

THE INTER PARTIES FORUM FOR CONSTITUTIONAL REVIEW

Position paper for an effective, efficient and democratic process towards completion of the constitution review process

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EXECUTIVE SUMMARY

The Inter-Parties Forum on Constitution Review (IPFCR) is committed to facilitating sustainable completion of the Constitution review process in Kenya through a participatory, effective and efficient process. This is in supporting the now state government policy that it shall referee the negotiation and adoption of a new constitution to replace the current unacceptable and deficient constitution.

The Forum acknowledges that the more than eighteen years and several billions of shillings that have been spent on the review without a new constitution being passed have taught Kenyans lessons. These lessons have been learnt from the serious introspection into why we failed as a nation to deliver a democratic constitution for ourselves. This is important to inform the next steps towards completing the process that is about to be underway. For the success of the process to be guaranteed, the forum has reproduced the goals and purposes that made it necessary for Kenyans to seek constitution review in the first place. The country must be focused on those objectives and purpose and in so doing put in place a process that is all inclusive and that meets the standards of democratic constitution making in peace time.

Certain constitutional issues need to be resolved up front before the actual work on constitutional negotiations commence. These issues include the issues of ethnicity and the national question; land and economic marginalization, the system and form of government, the electoral system, the provision for the Bill of rights and the need to separate policy issues from the constitution. If these issues were to be resolved clearly, the process will be more purposive and cumulative.

The jumpstarting of the constitutional review process now than ever before requires cooperation and consultations. A set of various good will bench marks ought to be appreciated and respected. As such it is important that right from the President, the Prime Minister and cabinet, the Minister for constitutional Affairs, the political parties, the civil society and all other actors in the constitutional review process, consultations shall be significant to build confidence and good will that is required to carry the process to the end.

The Centre for Multi-party Democracy-Kenya (CMD-K) found it a responsibility to constitute the Inter Parties Forum of the Constitution Review (IFRC) to facilitate dialogue on the constitution in response to the government's stated commitment to mid-wife the delivery of a new constitution in twelve months. CMD-K has put together a technical and lobbying committee which has developed a constitutional content and review process strategy presented in this position paper.

This position paper outlines the positions of the IFRC and generally offers an analysis of the milestones that have preceded the current constitutional talks that await jumpstarting. It also offers an analysis of the options for moving the constitution review process to conclusion in a sustainable manner.

The position paper similarly attempts to crack the fundamental but unresolved constitutional and political issues that the republic is grappling with including the National question, the system of governance, the electoral system an representation of the people, the land question, the Bill of rights and a strategy to separate constitutional principles from policy issues that should be dealt with at a policy and law making level.

1. BACKGROUND

At independence, Kenya African National Union (KANU) and the Kenya African Democratic Union (KADU) emerged as the two most significant political parties that negotiated the independence constitution with the colonial authorities. Political parties have remained the key actors in shaping Kenya's governance as vehicles for the people's participation in the affairs of the state. Over the decades, the role of parties has been moving from significant to marginal especially with the amendment of the constitution in 1982 to transform Kenya into a *de jure* one party state. Political leaders and other pro-democracy forces mounted a successful campaign for nearly a decade from 1982 to re-establish Kenya as a multi-party democracy. The repeal of section 2A does not seem to have institutionalized a multi-party democracy and therefore the popular call for the overhaul of the current constitutional order has been sustained since 1991 with successes and failures in between. Since the historic referendum on the constitution in November 2005, Kenyans have sustained the momentum to overhaul the current constitutional order. The case for institution of comprehensive review was made even more apparent when in January and February 2008, our constitutional framework proved inadequate to facilitate political dialogue and effective government leading to the amendment of the constitution through the National Accord and reconciliation Act which facilitated the formation of the current Grand coalition government in April 2008. The government working with the African Union facilitated National Dialogue and Reconciliation committee has undertaken to facilitate a democratic, inclusive and participatory constitution review process that shall culminate in a new constitutional order within a year from April 2008.

Kenyans are eagerly waiting to see how the government shall facilitate this process as the nation stands at the cross roads once again. The Inter parties Forum shall make its contribution in pushing the country in the proper direction.

