

**Memorandum to the Committee of Experts on the  
Constitutional Review**

**Subject:**

**Constitutional Non Consensus Issues and  
Proposals for Resolution**

**Memorandum by**



**The Constitution and Reform Education Consortium - CRECO**

**Date: 14<sup>th</sup> May 2009**

## **PART A: INTRODUCTION**

We, in writing this memorandum, take cognizance of the fact that from the anti-majimbo crusade in the early 60s to the defacto one party state in 1982, it has been a call for political survival. We take cognizance that the constitution and indeed the constitution making process is a political one, but we take exception to the fact that political survival has overshadowed the constitution.

From the late 80s, the call for a new constitutional dispensation has been variously captive to the narrow and unbridled selfish greed and myopia of the political class and marred by political aggrandizement, grandstanding and mediocrity:

1. The IPPG deal was between politicians and for political survival of both the government and the opposition
2. The CKRC was put in place to assuage and deflate political pressure
3. The Bomas conference, the only gathering that had a semblance of representative democracy was marred by political party intrigues and gangsterism
4. The Bomas betrayal, where government ministers and the AG absconded their constitutional role to give Kenyans a new constitution was politically motivated
5. The Wako draft was the fruition of balkanization of the dissenting voices in the Kenyan political field

6. The referendum was so politicized, so linked to non-constitutional issues that we know for a fact that people did not vote for the constitution: **they voted for the MOU and thus the whole of the Kenyan public was duped to fight in a predetermined war.**

A new democratic constitutional dispensation is ideally linked with other serious processes of a radical transformation of the politics and economic organization of the country e.g. transitional justice, land redistribution, etc. It is now clear that the role of parliament in the constitution-making process, **are limited to making the law to govern the process.** Since parliament has no powers to make the constitution beyond the legislative ones, there is no room for the heresy of parliamentary supremacy.

## **PART B: CORE VALUES AND PRINCIPLES**

In view of the ever present threat of contention, and in relation to values and principles that would be core to the Constitution-Making Process, and having looked at the previous law (Constitution of Kenya Review Act (1997) and as amended in 1998, 2000, 2001 and 2004) and now the Constitution of Kenya Review Act 2008 and the proposed amendments as captured in The Statute Law (Miscellaneous Amendments) Bill 2009, we noted with concern that some of the core values and principles contained therein were crucial and hence would be maintained, but with appropriate changes in wording. Further, it was recognized that core values and principles should precede the objects of the process, unlike the case of the previous law. Thus, we state that the constitution making process and content thereof would be guided and governed by the following values and principles:

1. All the peoples of Kenya, inclusive of: Cultural Nationalities; Communities; individual Citizens, men women and children are equal and shall enjoy equal access and participation in all aspects of the Constitution-Making Process.
2. All aspects of the constitution making process shall respect the diversity of the Kenyan people including socio-economic status, race, culture, gender, religion, faith, age, occupation, learning and physical ability.
3. The constitution making process shall be founded on the principles of Accountability; Moral uprightness; Trust; Honesty; and Integrity.
4. The constitution making the process shall engender openness, broad-based consultations and continuous constitutional education.
5. All activities of the constitution making process shall be conducted in a manner that will promote national cohesion, tolerance and dialogue.
6. That the process is guided by respect for the universal principles of human rights, gender equity and democracy.
7. The process shall secure gains already made and shall build on past experiences.

8. All organs and individuals charged with the responsibility of steering the process shall strive to work in a harmonious and complementary manner.
9. All aspects of implementing this shall be in the common good of the peoples of Kenya, men women and children.
10. The New Constitution shall be enacted for ourselves and our posterity.

### **PART C: OBJECTS AND PURPOSES OF CONSTITUTION MAKING**

The objects and purpose of the review of the constitution is to secure the following provisions:

- (i) Guaranteeing the sovereign authority of the people of Kenya in all matters pertaining to the governance of the nation and the execution of the constitution.
- (ii) Establishing a free and democratic system of government that promotes and guarantees, good governance, freedom, a culture of constitutionalism, the rule of law, human rights, equality and equity between gender, cultures, races and peoples of Kenya, men, women and children.
- (iii) Guaranteeing Supremacy of the Constitution;
- (iv) Guaranteeing the rights and dignity of the human person at all times.

