

**REPORT OF THE PROCEEDINGS OF THE GENDER
FORUM HELD AT THE NAIROBI SAFARI CLUB (LILIAN
TOWERS), NAIROBI ON 25TH JUNE 2009
FROM 4.00 – 600PM**

***“THE CONSTITUTIONAL REVIEW PROCESS:
OPPORTUNITIES AND CHALLENGES FOR WOMEN”***

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LIST OF ABBREVIATIONS

HBF	- Heinrich Boll Foundation (East & Horn of Africa)
CKRC	- Constitution of Kenya Review Commission
CBO	- Community-Based Organization
COE	- Committee of Experts
FIDA – Kenya	- Federation of Women Lawyers – Kenya
KLRC	- Kenya Law Reform Commission
NGO	- Non-Governmental Organization
PSC	- Parliamentary Select Committee

LIST OF STATUTES

Constitution of Kenya Review Act, 2008

EXECUTIVE SUMMARY

Constitutional reform in Kenya has been a major issue since Kenya gained its independence. There is broad consensus within and outside Kenya that the country needs constitutional reforms in order to strengthen local government and rectify regional resource imbalances.

The journey to achieving a new constitutional dispensation has been long and winding. The 1990's saw an increased push by the Opposition as well as the civil society for reforms. This resulted in the repealing of Section 2A of the Constitution, thereby making Kenya a multi-party state and introducing term limits to the Presidency. In 2000, following pressure from Kenyans and the international community, President Moi set up the Constitution of Kenya Review Commission to spearhead the constitutional reforms. This was the first major step towards constitutional reform.

Emotions flared up once more following the disputed 2007 Presidential Elections, which saw the eruption of violence following the disputed results. This prompted the reopening of the debate and negotiations on constitutional reforms. In March 2008, National Reconciliation Accord Act was enacted, introducing a temporary change to the constitution by the creation of the post of Prime Minister and two Deputy Prime Ministers. In 2009, Parliament has prioritized constitution reform through Agenda No. 4 and deliberations on how this reform will be tackled began in April, during the second session of the 10th Parliament.

It is against this backdrop that the Heinrich Boll Foundation held an insightful and highly-charged June forum based on the discussions and developments revolving around constitutional reforms in Kenya. The attendance alone, which was pegged at over 150 participants and one of the larger crowds witnessed by the Forum, was an indication of just how strongly Kenyans feel about this issue. Insightful and well-delivered presentations by the panelists sought to inform the Forum on the historical background as well as current developments on the subject, whilst highlighting, most importantly, the role of women in the reform process.

INTRODUCTION

Following a successful series of fora in 2008 focussing on the various emerging issues revolving around the 2007 disputed presidential elections, Heinrich Boll Foundation began the year with a focus on the Reform Agenda in order to build on the dialogue and interventions that began last year.

In line with its agenda to engage in discourse on the broader issues of the Kenya Reform Agenda, Heinrich Boll Foundation (HBF)'s theme for the June Forum was tailored to bring together panelists and participants to interact and discuss issues relating to the constitutional reform in Kenya. The participation by two panelists who have played a pivotal role constitutional reforms in Kenya, served to enrich the Forum with a historical and practical perspective to the process, highlighting the following thematic issues, *inter alia*:

- A discussion on the composition, role, tasks and key outputs of the Committee of Experts.
- The opportunities and challenges of the COE in fulfilling its mandate
- A brief introduction to the preparation, organization, interventions and gains of women during the previous constitutional processes.
- A brief reflection on the contentious issues
- Proposals for novel strategic interventions for women's engagement in the process
- A call to arms for women – the need for sustained action

Welcome Remarks

Welcoming the panelists and the participants to the Forum, Ms. Wanjiku Wakogi¹ introduced the topic of the Forum. Noting that this year, the Gender Forum is engaged in building on the broader issues of the Kenyan Reform Agenda, Ms. Wakogi highlighted the focus of previous fora, which were centered around gender specific legislative reforms. The next series of fora will focus on aspects of institutional reforms, beginning with reforms in the rule of law sector, electoral reform, public financial management reform, public sector reform and constitutional reform.

Ms. Wakogi introduced the panelists, namely Dr. Ekuru Aukot², Director, Committee of Experts on Constitution Review and Prof. Wanjiku Kabira of the University of Nairobi and welcomed the participants to what was expected to be a highly-charged discussion on constitutional reforms.

