Melizsa Mugyenyi, August 2012

KENYA'S CONSTITUTIONAL MOMENT

Designing a New Constitutional Order Post 2007- 8 Election Crisis

African Union	AU
Attorney General	AG
Constituency Constitutional Forum	CCF
Constitution of Kenya Review Act	CKR Act
Constitution of Kenya Review Act, 2008	CKR Act, 2008
Constitution of Kenya Review Commission	CKRC
Constitution of Kenya (Amendment) Act, 2008	Amendment Act, 2008
Committee of Experts on Constitutional Review	CoE
Civil Society Organisation	CSO
Election of Commission	ECK
European Union	EU
Interim Independent Boundaries Commission	IIBC
Interim Independent Constitutional Dispute Resolution Court	IICDRC
Interim Independent Electoral Commission	IIEC
Internally Displaced Person	IDP
Kenyans for Truth with Peace and Justice	KTPJ
Kenya National Commission on Human Rights	KNCHR
Kenya African National Union	KANU
Members of Parliament	MPs
Memorandum of Understanding	MoU
National Assembly	NA
National Accord and Reconciliation Act .	National Accord
National Constitutional Conference	NCC
National Rainbow Alliance Coalition	NARC
National Security Intelligence Service	NSIS
Orange Democratic Movement	ODM
Panel of Eminent Personalities	PoEP
Party of National Unity	PNU
Parliamentary Select Committee for Constitutional Review	PSC

Introduction

> *"Perhaps a constitution is best made during a historical moment when one order dies and another is born, preferably through violence, conflict, or a deeply embedded social dysfunction." (Professor Makau Mutua, 2008)*[1]

On August 4th 2010, Kenyans participated in a national referendum, voting overwhelmingly in favour of a new constitution. The event marked the end of Kenya's protracted quest for constitution reform. The over twenty year struggle has been symbolic of the normative aspirations of the people of Kenya. It has defined the agenda of civil society, determined political allegiances, financially burdened the state and cost the lives of thousands.

This paper is an analysis of the 2008 – 2010 constitution making process. Specifically, it is a study of the revolutionary legal framework governing the review. The Constitution of Kenya Review Act, 2008 (CKR Act, 2008) and Constitution of Kenya (Amendment) Act, No. 10 of 2008 (Amendment Act, 2008) are critically examined with a view to identifying the particular mechanisms which safeguarded the review process from undue political interference. The study is based on the premise that the failure of previous reform efforts can be attributed to the inability of the political elite[2] to reach consensus on the reorganisation of state power. It argues that the 2007/8 election crisis served as the trigger for the ruling elite to implement radical reform – without which, the review process would not have succeeded.

1. A History of Failed Constitution Making (1991 – 2001)

> *"There is always a connection between the process and the outcome."*[3] *(Yash Pal Ghai, Former Chair of the Constitution of Kenya Review Commission, 2007).*

Kenya gained independence from the British Colonial Government on December 12th 1963. Its independence Constitution was negotiated at Lancaster House, London between members of the

[1] Mutua, Makau., 'Kenya's Quest for Democracy- Taming the Leviathan,' (USA, Colorado, Lynne Rienner Publishers, 2008), Page 142.

[2] The terms 'elite' and 'political elite' shall be used interchangeably to describe individuals who hold a prominent position in Kenya's political sphere.

[3] Cottrell, Jill., Ghai, Yash., 'Constitution Making and Democratization in Kenya (2000-2005),' in *Democratization*, Volume 14, Issue 1, (February, 2007) Page 19.

Kenyan elite and the outgoing colonial government. Scholars are divided as to its merits, with some applauding the Constitution's promotion of democracy and human rights[4] and critics noting its lack of contextual authenticity.[5] Between 1964 and 1969, Kenya's first President and leader of the then ruling Kenya African National Union (KANU) party, Mzee Jomo Kenyatta sought to centralise state power, through a series of constitutional amendments. Of note, the Constitution of Kenya (Amendment) Act, No. 28 of 1964 repealed powers of regional governments and abolished the Office of Prime Minister.[6] Subsequent amendments followed, all with the purpose of destroying or preventing the emergence of "resilient, accountable, and transparent institutions of the state."[7]

Kenyatta's successor, Daniel Arap Moi (also of KANU), inherited this constitutional order in 1978 and continued its dismantling in the face of growing political opposition. The biggest blow to democracy came in July 1991, when President Moi amended the Constitution to ban all political opposition. However, following domestic and international pressure, the move was reversed in December of that same year. The action allowed for the nation's first wave of political liberalisation ahead of the 1992 general elections.[8] Despite these developments, President Moi's firm grip over the state apparatus meant that he able to "employ state machinery to disorganize, persecute, and manipulate the elections."[9]

Kenya's reform movement began in the late 1980s, taking "the form of constitutional reform because the country's problems were seen to arise from bad and oppressive governance, and lack of respect for the separation of powers and the rule of law."[10] The movement - composed of civil society and political opposition members - drafted a proposal for a Model Constitution in late 1994.[11] Fearing the initiative as a bid to remove him from power, President Moi decided to take control of the process, agreed to meet with the leaders of the reform movement and commence a

[4] Ibid, Page 2 – 3.
[5] *See Chapter 4 in Mutua, Makau., 'Kenya's Quest for Democracy- Taming the Leviathan'. Mutua notes the paradoxical purpose of the Lancaster Constitution as "meant to preserve the colonial order and at the same time give legitimacy to the emergent African ruling elite. In this process, akin to delivering a baby while choking it at the same time, a sever deformation occurred. The colonial state survived, but it morphed into a postcolonial variant, only too ready to continue tormenting its subject" (Page 60).*
[6] The Constitution of Kenya (Amendment) Act, No. 28 of 1964.
[7] Mutua, Makau., 'Kenya's Quest for Democracy- Taming the Leviathan', Page 62.
[8] Mutua, Makau., 'Kenya's Quest for Democracy- Taming the Leviathan', Page 68.
[9] Ibid, Page 69.
[10] Cottrell, Jill., Ghai, Yash., 'Constitution Making and Democratization in Kenya (2000-2005),' Page 3.
It is worth noting that the motivation for some of the members of the constitution movement was purely political, as a means to oust the KANU regime from power.
[11] The Report of the Committee of Eminent Persons,' 30th May 2006, (Available to download from www.constitutionnet.org), Page 12.

joint review.[12] Following intense negotiations between opposition members of the movement and the KANU regime, Kenya's first legal framework to review the Constitution was designed (The Constitution of Kenya Review Act - CKR Act). The process officially commenced in May, 2001[13] and a CKRC Draft Constitution (Ghai Draft)[14] was to be considered in 2002. However, the process was halted due to President Moi's strategic decision to dissolve parliament prematurely on 25th October, ahead of the 2002 general elections.[15]

Opposition leaders led by Mwai Kibaki, galvanised under the National Rainbow Alliance Coalition (NARC) party banner and were successful in toppling the KANU regime in 2002. Upon resumption of power President Kibaki promised his political and public supporters that Kenya's constitution review process would be completed within 100 days. The self – imposed deadline was not adhered to, and by the time the process restarted in April 2003, the NARC coalition was fractured. This, combined with the legal framework for review inherited from President Moi, made the review process a highly politicised affair.