- (v) Guaranteeing that separation of powers between 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 offices to the people of Kenya.
  
- (vi) Promoting and providing an enabling environment for people's participation in the governance of the country, through democratic, free and fair elections and other governance processes.
  
- (vii) Entrench and guarantee the principles of devolution in the exercise of power at all levels of governance.
  
- (viii) Respecting cultural and regional diversity and the right of communities to enjoy their cultural heritage and to accrue benefit from their resources.
  
- (ix) Guaranteeing the rights of the citizens to access basic livelihood needs through the establishment of a framework that ensures equitable access to social and economic resources.
  
- (x) Respecting for the diversity of the Nationalities, Communities and individual Citizens and their cultures, resources and heritage to forge peaceful co-existence, national unity and integration;
  
- (xi) Guaranteeing the realization of all rights of all the peoples through equitable access to natural and economic resources;

- (xii) Promoting leadership based on values, moral integrity, responsibility, accountability, and honesty;
- (xiii) Promoting the spirit and philosophy of Pan-Africanism through regional integration, and to strengthen the heritage of African peoples and societies;
- (xiv) Recognition of international instruments that promote a democratic culture, foster international cooperation and nurture dialogue among world nations;
- (xv) Creating and guaranteeing conditions conducive to a free exchange of ideas and right to information;

**PART D: RESOLUTION OF CONTENTIOUS ISSUES**

**1. Process Issues**

Issue	Proposed Resolution
<b>Civic Education</b>	(a) Establish an independent body or let it be coordinated by a civil society umbrella body.  (b) Civic education should be a permanent feature of the process, <b>not</b> to be done after the draft is released

<b>Negotiation of the draft</b>	<ol style="list-style-type: none"><li>1. To be carried out by the Council of reference which shall, among others<ol style="list-style-type: none"><li>(a) consider, discuss and debate, amend and adopt reports and Draft Constitution prepared by the Committee of Experts pursuant to section 30 of the Act;</li><li>(b) discuss and develop consensus on the areas of no-consensus identified by the Committee of Experts under section 30;</li><li>(c) validate and approve civic education materials developed by the Committee of Experts.</li></ol></li><li>2. The Council shall approve the proposed new Constitution and submit it to the Committee of Experts for onward transmission to the Attorney General for publication.</li><li>3. The National Assembly shall adopt the Proposed New Constitution before presenting it for referendum.</li><li>4. If the National Assembly raises some issues before</li></ol>
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	<p>adopting the Proposed new Constitution, the matter shall be referred back to the Council for discussion and consensus</p> <p>5. If the Council of Reference and the National Assembly are not able to arrive at a consensus on some issues, the no consensus issues shall be identified, isolated and framed into questions set for a referendum.</p>
<p><b>The Referendum</b></p>	<p>(a) The agreed issues should be presented in the form of a proposed new constitution and the referendum question shall be a YES/NO</p> <p>(b) The no consensus issues under shall be presented for a referendum and the questions shall be framed as options (Either/Or)</p>

<p><b>The new Constitution</b></p>	<p>(a) If the referendum is held, the Interim Independent Electoral Commission shall, after publication of the final results, forward (in 7 days) the results to the Committee of Experts to revise the Proposed New Constitution taking into account the results of the referendum.</p> <p>(b) In revising the document, the Committee of Experts shall take the position that won in the referendum as the agreed position settling the contentious issues (and publish final document in 21 days)</p> <p>(c) 14 days after the publication, the president shall proclaim it by Gazette notice. If so/not, the present constitution lapses on the 14<sup>th</sup> day and new constitution takes effect.</p>
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**2. Content Issues**

<b>Issue</b>	<b>Proposed resolution</b>
<b>Land</b>	<p>Constitution shall reflect fair and equitable redistribution of land resources to all. An independent land commission to deal with land matters including historical injustices needs to be established</p>

<b>Citizenship</b>	To be dual for all
<b>Religion</b>	All religions to be treated equally. Status quo on Khadhi's Courts to be maintained (to administer Muslim personal).
<b>Equity</b>	Should be intergenerational
<b>Gender</b>	Constitution to ensure that women and men have the right to equal treatment and opportunities in political, social and economic fields including the right to inherit, have access to and manage property. Any custom or culture that discriminates against dignity or status of women or men is prohibited. ALL public bodies should not have 2/3 of either sex.
<b>Children</b>	Constitution to stipulate that children's rights include being protected from exploitation, forced labour, corporal punishment or any inhumane treatment. Constitution to provide that the government shall ensure that children's rights to adequate nutrition, shelter, and healthcare are met.
<b>Disability</b>	Persons with disability are entitled to enjoy all rights, shall be respected and their human dignity observed including access to education, public places, use of sign language and Braille and to participate in decision making at all levels. Sign language should be identified as an official language in parliament and in other public fora. People with disabilities to constitute 8% of all persons in appointive or elective bodies.
<b>Representation</b>	People's power to recall elected representatives must be reflected.





