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THE KENYA NATIONAL DIALOGUE AND RECONCILIATION (KNDR) MONITORING PROJECT¹

Implementation of Agenda Items 1-4 and Progress Towards a New Constitution

Review Report

July 2010



¹ Supported by a grant from Foundation Open Society Institute (Zug).

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ACRONYMS

AU	African Union
COE	Committee of Experts
DK	Do not know
HRW	Human Rights Watch
ICC	International Criminal Court
ICT	Information and Communication Technology
IDPs	Internally Displaced Persons
IIEC	Interim Independent Electoral Commission
KNDR	Kenya National Dialogue and Reconciliation
LSK	Law Society of Kenya
MPs	Members of Parliament
NCIC	National Cohesion and Integration Commission
ODM	Orange Democratic Movement
PEV	Post-Election Violence
PNU	Party of National Unity
RTA	Refused to Answer
SLDF	Sabaot Land Defence Force
SMS	Short-text Message Service
TJRC	Truth Justice and Reconciliation Commission
UN	United Nations

EXECUTIVE SUMMARY

1. This is the second review report for 2010 on progress in the implementation of the Kenya National Dialogue and Reconciliation (KNDR) agreement signed by both the Government/Party of National Unity (PNU) and the Orange Democratic Movement (ODM) following the post-2007 election violence. The agreement was the result of international mediation by the African Union's (AU) Panel of Eminent African Personalities under the Chairmanship of Mr Kofi Annan. Under this agreement, the two parties agreed to undertake several actions to stop the violence and put Kenya back on the road to sustainable peace, stability and justice.
2. This report, unlike previous ones, focuses on the implementation of the KNDR agreement in relation to the progress towards delivering a new constitution for Kenya. The review has taken this focus because of the importance of a new constitution to Kenya's future. Also, the KNDR mediation identified the constitutional reform as part of long standing and underlying issues that had caused the crisis and which needed solution because they could lead to the recurrence of violence and threaten the future of Kenya as a nation state.
3. This review focuses on three interrelated themes in this respect:
 - a. The International Criminal Court (ICC) investigation of the Kenya situation and its implications for progress towards delivering a new constitution.
 - b. Cohesion in the Grand Coalition Government and its impact on the campaigns for the Proposed New Constitution.
 - c. Progress towards and challenges for the Referendum on the Proposed Constitution of Kenya.

Findings

The ICC, Security and the referendum campaigns

4. Efforts by the ICC to investigate and prosecute those who bear the greatest responsibility for the post-election violence has created political anxiety that has in turn reduced cohesion within the already fractious Grand Coalition. New political realignments continue to emerge and to coalesce into factions to safeguard the interests of politicians some of who continue to waver on whether to support the ICC intervention or the establishment of a local Special Tribunal for Kenya. Some have claimed to support the ICC option only to turn against it when the ICC involvement becomes more probable. This suggests that the Government does not have a unified and clear position on the ICC role. It appears that some have an interest in delaying the intervention for as long as possible or finding ways of scuttling it altogether.
5. Notwithstanding this ambivalence within the political leadership, many Kenyans have confidence in the ICC intervention because local mechanisms have failed to deliver justice for the victims. The ICC presents not only the hope for ending the culture of impunity but also a window of opportunity for genuine reforms.
6. Reconciliation is growing: more communities are getting along better with one another compared to 2008. There is a growing sense of acceptance of people from other communities. Unfortunately, mistrust is emerging again in areas where politicians are campaigning against the Proposed Constitution. There are instances of people being threatened with eviction ostensibly because they are settled in the territory 'owned' by another community. Fear of violence breaking out again has triggered gradual migrations from some of these areas.

Cohesion in the Grand Coalition and Its Implication for the Referendum

7. Public perceptions of the Coalition Government have improved, particularly because the two parties and the two Principals who lead them are united in their support for the Proposed Constitution. There are now more people who see the two Principals as being able to work together. This spirit of working together should continue now and after the referendum in order to instil confidence about the future.
8. Although the two Principals have shown a unity of purpose and largely transcended party differences in order to mobilise an affirmative vote for the Proposed Constitution, some of their supporters are yet to follow suit. The mistrust and suspicion that characterised the Coalition Government in the early period are still alive making it difficult to formulate an effective and a unified strategy to support the Proposed Constitution of Kenya. Indeed, not all members of the Government on the Yes side are actively supporting the Proposed Constitution. Some have earned the tag of ‘watermelons’ because they straddle the two colours assigned for the referendum campaigns -- Green for the Yes side and Red for the No side. The ambivalence of the indecisive and non-passionate leaders is causing similar indecision among their supporters and it is argued that some are more concerned about their individual political careers rather than the national public good.
9. The Interim Independent Electoral Commission (IIEC) has instituted important electoral reforms. People are generally supportive of the Commission’s efforts in this regard. This progress must be reinforced – the IIEC has not been firm in stigmatising the culture of electoral malpractice and alleged breaches of the Political Parties Act. The Commission must act firmly, especially on the alleged breaches of the Political Parties Act and other electoral malpractice, in order to lay a firm ground for a free and fair referendum and the 2012 General Elections, and a democratic culture in general.

Progress and Challenges to a New Constitution

10. The constitutional review process has passed through some of the most challenging hurdles. Going by the KNDR agreement, the review of the constitution was supposed to be concluded within a year. Although the process is late by a year, this achievement is no mean feat. Unfortunately, the short delay in concluding the constitutional review has given reactionary forces space to mobilise and blunt public awareness of the urgency of a new constitution, which was meant to reform Kenya’s governance infrastructure and secure the country from the risk of political and economic instability. There is optimism and enthusiasm surrounding the Referendum – many people say they will turn out to vote. It would appear from the polls that about half of the population are in favour of the Proposed Constitution, while a significant number – almost a quarter – are yet to decide whether to support the document or reject it, and a quarter are not in favour.
11. The referendum debate, unfortunately, appears to have been reduced to single issues rather than focusing on the big-picture governance and development questions. The Church, in particular, is looking at the Proposed Constitution from single issue point of view, unlike in the past reform initiatives when the Church championed comprehensive reforms so as to improve governance. The debate on the Proposed Constitution has been characterised by extreme views and interpretations generally unsupported by facts making it difficult for reason to prevail and also undermining sober contestation. The National Cohesion and Integration Commission (NICC) has begun taking action on purveyors of hate speech but the Commission has been criticised for perceived partiality. The Commission must, nonetheless, act decisively to deter the purveyors of hate speech in order to build responsible leadership, tolerance, and a mature political culture.
12. People have learnt more about the Proposed Constitution from the media rather than from the conventional civic education fora. The political leadership, the President and

the Prime Minister are more trusted in terms of the statements they make about the Proposed Constitution compared to those rejecting it. The media again is the most trusted of all sources of information.

Conclusion

13. The failure to take action against perpetrators of the post-election violence as well as the failure to hold politicians and other influential people to account for corrupt practices is leading to a 'business-as-usual'. The old habits are drifting back and the need to establish new allies and supporters for the 2012 General Election makes it even harder to take action against powerful individuals. This has emboldened the small and middle level groups of perpetrators who ICC will not target. It is important that the Government gives unequivocal support to the ICC investigations and prosecutions.
14. The ICC intervention alone will not address these problems of impunity and lack of accountability. The Government should once again build support for a Special Tribunal for Kenya to investigate and prosecute especially middle and low level perpetrators, even after the ICC has begun its work. This will also require complementary police and judicial reforms.
15. The country is approaching the end of the long and tortuous road to a new constitution. Many Kenyans are desirous of change and would support the Proposed Constitution because they want change -- they want to move on. But there are many hurdles to surmount before reaching the end. As in the past, individual and ethno-political interests are coalescing against the Proposed Constitution. Single issues are also being privileged over broader governance issues. There is a need to step up civic education and public information campaigns to enable people make informed decision.
16. The political leadership has not been aggressive in mobilising support for the Proposed Constitution. New energy and visibility is critical at this period and joint campaigns will unlock the huge numbers of undecided voters. Coming out actively and visibly to reach out to everyone -- through media such as radio and big national rallies -- is important and strategic.
17. The forthcoming referendum is an important milestone in the journey to a new constitution. The Proposed Constitution itself heralds a new era in the governance architecture of the country. It establishes a framework for improving governance and will hopefully mobilise energies towards a better Kenya by healing divisions that almost destroyed Kenya as a nation-state during the post-election crisis. But it is not the constitution alone that will change Kenya; the country's political culture must also change. Leaders will have to learn to be accountable; and ordinary citizens will have to learn to enjoy their rights with responsibility, without allowing themselves to be mobilised to protect leaders on the basis of ethnic considerations. If the Proposed Constitution is passed, then civic education on the implications of the new constitution will continue to be necessary even after the referendum so as to increase vigilance for implementation and counter attempts to roll back the gains.
18. Supposing the Proposed Constitution is rejected? Kenyans will have to look for new ways of healing their divisions and shaping their destiny. Impunity and anti-reformers, including politicians and officials who are indecisive or are 'watermelons' will triumph. There will be a new burden on Kenyans as they seek to secure the future. A central plank on the reform agenda or the National Accord will not have been achieved, leaving the 2012 elections prone to a recurrence of the violence.

19. If the Proposed Constitution is passed, then new hope for continued reforms will dawn but the challenge will be in implementing it. Demand for urgent and radical reforms will begin to take shape; new opportunities for radical and better reforms will emerge almost immediately. But there will also be challenges in implementation because divisions over the Proposed Constitution have added religion as another cleavage to the existing ethnic and class divisions.
20. To realise a successful and peaceful outcome, all must moderate their tone in the referendum debate. The debate should be honest, with reason and facts being given more room. At the same time, IIEC must act decisively against those breaching electoral rules. It should always be remembered that the constitutional review process was meant to prevent the recurrence of violence and find lasting solutions to the underlying factors that triggered it.

INTRODUCTION

1. Following the political violence that engulfed Kenya after the disputed December 2007 General Election, the two main parties – the Party of National Unity (PNU) and the Orange Democratic Party (ODM) – signed an agreement on February 28, 2008 agreeing on a number of steps to address the crisis. The mediation by the African Union (AU) Panel of Eminent African Personalities under the chairmanship of Mr Kofi Annan resulted in the parties signing the ‘Agreement on the Principles of Partnership of the Coalition Government’, which paved the way for the enactment of the National Accord and Reconciliation Act of 2008. Under the Kenya National Dialogue and Reconciliation (KNDR) agreement, the parties committed to undertake a set of actions under four main agenda items. These were:
 - a. Agenda Item 1: Immediate action to stop violence and restore fundamental rights and liberties;
 - b. Agenda Item 2: Immediate measures to address the humanitarian crisis, and promote healing and reconciliation;
 - c. Agenda Item 3: How to overcome the political crisis; and
 - d. Agenda Item 4: Addressing long-term issues, including constitutional and institutional reforms, land reforms, poverty and inequalities, youth unemployment, national cohesion, and transparency and accountability.
2. This is the second review report for the year 2010 on progress in implementing the KNDR agreement – Agenda 1 to 4. Previous reports covering the period between late 2008 and the first quarter of 2010 can be found at www.dialoguekenya.org.
3. This report covers the April to June 2010 period. Unlike previous reports, which examined systematic implementation of each agenda item, this report focuses only on how implementation of key aspects of each agenda item is affecting progress towards achieving a new constitution. The main emphasis of the report during this period, therefore, is the progress towards and challenges to the realisation of a new constitution. The KNDR process identified the adoption of a new constitution as one of the long-standing issues that required addressing to secure sustainable peace and political stability. The analysis focuses on three interrelated themes in this respect:
 - a. The International Criminal Court investigation of the Kenya situation and its implications for progress towards a new constitution;
 - b. Cohesion in the Grand Coalition Government and its impact on the campaigns for the Proposed New Constitution; and
 - c. Progress towards and challenges around the Referendum on the Proposed New Constitution
4. The report has utilized several data collection methods. The research team interviewed various respondents with knowledge on the four agenda items. These key informants were drawn from Government ministries, humanitarian organisations, civil society organisations, and the media. Two national surveys were conducted: one in May and another in June 2010 in all regions of the country. Qualitative data was also collected in various parts of the country in early June. Secondary sources have also been analysed

to give additional information. Once again, the review has taken care to remain objective and to let the set of data speak for itself.

5. The report is divided into sections corresponding to themes on the progress towards a new constitution.
 - (a) Section II discusses the International Criminal Court and implications for security and progress towards a new constitution.
 - (b) Section III discusses cohesion in the Grand Coalition Government and its impact on campaigns for the Proposed Constitution of Kenya.
 - (c) Section IV discusses progress towards and challenges to a new constitution.
 - (d) Section V identifies key conclusions and makes recommendations.
 - (e) The last part of this report comprises three annexes: Annex I – June 2010 survey findings; Annex II – May 2010 survey findings; and Annex III - matrix on progress in implementation of Agenda 4 action points.

