

**A Report on a Conference on State of Implementation of the Constitution since 2010 -
Progress or Regress**

Prepared for
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ACRONYMS

ACECA	Anti Corruption and Economic Crimes Act
AG	Attorney General
CGA	County Governments Act
CIC	Constitution Implementation Commission
COK	Constitution of Kenya
CORD	Coalition of Reform and Democracy
CRA	Commission of Revenue Allocation
CREAW	Center for Rights Education and Awareness
EISA	Electoral Institute for Sustainable Democracy in Africa
EACC	Ethics and Anti-Corruption Commission
FES	Friedrich Ebert Stiftung
IEBC	Independent Electoral and Boundaries Commission
IG	Inspector General
IPOA	Independent Police Oversight Authority
JSC	Judicial Service Commission
KACC	Kenya Anti-Corruption Commission
KDF	Kenya Defense Forces
KNHREC	Kenya National Human Rights and Equality Commission
M4M	March 4 th Movement
MP	Member of Parliament
NARC	National Alliance Rainbow Coalition
NIS	National Intelligence Service
NLC	National Land Commission
NPS	National Police Service
NSIS	National Security Intelligence Service

PEV	Post Election Violence
PFMA	Public Finance Management Act
PSC	Parliamentary Service Commission
PSCK	Public Service Commission of Kenya
SRC	Salaries and Remuneration Commission
TSC	Teachers Service Commission
UON	University of Nairobi

EXECUTIVE SUMMARY

On 27th August, 2010 Kenya promulgated a New Constitution after a search that had spanned over two decades. The Constitution of Kenya 2010 is fundamentally different from the Old Constitution as it embraces a pure presidential system, county governments, an enhanced bill of rights, a two house chamber, several constitutional commissions as well as a rigorous amendment process among other new clauses.

As a transitional remedy, the Constitution of Kenya 2010 took cognizance of possible contradictions and did put in place in-built mechanisms to ensure continuity and a smooth transition. To this end it suspended the implementation of a number of its provisions. For example, the provisions on representation, parliament, the national executive and the devolved governments were suspended until the conduct of the 2013 general elections. The elections were conducted on March 4 2013 and the new constitution is now fully in operation.

The Fifth Schedule to the New Constitution requires Parliament to enact 49 pieces of legislation over a period ranging from one year to five years after the effective date. It is against this background that Friedrich Ebert Stiftung, in partnership with the University of Nairobi's Department of Political Science and Public Administration, has deemed it fit to take stock of the implementation of the constitution six months after the 2013 general election that ushered in the suspended sections of the new constitution. This is a follow up to the first series of papers that were unveiled to coincide with the anniversary of the promulgation of the constitution and that were commissioned in mid 2011.

In this second series seven thematic areas have been identified. These are transition from a Semi-Presidential System to a Pure Presidential System .Second, transition from a centralized system to devolved governments; Third, the Judiciary; Fourth Political Parties; Fifth Constitutional Commissions; Sixth, the Media and Constitutional Implementation and Seventh Proposed and Potential Amendments to the Constitution.

Conference Opening Remarks

Dr. Peter Oesterdiekhoff, Resident Representative, FES, Kenya

Dr. Peter Oesterdiekhoff thanked all those that had made time to come and attend the conference organized by FES, Kenya. He also thanked Dr. Adams Oloo of the University of Nairobi for the support the University had given towards the organization of the conference.

Dr. Oesterdiekhoff acknowledged that Kenya is going through a Constitutional process in a bid to bring about reforms in the different sector and for greater political space. He especially pointed out the importance of implementing Chapter Six of the Constitution as being very critical.

He informed participants that with 2013 elections ushering in a new devolved government, it is expected that the conference will seek to explore the different challenges that come about with the new government system and propose possible solutions. Some of the issues he pointed out include legislation of new laws and inter-governmental conflicts. He added that the conference was to provide a forum for the various themes will be explored and discussed with the view to propose which approaches are best towards constitutional implementation as well as recommend areas that need further research.

Dr. Adams Oloo, University of Nairobi

He appreciated FES for organizing and partnering with the University towards the success of the conference. He emphasized that the Constitutional Implementation Commission, the civil society and the academia have a collective role to play in putting into practice what is on paper. The 2010 constitution is radically different from the former one, as it introduces radical changes like pure presidential system, decentralized government, bicameral parliament and an expanded and detailed bill of rights. To incorporate all these into our system, we need continued and sustained efforts to ensure we do not regress

The 1963 constitution was liberal, we moved into a dictatorship and the struggle towards the new constitution, and now that we have a progressive Constitution, it is our duty to ensure it is fully implemented. By having such inbuilt process, we can arrest any negative changes to the constitution that can take us back

Remarks by Prof. Yash Pal Ghai

Prof. Yash Pal Ghai started by thanking the organizers of the conference and those who had made time to come and engage in the deliberations on Constitutional implementation. He pointed out that a lot of effort has been put in the reforming the governance of this country

through constitutional review. Such conference helps in keeping in track the implementation process of a reform minded Constitution like the one we have.

He contended that while we may have a good Constitution, the mindset of Kenyans must be reformed if we are to realize the benefits of the Constitution. That there is need to change the national culture, otherwise there would be resistance to a radical Constitution such as this one. An effort was made to put in the constitution, mechanisms for its own implementation – the first in the whole world to confront such a challenge. The Sixth Schedule clearly outlined how the Constitution would be implemented, complete with timelines. Gradually, those implementation provisions got diluted and even the CIC no longer is what was envisioned in the constitution. But the Constitution cannot sufficiently provide for the many big issues that affect its implementation and therefore requires the political will to implement. The challenge to realization of reform emanates from a change of heart in the political class who were initially supportive of change once they get in power. Examples abound of former reform activists who changed once they gone into government.

Prof. Ghai maintained that many Constitutions in Africa do not have a link with the common man, unlike in Europe where the Constitution represents the will of the people, incorporates what the society wants. This is one of the reasons for the resistance to the Constitution by the African states. There is need to make an assessment of the forces that may want to resist the implementation process and see how to deal with them

He concluded by saying that it was hoped that in this Conference we will have time to look at the sociological factors to constitutional implementation – to understand the challenges of implementing a radical constitution. Kenya is not the only country that has attempted a radical Constitution and facing implementation challenges. South Africa for instance also has a radical Constitution and is facing serious threat.

Remarks by Prof. Peter Wanyande

Prof. Wanyande begun by clarifying the mandate of CIC. He stated that CIC was established to oversee and monitor implementation of constitution – it is not the implementer itself. The work of CIC involves at times to intervene where certain Constitutional provisions are under threat or have been violated.

