THE SIERRA LEONE CONSTITUTION REVIEW COMMITTEE
BENCHMARKING VISIT TO KENYA

FROM 25-31 OCTOBER 2015
Nairobi KENYA

A Report of the Proceedings
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(Prepared by Deborah Osiro)
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<td>Attorney General</td>
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<td>Community based organisations</td>
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<td>Constitutional Commissions and Independent Offices</td>
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<td>CEO</td>
<td>Chief Executive Officer</td>
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<td>CIC</td>
<td>Commission for the Implementation of Constitution</td>
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INTRODUCTION

1. Sierra Leone Constitutional Review Committee

The mandate of the CRC is to review the 1991 Constitution of Sierra Leone using Constitutional Review Commission Report submitted to Government in January 2008 as a working document. In carrying out its mandate, the committee is required to:

- Collect views by all practicable means for the general public in and outside Sierra Leone
- Undertake wide consultations with the public and the relevant social, political and economic groups on its terms of reference.
- Recommend provisions which will promote an open, transparent and democratic society.
- Examine constitutions of other countries.
- Examine and recommend any subject-matter of a constitutional nature which is relevant in strengthening multi-party democracy.
- Examine and recommend on any matter which is connected with or incidental to its terms of reference.

1.1 Background of the Constitutional Review Process

Sierra Leone currently operates on the basis of the 1991 Constitution, titled ‘The Constitution of Sierra Leone’, endorsed at a National referendum in August 1991. The Constitution provides two different methods for its amendment and renewal and these are stipulated in Section 108. Section 108 (1) confers authority for the alteration of the ordinary clauses of the Constitution on Parliament and 108 (2) states how this should be done. Section 108 (3) provides that a Bill for an Act of Parliament enacting a new Constitution or altering any of the entrenched clauses listed therein shall not become law unless the bill after it has been approved at a referendum.

Article X of the July 1991 Lome Peace asked for amendments to the constitution. Key recommendations of the Sierra Leone Truth and Reconciliation Commission (TRC) established in 2002 urged the Government of Sierra Leone to give serious consideration to the creation of a ‘new constitution’ in order to contribute to human rights.

In line with the TRC recommendations, a constitutional Review Commission was formed 11 January 2007. It comprised of professional associations, the executive, civil society, political parties, traditional leaders, Parliament, the Judiciary, youth and women groups. The Review Commission was led by the then Head of the Law Reform Commission, Dr. Peter Tucker.

The Commission submitted its Report to Government in 2008 but this was not made public due to the elapse of time that is Local Council Elections were pending in 2008 and it was illogical to combine them with the referendum. Government decided to prioritise the review process following the recommendations of the Conference on Development and Transformation.

The Sierra Leone conference on development and Transformation held in 2012 also recommended amendment to the Constitution. This recommendation was informed by emerging issues including women and youth participation in governance, management of
natural resources and climate change, strengthening the decentralization process, etc. The withdrawal of UNIPISIL in March 2014 also informed the process.

1.2 Legitimacy of the Constitutional Review Process

Following his re-election last year, HE the President underscored the need for a full-scale review of the 1991 Constitution of Sierra Leone. In April 2013, cabinet approved establishment of a broad-based Constitutional Review Committee. The Attorney General/Minister of Justice initiated the process. Approximately 12 member planning committee was set to guide the process. Eighty-person Constitutional Review Committee was formally inaugurated by the President on 30th July, 2013.

The CRC as part of its work will undertake a major civic education and consultation process, which will engage all segments of society in identifying recommendations for constitutional change. In accordance with the 1991 Constitution, at the conclusion of the process, Parliament will need to pass a Bill after which a referendum will be held to approve the new Constitution. The Draft Constitution should be finalised in March 2016.

1.3 CRC Composition

Constitutional Review Committee (CRC) consists of eighty (80) members established by the President of Sierra Leone Dr. Ernest Bai Koroma and it represents different stakeholders in society. These include representatives from registered political parties, governance institutions, professional bodies, civil society, women and youth groups, disabled groups, religious and traditional authorities, and business community.

CRC has developed detailed Terms of Reference, TOR; work methodology, rules of procedure and schedule of activities for the review process. It has also established nine sub-committees with TORs on different thematic issues on the review process. A Chief Technical Advisor assists the Committee.

CRC Terms of Reference

The Terms of Reference for the Constitution Review Committee shall be to review the Constitution of Sierra Leone, Act No 6 of 1991. In the discharge of its mandate, the committee will be required to do the following:

- Collect view by all practicable means from the general public in and outside Sierra Leone;
- Undertake wide consultations with the public and the relevant social, political and economic groups on its terms of reference;
- Recommend provisions which will promote an open transparent and democratic society
- Examine constitutions of other countries especially the best practice contained therein;
- Examine and recommend any subject-matter of a constitutional nature which is relevant in strengthening multi-party democracy;
- Consider any other matters that might arise during the review process pertaining to the constitution making;
- Examine and recommend on any matter which is connected with or incidental to its terms of reference; and
- The committee shall submit its report to the Government within eighteen months after it is constituted.

**CRC Sub-Committees**

The CRC is further divided into thematic sub-committees, which are constituted to facilitate the operations of the 1991 Constitution Review Committee (CRC) by conjoining the knowledge, experience and expertise of its various members in the best interests of reviewing and revising the Constitution of Sierra Leone.

In doing so, these constituent committees will conduct their business within its mandate and follow the Rules of Procedure framed for the operations of the CRC. The sub-committees shall have Members drawn from the CRC and be governed by Sub-Committee Chairmen and assisted by Secretaries who shall prepare the records of the various sub-committees. The sub-committees shall be called upon from time to time by the Chairman of the CRC to report the status of their work.

These thematic sub-committees includes:

1. Judiciary
2. Executive
3. Legislative
4. Fundamental Principles of State Policy and Human Rights
5. Local Government and other Ancillary Divisions of Government
6. Information, Education and Communication
7. Research
8. Report Writing-Drafting of the Working Document
9. Management of Natural Resources and the Environment

**CRC Strategy & Guiding Principles**

*The Strategy*

- Constitutional Review Committee members’ capacity is enhanced, to understand effective Constitutional review process and produce final recommendations.
- Build capacity of CRC Secretariat to provide administrative, legal and research services to the CRC.
- CRC Communication and messaging strategy designed and implemented.
- Civil Society led inclusive and informative civic education process completed.
- Capacity of MPs, democratic institutions, political parties and Civil Society strengthened to effectively support and participate in the review.
- CRC led inclusive and transparent civic education and public consultation process completed.

*Guiding Principles of implementation*

- Ensuring Conflict Sensitivity.
- Support Peace Building & Reconciliation.
• Promoting social cohesion as a key overarching theme.
• Maximizing partnerships
• Ensures national ownership of the process

Benefits of the Constitutional Review Process
1. Revised Constitution aimed at addressing outstanding root causes of Sierra Leone’s decade-long civil war.
2. Grievances that led to the conflict as a matter of weak governance institutions will be strengthened.
3. Assist in the formulation of mechanisms to reduce the impact of ethnicity in the Country’s elections.
4. Constitutional and or legal reform – useful tool for addressing emerging governance issues: gender, women and youth participation, natural resources management and climate change, strengthening decentralization
5. The review process will minimize potentials that trigger issues of conflict.
6. The review process will strongly consider the need to address risks not to trigger or exacerbate latent conflict.
7. Government & development partners aim to ensure an inclusive process to benefit the entire country.

2. Kenya Benchmarking Tour
Kenya was chosen for a study visit because it reviewed the constitution recently, in 2010 and is currently implementing the law. The visit would provide opportunity for learning about the review process, and the challenges of implementation. In addition, the country has had to grapple with similar issue to Sierra Leone during the review process such as land tenure system, human rights, citizenship, and status of subnational government.

