. The county governments are charged with overall service delivery and implementation of both local and national legislations and policies. The county governments are provided with public organs to do the functions. These include: County Assemblies; County Executive Committees; and County Public service. The constitution provides for the sharing of national resources where a minimum of 15% of the national revenue is allocated to the 47 counties for equitable sharing. A further 0.5% through the Equalization Fund is meant to provide basic services to marginalized areas.

# THE CONSTITUTION IMPLEMENTATION ROAD MAP

The constitution is to be implemented in two phases. The first phase is the transitional phase which runs from the 27th of August, 2010 to the 26th of August 2015. The second and final phase begins from August 26th, 2015 to infinity.

## I. Constitution and Other Laws in Transition Period:

Constitutions are a part of the numerous laws that exist to operationalize governments. In Kenya, the constitution exists alongside many laws that include Acts of Parliament, inherited English doctrines, legal precedents, African customary laws and the general rules of International law. The new constitution just like the old one is to ordinarily operate under the same environment. However it is important to note that all other laws are subject to the constitution and the later prevails when there is any contradiction.

Since the new Constitution is a radical departure from the laws in our history, it is definitely not in harmony with a majority of the existing legislations and statutes. It is therefore the latter that has to be systematically worked on so as to be in tandem with the constitution. The new constitution takes cognizance of the possible contradiction therein and has carefully opted to put a number of measures for purposes of continuity.

## II. Suspension of provisions:

It suspends the implementation of a number of its provisions. The provisions on representation, parliament, the national executive and the devolved government's are put aside until the general elections are carried out in 2012. The elections are nonetheless to be carried out using the provisions of the new constitution. This means that the current political arrangement goes full circle, parliament continues, so is the Presidency, Premiership and Local Authorities.

### **III. Existing Laws:**

The new constitution allows for the continuation of all laws in existence, international rights and obligations until such a time that they are systematically brought into harmony with the Constitution. However, parliament is mandated to enact a series of legislations within specified time frame.

### **IV. Mandatory legislations and timelines**

Within a period of five years, the new constitution contemplates that parliament together with all the relevant organs will have appropriately buttressed the Constitution. The legislations are spread out to be done within one year, 18 months, two years, three years, four years and five years respectively.

The following is a brief outline of the legislations to be passed and their time allocation:

#### **a) Within Year 1:**

##### **(i) Legislation on Citizenship:**

- Procedure of how to become a citizen
- Rights and duties of citizens
- Entry and residence in Kenya
- Renunciation of Citizenship

##### **(ii) Establishment of Kenya National Human Rights and Equity Commission:**

##### **(iii) Establishment of Ethics and Anti-Corruption Commission:**

##### **(iv) Legislation on Elections:**

- Delimitation of Electoral units
- Nomination of candidates
- Registration of voters including those residing outside the country
- Conduct, Regulation and Supervision of Elections and Referendum
- Electoral disputes
- Establishment of Independent Electoral and Boundaries Commission

- (v) Legislation on Political Parties:
  - Roles and Functions of political parties
  - Regulation of political parties
  - Accounts and Audits of political parties
  - Restriction in use of public resources by political parties
  - Access to state media and regulation of freedom to broadcast
- (vi) Legislation on vacation of office: When a member of parliament is deemed to have resigned from his/her party or joined a political party from being an independent
- (vii) Legislation for advisory committee on the power of mercy (tenure, additional membership, procedure and criteria)
- (viii) Establishment of other courts equal to High Court on the following areas:
  - Employment and labour relations
  - Environment
  - Use and occupation of land title to land
- (ix) Code of conduct for Judges of Superior Courts
- (x) Vetting of Judges and magistrates
- (xi) Election and removal from office of the Speakers of the County Assemblies
- (xii) Governance and management of urban areas and Cities
  - Criteria of classification
  - Principles of governance and management
  - Participation by residents
- (xiii) Legislation on Contingencies Fund
- (xiv) Legislation on terms and conditions for guaranteeing loans by the national government

**b) Within 18 months:**

- (i) Legislation on Land:
  - Revise, consolidate and rationalize land laws
  - Revise sectoral land use
  - Minimum and Maximum private land holding acreages
  - Land category conversions
  - Recognition and protection of matrimonial home
  - Public land access and review of grants/disposition
  - Protect deceased persons dependants holding interests on land

