



The African Union and Kenya's Constitution-Building Process

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Contents



Acronyms	4
Introduction	5
Post-election violence	7
AU intervention	7
AU legal and policy framework for intervening in conflict situations	8
<i>Constitutive Act of the AU</i>	9
<i>Lomé Declaration</i>	11
<i>Optional Protocol establishing the AU PSC</i>	12
<i>African Charter on Democracy, Elections and Governance</i>	13
The mediation process following the post-election violence	14
<i>National Accord and Reconciliation Act of 2008</i>	16
<i>National Cohesion and Integration Act of 2008</i>	16
<i>Truth, Justice and Reconciliation Commission Act of 2008</i>	17
<i>International Crimes Act of 2008</i>	18
<i>Constitution of Kenya Review Act of 2008</i>	18
Conclusion and policy recommendations	18
References	20



Acronyms

APRM	African Peer Review Mechanism
AU	African Union
CIPEV	Commission of Inquiry on Postelection Violence
CoE	Committee of Experts on Constitutional Review
ECK	Electoral Commission of Kenya
ICC	International Criminal Court
IREC	Independent Review Commission
KNDR	Kenya National Dialogue and Reconciliation
NCIC	National Cohesion and Integration Commission
NEPAD	New Partnership for Africa's Development
OAU	Organisation of African Unity
ODM	Orange Democratic Movement
PNU	Party of National Unity
PSC	Peace and Security Council
TJRC	Truth Justice and Reconciliation Commission
UCG	Unconstitutional Change in Government

The African Union and Kenya's Constitution-Building Process



Mugambi Laibuta

Introduction

Since Kenya's independence in 1963, the country's constitution has been amended many times. These amendments had the result of reinforcing and concentrating more political power under the control of the central government. They also contributed to tightening control over public life in all spheres, including politics, administration and management of public finance. The constitutional changes that took place between 1963 and 1967 had profound impacts on democratic governance in Kenya, and continue to reverberate today. The changes focused mainly on the transfer of power to the presidency from other arms or institutions of government. During this period, Parliament's ability to check the executive was eroded. The presidents used their powerful positions to advance their political interests, which left many communities and groups marginalized (Kirui and Murkomen 2011). The constitutional amendments had far-reaching effects on the economic, social and political well-being of the state.

In 1966, Regional Assemblies were scrapped, the Senate was dissolved and its members were co-opted into the House of Representatives to form the new National Assembly. The first president of Kenya, Jomo Kenyatta, banned opposition parties from contesting the elections in 1969, effectively making Kenya a *de facto* one-party state. Opposition leaders were detained and the ruling party, the Kenya African National Union, was the only party allowed to contest the elections. In 1983, multi-partyism was abolished and Kenya became a *de jure* one-party state. Constitutional reform started in the early 1990s, when there was a consistent push to return to multiparty democracy. Kenya returned to a multiparty system only after Section 2A of the constitution was repealed in 1991. Multiparty elections were held in 1992 in which the incumbent, Daniel Moi, won amid claims of electoral malpractice (Committee of Experts Final Report 2011).

* In this paper, the term 'constitution building' is used to indicate the legal, political, economic and social processes and events that led to a widely negotiated constitutional text in 2010.

In 2000, the 28-member Kenya Review Commission was established to facilitate the process of drafting a new constitution* and compiling a public report of recommended changes. After compiling the report and a draft bill for alteration of the constitution, the Commission convened the National Constitutional Conference to discuss, debate amendments and adopt a report and a draft bill to form the content of the constitution. The conference was composed of members of the National Assembly, civil society, professional bodies, political parties and district representatives (CKRC 2005). The draft constitution proposed by the conference was altered by the executive, which some claim led to its rejection by voters in the 2005 referendum (Banon 2007; Cottrell and Ghai 2007).