2. THE INTERNATIONAL CRIMINAL COURT AND THE PROPOSED CONSTITUTION

Introduction

6. Agenda 1 of the KNDR agreement sought to halt the violence and restore fundamental rights and liberties. The parties further agreed to investigate the violence and bring those responsible to justice. The Commission of Inquiry into the Post-Election Violence (CIPEV) recommended the establishment of a Special Tribunal for Kenya to try those responsible or yield the matter to the ICC. Since Kenya was unable to establish the Special Tribunal, the matter has since been handed over to the ICC. This section examines the possible effects of the efforts by the ICC to address the post-election violence. It also pays particular attention to developments in different parts of country since March 2010 when the ICC's Pre-Trial Chamber II approved investigations into the Kenya situation.
7. Agenda 2 of the KNDR agreement emphasised the need to address the humanitarian crisis by facilitating the return of Internally Displaced Persons (IDPs) to their homes and promoting healing and reconciliation. This section discusses how campaigns for the Proposed Constitution of Kenya ahead of the August 4 Referendum are affecting peace and security in areas most affected by the post-election violence. It pays particular attention to the experiences of IDPs in this regard.

Key Findings

Summary of findings

- Majority of Kenyans believe the 2010 Referendum will be peaceful but there are fears of violence breaking out in some areas, such as Rift Valley Province.
- The public is still very confident that the ICC intervention will end the culture of impunity by prosecuting those involved in violence.
- Illegally armed groups that were active in the post-election violence have redefined themselves as political agents in the referendum campaigns and are realigning themselves for political contests in 2012.

The ICC and the Kenya Situation

8. *ICC efforts and the political anxiety over who is on the list of suspected perpetrators of violence continue to weaken the Grand Coalition:* From March 2010 when the ICC Pre-Trial Chamber II approved investigations into the Kenya situation, anxiety has continued to grow over the list of names that the ICC would be investigating. This anxiety and the possibility that senior and influential politicians could be targets in these investigations have had several consequences. First, it has reinforced political realignments that began to emerge in 2009 when it became clear that the ICC would intervene in the Kenya situation. The realignments that evolved consolidated into political factions whose agenda was to safeguard the interests of senior politicians who felt threatened by these developments. Secondly, these factions had the effect of weakening the Grand Coalition because those central to these factions came from both

parties in the Grand Coalition. Thirdly, factionalism prevented the establishment of a Special Tribunal for Kenya and effectively undermined political commitment to prosecution of anyone involved in the post-election violence. Thus to date, there has been no successful prosecution of any incident related to the post-election violence.

9. *Failure to prosecute cases on post-election violence has entrenched a 'business as usual' attitude:* A culture of impunity has continued to crystallise – it is 'business as usual' in many respects, including political and economic corruption. There is slack commitment to efforts to promote accountability. Many cases related to the post-election violence have not been successfully concluded to date; some of those accused have been acquitted for lack of sufficient evidence. In the most recent instance, a police officer filmed on video shooting dead two demonstrators in Kisumu was set free on a technicality in June 2010. The serial number of the firearm produced as the murder weapon differed from that of the firearm he had been assigned.² Because of such deficiencies in criminal investigations, over half of Kenyans polled believe that while the ICC would provide justice – local mechanisms are not likely to do so.
10. *Divisions in the Grand Coalition Government undermine political commitment to support the ICC.* From the time chief mediator Kofi Annan handed over the bundle of evidence compiled by the Commission of Inquiry into the Post-Election Violence together with the list of names of suspected perpetrators, political leaders in Kenya have not taken a common position on the matter. Their divisions follow the fault lines in the Grand Coalition as well as along the lines of new factions that have emerged in pursuit of political interests. These divisions prevented the establishment of the Special Tribunal for Kenya in 2009 when Members of Parliament defeated the Bill that would have set it up.
11. *Leaders are not clear whether to support the ICC or establish a Special Tribunal:* Interestingly, whether to support the ICC (the Hague option) or the Special Tribunal is an issue that has seen tactical shifts, back and forth, within Kenya's political leadership. Some would support The Hague option but turn against it immediately they note some progress or when the ICC involvement seemed more probable, they would express support for the Special Tribunal as a way of preventing ICC intervention. This has prompted some commentators to observe that 'although the Government publicly promised to cooperate fully with the ICC, many of its senior officials still had an interest in delaying intervention for as long as possible.'³ These shifts demonstrate inadequate commitment to foster accountability.
12. *Divisions in coalition position on ICC investigation show in First ICC Review Conference in Kampala:* As a signatory to the Rome Statute, Kenya is required to cooperate with the ICC to prosecute those who bear the greatest responsibility for international crimes. During the First Review Conference on the Rome Statute held in Kampala in June 2010, the leader of the Kenya delegation, the Attorney General, stated

² Interview with a security expert in Nairobi, 19 June 2010; see also 'Failure to prove case against officer indicates need for reforms' *Daily Nation*, 27 June 2010; 'Freeing of former officer in post-poll killings case raises questions' *Daily Nation*, 23 June 2010

³ Siriram and Brown, p.5

the Government's commitment to cooperate with the ICC.⁴ Kenya officially informed the international gathering that it would be undertaking a number of legal and institutional reforms at the national level to facilitate domestic investigations and prosecution of international crimes.⁵ But ODM argued that the party had not been consulted in drafting the statement and that the statement reflected the position of only one side of the Government. Thus despite the government's official position, there remains differences in the position towards the ICC among some members of the two parties.

13. *Witness Protection (Amendment) Act now law*: Parliament passed and the President assented to the Witness Protection (Amendment) Act⁶, which provides for an independent and autonomous Witness Protection Agency. The Government committed itself to set up the necessary mechanisms to ensure the protection of victims and witnesses. However, the agency is yet to be established. The law notwithstanding, potential ICC witnesses have continued to express fears for their lives. Civil society continues to provide protection to several potential witnesses. But Kenya has signed a number of Witness Relocation Agreements, which would provide a positive response to requests from the ICC on behalf of the witnesses and their families. The Government has also signed commitments to protect all witnesses identified by the Chief Prosecutor⁷. These overt and exemplary measures to demonstrate the Government's cooperation are, however, hamstrung by low public trust and concern about lack of political will to follow through with the letter and spirit of cooperation.⁸ The narrow definition of who constitutes a witness also poses a dilemma for the protection of those who are under threat while not qualifying as witnesses to the Chief Prosecutor's cases.

Public Confidence in the ICC Intervention

14. *Expectations are high that the ICC intervention will break the culture of impunity for cycles of political violence*: From the last quarter of 2009 when the ICC took interest in the Kenya situation, the public has been consistently optimistic that the ICC intervention will provide justice by pursuing and punishing those responsible for the political violence that occurred in the aftermath of the 2007 elections. Opinion polls have shown that Kenyans overwhelmingly prefer the ICC to any local mechanism because they lack confidence in local judicial institutions. Confidence in the ICC has continued to remain high across the country before and after investigations into Kenya were approved. The Chief Prosecutor has made several statements in the media, which continue to raise Kenyans' expectations for justice. In the survey carried out in June 2010, 52 per cent of respondents were confident that the ICC would prosecute senior people who perpetrated the violence. The need to manage expectations and conduct outreach work to improve public understanding of how the ICC works is pressing.

⁴ Statement by Hon. Amos Wako, Attorney General of the Republic of Kenya, at the Review Conference of the Rome Statute of the International Criminal Court, Kampala, 31 May – 11 June 2010

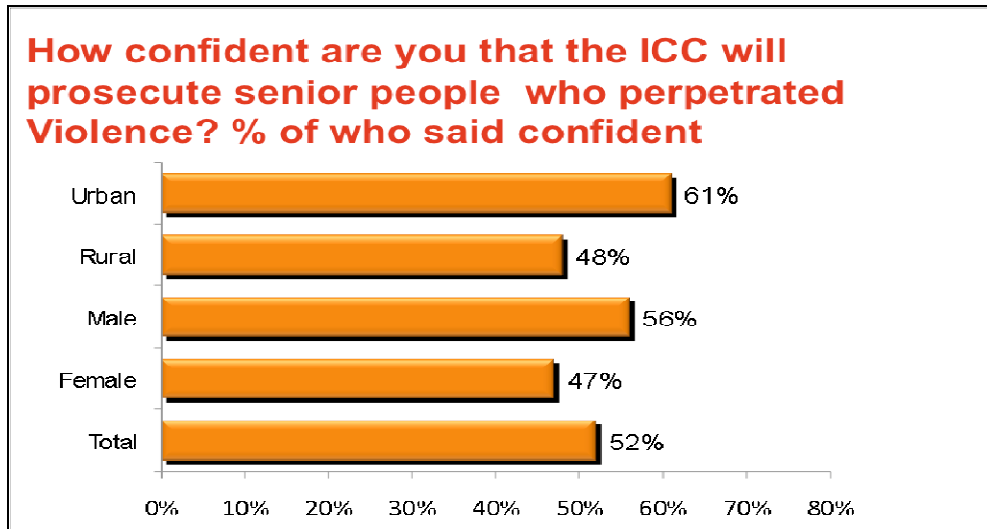
⁵ Ibid

⁶ The President gave the Bill assent in June 2010.

⁷ Draft Report of the Inter-Ministerial Committee preparing for the first review conference of the Rome Statute held in Kampala between 31 May and 11 June 2010, dated 21 April 2010

⁸ Amnesty International, *Kenya: Amnesty International Annual Report 2009*

Figure 1: How confident are you that the ICC will prosecute senior people who perpetrated violence?



15. Of those who are confident, many of them (61 per cent) are in urban areas. Slightly less than 50 per cent of those in rural areas are confident that the ICC will prosecute senior people. More men (56 per cent) than women (47 per cent) are confident that the ICC will prosecute the perpetrators.

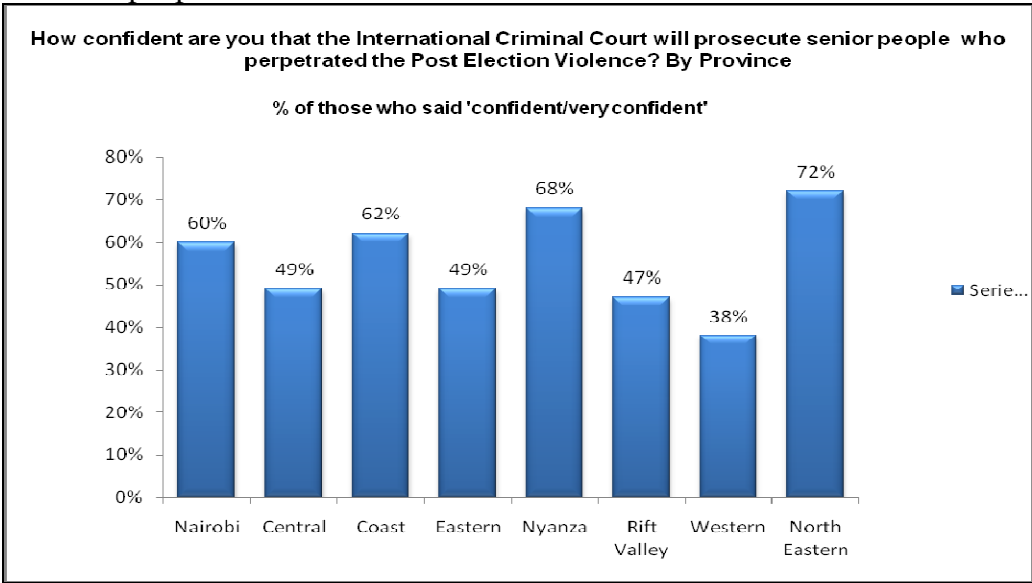
16. *Across the regions, Western and the Rift Valley Provinces have the least expectations that the ICC will deliver justice to victims. In Western Province, only 38 per cent have confidence in the ICC. This may be attributed, in part, to the violence experienced during the Government’s initiative to disband the Sabaot Land Defence Force (SLDF). Those who had looked forward to the rescue operation, dubbed ‘Operation Okoa Maisha’ (Save Lives), suffered from the violence that accompanied the operation by the military.⁹ Further, according to reports by human rights groups operating in the region and investigations by the UN Special Rapporteur on Extra-Judicial and Arbitrary Executions, Philip Alston,¹⁰ police officers used torture to extract information from the local people, resulting in injuries and abuses inflicted both by the SLDF militia and the security forces. Although the militia was disbanded, violence meted out by the security forces imbued the people with a lingering mistrust of interventions external to the region. An elderly man remarked, ‘We don’t know who to trust; you may give information seeking help but both of them come for you.’¹¹*

⁹ Human Rights Watch, *All the Men have gone: War crimes in Kenya’s Mt. Elgon conflict*. New York: HRW, 2008, p. 4

¹⁰ Philip Alston, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions: Mission to Kenya*, 6 May 2009

¹¹ Interview with an opinion leader in Cheptais, Mt. Elgon, 11 June 2010

Figure 2: Perceptions across the regions on how confident people are that the ICC will prosecute senior people



17. Respondents were also asked how members of their community would react if a senior member of the community were put on trial. In all regions, many people pointed out that they would support ICC trials. Over 50 per cent of the respondents in Central, Eastern and the Coast provinces would support ICC trials. In Rift Valley, North Eastern and Western Provinces, slightly more than 30 per cent would support the trial. Significantly, only a very small number, under 5 per cent in all provinces, would violently attack members of other communities.

