THE DRAFT CONSTITUTION OF KENYA 2004 (BOMAS DRAFT): REFLECTIONS AND COMMENTARY ON ISSUES OF CONTENT AND PROCESS BY KOKI MULI©[1]

INTRODUCTION

This commentary aims at rekindling the debate on issues relating to the constitutional review process and the content of the Draft Constitution of Kenya March 15 2004 (commonly known as the Bomas Draft). The other objective is to create awareness on the content of the Bomas Draft through the serialisation of the documentary and providing commentaries for each chapter or section. The commentary aims at provoking informed debate and discussions on the substance of the Bomas Draft. It is hoped that this will increase understanding of the contentious issues and hopefully generate useful public debates on it so that as we prepare for the referendum we are at the same level of appreciating the contentious issues and the necessity to find national consensus on the whole of the Bomas Draft.

The Bomas Draft is comprehensive and makes provisions for many concerns that have affected Kenyans for a long time, as a result it contains a great deal of detail which needs to be dealt with before it can be adopted in a referendum. There is no doubt that there are a number of disconnect in the chapters because cross-cutting issues and provisions were not exhaustively dealt with. There is a great deal of details which need not be in a constitution and can properly be catered for in legislation, while certain sections of the Bomas Draft can actually become schedules. There are other mistakes relating to cross-referencing but most important it is not clear how many of the provisions can and will be implemented. Indeed, the Bomas Draft requires a general cleaning up, tightening or clarification of provisions to facilitate effective implementation and enforcement. Certain provisions still require thinking through to determine their impact or effect as they are. These commentaries are by no means exhaustive; in fact, they are just aimed at kicking off the content debate and stirring people up for reaction. Some observations and commentaries are also made on the consensus documents, principally, the Naivasha Accord, Ufungamano document and the Bishop Sulumeti documents.

This commentary is divided in to two parts. The first part deals with the **process** through which the Bomas Draft Constitution was adopted. This part aims to determine whether the Constitution of Kenya Review Commission and the other organs established under the Constitution of Kenya Review Act (Cap 3A of the Laws of Kenya) adhered to procedures and the processes laid out in the law and to determine whether the process exhaustively dealt with the political questions and processes. There are many ways of interpreting and understanding the review process, which include the legal, the political, the scientific etc. The process itself is legal, political and even scientific. This commentary will restrict itself to the legal and the political processes. It answers two questions as follows

(1). Did the review process faithfully adhere to the process laid down by Cap 3A?

[1] Koki Muli, Executive Director, Institute for Education in Democracy. The views expressed here are not necessarily the views of the Institute for Education in Democracy. The author takes responsibility for the views and any mistakes therein.

(2). Did the review process adhere to the political processes and was it all-inclusive (politically)?

The question of how scientific the review process was is not addressed here in any detail. However, it may be interesting to note that if the process through which the Bomas Draft was prepared and produced was to be subjected to the test of science, it may very well fail to meet the scientific standards of research, data collection, collation, analysis and drafting requirements etc. This is because a social science interrogation of any process is rigorous, thorough, detailed and academic. It would inquire into the tools developed and utilised for generation, collection, collation, analysis and presentation of data, information, education and communication materials and processes, facilitation of understanding, feedback, consensus building during the process, negotiations, preparation, production and validation of the final product, the draft constitution. In fact, the process would also involve, the translation and dissemination of the draft constitution to the people to enable the realisation of the objective of a genuine people driven process of constitution review.

The second part is a serialisation of the Bomas Draft as adopted in March 15 2004 at the Bomas of Kenya and a brief commentary for each chapter or section is provided to kick off a discussion of the key issues on each section or chapter. The commentaries are based on the reports of the presentations and memoranda received from Kenyans by the Constitution of Kenya Review Commission (CKRC) synthesised and published in reports. The idea of collecting and collating views from Kenyans is founded on the theory of sovereign power of the people to make their own constitution and the doctrine of its supremacy. Tremendous effort and investment was made to facilitate as many Kenyans as possible, to tell the (CKRC) the kind of constitution they wanted. It was also necessary that the legitimate power of constitution review emanates from the people through their effective participation in the process through which they would influence a content that would address their needs and aspirations. This was the justification for the Bomas NCC, instead of for example a small team of experts and scholars being constituted to draft a constitution for Kenyans.

The documents which have aided this analysis include the "Draft Bill of the Constitution of Kenya Review Commission (2002)," "the Main Report of the Constitution of Kenya Review Commission, 18th September 2002," "CKRC A Summary of the Proposals – the Draft Constitution at a Glance," "Draft Constitution Bill – Consolidated on the basis of Committee Decisions at Bomas 2, other Revisions based on Committee Proceedings and Drafter's proposed Technical Revisions, 9th January 2004," "The Draft Constitution of Kenya 2004, as adopted by the National Constitutional Conference on March 15th 2004 (including the its Corrigenda)," "The Draft Constitution of Kenya 2004 – as adopted by the National Constitutional Conference on March 15th 2004 and verified and confirmed by the Constitution of Kenya Review Commission," "Working Draft of the Final Report of Constitution of Kenya Review Commission, October 21st 2004," and a number of verbatim reports, including the Rapportuer's reports, and the views of Kenyans on the constitution they want.

The commentaries are incomprehensive but allow for interrogation of the Bomas Draft. It is expected that these commentaries will generate passionate response from a cross-section of Kenyans, re-orient the debate to key issues in the Bomas Draft and enlarge the number of the people participating in the constitution review debate. This will help us determine

whether the content of the Bomas draft reflects the wishes and aspirations of Kenyans. It is hoped that it will also help our leaders to understand what the majority of Kenyans want. There are many issues in which Kenyans may not necessarily agree with their Members of Parliament (MPs). For example, in a recent Kenya Television Network poll, over 94 per cent of pollsters said that they did not want the remaining part of the review process finalised in Parliament by MPs.

