

**THE REVIEW PROCESS IN KENYA: A SNAP SHOT**

**By**

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**5<sup>th</sup> September, 2005**

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## **1. The Global Context**

- Over the last century, Constitution-making has come in three phases-
  - Post-Bolshevik revolution phase ushered in a large number of socialist Constitutions whose orientation was state control of the political economy;
  - Liberation of colonial territories beginning largely with the Indian sub-continent and peaking somewhere in the 1960's, ushered in an equally large number of Constitutions. These, however, were patterned after systems of governance in existence in the countries of the former colonial powers. With very few exceptions such as Tanzania and Guinea (Conakry), this second phase was concerned predominantly with power transfer.
  - The resurgence of liberal democratic ideals following the collapse of the Soviet Empire has been accompanied by a fresh wave of constitution making which is continuing to this day.
- In Africa, the second and third phases of constitution-making have been interspersed with numerous dramatic developments including-
  - Military coups, counter-coups, attempted coups, assassinations, civil strife and inter-ethnic strife. Between 1960 and 1999 Africa had reported in excess of 120 such events;
  - Revisions overhauls or enactment of new Constitutions in at least 32 out of Africa's 50 member states.
- In all these phases of reform, it is important to note that-
  - There has always been intense conflict and discourse;

- Constitution-making has not been easily conceded to by incumbent regimes;
- Different ideological outlooks have shaped the nature of constitutional outcomes;
- The Bolsheviks were fired by Marxist-Leninist theories of revolution;
- Independence elites were fired by freedom though under ex-colonial tutelage;
- The post-Berlin wall changes were fired by liberal concepts of democracy and good governance;
- Constitutional reform has, indeed been the continuation of politics by other means.

## **2. The Constitution-Making in Kenya**

- The constitutional reform debate in Kenya has protracted history-
  - Attempts by Odinga and his colleagues in the 1960s to review the current Constitution were thwarted by elites who wanted to consolidate power and wealth rather than to complete national liberation;
  - The process of consolidation of power culminated in the creation of *de facto*, then *de jure* one party state, and the emergence of the imperial Presidency in the 1970s and 1980s. That phase also coincided with the drive towards centralization and consolidation of state power throughout Africa.

- Kenya was not spared by the liberalization wave, which fuelled the Benin Constituent Convention in 1990.
- The process of review was preceded by intense debates on-
  - The need for a second liberation focusing on return to multi-party politics,
  - How best to design a framework for democratic governance and especially one that would remove the autocratic KANU regime.
- These debates were led –
  - Internally by civil society groups and opposition politicians,
  - Externally by donor agencies led by the Breton Woods Institutions.

### **3. The Constitution-making Process in Kenya;**

- The actual process of constitution-making, however, has gone through several phases –
  - The phase leading up to the repeal of Section 2A of the Constitution was targeted at liberalizing democratic space. That phase also brought in small but significant changes such as term limit provisions for the Presidency. That phase heralded the first multi-party elections since 1963 in 1992.
  - Because the 1992 elections did not lead to real change in democratic space, attention turned to slightly more comprehensive reforms. That led to the enactment of the so-

called Inter-Parties Parliamentary Group concessions and the 1997 election.

- When the 1997 elections again failed to produce real change in the political system, structural reforms were proposed with the enactment of the Constitution of Kenya Review Act, 1997.
- The post 1997 phase has been the most important, accompanied as it was, by a number of struggles –
  - The struggle over the design of the review process.
  - The struggle to control the review process itself
  - The struggle over the outcome of the review process
- These struggles were shaped by important political parameters –
  - The fact that reform was taking place with a sitting President barred from succeeding himself, in office,
  - The implicit assumption that review of the Constitution would *ipso facto* cure all the ills of bad governance especially if this were to remove the enormous power held by the President,
  - When review was not completed before 2002 elections, however, the political parameters naturally changed.
- These struggles are worth an introspective assessment.