Following the post-election violence of 2007–08, a new constitutional review process was initiated in 2008 with the establishment of the Committee of Experts on Constitutional Review, which led to a new constitutional referendum in 2010, in which the new constitution was approved by a 66.9 per cent majority. This process enjoyed overwhelming support from the international community, political parties and Kenyan citizens. There was, however, strong opposition from some religious groups (Kramon and Posner 2011; Mwangi 2012), which were opposed to the retention of Kadhi courts (Islamic Courts dealing with marriage, succession and personal disputes) in the constitution; they also wanted a total ban on abortion, gay relationships and gay marriages.

This paper analyses the constitution-building process that took place between 2008 and 2010, particularly the role and involvement of the African Union (AU) Peace and Security Council (PSC) and Commission. It is beyond the scope of the paper to examine the underlying political and social tensions during that time. The analysis begins with the 2005 African Peer Review Mechanism's (APRM) monitoring mission in Kenya, and traces the journey of Kenya's constitution from the 2005 referendum through the 2007–08 post-election violence and the resulting AU Dialogue and Reconciliation process.

The paper also examines the role of non-Kenyan experts in the constitution-building process, and whether future processes should have similar frameworks. It assesses the AU mediation team's role after drafting the constitution, and how the team fit within Kenya's new legal and power structure. The main questions are when the AU team ended its facilitation role in Kenya, and whether or not it truly represented the voice of the AU. The paper also explores whether, when and how the AU should take part in constitution-building processes.



Post-election violence

Kenya experienced post-election violence from December 2007 to February 2008 that resulted in more than 1,500 people killed and over 500,000 internally displaced (Kanyinga 2012). The violence was a culmination of pent-up tribal animosity, rising poverty levels, a feeling of disenfranchisement, inequality and the rise in living costs that had been exacerbated by the 2005 referendum.

During the period leading up to the 2007 elections, the opposition party—the Orange Democratic Movement (ODM), led by former Prime Minister Raila Odinga—raised concerns regarding the integrity of the electoral process, including the appointment of commissioners to the Elections Commission of Kenya (ECK), voter registration, and allegations of voter intimidation by the state and vote rigging (all of which were part of the New Partnership for Africa's Development (NEPAD) report on Kenya's APRM), which were ignored by the government and the ECK. When former President Mwai Kibaki was declared the winner of the election and sworn into office on 30 December 2007, the opposition called for mass action to protest the results. While some areas held peaceful demonstrations, others experienced murder, rape, arson, pillaging, forced evictions and beatings. It took the intervention of the AU's leadership for the violence to stop. Three Kenyans, including the president and deputy president, currently face charges of crimes against humanity related to this violence at the International Criminal Court (ICC) (Kanyinga 2012).

While electoral dispute resolution mechanisms were available through the courts, opposition parties rejected seeking judicial recourse on the grounds that the executive would likely manipulate the process. They also argued that since the judiciary had not been reformed, it was not in a position to deliver a fair judgement on any petition. The fact that no presidential petition had ever been successful in Kenya after the country returned to multiparty democracy in 1992 reinforced this impression (*Matiba v Moi* (1993); *Mwai v Moi* (1997)). Thus, supporters of various political parties resorted to violence.

AU intervention

At the height of the post-election violence, AU Chairperson John Kufuor visited Kenya to try and restore calm, which precipitated the appointment of the Panel of Eminent African Personalities to mediate the crisis, with the approval of the two main political parties: the ODM (representing

the opposition) and the Party of National Unity (PNU, representing the government that had been sworn into power). The Panel was composed of former UN Secretary-General Kofi Annan, former President of Tanzania Benjamin Mkapa and Dame Graça Machel-Mandela. It also included five representatives of each of the two main parties.

The early AU involvement highlights the need for prompt intervention by AU leadership whenever a member state is facing a conflict or constitutional crisis. Political consensus of the ODM and PNU, plus diplomatic pressure from the international community, was pivotal in ensuring the mediation process arrived at a resolution (Kanyinga 2012). At first, only the AU chairperson was involved in the mediation process. It was not until the Tenth Ordinary Session of the AU Assembly, held on 31 January to 2 February 2008 in Addis Ababa, that the only AU resolution on Kenya was issued (Assembly/AU/Dec.187 (X)). It expressed concern at the situation in Kenya, condemned the violence and loss of lives, and (most importantly) called for the parties to commit themselves to dialogue and peaceful resolution of the conflict through the Kofi Annan-led mediation process.