For the process to be meaningful and to result in a genuinely people's constitution, the people should have a say at all phases of the process and not just in the referendum. If there are contentious issues the people of Kenya should be able to participate either through a representative but structured process in identifying those contentious and negotiating a national consensus on them. Since, the people of Kenya already rejected the proposal by the former regime to allow Parliament to review the constitution, it is not right for the current parliament to give itself the mandate to negotiate political settlements, reopen the Bomas Draft and amend it on the basis of their political settlements. The people of Kenya have already spoken to the issue that Parliament has no right and authority from the people to review their constitution. Therefore, re-opening of the Bomas Draft will be a serious betrayal of the people by their leaders. It may be futile for people of Kenya to fight what has now become a mighty Parliament, as the only tool they have is the vote, either in a referendum or in an election. We know from experience in other countries that people do not vote for issues in a referendum but for their leaders. If indeed, our leaders are genuinely interested in a constitution that will serve the interests of all Kenyans; they should find a more inclusive method and forum to review the Bomas Draft. Power and authority must be exercised responsibly by our leaders to ensure democracy and good governance. What we see now the arrogance and the show of 'might' from the political elite. These may win them mileage from their constituents and may be even succeed in a re-election, but history will judge them as leaders who failed and betrayed their people for their only selfish interests.

Even without benefit of research, it is safe to state that many Kenyans do not know the provisions of the Bomas Draft other than what we read coming from our leaders, some of who also have not read the whole Bomas Draft, but only chapters which interest them. Many people may argue that, these questions should be dealt with during the referendum; however, it is not possible to amend or repeal any part of the Bomas Draft during the referendum. The referendum will be a one question referendum asking Kenyans to either endorse the Draft Constitution by voting 'yes' or reject the Bomas Draft by voting 'no'. In fact it is really a process of rubberstamping or rejection. While it is also true that many Kenyans had an opportunity to give their views to the CKRC on the constitution they want and to lobby during the Bomas NCC process, a bigger part of the Bomas Draft contains provisions that many Kenyans may even want but are alien to them. Therefore there is great need for comprehensive and rigorous civic education. Already, there are questions on whether the CKRC has capacity to supervise and effectively coordinate such civic education. These are some of the questions which we hope will be part of the public debate.

The history of constitution making in Kenya is intimately linked to the clamour for good governance and democracy, and therefore it is very much a legal and a political struggle. It is a history of a struggle to address some fundamental omissions in the independence Constitution of 1963 and repeal the subsequent Amendments to the Independence Constitution which succeeded in concentrating immense power in the Executive, specifically

the Presidency and in alienating people of Kenya, so that by 2002 general elections there was a remarkable disconnect between the rulers and the ruled. Even though the separation of powers of the three organs of government: Executive, Legislature, and the Judiciary, in the independence constitution were already blurred, the subsequent amendments to it made it impossible for the separation of powers to exist. History is important in the process of constitution making or review and the process because it helps us to remember where we are coming from and the lessons we have learnt.[2] It also helps us to understand our circumstances in order to determine what the best constitution for posterity is. The process of constitution making or review must also take into consideration the global, regional, national and local trends and development goals so that the constitution is relevant. The constitution must be able to answer the right questions of resource and power sharing,[3] to address the needs, aspirations and the dreams of all Kenyans. We must determine the legitimising ideology in the process of constitution making, the role of constitutionalism and use this process to recover, re-invigorate and reconstruct our State so that all the past inequalities and imbalances are addressed comprehensively and permanently. Some of these questions are addressed as affirmative action in the Bomas Draft.

It is easier to analyse and explain the legal process of constitution review because it based on written laws and procedures clearly defined in the Kenya Review Act (Chapter 3A of the Laws of Kenya) (CKRC Act or Cap 3A). However the political process is more complicated and confusing because its procedures and expected processes are not defined in law or laid down rules and procedures. The political process can be subjective, dynamic and very unpredictable. One of the key difficulties in the political process of reviewing our constitution is that, when the review process begun, those in government now were in opposition and were in the forefront agitating for a new constitution. Indeed, their views and memoranda largely contributed to the Bomas Draft and by 2002 they urgently needed a new constitution. While it is true that the CKRC Draft constitution published in September 2002 was amended, clarified or changed during the Bomas NCC, it is also true that the contents of Bomas Draft do not fundamentally differ with the original CKRC Draft. In fact the areas of serious contention among the ruling elite in the Bomas Draft did not at all change from what was originally contained in the CKRC September 2002 Draft. Yet, now that they are in government, there seems to be no urgency for a new constitution any more. Clearly this is confusing Kenyans as the same people wanted different things when they were in opposition from what they seem to want now. For example, complications arising from disagreement in relation to sharing of executive power and devolution of power have made it difficult for the process to culminate in a new constitution. Yet, the deadlock seems to surround the political elite while the majority of Kenyans just want a constitution that will address their needs and protect their human rights.

The basis of a people-driven constitution review is not about how scientific the process and the eventual contents are but that the process ensured people's participation throughout the

[2] Wanyiri Kihoro has edited with a commentary an excellent historical account of the process of constitution making –: "A Vision of the Future from the Past - Essential public documents in the making of the new Kenya Constitution." This book is a great background in understanding the process of constitution review in Kenya.

[3] Senior Counsel and constitutional lawyer Pheroze Nowrojee identifies the right questions as those that respond to equitable distribution of national resources, distribution of political and executive power and those that addresses the concerns and meets the need of every person in Kenya, including the minorities etc.

process, from collection of views, consensus building and other relevant debates to the process of the referendum. For the process to have genuine legitimacy and credibility all the phases in it must be inclusive and should involve the people of Kenya as much as is practically possible. In assessing the credibility of the process we may be able to determine whether or not the process was indeed, people driven, that it was as inclusive as it could possibly be. The methods of determining issues of legitimacy are based on the level of participation and involvement of the people in determining the content of the draft constitution, including a determination of whether people were facilitated to effectively participate in the process.