The Sierra Leone Team included:
1. Hon Justice Edmond Cowan – Chairperson, CRC and Ombudsman of the Republic of Sierra Leone
2. Mr. Sana Baloch - Chief Technical Adviser, Sierra Leone Constitutional Review Project
3. Alhaji Chief Sumanoli Kapen - Executive Sub-committee member
4. Ansumana M.P. Fowai - State Policy and Human Rights Sub-committee
5. Yoni Emmanuel Sesay - Chairman, Land, Natural Resources and the Environment Sub-committee
6. Halimatu Lucy Deen - Secretary, Information, Education and Communications Sub-committee
7. Georgina J. Benedict – Member, Judiciary Sub-committee (Justice of Peace & Commissioner for Oaths)
8. Mr. Gibril Thullali – Member, Legislative Sub-committee
9. Aruna mans-Davies - Secretary, Local Government and other Ancillary Divisions of Government Sub-committee
10. Alhaji Ben Kamara – Research Sub-committee
11. Saa Kpulun - Executive Secretary, CRC
2.1 Background of Kenya's Constitutional Review Process (Wikipedia)

Constitutional Reform in Kenya has been a major issue since Kenya gained independence. The evolution of Kenya's constitution can be highlighted by the following events:

- **1964** – Kenya becomes a republic and Jomo Kenyatta becomes Kenya's first President, with the position of Prime Minister scrapped.
- **1966** – Provincial assemblies scrapped. Senate dissolved and its members combined with those of the House of Representatives into a unicameral National Assembly.
- **1969** – A new 1969 Constitution adopted, consolidating amendments already made to the 1963 independence constitution, and further strengthening presidential powers.
- **1976** – Constitutional amendment enabling president to pardon politicians barred from contesting elections over electoral malpractices.
- **1982** – Multi-partism is abolished making Kenya a Single Party state with KANU as the ruling party. This was followed by the mlolongo (queuing behind a chosen candidate) system of elections where secret-ballots were no longer used.
- **1991** – President Moi in December 1991 at a KANU delegates meeting at Kasarani Stadium, repealed Section 2A of the constitution, thereby making Kenya a multi-party state. The change enabled the introduction of term limits to the Presidency.
- **2000** – Constitution of Kenya Review Commission (CKRC) was set up by President Moi and Prof Yash Pal Ghai was installed as its chairman to spearhead Kenya's first major constitutional reform. The Commission produces a Draft Constitution in 2004, the Bomas Draft to be considered for a referendum.
- **2005** – However, the government rejected the Bomas Draft and presented an alternative Draft, the Wako Draft for referendum in November. The Wako Draft was defeated at the polls.
- **2008** – In March 2008, the National Assembly of Kenya passed the Nation and Reconciliation Accord Act that introduced a temporary change to the constitution introducing the position of Prime Minister and two Deputy Prime Ministers.
- **2009** – Parliament establishes a Committee of Experts (CoE) on Constitutional Reform to gather views from the public, deliberate on contentious issues and come up with a draft of the new constitution, a process governed by the Constitution of Kenya Review Act 2008.
- In 2009, the Harmonised Draft Constitution written and proposed by the Committee of Experts is released for final round of consultation and amendment.
- In 2010, 6 May, the final text of the 2010 Constitution is published, for approval by referendum. The draft is approved by 67% of the populace in August.

2.2 Previous Proposed Constitution Drafts and Processes
The **1969 Constitution**, which replaced the **1963 Independence Constitution**, had already been amended at least 12 times by 2010, and was widely agreed to require a major overhaul to create a more democratic framework with greater oversight of the executive by parliament. The constitution gave the president wide-ranging powers, provided for no prime minister, and was ill-suited to multiparty politics, despite the 1991 repeal of a 1982 amendment that had formalised the one-party state. The constitutional reform process that began in 2000 led to the adoption of several competing drafts, and a deadlock between government and opposition, until 2008.

The **2004 Bomas Draft** (named after the location of the constitutional reform conference that adopted it) – Proposed transferring most of the powers of the office of the President elected by the people to the Prime Minister that would be elected by Parliament. In addition, there would have been checks on executive appointments. The PM would nominate MPs to become Cabinet ministers, the President would then appoint them. All appointments would require up and down votes by a members of the Senate.

The **2005 Wako Draft** (named after the Attorney General, Amos Wako) – Put forward unilaterally by the government instead of the Bomas Draft, which it rejected. A modified version of the 1969 Constitution but got rid of 25% requirement in general elections that requires the winner in the Presidential election to have 25% in at least 5 provinces. The winner would also have to get more than 50% of the vote, else an instant re-run would occur. In 2005, a Constitutional Referendum defeated the proposed constitution supported by the government.

Post-2005 Minimal Constitution Reform option – proposed by Prof. Yash Pal Ghai after the failed referendum. His proposal suggested that for political and practical reasons, the best way to achieve constitutional change would be to do it in small phases as opposed to immediate and complete overhaul of the current system.

**Constitutional Drafts and Processes leading up to the adoption of the 2010 Text**

Following the post-election violence that broke out after the controversial December 2007 elections in which the renewed mandate of President Mwai Kibaki was alleged to be stolen, a team of mediators led by Kofi Annan, proposed by President Kufuor of Ghana, then chair of the African Union, pushed for a renewed constitutional review process. The National Dialogue and Reconciliation process led to an agreement between the parties in February 2008, including the formation of a government of national unity and other reforms. Agenda item 4 in the agreement focused on ‘Long-Term Issues’, including constitutional and institutional reform.

In March 2008, the parties agreed on the principles for a constitutional review process, and Parliament establishes a **Committee of Experts** on Constitutional Reform to gather views from the public, deliberate on contentious issues and come up with a draft of the new constitution. A **Constitution of Kenya Review Act 2008** governs the review process, and enters into force in December 2008. The Committee held extensive public consultations and received many dozens of submissions.

In 2009, the **Harmonised Draft Constitution** written and proposed by the Committee of Experts was released on 17 November 2009 and had the following highlights:

- Transfer of executive authority from the President to the Prime Minister position who will be the Head of Government.
- President will be the Head of State and maintain a more ceremonial role.
• Prime Minister will be the Head of Government and will be the head of the party/coalition with a majority in Parliament – He will nominate ministers to the Cabinet.

• Half of the ministers in cabinet can be nominated from non- MPs.

• The total number of MPs will be increased from 222 to 295.

• An upper house, a Senate, will be introduced to represent the regions – the total number of Senators will be 113.

• Devolution to the provincial level – current 8 provinces will be now referred to as regions.

• The 8 regions/provinces will be subdivided into counties – There will be a total of 70 counties and will each be headed by executives.

• Nairobi Province will become a region and have a popularly elected Mayor as opposed to having the city councillors elect the Mayor.

• Retention of Kadhi court system as it is in the current constitution.

February 2010 – Following further consultation and amendment a revised text is published.

May 2010 – On 6 May, the final text of the constitution is published, for approval by referendum.

August 2010 – The draft constitution text is approved by a 67% margin in a national referendum. The Constitution is promulgated on 27 August.

October 2010 – On 5 October, parliament established the Constitutional Implementation Oversight Committee (CIOC), which is mandated to oversee the entire implementation process of the reforms required by the new constitution.

In addition, the Commission for the Implementation of the Constitution (CIC) was established soon after (January 2011) with the broad mandate of guiding and ensuring effective implementation of the Constitution by monitoring facilitating, coordinating and overseeing the implementation process the next 5 years.
Chapter Two

SUBSTANTIVE CONSTITUTIONAL ISSUES

1. BILL OF RIGHTS & CITIZENSHIP

1.1 Meeting with National Gender Equality Commission (NGEC)

The NGEC team was led by the Chairperson Ms. Winfred Lichuma.

The Chairperson reiterated the need to write a Constitution. The Chair worked with KNCHR before it became a Constitutional body. That experience prepared her for her present role and urged the team to understand that as a government watchdog, a Commission such as NGEC or Kenya National Commission on Human Right Commission (KNCHR) will never be liked by the people in power.

