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# Kenya's Grand Coalition Government – Another Obstacle to Urgent Constitutional Reform?

Henry Amadi

**Abstract:** Kenya's Grand Coalition Government was formed in the aftermath of a serious post-electoral crisis including widespread violence. No political progress has been recorded; in striking contrast to all expectations for more moderation and consensual preparation of a constitutional reform. Based on secondary data from textbooks, newspapers, journals, and documents from both governmental and non-governmental organisations, the author finds that the continuing wrangles within the Grand Coalition Government, the fear of the debilitating effects of a constitutional referendum and the hard-line positions on the contentious issues pose a big threat to the achievement of a new constitution before the 2012 Elections.

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**Keywords:** Kenya; Government; Constitutional amendments/constitutional reform

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The formation of Kenya's Grand Coalition Government, following the dispute over the December 2007 presidential election results, was largely based on the conviction that such a government has the potential to promote compromise and conciliation between adversarial factions and hence, more scope for bringing about consensus on how to address the long-term causes of the 2007-2008 post-election violence, including far-reaching political, economic, administrative and social reforms (Republic of Kenya, 2008a: 6). Constitutional reform has been on the Kenyan political agenda for decades and expectations were that it should be boosted by the Grand Coalition. The puzzling question is why this does not seem to be happening.

The purpose of this article is to examine the extent to which Kenya's Grand Coalition Government has succeeded in addressing the long-term causes of the 2007-2008 post-election violence with specific reference to comprehensive constitutional review.<sup>1</sup> The article presents the argument that Kenya's Grand Coalition Government's ability to address the issue of comprehensive constitutional review has been undermined by the unending wrangles among the coalition partners over the distribution of power; leading to their inability to reach consensus on the contentious issues on the one hand and the general fear of the debilitating effects of the campaigns in the run-up to constitutional referendum on the other.

The author basically assumes that, contrary to the underlying assumptions for the establishment of the Grand Coalition Government in 2008, Kenya's politicians continue to be guided, not by the over-riding national interest in a peaceful general election in 2012, but by their narrow interests in safeguarding their respective power positions, both now and in the foreseeable future (Spears 2002: 127).

Although the colonial regime had been for the most part oppressive, Kenya attained independence under a fairly democratic system.<sup>2</sup> However, the new government soon set in motion a series of constitutional amendments that had weakened the existing checks and balances leading to the emergence of an "imperial presidency" (Omollo 2002: 11-34). By 1991, Kenya's post-independent constitution had been amended more than 32 times (Republic of Kenya 2008b: 28). In this process the country had trans-

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1 A comprehensive review of Kenya's current constitution before 2012 was given a top priority at the National Dialogue and Reconciliation Committee negotiations (Kenya National Dialogue and Reconciliation 2008).

2 The post-independence constitution provided for a parliamentary system with the Prime Minister as the Head of Government and the Governor-General (acting on behalf of the Queen of England) as the Head of State. The system also had some democratic safety-valves, including a bi-cameral legislature, multi-party system and quasi-federal system known as *majimbo*.

formed itself from a British dominion to a republic, from a parliamentary system to a predominantly presidential system, from a quasi-federal system to a unitary system and from a multi-party system to a *de-jure* one-party state (Law Society of Kenya 2006: 13).<sup>3</sup> It has been argued that this series of fundamental constitutional amendments has helped to breed a culture of impunity, which was already apparent in the electoral violence of the 1990s and ultimately gave way to 2007-2008 post-election violence (Republic of Kenya 2008b: 24-36). As a consequence, by the early 1990s public opinion was slowly converging on the need to completely overhaul the constitution as one way of restoring good governance and economic development in the country. In the wake of the re-introduction of multi-party politics in Kenya in 1991, however, most aspects of the already flawed constitutional dispensation were left intact.<sup>4</sup> Indeed, it was the apparent incompatibility between the emerging multi-party system and the retention of the already flawed constitutional dispensation that triggered calls for a comprehensive review of the country's constitution in the early 1990s (Oloo and Mitullah 2002: 45).

