# Contents

*Abbreviations*  
*Foreword*  

1. **Introduction**  
   - A Brief Background  
   - Composition of the Fact-finding Mission  
   - Goal and Objectives of the Mission  
   - Tasks of the Mission  
   - Persons Interviewed by the Mission  
   -  

   -  

3. **Minimum or Maximum? The Reforms**  
   - Minimum Reforms  
   - Maximum Reforms  
   -  

4. **Shifting Alliances: The Players**  
   - Government  
   - Political Parties  
   - Civil Society  
   - Marginalised Groups  
   -  

5. **A Multiple-headed Monster: The Challenges**  
   - System of Governance  
   - Administrative Measures  
   - Security and the *Mungiki* Factor  
   - Mistrust  
   - Land  
   - The Metamorphosis of Political Parties and Ethnicity  
   - The Emergence of Civil Society as Another Power Centre  
   - The Constitution-making Process itself as a Challenge  
   -  

6. **Bomas or Wako? A Comparison of the Constitution Drafts**  
   -  

   -  

8. **The Way Forward: Recommendations and Conclusions**  
   -  

*Annexure A*  
*Persons interviewed by the Mission*  
*Annexure B*  
*Literature and Laws Available to the Mission*
Abbreviations

CCCC (4Cs) Citizens Coalition for Constitutional Change
CCRC Comprehensive Constitution Reform Coalition
CKRC Constitution of Kenya Review Commission
CSO Civil Society Organisation
DP Democratic Party
EAC East African Community
ECK Election Commission of Kenya
FORD Forum for Restoration of Democracy
GEMA Gikuyu, Embu and Meru Association
JDF Joint Dialogue Forum
KADU Kenya African Democratic Union
KANU Kenya African National Union
KCK Kituo Cha Katiba
KPU Kenya Peoples’ Union
LDP Liberal Democratic Party
MOU Memorandum of Understanding
MP Member of Parliament
MSRF Multi Sectoral Review Forum
NAK National Alliance of Kenya
NARC National Rainbow Coalition
NCC National Constitutional Conference
NDC National Dialogue Conference
NDP National Democratic Party
NGO Non Government Organisation
NPP National People’s Party
ODM Orange Democratic Party
Foreword

This book is a report by a team of East Africans from Tanzania, Uganda and Zanzibar who were commissioned by Kituo Cha Katiba—Eastern Africa Centre for Constitutional Development (KCK)—to inter alia: (1) secure the consensus and commitment of different key stakeholders in Kenya to peaceful general elections; and (2) solicit views and proposals of the various key stakeholders on the minimum standards or measures necessary for the achievement of peaceful upcoming general elections.

Led by Hon. Mr. Justice J. S. Warioba, former Prime Minister of the United Republic of Tanzania, the Mission held one-on-one consultations with key players in the process including among others officials of government, leaders of the major political parties, officials of the electoral commission and members of various civil society organisations in Kenya.

This report provides a useful backdrop to the current climate surrounding the constitutional review process in Kenya but also assesses the impact of the process on the ongoing negotiations on the form of and the path to the East African Federation.
Introduction

A Brief Background

The interest of the people of East Africa in matters relating to good governance and democratic development has increased exponentially over the last five years, with diverse interest groups and individuals engaging in processes of reviewing existing constitutional orders. Unfortunately, despite the gain in momentum in the clamour for constitutionalism in the region, certain constitution-making processes have represented mere symbolism intended to serve external interests rather than national or local needs. Coupled with this are the ulterior and selfish motives of state actors in their conduct of constitutional reviews.

In September 2001, concerned about developments in Kenya, Kituo cha Katiba: The Eastern Africa Centre for Constitutional Development (KCK) felt it imperative to contribute to Kenya’s democratisation process by initiating a follow-up process to the ongoing constitutional review process. A fact-finding team of four East Africans assessed the constitutional review process and made practical recommendations to the Constitution of Kenya Review Commission (CKRC) on how to move the constitutional review process forward. The specific recommendations included the need: to work as a team; to resolve internal differences; to consider the views of the people; and to offer support to groups undertaking civic education.

Later, following the November 2005 referendum in which the Kenyan people rejected the draft constitution, Kituo Cha Katiba provided further support to a group of East African experts to study the “Bomas” and “Wako” draft constitutions, and to synthesise the two to produce an “alternative” constitution. This was simplified and translated into Kiswahili and is expected to be used as an education
tool to stimulate further dialogue and debate and thus build consensus for a new Kenya constitution.

As the tide towards the upcoming elections gathers momentum amidst the current constitutional impasse in Kenya characterised by suspicions and sharp divisions among Kenya’s political factions, hinged mainly on the system of government and the distribution of power, Kenya’s democratic future remains bleak with consensus among key political actors a remote possibility. Against this backdrop, KCK in line with its mandate of promoting inter-disciplinary communication, dialogue and action on constitution-making and good governance in the region, from 18 – 21 June, 2007, sent a fact-finding mission of four East Africans to Kenya to provide a neutral forum to various stakeholders with varied interests and differing opinions with a view to generating consensus and commitment to acceptable minimum standards necessary for ensuring peaceful upcoming general elections in Kenya.

**Composition of the Fact-finding Mission**

The fact-finding mission comprised four East Africans of integrity from Tanzania, Uganda and Zanzibar with knowledge and practical experience on issues of constitutionalism and democracy in East Africa and beyond. The delegation consisted of:

1. Hon. Mr. Justice Joseph S. Warioba (TANZANIA), as Head of Mission. He is a former Judge of the East African Court of Justice in Arusha, Tanzania; former Judge of the International Tribunal of the Law of the Sea in Hamburg, Germany; member of the Board of Trustees of the Mwalimu Nyerere Foundation; president of the Governing Board of the International Ocean Institute and former Prime Minister of the United Republic of Tanzania.

2. Prof. Saida Yahya-Othman (TANZANIA/ZANZIBAR), Associate Professor, Department of Foreign Languages & Linguistics, and Director of Research and Publications, University of Dar es Salaam.

3. Fr. Albert B. Byaruhanga (UGANDA), member of the Uganda Joint Christian Council and executive board member of the Inter-Religious Council, Kampala.
4. Hon. Sarah Bagalaaliwo (UGANDA), former member of the East African Legislative Assembly and board member of Kituo Cha Katiba (KCK).
5. Ms. Caroline Murimi, Programme Officer, Kituo Cha Katiba (KCK)\(^1\).

**Goal and Objectives of the Mission**

The goal of the Mission was to contribute towards the consolidation of Kenya’s democratisation process during the current constitutional impasse.

The specific objectives of the Mission were:

1. To initiate dialogue with all stakeholders with varied interests and views in order to generate consensus and commitment to minimum standards necessary for ensuring peaceful general elections in Kenya, given the current constitutional impasse;
2. To provide a mechanism and neutral forum for activists, academics and politicians to engage in dialogue, self-reflection and critical debate over the constitutional stalemate in Kenya;
3. To act as a conduit of negotiation between the ruling National Rainbow Coalition (NARC), members of the opposition and civil society;\(^2\)
4. To provide regional support for positive constitutional development in Kenya; and
5. To enable critical actors in the ongoing processes in the region to share experiences and learn from each other’s mistakes as well as best practices.

**Tasks of the Mission**

Necessitated by the need for peaceful upcoming Kenya general elections slated for December 2007, the major tasks of the Mission team were:

1. To secure the consensus and commitment of various key stakeholders in Kenya to peaceful general elections.

---

1 Ms. Murimi represented Kituo Cha Katiba as secretary to the mission.
2 It has to be noted, however, that several people we talked to pointed out that in effect there is no ruling party as such, or even parties per se. What exists are factions whose structures cut across the opposition-government divide.
2. To solicit views and proposals of those stakeholders on the minimum standards or measures necessary for the achievement of peaceful general elections.

**Persons Interviewed by the Mission**

The Mission held one-on-one consultations with key players in Kenya, among whom were government officials, leaders of the major political parties, officials of the Electoral Commission, representatives of the main religious institutions, former members of the CKRC, members of parliament, and members of civil society including representatives from women and youth Non Government Organisations (NGOs), and the media.

Some of the key people identified for the discussions included Hon. Moody Awori, Vice President of the Republic of Kenya and chairman of the government committee charged with initiating dialogue with the opposition on minimum constitutional reforms; Hon. Martha Karua, Minister for Justice and Constitutional Affairs; Hon. Paul Muite, Chairman and Member of the Parliamentary Committee on the Administration of Justice and Legal Affairs; representatives of the opposition; the Multi-Sectoral Review Forum, Muungano wa Katiba Mpya.