**Gender Status, Issues and Concerns for Sierra Leone**

- Have been involved in a number if initiatives - capacity building, mentoring, sensitisation.
- Have a ministry concerned with Gender (Ministry of Social Welfare, Equality and Gender) and have a Children’s Commission.
- CRC would need to understand the functions of a Commission to facilitate the creation of their own.
- Issue of safe seats for Women - percentages, mechanism, etc. (Election are a first past the post).
- Issue of women not voting women, how do you address it? Partnerships.
- Issue of empowered women are elite women rather than the vulnerable - how to respond.
- Gender equality beyond political representation.

**Kenya’s NGEC**

The Kenyan Constitution has been made very people friendly. There is very little technicalities or Latin terms, which ordinarily dissuade from reading or understanding legal documents. Therefore, Sierra Leone is advised to *simplify the new Constitution as the first step in inclusivity.*

The creation of independent Constitutional Commission such as NGEC was based on avoiding following historical mistakes:

- An imperial presidency - answer was independent commissions & strong Parliament.
- Past ills, abuses of office and corruption – answer was to establish values and principles - leadership & integrity equality & non-discrimination, transparency, and accountability.

Chapter 15 Commissions ((Article 248) were established purposely to hold government accountable. They are: -

2. National Land Commission;
3. Independent Electoral and Boundaries Commission;
4. Parliamentary Service Commission;
5. Judicial Service Commission;
6. Commission on Revenue Allocation;
7. Public Service Commission;
8. Salaries and Remuneration Commission;
9. Teachers Service Commission; and
11. Auditor-General; and
12. Controller of Budget.

Article 59 provides for the creation of a Kenya National Human Rights and Equality Commission and outlines its functions. Article 59(4) gives Parliament option to establish one or several bodies to address the Bill of Rights issues, hence three bodies with the following mandate were created: -

1. Commission on Administrative Justice (Ombudsman) - abuse of public office;
2. Kenya National Commission on Human Right Commission (KNCHR) - all rights generally, and;
3. National Gender Equality Commission (NGEC) - vulnerable groups

Article 248 mandates the NGEC role, which is elaborated under Section 8 of NGEC Act 2011 to include:

- promoting gender equality and non-freedom from discrimination in accordance with Article 27 of the Constitution;
- monitoring, facilitating and advising on the integration of the principles of equality and freedom from discrimination in all national and county policies, laws, and administrative regulations in all public and private institutions;
- co-ordinating and facilitating mainstreaming of issues of gender, persons with disability and other marginalised groups in national development and to advise the Government on all aspects thereof;
- monitoring, facilitating and advising on the integration on the development of affirmative action implementation policies as contemplated in the Constitution;
- investigating any matter in respect of any violations of the principle of equality and freedom from discrimination;
- working with other relevant institutions in the development of standards for the implementation of policies for the progressive realization of the economic and social rights specified in Article 43 of the Constitution and other written laws;
- receiving and evaluating annual reports on progress made by public institutions and other sectors on compliance with relevant constitutional and statutory requirements;
- conducting audits on the status of special interest groups including minorities, marginalised groups, persons with disability, women, youth and children;

Commission role v. Ministry’s role
The Ministry’s role is to implement and execute to realise constitutional aspirations. Policies and programmes include cash transfer programmes, and procurement policies providing that 30% should be given to vulnerable groups. This is anchored in Article 27 on equality and non-discrimination support and affirmative action. The Commission’s role is a
monitoring, facilitating, evaluating and audit body. The Paris Principles on Human Rights Institutions formed the framework for the creation of the 3 bodies.

**Constitution clauses creating Two-Third Gender requirement**

Article 27 provides that every person is equal before the law and has the right to equal protection and equal benefit of the law. Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres. In addition, the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender. Article 81 states that the electoral system shall comply with the following principles that not more than two-thirds of the members of elective public bodies shall be of the same gender; while Article 175 provides that the County governments established under this Constitution shall reflect the principle that no more than two-thirds of the members of representative bodies in each county government shall be of the same gender. These provisions have not been sufficient to engender compliance by government. Hence, the introduction of *Two-Third Gender Rule Laws (Amendment) Bill 2015* to rectify this shortcoming.

**Affirmative Action**

Article 81(b) on political representation states that not more than two-thirds of the members of elective public bodies shall be of the same gender. The Constitution went further and prescribed for the County Assembly under Article 177(1)(b) that it shall consists of the number of special seat members necessary to ensure that no more than two-thirds of the membership of the assembly are of the same gender. However, there was no such provision for the National Parliament. The result is that Parliament has fallen short on the 33% gender requirement. Also, Kenya is trying to claw back by removing women from security structures contrary to the two-thirds gender rule. The Supreme Court also failed to interpret the law to accommodate the 33% rule. So the NGEC action has been to draft a Bill to amend the Constitution to ensure the gender rule is enforced.

**Advice - provide for the affirmative action in the Constitution.**

*Women failing to vote for women, and Elite women being empowered*

Women failing to vote for women be addressed by intensive education and partnerships with men. Elitist women actually do empower the vulnerable. The Chair is the perfect example. Also a word of caution, giving an illiterate woman a seat in the Assembly would mean that her ability to make laws is greatly limited.

**On Political parties**

Notes they are strange animals who will always work only to their interest which almost never coincides with national interest. Kenya has so far failed to enforce the two-thirds gender rule among the parties.

**Actual Gender Monitoring Work**

- Performance review and audit by NGEC of all bodies
- Composition of gender in public sector
- Composition of boards and decision-making positions in publicly quoted companies
- Gender responsive budgeting - provide gender responsive guidelines; impact of policies on gender;
- Creation of data for issues relating to equality and freedom from discrimination for different affected interest groups
Final Lesson
A Monitor for Parliament is essential, a fact that Kenya is learning to its detriment.

1.2 Meeting with Kenya National Commission for Human Rights

The team led by the George Morara - Commission Vice Chairperson briefed the Sierra Leone CRC Team.

Overview of Sierra Leone Bill of Rights Situation

Sierra Leone has no chapter on human rights in the current Constitution. The team outlined the following as their areas of learning:

- Problems, controversies, implications, etc. of implementing the Bill of rights provisions in the Constitution.
- Were any limitations necessary in Bill of rights?
- With respect to practical obstacles to human rights (e.g. poverty, police brutality), how does the Commission address them?
- Education – Kenya emphasises more academic freedom while in Sierra Leone, quality based education is the requirement. Comment.
- Justiciability of all rights e.g. integrity, economic and social rights
- Citizenship – in Sierra Leone, only conferred to persons of African descent along the male line. Citizenship laws - a father’s father must be of negroid descent to confer citizenship.
- Press freedom – what are the lessons learnt. Media body (in SR IMC) how to empower an entity to regulate media houses?
- Death penalty – What is Kenya’s actual position?

Major Challenges.

The Bill of Right Chapter Four from Articles 19-59 is the longest chapter in the Constitution. Citizenship falls under Chapter Three.

- The main problem faced by the Commission in discharging its function is the limited understanding of Constitution by the people. This means that the people are unable to demand accountability from their leaders.
- Difficult to reorient the country to what is provided in the supreme law
- The Bill of Rights is accused of being too liberal. Therefore, the government has been using it as excuse for its failure to deliver; while trying to limit and/or overturn the rights.
- Duplication of mandates among independent constitutional bodies and government departments is used to provide excuses for inaction by denying an acting Commission’s mandate.

Limitation of Rights

Article 25 outlines fundamental rights and freedoms that cannot be limited:

- freedom from torture and cruel, inhuman or degrading treatment or punishment;
- freedom from slavery or servitude;
- the right to a fair trial; and
• the right to an order of habeas corpus.

