

## The Committee of Experts on Constitutional Review



**Nzamba Kitonga SC,**  
Chairperson, Committee  
of Experts on  
Constitutional Review



**Atsango Chesoni,**  
Vice Chairperson,  
Committee of Experts on  
Constitutional Review



**Otiende Amollo,**  
Member, Committee of  
Experts on Constitutional  
Review



**Bobby Munga Mkangi,**  
Member, Committee of  
Experts on Constitutional  
Review



**Abdirashid Abdullahi,**  
Member, Committee of  
Experts on Constitutional  
Review



**Hon. Njoki Ndung'u,**  
Member, Committee of  
Experts on Constitutional  
Review



**Prof. Christina Murray,**  
Member, Committee of  
Experts on Constitutional  
Review



**Dr. Chaloka Beyani,**  
Member, Committee of  
Experts on Constitutional  
Review



**Prof. F. E. Sspembwa,**  
Member, Committee of  
Experts on Constitutional  
Review



**Dr. Eкуру Aukot,**  
Director, Committee of  
Experts on Constitutional  
Review (ex-official  
member)



**Hon. Amos Wako EGH,**  
Attorney General  
(ex-official  
member)

# Progress on the Constitution Review process by the Committee of Experts as at October 2009

## A. Preamble

The Committee of Experts (CoE) on the review of the constitution of Kenya is created by the Constitution of Kenya Review Act, 2008. The Review Act, 2008 is in itself the product of the Agenda No. 4 in which completion of the long-awaited constitution for Kenya was prioritized amongst other reforms. Kenyans would recall that after the post-election violence, Kenya needed to finalize, within the shortest time possible, all the pending reform agenda. At the time of being sworn in on March 2, 2009, the CoE had already lost 3 months because the Review Act, 2008 came into force on 23rd December 2008 with clear provisions contained in sections 1 & 28. Under these sections, the CoE was given only 12 months to complete the constitutional review process.

The CoE therefore assumed that it only had 9 months (if the Review Act, 2008 was not amended) and swung into action with clear commitment to deliver the harmonized draft constitution within the statutory timeline. The CoE is convinced that the constitutional review process is now at the tail end of this long process. The CoE also started its work under assumption that Kenyans, politicians, political parties and everyone who appreciates how long it has taken to deliver a constitution would support its expeditious delivery.

The CoE did not expect that there would be any attempt to politicize this process in the light of the 2008 post-election violence and further as a result of the agreed Agenda No. 4 as

well as the need for our country to transit into the next phase as espoused in sections 4 & 6 of the Review Act, 2008 that refer to the object and purpose of making the constitution, and the principles of making this constitution respectively.

In summary therefore, and taking into account the strict timeframe that the CoE was given, it is the conviction of the Committee that it has consulted sufficiently enough within its statutory timelines to be able to finalize the drafting of the long awaited new Constitution for Kenya. To put its work into perspective, the CoE wishes to now explain to Kenyans what it has done so far and how much it has consulted as well as highlight the status of the review process in accordance with the functions of the CoE as defined in section 23 of the Review Act, 2008, which requires the CoE to undertake the following functions.

## B. Identification of contentious and non-contentious issues

Many would ask the most obvious question, how did the committee identify the contentious issues? The Committee considered the previous draft documents, which include the following:

- The CKRC Draft
- The Bomas Draft and
- The proposed new Constitution (popularly referred to as the Wako draft)

The Committee further considered the documents that

emerged after the Bomas Draft including:

- The Kilifi Report
- The Naivasha Accord and
- The Kiplagat Report

In addition, the committee considered other relevant circumstance and reports among them;

- The Referendum Debates,
- The Kriegler Report
- The Waki Report and
- The post-election violence

The committee analyzed the draft documents as indicated above i.e. the CKRC, Bomas and PNC Drafts and isolated points of agreement and points of disagreement. The Committee then classified the issues into three categories as detailed below:

- Issues that are highly Contentious
- Resolvable differences and
- Agreed on issues

The Committee invited the public through adverts in April in all the mainstream newspapers to submit views by way of Memoranda to indicate what, in their opinion, they considered as being contentious and their thoughts on how to resolve the same. The Committee received thousands of

CONTINUED NEXT PAGE

# Progress on the Constitution Review process by the Committee of Experts as at October 2009

## FROM PREVIOUS PAGE

views and has, through its research department, analysed the views, worked them into percentages and classified them into the three categories of highly contentious, resolvable and issues agreed upon.