Unfortunately, due to unforeseen reasons, the Mission was unable to meet all the stakeholders. Among those the mission could not meet included representatives of the 12-member government team mandated to initiate dialogue on the constitutional review process; representatives of the main religious institutions; officials of the Kenya Law Reform Commission, and representatives of the Law Society of Kenya. Nonetheless, by and large, the persons met by the Mission were representative of the broad spectrum of Kenyan political views and provided a diversity of ideas which have enriched the report. A full list of persons met and interviewed is appended hereto.

Needless to say, given that the constitutional review process in Kenya has been going on for more than a decade (some would say
four decades, from the time of independence), and given the immense interest that the process has generated, the literature on the subject is vast, from academic to activist and official. It is not the intention of this report to review that literature, nor would that have been part of the mandate of the Mission. Nevertheless, reference was made to a vast quantity of documents, some of which are listed in the annexures. The Mission was more reliant, however, on the views expressed in the face-to-face interactions with various stakeholders. It is their voices that are represented in this report.
2


As elsewhere, the history of constitution-making in Kenya is linked to the struggle for good governance and democracy, and is therefore a legal and political question. It is a history of a struggle to address the fundamental omissions in the 1963 independence constitution as well as to repeal subsequent amendments which undermined constitutionalism. These amendments vested immense power in the presidency and so alienated the people of Kenya that by the 2002 general elections, a remarkable disconnection existed between the rulers and the ruled. The subsequent amendments to the constitution also aggravated the already blurred separation of powers between the executive (President), the legislature (parliament) and the judiciary.

The significance of a country’s history in the process of constitution-making or constitutional review cannot be overstated, for it acts as a reminder of where a nation comes from and what lessons it has learnt. It is also key to understanding the circumstances which determine the best constitution for prosperity. The process of constitution-making or review must also consider the global, regional, national and local trends and development goals if the constitution is to be relevant. In the Kenyan context, the constitution should be able to answer the right questions of resource and power sharing, and to address the needs, aspirations and dreams of the people in a way that comprehensively...

---


4 Senior Counsel Pheroze Nowrojee identifies the right questions as those that respond to equitable distribution of natural resources, distribution of political and executive power and those that address the concerns and meet the needs of every person in Kenya, including the minorities.
addresses past inequalities and imbalances. On the other hand, the basis of a people-driven constitutional review is not about how scientific the process and eventual contents are but how participatory the process is. People’s participation must be ensured throughout the process, from the collection of views, the debates for consensus-building and the referendum. In other words, for the process to be genuinely legitimate and credible, it must be inclusive. The people of Kenya must be involved in all its key stages as much as practically possible. Their level of participation and involvement in determining the content as well as the process of the draft constitution is critical.

By the time of the general elections in Kenya in December 2002, however, it had become increasingly apparent that the political elite were exploiting the on-going constitutional review process for political gain. While the CKRC found itself constrained in finalising comprehensive constitutional reforms ahead of the elections, it was faced with an obstinate executive and an “executive minded” judiciary that frustrated the process. In the end, the draft constitution could neither be debated nor adopted before the elections.

In 2002, the National Constitutional Conference (NCC) was constituted but it adjourned almost immediately in October 2002, and only reconvened at the Bomas of Kenya in April 2003 to work on a new draft constitution bill. At this stage, it emerged that National Rainbow Coalition (NARC) partners were no longer in agreement on the sharing of power as proposed in the CKRC draft constitution. National Alliance of Kenya (NAK) was unhappy with the proposed parliamentary system of government with a prime minister, devolution of power to the regions and an upper house of parliament. Apart

6 This is a coalition of several political parties that defeated KANU in the 2002 multi-party elections.
Moving the Kenya Constitution Review Process Forward

from disagreements on the substance of the draft, there were also disagreements on the process of the constitutional review. Key NAK members questioned the legitimacy of the NCC, such as the composition of its delegates, arguing that they were unrepresentative of the Kenyan population given that three delegates represented each district regardless of population size. However, Liberal Democratic Party (LDP) supported the process, insisting that the CKRC had collected the views of all Kenyans.8

The cohesion of the NCC was undermined by factional differences. This, together with utterances by senior government ministers that the NCC was illegitimate, eroded public confidence in the constitution making process. In spite of this, the NCC proceeded to discuss the various chapters by committees.9 A full draft was produced by the NCC in late March 2004. On 9 March, 2005, two bills – the Constitution of Kenya (Amendment) Bill and the Constitution of Kenya Review (Amendment) Bill, were framed, setting out a new programme of constitutional review. Eventually, the 2004 Constitution of Kenya (Amendment) Act was enacted with provisions for a mandatory referendum through which the people of Kenya were to enact their constitution. The Act gave powers to parliament to effect changes to the Bomas draft. Parliament finally passed an “amended” Bomas draft - the Wako Draft - which was subsequently assented to by the President. It was voted on in a referendum on 21 November, 2005, the outcome of which was a rejection by a 58 per cent majority.

With the rejection of the “Wako” draft constitution in the November 2005 national referendum, the constitutional review process had seemingly reached a dead end. Various proposals have since emerged to resume the process. Among these were the reconvening of the NCC, the election and convening of a constituent assembly; the remission of the whole matter to parliament, and the establishment of an expert commission to produce a draft which harmonises the various existing

8 Ibid p. 93
9 Ibid p. 94
drafts for consideration by one of these bodies. Several of these proposals envisaged a further round of consultations with the people and specialised groups.\textsuperscript{10}

In an opinion poll conducted by Steadman Research Services Limited and released on 20 December 2005, about 31 per cent of Kenyans sampled wanted ‘experts’ to complete the constitution review process. Eighteen per cent wanted the constitution reviewed by parliament, while 17 per cent were for another delegates’ conference similar to the Bomas of Kenya group. Six per cent thought Orange Democratic Party (ODM) should handle it, while some seven per cent did not know what should happen.\textsuperscript{11} Frustrated by the long wait for a new constitution and the intrigues they have endured over the last 15 years, 22 per cent of the respondents said they would rather the country remained with the current constitution. Apart from taking 15 years to complete, the review had been marred by political manipulation and infighting in the political parties, namely Kenya African National Union (KANU), National Rainbow Coalition (NARC) and Orange Democratic Party (ODM). However, 74 per cent considered it ‘very important’ to have a new constitution before the next general election. Of the three drafts in existence, 47 per cent preferred the Bomas draft, 22 per cent the Wako draft, and 21 per cent the current constitution.\textsuperscript{12}

There has been increased apprehension in Kenya about the issue of constitutional reforms with mainly two factions, one vying for minimum reforms and the other for comprehensive reforms. Sharp divisions arose among Kenya’s political factions on two critical constitutional issues: the first being the system of government at the national level (with one group advocating a parliamentary system and the other a presidential system); and the second being the distribution

\textsuperscript{10} Yash Ghai \& Jill Cottrell, December 2005.


\textsuperscript{12} Ibid.
of power between the central and sub-national levels of government (one group advocating a quasi-federal system and the other essentially a unitary system). However, past experience would suggest that none of these proposals was likely to lead to the speedy adoption of a new constitution.

In view of the above developments and with the general elections due in December 2007, the more likely scenario is one of lack of consensus between political factions. The president’s remarks about consolidating the “gains of the Wako draft” strongly indicated his support for (i) a presidential and (ii) an essentially unitary government which are the only ‘gains’ of the Wako draft. These are the precise points on which the opposition will now find itself unable to make any concession. It is likely that, sensing victory in 2007, the opposition would desire to change the constitution even though the highly centralised system frustrates its own coalition-building. It is also predicted that no agreement would readily be forthcoming on the composition and precise functions of any new review process proposed. Besides, there are not many ‘experts’ who are perceived as independent.  

Whatever the case, there seems little point in whatever new body is set up to travel around the country to collect the views of the people, since the CKRC and others have already done so. Additionally, these consultations are extremely expensive and, if properly conducted, time consuming. Already the Kenyan process has become, by a large margin, the most expensive in Africa. To some proponents therefore, it seems better to rely on the analyses made by the CKRC of the views of the Kenyan people and to some extent the proceedings at Bomas.

The above state of affairs has, since the 2005 referendum, been exacerbated by a mushrooming of Civil Society Organisation (CSOs) to discuss the issues surrounding the constitutional review process,

---

13 Yash Ghai & Jill Cottrell, supra note 9.
14 Ibid.
including the formation of alliances at various levels both within government and in the opposition. Unfortunately, these alliances have only served to create an unwarranted number of smaller sections with no common ground between them. It is clear that these alliances are likely to continue to emerge as members seek to align themselves for the upcoming general elections.
3

Minimum or Maximum?
The Reforms

As it was becoming apparent that the period remaining to the forthcoming elections may not provide sufficient time for the conclusion of the constitutional review process, almost all stakeholders were drawn to the debate on the feasible alternatives. It is through these debates that the concepts of ‘minimum,’ ‘maximum,’ ‘comprehensive’ and ‘essential’ reforms became the focal issues. Differences in the interpretation of these terms are something that even the various proponents of constitutional review/reform are grappling with as the struggle for constitutionalism in Kenya intensifies.