Figure 3: Thoughts about how people across the regions would react if a senior politician from their community were put on trial

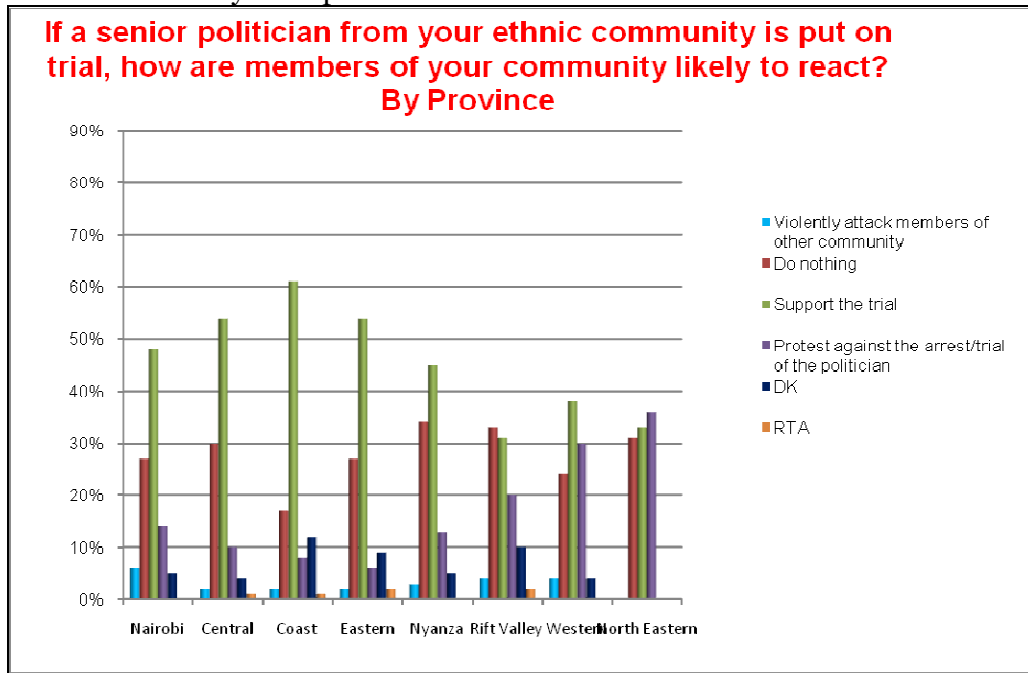
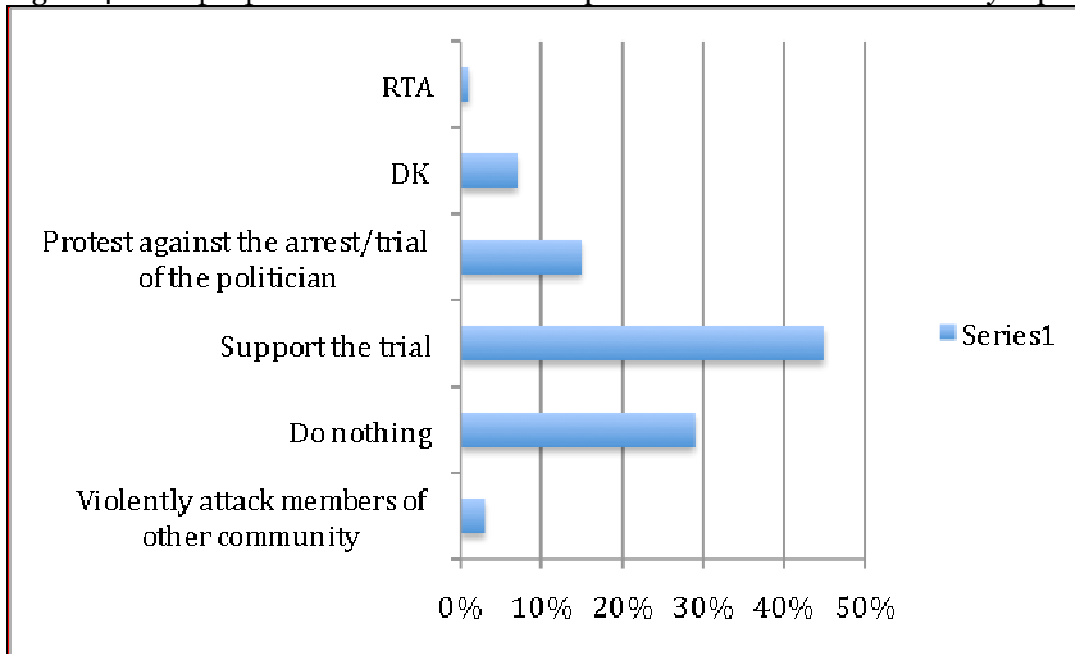


Figure 4: How people would react if a senior politician from their community is put on trial

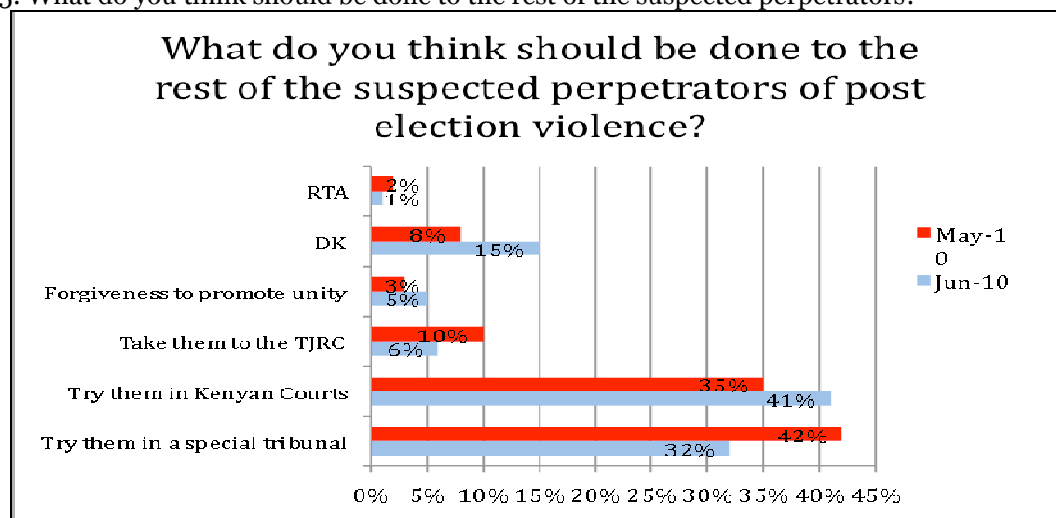


Implications of ICC Intervention for Peace and Security

18. *Local discourses of victimisation taking root among local communities in the Rift Valley:* Rift Valley Province was the main theatre of violence and displacement in 2008 as well as the earlier cycles of violence. Recent surveys in the area show that some of the local communities are crystallising an identity of victimisation, citing injustices by political elites in power. These discourses of victimisation colour interpretation of Government policy and political developments. This has sustained a high level of distrust against other communities in some parts of the province. Some of the perceptions of grievance centre around claims of elites from their community being marginalised from the centre of power after the retirement of the former president; eviction of illegal settlers from the Mau Forest Complex during the forest's reclamation; and demotion of Cabinet ministers who come from the region. Leaders opposed to the Proposed Constitution of Kenya are mobilising these discourses. Some are alleging that in addition to continuing marginalisation of the community, the Proposed Constitution allegedly contains a provision that will lead to loss of land for many. These and other claims whip up communal sentiments in campaign rallies and could therefore trigger threats against people from other communities.
19. *ICC investigations should be sensitive to ethno-regional political dynamics and contests; violence can be mobilised to undermine the court:* Whereas a majority of Kenyans -- including those in the Rift Valley -- support ICC prosecutions, it is apparent that how investigations and subsequent prosecutions are carried out will shape the ground for future stability of the country. Even though many people point out that they will support trials irrespective of who is arrested, the discourses of victimhood cited above and the ongoing campaigns to show how some communities have been marginalised can lead to violence in the region, especially if members of one community see themselves as the main target of investigations and prosecutions.
20. *Perceptions of fairness in investigations are critical:* Thus the ICC will be perceived as fair and not prone to political manoeuvres to eliminate political rivals if the indictments reflect and remain sensitive to ethno-regional political realities. Indeed, a respondent pointed out, 'We support the ICC, but Ocampo must arrest people from other tribes first. Why does everybody come to Eldoret? People died in Naivasha and Kisumu. Let him arrest those first then he can arrest us, too.' This suggests that if the prosecutions are perceived as being one-sided, those indicted can whip up support on an ethnic basis. The campaigns around the Proposed Constitution and the 2012 General Election are slowly preparing ground for mobilisation of support on along ethnic lines.
21. Lower and middle level perpetrators of violence fall through the net. The focus on those who bear the greatest responsibility may not provide deterrence for lower level perpetrators. The perception that only senior politicians and government officials will be held responsible might increase the complacency of gangs, hit squads and other agents of violence not directly associated with a political figure, thus providing opportunity for future involvement in violence. This may signal a change of strategy from open threats to resurgence of personal armies and 'goons for hire' to intimidate witnesses and rivals. New 'warlords' might emerge to replace those removed to The

Hague.¹² This raises a need to focus on middle and lower level perpetrators. In fact, the public is generally supportive of this approach. Asked ‘What should be done to the rest of the suspected perpetrators of post-election violence?’, the May 2010 and the June 2010 surveys show some differences in terms of those who would like them tried in a local Special Tribunal and those who would prefer the Kenyan courts.

Figure 5: What do you think should be done to the rest of the suspected perpetrators?



22. *There is still need for a local justice mechanism to deal with the post-election violence:* These perceptions indicate that there is still a need for a local mechanism to provide justice for the post-election violence especially because the ICC Chief Prosecutor has indicated that only four to six people are likely to face trial at The Hague. Although attempts to establish a Special Tribunal for Kenya failed, there is a need to begin, once more, to seriously consider how to establish a mechanism to try the low and middle level perpetrators. It is important to make these considerations as early as possible because people’s confidence in the ICC may wane if there are delays in investigations and prosecutions. Already, there is a drop in the number of people confident that ICC will prosecute senior people who perpetrated violence due to delayed prosecutions and disappointment that the ICC will net only a small number of perpetrators. In reality, however, even the number of targeted major perpetrators being mentioned, four to six, is quite high for the ICC.

Table 1: How confident are you that the ICC will prosecute senior politicians who perpetrated or financed the post-election violence?

	May 2010	June 2010
Confident	63 %	52 %
Not Confident	29 %	36 %
Not Aware of the Process	2 %	3 %
Don’t Know	5 %	8 %

¹² Interview with a researcher working on illegally armed groups in Nairobi, 29 May 2010

23. In conclusion, the ICC prosecutions and the international scrutiny of Kenya’s actions on the post-election violence could still prompt genuine reforms. Ironically, the entry of the ICC and international attention on the Kenya case has triggered movement towards reforms. The ICC intervention presents an opportunity for progress towards genuine reforms in the judiciary and the police. In this regard, the Minister for Justice, National Cohesion, and Constitutional Affairs has indicated that he will re-introduce the Special Tribunal Bill for debate in Parliament after the referendum. If enacted, and the Tribunal established in a transparent manner, there is a chance of meeting Kenyans’ demand for retributive justice. But the only opportunity for genuine and far reaching reforms still remains a new constitution – only a new constitution will open the window to undertake major and radical reforms to address impunity.
24. Finally, the failure of the Government to act against or prosecute perpetrators of the post-election violence has nurtured ‘business as usual’ culture where senior political elites get away without prosecution. In parts of the Rift Valley, there is speculation that victims can become perpetrators if they feel that their concerns are unlikely to be addressed due to impunity. Where victims have fled or unsuccessfully sought protection from the police or other institutions, erosion of confidence in international intervention may reinforce internal organisation for resistance or self-preservation. The salience of remarks such as ‘*Never again*’ or ‘*Next time it will be you!*’ attests to this budding rationalisation for possible violence.

The August 4 Referendum and Implications for Healing and Reconciliation

25. *Peace continues to prevail across the country; but the referendum campaigns pose challenges in some areas.* The last review reports noted that political violence as experienced during the post-election period had ended and calm had been restored to all affected areas. Most Kenyans surveyed were also confident that violence of that nature and magnitude would not recur within the year. The findings also showed that many more people feel safer than they did in early 2008. Healing and reconciliation are also slowly taking root. More people are getting along with each other better compared to the situation in 2008. Successive surveys show that ethnic relations have continued to improve since the post-election violence. In fact, as shown below, the number of people who say that their community has no problem getting along with members of other communities has increased by over 10 per cent in the past two years. There is thus a growing sense of acceptance of people from other communities.

Table 2: Does your community have problems getting along with other communities in Kenya?

	General Population			Voters (over 18)	
	Dec 08	Aug 2009	Jan 2010	May 2010	June 2010
Yes	23%	15%	12%	9%	9%
No	73%	83%	85%	88%	88%
Don't know	3%	1%	2%	2%	2%

26. *The campaigns for and against the Proposed Draft Constitution pose a challenge to this atmosphere of peace and calm.* In June 2010, when respondents were asked, ‘Would you say that the debate on the referendum has improved or worsened relations

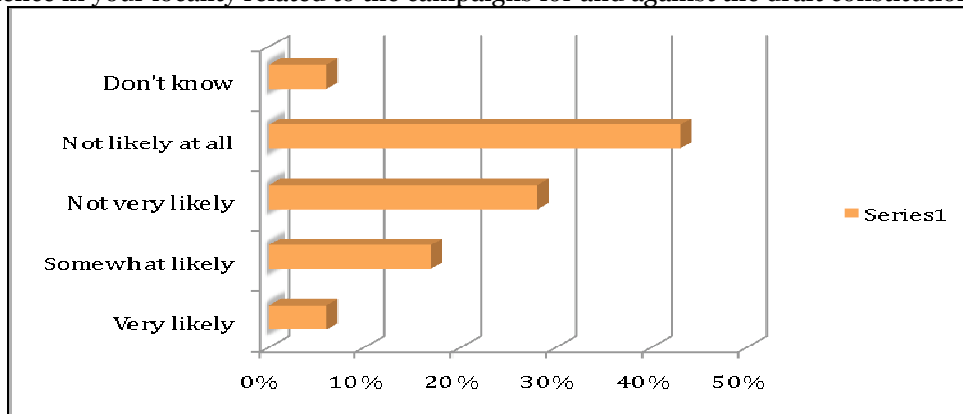
between communities’, 34 per cent said the relations had worsened while 26 per cent said the relations had improved.