The Committee also considered the CKRC report over which Kenyans were highly divided. It took cognizance of post CKRC draft issues e.g. the 2005 referendum, the issues surrounding the 2007 general elections, the post election violence and the National Accord. The Committee further held consultations with the Parliamentary Select Committee and the previous chairpersons of the CKRC namely Prof. Yash Pal Ghai and Lady Justice Abida Ali.

From the foregoing, the CoE unanimously identified the following issues as being the most contentious and issues on which Kenyans were most divided.

- i. The system/form of Government (i.e., the Executive and the Legislature),
  - ii. Devolution of Powers, and
  - iii. Bringing the Constitution into Effect (Transitional Clauses)
- In addition, the CoE noted and consulted on other issues of concern. These included:-
- a) Kadhis Courts
  - b) Land
  - c) Electoral systems
  - d) Affirmative Action

## C. Public, Thematic and Sectoral Consultations

The CoE has carried out regional public hearings for purposes of receiving presentations on the contentious issues as well as engaged in thematic and sectoral consultations with various stakeholders and interest groups.

Following the Publication of Contentious issues and invitation to submit views, through Memoranda and public submission on the said contentious issues, the CoE has collected 19,133 vies by the way of written and oral submission from members of the public. Of these submissions, 5,212 of them came from organised groups as follows;

- a) Civil Society 2,073
- b) Political Parties 88
- c) Private Sector 50
- d) Religious Organizations 2,969
- e) Statutory bodies 32

This number excludes verbatim recordings gathered during the provincial public hearings. This number of views collected over a period of only five (5) months compares favourably with a total of thirty five thousand (35,000) views collected by the former Constitution of Kenya Review Commission over 5 years.

In addition, the CoE has organised, held and participated in a series of consultations with various stakeholders directly and through the media as detailed below;

1. Consultations on Devolution - June 25th 2009 at the Hotel Intercontinental, Total participants - 46
2. Consultations on the Executive and Legislature: June 29th 2009 at the Hotel Intercontinental, Total participants - 39
3. Consultation on Inclusivity & Affirmative action: June 30th 2009 at the Hotel Intercontinental, Total participants - 45
4. Consultation on Electoral Systems: June 30th 2009 at the Hotel Intercontinental, Total participants- 31
5. Consultation on Transitional Clauses: 1st July 2009 at the Hotel Intercontinental, Total participants - 45
6. Meeting with The Private Sector: 15th July 2009 at the Hilton Hotel Total participants - 42
7. Meeting with Political Parties: - (1) 1st meeting on 15th July 2009 at the K.I.C.C; Total participants - 50  
(2) 2nd meeting: 2nd and 3rd September at the Leisure Lodge, Total participants - 126
8. Meeting with Religious Groups: 16th July 2009 at the K.I.C.C, Total participants - 214
9. Meeting with the Civil Society Organizations: 16th July 2009 at the K.I.C.C Total participants - 170
10. The CoE constituted a panel on the constitutional review



Some of the Secretariat staff.

process and met with over 300 Advocates during the 2009 LSK Annual Conference in Mombasa.