2. RATIONALE FOR AN INTER-PARTIES FACILITATION

The inter- Parties Forum on Constitution Review appreciates its mandate thus;

- a. Political Parties are the most central vehicles of a democracy. Civil society organizations, trade unions, business and professional associations, religious formations etc rely on Political Parties to offer the forum for these organizations to participate effectively in the governance of the country
- b. The role of Political Parties is to aggregate the aspirations, views and fears of the people and present policy options for legislation or implementation. Constitution reform presents the greatest policy and governance challenge for the nation at this moment in our history and parties must lead in this historic and onerous task of state transformation and reconstitution;
- c. Failure by the Political Parties to play a central role previously has been a great disservice for the republic.
- d. Political Parties have enormous political, intellectual, strategic and other resources that the country need deployed at the moment to sharpen the management and leadership of the state reconstitution process.
- e. Political parties have the role of political socialization through civic and political education, role play and role modeling. The political parties can not discharge this role effectively without being at the steering wheel of the process itself.

3. OBJECTIVES OF THE INTER-PARTIES FACILITATION

The main objectives of the IFCR are:

- a. To act as the Forum where the many contesting views on the constitutional reform roadmap shall mediated
- b. To facilitate dialogue amongst the various actors
- c. To clarify the standards and principles guiding constitution making
- d. To foster the win-win paradigm that is crucial for sustainable constitution reforms and nation building

- e. To facilitate and inject professionalism into the politics of constitution making and to mainstream technical facilitation of the negotiations, drafting and ratification stages of constitution review
- f. To ensure cumulateness. The Inter Parties Forum wants to ensure that our country does not lose all the gains we make in the review process only to begin from the start time and again

4. RESTATING THE OBJECTIVES OF CONSTITUTIONAL REVIEW PROCESS IN KENYA: WHY DO KENYANS WANT THE OVERHAUL OF THE CURRENT CONSTITUTION¹

The objectives of constitution making were outlined in the now expired Constitution of Kenya Review Act as follows;

The objects and purpose of constitutional review

The object and purpose of the review of the Constitution is to secure provisions therein-

- a. guaranteeing peace, national unity and integrity of the Republic of Kenya in order to safeguard the well-being of the people of Kenya;
- b. establishing a free and democratic system of Government that enshrines good governance, constitutionalism, the rule of law, human rights and gender equity;
- c. recognizing and demarcating divisions of responsibility among the various state organs including the executive, the legislature and the judiciary so as to create checks and balances between them and to ensure accountability of the Government and its officers to the people of Kenya;
- d. promoting the peoples' participation in the governance of the country through democratic, free and fair elections and the devolution and exercise of power;
- e. respecting ethnic and regional diversity and communal rights including the right of communities to organize and participate in cultural activities and the expression of their identities;

¹ The constitution of Kenya review Act 1998

- f. ensuring the provision of basic needs of all Kenyans through the establishment of an equitable frame-work for economic growth and equitable access to national resources;
- g. promoting and facilitating regional and international; co-operation to ensure economic development, peace and stability and to support democracy and human rights;
- h. strengthening national integration and unity;
- i. creating conditions conducive to a free exchange of ideas;
- j. ensuring the full participation of people in the management of public affairs; and
- k. enabling Kenyans to resolve national issues on the basis of consensus

With this in mind, the people's views collected in 2001/2002, the various drafts and the improvements in content since 2005 must be relied upon to ensure that these collective aspirations of the people are coded into the constitution as clear constitutional principles.

5. HOW WE GOT WHERE WE ARE TODAY: Landmarks in the Constitution Making Process

The following were important landmarks in the mutilation of the Kenyan Independence Constitution:

- i. 1964 – Kenya became a Republic and the Prime Minister became a President through a constitutional amendment without going back for any election
- ii. 1965 – assassination of Pio Gama Pinto which remains unresolved to date
- iii. 1966 – the abolition of the upper house of parliament- the Senate, and the abolition of regional assemblies.
- iv. 1966 – Constitutional amendment to bar KPU members of parliament from being elected
- v. 1969 – assassination of Tom Mboya which remains unresolved to date.
- vi. 1975 – Assassination of Josiah Mwangi Kariuki which remains unresolved to date.
- vii. 1975 – 1977 – Change the Constitution group meant to bar the Vice President from taking over from the Presidency in the case of the demise of the holder of the office of the President.
- viii. 1978 - death of President Jomo Kenyatta
- ix. 1982 – Kenya was declared a de jure single party state
 - a. Attempted coup d'état
- x. 1985 – security of tenure was removed from senior officials of the judiciary