However, despite repeated promises by the subsequent governments, a new constitution is yet to be attained. This is partly because the current constitution confers enormous privileges on the incumbents. Even winning opposition parties have frequently given lukewarm support to a comprehensive review of the constitution in the belief that it stands to benefit them in

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- 3 Among the amendments that were made to Kenya's post-independence constitution are: that which unified the offices of the head of state and the head of government in 1964; that which removed the constitutional protection against the redrawing of regional and district boundaries or the creation of new regions or districts in 1964; that which reduced the percentage required for parliament to approve a state of emergency from 65 per cent to simple majority in 1965; that which removed the time limitations on state of emergencies in 1966; that which required Members of Parliament who defect or start a new party, to seek a fresh mandate from their constituents in 1966; that which gave the President the authority to appoint the 12 nominated Members of Parliament in 1968; that which allowed the President to waive the penalty (i.e., being banned from contesting elections for five years) on persons found guilty of an election offence in 1975, and that which made Kenya a *de-jure* one party state in 1982 (see Law Society of Kenya 2006).
  - 4 With the exception of the repeal of Section 2 (A), by which opposition parties had been outlawed (Amendment Act No. 2, 1992), and the limitation of the tenure of the sitting president to two five-year terms (Amendment Act No. 6, 1992). The latter amendment also contains a controversial clause, which required a winning president to attain at least 25 per cent of the popular vote in at least five of the country's eight provinces. This clause has been associated with a series of ethnic cleansing that has accompanied General Elections in Kenya since 1992 (Republic of Kenya 2008b: 24-28).

future. Thus, even though the calls for a new constitution were evident prior to the introduction of a multi-party system, these calls plummeted after the introduction of the multi-party system giving the, then opposition movement, Forum for the Restoration of Democracy's (FORD) high hopes of winning the December 1992 Elections. It was only following its subsequent electoral defeat that it renewed its demands for a new constitution (Republic of Kenya 2006: 29).

Thus, during Moi's subsequent two five-year terms in office, he only managed to deliver a "minimum reform package," whose main purpose was officially to level the political playing field prior to the December 1997 General Elections (Cowen and Kanyinga 2002: 129 and 155).<sup>5</sup> In the meantime, the Constitution of Kenya Review Act (1997) was enacted to pave the way for a comprehensive constitutional review process after the elections (Republic of Kenya 1998). The subsequent turn of events, however, revealed that these were simply well-orchestrated attempts by Moi to delay the constitutional review process during his two terms in office. Not only did the reform package fail to level the political playing field (Cowen and Kanyinga 2002: 164-165),<sup>6</sup> but it also had no legal effect as it was not integrated into the country's constitution by the subsequent parliaments (*The Standard Sunday*, 18 December 2005: 1-4, 18).<sup>7</sup> Moreover, the failure of the Constitution of Kenya Review Act (1997) to cater for the participation of civil society in the constitutional review process, led to a lot of time being squandered on negotiations for its amendment and subsequent implementation. By the time these disagreements were finally resolved in 2001,<sup>8</sup> the December 2002

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5 The minimum reform package was the culmination of negotiations between the Kenya African National Union (KANU) and the opposition under the aegis of the Inter-Party Parliamentary Group (IPPG). It included a consensus by a cross section of political parties on: the repeal of detention act, the repeal of public order act, registration of all political parties, non-partisan broadcast by the media, wide consultations in all public appointments and an end to the government's interference in the running of political parties, among others.

6 This is borne out by the allegations of fraud that accompanied the December 1997 elections.

7 Indeed, it simply amounted to a "gentleman's agreement," as indicated by Kibaki's unilateral appointment of opposition KANU and Ford People Party MPs to his Cabinet in 2004, contrary to the IPPG consensus that this would in future only be done with the collective consent of the MP's respective parties.