11. Participated at the Centre for Multiparty Democracy CMD meeting at Safari Park Hotel
12. Participated in the Accord Program, KBC TV
13. Participated in an interactive session of Agenda Kenya on KBC on the 29th of April, 2009.
14. Participated in a roundtable meeting on Governance and Security in Kenya hosted by the Institute for Security Studies on the 5th of May, 2009.
15. Participated in the Louis Otieno Show, sponsored by Transparency International on the 14th May, 2009,
16. Took part in an episode of Moving the Masses on KBC (Lumumba's Show) at the invitation of the National Anti-Corruption Steering Committee on the 17th of May, 2009
17. Participated in the breakfast show on KBC, on the Contentious Issues,
18. Attended a meeting of the Minority Rights Consortium on Constitutional Reform on the 7th of August, 2009.
19. Attended 'A breakfast meeting for women commissioners' (from all the Agenda 4 bodies and KNCHR) hosted by Fida-Kenya on behalf of the G10 on the 31st August 2009,
20. Address to the members of Kenya Civil Servants at the Public Servants Club, Kisumu on the 14th of August 2009
21. Attended the Land Sector Non State Actors' breakfast meeting on "Land Reforms in Kenya" on the 7th October, 2009
22. Meeting with the National Council of Churches of Kenya NCCCK meeting at Jumuia place, Limuru, August 5th, 2009
23. Address to the Franciscan Sisters of Saint Anna (Iwak) IN Kisumu on September 26th. 2009.
24. Address to Actionaid Kenya's meeting of training of trainers at Jumuia Place Limuru, October 2009
25. Foundation for Women Rights in Kenya meeting at Pan Africa Hotel a Presentation on the review Act, 2008
26. Gender forum at Pan Afric Hotel on the role of Women in the Review process
27. Gender Forum organised by Heinrich Boll Foundation at Nairobi Club
28. Nairobi-based NGOs meeting at the Desmond Tutu Centre
29. The ICJ-Religious groups meeting at Naivasha
30. North Rift Academic Forum debates on Agenda no. 4: the Constitution making process
31. CoE Breakfast meeting with Editors and release of Contentious issues, June 25, 09, Intercontinental= Hotel

32. CoE Breakfast Meeting with the Media Owners Association, July 17, 09, Serena Hotel
33. Senior Journalists retreat, July 17, 18, 2009, Outspan Hotel, Nyeri
34. Community Media Training at the Stanley Hotel in Nairobi, August 8, 09
35. Community Media Training, Serena Beach Hotel Mombasa, August 15, 09
36. Community Media Training, Merica Hotel Nakuru, August 22, 09
37. Community Media Training at Kisumu Hotel, Kisumu, August 29, 09
38. CoE press Conference at Delta House Headquarters, Nairobi, September 3, 09
39. CoE Press Conference at Green Park Lodge, Naivasha, September 18, 09
40. Participation in the Nairobi International Trade Fair, September 28 to October 3, 09
41. Kenya Correspondents Association training workshop, Nanyuki, October 16, 2009. 120 participants
42. Appearance on 'Luis Otieno Live Show' on Citizen TV, June 25, 09
43. 'Power Breakfast Show' on Citizen TV, June 24, 09
44. 'Damka Morning talk Show' on KBC, July 1, 09
45. 'KTN Leo Live News' June 26,
46. 'Good Morning Kenya' Talk Show on KBC, June 24, 09
47. NTV on the 'Record Programme', July 2, 09
48. 'The Jam,' Capital FM, July 14
49. 'Frontier FM Talk Show' Somali station, July 17, 09
50. Appearance on Citizen Radio - 'Mjadala wa Jambo', July 14, 09
51. Appearance on Inooro FM 'Hagaria Programme', Kikuyu language, July 21, 09
52. Appearance on Mulembe FM 'Bukha Bushiele,' Luhya Station July 16, 09
53. Musyi FM 'Wamuka ata,' Kamba Language, July 15, 09

## D. The Reference Group

The CoE has held three joint meetings with the Reference Group (RG). The 1st Reference Group meeting was held on the 11th of August, 2009 at the Hilton Hotel with 46 participants. The CoE brought the RG members up to speed with the process and together defined a working

CONTINUED NEXT PAGE



Some of the secretariat staff

# Progress on the Constitution Review process by the Committee of Experts as at October 2009

## FROM PREVIOUS PAGE

methodology.