Minimum Reforms

In its interactions with various stakeholders, the Mission felt it necessary to have a clear line drawn around what was achievable in the period between the Mission and the general elections slated for the end of 2007. In this respect, the Mission would favour consensus being reached on those “non-contentious” issues that have been brought to the fore and would be agreeable to all the stakeholders.

These include:
(a) The entrenchment of the constitutional review process, favouring the inclusion of a “sunset clause” to legally bind the incoming government to finalise the process within a given time-frame;
(b) The empowerment of parliament to control its own calendar to ensure that the head of state does not control the election calendar;
(c) The provision for the conclusion of petitions challenging the president’s election within 21 days after the election;
(d) The provision for a clear mechanism to tame political “nomadism” in parliament;
(e) Allowing for dual citizenship, which would enable Kenyans in the diaspora to vote;
(f) Providing for a mechanism that ensures for the swift issuance of
identity cards; and
(g) Providing for a mechanism that allows for the continuous updating
of the voter register.

The term *minimum* reform has been given different interpretations. On the one hand, these are believed to comprise those issues that were described as “contentious” at Bomas, the list of which is long. These are thus those reforms which relate to the constitutional reform debate, although they have then become linked to the elections. They include:

- the sharing of executive powers between the president and prime minister;
- who between the president and Members of Parliament (MPs) should control parliament’s calendar;
- whether there should be a two-chamber system plus central, district, locational and civic authorities;
- whether the provincial administration should be abolished;
- whether women should by law be one third of all MPs; and
- the establishment of Kadhi and other religious courts at national level.

The second understanding of minimum reforms has been pegged to electoral, legal and policy reforms and not constitutional reforms per se. Under this ambit, minimum changes advocated for include:

- a reduction in the powers of the president;
- the right of parliament to set its own timetable;
- strengthening of the Electoral Commission so that it is shielded from manipulation;
- dual citizenship for Kenyans abroad;
- a ban on the use of public resources in election campaigns; and
- state funding for all political parties.

As can be seen, there are some overlaps in the two interpretations. Also, there is nothing “minimum” about the minimum reforms. The two perspectives of what constitutes the minimum reforms are so wide-ranging that addressing them comprehensively before the
Moving the Kenya Constitution Review Process Forward

elections presents a daunting task. Moreover, a more critical analysis of the essence of minimum reforms exposes an egocentric and short-lived agenda by politicians. Some have seen the call by opposition MPs for government to adopt specific minimum reforms as a gimmick to sway voters in their favour. In other words, minimum reforms have boiled down to whatever gives advantage to certain groups.

The Departmental Committee on the Administration of Justice and Legal Affairs, on its part, has proposed essential reforms, by which they mean those reforms that are prerequisites for free and fair elections. These include:

- the amendment of section 47 of the constitution so as to anchor the comprehensive review process within the constitution;
- vetting, by parliament, of appointments to key statutory and public offices;
- financial independence of the Electoral Commission and streamlining the appointment of its commissioners;
- dual citizenship;
- the equitable distribution of national wealth;
- summoning, prorogation and dissolution of parliament;
- entrenchment and protection of multi-party democracy;
- banning the use of public resources in election campaigns; and
- the winner of presidential elections to receive more than 50 per cent of all the votes cast in addition to 25 per cent of the votes cast in at least five of the eight provinces in Kenya.

Maximum Reforms

Some of the issues listed above under minimum reforms are, as said earlier, outstanding from the 2005 referendum. These are viewed by some as constituting maximum rather than minimum reforms. Among these are:

- power-sharing between the president and an executive prime minister;
- the establishment of a two-chamber parliamentary system;
• the devolution of power from the central authorities to district, local and civic authorities;
• the abolition of the provincial administration;
• granting women one-third of all seats in parliament;
• the establishment of Kadhi and other religious courts; and
• the vetting of appointments to key statutory and public offices such as Attorney General, the Chief Justice and Judges of the High Court and the Court of Appeal, the Director of Public Prosecutions, the Controller and Auditor General, Permanent Secretaries, Ambassadors and High Commissioners. This proposal is aimed at ensuring appointments on merit, capability and integrity as opposed to responding to the political whims of the day. It would equally limit or prevent the creation of extra offices without the approval of parliament, thus checking the excessive powers of the presidency.

The proposal that the winner in the presidential elections must receive more than 50 per cent of all votes cast in addition to 25 per cent of the votes cast in at least five of the eight provinces in Kenya is also a question for further deliberation. In the same vein, entrenchment of a provision in the constitution to oblige government to finance political parties is a sensitive issue requiring thorough consideration and a gradual approach to its implementation.

From the foregoing discussion, it is evident that the minimum or essential reforms that are being advocated comprise about 10 per cent of the issues that were considered “contentious” at Bomas. Justifiably, therefore, if immediate consensus between the different groupings can be generated with respect to the minimum/essential reforms, it would be viable to hold dialogue on the maximum reforms even before the 2007 elections or soon thereafter.

Given the controversial nature of the proposed maximum reforms – the majority of which touch on the system of governance – it is the Mission’s view that meaningful and comprehensive dialogue around them can only take place after the upcoming elections.
4

Shifting Alliances: The Players

Kenya is undoubtedly a highly politicised society, and this fact has manifested itself in a plethora of groups and coalitions all of which clamour for a piece of the action, seeing this as their constitutional right.

As noted, the perception among many is that all the players are taking part in a cyclical game which comes centre stage as the elections approach. The cry for constitutional reforms becomes louder from all parties: for the government, it is a method of placating other stakeholders and ensuring their support during the elections; for the opposition, it constitutes a weapon to highlight a major failure of the government to live up to its election promises; for civil society, it allows them to focus on an issue that is gripping for the whole nation, as well as the donor community, so that they appear to be tackling a people’s concern.

This chapter will examine the perceptions and contributions of the various groups and the roles they have played in the constitution making process.

Government

So fluid is the Kenyan political context that between the time of the Mission’s visit and the finalisation of this report, major events have taken place. The government, in an apparent concession to the cries for constitutional reforms, had set up an Inter-Party Parliamentary Group on minimum reforms, chaired by the Vice-President, Moody Awori, to see what changes can be made to the constitution within the time remaining. Within the month of July, this committee put forward proposals as part of a Constitution of Kenya Amendment Bill, whose contents included, among others:

• The president losing the power to declare a state of emergency
• The creation of new constituencies by parliament;
• Parliament controls its own calendar;
• Referendum must be attended by 40 per cent of registered voters;
• Kenyan women can take out citizenship for their foreign husbands;
• Dual citizenship to be allowed;
• Women getting more representation in parliament.

Subsequently, some of these provisions were sent to parliament, among them the proposal to increase women’s representation, and that for additional constituencies. None went through.

Proposals referred to here were not related to the Moody Awori committee work. They were a specific government initiative.

**Political Parties**

The political parties, especially those in the opposition, have ably demonstrated, at least twice, that unity is strength. The elections of 2002, which were won by the alliance of parties opposed to the ruling KANU, aroused great hope that Kenya had now gone beyond the “ideology of ethnicity” discussed by Oyugi (2001)\(^\text{15}\) and had begun to organise for the greater good of the nation. The more recent 2005 victory of the ODM in the constitutional referendum was another triumph. But in both cases, the remarkable victories were soon after eroded by the attempts of the various parties to jostle for vantage points for the next elections, including reneging on promises made during the alliance formation. In the current run-up to the elections, the politicians are clearly aligning themselves according to their ethnic affiliations, with declarations of support coming from various quarters based on the same criteria.

Currently, the official ruling party National Rainbow Coalition (NARC), the *de jure* incumbent, has had half of its MPs defecting

---

to National Rainbow Coalition (NARC)-Kenya, a party with only a few MPs. NARC-K now behaves like the *de facto* incumbent, campaigning for the president’s second term in office. The other half of National Rainbow Coalition (NARC) has been poached by the opposition, pledging alliance to ODM, which has no official presence in parliament.

The official opposition has not fared any better. A substantive number of its MPs have crossed to the government benches, and the remaining have aligned themselves with ODM Kenya. Parliament has thus become an interest group that constantly realigns. All this has led to some of our interviewees maintaining that there are now no political parties in Kenya, but merely “shades of opinion.”

Most interesting was the way these alliances played out in relation to the presidential candidates for the forthcoming elections. From one day to the next, the statements of whether, for instance, ODM would put up only one candidate while the rest stood back changed dramatically. There seemed to be initial agreement that only one candidate would be presented for president, but each party would put up its own candidates for MPs and councillors. This is now no longer the case.

The implication of all this for the constitution review process is that the presidential candidates are likely to pander to different constituencies in relation to the suggested changes, depending on where they see their support.