#### 4. **Struggle over Design**

- The discourse was divided between those who would have wanted the process to-
  - Follow Benin,

- Be a Board-room (experts) affair, or
  - Involve public enquiry and if so at what level and target focus.
- In the event, a complicated “people driven process” was designed and re-designed consisting, *inter alia* of the following organs –
    - A Commission of 15 later expanded to 27
    - Constituency Constitutional For a
    - National Constitutional Conference
    - Referendum, and
    - National Assembly
- Each organ was assigned a specific function.
- The Primary organ of that process was to be the Commission. It operationalised the process via a comprehensive national infrastructure consisting of district coordinators, constituency constitutional forum committees, and civic education agencies.
- To protect the Commission from interference by the Executive Parliament insisted on its independence by-
    - Establishing a separate Fund for the Commission,
    - Establishing security of tenure for Commissioners,
    - Shielding the Commission from the State Corporations Act,
    - Ensuring that the Government was bound by the Review Act,
    - Ensuring that the Commission could not be dissolved before its work was completed.
- It was the view of many that that design was something of an over-kill since-
    - Activities under it were sequential and time-bound,

- It left the Commission with very little discretion,
- It was expensive to operationalize,
- It was open to insurgency by “constitutional” action under the very instrument which was being reviewed, and
  - It operated entirely at the mercy of a Parliament whose political complexion was always subject to change and which was, in any event, reluctant to entrench it in the Constitution.
- Had the design been more flexible and its primacy over the existing constitution assured, it is possible that the process might have taken much shorter to complete.

## **5. The Struggle to Control the Process**

- Once the process commenced in November 2002, control over it became the primary occupation of various shades of the political spectrum –
  - Subordination of the Commission’s functions to merger negotiations led to loss of valuable time,
  - Foot-dragging by ruling party “hawks”,
  - Intra-Commission conflicts fueled by external political interests.
  - Although the Commission was able to weather many of these incidents, it was not always adept at handling their public fall-outs.
- The Commission, was, nonetheless able to put in place an elaborate system for review consisting of –
  - A road-map of issues and questions which were widely distributed and discussed,

- Civic education targeted at explaining what the current constitution was about and why it was necessary to review it,
- Public hearings in all of Kenya's 210 constituencies;
- Data analysis matrices taking into account every conceivable response from the public including those that may not be of "constitutional character."

## **6. Struggle over the Outcome of the Process**

- The primary product of the review process has always been the Draft Bill even though that outcome was expected to issue from other process activities.
- The Draft Bill-
  - Contemplates the complete replacement of the existing constitution – not just its revision;
  - Introduces far-reaching structural and normative changes in the way in which political activities are henceforth to be conducted.
- This it does in five ways:
  - Reconstitution of the state through-
    - Establishment of a basis for the legitimacy of the state;
    - Proclamation of the constituent power of the people;
    - Establishment of a framework for the exercise of the constituent power;

- Entrenchment of the rights and obligations of the citizenry as individuals or communities;
- Design of a new power-map of the state, involving, *inter alia*
- Decongestion of executive of authority, and
- Devolution of power;
- Prescription of clear principles and norms for the operation of that power map through, *inter alia*
  - An independent public service;
  - Leadership and integrity provisions;
  - Supervision by Constitutional Commissions;
- Regulates the manner in which the primary resources of the state may be held, controlled and managed.
- Once the Draft Bill was out, a new round of struggles immediately emerged involving –
  - Disruption of the Commission’s assembled National Constitutional Conference calendar;
  - Attempts to discredit the Draft Bill as being “foreign” or not representative of the views of Kenyans,

- Court proceedings by advocates and members of the judiciary intended to exclude the Commission from making recommendations on certain matters;
- Many believe, wrongly, that if and when a new Constitution is enacted, fresh elections must be held.

## **7. The Expectations**

- Although elections have put in place a popular administration, there is need for caution.
- The ills and flaws of the old constitution remain.
- The people's expectations for a new constitution also remains;
- On their zeal to make a difference and for that difference to stick, the new Government will need a new set of constitutional norms and institutions.
- Democracy, transparency and good governance cannot flourish on good will and intentions alone; a new set of principles, norms and institutional structures are needed. That was and remains the promise offered to the people by the second liberations.
- The ordinary Kenyan who gave so much in expectation for reform, must not accept anything less.

