

Wanjiku's Journey

Tracing Kenya's Quest for a New Constitution
and Reporting on the 2010 National Referendum





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November 2010

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KENYA HUMAN RIGHTS COMMISSION

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List of Abbreviations and Acronyms

4Cs	Citizens' Coalition for Constitutional Change
AG	Attorney General
CEC	County Executive Committee
CGD	Centre for Governance and Development
CIC	Commission for the Implementation of the Constitution
CIOC	Constitution Implementation Oversight Committee
CKRC	Constitution of Kenya Review Commission
CNC	Coalition for National Convention
CoE	Committee of Experts
COVAW	Coalition on Violence against Women
CRECO	Constitution and Reform Education Consortium
CSOs	Civil Society Organisations
DPK	Democratic Party of Kenya
ECK	Electoral Commission of Kenya
ELOG	Election Observation Group
FIDA	Federation of Women Lawyers-Kenya
FORD	Forum for the Restoration of Democracy
IDPs	Internally Displaced Persons
IEBC	Independent Electoral and Boundaries Commission
IIBRC	Interim Independent Boundaries Review Commission
IIEC	Interim Independent Electoral Commission
IPPG	Inter Parties Parliamentary Group
KADU	Kenya African Democratic Union
KANU	Kenya African National Union
KEC	Kenya Episcopal Conference
KHRC	Kenya Human Rights Commission
KNDR	Kenya National Dialogue and Reconciliation
KNCHR	Kenya National Commission on Human Rights
KNHREC	Kenya National Human Rights and Equality Commission
KPU	Kenya Peoples' Union
LDP	Liberal Democratic Party
NA	National Assembly
NAK	National Alliance of Kenya
NARC	National Rainbow Coalition

NARC-K	National Rainbow Coalition-Kenya
NCA	National Convention Assembly
NCC	National Constitutional Conference
NCCK	National Council of Churches of Kenya
NCEC	National Convention Executive Council
NCEP	National Civic Education Programme
NCIC	National Cohesion and Integration Commission
NDP	National Democratic Party
NGOs	Non-Governmental Organisations
NLP	National Land Policy
ODM	Orange Democratic Movement
ODM-K	Orange Democratic Movement-Kenya
PCK	Proposed Constitution of Kenya
PeCK	People's Commission of Kenya
PEV	Post-Elections Violence
PNU	Party of National Unity
PSC	Parliamentary Select Committee
REMAC	Referendum Monitoring and Advocacy Centre
RPP	Release Political Prisoners
SDP	Social Democratic Party
TJRC	Truth, Justice and Reconciliation Commission

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Further, we also wish to acknowledge the work of Viola Jobita and Pauline Wanja who were collecting, collating and analysing data emerging from the above monitors and also other sources. The KHRC is forever indebted to the dexterity of their analyses. Further still, we wish to thank Davies Malombe for having coordinated and supervised the work of the Referendum Monitoring and Advocacy Centre (REMAC).

Finally, this report was co-authored by James Mawira and Tom Kagwe, whom we heartily acknowledge as well. We acknowledge Beryl Aidi for input in copy editing. Last but not least, we wish to appreciate the meticulous editorial work done to this report by Muthoni Wanyeki, the Executive Director at KHRC.

While we appreciate the 70 percent eligible Kenyan electorate who turned up on August 04, 2010 to exercise their democratic right to vote, it is our hope that this report will serve as a wake-up call to all Kenyans, those living and those yet to come in the next generation, that the price of liberty is eternal vigilance. *Wanjiku's Journey* in searching for a new Constitution is over; at least the first part. The Promulgation of the new Constitution, on August 27, 2010, marks the beginning of a new *Journey*: that of implementing, safeguarding and upholding the values and principles that the new Constitution of Kenya (2010) sets forth.

God bless Kenya

Foreword by the Chair

Since its founding, the Kenya Human Rights Commission (KHRC) has established itself as the premier human rights non-governmental organisation (NGO) in Kenya, and perhaps in the region. The KHRC has been at the forefront of bringing new and novel methods of advocacy to the field. As a normative matter, the KHRC has pushed the frontier of norm-making in both traditional and non-traditional areas of advocacy. Vision 2012, the cornerstone of the KHRC's current mandate is a clear testimony to these contributions. That's why this report, on the 2010 referendum on the Constitution, is a fitting instalment in the work of the organisation.

First, some context. While it could be argued that the struggle for a democratic Constitution dates back to the anti-colonial struggle and the efforts to challenge the entrenchment of an imperial Presidency under the first post-independent regime, the KHRC was among the earliest advocates for a new democratic Constitution for Kenya. Way back in 1994—even before the clamour for a new Constitution became a key fixture in Kenya's political lexicon—the KHRC, together with the International Commission of Jurists (ICJ)-Kenya and the Law Society of Kenya (LSK), had produced a model Constitution for Kenya. Although the model Constitution was a project of these three organisations, the KHRC initiated and led the process towards it. I am proud of the KHRC's pioneering role in this respect.

That document laid the groundwork for the debate that was to follow and culminate in a new Constitution more than 15 years later. Its basic normative framework can be seen in the new Constitution. But, between 1994 and 2010, the KHRC ratcheted up its struggle for a new Constitution. The organisation's Board and staff members have been key players in the national debate every step of the way.

It's not, therefore, an exaggeration to claim the new Constitution as the KHRC's baby. That's why we, as an organisation, took a special interest in the referendum and the way it was conducted. We assiduously monitored the activities of all players throughout the long and contested process. We were concerned with the fairness and integrity of the process to make sure that the corrosive effects of bias, bigotry, and politics would not deprive Kenyans of their right to a free vote.

This report is particularly useful for the lessons it offers because it is those lessons that will indicate how well the Constitution is implemented. But the report is also a human rights record of the most historic event in Kenya since independence in 1964. We offer the report to all as a fund of knowledge for what we saw—especially those aspects of the process that pointed to a democratic deficit. We hope that it will serve as guide to democratic development.

Professor Makau Mutua,

Chair of the KHRC as well as Dean, SUNY Distinguished Professor of Law and Floyd H and Hilda L Hurst Faculty Scholar at the University of Buffalo Law School of the State University of New York.

Executive Summary

The KHRC is pleased to present this report on Kenya's historical referendum of August 2010. During the referendum, over 60 per cent of eligible Kenyans voted in a new Constitution, after two decades of explicit struggle for the same. And the KHRC is justifiably proud of its many contributions to this national achievement over the course of those two decades—as well as, most recently, to both the process of the last phase of the struggle and the content of what is now the Constitution of Kenya, 2010.

The KHRC was involved in and monitored the final drafting of and negotiations on the content of the Constitution overseen by the Committee of Experts (CoE), the civic education conducted in the lead-up to the referendum, the campaigns for and against the Proposed Constitution of Kenya (PCK) and the conduct of the referendum itself.

The drafting and negotiations were complicated, as anticipated, by the ever-shifting political interests of parties to (and factions within) the Grand Coalition Government, in both the Executive and the House. They were also complicated by the less anticipated emerging ethnic/political interests of both mainstream and more evangelical Christian organisations which, in effect, sought to limit equality rights as well as reproductive and sexual rights and use the same to mobilise Kenyans against the PCK.

The KHRC tried to mediate the same both within the CoE's Reference Group, to which it belonged, as well as through civic education, which it conducted through the community-based human rights networks (HURINETs) it partners with across the country. It also facilitated, through sub-granting, the civic education efforts of organisations identified as being able to reach critical and specific geographic regions and communities of interest with accurate information on the PCK, including: Central; Eastern; the Rift Valley; ethnic minorities; the mainstream media; people with disabilities; and women.

Finally, the KHRC monitored the campaigns for and against the PCK, as well as the conduct of the referendum—the latter being of particular significance given that the referendum was the first national exercise of suffrage which the Interim Independent Electoral Commission (IIEC) was to oversee. As is the KHRC's practice, the monitoring focused on human rights typically of concern during any electoral process, including those violated by: hate speech; ethnic/religious/political violence; and abuse of public office.

This report, in its Part 2 documents the KHRC's roles with respect to the same, including by sharing how the monitoring was conducted. In its Part 3, the report shares the KHRC's findings in all of these respects. And the report's Part 5 includes the KHRC's conclusions and recommendations on the same.

However, the referendum was not just another electoral process—it has helped realise a new constitutional dispensation, under which many of the KHRC's long-standing human rights demands have now found expression and protection. Separation of powers, checks and balances, devolution, public participation (including by minorities and women), expanded human rights recognition (including with respect to citizenship, equality and economic, social and cultural rights) and strengthened remedies (both quasi-judicial and judicial) for human rights violations—all these present real possibilities to advance realisation of the dignity and worth of all Kenyans and to increase the accountability of the Kenyan state.

Because of this, this report also tries to capture why the struggle for constitutional reform began and to illustrate its many twists and turns—its many steps forward, its many retreats. Its Part 1, on the history behind the referendum, is intended as a reminder. And that reminder, in turn, is intended to keep Kenyans alive to the challenges that now lie ahead in respect of implementing the Constitution of Kenya, 2010—and fully realising its transformative potential. The report's Part 4 focuses on just this—the public institutions responsible for ensuring momentum forward is maintained as well as Kenya's own roles and responsibilities.

Thus, this report is meant to serve as both a historical record—as well as a forward looking document. The KHRC hopes you will find it useful. And that all Kenyans will seize the opportunities presented by the Constitution of Kenya, 2010 to advance freedom and justice for all Kenyans.

PART I: BACKGROUND TO CONSTITUTIONAL REFORM

This brief background is to trace *Wanjiku's journey*.¹ It provides, first, a brief history of the struggle for the new Constitution (showing the KHRC's role in that struggle. It reminds us that constitutional reform was conceptualised as involving *Wanjiku* in the making of a new Constitution, which informs the national referendum of August 2010. Second, it shows the failure of the State to deliver on the 'independence dream' and to respond to demands made by pro-reform forces. Third, it depicts the imminent collapse of the State in 2008, which renewed energy to conclude the journey to a new Constitution.² This background thus underscores the historical import of the referendum that ushered in the new Constitution of Kenya (2010).

This background is also important for two other reasons. First, it is important that Kenyans acknowledge that the *journey* to a new Constitution was not smooth. Pro-reform Kenyans lost their lives, were maimed and/or forced into exile. Remembering this is especially important for younger Kenyans, who voted overwhelmingly in the referendum, without necessarily being involved in this long history. Second, Kenyans need to understand why the new Constitution must be protected—defended and safeguarded by all. Kenya achieved independence in 1963 with a progressive Constitution but hurried and numerous amendments made Kenya what it was, motivating the struggle for a new Constitution.

1.1 Brief History of Struggle

Although the 'formal' history of the constitutional review process dates back to the 1980s, the agitation for and gains can be traced to 1991, when the ruling Kenya African National Union (KANU) was forced to repeal Section (2A) of the former Constitution to restore multiparty democracy.³ The repeal resulted from popular pressures for change exerted by pro-reform forces within and outside the country. These gains did not lead to constitutional democracy, but expanded the space for demands for a new State based on fundamental freedoms and rights.

In 1992, pro-reform civil society and the political opposition formed the National Convention Assembly (NCA), to lobby for comprehensive constitutional reform in Kenya.⁴ The National Convention Executive Council (NCEC), the executive arm of the NCA, organised many public demonstrations⁵ The pressure mounted by the NCA led to further constitutional amendments in July 1992 such as opening up spaces for the opposition to campaign, meant to guide the 1992 General Elections. Faith-based groups, such National Council of Churches of Kenya (NCCK) and the Kenya Episcopal Conference (KEC) joined the clamour for constitutional reform.

The then President Daniel arap Moi and the ruling KANU promised comprehensive constitutional reforms (as opposed to further piecemeal amendments to the Constitution) after the General Elections, but this promise was never honoured. This however, did not stop the NCA's quest. In 1994, the NCA coalesced into a more assertive and popular constitutional reform movement under the auspices of the Citizens' Coalition for Constitution Change (4Cs).

1 This Report, titled *Wanjiku's Journey* is a chronology of how that journey started, why it did so, its twists and turns, who were involved and what the prize was. *Wanjiku* implies the ordinary person. It was coined by former President Daniel Arap Moi who, in the 1990s, dismissed attempts by CSOs to involve people in constitution-making by rhetorically asking: 'What does *Wanjiku* know about the Constitution?'

2 This was done through the Kenya National Dialogue and Reconciliation (KNDR) and is reported on in Sub-Section 1.3. See various reports in their website: <http://www.dialoguekenya.org>, (accessed September 25, 2010).

3 This was the 27th amendment to the former Constitution that returned the country to multiparty democracy. Earlier, in 1982, the 19th amendment had been passed, paving way for a one-party State. We also note formal, because campaigns to establish a State that is based on fundamental freedoms started back in early 1900s, with the struggle against British colonial rule.

4 The National Convention Assembly (NCA) was established by delegates representing diverse interests and sectors in Kenya gathered at the First Plenary Session in Limuru from April 3-6, 1997.

5 The NCA/NCEC initiative became a mass movement and institutionalised an alliance of pro-constitutional reform and pro-democracy forces in the run up to the 1997 General Elections through the clarion call: "No Reforms No Elections." Others included demonstrations, seminars and workshops. Demonstrations which were inevitably dispersed with excessive force by the Kenya Police Force and the militia, *Jeshi la Mzee* (The Old Man's Militia). The most prominent demonstrations are referred by the dates and months in which they happened, such as *Saba Saba*, (Seventh of July) *Nane Nane* (Eighth of August), *Tisa Tisa* (Ninth of September) and so on.

In early 1995, former President Moi made another promise, to facilitate a comprehensive review of the Constitution, led by Parliament. In response, the KHRC, the Law Society of Kenya (LSK) and the International Commission of Jurists (ICJ)-Kenya, under the banner of the 4Cs, drafted the first *Proposed Model Constitution*⁶. This was an attempt to demystify constitution-making and the process of writing one. The public demonstrations continued—garnering more public support and worse responses by the State. Following *Saba Saba* in 1997, in which 14 Kenyans were killed across the country, domestic and international outrage forced former President Moi to capitulate. He did, by stalling *Wanjiku's journey* and forming the Inter-Parties Parliamentary Group (IPPG) brokered by Members of Parliament (MPs) and some religious groups. The IPPG reform package was, again, piecemeal reforms to facilitate the 1997 General Elections and the establishment of the Constitution of Kenya Review Act of 1997.

This became the legal foundation for constitutional reform under the Constitution of Kenya Review Commission (CKRC). Further, this Act provided for people's representation in the constitutional review process, with Parliament only intended to technically approve the final draft. But, after a series of amendments in 1998, 2000, 2001 and 2004, the role of Parliament was reinstated as the key decision-maker.

But acrimony emerged between the ruling KANU (then working with the National Development Party, NDP) on the one hand, and civil society plus some opposition MPs on the other.⁷ The former was calling for a parliamentary process while the latter routed for a participatory process.

In December 1999, CSOs and faith-based groups formed the *Ufungamano Initiative*. This *Initiative* called for a participatory or 'people-driven' process. *Ufungamano* established the People's Commission of Kenya (PeCK) to counteract the KANU/NDP parliamentary-led constitutional review process. The PeCK was mandated by stakeholders to conduct a people-driven constitutional review process by traversing the Republic to gather citizens' views on what should be included in the new Constitution. In 1999, in a rejoinder to former President Moi's call for a parliamentary process, the KHRC, NCEC, the Greenbelt Movement, the LSK and the Presbyterian Church of East Africa stated that:

"We totally reject parliament as the only forum for constitution-making. We don't recognise it as a representative of all the voices in Kenya. We do this appreciating that there is already a stated national consensus that the Constitution properly belongs to all people of Kenya. We unequivocally state that the constitutional review process is irreversible and must be people-driven."⁸

The KHRC and many other CSOs stuck to this dictum—that involving *Wanjiku* is the best way to make a new Constitution. It should, however, be noted that there was criticism about not involving the 'real' *Wanjiku* from both parliament and civil society.⁹

Section 1.2 below shows State unresponsiveness to the calls for comprehensive and participatory constitutional reform, which later led to the situation of imminent collapse in 2008, after the disputed presidential results of the 2007 General Elections.

1.2 Failure of the State

To appreciate the struggle for constitutional reform, it is imperative to outline key events that led to the State's failure in achieving the promise of independence and, later, the clamour for constitutional reform.

⁶ This Model was the first document enabling Kenyans to engage in a focused and informed debate demanding a new constitutional order in Kenya.

⁷ From January 1998, KANU and NDP led by former President Moi and Raila Odinga collaborated and merged in March 2002. However, in October 2002, a dispute over who was to be KANU's presidential candidate in the 2002 General Elections ended the merger. During the partnership, the two parties took common positions on many issues of national interest, including the Constitution, with Odinga chairing the Parliamentary Select Committee on Constitutional Review.

⁸ See Daily Nation, Monday May 24, 1999.

⁹ In 1999, for instance, Dr Willy Mutunga (then Executive Director of KHRC) published a book titled: *Constitution Making from the Middle: civil society and transition politics in Kenya; 1992 to 1997*, highlighting his experiences with civil society and constitution-making. He concluded that civil society's initiative did not materialise into a mass movement with popular ownership with the citizenry in charge to realise their aspirations and initiate structural and institutional reforms they wanted. Civil society replaced and/or spoke on behalf of *Wanjiku*.

PART I: BACKGROUND TO CONSTITUTIONAL REFORM

Before Kenya got independence in 1963, Kenyan delegates and British officials in Lancaster negotiated a Constitution that became to be known as the independence Constitution.¹⁰ Some features of the independence Constitution were: a bicameral parliament (both the House of Representatives and the Senate); a semi-federal system of governance that gave the regions relative autonomy from the central government; separation of powers between the three organs of the state (the Executive, Legislature and Judiciary); and provisions for citizenship, fundamental freedoms and human rights among others.

In the May 1963 General Elections, after attaining internal self-government in the same year, Jomo Kenyatta, who had been the Prime Minister, became the first President of Kenya through an amendment to the independence Constitution. Following the dissolution of the Kenya African Democratic Union (KADU) to join KANU a year later, Kenya became a *de facto* one-party state.

Kenya's independence Constitution was then, between 1964 and 1978, amended many more times. The results were visible: dismantling the structures and systems of accountable governance. The space for democratic organising, political participation and also holding the State accountable for its actions shrunk. Significantly, the principle of Majimbo (devolved government) was repealed by 1969. This, together with the abolition of the Senate, made for a centralised and unaccountable Executive.