He pointed out that implementation of the Constitution is a complex process due to three main factors. First, that it involves many institutions, with each playing a different by complementing role in the implementation of the Constitution. Conflicts can never miss between the different institutions. Secondly, it involves many actors, from government, to civil society to the general public. And thirdly, it involves many processes, including enactment of enabling laws, setting up of new institutions and reforming existing ones.

One of the least understood issue is that the challenges to Constitutional implementation come from many sources apart from executive arm of government. For instance at times the county governments themselves undermine the implementation process by failing to proactively play their part in implementation and blaming ‘the government’ or waiting for directives on what to do.

The major challenge to a smooth implementation of this Constitution in Kenya is lack of a constitutional culture in the country – thinking that we can operate within the constitutional framework without respecting the constitution

As we interrogate the process of implementation, we should put in mind three key points:

- Respect the role of the various institutions established for the implementation
- We should not focus too much on those who resist implementation but rather turn focus to those who support so they feel encouraged
- Understand the constitution and internalize it so we can play a meaningful role in supporting its implementation

From a Mixed System to Pure Presidential System: between Theory and Practice

Dr. Adams Oloo, UON

The presenter pointed out that Kenya has, since independence experimented with all the three generic prototypes of political systems. There was at independence the pure parliamentary system which had the president as head of state with no executive powers and a prime minister as head of government with executive powers between 1963 and 1964. This was replaced by the semi-presidential system where we had a powerful president with no prime minister between 1964 and 2007. The Hybrid System was adopted in 2008 through the National Accord and lasted until March 2013. And the pure-presidential system as per the 2010 constitution came into force in April 2013 to date.

He noted that it can be concluded that Kenya is a country of experiments. And the problem experiments bring is that most of the times theory does not match practice, leading to many governance problems. So far in Kenya, there is pure Presidential System without presidential practice, pointing to a lack of constitutional culture. Indeed, while there is presidential system constitutionally, practically there is hybridized system of governance as a fore.

Characteristics of hybrid/semi presidential system

Characteristics of a hybrid/semi presidential system were identified. In this system, he said the President is both Head of State and Government. There is a shared Executive in “Hybrid”-President and Prime-Minister share executive power. There is continuous check on the government by the parliament through a “vote of no confidence”. If parliamentarians lose

confidence in the president or prime minister, then they can vote him out any time. In this system there is official conciliatory politics where there is a coalition of parties within parliament in order to marshal the necessary numbers sufficient to pass important bills and motions in parliament.

Cabinet under this system is drawn from among the members of parliament and the cabinet and the bureaucracy control the legislative agenda and the budget. Political party identities are important as party members in parliament have a 'BOUND MANDATE' and are always expected to vote along party lines. This makes parliament not to have power to exercise aggressive oversight on government working. This is because the government is majority and is always assured of winning in any vote in parliament. The Government's survival depends on a cohesive disciplined majority party that votes as a bloc.

The executive determines the calendar of parliament. It is the president who can summon or dissolve parliament and the parliament has no say. This was used by a former president Daniel Moi as a powerful political tool. For instance when he needed a new crop of politicians not aligned to Njonjo after the 1982 failed coup attempt, Moi called for snap elections in 1983, a year earlier than the usual five year term that would have ended in 1984.

Characteristics of a pure presidential system

In a pure presidential system, the presenter explained that all executive power is vested in the president. The president is both head of state and government. The term of presidency is fixed by the Constitution. The President can only be removed from office through impeachment as a result of an illegality and not through a vote of no confidence that can trigger a fresh election. In the legislative process, the president has power to veto bills presented to him for assent by parliament but supermajority of MPs can override the presidential veto and have the bill become an Act. Parliament also plays an important role in the appointment of government officials. They have to go through parliamentary vetting after appointment by the president.

There are not strict party lines in parliament, party discipline less strict and MPs have a "free mandate" to vote freely with few repercussions against the party/government. MPs are therefore expected to do the 'right thing' and not merely vote on party lines. The fate of the President is also not intertwined with that of the Legislature, and therefore the president can be removed without necessitating a general election.

The principle of Separation of Powers is more enhanced and thus parliament has more incentives to develop strong effective committees and to play a competitive law making role. The Government does not need to "Win" on every issue since losing a major vote doesn't endanger the executive's term in office as it would in parliamentary or hybrid systems.

It is not uncommon for different houses of the legislature to be controlled by different political parties and likewise for the Executive and the Legislature. Both the Executive and Parliament

are independent policy making entities. In spirit of mutual coexistence parliament accepts the budget from the executive, otherwise it is not obliged.

Implications of the pure presidential system under the 2010 Constitution

In the pure presidential system under the new Constitution, it was noted, the role of legislature has changed drastically under the pure presidential system. But, is the Kenyan legislature empowered to play this critical role? Countries with a similar system such as the US have their members well supported with legislative drafters, policy advisors, researchers etc. In Kenya some do not even have offices.

The bi-cameral parliament has two houses with distinct roles and need to be understood. The national assembly represents the general citizenry and a senate represents territorial units – counties. The President no longer controls the calendar of parliament and his role and that of parliament have been radically redefined as a result of pure presidential system and bi-cameralism.

Between theory and practice – the challenges

It was pointed out that the country seems to be still living in the past even though there is a new Constitution. The Constitution has introduced a presidential system but the executive and legislature are still behaving like we are still in a Hybrid/Semi-Presidential system. In the parliament, the MPs still think of themselves as being either Government MPs or Opposition MPs, and therefore still using the lexicon Government Side and Opposition side. In the same spirit committee chairs are not “Government Spokesmen” in their relative dockets – and therefore the most experienced and legislators with the relevant expertise should be the chairs of the respective committees

Similarly, he said, since the government is not in parliament “shadow ministers” being proposed by the minority side makes no sense. In fact, parliament is already demonstrating this by not having in its sitting arrangement a government side and opposition side.

In the pure presidential system that we are in, the Government should have no automatic expectation that parliament will support it. The minority party may support it and some or all of majority party may oppose. But this was not seen during vetting of key positions where MPs took positions to either support or oppose nominees to the different positions depending on the position taken by the political parties they are affiliated to. However, the Ngilu cases, and maybe the Mututho case, send a new signal on bi partisanship in parliament when it came to checking government.

In conclusion, it was noted that there is need for some conceptual clarity needed in inter-chamber relations between the National Assembly and the Senate. The Constitution defines

Parliament as both National Assembly and Senate but the same is not reflected in the working of parliament.

For instance an Act of parliament it appears does not mean a law passed by both house. Under Art 109 laws not concerning the county government can only be considered by the National Assembly with no input from National Assembly. Money bills under Article 114 can only be introduced by National Assembly.

Constitutionally we have a pure presidential system but attitudinally and behaviorally we are still largely stuck in the hybrid/semi-presidential system. There is therefore need for us to change our attitude to align our thinking with pure presidential system.