¹ Gender Forum Co-ordinator, Heinrich Boll Foundation

² Advocate of the High Court of Kenya, Former Executive Director of Kituo cha Sheria.

PRESENTATIONS

THE ROLE AND MANDATE OF THE COMMITTEE OF EXPERTS

- DR. EKURU AUKOT

Dr. Aukot's presentation was based on an extract borrowed on some current research work based on the title *"The Constitution is Not a Shopping List – Struggling with Realities/ Anticipating Challenges of Constitution-Building in Kenya"*. He noted that the objective of his presentation was to address the involvement of women and women groups in the constitutional reforms.

He began his presentation with a reflection on the actual or legal reality of constitution-making in Kenya today. Recalling an article in one of the local dailies by Mutahi Ngunyi titled *'Are We Going to Samara?'*, Dr. Aukot analogized the constitution-making process with the Biblical journey to Samara.

In the first part of his presentation, Dr. Aukot highlighted the differences between the current constitution-making process and all other processes and attempts that had been undertaken in the past. The Fourth Schedule to the Act includes women groups as part of the reference group. Although the legislation is yet to be enacted, it is expected that this will provide an opportunity for women to influence and engage in the review process. These groups would be able to give guidance and act as watchdogs to ensure that women's issues have been tackled adequately. Some of the groups proposed include Maendeleo ya Wanawake, FIDA Kenya and National Council of Women of Kenya.

An important question that must be answered is whether in Kenya today, we have a constitutional moment or an opportunity to make a constitution? It is noteworthy that when writing a constitution in a relatively peaceful country, many interests considered and taken on board as opposed to making a constitution during a period of crisis.

The fact that Kenya needs a new constitution cannot be over-emphasized. It is with this thought in mind that the Committee of Experts was established under the Constitution of Kenya Review Act, 2008. Dr. Aukot clarified that the COE was not replicating the work of the Constitution of Kenya Review Commission (CKRC). It is one of the organs of review stipulated in Section 5 of the Act and is time-bound. The COE is expected to complete its mandate within 12 months

from the enactment of the Act. However, having been sworn in sometime in March 2009, the committee has already lost approximately 3 months of its prescribed life.

Can everyone participate in the writing of a constitution? Citing the example of the US Constitution, Dr. Aukot noted that this Constitution, which is presumed to be a model constitution for most countries, was written by only 15 individuals. This begs the question - How then can people participate in the writing of the constitution?

The Constitution-making process has been very expensive for the country. There is need to consider the financial implications and assessing whether we want to spend more resources on this issue yet the country is currently afflicted by many problems including drought and famine.

The COE has acknowledged the fact that it needs support, more so in view of the limited time available to it. It is vital that a viable formula is found in order to complete the Kenyan process. This formula does not include just writing a constitution, but also how to complete and balance various interests without killing the process.

This begs the question – Will the Review Act, 2008 give rise to a new constitution?

In answering this question, Dr. Aukot pointed out that it is important to remember that the current process was kick started by the post-election violence. It, therefore, follows that the terms of reference should be drawn from the violence. It is from this that the two main legislations emerged, namely, the Constitution of Kenya Review Act and the Constitution of Kenya (Amendment) Act, 2008.

Section 37 of the Review Act deals with the Referendum question and provides that the Interim Independent Electoral Commission shall frame and publish the question to be determined by the referendum. The Act also establishes an Independent Constitutional Dispute Resolution Court to determine constitutional disputes and trying to cure some of the problems that have been experienced in the past.

Briefly highlighting the provisions of the Review Act, Dr. Aukot noted the following salient points:

- The Act was passed on 4th November 2008 and received Presidential assent on 11th December 2008.
- The Commencement date of the Act was 22nd December 2008.