- (ii) Procedure for removal of a County Governor
  - (iii) Legislation effecting implementation of leadership and integrity in reference to vacation of office of a member of County Assembly.
  - (iv) Legislation to effect devolution:
    - Phased transfer (for not more than three years after election of county assemblies) of functions from national government to county governments
    - National government to facilitate the devolution of power
    - Assist County Government in Building their capacity
    - Support County Governments
    - Set criteria for counties before functions are transferred
    - Prompt devolution to counties that have capacity
    - Establish revenue funds for County Governments
- c) Two Years:
- (i) Legislations on grounds and procedures for recall of Members of Parliament before end of the term.
  - (ii) To give effect to determination of question of membership to Parliament
  - (iii) Procedure for petitioning Parliament by any person
  - (iv) Procedure and ceremony for swearing in of a President
  - (v) Regulation of the Judiciary Fund
  - (vi) Legislation of Financial Controls Establishment, functions and responsibilities of the national treasury. Expenditure controls and transparency in all governments
  - (vii) Legislation to provide for functions, organization and administration of national security organs
- d) Three Years:
- (i) Freedom of the media
    - Establishment of an independent Media Body
    - Set Media standards and regulate and monitor compliance
  - (ii) Legislation to ensure that county Governments have adequate support to enable them perform their functions
  - (iii) Powers, privileges and immunities of County assemblies, their committees and members

**e) Four Years**

- (i) Consumer protection; fair, honest and decent advertising
- (ii) Promote efficient administration
- (iii) Protection, rights and welfare of victims of offenses - fair hearing
- (iv) Humane treatment of persons detained in custody or imprisoned
- (v) Legislations on environment
- (vi) Accounts and Audit of Public entities
- (vii) Legislation to effect values and principals of public service

**f) Five Years**

- (i) Legislation in respect to culture
  - Communities receive royalties and or compensation for use of culture and cultural heritage
  - Recognize and protect the ownership of indigenous seeds and plant varieties and use by communities
- (ii) Community land declaration
- (iii) Land use benefit for local communities and their economies
- (iv) Classes of transaction in giving grant of right or concession to exploiting natural resources
- (v) All other legislations required by the constitution

## **V. Immediate Commissions and Appointments**

The following is a run-down of the important appointments and their corresponding timelines that need to be made after the constitution has taken effect:

- i. The Judicial Service Commission- 60 days
- ii. Commission for the implementation of the Constitution- 90 days
- iii. Commission on Revenue Allocation- 90 days
- iv. The Chief Justice- 6 months
- v. Salaries and Remuneration Commission- 9 months
- vi. Attorney General- 1 year
- vii. Controller of Budget and Auditor General- 1 year
- viii. Ethics and Corruption Commission- 1 year
- ix. Supreme Court- 1 year

## VI. Organs to facilitate transition

### (a) Constitution Implementation Oversight Committee:

This is a parliamentary select committee responsible for overseeing the implementation of the constitution. It is to do among other things:

- (i) Receive regular reports from the Commission on the Implementation of the Constitution including reports concerning:
  - The preparation of the legislation required by the Constitution and any challenges in that regard
  - The process of establishing the new commissions
  - The process of establishing the infrastructure necessary for the proper operation of each county including progress on locating offices and assemblies and establishment and transfers of staff
  - The devolution of powers and functions to the counties
- (ii) Coordinate with Attorney General, the Commission on the Implementation of the Constitution and relevant parliamentary committees to ensure the timely introduction and passage of the legislation
- (iii) Take appropriate action on the reports including addressing any problems in the implementation of the Constitution

### (b) Commission for the Implementation the Constitution

The Commission is to be appointed in 90 days from 27th August 2010.

#### Composition

The Commission consists of

- A chairperson and
- Eight other members

#### The members of the Commission to include

- Include persons with experience in public administration, human rights and government
- Not to include any person who served as a member of the Committee of Experts appointed under the Constitution of Kenya Review Act, 2008

#### Functions

(a) Monitor, facilitate and oversee the development of legislation and administrative procedures required to implement the new constitution

(b) Coordinate with the Attorney General and the Kenya Law Reform Commission in preparing, for tabling in Parliament, the legislation

required to implement the Constitution

(c) Report regularly to the Constitutional Implementation Oversight Committee on:

(i) Progress in the implementation of the Constitution

(ii) Any impediments to its implementation

(d) Work with each constitutional commission to ensure that the letter and spirit of the Constitution is respected.