**Civil Society**

From the interviews the Mission conducted, it was clear that there was a high level of mistrust amongst civil society actors. Since 2002, civil society seems to be undergoing a post-transition crisis having lost a good number of its leaders to political parties and government. As a result, civil society’s response to fundamental constitutional issues has been rather fractured and disjointed, such that for every CSO agitating for reforms there is a corresponding one working in the
opposite direction. In a recent call for minimum reforms before the 2007 elections, the Catholic Church broke ranks with civil society and resorted to supporting government. Furthermore, it would also appear that it is no longer the preserve of political parties, but that of CSOs as well, to promulgate the new practice in Kenya of creating ethnic associations.

Part of the mistrust of civil society stems from the perception that there is lack of control over the constitutional process. There is no agreement on whether constitutional reforms should be minimum or comprehensive at this stage, the constitutional issue being used as tool for campaigning for elections. They themselves maintain that given the political will, minimum reforms should be possible before the elections. The existing Bomas draft takes care of most issues and there is therefore no need to start from scratch.

Whereas traditionally civil society is the natural ally of the political opposition, there has now developed a high degree of mistrust between these two groups. The opposition are seen to be focussing on personal rather than national interests. Some in this group are very nostalgic about 2002, when there was such an exuberant coalition which finally toppled the Moi government.

Civil society views itself as an important check in preventing the president from becoming a dictator as the present constitution allows him to be. The opposition on their part perceive civil society as also part of the problem, maintaining that they have been taken over by the political class. The incumbency, in particular, has managed to exert great influence on civil society, which is now facing difficulties with both the media and the political actors. It is in danger of being marginalised.

Where is the media in all this? Kenya has one of the most vibrant media in Africa. They have come a long way from the days of Moi, when the regime was in constant opposition to the media. They are not entirely out of the woods, as witnessed by the recent armed raid
on the *Standard*. But the recent withdrawal by government of the controversial media bill, which required journalists to reveal their sources of information, is an indication of the clout that the media still have. For the media and other CSOs, the right to information is paramount and must be enshrined in the constitution. But the media are still being attacked by government agencies and political parties, so their alliances cannot be taken as impartial. Their relations with other CSOs are also fractious sometimes.

**Marginalised Groups**

The most prominent of the marginalised groups in Kenya are the women. Under one-party rule, the women had a powerful voice under *Maendeleo ya Wanawake*. The institution of multi-parties meant that the women had to be mobilised within their own parties. This inevitably weakened their collective force and dissipated their efforts. However, one of the issues in the minimum reforms is the constitutionalisation of one-third representation by women. The women perceived substantial gains in the Bomas draft, in terms of representation, even if the content and the system of government leave much to be desired.

Given the reality in the region, for instance in Tanzania, and in another East African Community partner, Rwanda, Kenyan women were lulled into thinking that this representation was a foregone conclusion. However, when the proposal to amend Section 3 of the constitution by reserving 50 seats for women in parliament was sent to the House in August of 2007, it was woefully defeated. This demonstrates that the political parties have failed to provide the required support to their women wings, which would have done the necessary lobbying. Instead, the campaigns were left to a few women MPs.
As discussed in previous chapters, the constitutional reform or review process in Kenya has been long drawn out and highly contentious. Both the issues that need to be addressed and the stakeholders in the discussion become foregrounded prior to election periods. Setting aside the political opportunism of some of the parties to the debate, there is no doubt that one of the reasons for the continued stalemate is the complexity of the process, partly arising from Kenya’s history since independence.

**System of Governance**

At independence in 1963, Kenya inherited a parliamentary system of government in which the head of state was different from the head of government. But this system was not to last, being replaced by a presidential system after only one year.

Under the presidential system that was adopted, the president is both head of state and head of government. Executive power is vested in the president, and exercised with the assistance of ministers of his or her choice regardless of their support in parliament. The Kenyan president has an upper hand over parliament and also appoints most of the key public officers. Consequently there are few checks and balances on the exercise of presidential powers.

Proponents of the presidential system argue that it provides for a strong government which ensures stability and efficiency. They also contend that strong government emanates from vesting substantial powers in one person. However, others have stated that history has demonstrated that strong government does not emanate from the concentration of powers in one individual, but rather from the way that power is exercised. The cornerstone of strong governments is public
participation in issues of governance. It is achieved through consensus rather than coercion. On the whole, the presidential system provides fewer incentives for the government to listen to the people or to persuade them by reason, which ultimately renders such governments ineffective. In addition, stability becomes elusive once government is unable to carry out its policies because of having become authoritarian and corrupt through excessive powers.

In the parliamentary system of government, the roles of the head of state and head of government are distinct. The head of state represents the nation and symbolises its unity and for this purpose, many of his or her functions are largely ceremonial. He or she also has the responsibility to ensure the smooth application of the constitution, particularly with respect to the formation of government, by appointing the prime minister and ensuring continuity of government and administration. Executive powers are vested in the prime minister and his or her cabinet, and the powers are exercised collectively. Under a parliamentary system, government must always have the support of the majority of members of parliament, for it can be removed by them.

Within the ethnically charged context of Kenya, even the system of government is claimed to be viewed through regional lenses. The coastal people are said to prefer the federal system, with power devolving to provinces, while the central districts think that federalism will not work unless resources are shared equally to make sure that the units are economically viable.

One thing is certain – whether a presidential or parliamentary system of government is adopted – the lack of political will on the part of government has seemingly been the largest obstacle to bringing to fruition a long protracted constitution review process in Kenya. A number of people interviewed by the Mission saw the problem stemming from the narrow-mindedness of politicians who are more concerned with ascendancy to power than with constitutional review.
As a result, what has been happening in Kenya over the years are piecemeal changes to the constitution which are largely reactive rather than comprehensive.

A further concern has already been noted, and that is the use of the constitution review process by the politicians as an electioneering gimmick. It was disclosed that whenever elections approach in Kenya, there is a tendency for political parties to latch onto the fact that the constitutional review process has not been finalised as a failing on the part of the government and to use this as one of their election platforms. As a result, politics naturally takes centre-stage in the debate for constitutional reform, rendering the two inseparable. This is not surprising, for, as Wanyande notes, “politics is at the centre of constitution making.”

**Administrative Measures**

The National Rainbow Coalition (NARC) government was elected on the understanding that it would facilitate the enactment of a new constitution within 100 days of taking office. Kenyans generally agreed that democratic government was not possible under the existing constitution. Unfortunately, the government appeared to back-pedal on its commitment to facilitate constitutional review. There was evidence that the government was no longer comfortable with many of the proposed constitutional reforms, including: the abolition of the provincial administration, the creation of a two-chamber parliament, the devolution of power and, more importantly, the creation of the post of an executive prime minister. The reluctance to effect the desired reforms was linked to the factional conflict that developed within the ruling coalition shortly after the elections. This conflict inevitably found its way into the NCC and, later, the referendum.

---


Despite the government’s attempt to rekindle talks around constitutional reforms, it would seem that the issue of quorum or lack thereof continually arose to plague the success of any talks. On several instances, talks had to be postponed for lack of quorum and this begged the question whether there would be adequate time for the successful conclusion of the talks as well as the successful implementation of the agreed required “minimum” constitutional reforms before the general elections of 2007.

Coupled with the above is the clamour for the creation of new constituencies which has evolved into an administrative challenge for the government. Although the Electoral Commission of Kenya (ECK) has final authority over the creation of new constituencies, the fact that this issue has been usurped by opposing sides of government and the opposition alike has created a genuine fear that the process may not be as transparent as originally envisaged. If this is the case, then the process would ultimately lack the backing of the majority of Kenyans.

**Security and the Mungiki Factor**

In almost all our discussions, the Mungiki factor featured as a serious security threat to Kenyan citizens. There are an estimated two million members of the Mungiki Sect around the country. The word Mungiki means “a united people.” The sect is an outlawed quasi-political/religious cult in Kenya that has risen in notoriety in recent times due to the gruesome murders it has carried out, spreading terror throughout the country.

The origins of Mungiki seem to be rooted in the diversified efforts put in place during the struggle for change of leadership in the late 1990s. During the time of the alleged ethnic cleansing in the

---

western provinces, the citizenry organised themselves into “vigilante” groups to ward off the perpetrators. With assistance from various sympathisers, the group grew into an establishment of armed gangs that mushroomed throughout other districts. The finance raised also helped the group consolidate control over the transport sector. It is also alleged that the godfather of this organisation pledged to find these young people employment, once they came into power. Unfortunately, these promises never materialised and the group, which had grown both in number and strength, turned its anger against the government, launching constant attacks against innocent citizens.

While some politicians align this group to the Kikuyu tribe, others believe that it is the general wave of unemployment amongst the youth that has significantly contributed to the rise of this vice and of criminal activities. Hence, associated with the *Mungiki* group is the growing gap between the rich and the poor, which disparity some consider to be the source of the antagonism. Arguably, although the government has been hard pressed to handle this matter, the use of force alone without addressing the social inequalities may not provide the best solution.