SOME OBSERVATIONS ON CONATITUTION OF KENYA REVIEW PROCESS

1. THE LEGAL PROCESS

The legal process was mainly governed by the Constitution of Kenya Review Act, Chapter 3A of the Laws of Kenya,[4] (CKRC Act or Cap 3A) and managed by institutions and organs created by the CKRC Act, including the separately constituted Parliamentary Select Committee.

The CKRC Act was as a result of pressure to the government and intense negotiations. It was enacted in 1997 as the Constitution of Kenya Review Act of 1997 and was subsequently amended four times to allow for an inclusive process, which is people-driven and the result was CKRC Act/Cap 3A. Therefore, as it was an intensely negotiated document with detailed provisions, it turned out to be also a very restrictive document leaving very limited room for manoeuvre for the CKRC. Cap 3A was enacted because the people of Kenya rejected forcefully the possibility of Parliament to review the constitution for them, even though, they agreed parliament represents them. Indeed the long title of Cap 3A spells out clearly this position, as it indicates that it was ***an Act of Parliament to facilitate the comprehensive review of the constitution by the people of Kenya, and for connected purposes.*** The object and the purpose of the review of the constitution are set out in Section 3 as follows:

(a). Guaranteeing peace, national unity and integrity of the Republic of Kenya in order to safeguard the well-being of the people of Kenya;

(b). Establishing a free and democratic system of Government that enshrines good governance, constitutionalism, the rule of law, human rights and gender equity;

(c). 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;

[4] Government Printer, revised edition 2001 (2000).

(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 the identities;

(f). Ensuring the provision of 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 cooperation to ensure economic development, peace and stability and to support democracy and human rights;

(h). Strengthening national integration and unity;

(i). Creating conditions conducive to a free exchange of ides;

(j). Ensuring the full participation of the people in the management of public affairs; and

(k). Enabling Kenyans to resolve national issues on the basis of consensus.

Section 4 provides the organs through which the review process was conducted as follows;

(a). The Commission (CKRC);
(b). The Constituency Constitutional Forum (CCF);
(c). The National Constitutional Conference (NCC);
(d). The referendum; and
(e). The National Assembly (NA)

Section 5 provides that in the exercise of their powers or performance of their functions under Cap 3A the CKRC, CCF, NCC and the NA shall

(a). Be accountable to the people of Kenya;

(b). Ensure that the review process accommodates the diversity of the Kenyan people including socio-economic status, race, ethnicity, gender, religious faith, age, occupation, learning, persons with disabilities and the disadvantaged;

(c). Ensure, particularly through the observance of the principles in the Third Schedule[5] 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 alter the Constitution;
(ii). Is, subject to this Act, conducted in an open manner; and

[5] The Third Schedule provides the Principles for a democratic and secure process for the review of the constitution.

(iii). Is guided by respect for the universal principles of human rights, gender equity and democracy

(d). Ensure that the final outcome of the review process faithfully reflects the wishes of the people of Kenya.

The main function of the CKRC was to collect and collate the views of the people of Kenya on proposals to alter the Constitution and on that basis, to draft a Bill to alter the Constitution for presentation to the National Assembly.[6] Other related functions include conduct and facilitate civic education, conduct studies, research evaluations on what needs to be done to ensure the objects and the purpose of the review of the Constitution are met.

The work of the CKRC according to Cap 3A was visiting all the Constituencies in Kenya, compiling reports of the Constituency Forums, the NCC, conducting and recording decisions of the referendum and on that basis drafting a Bill for presentation to Parliament for enactment.[7] The CKRC was expected to compile its report together with a summary of its recommendations and on that basis, draft a Bill to alter the Constitution.[8] Section 27, which is very long provides for how the process of review was to proceed after the publication of the Bill and the report as done by CKRC in September 2002, then the NCC and the referendum if so requested on the floor of the NCC. Section 28 provides that the CKRC shall, on the basis of the decision of the people at the referendum and the draft Bill as adopted by the NCC prepares the final report and draft Bill. The CKRC was then required to submit the final report and the Draft Bill to the Attorney-General for publication as a Bill to alter the Constitution and for presentation and tabling to the National Assembly for enactment.

The role of the Parliament under Cap 3A was to receive the CKRC report and the published Bill to alter the Constitution from the AG and within seven days enact the Bill into a new Constitution. Clearly, Parliament was not allowed to open the Bill under whatever circumstances because this would go against the object and the purpose of Cap 3A and would be contrary to an all-inclusive people-driven review of the Constitution process. The referendum envisaged under Section 27(6) was not automatic. It was to be conducted only in the absence of a consensus at the NCC in which the question or questions would be taken to the people of Kenya for determination through a referendum. In this regard, the referendum would have been held within two months of the NCC (Section 27(6)).

Do we believe that the Constitution of Kenya Review Commission (CKRC) and the National Constitutional Conference (Bomas NCC) faithfully adhered to the procedures and the goals of the Constitution of Kenya Review Act, Cap 3A of the Laws of Kenya, (CKRC Act)?

Following careful analysis of the legal process, the answer here is yes, the CKRC, the NCC and the review organs faithfully adhered to the CKRC Act.

[6] Section 17 of Cap 3A
[7] Section 26(2) of Cap 3A
[8] Section 26(7) of Cap 3A

The process led by CKRC involved civic education collecting and collating the views of the people of Kenya, synthesizing them and publishing the relevant documents including a draft constitution. Then calling the Bomas NCC which was to discuss, refine and find consensus on the provisions to facilitate publication of the final draft, which would then be submitted to the Attorney-General (the AG) of Kenya for publication and enactment by Parliament. According to the Review Act, if there were contentious issues still unresolved, a motion to subject the question(s) to a referendum would have been moved on the floor of Bomas complying with the relevant procedure laid down by the Cap 3A.

Technically, the Draft Constitution of Kenya, 2004 (Bomas Draft) was adopted and passed by the Bomas NCC without any contentious issue getting the requisite majority to require consideration and reference to a referendum. Therefore, no motion was moved to subject the Draft Constitution to a referendum. Procedurally, in keeping with the CKRC Act, the AG should have received the CKRC report and the Draft Bill, published the Bill, tabled it to Parliament who by now should have enacted the new Constitution.