Assessment of the Constitutional Amendments Proposals Since 2010

Willis Otieno, EISA

The presenter begun by pointing out that it was agreed from the very onset that there was need for a new constitution, but there was no agreement on what should be put in that new constitution. The fight for a new Constitution has been a protracted one, but the 2007/2008 post-election violence spurred the final push towards a new Constitution in the country.

During the Constitution making process, there were several contentious issues, and these were pointed out by the Committee of Experts. But when the document came out, new contentious issues came up that had not been initially anticipated abortion, land, Kadhis Courts etc. Opposition to constitution by Church groups was based on Abortion and inclusion of Kadhis Courts. Parliament proposed over 120 amendments to the then proposed constitution when it was presented.

Modes of Amending the Constitution

Chapter Sixteen sets out the manner of amending the Constitution. Article 255(1) provides for certain amendments to the Constitution that requires a referendum to be effected.

Amendment by parliamentary initiative

Article 256 of the Constitution provides for amendment by Parliament. It calls for input by both houses of parliament for consideration of a proposed amendment. The Amendment must be supported by at least 2/3 of the members of both Houses for it to go through. It must then be published for at least 90 days after the first reading.

Amendment by popular initiative

The procedure for amendment of the Constitution through popular initiative is outlined in Article 257. The amendment must be supported by at least 1 million registered voters in the country through signatures. The proposal shall be presented to county assemblies in the

country and must be supported by more than half of the county assemblies. Parliament will then vote on a simple majority to pass the Bill or it would be subjected to a referendum if it relates to the areas covered by Article 255(1)

Proposed amendments

Gender and elections date

Art. 27 – the 2/3 gender principle – there was a general feeling among women organizations that given the cultural situation in Kenya, women would not be able to achieve the 1/3 principle in elective positions even with the constitutionally provided avenues e.g. 47 women representatives. There was a proposal to scrap the 47 women representatives and introduce amendments that would create exclusive elective jurisdictions for women. Tied together with this amendment was a proposed amendment on the Elections date under Art. 191 and section 10 of Sixth schedule proposing to change the dates from second Tuesday of August of 5th year to first Monday of December for the first election under the new Constitution, at least to allow the then parliament serve its full term. As the amendments were being done, there were ongoing cases on the two issues. The gender issue had been filed by CREAM and the Attorney General had sought the Supreme Court’s advisory opinion on the question of gender and election dates. The court held that the current parliament to serve full term and elections held 60 days later hence 4th March date by IEBC and that the gender provisions realization was progressive and full realization was to be in 2015.

Reducing the number of MPs

A proposal to reduce the number of MPs was introduced by Hon. Augusto Neto and Hon. Jakoyo Midiwo. The argument of the two is that the number of MPs as it currently stands under the current Constitution is too big and not financially sustainable. The amendment proposed capping the number 150.

Having different election dates for different elective offices

This proposal was fronted by Hon. Neto. The argument was that this will reduce mischief and cut down on irregularities by making IEBC work easier. The proposal was supported by the IEBC chair.

Changing the cluster of State Officers

This was a mischievous proposal introduced by Hon. Kajwang sought to remove members of parliament from the mandate of the Salaries Review Commission. It seeks to remove members of parliament as state officers

Increase of County Revenue Allocation

This had to do with proposal to increase county allocation from 15% to 40% so as to meet the cost of the transferred functions. The amendment has received bipartisan support from the Senate but is facing resistance from National Assembly.

Strengthen the senate

An amendment to give senate absolute legislative authority so that the laws passed should not be subject to review by national assembly.

Abolish the senate

It was introduced by Hon, Irungu Kang'ata. Argument that senate is irrelevant and its functions can be performed by National Assembly. It is however argued that the amendment is more of political rather than based on policy or performance. The amendment also falls under Art. 255 of the Constitution that requires a referendum.

Change of system of government to parliamentary system

This amendment is the initiative of the Coalition for Reform and Democracy (CORD) and M4M movement. It is felt that the current system disenfranchises the marginalized communities that may never be able to assume presidency. CORD has backtracked but M4M is still pursuing it.

Change the administration of Equalization Fund

It was introduced by Hon. Lelelit. It proposes that the Equalization fund be devolved from National government so as to be managed by the Counties identified as needing the funds.

Is it time to amend?

Mr. Otieno stated that it is true that some of the amendments are being pushed more for political reasons rather than for efficiency, others are informed by desire to perpetuate what old Constitution allowed MPs to unilaterally and arbitrarily increase their salaries unfettered. However there are those that are based on genuine concerns e.g. that for increase of allocation by governors arguing that there is need to increase allocation so as to be able to meet devolved functions. Opinion on whether time is ripe for amendments to be done on the Constitution when it is still in its implementation stage.

From State Centered People Centered Security System: Constitutional Perspectives of Security Sector Reforms

Tom Kagwe, Independent Policing Oversight Authority

The presenter started off by looking at two main Articles of the Constitution of Kenya that touch on the security sector of the country i.e. Article 238 states that “national security is the protection against internal and external threats to Kenya’s territorial integrity and sovereignty, its people, their rights, freedoms, property, peace, stability and prosperity and other national

interests [and] shall be pursued in compliance with the law and with the utmost respect for the rule of law, democracy, human rights and fundamental freedoms”. Article 239(1) set out the three organs that constitute the national security organs the Kenya Defense Forces; the National Intelligence Service; and the National Police Service.

He pointed out that with the promulgation of the new Constitution came hope that there will be reforms in the security sector. The Constitution outlined an array of rights that, if respected, would change the way security agencies operate. These include, Freedom of Assembly, Freedom of Association, Academic Freedom, ‘Freedom from Punishment’, ‘Bill of Wrongs by Security Agencies’ etc.

Legislative Framework and Institutions

It was noted that reform in the security sector has been largely based on the reports done by the ‘three Phillips’. Phillip Ransley’s report made recommendations for drastic changes in the legislations affecting the security sector. Phillip Waki, in his report on PEV implicated the police service as one of the key perpetrators of post election violence.

There was a clear lack of respect of Freedom of Assembly, Freedom of Association, Right to Life, Right to Security and Integrity of the Person Right to Political Representation, Freedom of Information / Right to Access Information etc. Stories are rampant of police being accused of Extortion, Bribery, trumped-up charges, misuse of the Courts, torture, Inhuman and degrading Treatment. There is no change of attitude among security agents. KDF has historically been accused of having caused atrocities to the citizenship e.g. Wagalla massacre, SLDF crackdown in Mt. Elgon

He argued that the biggest challenge to reforming the security sector was a problem of different people but with the same philosophy even under a new order. Atrocities have continued even under the new constitution and establishment of IPOA. Corruption, security lapses and gaps still exist in the Kenyan security system and are the ones that expose the country to attacks like the recent Westgate siege.

