STUDENTS speak

What Young People Want
Students Speak Out On Constitutional Reforms

Our Katiba
Our Responsibility
Kenyan Youths’ Role in Implementing the New Constitution

The 23 Year Journey
The History Of Constitution Making In Kenya
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<tr>
<td>AG</td>
<td>Attorney General</td>
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<td>CDF</td>
<td>Constituency Development Fund</td>
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<td>4Cs</td>
<td>Citizen Coalition for Constitutional Change</td>
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<td>CIC</td>
<td>Commission for the Implementation of the Constitution</td>
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<td>CKRC</td>
<td>Constitution of Kenya Review Commission</td>
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<td>CKRC Draft</td>
<td>CKRC Draft Constitution</td>
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<tr>
<td>CoE</td>
<td>Committee of Experts</td>
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<td>CRA</td>
<td>Commission for Revenue Allocation</td>
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<td>CSOs</td>
<td>Civil Society Organizations</td>
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<tr>
<td>CUEA</td>
<td>Catholic University of Eastern Africa</td>
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<tr>
<td>DPP</td>
<td>Director of Public Prosecution</td>
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<td>ECK</td>
<td>Electoral Commission of Kenya</td>
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<td>HDC</td>
<td>Harmonised Draft Constitution</td>
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<td>ICC</td>
<td>International Criminal Court</td>
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<td>IIBRC</td>
<td>Interim Independent Boundaries Review Commission</td>
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<td>ID</td>
<td>Identity Card</td>
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<td>IEA</td>
<td>Institute of Economic Affairs</td>
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<td>IIIEC</td>
<td>Interim Independent Electoral Commission</td>
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<tr>
<td>IPPG</td>
<td>Inter-Parties Parliamentary Group</td>
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<td>JSC</td>
<td>Judicial Service Commission</td>
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<td>KLRC</td>
<td>Kenya Law Reform Commission</td>
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<td>LASDAP</td>
<td>Local Authorities Service Delivery Action Plan</td>
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<td>LATF</td>
<td>Local Authorities Transfer Fund</td>
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<td>LSK</td>
<td>Law Society of Kenya</td>
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<td>MDGs</td>
<td>Millennium Development Goals</td>
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<td>KNDR</td>
<td>Kenya National Dialogue and Reconciliation Team</td>
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<td>MMPR</td>
<td>Mixed Member Proportional Representation</td>
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<td>MoJNCCA</td>
<td>Ministry of Justice, National Cohesion and Constitutional Affairs</td>
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<td>NA</td>
<td>National Assembly</td>
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<td>NARC</td>
<td>National Alliance Rainbow Coalition</td>
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<td>NCC</td>
<td>National Constitutional Conference</td>
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<td>NEMA</td>
<td>National Environmental Management Authority</td>
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<td>NGOs</td>
<td>Non-governmental Organisations</td>
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<td>ODM</td>
<td>Orange Democratic Movement</td>
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<tr>
<td>MP</td>
<td>Member of Parliament</td>
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<tr>
<td>PCIIOC</td>
<td>Parliamentary Constitutional Implementation Oversight Committee</td>
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<tr>
<td>PM</td>
<td>Prime Minister</td>
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<td>NCEC</td>
<td>National Convention of Executive Council</td>
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<td>PNC</td>
<td>Proposed New Constitution of 2005 (also known as the Wako Draft)</td>
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<td>PNU</td>
<td>Party of National Unity</td>
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<td>PSC</td>
<td>Parliamentary Select Committee on the Review of the Constitution</td>
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<td>RG</td>
<td>Reference Group</td>
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<td>RHDC</td>
<td>Revised Harmonised Draft Constitution</td>
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<td>TJRC</td>
<td>Truth Justice and Reconciliation Commission</td>
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<td>YAA</td>
<td>Youth Agenda</td>
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FOREWORD

From the onset, it is said that the best moments to write a new constitution are in times of crisis or immediately after a crisis. Further that it is very difficult to write a new constitution or rewrite it during peacetime and usually when a constitutional moment presents itself, the country should seize it before the window of opportunity closes.

Kenya’s constitution review process was long, treacherous and seemingly, never-ending. The process started in earnest in the late 80’s up to early 90’s with the clamour for reintroduction of multi-party politics. Following the amendment of the constitution in 1991 which saw the repeal of section 2A, Kenya legally became a multi-party state. This position was confirmed in 1997 when the constitution was again amended to include section 1A declaring that Kenya was and would continue being, under the current constitution, a multi-party democracy. Except for these changes, however, the constitutional structure remained largely in the single-party framework, essentially a case of having new wine in old wine-skins. This coupled with the wave of democracy sweeping across the continent meant that Kenyans continued to agitate for an overhaul of the current constitution.

After the disputed Presidential elections of 2007, Kenya witnessed its worst moment in history when there was widespread violence in the country. Negotiations mediated by the African Panel of Eminent Persons helped achieve a consensus that led to the signing of the National Accord. In order to achieve lasting peace and prosperity, the accord under Agenda Four required a new Constitution for Kenya to be enacted. Kenyans ratified the Proposed Constitution of Kenya on 4th August 2010. And once it was promulgated as the Constitution of Kenya (2010) on 27th August 2010, it began operation.

The critical role of the youth in the constitutional processes cannot be overstated. The fact that Kenyan population has a clear majority component being the youth and the fact that it is the youths who will be governed by the New Constitution for a longer period during their lifetime, then their feedback and input was and is inevitable. As such, the youth had to speak and be heard. The youths’ (students) speak project was therefore implemented by Youth Agenda to get the feel of how youths perceived the Proposed Constitution and their general grasp of the socio-economic, geo-political and religious-cultural issues around and about them and provide a platform for better understanding. The outcomes of these meetings have been captured in this publication.

Perhaps, the responsibility that lies ahead of Kenyans in implementation of the letter and spirit of the New Constitution is a heavy as the responsibility that comes with a rebirth of a new state. In fact, constitutional pundits estimate that the efforts for implementation of a new constitution might be heavier than enactment efforts. To bring the constitutional texts into life then Kenyans of all walks of lives and generations, through concerted efforts are called upon to join efforts. There is massive work that lies ahead, this includes, legislative, policy, institutional review and reforms, besides individuals change of mindset, to embrace the new thinking, values and principles that are espoused by the Constitution. We congratulate all the Kenyans of goodwill, profound passion and unwavering persistence who proposed, passed and promulgated the new constitution effectively securing a bright future for subsequent generations. We applaud the enthusiasm and optimism shown by citizens in their efforts at discussing, interpreting and implementing the eighteen chapters of our new constitution. Kenya is indeed on the cusp of a national rebirth. Kenyan youth are thus called to shape their destiny and the generations to come.

Susan Kariuki
Chief Executive Officer
The Constitutional Process In Kenya: The Journey
CHAPTER ONE

What is a Constitution

A pre-modern definition of a constitution was that it is a social contract that defines the relationship between the governing and the governed. This approach viewed the citizens as non-participants in the affairs of government. It created the concept of the governors and the subjects. The modern approach defines constitution as a supreme law that allocates powers and responsibilities to various organs and institutions of governance.

The term ‘Constitution’ is commonly used in at least two senses in any ordinary discussion of political affairs. First of all it is used to refer the fundamental and organic law of a nation or state that establishes the institutions and apparatus of government, defines the scope of governmental power and guarantees the individual rights and liberties. In the second sense, the term is used to refer to the written tangible instrument or document embodying the fundamental law of the land. In the context of the latter meaning, the basic and most important constitutional laws are specifically enacted into one document or series of documents which can be referred to as the constitution. The provisions of the constitution are easily available and can be analyzed and quoted because they have all been collected and ordained together in one document or series of documents. This understanding of constitutions is in most times a general statement. This is because the totality of a state’s constitution includes not only the written text of the constitution itself, but also the extent to which the letter of the law has been made to apply to practical situations through judicial interpretations as well as conventional or administrative practice.

With regard to the first understanding, there have been several definitions put forward by scholars all emphasizing different aspects of a constitution but nevertheless consisting of certain discernible content. For example Charles Wheare in his Book Modern Constitutions defines it as “…the collection of rules which establish and regulate or govern the government…” Bolingbroke in his essay On Parties defined it as thus “…By Constitution, we mean the …assemblage of laws, institutions and customs derived from certain fixed principles of reason… that compose the general system , according to which the community hath agreed to be governed…” Kanyeimba in his book, Constitutional Law and Government in Uganda describes the Constitution as consisting “…the basic and fundamental laws which the inhabitants of the state consider to be essential for their governance and well being…”

The string that runs through these definitions is the fact that a ‘constitution’ is the foundational charter of the state which is the basis for its establishment and organization. The first sense of the term constitution is the older and broader meaning and incorporates the second sense in which the term is used.

Types of Constitutions

Constitutions may be classified on the basis of a variety of factors as described below.

Written and Unwritten Constitutions

The traditional approach to the distinction of constitutions has always been the whether a constitution is written or unwritten. This distinction was used to distinguish between the American constitu-

tion which was formally written in one formal and tangible document and the British Constitution which was contained both in various statutes, decrees, usages, conventions, customs and traditions of the British people.

Within this literal meaning, the United Kingdom is the only remaining classical example of unwritten constitution while the rest of the countries of the world have written constitutions because they have more or less formal written constitutions. Even New Zealand, which was until recently classified as having an unwritten constitution changed from this category following the enactment by the New Zealand Parliament of the Constitution Act of 1996.

This traditional approach to the distinction of constitutions may be losing vogue because even in the case of Britain and Israel most of the constitutional precepts have been codified in a series of basic laws or statutes. The proper approach to this matter is that Britain has an unwritten constitution rather than that it has no written constitution.

Flexible and Rigid Constitutions

Constitutions may be classified according to the manner in which they may be amended. Constitutions which may be amended by the legislature through the same process as any other law are referred to as flexible constitutions. On the other hand, constitutions that have a special amendment process are referred to as rigid. The British Constitution has traditionally been given as the locus classicus of flexible constitutions while the United States Constitutions has been presented as the primus of rigid constitutions. With respect to the former, the British Parliament can change the Constitutional principles through ordinary legislation. The American Constitution on the other hand cannot be changed without the consent of three-fourths of the state legislatures or through a constitutional convention.

The practice in modern constitutions especially those that have been made recently after the cold war is to entrench certain provisions that are considered fundamental by providing a special amendment process for example through a referendum, and to allow the legislature to amend the other provisions that are not considered foundational.

The terms ‘flexible’ and ‘rigid’ constitutions are in the real sense comparative terms that may be used to define the amendment procedure of the constitutions of two or more states. For example if a constitution requires three quarter votes to be amended by Parliament while another requires a simple majority of votes of Parliament, then the latter could be described as flexible as compared to the former.

Regard must however be had to the fact that in practice, the degree to which a constitution may be amended is a matter that is purely dependent on the political dynamics obtaining in the country. Consequently, a rigid constitution may be easily amended where there is unanimity of opinion. Similarly, a flexible constitution may be impossible to amend where there is political polarization.

Monarchical and Republican Constitutions

Constitutions may be classified depending on the nature and
structure of the political system they establish. In this regard, monarchical constitutions are based on the notion that both the state and the system of government revolve on the axis of a hereditary monarchy. On the other hand, republican constitutions are those that base the system of government on the principle of popular universal suffrage and the power of the people that is exercised through their elected representatives. Constitutional monarchies are a variation of the traditional monarchies in that unlike the traditional monarchies who were deemed absolute, constitutional monarchies have their power established and defined in the constitution as a form of shield against abuse or political aggression by Parliament. However the constitutionalisation of monarchies has made them resemble closely with what a republic was intended to be.

Presidential and Parliamentary Constitutions

Constitutions may be classified on the basis of the relationship between the executive arm of government and the legislative arm of government. The pure presidential constitutions are those in which the executive is completely divorced from the legislature as in the United States. The (New) Constitution of Kenya, enacted in August 2010 adopts the pure presidential model. Similarly, the pure parliamentary constitutions are those in which the executive is purely based in the legislature. In between the two extremes, we have hybrids in which the executive and the legislature are interlinked at some point. This is the case of most modern African constitutions including the recently repealed constitution of Kenya, where the head of government and members of the cabinet were part of the legislature.

Unitary and Federal Constitutions

Constitutions may also be distinguished on the basis of structure of the state and the principle by which the powers of government are distributed in the constitution between the government for the whole country and any governments which may be established for constituent parts. Unitary constitutions for that matter are those that establish one supreme, effective and competent government for the whole country while federal constitutions are those that divide the competence of government between national and regional governments. Federal states such as the United States and Nigeria have federal constitutions while the United Kingdom and the majority of European countries have unitary constitutions. The line of distinction between unitary and federal constitutions is increasingly becoming blurred as a result of the pressure on unitary governments to give autonomy to local authorities through what has come to be referred to as the devolution of governmental powers. In certain constitutions, local governments have as significant autonomy as may be found in federal states.

Diarchical and Other Constitutions

Finally, a diarchical constitution is one in which the governmental competence is shared between two or more authorities other than on a regional basis. For instance the law making power may be divided between the executive and the legislature as is the case in the French Constitution whereby the executive has certain limited competence to make laws through presidential decrees.

The classification of constitutions is purely a theoretical engagement that is meant to establish and emphasize the different values of the forms of the constitution that exist for the different countries. As has been demonstrated, the distinctions between these constitutions may in practice be not very significant.

The Nature and Essence of Constitutions

Constitutions are primarily about political authority and power; the location, conferment, distribution, exercise and limitation of authority and power among the organs of state as well as between the state and its citizens. Viewed from this angle therefore, the first and fundamental character of constitutions is that they constitute the state and define its powers and objectives and as such are the pre-eminent, supreme and fundamental law of the state. Secondly and more fundamentally, constitutions have traditionally developed as means to limitation of the exercise of public authority. Consequently, a critical ingredient of a constitution is that it must define the relationship between the state and the individuals that constitute the state. Understood this way therefore, the constitution becomes the framework of the validity and the basis for the legitimacy of public authority as was more eloquently stressed by Tom Paine in his book Rights of Man thus “…a constitution is a thing antecedent to a government, and a government is only a creature of a constitution… A constitution is not the act of a government, but of a people constituting a government; and government without a constitution, is power without a right.”