The weakened parliament, under pressure from the increasingly powerful executive strengthened the office of the presidency at the expense of other institutions. Other amendments abolished and/or emasculated parliament, the civil service and the police. This affected and/or diluted fundamental freedoms and remedies for human rights violations since the President and the Executive could violate the Bill of Rights with impunity.¹¹

Other attempts were made to circumvent political participation. In 1982, Kenya moved from a *de facto* to a *de jure* one-party state with the ruling KANU becoming the only legal political party in the country. It was subsequent to this constitutional amendment that the country became familiar with political assassinations, the torture and flight of pro-reform academics, students and politicians. The State degenerated into the 'Moi State'.¹²

The struggle by Kenyans demanding fundamental reform and the restoration of multiparty democracy continued. Demands included: the resignation of the government; the re-introduction of a multiparty democracy; and limited presidential tenure. All were dismissed. Concessions included: ending the queuing system for General Elections; ending the expulsion of party members as a disciplinary measure; and the restoration of security of tenure for the judiciary and some in the civil service. But the State failed to fundamentally reform.

The restoration of political pluralism was a major step in opening political space in 1991. But the State's failure to advance in democracy, governance and development led to a different clamour. To many, the State's failure could not be addressed without comprehensive constitutional and institutional reform. By the time that the National Rainbow Coalition (NARC) took power in December 2002, it was clear that constitutional reform would be critical. Within the first two years of the NARC administration, constitutional reform was being pursued. Unfortunately, for many reasons, including NARC's mix of pro- and anti-reformers, constitutional reform agenda was abandoned midstream.¹³ Indeed, the political fall-out

10 At Lancaster House in London, a series of meetings were held (in 1960, 1962 and 1963) to negotiate Kenya's independence Constitution. In 1960, lack of agreement led the Colonial Secretary to issue an interim Constitution. In 1962, a framework for self-government was negotiated and in 1963, constitutional arrangements for Kenya's independence as a sovereign state were finalised. But this Constitution was amended several times following independence.

11 Of note are three amendments: the 6th amendment of 1966, which provided for detention without trial; the 23rd amendment of 1986, which provided that all capital offences are non-bailable, affecting suspects falsely accused of treason; and the 24th amendment of 1988, which increased the period of pre-trial detention for capital offences from 24 hours to 14 days, enabling torture and cruel, inhuman and degrading treatment of suspects.

12 It is argued that Kenya degenerated to the state typical of France during the reign of King Louis the 14th (1638-1715), during which the King used to assert: "L'etat du France, c'est moi" (the State of France, that is me). Former president Moi could have said the same. See Okondo, Paul H (1995) A Commentary on the Constitution of Kenya, Nairobi: Phoenix Publishers.

13 The power struggle within the NARC between the member parties, Liberal Democratic Party (LDP) and the National Alliance of Kenya (NAK), spilled over into the constitutional review process during the National Constitutional Conference (NCC) at the Bomas of Kenya. See Kagwe, Tom 'The Unfinished Reform Agenda and 2007 General Elections in Kenya' in Kanyinga, Karuti and Okello, Duncan (Eds) (2010) Tensions and Reversals in Democratic Transitions: the Kenya 2007 General Elections, Nairobi: Society for International Development (SID) and Institute for Development Studies, (IDS), University of Nairobi.

of the Bomas of Kenya process contributed to a divisive referendum of 2005.¹⁴

After the rejection of the Wako Draft in November 2005, two schools of thought emerged.¹⁵ The first group supported minimal constitutional and legal reforms aimed at levelling the political playing field. The second group, composed of CSOs, continued to root for comprehensive constitutional reform. These two groups argued between 2005 and 2007, with no end and/or compromise in sight, until the State faced imminent collapse following the post-elections violence.

1.3 Imminent Collapse in 2008

After the disputed presidential results from the 2007 General Elections, Kenya experienced widespread violence. Its nature, scope and speed led to deaths, physical injuries, mental distress, internal displacement and loss of property, being the worst in Kenya's post-independence history.¹⁶ It brought to the surface Kenya's divisions, threatening Kenya's existence as a unified nation-state. The country was divided into ethnic/political blocks, rule of law was non-existent, trade was collapsing, foreign relations hung in the balance and the resurfacing of militias threatened the very core of Kenya.

Pressure from outside the country was swift, notably by the African Union (AU) from which the European Union (EU), the United Nations (UN) and, eventually, the United States of America (USA) took their lead. Pressure locally, from Kenyan CSOs, particularly Kenyans for Peace with Truth and Justice (KPTJ) as well as, eventually, Kenya's business community and the media, led to negotiations mediated by the Panel of African Eminent Personalities, under the Kenya National Dialogue and Reconciliation (KNDR). These negotiations led to the signing of the National Accord and Reconciliation Act (2008), which formed the 'Grand Coalition Government.'¹⁷ In addition, to achieve lasting peace and prosperity, the KNDR addressed itself to four Agenda Items.¹⁸ Box 1 below depicts the same.

Box 1: Agenda Items (1-4)

- a) **Agenda 1:** immediate action to stop violence and restore fundamental freedoms and human rights, including through demobilisation and disarming of illegal armed groups
- b) **Agenda 2:** immediate measures to address the humanitarian crisis, including by settling internally displaced persons and promoting healing and reconciliation
- c) **Agenda 3:** resolving the political crisis through power sharing
- d) **Agenda 4:** addressing long-term issues including constitutional, legal and institutional reforms, transitional justice, land reform, tackling youth unemployment, poverty and inequality, consolidating national unity and cohesion and addressing transparency and accountability

(Source: KNDR Website, 2010)

14 The Bomas of Kenya was the venue for the NCC. The political contestation between the LDP and the NAK drew in some CSOs who also began to take up different positions. When the NCC was ending in March 2004 and the Draft Constitution of Kenya, 2004 (popularly known as 'Bomas Draft') was adopted, delegates aligned to the LDP/ KANU and the NAK/ Ford People disagreed over the Executive, devolution and transitional issues and chapters in the Draft. Contestations in courts of law and parliament led to a stalemate.

15 The Wako Draft, which was officially the Proposed Constitution of Kenya, was drafted mainly by the Office of the Attorney General in liaison with MPs who were perceived to be in the NAK faction of government then. Most MPs, and large sections of civil society, saw the draft as having been prepared without adequate consultation.

16 Kenya has also witnessed violence during the State of Emergency declared under colonial rule, during the shiftas crackdown (between 1963 and 1967) during the first President Kenyatta's regime and the Wagalla Massacre (in 1984) during the former President Moi's regime, which led to the death of about 5,000 men. Some cite the post-election violence (PEV) as the worst, however because of threatening the stability of the entire nation, through displacement of about 500,000 people, near economic collapse at the micro and macro level, and also the nature and extent of the repercussions of that violence.

17 On February 28, 2008 under the auspices of the African Union (AU)'s Panel of Eminent African Personalities chaired by Dr Kofi Annan, the PNU and the ODM signed the 'Agreement on the Principles of Partnership of the Coalition Government.' Under the KNDR, the parties agreed to enact the National Accord and Reconciliation Act (2008) to end the political crisis. The National Accord laid the foundation for power sharing and moved the country out of crisis.

18 See various reports: visit, <http://www.dialoguekenya.org> (accessed September 25, 2010).

PART I: BACKGROUND TO CONSTITUTIONAL REFORM

Parties to the KNDR agreed to establish mechanisms to oversee action on the four Agenda Items. These included: an Independent Review Committee (IREC) into the 2007 General Elections; a Commission of Inquiry into the Post-Elections Violence (CIPEV); and the Truth, Justice and Reconciliation Commission (TJRC).¹⁹ The parties also agreed that to address all those issues meaningfully, Kenya required fundamental constitutional reform to re-cast all legal, policy, institutional and also political causes of conflict.²⁰

Thus, in 2008, parliament enacted two laws: the Constitution of Kenya (Amendment) Act, 2008 and the Constitution of Kenya Review Act (2008).²¹ Both were to serve as the legal framework for achieving the new Constitution. In accordance with the Constitution of Kenya Review Act 2008, a Committee of Experts (CoE) was established which successfully lead the drafting of the new Constitution, which was approved by parliament, published by the Attorney General, and thereafter, subjected to the national referendum conducted by the Interim Independent Electoral Commission (IIEC) on August 4, 2010.²²

¹⁹ Both IREC and CIPEV concluded their work on schedule and handed over their findings and recommendations to the Panel of Eminent African Personalities and also the Principals in the Grand Coalition Government. Some of these reports' recommendations are incorporated in the new Constitution and some, which were political, administrative or operational have been implemented. Some recommendations, such as merging the Administration Police and the Kenya Police Force (arising from the CIPEV's report) or establishing a Mixed Member Proportional Representation (MMPR) electoral system (arising from the IREC report) were not fully incorporated in the new Constitution.

²⁰ See various reports from South Consulting, which monitors progress in implementing the KNDR on behalf of, and reporting to, the Panel of Eminent African Personalities: <http://www.scribd.com/doc/20106785/Kenya-National-Dialogue-and-Reconciliation-Monitoring-Project-Report> (accessed September 25, 2010).

²¹ On June 20, 2008, the Minister for Justice, National Cohesion and Constitutional Affairs (MoJNCCA) published in the Kenya Gazette two bills to facilitate completion of the constitutional review process. They were passed by parliament on November 4, 2008, and assented to by the President on December 11, 2008.

²² Parliament adopted the PCK on April 1, 2010, without any amendments, after failing to meet the required threshold of 2/3rds majority of the 222 MPs. The Attorney General published the same on May 6, 2010. Under the Review Act, the IIEC then took the responsibility for framing the referendum question, conducting the same and announcing the official results. See Parts II and III of this Report.

PART II: ROAD TO THE 2010 REFERENDUM

This section: outlines the organs and stages of the constitutional review process, which underlay the monitoring undertaken; provides the KHRC's rationale for participating in the referendum (which was an electoral process) and monitoring the same; and speaks to the establishment of the Referendum Monitoring and Advocacy Centre (REMAC), which sets out the objectives of the monitoring, the thematic areas monitored, the geographical areas mapped out and the methodology the KHRC relied on.

This section also, more broadly, provides the context of the 2010 referendum. The referendum was an event (of about three to four days), but background processes informed the nature of this event. Thus, this Part provides critical legal, policy, institutional and political, institutional considerations, which informed the findings, laid out in Part III.

2.1 Stages of Review and the Organs

There were five stages in the process, which required consultation as wide as feasibly possible. Box 2 below highlights the stages as planned (although in execution, there were some delays).²³

Box 2: Stages of Review

- a) **Stage 1:** an inclusive process would be initiated and completed to establish a statutory framework for review, including a timetable. It was envisaged that the review process would be completed within 12 months after enactment of laws by Parliament
- b) **Stage 2:** Parliament would amend the former Constitution of Kenya (2008) to secure the process and provide for the power of the people to enact the new Constitution through a referendum
- c) **Stage 3:** The statutory process would provide for the preparation of a comprehensive draft by experts
- d) **Stage 4:** Parliament, through its Select Committee and whole House later, should consider and approve the resultant draft Constitution
- e) **Stage 5:** The new Constitution would be ratified by Kenyans in a referendum

(Source: Committee of Experts Website, 2010)

The organs of review under the Review Act were: a) the CoE; b) the Parliamentary Select Committee (PSC) on Constitutional Review; c) the National Assembly composed of all 222 Members of Parliament (MPs); and, finally, d), the referendum.²⁴ Stakeholders and the CoE further agreed that a Reference Group of 30 members be established as a 'clearing house' for agreement and consensus on content matters.²⁵ For example, on matters such as clauses on the Kadhis' Courts and the Right to Life, the Reference Group agreed on wording (although the clergy represented later backtracked on the same).²⁶ The CoE is candid by citing that:

²³ Most of the deadlines were met since the Review Act was 'self-executing.' For further details, see: www.coekenya.go.ke (accessed September 30, 2010).

²⁴ Section 5, the Constitution of Kenya Review Act (2008). The Parliamentary Select Committee (PSC) was set up under Section 7 of the Review Act and consisted of 27 members. The PSC played a supervisory role for the CoE, on meeting its deadlines and ensuring funding and other logistical support. It also developed political consensus amongst MPs on the 'contentious issues' cited by the CoE, reaching agreement on the Executive and devolution. It, however, assumed a third role, drafting a Constitution with proposed amendments as it did in the Naivasha retreat (ending January 9, 2010). CSOs, however, accused the PSC of usurping the mandate of the CoE. The latter restored gains removed, but left some PSC recommendations in the document which remain in the Constitution of Kenya (2010).

²⁵ Ibid, see Fourth Schedule. The Reference Group could be described as a 'clearing house' to approve or disapprove some content. The 30 members included: those working on and/or representing persons living with disabilities, women, the youth, children, teachers, other workers, governance, human rights, the bar and the bench, mainstream and evangelical faith-based organisations (FBOs). The Group provided feedback to its constituencies as drafting progressed, and also to the CoE about issues from those constituencies. The CoE acknowledges the role of this Group by citing that it made some broad agreement on most contents. See the CoE's Final Report: <http://www.coekenya.go.ke/> (accessed October 26, 2010).

²⁶ See the CoE's Final Report, Ibid. The CoE states: "But that notwithstanding during the Committee's many interactions with the clergy, the Committee discerned a rather unfortunate constant shifting of positions by the clergy. At a meeting held at KICC on 15th July 2009, the Catholic Church was categorical that it had no objection to the inclusion of Kadhis' Courts in the Constitution. It maintained this position in various other meetings but it insisted that abortion must be outlawed in the Constitution. The evangelical churches' leadership was, however, vehement in its opposition to the inclusion of the Kadhis' Courts in the Constitution during the said KICC meeting."

PART II: ROAD TO THE 2010 REFERENDUM

“...all these matters were agreed upon during our meeting held in Nanyuki on 16th October 2009 with the statutorily created Reference Group of which both religious groups were represented. After the meeting, a joint statement was issued signed by all parties and was read in the full glare of television cameras. The nation sighed in relief. In the statement, it was agreed that the Kadhis’ Courts be included in the Constitution and the Life clause be expressed in the neutral terms that “Every person has the right to life” thereby leaving the rest for debate at legislative level. Subsequent activities by the clergy were however most disheartening and disappointing.”²⁷

To summarise major points about CoE as the technical organ of review. The CoE (sworn in March 2009) was composed of six nationals and three foreigners with the mandate to harmonise the various constitutional drafts proposed over the years.²⁸ The CoE’s was to:

- a) Identify issues agreed upon, and those not agreed upon, in the existing draft Constitutions;
- b) Solicit and receive memorandum on contentious issues;
- c) Undertake thematic consultations with interest groups, caucuses and experts;
- d) Carry out studies, research and evaluations on the Constitution and constitutional systems;
- e) Make recommendations to the PSC on resolution of contentious issues;
- f) Prepare a harmonised draft Constitution for presentation to the National Assembly;
- g) Facilitate civic education in order to stimulate public discussion and awareness on constitutional issues; and,
- h) Liaise with IIEC to hold a referendum on the draft Constitution.

In the design of the Constitution of Kenya, the CoE was to abide by the following five principles, to: ensure that the national interest prevails over regional or sectoral interests; be accountable to the people of Kenya; ensure that the review process accommodates the diversity of the people including on the basis of socio-economic status, race, ethnicity, gender, religious faith, age, occupation, learning, persons with disabilities and the disadvantaged; ensure that the review process is participatory, transparent, and is guided by respect for the principles of human rights, equality, affirmative action, gender equity, and democracy; and finally, ensure that the outcome of the review process faithfully reflects the wishes of the people of Kenya.²⁹ Opinion is varied as to whether the CoE, themselves and through the Constitution of Kenya (2010), faithfully upheld all five principles, but the majority of Kenyans (as seen in Part III of this Report) did approve the then Proposed Constitution of Kenya (PCK) to be the country’s new Constitution.³⁰

2.2 KHRC’s Role in the Final Phase of Constitutional Review

The KHRC’s vision is to entrench human rights and democratic values in Kenya. Its mission is to promote,

²⁷ Ibid, pages 10 and 46.

²⁸ The experts were: nationals: Nzamba Gitonga (Chair); Atsango Chesoni (Vice Chair); Abdirashid Abdullahi; Otiende Amollo; Bobby Mwangi; and Njoki Ndung’u; and foreigners: Dr Chaloka Beyani; Professor Christina Murray; and Professor Fredrick Ssempebwa.

²⁹ See Review Act, Op Cit.

³⁰ The CoE did its job well, despite misgivings from some quarters. On its own website, when asked to comment on whether the CoE did a commendable job, those who responded (2,543 people) reply as follows: Yes (66.5 per cent); No (24 per cent); and Maybe (8.3 per cent). 1.2 per cent of those who responded not aware of the CoE. See: <http://www.coekenya.go.ke/> (accessed October 26, 2010). There should be an independent gauge of the CoE’s work. The KHRC considers the CoE to have met its core principles, discussed in Sub-Section 2.2 below.

protect and enhance the enjoyment of all human rights for all individuals and groups.³¹ As seen in Sub-section 1.1, the KHRC has been involved in advocacy for constitutional reform and at the forefront of efforts to achieve a human rights-based and people-centred Constitution. In 2009, the KHRC was selected to serve on the Reference Group working with, and counter-checking the work of, the CoE in drafting the new Constitution. As part of the Reference Group, the KHRC was privy to the debates on content and process raised by the public with the CoE, as well as by other sectors. The KHRC served between August 2009 and March 2010, through meetings and working retreats.³² Through the above, and working with the *Katiba Sasa Campaign*, the KHRC provided linkages between the CoE and the KHRC's constituencies.³³ The KHRC also commented, critiqued and gave feedback to the CoE directly. The KHRC commented on all drafts through written memoranda. When the PCK was published by the Attorney General, the KHRC issued a public statement which noted that the PCK was an improvement on the former Constitution, since the PCK embodied principles necessary to ensure accountability of State power.³⁴ The KHRC therefore endorsed the PCK. Finally, the KHRC established a Referendum Monitoring and Advocacy Centre (REMAC) to monitor the referendum, as outlined below.

2.3 KHRC'S REMAC

Accountable electoral processes are critical towards realisation of the KHRC's vision and mission. From 1994 to date, the KHRC has monitored electoral processes, both elections and referenda.³⁵ Electoral processes are avenues for citizens to express their will when choosing their representatives or deciding on substantive matters, like the Constitution, by way of referenda. Although Kenya has gone through several elections since independence, the electoral processes remain volatile, requiring vigilance to ensure human rights are safeguarded and results accurately represent the will of the citizenry. Thus, the KHRC trained and dispatched monitors all over the country.³⁶ The objective was to avert potential electoral malpractices before, during and after the elections and help build voters' confidence in the electoral process.³⁷ Below is the goal of the monitoring, its objectives, its scope and, finally, targeted human rights violations.

2.3.1 Goal of Monitoring

The goal was to *ensure a free, fair, accountable, and violations-free constitutional referendum in Kenya*. The KHRC anticipated a conducive electoral environment in which both voters and campaigners (that is, both the 'Yes' and 'No' camps) would not face unreasonable limitations to their fundamental freedoms and participate in the process. The objectives were to: a) monitor and document the observance of human rights by all actors; b) seek accountability and redress for human rights violations; and c) campaign for the observance of human rights during the referendum.