This resolution sent a strong message of solidarity with the Kenya people and signalled the need for peaceful dispute resolution. It did not, however, identify concrete actions to be taken during the mediation process or provide a framework for the AU Assembly to monitor the process. Since there is no record of the Assembly discussing the Kenyan situation after the resolution was passed, it appears to have been a one-off political statement. Although the AU provided office space for the Panel of Eminent African Personalities and was in constant communication with it, there is no publicly available proof that the Panel presented its progress reports to the Assembly or the chairperson of the Union. Reports available to the public only indicate that it reported to donors who funded the Kenyan mediation and constitutional review processes.

AU legal and policy framework for intervening in conflict situations

The AU has put in place several legal instruments and policies that form the basis of the Union's intervention in conflict situations. These include the Constitutive Act of the AU; the Lomé Declaration; the Protocol establishing the AU PSC; and the African Charter on Democracy, Elections and Governance. This section argues that the implementation of AU legal and policy frameworks on intervention in conflict situations would have mitigated



or stopped the post-election violence in Kenya, and discusses the overarching principles propagated by the AU.

Constitutive Act of the AU

The Constitutive Act of the AU lays out objectives, principles and other organs of the Union. This section examines the legal and policy framework that may have facilitated the AU intervention in Kenya. In the last decade, the AU and regional bodies such as the Economic Community of West African States have been actively involved in diffusing conflicts in Somalia, Ivory Coast, Darfur in Sudan, Mali and Libya. But, as discussed below, the AU's interventions (such as in Kenya) have not been as structured as may have been intended.

Article 3(f) of the Constitutive Act provides that one of the Union's objectives is to promote peace, security and stability on the continent. Article 3(g) indicates that the Union is to promote democratic principles and institutions, popular participation and good governance. Article 4(e) calls for the peaceful resolution of conflicts among member states through appropriate means that may be decided upon by the Assembly. Article 4(h) gives the Union the right to intervene in a member state pursuant to a decision of the Assembly in grave circumstances such as war crimes, genocide and crimes against humanity, while Article 4(j) gives member states the right to request Union intervention in order to restore peace and security. Article 9(e) mandates the AU Assembly to monitor the implementation of Union policies and decisions and to ensure compliance by all member states. The discussion below analyses the application of AU objectives and functions in Kenya between 2007 and 2008.

Promotion of peace, security and stability

The intervention of the AU chairperson in Kenya was a precursor to a ceasefire in the post-election violence, and set the stage for the mediated process that led to the constitution-building process. Despite the escalation of hostilities, the AU Assembly did not hold an extraordinary session to chart a way forward for the country, which was on the brink of civil war. Article 6(3) of the Constitutive Act provides that the Assembly shall meet in extraordinary session at the request of any member state or on the approval of a two-thirds majority of the member states. Since there is no precedent to hold extraordinary sessions in times of crisis, no member state (including Kenya) invoked Article 6(3). The resolution related to Kenya was passed at a scheduled ordinary session that took place more than a month after the post-election violence began.

It may be helpful for the AU Assembly to convene extraordinary sessions in times of constitutional crisis or if violence erupts in a member state. This may ensure that it speaks in one voice and undertakes interventions based on regional consensus, and may protect member states from intervention by non-Union members.

Promote democratic principles and institutions, popular participation and good governance

The AU promotes democracy and governance in Africa through the APRM, under the auspices of the NEPAD, a technical body of the AU. APRMs were spearheaded by African leaders to address critical challenges facing the continent: poverty, development and the continent's international marginalization. Kenya was one of the first countries to submit itself to the APRM process.