Although there is no such thing as the ideal constitution and even though the nature and content of constitutions will depend first on the forces at work when the constitution is established or amended, constitutions worth their salt must contain certain common-sense considerations of practical convenience for purposes of limitation of power. Such considerations take the form of the separation of power between organs of government, the protection of the rights and liberties of the citizenry and the regulation of discretion to ensure that constitutions are applied to realize the values they were establish to promote.

History and Context of Constitution Making in Kenya

The Kenyan reform movement has its roots in early 1990s and was influenced by a global pro-reform wind of change after the fall of the Soviet Union in 1989. Demands for a systematic review of the Constitution were made as early as 1990 to the KANU Review Committee, headed by the then Vice-President Prof. George Saitoti. After this, the movement for a review of the Constitution gained momentum with demand for the restoration of multi-party politics and intensified pressure from religious and secular, civil society and political groups. This clamour by the people of Kenya for the review of the current Constitution was based on;

- The limitation of the Independence Constitution, negotiated by the political class without the input of Kenyans as a whole.
- The various deficiencies of the former Constitution resulting from the changes and amendments which blurred the principle of separation of powers resulting in people’s dissatisfaction with the existing governance.
- The fact that the political and social problems facing the country were attributed to these perceived deficiencies in the former Constitution.
Constitution.

- The post-independence repressive politics that exacerbated the erosion and violation of human rights, such as arbitrary detention without trial.
- Excessive powers vested in the presidency.

The political class of the time resisted this call spurring a series of demonstrations and protests by these groups. The state responded with force and detention of many pro-reform luminaries. However, in the face of an impending political crisis, the President conceded to minimal constitutional changes both in 1992 and 1997. In 1992, some groups unsuccessfully demanded comprehensive reform of the Constitution before the General Elections of 1992. In 1992, the President conceded to the re-introduction of multiparty politics in Kenya. The demand for comprehensive constitutional review gained momentum after the 1992 elections as it became clear that the provision to repeal the one-party rule before the Elections was, by itself, insufficient to democratise politics, usher in accountability and ensure responsive public policies. This was followed by a draft document, titled Proposal for a Model Constitution, prepared and circulated by the civil society and professional organisations. This proposed Constitution formed the basis of extensive consultations and workshops from 1994 onwards.

In 1997, the government conceded to the minimal constitutional and legislative reforms package adopted prior to the 1997 general elections, under the aegis of the Inter-Party Parliamentary Group (IPPG). The reforms included the strengthening of the independence of the Electoral Commission, repeal of a number of laws restricting civil and political rights, such as freedoms of association and expression by political parties, and annulment of the offence of seditious that was being used to clamp down on people who agitated for their rights. These were only interim reforms to ensure fair elections, after which a comprehensive review would be undertaken in accord with the Government’s position. As a result of the dissolution of Parliament in 1997, not all the proposed reforms were enacted. However, as part of the IPPG package, the Constitution of Kenya Review Act (1997) was enacted on 4th August 1997 to provide the legal framework required to meet the goals of post-election constitutional review.

The Constitution of Kenya Review Act (1997) did not satisfy all the interested parties. Consequently, negotiations with a large number of other stakeholders commenced. The aim was to identify an inclusive framework for the process and this resulted in the amendment of the Act 1998 to reflect the consensus of the negotiations. The pact was, however, not implemented since the major parties to the negotiations (particularly parliamentary political parties) disagreed on the mode of nomination of Commissioners. The ensuing stalemate resulted in the protagonists resolving to proceed singly.

In October 1999, the political momentum generated by this development led to the formation of a multi-party Parliamentary Select Committee (PSC) on Constitutional Review, which had the mandate to recommend how the Constitution should be reviewed under a legislative framework provided by the Constitution of Kenya Review Commission Act (as amended in 1998). The parliamentary process, backed essentially by KANU and allied political parties, established a Parliamentary Select Committee to determine the instruments that would be necessary for a comprehensive review. This led to further amendments to the Review Act in 2000. The amendments introduced substantial changes in the legislative framework as agreed in 1998.

Meanwhile, the other group – the Ufungamano Initiative backed by national religious organizations and organs of the civil society – appointed a People’s Commission of Kenya (PCK) structured on the provisions of the amended review Act. The group proceeded to collect the views of the public on constitutional issues.

The main challenge facing the Committee was to propose a process that would command legitimacy. In particular it needed to consider how to accommodate the parallel civil society reform initiative known as the Ufungamano Initiative in the process. Parliament adopted the report of the Select Committee on April 26, 2000. The report recommended that Parliament nominate 21 persons from whom the President would appoint 15 to become Commissioners of the Constitution of Kenya Review Commission (CKRC).


On 18 May 2001, the Constitution of Kenya Review Commission Act was amended once again to facilitate the merger of CKRC and the Ufungamano group. The members of the CKRC were appointed in 2000 with Professor Yash Pal Ghai as its chairperson. The work of the CKRC is well documented in its Report. The CKRC carried out a massive programme of public education followed by the collection of the views of Kenyans on a new constitution. This set the stage for the National Constitutional Conference anticipated in the 1997 Review Act. However, despite the clear programme for constitutional review in the amended 1997 Review Act, former President Daniel Moi dissolved Parliament in October 2002 to hold general elections, and thus effectively put the constitutional review process in abeyance.

The National Constitutional Conference (Bomas) 2003–2005

A coalition of parties under the umbrella of the National Alliance Rainbow Coalition (NARC) Party was formed to contest the 2002 elections against the then ruling Kenya African National Union (KANU). In its campaign, NARC promised to deliver a new constitution for Kenya within one hundred (100) days if the party were to be elected to power.

After the 2002 general elections, the CKRC convened the National Constitutional Conference (NCC) from 2003–2004 at which delegates debated, amended the CKRC Draft Bill 2002, and adopted the Draft Constitution of Kenya 2004 (the Bomas Draft). However, before the adoption of this draft at the National Constitutional Conference, political differences arose and a group of delegates walked out in disagreement about the position of the Prime Minister, amongst other matters. Nonetheless, the Conference adopted a new draft constitution, known as the Bomas Draft on 23 March 2004. Shortly after this a group of Kenyans led by Reverend Timothy Njoroge commenced judicial proceedings to review the

1. Proposal for a Model Constitution was prepared and circulated by the Kenya Human Rights Commission, the Law Society of Kenya and the International Commission of Jurists, Kenya Chapter.
constitutionality of the constitutional review procedure as set out in the amended 1997 Review Act and the then Constitution. Among other things, they argued that the Constitution permitted its amendment by Parliament but not its replacement and that the process denied the people of Kenya their sovereign right to approve a new constitution.

In Timothy Njaya and others v. the Hon. Attorney-General & 3 others, the High Court led by Justice Ringera held that the replacement of the Constitution, required full participation of the people through both a constituent assembly and a referendum. As not all the members of the National Constitutional Conference were directly elected and the MPs had not been elected for the specific purpose of replacing the Constitution, the Conference was not a constituent assembly. In addition, the process had not given the people their fundamental right to ratify the Proposed Constitution in a referendum.

Naivasha Accord

The Accord was basically a report of the Parliamentary Select Committee on Constitutional review, during a retreat at Sopa Lodge, Naivasha, formed to thrash out contentious issues arising from the Draft Constitution 2004, adopted by the National Constitutional Conference on 15th March, 2004. The retreat of the Committee was held from November 4th, 2004. It discussed and made recommendations on Chapters on Citizenship, Constitutional Commissions, Bill of Rights, Judicial and Legal System, Devolved Government, the Legislature, Representation of the People and the Executive.

Kilifi Report

The Report was produced by the Parliamentary Select Committee, at a retreat at Kilifi, between July 15th – 17th, 2005. It was another effort to come out with a truce on contentious issues arising out of the Draft Constitution 2004, adopted by the National Constitutional Conference on 15th March, 2004. The report made recommendations on the following chapters; Citizenship, Bill of Rights, Legislature, Executive, Judiciary, Devolved Government and Constitutional Commissions. Part Two of the Report dealt with ‘Consequential Amendments’, whereas Part Three recommended other issues for consideration. Part Four of the Report comprised of the Constitution of Kenya Bill, 2005 based on the Bomas draft Constitution of Kenya, 2004 as adopted by the National Constitutional Conference on 15th March, 2004. However, when the Report was tabled in Parliament for debate and approval, Part Four was expunged from the records following a ruling by the Speaker that the Committee had gone beyond its mandate in coming up with the Bill.

The Proposed New Constitution of Kenya (Wako Draft)

This was released by the Attorney General at Nairobi, on 22nd August, 2005, via Kenya Gazette Supplement, 2005. The Proposed New Constitution was drafted using the Draft Constitution 2004, adopted by the National Constitutional Conference on 15th March, 2004 and the Report of the Parliamentary Select Committee, produced at a retreat at Kilifi, between July 15th – 17th, 2005, less the Part Four, which had come up with a Bill.

The 2005 Referendum on a Proposed New Constitution in 2005

The Proposed New Constitution of Kenya (2005) commonly known as the Wako Draft was adopted by the National Assembly and presented to Kenyans in a referendum on 21 November 2005. It was rejected by 57% of the votes cast. The referendum campaign presented the perfect forum for the political elite to air long standing grievances and rehearse for the 2007 general election. Both the proponents and opponents of the Wako Draft resorted to distortion and incitement based on ethnicity and tribal affiliation, and raised hostility and animosity to levels that exacerbated the divides in Kenya. It was apparent that a process of reconciliation was needed but no efforts were made to institute a process of national healing. This laid the ground for the catastrophic consequences of the 2007 elections.

The Disputed Presidential Elections and the Electoral Crisis in 2007

During the referendum, the campaign for a “yes” vote was characterised by the symbol of a banana and the campaign for a “no” vote was characterised by the symbol of an orange. The deep political divide that arose from Bomas and was manifest in the referendum, led to the collapse of the NARC coalition after the referendum. The Oranges became organised under the umbrella of the Orange Democratic Movement (ODM) while the Bananas, what remained of NARC and other allied political parties, e.g., KANU, formed a loose coalition under the banner of the Party of National Unity (PNU).

The general elections held on 27 December 2007 were heavily contested with the two main presidential candidates being the incumbent, His Excellency President Mwai Kibaki, and the Right Honourable Prime Minister Raila Odinga. The final results were delayed and then announced amidst public tension. Accusations were that the delay was a sign that the President’s party was attempting to rig the elections. Eventually the results were announced on 30 December 2007 and President Kibaki was sworn in for a second term. Violence erupted in different parts of the country and scenes of people killed, and property being destroyed, were projected by the national and international media. More than 1000 people died and at least 300,000 displaced through forcible evictions or in fleeing the violence. The country was visibly torn apart and teetered on the brink of civil war.

The African Union became the focal point for mediation efforts and the Panel of Eminent Persons led by the former United Nations

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4. Miscellaneous Civil Application No 82 of 2004. (Justice Kuba was of dissenting opinion in this ruling).


6. On the Brink of the Precipice: A Human Rights Account of Kenya’s 2007 Election Violence Preliminary Edition, a report by the KNCIRF states that it found at least 11,622 instances of death and 350,000 displacement of the people. The Commission of Inquiry into Post Election Violence (CPEV) approximates that 1,350 and 350,000 were killed and displaced respectively. Whereas, figures given by the ICC prosecutor at the Pre-Trial Chamber II during the hearing of the case against “the Hague Six” states that more than 1,100 people were killed and 600,000 displaced. In addition the Independent Report of the Commission on the General Election held in Kenya on 27th December, 2008.
Secretary General, Kofi Annan brokered a delicate agreement which was signed by His Excellency the President Mwai Kibaki and the Right Honourable Prime Minister Raila Odinga on 28 February 2008. This agreement resulted in the formation of a Coalition Government and effectively restored calm in the country. The agreement also laid the foundation for the formulation and implementation of constitutional and institutional reforms aimed at guaranteeing the political stability of Kenya in the long term.

Four main agenda items for reform were identified by the Kenya National Dialogue and Reconciliation Team (KNDR):

1) Immediate action to stop violence and restore fundamental rights and liberties.
2) Immediate measures to address the humanitarian crisis, promote reconciliation, and healing.
3) How to overcome the political crisis.
4) Addressing long term issues, including constitutional, legal and institutional reforms, tackling youth unemployment, tackling poverty, inequality and regional development imbalances, consolidating national unity and cohesion, and addressing impunity, transparency and accountability.

The Revived Constitutional Review Process: 2008-2010

These circumstances offered Kenya a constitutional moment, an opportunity to reinvigorate the stalled constitutional process. To that end, two key pieces of legislation were enacted in 2008: the second Constitution of Kenya Review Act and the Constitution of Kenya (Amendment) Act. The purpose of the 2008 Review Act was “to facilitate the completion of the review of the Constitution of Kenya.” The Act set up the Committee of Experts (CoE) on Constitutional Review as an organ of review with the mandate to identify and resolve outstanding issues before preparing a draft Constitution for adoption by Parliament and ratification in a national

In addition to the CoE, three other organs of review were identified in Section 5 of the Act:

a) The Parliamentary Select Committee (PSC) – a 27 member, multi-party parliamentary committee;
b) The National Assembly (NA); and
c) The Referendum.