31 The KHRC aims to achieve this through five strategic objectives: a) civic action for human rights; b) accountability and human rights-centred governance; c) leadership in learning and innovation in human rights and democratic development in Kenya; d) mainstreaming equality, non-discrimination and respect for diversity; and finally, e) organisational sustainability.

32 Tom Kagwe, Senior Programme Officer (Research and Advocacy) represented the KHRC in the Reference Group.

33 The *Katiba Sasa Campaign* was hosted by the Constitution and Reform Education Consortium (CRECO). Its objective was to check that both content and process respected the five principles in the Review Act, but it also developed 11 other principles. Through a series of technical meetings, the Campaign generated information for advocacy with the organs of review, the Reference Group and for press conferences (held every Sunday between November 2009 and August 2010). See: <http://www.crecokenya.org> (accessed September 30, 2010).

34 These principles include: popular sovereignty; separation of powers; checks and balances; constitutionalism; judicial review; devolution of power; public service and professionalism; and the protection and promotion of fundamental freedoms and human rights. With this principles being met, the KHRC endorsed the PCK as capable of transforming the State.

35 The KHRC monitored the General Elections of 1997, 2002, and 2007. It also jointly, with the KNCHR, monitored the referendum of 2005.

36 The KHRC trained 60 monitors (40 men and 20 women) from 70 constituencies selected on the basis of what the KHRC was monitoring, including violence, abuse of State resources and hate speech. The KHRC's staff also participated in observation of the referendum. See Annex 1.0 for the areas/constituencies monitored.

37 Kenya has experienced electoral malpractices leading to gross human rights violations before, during and after voting before. Since the advent of multipartyism in 1992, many have been disenfranchised, injured and killed and property destroyed due to political polarisation. Following the 2008 PEV, the electorate became disillusioned by elections. Efforts were required by local and international groups to observe every aspect of the electoral process and hold the government accountable for any crimes of omission and commission. See various reports of these groups (between 1992 and 2007).

2.3.2 Objectives of Monitoring

- a) Ensure informed and issue-based engagement during the referendum (during civic education, the campaigns, in dispute-resolution and in voting);
- b) Monitor and document the observance of human rights by all actors in the afore-mentioned phases of the referendum (June 10-August 10, 2010);
- c) Campaign for the observance of human rights during the referendum;
- d) Seek accountability and redress for human rights violations through effective and timely policy and political actions/ responses from dutybearers; and,
- e) Foster strategic linkages and partnerships at all levels.

2.3.3 Thematic Scope and Focus

Based on past electoral processes and bearing in mind the context of the referendum, the KHRC focused on 11 human rights with relevance to electoral processes qualifying as reflecting the people's will.³⁸ Box 3 below summarises them:

Box 3: Monitoring Individual and Democratic Rights

- a) *Rights to campaign and elect representatives* to a public or political office (right to run or elect to public office) at each territorial level of government by universal and equal suffrage, at regular intervals, by secret ballot, and with effective choice between candidates and parties. In the referendum, choice entailed the campaigns for either 'Yes' or 'No' side;
- b) *Right to vote* directly in a referendum on substantial changes to the Constitution affecting the rights of electors or the reach and powers of the national elective office(s);
- c) *Right to integrity and security of person*: citizens' safety and security, or right to be free from physical violence, fear and intimidation;
- d) *Right to free expression*: citizens' ability to freely impart and receive information;
- e) *Right of the independent press to operate freely*: the media's ability to research and report on the politics and administration of the electoral process from the viewpoint of their choosing;
- f) *Right to access information*: citizens' ability to learn about any aspect of the electoral process and not to be restricted from monitoring that process;
- g) *Right to freedom of assembly*: there shall not be unnecessary restrictions on political meetings, processions, public rallies and other types of peaceful gatherings;
- h) *Right to freedom of association*: individuals' and groups' ability to form and join any political organisation or movement that intends to participate in the electoral process;
- i) *Right to freedom of movement*: individuals' and groups' ability to move unrestrained around any part of the country to build support for their political platforms;
- j) *Right to judicial petition*: in cases of disputed election outcomes, an independent, predictable judicial process which reviews and rules on such disputes when and where they arise;
- k) *Right to due process before the law* during judicial petitions challenging the results.

(Source: David Beetham, 2004)

All the above rights are to be applied equally to everyone, individuals or groups, *without discrimination of*

³⁸ See Beetham, David (2004) "Freedom as a Foundation," *Journal of Democracy* 15(4).

PART II: ROAD TO THE 2010 REFERENDUM

any kind.³⁹ In keeping with the constitutional principle of equality of citizenship, no individual's vote is to be valued above or below that of other persons. To track the above human rights (and any violations of the same), the KHRC identified 70 constituencies in which to monitor the referendum.⁴⁰ They were selected as they were: a) constituencies in areas which have historically experienced electoral violence, voter intimidation or allegations of interference with the ballot; b) constituencies in areas the KHRC believed there was the greatest likelihood of misinformation, hate speech or incitement to violence; and c) in 27 instances, where the KHRC is engaged in programmatic work in partnership with local groups on thematic human rights issues.

2.3.4 Targeted Human Rights Violations

Based on the human rights outline above, previous work of the KHRC and the context of the referendum, the following violations were targeted for remedial action:

- a) *Political violence*: including oath-taking, incitement to violence, issuing political threats, disruption of referendum rallies by opponents or state security forces, politically-instigated clashes and any other actions that could breach public peace and security;
- b) *Hate speech*: including utterances that are prejudiced, stereotypical, discriminatory or illegal in the sense that they are intended to incite contempt, hatred, hostility, suspicion and violence against those from other ethnic communities and/or religious groups in Kenya. This also included the use of unsavoury language;⁴¹
- c) *Corruption and abuse of public resources and offices* including: buying and destroying voter cards, bribery and/or expedient provision of public services and misuse of public resources as well as the harassment of opposition supporters and the media by arbitrary arrest, detention and torture, among other practices prohibited under domestic, regional and international human rights law;⁴²
- d) *Myths and propaganda* including distortions and misrepresentations of the PCK's content with the intention to mislead and sway votes in favour of either political side/divide;
- e) *Malpractices of any other nature* including any other behaviour inimical to the smooth management of the referendum. There were two aspects to this:
 - i) During preparations, to ensure: timely voter/civic education (by the CoE, the IIEC and other actors), registration of voters and referendum sides (by the IIEC);
 - ii) During polling and counting, to observe: voter delays; the order in which voters were allowed to cast their ballots; whether secrecy was observed; the use of the voter register and the 'black book' (that provides backup for names in the entire electoral register); procedures to assure security of the ballot boxes; the counting and tallying of votes; whether the announcement reflected the true count and tally; the freeness and fairness of the voting process, especially for women, the physically challenged and the elderly, among other marginalised groups; and general order.

The KHRC collected and collated data guided by the above considerations, highlighting areas of action/required responses by relevant authorities and seeking solutions where feasible. Part III below contains the findings.

³⁹ The KHRC, under its Strategic Objective 4 on equality and non-discrimination, supported an inclusive and open-ended list of protected grounds, including those provided for in Article 27(4) of the Constitution of Kenya (2010), which guarantees freedom from direct and indirect discrimination on: "any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth." Through judicial activism under its equality and non-discrimination campaign, the KHRC is currently working on guaranteeing gender identity and sexual orientation as protected grounds.

⁴⁰ These constituencies are contained in Annex 1. See Section 5.0.

⁴¹ 'Unsavoury language,' refers to language expressive of a prejudice or a stereotype that could encourage discriminatory behaviour.

⁴² In the 2005 referendum, the government stated that the referendum was a government project and it was incumbent for it to use public funds to campaign for 'Yes.' Public servants were to support the 'Yes' vote. In 2010, similar statements were made, as seen in Part III of this Report.

PART III: MAJOR FINDINGS

This Part is in five Sections, providing the KHRC's major findings. The first Section shows that civic education proceeded with challenges, notwithstanding the CoE's able efforts on the same. The second Section documents findings from the referendum campaigns in relation to: a) abuse of office or State resources; distortions of the PCK; and c) use of hate speech and/or unsavoury language. The third Section documents acts of intimidation, threats and violence, including sexual and gender-based violence (SGBV). Finally, the KHRC reports on the conduct of the referendum—what worked, where there were anomalies and hitches both at the constituency level and at the national tallying centre in the Bomas of Kenya.

This Part is important in that all Kenyans, and institutions supposed to maintain law and order and ensure justice prevails, must hold all violators to account through public and private prosecutions, especially under the Bill of Rights of the Constitution of Kenya (2010). Without holding these 'leaders' to account, the rule of law is compromised. While the KHRC lauds efforts by some institutions to prosecute some individuals, the majority of the individuals who committed these human rights violations are still walking scot-free. Many are MPs, who are supposed to lead *Wanjiku* by example. The concluding remarks are clear: MPs used distortions, lies and threats to support or oppose the passage of the Constitution of Kenya (2010). This Constitution must be used by Kenyans and institutions to hold these individuals to account.

3.1 Civic Education by the CoE

The KHRC was satisfied with the technical drafting of the Constitution of Kenya (2010). But the CoE had another mandate, that of civic education (throughout and also within the 30-days period it was to facilitate civic education on the PCK, as provided for by the Review Act). Having been involved in the compilation of the public's views and harmonisation of the various drafts, the CoE was best placed to inform and educate the public on the content of the PCK and its implications. The findings of this report indicate that the CoE was limited by time and bureaucratic hurdles (with respect to accessing financial resources). It was, from the outset, rendered unable to conduct far-reaching and effective civic education:

- a) Initially, the Secretariat and the Experts wrangled among themselves due to political differences, which were later resolved;
- b) The CoE was unable to produce enough drafts of the PCK in Kiswahili;
- c) Civic education was sporadic as opposed to sustained;
- d) The early onset of campaigns, before the statutorily-mandated period, overshadowed civic education;
- e) The monitors noted areas where civic education was not conducted fully, such as Turkana, Marakwet, Samburu and Kuria among others;
- f) Though some of these areas received copies of the then PCK, the level of understanding of the same was low considering high illiteracy levels in English and Kiswahili; and
- g) In some areas, the CoE did not receive support from local leaders especially where communities had taken a stance against the PCK such as in Keiyo, Bureti, Bomet, Sotik and Baringo among others, largely in the north Rift Valley province.

The Review Act did not, however, limit responsibility for conducting civic education to the CoE. Other individuals, groups and organisations conducted civic education. Key were MPs, CSOs and a few mainstream faith-based organisations. Much misinformation about and misrepresentation of the PCK's contents occurred, particularly with respect to clauses on the right to life and conditions for terminations of

PART III: MAJOR FINDINGS

pregnancy; land, especially community land; and the Kadhis' Courts.⁴³

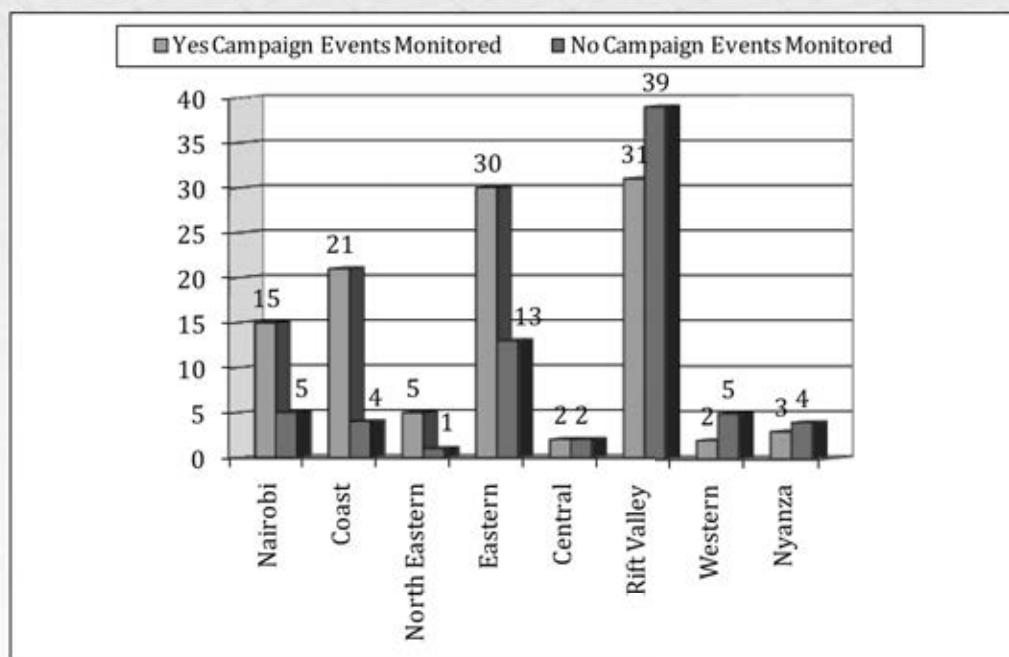
The CoE employed a three-pronged strategy to reduce these myths and propaganda and their efforts seem to have made a difference but the KHRC noted all kinds of materials were being circulated to the public. Perhaps the CoE could have worked with the National Cohesion and Integration Commission (NCIC) to stop the hate speech in particular. That said, the CoE should be commended for using publicly-accessible means for civic education, including: the print and electronic media, public visits and easy-to-read, simple materials, manuals, and so on.⁴⁴

To complement the work of the CoE, the KHRC was involved in civic education through the training of community civic educators at the local, regional and national levels, fora in religious institutions, social gatherings and the media.⁴⁵ While the KHRC position was to support the PCK, the Commission still emphasised the need for the PCK's content to be understood. This proved to be challenge in some meetings that KHRC organised: that is, explaining the KHRC's position but also being part of civic education.

3.2 The Referendum Campaigns

The KHRC monitored 109 campaign events of the 'Yes' team and 73 events of the 'No' team. Most of these events were in the Rift Valley (31 for 'Yes' and 39 for 'No'), while the least covered events were in North Eastern, with only six covered (five for 'Yes' and one for 'No'). Figure 1 below depicts the coverage of campaign events by province. The Figure is followed by cases documented:

Figure 1: Campaign Events Monitored



(Source: KHRC Data, 2010)

⁴³ See more distortions in Sub-Section 3.2 below.

⁴⁴ The CoE states that it relied on direct engagements with the public; the use of media houses; and alliances and partnership and alliances with CSOs. But the CoE notes that civic education worked, despite the distortions, but does not cite the challenges, alluded to in Chapter 10, they faced in terms of civic education. See the CoE's, Final Report, Chapters 4 and 10: <http://www.coekenya.go.ke/> (accessed October 26, 2010).

⁴⁵ With regard to the regions, awareness was created about the content of the draft during the pre-referendum period in July 2010. Two activities contributed to this result. First, civic education of potential trainers in the regions. Second, airing of radio programmes. Through radio programmes, many Kenyans were reached. The impact of this work was the ratification of the PCK.

PART III: MAJOR FINDINGS

3.2.1 Abuse of Office and Bribery

The Public Officers' Ethics Act governs the conduct of public officers, who are prohibited from bias in the electoral process. Section 16 prohibits public servants from political activities, such as party campaigns, which could lead to her/him to compromise the neutrality of the office they hold.⁴⁶

The Act does not speak to the role of civil servants with regard to a referendum on a law being sponsored by the government. However, there were two contentions: first, about attending campaign rallies or participating in organisation of the same; and second, whether public officers should have been forced to adopt the position of the government on the PCK. While civil servants may exercise their right to vote and freedom of expression privately, it is illegal to do so in public rallies and to be forced to organise such rallies. In addition, no civil servant should have been forced to support the PCK. Below, in Box 4, find some incidents reported to the KHRC, depicting abuse of office by public officers, which translates to abuse of State resources:

Box 4: Abuse of State Office

- On July 27, 2010, "transport reimbursements" of KES1,000 each were given to every person who attended a government civic education meeting spearheaded by Edward Sambili (PS, Ministry of Planning), Geoffrey Taragon (DC, Marigat), Obel Ojwang (DC Baringo Central, Joshua Otieno (DC, Baringo North) and lawyer Kipchumba Murkomen at the Government Training Institute, Kabarnet.
- Naomi Shaaban (MP Taveta), while closing a 'No' meeting at Kitobo, Taveta district on July 30, 2010 gave KES10,000 each for children, women and men respectively.
- On May 7, 2010, the Head of Civil Service, Ambassador Francis Muthaura, expressed his desire to have civil servants support the PCK.
- On June 9, 2010, the Prime Minister, Raila Odinga, instructed 40 PSs to publicly support the PCK.
- On July 22, 2010, at a 'Yes' rally in Gusii stadium in Kisii, President Mwai Kibaki agreed to the request to have Kisii University College elevated to a university.
- On July 26, 2010, Vice President Kalonzo Musyoka, while touring Yatta, Mwingi and Masinga districts pledged to give KES1 million to residents of the district that cast the most votes in favour of the PCK.
- On July 21, 2010, President Mwai Kibaki established extralegally three districts (Balambala, Habaswein and Tarbaj) as he campaigned for the PCK in Garissa. The President also announced he would be elevating Garissa Teachers Training College to the status of a public university to woo 'Yes' voters in the area.⁴⁷

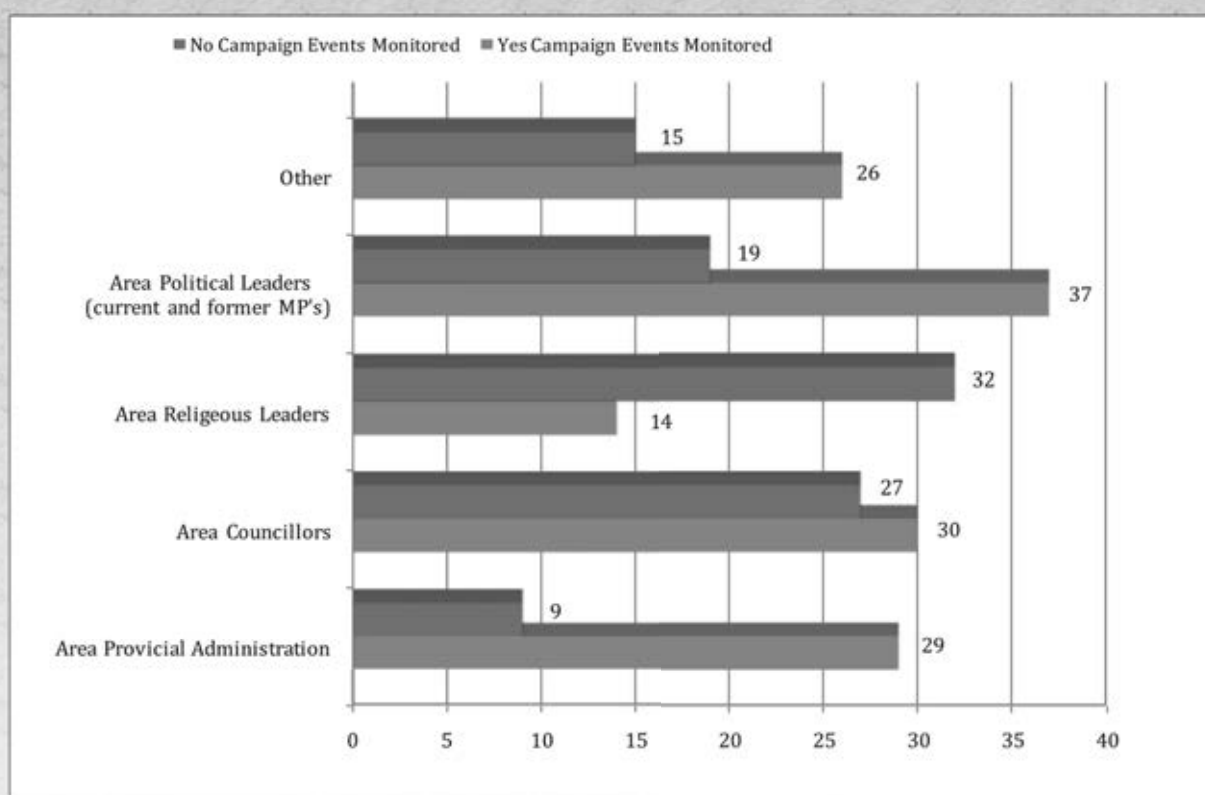
(Source: KHRC Data 2010)

The KHRC was also able to track who mobilised for campaign rallies. Figure 2 below shows both sides were responsible for used public officials to mobilise crowds to attend their campaign rallies. They ranged from Councillors, to the Provincial Administration as well as religious leaders and local opinion leaders. The 'Yes' camp relied on the Provincial Administration to mobilise for its events in 29 incidents reported to the KHRC. The 'No' camp relied on the same officers, with nine incidents reported. With regard to the use of religious leaders by the 'No' team, 32 incidents were reported to the KHRC, while the 'Yes' team relied on the same in 14 incidents.