# THE ROLE OF APSEA AND PROFESSIONALS IN THE IMPLEMENTATION PROCESS

The following table provides an evaluation of the role APSEA should play in the implementation process:

<b>APSEA</b>	
<ul style="list-style-type: none"> <li>• Critical membership appraisal of the current legislations and policies against the provisions of the new constitution.</li> <li>• Roles allocated to interlocutory institutions</li> <li>• Search for membership inclusion, action and mandates in the constitution.</li> <li>• Membership and Public education</li> <li>• Advocacy, Lobbying and process influencing.</li> <li>• Process monitoring. It is the professionals who have the capacity to monitor whether corporately or individually.</li> <li>• Pro-action i.e. Litigation process, initiation of bills, engaging with implementation organs, etc</li> <li>• A reminding hub.</li> <li>• Do detailed devils work</li> <li>• Scheduled tool reminders</li> <li>• Identify entry points</li> <li>• Monitoring the implementation process.</li> </ul>	

<b>Professional Association Sectors</b>	<b>Constitution Core areas</b>
<b>Finance, Accounts, Audits and Management</b>	<ul style="list-style-type: none"> <li>• Leadership, integrity and Ethics</li> <li>• State offices and public offices</li> <li>• Structures of Governance and Administration. Roles of different levels of government and their relationship.</li> <li>• Principles of Public Finance</li> <li>• Different sets of public funds</li> <li>• Revenue raising powers of different government levels</li> </ul>

	<ul style="list-style-type: none"> <li>• Commission on Revenue Allocation</li> <li>• Division of revenue</li> <li>• Criteria of sharing national revenue</li> <li>• Budget processes for both levels of government</li> <li>• Fiscal controls and accounting processes</li> <li>• Roles of Financial officers and Institutions i.e. Controller of Budget, Auditor General, Salaries and Remunerations Commission and the Central Bank</li> </ul>
<b>Law and Arbitration</b>	<ul style="list-style-type: none"> <li>• The entire constitution</li> <li>• The enhanced role of judiciary</li> <li>• The litigative areas particularly in the enforcement of rights and the place of the people in the constitution.</li> <li>• Legislative timeframes</li> <li>• Implementation monitoring</li> </ul>
<b>Land and Built Environment</b>	<ul style="list-style-type: none"> <li>• Land Classification ( public, community and Private)</li> <li>• Land lease arrangements</li> <li>• Regulation on land use</li> <li>• Role of the national land commission</li> <li>• Legislation series and schedules</li> <li>• Environmental obligations on the state</li> <li>• Measures on enforcement of environmental rights</li> <li>• Legislations on environment</li> </ul>
<b>Mines and Geology</b>	<ul style="list-style-type: none"> <li>• Responsibility on natural resources</li> <li>• Grant of right and concessions processes</li> <li>• Legislation on classes of extraction transactions</li> </ul>
<b>Health</b>	<ul style="list-style-type: none"> <li>• Right to highest health care services including reproductive health.</li> <li>• Non denial of emergency treatment</li> <li>• Repository of health functions</li> </ul>
<b>Agricultural and Food Technology</b>	<ul style="list-style-type: none"> <li>• Agriculture and agricultural services repository</li> </ul>

# POTENTIAL BENEFITS UNDERLYING SUCCESSFUL IMPLEMENTATION OF THE CONSTITUTION.

## I. The place of the People

The new constitution sets its basis and reasons for its existence on the people. It lays a mandate and a commitment to nature and to protect the well being of the individual as the corner stone of the family, communities and the nation. It places sovereign power on the people of Kenya to be exercised directly by them or through democratically elected representatives. The people are placed ahead of any provisions or creations of the constitution. Sovereign power is only delegated to state organs like Parliament, national executive, judiciary and independent tribunals, county assemblies and county government.

The Constitution entitles every citizen with rights, privileges and benefits. Some of the rights and fundamental freedoms include:

- Right to life
- Right to equality
- Human dignity
- To the highest attainable standard of health
- To accessible and adequate housing and sanitation
- To be free from hunger and have adequate food of acceptable quality;
- To clean and safe water in adequate quantities;
- To social security. (The state is to provide appropriate social security to persons who are un able to support themselves)
- To education
- To Emergency treatment. (Article 43)
- To property

## II. Limitation of Rights

Fundamental rights and freedoms can only be limited on condition that the limitation is reasonable, justifiable and takes cognizance of other factors as;

- The nature of the right or fundamental freedom;
- The importance of the purpose of the limitation;
- The nature and the extent of the limitation;
- The need to ensure that the enjoyment of the rights and fundamental freedoms by any individual does not infringe on the rights of others;
- Clear demonstration to court, tribunal or other authority that the limitation is in accordance with the laid down law.