8 Disagreement over the implementation of the Constitution of Kenya Review (Amendment) Act, 1998 led to the formation of a parallel constitutional review initiative by the Ufungamano group (a religious-led organisation) in 1999. It took two further amendments to the review act for the parallel constitutional review process to be re-integrated into the mainstream process, namely in 2000 (by which the constitution review team was reduced from 25 to 15 commissioners) and 2001 (by

elections (ending Moi's second term in office) had come too close to allow for a constructive constitutional review process.

In the same way, Kibaki's National Rainbow Coalition (NARC) government saw the watering down of the proposed new constitution (Bomas draft) into what became known as the Wako draft, which was rejected in a popular referendum in November 2005 (Republic of Kenya 2006: 29). Apparently, Kibaki's allies (mainly drawn from the National Alliance Party of Kenya (NAK) wing of NARC) reneged on their earlier support for an executive Prime Minister's position which had been based on the pre-election Memorandum of Understanding (MoU) between them and the members of the Liberal Democratic Party (LDP) (Murunga and Nasong'o 2006: 16-19). Not only was the Wako draft increasingly associated with the interests of the people from the Mt. Kenya region (Republic of Kenya 2006: 64-65; Republic of Kenya 2008b: 28-30), but it also generated many contentious issues that failed to be resolved (Republic of Kenya 2006: 72)<sup>9</sup> leading to its rejection.

However, the alliances that were formed in the run-up to the 2005 referendum were largely sustained (with slight modifications) up to the December 2007 elections (Republic of Kenya 2008b: 29-30).<sup>10</sup> In the run-up to the December 2007 elections, the renewed fear that the incumbent government had an electoral advantage prompted demands for "minimum constitutional reforms" by the civil society and the opposition. These demands were, once again, scuttled by the Kibaki administration under the pretext that they were aimed at delaying comprehensive constitutional review efforts by the government (*Daily Nation*, 30 May 2007: 59).

## The Grand Coalition Government and the Quest for a New Constitution

On 30 December 2007, violence broke out in several parts of the country following the announcement of the results of the presidential elections. In a bid to contain the situation, a power-sharing deal was brokered between Mr. Kibaki and Mr. Odinga by the former United Nations Secretary-General

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which twelve more commissioners from the Ufungamano group were added to the constitution review team).

9 These include: the executive, devolution, land ownership and use, the legislature, the Kadhi courts, the Provincial administration, the right to abortion and the enactment of the new constitution, among others.

10 The LDP and KANU, which teamed up against the draft constitution, finally formed the Orange Democratic Party (ODM), while the NAK, which supported the draft Constitution, formed the Party of National Unity (PNU).

Kofi Annan, leading to the formation of the Grand Coalition Government (Republic of Kenya 2008a: 9). Apart from ending the spiralling violence, the power-sharing agreement sought to address a wide range of institutional defects considered to be responsible for the recurrence of conflict in post-independence Kenya. The defects included a flawed constitutional dispensation, unfair distribution of land, unemployment and the culture of impunity (Republic of Kenya 2008a: Preamble; Dialogue Africa Foundation, 2009: viii).<sup>11</sup>

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. It was expected that their subsequent recommendations for sweeping electoral and institutional reforms should form the basis for a comprehensive constitutional review before the 2012 elections. In late 2008, a Parliamentary Select Committee (PSC) on Constitutional Review was named and two review statutes (the Constitution of Kenya Amendment Act, 2008<sup>12</sup> and the Constitution Review Act, 2008) were enacted by parliament. These paved the way *inter alia* for the subsequent creation of the Interim Independent Electoral Commission (IIEC), Interim Independent Boundary Review Commission (IIBRC)<sup>13</sup> and the Committee of Experts (CoEs) on constitutional review.

