

PNU has proposed a hybrid system and this difference is not only threatening the process but will inevitably have an impact on the constitutional referendum. It is a well established practice that during the referendum people vote for the parties positions rather than the substance of the document.

The constitution making process in Kenya falls short of the normative standards of constitution making especially in so far as the element of inclusiveness is concerned. The same applies to civic education. There is no need to include the people who do not understand the contents and purpose of the constitution. Although constitution making process are often expensive and costly, this should not be a reason not to engage in civic education. Cheap and effective means of public awareness should be devised.

Generally, the constitution making process in Kenya is happening at a right time when the Kenyan nation needs to rebuild its society after the post election violence. Constitution making processes are political processes and can not be easily detached from the normal governance of the country and those in power. Political will remains a necessity in order to have a constitution in Kenya before the 2012 election. Unless the major political parties broke a deal and agree to a common mission, the existing political climate and suspicion among the coalition partners as well as the 12 months deadline for the committee of experts might only mean that the likelihood of adopting a constitution that will be rejected by the population through a referendum.

5.2. Recommendations

There is no uniform method of constitution making in the world but there are some basic standards that most constitution making states should fulfill in order to have a constitution that enjoys legitimacy among the people. This calls for a people driven process and the Kenyan constitution making process forms no exception to this principle.

The Kenyan constitution making process needs to put into consideration the following factors if Kenya is to have a constitution before the 2012 elections.

- The consultation phase should be revisited again to include not only the target groups but all the marginalized members of the society who may include those who have never owned land and the internally displace people in Kenya.
- The consultation phase should include women and youth from both rural and urban areas. The Bomas Constitution making process was criticized for not having a fair

representation of women where the urban Nairobi based women were proportionally more than the others. The number should be determined according to population as per region.

- The public should be given more time to decide on what the contentious issue should be and this should not only be the work of a few individuals and the politicians. Critics have argued that the failure to extensively include the people has led the committee of experts to leave out important issues' like land and the Islamic *khadi* courts. However sensitive these issues are, failure to subject them to debate is just postponing a conflict to later stage.
- The Committee of Experts ought to act impartially and avoid partisan politics. The previous constitution making process have not only been named after their chairpersons but also it is evident that the drafters would be linked to party politics.²⁵⁰ The wrangles between the commissioners affect the credibility of the process and the outcome.
- The parliament and the political parties should not hijack the process from the people. It is evident that after the consultation and drafting, the parliamentary select committee would need to take the issue to parliament for approval. The Kenyan coalition government's parliament is fragile with a lot of political animosity between the major parties of ODM and PNU. In case, the political parties do not reach a compromise on the devolution of power, parliamentary politics will take over the prior contributions of the few and target groups that were consulted by the committee of experts.
- There is need to educate the public and an extensive campaign about the constitutional making process and the contents especially the bill of rights. The people should be informed and educated before they go for the constitutional referendum. It has been a practice that during the referendum, the politicians who are not satisfied with the process and their personal interests sabotage the process by campaigning against the draft constitution. It has been argued that though the Bomas Constitution was highly accredited to have been inclusive, the majority who voted for and against it did not know the contents of the Constitution.²⁵¹

²⁵⁰ See Wako Commission, Ghai Commission etc.

²⁵¹ Kindiki (n 3 above) 4.

The presence of efficient and functioning institutions is an important factor in the democratic governance and the rule of law. Institutions that are credible and impartial render the process and outcome enjoy legality among the people. The people are the primary beneficiaries of the constitution. The Kenyan people should be involved meaningfully in the constitution making process in order to address the fear and concerns of the people. The causes and impacts of the recent 2007 post election violence should inform the coalition government that an accountable, all inclusive and people driven process is the pillar to the foundation of democracy and good governance in Kenya. The South African experience indicates that even when the political parties have differences, a constitution can be managed and negotiated through tolerance and accommodating each other.²⁵²



Word count: 16,935 words.

²⁵² B de Villiers & J Sindane (eds) *Managing constitutional change* (1996) 336.

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