### III. Enforcement of rights

#### a) The role of the State

Under the new constitution, it is fundamental duty of the state and every state organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms of every person. The state is required to make every effort including legislative, policy, setting standards and any other measure to achieve progressive realization of the rights.

All the public officers have the duty to address the needs of vulnerable groups within society, including women, older people, and persons with disabilities, children, and youth, members of minority or marginalized communities, and members of particular ethnic, religious or cultural communities.

#### b) The role of judiciary

The Chief Justice is to make rules to:

- Fully facilitate the parties infringed
- Proceedings formalities are kept to the minimum. The courts are not reasonably restricted by procedural technicalities;
- No fee is charged for commencing the proceedings

In interpreting the bill of rights, the courts are mandated to:

- Adopt the interpretation that most favours the enforcement of a right or fundamental freedom
- Promote the values that underlie an open and democratic society based on human dignity, equality, equity and freedom
- Promote the spirit, purport and objects of the bill of rights
- Be guided by certain principles in case the state claims that it does

not have resources to implement the fulfilment of a right.

Every Kenyan, can seek redress by moving to court in case of rights denial, violation, threatened or infringed i.e. right to access to information held either by the state or another person and required for the exercise or protection of any right or fundamental freedom. Other than the individual action, the constitution also allows for action:

- a) On behalf of another person who cannot act in their own name
- b) A person acting as a member or in the interest of a group or class of persons
- c) A person acting in the public interest; or
- d) An association acting in the interest of one or more of its members.

### **c) The place of the people in Parliament**

Parliament is one of the main organs that demonstrate how individuals' political rights are achievable. The conduct and outcome of parliamentary output are right indicators as to how responsive parliament is to the overall enjoyment of ones rights and fundamental freedoms. The constitution opens up parliament to the people not just in representation but more importantly in how the people can influence the parliamentary output.

### **d) Public access and participation:**

- o Parliament is to conduct its business in an open manner. Its sittings and those of its committees are to be opened to the public (Article 118, 1 a & b);
- o Parliament is to facilitate public participation and involvement in the legislative process and other businesses including operations of its committees. Parliament has, therefore, to come up with procedures and directions of how it intends to facilitate the people to adequately participate in its processes;
- o Parliament may not exclude the public or any media from any sittings unless in exceptional circumstances. The relevant speaker has to determine that there are justifiable reasons for the exclusion;
- o Every person has a right to petition parliament to consider any matter within its authority, including matters that may arise following the enactment, amendment or repealing of any law;

- o Right to recall Members of Parliament. The electorate has the right to recall a member of parliament representing their constituency before the end of the term of the relevant House of Parliament. However, Parliament is to enact a legislation to provide for the grounds on which a member may be recalled and the procedure to be followed.

Similarly, County Assembly has to operate in the same manner. It has to:

- (a) Conduct its business in an open manner and hold its sittings and of its committees in public;
- (b) Facilitate public participation and involvement in the legislative and other business of the assembly and its committees;
- (c) May not exclude the public or any media from any sitting unless in exceptional circumstances which must include justifiable reasons for doing so;
- (d) In Schedule 4 part 2 (14) county governments are to ensure and coordinate the participation of communities and locations in governance at the local level as a way of developing the administrative capacity for the effective exercise of the functions and powers and participation in governance at the local level.

#### **e) Public participation in Public Finance**

The constitution stipulates that there must be openness and accountability including public participation in financial matters.

The public finance system is to promote an equitable society that provides fair taxation, equal distribution of resources among national and county governments.

Further, expenditure is hinged on a strategy that seeks to promote equitable development of the country, including making special provision for marginalized groups and areas.

Other areas include enhancing prudent management of public funds. Both the national and counties governments must adopt responsible financial management practices with a clear fiscal reporting.

The senate has a mandate to invite the public including professional bodies to make submissions in respect to sharing of the 15 % allocation among the counties.

## **IV. Amendment of the Constitution**

The constitution provides that it may be amendment through a ‘popular initiative’ started by an individual or group of Kenyans who then must get the support of at least one million registered voters. The popular initiative can either be in the form of a general suggestion or a formulated draft bill so long as it respects the guarded provisions (Art. 255).

If a popular initiative is in the form of a general suggestion, the individuals spearheading the initiative are to formulate a draft bill which is to be submitted to the Independent Electoral and Boundaries Commission with the supporting signatures. The commission is to verify that the initiative is supported by at least one million registered voters.