In this election year in Kenya, the *Mungiki* have resurfaced with renewed vigour. Again, the connection between elections and the escalation of violence was drawn. Unfortunately, the *Mungiki* menace seems to have eluded politicians and the police alike. Counter accusations have been traded with opposition politicians claiming that their counterparts in government are members of the sect and were unwilling to bring an end to the violence. The Minister in the Office of the President responsible for Internal Security, Hon. John Michuki, has brushed these accusations aside, laying the blame instead squarely at the feet of the opposition, whom he identifies with the previous regime.

While *Mungiki* seems to be high on the agenda of the current security concerns, many Kenyans believe that the issue will be resolved once other social problems such as poverty and unemployment
are adequately addressed by government. In addition, views were expressed that the level of violence was enhanced by the retaliation and brutal methods employed by security forces. Whatever the case, it is strongly contended that security concerns will plague the electorate in the run-up to the 2007 elections.

**Mistrust**

As the elections in Kenya draw near, it is not just the politicians who are sharpening their competitive skills to face the contest ahead. It seems that even the non-political groups are not mere interested observers anymore, but are in fact part of the competition. The Kituo Cha Katiba (KCK) mission was unable to talk to some groups, such as the academics and the media, but the discussions held with representatives of some of the groups were not only extremely enlightening, but more important, they constituted a reflection of how hemmed in and thwarted each group perceived itself to be. There is a strong perception that each group views the other as playing an exclusion game, trying to ignore the views of others, and attempting to exclude them from the whole political process.

The issue of mistrust among the key stakeholders emerges as a major challenge befalling the constitutional review process. A majority of the stakeholders interviewed were wary of government intentions following the establishment of a government-led initiative to restart the dialogue process with both opposition leaders and civil society. Led by vice-president Hon. Moody Awori, the initiative was heralded as a step in the right direction but, in the same breath, viewed with scepticism in terms of delivery of its mandate. Many respondents felt that this initiative was introduced to simply placate the growing dissent and to allow government to buy time to consolidate its position prior to the upcoming elections.
Land

Kenya’s main natural resource is its land, of which nine per cent is currently cultivated. Almost all arable land is located in the south, as the northern two-thirds of the country is mostly desert or semi-desert. As elsewhere, the issue of land remains very sensitive and contentious, although many Kenyans own very large farms, most of which were originally created or inherited from the colonialists. It is noteworthy that unlike the current constitution, both the Bomas and Wako drafts propose maximum land holding size in arable areas of the country. This proposed restriction on the size of land holdings has already caused ripples of dissent, and in some areas, resulted in land clashes. Additionally, since the advent of multi-party politics, incidents of ethnic violence have peaked during the election years – 1992, 1997, 2002 and 2007. Both at national and local level, politicians are known to have used historical land issues and ethnicity to whip up communities against each other in order to raise more votes.

Already, in the run-up to the 2007 elections, media reports indicate emerging conflicts not only in Molo but also in Bura, Tana River, Meru, Tharaka, Trans Nzoia, Mount Elgon, Narok, South Turkana, Baringo, Likoni, West Pokot, Trans Mara and Kuria Districts. A majority of these land clashes are believed to stem from land allocations that favoured certain ethnic groups over others.

Because of the hostilities arising from or related to the issue of land, it is essential that it is treated with the greatest sensitivity to avoid any further acrimony amongst the people.

The Metamorphosis of Political Parties and Ethnicity

Metamorphosis is a transmutation of an existing state. Political parties in Kenya seem to be in a continuous metamorphosis cycle of creation, merger, separation and reconstruction, thus prompting the question: “Are there political parties anymore?”
The political parties in Kenya have tended to build their membership around ethnic groups, which raises serious doubt as to the conviction of their members to any of the party objectives or ideology. At the time of independence, the two main political parties were the Kenya African National Union (KANU) comprising Kikuyu and Luo and the Kenya African Democratic Union (KADU) mainly comprising the small ethnic groups of Kalenjin, Maasai, Turkana and Samburu. The origins of a unitary state in 1964 saw the dissolution of KADU to merge with KANU and shortly thereafter the breakaway of the Oginga Odinga faction to form the Kenya Peoples’ Union (KPU). Even during the one-party system in Kenya, ethnic leanings were consolidated within the Luo, Luhya and Gikuyu, Embu and Meru (GEMA) associations. Furthermore, the political parties formed in 1992 had apparent ethnic association with the Kikuyu in the Democratic Party (DP) and FORD-Asili, the Luo in FORD-Kenya and Kalenjin in KANU. This pattern was to be repeated in 1997 when a majority of Kikuyus were members of the DP, Luos were aligned to the National Democratic Party (NDP), the Kalenjin to KANU and Luhya to FORD-Kenya.

Although the defeat of the opposition political parties in 1992 and 1997 gave rise to the formation of new coalitions, again, these tended to be along regional affiliations. For example, the Luo NDP members joined the KANU government in 2001, leading to a short-lived merger in 2002. At the same time another alliance – the National Alliance of Kenya (NAK) - was formed by 13 opposition parties to counter the KANU-NDP alliance. When NDP broke away from KANU due to dissatisfaction with the presidential nominee, Mr. Odinga and other party leaders formed the Rainbow Alliance which transformed itself into the Liberal Democratic Party (LDP).

The calls for a united opposition led to the formation of the National Alliance for Change (NAC) comprising DP, FORD-Kenya and NPK. Not long thereafter, the Rainbow Alliance joined NAK to form the National Rainbow Coalition (NARC) to contest the 2002
elections. Unfortunately, after winning the elections, the failure of the government to honour an unwritten memorandum of understanding (MOU) in respect of power sharing between members of the different parties within the coalition resulted in the break-up of National Rainbow Coalition (NARC).

During the referendum debate a new alliance – the Orange Democratic Movement (ODM) – was formed to oppose the government-written constitution. Since then, the various parties and politicians have been engaged in alliance formation and negotiation to counter the incumbent in the forthcoming elections. Of concern to citizens is the fact that alliances or mergers have ceased to be ideological and have instead become part of a power brokering game to satisfy the selfish egos of a few politicians. Another concern is that continued mergers specifically designed to defeat an incumbent government have resulted in the loss of identity of the political party entity. And the result has been a breakdown in the ethos of nationalism.

The Emergence of Civil Society as Another Power Centre

The Constitution of Kenya Review Act was meant to place the citizenry at the centre of the review process to enable their participation and eventual ownership of both the process and constitution itself. The deviation by government from having a people-driven constitution has led to the continued impasse.

All the various efforts in the process have been enthusiastically embraced by numerous CSOs. Like political parties, CSOs addressing constitutional and governance issues have continued to emerge. Again, they have themselves been aligned to various initiatives and fora to put their issues across. Interestingly, CSOs have also fallen into the practice of walk-outs and memorandum of understandings.

The civil society groups that have emerged have included, amongst others:
(a) The Comprehensive Constitution Reform Coalition (CCRC);
(b) The Multi Sectoral Review Forum (MSRF);
(c) The National Dialogue Conference (NDC); and
(d) The Joint Dialogue Forum (JDF).

Cognisant that some of the major roles of a CSO are to raise awareness about pertinent issues, lobby for democratic reforms and act as a catalyst for change, there is always a controversy around assuming the representative role for which their mandate remains questionable. Can they replace the elected representatives of the people? What percentage of the population can one CSO claim to represent?

The agitation for equal representation in the multi-sectoral forum has subjected civil society to examination of their mandate and direction. Key questions that have emerged include: Who is the legitimate representative of the people? Are civil societies an alternative parliament?

One respondent expressed his misgivings regarding civil society thus: “Civil society has become a power centre negotiating with another power centre to claim for power.”

Despite having been well focused before the previous elections, CSOs may be losing direction and appear to be contributing to the current frustration. There is fear that civil society has been reduced to addressing sensational issues and hence turn into pressure groups for radicalism. However, certain intervening factors may deter this. First, the intense competition for funding and for an active and dominant voice had caused divisions between the civil society groups. CSOs have been squeezed by donors through insistence on basket funding and other measures. As a result, some have become suspicious of each other. Secondly, while many members of CSOs seem to be aspiring for political office in the near future, and others have actually already moved into politics and government, the remaining may be constrained in presenting themselves as such by the nature of their organisational structure and constitution. Nonetheless, with these developments,
civil society risks becoming irrelevant as a vehicle for social change unless it redefines its relationship with the state and creates strategic synergies to be able to effectively push forward the reform agenda.