These organs were guided by principles laid out in Section 6 of the Review Act. Under these principles, the review organs were to:

a) Ensure that the national interest prevails over regional or sectoral interests;
b) be accountable to the people of Kenya;
c) ensure that the review process accommodates the diversity of the people of Kenya including socio-economic status, race, ethnicity, gender, religious faith, age, occupation, learning, persons with disabilities and the disadvantaged;
d) ensure that the review process:
   i) provides the people of Kenya with an opportunity to actively, freely and meaningfully participate in generating and debating proposals to review and replace the Constitution;
   ii) is guided by the principle of stewardship and responsible management;
   iii) is conducted in an open manner; and
   iv) is guided by respect for the principles of human rights, equality, affirmative action, gender equity, and democracy;

c) ensure that the outcome of the review process faithfully reflects the wishes of the people of Kenya.

According to Section 4 of the 2008 Review Act, the object of the review process was to secure a constitution that contained provisions:

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 guarantees good governance, constitutionalism, rule of law, human rights, gender equity, gender equality and affirmative action;
c) recognising 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 organise and participate in cultural activities and the expression of their identity;
f) ensuring the provision of the basic needs of all Kenyans through the establishment of an equitable framework 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 integrity 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) committing Kenyans to peaceful resolution of national issues through dialogue and consensus.

In addition to the Review Act, other constitutional and legislative changes introduced as a result of the KDNR process influenced the course of the constitution making exercise. The Constitution of Kenya was amended to achieve four main things:

1) To entrench the political agreement reached by the KDNR team. The amendment authorised Parliament to enact legislation concerning the Coalition Government, and appointment and termination of the offices of the Prime Minister (PM), Deputy Prime Ministers and Ministers as well as to determine their functions. The new cabinet would consist of the President, the Vice-President, Prime Minister, two Deputy Prime Ministers and the other Ministers.
2) To establish a procedure for its replacement by a new constitution.
3) To establish the Interim Independent Constitutional Dispute Resolution Court.
4) To establish a new Interim Independent Electoral Commission (IIEC) and an Interim Independent Boundaries Review Commission (IIBRC).

The National Accord and Reconciliation Act (2008) (The National Accord) reinforced the constitutional amendment by giving effect to the agreement of the two Principals to establish a Coalition Government and foster national reconciliation.

The provisions in the constitutional amendment that established a procedure for the replacement of the former constitution with a new one was of particular relevance to the review process. First, it contemplated comprehensive reforms – the replacement of the Constitution and not mere amendment. Most importantly, the Act

The International Dispute Resolution Court (IICDRC) was intended to protect the process from unfounded legal challenges and was granted exclusive original jurisdiction to hear and determine matters arising from the constitutional review process. (The Court made decisions that were vital to the success of the process when this was challenged before the referendum and promulgation of the new Constitution).

The function of the IIEC was to reform the electoral process and management of elections in order to institutionalize free and fair elections. Importantly this body was mandated to organise the constitutional referendum and it played a magnificent role to that end.

The issue that arose in relation to the National Accord Act in the context of the constitutional review process was the terminal effect that a new constitution would have on the Act and the arrangements for a coalition government that it established. Under section 8, the Act would cease to apply upon dissolution of the tenth Parliament, if the Coalition was dissolved, or if a new constitution was enacted, depending on whichever was earlier. This showed that the coalition arrangement was transitional in nature and that a new constitutional settlement was necessary for longer term stability.

The Committee of Experts (CoE) on Constitutional Review, 2009 – 2010

The Committee of Experts (CoE) on Constitutional Review was established in accordance with the Constitution of Kenya Review Act (2008) to facilitate the completion of the then stalled constitutional review process. The Committee under the leadership of Mr Nzamba Kitonga, SC assumed mandate to embark on a constitutional review process under the Review Act, building on the work of the Constitutional Review Commission of Kenya (CRRC).

In discharge of its mandate, the CoE prepared its first report, the Preliminary Report of the Committee of Experts on Constitutional Review issued on the Publication of the Harmonised Draft Constitution, was released to the public upon the publication of the Harmonized Draft Constitution in 17 November 2009. In the Preliminary Report, the CoE identified those issues in the constitution making process that were not contentious and were agreed upon, and issues that were contentious and not agreed upon, in accordance with section 30(1) of the Review Act. The contentious issues had over sometime become very elusive to solve because of their very nature of shifting paradigm. The mandate of the CoE was therefore to make appropriate recommendations to the PSC on their resolution.

From the day that the Harmonized Draft Constitution was published the public had 30 days to debate and comment on it. Then, under section 32 of the Review Act, the CoE had 21 days to revise that draft in light of the public’s views. In terms of section 32(1)(c) of the Review Act, the CoE submitted the revised draft, together with a report, to the PSC “for deliberation and consensus building on the contentious issues.”

The second report, the Report of the Committee of Experts on Constitutional Review Issued on the Submission of the Revised Harmonized Draft Constitution to the Parliamentary Select Committee on Constitutional Review, was issued on the submission of the
Revised Harmonised Draft Constitution (RHDC) to the Parliamentary Select Committee (PSC) on 8 January 2010. The report provided an overview and summary of the publication and dissemination of the Harmonized Draft Constitution, the public’s views on the draft, and the key areas of change arising from the views of the public.

On Tuesday 2 February 2010, the CoE received from the PSC a draft containing proposals for changes to the Revised Harmonized Draft Constitution. Sections 33(1) and 33(2) of the Review Act gave the CoE 21 days in which to “revise the draft Constitution taking into account the achieved consensus” of the PSC. Among other things, the PSC had reached consensus on a presidential system of government for Kenya. However, the PSC had not amended the draft fully and requested the CoE to make adjustments to ensure that the Proposed Constitution of Kenya would contain appropriate checks and balances to ensure a sound democratic presidential system of governance for the people of Kenya, in keeping with the principles established in the Review Act. (The PSC’s explicit request was that the constitution should follow the American model.)

The third report, the Report of the Committee of Experts on Constitutional Review Issued on the Submission of the Proposed Constitution of Kenya, was issued on the submission of the Proposed Constitution to the National Assembly on 23 February 2010. The report outlined the adjustments made by the CoE to the PSC draft. This Report and the Proposed Constitution of Kenya was submitted to the National Assembly for deliberation on 28 February 2010. Pursuant to Section 33(4) of the Review Act, the National Assembly had 30 days within which to debate the Proposed Constitution, and approve it, or propose amendments to it. Following heated debate, the National Assembly unanimously adopted the proposed Constitution on 2 April 2010 without amendments.

Approval of the Proposed Constitution by the National Assembly set the stage for the Attorney-General to publish the Proposed Constitution within 30 days after receiving it from the National Assembly by virtue of section 34(1) of the Review Act. In terms of section 34(3), a referendum on the Proposed Constitution was to be held within 60 days of its publication by the Attorney-General.

The referendum was held on 4th August 2010 and an overwhelming majority voted in favour of the Proposed Constitution. The new Constitution was promulgated by President Mwai Kibaki at Uhuru Park on 27 August 2010.

The CoE mandate was successfully discharged when the new Constitution was promulgated and officially ushered Kenya into a new constitutional dispensation. This was almost twenty years after the search for a new constitution had begun.

The Participation of the Youth in the Constitutional Review Process

The youth have walked the long walk in search of constitutional reforms in the country. The youth were part and parcel of the early 1990s constitutional reform movement and initiatives. Such initiatives included the NCEC, Muungano wa Mageuzi, Ufungamano initiative, 4Cs, among others. The youth also provide a critical mass during the mass movement to compel the then dictatorial regime to accede to constitutional reforms. In post-2000 constitutional reform process, the youth were mobilised to submit their views to the CKRC, were represented at the Bomas Conference and the CoE at the Reference Group, among other fora.

Why Kenyans sought to review their Constitution

The people of Kenya sought a new constitutional dispensation because the constitutional and governance structure as underpinned by the existing constitution was inefficient, authoritarian, remote and encouraged the violation of principles of constitutionalism, the abuse of human rights and the mismanagement of national resources and opportunities. The existing constitution had been made ineffective by several amendments that had over time been made to entrench presidential imperialism. Kenyans therefore wanted to review the constitution in order to redefine a new framework of values and standards for their governance. Through the constitution making process, Kenyans hoped to achieve at least seven objectives; namely:

a) the reconstitution of state on the basis of the sovereignty of the people, the supremacy of the Constitution and an entrenchment of an elaborate value system to guide public action;

b) the entrenchment of the rights and obligations of the citizenry as individuals and as communities and affirmative action principles to protect minorities and marginalized groups in the society;

c) the decongestion of state power through the vertical and horizontal dispersal of executive authority, devolution of state powers to more participatory and responsive levels of government and an embedded system of elaborate checks and balances between all organs of government;

d) the exercise, control and supervision of state authority through an independent public service, the establishment of independent constitutional commissions and the entrenchment of a system of leadership and integrity;

e) the establishment of a more rational, efficient, accountable and transparent fiscal management system that emphasizes public ownership and management of national resources and opportunities and the equitable allocation of resources across all regions and priorities of the people; and

f) the establishment of a strong, effective and elaborate system of representation and participation of citizens in decisions making and in the public life of their country.

Challenges of the Review Process

The constitution making process in Kenya has been a complicated and elaborate process. Perhaps the reason could be that the process was a unique one in the sense that our constitution was being written for an existing state; one whose condition can be described as functional and during an epoch that can be said to be relatively peaceful. It is why pundits say, our reform process is the most protracted in the world? It has been argued that constitutions

7. The Youth Agenda was represented in the Reference Group, an organ of the post 2008 revised Constitution Review process, pursuant to the Constitution Amendment Act (2009).
are never written during peacetime. This position has been echoed by acknowledged scholars in constitutional law, Wade and Bradley, who contents:

"In the modern world, the making of a constitution normally follows some fundamental political event – the conferment of independence on a colony, successful revolution, the creation of a new state by the union of states which were formally independent of each other; a major reconstruction of a country's institutions following a world war."

Pundits, commentators, scholars and the general public are agreed that the review process faced many challenges, among them: politicization of the review process; political mistrust during entire process; lack of national consensus on some key provisions of the constitution; several court cases that served to stall or introduce further complications to the process; lack of political will; and leadership and management problems in the process.

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The Constitutional Making And Debate In Kenya: Synthesis Of Students’ Views
Views of the Youth in Contexts

In discharge of its mandate as a leading youth organization, the Youth Agenda organized and facilitated a number of youth engagement activities during the period of constitutional review by the CoE. The forums engaged young people in the constitutional review process, through different initiatives. These included:

(i) The Students Speak Parleys: These forums engaged the youth in institutions of higher learning (colleges, Universities and polytechnics) in a 3 to 4 hours constitutional debate forum, commonly called ‘Parleys’. The forums engaged the youth in institutions of higher learning (colleges, Universities and polytechnics) for purposes of collecting their views and concerns on various issues in the Harmonized Draft Constitution. The parleys were held between November 2009 and February 2010 in the following campuses: Maseno University, Nairobi University, Kenyatta University, Masinde Muliro University, Jomo Kenyatta University, Daystar University, Moi University, Catholic University, Egerton University, Kenya Methodist University, Baraton University. Over 3000 students directly participated in the parleys. The structure of the parleys included the presentation of technical and historical aspects of constitution making in Kenya, followed by an exploration of the need for youth involvement in the process. The students would then be invited to air their views and concerns on what first and foremost, had been isolated by the CoE as contentious issues namely, System of government (the nature of the Executive and Legislature); Devolution; and Transitional Clauses, then the sessions would be opened up for the participants to bring up whatever other issue they deemed important for discussion.

(ii) The Political Cafés: These were monthly meetings that provide young people with an opportunity to air their views on various national policies or situations in a relaxed non-formal atmosphere and to offer their recommendations. Political Cafés targeted young professionals and students. Two Political Cafés on the constitution were held on 23rd of November and 8th December 2009;

(iii) The National Youth Forum: A consortium of Grassroots and National Organizations which convened a national Youth Forum in Nairobi on the 17th November and thereafter facilitated regional meetings in the eight (8) provinces, Consultative meetings and discussions with various actors in the civil society, human rights sectors and the larger National Youth Movement; and

(iv) The Youth Speak Survey: The survey drew views from the youth in colleges and universities and grassroots levels during the 30 days period for public to comment on the Harmonized Draft Constitution in December 2009. The survey targeted 1600 youth respondents from across the eight provinces in Kenya.

The parleys were very important in informing the students on the provisions of the Constitution towards making informed decisions in the August, 2010 referendum and preparing them in their role of implementing the ‘new’ Constitution, instilling and nurturing the culture of constitutionalism and the Rule of Law in the Country.

The critical role of the youth in the constitutional processes cannot be overstated. The fact that Kenyan population has clear majority component being the youth (people aged 18-35 yrs) and the fact that it is the youth who will be governed by the new constitution for a longer period during their lifetime, then their feedback and input was inevitable. As such, the youth had to speak and be heard. Thus, the aim was therefore to get the feel of how youths perceived the proposed constitution and their general grasp of the socio-economic, geo-political and religious-cultural issues around and about them.

The synthesis of the views of the youth below generated from information gathered from student speak parleys, and the Youth Speak survey.

Synthesis of the Views of Youth

During the parleys and in the youth speak survey, responses were collected and analysed and conclusions reached, which now inform the summary of the youth views below. The analysis approach is thematically and also includes other relevant issues to this discourse that would not fit in any of the selected themes. The findings have been divided into the following themes and topics:

a) Level of awareness of the immediate former constitution;

b) Whether the Former Constitution should have been reviewed;

c) Contentious issues in the constitutional review process; and

d) Views of the youth thematically analysed.

Level of Awareness of the Immediate Former Constitution

The youth speak survey found out that only 58.5% of the youth were aware, whereas 41.5% of the youth were not aware of the Immediate Former Constitution that was repealed in August, 2010. The statistics suggests that indeed 41.5% of the youth voted in the August 2010 referendum, against or in favour of the Proposed Constitution. Their decision was not by and large informed by what was the comparative advantage for voting ‘Yes’ in favour of or ‘No’ against the proposed constitution and end up retaining the immediate former constitution. The respondents who said that they were not familiar with the contents of the Immediate Former Constitution, cited illiteracy, lack of access to information and marginalization of the rural folk as the key reasons.