⁴⁶ Section 16 (1) provides: "A public officer shall not, in or in connection with the performance of his duties as such - (a) act as an agent for, or so as to further the interest of, a political party; or (b) indicate support for or opposition to any political party or candidate in an election." Further, in Sub-Section 2, a "public officer shall not engage in political activity that may compromise or be seen to compromise the political neutrality of his office."

⁴⁷ Districts were gazetted on August 26, 2010, a day before promulgation day. Daily Nation, August 27, 2010.

Figure 2: Mobilisers for Campaigns



(Source: KHRC Data, 2010)

3.2.2 Distortion of the Contents of the PCK

The misinformation or misrepresentation of the PCK's contents was reported to the KHRC during and after the referendum. Some distortions bordered on hate speech and incitement, persisting after the referendum. For instance, on restructuring of the Provincial Administration, government officials have taken different positions, as seen in the post-referendum period.⁴⁸ During the campaigns, distortions by 'Yes' supporters were made to raise people's expectations and whip up support for the PCK; while 'No' supporters of 'No' created fear to generate opposition to the PCK. The following are some such distortions documented by the KHRC monitors.⁴⁹ The statements appear in bold, with translation following (where applicable) and then the person responsible for uttering the same.

- ***“Wakenya wamechanganyikana. Wakamba wakipiga ‘yes’ kwa hii katiba itamaanisha wale wakamba wetu wako Coast Province and other provinces wafunge virango warudi hapa.”*** (Kenyans are diverse. If the Akamba vote yes, it will mean that those Akamba in the Coast province and other provinces should pack their belongings and they come back [to Machakos]).
 - *Kiema Kilonzo (MP Mutito) addressing a ‘No’ rally in Machakos on May 15, 2010.*
- ***“Utakuta siyo tu abortion, utakuta siyo tu kadhi courts. Utakuta vitu vingine mle ndani. Hata mbwa yako utalipia kodi, hata ng’ombe yako utalipia kodi.”*** (You will not just find abortion, or Kadhis' Courts, but you will find many more in the PCK. You will also pay tax for your dog and for your cow too).

⁴⁸ See various media reports (electronic and print), between September and October 2010. To some senior government officials, and this includes ministers, restructuring means linking the administrators to county governments, whilst to others, restructuring means scrapping the entire system and assigning the administrators new roles in governance at national level.

⁴⁹ statements have been verified and corroborated by the KHRC. The names of all the monitors are withheld.

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- *Bishop Mark Kariuki addressing a gathering in Kakamega on June 6, 2010.*
- *“Hii katiba inasema bunge itatunga sheria ya juu ya kumiliki shamba na ya chini ya kumiliki shamba. Hatari moja hapa Trans Nzoia, ikiwa nasikia wabunge wengi wanasema huenda tutaweka acre moja shamba la chini. Hatari ni hii. Bunge ikishapitisha kwamba acre ya chini unayomiliki ni acre moja, ujue kuanzia siku hiyo huwezi kuruhusiwa kununua plot, huwezi enda kununua nusu acre. Sasa vijana, sisi tutaweka wapi familia?”* (This PCK provides that Parliament will enact legislation on minimum land acreage of owning land. The danger is that in Trans Nzoia many legislators are saying that it is possible to provide that only one acre will be the minimum. This is dangerous. One parliament does so, it will be illegal to buy a plot of half an acre. Now, as youth, where do we raise our families?)
 - *Joshua Kutuny (MP Cherengany) addressing a ‘No’ rally in Saboti constituency at the show ground in Kitale on June 19, 2010.*
- *“Article 24 inasema hivi: ‘The State shall not discriminate against any person on any ground including race, sex...’ Nataka tuangalie kwa makini hapo. Mimi nilikuwa Bomas...Kwa Bomas hii mambo badala ya ‘sex’ ilikuwa imewekwa ‘gender’ kumaanisha itakuwa aitha mwanaume au mwanamke. Lakini tukiangalia sasa, wanasema hii katiba ikipita haita discriminate against any marginalised groups that include sex. Mumesikia mambo ya kusema, kuna gay marriages, kuna lesbianism, sindio? Na hiyo tunajua kwa mila yetu ya ki-Africa—hata hatutaki ku-mention...Lakini sasa inaonekana watakuwa protected kwa hii katiba. Watapata rights. That means we are introducing gay marriages in our Constitution, we are allowing lesbianism in our Constitution.”* (Article 24 says this: “The State shall not discriminate against any person on any ground including race, sex,...” I want us to pay keen attention to this provision. I was at Bomas.... In Bomas instead of using the word ‘sex’ we had put the word “gender”, to mean the distinction between a man and a woman. But we can see now that they are saying that should this PCK pass it will not discriminate against any marginalised groups that include sex. You have heard it said that there are gay marriages; there is lesbianism, isn’t it? And we know that according to our African culture... we don’t even want to mention.... but now it looks like they will be protected under the PCK. They will have rights. That means we are introducing gay marriages in our Constitution, we are allowing lesbianism in our Constitution).
 - *Linah Jebii Kilimo (MP Marakwet East) speaking at a ‘No’ rally in Kwanza at the Kwanza grounds on June 22, 2010.*
- *“Article 63 (1) of the draft Constitution says: ‘Community land shall vest in and be held by communities identified on the basis of ethnicity, culture and similar community of interest.’ If the draft Constitution is passed during the referendum, Kenyans who have migrated and settled in areas outside the traditional ancestral lands of their tribes may be evicted by the local communities. In the past, such evictions were illegal and done because of impunity. However, if the draft is passed, then every tribe will be given an excuse to evict anyone they think does not belong there, with full support of the National Land Commission.”*
 - *Linah Jebii Kilimo (MP Marakwet East) speaking at a ‘No’ rally in Kwanza at the Kwanza grounds on June 22, 2010.*
- *“Katiba hii ikipita, kazi humu itakayopewa kaunti ya Kilifi ni kuchukua kodi ya kufuga majibwa. Na nyinyi mtawekewa sheria ya siku maalum ya kuzikwa kwa watu na siku ya kuzika majibwa. Hivyo ukimzika jibwa na usikubali na hiyo, utachukuliwa hatua”* (Should the PCK pass, the work of the County in Kilifi will be to collect taxes on the dogs that you keep. And a law will be enacted requiring you to bury people on a certain day and bury dogs on a certain day. Therefore, if you bury a dog on a different day from the one specified you will be prosecuted.).
 - *Yusuf Abubakar at Mariakani’s stage grounds at a ‘No’ rally on July 3, 2010.*
- *“Katiba hii ikipita kila mzigo utakaoingizwa kwa kaunti kutoka Kaunti nyingine utalipiwa ushuru. Je, watu wa Kinango na Kwale wataweza kulipia magunia ya mihogo mnayopeleka sokoni Kongowea?”* (Should the PCK pass, all cargo coming from other counties will be taxed. How then will you the

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people in Kinango and Kwale be able to pay for the goods that you take to the market in Kongowea?)

- Francis Baya (MP Ganze) at a Harambee for Mwavumbo Secondary School, on July 10, 2010
- *“Mkipitisha katiba hii, mjue mmepoteza mashamba yenu...katiba hii ni wazi kwamba ni njama ya kunyang’anya wananchi mashamba.”* (If you pass this Constitution, then you will have lost your land...this Constitution is a ploy to take away land from Kenyans).
 - Samuel Poghishio (MP Kacheliba) and Sammy Mwaita (MP. Baringo Central) were quoted saying that (in Kiswahili and English respectively), when addressing a ‘No’ rally in Marigat town on July 17, 2010.
- *“I want to thank the retired President because he led us without problems. I will be very brief and I want to ask one thing: this Constitution will allow same sex marriages. And allow me to speak in Kalenjin: ara anyun nyonei ngo konyo kutononane Arap Boit? (Who will come to marry me, Arap Boit? Therefore Mzee, we are not going to allow such behaviour to destroy our good Kalenjin culture. Thank you all).*
 - William Boit (former MP Baringo North) addressing a ‘No’ rally in Marigat town on July 17, 2010.
- *“I was among the leaders of this country who brought the Lancaster Constitution. I have heard some of those supporting the PCK calling us land grabbers. Mzungus came to this country. Whose land was grabbed? Is it not Rift Valley? And who did the Rift Valley belong to before the wazungu came? It belonged to the Kalenjins and the Maasai. When Wazungus left the country, Kenyatta and I decided not to divide the country along tribal lines and that is why we tried our best to allocate people land anywhere. And now they want to create room that if this Constitution passes land matters will start burning now. We shall see how they will cease that fire...finally, I want to tell Kenyans that this PCK is a danger to the security of this country because it allows the security personnel to participate in the strike like trade unionist workers and I want to ask Kenyans what would happen if the enemy strikes while the security forces are on strike? Your lives and property will be at risk, therefore I am telling you to vote no.”*
 - Former President Daniel Arap Moi addressing a ‘No’ rally in Marigat town on July 17, 2010.
- *“If ‘Yes’ wins, the Mombasa port will belong exclusively to the Mombasa County.”*
 - Najib Balala, Minister for Tourism, at Makadara grounds in Mombasa, on July 25, 2010.
- *“Kupigia katiba mpya kura kutawafanya muondolewe katika shamba la Basil Criticos, pia hatutakuwa na uwezo wa kumpokonya mashamba yake yote.”* (Voting for the proposed Constitution will result in your eviction from the land belonging to Basil Criticos and, furthermore, you will never be able to dispossess him of all his properties).
 - Naomi Shaaban (MP Taveta), addressing a meeting at Kitobo, Taveta district on July 30, 2010.
- *“Serikali itapea nyinyi bunge nyingine mradi mpitisha katiba.”* (The government will give you [women] another parliament so long as you vote in favour of the draft).
 - George Saitoti (Minister for Internal Security and Provincial Administration) addressing women in Marigat Town on August 1, 2010.
- *“Nyinyi sasa mnaweza zaa ile watoto mntaka na katiba itashughulikia watoto wenu wote.”* (You can give birth to as many children as you wish, the Constitution will take care of all your children).
 - Maison Leshomo (Nominated MP) addressing women in Marigat Town on August 1, 2010.
- *“Wamepanga kufukuza nyinyi kwa hii mashamba na watatumia katiba hii, na pia kuna njama kufukuza sisi Nakuru na Laikipia.”* (They have planned to evict you from your land through this proposed Constitution and they are also planning to chase us from Nakuru and Laikipia).

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- *Statement made by Gideon Moi (former MP) at Mochongoi Settlement Scheme, on August 29, 2010.*
- *“This draft Constitution will constitutionalise land clashes. Article 63 (1) of the draft Constitution says: ‘Community land shall vest in and be held by communities identified on the basis of ethnicity, culture and similar community of interest.’ If the draft Constitution is passed during the referendum, Kenyans who have migrated and settled in areas outside the traditional ancestral lands of their tribes may be evicted by the local communities. In the past, such evictions were illegal and done because of impunity. However, if the draft is passed, then every tribe will be given an excuse to evict anyone they think does not belong there, with full support of the National Land Commission.”*
- *Excerpts from a leaflet entitled: “Will the New Constitution Secure your Peace Land and Food?” prepared by Kenya Christian Church Leaders.*

It is clear that *Wanjiku* was being misled by ‘leaders’ she elected and expects guidance from. Such misrepresentation could be addressed by existing provisions of the Penal Code. In addition, the Constitution of Kenya (2010) can address the utterances of such distortions lies through provisions relating to the qualities of a leader or State officer.⁵⁰

3.2.3 Use of Hate Speech and Unsavoury Language

The Penal Code, the Communications Act and the Media Council of Kenya Act have provisions relative to hate speech. More recently, the National Cohesion and Integration Act outlaws hate speech, defined as the use of “threatening, abusive or insulting words or behaviour.” Anyone who produces, publishes or displays any material that is “threatening, abusive or insulting or involves the use of threatening, abusive or insulting words or behaviour commits an offence if such a person intends thereby to stir up ethnic hatred, or having regard to all the circumstances, ethnic hatred is likely to be stirred up.”⁵¹

Definition is restricted to hate speech on the ground of ethnicity. The KHRC relied on a universally accepted definition that characterises hate speech as any communication which disparages a person or a group on the basis of any ground, including race, sex, ethnic or social origin, colour, age, disability, or such other protected grounds that could bring about discrimination. Hate speech is forbidden because it may incite violence or prejudicial action against or by a protected individual or group, or because it disparages or intimidates a protected individual or group.

Despite clarity in both local and international law, it was reported that, again, Wilfred Machage, MP [Kuria.], uttered the following: “*WaKikuyu wahame Rift Valley mahali kulimilikiwa na WaDorobo.*” (The Agikuyu should leave the Rift Valley, which belongs (belonged) to the Dorobo).⁵² The NCIC acted promptly, as seen by the arrest and charging of three MPs—Wilfred Machage, Fred Kapondi, MP [Mt. Elgon.] and Joshua Kuttuny, MP [Cherengany]—as well as one businesswoman with the crime of hate speech.⁵³ This action perhaps explains why incidents of hate speech in public fora and the media decreased.

Though incidents of hate speech diminished, the use of prejudicial and discriminatory language with discriminatory, derogatory or demeaning implications persisted. Such statements are seen below.

⁵⁰ See Articles 73(1) and 33(2).

⁵¹ Section 13 (1), National Cohesion and Integration Act (Cap 12 of 2008) .

⁵² Wilfred Machage speaking at the opening of the Red Card Centre.

⁵³ The case is still undecided as we produce this Report. Machage stands suspended from the portfolio of assistant minister since he was found to have a case to answer.

Box 5: Use of Prejudicial and Discriminatory Language

- On July 27, 2010, Charles Keter, MP [Belgut.], addressing a 'No' rally said the following at Kabarnet Stadium: *"Hii katiba ni mbwa ya Marekani...Orengo hana mashamba RiftValley na tunamweleza awachane na Rift Valley."* (This constitution is America's dog...Orengo (MP for Ugenya) does not have land in the Rift Valley and we urge him to stop meddling with Rift Valley)
- On July 27, 2010, President Kibaki, without naming him, accused former President Moi of misleading Kenyans and asked him to stop doing so: *"Wazee wengine wanazunguka wakisema katiba ni mbaya."* (Some old men are moving around saying the Constitution is bad)." He said he felt sorry for former President Moi, whom he said was embarrassing himself with these activities. *"Ni aibu kubwa kwa wazee kama hawa. Awache wasiwasi na aungane na sisi tupitisha katiba."* (It is a shame for such old men. He should stop panicking and join us so that we can pass the Constitution). Kiema Kilonzo, [MP. Mutito.], responded thus: *"[American Ambassador] Ranneberger has been going around the country campaigning for the Constitution. Why didn't Kibaki talk against him knowing well that he's a foreigner...We are eager to listen to the Whites and when it comes to Moi we tell him to shut up. Isn't that double standards?"*
- Naomi Shaaban, [MP. Taveta], responding to an audience in a meeting at Kitobo, Taveta district on July 30, 2010: *"Mr Ranneberger [American Ambassador] is just a small man who has no ability to shake her or deliver what he promised Taveta Youth, Ranneberger ni kanyoka kadogosana."* (Ranneberger is a very small snake)

(Source: KHRC Data 2010)

The use of the terms "wazee", "whites" and "foreigners" implied in the contexts they were used that such persons should not be involved in any political activities processes and was, in this sense, discriminatory.

3.3 Intimidation, Threats and Violence

Section 96 of the Penal Code (Cap 63) makes it a crime for any person to incite another to a violent act including through: statements and acts of commission or omission, as reported below. The KHRC's monitors and the media reported an upsurge on acts of intimidation, incitement, violence, Sexual and Gender-based Violence (SGBV) and intolerance. A cornerstone political right is the right to freedom of expression. Incidents of threats and intimidation to those campaigning for both the 'Yes' or 'No' vote were reported.

Intimidation and Threats

- On July 21, 2010, in Suswa (Narok), 'Yes' supporters tried to stop the holding of a 'No' rally led by nominated Councillor Lydia Ntimama.
- On July 22, 2010, 'Yes' supporters believed to be loyal to Moses Wetangula, former Minister for Foreign Affairs, stopped a helicopter from landing in Bungoma, which was carrying 'Yes' supporters Noah Wekesa, [MP. Kwanza.], Mukhisa Kituyi (former MP) and Eugene Wamalwa, [MP. Saboti]. Three people were injured as a result.
- On July 23, 2010 in Nkubu (Meru) a group wearing 'Yes' T-shirts and caps chanted slogans drowning out the speakers' voices at a 'No' rally despite the presence of the Kenya Police Force.