- xi. 1985 – formation of Ukenya party and government in exile
- xii. 1986 – 1987-9 – Mwakanya arrests, tortures, detentions and trials
- xiii. 1988 – Farcical KANU nominations by ‘mlolongo’
- xiv. 1989 – announcement of the formation of the National Democratic Party
 - a. Rubia, Matiba and others expelled from KANU
 - b. Muoroto riots
 - c. The church joins agitation for democratization
 - d. Bishop Muge dies in a freak road accident. Riots in part of the country
- xv. 1990 – detention of Matiba, Rubia and Raila
 - a. Assassination of Hon. Robert Ouko
 - b. Sabasaba riots
- xvi. 1991 – KANU Saitoti committee to find out what Kenyans wanted with respect to governance
 - a. Formation of Forum for the Restoration of Democracy (FORD)
 - b. Further Sabasaba riots
 - c. Release of political prisoners
 - d. KANU delegates conference approves return to multi- party democracy
 - e. Formation of many political parties
- xvii. 1992 – the first FORD rally in Nairobi
 - a. Split of FORD
 - b. Differences between civil society and politicians on whether to go to elections before or after constitutional change
 - c. The first multiparty elections held without reviewing the constitution
 - d. The divided opposition loses elections
- xviii. 1993 - The drive for a new constitution intensifies
- xix. 1994 – Jaramogi Oginga Odinga passes away
- xx. 1995 – 1997 – Safina refused registration
- xxi. 1997 – Inter- Parties Parliamentary Group (IPPG) driven amendments
 - a. NCA-NCEC led agitation and mass action programme for a new constitution carried out
- xxii. 1998 – passing of the Constitution of Kenya Review Act (1998) (later amended 2002, 2004)

- xxiii. 1999-2001: Fall out with the government process led to the formation of the Ufungamano review initiative
- xxiv. 2001: CKRC was formed and came up with a draft constitution after intensive and extensive civic education and consultation with the general public and various groups
- xxv. September 2002 - Moi disbanded Bomas 1 before it met and he dissolved parliament so that we went to the 2002 elections under the old constitution.
- xxvi. December 2002 - NARC promised to deliver the Bomas Draft to the people of Kenya within 100 days of being elected
- xxvii. 2003 – Shifting of positions on issues previously agreed on in the Bomas Constitution mainly on: the executive, devolution and the system of government i.e. parliamentary vs. presidential
- xxviii. 2005 early – Naivasha Accord; where all major politicians agree on a the contents of a draft constitution and pass these in an ‘accord’
- xxix. 2005 – NARC government comes up with another draft constitution- the Kilifi draft, drafted by the then Attorney General, Amos Wako, hence it was consequently referred to as the ‘Wako Draft’
- xxx. 2005 – Referendum on the Wako Draft. The government ‘banana’ side supporting the draft loses to the ‘orange’ side opposing the same
- xxxi. 2006 – dissolution of the CKRC following the expiry of its mandate
- xxxii. 2006 - The Multi-Sectoral Review Forum of 2006 is convened by the Ministry of Justice and Constitutional Affairs
- xxxiii. 2007 – production of the broad principles that enabled the Minister of Justice and Constitutional Affairs to publish the Constitution Of Kenya Review Bill (2007)
- xxxiv. 2007 December - The country goes to the 2007 general election under the old constitution. Major parties make promises to deliver a new constitution upon election into office
- xxxv. 2008 – National accord is passed
- xxxvi. 2008 May: The National Accord and reconciliation committee facilitated by the African Union publishes a road map that informs the Ministry of Justice and constitutional affairs’ (MOJCA) to revise the earlier (2007 Multi-sectoral forum) roadmap

6. HOW WE GOT WHERE WE ARE TODAY: THE CONSTITUTIONAL AMENDMENTS

The Inter Parties Forum on Constitutional Reform has analyzed the more than thirty amendments that were made to the current constitution. The synthesis of those amendments is as follows;

- a. The Amendments fundamentally overturned the constitutional philosophy and design. The Bicameral chamber Parliament was reduced to a unicameral National Assembly; the regional governments and regional assemblies were cut out
- b. The amendments transformed the system of government envisaged at independence; the Parliamentary system of government was substituted with a mixed system of government which escaped all the accountability and checks systems within either a parliamentary or presidential systems of government. The amendment of the constitution by the National Accord does in 2008 to re-introduce the post of the Prime-Minister have done little to address this fundamental flaw in the constitution.
- c. The Amendments basically established an imperial presidency that totally emasculated the other institutions of governance therefore personalizing power in the presidency. This has led to the observation that Kenya has a constitutional and elected dictatorship that is totally unaccountable to parliament or to the electorate.
- d. The centralization of power has led to the massive inequalities that the country is witnessing today. Corruption and heightened ethnic tensions may have been fertilized by this centralization of power and resources at the center.
- e. The constitutional dictatorship has severely undermined the access to and enjoyment of rights and freedoms by the citizens. This has fundamentally undermined initiative and the expression of the collective will of the people of Kenya hence the under development. Impunity and the disrespect of the rule of law are the other features that have persisted under the current distorted constitutional framework.