2. Focus on the Flawed Review Design, Post 2002

To develop an appreciation of the significance of the 2007 - 8 post election crisis in ushering in Kenya's new constitutional era, a look at the earlier failed review process under President Kibaki is helpful. The core organs through which the previous review was conducted were the Constitution of Kenya Review Commission (CKRC), National Constitutional Conference (NCC), Constituency Constitutional Forum (CCF), National Assembly (NA), Parliamentary Select Committee for Constitutional Review (PSC) and the Kenyan people through a referendum. Established under Section 6 of the CKR Act, the functions of the CKRC were to carry out civic education of the review exercise, gather views from the Kenyan public to inform the content of the draft and develop the draft constitution (Section 17)[16]. To facilitate its work, the Commission established CCF's in the various electoral constituencies.[17] Once the Commission developed a draft would it was to be deliberated and adopted at the National Constitutional Conference (NCC).[18] The NCC-adopted draft would then be tabled before the NA for debate and further amendments and finally forwarded to

[12] Cottrell, Jill., Ghai, Yash., 'Constitution Making and Democratization in Kenya (2000-2005),' Page 4.
[13] Ibid, Table 1, Page 8.
[14] Named after the CKRC Chair, Yash Pal Ghai.
[15] Mutua, Makau., 'Kenya's Quest for Democracy- Taming the Leviathan' Page 135.
[16] Section 17, Constitution of Kenya Review Act, 1999 (Available to download from The Official Law Reports of Kenya Website, www.kenyalaw.org).
[17] Ibid, Section 20.
[18] Ibid, Section 27.

the Attorney General (AG) for publishing.[19] The PSC was to assist the NA throughout by providing an oversight function for the Commission and serving in an advisory role to the NA.[20]

The Constitution of Kenya Review Commission: The appointment procedure for the Chair, Commissioners and Secretary of the CKRC was widely viewed as 'state' biased.[21] Sections 9 (1) and 11 (1) of the CKR Act allowed the President to directly appoint the Commission's Chair and Secretary respectively. In addition, the minimum required criteria for Commissioners was "at least five years … [professional]… experience in matters relating to law"[22] or "knowledge of and experience in public affairs"[23]. It is not surprising then
that Commissioners with "mediocre and unremarkable careers"[24] were appointed to the CKRC. Displeased by the apparent lack of political independence of the Commission, a parallel civil review process emerged, led by members of civil society. The 2006 Report of Eminent Persons noted that:

> *"The Ufungamano Initiative appointed a People's Commission of Kenya...The existence of the Commission and the Ufungamano Initiative side by side was obvious evidence of a serious fracture in the political landscape. The Commission was perceived as an instrument of the ruling political party and the Ufungamano Initiative as that of those in opposition to it."*[25]

Although a merger was later negotiated which absorbed the Ufungamano Initiative into the CKRC, the core organ of the review exercise was already severely fragmented.

The Parliamentary Select Committee for Constitutional Review: The function of the PSC was to behave as the institutional linkage between the CKRC and NA.[26] In addition, the PSC was empowered to propose amendments to the CKR Act that would change the powers of the CKRC or terms of its Commissioners.[27] As such, the position of its Chair was politically coveted. The 2004 appointment of Member of Parliament William Ruto, widely viewed as anti – reformist, was confirmation of the organ's complete lack of political neutrality. As Makau Mutua remarks:

[19] Ibid.
[20] Ibid.
[21] Mutua, Makau., 'Kenya's Quest for Democracy- Taming the Leviathan,' Page 125.
[22] Section 8 (1) (a). Constitution of Kenya Review Act.
[23] Ibid, Section 8 (1) (b).
[24] Mutua, Makau., 'Kenya's Quest for Democracy- Taming the Leviathan,' Page129.
[25] 'The Report of the Committee of Eminent Persons,' Page 20.
[26] Section 10,Constitution of Kenya Review Act.
[27] Mutua, Makau., 'Kenya's Quest for Democracy- Taming the Leviathan,' Page 126

> *"It was inconceivable that such a vapid partisan....could be a successful arbiter....It was remarkable that an opponent of democracy would shepherd Parliament through constitution making."*[28]

The PSC became the ideal apparatus for the incumbent President to distort the work of the CKRC.

The National Constitutional Conference: The NCC was intended to add an element of popular participation to the review process. Specifically, it was mandated to discuss, debate, amend and adopt the CKRC Draft Constitution.[29] The national forum was meant to be representative of the views of Kenyans and as such was composed of 629 delegates, including all CKRC commissioners and members of the NA, 126 civil society delegates, 41 political party representatives and 210 district delegates.[30] In reality, the composition of the NCC contradicted the 'people- driven' slogan of the review process by deceptively concentrating decision-making authority in the Kenyan elite. Indeed, "one third of the delegates – [Members of Parliament], MPs- were predetermined by virtue of their membership in the National Assembly, as were the members of the CKRC."[31] The vast majority of district delegates meanwhile had close links with MPs.[32] Further, the sheer size, composition and powers of the NCC created a platform that was not conducive for constructive debate and consensus building. As observed by Morris Odhiambo, the effect was the pursuit of individual self interest:

> *"Throughout the NCC sittings... stakeholders from political parties continually shifted their positions on specific issues. These shifts depended on whether or not the issue at hand had the potential to advance particular group interests."*[33]

The NCC sittings (Bomas I, II and III)[34] became a forum for political contestation, corrupted by "boycotts, irrelevant grandstanding ... [and] outright bribery of NCC delegates."[35] In March 2004, during Bomas III, tensions between delegates reached a climax when a group of ministers and

[28] Ibid, Page 222.
[29] Section 27 (1) (a), Constitution of Kenya Review Act.
[30] Section 27 (2), Constitution of Kenya Review Act. *See also, 'National Constitutional Conference: Information Handbook for Delegates (2003):2.*
[31] Mutua, Makau., 'Kenya's Quest for Democracy- Taming the Leviathan,' Page 153.
[32] Ibid.
[33] Odhiambho, Morris., 'Constitutionalism under a "Reformist" Regime in Kenya: One Step Forwrad, two Steps Backwards?', (Available to Download from Kituo Cha Katiba – Eastern Africa Centre for Constitutional Development, Official webpage, http://www.kituochakatiba.co.ug/Constm%20KEN%202004.pdf).
[34] Named after the location of the sittings.
[35] Cottrell, Jill., Ghai, Yash., 'Constitution Making and Democratization in Kenya (2000-2005),' Page 15.

delegates walked out of the conference led by then Vice president Moody Awori.[36] Subsequently, the now amended CKRC Draft, known as the 'Bomas Draft' was adopted by the remaining NCC delegates.