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Incitement to Violence

- Most threats were issued by politicians. For example, the Minister for Water, Charity Ngilu (allied to the 'Yes' camp) was reported to have uttered at the Launch of the Yes campaign in Uhuru Park on 15th May, 2010; "*Hawa watu wanataka kuangusha hii katiba. Kwahivyo msiende mukiuliza huyu nikimpiga? Pigeni! Na piga sasa.*" (These people want to floor the PCK. So, do not go asking whether we need to beat them. Beat! And beat them now).
- On 10th June 2010 during the launch of the 'No' Secretariat in Nairobi, Wilfred Machage was reported to have asserted that: "*Hawa wajaluo watoke kwa ardhi ya wakuria.... Katiba hii itatupea ruhusa kuwatoa hata kwa fujo.*"⁵⁴ (These Luos should leave the land of the Kuria...the PCK will give us [the Kuria] permission to evict them by force). "*WaMaasai chenu hakiko Rift Valley, mashamba yenu yote yataenda kwa serikali.*" (You, the Maasai, all your land in Rift Valley will be repossessed by the government). "*Nairobi tokeni hii ni shamba la WaMaasai.*" (People of Nairobi, this land belongs to the Maasai, get out).
- On the same day, at a parallel launch, Fred Kapondi was reported to have said: "Bungoma ata vile jina iko in yetu, kule Tranzoia ni kwetu na vile wanasema Tranzoia ni cosmopolitan sisi tunaambia watu wa Tranzoia katiba ikipita wafunge viraka mwende kwenu, wale wako Bungoma katiba ikipita wafuge viraka waende kwao." (Bungoma as the name is ours. Tranzoia is also ours and those claiming that Tranzoia is cosmopolitan, we are telling people of Tranzoia if the Constitution passes they should pack their tatters and go back. And those in Bungoma if the Constitution passes they should pack their tatters and leave.)⁵⁵

Violence

- On July 20, 2010 in Kitui town, violence was reported, where 'Yes' supporters who appeared loyal to Charity Ngilu (Minister for Water) physically attacked alleged 'No' sympathisers, with six individuals suffering injuries as a result.
- In Uriri constituency, on July 28, 2010, a man allied to the area MP, Ojwang Omollo, was murdered after he missed a step and fell trying to jump into a moving pick-up after disrupting a rally. He was the personal assistant to the incumbent and was part of a group that had supposedly been hired to disrupt a parallel 'Yes' rally within the constituency, organised by Martin Owiny, an aspirant. Scores were left injured.

Sexual and Gender Based Violence

- In Molo, from July 11-13, 2010, a girl aged 14 years was kidnapped and gang-raped by members of a community believed to be opposed to the PCK. While they raped the girl, they inquired why people of 'her tribe', believed to be supporting the PCK, were still in the area, implying that her community should have left before the referendum.
- On July 20, 2010, a man beat and injured his wife in Watamu following a disagreement over the PCK. The man, a Christian (assumed a 'No' supporter) reacted when his wife told him: "The proposed Constitution will liberate women and that's why I'm going to vote for it during the referendum. Anybody opposing the new Constitution is an enemy of change."⁵⁶

Further intimidation, threatening the right to freedom of expression and intended to disenfranchise 'Yes' supporters was reported in Molo, Burnt Forest, Kuresoi, Kipkelion, Trans Nzoia, Koibatek and Timboroa.

⁵⁴ Machage speaking at the opening of the 'Red Card Centre' (secretariat for the 'No' camp).

⁵⁵ See media reports between May and June 2010.

⁵⁶ Daily Nation, Wednesday, July 21, 2010.

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In these places, threats of eviction were issued to ‘non-indigenous’ populations by local politicians. While some action, with regard to charging some of alleged perpetrators in courts of law, happened and has been documented in this Report, most violations of the Penal Code occurred with impunity.

3.4 Political Subversion

Although this was not initially a focus for the KHRC, a KHRC monitor informed the KHRC that a meeting was held in the office of a Minister in the ‘No’ campaign. The Minister in question brought together Christian leaders, public officials with the Provincial Administration and opinion leaders from northern Kenya. It was documented that this was not the first of such meetings conducted by the Minister in question.

At the above meeting, the Minister reportedly informed those present that his campaign against the Constitution had nothing to do with the merits or demerits of the PCK, but was about a political contest between himself and the Prime Minister in preparation for the 2012 General Elections. He urged those present to join forces with him on the basis that people from his community had closer ties with their communities than with supporters of the PCK. The Minister thereafter took them through the arguments he was using to rally support against the PCK and urged them to use the same when they returned to their home areas.⁵⁷

3.5 Conduct of the Referendum

The successful conduct of the referendum was a step forward for the consolidation of democracy and rule of law in Kenya. Following the disputed 2007 General Elections, the need to reform the electoral body was acknowledged. Electoral reforms instituted by the IIEC entailed improving the responsiveness of electoral processes to public desires and expectations by fostering greater impartiality, inclusiveness, transparency, integrity and accuracy.

The constitutional review process was legally grounded with timelines and specifications. Institutions responsible for constitutional review and the conduct of the referendum (the CoE and the IIEC) were independent in carrying out their mandate and were open to the scrutiny of civil society and all stakeholders. There was a commitment from the onset that Kenyans would participate meaningfully in the referendum. The success of the referendum was as a result of the following factors:

- a) There was political will and public expectation to adhere to the deadlines of the Review Act.
- b) Early-warning systems were put in place by CSOs to provide information about possible hot-spots to deter violence. Their findings were published in both public and private media.
- c) The IIEC ensured that over 10,000 local observers were accredited for the referendum in to protect the integrity of the vote.
- d) Agents for Yes’ and ‘No’ were accredited to observe the processes.
- e) Campaigns for and against the then PCK were monitored by public bodies and CSOs.
- f) Counting and tallying was done transparently, before the public. Tabulation too and results were continually announced within the entire period.

Polling was conducted smoothly, with few incidents of concern reported. On referendum day, collaboration between various stakeholders including observers, monitors and polling staff was observed. The

⁵⁷ KHRC Monitor (name withheld) was part of the meeting. An affidavit has been signed and deposited at the KHRC.

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following was observed across the country:

Some observations

- i) Opening and closing of polling stations: Most stations were opened at 5 am to prepare for casting of ballots at 6 am. Preparation included briefing and positioning of electoral officials, as well as the admission of agents, observers, the media and other stakeholders. Voting commenced between 6 am and 6.30 am and closed between 5 pm and 5:30 pm, depending when voting had begun. In Donholm primary school, Embakasi constituency, voters had arrived from 4 am but the polling station was characterised by queues which took more than an hour to move from outside to the polling station. By 5:30 pm, when the polling station was closing, there were still queues both inside and outside. In Migori constituency at Moi Suba polling station, however, voters experienced no delays due to the organisation of the electoral officers. The station closed at 5:15 pm, after which the ballot boxes were sealed.
- ii) Time taken to cast votes: Voting was efficient in certain polling stations though the opposite was witnessed in many parts of the country. In Olympic and Donholm primary schools, polling stations were congested and voter turnout high. Once people got into the polling stations, they got lost due to poor labelling and misdirection from the IIEC's staff. Our monitor witnessed an electoral officer at Donholm primary school directing voters to use the combination of the first letters of their surnames and middle names as opposed to applying the first two or three letters of their surnames. Some could not trace their names and, after being unable to vote for more than four hours, swore never to register or vote again. While the KHRC's monitors strived to directly assist, they also raised the concern with the electoral officers.
- iii) Order in the polling stations: In majority of the stations, order was observed. When voters came, in they were served by the first, second and the third clerk who issued them with ballot papers and directed them to go mark out the same at the booths. Thereafter, voters were directed to put the marked ballot papers in the transparent ballot boxes through the open aperture and move to the fourth clerk, who embossed the voters' cards and had their small fingers marked with indelible ink. In cases where voters had nail varnish on, they had the space between the index and middle fingers marked, after which they exited the polling station.
- iv) Voters with special needs: Voters queued and entered the polling stations one at a time. Although there were long queues in the morning (which subsided towards midday and in the afternoon), presiding officers controlled the influx. There were, however, a few instances of stampedes. Priority was given to the elderly, people with disabilities as well those who were ill or expectant. At Assar Johansson primary school and Kaplaba market polling station in Migori and Kipkelion constituencies respectively, when voters needed assistance, the presiding officers administered to the assistants an oath of secrecy before they proceeded to assist voters. They also had their left thumb nails or the space between their left thumbs and index fingers marked with indelible ink to counter multiple voting. However, in Kayole primary school polling station, there was an absence of support for the aged, the ill, women with children and persons with disabilities. At Donholm primary school, the same was true and our monitor witnessed old men and women getting lost, tired and agitated to the extent of threatening to throw away their voters' cards.
- v) Voters' register: The names of some would-be voters did not appear in the voters' register in various polling stations across the country. Some missing names were located in the black books in the custody of presiding officers. But some names were missing in both records, meaning that some would-be voters lost the opportunity to vote.
- vi) Privacy: Secrecy in voting was observed except with assisted voting. The booths were placed so that their open face was to the wall with space enough only to voters to access the booth to mark their ballot papers. All booths had pens tied to them and were positioned so as to accord

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privacy in all polling stations observed.

- vii) Security: Security personnel were deployed in all polling stations. Both civilian and uniformed and security agents were spotted in every polling station observed, seated strategically within the polling stations and occasionally patrolling to detect and deter any interference.
- viii) Attempted impersonation: Cases of impersonation were witnessed in various polling stations, in which people turned up at polling stations with identity/voters' cards which did not belong to them, seeking to be allowed to vote on other people's behalf. According to our monitors, all such requests were turned down and those making the requests were informed that they risked being turned over to the Kenya Police Force should they press further.
- ix) Attempted bribery: Desperate attempts by the NO camp to bribe votes in some polling stations were frustrated. In Mawa polling station in Lugari constituency a lady who was approaching voters and dishing out money to woo them took off into a nearby maize plantation after she noticed danger when the electoral officers got suspicious of her motives. Attempts of voter buying were also observed in Makhokho, Malinya, and Lubambo polling stations within the same constituency.

Some anomalies

The following anomalies were observed by the KHRC's monitors:

- i) In Laikipia constituency, at Ndururi primary school, polling station number 118, Janet Thiong'o, a presiding officer took away an Election Observation Group (ELOG) observer's badge after she questioned the absence of a serial number on a ballot box.
- ii) Within the same constituency, at Nanyuki primary school, polling station number 98, where the military comprise 75 per cent of registered voters, voters from the military were turned away for lack of original identity cards even though their original ID cards are surrendered during recruitment and they registered as voters using photocopies of the same.
- iii) In various prisons across the country, inmates registered as voters, but those released just before the referendum were unable to vote at the prisons they were registered. At the Nanyuki GK prison, for instance, 21 inmates registered as voters but only 17 voted since the rest had been released.
- iv) In some polling stations, there was a shortage of queuing clerks, inconveniencing illiterate and elderly voters.
- v) There were many incidents of missing names in most polling stations.
- vi) In Saint Xavier primary school polling stations, amongst other polling stations, there were cases of failing computers.
- vii) In Racetrack primary school polling station in Nakuru Town constituency, voters turned up without voters' cards and alleged they had earlier given their voters' cards to registration clerks for rectification of details. Apparently, they had been told to pick them up from the station. On being reached, the IIEC's officials said they had some uncollected voters' cards but could not access them then. This disenfranchised many voters.

The National Tallying Centre

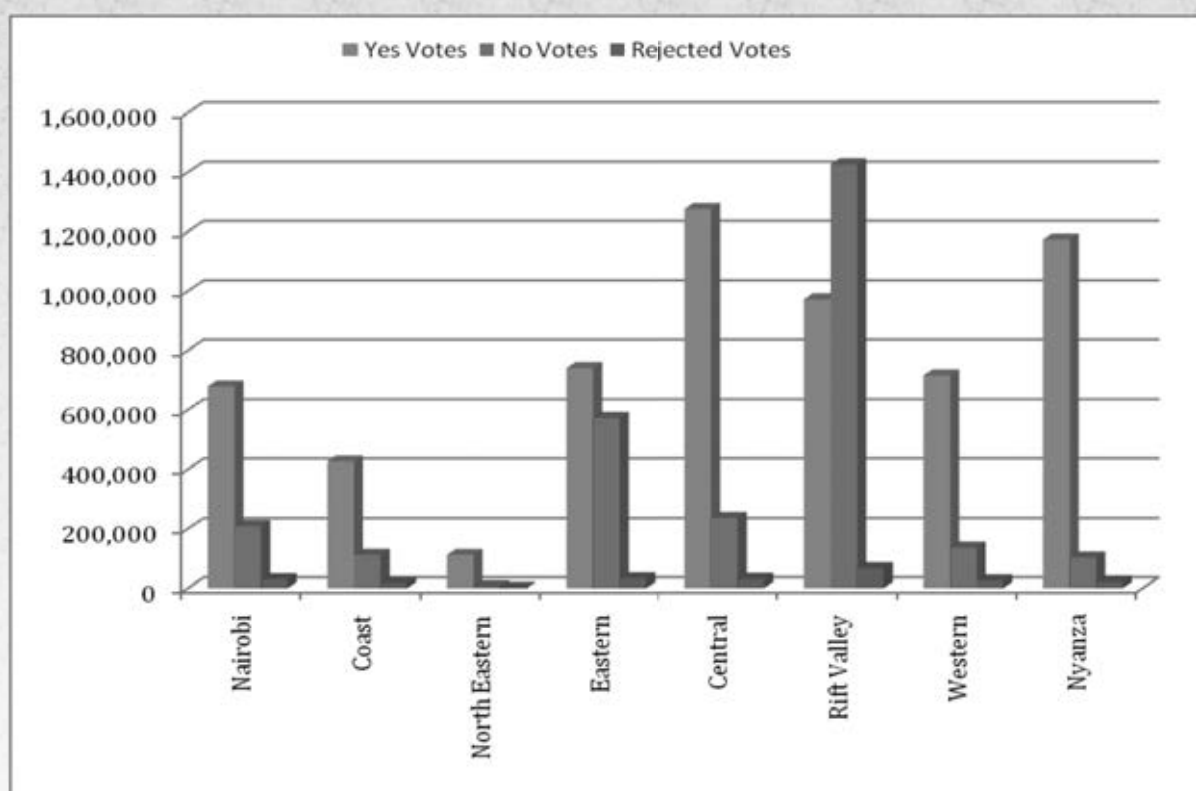
The KHRC's monitors met other actors from civil society, political parties, the diplomatic corps, the 'Yes' and 'No' teams, government officials and the media at the Bomas of Kenya, the national tallying centre, to monitor the national tallying of results. Results from the polling stations and constituency tallying centres started coming in from 6 pm on August 4, 2010. The 'No' vote initially lead but was overtaken, with two million votes against four million counted for the 'Yes' vote by 8 pm the same day. 'No' sup-

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porters contested this, claiming of rigging at the Bomas of Kenya and creating tension.

The IIEC's Commissioners issued a statement clarifying the electronic tallying process and reiterating their commitment to organise a free and fair referendum. The Commissioners also called upon both teams to respect their authority and mandate. A team of ten representatives from both the 'Yes' and 'No' teams was constituted and called upon to deal with any allegations of rigging, with the IIEC's Commissioners assisting. By 1.00 am on August 5, 2010, the allegations had been investigated and dismissed. However, the IIEC did not update the results until 9 am on August 5, 2010. By 9 pm, nearly all the results had been received and the IIEC officially announced that Kenyans had ratified the PCK. The IIEC declared the official results: that 68.55 per cent of Kenyans voted 'Yes' while 31.45 percent voted 'No'.⁵⁸ Figure 3 below shows the extent to which there was agreement on the PCK, in all provinces, despite 'No' winning in the Rift Valley.⁵⁹

Figure 3: Kenyans Ratify the Constitution of Kenya



(Source: IIEC Data, 2010)

Kenyans overwhelmingly ratified the PCK, which was promulgated by the President on August 27, 2010. *Wanjiku's journey* ended—at least the first part of the journey. The challenges ahead, as already evident, are enormous requiring continued vigilance by all Kenyans.

⁵⁸ There was contestation about the 'final results.' See Part IV, Section 4.1.

⁵⁹ In all provinces, the 'Yes' vote was overwhelming, relative to voter turnout. The statistics are contained in Annex 2

PART IV: JOURNEY TOWARDS IMPLEMENTATION

4.1 Effective Date

The effective date is the date this Constitution came into force.⁶⁰ The effective date is significant, because it determined when Kenya began to operate under the new constitutional dispensation as well as many implementation steps outlined in the Constitution: from setting up institutions; to passing legislation; to enabling some Schedules and Chapters to take immediate effect, with others remaining suspended until the 2012 General Elections.

The effective date began the countdown towards enabling legislation outlined in the Fifth Schedule of the Constitution and for reconstruction of some existing state offices under the Sixth Schedule. The Constitution is somewhat 'self-executing' and all laws envisaged by it must be passed by certain timelines, as is the case with institutions to be set up, or with state officers required to leave or be appointed to some state offices.

After the declaration of the official results by the IIEC, there was contestation as to when the 14-days period their becoming 'final' based on the words "final result" in Article 263 and the words "the results of the referendum shall be final" under Section 43(2) and (3) and Section 44(1) of the Review Act. On August 6, 2010, the IIEC published the 'official results' (which many thought were the "final results") in the Kenya Gazette in accordance with Regulation 36(1) of the Constitution of Kenya Review (Referendum) Regulations and Section 43 (1) of the Review Act.⁶¹ However, there was provision for anyone to challenge these results within another 14 days, without which they would be the "final results". Those days expired at midnight on August 20, 2010, without any successful petition being lodged in court.⁶² The President promulgated the Constitution on August 27, 2010, which is the effective date for purposes of implementing the Constitution.⁶³

4.2 Organs for Implementation

All of the Government of Kenya (GoK) is responsible for implementation of the Constitution. But, to avoid bureaucratic resistance and in recognition of the fact that the GoK has other work to meet Kenyans' needs, the Constitution establishes two temporary organs for its implementation: the Constitution Implementation Oversight Committee (CIOOC) which is a Parliamentary Select Committee; and the Commission for Implementation of the Constitution (CIC).

4.2.1 The CIOOC

The CIOOC is established under Section 4 of the Sixth Schedule of the Constitution, which provides that this Committee shall be responsible for overseeing implementation of the Constitution. Its duties are elaborated, which include coordinating with the Attorney-General (AG), the CIC and relevant parliamentary committees so as to ensure the timely introduction and passage of legislation set out in the Fifth Schedule. The role of the CIOOC is supervisory, to: a) oversee the work of CIC; and b) facilitate enactment of legislation required by the new Constitution within set timelines. The members of the current CIOOC are:

⁶⁰ Article 260 of the Constitution of Kenya (2010). Section 47A (6) and (7) of the former Constitution prescribed that if the Proposed Constitution were to be ratified in a referendum, it would come into force when promulgated by the President or, if the President failed to promulgate it within 14 days of the announcement of the final results of the referendum, it would come into force on the 15th day after that announcement. Article 263 of the new Constitution contains similar provisions.

