



International Center for Policy and Conflict

International Center for Policy and Conflict

Guiding Principles to the Kenya Constitution Making Process

Submission to the Committee of Experts

May 19th, 2009

Introduction

The International Center for Policy and Conflict (ICPC) is encouraged by the Constitutional debates currently underway and the ability of various actors to table their Constitutional proposals. However, the Committee of Experts needs to facilitate a structured and principled negotiation process that is more inclusive and devoid of unnecessary acrimonies in order to build consensus on the new democratic Constitution as the foundation of an entirely new democratic order. A good constitution making process should have good rules of decision making, aimed at building consensus. There should be adequate time of consultation and analysis of views of the people. The process should be transparent and accountable to the people. It is vital for rebuilding social and political trust so necessary in a society coming out of deep divisions and political crisis.

The process by which Constitution is made matters. The Constitution-making process can be a transformational one that facilitates peace and stability. If not organized transparently and with public participation, however, the Constitutional process runs the risk of further fracturing the country. The challenge will be for the Committee of Experts to organize this process, ideally through a set of interim rules to ensure transparency and to articulate fundamental Constitutional principles. The process should be more open and transparent, with the drafters deeply informed by outside opinions and suggestions without being necessarily bound by them. There is not doubt that powerful political elite factions will play a major role in Constitution-making process, but it is essential to avoid a final Constitution that simply reflects a division of the spoils among such factions. It is also very much in the interest of the dominant faction(s) that the Constitution is viewed not as one that is imposed on the nation by them but, rather, as the product of a robust, inclusive dialogue that protects the rights and interests of all groups in the country.

It is impossible-and not necessarily desirable-to bar factions from proposing their own Constitutional drafts. However, the effect that these drafts have in narrowing public debate should be addressed. One way to minimize this negative effect is for the Committee of Experts to explore each Constitutional question anew, and to ensure that the public has the opportunity to be heard on all Constitutional issues—not merely those raised in respective drafts. In these circumstances, the Committee can serve as the repository of all drafts and other submissions from all parties and individuals. The Committee can then take those drafts and submissions into consideration, along with the results of the popular consultation; then synthesize all of these elements in a consolidated draft, or a set of options.

Kenya wants to set up a political institution that can provide stability and certainty. The making of a new democratic Constitution is an essential part of the peace process. National conflict produces or is reflective of deep social and economic divisions, anger and bitterness, and lack of trust. These cannot be removed merely by the promulgation of a new constitution. In fact the successful operation of the new Constitution itself depends on the removal of these negative features. It is easier to remove them if the process of Constitution making which provides

opportunities for the review of the causes of conflict, acknowledgement of responsibility for past atrocities and violations of the rights of others, and for reconciliation. The Constitution is then not just only about state rebuilding but more importantly, it is about nation building. As nation building cannot be effective without the engagement of all groups, the process itself should be participatory and consultative.

The negotiation process must have clear rules of engagement in order to create atmosphere of reasonable amity. Indeed, dumping the old Constitution and writing a new one has strangely become a popular and acceptable method to deal with a country's ills. The writing of Constitution for political purposes is a "perversion" of the country's democratic principles. A democratic Constitution is not meant to give guarantees to a fleeting majority. It must withstand the whims of a leader or a majority at any given time and it has to give assurance to everyone, particularly minorities. More profoundly, churning minimum Constitutional reforms makes it very difficult to consolidate democratic institution. Without Constitutional finality and clarity, state bureaucracy flounder and democratic institution can't advance. Thus a pernicious cycle develops in which change is promised, expectations of the electorate are raised, and nothing gets delivered.

ICPC recommends the following on the road to new democratic Constitution;

A) The final democratic Constitution needs to avoid some of the past approaches to Constitution-making and the consequent characteristics of the then proposed Constitution(s)(both the Bomas and Wako drafts), which were:

- a. Were too detailed, and purported to deal with issues which should be left to Parliament to legislate on. It is not in country's interests to negotiate provisions in the Constitution which can be dealt with by statutes. It is only necessary to ensure that there are no unnecessary Constitutional limitations on the expression of the will of Parliament. We fear parties will be seeking to elaborate on the provisions in the Constitution. In general, the only issues which should be constitutionalised are the principles upon which democracy is founded and guaranteed, as well as the necessary identification of the essential features of the institutions which give expression to these principles. The mechanics and rules of such institutions should be left to Parliament to create provided there is schedule of bound timelines.
- b. Provided an excessive set of structures, duplication of functions, often boosting the costs of government, sometimes without any clear benefit to people. The process did not encourage a "costing" of the measures and means introduced.
- c. Concentrated on regional government and a variety of forms of regional representation at the expense of local and national levels of government.
- d. Abounded with complex, legalistic language. The Constitution should be written in a concise style and be suitably designed, yet it should be drafted in clear, simple and understandable language.
- e. Avoid antagonistic referendum in any possible proposed new Constitution. Instead embrace or encourage principled and structured constitutional negotiations that allow consensus building and win-win compromise on the Constitutional principles. The referendum should be a win for all Kenyans through democratic negotiations and not for partisan interests as witnessed in 2005.

B) ICPC believes that the guiding and pre-eminent principles for the new democratic constitution should be as follows:

- I. The Constitution shall create the framework to build a democratic, united and peaceful nation.
- II. The character of the state shall be a multi-party democratic state based upon democratic majority rule and principles of equality and parity.
- III. The Constitution shall commit the country to a non-discrimination and gender parity order based on the inherent dignity of all persons and the equal enjoyment of all human rights.
- IV. There shall be a Bill of Rights guaranteeing all accepted human rights including socioeconomic rights and which shall be, where appropriate, applicable against all sources of power.
- V. The Constitution shall as far as possible empower the poor and the vulnerable to enforce their rights and shall inter alia create an effective Human Rights Commission and a Public Protector to perform this function.

- VI. There shall be regular democratic elections, at no longer than five year intervals, on a common votes roll based on universal adult suffrage at all levels of government. The electoral system at the various levels shall ensure accountable and equal representation.
- VII. Parliament shall, subject to the Constitution, be the supreme law-making organ and the expression of the will of the people. The executive will be accountable to it.
- VIII. There shall be democratically elected government at regional and local levels, both urban and rural, whose powers shall be set out in the constitution. The powers of devolved government shall be subject to the need for national uniformity and the values in the Bill of Rights. Government shall be formed by the majority party or voluntary coalitions, if any. It shall be honest, accountable, transparent, cost effective and ensure active public participation.
- IX. The civil service shall be representative, impartial, and shall loyally serve the Government of Kenya and mechanisms shall be adopted to ensure the accountability and transparency of the public service. There shall be stringent vetting mechanisms for the appointment of public servants. The electoral body shall have constitutional powers to vet candidates standing for elections.
- X. Separation of Powers between the organs of government shall be provided for in a manner consistent with the accountability of the Executive to Parliament.
- XI. The New democratic constitution shall reflect certain key transitional justice principles.
- XII. The constitution shall give clear guidelines on the responsibility of government of Kenya to international obligations including the conventions and treaties; and that Parliament shall have final endorsement.
- XIII. Powers should be distributed to the viable devolved units so as to promote, on the one hand, government closer to the people, and popular participation in governance, and, on the other hand, to minimise antagonistic divisions between units and between levels of government.
- XIV. All provisions of the final constitution shall be capable of amendment subject only to the constitutionality prescribed majorities and procedures.

Signed by

Ndung'u Wainaina

Executive Director