Another problem arises from misallocation of police officers with many of them being wasted on senior government officers as bodyguards, even when many parts of the country are suffering shortage of police officers. This, coupled with poor service provision at the Kenya police stations and corruption, has made the public to lose trust in the police service.

In his prognosis of the security sector, the presenter stated that three questions should be answered when attempting to effect Security Sector Reforms. These are: reforms to whom? About what? and Which institutions?

National Institutional Frameworks for Accountability

National institutional strategies should be worked out jointly so as to enable sharing of insights on administration of justice. Security institutions should avoid turf wars that are rife among the

different security agencies as this impedes performance. The presenter said that there is need to remove bureaucracy among different security agencies. The Provincial Administration should be scrapped, with positions like county commissioners removed as they lack the necessary legal framework to support the existence.

People within Institutions

The people serving in the various security agencies need a complete change of attitude and culture. Our security personnel are used to coercive force, which has been effectively used by past regimes as tools for controlling the citizens. There has been no change of attitude among security agents – human rights violation, misuse of firearms, no respect of constitution are still rampant. There is need for commitment by security agents to national security as defined in the Constitution. He however acknowledged that The KDF and NPS should be commended for the commitment especially in handling the Somalia invasion and the Westgate attack.

Plenary

During this session, the stakeholders agreed that it is increasingly evident that the country is still living in the old constitutional order and effort needs to be made to redefine our politics in line with constitutional change.

On the issue of transition from hybrid system to presidential system, the stakeholders asked several important questions. They wanted to know the implication of the old system of government to a pure presidential system especially in line with Art. 1 of the constitution; Why there is apathy by general public in engaging in the push for reform; whether there is some level of comfort among the general citizenship such that it has become complacent to the ills in government. It was explained, however, that in a pure presidential system president is not a figure head – he is both head of state (symbolic) and chief executive or head of government. There are two levels of executives elected by the people – president at the national level, and governors at the county level. Indeed, the biggest problem bedeviling the country is that of interests, e.g. parliament acts bipartisan where they are selfishly benefiting and split where it suits them. Amendments are based on selfish interests and not based on principles, practice or objective test of how effective the provisions have been, rather it is what selfish gain the individual or group stands to achieve. It was also agreed that it is true some legislations are sneaked in amendments derogate from the very principles of the constitution. Some laws do not meet the test of the constitution.

It was pointed out that historically, the four big tribes formed majority of the civil society to fight one tribe, making it appear like civil society was very strong. But when political mergers came about, it weakened the civil society as the different ethnic communities were absorbed into govt. since then; it has never been the same. There is need for civil society to re-engineer itself so as to outgrow the ethnic discoloration that it has been characterized with. The public listen more to the political class rather than the purely civil society or religious personalities.

On the issue of amendments to the Constitution, it was agreed that many amendments have been made to the constitution disguised as legislation. The bills are introduced in parliament at 11pm in the night, with no involvement of the public, and no inputs from the AG. It was pointed out that there must be sufficient public crisis to warrant a first amendment, the country is yet to get to that level. The civil society must guard against amending the Constitution too early without sufficient reason. It needs to do more in terms of civic education so as to make the citizens aware of their rights and be able to understand how to utilize the channels for enforcement of their rights.

On reform in the security sector, it was concluded that the country is still rooted in the colonial times where there was no difference between military and police, security agencies being misused by government to oppress the citizens. There must be divorce of the security agencies from office of the president so as to allow the agencies to act independently.

In the police vetting process, section 7 of Police Vetting Act requires removal of officers who fail the vetting process. However the same is being resisted especially by senior police officers who fear the axe might land on them. There is need for political will from top leadership on vetting if reform in this sector is to be realized.

It was also agreed that reforms in security sector means different things to different people and different circumstances. While to police agencies, reforms mean new cloths, housing, vehicles etc, to civil society it is respect of law, rooting out corruption, respect of human rights etc. There is need for all stakeholders to read from same page.

Mr. Kagwe stated that much has been done in the security sector reforms, both at institutional and legislative in the first four months of establishment of IPOA. Examples include the establishment of National Police Service and enactment of the Police Act. He said that many of the things are not done in the public, but done through boardroom diplomacy. Reports documenting all that has been done by IPOA are uploaded on the IPOA website.

On the concern about informal security organs like the 'Nyumba Kumi' initiative, Mr. Kagwe said that IPOA would be issuing a statement. It was concluded that for fruits of the new constitution to be realized, people must be ready to make sacrifices beyond the tribe.

Evaluation of the Constitutional Commissions in Kenya: Experiences, Challenges and Lessons
Prof. Ben Sihanya

The key questions guiding the presentation were identified as: Why haven't the Constitutional Commissions delivered on the constitutional promise of popular sovereignty, liberty, service delivery and constitutional democracy? Why does tribal colonization and tyranny any persist in appointments, tender, contracts service delivery and manipulation and intimidation especially in public service? The paper seeks to review the performance of constitutional commissions, the challenges they have faced so far, the lessons Kenya's can learn and prospects for the future.

The presenter pointed out that sovereignty has three key components: how you make constitution and implement; how you elect your leaders; monitoring and evaluation of government

Admittedly, it was noted that there is no clear typology because some were created more for political expediency. He said proponents of classical or strict limitation of powers proponents of strict separation of powers envisioned a neat typology of three arms of government, i.e. parliament, executive and judiciary. From the 1980s, there has been an argument for a fourth arm of government in Kenya's constitutional framework

Article 248 of the Constitution establishes ten (10) commissions and two (2) independent offices.

The Ethics and Anti Corruption Commission is the only constitutional Commission that is not specifically located in chapter Fifteen of the Constitution. Has its Constitutional basis in Art. 79. Established by the Ethics and Anti-Corruption Commission Act 2011. But it has been argued that the EACC enabling Act is weak and renders EACC toothless. The Commission under section 13 of the EACC Act has the powers to conduct investigations on its own initiative or on a complaint made by any person. Two years after its establishment and restructuring, it still remains inconspicuous in handling serious corruption cases. It has further been argued that the Anti Corruption and Economic Crimes Act (ACECA) were diluted by Parliament in a designed scheme to cushion MPs and their friends interested in vying for political seats. The Act allows those with pending court cases to contest in elective seats. The Commission remains a toothless dog as it can only deal with corruption cases touching on public officers but not state officers. If corruption is to be effectively fought, a lot still needs to be done to empower this commission. This includes review on policy framework. The other commission is the Independent Electoral and Boundaries Commission (IEBC), which it was noted was meant to rectify historical mistakes including irregularities in voter registration, voting and transmission of results. However questions are still being raised no whether the IEBC met this mandate right from procurement of BVR kits to failure of the BVR electronic transmission of election results. After presiding over the 2013 General elections and the evidenced irregularities that ensued, it is difficult to find IEBC an effective, efficient and credible commission worth a second chance. In the Raila Odinga presidential election petition, the IEBC was accused of massive electoral fraud and malpractice that apparently resulted in the technological failure which had a bearing on the electoral results. The commission was also accused of applying double standards in handling the Kethi Kilonzo nomination saga. It was pointed out that if Kenya is to ever have free, fair and transparent elections, the electoral commission in force has to be a thoroughly restructured one.