⁶¹The Kenya Gazette 2010, Gazette Notice Number 9360 and 9361, Government Printers, Nairobi (August 6, 2010). Section 43 (1) of the Review Act required the IIEC to publish the results of the referendum in the Gazette within two days of the holding of the referendum.

⁶² There were attempts, up to the last day, of lodging cases. But most petitioners filed the results at the High Court rather than at the Interim Independent Dispute Resolution Court (IIDRC). Cases filed at the IIDRC were thrown out on technicalities.

⁶³ There is need for legal opinion or judicial interpretation as to whether August 27 is the 'effective date.' Article 263 of the Constitution states that: "This Constitution shall come into force on its promulgation by the President or on the expiry of a period of fourteen days from the date of the publication in the Gazette of the final result of the referendum ratifying this Constitution, whichever is the earlier."

PART IV: JOURNEY TOWARDS IMPLEMENTATION

- | | |
|---------------------------------------|----------------------------|
| 1. Mohammed Abdikadir, Chair | 15. Ababu Namwamba |
| 2. Millie Odhiambo-Mabona, Vice-Chair | 16. Danson Mwakulegwa |
| 3. Professor Philip Kaloki | 17. Sophia Noor |
| 4. Martha Karua | 18. Dr Joyce Laboso |
| 5. Chirau Mwakwere | 19. Joseph Nkaiserry |
| 6. Dr Kilemi Mwiria | 20. Charles Onyancha |
| 7. Charles Kilonzo | 21. Alfred Khang'ati |
| 8. Beth Mugo | 22. John Mbadi |
| 9. Ekwee Ethuro | 23. Elizabeth Ongoro |
| 10. Cecily Mbarire | 24. Reverend Julius Murgor |
| 11. Dr Eseli Simiyu | 25. Lucas K. Chepkitony |
| 12. Moriasi Ombui | 26. Benedict Fondo Gunda |
| 13. Amina Abdallah | 27. Rachel Shebesh |
| 14. David Ngugi | |

4.2.2 The CIC

The CIC is set up under Section 5 of the Sixth Schedule. The CIC, mandated to manage the implementation process, was to be constituted within 90 days from the effective date.⁶⁴ The functions of the CIC are to: monitor, facilitate and oversee the development of legislation and administrative procedures required to implement the Constitution; co-ordinate with the Attorney-General and the Kenya Law Reform Commission (KLRC) in preparing, for tabling in Parliament, legislation required to implement the Constitution; and, work with each constitutional commission to ensure that the letter and spirit of the Constitution is respected. The CIC therefore differs from the parliamentary select committee as it is an independent office. The CoE, visualised the roles of the two bodies as distinct, as seen in Box 6 below.

Box 6: Vision of CoE about Organs for Implementation

"The CIOC and the CIC have distinct roles. The CIC, with tenure of five years, is a 'hands on' organ. It will be comprised of nine people with proven skills in public administration, human rights and government. Its members need expertise in structuring programmes and taking initiative when they are delayed or have failed. The CIC will monitor, facilitate, and oversee, the development of legislation and administrative procedures required to implement the new Constitution. It will coordinate with the Attorney-General and the Kenya Law Reform Commission in preparing, for tabling in Parliament, the legislation required to implement the new Constitution. It is required to report to CIOC on the progress made in, or on any impediments to, the implementation of the new Constitution. These are responsibilities that cannot be fulfilled by Parliament. They will require fulltime attention which MPs cannot give as they have many other responsibilities.

*Moreover, the new Constitution will generate a huge legislative agenda as well as significant new roles for Parliament such as approving Presidential nominees for appointment. The role of the CIOC is to assist Parliament in overseeing the process of implementing the new Constitution and to facilitate the adoption of the laws required by the Constitution. Because the CIC will act independently and will be non-partisan, it will be able to support the CIOC work by offering neutral assessments of progress, and to report objectively on proposals. Through its composition, CIC is capable of yielding a range of expertise and views to enrich, and contribute to the success of the implementation process."*⁶⁵

(Source: Committee of Experts, 2010)

⁶⁴ Section 25 (1) of the Sixth Schedule, the Constitution of Kenya (2010). By 26th of November 2010, the CIC was not constituted since parliament adjourned without approving the nominees as presented by the President. This move was sharply criticized since MPs refused to debate these nominations (including those of the Commission for Revenue Allocation) on the basis that the IIBRC report on the additional 80 constituencies was contested by some MPs, while supported by majority of the MPs.

⁶⁵ See the CoE's Final Report Op Cit, pages 150-151. This neatness has been challenged. See Part V, on conclusions and recommendations, of this Report.

4.2.3 Role of Parliament

Article 261 of the new Constitution obliges parliament to enact the legislation set out in the Fifth Schedule within the time limits set out therein. It is assumed that the Constitution imposes a burden upon the members of the National Assembly, but MPs will not be involved in originating or drafting bills. The Attorney General's Office, in consultation with the CIC and the KLRC, has the responsibility to prepare the bills for tabling to enable parliament to enact the legislation within the periods specified.⁶⁶

MPs can also seek to extend the period given for the enactment of any particular piece of legislation. However, this can only be done once on the basis of a resolution supported by the votes of at least two-thirds of all the members of the National Assembly.⁶⁷ A resolution for extension can only be raised once in respect of a particular matter and only in exceptional circumstances to be certified by the Speaker of the National Assembly.⁶⁸

Any extension granted cannot exceed a period of one year. Consequently, the laws that are to be tabled before Parliament are to be passed within the time frames stipulated under the Constitution, failure to which any person can, under Article 261 (5), petition the High Court seeking an order to direct Parliament to pass the particular piece of legislation within a specific time frame. There are five considerations regarding consequential legislation: first, why the legislation is being drafted in the first place.⁶⁹ Second, the need for entirely new legislation. That is, the listed issues/aspects do not all imply entirely new laws. Third, the possibility of enacting amendments to existing legislation, which can be done whilst the new laws are being drafted. Fourth, the need for supportive legislation, some of which is not contemplated in the Fifth Schedule (such as the Freedom of Information Act). Finally, the timelines set out, some of which could be met in advance.⁷⁰

4.2.4 The People of Kenya

The new Constitution has made strides towards recognising the fundamental freedoms and human rights of Kenyans. But it has also imposed a corresponding duty upon citizens—to respect, uphold and defend the Constitution through Article 3 (1). The new Constitution has enabled Kenyans to do this by providing them with *locus standii* (the right to bring an action or challenge a decision) where the Bill of Rights or any other constitutional provisions are being violated or are under threat of violation, whether or not they have suffered a direct injury as a result of that violation.⁷¹ The participation of the public in decision-making is the cornerstone of democracy. In a functioning democracy, the people are sovereign and their views must be taken into account in every sector of public life. The new Constitution aims to guarantee such a democracy. Therefore, all legislation should entrench and augment consultation and involvement of the public in decision-making.

66 Article 261 (4) of the Constitution of Kenya (2010).

67 Article 261 (2) of the Constitution of Kenya (2010).

68 Article 261 (3) of the Constitution of Kenya (2010).

69 Legislation must set out guiding principles according to which it is to be implemented. Guiding principles, which provide the lens through which every provision of proposed statutes are to be viewed, by officials of the statutory body created, the courts and parties that may be affected by the activities or decisions of the statutory body. These guiding principles must be in conformity with the text and spirit of the constitutional provisions which raised the obligation for their enactment. See *Re Castoni* [(1891) QB 149, page 167], where it is argued: "a degree of precision... is essential to [the drafting of] Acts of Parliament which, although they may be easy to understand, people continually try to misunderstand, and in which, therefore, it is not enough to attain a degree of precision which a person reading in good faith can understand, but it is necessary to attain if possible to a degree of precision which a person reading in bad faith cannot misunderstand."

70 Ghai, Yash Pal (2010) *Implementation of the Constitution: a briefing paper* [Unpublished].

71 Articles 22 and 258 of the Constitution of Kenya (2010).

PART V: CONCLUSIONS AND RECOMMENDATIONS

4.1 On the Constitution of Kenya

The Constitution of Kenya (2010) has the potential to change the political and socio-economic structure of the country. However, significant effort and engagement will be required if Kenyans are to change the way the county has been conditioned to perceive of and relate to their systems of governance, justice, law and order. This change will require sustained civic education and debate on the new constitutional order, the changes it ushers in and how it affects our concepts of civic, political, social and economic affairs.

Constitutionalism demands that political authority be bound by institutions that restrict the exercise of power. Such institutions offer rules that bind both persons in political authority as well as the organs or bodies that exercise political power. Checks and balances, separation of powers, human rights and the rule of law are central components of constitutionalism.⁷²

Constitutionalism seeks to secure the dignity of the individual within the state through proactive protection and promotion of the full spectrum of fundamental freedoms and human rights (civil, political, social, cultural and economic) through legislative entrenchment, judicial enforcement and policy reform. Constitutionalism also seeks to preserve these fundamental freedoms and human rights by limiting the exercise of political power through legal and institutional safeguards established within the Constitution.

From the outset, the constitutional review process in Kenya set out to ensure that these two objectives would inform the design of the Constitution of Kenya (2010). Amongst the objects and purposes of the review of the former Constitution, outlined in the Review Act, was to secure and/or establish a free and democratic system of government that would guarantee good governance, constitutionalism, the rule of law, human rights gender equity, gender equality and affirmative action.⁷³ The new Constitution has succeeded in rooting democracy and constitutionalism by restoring the supremacy of the people in matters of governance.

4.2 On Leadership

Many debates in Kenya have focused on what needs to change for the country to realise its potential. Such debates inevitably surface the demand for better leadership and our failure to unearth visionary and prudent leaders.

Almost no election takes place without expressed dissatisfaction with the mediocrity of declared candidates and an expressed hope that some prominent figure, who is perceived of as having the potential for greatness, will enter the race. For all its allure, 'greatness' is a potential a problem for democracy. The idea of 'greatness' emphasises the remove between the anointed one and the people. 'Greatness' is more compatible with monarchies, in which leaders are required not to serve the people but to take care of them.⁷⁴

Democracy is incompatible with this notion of leadership. It is agreed that leadership implies the influence of another's attitudes, beliefs, behaviour or values. In the past, this influence has been wielded by politicians to secure the loyalty and ballot of the people—in Kenya, based on parochial, ethnic interests as seen in Part III of this Report: the politics of fear and division.

To secure political representation under the new Constitution, the political tactic of fear must end. The manipulation of fear by politicians is geared toward securing public favour or creating divisions within groups of people with the aim of leading one group against the other. Often, during campaigns, politicians, unable to speak to their good deeds or to the benefit of their cause, seek to influence decision-

⁷² Lake, Jan-Erin (1996) *Constitutions and Political Theory*, Manchester University Press ND, page19.

⁷³ Section 4(b) of the Constitution of Kenya Review Act. Article 10 of the Constitution of Kenya (2010) has entrenched these.

⁷⁴ Landy, Marc and Milkis, Sidney M (2000) *Presidential Greatness*, University Press of Kansas, page 2.

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PART V: CONCLUSIONS AND RECOMMENDATIONS

making by statements designed to induce fear. Through fear, politicians subvert the rationality of their audiences, leading them to think with their hearts not their minds.

During the referendum campaigns, those who campaigned against the Constitution misrepresented the PCK so as to evoke anxiety and apprehension about the PCK. False statements were made because of their fear inducing value. Fearful messages have an effect on the political process partly because of audiences' concern for the safety of themselves and their families.⁷⁵ Through the creation of fear, politicians get audiences to overlook their past performances in public office and focus on perceived threats. The purpose is to evoke irrationality and so benefit the politicians' personal causes and interests.

Kenyan politicians have routinely used fear-inducing propaganda to consolidate popular support and forestall issue-based debates on political candidates or issues. They fabricate enemies, sometimes related to past disputes. Historically entrenched fear offers good soil in which to plant seeds of propaganda. Fear of being destroyed turns irrational discourse into credible discourse. The net effect is the ever-deepening divisions along tribal lines and the culture of tribal-based political engagements. This is evident from the turn out for the referendum, with politicians using tribal affiliations to sway voters for or against the new Constitution.

This can no longer be allowed to flourish. If the nation is to heal, the fallacies that brought conflict must be corrected—and any material basis for concern or fear rationally addressed. The new Constitution provides for the blocking of such 'leaders' from joining elective politics and/or being appointed to serve, through its Chapter on Leadership and Integrity. Some 'leaders' must pay for past human rights violations through courts of law. But Kenyans must also exercise their sovereign right to elect men and women of character. It would be defeatist for Kenyans to have a new Constitution yet hand over custodianship of the same to such 'leaders,' some of whom are already eyeing positions of Senator or Governor!

4.3 On the People of Kenya

The new Constitution has the potential to deliver benefits to citizens with respect to human rights and governance. However, it also demands that citizens themselves be the first check over the various arms and also levels of government.

Democracy is more than the mere exercise of universal suffrage. The active engagement of citizens in legislative and policy formulation and in the defence of the new Constitution is required for it to provide meaningful change. The Constitution imposes a duty upon citizens to uphold and protect it and provide the means through which this duty can be carried out. Constitutional democracy seeks to ensure that government operates under and implements the will of the people. However, as its authority is delegated to it by the people, the people must watch over what they have delegated.

4.4 On Implementation

The enactment of statutes and their implementation is required, bearing in mind the distinct roles of organs charged with implementation and legislation.

The CoE above saw distinct roles for the CIC and CIOC (See Box 6 above), but other scholars argue otherwise. For example, Section 4 of the Sixth Schedule provides that the CIOC shall be responsible for overseeing implementation of the Constitution. This appears similar to provisions in Section 5(6)(a) on the functions of the CIC. There seems to be overlap. The word co-ordination occurs several times, but with no indication of how co-ordination should be organised. There is the risk of conflict, particularly as the required legislation touches on important policy issues.⁷⁶

⁷⁵ Athleide, David L (2006) *Terrorism and the Politics of Fear*, Rowman Altamira, page 5.

⁷⁶ Ghai, Yash Pal (2010) *Implementation of the Constitution: a briefing paper*.

PART V: CONCLUSIONS AND RECOMMENDATIONS

Further, it has been argued that the law establishing the CIC should give it powers to set up joint committees with other relevant bodies, such as the Offices of the Prime Minister, the Attorney General and the KLRC, as well as to establish working groups (for example, on devolution and land, as they cut across many areas of expertise).⁷⁷ It is important that the CIC to convene working groups that include members of the CoE, CSOs and key stakeholders in designing legislation as this would ensure conformity with the desires of the Constitution.

4.5 On the 2012 General Elections

The IIEC's conduct of the referendum was impressive and restored the county's faith in the ability of electoral processes to reflect the will of the people. However, that electoral process was not without its challenges, which, if not addressed, will be compounded in light of the scale of the 2012 General Elections. Of importance will be the following concerns:

Box 7: Concerns for 2012

- 1) The 290 constituencies: the creation of 290 constituencies and their distribution among the counties is very significant. The public will need to be informed of the distribution of the constituencies and their rationale.⁷⁸ The recent census should assist, but also we should note that there were contestations about some data in some areas.
- 2) The Independent Electoral and Boundaries Commission (IEBC): this body must be established by August 2011. However, due to the urgency of its mandate and in light of time constraints, legislation setting up this body will need to be prioritised and expedited. The Constitution must be respected when transition from the IIEC to the IEBC occurs—to maintain continuity with electoral reforms already underway.⁷⁹
- 3) The counties: there is need for early and clear demarcation of county lines in light of past unlawful sub-divisions of districts. There is also need to be early and clear demarcation of wards within those counties.
- 4) Voter registration: this will need to be conducted early, at least one year before the 2012 General Elections in August 2012.
- 5) Voter education: voter education should begin as early as possible. This is necessary to ensure voters understand the voting system, methods of queuing and the correct use of ballot paper(s) as well as to avoid double registration and election offences. We recommend a partnership with CSOs to assist with this.
- 6) Improvement of the voting process: queuing at voting streams needs to be improved with persons equally distributed among streams. There is also the need to conduct voter education in identifying the stream sign to which they belong
- 7) There is need to provide clear, visible and easy to understand signs to guide voters to polling stations and voting streams.

⁷⁷ Ghai, Yash Pal, *Ibid.*

⁷⁸ After presentation of its report on the 80 constituencies, a lot of debate by MPs, members of the public, media columnists, TV and radio debates, and many more ensued about the fairness of the distribution of the new constituencies. Indeed, a court petition was filed and the ruling made was to issue an injunction against the IIBRC from the gazetting of their report. High Court Judge Jeanne Gacheche granted an interim injunction on November 16, 2010. Later, November 26, 2010, a full injunction was granted. See John Kimanathi vs Hon Andrew Ligale and Others, Petition No. 72 of 2010, as decided by Justice Musinga. The judge identified four main issues for determination: a) the qualification of the persons appointed to the Commission; b) what was the mandate of the IIBRC under the repealed Constitution and the new Constitution; c) did the IIBRC act within its mandate; and d) consultations prior to publication of constituencies. The court concluded by grant an injunction, pending the hearing and determination of the Petition, restraining the IIBRC from publishing in the Kenya Gazette the proposed delimitation of electoral units for the election of the National Assembly, County Assemblies and classifying areas as urban and cities contrary to the constitution. See 'Summary of IIBRC ruling'. Visit <http://kenyanjurist.blogspot.com/2010/11/summary-of-iibrc-ruling.html> (accessed November 29, 2010)

⁷⁹ Constitution of Kenya (2010), Sixth Schedule 28(2): "When members of the Independent Electoral and Boundaries Commission are selected, regard shall be had to the need for continuity and the retention of expertise and experience."

PART V: CONCLUSIONS AND RECOMMENDATIONS

- 8) There needs to be a redistribution of voters among polling stations or an increase in the number of polling stations in areas where there is overcrowding, such as in Embakasi and Langata.
- 9) Open air polling stations should be avoided and, if this is not possible, special measures should be taken to ensure privacy of voting, for example, through the creation of partitions and providing canopies in voting areas.
- 10) There is need for early recruitment and training of electoral staff on handling abrasive personalities.
- 11) Protocols and guidelines for agents and observers should be spelt out well before voting day.
- 12) Improvement of the voting process and tallying systems: the introduction of electronic transmission and tallying of results was progressive. This needs to be expanded to all constituencies and voter education conducted on the same.

(Source: KHRC Data, 2010)

4.6 On Civic Education

Despite the civic education carried out before and during the campaigns, the majority of Kenyans are still unaware of the implications of the new Constitution. The focus on emotive issues during the campaigns sidelined discussions on issues such as the Bill of Rights, devolution, leadership and integrity and so on.

