

**THE POSITION OF THE KENYAN SECTION OF THE INTERNATIONAL
COMMISSION OF JURISTS ON THE PROPOSED CONSTITUTION OF
KENYA AND THE REFERENDUM**

For over 15 years now, Kenyans have been agitating for a new constitutional dispensation. This was out of a realization that we as a people needed to define our existence as a nation and craft a structure of government that would unify and serve us for posterity.

In seeking to develop a way forward towards the achievement of the above ideals, ICJ Kenya organized a workshop with representation from members of parliament, civil society, government agencies and the academia to interrogate the issues in the month of June 2005. Five options on the way forward emerged.

First was to proceed with the process, as it is currently pursuant to the Constitutional Review Amendment Act. This option presents pitfalls that have to be addressed.

Secondly was to abandon the entire process and start afresh. This would begin with the amendment of section 47 of the current constitution and the disbandment of the CKRC as currently constituted. All materials developed towards the review would inform the new process, including the Bomas Draft.

Third was to abandon the entire process until an opportune time. The thinking behind this option was that the constitutional moment has passed and needs to be recreated.

The fourth option would be to abandon the current process as it is and revert to the post-Bomas but pre-Njoya decision, and repeal the CKRC Amendment Act. The Attorney General would then submit to parliament the Bomas draft. Flaws in the draft would then be amended as provided for in the draft.

The fifth option identified was the possibility of constituting a technical committee to examine the Bomas Draft to address the juristic issues and editorial shortcomings. The committee would not interfere with the substantive provisions of the draft.

In recent times, the Attorney General has published the proposed New Constitution of Kenya. The publication of this draft has created much acrimony and divisions in many sectors of the society. The Electoral Commission of Kenya has developed rules for a referendum to be held on Monday, 21st November 2005, while the Constitution of Kenya Review Commission reports its readiness to commence civic education nationally in within the next two weeks. Notably, this has not been without differences of opinion even within those bodies.

The stage is set for potentially acrimonious disagreements between the protagonists for a 'YES' vote and those of the 'NO' vote.

ICJ Kenya considers this an unfortunate development. It is regrettable that constitution making in Kenya has descended to a simplistic level of just voting yes or no on a document that could easily form the basis for a new constitutional dispensation. Such a simplistic reduction of the issues coupled with extreme politicization of the process has set the stage for polarization of the Kenyan populace. A wall seems to have been created and is now being fortified separating the two opposing camps. This wall cuts through families, communities, political parties and religious bodies among others. It has degenerated into “us” versus “them”. One would have expected that a process of self-examination and self-definition would be uniting for Kenyans and not polarizing.

Content of the Draft

The Wako Draft contains many progressive provisions and many that are not contentious by any standard. On the other hand, it contains some provisions that are very contentious and divisive. The challenge in this phase of constitution making is to isolate and safeguard the many non-contentious issues while subjecting the contentious issues to further discussions and referendum.

Unfortunately, there is a law that requires a new constitution by 12th December 2005. While the constitutionality of this process has been questioned and even challenged by several cases that are still pending in court, time is running fast towards the referendum in November.

ICJ Kenya recommends that the referendum be deferred as proper rules are developed to accord Kenyans real choices and forestall the possibility of Kenyans rejecting the full draft or accepting it with retrogressive provisions.

The Referendum

The ICJ Kenya recognizes the centrality of a referendum to allow Kenyans determine the kind of constitution they want. We however take issue with the mode and manner in which this proposed referendum has been conceptualized. This conceptualization has a real potential of throwing out the many progressive provisions in the draft. It does not put to test the core issues of contention in the public arena. It offers no real choices for Kenyans. It inevitably leads to the fact that as long as a person is unhappy with any provision in the draft, he/she must reject the whole draft.

In our opinion, it would have been more prudent to isolate the contentious issues and only subject those to a referendum where people vote several times on each of the contentious issues.

The current formulation of the referendum is simplistic, divisive and deceptive.

Civic Education

Civic education is supposed to start in the next few days. The atmosphere however seems too poisoned for objective civic education to be conducted. The CKRC is already divided, with accusations of adversarial positions already taken by commissioners. Besides, the paucity of copies of the Draft Constitution, coupled with the unrealistic timeframe for civic education (14 weeks), in our view, marched with the number and capacity of civic education providers available, jointly present a situation where Kenyans will go to vote without knowing what they are voting for!

The code of conduct for civic education and the guidelines for the referendum should be enforced stringently. Unfortunately, neither the CKRC nor the Electoral Commission of Kenya has the capacity to enforce the code and guidelines against contravention. In fact, politicians and other groups have already hit the campaign trail and taken positions, some of which are either ill-informed or outright falsehoods! The implication of this is that objective civic education will not be possible as different interest groups seek to drum support for adoption or rejection of the entire draft.

The ICJ Kenya calls upon all actors in this process to go back to the drawing board and through a process of dialogue develop a system of enacting a new constitution. We firmly believe that it is not too late to amend the Constitution of Kenya Review Act to defer the referendum and accord dialogue a chance. This amendment should also extend the time available for civic education.

Unless the process of review as is currently conceptualized is arrested, it is certain that Kenyans will not get the kind of constitution they were yearning for. The time and resources appropriated for the process will have gone to waste.

We implore the President, Parliament and the political leadership to pause, rethink and re-assess the process in order to give Kenyans a real possibility of having the type of constitution they have yearned for for years. If our advice is not heeded, we shall, sadly, advise Kenyans to reject the draft and continue the demand for the constitution we want.

SIGNED:

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Dated 7th September 2005