When asked what they thought about the former constitution, a majority of the respondents answer was that ‘the constitution was
a tool of governance and the supreme law of the land. This answer defines what a constitution is as opposed to what the former constitution stipulated. This is a clear testimony that most the student indeed did not know what was contained in the Former Constitution, as manifested by the lack of a solid example of the provisions of the former constitution.

**Should the Immediate Former Constitution of Kenya be reviewed?**

On this issue, 88% of the respondents in the youth speak survey supported a review of the Former Constitution, with only 12% against the review. The reasons advanced as to why the former constitution needed to be reviewed so as to:
- improve the governance of the country;
- allow and enhance participatory and inclusive leadership;
- eradicate the colonial elements in the current (former) constitution;
- ensure women and youths participation in government;
- improve human rights situation in Kenya; and
- enhance equity and equality at all levels of government.

The views of the youth as to why the constitution needed to be reviewed are by and large in sync with the views of the Kenyans. As stated above, Kenyans, just like students sought to review their constitution in order to reconstitute the state on the principles of good governance, de-concentration of powers, to guarantee human rights of individuals and communities, to enact checks and balances on all levels of government, to exercise control and supervision of state authority through independent commissions and offices, to entrench a system of leadership and integrity, to establish of a more rational, efficient, accountable and transparent fiscal management system that emphasizes public ownership and to ensure the proper management of national resources and opportunities and the equitable allocation of resources across all regions and priorities of the people; and to establish a strong, effective and elaborate system of representation and participation of citizens in decisions making and in the public life of their country.

**Contentious Issues in the Kenyan Constitutional Review Process**

Contentious issues in the Kenyan constitutional review processes developed the character of ‘a shifting paradigm’ that kept on changing with changing times, politics, and at different stages of the review process. For instance, the contentious issues at the National Constitutional (Bomas) Conference, the cradle of contention, were not exactly the same issues at the 2005 Referendum on the Proposed New Constitution (Wako Draft), neither were they the same issues that the CoE was mandated to address. Further, the contentious issues metamorphosed into a different shape during the August, 2010 referendum campaigns. The list kept on growing and reducing, and assuming a different form with the every changing political scene. Perhaps, the history of contentious issues in the Kenyan constitutional review process best explains assertions that constitutional making process is more of a political than legal process.

For purposes of our current discussion we will define contentious issues in the context of CoE constitutional review process and sections 23(a), 29 and 30 of the Constitution of Kenya Review Act
(2008). The Review Act required the CoE in identifying the contentious issues to draw upon the views of the people of Kenya as collected by the CKRC: study the two CKRC (the Gha Draft and the Bomas); and the Wako Draft, and identify areas where these drafts agree and where they do not agree (areas in contention). In discharge of its mandate, the CoE analysed the said draft constitutions and also received views from the members of the public in coming up with the contentious issues. The CoE identified the following issues as being contentious:

a) System of Government (the nature of the Executive and Legislature);
b) Devolution; and
c) Transitional Clauses (Bringing the New Constitution into Effect).

Most of the memoranda received from Kenyans, expressed perspectives on the chapters pertaining to the proposed system of government: the Executive and Legislature: as well as those on Devolution; and Transitional Clauses. Even the commentary related to the Judiciary chapter was largely in respect of the provisions contained in the transitional clauses.

Similarly, the youth almost unanimously identified the following issues as being contentious: devolution and system of government, particularly the Executive as being contentious. Also, the youth identified Transitional clauses as being contentious, alongside provisions provincial administration. However, it is noteworthy that the students in the parley did not as such consider the chapter on Legislature as being contentious save for the debate on the merits and demerits of bi-cameral parliament.

**Views of the Youth Thematically Analysed**

**System of Government**

Thematically, systems and structures of government encompass chapters on Representation of the People, the Legislature, the Executive, the Judiciary and Devolved Government. All these chapters provide for:

- Powers and functions of the three Arms of Government and a system of checks and balances;
- A system of devolved Government and structures for distribution of power, functions and resources allocations between the national and devolved levels of Government; and
- Democratic participation in representative institutions, the conduct of free, fair and regular elections by an independent Electoral and Boundaries Commissions and the regulation of the conduct of political parties.

However, the youth’s views were by and large confined to the topics on the executive and devolution, clearly manifesting their narrow view of the whole concept of system and structure of government.

**System of Government: The Executive**

More than 95% of the submissions on the Harmonized Draft Constitution, received by the CoE related specifically to the nature of the Executive organ of Government. The debate centred on the system of government that they preferred. Out of the 1426 respondents during the youth speak survey, 37% rooted for Presidential system, 33% Hybrid and 30% for parliamentary system.

The presidential system of government got a slightly higher approval rate but one could easily conclude that most young people preferred that system from their explanations. There was almost unanimity amongst the youth that they wanted a system of government with a clear centre of power and an individual or institution with whom the buck stops. The respondents also preferred the presidential system for reasons that it was easy and effective in decision making. A number of the pro-presidential system respondents also cited the desire for a less bureaucratic government as the reason for their choice.

The pro-parliamentary system respondents on the other hand cited checks and balances and power decentralization as the key reason for their choice while the pro-hybrid system respondents expressed need for power sharing and the desire to avoid the winner–take–it-all approach to issues of governance.

On the mode of election of the President, 94.6% of the respondents in the survey preferred to elect their president directly while a plurality 3.7% and 1.7% preferring the president who is elected by members of parliament or other possible ways respectively. This is a clear manifest that most youth just like Kenyans would like to elect their president directly, a classical characteristic of a presidential system of government.

The substance of the views expressed by the public to the CoE show:

- preference for a President and Prime Minister;
- that there be proper delineation of powers between the State President and the Prime Minister;
- that there be a clear distinction between offices of State and offices of Government; and
- that whatever form is adopted, the chief executive should be elected by members of the public, whether it is a President, Prime Minister, or both.

Most Kenyans were united in expressing their wish that there should be a Prime Minister who commands the majority of seats in Parliament. Similarly, 34% of the youth from the survey rooted for a hybrid system of government, where we have both the President and the Prime Minister, compared to the 37% who preferred a pure presidential system of government. On the mode of election of the election of the Prime Minister, 48% of the respondents said that the Prime Minister should be elected by members of parliament 43% said they preferred a prime minister elected directly by the people.

Despite the confusion on the choice of the system of government, most students in the parleys wanted a system of government with clear checks and balances and separation of powers. 57% of the respondents to the question whether the President and/or the Prime Minister be elected Members of Parliament answered in the negative whereas 43% answered in the affirmative. The y respondents explained that they did not wish to have a President...
President and Prime Minister time to serve the people; and to enhance the principle of separation of power between the executive and the legislature.

Proponents of the suggestion that the President and/or the Prime Minister be elected members of parliament postulated that they should be able to go to parliament to whip members to pass crucial bills; to be able to be active participation in policy making; and to get mandate from their constituents.

In the end analysis, the CoE, the Parliamentary Select Committee (PSC) on the Review of the Constitution, and the citizens in the November 2010 referendum, just like the youths, albeit closely divided on whether the Country should adopt a presidential, hybrid or parliamentary system, chose the presidential system over the other systems of government with the following salient features:

(i) Separation of powers.
(ii) The President who is elected by universal suffrage with a majority vote of 50%+1, and wins 25% in more than half the counties.

It is noteworthy that many youth declined to explain the choice of their preferred system of government saying they did not understand how either of the systems work.

System of Government: The Legislature

All constitutions have provisions for some form of legislature. unicameral legislatures are common in jurisdictions based on a unitary system of government, including those of Uganda and Tanzania. Bicameral legislatures on the other hand, are common in jurisdictions based on federal or substantially devolved systems of government. In these jurisdictions, legislative authority is shared between a “lower house” and “upper house” although the degree of responsibility between them varies. These include Nigeria and India.

Parliament plays a central role in democracy as a form of representation, in some system choosing or approving the government, responding to people’s preferences - particularly in law making, holding government accountable, custody and control of state finances and resources.

Kenyans have rather ambivalent views about their parliamentarians. On one hand they are often seen as greedy, and uninterested in their constituents except at election time, and lazy – having long breaks, and even failing to turn up for debates so that Parliament often has to be adjourned.

The debate by the students in the parleys on the system of government also delved on the legislature as was proposed in the then Proposed Constitution of Kenya. The debate, by and large, was about whether Kenya should have a bicameral parliament with a second house, the name and the role of such house, and what its powers should be in relation to the National Assembly and the Executive.

A look at the progression of different draft constitutions reveals that whereas the CKRC and the Bomas Draft proposed from bicameral parliament, the Wako draft was a complete departure, by proposing a unicameral parliament. The Proposed Constitution also proposed a bicameral parliament, made up of the National Assembly and the Senate. This proposal was presented to the PSC which debated and approved the position, however, with a rider that the 'National Assembly should be the Upper House' and the 'Senate the Lower House'.

About 67% of the submissions made by the public to the CoE addressed the framework of the Legislature in the Harmonized Draft Constitution. Analysis of these submissions by the Committee showed that there is overwhelming support for a bicameral legislative body comprising of the National Assembly and the Senate.

The students on their part, when asked whether Kenya needed a two chamber (upper and lower houses) parliament, 58% said no while 42% said yes. The opponents of the bicameral parliament felt that the system shall be an additional cost to the tax payers and that it will cause more bureaucracy hence hindering speedy and effective legislation. Felt the two chamber house will be more representative and that it will bring some checks and balances in the legislative process.

System of Government: Devolved Government

Kenyans gave views that far too much power is concentrated in Nairobi, and decisions that affect people have been made far away from them. Local governments were said to be weak – and very much under the control of the national government. Power has been highly centralised. For many people their main contact with government has been with Provincial and District Commissioners, Chiefs and Assistant Chiefs (Provincial Administration), ultimately responsible to the office of the President. It was until recently that Kenyans have had an opportunity to participate in some sort of decentralised governance. Such avenues have been presented by their participation in decentralised funds and development planning framework under the recently established decentralised funds, including the Constituency Development Fund (CDF) the Local Authorities Transfer Fund (LATF) and its participatory framework known as the Local Authorities Service Delivery Action Plan (LASDAP), among others.

Kenya became independent with a system of “regional government”; famously referred to as ‘Majimbo’. There were to be 8 regions with elected Assemblies and Regional Executives. Each was to have the power to make laws including on some aspects of education, health and agriculture. There were to be regional contingents of the police. And the regions were to be able to tax incomes of residents, impose land rates, and raise certain taxes. The regional governments would not have been very strong – but the system was essentially abolished before it had started to work.

The question of “devolving” power to lower levels of government has another importance: what is reserved to the local levels of government is not within the power of the national government. This would have the effect of reducing the power of the national government and its head the President.

12. Supra
The views received confirm the Kenyans’ support for the system of devolution. Students in the parleys alike were of the view that Kenya needed a devolved system of government. Those in support of the devolution cited better representation and job creation as the key reasons for their choice while those against devolution felt that it will be too expensive to run and bulky. The opponents of devolution also opined that the structure of devolution as formulated (in the then Proposed Constitution, and now the Constitution of Kenya) would promote negative ethnicity. However, it must be noted that despite the students expressing their desire for devolved system of government, their debate was limited to that extent. Available data does not show how deep the students went into discussing devolution in terms of the levels, functions, resources and other key salient features.

The Provincial Administration

Most Kenyans’ interaction with some form of decentralization for very long time has been with the provincial administration and the Local Government system. The central government has always employed the provincial administration to decentralize national laws and policies, through Provincial Commissioners, through various levels to the chiefs and assistant chiefs. For example, chiefs have the duty “to maintain order” in the area for which they are appointed; they have functions in connection with disease control; can issue orders “prohibiting or restricting the ... manufacture, transfer, sale and possession of noxious drugs or poisons”; “preventing the spread of disease”; they deal with registration of births and deaths and so on.

The Provincial Administration is a very “top-down” system – a method of control originally set up by the colonial power, which now has its apex in the Office of the President. It has become an object of suspicion in some ways – being accused of being not just an arm of the government but an arm of the party in power. And there is no democratic control over the provincial administration, at least not from the people in the area concerned. They do not choose their PCs, DCs, DOs and chiefs; there is no accountability of these officials to the people. Many people have wanted the system abolished.

At the same time, people have complained that they need more services close to them. Presidents have courted popularity by creating more districts – so more district headquarters, more jobs and less distance to go to get to government offices.

The then proposed Constitution went some way towards the third approach mentioned earlier, with the county governments – and it has been often described as “devolution” but questions remain: how will national government services get delivered to the people, and how will county government services get delivered to people more locally (because the 47 counties will still be quite large and county headquarters far from the people). This has begged the questions of most Kenyans especially in the Arid and Semi-Arid areas and marginalized areas to ponder what will happen to the provincial administration under the devolved system of government.

When the students in the parleys were asked what should happen to the provincial administration under the devolved government, there were divided sentiments with some calling for its retention while others calling for its abolition.

Those respondents, who said the Provincial Administration should be retained, explained that provincial administration plays an important role of public policy interpretation and implementation and that they would have an important role to play in prevention and control of crime. As much as reasons for retention of the Provincial Administration are valid, the same are not foolproof since these roles of public policy interpretation and prevention and control of crimes can adequately be addressed by the national government through relevant ministries and the counties. In fact, the counties have been given power to have their own police.

The students who felt that the provincial administration should be abolished, opined that the system has been historically ineffective, a tool for oppression and exploitation of the people, and a colonial spill over.

The findings from students’ views just like Kenyans views presented to the CoE points to the need to streamline the
operations of the provincial administration other than disbanding it.