LEGAL CHALLENGE: NJOYA AND OTHERS CASE

However, before the AG received the Draft Bill in his capacity as the AG a legal challenge was presented to the review process through an originating summons dated 27th January 2004 and amended on 17th February 2004 by applicants, Rev. Dr. Timothy Njoya, Munir M. Mazrui, Kepta Ombati, Joseph Wambugu Gaita, Peter Gitahi, Sophie O. Ochieng, Muchemi Gitahi and Ndungu Wainaina. As a result of this legal challenge, the AG was not able to receive the Draft Bill in his capacity as AG but received it in his capacity as a delegate to the NCC.

This legal challenge raised some serious questions which are important to the legal process of the constitution. Some of these include the following:

1. There were concerns regarding representation by delegates in the NCC. For example, Cap 3A treated Nairobi as a county council resulting in it being represented by only three (3) delegates when it has over 2,143,254 residents, while North Eastern Province with only 962,153 residents was represented by twelve (12) delegates. Furthermore, all districts irrespective of population were represented by three delegates each; for example, Machakos district with about 906,644 people was represented by three (3) delegates just as Nakuru district with 1,187,039, Keiyo district with 143,865 and Lamu district with 72,686 people.

2. The issue of the categories of delegates as set out in section 27(2) remained an issue which was contentious in that many Kenyans felt that although Cap 3A was intensely negotiated by all sectors and therefore fairly representative, representation from politicians was rather overwhelming. This is because ***all members of the National Assembly***, ***councillors***, representatives from ***all registered parties***, were the majority and the rest of Kenyans were represented only by 25% of the delegates (religious organisations,

professional bodies, women's organisation, trade unions and Non-Governmental Organisations registered at the commencement of the Act). In fact, Civil Society Organisations which are not registered as NGOs were not represented. These include Companies limited by guarantee, Trusts and other Charities and many other lobbies and organisations operating under other legal regime but not registered as NGOs. Therefore, in fact, in terms of voting majority, only politicians had the gravitas and the majority to carry the day on any issue and it may not be wrong to conclude that the Bomas Draft is political document. As such, although all shades of opinions were represented, representation by categories was unfairly distributed and since the NCC was a voting process, this meant that those with the numbers carried the day. Yet all registered political parties irrespective of their membership and representation were each entitled to one delegate to represent them in Bomas.

3. Further, there is the argument that minorities whatever their shade and background must be protected by all means necessary, a democracy requires that the majority should not bully the minority, they should instead scrupulously protect them. However in the context of constitution making the constitution is being made for all, minorities and majorities alike and, the voice of all should be heard so that they can all own the constitution which will bind them together. Yet, "to accommodate minorities does not entail reversing the democratic equation by having minority dominance in representative forums… the composition of NCC was quite flawed and no amount of antecedent history of skewed representation in Parliament or elsewhere could wholly justify it."[9]

4. The procedure of the review of the constitution through the NCC and the referendum contravened the provisions of section 47 of the Constitution of Kenya. Therefore, the Bomas NCC process should not have begun without amendments to that section of the Constitution.

5. In any case since the object and purpose of the review of the constitution was to ensure an all-inclusive, people driven, and democratic review process, a referendum should have been automatic and not optional depending purely on the decisions of the NCC. Therefore section 27 and 28 of Cap 3A should have provided for mandatory referendum.

6. The issue of supremacy of the constitution and the importance of constitutionalism requiring a limited government under the rule of law need to be interrogated so as not to negate what the constitution stands for in the first place. This means that no organ of government (Executive, Legislature and the Judiciary) is more powerful or important than the other although with different functions, only the Constitution is supreme – superior.

[9] Above Njoya and others case, page 58.

The findings of the court[10] in the above case included the following:

- That in a democracy, and Kenya is one, the people are sovereign. The sovereignty of the Republic is the sovereignty of the people and all Governmental power and authority is exercised on behalf of the people. The court ruled that the Constitution gives every person in Kenya an equal right to review the Constitution which right includes the right to ratify the Constitution through a national referendum.

- That if the people of Kenya have to have an abiding loyalty and reverence to the constitution they must be able to exercise their constituent power in a compulsory referendum and this is not negotiable. Therefore section 27(5), (6), and (7) of Cap 3A are unconstitutional and therefore invalid (null and void).

- The ruling of the court with regard to section 47 of the Constitution was that Parliament has no power under this provision to abrogate the Constitution and or enact a new one in its place. The meaning here, is that the court said 'Parliament may amend, repeal and replace as many provisions as desired provided the document retains its character as the existing Constitution. A new Constitution cannot by any stretch of the imagination be the existing Constitution as amended and the word 're-enact' does not mean the replacement of the constitution with a new one, it simply means to enact again, to revive.[11] Parliament being one of the creatures of the Constitution it cannot make a new constitution. Its power is limited to the alteration of the existing Constitution only.[12]

- Further, the court ruled that section 28(4) of Cap 3A offends or contradicts or is inconsistent with section 47 of the Constitution because it invites the National Assembly[13] to assume a power it does not have – the power to abrogate and enact a new constitution. Also, the court argued that the provision (section 28(4)) takes away the Constitutional discretion of the NA to accept or reject a Bill to alter the Constitution, and directs the National Assembly to enact the Bill presented to it into law.[14] The court further ruled that Cap 3A has no powers to fix a time table for Parliament as it does in section 28(4) because section 47 read with section 56 of the Constitution do not allow that. Section 28(4) supposes that the Parliament enacts Bills into law but the court ruled that the Parliament has no such powers, it only passes Bills, and the enactment is the function of the Parliament comprising the NA and the President.[15]

- On the other hand the dissenting view of Kubo J, in the same case was that section 47 of the Constitution of Kenya does not limit the power of Parliament to amend or repeal the Constitution and replace it with a new Constitution. In other words,

[10] This is the majority ruling by AG Ringera, J and Mary Kasango, Ag. Judge.
[11] Njoya and Others Ruling, page 70.
[12] Njoya and Others Ruling, page 71.
[13] Section 30 of the Constitution provides that "the legislative power of the Republic shall vest in the Parliament of Kenya, which shall consist of the President and the National Assembly."
[14] Njoya and Others Ruling, page 79.
[15] Njoya and Others Ruling, page 80.