**Justiciability and Enforcement of the Constitution.**

Article 258 provides that every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention. Also Article 21 makes it a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights. The State shall take legislative, policy and other measures, including the setting of standards, to achieve the progressive realisation of the rights guaranteed under Article 43. Currently, there are cases that are in court or have gone through court with regard to enforcing some of the Bill of Rights provisions including: right to health for HIV AIDS meds; right to shelter to avoid eviction, and; gagging the media from freedom of expression. The Commission would like the government to provide indicators in line with international standards to enable any action in court.

**Practical Implementation Challenges**

1. **Education** - The article on Education (Article 43(1)(f) illustrates the practicality of implementing a constitutional right. The education sector has undergone drastic changes in the past decade. Free primary education was introduced during President Mwai Kibaki’s regime. In addition, subsidies to secondary schools were provided. Universities were expanded, both public and private. Politicians ceased being in charge of the public universities, which ushered in an era of academic freedom. A consequence of this is that research critical of government expanded. Since 2010, 13 pieces of education legislation have been enacted to give effect to constitutional requirements and consolidate the gains of Kibaki’s regime. However, challenges abound.

   • Access to that free primary education (FPE) is still not universal, close to 1.4 million children out school
   • Quality and standards - many children cannot read basic English text and even universities are affected by low standards. The Government has established an institution to address standard and quality of education.
   • Inadequate financing - disbursement of funs for FPE is insufficient. The subsidies for secondary schools are also inadequate.
   • Capacity inadequate: The current ratio of teacher to pupil stands at 1:70 rather than the recommended 1:40. There is an estimated shortage of 100,000 teachers. This has resulted in frequent teacher unrest in the country.

2. **Police Brutality** - Kenya has a litany of cases against police abuse of their power. To address this, the Constitution creates new institutions for oversight, Independent Police Oversight Authority (IPOA) and the National Police Service Commission to ensure smooth functioning of the National Police Service. IPOA is a civilian oversight body that holds the Police accountable to the public in the performance of their functions; ensure independent oversight of the handling of complaints by the Service, and give effect to the provision of the Constitution (Article 244) that the Police shall strive for professionalism and discipline and shall promote and practice transparency and accountability. [The Independent Policing Oversight Act]. Key constitutional milestones include the reform of police training by changing curriculum from force to service, and vetting of senior police officers. However, challenges still remain particularly administrative, and; need for culture change (force to service).

**Media Freedom**

Articles 33, 34 & 35 provides for freedom of expression, freedom of the media and access to information respectively. Access to information is a citizen’s right. The current points of
contentions with regard to access to information by the citizenry vis-à-vis constitutional requirements are:

- What sanctions to provide
- The nature of the oversight body
- Exemptions (good one is when narrowly defined)

In the event of conflict, the Constitution is supreme law and any other is unenforceable. Laws to give effect to these provisions include the *Media Council Act 2013* and *Access to Information Bill 2015*.

**Death Penalty**

The Commission’s position differs from the Kenyan position. The Constitution does not prohibit the death penalty. Kenyans were against such a clause. Thus in practice, the death penalty is allowed. The Commission applies international best practices that are against the death penalty.

**Citizenship acquisition**

Unlike Sierra Leone, Kenya’s tension points were on women passing citizenship to their children and the issue of dual citizenship. Chapter 3 removes all the previous restrictions. Citizenship may be acquired by birth or registration (no gender or race restriction), and cannot be lost through marriage or the dissolution of marriage. Article 16 provides that a citizen by birth does not lose citizenship by acquiring the citizenship of another country (also *Kenya Citizenship and Immigration Act 2011* section 7 & 8).

**Main KNCHR Lesson**

The Commission advised the CRC Team to set standards for systems not persons.

1.3 **Meeting with Commission on Administrative Justice (CAJ)**

The team led by the Chairperson Dr. Otiende Amollo (Office of the Ombudsman).

**Mandate**

The Commission, also known as the Office of the Ombudsman is an independent commission established by the *Commission on Administrative Justice Act 2011* pursuant to Article 59 (4) of the Constitution. The Commission is mandated to address all forms of maladministration, promote good governance and efficient public service delivery by enforcing the right to fair administrative action. The Commission investigates abuse of power, manifest injustice and unlawful, oppressive, unfair or unresponsive official conduct.

**Scope of Work**

1. The Primary responsibility of the CAJ is the traditional role of the ‘Office of The Ombudsman’. This office checks maladministration on the part of public officers, and deals with instances where such officers unreasonably delay in action; show discourtesy or misconduct; incompetent or inept and generally fail to adhere to the Constitutional principles that all sovereign authority of the state draws from the people, and that all public officers to whom that sovereign power is delegated must treat the people with respect, and must be efficient, responsive and impartial and in accordance with Articles 73 & 232 of the Constitution.

2. In the context of the right to fair administrative action, Article 47 of the Constitution specifically recognises the right to administrative action that is expeditious, efficient, lawful,
reasonable and procedurally fair. CAJ is the primary custodian of that right. *(Fair Administrative Action Act 2014.)*

3. Further, the CAJ, in collaboration with sister commissions and organs, will be the organ to ensure compliance with the ethics and integrity requirements in Chapter Six (6) of the Constitution, and the tenets of public service in Chapter 13 of the Constitution. CAJ in conjunction with the Ethics and Anti-Corruption Commission:

- Ensure state officers conduct themselves with dignity, respectfully and as to promote public confidence [A.73 (1)].
- Ensure decisions of state officers are not influenced by nepotism, favouritism or other improper motives [A.73(2)].
- Ensure state officers conduct themselves, in public or private, as to avoid demeaning the office, or conflict of interest [A.75 (1)].
- Keep a register as to ensure that any person removed from office for abuse of office does not hold any other state officer [A.75 (3)].
- Investigate and ensure no state officer maintains a Bank Account outside Kenya [A.76].
- Ensure no state officers holds any other gainful employment [A.77(1)].
- Ensure no appointed state officer holds office in any Political Party [A.77 (2)].
- Ensure no state officer or member of the Defence forces holds dual citizenship [A.78 (2)].
- Ensure any gift or donation to a public officer is surrendered to the State [A.76 (1)].
- Ensure Declaration of Wealth by public officers is complied with *(Public Officer Ethics Act)* and that such declarations are made available and accessible to the Public [A.35].
- Ensure the protection accorded to minorities and marginalized, nationally and within Counties, is respected [A.174 (e), 177(b) & 197(b)].
- Ensure compliance with regional ethnic or gender balance whenever required in the Constitution.
- Certify persons seeking elective office have not failed the “ethics and Integrity” test as per chapter six of the Constitution as read with [A. 99 (1) (b) and other Articles.]
- Monitor and ensure administrative arrangements for registration of voters facilitates, rather than denies, eligible citizens the right to vote or vie [A.83 (3)].
- Report on any pending complaints against any Judges or Magistrates in accordance with the Vetting of Judges and Magistrates Act 2011.
- Whenever appropriate to institute, or join as amicus, any suit or action challenging any administrative action or inaction, or challenging any legislation, which falls below the test of administrative fairness.
- Generally oversee the implementation of the prescriptions in the *(Public Officer Ethics Act 2003).* In undertaking the foregoing, the Commission will look into the conduct of all Public Officers, within national and county government, and will thus decentralize its offices and services to the County level for easy access by the public and more effective carrying out of its mandate.

Litigation and Amicus Briefs – The CAJ has asked the High Court to scrap some sections of the *(Supreme Court Act,* terming them inconsistent with the Constitution. CAJ has submitted that Section 14 of the Act vesting the court with special jurisdiction to review rulings made
on judges removed from office on account of a recommendation by a tribunal, or who resigns or opts to retire contravenes the Constitution of Kenya.

Resolution of inter-governmental conflicts. - In public administration, conflicts may arise between departments within Government. It is the role of the Commission to facilitate resolution of inter-governmental conflicts through reconciliation, mediation and negotiation \[A.252 (1) (b)\].