However, there has been evidence of foot-dragging by the Grand Coalition Government in the execution of the reform measures agreed upon by the National Dialogue and Reconciliation Committee. This is evidenced by the time lapse between the signing by Mr. Kibaki and Mr. Odinga of the

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- 11 The National Dialogue and Reconciliation Committee agreed on four main agenda items that would help resolve the crisis, including: immediate action to stop violence and restore fundamental rights and liberties; immediate measures to address the humanitarian crisis, promote reconciliation, healing and restoration; how to overcome crisis: and, addressing long-standing issues and their solutions, including constitutional reform and inequalities in the country (see Dialogue Africa Foundation 2009: viii).
  - 12 By this Constitutional Amendment Act, Article 47 of the constitution which empowers the Kenyan Parliament was amended to pave the way for the forthcoming referendum. It is noteworthy that this Article has remained contentious throughout the constitutional review process and was partly responsible for the rejection of the proposed New Constitution in 2005.
  - 13 Both the IIEC and the IIBRC were formed following the recommendation by the Independent Review Commission on the 2007 Elections that the already discredited Kivuitu-led Electoral Commission of Kenya (ECK) be replaced by two electoral bodies to spearhead both electoral reforms and boundary review ahead of the 2012 elections (Republic of Kenya 2008c: 8-10, 153-163).

“Agreement on Principles of Partnership of the Coalition Government” on 28 February, 2008 and the naming of the bodies that are crucial to the constitutional review process, including the IIEC, IIBRC and CoEs, all of which were sworn-in well into the year 2009 (*Daily Nation*, 9 January 2009: 1-2). Moreover, following their swearing in, these bodies have had to contend not only with delays in allocation of funds by the government (*The Standard Sunday*, 31 May 2009) but also with the inadequacy of the same (*The Standard Sunday*, 7 June 2009: 8).

Furthermore, a new constitution can only be expected in late 2010 since in last year’s budget no money was allocated to the national referendum that is expected to midwife a new constitution (*Daily Nation*, 19 June 2009: 4).<sup>14</sup> As a result, there are clear indications of loss of confidence in the Grand Coalition Government’s ability to deliver the required reforms, including a new constitution, before the 2012 elections (Kenya National Dialogue and Reconciliation Monitoring Project 2009: 26, 29).<sup>15</sup>

According to the findings of the CoEs, three main contentious issues have arisen from the preceding efforts at constitutional review, namely: the executive and the legislature, the devolution of powers and bringing the transitional clauses of the constitution into effect (CoEs 2009).<sup>16</sup> In the following paragraphs, an attempt is made to assess the extent to which the

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14 This is as per the report of the current Minister for Justice, National Cohesion and Constitutional Affairs Mutula Kilonzo.

15 In a National Baseline Survey conducted from 17-24 December 2008, the Kenya National Dialogue and Reconciliation Monitoring Project found that 72 of the respondents were of the opinion that the Grand Coalition Government must give Kenyans a new constitution. However, only 10 per cent felt that the Grand Coalition Government was very likely to deliver a new constitution by the year 2009, compared to 40 per cent, 30 per cent and 15 per cent, who felt that it was more or less likely, more or less unlikely and very unlikely, respectively.

16 It is important to note that the Committee of Expert’s list of contentious issues has itself become contentious based on allegations that it has left out many contentious issues. For example, the clause that seeks to anchor the Kadhis’ courts in the constitution continues to generate heated debate despite having been left out of the list of contentious issues. Actually, Kadhis’ courts have been in Kenya’s constitution since independence, (article 66, 8), when they were charged with the responsibility of determining questions of Muslim law relating to personal status, marriage, divorce and inheritance among people professing Islamic faith (article 66, 12). The trouble began with an attempt by the NARC government to please other religious groups by allowing them to anchor their courts in the constitution (Wako draft, article 195, 1) in the run-up to the November 2005 referendum. It currently appears as if the issue of the Kadhis’ courts poses one of the most serious threats to the attainment of a new constitution under the Grand Coalition Government. For details, see the report of the national survey done by Transparency International from 19-26 April 2009 (Transparency International Kenya 2009: 12-13).



constitutional review process is threatened by an apparent hardening of stand by both politicians and citizens alike.