Table 3: Would you say that the debate on the Referendum has improved or worsened relations between ethnic communities?

Improved	26%
Worsened	34%
No difference	25%
Don't know	16%

27. *Mistrust is high in areas where politicians are campaigning against the draft: A regional analysis of where people feel that relations have worsened shows that ethnic relations have deteriorated in areas where politicians are campaigning against the draft. And it does not matter whether the area is largely mono-ethnic or multi-ethnic. Eastern and Rift Valley provinces, where 42 per cent and 40 per cent respectively feel ethnic relations have worsened, are also shown to have a significant number of politicians opposed to the draft. This notwithstanding, many people would not like to witness political violence because they understand that it is the politicians who tend to benefit from violence: ‘Today those we fought for are dancing and eating together; it was foolish of us to fight. Kenyans will not allow that to happen again.’¹³ Only 23 per cent of the respondents think that it is likely that violence related to the referendum campaigns will occur in their locality. About 70 per cent do not think it is likely to occur.*

Figure 6: Do you think it is likely, somewhat likely, not very likely or not likely that there will be violence in your locality related to the campaigns for and against the draft constitution?



28. *The fact that the Principals are on the same side in supporting the Proposed Constitution of Kenya has increased public confidence that there will be no violence. Consensus between the President and the Prime Minister has also bolstered public*

¹³ Interview in Kitale town with a woman displaced from Cherangany, 10 June 2010

confidence in the Coalition Government and sent a strong message for a peaceful referendum. A respondent in Nairobi noted that the Constitution has played a big role in healing and reconciling Kenyans *'because now many tribes are supporting one position. If Raila and Kibaki were not agreeing, it would be a different thing all together. They are thinking about the country, not themselves'*.

29. *There are signs of tension in the Rift Valley.* High profile campaigns against the Proposed Constitution in the region are predisposing local communities to violence. The province has a history of violence targeted at communities associated with rival political opinions. Local discourses of who are 'indigenous' and 'migrants' are tied to the history of land ownership and occupation in the area. These discourses are now increasingly used to define political friends as people who are indigenous and political foes as those who are migrants or came to settle in the area recently. Verbal threats, intimidating leaflets and messages carved into the barks of tree trunks are causing trepidation in parts of the Rift Valley. Persons in favour of the Proposed Constitution have been warned to leave before the referendum date.
30. *Fear of violence is causing anxiety in some parts of the Rift Valley Province.* In parts of Molo and Kuresoi, people fear that there would be violence as the referendum date approaches; some of them are moving away from their homes as the referendum date approaches. In other parts of the country, notably Mt. Elgon, Trans Nzoia and West Pokot, leaflets warning people to leave by 4 August 2010 have been circulated. Some people are moving out of West Pokot, but in other areas, they are waiting to see how the situation evolves.
31. *Some people prefer not to vote, or to vote as directed by the indigenous community:* In parts of Uasin Gishu, and in particular areas around Eldoret, IDPs have ostensibly decided to 'buy peace' by giving up their democratic right to vote. They argue that it is better not to vote than to vote and live in danger afterwards: *'If all they want is for us to vote as they want us to, why should we not obey, yet it is what we have to do to live in peace?'* In Nyanza, and especially in Kisumu, the local community has collectively decided to vote in favour of the Proposed Constitution and those opposed will likely not be tolerated. Inter-personal brawls have been reported in bars and other social places, indicating a recession in democratic engagement at the community level. *'People are afraid to voice their opinion openly because they will be beaten. Is this democracy?'* said one respondent.¹⁴
32. In some parts of the Rift Valley, IDPs have not been able to resettle, and some of those who had land are unable to access it. An interesting finding in some parts of the Rift Valley is that caretakers of IDPs' land and other members of the community who are perceived to be sympathetic to 'outsiders' are reprimanded and threatened. For example, a young man who claims to be independent-minded observed, 'I used to say publicly that I will vote Yes. I could engage in debates with other young men and try to convince them -- You know, we don't need this land and there is no point of fighting for it. One day a group of people came to my house and told me to tell them how I will

¹⁴ Interview with a university student in Kisumu, 8 June 2010

vote. I had to change my mind; they were going to burn my house.’¹⁵

Conclusion

33. The entry of the ICC to investigate the major perpetrators of the post-election violence is a welcome development for a majority of Kenyans. They have confidence in the process because local mechanisms have failed to deliver justice to victims. The ICC therefore presents the only hope for breaking the culture of impunity, but it also opens a window of opportunity for genuine institutional reforms. However, care must be taken to avert attempts by those likely to be indicted to mobilise violence, or to otherwise undermine the process. A number of scenarios are possible once investigations start. Constant monitoring of political activities should be maintained.
34. The Referendum campaigns are going on peacefully in most parts of the country. However, intimidation in some parts of the Rift Valley and Western provinces has triggered pre-emptive displacement of persons from volatile areas. Although the National Cohesion and Integration Commission (NCIC) has warned politicians against engaging in hate speech, there is need for synergy with other institutions, including the police, to deter violence and provide adequate security to Kenyans.
35. The quest for peaceful co-existence in multi-ethnic parts of the Rift Valley poses a threat to democracy. Persons wishing to avoid violence and displacement are contemplating giving up their democratic right to vote or changing their political decision to please members of the dominant community. The level of intolerance for dissenting opinions is on the rise, a trend that might undermine democracy and debate on issues of national importance.

¹⁵ Interview with a university student in Eldoret, 6 June 2010

3. COHESION IN THE GRAND COALITION AND CHALLENGES TO A NEW CONSTITUTION

Introduction

36. The KNDR agreement recognised that the political crisis that followed the disputed election of December 2007 revolved around issues of power and the functioning of state institutions. Thus, resolving the crisis required adjusting the Constitution to provide for a Coalition Government. The Constitution was amended to provide for power sharing between the two parties. And, in order to set out a framework for reforms, the KNDR agreement stressed the need for political will, consensus and consultation in the functioning of the Grand Coalition Government. It was expected that lack of an opposition in Parliament would enable the Government to make hard decisions and easily undertake radical reforms.
37. This section discusses unity within the Grand Coalition Government and how it has affected progress towards a new constitution. The discussion also examines how both parties are approaching the referendum debate and the implications of this for achieving a new constitution.

Key Findings

Summary of findings

- The Coalition Government continues to hold together in spite of internal differences.
- Intra-party factions have crystallised but pose a limited threat to the survival of the Coalition Government.
- The outcome of the referendum increasingly likely to shape the focus of the 2012 General Election.
- The unity of the two Principals in supporting the Proposed New Constitution stabilises the Coalition and the country in general.
- Personality and ethno-regional differences as well as divisions between the two parties weaken the momentum of campaigns in support of the Proposed New Constitution.

The Importance of Cohesion in a Coalition Government

38. *Coalitions are formed when it is recognised that no party can effectively govern alone:* Coalition governments are formed when those who win elections do not have the necessary majority to govern on their own. Parties and their respective leaders in a coalition have to be united to facilitate implementation of policies critical for the stability of the country. Thus, power-sharing is meant to facilitate accommodation of diverse political interests and create a base for legitimacy and stability of the Government. Those in leadership are required to accommodate varied interests. They are required to make efforts to transcend cleavages and join rival elites so as to achieve the public good – undertaking far reaching reforms for the good of the nation. The

assumption here, however, is that the elites who are opposed to each other understand the perils of fragmentation. It is this understanding that enables them to make their own rules to limit political competition.

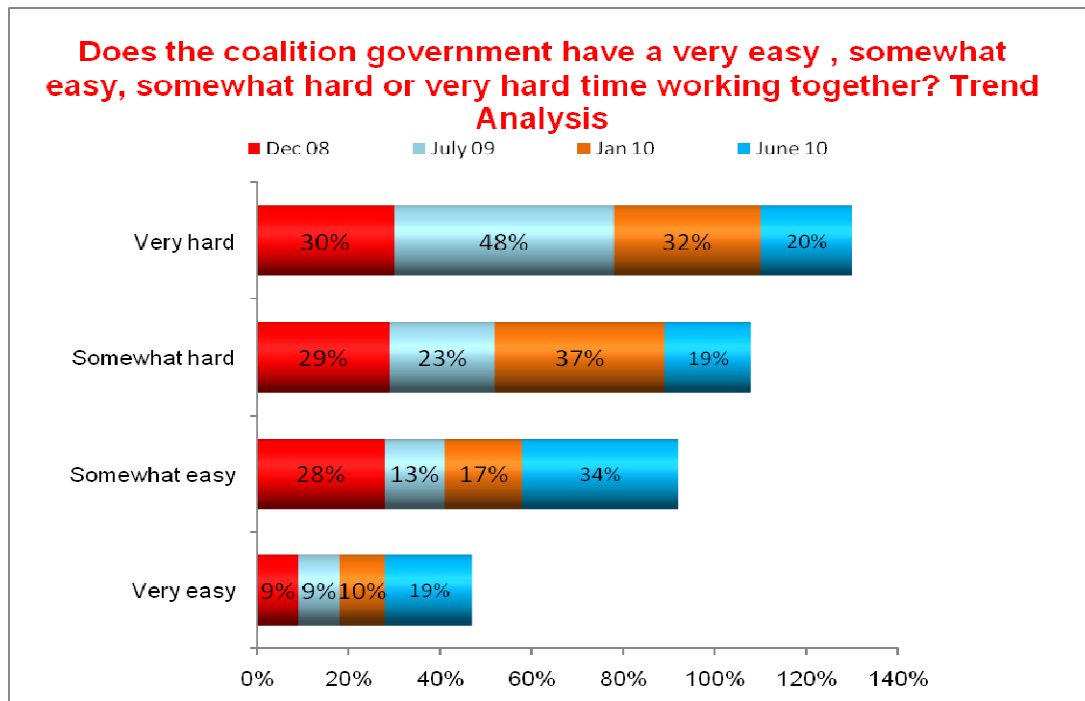
39. *Cohesion is achieved when parties abide by the principles that guide their functioning as one government:* The first and most important responsibility of leaders when forming a coalition government is to agree on principles under which the coalition will operate. Parameters and basic minimums are agreed upon. Coalition governments usually agree on issues that members will support under the principle of collective responsibility.¹⁶ They also agree on issues where members are exempt from this principle. A mechanism of resolving disputes is also agreed upon.
40. *The Kenya Coalition Government has important principles but adherence to them is an issue of concern:* When Kenya's power-sharing agreement was signed in February 2008, the KNDR agreement underlined broad principles to guide the operation of the Coalition Government. Consultation, compromise, and consensus building stood out as the main pillars of the new government. Clearly lacking were institutions to resolve disputes and conflicts. Also lacking was a detailed framework on how the parties would function as one government. Lack of these structures has meant limited adherence to these principles and therefore contributed to friction in the functioning of the government. But as noted earlier, the President and the Prime Minister being united in their support for the Proposed Constitution has stabilised the Government and the society in general.

The Coalition and Support for the Proposed Constitution of Kenya

41. *Perceptions of the Coalition Government have improved; the Principals are united in supporting the Proposed Constitution:* The two Principals have been consistent in supporting the Proposed Constitution. They have also publicly voiced their support for the work of the Committee of Experts (COE), which drafted the Proposed Constitution. The Principals have both urged Kenyans to vote for it in the referendum. They have also led the Yes campaigns – in support of the Proposed Constitution -- and travelled several parts of the country seeking support for it. This has improved public perceptions about the Coalition Government. In the June 2010 survey, 53 per cent of respondents believed that the Coalition Government has an easy time working together. This is a significant improvement on the situation in July 2009 when only 22 per cent believed this. Again this is generally attributable to the working relations between the two Principals and some of their supporters in mobilising a Yes vote at the referendum.

¹⁶ The Conservatives and the Liberal Democrats in the United Kingdom, for instance, had to discuss and negotiate a number of issues before drafting their Coalition Programme. They set a Coalition Committee led by the two party leaders to specifically address disputes within the coalition. Liberal Democrat MPs are permitted to abstain in a vote in the House of Commons on certain issues where they disagree with the Conservatives, e.g., on the Conservatives' plans for a tax break for married couples.

Figure 7: Does the Coalition Government have a very easy or hard time working together?