The APRM team visited Kenya after the 2005 referendum and made several observations. In its report (APRM 2006) on democracy and political governance, the team observed that the country exhibited factors that have been markers of civil strife elsewhere, such as strong ethnic divisions, polarized political issues, political manipulation, rampant violence, socio-economic disparities, deepening levels of poverty and endemic corruption. The report noted that although Kenya had initiated and implemented programmes to enhance its socio-economic development, several problems persisted, including increasing poverty, a high unemployment rate (especially among youth), poor infrastructure, lack of credit facilities and inadequate access to markets. Despite numerous accomplishments in gender mainstreaming, the team reported that disparities still persisted due to unequal access to productive resources, social attitudes, harmful cultural practices, unequal educational attainment and the low participation of women in decision-making processes, both on the political and economic fronts.

The APRM team identified Kenya's main challenges, which were left unresolved and eventually triggered the post-election violence (KNDR 2008):

- the inability to address the colonial legacy, and the need to set a political agenda for real and strong national unity;
- historical imbalances in the channelling of resources and development programmes to certain regions in Kenya, which has perpetuated regional and ethnic inequalities;
- the delay in promulgating a new constitution, even though the Bomas draft was the product of the most extensive constitutional consultations in Africa's history;

- the absence of broad-based and inclusive political parties that cut across racial and ethnic divides and are anchored on a truly national agenda;
- a lack of confidence and trust in public institutions, coupled with pervasive corruption, despite the substantive legal and institutional frameworks designed to curtail it;
- the high incidence of poverty and pervasive unemployment, especially among youth;
- the under-representation of women in key leadership positions at all tiers of government and the private sector;
- the lack of efficient public sector service delivery and enforcement mechanisms, as well as weak implementation of policies and programmes;
- the ineffectiveness of the parliamentary oversight committees;
- the limited access to finance for small business; and
- the low probability of meeting the Millennium Development Goals, with the exception of universal primary education and decreased HIV/AIDS rates.

Peaceful resolution of conflicts and intervention in member states

As discussed above, the AU chairperson, John Kufuor, intervened in Kenya in a timely manner. He was instrumental in convincing the parties to the conflict to cease hostilities and decide on a mediation process.

Monitoring the implementation of Union policies and decisions

The voluntary APRM process lacked concrete follow-up mechanisms to mitigate the negative effects of the country's challenges in the run-up to, and after, the general elections. If the APRM proposals and recommendations had been gradually implemented by Kenya with guidance from NEPAD, some of the controversies that caused the Kenyan crisis may have been averted. Thus NEPAD's monitoring of the implementation of Union reports, policies and decisions needs to be re-examined.

Lomé Declaration

In reaction to the periodic unconstitutional changes in governments (UCG) across the continent, the heads of state and government of the Organization of African Unity (OAU) met in Lomé, Togo from 10–12 July 2000 to renounce *coups d'état*. The Kenyan crisis could have easily escalated into a UCG. The violence put pressure on security forces, humanitarian assistance, the economy and the social fabric of society. Consequently, landlocked states

like Uganda, Burundi and Rwanda, which depend on the Kenyan seaport, bore the brunt of a lack of safe passage of goods to and from the Mombasa port.

Perhaps due to situations like in Kenya, the Assembly identified elements of a framework for an OAU response to UCG: (1) a set of common values and principles for democratic governance, (2) a definition of what constitutes UCG, (3) measures and actions that the OAU would progressively take to respond to a UCG and (4) a description of an implementation mechanism for interventions.

The Assembly went further by laying out principles as a basis for articulating common values and regulating democratic governance in member states. While the OAU no longer exists, these principles offer guidance to the AU. The principles were that member states should adopt a democratic constitution, respect the constitution and legislative enactments adopted by Parliament, ensure the separation of powers and the independence of the judiciary, promote political pluralism, recognize the opposition, guarantee free and fair elections, and recognize and guarantee fundamental rights and freedoms.

The Lomé Declaration goes further to define what constitutes UCG, and defines mechanisms for restoring constitutional order. Oddly, Kenya did not exhibit any of the common values and principles for democratic governance in the run-up to the 2007 elections. But the AU had no mandate to intervene, as Kenya was not facing a constitutional crisis or experiencing sporadic violence before December 2007. For example, before Kenya's 2010 constitution, the executive had exclusive control over the appointment of judicial officers and members of the Electoral Commission. No reforms had been undertaken in the electoral system, security services or related to respect for the rule of law. The challenge that arises is whether the AU should police adherence to constitutional principles and the rule of law in member states.