The compendium of the amendments to the constitution is appended to this position paper for your perusal;

7. DIAGNOSIS OF THE FUNDAMENTAL FLAWS THAT HAVE MADE KENYA FAIL TO GET A NEW CONSTITUTION FOR NEARLY 18 YEARS

Kenya has always failed to secure a new and democratic constitution for the following reasons;

7.1 Flawed constitution making policy

The Constitution making process leading to the Bomas conference was sound and principled. Since that time many initiatives controlled by politicians alone including the Naivasha accord, the Kilifi initiative and the Parliamentary process that finally saw the Kilifi draft ratified and presented as the Wako draft have come and passed. Since the Bomas Conference, Kenya has been guided by a flawed constitution making policy- the state driven constitution making policy. This policy is based on the understanding that constitution review is a part of the amendment process provided for under the current constitution. This basis is flawed since the constitutional court has since ruled that constitution review is solely a political process that can be carried out by the people of Kenya through the appropriate and legitimate forums and methods. It paradoxical that while Kenya is going through a unique historical process where the process that needs to be patently participatory and all inclusive, the Serena talks and the Ministry of Constitutional Affairs has chosen the wrong road.

The IPFCR takes the position that those in power constitute only a section, albeit, important of constitution making and the constitution making policy must therefore be reconfigured to roll out a participatory and all inclusive state refereed process where the people are involved in the negotiations (drafting) of the constitutional principles and design as well as in the adoption or ratification of the constitution.

7.2 A weak and unsecured constitution making process

The country has always operated a weak and unsecured process that is easily torpedoed by the government of the day when the interests of those in government are not secured or assured. This has made even very participatory phases like the Bomas conference to flounder. The process needs to begin

with essential reforms that will entrench the process and strengthen the judiciary, put in place a new independent and professional ECK and give parliament the powers over its calendar. Essential reforms should also enfranchise Kenyans by passing the dual citizenship provisions and fix the police system in Kenya because Kenyans can not deal with constitution reform when they can not dialogue, conduct civic education and hold public meetings to debate on what their next constitution should provide for. Without essential reforms the current criminal, politicized and compromised police force shall remain unchanged hence frustrating reforms!

7.3 Poor technical processing of inputs and material for constitutional drafting

There has always been poor technical processing of inputs and constitutional negotiations and settlements. The technical arm of the review process such as was the Constitution of Kenya Review Commission (CKRC) was designed very much like a political wing of the very conflicting political elite in the political system. Hence we had KANU commissioners, NDP commissioners, DP commissioners etc. The Consequences of such a politically-driven committee of experts is the fact that the technical input ceases to be professional and expert based but an arena of championing subjective views of the dominant political elite.

The IPFCR recommends strongly that the technical team must essential be professional and expertise based. The process of selecting such a team of technical experts must itself be meritocratic, open and built on confidence.

7.4 Poor preparation and faulty information management

Preparations for constitution making must be thorough. The preparations must be guided by benchmarks of a principled process. In short, clear standards should be stated that guide the review process. These standards include the passage of the essential reforms in parliament to entrench the process, the professional establishment of the technical/expert team, the competent establishment of the constitutional conference, the securing of the process from political undermining, the setting up of a competent information management system, the proper setting out of the engagement mechanism for sectors outside the conference to send into the process their technical positions, and the need to empower the masses to participate through proper civic and voter education before the conference, during the conference and before the referendum.

7.5 Political Instrumentalization of the review contestations

The political elite have used the constitutional review process to advance their political interest as opposed to the greater national interests of our nation. This has been done by linking constitutional review to the general. Over the last fifteen years or more, the “promise of delivering a new constitution on capturing power” has been a recurrent promise. Kenya should never allow the constitution making issue to be an electoral issue again.