42. *Lack of cohesion spilling over into the management of campaigns for the Proposed Constitution:* Even though the two Principals have shown unity of purpose to mobilise a Yes vote, their supporters are yet to transcend party differences. That is, despite the two Principals leading the Yes campaign, they have been unable to rally the entire Government to their side. Cohesion is yet to emerge within Government in relation to mobilising a Yes vote or in support of the Proposed Constitution. The mistrust and suspicions that characterised the Coalition Government in its initial stages are still alive. The two parties are yet to pull in one direction even though they both support the Proposed Constitution. A significant observation is that the joint secretariat for the Yes campaign, formed by both ODM and PNU, is also split along similar interests. These divisions have prevented the launching of an effective collective strategy to sell the Proposed Constitution.
43. *Not all members of the Coalition Government are supporting the Proposed Constitution:* Although the KNDR agreement identified constitutional and institutional reforms as some of the long-standing issues that required immediate attention in order to promote stability and peace, some members of the Cabinet are opposed to the draft. These divisions within the Government are not entirely the result of disagreements over the content of the draft. They are the result of alliances and realignments that have been taking place within the coalition aimed at promoting individual political ambitions for some members within the Government. Thus, while some of the members are actively supporting the Yes campaign, others could be allied to the No side – they are referred to as the ‘water melons’ (green outside - the colour assigned as the electoral symbol of the Yes side, and red inside – the colour assigned as the symbol for those opposed to the draft). These leaders allegedly support the Proposed Constitution but secretly lend support to the opposite side. They are oscillating

between the two sides and are undecided on where to move to as they are not certain about the implications of the Proposed Constitution for their political careers.¹⁷ Thus, some of the politicians on the Yes side lack passion and personal commitment to the Proposed Constitution but cannot openly go against it because the two Principals are leading from the front. Some senior politicians are simply indifferent to the constitution and are not going out to actively support it.¹⁸ Still, there are those who are indifferent to the Proposed Constitution because they feel that if it passes, credit will accrue to their rivals. There is a feeling among some PNU members that they are losing ground to the ODM party leader. They observe that a Yes victory will be credited to ODM.¹⁹ Some in PNU are, therefore, not passionate about the Proposed Constitution.

44. *The political realignments for the 2012 elections are affecting support for the Proposed Constitution:* As observed in previous reports, individual political interests, rather than national interest or the public good, have been driving political realignments and creating new political factions within the coalition. These interests are again feeding into the referendum campaigns. Politicians are aligning on the basis of how they would want to form alliances for the 2012 elections. The Referendum campaigns are thus turning out to be a curtain-raiser for the 2012 elections, with political alignments in support or opposition driven by electoral politics. These considerations might create the conditions for a very divisive referendum vote. What is lost in this debate is that the constitution is for the better governance of Kenya and not tied to any particular community or person. This is a chance for the country to secure its future by creating a democratic governance structure that will address issues of impunity and prevent a return of the 2007 post-election violence.

Electoral Reforms

45. The Interim Independent Electoral Commission (IIEC) was created to reform the process and the management of elections as part of institutionalising free and fair elections. The IIEC was required to set up an efficient and effective secretariat, conduct fresh registration of voters and develop a modern system of collecting, collating, transmitting and tallying electoral data. In addition, the law requires the electoral body to organise and facilitate the referendum on the constitution.²⁰
46. *Electronic voter registration rekindles faith in the electoral process:* The IIEC has already laid down an infrastructure for innovative reforms. In its quest to set up a modern electronic voter system, the IIEC conducted both manual and electronic registration nationwide. The electoral body has encouraged registered voters to make use of Short-text Message Service (SMS) to verify their details in the register ahead of the referendum. The usage of electronic voter registration has received a positive response. According to the June 2010 survey, 69 per cent of respondents said electronic voter registration would guarantee free and fair elections. Many believe the system will guarantee a free and fair election/referendum.²¹

¹⁷ Interview with an assistant minister, 25 May 2010

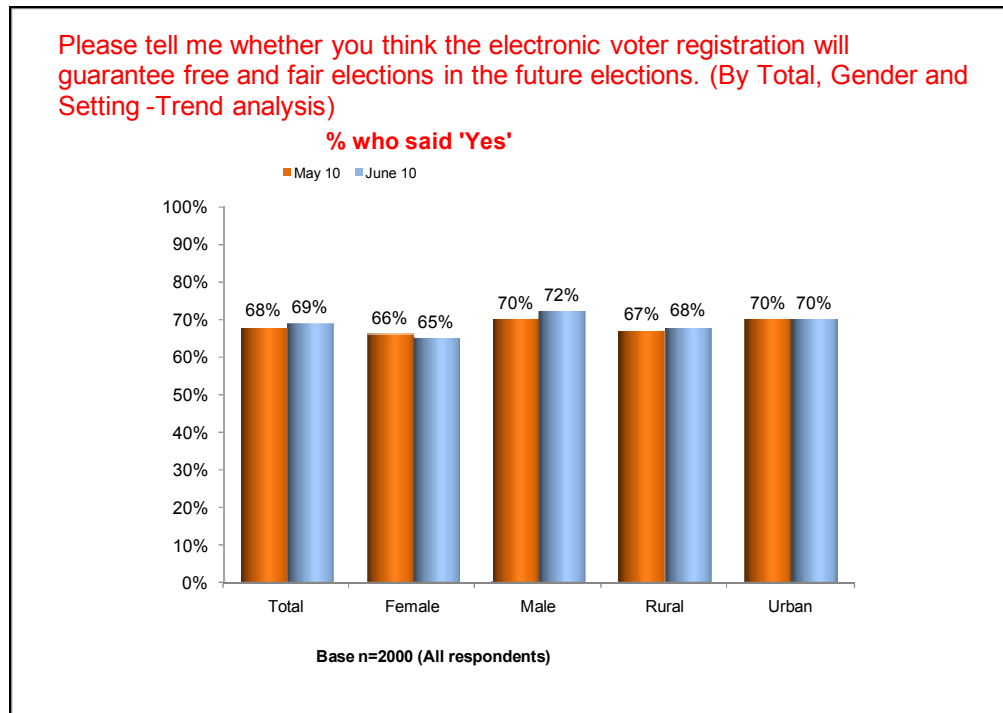
¹⁸ Interview with former MP, 28 May 2010

¹⁹ Interview with a PNU MP and assistant minister, 25 May 2010

²⁰ *Kenya Gazette Supplement, The Constitution of Kenya (Amendment) Act, 2008*

²¹ Random interviews with electronically registered voters in Nairobi's Langata constituency, 20 May 2010

Figure 8: Perceptions of the role of electronic voter registration in guaranteeing free and fair elections



47. *A new voter register is in place:* The IIEC has compiled a new voter register and voters are verifying their details until July 11 2010. The exercise, which began in March 2010, has been highly successful – it exceeded the 10 million mark earlier targeted. This is a commendable achievement on the part of the IIEC. Factors contributing to this include the IIEC’s communication strategy and growing enthusiasm among Kenyans to participate in both the elections and the forth-coming referendum.
48. *Electronic voter registration and voting has certain challenges:* As noted above, the use of electronic voter registration on a pilot basis has been received well by many people in Kenya. However, experience elsewhere, including the United States, where electronic voting has been undertaken, shows that it can have its own credibility problems. A mere shift to electronic registration does not guarantee an end to Kenya’s electoral malpractices. The major challenge is usually security of the webpage and electronic network and database, which can be hacked and manipulated. For instance, in May 2001, the Philippines elections showed that electronic tallying in 70,000 cases had mistakes that would have disenfranchised many people. Lack of familiarity with the machine-countable ballots contributed to this. Further, in e-voting, counting of votes does not make it possible to detect fraud instantly. Neither can one do a recount with ease after data entry. While the introduction of e-registration and probably e-voting in Kenya is worth celebrating, there is a need to learn from other countries’ experience to ensure that e-voting does not introduce new problems.
49. *By-elections vote tallying conducted using ICT:* During the period under review, the IIEC conducted by-elections in South Mugarango constituency where it used an

electronic voter tallying system that speeded up the process faster and was more transparent. The use of ICT was a positive move that reduced the anxiety usually witnessed during tallying. However, the electronic tallying system has certain challenges that should be addressed. The results displayed are usually provisional, which may raise anxiety among voters. Still, speedy display of results increases opportunities for scrutiny and prevention of manipulation.

50. The Commission conducted a fresh voter registration exercise in South Mugirango constituency. Few voters were turned away from voting and the presiding officers made every effort to confirm their records with the IIEC command centre and headquarters before turning away anyone. This was commendable in that it touches on the status and accuracy of the vote registration exercise.²²
51. *Culture of electoral malpractices continues:* Overall, the culture of electoral malpractices is institutionalised in the society because of the failure to hold accountable those who take part in them. Cases of electoral malpractice and electoral violence were reported in the South Mugirango constituency but the IIEC did not take any action against the political parties. Voter bribery, inducement and undue influence on the electorate were also reported. This was carried out with impunity and seems to be entrenched in the society. While there were few people queuing to vote, there were many others outside the polling stations who, we were informed, were expecting to be paid before going in to vote.²³ Establishing systems to change this culture is a major challenge for IIEC. Further, the electoral code of conduct needs to be respected and strictly enforced.
52. *Political Parties Act was flouted:* Politicians flouted the Political Parties Act or reneged on important democratic principles. In many instances, senior politicians campaigned for candidates in political parties other than those to which they are members or are formally affiliated to. The IIEC did not take action against these political malpractices. Even though the legal framework to challenge some of these practices is weak, these issues need to be addressed. Failure to address them will again lead to 'business as usual' as the country gears up to the 2012 General Election. On the whole, as the IIEC prepares to administer the constitutional referendum, it is hoped that the by-elections will provide important lessons. The IIEC needs to continue dedicating time to reforming the electoral system. It is hoped that the new constitution will propel these reforms.

Conclusion

53. The Coalition Government was established not as an end in itself but for the immediate purpose of ending the crisis and undertaking far reaching reforms to prevent recurrence of conflicts. Key among these was the passage of a new constitution, which was seen as the best way of addressing certain challenges that have remained unattended throughout Kenya's independence history. However, the initial disagreements about power sharing and political party differences are making it hard

²² Ibid

²³ Interview with several voters in South Mugirango constituency, 10 June 2010

for the coalition to build a joint strategy for the Yes campaign. This has set the stage for a divisive referendum, which could lead to violence.

54. The two Principals are leading the Yes campaign but the Cabinet is divided. Some members of the Government are popularly referred to as watermelons – Green (Yes) outside and Red (No) inside – because they are not actively supporting the Proposed Constitution. This has been attributed partly to succession politics and partly to the recognition that the Proposed Constitution will bring about radical changes that many are not prepared for.
55. Progress appears to have been made in implementing electoral reforms. Recent by-elections have largely been conducted satisfactorily. In particular, electronic voter registration met with public approval. However, this progress must be reinforced. IIEC has not been firm enough in pursuing numerous electoral offences and stigmatising a culture of institutionalised electoral malpractice such as bribery, and alleged breaches of the Political Parties Act. Systematic efforts should be made to extract lessons from the by-elections for the forthcoming referendum on the Proposed Constitution.

4. PROGRESS AND CHALLENGES TO A NEW CONSTITUTION

Introduction

56. Constitutional and institutional reforms were among the long-standing issues the KNDR mediation identified as likely to lead to further instability in Kenya if they remained unaddressed. These included reforms to address the root causes of recurrent conflict and create a better, more secure and prosperous nation. Of these reforms, the constitutional review process has been the most critical. It has been a subject of great concern for over two decades now. However, it is one issue among others identified through the KNDR process that has progressed satisfactorily in terms of the time frame set for the review.
57. This section discusses the progress made and the challenges encountered in efforts to deliver a new constitution. The referendum on the Proposed Constitution is scheduled for 4 August 2010. This section of the report also discusses the challenges around the referendum process and the possible scenarios.

Key Findings

Summary of findings

Constitutional reforms

- Parliament passed the Proposed Constitution of Kenya without amendments.
- The Attorney General published the Proposed Constitution in May 2010; later it was discovered that someone had illegally inserted new words in the document during printing.
- The Church emerged as the main opposition to the Proposed Constitution; signs of conflicts ahead begin to show when grenades exploded at a huge Church rally at Uhuru Park, Nairobi.
- Some senior politicians remain unclear on whether they support or oppose the Proposed Constitution.
- The National Cohesion and Integration Commission begins to monitor hate speech, summoning politicians and causing some to be charged in court.

Progress in the Constitutional Review Process

58. *Constitution review in its last phase:* During this review period, April to June 2010, important developments concerning the constitutional review took place. In particular, the remaining legal requirements for holding the referendum were finalised and the details of conducting it provided. The most important development was the passage of the draft constitution through the last institutional hurdle when Parliament debated and approved it without amendments. It was transmitted to the Attorney General, who published the Proposed Constitution of Kenya within the stipulated time. The draft's

publication on 6 May 2010 marked yet another milestone and opened up a new chapter for the constitution review process.