With these provisions and much more, the people of Kenya have express constitutional mandate to participate fully in the implementation of the constitution and act swiftly to protect it from abuse.

## **V. Governance accountability**

The constitution sets the following for purposes of public office accountability.

- Participation of the public on financial matters
- Parliament on public finances. The budget process has been changed greatly. Parliament is to be the repository of the public budget. Institutions are to submit their annual estimates to parliament as opposed to the traditional budget office in the ministry of Finance.
- The controller of budget and commissions dealing with finances are established and enjoy security of tenure.
- Clear delineation of roles and responsibilities. All the organs of the state have corresponding check mechanisms while their roles are individually clearly demarcated. No state organ is on its own and can act alone. Public Management is placed in the hands of professionals based on merit selection.

## **VI. Reduced load on the Capital**

Over reliance on Nairobi for everything has been a bad past. The constitution now delineates functions that will be Nairobi based and

those that will be placed in the devolved governments. Even the functions that are national governments' are required to be provided in all parts of the republic. Article 6(3).The impact of this will be realised instantly and will touch on every aspect including traffic, road carnage, housing, pollution, etc

## VII. Planning and service delivery

- It is a set constitutional principle that the state has to ensure reasonable access to its services in all parts of the republic. The principle has to be executed by both the national and county governments. The services on the other hand are listed as rights to people who in turn are mandated to go to court when the rights are threatened, denied or abused.
- The basic services are to be rendered at the counties guided by the national development plans, national policies and standards. Unlike before where 'taking government' closer to the people meant taking provincial administration closer to the people, the new constitution devolves basically all the services.
- There will be ease in monitoring the actions of the government. The Counties are nearer to people and information reach out is easy and will be a good deterrence to malpractices.

## VIII. Reversal of demographic trends

Over the last decades, the rural -urban migration has been choking the major cities and urban areas. Counties will bring along alternatives. Chances are that there will be a reversal of the trend particularly on non industrial concerns.

## IX. Wide scope for professionals

The constitution widens the horizons for engagement. Ordinarily the biggest consumer of professional services is governments. The constitution has created many governments and has endowed them with resources. Capacitating the counties enhances investments, incomes and consumption.

## **X. Improved livelihoods and investments**

The extent of poverty and inequalities in the past are enemies to wealth generation. The central commitment of the new constitution is on protecting and nurturing the well being of the individual.

## **XI. Positive competition between counties**

The counties are set to compete positively for public resources and external investments. There is a set criteria for counties access to national resources which includes fiscal capacity and efficiency of a county as well as its ability in economic optimization. Counties will attract external investments based on their individual capacity to recognize the need and environment for such investments.

## **XII. Utilization and exploitation of local resources**

Land has been an emotive issue in the country. The constitution now clearly draws land categories and ownership tenure. There are only three categories - Private, public and community. Land transacting agency is only one - the National Land Commission.

## **XIII. De- ethnicization of politics**

Unlike in the past where ethnic blocs had single geographies, the new constitution encourages intra ethnic competition. Ethnic communities will find themselves in different county governments where counties will engage in performance competition. The whole idea of reciprocity and image building will reduce ethnic tensions. The whole issue of running mate in presidential and governor's elections will also slow down ethnicity in politics. Regional/ethnic blocks partnering will only be possible among two communities. Chances are that when a presidential candidate nominates a running mate based on ethnic block then all the other ethnic communities will join in on the opposite.

## **XIV. Equalization efforts**

The constitution emphasises on inclusivity of the marginalized and minority. An equalization fund is established as an affirmative fund meant to uplift the historically marginalized areas to bring them to equal levels with other areas.