Parliament can review and make a constitution on behalf of Kenyans.[16] Therefore, indeed, Cap 3A would at best be a duplication of the constitutional requirement and at worst be illegal because it takes away the power of Parliament under section 47 of the Constitution to review and replace the constitution and gives that power to the people of Kenya through the organs set out earlier.

CKRC ACT/CAP 3A AND THE 2004 CKRC (AMENDMENT) ACT

The issue of quorum, many argue was dealt a severe by the amendment to Cap 3A in 2002 from requiring that quorum shall be 2/3 of all the NCC delegates to two thirds of delegates present and voting. Therefore during the adoption of the Bomas Draft, it did not matter very much that the majority of delegates were absent from the NCC because out of those who were present and voting, two thirds of them supported the motions moved to adopt different clauses of the Bomas Draft. This is why only slightly more that fifty percent of the Bomas delegates adopted the Bomas Draft.

Although, some delegates raised issues of contention in relation to the content of the draft and the committee work, these issues did not find majority support and were discussed and dealt with outside the CKRC Act, and only found their way to the NCC by way of recommendations which could not be binding on the NCC. Accordingly, there were technically no issues of contention that required reference to a referendum then, as the majority of delegates were in consensus on the clauses being passed on the floor of Bomas NCC.

In the end legally speaking the process adhered faithfully to CAP 3A.

Yet, the Bomas Draft has not been enacted as the new Constitution because of what the political elite refer to as contentious issues rendering the adoption of the Bomas Draft impossible. Parliament determined that it will deal with the issue of the ruling in the Njoya case by amending Cap 3A to allow for a mandatory referendum. It also amended this same Act to enable itself to find consensus on the issues it finds contentious, amend the Bomas accordingly and then subject it to a national referendum. This is the Constitution of Kenya Review (Amendment) Act, 2004 amending certain sections of Cap 3A and making a referendum mandatory. It also categorically declares that only one question will be subjected to the referendum, a 'yes' or 'no' vote to endorse or reject the constitution. It also gives the national Assembly the power to debate, consider, consult on the Bill, facilitate and promote national consensus on the contentious issues as recommended by the Parliamentary Select Committee and approved by the National Assembly.[17] Most important this Amendment was enacted to resolve some of the issues raised in the Njoya and Others Ruling. For example, section 26 of the 2004 Amendment provides that "recognising that the people of Kenya collectively have the sovereign power to replace the Constitution with a new Constitution, sections 27, 28, and 28A are enacted to facilitate the exercise of that right and power." Yet the same Amendment allows Parliament to debate, find consensus and re-open and amend the Bomas draft, as mentioned above. This is quite contradictory and confusing.

[16] In the ruling by Kubo J on page 56.
[17] Section 27 of the Constitution of Kenya (Amendment) Act, 2004.

Furthermore, the long title of the Amendment is "an Act of Parliament to amend the Constitution of Kenya Review Act to provide for participation of the people of Kenya in the making of the new Constitution through the National Assembly and a referendum and to provide for certain other matters." The Parliament hoped to involve the people of Kenya through a mandatory referendum, while it is quite clear a referendum is an endorsement or rejection of an issue and it cannot be "a making of a new Constitution." As if this were not enough, it almost makes it impossible for a person to challenge the referendum because of the stringent procedures and the requirement that an applicant deposits five million Kenya shillings as security of costs.[18] Section 28J makes a determination that the work of the CKRC and the NCC was done in accordance to the Act. This means that the envisaged process under this Amendment acknowledges that the NCC adopted the Bomas draft on March 15th 2004 and proceeds from there to facilitate the completion of the review process in the manner mentioned here.

THE POLITICAL PROCESS

The review of the Constitution of Kenya has been and is intensely political. Indeed, even the law governing the review process was enacted as a result of intense political pressure from the opposition, Civil Society Organisations, Religious Organisations and leaders, the media, and the international community. The Bomas NCC begun with tremendous political goodwill from the people of Kenya, delegates, observers and other stakeholders. However, by the end of the process, the delegates were totally polarised and divided along political and ethnic lines while the people of Kenya were completely disenfranchised and fed up with the lack of agreement among the political elite on so-called contentious issues.

The current government was elected on the promise of a new Constitution and in fact it was the basis upon which many Kenyans voted for it and therefore, as it was expected, the NCC in the first half of 2003. Every person in Kenya expected and knew that the process we had settled on was an all-inclusive people-driven, and so the stage was set in that understanding. In such a process, there are two key issues relating to the politics of constitution making which require to be addressed.

1. The issue of **legitimacy** and **credibility** of the process; and,

2. The issue of **inclusiveness**, which remains an issue even if the issues of legitimacy and credibility are addressed. This is because, constitution making is not a democratic process, and it's not about majority rule. It is about a process that is sensitive enough to include even the minority groups, views and opinions.

Therefore the political process question here is, did the process satisfy the standards of **legitimacy, credibility and inclusiveness**?

Legitimacy entails the full **participation** and **involvement** of the people of Kenya in the review process to give it the **authority** and **justification** of the claim that it was a people-led

[18] Section 28B of the Constitution of Kenya (Amendment) Act, 2004.

review process. Legitimacy is derived from the people not from documents, not even from the Constitution itself. The issue of people's participation and exercise of their constituent sovereign power is the basis of Cap 3A and the 2004 Constitution of Kenya Review (Amendment) Act, discussed above. There cannot be legitimacy in such a process without the direct involvement of the people, so long as that is the chosen path.