59. *Individual and ethnic political interests prevented Parliament from amending the draft constitution:* Members of Parliament held a consensus-building meeting but failed to agree on any amendment to the Proposed Constitution of Kenya within the 30 days they had to debate the document. Political interests in Parliament overrode all other interests and produced a stalemate. While this was received well by the civil society, among others, there were groups who remained uncomfortable with certain provisions. From the outset, therefore, there were some politicians who were not supportive of the document because it failed to satisfy their personal interests as well as their ethnic or sub-ethnic parochial needs. Opposition to the draft, therefore, began to build in earnest because although many wanted amendments they disagreed on the nature of these amendments.
60. *The IIEC has made preparations for the referendum:* Through a *Kenya Gazette* notice of 10 May 2010²⁴ the IIEC published the rules and regulations to govern the conduct of the referendum. The Constitution of Kenya Review (Referendum) Regulations, 2010, required the IIEC to frame and publish the referendum question; specify the symbols to be used by those campaigning to approve or reject the referendum²⁵; set the referendum date²⁶ and the polling time; make public the referendum campaign period; and register referendum committees for those campaigning to approve or to reject the Proposed Constitution. The IIEC has already fulfilled all these requirements.
61. *Politicians remain the biggest challenge to a free and fair referendum:* The IIEC has also scheduled the campaigns to take place between 13 July and 2 August. However, politicians supporting the adoption of the Proposed Constitution and those against it began their campaigns in earnest prematurely. Although the law empowers the IIEC to set the campaign season, it does not provide for sanctions against those who work outside the stated period. Again, there is a need for the IIEC to begin taking action to erode the evolving culture of 'business as usual' in people fail to abide by the laws. Pushing for the enactment of laws that empower IIEC to punish those who flout electoral rules will erode the culture of impunity and prepare ground for a free and fair General Election in 2012.
62. *Voter turnout is likely to be high:* All the polls conducted from 2009 point to high voter turnout for the referendum and the General Elections. In the survey carried out in May 2010, 77 per cent of registered voters said they will turn up to vote in the referendum, 19 per cent were undecided while only 4 per cent would not vote. The proportion of respondents who say they will vote has increased to 90 per cent in the June survey, with only 7 per cent undecided and 3 per cent saying they will not vote. Of those that will not vote, 26 per cent said it is because they have not read the draft, 10 per cent do not trust the elections will be free and fair, while 18 per cent said it is because of the experience of 2007 elections. The renewed optimism for a fresh start through a new

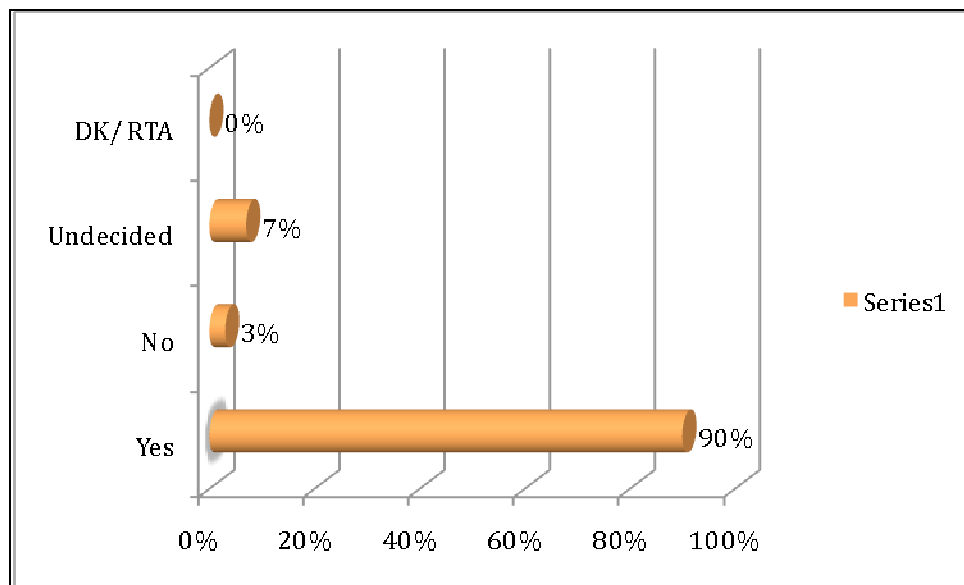
²⁴ Government of Kenya, The Constitution of Kenya Review (Referendum) Regulations, 2010 (Legislative Supplement No. 20), 10 May 2010. Government Printer.

²⁵ The colour Green was allocated for those campaigning to approve the Proposed Constitution while Red was allocated for those voting to reject the draft.

²⁶ Referendum date was set for 4 August 2010.

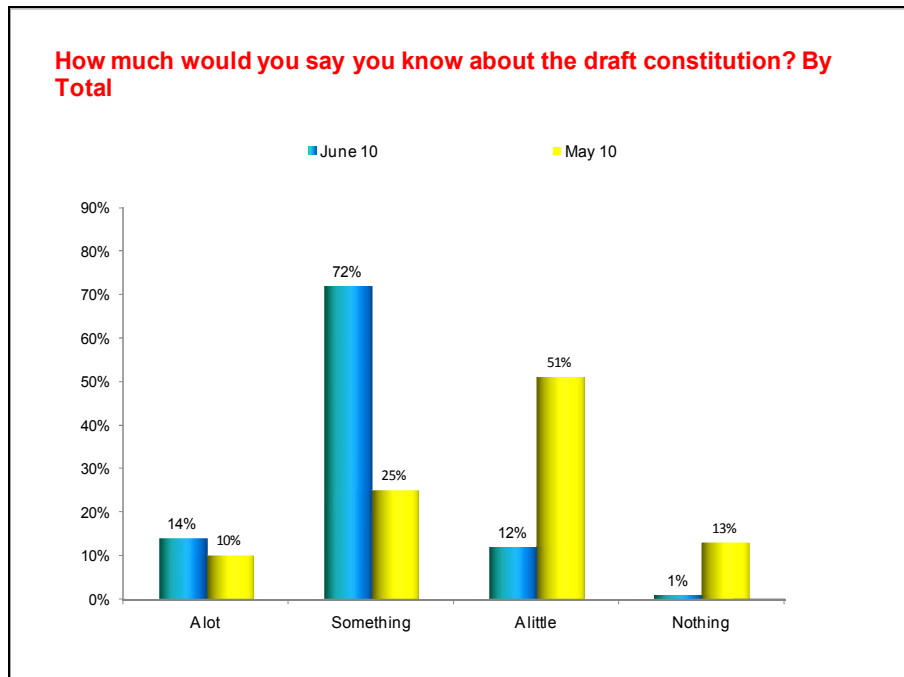
constitution and the fact that the President and the Prime Minister are unified in championing its enactment also contribute to this enthusiasm.

Figure 9: Are you planning to turn out to vote?



63. ***Increasing knowledge of the content of the Proposed Constitution:*** There has been a remarkable increase in the knowledge about the Proposed Constitution. In the May survey, when asked “how much would you say you know about the draft constitution?” only 35 per cent of respondents (43 per cent male and 28 per cent female) said they knew “a lot” or “something”. The spread was similar for urban (41 per cent) and (33 per cent) rural. There are also glaring differences in levels of awareness of the Proposed Constitution by region. While Nairobi has the highest levels of awareness (at 45 per cent), North Eastern Province has the lowest (at 21 per cent). The levels of awareness on the Proposed Constitution have significantly improved. In the June survey, over 86 per cent of the registered voters said that they knew “a lot” or “something” about the constitution. The levels of those who knew nothing in May had drastically reduced by June; dropping from 13 per cent to 1 per cent. The level of awareness in the various regions has also increased.

Figure 10: How much would you say you know about the draft constitution?



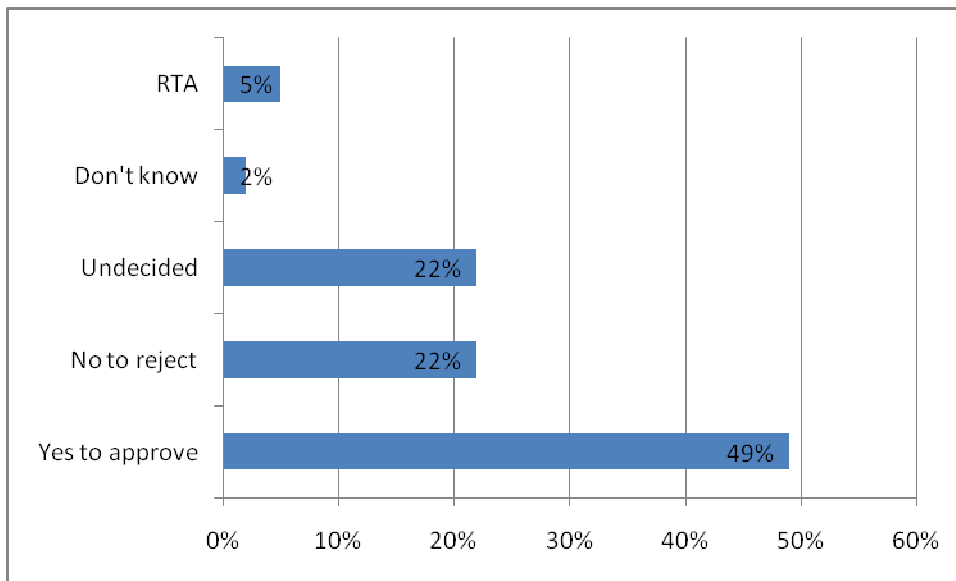
Why People Will Vote Yes or No

64. Support for the Proposed Constitution has declined without a corresponding increase in the number of people opposed to it. Some of those in favour of the document have become undecided while only less than 2 per cent have shifted to the No side.
65. **Yes:** Those voting Yes (49 per cent) identified several factors for doing so. Many of those who will vote Yes say they will do so because Kenya needs change and that the struggle for a new constitution has been on for a long time; it is time to have one – a better one – and move on. Others are of the view that the Proposed Constitution is better than what Kenya has at present. They note that the Proposed Constitution provides for devolution through creation of counties; it will create job opportunities; and Cabinet members will be appointed from outside Parliament. The proposed draft provides for and protects human rights; advances the welfare of women; and promotes good governance. Some add that those voting for No are making false claims, especially on the issue of Kadhi’s Courts and the abortion clause.
66. **No:** On the other hand, the 22 per cent who said they will vote No will do so mainly because they disagree with the abortion clause, provisions on land, and inclusion of the Kadhi’s Courts in the Proposed Constitution. There are still others who will vote No because they are not well informed and also because they would want further amendments on the Proposed Constitution. Also, some are unhappy with the structure of devolution and the number of counties, which they think will promote tribalism. Interestingly, there are those who argue that they will vote No because the Government will repossess people’s land if the Proposed Constitution is passed at the referendum; the Government will tax land; and land acreage will be limited. However, only a small number will vote against the draft because religious leaders are against it.

Support for the Proposed Constitution: Explaining the Decline

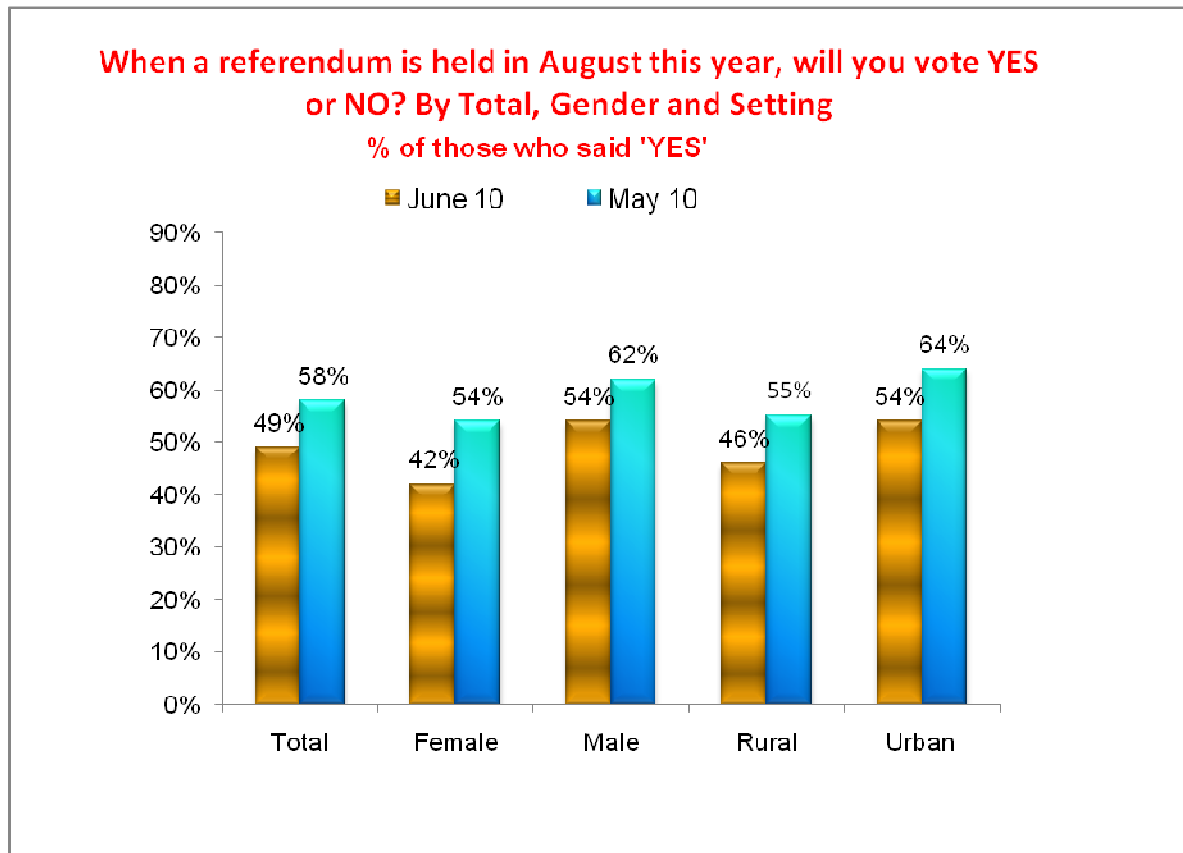
67. *About 50 per cent will vote Yes; 22 per cent are undecided and another 22 per cent will vote No:* Support for the Proposed Constitution is on the decline without a corresponding increase in the number of people rejecting it because about one quarter are undecided. Those who say they will vote in favour of the Proposed Constitution now constitute 49 per cent of the surveyed respondents while those opposed make up 22 per cent. The undecided are about 22 per cent. Those in favour have dropped from 58 per cent in May to 49 per cent in June. That is, those not voting Yes have not shifted to the No side; they are undecided. It is significant that this decline in the number of those supporting the Proposed Constitution has not led to a significant increase in the number of people rejecting it.