Promotion of Constitutionalism and Human Rights advocacy - Like all other Commissions and Independent offices the Commission has a constitutional duty of securing observance of democratic values and principles of constitutionalism by all state organs \[249 (1) (b&c)\]. Work with the Kenya National Commission on Human rights to ensure efficiency, effectiveness and complementarity in respective activities and to establish mechanisms for referrals and collaboration.

\section{Natural Resources}
(Chapter Five – Land and Environment)

\subsection{Land}

\subsection{Meeting with Ministry of Lands, Housing and Urban Development}

The team was led by the Principal Secretary (PS) Ms. Miriam El Maays.

Overview of Land and Natural Resources Management in Sierra Leone
The Land tenure system is not embedded in the current Constitution. So the challenge is how to merge the historical differences. The country is divided into two land-wise; colony land and protectorate land. Colony land is easily acquired while in the protectorate, land is vested in trust with a Council for the people. This customary land means that land can not be acquired by the foreigners (a term that included Sierra Leonean Creoles) and in some areas; women were barred from ownership for traditional reasons.

- Environment- the Constitution is also silent on the environment, though an environmental law and agency were recently established. So hoping to learn lessons in these areas.
- Major need to harmonise the land tenure system - the Leasehold v. freehold. How best to reform the two systems and harmonise them.
- Also would like to understand the administrative structure of the land system in Kenya
- With respect to natural resources, the Constitution is silent - need to understand, the rationale, best practices, and need for an agency (NR Commission),
- What are the challenges Kenya faces?
- Advise on, taking into account Sierra Leone’s tenure system, how best to frame the Constitution.
- Land is a key factor of production but how does one exploit this when the control is under the paramount chiefs? Need to come up with reforms to facilitate the transfer and ownership of these lands.

Kenya assured the team that the Sierra Leone’s constitutional review journey was a familiar among Kenyans. Outlined the road to the new Constitution, which was given impetus by the new leadership changes of the early noughties and the 2007 post election violence (PEV). Land was at the centre of the entire process. Still is.
National Land Policy was crafted in 2009 before the 2010 Constitution. A Two-Tier government means allocation of authority on land.

Kenya is still on a learning curve with respect to land reforms. In addition, there is more than 50 years of pending land reforms. The major problems remain unaddressed but presented bill to Parliament (hope latter will be objective and constructive in review and debate). Encouraged the Team to meet the lands committee in Parliament. Certain issues have been unattainable since land is an emotive issue.

Colonial Land Tenure Legacy

Kenya has a similar background with Sierra Leone in terms of the colonial legacy introduction of new land tenure system including crown land, and new laws. The administration of land was complicated and fully under the colonial government. The Governor had full powers to transfer land, which was transferred to white settlers to develop plantations. Africans were relegated to native lands and reserves. That meant that infrastructure development was limited to the white settler lands areas. After independence, a new land law, the Registered Land Act was meant to replace all the other land laws. It simplified land transactions so that anyone could transfer land without the use of a lawyer. Offices were opened in Nairobi & Mombasa where the Commission for Land was located. However, the full conversion was never finalised so Kenya still has a dual land system in operations for land administration and management

Land Policy 2009

2002-2009 - formulating land policy just before the new Constitution. The lengthy period was because land is a highly emotive matter in the country. The Land Policy principles
formed the basis for the Constitution’s philosophical background of land agenda in Chapter 5. Input from all experts and benchmarked with various countries including Ghana and Eastern Europe. But not everything from the Policy was captured in the Constitution especially the institutions.

**Issues To be addressed by 2010 Constitution**

- Control of land - the President held the radical title in all land in Kenya
- Lack of government accountability
- Over protection of private land - could only challenge a title in the High Court irrespective of how it was acquired.
- Mass disinheritance of Kenyans - to use their land for economic explorations
- Minorities and Vulnerable groups were also excluded
- Participation of the citizenry in determining land transfers - both national government and local authorities abused the system

**Land in the New Dispensation**

Principles governing land uses and management in the country are equitable, efficient, productive and sustainable manner (Article 60). Land belongs to the people collectively as a nation, as a people, and as individuals (Article 61). Ownership of land by foreigners - can only own as 99-year lease and only for investment purposes. Africa is currently facing major challenge of land grabbing. Article 40 provides for the protection of land and property rights but the clarifies that any improper acquisition not protected.

Natural Resources (forests, coastal land, minerals) are public land vested in national government to be managed by NLC (Article 62). If resources fall under community land, then Policy provides for a benefit sharing mechanism between government and community. Policy document and legislation been developed by the Ministry for Environment. (Part 2 Chapter 5 of Constitution). The previous central authority to administer and manage land was decentralised and county governments have been given certain functions - physical planning, survey and previously land vested in the President is now vest in county in trust for the people.

The new Constitution harmonise all the previous land laws, and possibly reduce them to 4/5 laws. Thus far, Kenya has: -

- Land Act 2012
- Land Registration 2012
- Land Control Act
- The Environment and Land Court Act 2011

The Constitution was also meant to address the issue of redistribution of land wealth. Development of infrastructure is vested in County that receives funds from the national government according to their perceived developmental needs. Public participation is key in this new arrangement - they have as say on which development project are implemented in which areas in the County.

**Land Categorisation**

Land tenure systems in the country are two types - freehold and leasehold. Land is classified as public, community or private land (Article 61).

1. Public (primarily resource rich and public institutions and vested in the national government through NLC and includes County in trust land) (Article 62);
2. Community land (vested in County in trust for the people) (Article 63), and;
3. Private (held by any person) (Article 64).
Parliament is in the process of passing a Community Lands Act. One of its key components is that thought the County holds that land in trust, it does not have the power to transfer (though no development may take place without County approval. Kenya has no paramount chiefs. Instead, it is proposed that the Communities will have the authority to elect members of the committee to administer the land.

**Challenges**

1. There is a constitutional deadline of 2015 August to operationalise the land laws. But it is unclear what is the threshold of operations – existence of laws and or their implementation?
2. There are different approaches to interpretation of the laws by the Counties- e.g. agricultural v. arid Counties, or; community v private land.
3. County priorities are also different e.g. to dispute resolution adjudication, and reallocation of land.
4. Though the number of titles has increased, there is no infrastructure to support it.

**Key Milestones**

- Benchmarking in the region - of the 20 Sub-Saharan countries - looking at certain areas of achievements.
- Secure record management - automate, harmonise, institution
- KENREF - Kenya Referencing Framework
- Digitising and e-presence

**Summary**

- In terms of constitutional implementation, it has not been an easy ride - all the actors are new to their offices especially in the devolved system. But there is a lot of goodwill. All major players are supporting the robust system.
- Judiciary on board with new laws to work with and enables resolution of many pending disputes.
- Communities are embracing opportunities to participate in the land management.
- Process on average takes about 4-6 weeks to establish a tenure document. But must remember to balance the amount of land that changes from one system to another. Zambia and Uganda seem to have a better grasp of how to manage this balance though they seem to have a better homogeneity on the issues.

**2.1.2 Meeting with National Land Commission (NLC)**

The National Land Commission Team was led by their Chairperson Mohammed Swazuri.

**Sierra Leone Issues for Consideration**

- No foreigners (including creoles) can own in protectorate but can lease.
- People need to have a chapter on land and resources system in the country
- Other issues (SR CRC Land committee)
- Land Policy is in cabinet. the proposed land commission currently applies to state land but now would want one to apply to all lands
also require help with land security particularly with regard to land granted by foreign investors
Also issue of land tax
Do not have an act to review Constitution but the President derived his power from the Constitution supported by the Peace Agreement to establish the process.

Kenya Referendum process framing

The NLC Chairperson was a member of Kenya’s Constitutional Review Commission.

He provided an overview of the process from Bomas Draft to Wako Draft, which was rejected in the 2005 referendum. Originally, the experts drafted the Constitution and gave it to the people to accept or reject. This was very costly.

The second round changed to draft from people’s views and let the experts fine-tune. This began the whole constitutional requirement that people must be consulted at all governance decision-making levels. At every stage of the review process, minority and persons with disability were represented.