Refusal to constitutionally entrench the review process: Besides the weaknesses of the CKR Act, the review process was not entrenched in the constitution, thus exposing it to subversion by the ruling elite. During the Ufungamano and CKRC merger negotiations, entrenchment of the review process was rejected by government ministers who feared that such a move would demote parliament "into a rubberstamp for an uncontrollable CKRC."[37] Lack of entrenchment later haunted the review process when a number of legal challenges emerged questioning its constitutionality and procedure. The most significant of these was the case of *Timothy Njoya and others – v – the Hon. Attorney General & others,*[38] where "the High Court ruled that the people of Kenya had the exclusive power to replace their constitution. Parliament could not exercise that power on behalf of the people... The Court ... made a referendum on the product of the National Constitutional Conference mandatory."[39] Subsequently, the initial roadmap for review was derailed, and referendum campaigns became the latest platform for politicking.

By now, the Bomas Draft had developed into the pro – government Proposed New Constitution of Kenya, 2005 (popularly known as the 'Wako Draft' after the then Attorney General) "Campaigns signified a government divided against itself"[40] and its contents were no longer the primary consideration for voting Kenyans. Instead, the action of voting became a declaration of allegiance to either the opposition leaders or incumbent President. In January 2006 the 'Wako Draft' was defeated by a vote of 57% to 42%[41] and the CKRC's work came to an official end. Post referendum and Kenya's political landscape was transformed once again. The NARC Coalition collapsed and President Kibaki established the Party of National Unity (PNU) as a vehicle for clinching a second term in Government. Meanwhile, Raila Odinga developed himself into the leader of the opposition under the Orange Democratic Movement (ODM).

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[36] Odhiambho, Morris., 'Constitutionalism under a "Reformist" Regime in Kenya: One Step Forwrad, two Steps Backwards?'.
[37] East African Standard, (April 13, 2001), *(Subscription Archives).*
[38] Timothy Njoya and others – v – the Hon. Attorney General & others, Miscellaneous Civil Application No, 82 of 2004.
See also, Njuguna Michael Kung'u. Gacuru wa Karenge & CKRC, High Court Misc.
[39] *See* Odhiambho, Morris., 'Constitutionalism under a "Reformist" Regime in Kenya: One Step Forwrad, two Steps Backwards?'.
[40] Mutua, Makau., 'Kenya's Quest for Democracy- Taming the Leviathan,' Page 229.
[41] 'Referendum Results: How the Provinces Voted," Daily Nation, November 24th, 2005, *(Archives)*.

3. Designing a New Constitutional Order

2007/8 Post Election Crisis - Negotiating a New Order: In late December 2007 Kenyans took to the polls in a general election. As results from PNU strong-hold constituencies were announced, pitting Kibaki ahead of Odinga, allegations of electoral malpractice emerged.[42] "Despite the protestations of the ODM ... that irregularities in the results had not been sufficiently investigated, the chair of the [Electoral Commission of Kenya] ECK ... declared Kibaki the winner with 4,584,721 votes to Odinga's 4,352,993"[43]. President Kibaki was hastily sworn in by the Chief Justice that same day.[44] The outbreak of violence was immediate, occurring along ethnic lines.[45] Subsequent investigations into the election violence revealed that members of the political elite played a central role in its organisation.[46]

With the opposing camps unwilling to negotiate a peace agreement, external actors stepped in to mediate. The then Chairperson of the African Union (AU) and Ghanaian President John Kufour played a mediating role in the first round of negotiations between supporters of the President and the opposition.. The opposition proposed an independent investigation into the elections, and subsequent re-run of the elections, which the incumbent rejected.[47] Though unsuccessful in reaching a resolution, the adversaries agreed to engage in further talks headed by a Panel of Eminent African Personalities[48] and chaired by Former United Nations Secretary General, Koffi Annan.[49] On February

[42] Cheeseman, Nic., 'The Kenyan Elections of 2007: An Introduction', *in Journal of Eastern African Studies,* Vol. 2, Issue. 2,(2008), Page 176

[43] Ibid. *Former ECK Chair Samuel Kivuitu was aware of the explosive impacts of election results even before tallying was completed. "I will need an Army barrack to announce the elections." December, 28th, 2007 in, The Nation Newspaper, Special Report, Page 17, 29th December 2009.*

[44] *Note that investigations into election rigging later concluded that it was impossible to determine the legitimate winner of the elections, owing to rigging on both sides (ODM, PNU). See the Report of the Independent Review Commission on the General Elections Held in Kenya on 27 December 2007 (Krieglar Report), (Available to download from The Kenya National Dialogue Webpage www.dialoguekenya.org) for more information.*

[45] Branch, Daniel., Cheeseman, Nic., 'Democratization, Sequencing, and State Failure in Africa: Lessons from Kenya', *in African Affairs,* Volume 108, Issue 430,(December, 2008), Page. 2.
The violence largely occured between the Kikuyu and Luo tribes (Kibaki and Odinga's tribes respectively).

[46] *For more information, see 'On the Brink of the Precipice: A Human Rights Account of Kenya's Post 2007-Election Violence, Final Report, 15th August 2008', by the Kenya National Commission on Human Rights, (Available to download from the KNCHR official webpage, www.knchr.org) and, Report of the Commission of Enquiry into post Election Violence, 15th October 2008 ('Waki Report'), (Available to download from The Kenya National Dialogue Webpage www.dialoguekenya.org).*

[47] 'Kenya Crisis talks end in failure', The British Broadcasting Corporation Official Webpage, 10th January 2008 (Accessed 27th August, 2010), http://news.bbc.co.uk/1/hi/world/africa/7181184.stm .

[48] Other members of the Panel included: Former Tanzanian President, H.E Benjamin W Mkapa and Dame Graça Machel-Mandela

[49] 'Kenya Crisis talks end in failure', The British Broadcasting Corporation Official Webpage.