## Disputed Elements of the Constitutional Review Process

### *The Executive and the Legislature*

With reference to the executive and the legislature, the members of the CoEs have noted that the main areas of contention pertain to whether or not the country should adopt a presidential, parliamentary or hybrid (mixed) system with executive power shared between the President and the Prime Minister. With specific reference to the legislature, there is still no agreement on what should be the name and role of the Second House and how this house should relate to the other house on the one hand and to the executive on the other.

Barely two weeks after the CoEs asked Kenyans to submit their views on contentious issues (*Daily Nation*, 19 June 2009: 16), the ODM and PNU came up with diametrically opposed views, indicating that the two Grand Coalition Partners have not softened their hard-line stands since the 2005 National Referendum. According to the ODM,<sup>17</sup> a parliamentary system providing for an executive Prime Minister is still the most preferred system of government. This stand by the ODM may be closely linked to the fact that it mainly inherited the regions that had been strong-holds of KANU, whose constituencies were deliberately split so as to yield a parliamentary majority for the party despite its lack of a popular majority (*The Standard Sunday*, 8 March 2009: 16).

On the other hand, the PNU, led by its Deputy Prime Minister Uhuru Kenyatta<sup>18</sup> made clear its preference for a mixed system of government (where the President holds the ultimate executive authority) arguing that a parliamentary system such as that proposed by the ODM has the potential to divide the country in that it creates two centres of power. Nonetheless,

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17 This is as reflected in statements by, among others, its leader Prime Minister Raila Odinga and MPs Otieno Kajwang' (the Minister for Immigration) and Jakoyo Midiwo (also doubling as party whip).

18 In making this statement, Uhuru was accompanied by Energy Minister and Assistant Minister Kiraitu Murungi and Mwangi Kiunjuri respectively, MPs Mithika Linturi (Igembe South), George Thuo (Juja, also doubling as the party's chief whip), Ephraim Maina (Mathira), Lenny Kivuti (Siakago) and Mburi Muiru (Tharaka).

both office-holders would have to be elected by popular vote.<sup>19</sup> Indeed, the respective parties' perceived gains and losses entailed in the adoption of the alternative systems of government are already threatening to undermine the process of boundary review by IIBRC. The review itself has already been politicised by two important changes that have occurred under the Kibaki regime: the introduction of the Constituency Development Fund (CDF) in 2003 and the introduction of the office of Prime Minister following the enactment of the National Accord in 2008.

The introduction of the CDF implies that the constituencies have to be more or less equal in terms of population to avoid claims of discrimination, especially by the more populous constituencies, most of which are in the PNU strong-holds.<sup>20</sup> On the other hand, the introduction of the office of Prime Minister in 2008 has significantly boosted the power of the majority party in Parliament, which is only likely to be confirmed by the introduction of a parliamentary system. Hence, IIBRC's recommendations are only likely to be received favourably by ODM if they either leave intact or do not reverse the current parliamentary majority enjoyed by it.<sup>21</sup>

### *Devolution*

According to the findings of the CoEs, the main areas of disagreement in regard to devolution are on how many levels of government should be adopted, what the powers of each level of government should be and how much supervisory and regulatory power should be vested in the central government. According to a national survey that was carried out by Transparency International (TI) Kenya from 19-26 April 2009, 61 per cent of Kenyans support devolution of power (this consists of 64 per cent in Central province, 58 per cent in Coast province, 45 per cent in Eastern province, 55 per cent in Nairobi, 81 per cent in North-Eastern province, 73 per cent in Nyanza, 56 per cent in Rift Valley province and 74 per cent in Western province) while 39 per cent do not (TI Kenya 2009: 8).

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19 The insistence by PNU that both the position of the President and that of the Prime Minister be elective is largely a reflection of PNU's perceived weakness in terms of seats in Parliament, and strength in terms of popular vote. With a share of 22 per cent of the total population, the Kikuyu Community is the largest ethnic group in Kenya. However, it is also closely allied to the Embu and Meru communities, with whom it has in the past voted as a block.