Figure 11: When the referendum is held in August this year, will you vote Yes to approve or No to reject the proposed constitution?



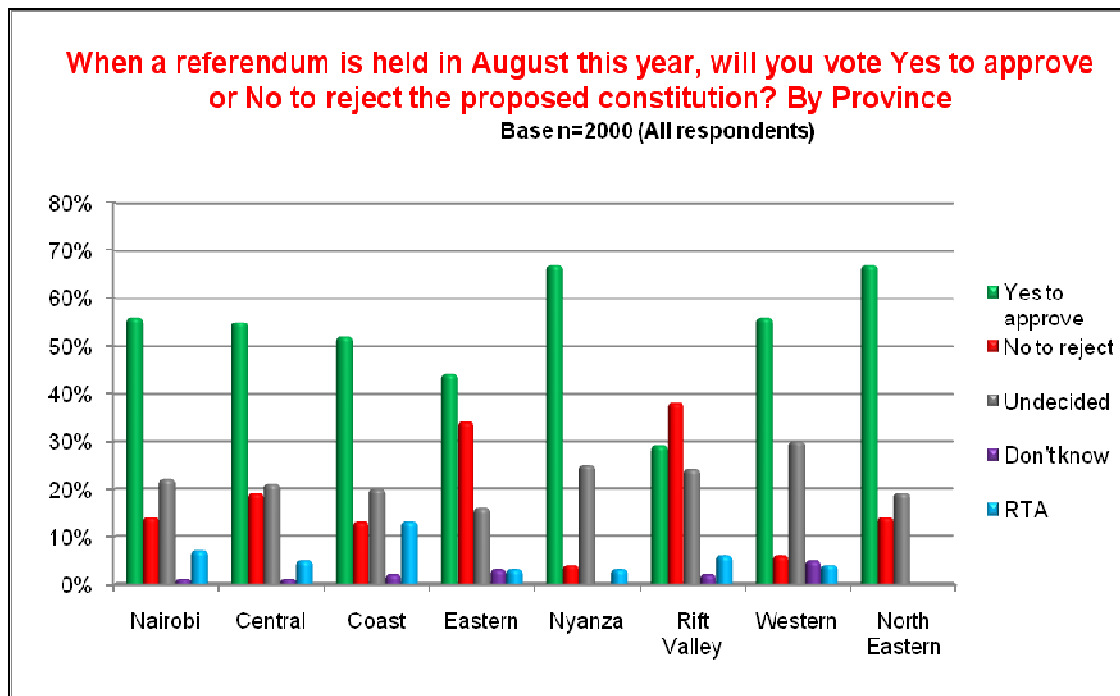
68. It is also interesting that more people in urban areas are likely to vote in favour of the Proposed Constitution than those in rural areas. Also, there are more men likely to vote in favour of the Proposed Constitution than women.

Figure 12: Those who will vote Yes – by gender and location



69. *How the undecided will eventually vote will contribute significantly to the final outcome:* Except for Eastern Province, where the number of undecided reduced from 18 per cent in May to 16 per cent in June, and in Central Province where the number remained almost the same, the number of undecided voters has increased significantly in all the other regions. In Nyanza and Western provinces, the proportion of the undecided increased by 12 per cent, while in North Eastern it rose by 11 per cent. Nairobi's undecided increased by 9 per cent while Rift Valley and Coast's increased marginally by 5 per cent and 4 per cent, respectively.
70. *Regional pattern of voting is evident:* More than 60 per cent of voters in Nyanza and North Eastern provinces will vote in favour of the Proposed Constitution. Slightly more than 50 per cent in Nairobi, Central and Western Province will also vote in favour of the Proposed Constitution. Only in one province, the Rift Valley, are there more people rejecting the draft (38 per cent) than those in favour of it (28 per cent). About 44 per cent in Eastern Province will support the Proposed Constitution and another 34 per cent are opposed to it.

Figure 13: How people will vote – regional pattern

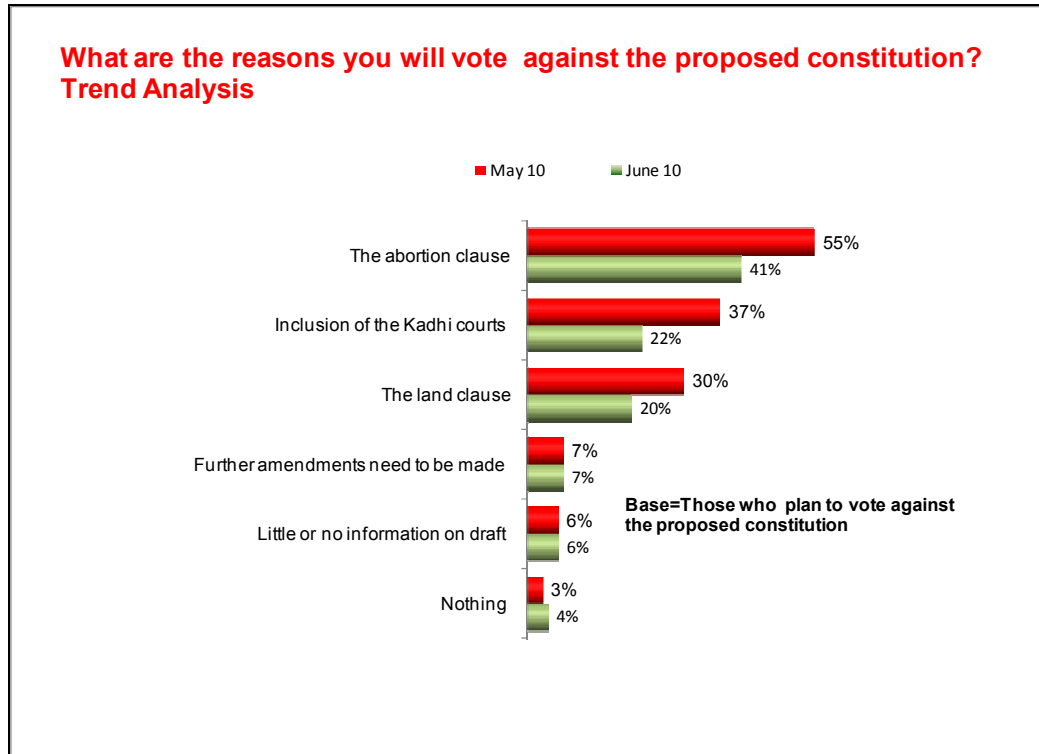


71. There are several factors accounting for the decline. One is the *indecisive position of some of the senior politicians*. Some of them are yet to actively support the Proposed Constitution. The more indecisive they are, the more uncertain their ethnic constituencies become.
72. Two, is the lack of a high profile visibility campaign strategy by the Yes team. The absence of high profile joint campaigns by the senior political leadership is affecting mobilisation for the Proposed Constitution. There have been relatively few high profile national level campaigns by the political leadership of the two parties. Related is lack of political passion and commitment to the campaigns by especially some of the ethnic elites and ethno-regional leaders. Combined, these factors are contributing to indecision among the electorate. Some of the voters are adopting a 'wait-and-see' approach.
73. Three, and as noted earlier, some of the politicians are using the referendum campaign to out-compete each other in preparation for the 2012 General Election or for succession politics in general. This has evolved into depressed passion among some of the leaders. Indeed, media reports point out that the Yes joint meetings are characterised by tensions and open hostility. Again, this is the result of lack of cohesion within the Grand Coalition Government. Thus, rather than look at the opportunity to deliver reforms, individual interests and ambitions have become the main driving force among some of the senior politicians.
74. Four, there are those who fault the devolution structure in the Proposed Constitution. Some argue that the 47 counties are not equitably distributed among ethnic regions and that in some counties, some sub-ethnic groups will dominate smaller ones. Some argue that some regions have fewer counties than others yet they have higher

populations and larger territories compared to those that have more counties. This has led to the perception that the draft favours some regions over others.

75. Finally, there are three important issues that are often cited by those rejecting the Proposed Constitution. Abortion, Kadhi's Courts and the land issue are the most visible issues around which the No vote is mobilised at the local level. When asked why they would vote against the Proposed Constitution, those who said they would vote No in the May survey identified the abortion clause, inclusion of Kadhi's Courts and the land clause. The June survey shows similar responses.

Figure 14: Voting against the proposed constitution – key issues in the May and June surveys



76. *The Church is more influential than politicians in terms of mobilising for the rejection of the Proposed Constitution:* In the May and June 2010 surveys, when asked what reasons were for the Yes team not being successful, many identified the same contentious issues -- abortion, Kadhi's courts, and land. But viewed closely, the data suggests that it is the Church's issues -- abortion and Kadhi's Courts -- that are dominant and therefore influential in the No campaigns. The politicians' main concern is the question of land but this is not the most important issue among those rejecting the draft. Indeed, the survey shows that more people (61 per cent) think that the Proposed Constitution will make the distribution of land ownership fairer. Only 30 per cent do not agree with this statement. In the meantime, the data shows that support for this issue has also reduced. This suggests that the Church, particularly because of its grassroots networks and the reach, is the major force against the Proposed Constitution.

Table 4: People’s opinion on the most contentious issues

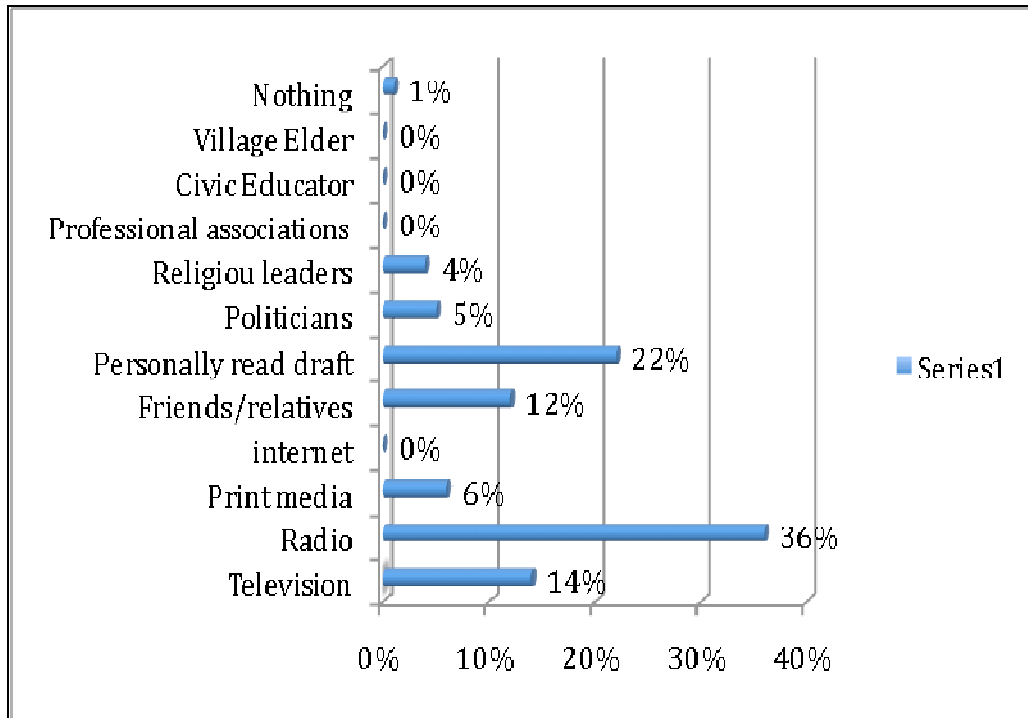
Please tell me whether you agree or disagree with the following statement			
	Disagree	Agree	No opinion
Kadhi’s Courts should remain in the draft constitution	40%	53%	7%
If the constitution passes, my community will be more secure and peaceful	29%	62%	9%
The draft constitution will make the distribution of land ownership in Kenya more fair	30%	61%	9%
The draft constitution advances the welfare of women in Kenya	20%	69%	11%
I feel like I don't have enough information about the draft constitution to make an informed vote	44%	50%	6%

77. *Support for issues around which the No side is mobilising has reduced:* Even though support for the No campaign has not reduced, support for its positions as well as the key issues propagated by it has reduced drastically. On the three major issues that those opposing the Proposed Constitution said were the most important to them – the abortion clause, inclusion of the Kadhi’s Courts and the land clause – support has reduced. On abortion, support reduced from 55 per cent in May to 41 per cent in June, a drop of 14 per cent. On opposition to the inclusion of Kadhi’s Courts in the Proposed Constitution, support reduced by 15 per cent from 37 per cent in May to 22 per cent in June, while land issues reduced by 10 per cent from 30 per cent in May to 20 per cent in June. This also tends to support the view that the more people know about the Proposed Constitution, the more they are making independent decisions about it. This is also consistent with the people’s low levels of trust in the Church and the politicians, the major drives of the No campaign in the referendum.
78. *Reduced impact of and access to civic education:* The Review Act set aside at least 30 days for civic education²⁷. In the June survey, we asked the question: “Have you attended any forum or meeting where information or education about the draft constitution was discussed?” Only 14 per cent answered Yes, while 86 per cent said No. Of those who said Yes, only 12 per cent were in a forum convened by the Committee of Experts. Another 33 per cent were in a forum convened by the religious groups, while 31 per cent were in a meeting convened by Government officials, mainly from the provincial administration. Another 9 per cent had been convened by politicians.
79. *The media has more reach in terms of civic/voter education:* asked which persons or groups of persons or sources of information had influenced the way they would vote, many respondents -- about 56 per cent -- identified the different forms of media as the most influential. About 36 per cent specifically cited the radio and another 14 identified the television as influential in this respect. This points to the fact that civic education

²⁷ Interview with an LSK executive on April 25, 2010.