- Sec 7 establishes the Parliamentary Select Committee on the Review of the Constitution, which consists of 27 members mandated to assist the National Assembly in the discharge of its functions under the Act.
- Appointment of the COE under Section 8, comprising of 9 persons nominated by the National Assembly. Of these, 3 are non-citizens of Kenya, nominated from a list of names submitted to the PSC by the Panel of Eminent African Personalities, in consultation with the National Dialogue and Reconciliation Committee, while the remaining 6 are citizens of Kenya nominated in accordance with the procedure prescribed in the First Schedule.
- Sec 23 outlines the functions of the COE, namely,
 - To identify the issues already agreed upon in the existing draft constitutions
 - To identify the issues which are contentious or not agreed upon in the existing draft constitutions
 - To solicit and receive from the public written memorandum and presentations on the contentious issues
 - To undertake thematic consultations with caucuses, interest groups and other experts
 - To carry out or cause to be carried out such studies, researches and evaluations concerning the Constitution and other constitutions and constitutional systems
 - To articulate the respective merits and demerits of proposed options for resolving contentious issues
 - To make recommendations to the PSC on the resolution of the contentious issues in the context of the greater good of the people of Kenya
 - To prepare a harmonized draft Constitution for presentation to the National Assembly
 - To facilitate civic education in order to stimulate public discussion and awareness of constitutional issues
 - To liaise with the Electoral Commission of Kenya to hold a referendum on the Draft Constitution
 - To do such other things as are incidental or conducive to the attachment of the objects and principles of the review process
- Sec 4 provides the objects and purpose of the constitutional review process
- Sec 6 outlines the guiding principles of the organs of review
- Sec 5 outlines the organs of review, namely, the PSC, the National Assembly, the Referendum, the COE and the reference groups.

What are some of the winning ideas in this process?

1. Bringing on board the political class/ political support

There is skepticism that this process is controlled politically. We need to confront our fears and agree that we all need a new constitution. Even though the political class are perceived as a danger, there is need to bring them on board. This can be done by striking a relationship with them. Furthermore, politicians are individuals who do not like to fail. In acknowledging and appreciating this fact, we must then seek to make them succeed. This will require a lot of tact.

2. A vibrant civic education/ public participation program

The constitution-making process itself is the most important component if the outcome is to be successful. In view of this, there is need to being negotiation and engage in discourse about the process and use agencies of credibility. Most Kenyans do not know about the COE. Therefore, there is a need for the COE to get to the people who can get to the people. In Kenya, however, the challenge arises from the lack of tangible constituencies over which a particular group wields influence.

The fact is that the COE cannot reach all the 35 million Kenyans. This realization has led to the proposed use of various techniques, including posters, adverts, sound bites, catchy slogans and media campaign, with a view to creating public awareness. In addition, the COE intends to use high profile figures and drivers of changes such as the Prime Minister, President, Vice- President, the Community Based Organizations, NGOs, religious groups and women groups. In this way, the CEO would be able to adopt a winning formula, by involving these drivers of change to spearhead the process.

The COE has come up with a one-year operational plan (Operational Plan 2009 – 2010), which is intended to assist the COE in achieving its objective and finally delivering on its mandate. Dr. Aukot highlighted some of the key result areas/ deliverables as follows:

1. financially independent/ fully operational secretariat
2. political consensus and agreement
3. religious and cultural consensus
4. effective public participation in the review process
5. affirmative referendum result
6. draft constitution submitted to referendum by December 23rd, 2009
7. harmonized constitutional draft.

One of the major challenges facing the COE is how to come up with a draft that harmonizes the various competing interests. In light of this, the Committee has embarked on creating awareness so that Kenyans know that this constitution is made for them. There is need to ensure effective public participation in the process.

In conclusion, Dr. Aukot challenged the women groups to ensure that their presence in the entire process is felt. Consensus is the key to the completion of the review. Political will is vital if the process is to be success.

WOMEN AND CONSTITUTION MAKING – OPPORTUNITIES & CHALLENGES

- PROF. WANJIKU KABIRA

Prof. Kabira began her presentation with a brief recap of her experience as a Commissioner of the Constitution of Kenya Review Commission, noting that at the time, it was believed that a new constitutional dispensation would be achieved. Interestingly, several years later, the process has began once again. Generally, it had been observed that many of the people who voted for or against the draft constitution at the Referendum³ in 2005, did not understand the contents of the documents for or against which they were voting.

She concurred with the sentiments of the previous Speaker that the process of constitution-making requires a lot of goodwill, not only from the politicians but also from the general public. Civic education is paramount in establishing a draft constitution that will be acceptable to all. Although a lot of attention and hope is pegged on the Committee of Experts, she noted that previous draft constitutions should not be overlooked since a lot of effort and resources had gone into coming up with these drafts. Despite the few contentious issues in the previous drafts, these drafts had been created through public consultation and there was consensus, seemingly, on most of their provisions.