The Parliamentary Service Commission (PSC) was expected to provide a certain level of checks and balances in parliament. It has however not played a role in limiting powers of the legislature. Instead, it has occasionally protected the interests of the Members of Parliament especially on tax and salary increment advocacies. It has been accused of cushioning the welfare of the Members of Parliament at the expense of the common citizen's rights. Has been said to

have overstepped its mandate by interfering on other commissions and purporting to act as check and balance on them e.g. in its summoning of JSC. The commission is accused of acting more like a welfare association for MPs instead of safeguarding the interests of the public by limiting powers of the legislature. The Commission for the Implementation of the Constitution (CIC)'s key role is to monitor the implementation of the system of devolved government effectively. It has been at the forefront in keeping parliament on toes through media and court. It has however been severally accused for failing to intervene at critical times like in the disputed elections. It has also been accused of wasting too much time in fighting turf wars with the A.G. Kenya National Human Rights and Equality Commission (KNHREC) is established by the Kenya National Commission on Human Rights Act, 2011 and replaces the original KNCHR. In addition, there are two other commissions: National Gender and Equality Commission and the Commission on Administrative Justice Part II of the National Gender and Equality Commission Act 2011. These commissions are very crucial if the Bill of Rights in Chapter 4 of the Constitution is to be promoted and protected to the uttermost. It has however been said that the efficiency of KNHREC and its sister commissions has been affected by control from the government through budget and appointment of commissioners.

Has been argued that the National Lands Commission's operations have been stifled by the under- funding and recent distribution of land title deeds by the president brought the Commissions executive control under sharp focus. It was recommended that there should be on-going civic education since property related information is new in the constitution and the enacted land laws have not been disseminated adequately. The Judicial Service Commission (JSC) is responsible for ensuring that the Judiciary has adequate and motivated staff for efficient service delivery. It is expected to handle all matters relating to human resource management and development. It has been lauded for a number of achievements, including the successful vetting of the judges to the superior courts. However, the recent JSC v Gladys Shollei saga seems to have eroded confidence and trust in the Judiciary. Members of the Judicial Service Commission are also under fire for spending millions of shillings monthly in sitting and travel allowances. The commissioners earn Sh80, 000 per sitting, meaning that a commissioner could easily earn Sh1 million in allowances within a month. The Commission on Revenue Allocation (CRA)'s mandate is to recommend the basis for equitable sharing of revenues raised nationally between the National and the County Governments; and sharing of revenue among the County Governments. It came up with population, poverty levels, county land area, prudential financial management/performance index, and fund equalization index as indicators of revenue allocation. The issue of population, however, has been met with mixed feelings. The Public Service Commission of Kenya (PSCK) is an Independent government Commission established under the Constitution of Kenya to manage human resources in the Kenya Civil Service and the Local Authorities. The Commission has been accused of failing in its mandate of establishment and abolishment of offices in the public service – many have been established unconstitutionally and irregularly.

While the Salaries and Remuneration Commission (SRC) was looked upon as the savior of the labor force in the country – to rationalize the pay of all public employees, it is believed to have

failed in this mandate. The Salaries and Remuneration Commission declared the hefty exit package that MPs had awarded themselves illegal and promised to consider moving to court to block it. Commission chairperson Sarah Serem condemned the move saying it is unconstitutional. She said such payments can only be effected by the Commission. The Teachers Service Commission was established to manage human resource within the education sector. It has however faced many challenges due to rampant teachers' strikes. The TSC requires reforms to be able to perform its mandate fully. It has severally been argued that its formation was more of a political concession for the teachers to support the New Constitution. The National Police Service Commission of Kenya (NPS) was established to ensure smooth functioning of the [National Police Service of Kenya](#). This is the body that was looked upon to bring the much needed reform in the security sector that has for many years been accused of being the most corrupt and one of the worst abusers of human rights. However the presidency seems to be keen to hold on to police powers e.g. have all powers vested in I.G but who is subject to control by SC. The commission therefore lacks the independence to be able to execute its mandate.

From Centralized System to Devolved System of Government: Past, Present and Future Dynamics
Cyprian Nyamwamu

Before the Constitution of Kenya was promulgated in August 2010, Kenya survived a legacy of underdevelopment characterized by misuse of power, systemic marginalization and exclusion of peoples along ethnic lines; skewed distribution, not sharing of resources; none involvement of citizens in governance.

He stated that devolution is a system of decentralization that effectively (through the constitution) locates political and economic power at sub-national levels and that is controlled democratically by the people and not the national/central government. It differs with Local governance or delegation, which is a system of decentralization controlled by the national Government through local representation in national governance and control

The Devolved system of government is characterized by a national government and not a centralized one. There is one National government and 47 devolved governments. Parliament has enacted several enabling laws that have facilitated the establishment of county governments and the transition from centralized to devolved system of government.

The Past Dynamics

The Presenter outlined several past dynamics that have informed the current debate on devolution. He stated that the devolved system is not new in the country as it was there at independence. In 1964 the Kenyatta government successfully pushed for the constitutional amendment to dissolve the senate, the regional assemblies and regional governments.

Many changes were also made to old Constitution of the republic up until 2010 underwent numerous amendments aimed at strengthening the predatory state and entrenching impunity governance.

He also pointed out that the delegated system of the Provincial Administration has been used by successive governments as a tool for institutionalizing exclusion, abuse of power, marginalization, human rights violations and state terrorism. He said that centralized power means unaccountable power and this is the legacy of impunity and corruption that characterized the Kenyan government for many years.

Present Dynamics

It was argued that there has been a chaotic transition to the devolution process. The Transition to Devolved Government Act 2012 is being amended with the intention to dissolve the Transition Authority and facilitative transitional mechanisms to allow devolution on the terms of the National Executive. This, he argued, is likely to undo the gains made towards implementation of the devolution provisions in the Constitution.

There are many problems with human resources, secondment of staff from civil service and transition from local authority to the devolved government. There is also evident lack of institutional capacity at the County Executive and County Assemblies.

The presenter maintains that the Constitution Commissions have not been decisive in supporting the faithful roll out devolution, and this has slowed down the transition process. He called on the Commissions to take interest in defending devolution from interference from the National Government. He also said that there is need to come up with a proper structure for civic education in order to ensure the citizens are enlightened on the processes of a devolved government; the right of the citizens to actively participate in the devolution process; and how they can be involved.