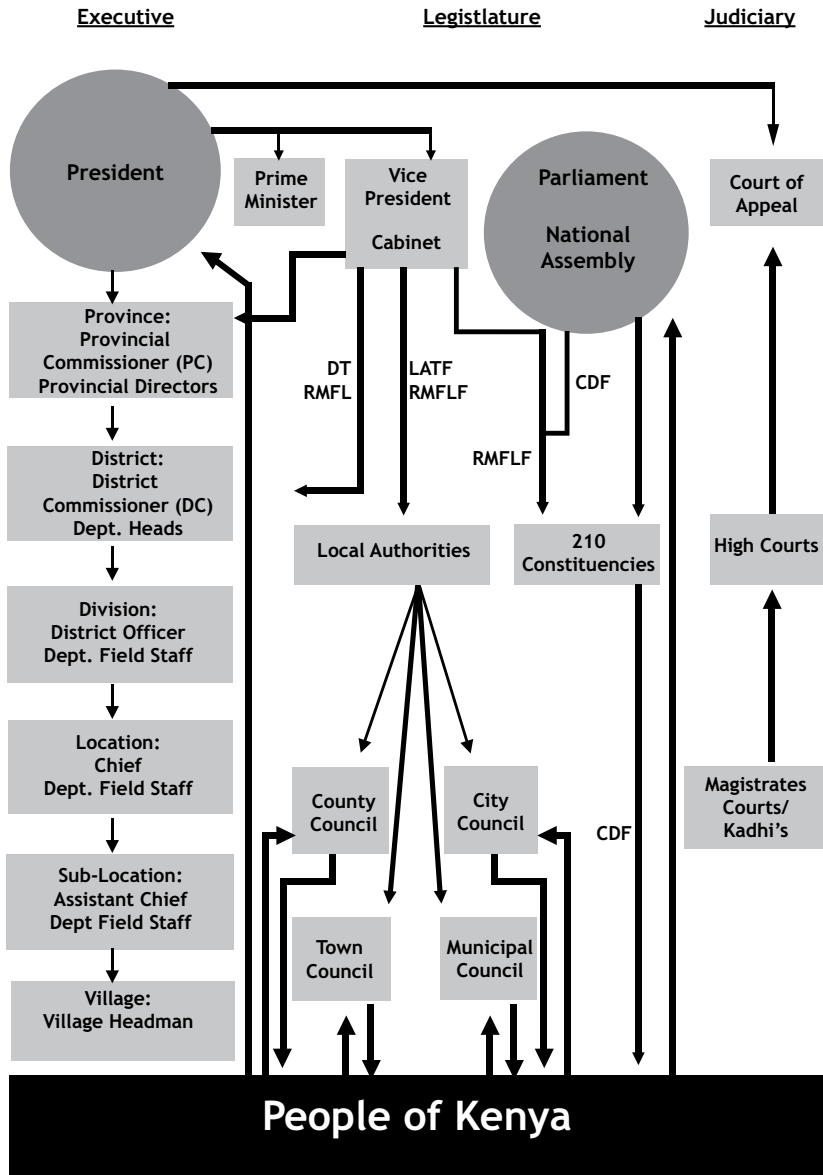
## XV. Reduced Cost of Public Administration

The cost of public administration will tremendously come down in the long run. The constitution envisages no parallel governments and no more vertical levels of government other than the national and the devolved units. At the moment, there are no less than four parallel governments running from Nairobi to the villages *see illustration 1 below*. These include;

- i) The national executive embodied in the provincial administration and line ministries placed at 6 different vertical levels.
- ii) The local government.
- iii) The MPs/CDF government
- iv) Other Decentralized fund governments

The new structures of government are to be two distinct ones. Any other structure below the county is left to the county government to decide Article 176(2). *See illustration 2*.