Quoting from the book⁴, *‘The River and the Source’* by Margaret Ogola, Prof. Kabira compared the constitutional reform process to that of a river flowing towards the sea. She analogized the sea as

³ On November 2005, Kenyans voted on a new constitution in a national referendum. About 57% voted NO and 43% voted YES, at a turnout of 52%. More than 11 million Kenyans were eligible to vote.

⁴ ‘On the fifth day, she (Akoko) embarked on a journey which would bring her and her offsprings to a new era, for the great river starts its journey as a little stream which at first meanders around without any apparent

the collection point, where all ideas merge. This quotation describes the women's path towards a new constitution.

Commenting on the strides made by women with respect to constitutional reforms, Prof. Kabira noted that the Bomas Draft was particularly favorable to women. It is not a coincidence that this draft caters for marginalized groups. The special interest groups were actually well represented at Bomas and this ensured that provisions favorable to them were entrenched in the draft. She urged the COE to retain those provisions of the draft which are not considered contentious and not to delete them on the grounds that the constitution would then be too detailed. She emphasized that there was need to have a detailed constitution because past experience has shown that when a provision is not well-stipulated, then this creates problems in future in terms of interpretation.

The journey by women in constitutional reforms began in 1997, with a motion moved by Hon. Phoebe Asiyo on the establishment of the Women Political Caucus. The motion was defeated. Other key milestones in this journey are:

- 1998/99 – Women leaders and women's organizations entrenched affirmative action in the law
- 2000 – Affirmative Action Bill tabled by Hon. Beth Mugo to cater for 33% women representations in Parliament and local authorities. The motion was eventually passed and handed over to the Ghai Commission (CKRC) for inclusion in the review.
- 2001/2002 – Women aired their agenda and presented it loudly and clearly to the CKRC
- 2003 /2004 – Women were well represented during the Bomas rounds and their negotiations are one of the best success stories. The result of which are the gains that women must protect.
- 2004/2005 – Women negotiated to retain their gains in the draft. Although they managed to retain some, others were lost with the removal of some institutions such as the Upper House and locations where women had 50% representation.
- 2005 – Things fell apart at the National Referendum. "The river of women's struggle started to meander without any apparent directions, sometimes disappearing and fearful of confronting the enemy that was drinking the water of life – politics and ethnicity."

direction, sometimes disappearing underground altogether, but always there, always moving towards the sea.' – Margaret Ogola (*The River and the Source* pg 71)

With this in mind, it is therefore important to create consensus around the draft to be tabled by the COE before the same is subjected to a referendum, if the same is to be successful. All kinks and contentious issues must be ironed out prior to a referendum, otherwise this would, once again, be an effort in futility.

- 2006/ 2007 – The great river emerged to the surface again. More than 2000 women took over Nairobi demanding 50 seats. Hon. Martha Karua prepared the Bill, and women obtained the petitions. For the first time in the life of the August House, petitions were presented to the Speaker, but some have chosen not to see.
- 2009 - Women are back to the table to negotiate. The river must come back to the surface and begin to flow.

Airing her anxiety and apprehension on the provision of the Review Act that requires the COE to table its draft in Parliament prior to a referendum, Prof. Kabira noted anything is possible and anything could happen in Parliament. It is indeed possible that the few gains made in the draft could be deleted once the same is tabled in Parliament. Some of the gains made with respect to gender in the Bomas and Wako Drafts were in the following areas:

- Citizenship (citizenship by birth and by marriage)
- Bill of Rights (Freedom from discrimination; Gender; Children; Family' Gender Commission)
- Land and Property (General principles; property rights of spouses; legislation on land)
- Leadership and integrity (conduct of state officers)
- Representation of the people (the electoral system and process; affirmative action)
- Political parties (political parties fund⁵). The Legislature (Members of the Senate; members of the National Assembly; state functions of the President)
- The Judiciary (the Kadhi's Court)
- Devolved Government (Principles of devolved government; election of district councilors, locational councilors)
- Public finance (composition of commission; Gender Commission)

Prof. Kabira clarified that these gains were in respect of gender, which includes both men and women, and not limited to women alone. Although the chapter on Representation of People has

⁵ The motion to establish a political parties fund was first tabled by Hon. Phoebe Asiyo in 1997.

numerous gains for women, one thing that women tried to advocate for, unsuccessfully, was proportional representation. This is an important aspect since it would address the issue of representation of ethnic minorities and other marginalized groups.