1st 2008, PNU and ODM agreed on an Agenda for dialogue.[50] By then, 1133 people had been killed and 3651 seriously injured.[51]

- *Agenda Item One* of the agreed Agenda dealt with "immediate action to stop violence and restore fundamental rights and liberties".[52]
- *Agenda Item Two* aimed to identify and agree on "immediate measures to address the humanitarian crisis, promote reconciliation, healing and restoration".[53]
- The objective of *Agenda Item Three* was to "overcome the current political crisis".[54]
- *Agenda Item Four* addressed with the resolution of 'long-term issues'. Specifically, dialogue was focussed on constitutional, institutional and legal reform; land reform; poverty, inequity and regional imbalances; youth unemployment; consolidation of national cohesion and unity and; transparency, accountability and impunity in governance.

It is under Agenda Item Three where the National Accord and Reconciliation Act, 2008 (hereafter referred to as the 'National Accord') was negotiated and agreed to on 28th February 2008.[55] The National Accord provided for the "formation of a Coalition Government and Establishment of the Offices of Prime Minister, Deputy Prime Ministers and Ministers of the government of Kenya."[56] Raila Odinga was elected as Prime Minister to lead government alongside President Mwai Kibaki. The Coalition was a temporary one, "designed to create an environment conducive to [compromise] and to build mutual trust and confidence."[57]

While Agenda Items One - Three tackled the recovery of the nation post-conflict, Agenda Item Four confronted the "deep-seated and long standing divisions within Kenyan society, which, if left unaddressed, threatened the very existence of Kenya as a unified country."[58] Of all identified 'long – term issues' constitutional and institutional reform emerged as the most critical. With reference to the latter issue, there was agreement among the public that politicised and inefficient state

[50] 'On the Resolution of the Political Crisis- Annotated Agenda and Timetable' Pages 1-2, (Available to download from The Kenya National Dialogue Webpage www.dialoguekenya.org).
[51] Report of the Commission of Enquiry into post Election Violence, 15th October 2008 ('Waki Report'), Pages 245-246.
[52] Ibid, Page 1
[53] 'On the Resolution of the Political Crisis- Annotated Agenda and Timetable' Page 1.
[54] Ibid, Page 2
[55] National Accord and Reconciliation Act, 2008, ACT NO. 4 of 2008 - National Accord, (Available from the Official Law Reports for the Republic of Kenya webpage, www.Kenyalaw.org).
[56] Ibid, Preamble.
[57] 'Acting Together for Kenya - Agreement on the Principles of the Partnership of the Coalition Government,' Page 1,(Available to download from The Kenya National Dialogue Webpage www.dialoguekenya.org).
[58] Ibid.

institutions contributed significantly to triggering and intensifying the crisis. In particular: the ECK engaged in electoral malpractice;[59] security and administrative committed crimes against humanity by using excessive force[60] and failing to behave with ethnic impartiality;[61] the Judiciary could not offer an objective forum to end the political standoff, and;[62] the National Security Intelligence Service (NSIS) was unsuccessful in its planning and security coordination.[63]

4. The Post-Crisis Legal Framework for Constitution Reform

> *"The legal framework can be described as being the work of genius intent on ending the twenty year elusive search for the constitution."[64] (Ekuru Aukot, Director of the Committee of Experts on Constitutional Review, 2010).*

Throughout the course of 2008, negotiations aimed at determining the procedure for constitution review took place, concluding with the enactment of the Constitution of Kenya (Amendment) Act, 2008 and Constitution of Kenya Review Act, 2008.

4.1 The Constitution of Kenya (Amendment) Act, 2008

Entrenching the Review Process in the Constitution of Kenya (Repealed) Act: The Constitution of Kenya (Amendment) Act, 2008[65] (Amendment Act, 2008) entrenched the review process into the Constitution of Kenya by providing for the replacement of the constitution.[66] Given Kenya's history of stalled review efforts, entrenchment safeguarded against "premature termination of the review process by the ruling party or Government."[67] Critically, the Act outlined the procedure for review, vesting "the sovereign right ... [of replacement with] ... the people of Kenya through a

[59] Report of the Independent Review Commission on the General Elections Held in Kenya on 27 December 2007 (Krieglar Report), 'Executive Summary,' IX, (Available to download from The Kenya National Dialogue Webpage www.dialoguekenya.org).
[60] 'On the Brink of the Precipice: A Human Rights Account of Kenya's Post 2007-Election Violence, Final Report, 15th August 2008', by the Kenya National Commission on Human Rights, P. 4, (Available to download from the KNCHR official webpage, www.knchr.org).
[61] Ibid, P.4
[62] Of note, while there existed constitutional provisions to resolve electoral disputes, no party was willing to take their case to the Courts, particularly the ODM. The Judiciary was viewed as state appointed and biased. Indeed just a few months prior to the elections, President Kibaki unilaterally appointed a number of Judges.
[63] Waki Report, Executive Summary - IX
[64] Aukot, Ekuru., Private Correspondence between Dr. Aukot and Author (August 2010).
[65] The Constitution of Kenya (Amendment) Act, No. 10 of 2008
[66] Section 47A (1), Constitution of Kenya (Repealed) Act.
[67] 'The Report of the Committee of Eminent Persons,' Page 67.

referendum."[68]

Institutional Safeguards to Protect the Review Process: The Amendment Act, 2008 established institutional safeguards, including an Interim Independent Constitutional Dispute Resolution Court (IICDRC). The IICDRC had "exclusive original jurisdiction to hear and determine all and only matters arising from the constitutional review process."[69] Crucially, the creation of the Court "removed the constitution-making process from the ordinary court that was the subject of reform."[70] Considering the dominant public perception of the judiciary as corrupt, inefficient and highly politicised, such a move was necessary to legitimise the review process.[71] Functionally, the IICDRC would prevent delays in the review process caused by litigants challenging the constitutionality or procedure for the review process before regular Courts.