At the second joint meeting between the CoE and the Reference Group it was resolved as follows:

1. That the Reference Group will appoint its own spokesperson.
  2. That the CoE will harmonize and share with the Reference Group information received from all respondents to ensure that the Reference Group feeds into the process.
  3. That for the future the Reference Group is kept in the know.
  4. That the Reference Group underscores the importance of complying with the law in discharging its mandate.
  5. That the Committee of Experts will facilitate meetings of Reference Group when they want to meet on their own.
  6. That the experts being the experts, the Committee of Experts will present to the Reference Group expert decisions on the contentious issues.
  7. That the Reference Group is fully supportive of the work of the Committee of Experts and the constitutional review process.
  8. That the Reference Group does not want to be perceived to be in the way of the completion of the process.
- The third joint meeting between the CoE and the Reference Group, the following resolutions were made:

### 1. The path to reforms

The CoE and the Reference Group discussed and appreciated that the path to constitutional and institutional reform in Kenya has taken exceedingly long and that there was urgent need for a new constitutional order to avert the type of Kenya we all witnessed in the last post election violence in which Kenyans killed one another. The CoE and the RG noted that over 1200 Kenyans died, 300,000 were displaced and millions worth of property destroyed. Members of the RG and CoE resolved that they would not wish this state of affairs to be repeated. The RG and the CoE observed that Kenyans were capable of making suitable choices to give effect to the provisions of sections 4 and 6 of the Constitution of Kenya Review Act, 2008 which refer to the objects and principles of constitution making in Kenya respectively.

### 2. Methodology and times lines

The CoE and the RG appreciated the times lines in the making of the Constitution. It is appreciated that the process

must somewhat come to an end to give Kenyans the long awaited Constitution. In this regard the CoE has conducted consultations to the best of its ability within the timelines, and continues to consult.

### 3. Transitional clauses

The RG and the CoE appreciated the contentions on the transitional clauses of the past three drafts; and are working to ensure that the new Constitution remains the basis for peaceful transition to a new order, inclusion and acknowledgement of past mistakes and the need to remedy them.

### 4. Devolution

The RG and the CoE acknowledge that while Kenyans want devolution, it is important that the levels of devolution are carefully thought so that the architecture does not become impossible to implement and or fail the very purpose for which it was intended; the RG and the CoE agreed on the need, formulation and design of devolution at three levels of government.

### 5. The Kadhis courts

The RG and CoE appreciated that the Kadhis Courts raise various concerns and they are important socio-cultural issues in our society. To this extent, the RG and CoE have deliberated on the issue of the Kadhis courts and there is an emerging consensus. While members of CoE and RG will continue to educate and engage with Kenyans and religious leaders, the CoE and RG wish to affirmatively state that the Kadhis court issue will no longer be a reason to object to the process of constitution making or to defeat the draft constitution.

### 6. Systems of government

The CoE and the RG acknowledged that the issue of which system of government to adopt is contentious to Kenyans generally. We acknowledge the need to carefully design a system of government that resonates with the views and needs of Kenya.

### 7. Way forward

The RG and the CoE re-affirmed their commitment to give

Kenyans a new Constitution. Members of the RG declared their confidence in the CoE under the chairmanship of Mr. Nzamba Kitonga. The RG and the CoE urged all members of the public, the political class, civil society, and the religious sector to support the completion of this process to give Kenyans and Kenya a new constitution.

The CoE plans that as soon as the draft is published, it would hold a series of consultations/negotiations with various interest groups including the other organs of reform under Agenda no. 4 such as the Interim Independent Electoral Commission (IIEC), the Interim Independent Boundaries Review Commission (IIBRC), and the Truth Justice and Reconciliation Commission (TJRC) so that together these bodies can inform the draft where it concerns them.

### E. The process of harmonization and resolution of the contentious issues

In harmonization and resolution of contentious issues, the Committee will be guided by the following:

#### 1. By considering public views

The committee considers the views received from the public and would adopt majority opinion unless it goes against a constitutional principle or it is manifestly against the rights of the minority in need of protection. In this regard, the CoE has carefully analysed the views received from the public in various forms.

#### 2. Thematic Consultations

These comprises expert opinion and resolutions emanating from specialized workshops. The CoE has held such workshops on the issue of:

- (a) Devolution
- (b) System of Government
- (c) Inclusivity and Affirmative action
- (d) Transitional provisions
- (e) Electoral Systems

#### 3. Sectoral consultations

This comprises views and proposals emanating from meetings with Political Parties, Religious Organizations, Private Sector and the Civil Society.