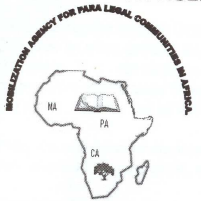










	All elections to be by universal suffrage
<b>People's Sovereignty</b>	The constitution must guarantee the sovereign authority of the people of Kenya in all matters.
<b>Freedom of Speech</b>	The constitution shall Create and guarantee conditions conducive to a free exchange of ideas and right to information.
<b>Constitutional Supremacy</b>	The constitution must guarantee the supremacy of the constitution. It should set such schedules (2 years maximum) and frameworks for repeal of all laws inconsistent to the provisions of the constitution
<b>Human Rights</b>	The constitution should guarantee the rights and dignity of the human person at all times.
<b>Separation of Powers</b>	<p>The constitution should guarantee the separation of powers between the Executive, Legislature and the Judiciary. Creating a framework for checks and balances between them</p> <ul style="list-style-type: none"> <li>• President not to be a member of parliament</li> <li>• Ministers to be appointed from professionals who are not MPs</li> <li>• Hiring and firing of ministers to be through a parliamentary process</li> </ul>
<b>National Security</b>	Heads of security organs to be appointed and fired through a parliamentary process
<b>Representative Democracy</b>	<ul style="list-style-type: none"> <li>• Constitution to promote and provide an enabling environment for people's participation in the governance</li> </ul>






	<p>of the country, though democratic, free, fair and regular elections and other governance processes.</p> <ul style="list-style-type: none"> <li>• Election of the president to be separated from election of MPs</li> </ul>
<b>Devolution</b>	<p>Entrench and guarantee the principles of devolution in the exercise of power and authority at all levels of government and governance.</p> <ul style="list-style-type: none"> <li>• District to be basic level of devolution</li> <li>• Equitable access and distribution of resources to devolved structures</li> <li>• Legislature to have two houses: Senate and House of Representatives</li> </ul>
<b>Basic Rights</b>	<p>The constitution to guarantee the rights of the citizens to access basic livelihood needs through the establishment of a framework that ensures equitable access to social and economic resources.</p>
<b>Culture and Diversity</b>	<p>The constitution to recognise, respect and promote the diversity of all the Kenyan nationalities, communities and individual citizens and their cultures, resources and heritage.</p>
<b>Access to Resources</b>	<p>Constitution to guarantee socio-economic right through equitable access to natural and economic resources – land and employment – for all</p>
<b>Leadership</b>	<p>Leadership to be based on values, moral integrity, responsibility, accountability, and honesty: a clear code of ethics and</p>

	enforcement mechanism needs to be in place.
<b>International law</b>	Constitution to have a framework for recognition and domestication of international instruments that promote a democratic culture, foster international cooperation and nurture dialogue among world nations

Signed,

**CRECO MEMBER ORGANISATIONS**

				
<b>CLARION</b>	<b>KHRC</b>	<b>YAA</b>	<b>4Cs</b>	<b>MAPACA</b>
				
<b>COBADES</b>	<b>CEDGG</b>	<b>ICEDA</b>	<b>UDPK</b>	<b>RPP</b>
				
<b>ILISHE TRUST</b>	<b>ST. JUDES COUNSELIN G CENTRE</b>	<b>CHRCE</b>	<b>CREAW</b>	<b>NCEC</b>

				
<b>MAZINGIRA INSTITUTE</b>	<b>NADISGO</b>	<b>RCDA</b>	<b>MMO</b>	<b>CREDO TRUST</b>
<b>Kazi Riziki</b>	<b>SEMA Trust</b>	<b>PACODEO</b>	<b>XXXXXXXXXX</b>	<b>XXXXXXXXXX</b>