The Amendment Act also established the Interim Independent Electoral Commission (IIEC) which replaced the discredited Electoral Commission of Kenya.[72] Of note, the provided for a transparent appointment procedure for its Commissioners and Chairperson.[73] The purpose of creating the IIEC was to ensure that public confidence in the national elections oversight body was renewed, ahead of a referendum on a new constitution. Finally, an Interim Independent Boundaries Review Commission (IIBRC) was established.[74] Its function was to make "recommendations to Parliament on the delimitation of constituencies [,] local authority electoral units and the optimal number of constituencies on the basis of equality of votes."[75]

4.2 The Constitution of Kenya Review Act, 2008

Enacted on 22nd December 2008, the Constitution of Kenya Review Act established four core organs of review. Namely: the Committee of Experts on Constitutional Review (CoE), a Parliamentary Select Committee for Constitutional Review (PSC), the National Assembly (NA) and the citizens of Kenya through a referendum.[76] The procedure for review began with the CoE which was tasked with

[68] Section 47A (2) (a), Constitution of Kenya (Repealed) Act.
[69] Section 60A (1), Constitution of Kenya (Repealed) Act.
[70] Aukot, Ekuru., Private Correspondence between Dr. Aukot and Author (August 2010).
[71] *See Mutua, Makau., 'Justice Under Siege: The Rule of Law and Judicial Subservience in Kenya,' in Human Righst Quarterly, 23 (2001) and Report of the Integrity and Anti-Corruption Committee of the Judiciary of Kenya ('The Ringera Report'), (September, 2003).*
[72] Section 41A (1), The Constitution of Kenya (Repealed) Act.
[73] *Ibid, See Section 41A.*
[74] Section 41B (1), The Constitution of Kenya (Repealed) Act.
[75] Ibid, Section 41C (a).
[76] Section 5, The Constitution of Kenya Review Act, 2008, No. 92 (Acts No. 9).

drafting the constitution. In performing this duty its members were to consult with various stakeholders, including a Reference Group of thirty members selected by key interest groups and members of the public.[77] Upon receipt of the CoE draft, the PSC would deliberate its contents and engage in "consensus building on [identified] ... contentious issues."[78] Taking into account any recommendations from the PSC, the CoE would then revise their draft for tabling before the NA.[79] After debate and approval, the NA would forward it to the Attorney General for publication.[80] Finally, a referendum would be held to determine adoption of the draft constitution.[81]

*The Committee of Experts on Constitutional Review (CoE)***:** In contrast to the bloated CKRC, the number of CoE Commissioners was considerably less. The Review Act, 2008 provided for the establishment of nine persons, of whom:

> *"(a) three shall be non-citizens of Kenya nominated by the National Assembly from a list of five names submitted to the Parliamentary Select Committee by the Panel of Eminent African Personalities, in consultation with the National Dialogue and Reconciliation Committee; and (b) six shall be citizens of Kenya nominated by the National Assembly...."*[82]

Such a compact team would presumably be more efficient in drafting the constitution since the possibility of diverging views would be limited to nine individuals. By virtue of the non-citizen Commissioners being nominated by the Panel of Eminent Personalities (PoEP) some symbolic ownership of the review exercise was awarded to the post crisis peace process. In contrast to the previous CKR Act, which required that Commissioner possess "at least five years experience in matters relating to law"[83] or "knowledge of and experience in public affairs,"[84] the CKR Act, 2008 outlined a more rigorous set of criteria for appointment. For instance, proven knowledge of and experience in "comparative law [or] systems and structure of democratic governments [or] land and land law [or] mediation and consensus building"[85] was a minimum requirement for appointment as Commissioner. In addition, where CKRC Commissioners had been shortlisted and nominated solely

[77] Ibid, Sections 31 (1) and 32.
[78] Ibid, Section 32 (c).
[79] Ibid, Section 33.
[80] Ibid.
[81] Ibid, Section 5.
[82] Section 8 (4) (a) and (b), Ibid.
[83] Section 8 (1) (a), Constitution of Kenya Act.
[84] Ibid, Section 8 (1, b).
[85] Section 10 (a) (b) (e) (j), The Constitution of Kenya Review Act, 2008.

by the NA, CoE members were recommended to the NA for nomination by the PSC. In short-listing candidates for consideration, the PSC was mandated to consult "a reputable human resource firm."[86] The NA would then nominate six candidates following perusal of the ranked candidates, and finally the President would appoint all nine chosen Commissioners. This procedure allowed for quality assurance and efficiency, since the short listing process had external technical input and the PSC (a team of 27 Members of Parliament) were responsible for the bulk of the selection process. By empowering the PSC in this way and limiting the role of the NA to only reviewing a short list of candidates, potential politicisation was limited. The outcome was the selection of a body with varied and proven credentials.[87]

Unlike its predecessor, the CoE was empowered under Section 11 (1) of the CKR Act, 2008, to elect its own Chairperson and Deputy Chairperson from within its members.[88] Under the previous legal framework, the appointment of the Chairperson was an executive decision and as such, a source of tension within the CKRC and political elite. Allowing the CoE to elect its own Chairperson was therefore significant in promoting consensus among its members. In addition, Section 11 (1) asserted the CoE's independence from the Executive. The independence of the CoE was explicitly affirmed under Sections 16 and 25 (1) of the CKR Act, 2008 respectively:

> *"In the performance of its functions ... the Committee of Experts shall not be subject to the control of any person or authority."*[89]

> *[On the procedure of the Committee of Experts] .... "the Committee of Experts shall regulate its own procedure."*[90]

Constitution 'Completion' in favour of Constitution 'Making': The post-crisis setting was one of urgent reform. As such, the function of the CoE was to facilitate the *completion* of Kenya's protracted and stalled constitution review. Besides, there already existed "a rich base of resource

[86] Bids from 13 human resource firms were considered – 'PSC names Experts on Law Review', in Nation Newspaper Online, 22nd January 2009, (Accessed 30th August 2010), http://www.nation.co.ke/News/-/1056/518064/-/u1cdhx/-/index.html .

[87] *Chairperson, Nzamba Kitonga SC; Vice Chairperson Atsango Chesoni; Professor Christina Murray; Dr. Chaloka Beyani; Professor Frederick E Ssempembwa; Bobby Munga Mkangi; Hon. Njoki S Ndung'u; Otiende Amollo; Abdirashid Abdullahi. Ex Official Members- Hon. Amos Wako EGH, Director, Dr. Ekuru Aukot.*

[88] Section 11 (1), The Constitution of Kenya Review Act, 2008

[89] Ibid, Section 16.

[90] Ibid, Section 25 (1).

materials developed out of previous review processes,"[91] including three draft constitutions[92] and Section 29 mandated the CoE to draw upon these reference materials.[93] The aim was to identify those "issues [that were] contentious or not agreed upon in the existing draft constitutions."[94] Thereafter, public views on the resolution of these issues would be gathered in preparation of a harmonised draft constitution.[95] This methodology was intended to build elite *and public* consensus by targeting those clauses most likely to be divisive from the outset.[96] Such an approach was in stark contrast to previous efforts, whereby identification of contentious issues at later stages of the review process only allowed a responsive style of conflict management.