20 For example, Juja Constituency in Central Province, with some 163,000 registered voters has in the past been given the same CDF allocation as Budalang'i Constituency in Western Province with only 27,000 registered voters.

21 Conversely, its recommendations are only likely to be received favourably by PNU if they seek to reverse ODM's current parliamentary majority.

However, of those supporting devolution of power, only 34 per cent believe that regional governments should be in charge of the allocation of national/public resources, with the rest believing that the task should reside with either Parliament (42 per cent), the President (7 per cent) or Provincial Administration (15 per cent) (TI Kenya, 2009: 8). This confirms the persistent lack of a clear understanding of the real meaning of devolution (commonly referred to in Kenya as *majimbo*), which appears to have been confirmed by further findings of the national survey. Only 33 per cent of Kenyans associate it with regional autonomy in terms of revenue collection and expenditure (consisting of 27 per cent in Central province, 48 per cent in Coast province, 24 per cent in Eastern province, 32 per cent in Nairobi, 32 per cent in North-Eastern province, 35 per cent in Nyanza province, 34 per cent in Rift Valley province and 46 per cent in Western province) (TI Kenya 2009: 10).<sup>22</sup>

The fact that both Central and Eastern provinces have the lowest support for regional autonomy in revenue collection and expenditure may be linked to the campaign period that preceded the December 2007 elections. PNU (whose strongholds were in these two regions) was pitted against ODM (whose support was drawn from the rest of Kenya). The latter was in support of a devolved system (in the above sense) whereas the former was not.

Many a time, this notion of a devolved system of government has been politicised (by way of associating it with balkanisation) as a means of gaining a political edge over adversaries. This is what happened in the immediate post-independence period when KANU dismantled the “*majimbo* system” in its bid to create a single-party monolithic system (Oyugi 1994: 157). In the wake of the struggle for the introduction of a multi-party system in 1991, the *majimbo* debate was revived by a group of politicians allied to the former President Moi. This was widely believed to be caused by fear on the part of the smaller ethnic groups that the introduction of a multi-party system would confer a disproportionate advantage to the larger ethnic groups, particularly the Kikuyus. The subsequent ethnic clashes seemed to justify KANU’s decision to do away with the post-independence *majimbo* constitution in the 1960s (Republic of Kenya 2008b: 41-43). In the run-up to the December 2007 Elections the issue of a devolved government was once

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22 The survey found that only 33 per cent of Kenyans believe that it has to do with regions retaining part of the revenue collected. This is as compared to 41 percent, who believe that it refers to sharing of national resources across different regions, and 23 per cent who believe that it refers to making different regions exclusive for specific communities (3 per cent of the respondents are categorized as others).

more politicised by PNU for selfish political gains.<sup>23</sup> Given the power struggle that has been going on in the Grand Coalition Government, a replay of what happened in the run-up to the December 2007 elections cannot be totally ruled-out should the proposed new constitution provide for a really devolved system of government.

### *Constitutional Referendum*

According to the Constitution of Kenya Review Act, 2008 (Section 30, 3), a referendum shall be held by the Electoral Commission 60 days after publication of the draft constitution by the Attorney General. In the meantime, the CoEs have already expressed fear that the forthcoming referendum is likely to divide the country along ethnic lines, as happened in the run-up to the November 2005 referendum. This fear, which is shared by the legal experts of various institutions in the country, is not totally unfounded, given the contentious issues discussed above and the experience of 2007-2008 post-election violence (*The Saturday Nation*, 22 August 2009: 4).<sup>24</sup> According to them, a referendum is not mandatory since it is not based on any written law, but on a High Court ruling following a court challenge by a clergyman (Bishop Njoya and six others) of the National Constitutional Conference at the Bomas of Kenya, Nairobi (National Council for Law Reporting 2008; *The Saturday Nation*, 22 August 2009: 4).