Credibility speaks to the trustworthiness, integrity, sincerely and reliability of the process. Did the people of Kenya believe that the Bomas NCC was a reliable, trustworthy and a process of integrity? Did the organs of the review process conduct themselves with integrity? Was the process believable?

Inclusiveness speaks to the question of whether the process was all-encompassing, wide-ranging, comprehensive and extensive in relation to people's participation. Were there special efforts made to ensure that every Kenyan was represented or had their interests represented and protected? Inclusiveness does not necessarily mean every Kenyan physically participates in the process. It means that every Kenyan is fairly represented, that, their interests, needs and aspirations are addressed comprehensively and exhaustively. The questions raised earlier in the Njoya and Others case relating to geographical representation are important to consider here because they are mainly political questions. Was it fair that Nairobi province with over 2.1 million people was represented in Bomas by only three district delegates while North Eastern with about 950,000 people was represented by 12 district delegates. There was nothing against the law in that. Can any questions be asked about whether those three district delegates were able to effectively represent the interests, needs and aspirations of a metropolitan groups of people were can certainly not be said to be homogeneous?

The test of Legitimacy, credibility and inclusiveness is based on the composition of the CKR Commission and it passed the test after Prof. Yash Ghai negotiated a merger with the *Ufungamano* initiative and expanded the CKR Commission. It was believed the CKRC represented a diversity of interests and aspirations. Also, the geographical and regional representation by Commissioners was fair and satisfactory.

The other question relates to the involvement of Kenyans in determining the content of the Draft Constitution. The civic education (which may or may not have been adequate) and collection of the views and wishes of Kenyans may not be a scientific process to the social scientist, but it was a process to involve Kenyans and listen to what they wanted included in their constitution. This was a process to legitimise the review process to make it as people driven as possible. The objective in my view was met. A certain degree of credibility and integrity was maintained. Indeed, the CKRC received as diverse views as it could, prepared and published a report and a Draft Bill that was subjected to debate and discussions at the Bomas NCC.

However, some question marks arise with regard to the credibility of the CKR Commission on whether their interpretation of the views of the people in cases where they needed to, were always faithful to what the people wanted. I have compared the content of the Bomas draft with the views received from the people and found that where express views exist, the Bomas Draft truly represents the values and wishes of the people of Kenya. Also, it would appear, where there were no clear express wishes on an issue, the CKRC estimated an

interpretation of those wishes as close as they could get and remained as faithful to the values and wishes of the people of Kenya. Yet, there have been complaints that the CKR Commission in some cases imposed their own views and went against the views of Kenyans for example, it was said that more than 90% of Kenyans wanted the death penalty to remain, yet the CKR Commission went against that wish (not that I support the death penalty). Furthermore, although many Kenyans wanted a reformed Provincial Administration the majority of Kenyans wanted it to remain and yet the CKRC abolished it altogether. There are many examples and it is easy to understand why the CKR Commission would be justified to change the views of the people. The question is, does this meet the standards of credibility and legitimacy? Why ask the people and then write what you want, someone may ask?

As one would expect, the reports on the values, wishes and views of Kenyans, the interpretation and the original Draft Constitution of September 2002, which became the basis for the Bomas NCC, were compiled and written by CKRC as were the Constituency Forums reports.[19] However, there no fundamental departures from the reports and the draft Bill of CKRC therefore, one can conclude, no matter the divided opinions on the capacity of the CKRC, their work reflected the general aspirations of Kenyans and therefore as far as they concerned they pass the test of credibility.

The next level of engaging Kenyans was at Bomas NCC. In relation to the issue of legitimacy, credibility and inclusiveness, Bomas indeed represented diverse interests and aspirations of Kenyans and at least every region of Kenya was represented. A key question that goes to the content of the Bomas Draft was, did we believe that the delegates had the capacity and the expertise to produce for Kenya a Constitution. Apparently. The delegates were expected to debate, find consensus and adopt for us a Draft Constitution which would be passed by the Parliament. They were also expected to analyse and make informed decisions on the content of the Constitution based on expert presentations, reading, preparations and presentations of motions and the impact of whatever provisions they adopted in the draft Constitution. The CKRC was expected to guide the process and especially to ensure that all issues are debated, cross-cutting issues addressed, facilitate consensus building etc. This was mainly because decisions were expected to be taken on the basis of consensus and where there was no consensus the question(s) were expected to be addressed to a national referendum. This means, the referendum envisaged in Cap 3A was not just one to ratify the Draft Constitution but to resolve contentious issues.

Questions were raised regarding the capacity of delegates to interrogate constitutional questions etc. However, during the Bomas NCC, although delegates could rely on other background materials and documents they were expected to address themselves to the CKRC Draft Bill and the report. Constituency and other reports of the CKRC were used as reference materials to which delegates were welcome to consult. So under the circumstances, was there sufficient room for manoeuvre for delegates to be able to change the form or the content of the Bomas Draft? Other than in a few places, the content of the Bill largely remained the same. In the end, CKRC verified a document they felt served the interests of Kenyans. Perhaps this may be as well, because when the political elite begun to interrogate

[19] Also, the library and verbatim reports available for cross-inspection were also compiled, prepared and produced by CKRC.

the contents of the draft Bill, they only focused on provisions and chapters which served their own interests. Many of them did not bother to read the whole document and deal with every issue in it as responsible leaders should do. In fact, the recurring contentious issues arise only where they have their interests vested. Our leaders do not question the impact of certain provisions in the Bomas Draft or where the resources will come from to implement the new Constitution, so long as they are able to reach their own political settlements. Great responsibilities require great sacrifices, the retired President Moi used to say, but it does appear that either our political elite do not appreciate that leadership comes with great responsibilities or that they are unwilling to make great sacrifices for the good of this country.

