

STAKEHOLDER BRIEFING – CONSTITUTION OF KENYA (AMENDMENT) BILL, 2013

‘Designation of State Offices and the Thinking Behind Article 230 of the Constitution.’

(Otiende Amollo, EBS)

1. The Constitution of Kenya, promulgated in 2010, ushered in a new dispensation in Kenya’s constitutional, social, political and economic order. It overhauled the governance structures introducing a devolved system of government, a bicameral legislature and a number of Independent Constitutional Commissions among others.
2. The Various Constitutional Commissions are set up each for a particular purpose and with specific functions in the Constitution. The Constitution reduced the imperial presidency and most of the functions initially bestowed upon the Presidency and Parliament were donated to the various Constitutional Commissions. The objects of Constitutional Commissions and Independent Offices in Article 249 cannot go unmentioned especially protecting the sovereignty of the people and as well as securing the observance of all state organ of the democratic principles.
3. The argument on whether or not to disband some of the commissions should not therefore arise as it amounts to reverting back to a highly centralized system. The powers currently being exercised by Constitutional Commissions are intended to ensure checks on the three arms of government. Those powers were initially exercised by the executive and amounted to a very powerful and unaccountable executive.
4. Article 230 of the Constitution establishes the Salaries and Remuneration Commission (SRC), an Independent Commission with a mandate to set and regularly review the remuneration and benefits of State Officers.
5. For public officers, the constitution mandates the Salaries and Remuneration Commission to advise the national and county governments on the remuneration and benefits of all other public officers. A decision reached because setting salaries in the public service is a matter closely linked to government policy and subject to collective bargaining. It is therefore appropriate to allow the executive (and unions) to deal with the same as it is dictated by the economic situation prevailing at any particular time.
6. The understanding was that the Salaries and Remuneration Commission protects constitutional democracies in two important ways. First is to ensure that no particular person or body sets their own salaries – thus although MPs must pass the budget, they do not set their own salaries. This is to ensure checks and balances and to remedy the Kenyan tradition where MPs had previously increased their salaries abnormally.
7. Secondly, the SRC protects the remuneration of members of the institutions that are intended to guard the Constitution and oversee the Executive and Parliament. So, for instance, no other arm of the government can arm twist the other, thereby challenging its independence

by adjusting remuneration to the disadvantage of that arm. The salaries of members of Constitutional Commissions and judges are protected.

8. It is good to note that an express provision had been made in all three prior drafts for a Salaries and Remuneration Commission that would set and review salaries of all public officials, including MPs. This was in line with the views received from the public to the Committee of experts. However it ought to be emphasized that the Parliamentary Select Committee had proposed that the Parliamentary Service Commission would have powers to appoint an independent body to deal with salaries and allowances of Members of Parliament a proposal that COE rejected. This proposed amendment (Constitutional amendment Bill 2013) is therefore not new but intended to ensure that MPs have control in determining their salaries
9. On the Designation of state officers in Article 260 it is important to get the reasons why some were classified as such:
10. As stated above, the classification was informed by the need to protect those offices in terms of protecting their independence. The officers so designated cannot be manipulated by adjusting their remuneration negatively. This is important in so far as appointive positions are concerned
11. For elected officers, it is to curb Members of Parliament and Members of the County Assembly from determining their own salaries thereby creating disparities with other government officers and also from increasing the overall wage bill.
12. In the design of the Constitution of Kenya 2010, the terms state, state office, state officer and state organ are carefully defined and applied in such an intricate manner, that to seek to amend the definition of “State Officer” without amending the other related terms is not only impossible, but will fundamentally alter the structure, design and integrity of the entire Constitution.
13. We therefore note that to the extent that the terminology “state organ” is entrenched in Article 6, while the foundations of the Chapter Six principles are captured in Article 10(2) (c), an amendment that seeks to reduce the threshold of integrity, accountability and good governance in state officers is one as would require a referendum in accordance with Article 255(1) (d).
14. In seeking to obliterate the essential independent jurisdiction of the Salaries & Remuneration commission, the Amendment would still require a referendum as it would essentially interfere with the Independence of Commission under A.255(1)(g).
15. It should be noted at all times that National and County governments are distinct (A. 6(2)). When weakening the roles and functions of independent institutions meant to regulate the governments, some County governments may ran rogue and reject any interventions from National government entities. This will be the biggest threat to statehood, and the Republic of Kenya.