The success of the referendum was also primarily based on the in-built system that made it impossible to delay the review process with extreme interests and parliamentary shenanigans. The Constitution Of Kenya Review Act 2008 imposed strict deadlines and ensured there was back tracking in the process.

Formally submitted to Parliament the post Naivasha Draft that the MPs did not like. They proposed many amendments (about 300 that were highly contradictory), which could only be allowed with a two-thirds majority. But they were under obligation to pass the draft or reject it. The draft passed by force of law at the last minute without any amendments. And only because, it rejection would trigger the dissolution of Parliament. The draft was presented for a referendum in 2010, and the Yes won by a solid majority. The No camp was largely composed of religious organisations.

In the two referenda, the most contentious issue was always land.

60% of the views collected on constitutional reforms from Kenyans were on land issues. From Bomas to Naivasha caucus Drafts; the NLC was described not only as a monitoring body, but also as an implementing one. But the Naivasha Caucus managed to reduce the Commission’s functions leaving only four main ones - research, investigation, review land tax and manage public lands. In essence, the NLC was thoroughly emasculated.

NLC Mandate


- to manage public land on behalf of the national and county governments;
- to recommend a national land policy to the national government;
- to advise the national government on a comprehensive programme for the registration of title in land throughout Kenya;
- to conduct research related to land and the use of natural resources, and make recommendations to appropriate authorities;
- to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress;
- to encourage the application of traditional dispute resolution mechanisms in land conflicts;
• to assess tax on land and premiums on immovable property in any area designated by law; and
• to monitor and have oversight responsibilities over land use planning throughout the country.

The National Land Commission Act further defines that the Commission shall:
• on behalf of, and with the consent of the national and county governments, alienate public land;
• manage and administer all unregistered trust land and unregistered community land on behalf of the county government; and
• The Commission shall ensure that all unregistered land is registered within ten years from the commencement of this Act.
• Within five years of the commencement of the NLC Act, the Commission shall review or grant disposition of public land to establish their propriety or legality.
• The Commission shall in consultation and corporation with the national and county governments, establish county land management boards for the purposes of managing public land.

Under the **Land Act 2012**, the Commission shall -
• Administer the Land Settlement Fund in accordance with section 135 of Land Act
• Manage the Land Compensation Fund
• Identify ecologically sensitive areas that are within public land and demarcate and take any other justified action on those areas and act to prevent environmental degradation and climate change in accordance with the Land Act.
• Ensure that the investments, in land benefit local communities and their economies.

**Principles of Land Administration and Management**
Land in Kenya shall be held, used and managed in a manner that is equitable, efficient, productive and sustainable, and in Principles of land policy accordance with the following principles (Article 60): -

a) Equitable access to land;

b) Security of land rights;

c) Sustainable and productive management of land resources;

d) Transparent and cost effective administration of land;

e) Sound conservation and protection of ecologically sensitive areas;

f) Elimination of gender discrimination in law, customs and practices related to land and property in land; and

g) Encouragement of communities to settle land disputes through recognised local community initiatives consistent with this Constitution.

h) Participation, accountability and democratic decision-making with communities, the public and Government;

i) Technical and financial sustainability;

j) Affording equal opportunities to members of all ethnic groups;

k) Non-discrimination and protection of the marginalised;

l) Democracy, inclusiveness and participation of the people: and

m) Alternative dispute resolution (ADR) mechanisms in land dispute handling and management.
Commission mandate v. Ministry mandate

Not clearly outline thus there is overlap and/or fringing in another’s function that creates a lot of problems in addition to disregarding constitutional requirements. For instance, the Cabinet Secretary has formulated a law providing for minimum and maximum land holdings (agro business zone v pastoral zone) and failed to consult as required. Also a scientific study was supposed to be done before the laws could be formulated. The CS’s action also means that the draft law contradicts other laws. The Ministry is also failing to develop new laws as required, and is instead merely expanding existing provisions. Their rationale is that the country already has many land laws so it does not need to increase them.

Foreigners – 99-year lease is maximum they can acquire. Kenya considers 20 years as a long-term lease.

Status of Implementation

It is a very progressive Constitution. It provides for 15 independent commissions to handle implementation within set timelines by creating institutions and enacting laws and policies. The major Land Concerns - historical injustices and— are yet to be addressed but the NLC is working on it. But Commission is to formulate the Historical Justices Act while the Community Land Bill 2014 is under consideration in Parliament.

All the over 99-year leases were automatically nullified by 2010Constitution. The renewal of these leases is not automatic too. Many interests lobbied against the enactment of land laws. Their legislation will be further affected by the closing down of Commission for the Implementation of the Constitution (CIC) and the 2017 election campaigns that are about to begin. Though Parliament has a Constitution Implementation Oversight Authority. The Transitional Authority will also be shutting down soon.

Uganda warned Kenya that it should not make a Constitution because of a person (the then seating President Moi). This would limit the instrument’s utility e.g. roadside appointments. Provincial administrators were mini-presidents who abused their powers to allocate land irregular

Taxing land ownership was also very contentious and was disallowed.

But remember, irrespective of the detractors, once the right and freedoms are granted in the Constitution, there is no going back.

Lessons To Take Home

Constitutional land provisions mirrored Land Policy provisions since the same drafters did the work.

1. Advice is to consolidate the two tenure systems or alternatively for similar systems - advice is to visit Zambia that also has a paramount chief system where government must seek their permission to develop land.
2. Also consider consolidation for the sake of revenue generation. Leasehold in city and freehold in rural setting brings in more money than Sierra Leone’s current tenure system.
3. Consider the need to ensure clarity on type of lands you create. In Kenya, the NLC is currently dealing with individuals who want to term leased public land as private land, which would remove the NLC from its management role of public land.
4. To avoid land grab - define all relationships - community, investor, government, etc.
5. Definitions, definitions, definitions - e.g. public land is and with any natural resources which would mean all land provided natural resources is all inclusive
6. Mandates - must be clarified as day and night. E.g. office of the register is meant to be in the NLC since they prepare all the documentation, however Ministry has
refused to give up that function. Also planning has become a devolved function so even if NLC has mandate to plan, other Ministries and counties plan too.

7. Strict timelines is extremely important. Left to the system - implementers and politicians, the laws would never be enacted. Kenya's constitutional act had provided a penalty that stated failure to enact the Draft Constitution, Parliament would be dissolved.

8. When provide transition clauses, do not make them on open-ended nor make them vague or use vague language. Must state that it shall be done by 31st August in explicit language. No ‘ensure, oversight, monitor, advise, etc’ - all this must be further defined and clarified if they must be used.

2.2. Environmental and Natural Resources

2.2.1 Meeting with Ministry of Environment

The team led by James Konkoti – Director Meteorological Department.

Overview of Environmental Concerns in Serra Leone

- Environmental law and agency was only created three year ago. Six (6) months ago heavy rainfalls displaced thousands of Sierra Leoneans who are yet to be resettled. This is a consequence of poor environmental management. No constitutional provision for environmental protection.
- Major environmental Challenges include - deforestation, illegal logging, mining, and failing to reclaim exploited land.
- Of interest is the implementation of the 10% true cover implementation - framework of implementation and challenges.
- Precautionary principle with regard to climate change mitigation.
- Institutions managing national resources, how have they been aligned with the economic interests of the states?
- Enforcement of environmental laws in the country - which are the challenges
- Climate change mitigation - what has Kenya done - laws, institutions, processes
- On managing natural resources, if foreign investor is involved, which ministries are responsible for signing contracts? Is it a multi-ministerial process?
- Challenges vis-à-vis implementation of natural resources laws.
- Lesson or critique of environmental provisions.
- Overlap functions apparent in Kenya relative to Sierra Leone - so does the Constitution have an answer?
- Sierra Leone Constitution has provisions which are not enforceable in court e.g. education

Ministry’s Mandate

Ministry has a wide mandate. Originally included water and irrigation but now limited to environment, natural resources, and regional development authorities. Their key area is policy. The Environmental Management and Co-ordination Act 1999 (EMCA) which was recently amended to be in line with new Constitution is the key law governing the Ministry.
There are also laws relating to natural resources covering forests and wildlife that fall under the Ministry.