The other important dynamic is the fiscal budgeting at national and devolved levels. The Budgeting process has theoretically shifted public finance Management power to the Legislature at the National and county levels. Public Finance Management Act 2012 provides for this. Unfortunately the architecture retains the executive at the National Level as the main decision maker on financial matters. County Governments have received dismal fractions of the expected revenue and they are so far starting off.

The transfer of functions also remains highly heated and politicized with the aim to retain financial resources at the National Level but transfer functions to the County Governments. Unfortunately the County Governments have also not yet demonstrated ability to deliver services.

The other important issue is the gender, ethnic, conflict and security dynamics in the Second republic. The mechanisms/platforms for public participation are yet to be set up in the country.

While citizens generally have not stepped up their engagement, women are largely structurally excluded from governance and leadership processes both nationally and at the county level. It was also pointed out that the security situation and institutional vulnerability and unwillingness to secure the people and their values continue to challenge the realization of devolution. The main triggers of insecurity at the Counties include organized crime and gang crimes, politically inspired violence, Cattle rustling, banditry, Terrorist attacks. There is need to focus on disarmament, demobilization and disbandment of criminal gangs that are prevalent across the country and reintegration of members to the community- women are best placed to inform these processes. Protecting vulnerable groups is largely lacking because of institutional vulnerabilities of security agencies. There is need for system wide reforms here. In implementing security sector reforms women must be involved to ensure gender representation.

Future Dynamics

According to the presenter, counter-reform is gathering momentum to return effective power back to the center by showing that devolution is inherently a failed system of decentralization and that it will not deliver services or facilitate development. He also pointed out that the reform of the predatory state remains unsuccessful. The forces that will transform the Kenyan state into a democratic and developmental State remain weak and disarticulated. He emphasized that the genuine push for reforms to capture the vision of devolution and democratic consolidation as envisioned at Bomas must be maintained to ensure the dream of devolved power, government functions, resources and development is realized.

Challenges of Peaceful Ethnic Interrelations in a Devolved System: The Case of Macedonia

DR. Heinz Bongartz, FES Macedonia

Dr. Heinz stated that Macedonia has been largely successful in the implementation of the devolved system in a multi-ethnic society. Government of Macedonia was keen on maintaining a unitary system of government, even with devolved units. Macedonia's decentralization represents devolution without affecting division of central governance. The devolved units in the country are called Municipalities.

He pointed out that not all services have been devolved in the country and some of the some devolved competencies still remain limited. For example in education the education system is still regulated and managed at National level.

Municipalities only participate in legislation and policy decision of matters that only affect them. Decision making in national matters is the preserve of the national government. In an effort to try and have a say in the national policy making, Municipalities are organized in Association of municipalities. However the association is registered as an NGO and therefore is not very authoritative in decision making. Municipalities do not have absolute autonomy to make self-determination and they are still controlled by the central government.

Municipalities are free to use their respective languages in addition to official Macedonian language. There is a law that also governs the use of emblems and flying of flags by municipalities.

Plenary

During the plenary discussions, it was agreed that with strict application of accountability requirements, commissions should be able to be revived. But challenges from executive interference and the rogue parliament impede the process. It may call for a revolution to correct some of these historical errors that pose a challenge to proper functioning of the commissions. Sustained pressure through litigation, activism etc should be maintained to ensure they are working.

It was inquired whether the decreasing per capita income is the contributory factor to the signs of failing devolution in the country. A participant also sought to know how well the ministry of devolution had set up a framework to ensure citizen participation in the devolution process. be the reason why Kenyan devolution is failing. Another stakeholder sought to know whether devolution was headed to fail.

In response, it was pointed out that the initial proposal was to make only 14 units, but this was changed by a group of 27 MPs at Naivasha who decided that the 1992 districts would be used as county units to arrive at 47 units. It appears like the arrival at 47 units was more for expedience than genuine fiscal consideration by the decision makers.

said it was argued that going by recent amendments to the Act, the government appears unwilling to facilitate proper implementation of devolution. There has so far been no completion of verification of physical assets of county governments. The government has the ability to facilitate public participation but it lacks the will to establish the framework

On the question as to whether devolution is headed to fail - the challenge is not so much on devolution, but on the Constitution as a whole. There are however those committed to ensuring success of devolution and they should not tire

Media and Constitutional Reforms in Kenya: Quest for Freedom of Expression *Polycarp Ochillo*

Mr. Ochillo from the University of Nairobi's School of Journalism started by pointing out that the paper seeks to re-affirm that the centrality of the press as a 4th Estate has continued to be a critical body in Kenya from colonial time and after independence. The media is used in the dissemination of general information, specific and news. The media is also used as "a tool of the ruling elite" as a device to maintain status quo'. Yet the same media is required to play the surveillance global functions and social control.

But the country has historically faced challenges on the freedom of expression and free press. The paper, he said, looks at press freedom and freedom of expression in Kenya in relation to the roles of the press in the implementation of the Constitution of Kenya, 2010. It also considers how neutral the media is in playing its role as public watchdog, in face of many media houses aligning themselves with the ruling elite and being used as a tool for advancing class interests. The paper starts by giving various conceptual definitions of what is understood by the terms Constitution, Democracy and Media and the theoretical foundations of the press.

Freedom of the media in Kenya is stifled through ownership. Most of the media houses are owned or are affiliated to members of the ruling class, and it is these owners that get to send their Editorial Agenda and control press releases.

Paper also lays down the two theoretical foundations for press freedom. The first one is the Authoritarian Press Theory where the ruling class has absolute control over the ownership of the media. The ruling class controls the content of news to be disseminated by the media. It still exists today in controlled societies, which are also dominated by small ruling classes. Second was the libertarian theory, its roots extends back into the Seventeenth Century, but, only became dominant in the nineteenth century. The media is independent of the ruling class and is self-regulating.

Provisions for Press Freedom in the Constitution of Kenya 2010

He outlined the Constitutional provisions that touch on freedom of press. Article 33 of the Constitution provides for Freedom of Expression. But, in exercising the right to freedom of expression, every person shall respect the rights and reputations of others. Article 34(10) to 4 (a) (c) - outlines the extent to which freedom and independence of electronic, and all other types of media is guaranteed

He pointed out it is important that these freedoms are provided for in the Constitution as then the media is able to cover fully without any fear, diverse issues of citizens concerns, such as promotion of food production, Health, Security Peace and Conflict Resolution

Limitations to freedom of expression

The Constitution at Article 33(2) includes circumstances for limitation of freedom of speech - Propaganda for war, Incitement to violence, Hate speech; or Advocacy of hatred among others. There are also legal limitations arising from Acts of Parliament such as defamation, libel and slander Laws.