The urgency for constitution 'completion' demanded strict adherence to statutory timeframes, of which the CoE was committed. As remarked by CoE Director, Ekuru Aukot:

> *"The law provided timelines that had to be followed lest the delay was to be occasioned. These deadlines were also supplemented ... by a committed Committee of Experts who wanted to do their work and go. We adopted business unusual and remained faithful to the legislation."*[97]

In adopting 'business unusual' the CoE demanded clarification regarding its statutory timeframe.[98] Under Section 28 (1), the Committee was mandated to complete its work "within a period of twelve months of the commencement of [the CKR Act, 2008]." However, CoE members were sworn into office three months *after* the commencement date of 22nd December 2008, resulting in an instant loss of three months of work *ab initio*.[99] At the request of the CoE, parliament later amended Section 28 (1) in the Statute Laws (Miscellaneous Amendments) Act (2009).[100] The amendment clarified that the twelve months statutory timeframe was to commence upon appointment of the organ's

[91] *See also, Section 29 The Constitution of Kenya Review Act, 2008.*
[92] *CKRC Draft of 2002, National Constitutional Conference ('Bomas') Draft and the Proposed New Constitution ('Wako' Draft).*
[93] Section 29, The Constitution of Kenya Review Act, 2008.
[94] Ibid, Section 23 (b).
[95] Ibid, Section 23.
[96] Three issues emerged as contentious, namely: systems of government, devolution and transitional clauses. *For more information, see The Preliminary Report of the Committee of Experts on Constitutional Review, Issued on the Publication of the Harmonized Draft Constitution., (17th November, 2009), Page 19.*
[97] Aukot, Ekuru., Private Correspondence between Dr. Aukot and Author (August 2010).
[98] The Preliminary Report of the Committee of Experts on Constitutional Review, Page 16.
[99] Ibid.
[100] Statute Laws (Miscellaneous Amendments) Act (2009)

members.[101] Such initiative from the members of the CoE was critical in ensuring statutory compliance of all review organs.

Avoiding the Perils of 'Over-Representation': As discussed earlier, under the previous CKR Act, a national forum was establishment with the function of discussing, debating, amending and adopting the CKRC draft Constitution.[102] The forum's politically bias composition and bloated size discredited the notion of 'popular participation' instead becaming a platform for political contestation. Given the decision-making authority awarded to the forum, it is not surprising then when much of the breakdown of the review process was played out during forum sittings. The CKR Act, 2008, did not provide for any national forum.

Instead, the CoE sought stakeholder representation and opinion through: written memoranda from the public;[103] provincial and regional hearings; consultations with a thirty member reference group;[104] caucuses and; interest groups.[105] The CoE then "held thematic consultations which sought expert opinion and resolutions"[106] on gathered views. These consultations were along the themes of the identified contentious issues.[107] In this way, the CoE was able to *manage and control* the consultative process. In addition, separation of interest group consultations was conducive to consensus building *within* those groups. The CoE further limited public debate to contentious issues through its civic education outreach programme. For instance, a collaboration between the CoE and popular interactive political TV talk show – Agenda Kenya - [108] saw CoE Experts participate in a series of programmes, which highlighted considerations related to contentious issues. The benefits of a non-forum approach meant that the aforementioned perils of 'over-representation' were avoided. Instead, a carefully structured engagement with members of the public and interest groups ensured a level of popular participation conducive to the review process.

Proposal of a New Constitution – Limiting Potential for Elite Take Over: Past experiences on constitution reform showed that the PSC and NA were potentially the most politicised organs of review due to the composition of their members, who were members of the political elite. In the absence of clear legal mechanisms to delimit the parameters of the organs' roles, and strict

[101] Ibid.
[102] Section 27 (1) (a) Constitution of Kenya Review Act.
[103] Section 23 (C), The Constitution of Kenya Review Act, 2008.
[104] Ibid, Section 31 (1).
[105] Ibid, Section 23 (d).
[106] The Preliminary Report of the Committee of Experts on Constitutional Review, Page 21.
[107] Ibid.
[108] Agenda Kenya, produced by Media Development in Africa.

adherence to the law, a political take-over was likely. This was the case in 2005 when the PSC proposed extensive amendments to the Bomas Draft, going as far as creating an entirely new one (Wako Draft), later adopted by the NA.[109] To safeguard against such overextension of authority, the CKR Act, 2008 left little room for interpretation by carefully demarcating the functional boundaries of the NA and PSC.

The Parliamentary Select Committee for Constitutional Review: The role of the PSC was strictly to build elite consensus on contentious issues which constrained its contributions to the draft constitution. For instance, while the organ was empowered to submit recommendations on contentious and non contentious issues to the CoE for revision, the CoE was not obliged to consider any recommendations concerning *non-contentious* issues. Subsequently, a number of PSC proposed non-contentious recommendations, such as an amendment to allow Parliament to vet all judicial appointments, were rejected by the CoE. [110] This limitation on the contributions of the PSC, combined with the CoE's strict adherence to the law, meant that the PSC was prevented from over extending its authority – as shown in the below account by Ekur Aukot:

> *"I recall an incident in which the PSC had brokered some agreements but had stepped outside the confines of the law, and in a meeting between [the CoE] and them ... were not able to justify their decisions ... we ruled them out and reverted back to the letter and spirit of the law."*[111]

But it was not the PSC alone that needed reminding of its role in the review process. In a separate instance PNU party members, aggrieved by the CoE's proposal for a hybrid executive, demanded the CoE review again relevant memoranda from the public and alter the draft accordingly.[112] CoE Chairman, Nzamba Kitonga refused to be absorbed into the political sideshow and advised PNU party members to direct all such concerns to the PSC as the CoE was not mandated to build elite consensus on contentious issues.

The National Assembly: Under Section 4 (a) of the CKR Act, 2008 the National Assembly was charged with debating and approving "the draft Constitution without amendment and

[109] *See 'The Report of the Committee of Eminent Persons,' Pages 33-36*
[110] *See Section 151 of the PSC Revised Harmonized Draft Constitution and Section 166 of the Constitution of Kenya Act.*
[111] Aukot, Ekuru., Private Correspondence between Dr. Aukot and Author (August 2010).
[112] 'PNU Disowns Revised Draft – PNU Rejects Hybrid System, Claims Team Doctored Kenyans' Views' The Standard Newspaper, January 14th 2010, Page 6.