## **8. The Conference**

The National Constitutional Conference whose first session commenced on 28<sup>th</sup> April and concluded on the 6<sup>th</sup> day of June, 2003 is a landmark in African Constitutions because its neither a Parliament or a constituent

assembly yet it is arguably the largest and arguably the most representative body ever assembled to make a Constitution in Africa.

The Conference enjoys and exercises authority donated to it by Parliament under S. 47 of the current Constitution, indeed that is only the final Bill to alter the Constitution, which must go back to Parliament for enactment.

## **9. Assessment of the Conference**

The Conference work was divided into three distinct stages:-

- The general debate
- The Technical Committees
- The Considerations stage

At the time of adjournment on the 23<sup>rd</sup> March 2004 the Conference endorsed the Draft Bill, it adopted on 15<sup>th</sup> March, 2004.

## **10. Post Conference Activities**

- On the 15<sup>th</sup> day of March 2004, some Conference Delegates, who included Cabinet Ministers, walked out in protest after the majority of Delegates rejected a compromise motion based on the Sulumeti Consensus. Since then controversy has bedeviled the review process.
- Shortly after Bomas Conference, a Constitutional Court delivered a ruling in the *Njoya Case* declaring subsections (5), (6), and (7) of Section 27 of Constitution of Kenya Review Act

(Cap 3A) under which the Bomas Draft was adopted were declared unconstitutional.

- Section 28(4) under which the National Assembly was required to pass the Bomas Draft was declared inconsistent with Section 47 of the Constitution.
- To accommodate the *Njoya Case* ruling and to chart the way forward in the review process, various consensus efforts were undertaken between warring political factions and thereafter Parliament enacted the amendment to the Review Act, commonly known as the “**Consensus Act.**”
- Pursuant to Section 27 of the Consensus Act, the Select Committee Review of the Constitution of Kenya was constituted on May 05, 2005 to provide “leadership” in the Constitution Review Process.
- The Select Committee received and held consultations with various stakeholders toward building a Consensus. The Stakeholders included the Kenya Church, Media Owners Association, Ufungamano Initiative, COTU, Law Society of Kenya, Parliamentary Consensus Group and the Supreme Council of Muslims in Kenya (SUPKEM) among others.

- On June 10<sup>th</sup> 2005, the Select Committee established a Technical Sub- Committee, which submitted its report on June 28, 2005. Its mandate was:
  - (i) Study the Bomas Draft and the CKRC Report adopted on 15<sup>th</sup> March 2004 and the Consensus Building Report (Naivasha Accord) and compile a list of Contentious Issues for presentation to the main Select Committee.
  - (ii) Prepare a new draft Bill based on the Bomas draft and the Consensus Building Report for presentation to the Select Committee.
  - (iii) Co-opt such experts as may be deemed necessary.
  
- Thereafter the Parliamentary Select Committee held a two day meeting for MPs in Kilifi (from July 14 to 16, 2005) to:
  - (i) Brief Members on the Constitutional Review process;
  - (ii) Discuss and exchange views with Members on the harmonized draft; and
  - (iii) Prepare Members for the actual debate on the PSC Report and accompanying documents on the floor of the House.

- After Kilifi Retreat the PSC presented its Report to the Parliament. Part Four of the Report contained an Appendice entitled the “**Draft Constitution of Kenya, 2005,**” which came to be known as the “**Kilifi Draft.**”
  
- The proposals made in the Kilifi Draft were excluded from PSC’s Report to the extent they were considered to have gone beyond the mandate that had been given to it via a resolution made on the 30<sup>th</sup> day of June, 2005.
  
- The PSC Report as amended by the Parliament was forwarded to the Attorney- General for harmonization with the Bomas Draft.
  
- On 22<sup>nd</sup> August 2005, the Attorney General, acting pursuant to Section 27 of the Constitution of Kenya Review Act (Cap 3A) Laws of Kenya, published the **Proposed New Constitution (see Kenya Gazette Supplement No. 63** which is awaiting to be subjected to a referendum in the month of November, 2005.