**Transitional Clauses (Bringing the New Constitution into Effect)**

The youth were divided on within what timeframe the 'new constitution' should come into force. The majority of the youths 57.4% wanted fully operational constitution within a year, from the date of enactment, 30.5% within two years and 12% within three. The youth want the New Constitution to fully take effect immediately, and at the very latest, within three years, sooner than the five years time frame provided under the 5th Schedule.

Some provisions in the New Constitution can have legal effect immediately. Most of the human rights provisions of the Constitution would come into force straight away, provisions about the electoral system not until the next elections. Some provisions require no further action; when a constitution specifies how a particular institution will be formed, if it is not formed in that way it will probably be unconstitutional and its acts of no legal effect.

There is a rational fear that new provisions of a constitution that may not be welcome to the ruling classes may never be brought properly into effect. It is not easy to ensure that new rules will indeed be made operational. The Constitution does have several techniques to try and ensure that its provisions are brought into effect.

**Issues of Sectoral Concerns**

A look at the criteria provided by the Constitution of Kenya Review Act (2008), for identifying what issues in the various draft constitutions, leaves out some issues that are not agreed upon but cannot be classified as being contentious since the CKRC, Bomas and Wako drafts were consistent on these issues. According to the constitutive Act, such issues were to be classified as 'not agreed upon within the existing draft constitutions'. From the students' views and debates, the following issues can be classified as not agreed upon; clauses, Kadhis' Courts, dual citizenship and bill of rights - abortion recall of elected leaders.

**Kadhis Courts**

In 1920, the mainland territory of Kenya became a colony and its inhabitants became British subjects. By contrast, the Coastal Strip, still on lease from the Sultan of Zanzibar, was renamed the Protectorate of Kenya. This means that the Coastal Strip was a separate legal entity with protectorate status and its residents were considered "British protected persons" rather than "British subjects".

This status continued until independence. At the start of the Lancaster House constitutional talks in 1961, the status and fate of the Coastal Strip came up for determination. The difference in status between mainland Kenya as a British colony, and the Coastal Strip as a British protectorate was emphasized as the British Government organized separate talks for the delegates from the Kenya colony, and from the protectorate of the Coast.

Sir James Robertson, formerly Governor-General of Nigeria, was mandated to recommend to the British Government and to the Sultan of Zanzibar what changes should be made in the 1895 agreement that had been signed concerning the Coastal Strip. He recommended that, despite the different status of the Coast, it had been governed for a long time as part of Kenya and should therefore be integrated into mainland Kenya. It was agreed that the Sultan would receive suitable compensation and the following guarantees were to be enshrined in the Constitution:

- a) A declaration of human rights including freedom of worship;
- b) Safeguards for the retention of Kadhis' Court; and,
- c) Arrangement that future appointment of administrative officers from predominantly Muslim areas be Muslims.

Consequently, on 8th October 1963, the Government of the United Kingdom, His Highness the Sultan of Zanzibar, the Government of Kenya and the Government of Zanzibar, signed an agreement whereby the Sultan of Zanzibar relinquished his claim of sovereignty over the Coast of Kenya. As part of the independence agreement, Prime Minister Jomo Kenyatta and the Prime Minister of Zanzibar, Mr Shomte, on behalf of the Sultan of Zanzibar, exchanged letters stipulating the terms of integrating the Coastal Strip to Kenya. Then Prime Minister Mzee Kenyatta made written undertakings in the letters of exchange that contained the agreement.

On the basis of this and other guarantees, the Sultan agreed to waive all his authority over the Coastal Strip. By virtue of the independence agreement between the British Government, the Kenyan Government and the Sultan of Zanzibar, the Kadhis' Courts were entrenched in the Independence Constitution.

It is this constitutional settlement that would be abrogated by removing the Kadhis' Courts from the Kenyan Constitution. The obvious danger would be that the Coast, along with a sea belt of an exclusive economic zone of 200 miles enjoyed by the country in terms of resources and access to the sea, including underwater cables supplying internet communication, would separate from Kenya as the terms on which the Coast was integrated would have been breached. In other words, provision for the existence of the Kadhis' Courts in the Constitution is part of the constitutional and territorial foundation of Kenya as well as the basis for the protection of the diversity of Muslims and their belonging within Kenya. All this had to be preserved for the peace, stability, integrity, and economic good of the country.

Kadhis courts were not identified by CoE as contentious. The explanation is that methodology for identifying contentious issues under the Review Act did not render the Kadhis Courts contentious.

Views of Kenyans collected and collated by the CKRC and examined by the CoE revealed that Kenyans had indeed sought to have the Kadhis' Courts provided for in Kenya's new constitutional dispensation. There was no indication of the contrary on this particular issue in the CKRC's final Report.

Notably the Proposed New Constitution provided for Kadhis' Courts, though differently to the other drafts. It included Kadhis' Courts in section 195, referred to as Religious Courts.
The CoE received over 12,000 memoranda from Kenyans on what they considered contentious. These memoranda did not show Kadhis' Courts as contentious. Only a minority mentioned Kadhis' courts as a contentious issue. Others supported their retention as it was in the former Constitution. Thus, the CoE could not identify Kadhis' Courts as contentious. However, it noted its importance as a national socio-cultural issue that needed resolution amongst Kenyans.

The issue was neither contested nor identified as contentious during the CKRC led process, the National Constitutional Conference and in the run up to the 2005 referendum. But after the release of the Harmonised Draft Constitution, the Revised Harmonised Draft Constitution, the Proposed Constitution of Kenya, Civic Education and on the campaign in the run up to the August, 2010 referendum, it became hotly contested with the mainstream Christian churches opposing its inclusion in the proposed constitution. The hardliner stance by the churches against Kadhis Court was also expressed by a student during the student speak forum at Catholic University of Eastern Africa (CUEA), it is reported that a student stated;

'Christians should be the ones to decide on the issue of Kadhis courts since they are the majority in Kenya. The government shouldn't cater for the Kadhis courts in terms of finances.

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Source; Youth Agenda report for CUEA Constitution Parley held on 11th March, 2011 at CUEA University

During the youth speak survey, the youth were closely divided on whether Kadhis Courts should be included in the constitution of Kenya, with 57 % of the respondents supporting their inclusion, whereas 43 % opposing. Those in support of their inclusion explained that Kadhis Courts were a historic right for Muslims which was already entrenched in the Former Constitution. The opponents felt that entrenching the Kadhis' Courts in the Constitution was tantamount to preferential treatment for one religious group (Muslim) and is an attempt to convert Kenya to an Islamic country.

**Dual Citizenship**

A country is its citizens. Citizens have certain rights and privileges in any country that non-citizens do not have. In most countries only a citizen can vote, and usually only a citizen can be an MP or hold certain posts (for example many countries would not permit a non-citizen to be an army officer). A citizen always has a right to be in their own country; other people have to get special permissions such as visas and work permits. People sometimes feel that one ought to be - or even can be - loyal to one country only. The former constitution prohibited any person from holding Kenyan citizenship and that of another country (except for children, who can hold dual citizenship until they are 21 and then must decide).

A clear majority of those who expressed a view to the CKRC felt that it should be possible to have dual citizenship, though others felt that a person ought to make a choice. The youth on their part, in the ensuing debate on the issue of dual citizenship in the run up to the August 2010 referendum had varied views. Of the 1411 respondents who were asked whether the proposed constitution (by then) should allow dual citizenship, 60.2 % said yes whereas 39.8 % where against the proposal.

Reasons advanced by youth in favour of dual citizenship were:

- a) To allow for a bigger niche for economic participation,
- b) To allow for free movement,
- c) To allow free choice of citizenship,
- d) To encourage foreign investment, and
- e) For purposes of international bonding/being part of the global family.

Those who opposed the proposal cited national security threat, national pride and patriotism as the reasons for their choice.

In the modern world many people spend part of their lives in one country and part in another. That is good not just for them but for international understanding and international commerce. Dual nationality means that they can more easily travel between the countries in which they have an interest. The arguments in favour of dual citizenship include that such a person might actually be more inclined to retain a connection with Kenya if it is possible to retain citizenship.

In reality many people even nowadays do have two or more passports. Not to permit this to be done lawfully is an invitation to deception and corruption. What do other countries do? The UK has always allowed dual nationality. Until recently the USA was firmly against it, but in recent years the law has been relaxed. Canada has recognised dual nationality since 1977. There is a definite trend towards recognizing dual nationality, though most African countries have not followed the trend.

Bill of Rights - Abortion

The provision on the Right to life under the Bill of Rights gained notoriety as the ‘abortion clause’ notwithstanding the cardinal principle of the provision which seeks to safeguard the sanctity of human life. The controversy stemmed from a proviso that came up as a result of an attempt to expand the scope of previous Articles 35 and 31 of the Harmonised Draft Constitution and Revised Harmonised Draft Constitution that had generally provided that every person had a right to life and that a person shall not have his life arbitrarily deprived. When religious leaders made their submissions to the PSC on the Review of the Constitution and the CoE, they strongly asked that the Constitution should expressly prohibit abortion. But owing to the difficulty the proposal by the religious leaders was likely to occasion to women during child birth, the CoE reformulated the Article on the Right to life to provide that abortion was not allowed except in the opinion of a trained health professional, there was need for emergency treatment, or the life and health of the mother is in danger, or if permitted by any other written law, hence the controversy.

Students across the universities, hotly and with emotions debated this issue during the parleys. Opinions were divided on whether abortion should be outlawed wholesome or there were some circumstances that warranted abortion, especially in cases of emergency treatment. On the other hand, the opponents of the abortion were adamant that there was no circumstance that warranted abortion. An opponent of abortion stated as follows:

Whether we permit it or not, abortion is always there in our society. However, it shouldn’t be allowed at any circumstances; one cannot save the mother at the expense of the child, life is life so let us do away with it.

Source: Youth Agenda report for CUEA Constitution Parley held on 11th March, 2011 at CUEA University

Recall of Elected Leaders

Many votes, while submitting their views to the CKRC asked for a mechanism to make their leaders accountable. Specifically they wanted a provision within the constitution that would enable them recall their elected leader without having to wait for full five years to vote them out during the general election. However, under the New Constitution, the voters will have to wait until a new law to be passed by Parliament on the procedure and requirements for recall. In addition, the recall provision will only take effect after the next/first election under the New Constitution. Presumably MPs will not be enthusiastic about the idea and may well pass a law that makes it very difficult to recall them.

By and large, students in parleys supported the idea of recall clause being entrenched in the Constitution, with 70% in support and only 30% in opposition. The respondents advanced the following reasons in support of the recall:

i. To enhance a culture of self tolerance;
ii. To create a culture of effective service delivery by the elected leaders; and
iii. To get rid of leaders who don’t perform.

The opposition of the recall provision stated that the recall clause will be abused by election losers; it will bring about confusion that it was not necessary since the elected leaders were being recalled every five years, during the general elections, and that the recall clause will place the country in the election mood throughout, hence adversely affecting development.

Recall is possible in various countries, including various US states and Canadian provinces. It is also under serious discussion in the UK. Recall procedures have often been ineffective because of the difficulty in getting enough signatures, however, requiring too few opens the possibility of abuse. There are risks in such a system – especially of abuse for personal reasons, or to cause confusion. The law to be passed will have to decide also whether removal is to be possible because of loss of political support or only because of misconduct. And it may be necessary to restrict the use of the procedure for a period after an election, and before the next election.

Other Issues of Youth Concern

National Youth Council

During the said youth speak survey, the youth were asked whether the National Youth Council be entrenched in the constitution. 73.3% of the respondents supported the proposition whereas 26.7% were against the suggestion. When asked what should be the functions of the National Youth Council, they proposed that its function should include the following:

i. Campaign and for all pro-youth issues;
ii. Lobby for active and proportionate representation of youths in all the decision making organs for the youth; and
iii. Lobby for new pro-youth policies while trying to influence the existing policies.

The respondents who were against the inclusion of the National Youth Council felt that the youth are never serious thus they did not deserve to be involved in a serious process like the making of a constitution. This statement by a fellow youth is a challenge to shed off the image of lack of serious and repackage themselves in preparation for national duty.

Quantum of Youth Representation in the Government

A question was asked to the youth as to what percentage of appointed and nominated positions in the government should the constitution reserve for them. The pattern of the responses from 1423 respondents was as below:

<table>
<thead>
<tr>
<th>Range</th>
<th>Percentage</th>
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<tbody>
<tr>
<td>0 – 83</td>
<td>5.4%</td>
</tr>
<tr>
<td>10 – 156</td>
<td>10.2%</td>
</tr>
<tr>
<td>20 – 251</td>
<td>16.4%</td>
</tr>
<tr>
<td>30 – 285</td>
<td>18.7%</td>
</tr>
<tr>
<td>40 – 219</td>
<td>14.4%</td>
</tr>
<tr>
<td>50 – 430</td>
<td>28.2%</td>
</tr>
</tbody>
</table>
Clearly, Kenyan youth want active representation in all levels of government. The interpretation is that the youth feel under represented. A deliberate effort such as a constitutional pro-youth affirmative action should be put in place. Serious planning, conceptualization and strategic thinking shall be of the essence for youth to counter the problem of under-representation.

**Participation of the Youth in the Constitution Making process**

Despite the long, wide and elaborate constitutional review process spanning for over two decades, young people felt that they had not been adequately involved in process. In order to validate the response, when asked how they thought that they would have been involved in the process, they felt that they should have been actively represented at all the levels and stages of the review process, being given a chance to give views and by their views being incorporated. They stated that it is only through such a way that the New Constitution would have fully been able to respond to their aspirations as the majority component of the Kenyan national population.

**Conclusion**

The dynamism nature of the contentious issues during the history of the Constitution of Kenya review process, demonstrates that it is very difficult to achieve a complete consensus on various issues in the different draft constitutions.