> submit it to the Attorney General for publication."[113] On 1st April 2010, in a historic sitting, Parliament debated and passed the draft constitution without a single amendment.[114] Of note, a 65% majority vote from the NA was required to pass a proposed amendment to the draft constitution. Over 150 amendments were put forward but in each instance, the 65% margin was not reached.

In the event that the draft constitution had *not* passed, the CKR Act, 2008 outlined a procedure for overcoming the impasse. The NA would submit its proposed amendments to the CoE "for consultation and redrafting."[115] Having considered these amendments, the CoE would submit a revised draft to the NA.[116] If the NA failed to approve the revised document a second time, a meeting would be convened between the PSC, CoE and Reference Group -upon invitation by the CoE-[117] and thereafter the CoE would produce a final third draft.[118] Critically, the NA could only veto the draft constitution twice, after which, it must approve the final third draft. The entire process would take place over a maximum twenty eight day period, and as such did not appeal to the political elite as an effective 'delaying' strategy.[119]

5. Theoretical Analysis

> *"Good citizens of Kenya ... If you have ever gone hunting, you know that you only get one clean shot at the animal ... If you blink – even for a split second – the animal is gone. Don't blink on August 4." (Professor Makau Mutua, July 31st, 2010)*[120]

On August 4th, Kenyans participated in a referendum to determine the adoption of the draft constitution. A majority 6,092,593 66.9 (sixty seven per cent of total votes) voted in favour of the new constitution.[121]

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[113] Section 33 (4) (a) CKR Act, 2008.
[114] 'Kenya Passes Draft Law Without Amendments,' The Daily Nation Official Website, April 1st 2010 (Accessed 4th September, 2010), http://www.nation.co.ke/News/politics/Kenya%20Parliament%20passes%20new%20law/-/1064/891336/-/n6nauw/-/index.html .
[115] Section 33 (4) (b), Constitution of Kenya Review Act, 2008.
[116] Ibid, Section 33 (5).
[117] Ibid, Sections (6) and (7).
[118] Ibid, Sections (9) and (10).
[119] Ibid, *See Section 33 (4 -9).*
[120] Mutua, Makau., An Open Letter to the Kenyan People, The Daily Nation Online, July 31st, 2010 (Accessed 31st July 2010), http://www.nation.co.ke/oped/Opinion/An%20open%20letter%20to%20the%20Kenyan%20nation%20/-/440808/968224/-/15mvv33/-/

Unpacking Kenya's Post-Crisis Constitutional Moment: The term 'constitutional moment' implies a process that is "temporally compressed rather than extended."[122] It suggests the existence of a window of opportunity, invoking a sense of urgency lest this window closes. Determining the duration of this opening is not a scientific process, rather, it can be ascertained through a case by case country analysis. For instance, the CoE identified Kenya's window for change as closing in mid 2010, on the basis that after this point the political elite would "be in an electioneering mood which [would] not be conducive to the constitutional review process."[123] Perhaps then, the clearest barometer for gauging the 'constitutional moment window' is by observing the behaviour of the elite, and in particular their ability to reach and maintain consensus.

Taking 'elite consensus' as the critical factor in our analysis, Kenya's constitutional moment commenced with the signing of the National Accord and establishment of a Grand Coalition Government. From February 2008 to the present day, numerous reforms have been enacted by this Coalition. The level of elite consensus among Coalition members at any one time can be measured against a demonstrable commitment to implement agreed reforms. The significance of the CKR Act, 2008 and Constitution of Kenya (Amendment) Act, 2008 is that they froze in time, the early commitments of the Grand Coalition. The Acts bound the elite to a safeguarded review process, forcing the constitutional moment window to remain open long enough for the Constitution of Kenya to be replaced.

Elite Consensus through Shared Vulnerability:

> *"We are privileged to be ... Members of this Parliament ... I believe that out of this crisis, we have found a new spirit of unity. It will take unity and working together to complete the constitutional review process that stalled because of partisan reasons. Indeed, it is a big challenge but equally ... in every crisis, there is an opportunity." (Mr. Eugene Ludovic Wamalwa addressing the National Assembly on March 18th 2008)*[124]

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[121] Final Kenyan referendum result, Reuters Website, 6th August, 2010, (Accessed 14th September, 2010) http://www.alertnet.org/thenews/newsdesk/LDE6751DA.htm .

[122] Tushnet, Mark., 'Potentially Misleading Metaphors in Comparative Constitutionalism: Moments and Enthusiam', Page 7.

[123] The Preliminary Report of the Committee of Experts on Constitutional Review, Page 29.

[124] Official National Assembly Hansards, Wednesday, 12th March, 2008, (Available to download from Kenya Parliament Website, www.bunge.go.ke), Page 81.

The CKR Bill, 2008 and Constitution of Kenya (Amendment) Bill 2008 were negotiated by the National Accord and Reconciliation Committee and debated in Parliament. The levels of elite consensus during that period was high, and a number of mechanisms intended to safeguard the review process from undue political interference were actually proposed and passed by Members of Parliament. These included:

- Framing the review process in terms of *completing* Kenya's protracted struggle for a new constitution,[125] *(Section 29, CKR Act, 2008)*
- Creating a Reference Group to ensure *representation of Kenyans* and limit political over-representation,[126] *(Section 31, CKR Act, 2008).*
- Establishing an Interim Independent Constitutional Dispute Resolution *Court* to deal exclusively with issues arising from the review process, *(Section 60 A, Constitution of Kenya (Repealed) Act).*

It is remarkable that the biggest agitators of the election crisis were seen to be *implementing* reform post-crisis. The paper attributes this to two factors, elite vulnerability post crisis and a 'veil of ignorance' surrounding the nation's future political configuration.

The Fear of Becoming a Failed State **:** Kenya's political crisis threatened to advance into a state of emergency following the disputed elections. Indeed, a combination of pre-election campaigns characterised by hate speech along ethnic lines, inefficient and politicised state institutions, state-sponsored violence and political standoff between PNU and ODM pushed Kenya to the brink of collapse. As well as the losses of human life and displacement of hundreds of thousands, the nation experienced a severe decline in domestic business activity and regional trade, its tourism industry was devastated and its international reputation tarnished. Makau Mutua observes the impact of these developments on the psyche of the political elite:

> *"They were really afraid that Kenya would cease to exist and become a Somalia. That fear pushed them to realize that long delayed reforms had to be undertaken ... None of them wanted to end up as refugees of a failed state a la Somalia."*[127]

[125] Ibid, Page 3242.
[126] Ibid.
[127] Mutua, Makau., Private Correspondence between Proffesor Makau and Author (June-August, 2010).