Moreover, it opens the door to all manner of political interference in the constitutional review process, including: the possibility of politicians using the process to settle their political differences; the possibility of political parties aggrieved by the process poisoning people's minds against the draft document regardless of its merits; and the possibility of a protest vote by Kenyans, regardless of a political consensus. They further note that, as used elsewhere, a referendum is only necessary when a constitutional making process has not been participatory (*The Saturday Nation*, 22 August 2009: 4).

Based on the foregoing observations, the current Justice, National Cohesion and Constitutional Affairs Minister Mutula Kilonzo promised to advise the government (and the country for that matter) to avoid a referen-

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23 Indeed, the polarising nature of the *majimbo* debate in the run-up to the December 2007 Elections is partly responsible for the outbreak of the post-election violence.

24 Among those who have already indicated their fear of the referendum are: the chairman of the CoEs Mr. Nzamba Kitonga, Justice, National Cohesion and Constitutional Affairs Minister Mutula Kilonzo, the IIEC Chairman Issack Hassan, the former CKRC chairman Prof. Yash Pal Ghai, the Political Advisor at the Steadman Synovate Dr. Tom Wolf and the Head of Department of Public Law Dr. Kindiki Kithure.

dum. At the same time, he has tasked the Law Reform Commission (LRC), the Kenya National Commission on Human Rights (KNCHR), the International Commission of Jurists (ICJ) and the Law Society of Kenya (LSK) to devise a referendum law that spells out issues that should be taken to the referendum (*The Saturday Nation*, 22 August 2009: 4). According to the experts, therefore, there is a serious need to re-think the provisions for the referendum in the constitutional review process (*The Saturday Nation*, 22 August 2009: 5).

Among their recommendations are: that the Constitution of Kenya Review Act, 2008 be amended to provide for a “Yes-Yes” referendum in place of the current provision for a “Yes-No” referendum<sup>25</sup> and that the Government be empowered to come up with a brief and a general constitution with agreed minimums (as was the case in post-apartheid South Africa), in case it is unable to resolve the contentious issues (*The Saturday Nation*, 22 August 2009: 5). It is far from clear if Kenyans will receive these proposals for revising the review act favourably. Indications are, therefore, that the constitutional review process is becoming more and more complicated with the possibilities of political interference becoming greater.

## Conclusion

From the arguments presented in this paper, several conclusions can be drawn. First, successive ruling coalitions in the multi-party era have had an incentive to retain the current Constitution in their bid to maintain the status quo as it has been profitable to those in power. Secondly, it is this pre-occupation with status quo maintenance by the ruling elite, among other factors, that worked against the endorsement of the Draft Constitution in the 2005 referendum, paving the way for the 2007-2008 post-election violence. Thirdly, this pre-occupation with status quo maintenance by the ruling elite has continued under the Grand Coalition Government, contrary to the underlying assumption that its creation would pave the way for a consensual attainment of a new Constitution. This is evidenced by differences among the coalition partners regarding the direction that the constitutional reform should take, as indicated by their hardening of stands on the contentious issues and their fear of the debilitating consequences of a referendum. As a result, the chances of Kenyans getting a new constitution before the 2012

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25 Under the “Yes-Yes” referendum, the voters are faced with two alternative texts out of which they can choose one instead of only one text, which they can approve or reject (a “Yes-No” referendum). This implies that under a “Yes-Yes” referendum, a new Constitution is guaranteed.

General Elections are not any greater than they were prior to the 2007 General Elections.

This apparent lack of commitment to constitutional reform on the part of the coalition partners arises from the fact that individuals in both parties harbour presidential ambitions and are therefore (together with their lieutenants) unwilling to see a drastic reduction of the powers of a president (*The Standard Sunday*, 8 March 2009: 13).<sup>26</sup> In general, however, ODM appears to be more committed to comprehensive constitutional reforms than PNU. This is best indicated by the latter's admission (through its Secretary-General Kiraitu Murungi) that it is contemplating "minimum reforms," which to ODM (through its Chairman Henry Kosgey), betrays its scheme to delay comprehensive constitutional reforms (*The Standard Sunday*, 31 May 2009: 20).<sup>27</sup> Moreover, it is also backed by findings from a national survey that 60 percent of Kenyans think that the ODM is committed to the constitutional review process, compared to only 38 per cent who think that the PNU is committed to the same (National Dialogue and Reconciliation Monitoring Project 2009: 28).<sup>28</sup>