Optional Protocol establishing the AU PSC

In July 2002, AU member states established the PSC, the standing decision-making organ for the prevention, management and resolution of conflicts. It is also the collective security and early-warning arrangement to facilitate the timely and efficient response to conflict and crisis situations in Africa. The PSC ought to be supported by the AU Commission, a 'panel of the wise', a continental early warning system, an African standby force and a special fund.



The PSC's objectives are to promote peace, security and stability in Africa; anticipate and prevent conflicts; promote and implement peace-building and post-conflict reconstruction activities to consolidate peace and prevent the resurgence of violence; and promote and encourage democratic practices, good governance and the rule of law; protect human rights and fundamental freedoms, respect for the sanctity of human life and international humanitarian law.

Like the AU Assembly, the PSC released a similar general statement on the Kenyan situation, and provided no concrete follow-up mechanism. The Council requested the AU Commission that acts as the AU secretariat to closely follow developments in Kenya and to report to it as soon as possible on the situation in the country and the evolution of the mediation efforts. There are no public indications if these reports were ever done.

African Charter on Democracy, Elections and Governance

Kenya signed the African Charter on Democracy, Elections and Governance in 2008, but it did not enter into force until 2012. The charter represents a targeted move by AU member states to promote constitutionalism and the rule of law. The challenge remains monitoring the quality of governance and democracy in member states when there is no conflict or constitutional crisis.

AU organs have the responsibility to promote favourable conditions for democratic governance on the African continent, and, more specifically, to ensure that Union decisions related to UCG are implemented. The charter seeks to promote adherence to human rights and democratic principles; the 'condemnation and total rejection' of UCG; rule of law; representative governance; the holding of regular, transparent, free and fair elections; gender equality; separation of powers; transparent management of public affairs; and condemnation and combatting of corruption.

The language used by the charter indicates that its provisions are meant to be obligatory. For example, Article 4 states that state parties '**shall commit** themselves to promote democracy, the principle of the rule of law and human rights' (emphasis added). Article 5 provides that 'state parties **shall** take all appropriate measures to ensure constitutional rule, particularly the constitutional transfer of power' (emphasis added). To give effect to the charter, state parties ought to initiate appropriate measures, including legislative, executive and administrative actions to bring state parties' national laws and regulations into conformity. Further, state parties should take necessary measures in accordance with constitutional provisions and procedures to

ensure the wider dissemination of the charter and all relevant legislation as may be necessary to implement its fundamental principles. State parties should also promote political will as a necessary condition for attaining the goals set forth in the charter. In essence, state parties should incorporate the charter's commitments and principles in their national policies and strategies.

At the continental level, the AU Commission is obligated to develop benchmarks for implementing the charter's commitments and principles and evaluating compliance by state parties. The Commission should also work toward harmonizing states' policies and laws, and ensuring state party compliance with AU decisions and Assembly or PSC sanctions.

The above charter provisions should be the blue print to sustained constitutionalism and adherence to the rule of law in Africa. Although Kenya signed the Charter after the 2007/2008 crisis, moving forward, the AU Commission, Assembly plus the PSC should take an active role in ensuring Kenya's compliance to the charter. This may be done through collaboration with organs of the AU and progressive implementation of the principles of the charter. Since Kenya does have a constitution dubbed as progressive, the AU should monitor to what extent it is fully implemented and whether there are threats to constitutionalism and the rule of law.

The mediation process following the post-election violence

The mediation process (called the Kenya National Dialogue and Reconciliation (KNDR) process) was the result of the AU intervention discussed above; it crucially contributed to a final negotiated constitutional text. To set the stage for constitution building, the Panel of Eminent African Personalities and the negotiation teams created the following agenda:

- immediate action to stop violence and restore fundamental rights and liberties;
- immediate measures to address the humanitarian crisis and promote reconciliation, healing and restoration;
- overcome the current political crisis; and
- long-term issues and solutions.