The Constitution-Making Process Itself as a Challenge

The adopted constitutions of many African countries transiting from colonialism to independence tended to be negotiated documents between the outgoing colonial masters and the few representatives of the indigenous communities who at the time were members of legislative councils. In the 1960s, the changes were concerned with the transfer of power from the colonialists and the establishment of the ruling party - a trend that unfortunately gave rise to the establishment of the one-party state. Subsequent constitutional reviews between 1966 and 1990 were aimed at ingraining the political clout of the ruling party and centralisation of powers in the presidency. Ultimately, these resulted in the weakening of parliament and other institutions of the state. Later efforts for constitutional renewal in Kenya were a result of pressures from citizen groups, the churches and civil society agitating for the restoration of multi-partism and for change of government. It has been observed that overall, the process of constitution making in Kenya has always been ad hoc and reactive - aimed at dealing with political exigencies of the moment. Worse still, it has been marred by a lot of controversy, escalating the mistrust of people in government.

One of the arguments put forward in the post-independence efforts to rewrite constitutions is the absence or lack of a consultative mechanism with all stakeholders. Ostensibly, terms such as “participatory” or “people-driven” became synonymous with the democratic constitutions born out of the era of constitutionalism of the 1990s. The Review Act (1997) which was enacted to provide the legislative framework for the constitutional review process and the structures therefore failed to take off smoothly. An amendment to this Act in 2001 was made to cater
for greater inclusiveness and to merge the various institutions which were involved in the exercise. The defeat of the government-drafted constitution in the referendum of 2005 was a manifestation of the lack of legitimacy of the process of constitution making. The voice of the people was visibly reflected in the defeat of the government position in the referendum. The pitfall was the perception of the people that the defeat would lead to an automatic acceptance of the Bomas draft. However, what is clear is that for as long as the Kenyan people feel that the process is controlled and manipulated by the government, it is bound to fail.
One of the major reasons behind the clamour for constitutional reform/review in Kenya arose from the realisation that the concentration of powers in the presidency at the expense of the other arms of government continually led to bad governance, the collapse of the rule of law, and the erosion of the culture of human rights. The constitution review process was therefore mandated to clearly define specific areas of responsibility between the three principal organs of the state – the executive (president), the legislature (parliament) and the judiciary – in order to create a system of checks and balances in accordance with the principle of separation of powers. This would, in turn, ensure accountability of the government and its officers to the people of Kenya.

A Comparative Analysis of the Contentious Issues in the Bomas and Wako Drafts

The Bomas draft is a very comprehensive document that attempts to embrace many of the concerns of the Kenyan people collected by the CKRC. As such, it has been argued, the Bomas draft may be too detailed in its content to be comprehended by the ordinary mwananchi. On the other hand, the Wako draft, in proposing to streamline what is offered by the Bomas draft so as to “appease” the majority view, destroys the very fabric of the Bomas draft and, by virtue of its very design, continues to perpetrate the injustices of the current constitution. Following is a comparative analysis of the main issues covered in both the Bomas and Wako drafts, chapter by chapter. We use the Bomas draft as the base document.
Chapter One

Sovereignty of the People and Supremacy of the Constitution

This chapter serves to remind state organs that they exist to serve the people of Kenya and not vice versa. Of note is the recognition of other sources of law such as personal laws, regional laws and international laws, which are not recognised under the current constitution. The Wako draft does not differ in this respect.

Chapter Two

The Republic

<table>
<thead>
<tr>
<th>Art</th>
<th>Bomas Draft</th>
<th>Wako Draft</th>
</tr>
</thead>
<tbody>
<tr>
<td>5</td>
<td>provides for regions, inter alia, among the units making up Kenya</td>
<td>is silent about regions; talks about districts as the constituent units</td>
</tr>
<tr>
<td>6</td>
<td>devolves powers to regional, district and local level</td>
<td>devolves powers to districts alone</td>
</tr>
<tr>
<td>121</td>
<td>provides for devolving legislative power to senate, districts and local government</td>
<td>devolves legislative power between central government and districts only</td>
</tr>
<tr>
<td>206</td>
<td>devolves power to regional, districts and local governments</td>
<td>devolves power only to districts</td>
</tr>
<tr>
<td>210C</td>
<td>does not provide for a national forum for district governments</td>
<td>provided for in Art 206</td>
</tr>
</tbody>
</table>

At independence, devolution had been provided for in the form of the majimbo system which, because of its lack of specific boundaries drawn between local, regional and central governments, did not last long. The Bomas draft re-introduces the concept of devolution by proposing four levels of government – location, district, regional and national, a participatory system where everyone is included in terms of governance, decision making, service delivery and resource management. The Wako draft, on the other hand, only proposes two levels of participation – district and national levels.
It is important to note that in both drafts, this particular chapter brings to the fore the need to protect and develop indigenous languages, sign language and the use of Braille in recognition of persons with disabilities.

**Chapter Three**

*National Values, Principles and Goals*

National values, principles and goals lay the foundation of good governance and democratic development in Kenya by creating a duty on the state to promote national unity and access to justice. This chapter provides for women’s and human rights and comprehensively deals with discrimination – including the elimination of disparities in development between various parts of the country and various sectors of society.

**Chapter Four**

*Citizenship*

<table>
<thead>
<tr>
<th></th>
<th>Bomas Draft</th>
<th>Wako Draft</th>
</tr>
</thead>
<tbody>
<tr>
<td>Art 12</td>
<td>calls on the Kenyan state to be a citizen of the world with responsibility to work for international peace and stability</td>
<td>enjoins Kenya to cooperate with the international community to enhance international peace</td>
</tr>
<tr>
<td>Art 20</td>
<td>Allows dual citizenship</td>
<td>protects only citizens by birth; does not allow dual citizenship</td>
</tr>
</tbody>
</table>

The Bomas Draft makes significant improvements on the citizenship provisions in Kenya. It outlaws discrimination on the basis of sex for Kenyan women married to foreigners who cannot at the moment pass on citizenship to their foreign spouses and children while Kenyan men can.
Chapter Five

Culture

<table>
<thead>
<tr>
<th>Bomas Draft</th>
<th>Wako Draft</th>
</tr>
</thead>
<tbody>
<tr>
<td>Art 26</td>
<td>spells out the positions and number of members of the National Commission on Culture</td>
</tr>
</tbody>
</table>

The inclusion of this chapter serves as a reminder of the importance of the diverse cultures in Kenya.

Chapter Six

The Bill of Rights

<table>
<thead>
<tr>
<th>Bomas Draft</th>
<th>Wako Draft</th>
</tr>
</thead>
<tbody>
<tr>
<td>Art 30</td>
<td>recognises vulnerable groups such as the disabled for special attention and protection</td>
</tr>
<tr>
<td>Art 34</td>
<td>allows clinical abortion to save the life of the mother</td>
</tr>
<tr>
<td>Art 43</td>
<td>provides for the protection of minorities and marginalised groups</td>
</tr>
<tr>
<td>Art 50</td>
<td>does not provide for limitations on the freedom of the media</td>
</tr>
<tr>
<td>Art 70</td>
<td>provides for the right of every person to refuse to obey unlawful instructions</td>
</tr>
<tr>
<td>Art 80</td>
<td>provides for property rights of surviving spouses</td>
</tr>
</tbody>
</table>

The Bill of Rights as contained in the Bomas draft has been hailed as the most progressive thus far. The language used is simple, clear and unambiguous, making the provisions easy to understand. More specifically, the Bill of Rights provides for the protection of minorities and other disadvantaged and marginalised groups through affirmative action and progressive administrative measures. It also expressly provides for the responsibilities of a citizen.
Chapter Seven

Land and Property

Land is too sensitive an issue to be fully addressed within the confines of a constitution. What is important to note is that the Bomas draft provides for the creation of a permanent constitutional National Land Commission to regulate and harmonise land laws and administrative arrangements.

Chapter Eight

Environment and Natural Resources

<table>
<thead>
<tr>
<th>Art 90</th>
<th>Bomas Draft</th>
<th>Wako Draft</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>provides that environmental rights may be enforceable by court action</td>
<td>does not go as far</td>
</tr>
<tr>
<td></td>
<td>provides for a permanent constitutional National Environment Commission to regulate and harmonise environmental laws and administrative arrangements</td>
<td>is silent</td>
</tr>
</tbody>
</table>

Chapter Nine

Leadership and Integrity

<table>
<thead>
<tr>
<th>Art 97</th>
<th>Bomas Draft</th>
<th>Wako Draft</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>provides for the prohibition of foreign bank accounts for public officers</td>
<td>is silent</td>
</tr>
</tbody>
</table>

Following Kenya’s experiences with the Goldenberg and Anglo-Leasing scandals such a provision is understandable.