Press Censorship under undemocratic states will equally contain the freedom of the Press in carrying out Investigative Journalism. In some circumstances, different countries might pass laws which may ban some Publications or broadcasts outright.

In Africa evidence exists to the extent that Military regimes sometimes put outright ban on information dissemination by agencies other than official press or they may ban a particular publication as exemplified with the current situation in Egypt.

High cost of newsprint, paid for in foreign currency may also affect the levels a Newspaper's productivity. Lack of professionally-trained experts and Journalists is yet another limitation.

In his conclusion, he said that there is need for Kenya as a country to follow the two leading countries in Africa, South Africa and Nigeria, to establish Information and Communications Policy as a basis for entrenching the various roles of the Media based on generated empirical evidence.

Political Parties and Democratic Governance in Kenya

Dr. Fred Jonyo

Dr. Fred Jonyo, in his presentation, underlined the important role played by political parties in democratization. Some of the important roles he mentioned include, Political parties act as unifying factors for the citizens in the country by providing a forum for sharing common beliefs; the parties undertake political recruitment and expose the people to power; the political parties act as institutions of democracy; the parties play a role in socializing individuals in certain norms/mannerisms and expectations for a civilized society; and the parties also play a role in conflict resolution.

Kenya's political parties evolved based on ethnic nationality – to deal with community grievances rather than national values. This was mainly because the Kenyan society is not divided on class basis so as to have people holding differing ideologies along which to create parties. The basic units for people to express their grievances then remain only ethnic groups.

Dr. Jonyo also pointed out that Kenya's political party system has evolved over a long period of time since pre-colonial times up to present. During the fight for democracy, Africans had several political parties, with the two major ones being KANU and KADU. At independence, KANU assumed power and moved to on to introduce a raft of amendments to the law that made Kenya first a de facto one party state and later a de jure one party state.

After a long period of agitation dubbed 'the fight for second liberation' in 1991 the law was amended to allow for the introduction of multi-partism. But in the ensuing elections, the ruling party KANU still went on to win a disputed election. In 1997 some gain was made towards democracy through Inter-Party Parliamentary Group initiative that allowed, among other things, allowed for consultative appointment of officers in the Electoral Commission of Kenya (ECK).

In 2002 opposition parties, learning from the '92 and 97 losses came together to defeat KANU. But Kibaki was to go back on the pre-election agreement leading to acrimony in the NARC government and the Raila-led team to break out and form Orange Democratic Movement (ODM). In 2007, president Kibaki won the presidency through Party of National Unity (PNU) in a disputed election that led to Post Election Violence.

In 2013 coalitions were build but not based on any ideology, common believes or programmes but rather with the view of getting the largest possible numbers to propel them to power. He argued that Political Parties formed along ethnic line instead of ideology creates a sense of 'them and us' which goes against the tenets of democracy.

He also pointed out that personality factor in political parties is still very strong in Kenyan political system with parties revolving around politically influential individuals who determine the direction the party takes. This, he said, has led to a sense of dictatorship and personality worship within parties with aspirants being forced to pledge allegiance to a personality as a guarantee of getting nomination. Many parties therefore lack internal democracy in the nomination process. Internal power struggles within parties, mainly based on the need for individuals bid to control the party, have led to destruction of formidable parties.

He stated that political parties have not performed as would be desired in Kenya. But political parties still remain important vehicles in any democracy

in his recommendations, the presenter outlined several approaches towards the strengthening of political party system in the country. These include establishment of a mechanism to punish errand parties should be put in place; Election commission should prevent parties from being opportunistic, and candidates should be required to be in a party for a particular period before being allowed to run for office on the said parties; Supervision of nominations/elections within parties; Parties should have clear structures, membership policies and programmes; An independent party supervisory body should be established to regulate working of political parties; and Kenya should be a 3-party state and not multiparty state so as to strengthen party democracy

Commentary on the State of Constitutional Implementation since the Promulgation
Prof. Yash Pal Ghai

Prof. Ghai pointed out that it had come out from many presentations made earlier in the conference that implementation of the constitution is facing many challenges from different sources.

He stated that is important to note that upon promulgation of the Constitution on 27th October 2010, there were certain parts of the Constitution that came into effect immediately, for example the bill of rights. However there many other provisions that could only be implemented after the coming into office of a new government. These therefore had to wait until after general elections and establishment of a new government in 2013

The Constitution itself gave deadlines for enacting certain laws which the parliament had to meet. While parliament may have met some or most of the deadlines through timely enactment of the relevant laws, it is also true that parliament only met these requirements in form but not in principle of the Constitution. Some of the laws were made that are not possible to implement,

some have been challenged for being unconstitutional, yet others have been accused of watering down the very Constitution provisions that provided for their enactment.

There is need for reflection on the nature of Constitution and potential of the Constitution to make a difference. There is the presumption that once there is a Constitution that is good, that grants rights to the people, provides for equal sharing of resources, then things will be fine. Nothing can be far from the truth, for unless there is a willingness to remain faithful in the proper implementation of the good Constitution, it will be no better than the paper it is written on!

He said that pre-colonial times, though without any written Constitution, had structures and systems that allowed for sharing of resources and peaceful co-existence among the people of a given community. There was law and order and the respect of unwritten rules. But then came the colonial Constitution which was to become an instrument for oppression and stealing of community and individual property. The Constitution was made to protect the ruling elite and enslave the citizens. Even the celebrated US constitution served the same purpose, as a tool for the ruling class to oppress the poor and the defenseless.

The French took a different approach in Constitution-making, by enacting a Constitution that sought to liberate rather than to enslave the people, contrary to the American constitution. It is because of the liberal approach to Constitution making, going against the ruling class that France went through many years of turmoil as the Constitution was fought by the elite. Perhaps Kenya can draw parallels with the French, because the Kenyan constitution was an effort to radically reform the governance system in Kenya and sought to liberate more than enslave the common man. It is then likely to face a lot of resistance in its implementation especially from the ruling elite as it seeks to empower the citizen and put checks on the leadership.

Colonial Constitution and the subsequent Kenyan independence constitution emphasized so much on coercion through the police and army, something that the ruling class was comfortable with. The security service was considered as a tool for advancement of coercive power by the executive arm of government against its own citizens. This is something that the 2010 Constitution tries to deal with, trying to have security agencies protect rather than coerce citizens.

Prof. Ghai further stated that at independence, it was easier to bring about reform when the Kenyan ruling class was not so entrenched than it is now. But then the founding fathers went on to undo all the important reforms that had been introduced at independence as the ruling class entrenched impunity and disrespect to the rule of law. It explains the resistance to efforts to end impunity restores the rule of law and reform public offices. It is difficult to bring about change in our society that has lost all the values the pre-colonial societies held so dear and replaced with the culture of impunity and greed.