8. GOODWILL BENCHMARKS FOR THE DELIVERY OF THE NEW CONSTITUTION

The following form the goodwill benchmarks towards a sustainable process of completing the constitution review;

- a. National Consensus on the most efficient, effective, all- inclusive and democratic review road map is necessary. This includes Parliament and the government cooperating and consulting with the rest of the interest groups to effectively enact the roadmap and secure the process
- b. United and cohesive leadership and guidance from the Grand Coalition Government
- c. Central involvement of Political Parties and all other key interest groups in negotiating, drafting and ratifying the new constitution
- d. A win-win attitude in negotiations and tolerance of divergent views
- e. Efficient and effective Technical inputs
- f. Civic education and responsible review process management

9. OPTIONS FOR MOVING THE CONSTITUTION REVIEW PROCESS TO CONCLUSION

10.1 The Parliamentary negotiated constitutional review process and a referendum : an analysis of the government road map

Under this option being proposed by the Serena National Accord negotiations committee, a technical committee shall be mandated to work with a committee of Parliament in drafting the constitutional proposals that will finally be presented to Parliament for approval; the process shall flow as follows;

- a. Parliament negotiates and drafts the constitutional proposals for the referendum after receiving the constitutional proposal from the experts committee
- b. a referendum is conducted on those constitutional proposals already agreed upon by Parliament
- c. Those issues parliament is not agreed to be subjected to the referendum separately

The Forum finds this route to constitutional reform totally unacceptable. Parliamentarians are never elected as a constituent assembly. They are ordinary law makers and they only have the power to amend the constitution. The current exercise is a constitutional exercise where even the design and powers of the Parliament will be reviewed. There are more than fifteen interests that must be involved in drafting and approving the constitution that shall be presented to the referendum. Political Parties are one such major interest group that can not be ignored.

10.2 The Multi-sectoral (interests) negotiated option

This route was presented under the Multi-sectoral forum road map of 2006/2007. The process had a conference of representatives of interests who were to negotiate and draft a constitution that Parliament was to ceremoniously endorse as a Bill to be put to the referendum. This route was supported as it was all-inclusive and consultative. The referendum was approved under this road map.

Under the Multi-sectoral negotiated road-map of November 2006 (known as the November Package²), several others issues were also agreed on as essential reforms to create a level playing ground for constitutional making. These included the passage of constitutional amendments to entrench the review process; permit for dual citizenship so that Kenyans abroad can vote in the constitutional referendum; strengthening the judiciary and making it independent to determine constitutional cases; empowering parliament to run its own calendar as a strategy to ensure the review process is secured from subversion by the executive through premature dissolution; create a professional and empowered ECK to manage the

² The November Package was passed on November 16, 2006 by the Multi-sectoral Review Forum (MRSF) that was convened by the Ministry of Justice and Constitutional Affairs. The Forum commenced from the August 2006 Windsor Inter Political Parties Meeting that was chaired by Hon. Martha Karua at Windsor Hotel. The Forum was later expanded to include twelve other sectors from the religious, private sector, civil society, professional and other sectors of Kenya's political economy.

referendum on the constitution and to provide for standards on the conduct of the referendum through the passage of the referendum Bill into Law.

These reforms are still crucial to secure the process from political turbulence and from being torpedoed.

This is the road map that the Inter-Parties recommends and supports.

10.3 The YES-YES referendum Option

This roadmap has been proposed by the National Civil society congress. In this roadmap, the Multi-sectoral (interests) conference shall not draft one but two constitutional proposals. These two proposals, one with the executive under a Parliamentary system of government and another with the executive under a Presidential system of government shall be presented to the people at a referendum for the citizens to choose which system best suits Kenya.

The main contention by the National Civil society Congress (Under the People's Constitutional Conference [PCC]) is that even the Bomas Conference was unable to resolve what system of government is appropriate for Kenya. Bomas ended up with a hybrid system that does not solve the fundamental governance complications of our nation. The People's Constitutional Conference then contends that the proper strategy is to design both systems so coherently with checks and balances and empowering the people under each of the systems so that whichever system is passed, the people shall be the beneficiaries.

10.4 The Constituent Assembly Approach

The Constituent Assembly approach has been forcefully presented by the LSK. The LSK contends that the referendum becomes necessary when the people who draft the constitution are not elected for the purpose of constitution making alone. When these delegates are elected to the Constituent Assembly for constitution drafting and ratification, they have the powers of the Constituent Assembly and therefore a referendum is not necessary³.

³ Analysis based on the LSK Final Report by its Standing Committee on Constitutional Review chaired by Senior Counsel Mr. Nzamba Kitonga. The report was table to the LSK Council in August 2006.