The long-term issues and solutions are the most relevant for the current analysis. The KNDR process identified constitutional, institutional and legal reforms as long-term solutions, yet the mediation process was not anchored in Kenyan law. The process nonetheless led to the enactment of various legislation



and several amendments to the constitution to facilitate constitutional review, and legal and institutional reforms. Since the mediation took place during a time of crisis, the process was not anchored in the constitution or legislation passed by the National Assembly. The mediation process, and its outcome, was a largely political process. Whether or not the outcome reflected the will of the populace is arguable, since representatives of the two main political parties conducted the process. Practically, it was not possible to take the views of the people into account in the mediation process at that politically fragile moment. In such a case, it is a challenge to give constitutional and legal credence to the process at a time of high political tension and violence. In the end, political goodwill and the consensus of Kenya's two main political parties, plus diplomatic support and pressure from the AU and development partners, pushed the mediation process into a targeted constitution-building process.

Based on the National Dialogue and Reconciliation Committee's agreement, two commissions—the Independent Review Commission (IREC) on the 2007 Elections and the Commission of Inquiry on Post-election Violence (CIPEV)—were formed to investigate and report on different aspects of the crisis. Both commissions were formed under the Commissions of Inquiry Act. IREC was composed of seven members, three of whom were international experts nominated by the Panel of Eminent African Personalities following consultations with ODM and PNU representatives to the mediation process. CIPEV had three commissioners, two of whom were international experts nominated by the Panel of Eminent African Personalities. From the onset of framing issues to find long-term solutions for Kenya, non-Kenyan experts were involved.

The IREC presented its findings and recommendations, which were based on its analysis of the legal framework for the conduct of elections in Kenya; the structure, composition and management system of the ECK; and its organization and conduct of the 2007 election. CIPEV was mandated to investigate the circumstances that led to the post-election violence; investigate the actions and omissions of security agents during the violence; and recommend legal, political or administrative solutions and proposals to bring persons responsible for criminal acts to justice. Recommendations by CIPEV and IREC provided a factual basis for sweeping electoral and institutional reforms, which formed the foundations of a comprehensive constitutional review before the 2012 elections.

Involving international experts with Kenyans in different constitution-building organs was creative and pragmatic. Since the country was polarized

before and after the 2007 elections, the international experts offered neutral input to different processes, as is indicated by the partial success of the CIPEV, IREC, Committee of Experts on Constitutional Review (CoE), and Truth, Justice and Reconciliation Commission (TJRC) processes. If only Kenyan experts were used in these processes, the national political tensions would have been devolved to institutions formed during and after the mediation process.

After the IREC and CIPEV processes, legislation was put into place to further support constitution building and establish constitution-building institutions. The key pieces of legislation that were engineered by the mediation process, all of which contributed to constitution building, are discussed below.

National Accord and Reconciliation Act of 2008

To overcome the political crisis, the negotiated team came up with the National Accord and Reconciliation Act. The Act gave effect to the Agreement on the Principles of Partnership of the Coalition Government; its aim was to foster national accord and reconciliation, and to provide for the formation of a coalition government and the establishment of the offices of prime minister, deputy prime ministers and ministers of the government of Kenya and their functions. The positions were created by a power-sharing agreement between the PNU and the ODM.

The formation of a coalition government ensured that there was political consensus in initiating constitutional, institutional and legal reforms. The coalition government went on overdrive to address the long-term issues (Kanyinga 2012). President Kibaki and Prime Minister Odinga, who were antagonists before March 2008, supported the draft constitution. The unified rallying cry by the political elite in a coalition government gave the constitutional review process the political goodwill it required to succeed. Hence, principles of constitutionalism and respect for the rule of law, as articulated by various AU documents, were put into action.

National Cohesion and Integration Act of 2008

The National Cohesion and Integration Act endeavoured to encourage national cohesion and integration by outlawing discrimination on ethnic grounds in order to provide for the establishment, powers and functions of the National Cohesion and Integration Commission (NCIC). The NCIC's mandate is to outlaw and monitor discrimination, hate speech and harassment



based on ethnicity. The NCIC was intended to facilitate and promote equal opportunity, good relations, harmony and the peaceful coexistence of persons of diverse ethnic and racial backgrounds in Kenya. It was also to enhance tolerance, understanding and acceptance of diversity. Though it was created in 2008, the NCIC has not achieved any concrete gains. Kenya still remains regionally and ethnically divided.