**The old Government Structure, Resources and Services Lines until 2012**

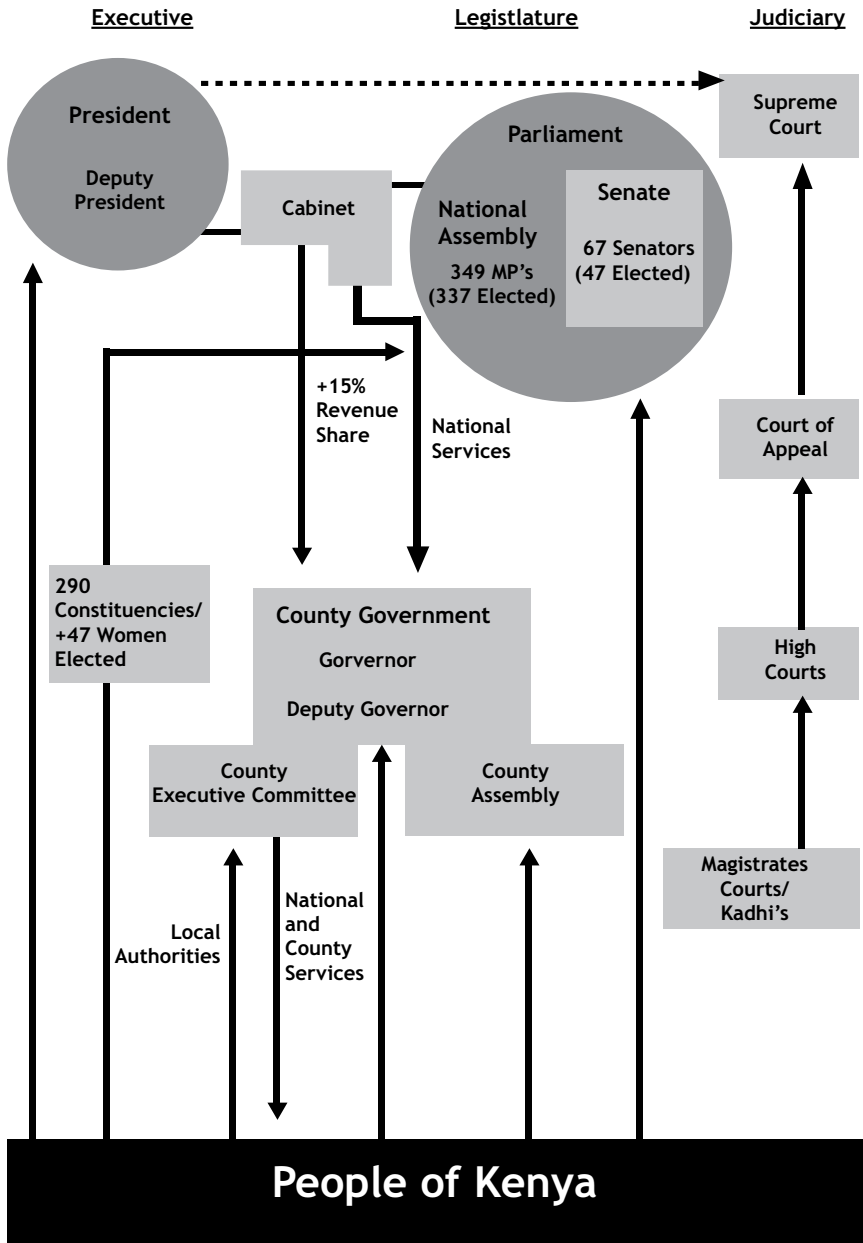


- DT = District Treasury
- LATF = Local Authority Transfer Fund
- CDF = Constituency Development

- RMFLF = Roads Maintenance Fuel Levy Fund

Note: There are other parallel resource lines not included i.e the Regional Dev. Authorities

**Government Structure, Resources and Service Lines in the New Constitution**



Note: No parallel resource and service structures

## POTENTIAL CHALLENGES

The implementation of the constitution just like any new paradigm is bound to meet numerous challenges and pitfalls. The following are key areas where challenges may arise:

### **i. Public understanding of the constitution:**

The general public have not comprehended and internalized the constitution. It means different things to different set ups. There are those who equate it federalism while some even imagine shaping up for secession.

### **ii. Initial balkanization of certain areas:**

Devolution when not well handled in the initial stages might leave some counties behind for along period. There will be the temptation to throw people out of employment for those who are not indigenous of those counties.

### **iii. The major role of judiciary:**

The constitution places heavy premium on the judiciary. The courts are to give direction on virtually everything. Court processes are likely to slow down even derail the implementation process.

### **iv. Conservatism:**

The ant reformist groups prevalent in the country still remain in the institutions that are to facilitate change. They will keep slowing down the good will. Some are keen on maintaining the status quo in order to protect their positions, connections and at times ill acquired wealth. The attempts by the Office of the President over the role of provincial administration and the issue of Local Authorities and the task forces in the ministry of Local Government further attests to that fact.

### **v. Challenges in Transition:**

The transitional arrangements are fairly complex against a fairly unfriendly environment. The constitution suspends implementation of

changes in some structures of government to sustain the transition. The same organs are under threat of extinction in the constitution. The numerous task forces started by ministries, role of the AG, CJ, Ministry of Justice, the role of parliament. Transitional time lines not getting honoured. Parliament and the executive are constantly at power wars. There is a divided chain of command in government yet the constitution provides for compulsory consultations between the president and the PM.

#### **vi. Counties in transition:**

The national government is to facilitate, build capacity and transfer county functions in phases. If there is no adequate good will combined with resistance for change expected in the state bureaucracy, devolution will be greatly challenged.

#### **vii. The Electoral challenges:**

There will be six elections in one general election. The amount of confusion on the side of voters and the management challenges on the side of IEBC will be massive.