LSK argues that in the Kenyan context, the referendum has been captured by politics and the leading politicians; divided the nation deeply and denied constitutional change a chance. They argue that instead of a referendum on the constitution, Kenyans should elect delegates to negotiate and draft the constitution. After finalizing drafting and negotiations, they should share the same with the public for input before the Constituency Assembly adopts it as the constitution of the republic. This roadmap also emphasizes the point that MPs are not elected to make the constitution but to make laws and amend the constitution but not to make a constitution for the republic. The road map observes that in countries such as South Africa, the MPs were elected as a constituent Assembly to make and adopt the South African Democratic constitution. But they also were granted a mandate of making laws in the transitional period of four years.

10. KEY CONSTITUTIONAL ISSUES THAT MUST BE RESOLVED TO ANCHOR SUSTAINABLE NEGOTIATIONS

11.1 Constitutional principles to resolve the ethnic and national question in Kenya

The Forum observes that the National question is tied to several other fundamental constitutional issues including the consent of the ethnic communities to live together with other communities in the same country. The post election violence and political crisis invited difficult questions where Kenyans were heard asking openly whether they must continue to live in the same country with other ethnic communities.

The National question of ethnic identity and its place in governance raises questions such as; What rights and responsibilities do an individual and a nationality/ ethnic community have?; what system of government and devolved structure best secures the interests of a citizen and his nationality (ethnic community); what National values and Principles in the constitution secure the interests of all citizens; how does the centrality of political parties in the governance of the country get secured even as citizen and ethnic community/ nationality interests get secured?; what Electoral system ensures that each vote counts and how does the constitution guarantee a democratic and accountable state for all? The Constitution should fundamentally provide for all these concerns in principle to avoid a situation like the post election

crisis where Kenyans began to ask each whether they must continue to live together if they could not respect and cherish one another.

11.2 Which system of government for Kenya: Parliamentary, presidential or mixed (hybrid) system?

The 1962 constitution provided for a Parliamentary system of government with a devolved structure where there were regional government and regional assemblies. The aim was to democratise the state and empower Kenyans to participate the management of the resources in their regions and hence transform the lives of the peoples of Kenya. There was also the provision for a bi-cameral chamber to anchor the devolved structure while the executive was headed by a head of government (the Prime Minister) and the Head of State (the President). This were all reversed and changed and in the place of the elaborate government structure, the office of the Prime Minister was merged with that of the President to present a government system that was neither presidential nor Parliamentary. This is what has created in Kenya the constitutional dictatorship under an imperial presidency⁴.

The Constitution should clear resolve this issue and provide either for Parliamentary; mixed system or presidential system so long the interests of the people are secured in each of the system through checks and balances and separations of functions as much as possible. The relations between the various arms of government being parliament, executive and the judiciary should be resolved to undo the current system where the executive control all the arms of government. The devolution system in the constitution should not be confused with mere delegation of the functions of the executive to lower levels as was the case under the Wako draft and the current constitution. The Bomas approach should be refined but its principles retained.

⁴ The imperial Presidency is used here to mean a Presidency that is neither accountable to Parliament nor to the people hence fusing monarchical supremacy as well as republican mode of access to office through election.

11.3 Land and Economic Marginalisation :A statement on government and trust land in the constitution

There is urgent need for land reform premised on the amendment to the constitution to recognise land as a special category of property. The constitution must establish an efficient, accountable and equitable institutional framework for land ownership, administration and management. Special law issues such as historical injustices, pastoralism, minority interest and those issues peculiar to the coast region require special attention. Measures such as land redistribution, restitution and resettlement need to be anchored through legal framework. The powers of allocation of land vested in the president and the commissioner of lands must be immediately revoked and vested in a more accountable and transparent institution.

The IPFCR has found the provisions in the Bomas constitutional Proposal as greatly sufficient but can be improved upon at the Constitutional Conference.

11.4 Which system of government for Kenya: centralized or decentralized/ devolved system?

Delegation must not be confused with devolution. Kenyans seem to have settled for devolution as opposed to delegation of functions. Delegation is where the representatives of the President or the Prime Minister execute functions on behalf of the chief executive but are accountable and report to the chief Executive at the center. Under delegation, there are no legislative powers devolved to the regions or delegation levels. All these powers are controlled from the center. This is the system currently in force where the provincial administration represents the president at various levels.

Devolution on the other hand means that executive, legislative and other powers are devolved from the centre to the regional levels. While in Kenya this has not assumed the federal approach, what has been proposed under the Bomas constitution is effective devolution of powers and resources to the people in the regions. People under the devolved system are empowered to elect their government in the regions and in the lower councils as well as make strategic decisions and therefore to increase productivity and prosperity unlike in the delegated system where citizens wait on the central government to make decisions and for the administrators at the local level to execute the same decisions. For instance with the increase

of Kenyan administrative districts to nearly 120, the cost of sustaining administrators who only implement the policies of the central government is enormous while if the constitution established a devolved systems, the people's elected representatives and administrators will be accountable to the citizens and may be much fewer at the district councils and at the regional level.