Truth, Justice and Reconciliation Commission Act of 2008

The TJRC Act was to provide for the establishment powers and functions of the TJRC. The TJRC's mandate was to investigate, analyse and report on all of the following that occurred between 12 December 1963 and 28 February 2008:

- gross violations and abuses of human rights, including abductions, disappearances, detentions, torture, sexual violations, murder, extrajudicial, killings, ill treatment and expropriation of property;
- economic crimes including corruption and exploitation of natural or public resources;
- irregular and illegal acquisition of public land;
- marginalization of communities;
- ethnic violence and tensions;
- crimes of a sexual nature against female victims;
- investigate the context, causes and circumstances of the violations and abuses;
- enquire into, investigate and provide redress in respect of violations and abuses; and
- educate and engage the public on issues related to its work.

Section 10 of the TJRC Act provided that the Commission would consist of nine commissioners, of whom three would be non-citizens, at least one of whom would be of the opposite gender, selected by the Panel of Eminent African Personalities. The TJRC released its final report in May 2013, and has received mixed reactions from Kenyans. The report was tabled before Parliament, and it is not clear how its recommendations will be implemented. The TJRC was crafted just like the South African Truth and Reconciliation Commission.

International Crimes Act of 2008

The International Crimes Act makes provision for the punishment of certain international crimes (genocide, crimes against humanity and war crimes) to enable Kenya to cooperate with the ICC. It forms the basis for Kenya's cooperation with the ICC, in which three Kenyans are currently facing charges of committing crimes against humanity.

Constitution of Kenya Review Act of 2008

This act facilitated the completion of the review of Kenya's constitution after the failed referendum in 2005. The CoE was to analyse all existing draft constitutional documents that had been previously considered and come up with a harmonized document. All other processes discussed above—the IREC, CIPEV and the formation of a coalition government—contributed to the constitution-building process.

Within 18 months of appointment, the CoE delivered a draft constitution for Kenyans to consider. Constitutional amendments and legislative provisions that had been enacted after the Kofi Annan-led mediation made the constitutional review easier; in essence, constitution building leading up to the current constitution had taken place.

Section 8 of the Constitution of Kenya Review Act of 2009 provided that the CoE was to comprise nine persons nominated by the National Assembly and appointed by the president, of whom three must be non-citizens of Kenya nominated by the National Assembly from a list of five names submitted to the Parliamentary Select Committee by the Panel of Eminent African Personalities, in consultation with the National Dialogue and Reconciliation Committee. Just like other constitution-building institutions, the CoE had international representation that offered non-partisan contribution to the constitutional review process.

Conclusion and policy recommendations

Constitution building is a long, convoluted process, as the Kenyan case indicates. After the failed constitutional review process, the mediation process of 2008 offered new hope for constitution building and highlights some policy recommendations for the future:

- The AU should promptly respond to conflicts within or among member states to ensure that a conflict resolution mechanism is quickly put in place to diffuse tensions. The AU chairperson's timely intervention in Kenya was important for fostering political consensus on the mediation process and the rule of law.
- AU organs should openly and publicly discuss member states' constitutional crises to promote constitutionalism and the rule of law, and create oversight committees to monitor mediation processes. One of the challenges of Kenya's mediation process was that it was not expressly anchored in and monitored by key organs of the AU such as the Assembly or the PSC. Had they taken ownership of the constitution-building process and publicly tracked progress, the outcome may have been more positive.
- The AU should have a model constitutional text that member states can adapt to their own contexts. Minimum standard constitutional provisions would promote uniformity in constitutionalism and rule of law provisions among its members.
- The AU should involve both local and international experts in mediation processes. International experts are far removed from a country's political and social tensions, and can act as neutral 'mediators' to balance the competing interests of divergent political interests.



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