Chapter Ten

Representation of the People

<table>
<thead>
<tr>
<th>Art 113</th>
<th>Bomas Draft</th>
<th>Wako Draft</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>sets up a political parties fund and talks of regulations regarding financial resources of political parties</td>
<td>does not have such provisions</td>
</tr>
</tbody>
</table>
The Legislature

<table>
<thead>
<tr>
<th>Art 124A</th>
<th>Bomas Draft provides for representation in parliament of marginalised groups such as women and persons with disabilities</th>
<th>Wako Draft does not have such provisions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Art 125</td>
<td>sets a definite timetable for the elections of MPs</td>
<td>Wako Draft provides for MPs’ elections to be concurrent with those of the president</td>
</tr>
<tr>
<td>Art 134</td>
<td>provides that bills may be considered by senate before or after parliament has done the same</td>
<td>Wako Draft does not provide for the establishment of senate</td>
</tr>
<tr>
<td>Art 180</td>
<td>Prime minister may assign duties to cabinet ministers</td>
<td>President may assign duties to prime minister and ministers</td>
</tr>
</tbody>
</table>

The Executive

<table>
<thead>
<tr>
<th>Art 151</th>
<th>Bomas Draft shares out power between the president, the deputy president, the prime minister, deputy prime ministers and a limited number of cabinet ministers</th>
<th>Wako Draft vests all executive authority in the hands of the president</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>defines that the prime minister shall be nominated by the president and approved by parliament</td>
<td>gives the president power to appoint and dismiss the prime minister.</td>
</tr>
<tr>
<td></td>
<td>provides that only parliament may dismiss the prime minister</td>
<td></td>
</tr>
<tr>
<td>Art 177</td>
<td>Bomas Draft provides that the president appoint members of cabinet who have been nominated by the prime minister and approved by senate</td>
<td>Wako Draft the president appoints all members of cabinet and may dismiss them</td>
</tr>
<tr>
<td>Art 178</td>
<td>Bomas Draft provides that the president’s appointment of secretary to cabinet must be approved by the parliament</td>
<td>Wako Draft the president appoints secretary to cabinet</td>
</tr>
<tr>
<td></td>
<td>provides for the impeachment of the president with a required two-thirds majority vote in parliament</td>
<td>Wako Draft raises the requirement to 75 per cent</td>
</tr>
</tbody>
</table>
The rise in the required proportion to 75 per cent makes it extremely difficult if not impossible to impeach the president.

**The Judiciary**

<table>
<thead>
<tr>
<th></th>
<th>Bomas Draft</th>
<th>Wako Draft</th>
</tr>
</thead>
<tbody>
<tr>
<td>Art 184</td>
<td>retains the provision from the current constitution for a Kadhi court with jurisdiction over questions of Muslim law relating to personal status, marriage, divorce or inheritance in which all parties profess the Muslim religion</td>
<td>goes further to introduce Christian and Hindu courts to have jurisdiction in disputes of a personal nature</td>
</tr>
</tbody>
</table>

**The Public Service**

<table>
<thead>
<tr>
<th></th>
<th>Bomas Draft</th>
<th>Wako Draft</th>
</tr>
</thead>
<tbody>
<tr>
<td>Art 105</td>
<td>provides that candidates for elective office include those for regions and other local governments</td>
<td>provides only for national and districts</td>
</tr>
<tr>
<td>Art 297</td>
<td>provides in full what are called constitutional commissions</td>
<td>gives parliament powers to set up additional constitutional commission</td>
</tr>
</tbody>
</table>

The provision in the Bomas draft means that any commission not provided for therein is not a constitutional commission.

**Amendment of the Constitution**

**General Provisions**

<table>
<thead>
<tr>
<th></th>
<th>Bomas Draft</th>
<th>Wako Draft</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>reserves 74 seats in the National Assembly and 28 seats in the senate for women, as well as 33 per cent of district council and 50 percent of location council seats</td>
<td>is silent on affirmative action</td>
</tr>
</tbody>
</table>
Kenya and its Neighbours: Implications for the East African Federation Process

As part of the East African Community (EAC), whatever happens in Kenya will inevitably be of interest to the other countries. In the current context, the debate on constitutional review/reforms in Kenya is being closely studied in the other countries during the course of their own internal debates on their constitutions. More importantly, both the process and the content of the Kenya constitutional review is likely to have an impact on East Africa’s march towards the federation.

Although the fast tracking of the East African Federation has been slowed down, there is still a clear intention to move the process faster than it was originally intended. This is evidenced by the decision of the Summit of Heads of State to set the deadline of 2012 for the establishment of the common market and monetary union. By that time the debate on the constitution of the East African Federation should have started.

The debate on the review/reforms of the Kenya constitution has both positive and negative aspects. The need to address the aspirations and expectations of the people has been most salient. More significantly, the debate has foregrounded the effective participation of the people in the process. The process of framing the federation constitution will certainly involve the people of East Africa at every stage, culminating possibly in a referendum.

A second positive feature manifest in the Kenya process is the creation of alliances, both among the political parties and the civil society. The political fabric differs from country to country. So in order to build a consensus on the federal constitution, alliances of like-minded political parties and CSOs will be helpful.
These same alliances, however, have shown a negative side as well in Kenyan politics. The discussion above has shown that the ethnic factor has occupied a strong position in Kenyan politics, and therefore the alliances appeared to offer an alternative to ethnic politics, and a movement towards greater national unity. Although the rhetoric suggests that the target is national unity, the reality is that political parties formed alliances simply for the purpose of gaining electoral advantage.

After the elections the alliances became weak or disintegrated altogether. NAK was formed in 2002 for electoral purposes. So was National Rainbow Coalition (NARC). After the elections National Rainbow Coalition (NARC) disintegrated into NARC and NARC-Kenya. ODM was an alliance formed for the purpose of blocking the adoption of the Wako draft constitution in a referendum, at which it was very successful. But the subsequent behaviour of ODM clearly demonstrated that those in the alliance intended to use it as a vehicle to gain power in this year’s election. Individualism, tribalism and ethnicity have led to the fractionalisation of ODM into two factions - ODM and ODM–Kenya.

Chapter Five has enumerated the challenges that Kenya faces in the constitutional review process. These same challenges (ethnicity, individualism, political violence and mistrust among stakeholders) will, in one way or another, have an impact on political and constitutional developments in East Africa and its march towards the federation.

The tribal face of Kenyan politics will have a very negative influence in the context of East African politics. This tribal base makes it impossible for Kenyan leaders to rise to national status without the solid support of their ethnic groups. Should Kenya export this into the other East African countries, the prospect of a strong East African federation would be bleak.

Individualism in Kenyan politics is also a drawback. It is clear that the progress of the review of the constitution has been compromised
by individualism. Important constitutional principles have been compromised in the debate because of individual likes or dislikes. For example, the principle of power sharing was not discussed strictly on its merits but rather from the point of individual preferences. In the discussion on the establishment of the post of prime minister, logic was sometimes lost, and the issue of who would occupy the post came centre stage. To some extent the same was reflected in the discussion on the system of government, which became somewhat coloured by individual or tribal considerations. At the East African level the system of government and power-sharing will be important issues. Should tribalism, ethnicity or individualism be introduced in the negotiations, complications are bound to arise.

Politically motivated violence is another spectre that hangs over Kenya’s politics. Criminal violence is found in all countries. However, political violence, particularly when it is linked to tribal or ethnic groups, is scary. The membership of Rwanda and Burundi to the EAC was delayed mainly because of the violence that existed in those countries. Violence in one country will certainly affect the attitude of other countries towards the federal arrangements to be put in place, particularly internal security arrangements. It is possible fear may cause reluctance in some countries to surrender enough sovereignty to make the federation strong.

Building consensus on political federation will require the utmost trust. The mistrust among the stakeholders in Kenya has been partly to blame for the frequent splits within political parties, alliances and CSOs.

The challenges which face Kenya are not peculiar to that country alone. Other countries in East Africa face the same challenges, but not to the same degree, and not in that particular combination. Kenya, however, is key in the context of East Africa. Because its process of constitutional reforms is so far advanced, whatever happens in Kenya will certainly influence positively or negatively political developments in East Africa.
The importance and sanctity of a constitution cannot be overemphasised, nor can the relevance of a constitution that is owned by its constituents.

Most Kenyans agree that the socio-economic and political problems afflicting the country have their roots in the existing (defective) constitution. The fight for a new constitution has been on for over a decade. Although there have been previous constitutional reforms in Kenya, they have all tended to become election agendas which are addressed intensely immediately before the general elections, but are then placed on the back burner when the elections are over. The emerging pattern is that the challenges are directed towards expediency rather than resolving fundamental issues.

The Mission first commends the efforts of all stakeholders in Kenya for their persistent efforts in continuing to dialogue on constitutional reform, which is fundamental to the country’s democratisation process. It is an effort that should be encouraged as a mechanism of building trust and cohesion amongst Kenyans. However, a number of issues were of concern to the Mission.