11.4 Which electoral system and the representation of the people?

Kenya's electoral system has been the centre-piece sustaining the undemocratic governance structure.

There are broadly speaking three electoral systems;

i. The First-Past-The-Post Single Member Constituency System

This is the system in operation in Kenya today. Members of parliament are elected from geographically demarcated single member constituencies and the chief executive- the president is voted for by all Kenyans but needs to only garner a minimum of 25% of the vote in at least 5 of the 8 administrative provinces. This creates the first-past-the-post scenario where the winner takes-it-all and a real incentive for gerrymandering of the geographic constituencies to favour the incumbent. KANU and President Moi are often accused of seriously gerrymandering the constituencies to ensure that where KANU had a strong presence was demarcated many times to increase the number of KANU MPs and therefore control more than 50% of Parliament while the President himself only enjoyed between 33-37% endorsement by the electorate.

Similarly, this system has seriously distorted representation and has devalued the role of political parties in the political system. It often joked about in Kenya that the first time the Party leader ever sees the Member of Parliament from who ran and won on their Party's ticket is when they are being sworn in Parliament.

Moreover, under this system, not every vote counts. The example of Wajir North where the winner won by only 500 votes or in Embakassi where the winner won by about 5,000 votes, it is tragic that the votes of the other nearly 30,000 voters do not count!

The current system of representation in parliament and civic authorities is narrow and does not reflect the diversity of the country with respect to regions, political parties, minorities, workers, professionals, ethnic groups and religions. Moreover, there are no clear systems of checks and balances. In order to address this problem, it is imperative that the following system of representation be instituted:

ii. The Mixed member proportionate representation

The Mixed Member Proportionate representation system provides that an election should be conducted to elect representatives in the single member constituencies first after which the votes

cast in favour of every Political Party shall be modulated to ensure that the anomaly caused by the gerrymandering of geographical constituencies is corrected.

The Bomas Draft created electoral districts for women and empowered Political Parties to nominate through the Party lists representatives of other categories including Persons with disabilities, the youth, labour etc.

Although the Bomas draft did not entirely provide for the MMPR, it greatly improved the system to provide for the special constituencies for women and for Parties to nominate MPs from other interest groups through the Party lists. This was a significant improvement on the current system that is not representative enough.

Such MMPR systems are in force in Rwanda, Tanzania and Uganda and these has greatly improved the quality of representation and the legitimacy of the political system.

iii. The proportionate representation

The Proportionate representation system is a system where the electorate votes for the Parties. Each Political Party is then allocated the number of seats proportionate to number of votes that Party garnered in the election. This system that is widely the practice in many European countries is in force in South Africa. Parties publish their list well before elections and it is agreed what number of votes will guarantee a party a seat. In South Africa, every 39,000 voters represent a Member of Parliament. A party is there fore granted as many seats as the number of votes it garnered.

When there is a vacancy in the office of a Member of Parliament, the Party is then automatically empowered to name the replacement of that Member of Parliament.

The Position of the Inter-Parties Forum on Constitution Review

The Inter-Parties Forum supports the Bomas draft electoral framework since it more democratic, accords as many constituencies (both geographic as well as sectoral) as possible a voice, creates a room for Parties to have a greater and more central role in the political process and ensures minorities have a chance to be involved in the decision making process.

The proportionate representation (PR) system is even more democratic and should also be considered during this constitutional negotiations that are about to get underway.

In order to address the current problem of the first-the-post single-member-constituency electoral system, it is imperative that the following system of representation be instituted:

a. National Level

In line with the Bomas Draft Constitution, a bicameral parliamentary system should be adopted. The upper house, Senate, should consist of representatives elected by the District Councils. The lower house, National Assembly, should consist of members elected from geographical constituencies, political party lists should facilitate the election to Parliament of representatives of Persons with disabilities, labour and youth representatives, trade union representatives and other interest groups. The members elected from geographical constituencies should constitute not more than 50%. The women members should be elected by women in districts. All other members should be elected by relevant members of the groups they represent. The electoral procedures and requirements should be embedded in law.

b. Regional level

In line with the Bomas Draft, each region should have a Regional Assembly. Membership of each Assembly would consist of elected representatives from District Councils. The assemblies should adequately represent persons with disabilities, women, youth and other interest groups.