Some distortions peddled during the campaigns have yet to be corrected. Most of these concerned the Land Chapter, given that land is an emotive and conflict-inducing concern. The actions of the NCIC and security services to prevent conflict were stellar. However, the upcoming 2012 General Elections, in which competition is expected for many new and perceived to be lucrative positions, may provide fertile ground for the manipulation of ethnic tensions on the basis of land.

The poor conduct of civic education, coupled with the need for an informed electorate before 2012 and the need to ensure the public engages in informed monitoring of implementation make civic education crucial for all stake holders. Civic education should focus on:

- 1) Bill of Rights: it is important that the public understand the provisions in the Bill of Rights and their implications.
- 2) Devolved government: the devolved structure of government is new and will require explanation regarding elections and appointment to office, functions, application of devolved funds, the right to participation and pending legislation on devolution.
- 3) The Legislature and Executive: the separation of the Executive and Legislative arms of government will need to be explained. The structure of Parliament, which will include the Senate, will need to be described to enable the public to understand its composition, its functions and important legislation to be enacted, such as legislation on the right of recall and public participation.
- 4) Avenues for public participation: it is important that the public understands that is required to engage the bodies created to ensure that their input informs decisions of these bodies.
- 5) Land: due to the emotive nature of land questions and the misinformation peddled during the campaigns, it is important to clarify the Land Chapter and contextualise land reform in light of the National Land Policy (NLP).

ANNEXES AND REFERENCES

Annex 1: Constituencies that were monitored

1. Kasarani
2. Westlands
3. Starehe
4. Kamkunji
5. Langata
6. Embakasi
7. Othaya
8. Tetu
9. Juja
10. Kabete
11. Limuru
12. Gatundu South
13. Mwingi North
14. Kibwezi
15. Isiolo North
16. Isiolo South
17. Igembe South
18. Tigania East
19. North Imenti
20. Mutito
21. Machakos town
22. Mwala
23. Kangundo
24. Wajir West
25. Wajir East
26. Lugari
27. Ikolomani
28. Bumala
29. Mount Elgon
30. Saboti
31. Marakwet East
32. Marakwet West
33. Chepalungu
34. Cherengany
35. Eldoret North
36. Kacheliba
37. Rongai
38. Kuresoi
39. Mosop
40. Belgut
41. Bomet
42. Konoin
43. Keiyo North
44. Emgwen
45. Keiyo South
46. Subukia
47. Ainamoi
48. Eldama Ravine
49. Kipkelion
50. Kajiado South
51. Baringo Central
52. Baringo North
53. Baringo East
54. Eldoret South
55. Laikipia East
56. Kuria
57. Migori
58. Uriri
59. Kitutu Masaba
60. Ugenya
61. Nyakach
62. Kisauni
63. Likoni
64. Changamwe
65. Taveta
66. Wundanyi
67. Malindi
68. Matuga
69. Kinango
70. Lamu

ANNEXES AND REFERENCES

Annex 2: The IIEC's Official Referendum Results

Const. Code	Constituency	VOTES		Rejected Votes	Total no of Registered	Votes Cast	Valid Votes	% Voter Turn Out	% of the Valid votes		% of the Votes cast		% of Rejected Votes
		YES	NO						% of YES Votes	% of NO Votes	% of YES Votes	% of NO Votes	
1	MAKADARA	62,636	22,397	1,802	125,492	86,835	85,033	69.20	73.66	26.34	72.13	25.79	2.08
2	KAMUKUNJI	64,211	20,508	2,938	132,162	87,657	84,719	66.33	75.79	24.21	73.25	23.40	3.35
3	STAREHE	68,815	25,529	4,612	136,630	98,956	94,344	72.43	72.94	27.06	69.54	25.80	4.66
4	LANGATA	89,280	22,653	6,251	161,408	118,184	111,933	73.22	79.76	20.24	75.54	19.17	5.29
5	DAGORETTI	63,855	21,119	2,257	122,496	87,231	84,974	71.21	75.15	24.85	73.20	24.21	2.59
6	WESTLANDS	76,398	18,540	3,345	138,105	98,283	94,938	71.17	80.47	19.53	77.73	18.86	3.40
7	KASARANI	104,214	28,245	2,596	181,783	135,055	132,459	74.29	78.68	21.32	77.16	20.91	1.92
8	EMBAKASI	149,212	49,204	5,497	294,153	203,913	198,416	69.32	75.20	24.80	73.17	24.13	2.70
9	CHANGAMWE	42,515	13,658	1,829	91,483	58,002	56,173	63.40	75.69	24.31	73.30	23.55	3.15
10	KISUMU	54,494	15,989	2,206	115,360	72,689	70,483	63.01	77.32	22.68	74.97	22.00	3.03
11	LIKONI	22,710	4,322	1,242	50,378	28,274	27,032	56.12	84.01	15.99	80.32	15.29	4.39
12	MVITA	32,820	7,065	1,093	67,837	40,978	39,885	60.41	82.29	17.71	80.09	17.24	2.67
13	MEAMBWENI	29,862	5,882	1,243	68,949	36,987	35,744	53.64	83.54	16.46	80.74	15.90	3.36
14	MATUGA	17,623	2,522	169	41,719	20,314	20,145	48.69	87.48	12.52	86.75	12.42	0.83
15	KINANGO	17,122	4,965	797	51,206	22,884	22,087	44.69	77.52	22.48	74.82	21.70	3.48
16	BAHARI	30,750	8,751	1,415	83,811	40,916	39,501	48.82	77.85	22.15	75.15	21.39	3.46
17	KALOENI	23,080	8,242	1,305	67,599	32,627	31,322	48.27	73.69	26.31	70.74	25.26	4.00
18	GANZE	11,407	5,455	469	34,405	17,331	16,862	50.37	67.65	32.35	65.82	31.48	2.71
19	MALINDI	31,561	8,808	821	70,478	41,190	40,369	58.44	78.18	21.82	76.62	21.38	1.99
20	MAGARINI	13,945	4,096	590	36,110	18,631	18,041	51.60	77.30	22.70	74.85	21.98	3.17
21	GARSEN	10,196	3,552	205	27,840	13,953	13,748	50.12	74.16	25.84	73.07	25.46	1.47
22	GALOLE	7,609	2,313	167	19,007	10,089	9,922	53.08	76.69	23.31	75.42	22.93	1.66
23	BURA	9,511	1,025	192	22,399	10,728	10,536	47.89	90.27	9.73	88.66	9.55	1.79
24	LAMU EAST	2,615	112	15	9,181	2,742	2,727	29.87	95.89	4.11	95.37	4.08	0.55
25	LAMU WEST	12,097	3,748	607	26,886	16,452	15,845	56.95	76.35	23.65	73.53	22.78	3.69
26	TAVETA	11,155	3,046	574	21,349	14,775	14,201	69.21	78.55	21.45	75.50	20.62	3.88
27	WUNDANI	13,159	1,731	463	25,604	15,353	14,890	59.96	88.37	11.63	85.71	11.27	3.02
28	MWATATE	15,541	2,335	541	30,825	18,417	17,876	59.75	86.94	13.06	84.38	12.68	2.94
29	VOI	15,854	3,915	445	32,660	20,214	19,769	61.89	80.20	19.80	78.43	19.37	2.20
30	DUJES	17,378	1,337	221	33,045	18,936	18,715	57.30	92.86	7.14	91.77	7.06	1.17
31	LAGDERA	7,751	177	73	21,477	8,001	7,928	37.25	97.77	2.23	96.88	2.21	0.91
32	PAPI	3,475	94	10	9,033	3,579	3,569	39.62	97.37	2.63	97.09	2.63	0.28
33	IJARA	6,066	292	28	12,465	6,386	6,358	51.23	95.41	4.59	94.99	4.57	0.44
34	WAJIR NORTH	3,840	472	0	10,133	4,312	4,312	42.55	89.05	10.95	89.05	10.95	0.00
35	WAJIR WEST	10,755	242	6	23,967	11,003	10,997	45.91	97.80	2.20	97.75	2.20	0.05
36	WAJIR EAST	12,675	541	46	23,835	13,162	13,216	55.64	95.91	4.09	95.57	4.08	0.35
37	WAJIR SOUTH	7,047	395	48	21,760	7,490	7,442	34.42	94.69	5.31	94.09	5.27	0.64
38	MANDERA WEST	11,738	77	14	18,283	11,829	11,815	64.70	99.35	0.65	99.23	0.65	0.12
39	MANDERA CENTRAL	17,145	303	87	29,356	17,535	17,448	59.73	98.26	1.74	97.78	1.73	0.50
40	MANDERA EAST	13,122	1,040	66	28,574	14,228	14,162	49.79	92.66	7.34	92.23	7.31	0.46

ANNEXES AND REFERENCES

Const. Code	Constituency	VOTES		Rejected Votes	Total no of Registered	Votes Cast	Valid Votes	% Voter Turn Out	% of the Valid votes		% of the Votes cast		% of Rejected Votes
		YES	NO						% of YES Votes	% of NO Votes	% of YES Votes	% of NO Votes	
41	MOYALE	10,196	2,518	85	30,517	12,799	12,714	41.94	80.20	19.80	79.66	19.67	0.66
42	NORTH HORR	5,568	951	11	20,516	6,530	6,519	31.83	85.41	14.59	85.27	14.56	0.17
43	SAKU	7,723	1,823	46	16,231	9,592	9,546	59.10	80.90	19.10	80.52	19.01	0.48
44	LAISAMS	6,800	2,465	30	19,838	9,295	9,265	46.85	73.39	26.61	73.16	26.52	0.32
45	ISOLO NORTH	16,646	4,398	339	33,434	21,383	21,044	63.96	79.10	20.90	77.85	20.57	1.59
46	ISOLO SOUTH	6,668	360	75	11,840	7,103	7,028	59.99	94.88	5.12	93.88	5.07	1.06
47	IGEMBE SOUTH	20,635	35,365	1,276	76,405	57,276	56,000	74.96	36.85	63.15	36.03	61.74	2.23
48	IGEMBE NORTH	15,603	29,477	875	61,256	45,955	45,080	75.02	34.61	65.39	33.95	64.14	1.90
49	TIGANIA WEST	20,464	9,665	1,018	44,301	31,147	30,129	70.31	67.92	32.08	65.70	31.03	3.27
50	TIGANIA EAST	24,667	12,444	806	50,829	37,917	37,111	74.60	66.47	33.53	65.06	32.82	2.13
51	NORTH IMBENTI	51,598	18,076	1,121	104,414	70,795	69,674	67.80	74.06	25.94	72.88	25.53	1.58
52	CENTRAL IMBENTI	35,406	11,497	1,528	64,372	48,431	46,903	75.24	75.49	24.51	73.11	23.74	3.16
53	SOUTH IMBENTI	39,827	17,418	610	79,441	57,055	57,245	72.03	69.27	30.43	60.04	30.11	1.05
54	NITHI	49,515	21,957	2,408	104,139	73,880	71,472	70.94	69.28	30.72	67.02	29.72	3.26
55	THARAKA	14,627	15,655	680	45,392	30,962	30,282	68.21	48.30	51.70	47.24	50.56	2.20
56	MANYATTA	27,548	23,392	1,594	76,193	52,534	50,940	68.95	54.08	45.92	52.44	44.53	3.03
57	RUNYENJES	23,630	18,086	4,000	67,995	45,716	41,716	67.23	56.64	43.36	51.69	39.56	8.75
58	GACHOKA	17,231	14,341	1,140	47,226	32,712	31,572	69.27	54.58	45.42	52.67	43.84	3.48
59	SLAKAGO	9,330	13,344	862	34,298	23,536	22,674	68.62	41.15	58.85	39.64	56.70	3.66
60	MWINGI NORTH	24,489	14,780	854	63,594	40,123	39,269	63.09	62.36	37.64	61.03	36.84	2.13
61	MWINGI SOUTH	22,372	14,541	965	59,657	37,878	36,913	63.49	60.61	39.39	59.06	38.39	2.55
62	KITUI WEST	14,283	19,639	944	55,504	34,866	33,922	62.82	42.11	57.89	40.97	56.33	2.71
63	KITUI CENTRAL	19,416	16,201	1,069	58,734	36,686	35,617	62.46	54.51	45.49	52.92	44.16	2.91
64	MUTITO	14,201	9,654	606	37,025	24,461	23,855	66.07	59.53	40.47	58.06	39.47	2.48
65	KITUI SOUTH	13,488	14,177	620	47,286	28,285	27,665	59.82	48.75	51.25	47.69	50.12	2.19
66	MASHINGA	15,197	13,356	309	43,402	28,862	28,553	66.50	53.22	46.78	52.65	46.28	1.07
67	YATTA	18,342	12,550	831	50,035	31,723	30,892	63.40	59.37	40.63	57.82	39.56	2.62
68	KANGUNDO	26,568	26,477	834	86,389	53,879	53,045	62.37	50.09	49.91	49.31	49.14	1.55
69	KATHANI	31,243	28,804	52	93,515	60,099	60,047	64.27	52.03	47.97	51.99	47.93	0.09
70	MACHAKOS TOWN	22,069	27,654	1,627	77,595	51,350	49,723	66.18	44.38	55.62	42.98	53.85	3.17
71	MWALA	19,489	20,453	694	64,057	40,636	39,942	63.44	48.79	51.21	47.96	50.33	1.71
72	MBOONI	20,554	23,737	941	65,165	45,232	44,291	69.41	46.41	53.59	45.44	52.48	2.08
73	KILOMBE	9,572	12,315	494	34,558	22,381	21,887	64.76	43.73	56.27	42.77	55.02	2.21
74	KAITI	13,506	15,465	384	43,385	29,355	28,971	67.66	46.62	53.38	46.01	52.68	1.31
75	MAKUENI	28,340	26,150	834	82,955	55,324	54,490	66.69	52.01	47.99	51.23	47.27	1.51
76	KIBWEZI	24,298	22,924	1,918	76,951	49,140	47,222	63.86	51.45	48.55	49.45	46.65	3.90
77	KINANGOP	55,072	7,767	1,047	80,254	63,886	62,839	79.60	87.64	12.36	86.20	12.16	1.64
78	KIPIPI	25,976	3,074	531	37,747	29,581	29,050	78.37	89.42	10.58	87.81	10.39	1.80
79	OL KALOU	60,036	4,238	1,127	82,453	65,401	64,274	79.32	93.41	6.59	91.80	6.48	1.72
80	NDARAGWA	30,432	1,780	241	39,516	32,453	32,212	82.13	94.47	5.53	93.77	5.48	0.74

ANNEXES AND REFERENCES

Const. Code	Constituency	VOTES		Rejected Votes	Total no of Registered	Valid Votes	Turn Out	% of the Valid votes		% of the Votes cast		% of Rejected Votes	
		YES	NO					% of YES Votes	% of NO Votes	% of YES Votes	% of NO Votes		
81	TETU	30,183	2,232	382	40,478	32,797	81.02	93.11	6.89	92.03	6.81	1.16	
82	KIENI	55,659	5,085	889	78,381	61,633	60,744	91.63	8.37	90.31	8.25	1.44	
83	MATHIRA	53,736	7,158	595	75,978	61,489	80,893	88.25	11.75	87.39	11.64	0.97	
84	OTHAYA	34,806	3,039	626	48,024	38,471	37,845	91.97	8.03	90.47	7.90	1.63	
85	MUKURWEINI	30,507	3,148	443	42,405	34,098	33,655	80.41	90.65	9.35	89.47	9.23	1.30
86	NYERI TOWN	42,288	6,281	1,274	61,108	49,843	48,569	81.57	87.07	12.93	84.84	12.60	2.56
87	MWEA	45,385	10,765	1,334	76,228	57,484	56,150	75.41	80.83	19.17	78.95	18.73	2.32
88	GICHUGU	36,078	11,655	653	64,293	48,386	47,733	75.26	48.58	24.42	74.56	24.09	1.35
89	NDIA	32,183	5,554	248	49,004	37,985	37,737	77.51	85.28	14.72	84.73	14.62	0.65
90	KIRINYAGA CENTRAL	34,995	8,491	489	56,268	43,975	43,486	78.15	80.47	19.53	79.58	19.31	1.11
91	KANGEMA	26,924	2,589	429	37,559	29,942	29,513	79.72	91.23	8.77	89.92	8.65	1.43
92	MAYTHOYA	30,411	2,430	489	41,378	33,330	32,841	80.55	92.60	7.40	91.24	7.29	1.47
93	KIHARU	55,752	8,386	1,594	83,597	65,732	64,138	78.63	86.93	13.07	84.82	12.76	2.42
94	KIGUMU	38,060	5,765	923	56,420	44,748	43,825	79.31	86.85	13.15	85.05	12.88	2.89
95	MARAGWA	41,025	6,319	1,409	63,624	48,753	47,344	76.63	86.65	13.35	84.15	12.96	2.89
96	KANDARA	48,630	6,278	1,728	71,037	56,636	54,908	79.73	88.57	11.43	85.86	11.08	3.05
97	GATANGA	48,655	8,050	750	73,843	57,455	56,705	77.81	85.80	14.20	84.68	14.01	1.31
98	GATUNDU SOUTH	32,422	10,209	541	55,184	43,172	42,631	78.23	76.05	23.95	75.10	23.65	1.25
99	GATUNDU NORTH	30,290	7,014	1,211	49,100	38,515	37,304	78.44	81.20	18.80	78.64	18.21	3.14
100	IJA	101,472	33,589	2,687	186,049	137,748	135,061	74.04	75.13	24.87	73.66	24.38	1.95
101	GITHUNGURI	45,542	11,243	1,244	70,489	58,029	56,785	82.32	80.20	19.80	78.48	19.37	2.14
102	KIAMBAA	63,799	18,848	2,031	105,521	84,678	82,647	80.25	77.19	22.81	75.34	22.26	2.40
103	KIKUYU	71,490	18,537	1,884	116,827	91,911	90,027	78.67	79.41	20.59	77.78	20.17	2.05
104	LIMURU	39,127	8,392	1,392	62,002	48,911	47,519	78.89	82.34	17.66	80.00	17.16	2.85
105	LABU	34,032	7,672	1,501	54,131	43,205	41,704	79.82	81.60	18.40	78.77	17.76	3.47
106	TURKANA NORTH	9,310	5,459	90	41,720	14,859	14,769	35.62	63.04	36.96	62.66	36.74	0.61
107	TURKANA CENTRAL	19,022	7,097	106	48,886	26,225	26,119	53.65	72.83	27.17	72.53	27.06	0.40
108	TURKANA SOUTH	10,812	3,880	141	26,210	14,833	14,692	56.59	73.59	26.41	72.89	26.16	0.95
109	KACHELIRA	3,962	9,324	151	21,613	13,437	13,286	62.17	29.82	70.18	29.49	69.39	1.12
110	KAPENGUIA	7,891	31,970	687	50,051	40,548	39,861	81.01	19.80	80.20	19.46	78.84	1.69
111	SIGOR	5,824	28,363	624	43,054	34,811	34,187	80.85	17.04	82.96	16.73	81.48	1.79
112	SAMBURU WEST	18,142	11,307	418	41,677	29,867	29,449	71.66	61.60	38.40	60.74	37.86	1.40
113	SAMBURU EAST	7,747	1,685	77	15,127	9,509	9,432	62.86	82.14	17.86	81.47	17.72	0.81
114	KWANZA	28,190	14,520	1,171	60,261	43,881	42,710	72.82	66.00	34.00	64.24	33.09	2.67
115	SABOTI	53,915	21,251	1,731	105,719	76,897	75,166	72.74	71.73	28.27	70.11	27.64	2.25
116	CHERANGANY	23,266	16,577	4,519	55,883	44,362	39,843	79.38	58.39	41.61	52.45	37.37	10.19
117	ELDORET NORTH	43,317	65,007	2,951	135,065	111,275	108,324	82.39	39.99	60.01	38.93	58.42	2.65
118	ELDORET EAST	14,565	50,667	1,459	79,377	66,691	65,232	84.02	22.33	77.67	21.84	75.97	2.19
119	ELDORET SOUTH	22,889	41,161	4,610	83,816	68,660	64,050	81.92	35.74	64.26	33.34	59.95	6.71
120	MARAKWET EAST	1,817	20,008	177	24,001	22,002	21,825	91.67	8.33	91.67	8.26	90.94	0.80