Even, a homogenous group like the youth, could not reach consensus during the various debates. Perhaps, our experience over the past two decades is an indication that no matter what efforts, complete consensus was never to be reached. Though not defined and identified at the initial stages of the constitutional review process, contention has always existed; at the inception stage about the process, pre-Bomas conference, the conference phase, the post conference phase, the 2005 referendum, the Harmonised and Revised Harmonised Draft Constitutions phase, the Proposed Constitution and 2010 referendum phase and the on-going contention on the implementation of the New Constitution. The never ending gridlock explains why referendum is always sort as a deciding factor in constitutional reviews, as was the case in 2005 and 2010 when Kenyans voted to reject Wako draft and Proposed Constitution of Kenya respectively. However, caution must always be made for reconciliation and national healing, especially in hotly contested referendum to avoid the contentious spilling over and degenerating into political crisis in the future.
Role Of The Youth In Implementing The Constitution Of Kenya
CHAPTER THREE

Introduction

Kenyans ratified the enactment of the New Constitution on the 4th of August 2010 referendum. The Constitution came into force upon the ceremonial promulgation by the President on 27th August 2010, save for the chapters and provisions expressly suspended in accordance with the Sixth Schedule on Transitional and Consequential Provisions. In line with Articles 263 and 264, the New Constitution repealed the former Constitution of Kenya (1969, as amended 2008).  

With the dawn of the new constitutional dispensation in the country, there comes a heavy responsibility of implementation and entrenchment of the culture of the constitutionalism and the rule of law. Such a responsibility is as heavy as the responsibilities that often come with the attainment of freedom or self rule with the newly created states, emerging from struggles. Nothing captures such feelings than the words of the former South African President, the icon of struggle for independence, Nelson Mandela. Mandela in his book ‘Long walk to Freedom’ remarked at the independence of South Africa as thus:

“I have taken a moment to rest, to steal a moment of a golden vista that surrounds me, to look back on the distance I have come. But I can rest only for a moment, for with freedom come responsibilities, and I dare not linger, for my long walk is not yet ended”

Perhaps, the responsibility that lies ahead of Kenyans in implementation of the letter and spirit of the New Constitution is as heavy as the responsibility that comes with a rebirth of a new state. In fact, constitutional pundits estimate that the efforts for implementation of a new Constitution might be heavier than enactment efforts. To bring the constitutional texts into life then Kenyans of all walks of lives and generations, through concerted efforts are called upon to join efforts. There is massive work that lies ahead, this includes, legislative, policy, institutional review and reforms, besides individuals change of mindset, to embrace the new thinking, values and principles that are espoused by the Constitution.

For the young people to seize the constitutional moment and their space and time in this historical moment, they not only need to rise up to the occasion but also claim their position at the pinnacle of new constitutional order. To contextualise the place of the youth in the new constitutional order then it is inevitable that one understands the current context that the youth operate.

The Constitution defines the youth as the collectivity of all individuals who have attained the age of eighteen years but have not attained the age of thirty five years. According to the Kenyan Housing and population Census, 2009 the youth constitute 35.39% of the total population. Those aged between 0 – 14 years constitute 42.92% of the total population. Thus, under 34’s constitute 78.31% of Kenya’s population. Despite their numerical superiority, the voices of the youth in legislative, policy and institutional development processes and outcomes is minimal. This state of affairs has been blamed on a number of factors, the primary factor being the country’s governance systems that place little interest in listening to the youth and tapping their potential.

In a survey conducted by the Institute of Economic Affairs (IEA) of the intergenerational divide found out that 87% of the respondents felt that the government was reluctant to address issues affecting the youth including providing job opportunities. Only 3% felt that the government concentrated more on the youth projects. 60.1% of these respondents were people aged between 18-35%.

In another survey by the IEA in 2010, when asked whether the youth were capable of handling political, business and religion leadership successfully 71.3%, 81% and 58% respectively, agreed. The youth were said to have the following attributes to enable them successfully handle leadership, political or business:

a) Knowledge,

b) Energetic,

c) Skills,

d) Numerical strength,

e) Business mind,

f) Creative,  

g) Innovative, and

h) Change oriented.

The respondents, who disagreed that the youth were capable of handling political and business leadership successfully, felt that the youth were:

a) Destructive,

b) Fun loving,

c) Needed supervision,

d) Too money minded,

e) Lacked experience,

f) Lacked enough knowledge, especially about politics,

g) Lacked financial resources,

h) More corrupt,

i) Unable to solve conflicts, and

j) Selfish.

The youth have long held the feeling that leadership of the country has always paid little efforts in bringing their participation in the mainstream of the country’s governance processes. The youth have always been relegated to the periphery and most of time their participation has been limited. A perfect example is the recently concluded constitutional review process. Despite the elaborate process spurning for over two decades, most of the youth feel that


they were not adequately involved in the process. This position was confirmed by the youth speak survey that found that up to 91% of the youth felt that they were not adequately involved in the process.

Participation has generally been defined as ‘people sharing ideas, thinking of themselves, expressing their views effectively, planning, prioritizing, and being involved in the decision making process’ [17] Hodgson (1995) states that five conditions should be aimed for if young people are to be truly empowered. These are:

- Access to those in power;
- Access to relevant information;
- Choices between different options;
- Support from a trusted independent person and where needed a representative; and
- A means of appeal or complaint if things go wrong.

Understanding the Role of the Youth in Implementing the Constitution

The Constitutive Process

The constitutive process consists of the provisions in the Preamble; chapters on Sovereignty of the People and Supremacy of the Constitution; the Republic; Citizenship; and the Bill of Rights which, together, provide for:

- The establishment of fundamental principles of state formation; and affirmation of the sovereignty of the people and supremacy of the Constitution;
- The history of making a nation including the struggle for independence;
- The sovereignty of the people;
- The establishment of principles of national values and goals;
- The acquisition of citizenship, rights, privileges and responsibilities under the Constitution;
- Protection and preservation of culture;
- Democracy and good governance; and
- Human rights limitations, guarantees, protection and promotion.

Constituent power is reposed in the people by virtue of their sovereignty and the hallmark thereof is the power to constitute or reconstitute the framework of government; or in other words make a Constitution[18]. The Constitution in the said chapters affirms the fact that Kenya is a democracy, and in a democracy, the people are sovereign and therefore the sovereign will (constituent power) vest in them and is primordial. Professor B.O Nwabwueze affirms this contention by stating that:

“The nature and importance of constituent power need not be emphasized. It is a power to constitute a frame of Government for a Community; and the Constitution is the means by which this is done. It is a primordial power, the ultimate mark of a people’s sovereignty. Sovereignty has three elements: the power to constitute a frame of Government, the power to choose those to run the Government and the powers involved in governing. It is by means of the first, the constituent power that the last are conferred. Implementing a community’s constituent power, a Constitution not only confers powers of Government, but also defines the extent of those powers, and therefore their limits, in relation to individual members of the Community. This fact at once establishes the relation between a Constitution and the powers of a Government; it is the relation of an original and a dependent or derivative power, between a superior and a subordinate authority. Herein lies the source and the reason for the Constitution’s supremacy.”[20]

The youth must assert and defend the basis for the constitutive power since this is the basis upon which the Constitution is founded. The youth must play a critical role in defending, upholding and practicing the values, philosophy and guiding principles on which the implementation and interpretation of the Constitution is based. This is an opportunity that the youth must internalise, religiously uphold and practice since it is the constitutive power that is the reference point or the foundation for all the subsequent provisions in the Constitution.

## Specific Opportunities and Action points for the Youth

<table>
<thead>
<tr>
<th>Chapter/Article</th>
<th>Action Points</th>
<th>Intervention</th>
<th>Players/Actors</th>
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</table>
| Preamble & Chapter 1 – Sovereignty of the People and Supremacy of the Constitution, Articles 1 - 3 | • Fulfil the aspirations of Kenyans  
• Assert and uphold the sovereignty of the people  
• Respect, uphold, safeguard and defend the Constitution. | • Legislative advocacy  
• Constitutional interpretation by the Supreme Court  
• Public interest litigation  
• Representative suits.  
• Civic education  
• Community mobilization | • Executive  
• Legislature, especially the parliamentary Constitution Implementation Oversight Committee (CIOC)  
• Judiciary, especially the Supreme Court  
• Citizens  
• Youth  
• Constitution Implementation Commission (CIC)  
• Kenya Law Reform Commission (KLRC)  
• Ombudsman Commission  
• Attorney General  
• Cabinet Office |
| Chapter 2 – The Republic, Article 4 & 10 | • Respect, safeguard and uphold sovereignty of Kenya, democratic values, national values and principles of good governance. | • Patriotism  
• Respect of Rule of Law  
• Assert and uphold the sovereignty of the people  
• Respect, uphold, safeguard and defend the Constitution. | • Executive  
• Legislature  
• Judiciary  
• Citizens  
• Youth  
• CIC  
• Ombudsman Commission |
| Chapter 2 – The Republic, Article 6 | • Uphold principles of devolution of power, resources and services  
• Enactment of relevant laws  
• Protect and uphold equitable governance  
• Respect and promote gender equity  
• Uphold and safeguard inclusive governance | • Demand and advocate  
• Monitor and Evaluate  
• Social Audit  
• Public interest litigation,  
• Representative suits  
• Civic education  
• Community mobilization | • County Governments; County Assembly and Executive  
• Legislature especially the Senate  
• Judiciary  
• Citizens  
• Youth  
• Gender and Development Commission  
• Ombudsman Commission  
• Kenya National Human Rights and Equality Commission  
• Attorney General  
• Cabinet Office |
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<th>Chapter/Article</th>
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<th>Intervention</th>
<th>Players/Actors</th>
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| Chapter 3 - Citizenship, Articles 12 - 18 | • Assert, demand and uphold the entitlements of citizens - Identity Cards and Passports.  
• Advocate against discriminatory grants of citizenship on the basis of sex and marriage  
• Enactment of relevant laws  
• Public policy formulation | • Demand and advocate  
• Legislative analysis and advocacy  
• Constitutional interpretation  
• Public interest litigation  
• Representative suits  
• Civic education  
• Community mobilization | • Executive – Ministry of Immigration and department for registration of births.  
• Legislature especially CIOC  
• Judiciary, especially the Supreme Court & other superior courts  
• Citizens  
• Youth  
• Constitution Implementation Commission (CIC)  
• Kenya Law Reform Commission (KLRC)  
• Public Complaints Commission (PCC)  
• Kenya National Human Rights and Equality Commission  
• Attorney General  
• Cabinet Office |
| Chapter 4 – Bill of Rights, Articles 19 – 23, 25 – 57, 43, 55 & 59 | • Assert, uphold, respect, safeguard and defend human rights especially social and economic rights  
• Enactment of relevant laws  
• Institutional reforms  
• Resource allocation  
• Provision of legal aid  
• Poverty reduction policies and programmes  
• Job creation  
• Policy formulation and implementation  
• Enforcement of human rights  
• Change of mindsets  
• Monitor, evaluate and campaign and lobby for the implementation of Vision 2030 and MDGs | • Legislative analysis and advocacy  
• Constitutional interpretation by the Supreme Court  
• Public interest litigation  
• Representative suits  
• Civic education  
• Community mobilization  
• Institutional Reforms  
• Public policy analysis and advocacy  
• Enforcement of international treaties and conventions  
• Budget analysis and advocacy  
• Successful implementation of Vision 2030; social and political pillars  
• Successful implementation of the Millennium Development Goals (MDGs) | • Commission for Revenue Allocation  
• Executive – relevant ministries  
• Legislature especially CIOC  
• Judiciary, especially the Supreme Court & other superior courts  
• Citizens  
• Youth  
• Constitution Implementation Commission (CIC)  
• Kenya Law Reform Commission (KLRC)  
• Public Complaints Commission (PCC)  
• Kenya National Human Rights and Equality Commission  
• Attorney General  
• Cabinet Office |
Management of National Resources

This pertains to the identification, utilization, regulation and management of national resources, which are essential features of any country. The proper distribution, sharing, protection and use of these resources guarantee satisfaction to all.

This thematic area clusters chapters that deal with national resources, which include;

- Land and Environment;
- Public Finance;
- The Public Service; and
- National Security.

There are values and principles put in place to guide the management and utilization of each of these resources. Clear guidelines and principles are embedded into the Constitution for the first time to govern the sustainable use of the country’s environment and natural resources for the good of all Kenyans. This section stands on the premise that, the country’s environment and natural resources belong to all Kenyans.

Similar provisions are in this part to guide and regulate the conduct of public officers in their day to-day operations. The part also provides for a defence and national security system, which derives its authority from established bodies. The work of National security is to safeguard the well-being of Kenyans and their property within Kenya’s territorial boundaries.