c. District level

In line with the Bomas Draft, each district should have a District Council. Membership of each Assembly consists of elected representatives from the district. The council should adequately represent persons with disabilities, women, youth and other interest groups

d. Presidential

The current crisis in Kenya demonstrates how the powers of the imperial president can be misused. It is for this reason that the Inter-Parties Forum on Constitutional Review advocates for a dispersal of executive power and a parliamentary system of government. The same crisis also clearly shows how the universal suffrage system in electing a president can divide the country along ethnic lines. This Forum is therefore recommending that the president be elected by the electoral college of Senate and the National Assembly.

e. Elections

It is of crucial importance that elections be managed by a competent, professional and ethical body. We recommend that the Electoral Commission be reconstituted to reflect this. The body should have nine members.

In the run- up to national elections, executive authority should be vested in the office of the Chief Justice in the last 90 days prior to elections. National Assembly and Regional elections should be held two years apart. All elected members of all organs should assume office 90 days after being elected. This would allow room for all electoral petitions to be heard and determined. Any by- elections resulting from the petitions should be conducted within 90 days of the convening of the relevant organ. In the event that a member of an organ is not able to continue serving due to death, incapacitation, resignation or dismissal, the relevant political party should nominate another qualified person to complete the term.

11.5 Anchorage of the Bill of rights and Bill of responsibilities

The Bill of Rights should be clear and incontrovertible. The United Nations Universal Declaration on Human rights and the Africa Charter on Human and People's Rights should form the foundation of the Kenyan Bill of Rights. The provision in the Bomas Draft can be improved upon to outline a more articulate Bill of rights than what had already been provided for. The Bill of rights ought to be *justiciable* and not tentative as was in the Wako Draft where the promotion and protection of the enjoyment of basic rights was pegged on availability of funds.

11.6 Separating the policy issues from the constitutional principles

There are certain policy issues that should not be provided in the constitution. These include the chapter on the environment, culture, the numerous commissions (except for the Electoral and Boundaries, Human rights and administration of Justice, the judicial service and public service commissions); These policy issues can create unnecessary tension that is better left to the political Parties manifestos.

12. CONCLUSIONS

- The current normalcy should not be confused for stability. It is basically the lull before the storm. Ultimately, it is only a democratic and new constitution that is capable of giving a foundation for Kenya's political, economic and social renewal, reconstruction and reform.
- Eventually, national reconciliation shall be an outcome of various processes all of which must be based on a democratic constitutional framework
- Failure to observe the aspirations of the people as outlined as objectives of constitution making in the Constitution of Kenya Review Act 1998 led to the drafting of the Kilifi/ Wako Draft
- The review roadmap needs to be acceptable and one that meets the standards of democratic constitution making in peace- time

13. RECOMMENDATIONS AND WAY FORWARD

13.1 The President, the Prime Minister and the cabinet

The President, the Prime Minister and the Cabinet should outline the policy that shall guide constitution making to bring about order and predictability to the process of constitution making. Cabinet should seriously consider adopting this forum's position. Cabinet will add value to the process if for instance, it clearly articulated when the much talked about twelve months commence and end.

13.2 The Minister for Justice, National Cohesion and Constitutional Affairs

The forum recommends that the minister should urgently re- convene the Multi- Sectoral Forum to jump- start the process before July 7th. It is the forum's position that the current on- going reform and reconciliation initiatives may not deliver on the electoral truth and justice, justice, human rights and reconciliation and the transformational agenda they were established to achieve in the first place if the constitutional review process is not jump- started at once.

13.3 The Speaker and the National Assembly

The Speaker and the Parliamentary Business Committee should consider urgently setting up a select committee on constitutional reform to jump- start the process. The select committee on constitutional reform shall play a key role in speeding- up the passage of the essential reforms in parliament to entrench the process, building consensus on the most effective and efficient way forward and in establishing a firm linkage with the other actors outside parliament.

13.4 The Political Parties

The forum encourages each political party to develop its content and process position in readiness for the anticipated robust negotiations on the constitutional road- map. CMD Kenya on its part shall facilitate dialogue among political parties through this inter- parties forum.

13.5 The Civil Society, Religious Sector, Trade Unions, Business Sector and other interest groups

The forum encourages the National Civil Society Congress, Religious Sector, Trade Unions, the Business Sector through KEPSA and other interest groups to develop and publicize their positions on the content and process in readiness for the anticipated robust negotiations on the constitutional road- map. These interest groups and the Inter- Parties Forum should consider convening the Multi- Sectoral Forum in readiness of the formal convening of that forum by the minister.