First of all, many Kenyans agree that there is very little goodwill from the government to lead a comprehensive constitutional review within the little time remaining before the 2007 elections. What is feasible in the current environment is constructive dialogue leading to some agreements on fundamental minimum reforms before the general elections. It is therefore incumbent on all stakeholders – especially the government – to put aside their personal interests before coming to the negotiating table if consensus is to be achieved. The Mission also calls for a clear demonstration of political will by the government through a practical administrative decision before the elections.
A majority of those who spoke to the Mission agree that whether minimum or maximum reforms are preferred, neither should be tied to any electoral cycle; otherwise politicians would definitely resort to designing short-term goals aimed at accumulating power come the elections, and, thereafter, the promise to conclude the constitutional review process will be forgotten. To this end, a reasonable number of persons who spoke to the Mission were emphatic on the inclusion of a “sunset clause” to entrench the comprehensive constitutional review process. This clause would provide for a legally binding timeframe within which the constitutional review process should be completed. The time suggested by most is a year from the upcoming elections.

A negotiation is a process where differing positions are placed on the table with the aim of finding a middle ground. This cannot be achieved if the parties to the negotiation have already firmed up their positions. The current talks on minimum reforms present one such opportunity for government, the opposition and civil society alike to engage in constructive dialogue over constitutional reforms and to reach a consensus. There is an urgent need for civil society to amend its position of boycotting the ongoing talks solely on the basis of equal representation.

The Mission found there is a growing negative perception about the role and relevance of CSOs. They seem to have moved from their constructive activism to selfishly seeking political status without a defined mandate. The Mission thinks that the continued internal squabbles within CSOs and habitual opposition to the political structures may be pointers to the continuing loss of direction and increased complacency.

Civil society is challenged to conduct self-examination to enable it to reposition itself as a true representative of the people. The existence of so many different factions of civil society unable to work with one another gives ground to the notion that civil society is self-serving and that it is those interests that form the driving force behind their
The clamour for constitutional reform. The fact that civil society became an interested party in the struggle for state power in the run-up to the 2002 elections remains a handicap in their fight to advocate for genuine constitutional reform.

The Mission is of the view that the divisions within the government itself do not augur well for the definitive conclusion of even the most minimal reforms before the general elections. Recent newspaper reports have pitted the Minister of Justice and Constitutional Affairs, Hon. Martha Karua, against the 27-member inter-parliamentary committee of MPs from the opposition and government side which is chaired by the vice-president and of which she is a member.

The divisions among the opposition parties as well have left Kenyan voters disillusioned. The recent fractionalisation of ODM into two camps, after negotiations which were clearly moving towards a single candidate for the opposition, are bound to strengthen the people’s perceptions of self-seeking representatives.

The numerous CSOs continuing to emerge and work with the government to create various fora to dialogue and search for the way forward on the constitutional review process was another concern of the mission. And specifically, the repetitive nature and cost of these informal talks, some of which are not well coordinated within the existing government and parliamentary structures, is a worrying trend. The Mission calls for a coordinated negotiation process.

Throughout the course of our Mission, it has been generally agreed that it is prudent for all parties to fine-tune their thinking on specific areas. A cautious approach would assuage the present fears as expressed by one respondent, that “what looks like minimal may require far reaching alterations that would only be accommodated in a comprehensive review.”

Furthermore, the Mission observed that politicians and the civil society are not oblivious to the reality on the ground, the continued mistrust and the likely consequences and cost of a failed effort. This
Moving the Kenya Constitution Review Process Forward

has been an underlying factor to the concept of minimum versus maximum reforms. The Mission appreciated the merits of this dialogue as a feasible approach to move towards gradual and practical implementation of a revised constitution. However, the Mission feels that there is urgent need to come out with agreed positions.

The proponents of the concept that maximum reforms are both the minimum and essential reforms may be genuine in their radical stand. The Mission believes that this issue needs to be addressed reasonably and realistically. While the Mission is of the view that certain minimum reforms can be achieved before the forthcoming elections, what can be done within the remaining period leading to the elections and what cannot should be guided by fair judgement. The Mission also feels that the concept of minimum reforms should reflect practical options that would promote fair play and a level field for all parties.

On a much more fundamental note, the Mission is concerned about whether a total rewrite of the constitution is a realistic goal given the country’s history, and if it is, what would be the cost to the nation in terms of unity and cohesion. Kenyans may want to make those amendments on which there is widest consensus now, rather than wait for maximum reforms on which everybody can agree.

The Mission observed that security continues to be a growing concern in Kenya. Although we did not delve into all the dimensions of the Mungiki factor, the briefs given pointed to a security problem that warrants direct government response. It is the duty of the government to ensure maintenance of law and order particularly in the election period. All citizens should have the freedom and ability to conduct lawful business pursuits in an environment devoid of violence. Opposition leaders are also duty-bound to condemn all acts of violence within the country.

Members of parliament in Kenya enjoy salaries and allowances which many feel are not commensurate with their outputs. The wrath and anger directed at them is a genuine feeling of the growing
disparity between the haves and the have-nots in the country. The recent decision by MPs to award themselves hefty golden handshakes before the elections can only serve to consolidate this disillusionment among their voters. The Mission notes the need for members of parliament to work towards improving the image which depicts them as promoting their personal interests. Equally significant, the Mission underscores the need for government, politicians and civil society groups to account to the people of Kenya with respect to the constitutional review process. They owe the public a duty to inform them about key developments as well as the cost of the exercise.

The Mission believes that the government and politicians should promote the spirit of nationalism and continuity beyond elections. Accordingly, the Mission recommends the need to address underlying currents of ethnic issues that are likely to undermine the acceptability of the reforms.

Overall, the Mission is of the view that substantial constitutional reforms cannot be realistically concluded before the forthcoming elections. It is the considered opinion of the Mission that the review process should be embarked upon the following year in order to allow for deeper reflection on whatever proposals there may be for the new constitution. The inclusion of a “sunset clause” that legally binds the incoming government to conclude the constitutional review process within a stipulated timeframe will be an essential part of any reforms to be passed in the interim period.

The Mission also emphasises that the tasks of providing a forum for the different factions to dialogue, and of providing regional support to the constitution making process are still to be done, and it is hoped Kituo Cha Katiba (KCK) will continue to facilitate this process.
Annexure A

Persons interviewed by the Mission
Hon. Paul Muite – MP and Chairman of the Parliamentary Committee on the Administration of Justice and Legal Affairs.
Hon. Bifwoli Wakoli – MP and Member, Parliamentary Committee on the Administration of Justice and Legal Affairs.
Hon. Zaddock Syong’o – MP and Member, Parliamentary Committee on the Administration of Justice and Legal Affairs.
Hon. Samuel M. Kivuitu – Chairman, Electoral Commission of Kenya.
Commissioner Gabriel Mukele – Vice Chairman, Electoral Commission of Kenya.
Commissioner Samuel Arap Ng’eny – Commissioner, Electoral Commission of Kenya.
Commissioner Abuya Abuya – Commissioner, Electoral Commission of Kenya.
Commissioner Kihara Muttu – Commissioner, Electoral Commission of Kenya.
Commissioner Felista W. Ole Churie – Commissioner, Electoral Commission of Kenya.
Ms. Priscilla Nyokabi – Programme Officer, International Commission of Jurists - Kenya Chapter.
Ms. Immaculate Njenge-Kassait – Programme Officer, Institute of Education in Democracy.
Mr. Davinder Lamba – Executive Director, Mazingira Institute.
Ms. Alba Jaramilla – Intern, Mazingira Institute.
Mr. Cyprian Nyamwamu – Chief Executive Officer, National Convention Executive Council.
Mr. Koitamet ole Kina – Katiba Watch.
Ms. Ann Njogu – Executive Director, Centre for Rights Education and Awareness.
Mr. Sam Ongoro – Committee Member, Joint Dialogue Forum.
Mr. Ndung’u Wainaina – Executive Director, International Centre for Policy and Conflict.
Mr. Patrick Onyango – Executive Director, Citizens Coalition for Constitutional Change.
Ms. Hilda Obierodhyambo – Deputy Director, Citizens Coalition for Constitutional Change.
Mr. Okoiti O. Omtatah – Claws Trust.
Mr. Kennedy Karanja – African Leadership Institute.
Mr. James Maina – Hema la Katiba.
Mr. Tom Kagwe – Kenya Human Rights Commission.
Mr. Kalonzo Mackenzie – Muungano wa Katiba Mpya.
Mr. Said K. Abubakar – Centre for Democracy and Marginalised Communities.
Ms. Shamsia Ramadhan – Citizens Assembly.
Ms. Mary Njeru – Education Centre for Women in Democracy.
Ms. Kawive Wambua – Centre for Reform and Constitutional Education.
Mr. Awori Achoka – Constitution Education Training Institute (CETI).
Annexure B

Literature and Laws Available to the Mission


THE DAILY NATION, various newspaper articles between the period from October 2006 to date.