The youths’ role in implementation of these chapters of the Constitution is geared towards safeguarding, respect, upholding and management of Kenya’s natural resources; promotion of efficient and sustainable utilization, distribution and regulation of natural resources; the roles and functions of organs charged with oversight responsibility of these resources; and the professional ethics and integrity in the provision of public services.
Specific Opportunities and Action points for the Youth

**Chapter/Article**

*Chapter 3 – Land and Environment, Articles 60, 65, 66, 67, 68*

**Action Points**

- Implementation of the National Land policy
- Address historical land related injustices
- Enact, simplify and implement fair land laws
- Address inequities in land ownership
- Address landlessness, squatters and internally displace persons problems
- Conversion of 999 land leases held by the foreigners to a maximum of 99 years land leases
- Resolution of historical land injustices
- Removal of sanctity of illegal grants of public land
- Elimination of gender discrimination laws, regulations, customs and practices
- Recover/repossess illegally acquired public land
- Prescription of minimum and maximum land ownership
- Convert trust lands to community land
- Establish the National Land Commission
- Reclaim forest and plantation trees to attain the minimum requirement that at least 10% of the total Kenyan land should be under forest cover
- Consciousness on environmental conservation
- Develop, promote and/or implement sustainable development laws and policies
- Respect, defend and protect environment
- Establishment of the National Land Commission

**Intervention**

- Analysis and appraisal of the National Land policy
- Disseminate contents of the land policy
- Public interest litigation
- Advocate, campaign and lobby for the implementation of the National land policy
- Advocate, campaign and lobby for equity in land ownership
- Advocate, campaign and lobby for the repossession of the illegally acquired public lands
- Submit views on historical land injustices to the TJRC
- Report the incidences of land grabbing to the National Land Commission, Public Complaints Committee and the Kenya Anti-Corruption and Ethics Commission
- Report/name and shame land grabbers
- Public interest litigation on environmental conservation
- Representative suits
- Domestication and enforcement of international environmental convention, treaties and standards
- Successful implementation of Vision 2030; social and political pillars
- Successful implementation of the Millennium Development Goals (MDGs)

**Players/Actors**

- Executive – Ministry of lands
- Community members
- Truth Justice and Reconciliation Commission (TJRC)
- National Land Commission
- County Governments
- National Environmental Management Authority (NEMA)
- Legislature especially CIOC
- Judiciary
- Constitution Implementation Commission (CIC)
- Kenya Law Reform Commission (KLRC)
- Public Complaints Commission (PCC)
- Kenya National Human Rights and Equality Commission
- Kenya Anti-Corruption and ethics Commission
- Local Authorities
- CSOs
- Youth
Chapter 12 – Public Finance, Articles 201 - 207, 210, 214 - 231

- Promote and uphold transparency and accountability in management of public fund – devolved, county and national governments funds.
- Public participation in management of public funds processes.
- Sound, efficient and effective management of public funds.
- Advocate and petition for fairness, especially taxation of salaries of MPs and other state officers.
- Advocate and safeguard fairness in sharing national resources, at both national and county governments.
- Advocate and petition the national and county governments to disclose the public debt burden.
- Petition, advocate and enforce public participation in budgeting processes.

Intervention
- Enactment of Access to Information Act.
- Implementation and participation in social budgeting framework.
- Conduct social audits and public expenditure tracking surveys on public funds and projects.
- Monitor and evaluate public funded projects.
- Public interest litigation in cases of misuse of public funds and to compel MPs pay taxes.
- Entrench and uphold in public participation in budgeting process; at national and county governments and devolved funds.
- Conduct awareness creation and civic education on public finance.

Players/Actors
- Parliament – (National Assembly and Senate).
- Treasury.
- Commission for Revenue Allocation.
- CDF Board and CDF Committees.
- Controller of Budgets.
- Auditor & Controller General.
- Salaries & Remuneration Commission.
- Central Bank of Kenya.
- County Governments.
- Legislature especially CIIOC.
- Executive – relevant ministries.
- Judiciary.
- Constitution Implementation Commission (CIC).
- Kenya Revenue Authority.
- CSOs.
- Youth.
- Attorney General.
- Cabinet Office.

Chapter 13 – Public Service, Articles 232, 233

- Instillation of the culture, values, principles, standards, professionalism, efficiency and effectiveness in use of public resources, responsiveness, transparency, accountability, community participation, amongst public servants.
- Compliance with the requirement that at least one-third (1/3) of public servants must be of either gender.
- Prevention of corruption.
- Salary reviews, fair reward for work and equity in remuneration of all public servants.
- Representation of marginalized groups in public employment.
- Elimination of ethnicity and favourism in public employment.

Intervention
- Advocate and lobby for performance contracting and Result Based Management.
- Petition Public Service Commission (PSC) to conduct Annual Appraisals of public servants.
- Campaign, advocate and enforce wealth declaration by public servants.
- Lobby for fair remuneration and reward for performance.
- Facilitate and partner in constant training, capacity building and mentorship of public servants.
- Draft and implement public service charters.
- Implement Rapid Result Initiatives and Assessment.
- Conduct awareness creation and civic education.

Players/Actors
- Public Service Commission.
- Legislature especially CIIOC.
- Judiciary.
- Constitution Implementation Commission (CIC).
- Kenya Anti-Corruption and Ethics Commission.
- Salaries and Remuneration Commission.
- National Cohesion and Integration Commission (NCIC).
- CSOs.
- Youth.
Chapter/Article
Chapter 14 – National Security, Articles 238, 240, 244.

Action Points
• Instillation of the culture, values, principles, standards, professionalism, responsiveness, transparency, accountability, community participation, amongst national security agents
• Compliance with the requirement that at least one-third (1/3) of national security agents must be of either gender
• Prevention of corruption
• Salary reviews, fair reward for work and equity in remuneration of all national security agents/public servants
• Representation of marginalized groups in public employment
• Elimination of ethnicity and favouritism in employment into national security organs
• National security agents and organs reforms

Intervention
• Advocate and lobby for performance contracting and Result Based Management
• Campaign, advocate and enforce wealth declaration by national security agents
• Lobby for fair remuneration and reward for performance
• Constant training, capacity building and mentorship of national security agents and organs
• Fast track and implement the police and other security agents and organs reform processes
• Conduct awareness creation and civic education
• Advocate and lobby for public vetting of security agents and organs
• Campaign for enactment of relevant laws

Players/Actors
• National Security Council
• Legislature especially CIOC
• Judiciary, especially the Supreme Court & other superior courts.
• Citizens
• Youth
• Constitution Implementation Commission (CIC)
• Kenya Law Reform Commission (KLRCC)
• Public Complaints Commission (PCC)
• Kenya National Human Rights and Equality Commission
• Task Force on police reforms

Systems & Structures of Government
Systems and Structures of Government consist of the chapters on Representation of the People, the Legislature, the Executive, the Judiciary, and Devolved Government which provide for:

• Powers and functions of the three arms of government and a system of checks-and-balances;
• A system of Devolved Government; and structures of distribution of power, roles and resources allocation between the National Government and devolved levels of government; and
• Democratic participation in representation institutions, the conduct of free, fair and regular elections by an Electoral and Boundaries Commission and the regulation of the conduct of political parties.

These chapters address governance and participation including composition and functions of the organs of state including the Executive, the Legislature and the Judiciary and their operations aiming to maximise their mutual checks and balances and secure their independence; the electoral system of Kenya; the jurisdiction of the courts and their accountability, efficiency and discipline.

The role of the youth in implementing the Constitution under this theme will entail examining chapters on Representation of the people, Legislature, Executive, Judiciary and Devolved Government. Specifically, the attention of the youth should be focussed on:
• Powers and functions of the three arms of government and a system of checks and balances;
• A system of devolved government and structures for distribution of power, functions and resource allocations between the National government and County governments; and
• Democratic participation in representative institutions, the conduct of free, fair and regular elections by an independent Electoral and Boundaries Commission and the regulation of the conduct of political parties.

The objectives of the youth in this area should be to lay the basis for the establishment of a democratic system of government based on the fundamental principles of separation of powers, accountability, good governance, public participation, effective representation, checks and balances and Constitutionalism.
The role of the youth will be in advocacy and other actions geared toward anchoring and safeguarding institutional independence and effectiveness, ensuring that any election, appointment, removal of any democratic system of government is based on free and fair elections, an effective and fair electoral system, constitutionalism, the rule of law, human rights and gender equity.

The youth also have to ensure the rationale and mechanisms through which the people of Kenya are to be involved in the governance and development processes of their country. Through full and effective participation, people, and especially the youth assume both the right and the responsibility to be involved in charting their own laws and programmes that aim to sustain and improve their well-being.

The youth must also play a leading role in the structure and functions, appointment, removal from office and the conduct of the judicial system and its office holders.

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**Specific Opportunities and Action points for the Youth**

**Chapter/Article**

Chapter 7 – Representation of the People; Article 81 - 92

**Action Points**

- Enactment of the Elections Act
- Amendment of Political Parties Act
- Establishment of the Independent Electoral and Boundaries Commission, appointment and recruitment of Commissioners, members of the secretariat and other election officials, respectively
- Effective, efficient and fairness in management of electoral processes
- Registration of the voters, especially the youth
- Voter education
- Vetting of election candidates
- Enforcement of Electoral Code of Conduct
- Management and democratization of conduct of political parties and their internal processes
- Supervision of political parties nomination processes
- Funding of political parties
- Control of political campaigns by political parties and candidates
- Independent candidates
- Voting process
- Management of Electoral

**Intervention**

- Analyse, appraise and critique the Elections Bill and Political Parties Bill
- Sensitise members of the public on the provisions of the Elections Act and Political Parties Act, electoral system and processes through voter education and civic education
- Institute legal proceedings against campaign violence, electoral malpractices and unfair election results
- Advocate and/or institute public interest litigation to compel the Registrar of Persons to speedily issue all the youth who have attained 18 years with ID cards to enable them register as voters
- Advocate and petition the IEC commission and the yet to be formed IEBC to carry out continuous voter registration exercise to enable youth register as voters
- Advocate, campaign and lobby peaceful conduct of 2012 and subsequent elections and peaceful and legal resolution of electoral disputes
- Advocate, campaign and lobby for representation,

**Players/Actors**

- Parliament
- Community members
- Youth
- Legislature
- CIOC
- Judiciary
- Constitution Implementation Commission (CIC)
- Kenya Law Reform Commission (KLRC)
- Public Complaints Commission (PCC)
- Kenya National Human Rights and Equality Commission
- Kenya Anti-Corruption and Ethics Commission
- Registrar of political Parties
- Political Parties Tribunal
- CSOs
- Executive – Ministry of Internal Security
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<th>Action Points</th>
<th>Intervention</th>
<th>Players/Actors</th>
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<tbody>
<tr>
<td><strong>Chapter 7 – Representation of the People; Article 81 - 92</strong></td>
<td>candidates</td>
<td>• Advocate, campaign and lobby for representation, inclusion and equitable representation of the women, youth and other marginalised/disadvantaged groups in electoral processes and outcomes</td>
<td>• Parliament – National Assembly and Senate</td>
</tr>
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<td>• Voting process</td>
<td>• Advocate, campaign, lobby and name and shame electoral candidates involved in electoral malpractices</td>
<td>• Community members</td>
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<td>• Management of Electoral disputes</td>
<td>• Monitor and evaluate equity and representation in party lists</td>
<td>• Youth</td>
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<td>• Delimitation of electoral units</td>
<td>• Advocate and campaign for protection of independent candidates in elections</td>
<td>• CIOC</td>
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<td>• Allocation of party lists</td>
<td>• Report hate speeches and use of abusive languages during election campaigns</td>
<td>• Judiciary</td>
</tr>
<tr>
<td><strong>Chapter 8 - Legislature; 94, 100, 101, 104, 118, 119, &amp; 125</strong></td>
<td>• Performance of Parliament</td>
<td>• Submit views on the management of the electoral processes and disputes, to be included in the Election Bill</td>
<td>• Constitution Implementation Commission (CIC)</td>
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<td>• Accountability of MPs</td>
<td>• Monitor, evaluate and observe electoral processes and campaigns and report incidences of election violence and malpractices to the Electoral Commission and the police. Commission</td>
<td>• Kenya Law Reform</td>
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<td>• MPs hiking their own salaries and non payment of taxes</td>
<td>• Advocate and lobby for the enactment and enforcement of the Electoral Code of Conduct</td>
<td>• Public Interest litigation on environmental conservation</td>
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<tr>
<td></td>
<td>• Establishment of the Senate</td>
<td>• Public interest litigation on environmental conservation</td>
<td>• Participate in the process of vetting election candidates by giving views and evidence</td>
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<td>• Representation of Marginalised and minority</td>
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### Chapter 8 - Legislature

#### Action Points
- The Senate
  - Representation of Marginalised and minority groups
  - Representation of the Youth
  - Right of recall
  - Legislative process
  - Public access and participation in the legislative process
  - Right to petition Parliament
  - Tendering Evidence
  - Enactment of laws and/or revision of Parliamentary Standing Orders

#### Intervention
- Litigation to compel Parliament to respect, defend and uphold the Constitution.
- Campaign for the establishment of the Senate within the provided time frame
- Advocate, campaign and lobby for Parliament to enact laws that provides for reasonable conditions and procedures for recalling non performing elected leaders
- Monitor and evaluate the suitability of the electoral procedures and processes to guarantee free and fair elections for the marginalised groups, women and the youth
- Monitor and lobby to ensure that party lists faithfully and fairly reflects the interests and gives fair chances to marginalised groups.
- Advocate and petition Parliament to enact good laws to facilitate public access and participation in the business of Parliament
- Collect, collate and submit evidence to Parliament on matters of public interest
- Enlighten, empower and mobilize members of the public to petition Parliament to pass laws whenever there is need

#### Players/Actors
- CIC
- Kenya Law Reform Commission (KLRC)
- Public Complaints Commission (PCC)
- Kenya National Human Rights and Equality Commission
- Kenya Anti-Corruption and Ethics Commission
- Registrar of Political Parties
- Political Parties Tribunal
- Youth
- CSOs

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### Chapter 9 - Executive

#### Action Points
- Exercise of Executive Authority
- Functions of the President – National values, International obligations.
- Decisions of the President
- Power of mercy – to be exercised only in accordance with the advice of the Advisory Committee on Power of Mercy
- Qualifications for election as President – age
- Election of the President

#### Intervention
- Monitor, evaluate performance of President, and where necessary petition that he exercises the executive authority in accordance with the Constitution and wishes of the Kenyans
- Monitor and ensure that the decisions of the President are in writing as opposed to arbitrary roadside declarations
- Monitor, petition and advocate to ensure that the President’s Power of mercy is

#### Players/Actors
- Parliament – National Assembly and Senate
- Community members
- Judiciary – Supreme Court
- Kenya National Human Rights and Equality Commission
- Kenya Anti-Corruption and Ethics Commission
- Youth
- CSOs
- International Criminal Court (ICC)
**Chapter/Article**

Chapter 9 - Executive; 129, 132, 133, 135, 138, 140, 143, 144, 145, 156, 157, 158,