CONTINUED NEXT PAGE



**The Committee of Experts in session**

# Progress on the Constitution Review process by the Committee of Experts as at October 2009

## FROM PREVIOUS PAGE

### 4. Experts Engagement

The Committee has engaged various specialists on technical areas such as drafting, financial devolution and delimitation of electoral units. The CoE considers such report alongside other considerations.

### 5. Internal discussions of CoE

As required by the Review Act, 2008 the CoE members discuss and interrogate every issue, examining the merits and demerits and reach decisions by consensus. It should be noted that consensus is not unanimity. While the Act contemplates a vote, the CoE has encouraged reaching decision by consensus.

### 6. Consultation with the Reference Group

The CoE considers the valuable discussions and resolutions reached in joint meetings with the Reference Group including as mentioned above.

In resolving the contentious issues, the committee is also guided by Section 4 and section 6 of the Constitution o Kenya Review Act, 2008. The committee has further adopted ten (10) principles which will guide the process of resolving the contentious issue. These principles are:-

- The need to unify and strengthen the Nation of Kenya
- Need to constrain executive power, embracing the separation of powers, with checks and balances;
- Need to de-centralize power;
- Need to avoid dangerous and acrimonious presidential/ National elections and avoid winner-take-all elections;
- Need to deepen democracy, and an accountable government;
- Need for an effective Government;
- Need for a stable Government;
- Need for equity in distribution of resources;
- Need to strengthen and regulate political parties;

- Need for ethnic, regional and gender balance.

### F. From the Harmonized Draft to the Referendum

#### Step 1:

Upon the publication of the draft Constitution and the preliminary report, the public will have 30 days within which to give their views. The Committee of experts will have another 21 days within which it is required to incorporate the views of the public. (Section 32 (1))

#### Step 2:

The Committee of experts shall present the draft constitution to the parliamentary Select Committee (PSC) for deliberation and consensus building on the contentious issues within 21 days (Section 32 (c))

#### Step 3:

The PSC to reach an agreement of the draft and have the committee review the same and resubmit to Parliamentary Select Committee. The PSC shall within 21 days resubmit the draft constitution and the report presented to it together with the recommendations agreed upon as a result of its deliberations and the Committee of Experts shall revise the draft taking into account the achieved consensus. The Committee of Experts shall submit the revised draft and its final report to the Parliamentary Select Committee within 21 days and thereafter the Parliamentary Select Committee shall within 7 days table the report and draft before the National Assembly.

#### Step 4:

The National assembly to approve the draft within 30 days of the tabling of the draft constitution by the Parliamentary Select Committee, the same shall be forwarded to the attorney General for publication.

The National assembly may propose amendments to the draft constitution and submit it to the Committee of Experts for consultation and redrafting. Where the National Assembly proposes amendments to the draft

constitution, it shall submit the draft constitution to the Attorney General who shall within 7 days submit the draft to the Committee of Experts for consultation and redrafting. (Section 33(4)).

If the National Assembly fails to approve the draft constitution, a joint meeting between the Parliamentary Select Committee, The Reference Group and the Committee of Experts shall be convened by the Chairman of the Committee of Experts to consider the issues and to make recommendations to the National Assembly. The National Assembly thereafter shall within 21 days approve the draft constitution and submit it to the Attorney General for publication.

#### Step 5:

The Attorney General to publish the Draft Constitution within 30 days of receipt from the National Assembly. The Attorney General shall not affect any alterations to the draft except for editorial purposes in consultation with the Parliamentary Select Committee. (Section 34)

#### Step 6 :

The Committee to conduct Civic Education for a period of 30 days (Section 35)

#### Step 7 :

The Independent Interim Electoral Commission shall within 7 days of the publication of the draft constitution publish the question to be determined by the referendum. The question shall be framed in consultation with the Parliamentary Select Committee and the Independent Interim Electoral Commission shall organize, conduct and supervise the referendum.

#### Step 8:

The Independent Interim Electoral Commission to publish the results of the referendum within 2 days of the holding of the referendum. (Section 43)

#### Step 9:

If the final result of the referendum is that the people of Kenya have ratified the draft constitution the president shall proclaim the new constitution to be law not later than 14 days after the publication of the final result of the referendum. (Section 43A)