Highlighting some of the strategies used in the journey towards a new constitution, Prof. Kabira made the following key observations:

- Defining the agenda for women at different stages of the journey
- Getting teams of technical experts to identify issues and carry out research
- Sharing the issues with women's organizations, community-based organizations and women leaders
- Agreeing on the agenda
- Identification of key women who can open the door to the politicians and other relevant persons. For this process, there are many women that ought to be recognized for their invaluable contribution e.g Hon. Phoebe Asiyo, Hon. Martha Karua, Hon. Martha Koome, J.
- Organization of lobbying teams, sometimes regions-based, party-based etc. Prof. Kabira challenged the participants to take up the task of lobbying politicians and other stakeholders in a bid to achieve consensus on the document. There is need for a strategic approach to those we intend to lobby.
- Identifying other stakeholders to work with us e.g minorities, marginalized groups, youth etc
- Identifying critical leaders who have influence and negotiating with them

In this journey, women have made gains. Some of these are:

- Affirmative action for women's representation at various levels and in various organs. It is important to note that participation by women in these negotiations is vital because this is the only way women can ascertain that their interests are considered and taken on board.

Prof. Kabira pointed out that even after the COE prepares and presents the draft to Parliament, it is important to scrutinize the draft to ensure that the gains made by women in the previous drafts have not be deleted. It is important to note that politicians will try to influence this process at every stage. It is therefore incumbent upon the populace to ensure that such influence is for the good of all groups, including the marginalized and special interest groups.

- Drafting and presentation of various Bills such as the Matrimonial Property Bill, Equal Protection Bill, a review of the Law of Succession Act, Sexual Offences Bill.
- The presidential directive on the 33% women's representation in public service appointments and promotions and in committees.

Although the constitution is yet to be reviewed and a new one enacted, it is noteworthy that the hue and cry about various aspects of it have now created a general awareness amongst members of the public of issues that previously went unnoticed. In view of this, there are some gains that have been made in terms of creating awareness, but these need to be consolidated and solidified in provisions of the new constitution or other legislation in order to give them the force of law. Such gains include:

- IPPG Affirmative Action
- Gender Commission
- Affirmative action in political parties

These gains, which have often been dismissed as political gimmicks, are a clear indication on the struggle by women to ensure that their interests are considered. Implementation in these areas is very wanting.

In the ten-year journey by women, there have been many lessons learnt. Some of these are:

- i) It is important to identify and agree on an agenda
- ii) Women should never assume anything. Even after the women's provisions were agreed upon at Bomas and were not considered to be contentious issues, when the draft was tabled at Parliament, the MPs transformed these provisions into some of the contentious issues. It, therefore, incumbent upon women to be vigilant and alert at all times until the new constitution is in place and even after its enactment.
- iii) Arming ourselves with knowledge and implementation mechanisms. It is very easy to argue that we cannot put this in the constitution because we will not be able to implement it. This does not mean that the implementation strategy should be in the constitution.
- iv) Lobby the right people, those who have power and influence and can make decisions. Political party leaders and Members of Parliament are critical in the review process.
- v) It is important to build linkages with other stakeholders e.g. religious organizations, civil society organizations, political party leaders among others.

- vi) Keep in touch with women from different political parties and regions in order to consolidate our lobbying capacity.

Commenting on the contentious issues as highlighted by the COE, Prof. Kabira was of the view that some of these issues may not necessarily be contentious. For instance, on the issue of devolution, it is generally agreed and accepted that there ought to be devolution. What remains is agreement or consensus on which is to be the unit of devolution. At the moment, it seems that the constituency is to be the lowest level of devolution. However, there is need to rework its structure in order to reflect the separation of powers, as is contained in the Bomas draft, whereby the executive powers and the council will make decisions and monitor implementation of activities that the chief executive and his/her running mate at the constituency level will be elected by the residents of that constituency. The most suitable alternative would be to adopt the Bomas concept of lower level of devolution which was at the district level and where the policy makers are separate from the implementers.