The Ministry includes the following directorate Environment (Policy Formulation & Implementation), Multilateral Environmental Agreements, Climate Change, Natural Resources, and Kenya Meteorological Department. Semi-autonomous government agencies under the ministry include:

- National Environment Management Authority (NEMA)
- Kenya Wildlife Service (KWS)
- Kenya Forest Service (KFS)
- Kenya Forest Research Institute (KEFRI)

EMC Act Institutions are National Environment Council (NEC), National Environment Trust Fund (NETFUND), National Environment Tribunal (NET) and Public Complaints Committee (PCC).

Environmental Rights (Article 42)

Every person has the right to a clean and healthy environment, which includes the right (a) to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69; and (b) to have obligations relating to the environment fulfilled under Article 70.

Ten Percent (10%) Tree Cover

The Bill to implement this requirement (Article 69(b) is currently in Parliament (The Forest Conservation And Management Bill 2015). Article 69 of the Constitution provides clear obligations on what Kenya must do to achieve 10% tree cover. Responsibility rests with all Kenyans but the Ministry of Environment spearheads the implementation through the Kenya Forestry Service (KFS). KFS specific role is management of national forests but is also expected to coordinate with the county governments to implement the Article 69.

Managing Natural Capital & Benefit sharing

Several ministries are responsible. They are guided by Vision 2030, which is an economic blueprint for the country implemented through 5-year development plans. Article 69 creates obligation to ensure that benefits accruing from natural capital are shared equitably and fairly. E.g. The Wildlife Act has benefit sharing arrangement, which necessitates the creation of instruments to implement these mechanisms (The Wildlife Conservation and Management Act 2013). There is also the Traditional Knowledge and Traditional Cultural Expressions Bill 2015 to cover traditional rights.

In mining area, the need for rehabilitation is the ministry’s mandate. They are creating Deposits Bond - required to ensure that the mining entity is compelled to address any environmental issues that arise. Also provide a fund for enforcing environment judgements in the event of default. There is also an Equalisation Fund - to address marginalised areas issues.

Vulnerable groups - Bill of Rights clearly articulates their rights (Articles 52-54) and this is given effect by the specific sector laws.

Natural Resources Contracts

The Constitution provides that the national assembly must approve such contracts before the ministries responsible can sign them (Article 71). In addition, all agreements that relate to natural resources will have to be cleared by Parliament as stipulated in an Act (Natural Resources (Classes of Transactions Subject to Ratification) Bill 2015), which provides the specific threshold when the need for approvals kicks in. International obligations are applicable and
enforceable in Kenya in the new Constitution so provisions such as the CBD’s benefit sharing mechanisms apply. Article 2(6) states that any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution given effect in *Treaty Making and Ratification Act 2012*.

Land ownership falls under 3 categories, private, public and community. The benefit sharing arrangements apply to public and communal land, not private so the issue of joint ventureship does not arise.

_Engforcement_

EMCA - is a framework law that means that the responsibility for its enforcement rests with the various sector institutions (KWS, KFS, Water, Mining, etc.) whose laws must be in line with the EMCA. NEMA does the rest. The institution also has the right to compel government, other institutions and counties to enforce certain laws and the constitution. The Constitution provides functions for each level of government and country’s main role is waste management

All environmental provisions in the Constitution are justiciable and one need not be directly affected to go to court (Article 70). If a person alleges that a right to a clean and healthy environment recognised and protected under Article 42 has been, is being or is likely to be, denied, violated, infringed or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter. It further states that ‘for the purposes of this Article, an applicant does not have to demonstrate that any person has incurred loss or suffered injury.’

_Challenges_

Article 71 assumed that all the natural resources would fall under the Ministry of Environment yet the reality is that they fall under other ministries. Hence the need for Parliament to take up the overarching role final authority on natural resources.

Institutional overlaps were not anticipated by the Constitution.

Creation of the many institutions also results in Institutional deficiencies such as inadequate finance e.g. Land and Environment Court. Also, though tourism is the number two foreign exchange earner, KWS receives very little in terms of direct cash benefits which makes it hard to implement the benefit sharing requirement as the public does not consider the conservation services as elements of benefits. E.g. Forest adjacent communities or in wildlife protected areas, assume that must share with the revenues from these resources without taking into consideration the non-cash benefits they have received over the years - biodiversity services

Participatory approaches is another challenge - hard to make the public under their role in the fulfilment of the Constitution - misinterpretation

Overlaps - It was envisaged that in the event of conflicts in areas of coordination, EMCA would prevail. Though the review tried to minimise the conflicts, some still exist. In addition, the system of government in the Constitution also provides for further opportunities to reduce the inevitable conflicts. Each new administration has the opportunity to create 14-22 ministerial portfolios and define their functions.

Inter-ministerial committees another forum for resolving issues – National Economic and Social Council (NESC) while the Intergovernmental forum for issues between countries and government
Lessons

1. Implementation period - Process of review of laws to align with the Constitution is lengthy. And in addition, not all will be satisfied so more changes. This then follows the need to develop regulations, another lengthy process.
2. Need for Awareness creation - another problem is the assumption that the new laws created will be self-implementing.
3. Governance – there is need to have deputy Cabinet Secretary.
4. Oversight - Parliament provided with powers to watch over administration yet there is no commensurate powers to another entity to watch over Parliament particularly County assemblies.

The Ministry will be keen to know Sierra Leone study results/outcomes.

2.2.2 Meeting with Ministry of Energy and Petroleum

The Team led by Mr. Isaac Kiva, Director of Renewable Energy.

Sierra Leone Energy Overview

- Energy crisis – sources,
- The issue of charcoal burning v environmental protection
- Has a petroleum directorate
- Carbon trading - want to put a blanket ban on carbon trading as it is not helpful for global aspirations
- Dam for HEP - how to solve transmission and livelihoods protection and compensation
- Chapter 6 on Leadership & integrity. Comment

Ministry’s Mandate

The fundamental goal and purpose of the Ministry of Energy and Petroleum is providing and sustaining quality services, which are geared to satisfy the needs and expectations of its esteemed customers. Its aim is to facilitate provision of clean, sustainable, affordable, reliable, and secure energy services for national development while protecting the environment.

Applicable constitution provisions include:

- The Bill of Rights, which changed the Ministry’s goal from profitability to universal energy provision. There mandate means that they must extend electricity to all citizens; and also applies to element of service quality - the issues power outages.
- Environmental protection - the type of energy extracted must take into consideration the environmental impact.
- Sharing of revenue - particularly in the energy sector. Two levels of government means - need to share proportionally. To be regulated by Petroleum Exploration, Development And Production (Local Content) Regulations, 2014 and Energy (Local Content) Regulations, 2014.
- Power generation relies on private sector so the Constitution has provision to allow private sector participation.
- Constitution also required the legislations for natural resources sector to be in compliance. The Ministry formulated The Energy Bill 2015 and Petroleum
**Exploration, Development And Production** Bill 2015. Energy Bill- affordability, institutions (regulator, authority (for exploration), environmental protection, benefit sharing, local content (local participation in the workforce).

*Forestry Act* regulates how charcoal is exploited and trees replaced, and the trading permit. Explore alternative green sources of energy - biogas

**Land access - ensure that land policies ease infrastructure projects.**

Carbon trading has assisted Kenya: the monies have for instance helped develop the country’s geo-thermal infrastructure.

*Dam* - created a lot of water catchment protection initiatives (tree planting & soil erosion stoppage) to mitigate water reduction. In essence, it calls for the need to manage the water resources. In addition, Kenya has diversified to geo-thermal as another source of electricity generation. Power generation is liberalised in the country but not the distribution.