Yet, aspersions have been cast on the Bomas NCC, that it was mismanaged, manipulated, and lacked firm and decisive leadership therefore serious issues of content have arisen, which have made the Bomas Draft Constitution subject of passionate national debate. It has also been manipulated by the divisions in the governing party, where they continuously blame each other for stalling the review process. Unfortunately, the remaining part of the opposition has not provided any leadership in the review process, as the other part of the opposition continues to snuggle with the ruling party. This is unfortunate because the former opposition now in government, and it was not that large, in collaboration with the Civil Society (organisations and individuals), media and others exerted enough pressure on the former regime to begin and advance the review process. It was very difficult then, unlike now, yet the opportunities have been squandered by the opposition which should be in the forefront to deliver a new constitution to Kenyans. The review process has continued to lack leadership because the government cannot seriously provide such leadership, yet the opposition has failed to seize that opportunity to provide leadership. There are numerous groups in the civil society yearning for gravity and leadership from our political elite and getting none. Having been in government the opposition should know by now, there is no government which would readily cede their privileges and political power. The opposition should lead Kenyans to take and adopt what is rightfully theirs, the new Constitution.

Some of the representatives of the *Ufungamano* Initiative, which played a pivotal role in the constitution review process in this country and brought together the parallel review processes, walked out of the Bomas NCC. Even though other members of the *Ufungamano* Initiative remained, the walk-out of even a small following raises the political question of credibility and inclusiveness. Perhaps, efforts should have been made to resolve whatever made the *Ufungamano* initiative representative walk out. Also, movements like the NCEC mainly participated in this Bomas NCC process as observers,[20] while they most certainly played a significant role in the mobilization and struggle for the constitution review process. The political questions of legitimacy, inclusiveness and credibility arose and should have been interrogated and dealt with. Many individuals and groups who have been in the forefront agitating for a new constitution for this country and who played a significant role in the resistance movement participated in the Bomas NCC as observers who were not allowed to speak or make interventions during the proceedings. Others like James Orengo, Pheroze Nowrojee, Betty Murungi and others were not even at Bomas NCC. Their history in struggle for a new constitution is a matter of public notoriety.

[20] Observers were not allowed to speak or participate in the proceedings of the Bomas NCC.

There serious concerns rose in relation to the capacity of delegates to effectively participate in the Bomas NCC and adopt a responsive Constitution for Kenyans. At some stage, many Kenyans were convinced that the delegates had exhausted their potential because of the level of debates that begun to emerge from Bomas. In fact Civil Society Organisations which believed in a constituent assembly as the best forum for reviewing the Kenyan Constitution had serious misgivings on the legitimacy of the constitution of the Bomas delegates, because only a third (MPs, and where relevant Councillors) of those delegates were elected. Further it was not clear the criteria adopted in the selection of the other delegates and what capacities they required for the work before them. There were serious questions on whether some of the delegates had the capacity and skills to engage in the Bomas NCC process. Such questions were received with anger consternation by the delegates and the CKRC, as if they were meant to criticise and ridicule the delegates. Yet, these questions and doubts continue to follow the reservation people have on the content of the Bomas Draft Constitution.

Concerns were also raised about the media and the role they played. In fact, there were such serious concerns that the media was not providing the relevant information to the public that alternative for a were created to facilitate issue-based debate within Bomas. These included for example, bi-weekly publications like *Yawezekana* published by the Coalition on Safeguarding the Gains for Women in the Draft Constitution (IED, FIDA, LKWV and KHRC). The mainstream media seemed caught up in the intrigues and the sensational side-shows that characterised the Bomas NCC. There were of course very good coverage of serious issues on the review process but these were few and far apart.

The Bomas NCC reduced key Civil Society Organisations to mere observers and lobbyists, CSOs which ensured that the diverse delegates get to Bomas in the first place and that the NCC is conducted in the manner in which it was. Yet, it is remarkable that despite the incredible difficulty in lobbying and advocacy these CSOs remained in Bomas throughout providing technical and other support to delegates, including organising and paying for meetings, seminars, workshops, preparing motions, and providing data on key issues etc to ensure that serious debate on constitutional issues is sustained throughout the Bomas NCC. These CSOs researched, trained and wrote numerous documents which in the end fundamentally supported the Bomas NCC.

Although, these CSOs worked very hard and never missed the sessions of the Bomas NCC even though many were just observers and did not utter a word the whole period during the NCC proceedings, they were not always successful in getting serious motions discussed. For example, many of these CSOs were concerned with the failure of NCC to seriously address crosscutting issues, lack of justification and rationalisation of certain provisions, the impact and effect of certain provisions when implemented, lack of any consideration on the practicality of certain provisions, etc. These are now some of the contentious issues being addressed after the fact, when if these CSOs were allowed to participate effectively in the process many of these concerns would have been dealt with at the Bomas NCC. Sometimes it was so bad that some delegates moved motions to oppose proposals by these CSOs. For example proposals on the Mixed Member Proportional Representation, Bill of Rights and Land and Property rights, etc, were shot down without serious rationalisation for rejection.

Also key institutions like the Electoral Commission of Kenya (ECK), which will now have to conduct voter education and the referendum on the Bomas Draft, were just a special

category and spoke on invitation during the Bomas NCC. Yet these institutions are concerned with a substantial part of the Bomas Draft – issues of the Electoral Systems and Processes, Political Parties, Representation, Electoral Boundaries, Devolution etc. Questions of why such key institutions were left out in process must be asked as they significantly impact on process, including the referendum, the content and the implementation of the new Constitution.

At some stage, the Minister for Justice and Constitutional Affairs, in whose docket the review process resides, walked out on the Bomas NCC process, with his colleagues and other delegates on his side on tow. It is said that they were never in the process in the first place to have capacity to walk out, but the political question, is they staged a walk out in protest. A political process cannot claim legitimacy, credibility and inclusiveness when any of its participants walk out. Legally, the walk did not invalidate the process as there was quorum to transact business in the house, and furthermore, one must go to equity with clean hands. This is so because it appeared as though the Minister and his colleagues were engaged in legal mischief, to walk out of a process and claim later that they were not involved or included in the process.