Chapter 10 - Judiciary; Articles: 159, 160, 161, 163, 166, 168, 172, 173 and 173

**Action Points**

- Election of the President
- Limitation of immunity of President from legal proceeding with regard to the international crimes
- Removal of President on grounds of incapacity
- Impeachment of the President
- Appointment and Approval of the Attorney General
- Appointment and Approval of the Director of Public Prosecutions

**Intervention**

- the President’s Power of mercy is exercised only in accordance with the advice of the Advisory Committee on Power of Mercy
- Advocate, campaign and petition the International Criminal Court to arrest a President who commits international crimes while still in office
- Petition and lobby Parliament to remove the President on ground of incapacity and impeachment for violation of the Constitution and abuse of power
- Propose, vet, lobby, campaign and petition for the appointment and removal of the Attorney General and the Director of Public Prosecutions
- Institute Public Interest Litigation to compel or challenge the President for inaction or for exercising powers beyond the Constitution
- Campaign against the elections of individuals who are not suitable to hold the office of the President

**Players/Actors**

- International Criminal Court (ICC)

- Parliament
- Community members
- Judiciary
- Supreme Court
- Kenya National Human Rights and Equality Commission
- Kenya Anti-Corruption and Ethics Commission
- Youth
- Law Society of Kenya (LSK)
- CSOs
- Public Complaint Committee

- Monitor, evaluate performance of the Judiciary, especially in addressing cases backlog
- Analyse and evaluate the quality and soundness of the judicial decisions by the Judiciary
- Monitor, evaluate and lobby for the independence of the Judiciary in its operations
- Report cases of misbehaviour by judicial officers to the JSC and the Anti-Corruption and Ethics Commission
- Submit views and memoranda in the forthcoming vetting of judicial service officers exercise.
<table>
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<tbody>
<tr>
<td>Chapter 10 – Judiciary; Articles 159, 160, 161, 163, 166, 168, 172, 173 and 173</td>
<td>appointment of judicial service officers</td>
<td>including vetting of judicial service officers exercise. *Submit views and memoranda during the appointment and vetting of the nominees to various judicial service offices, including the CJ, Deputy CJ, DPP, Judges, magistrates, among others. *Propose names of qualified, distinguished and respected individuals to the JSC, to be appointed to the various judicial offices.</td>
<td>Task Force on Devolved Government in Kenya *Parliament – National Assembly and Senate *CIC *CIOC *Community members *Judiciary – Supreme Court *Kenya National Human Rights and Equality Commission *Kenya Anti-Corruption and Ethics Commission *Youth *CSOs *Public Complaint Committee *NCIC</td>
</tr>
<tr>
<td>Chapter 11 – Devolved Government; Articles 174, 183, 184, 185, 186, 187, 188, 189, 190, 192, 196, 197, 198</td>
<td>• Bringing County Governments into operation • Promotion of democratic and accountable exercise of power • Enhancement of people participation and self governance • Local development • Establishment of county governments • Election of the members of County Executives • Governance and management of urban areas and cities • Appointment of members of County Executives • Legislative processes by the counties • Publication of county legislation • Alteration/review of the boundaries of the counties • Support for county governments • Transfer of functions and powers between national and County Government • Review of boundaries of counties • Cooperation between national and County Governments • Support for County Governments • Conflict of laws • Suspension of County Government • Public participation in the affairs of counties</td>
<td>• Mobilize citizens and youth to submit their views on the devolved governments to the Task Force on Devolved Government in Kenya • Analyse, appraise, critique and give feedback to the Interim Report of the Task Force on Devolved Government in Kenya • Monitor and evaluate performance of the and Senators, County Assembly, Ward Representatives and members of County Executives • Public interest litigation to compel County Governments (when established) to respect, defend and uphold the Constitution • Campaign for the establishment of the County Governments within the provided time frame • Advocate, campaign and lobby County Assemblies to enact laws that will spur good local governance, community participation and sustainable development • Monitor and evaluate the representation and inclusion of the marginalised groups, women and the youth in all affairs of the County Assemblies • Advocate and petition county governments to enact good laws to facilitate public access and participation in the</td>
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Chapter/Article

Chapter 11 – Devolved Government: Articles 174, 183, 184, 185, 186, 187, 188, 189, 190-192, 196, 197, 198

Action Points

- Suspension of County Government
- Public participation in the affairs of counties
- Gender balance and diversity

Intervention

- Public access and participation in the business of Parliament
- Empower and mobilize members of the public to petition County Governments to pass laws whenever there is need
- Demand for access to public information held by County Governments
- Implementation and participation in social budgeting framework at county levels
- Conduct social audits and public expenditure tracking surveys on public funds and projects
- Monitor and evaluate public funded projects
- Public interest litigation in cases of misuse of public funds
- Entrench and uphold public participation in budgeting process; at County Governments and devolved funds
- Conduct awareness creation and civic education on public finance
- Petition Parliament to timely enact laws that will bring into operation County Governments and to provide for management of urban areas and cities
- Monitor and lobby to ensure that lists of nominees to County Assemblies, faithfully and fairly reflects the interests and gives fair chances to the youth and other marginalised groups.
- Advocate and petition County Assemblies to enact good laws to facilitate public access and participation in their business
- Collect, collate and submit evidence to County Governments on matters of public interest
- Enlighten, empower and mobilize members of the public to petition County Assemblies to pass laws whenever there is need

Players/Actors
The Management of Constitutionality and Transitional Arrangements

The theme on Management of Constitutionality consists of the chapters on Leadership and Integrity, Commissions and Independent Offices, Amendments of this Constitution, General Provisions and Transitional and Consequential Arrangements.

Leadership and integrity provides for the ethical conduct of public affairs and promotion of meritocracy, integrity and competence in access to office and objectivity, impartiality, self-less commitment and accountability in public service.

Constitutional Commissions, seen as the ‘Fourth Arm of government’, are a people-based mechanism under the principle of checks-and balances, and ensure Constitutional continuity.

Amendment of the Constitution as a chapter provides for the three ways in which the Constitution may be amended; entrenched provisions may only be amended by ratification by the people of the proposed amendment in a referendum; by the Parliament, and by the people through a ‘popular initiative’. General Provisions provide for guidelines for the interpretation of the Constitution and definitions of the meanings of words, terms and phrases used in this Constitution.

Transitional and Consequential Arrangements provide for the transition from the former Constitution to the current/new Constitution, as set out in the schedules; makes it a mandatory Constitutional duty for Parliament to enact Acts of Parliament for implementation and the High Court as the avenue through which citizens will compel Parliament to act on transition.

Management of Constitutionality and transitional arrangements provide for structures and principles that would facilitate the internalisation and supervision of Constitutionality. It is for this reason, therefore, that the new Constitutional Commissions act as the ‘Fourth Arm’ of government. Additionally, the new Constitution also entrenches transitional and consequential arrangements that would ensure a smooth transition from the previous Constitution to the proposed new Constitution. Provisions in the new Constitution have been provided for Amendment of the Constitution to help in understanding the rationale, organs and procedures involved in the amendment process.

The role of the youth in this regard is to help Kenyans understand and enforce the Constitutional mechanisms and institutions put in place to ensure entrenchment and adherence to the new Constitutional dispensation.

Specific Opportunities and Action points for the Youth

<table>
<thead>
<tr>
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<th>Intervention</th>
<th>Players/Actors</th>
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</table>
| Chapter 6 - Leadership and Integrity; Articles 73, 75 - 80 | • Conduct of state officers  
• Guiding principles of leadership and integrity  
• Financial probity of state officers  
• Legislation on leadership | • Monitor, evaluate and report to Ethics and Anti-Corruption Commission, state officers who violate provisions of this chapter and anti-corruption laws  
• Monitor and report unethical and illegal financial activities of state officers  
• Advocate and campaign for timely enactment and enforcement of anti-corruption laws, regulations and policies  
• Name and shame corrupt state officers  
• Participating in vetting and approving (or rejecting) processes of state officers before their appointment or election to state offices | • Parliament – National Assembly and Senate  
• CIC  
• CIOC  
• Community members  
• Youth  
• Judiciary  
• Kenya National Human Rights and Equality Commission  
• Kenya Anti-Corruption and ethics Commission  
• CSOs  
• Public Complaint Committee  
• NCIC |
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<tr>
<td>Chapter 15 - Commissions and Independent Offices; Articles 249, 251 &amp; 254</td>
<td>• Objects of Commissions and independent offices</td>
<td>• Monitor and evaluate Commissions and independent offices to ensure that they are Constitutional mandate under Art. 249</td>
<td>• Parliament</td>
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<td>• Removal from office of a member of a commission and holder of an independent officer</td>
<td>• Petition/submit views and memoranda for removal of Commissioners and holders of independent officers who are incompetent and not discharging their Constitutional mandate</td>
<td>• CIC</td>
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<td>• Reporting by Commissions and independent offices</td>
<td>• Lobby for appointment into offices people qualified to hold these offices</td>
<td>• CIOC</td>
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<td>• Safeguard and protect interests of holders of these offices who are being unfairly targeted for performing their Constitutional obligations in accordance with Art. 249</td>
<td>• Community members</td>
</tr>
<tr>
<td>Chapter 16 - Amendments of this Constitution; Articles 256 &amp; 257</td>
<td>• Amendment by Parliamentary initiative</td>
<td>• Monitor, advocate and campaign against any illegal and unreasonable attempts by the Parliament to arbitrarily amend the Constitution</td>
<td>• Youth</td>
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<tr>
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<td>• Amendment by popular initiative</td>
<td>• Petition Parliament to amend provisions of the Constitution within their mandate when it is beneficial for the country</td>
<td>• Judiciary</td>
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<td>• Raise awareness of the public on the Constitutional amendment by popular initiative opportunities available to them</td>
<td>• Independent Electoral and Boundaries Commission</td>
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<td>Chapter 17 - General Provisions; Articles 258 &amp; 259</td>
<td>• Enforcement of the Constitution</td>
<td>• Mobilize community members to endorse or reject proposed Constitutional provisions requiring amendments, based on the value addition or lack of it, of the proposed amendments</td>
<td>• Judiciary –especially, the Supreme Court</td>
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<td>• Construing the Constitution</td>
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<td>• Parliament – National Assembly and Senate</td>
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<td>• Youth</td>
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<td>• Independent Commissions and Offices</td>
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</table>
Chapter/Article

Chapter 18 - Transitional and Consequential Provisions; Articles 261 & 262

Action Points

- Consequential legislations to give effect to the Constitution
- Transitional and Consequential provisions

Intervention

- Petition/ submit views and memoranda for consideration in the on-going legislative processes
- Advocate for timely enactment of the legislations set out in the 5th schedule
- Institute public interest to compel dissolution of Parliament should it fail to enact laws as per the time schedule
- Mobilize community members to demand for meaningful legislative and institutional reforms geared towards fully implementing the ‘new’ Constitution
- Raise awareness of the public on the provisions of the ‘new’ Constitution
- Analyse, appraise and critique Bills proposed by the CIC, KLRC and Parliament for enactment
- Monitor, evaluate and advocate for comprehensive and full transition from the former Constitution to the ‘New’ Constitution, as set out in the 6th Schedule

Players/Actors

- Independent Commissions - CIC
- CIOC
- Parliament
- Judiciary – the High Court
- Community members
- Youth

Conclusion

Challenges to implementing the Constitution are many. These can be grouped into: a) content matters; b) processes of implementing; c) institutional hangover; and d), complications surrounding the impending 2012 General Elections. These then translates into challenges of implementing aspects on devolution, land and Judiciary among others; overcoming nepotism and patronage along ethnic lines in recruitment of persons and creation of institutions to implement the Constitution; the inefficiencies of the public service, yet they have a key role in setting the pace of implementation; lack of respect for the rule of law among Kenyans; and the lack of a culture of democracy either in public or private lives of Kenyans. From the foregoing, there is bound to be institutional, policy, legislative and also personal resistance to change.

To illustrate, the political elite, who stand to lose or gain (despite which side they were supporting prior the referendum) could mobilize ‘ethnicity’ - a tool that is too familiar to the politicians who want to scuttle the implementation process. A candid analysis of the debate surrounding the ‘restructuring of the Provincial Administration’ could serve as an example. Another example would be the possible re-invention and re-election of retired politicians into the new structures of governance at the County level. Therefore young people must not assume that passage of the Constitution was the difficult part: implementing the same though, especially through a concerted effort aimed at technical, political and social organization of the voices of a sizeable constituency of youth and general public. Networking with like-minded CSOs, lobbying progressive MPs, knowledge-based advocacy, acquiring and dissemination of critical information, and working closely with progressive media houses in all the above interventions are possible areas of work.

Vigilance would be key: both as a “collective of individuals” and also as individuals in themselves. As former United States President Andrew Jackson stated on 4th March 1837: “…you must remember my fellow citizens, that eternal vigilance by the people is the price of liberty, and that you must pay the price if you wish to secure the blessing: it behoves you, therefore, to be watchful.”

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The youth stand at every important moment in the history of the country. Having elaborately participated in the process and successfully negotiated some youth friendly provisions in the Constitution, now lies ahead of them the task of claiming and consolidating the gains. This calls for strategic, informed and timely approaches by the youth. Most important, the youth must read and internalise the Constitution, must educate one another, must build support through a critical mass, must lobby, campaign and advocate for what they rightfully deserve. Most importantly, the youth must comprehend the politics and strategically and firmly claim their space.
REFERENCES

2. Charles Wheare, ‘Modern Constitutions’
21. The Institute of Economic Affairs (2010); ‘Youth Fact Book, Infinite Possibility or Definite Disaster?’
29. Timothy Njooja and others – v- the Hon. Attorney-General & 3 others, High Court Miscellaneous Civil Application No 82 of 2004.
34. Youth Agenda, ‘Research Data Analysis Report’ (A report on the analysis of the Youth Speak Survey), (Unpublished)