Prof. Kabira proposed that the number of units for the national, district and regional governments ought to be between 22 and 24 only. She called for the review of the 4th and 5th Schedules, dealing with the functions of these governments, in order to assign them powers and functions that they can handle. This would take into cognizance the size of the unit. For instance, a constituency cannot deal with roads, health centers and schools that serve people across constituencies.

With regard to the Second Chamber, which only appears in the Bomas but not the Wako draft, it was the Professor's opinion that given the capacity of Parliament to move towards dictatorship and lack of respect even for the electorate, it would be prudent to have a Second Chamber with the following traits:

- Members do not meet full time, with a view to reducing costs
- Will be representative of all ethnic communities and marginalized groups, as far as possible

On the issue of representation, Prof. Kabira proposed that election colleges at the middle level unit of devolution could elect the 33% women's representation at the middle level unit and even in Parliament. Similar processes could be explored at the constituency and locational level.

In conclusion, Prof. Kabira reiterated the need for women to get back onto the battlefield and lobby for the inclusion of provisions that are secure their interests and gains. Further, women

need to present their recommendation on the contentious issues to the COE, bearing in mind the lessons learnt from the start of the journey, by protecting, negotiating and safeguarding their gains. She took a moment to pay tribute to all the women who had fought and struggled in this epic journey and called on other women to ensure that the river continues to flow.

PLENARY

Following the enlightening presentations on constitutional reforms by the two panelists, the participants then took the opportunity to air their views on the topic of discussion. Bearing in mind the sensitivity of the topic to most Kenyans, the atmosphere during the plenary session was highly charged, with most participants eager to voice their concerns on the issue. However, due to the limited time available, only the following pertinent issues were raised:

- One recurring concern was the need to have a people-driven Constitution. Kenyans from all walks of life should be involved in the process of reforming the Constitution. Constitutional reforms are not matters that should be handled solely by the Committee of Experts or Parliamentarians. There ought to be some accountability to the masses to whom a draft should be tabled, preferably at a Conference, prior to a referendum.
- The shared mood of the participants was that the constitutional review process had taken too much time. Kenyans had waited too long for a new constitutional dispensation.
- What guarantee do Kenyans have that the COE is independent of any political influence and that it is different from other Commissions that have been formed in the past?
- There was a call for the inclusion of a recall clause, whereby the electorate is able to recall non-performing Members of Parliament.
- The constitutional review process has been ongoing for about a decade now. Those who once advocated for the constitutional reforms are the current power-brokers and constitutional change would be unfavorable to them. Bearing in mind this historical background, it is difficult to fathom that the current efforts will result in a constitution that is acceptable to all Kenyans. There is a lot of hypocrisy in the process, which is merely a gimmick to spend taxpayers' money.

- There was a general query on how the Committee of Experts would engage the youth, women and other special interest groups in the review process.
- Devolution is one of the most controversial issues in the draft constitution and one that has elicited the most debate. How would the COE deal with this issue in order to ensure an efficient and effective balance between the central and local governments?
- There was a general query about the beginning of life, and whether this was an issue that the COE would tackle.
- There was concern about the limited definition of minority and special interest groups in the previous drafts since not all marginalized communities have been catered for. Further, more often than not women from such marginalized regions are excluded from fora such as this where issues of great national concern are deliberated. These women rarely get to know of such fora and are often not invited to attend, therefore leaving them in dark about issues that greatly affect them.
- Strategy and lobbying would be the most successful approach to achieving the goal of successful constitutional reforms. Kenyans must forget the differences and their bitterness and work together in order to attain the requisite majority to enact a new all-inclusive constitution that best caters for their needs.

Responding to the issues raised, Dr. Aukot reiterated that section 16 of the Constitution of Kenya Review Act provides for the independence of the COE in the performance of its functions as stipulated under the Act. He noted that this independence is taken very seriously by the COE in the discharging its duties and members consider themselves professionals in their own right. The independence is manifested in the ability of the Committee to raise its own funds and acquire resources to enable it discharge its mandate.