The notion of becoming a failed state invoked fear in the elite who were *equally* vulnerable, since state collapse would include a breakdown of constitutional order. Without such order, the arenas in which they partook in state affairs and negotiated their interests would no longer exist. In addition, the events of 2007/8 had hardened Kenyans disillusionment in the ability of the political elite to govern with integrity. The elite recognised the need to legitimise themselves, particularly since the Grand Coalition was not a democratically constituted government. In order to regain popular confidence, the elite needed to demonstrate real commitment to a transparent and depoliticised review process.

Domestic and International Pressure for Constitutional Reform: The role of civil society was crucial in exerting pressure on ODM and PNU adversaries to reach a peace agreement in early 2008, and pushing for constitutional review. Particularly influential was the Kenyans for Peace with Truth and Justice (KPTJ)[128], a broad based coalition of civil society organisations (CSOs), led by the Kenya National Commission for Human Rights (KNCHR). KPTJ helped in garnering foreign intervention to resolve the crisis[129] and shaping the events as rooted in the zero sum game of Kenyan politics and culture of impunity.[130] The antagonistic behaviour of the political elite was framed as the result of chronic institutional weaknesses.[131] Critically, the elite were painted as *collectively responsible* for exploiting this system for purposes of self interest.[132] By avoiding individual blame – placing, responsibility for implementing reform fell squarely on the political elite as a whole. Following the signing of the National Accord, the KPTJ evolved into a monitoring body, observing the early implementation of the Coalition's Agenda Item Agreements.

International pressure for reform came from member states of the African Union, the European Union, and the United States of America.[133] Where Kenya was previously viewed by the international community as the economic hub of East Africa, on track to attaining solid status as a democratic

[128] *See Africa Centre for Open Governance Official Website for further information (Secretariat), www.africog.org .*
[129] *For instance, former Chairperson for the KNCHR, Maina Kiai addressed the US Congress on the 6th, February 2008 calling for an American intervention to resolve the crisis.*
[130] *See, Kiai, Maina, 'The Political Crisis in Kenya: A Call for Justice and Peaceful Resolution' (Hearing before the Sub Committee on Africa and Global Health of the Committee of Foreign Affairs House of Representatives, One Hundred Tenth Congress – Second Session), February 6, 2008 ,Serial No. 110-211, Printed for the use of the Committee on Foreign Affairs.*
[131] Ibid.
[132] Ibid.
[133] *See Ranneberger, Michael (US Ambassador), 'The Reform Agenda and Kenya's Historic Opportunity', Speech to the Law Society of Kenya, October 30, 2009 (Available to download from the Embassy of the US, Nairobi, Kenya http://nairobi.usembassy.gov/speeches_2009/sp_10302009.html)*

state and a useful geopolitical ally, there was real fear that without radical reform, the country would descend into crisis once again.[134] Indeed:

> *"Kenya was humiliated like it had never been before -- it was viewed as just another failed African state. The elites felt very diminished by these international perceptions of them."*[135]

The Creation of a 'Veil of Ignorance': Although the National Accord 'unified' the incumbent and opposition, in reality, the PNU - ODM divide was evident in everyday politics. Yet, by virtue of PNU and ODM ruling side by side, the future balance of powers was not certain. This was particularly true, since President Kibaki's term was constitutionally coming to an end in 2012. The impact of this 'veil of ignorance' meant that the risk of self-dealing during the review process was minimised as individual parties were not certain of how they would directly benefit from a new constitution.[136] Alicia Banon rightly identifies the 2002 NARC Memorandum of Understanding (MoU) as a critical factor in encouraging self-dealing in earlier review efforts. The MoU promised the establishment of the position of Prime Minister for Raila Odinga to rule alongside coalition leader Mwai Kibaki. When Kibaki reneged on the MoU shortly after election into office, political contestation turned to the review process, where "the establishment of the Prime Minister position was debated explicitly in the context of support for or opposition to Odinga, rather than on its merits."[137]

In contrast, where the balance of future political powers is not certain, actors tend to favour "an institutional framework involving strong checks and balances, including protection for minorities"[138], since there is a possibility that they may be a part of the minority. Elite uncertainty was strongest during the immediate aftermath of the crisis, *before coalition alliances had solidified and succession politics dominated.* This was the optimal time for negotiating the legal framework for the review process.

6. Conclusion

[134] Ranneberger, Michael (US Ambassador), The Standard Newspaper, January 1st, 2010, Page 6.
[135] Mutua, Makau., Private Correspondence between Proffesor Makau and Author (June-August, 2010).
[136] Banon, Alicia., 'Designing a Constitution- Drafting Process, Kenya' in *The Yale Journal,* Volume 116, Issue 8 (2007), Page 1851.
[137] Ibid, Pages 1851-1852.
[138] Arato, Andrew., 'Forms of Constitution-Making and Theories of Democracy', in *Cardoso Law Review,* Volume 17, Issue 2 (1995), Page 228.

> *"The Grand Coalition Government has provided the required leadership for delivering the New Constitution. We are ready and fully committed to providing continued leadership in the implementation of this Constitution."(President Mwai Kibaki, 27th August, 2010).*[139]

This paper examined the legal framework governing the post 2007 review effort, arguing that the election crisis created the necessary urgency for the political elite to prioritise constitutional reform. The crisis "brought into sharp relief the reasons for the near collapse of the state"[140] uniting the elite in the stabilisation and reform of the state. Critically, the elite banked on this initial consensus to design a review process safeguarded from their own interference. At every stage of the process, mechanisms were put in place to ensure that input from the elite was focussed and limited. The effectiveness of this model left the referendum as the only opportunity for the elite to influence the outcome of the review. Referendum campaigning was fierce but despite this, Kenyans voted overwhelming in favour for a new constitution.

The experience of Kenya demands further inquiry to explore broader impacts for theories of constitution making on the continent. In addition, the proven capability of the non - democratically elected elite to implement constitutional reform necessitates an interrogation of relevant democratisation theory.

Since the promulgation of the Constitution of Kenya, 2010 considerable progress in implementation has been made. Under the 5th Schedule, 49 items of legislation must be enacted by August 2015 to ensure compliance with the new constitution. In addition, a further estimated 700 laws, policies and regulations will require separate review. With key political figures facing criminal charges relating to the post election violence before the International Criminal Court and general election planned for March 2013, the current political climate is not conducive for reform. Attention now turns to the ability of the political elite to implement the new constitution.

[139] Speech by President Mwai Kibaki, On the Occasion of the Promulgation of the New Constitution, (27th August, 2010).
[140] Mutua, Makau., Private Correspondence between Proffesor Makau and Author (June-August, 2010).

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