ANNEXES AND REFERENCES

Const. Code	Constituency	VOTES		Rejected Votes	Total no of Registered	Votes Cast	Valid Votes	% Voter Turn Out	% of the Valid votes		% of the Votes cast		% of Rejected Votes
		YES	NO						% of YES Votes	% of NO Votes	% of YES Votes	% of NO Votes	
81	TETU	30,183	2,232	382	40,478	32,797	32,415	81.02	93.11	6.89	92.03	6.81	1.16
82	KIENI	55,659	5,085	889	78,381	61,633	60,744	78.63	91.63	8.37	90.31	8.25	1.44
83	MATHIRA	53,736	7,158	595	75,978	61,489	60,894	80.93	88.25	11.75	87.39	11.64	0.97
84	OTHAYA	34,806	3,039	626	48,024	38,471	37,845	80.11	91.97	8.03	90.47	7.90	1.63
85	MUKURWEINI	30,507	3,148	443	42,405	34,098	33,655	80.41	90.65	9.35	89.47	9.23	1.30
86	NYERI TOWN	42,288	6,281	1,274	61,108	49,843	48,569	81.57	87.07	12.93	84.84	12.60	2.56
87	MWEA	45,385	10,765	1,334	76,228	57,484	56,150	75.41	80.83	19.17	78.95	18.73	2.32
88	GICHUGU	36,078	11,655	653	64,293	48,386	47,733	75.26	48.386	24.42	74.56	24.09	1.35
89	NDIA	32,183	5,554	248	49,004	37,985	37,737	77.51	85.28	14.72	84.73	14.62	0.65
90	KIRINYAGA CENTRAL	34,995	8,491	489	56,268	43,975	43,486	78.15	80.47	19.53	79.58	19.31	1.11
91	KANGEMA	26,924	2,589	429	37,559	29,942	29,513	79.72	91.23	8.77	89.92	8.65	1.43
92	MAYHOYA	30,411	2,430	489	41,378	33,330	32,841	80.55	92.60	7.40	91.24	7.29	1.47
93	KIHARU	55,752	8,386	1,594	83,597	65,732	64,138	78.63	86.93	13.07	84.82	12.76	2.42
94	KIGUNO	38,060	5,765	923	56,420	44,748	43,825	79.31	86.85	13.15	85.05	12.88	2.06
95	MARAGWA	41,025	6,319	1,409	63,624	48,753	47,344	76.63	86.65	13.35	84.15	12.96	2.89
96	KANDARA	48,630	6,278	1,728	71,037	56,636	54,908	79.73	88.57	11.43	85.86	11.08	3.05
97	GATANGA	48,655	8,050	750	73,843	57,455	56,705	77.81	85.80	14.20	84.68	14.01	1.31
98	GATUNDU SOUTH	32,422	10,209	541	55,184	43,172	42,631	78.23	76.05	23.95	75.10	23.65	1.25
99	GATUNDU NORTH	30,290	7,014	1,211	49,100	38,515	37,304	78.44	81.20	18.80	78.64	18.21	3.14
100	IJA	101,472	33,589	2,687	186,049	137,748	135,061	74.04	75.13	24.87	73.66	24.38	1.95
101	GITHUNGURI	45,542	11,243	1,244	70,489	58,029	56,785	82.32	80.20	19.80	78.48	19.37	2.14
102	KLAMBA	63,799	18,848	2,031	105,521	84,678	82,647	80.25	77.19	22.81	75.34	22.26	2.40
103	KIKUYU	71,490	18,537	1,884	116,827	91,911	90,027	78.67	79.41	20.59	77.78	20.17	2.05
104	LIMURU	39,127	8,392	1,392	62,002	48,911	47,519	78.89	82.34	17.66	80.00	17.16	2.85
105	LARI	34,032	7,672	1,501	54,131	43,205	41,704	79.82	81.60	18.40	78.77	17.76	3.47
106	TURKANA NORTH	9,310	5,459	90	41,720	14,859	14,769	35.62	63.04	36.96	62.66	36.74	0.61
107	TURKANA CENTRAL	19,022	7,097	106	48,886	26,225	26,119	53.65	72.83	27.17	72.53	27.06	0.40
108	TURKANA SOUTH	10,812	3,880	141	26,210	14,833	14,692	56.59	73.59	26.41	72.89	26.16	0.95
109	KACHELIBA	3,962	9,324	151	21,613	13,437	13,286	62.17	29.82	70.18	29.49	69.39	1.12
110	KAPENGURIA	7,891	31,970	687	50,051	40,548	39,861	81.01	19.80	80.20	19.46	78.84	1.69
111	SIGOR	5,824	28,363	624	43,054	34,811	34,187	80.85	17.04	82.96	16.73	81.48	1.79
112	SAMBURU WEST	18,142	11,307	418	41,677	29,867	29,449	71.66	61.60	38.40	60.74	37.86	1.40
113	SAMBURU EAST	7,747	1,685	77	15,127	9,509	9,432	62.86	82.14	17.86	81.47	17.72	0.81
114	KWANZA	28,190	14,520	1,171	60,261	43,881	42,710	72.82	66.00	34.00	64.24	33.09	2.67
115	SABOTI	53,915	21,251	1,731	105,719	76,897	75,166	72.74	71.73	28.27	70.11	27.64	2.25
116	CHERANGANY	23,266	16,577	4,519	55,883	44,362	39,843	79.38	58.39	41.61	52.45	37.37	10.19
117	ELDORET NORTH	43,317	65,007	2,951	135,065	111,275	108,324	82.39	39.99	60.01	38.93	58.42	2.65
118	ELDORET EAST	14,565	50,667	1,459	79,377	66,691	65,232	84.02	77.67	21.84	75.97	21.9	2.19
119	ELDORET SOUTH	22,889	41,161	4,610	83,816	68,660	64,050	81.92	35.74	64.26	33.34	59.95	6.71
120	MARAKIWEI EAST	1,817	20,008	177	24,001	22,002	21,825	91.67	8.33	91.67	8.26	90.94	0.80

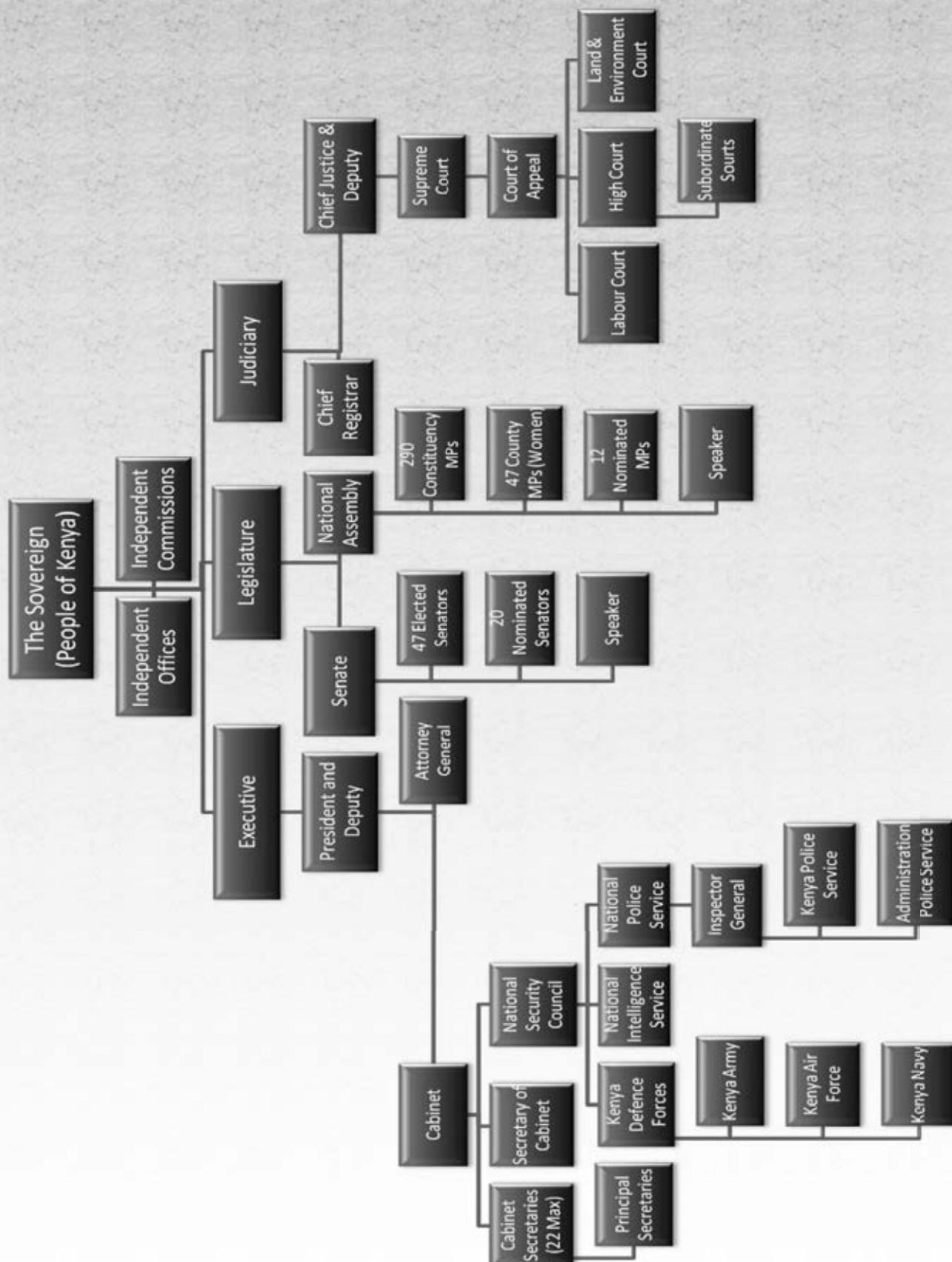
ANNEXES AND REFERENCES

Const. Code	Constituency	VOTES		Rejected Votes	Total no of Registered	Valid Votes	% Voter Turn Out	% of the Valid votes		% of the Votes cast		% of Rejected Votes	
		YES	NO					% of YES Votes	% of NO Votes	% of YES Votes	% of NO Votes		
161	IKOLOMANI	22,469	1,637	430	35,833	24,536	68.47	93.21	6.79	91.58	6.67	1.75	
162	BUTERE	28,018	1,954	1,051	48,162	31,023	29,972	93.48	6.52	90.31	6.30	3.39	
163	KHWISERO	20,783	1,415	453	35,192	22,651	22,198	93.63	6.37	91.75	6.25	2.00	
164	EMUHAYA	35,922	3,052	1,092	66,482	40,066	38,974	92.17	7.83	89.66	7.62	2.73	
165	SABATHA	28,809	1,900	1,013	47,949	31,722	30,709	93.81	6.19	90.82	5.99	3.19	
166	VIHIGA	19,326	1,374	0	34,012	20,700	60.86	93.36	6.64	93.36	6.64	0.00	
167	HAMISI	25,382	2,432	1,823	52,211	29,637	27,814	91.26	8.74	85.64	8.21	6.15	
168	MT. ELGON	12,766	27,682	976	51,845	41,424	40,448	31.56	68.44	30.82	66.83	2.36	
169	KIMILILI	43,695	8,281	2,773	81,562	54,749	51,976	84.07	15.93	79.81	15.13	5.06	
170	WEBUYE	36,764	8,048	1,259	67,510	46,071	44,812	82.04	17.96	79.80	17.47	2.73	
171	SURUSA	34,560	7,893	1,727	67,176	44,180	42,453	81.41	18.59	78.23	17.87	3.91	
172	KANDUYI	30,376	11,683	964	68,148	43,023	42,059	72.22	27.78	70.60	27.16	2.24	
173	BUMULA	23,255	5,826	1,550	51,600	30,631	29,081	79.97	20.03	75.92	19.02	5.06	
174	AMAGORO	42,543	9,553	1,101	77,823	53,197	52,096	81.66	18.34	79.97	17.96	2.07	
175	NAMBALE	33,859	5,734	728	61,096	40,321	39,593	85.52	14.48	83.97	14.22	1.81	
176	BUTULA	22,774	1,739	597	37,435	25,110	24,513	67.08	7.09	90.70	6.93	2.38	
177	FUNYULA	16,694	2,302	315	32,250	19,311	18,996	87.88	12.12	86.45	11.92	1.63	
178	BUDALANGI	12,397	2,185	111	22,909	14,693	64.14	85.02	14.98	84.37	14.87	0.76	
179	UGENYA	49,788	642	891	64,124	51,321	50,430	98.73	1.27	97.01	1.25	1.74	
180	ALBEO	49,155	535	986	62,216	50,676	49,690	81.45	98.92	1.08	97.00	1.06	1.95
181	GEM	38,892	552	506	50,592	39,950	39,444	78.97	98.60	1.40	97.35	1.38	1.27
182	BONDO	40,580	375	349	41,304	40,955	83.07	99.08	0.92	98.25	0.91	0.84	
183	RARIEDA	35,206	429	244	44,796	35,879	35,635	80.09	98.80	1.20	98.12	1.20	0.68
184	KISUMU TOWN EAST	45,294	1,189	1,293	59,042	47,776	46,483	80.92	97.44	2.56	94.80	2.49	2.71
185	KISUMU TOWN WEST	68,699	2,780	717	91,604	72,196	71,479	78.81	96.11	3.89	95.16	3.85	0.99
186	KISUMU RURAL	39,024	489	305	48,696	39,818	39,513	81.77	98.76	1.24	98.01	1.23	0.77
187	NYANDO	38,009	282	317	45,786	38,608	38,291	84.32	99.26	0.74	98.45	0.73	0.82
188	MUTHORONI	37,434	1,203	209	46,899	38,846	38,637	82.83	96.89	3.11	96.37	3.10	0.54
189	NYAKACH	35,805	276	242	44,147	36,323	36,081	82.28	99.24	0.76	98.57	0.76	0.67
190	KASIPUL-KABONDO	54,015	330	770	61,867	55,115	54,345	61.89	99.39	0.61	98.00	0.60	1.40
191	KARACHUONYO	44,408	205	507	51,792	45,120	44,613	87.12	99.54	0.46	98.42	0.45	1.12
192	RANGWE	50,701	547	292	60,001	51,540	51,248	85.90	98.93	1.07	98.37	1.06	0.57
193	NDHIVA	42,478	240	277	48,765	42,995	42,718	88.17	99.44	0.56	98.80	0.56	0.64
194	RONGO	51,634	530	880	61,275	53,044	52,164	86.57	98.98	1.02	97.34	1.00	1.66
195	MIGORI	48,677	478	242	55,792	49,397	49,155	88.54	99.03	0.97	98.54	0.97	0.49
196	URURI	28,977	294	228	34,911	29,499	29,271	84.50	99.00	1.00	98.23	1.00	0.77
197	NYATIKE	37,805	255	201	42,782	38,261	38,060	89.43	99.33	0.67	98.81	0.67	0.53
198	MBITA	26,230	310	156	31,643	26,696	26,540	84.37	98.83	1.17	98.25	1.16	0.58
199	GIWASSE	23,673	254	164	29,143	24,091	23,927	82.66	98.94	1.06	98.26	1.05	0.68
200	KURIA	16,486	21,717	836	54,693	39,039	38,203	43.15	56.85	42.23	55.63	2.14	

ANNEXES AND REFERENCES

Const. Code	Constituency	VOTES		Rejected Votes	Total no of Registered	Votes Cast	Valid Votes	% Voter Turn Out	% of the Valid votes		% of the Votes cast		% of Rejected Votes
		YES	NO						% of YES Votes	% of NO Votes	% of YES Votes	% of NO Votes	
201	BONCHARU	17,039	6,761	648	33,583	24,448	23,800	72.80	71.59	28.41	69.69	27.65	2.65
202	SOUTH MUGIRANGO	15,658	4,928	237	41,327	20,823	20,586	50.39	76.06	23.94	75.20	23.67	1.14
203	BOMACHOGE	26,018	7,187	481	65,925	33,686	33,205	51.10	78.36	21.64	77.24	21.34	1.43
204	BOBASI	28,182	7,840	2,144	60,745	38,166	36,022	62.83	78.24	21.76	73.84	20.54	5.62
205	NYARIBARI MASABA	22,076	3,718	684	42,663	26,478	25,794	62.06	85.59	14.41	83.37	14.04	2.58
206	NYARIBARI CHACHE	23,109	8,004	1,127	49,029	32,240	31,113	65.76	74.27	25.73	71.68	24.83	3.50
207	KITUTU CHACHE	30,891	13,253	1,200	71,620	45,344	44,144	63.31	69.98	30.02	68.13	29.23	2.65
208	KITUTU MASABA	37,301	6,202	1,068	69,229	44,571	43,503	64.38	85.74	14.26	83.69	13.91	2.40
209	WEST MUGIRANGO	29,815	4,195	689	54,925	34,699	34,010	63.18	87.67	12.33	85.92	12.09	1.99
210	BORABU	40,974	5,491	1,367	75,958	47,832	46,465	62.97	88.18	11.82	85.66	11.48	2.86
	TOTALS	6,092,593	2,795,059	218,633	12,616,627	9,106,285	8,887,652	72.18	68.55	31.45	66.91	30.69	2.40

Annex 3: Envisaged Government Structure



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