#### **viii. The Public Administration and Local Authorities:**

There is a big confusion as to the place and future of Provincial Administration and Local Authorities. The respective ministries are indicating a stay on position. The entire personnel still go with position of the ministry heads that appear to be playing politics. It is in the reverse of the provisions of the constitution.

#### **ix. Chances of Counties bolting out after 2015:**

The counties will most likely take over all the public service personnel currently at the districts and below as part of the national government facilitation to the counties. In practice, the counties might only need less than half. There will be attempts to down size which might be resisted by the national government during the three years. However by 2015, the counties will have full powers to bolt out and do as they deem fit when it comes to county public service.

## **x. The public service personnel.**

Currently the entire public service is a central government bureaucracy consuming up to 78% of the national budget. The constitution reduces the functions of the national government, limits its tentacles and takes away a minimum of 15.5% of the budget to counties. Can the national government run its development portfolio with the remaining 6.5%? Or will the government hive out its lower level personnel to counties? Will the counties accept and at what cost?

## **xi. The Devolution of vices and bad practices:**

Influence peddling, corruption, deals etc are likely to devolve too to the county governments. Many players including the current crop of MPs are gearing up for Governorship at the counties. The indicated fund transfers seem to be alluring.

## **xii. Non Clarity and Ambiguities:**

The constitution has certain ambiguities and fairly confusing provisions. Some of these include:

- a) The date of the next general election. Statements like
  - Parliament determines its own calendar.
  - the term of any parliament expires on the date of the next election
  - elections are to be held on second Tuesday of a fifth August,
  - the current parliament goes full term
  - president can dissolve parliament when advised by the CJ
- b) National functions in the county geographies. How national government will ensure it reaches out to every corner of the republic with its services when it does not have its own structures. Why should it have structures of its own when most of its direct services to the people are much fewer and less technical?
- c) The position of PAs, LAs and the current decentralized funds ie CDF, LATF, RMFLF, ESP and several other decentralized authorities.
- d) The date of constituting JSC and the inclusion CJ and AG who themselves have to leave in short time.

# MONITORING FRAME WORK FOR THE PROCESS

Monitoring the process of implementation is one critical activity that has to be done by many agencies, individual professionals included. As indicated, there are enough forces and tides against the implementation process. If it is not properly monitored for continued and sustained pressure the process can easily flounder. The monitoring framework needs to be guided by:

- The overall constitution implantation cycle
- Isolating and plotting individual legislative and activity actions in the cycle
- Plotting individual membership against the activities in the cycle. In order to achieve the monitoring goal, it is important to:
  - a) **Develop a monitoring tool.** The tool should include time frame arranged in line with the constitution action time lines, who to check, whom to report to who, who to take what action and with whom.
  - b) **Set up a monitoring desk.** This should be within the secretariat or to a contracted individual
  - c) **Network with other players.** It is important to know what other players are doing and how APSEA can relate with them including claiming a specific niche
  - d) **Identify with the implementing organs.** APSEA needs to claim recognition and to lobby to have membership professionals appointed in some of the institutions and organs in charge of the implementation process. This will help in monitoring the implementation from within.
  - e) **Work out a media strategy.** Many things go unnoticed by professional until they are out in the media. The media may also be used to highlight the professionals concerns and issues.

## CONCLUSION AND RECOMMENDATIONS

Based on the findings, APSEA as a professional conglomeration in the country has numerous identifiable tasks that it needs to play both corporately and through member associations. The constitution implementation is such a task that should not be left with politicians and loud entities only.

I therefore recommend the following:

- More in-depth interrogation and tracking of the constitution implementation process. Setting up a constitution implementation desk would be ideal.
- Identifying niches and prodding membership associations to engage either individually or collectively
- Formal engagement with the constitution implementation organs i.e. the CIC, LRC, Parliamentary oversight committee, etc
- Do research on individual legislations to isolate areas of contradiction to the constitution.
- Engage the media as a medium for promotion of legislative suggestions and public engagement.
- Do petitions for improvement on legislations.
- Corporate action on behalf of individuals, membership and public interest concerns.
- Offer professional input either from within or outsourcing of minds to help in offering support to the complex implementation processes like devolution.
- Professional support to nascent counties from 2012. Counties will need a lot of internal strategic capacity support.
- Identify opportunities for membership engagements ie counties will be under every temptation to utilize local human resources, local companies, etc.

Counties will also compete to attract investments thus offering new opportunities for professionals.



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