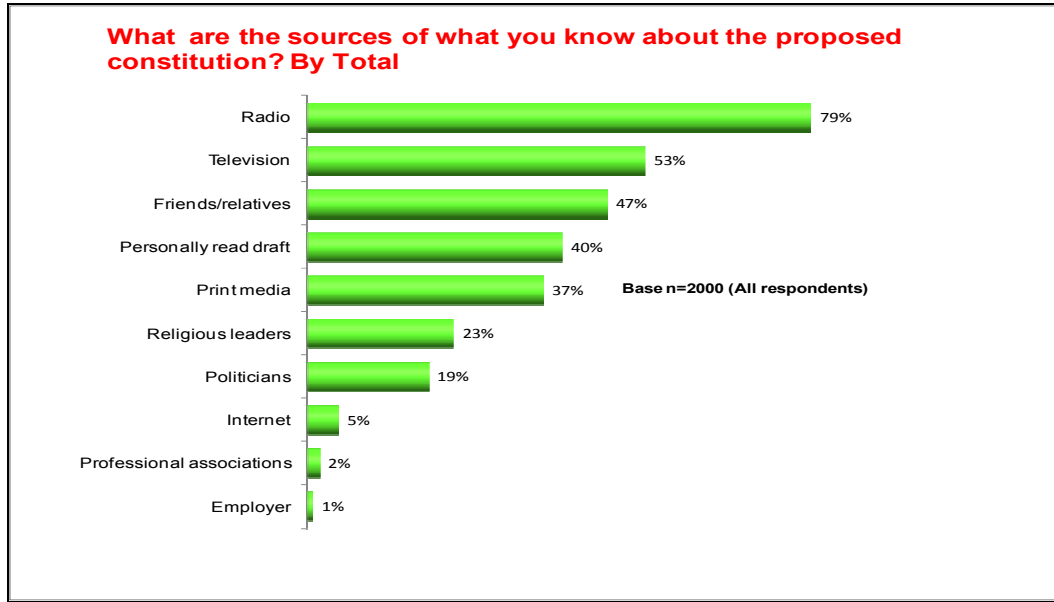
efforts should be stepped up through use of the media in order to increase outreach and impact.

Figure 15: What source of information has influenced whether you support or oppose the draft constitution?



80. *The media is the main source of information on what people know about the Proposed Constitution:* The media (radio, television and print media) again are the major sources of information. Civic education is, however, undermined by political campaigns; politicians are holding campaigns for political purposes rather than to disseminate information on the contents of the Proposed Constitution.

Figure 16: what are the sources of what you know about the Proposed Constitution?



81. *The President and the Prime Minister are most trusted in regard to their statements on the Proposed Constitution:* The survey in June asked people ‘how much they trusted statements on the Proposed Constitution by a number of leaders and institutions’. The responses clearly show that many people trust the country’s political leadership, and in particular the President and the Prime Minister. However, again the media is the most trusted in terms of the statements made on the Proposed Constitution. These responses stress a need to use the media to disseminate information on the Proposed Constitution and the country’s political leadership to jointly mobilise the support for the Proposed Constitution in a visible manner.

Table 5: How much do you trust statements on the proposed constitution by the following leaders or institution?

	Trust	Not trusted	DK/NA
President	72%	25%	3%
Prime Minister	68%	29%	3%
Your Member of Parliament	61%	28%	11%
Christian Religious leaders	59%	37%	4%
Muslim Religious leaders	45%	41%	15%
Media (Newspapers, Radio, Television)	80%	17%	3%
Civil society organisations	64%	21%	15%
No camp	33%	57%	10%
Yes camp	62%	30%	9%

Challenges Ahead

82. *Possible litigation to constrain progress towards a new constitution:* Since December 2008 when Parliament enacted the relevant Constitution of Kenya Review laws, the process has moved relatively fast compared to previous initiatives. Factors contributing to this include the fact that the legal framework governing the review process anticipated political mischief and accordingly insulated the process from possible sabotage. But it is still possible that litigation will emerge. Already, there are several cases in court touching on the referendum and awaiting determination. There are still other judicial rulings that have been made and appear to have implications for progress towards a new constitution. Notably, in May, the High Court ruled that the provision for Kadhi's Courts was inconsistent with the rest of the current constitution, thereby adding to anxiety that has been building over the Proposed Constitution. Again, on 23 June a ruling²⁸ by the Interim Independent Dispute Resolution Court ordered that prisoners be registered to vote in the August 4 referendum, thereby piling pressure onto the IIEC's logistical challenges in preparing a new voter register. There are at least three other cases pending in the same court challenging the referendum. There is a need to consider preparing, well in advance, for litigations against the review process, the referendum or even the actual constitution once it is passed at the referendum.
83. *Anti-reformers – water melons -- can easily sabotage the referendum process:* Previous review reports have pointed out that anti-reformers have been grouping or forming factions and political alliances to promote their interests and their ambition to capture state power in 2012. The alliances and new factions had had the effect of slowing reforms. Indeed, the window for radical reforms closed because these factions tended to block implementation of any initiatives that threatened their interests. With regard to the process to deliver a new constitution, some of the anti-reform elements have constituted their own space to stealthily undermine the review process. This is what accounts for lack of passion in supporting the draft. Some of the anti-reform groups are in Government and can, therefore, easily sabotage the process from within. But they cannot take overt actions against the Proposed Constitution because the President and the Prime Minister are supporting it. This could explain illegal insertion of words in the Proposed Constitution during printing. For these reasons, there is need for a speedy conclusion of investigations and prosecution of those arrested on matters concerning the review process -- illegal insertion of words in the document and hate speech, among others.
84. *Limited knowledge on the Proposed Constitution and likely impact on governance:* The discussion on why people will vote the way they will show clearly that there is ignorance on the content of the Proposed Constitution even though many people say that they have some knowledge about it. There is also misinformation on what is contained in some provisions that would have been addressed through systematic civic education. But as shown earlier, conventional civic education forums have been limited in scope and reach. Only the media have been stepping up public education. Indeed, ignorance on the Proposed Constitution is not just based on resulting from the failure

²⁸ This was a case filed by the Kituo Cha Sheria on behalf of Shimo La Tewa Prison who wanted the IIEC compelled to register them arguing that the Kenyan Constitution only barred prisoners from participating in presidential, parliamentary and local council elections but not in a referendum. The court granted the prisoners their prayer.

to read the document but also on a lack of understanding on what the entire effort means for governance. Not many people fully comprehend how the Proposed Constitution will revolutionalise the governance systems and institutions of the country. The failure to comprehend the implications of the reform effort could result in negative outcomes in case the constitution is passed such as the election of people (governors and senators) who are incapable of governing or running the counties.

85. Unfortunately, ongoing civic education might not resolve this and may not provide the people with the understanding necessary if Kenyans are to fully benefit from the Proposed Constitution²⁹. A new mindset and a new ethos are required to fully understand, unravel and address the politics and interests that have been driving the political system as well as the forces that will be working against the Proposed Constitution in the period after the referendum.
86. *Many Christians will vote for the draft in spite of rejection of the draft by the Church:* As noted in previous reports, essentially single issues are shaping the referendum debate. Never before has the debate on the review process or even the content of the Proposed Constitution even been determined by single issues as is the case today. But these issues are also evolving a new pattern, especially in the Church. From the May and June surveys, it is noted that despite the majority of Kenyans confessing Christianity, more of them will vote Yes, in spite of the Church's position – 56 per cent Christians will vote Yes and 20 per cent will vote No. Two, the church is not the major source of the information people have on the draft – the media is. Three, not everyone trusts what the church is saying about the Proposed Constitution.
87. *Polarisation along religious lines:* The continuing mobilisation for the rejection of the Proposed Constitution may lead to polarisation along religious lines. The issue of the Kadhi's Courts is likely to produce polarising effects and lead to sectarian conflicts. This again calls for putting in place a framework to begin addressing some of the tensions and possible conflicts arising from how the debate is evolving.

Conclusion

88. *The two Principals and the country's political leadership should step up their campaign for change:* The journey to a new constitution in Kenya has been a long and a tortuous one, often frustrated by individual and ethno-political interests. The journey to reform that began after the post-election violence is coming to an end and there are indications that many Kenyans are desirous of a new constitution. Close to half of the population appear supportive of the Proposed Constitution of Kenya and close to a quarter are yet to decide whether to approve or reject it. Many Kenyans want change and to move on.
89. *Indecisive leaders are a threat to reforms:* Self interest and parochial considerations have in the past threatened, and cut short, the journey to a new constitution. This current journey is not exceptional. A number of politicians have remained indecisive to a point where they are seen as rejecting the draft. Their indecisive nature is a challenge to getting a new constitution.
90. So far, there is every indication from the polls that the Proposed Constitution will be passed at the referendum. The question is whether the Proposed Constitution will have

²⁹ Interview with a CoE Constituency coordinator June 9, 2010.

the necessary support to guarantee peace, stability and national unity – the challenge is implementing it. Conducting a free and fair referendum is one issue to stress at this stage. Putting in place a framework that would enhance transparency from the outset is critical.

5. GENERAL CONCLUSION

91. Several conclusions have been drawn in the three main parts of this report. This section reiterates the main ones. It is important to reiterate that failure to take action against perpetrators of post-election violence as well as the failure to hold politicians and other powerful individual to account for corrupt practices has led to 'business-as-usual'. The old habits are back and the need to establish new allies and supporters for the 2012 General Elections makes it even harder to take action on powerful individuals. This has emboldened the small and middle level groups of perpetrators. It is important that the Government gives support to the ICC investigations and prosecutions.
92. The ICC role alone will not address these problems. Moreover, the ICC will investigate and prosecute a few people – not the many who perpetrated violence. The Government should once again build support for a Special Tribunal to investigate and prosecute especially middle and low level perpetrators, even after the ICC has begun its work. This will also require complementary police and judicial reforms. These are too long overdue. Comprehensive changes in the police, the judiciary and the criminal justice system will be required if the initiative to deal with this form of impunity is to be effective. Given the short time remaining, systematic thought must be given to the sequencing and prioritising these reforms. Systematic outreach on the work of the ICC will be necessary to manage expectations and reinforce commitment to its work.
93. The electoral reforms by the IIEC are ongoing. The introduction of the electronic voter register is very welcome and many people are supportive of it as a means of conducting free and fair elections. This progress must be reinforced; IIEC must be firm in pursuing electoral offences by stigmatising electoral malpractices and punishing breaches of the Political Parties Act. This will lay a firm foundation for both the referendum and the 2012 elections. Failure to punish senior and influential politicians involved in electoral malpractices and breaches of the Political Parties Act will entrench impunity after the referendum and in 2012.
94. The country is nearing the end of the long and tortuous road to a new constitution. Many Kenyans are desirous of change and would support the Proposed Constitution because they want change and they want to move on. But there are many hurdles before reaching end of this journey. Like in the past, individual and ethno-political interests are coalescing against the Proposed Constitution. The Church is also mobilising around single issues rather than on the broad platforms of good governance to reject the Proposed Constitution. Although the surveys show that half of the people support the Proposed Constitution, there is need to step up campaigns and reach more people because the final output and the legitimacy of the verdict will be determined by the voter turnout.
95. The political leadership has not been aggressive in mobilising support for the Proposed Constitution. Their visibility is critical at this period but joint strategies by both parties will unlock the huge numbers of undecided voters. Moreover, it is clear from survey findings that indecisive leaders are contributing to indecision among their supporters. Coming out actively and visibly to reach out to everyone is important.

96. The forthcoming referendum is an important milestone in the journey to a new constitution. The Proposed Constitution itself heralds a new era in governance architecture. It establishes a framework for improving governance and will hopefully mobilise energies towards building a better Kenya by healing divisions that almost destroyed Kenya as a nation-state. But it is not the constitution alone that will change Kenya; Kenya's political culture will be required to change. Leaders will have to learn to be accountable; and ordinary citizens will have to learn to enjoy their rights with responsibility, where they are not to be mobilised to protect leaders on basis of ethnic considerations. This points to the continuing need for intensive civic education after the referendum, if the Proposed Constitution is accepted.
97. Supposing the Proposed Constitution is rejected? Kenyans will have to look for new ways of healing their divisions and shaping their destiny. Impunity and anti-reformers will triumph. There will be a new burden on Kenyans as they seek the future. It is possible that fatigue will set in and there will be no urgent interest in reviewing the constitution. The 2012 general elections will be held under the system that led to violent conflict and the near collapse of Kenya in 2008.
98. If the Proposed Constitution is passed, then new hope for reforms will dawn but the challenge will be in implementing it. Demand for urgent and radical reforms will begin to take place; new opportunities for radical and better reforms will emerge almost immediately. But the challenge will also be in implementation because divisions over the Proposed draft have added religion as another cleavage to the existing ethnic and class divisions.
99. To realise a successful and peaceful outcome, all must moderate their tone in the referendum debate. The debate should be honest; reason and facts should be given room. At the same time, IIEC must act decisively against those breaching electoral rules. It should always be remembered that the constitutional review process was meant to prevent recurrence of violence.