The question remains now, even though there was quorum as was required by the law, can this Bomas NCC process then be said to have been representative and as ideally inclusive as it should have been, considering only about 55% of the delegates adopted the Bomas Draft in the end? This is a sensitive question begging serious consideration especially because 45% of delegates walked out or did not participate in the adoption of the Bomas draft. There are other questions of legitimacy for example, isn't 45% of delegates a large enough number to affect representation of different interests and aspirations?

CONSENSUS BUILDING PROCESSES

During the Bomas NCC, a parallel Consensus Committee moderated by Bishop Philip Sulumeti, a delegate and chaired by the CKRC and Bomas NCC chairperson, Prof. Yash Pal Ghai, was constituted and given issues on which to find consensus. This Committee's legal status was questionable as it was not an organ of the CKRC Act and since it was not integrated into the Bomas NCC, it lacked legitimacy and its recommendations were rejected on the floor of Bomas NCC. The architects of the committee and the contentious issues for discussion were therefore not satisfied and have continued to fault both the process and the content of the Bomas Draft. This group of people enjoys a significant following by other Kenyans who are uncomfortable with certain provisions in the Bomas Draft. This is a political question in relation to the process because although, it did not affect the legal process, it is a serious political process issue because it has held the progress of review for more than a year. Although, the 2004 CKRC (Amendment) Act has been published and the process through Parliament has re-started, there are serious questions about the credibility and legitimacy of Parliament especially in re-opening and amending the Bomas Draft.

The process to find consensus, compromises and political settlements on the contentious issues has continued despite the fact that the Bomas draft was adopted without the requisite majority to support contentious issues warranting a referendum. In fact, these issues are so crucial to the political elite that their continued disagreement has resulted in a deadlock in

the review process. As a result, the Parliamentary Select Committee on Constitutional Review (PSC) and the *Ufungamano* Initiative held meetings to facilitate a consensus building. The PSC's last such meeting was held in Naivasha on 4th to 6th of November 2004 at Sopa Lodge and came up with what is commonly referred to as the Naivasha Accord, a political settlement of some sorts, focusing on some 8 sections and chapters that interest and concern the political elite. These areas relate to following:

(i) Citizenship (to restrict access to this right by foreigners);
(ii) Constitutional Commissions (to reduce the number not necessarily to rationalise the reduction of some not others);
(iii) Bill of Rights (to provide limitations to right to life, limit media freedom and to restrict access to information);
(iv) Judicial and legal systems (to delete certain sections on limitation of rights and to remove certain jurisdiction of the Kadhis courts);
(v) Devolved government (to limit the role regions and reduce the levels of devolution)
(vi) The legislature (to scrap the Senate and increase the majority for impeaching the president to two thirds of all MPs)
(vii) Representation of the people (to endorse that the provisions remain as they are in the Bomas Draft)
(viii) The Executive (this chapter has greatly excited the political elite since the Bomas NCC begun and therefore, it has been scrutinised in great detail and a political settlement achieved. This information is available to all MPs and is not summarised here.)

The *Ufungamano* Initiative came up with their own set of resolutions of what they considered as acceptable consensus. They considered ten sections and chapters of the Bomas Draft Constitution as follows:

(i) The Executive (to provide for non-executive prime minister who will lead government business and will be appointed by the president from among MPs and approved by Parliament in the same way they elect their current Speaker, not necessary the leader of the party with majority MPs in Parliament);
(ii) Devolution (agree on two levels of government – central and local level and the rest of the details will be addressed by the Boundaries and Electoral Commission governed by Legislation);
(iii) Parliament and Elections (agreed on one chamber Parliament, MMPR, no more than 2/3 of the Legislature will be of the same gender and no review of boundaries before adoption of the new constitution);
(iv) State and Religion (agreed on separation of religion and state in the constitution);
(v) Public Finance (equity in taxation and expenditure, constitutional mechanisms to control public and parliamentary wage bills, wealth to determine remuneration, Parliament's capacity to oversee budgetary process and monitor expenses etc.);

(vi) Constitutional Commissions (reduction of their numbers and membership and proposal that the President appoints them with Parliamentary approval);
(vii) Cabinet (Members to be appointed by the President with approval by Parliament, non-elected professionals);
(viii) Drafting Style (The Constitution must avoid details);
(ix) Transition (New Constitution to come to effect upon dissolution of current Parliament and a schedule for transition from current to new constitution be prepared); and,
(x) Process of Review (delay gazetting of the 2004 CKRC (Amendment) Act until consensus on new Constitution is obtained, all stakeholders to be involved, Parliament not to alter the Draft Constitution, and a mandatory referendum).

There are other initiatives by the Civil Society, for example the Yellow Ribbon Movement, which is a multi-sectoral movement focusing on civic education and creating awareness on the contents of the Bomas Draft. The Yellow Ribbon Movement believes in the sovereign power of the people to make their own constitution and agrees with the ruling in the Njoya and Others case that Parliament has no right or power to re-open and amend the Bomas Draft and has been lobbying, demonstrating, agitating for a people-driven finalisation of the review process. It also believes that the referendum is a constituent right of the people to ratify their Constitution. The rationale for civic education on the contents of the Bomas Draft is to enable people to interrogate the contents and determine for themselves if there are contentious issues in it and how such issues should be dealt with, ensuring that the people's sovereign to review their Constitution is not abrogated and taken away by Parliament. National activities of the Yellow Ribbon Movement are continuing.

There is a divergence of opinions on how we should proceed with the review process. The Parliament and CKRC believes it should proceed on the basis of the 2004 CKRC (Amendment) Act while the Yellow Ribbon Movement, Ufungamano Initiative and other members of the Civil Society believe that while Parliament is one of the stakeholders in the process, it should not alone proceed with the review process, all stakeholders must be involved and allowed to participate in equal measure and not just in ratifying the Constitution through the referendum. Therefore, to some of these groups this Amendment is unjust, unconstitutional and offends the court ruling in the case of Njoya and Others because it allows the seizure by Parliament of the sovereign power of the people of Kenya to make their own constitution.