

Success of review needs trust among key players

By Kamau Kuria

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To resolve the current problems in the constitutional review, we must do two things: First, we must separate the imaginary from the real.

We must also abandon the hurry to get a democratic constitution through an undemocratic process. We have to improve the process.

Fortunately, there is consensus. Part of the problem arises from the fact that the consensus does not have adequate support from the Constitution and the Constitution of Kenya Review Act. It is these inadequacies that are causing the distrust over the review.

Secondly, we must reject the colonial view which has been expressed by those who support the process.

It is that Kenyans are second-rate and must make do with a process which is not entirely democratic.

Last year, we changed the Government in a civilised a manner and there is no basis for making that assumption.

Any opposition to improving the process can only be based either on an acceptance of that view or a conviction that the process serves their political needs or they do not know something better.

Those who have followed the views of the National Convention Executive Council and the Law Society of Kenya are not surprised by the current dissatisfaction.

The flaws arise partly from the ordinary Kenyans' acceptance of constitutional promises and commitments made by the Governments, without requiring that they be reduced into writing and partly from the politicians' reluctance to effect constitutional amendments which may affect their political fortunes adversely.

These flaws have given rise to fears that the new Constitution will not be democratic. These fears are at the root of the constitutional crisis and they must be addressed.

To these inherent weaknesses have been added three factors which have complicated the process.

The first one is the Government's cautious policy of not pointing out these flaws lest it be accused of renegeing on its promises.

Another issue was the Summit's mistaken way of tying its political ambitions to the Draft Constitution, published in September last year.

The Draft created offices for prime minister and deputy prime ministers. That exported politics, particularly that of the ruling party, into the constitutional review.

Political parties which sent delegates to Bomas are using the Draft for a purpose for which it was not designed. This has alienated many.

The politicisation of the review is a direct result of the memoranda entered into in October, last year. The mistake should be corrected now.

The third factor is an illegitimate political purpose which the Draft sought to achieve for those who had power then.

This was to meet the succession ambitions of former President Moi and Kanu, at the time it merged with the dissolved National Development Party.

These were to ensure that the next Government would be led by a person Moi would control.

The Draft Constitution embodied that illegitimate purpose; it still does.

It is easy to see why people whose ambitions are embodied in the Draft are in hurry to get it turned into a new Constitution.

Kenyans have chosen to act on the assurances of politicians and the Governments that they are all committed to a people-driven process.

The solutions to the problems, and the way forward must include a recognition of the fact that the constitutional review which the Kanu Government prevented from running its course through many devices, including the dissolution on October 28 last year, always had structural problems.

These problems must now be addressed for the review to run its course. These are the stumbling blocks created by sections 9, 47 and 59 of the Constitution which vest in Parliament and the President the power to control the review.

The power to control the constitutional review should always be with the people and exercisable through a democratically composed review commission and national constitution conference.

This can be settled through amendments to section 47 of the Constitution and the Constitution of Kenya Review Act.

The dispute between the people and their representative in Parliament over supremacy; in democratic constitution-making, the people are superior to their representatives.

Party politics must be banished from the review. Disputes must be resolved within the party organs of Narc and not at Bomas.

The compositions of the Commission and Bomas must be addressed, and experts should review the Draft.

Kenyans are uncomfortable with a situation where either Bomas or MPs have the final say. There is need for a referendum or a democratically elected constitutional conference.

Once section 47 of the Constitution makes referendum an organ of review, Parliament's role will be ceremonial.

We should also stop rubbishing dissenters. All Kenyans are patriotic; their concerns must be addressed. Dissenters should not be jeered or denied a chance to be heard.

The review raises important philosophical, moral, political, economic and social issues about which honest, intelligent, patriotic, reasonable and morally upright people can and will certainly disagree.

Confidence and trust building mechanisms must be put in place. We need to remind ourselves about what reform was about — creating, through institutions, a happy Kenya for this generation and posterity.

We should accept that crises are part of constitution-making and citizens have the ability to stand the stress.

We have to persuade those who are pursuing the succession agenda that Kenyans on December 27, last year, ruled on the issue.

Bomas also needs a chairman who will recognise the structural problems in the review, the sincerity of dissenters and one who is not partisan.