The discussion about the merits and shortcomings of power-sharing agreements has only recently focused on the level of detailed arrangements during the negotiation phase. Kenya may become an example of negotiators failing to get enough guarantees from the disputing parties to proceed with one crucial aspect of the crisis: constitutional reform. The negotiated introduction, after the agreement, of a number of commissions and expert committees to deal with important issues has so far proved of limited utility. In contrast to post-war power-sharing the post-crisis power-sharing experienced in Kenya comes with no provisions for the third-party guarantees or enforcement capacities usually ensured by the presence of a military force. In Kenya, many citizens place their hope on increased donor pressure on the Grand Coalition Government to deliver on constitutional reform. Already, heightened pressure from the donor community has yielded positive results as indicated by parliament's renewed initiatives to pass the law estab-

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26 In ODM for example, the biggest problem between Mr. Odinga and Mr. Ruto has to do with their respective presidential ambitions come 2012. The same applies to the problem in PNU between Mrs. Karua (who is already campaigning for presidency ahead of 1012) and Mr. Kibaki (who has a different succession plan for himself).

27 In the past, minimum and comprehensive reforms have been considered mutually exclusive in the sense that demands for the former have been seen as schemes to delay the latter and vice-versa (how the debate was played in the run-up to 1997 and 2007 elections, see above).

28 The survey interviewed 4,021 households, selected through a nationwide multistage cluster sampling, from 17-24 December 2008.

lishing a local Tribunal to try the suspects of the post-election violence (the Imanyara Bill) (*The Saturday Nation*, 22 August 2009: Back page)<sup>29</sup>. This followed successive failures at both the parliamentary (*Daily Nation*, 13 February 2009: 1, 4) and cabinet levels (*Daily Nation*, 15 July 2009: 1, 4). The intrinsic will of the Grand Coalition Government to pursue constitutional reform zealously is low, given the uncertainties that are associated with a new constitution. Indeed, pressure from the international community has been crucial to Kenya's democratisation process since the late 1980s, either directly through the withdrawal of donor aid, or indirectly through the sponsorship of civil society organisations. In most cases, such pressure has been complementary to, rather than opposed to the demands of civil society organisations.

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29 The renewed efforts at the establishment of a local tribunal to try the suspects of the 2007-2008 post-election violence came in the wake of threats by the European Community to withdraw financial assistance (*The Standard*, 20 July 2009: 7) and by the US to issue visa bans to top government officials who were frustrating the reforms process (*Daily Nation*, 29 October 2009: 4).

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### **Die Große Koalition in Kenia – ein weiteres Hindernis für die drängende Verfassungsreform?**

**Zusammenfassung:** Die Große Koalition in Kenia wurde im Anschluss an eine heftige, gewaltsam ausgetragene Nachwahlkrise gebildet. Entgegen aller Erwartung, jetzt werde eine moderate und gemeinsam abgestimmte Vorbereitung der Verfassungsreform möglich, wurden keine politischen Fortschritte erzielt. Der Autor analysiert Sekundärdaten aus Monografien, Zeitungs- und Zeitschriftenartikeln sowie Dokumenten von Regierungs- und Nichtregierungsorganisationen und kommt zu dem Schluss, dass der fortgesetzte Streit innerhalb der Koalitionsregierung, die Furcht vor den Unwegsamkeiten eines Verfassungsreferendums und die verhärteten Positionen zu den umstrittenen Fragen die Realisierung einer neuen Verfassung vor den Wahlen 2012 wenig wahrscheinlich machen.

**Schlagwörter:** Kenya; Regierung; Verfassungsänderung/Verfassungsreform