Concurring with the participants that, indeed, in the past many commissions have been formed and numerous resources expended, only for their subsequent reports to be shelved, Dr. Aukot observed that the COE is a time-bound Committee. It must achieve its mandate within a specified period of time. In fact, it has recently published in the local dailies a step-by-step guideline on its mandate and its progress in discharging the same, so that the public may be able

to follow and hold the COE accountable. Although he assured the participants of the Committee's commitment to performing its duties, he pointed out the need to remember that the Committee is, nevertheless, working within a political environment.

On the issue of a people-driven Constitution, Dr. Aukot clarified that the Review Act is very clearly on the mandate of the COE, which is limited to the drafting of a new constitution. Although the Act does not call for or require the COE to lobby and engage the public in consultation, the COE has found it necessary to do so if it is to come up with a constitution that will be acceptable to most Kenyans. It has taken the initiative to conduct civic education countrywide and lobby various interest groups in order to create a general consensus on the draft constitution. In a sense, the COE can be said to be writing a constitution on behalf Kenyans who are not able to participate directly in the drafting.

The current Act does not provide for a National Delegates Conference, before which the draft constitution is to be tabled prior to a referendum. However, Dr. Aukot suggested that this can be achieved by lobbying Parliamentarians to amend the current Act to include such a provision.

In response to the query on the beginning of life, Dr. Aukot was reluctant to open debate on what he termed as an emotive debate, which is largely premised on religious conviction. Instead, he called on participants to concentrate on the three contentious issues - the Executive, devolution and transition – and send in their comments to the COE.

Indeed, there is a lot of mistrust in the politicians and in our country as a whole. However, looking back at the events following the 2007 General Elections, there is general anxiety among the public who would not wish to have a repeat of the post-election violence. Dr. Aukot called on the public to be proactive in finding solutions to the myriad of problems that face the country, rather than sitting back and lamenting about them.

It is often believed that Constitution making began in the 1990's. However, another school of thought hold the view that the process began in the 1950's, with the first constitutional amendment in 1958. It was at this point that questions arose as to whether the Constitution of Kenya was one that reflects the views of the country. It can be argued that there was no constitution from the very beginning, considering that the same was drafted by a few individuals who were assumed to represent the views of all Kenyans.

Marginalization, sometimes, can be self constructed. An individual from a marginalized ethnic community but residing in a large town, with access to resources, cannot be deemed to be marginalized. Yet, often enough, there is hue and cry from such individuals, with claims that they are marginalized simply because of their ethnic background.

In conclusion, Dr. Aukot challenged the civil society on the issue of civic education. He advocated for the continuity of civic education and not only when there is something to capitalize on.

Responding to the issue of hypocrisy in the constitutional review process, Dr. Kabira concurred that the journey to a new constitutional dispensation is indeed a lengthy and tedious one that is laden with many obstacles. However, this must not deter the public from engaging in it and pushing forward in order to achieve the ultimate goal of a new constitution.

There is a difference between decentralization and devolution. Whereas decentralization is not provided for in the constitution, the levels of devolution will draw their power from the constitution. These levels and their interaction have been clearly spelt out in the Schedules. It would, therefore, be difficult for a Minister or other government official to interfere with the running of the different levels as easily as he can in the case of decentralization. The Schedules also provide for resource allocation between the levels of devolution thus enabling them to function more efficiently.

The minority, whether marginalized ethnically or geographically, have been well covered in the Bomas Draft. This is one major difference between this draft and other subsequent drafts. Dr. Kabira supported the idea that all ethnic communities should be taken on board in the negotiations for a new constitutional dispensation. In clarifying on the definition of marginalized and minority groups, Dr. Kabira noted that there are those classes of persons who might be marginalized but are not necessarily minority, for example women and the physically challenged. These are groups that live among the majority and therefore consider themselves minority. They may be marginalized in terms of decision-making through historical and cultural experiences.

WRAP UP & CONCLUSION

Judging from the intensity of the discussion and questions fielded, it is clear that constitutional review is an issue that is highly sensitive to the general public and one that will continue to elicit a lot of reaction. It is definitely not a topic can be conclusively and comprehensively discussed at one Forum due to the limited time available.

Wrapping up the edifying discussion on constitutional review, Ms. Wakogi apologized for the inability to field more questions from the participants, which was due to the limited time available. She invited them to email any further questions to the Foundation, which would in turn forward the same to the panelists. She gave a vote of thanks to the panelists for their informative and thought-provoking presentations on this emotive topic.

END