What can be done?

Prof. Ghai outlined a number of things that are imperative if the country is to remain on the path towards implementation of the Constitution. He said that it was a plus that the 2010 constitution came in after one of the most participatory process and got overwhelming endorsement.

He however lamented that complacency has caused the ruling class to regroup and consolidate itself – it is not so much an ethnic issue but rather the issue of class

He pointed out that the civil society needs to renew the fight for freedom. It needs to renew its connection with the ordinary people who have borne the brunt of the bad economic system and governance. The public is aware of what is going on but are less aware of what they can do about it. It is the duty of the civil society to do proper civic education, to make the public understand that the Constitution gives them power to ensure the country remains on the path towards reforming our governance system.

There is need for sustained efforts in pursuing judicial efforts in enforcing certain rights of the citizens. When under CKRC efforts were made to ensure independence of the judiciary, the same judiciary was on the forefront fighting it, with the court issuing an arrest warrant for me, the chair. It was however agreed that reform of the judiciary was a prerequisite

The 2010 constitution did a good job in creating an independent judiciary, but the enabling law sought to weaken it. So far there have been some good appointments and some good judicial decisions. He disagreed with Prof. Sihanya on his statement that he is ashamed of the decisions coming from our courts. Granted, the judiciary is now facing some administrative challenges which might undo the gains so far achieved, but the civil society should remain vigilant and ensure it remains on the reform path. The constitutional process making was quite participatory but the civil society has failed to raise up to the occasion, go to the people and educate them on the constitution, election matters and all. The civil society failed in ensuring that the same people guilty of muzzling reforms are not reelected back to power. Now they are in power and are regrouping to undo the gains of the New Constitution!

The civil society has failed to use the opportunities it has had after enactment of the new Constitution, to reap maximum gains from this very good constitution. There is need for civil society to reengineer itself towards ensuring this.

Plenary

During the plenary session, one participant argued that while it is true that political parties are without ideology, it is very progressive considering the kind of society we are. Kenya being a pre-industrial society, the only basic unit that is common to all is the ethnic unit. The parties are even more of individual based rather than ethnic. Until serious classes emerge, the parties will continue being based on ethnic units, being the only form of organization that the peasants know. However in response, it was warned that the danger with taking that assumption is

allowing ourselves to undertake democracy without democratization. If we choose to be democratic then we should go the whole hog and ensure our institutions are founded on democratic foundations. On the question of what ideological differences would inform the formation of only three parties, it was explained that the idea is to have individuals coalesce around these three parties and have a legal bind to remain with these parties, thereby transcending ethnic differences. The parties will then be forced to come up with ideologies, and through market forces try to add some value to the parties as they strive to attract as many citizens as possible into joining their parties. With stringent laws on party hopping, we should be able to have a strong party system

It was also agreed in the plenary that the ruling class fights to reach the lower class majority as a way of getting themselves to power. The way to reach them is through media, giving reason for the ruling class to want to control the media. The Media is also an enemy to itself; it does not want to support anyone who is fighting to its good. A curriculum overhaul was done and proposed, and has been adopted by countries like Nigeria and S.A. but Kenya is yet to adopt this new progressive curriculum. On the question whether it is possible for civil society groups to come up with a media house that go against the political class, it was said that it is not a bad idea in the de-regularized society for the purpose of pushing the civil society's agenda. The market forces will then decide how such a media house will survive in the market. It will be upon the civil society to remain vigilant so as to avoid being influenced by the government of the day.

It was also explained by Prof. Ghai that one can look at the constitution itself on how the public can participate in its implementation. The civil society can use avenues like holding marches, lobbying, petitioning parliament, going to court. There are many possibilities and people should be told about these avenues through seminars, civic education and all. Simplified versions of the constitution and how it can be applied has been published by Katiba Institute and the civil society groups can request for them to use in educating the public.

Final Conclusions and Recommendations after the Conference

Patrick Onyango, PatConsult

All stakeholders present agreed that Kenya has a good constitution in place. The contestation we have now has been there historically and it is not uncommon for such contestation for so important a Constitution as this one.

Civil society opposed the constitution in 2005 and won; in 2010 they supported and won. In both instances, the civil society connected with the public and made it appreciate their position. This connection should not be lost, as it is the best way to ensure the public appreciates the importance of ensuring the Constitutional implementation process remains on course.

Two schools of thought came out in the constitution referendum – those who said let it pass and we implement it and those who said let it pass and we kill it. The ones who said let it pass and we kill it have regrouped and are fighting its implementation. There is need for the Civil

Society and the public to remain vigilant identify those fighting the Constitution and ensure they do not succeed. There is also need for conceptual clarity on presidential system so as to reorient all the stakeholders under the new Constitution.

There is need to establish if political parties are sending people to implement the constitution through a democratic process. There is no way reform minded individuals will get into offices of influence if there are not reforms in the political parties in line with the Constitution.

We need to look at technical, institutional, ideological and political approaches to implementation of the constitution. There is also need to be vigilant so that the constitution is not fraudulently amended through unconstitutional legislations being championed by some members of parliament who are keen to sneak back retrogressive laws. There is need to profile those supporting and those opposing the implementation of the constitution and why. Those opposing should not be given a chance to succeed in their ways, while those supporting should be supported and encouraged.

There is need to look at our security agencies and how they can be reformed. The security service should be reformed by socializing the coercive power that has been entrenched in our security organs since the colonial times.

The whole question of citizen participation and how the civil society can effectively involve as many members of the public as possible in the Constitutional implementation process needs to be reviewed. Civic Education through different media that will ensure as many citizens as possible are reached should be considered. The media should play a role in the reform process by being encouraged to disseminate timely, accurate and objective information to the public, provide a reliable platform for civic education and play a role in keeping the government in check.

It is imperative that we look at our political party laws, and the media laws for purposes of democratizing them so as not to fall captive of the political class. Need to look at media ownership or affiliation with certain political leaders vis a vis chapter six of the Constitution on Leadership and Integrity. Can the media house be disallowed from tendering to provide government services due to conflict of interest, when it is established that they are owned by senior government officers?

It is important that the reforms being implemented in the judiciary are sustained. Research should be carried out in the judiciary by an independent researcher to assess the progression of reforms in the judiciary and make recommendations on the critical areas that need to be relooked to ensure this critical institution remains on the reform path. This is especially so with the recent administrative challenges the Judiciary has been facing.

The question of the place of tribalism in the implementation of the constitution – there is need to reconstruct tribalism as an aspect of ethnicity and consider its place in the implementation of the Constitution. Ethnicity should not be looked at as an impediment to the proper reform of

our governance system and implementation of the Constitution. Rather it should be used positively to effect change.