*Transmission* - may need to upgrade transmission capacity.

For displacement – there is need to have a Resettlement Action Plan, a document created in consultation with the people. The geothermal power station in Ol Karia necessitated the resettlement (and betterment) of the displaced communities.

With respect to Chapter 6, All top leaders in Ministry are vetted according to the Constitution and the Ethics Act.

*FDI* – it is part of harmonised policy development.

Term - ‘affordable services’ used in Constitution

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**2.2.3 Meeting with Ministry of Mining**

The Team led by Cabinet Secretary (CS) Najib Balala. The Team was lauded for taking the bold step of reviewing the Constitution. The Minster gave an outline of his previous government work during which he formulated the *Gender Bill* while Gender Minister; *National Heritage Bill, Tourism, Cultural Heritage Bill*, and the *Disability Bill*.

*Overview of Mining Issues and Concerns in Sierra Leone*

- There is virtually no legislation to govern extraction. There is a Ministry for Mines and a Mines Commission but there is no constitutional provisional to ensure the extractive sector shares benefits with the populace.
- The natural resources constitutional provision requirement simply states that ‘state shall harness all the natural resource of the country.’ This basically gives ownership of natural resources such as minerals to government. Yet for instance, the Sierra Leone diamond is alluvial which means anyone can harvest anywhere anytime. How does the government regulate this?
- Resource curse - how do we put a stop it? Sierra Leone is rich in minerals but so far this has not benefitted as a nation.
- Signing of contract - should involve all players, not just the Treasury ministry.
- On FDI, there is an influx in of agricultural and mining investors. How does the country anchor in the need to manage FDI activities in the constitution while addressing land acquisition. There is no land reclamation ever done by any company.
- Proceeds sharing mechanisms especially for non-renewable resources.
• Local content policy - to ensure the communities can benefit
• Environmental conservation for future generation - what considerations to include.
• Mining under the guise of exploration that means that a company abuses system. Company pretended to mine iron ore while mining diamond because the area has diamonds

On constitutional review process, must have some justice and fairness. Sierra Leone should not allow itself to feel obligated to get a new Constitution under pressure of circumstance - bloodshed, time factor, etc. Of the opinion that the Kenya 2010 Constitution was a bit compromised. It dilutes the authority of government, which makes it easier to attack a weakened government by both internal and external forces.

Governance issue – make sure it is monitored and it is crucial to include all. Do not compromise at all. People-centred, do not compromise as experienced with the Wako Draft.

Government position on reviewing the 2010 Constitution Review should be done after at least 5 years are completed which is also pegged on the completion of the implementation of all the laws required

Ministry existence & Mandate

Institution - Ministry’s existence is a given administration’s discretion The Ministry of Mining was formed by the Kenya government to look into mining activities in the country. The Ministry undertakes various functions aimed at enhancing growth of the mining sector in the country as guided by the executive order No. 2 of 2013.

Minerals policy

Kenya is using a 1940 Mining law - Mining Act (Cap 306). The current status is good for the operating companies but really bad for potentially new investors. A proposed Mining Bill has been introduced to Parliament 3 times. It was finally approved at the National Assembly but the Senate wants to amend. They need to convene a meeting of both groups to mediate. If they fail, the Bill dies.

The Mining Bill is based on 3 Pillars:
1. Predictability
2. Transparency (can apply online and is 3 months turn around) - Simple approval process that has only 3 things requirements - people approval, financial capability, and competency
3. Equity - for the benefit of the people.

Remember - Do not remove authority from the national governments (can be used to undermine central government by subnational governments). Thus Kenya’s sharing proportion is 70% for national government, 20% to county government and 10% to the community. The government share is destined for the infrastructure coffers. On consent, community development agreement incorporated in to the policy.

Resources Curse

To alleviate the curse, all the decision-making and legal and policy development must be people centred. It is better to have the minerals unexploited than create the opportunity to exploit the people, and hence conflict. Royalty alone is not good enough e.g. why should AU say that government should receive only 5%? Kenya has not joined the Extractive Industries Transparency Initiative (EITI) because he wants investors to also declare how much they pay, not just government making declaration. E.g. Quantum in Zambia with so much reserve yet Zambia is poor. TNCs steal through tax avoidance, transfer pricing, etc.
**Mining on an Exploration License**

Exploration is technical and difficult and may end up not paying (for gold exploration, it is typically 1%). Governments should conduct studies to have an idea of which areas have what minerals to begin the monitoring. In Kenya, one can begin mining even as they continue exploring. Also allows the company to make a declaration of a different mineral from the licenced one and the company has the first right for acceptance provided it demonstrates capacity.

**Historical wrongs**

Establish clauses in the Constitution to correct historical injustice and structural problems that exist in the current extractive industry. E.g. Kenya and land, limiting the nature and duration of foreign ownership in land corrected historical injustices. Also Article 2 requiring all international laws as being domesticated makes the issue of international obligations become under wider scrutiny. So advice - add clause like ‘all contracts entered before this new Constitution shall be made public’.

**Environmental Protection**

All mining contracts typically require rehabilitation of environment but all lack capacity for enforcement. So advice - considering TNCs have best standards back home but apply lower standards in Africa so ensure that they apply the same home standards locally.

**Mineral Contracts**

Mineral contract must be ratified by Parliament when they surpass USD500 million.

**Benefit Sharing**

Sharing of profits is based on principle of resources following function. Different models are in operation in Kenya. Most apply 70-20-10 while the wildlife uses 90-10 (in favour of the communities).

Minerals owned by people but held in custody (for current and future generation) by government because not all areas are endowed so government gets to redistribute to lacking areas.

**Advice** - enshrine concept of sovereign bonds/funds to accommodate the element of future generations cf. Norway. Kenya does not have but is addressing it with a statute (*The National Sovereign Wealth Fund Bill 2014*).

**Land acquisition**

In Sierra Leone, paramount chiefs are the custodians of customary land, not government. Mining separates two rights - surface rights and mineral rights. Kenya’s categorises minerals in all land as public but access will depend on the level of national interest. Latter can be compulsorily acquired but if interest is limited, then community must have a say and benefit directly.

**Advice** - Mining sector is private sector driven - don’t stifle it to make it too unattractive to operate. Investors care most about predictability and property protection.

**Advice** - public participation was not well defined but only stated as a principle in Kenya, which means that practice is primarily token and nominal. So make sure the Constitution defines the nature of participation.
3. GOVERNANCE STRUCTURES

The following is a representation of the government structure created by the 2010 constitution. The three arm of government and the two-tier government system.

3.1 Meeting at the National Assembly

The Team was led by Senior Deputy Clerk Michael Rotich Sialai.

Overview of Sierra Leone Team’s Issues, Concerns, Commentary

- Role of parliamentarian in the review process critical because though the process should be people driven, they rely on their leader’s position or input so essential to co-opt this segment.
- Process of review in parliament
- Major issues
- Lacks regulatory body = separation of power lacking since Parliament is at the mercy of the executive (budgetary approval)
- Election of speaker of Parliament – Sierra Leone would like to change current commonwealth position of any legal background to limit person to a member of the national Assembly.
- Post election, how does the Constitution provide for the process of inaugurating the new parliament? Sierra Leone has a vacuum that exists for up to 28 days.
- Length of Legislative provisions
• Rules and procedures of committee composition – are they in Constitution?
• Independence of the Judiciary cannot be overemphasised. People want the Judiciary to be financial self-accounting.
• Pensions and gratuity for elected officials in Sierra Leone, this is administered by Salaries and Pensions Committee (MPs + ex officio members Chief Justice and an Executive official). What is the situation in Kenya?
• Recall provision. Clarity
• Considering introducing provision to allow citizenry to propose changes to environmental protection as a referendum proposition. Threshold should be the main issue.

Kenya National Assembly
Article 95 establishes the National Assembly consisting of the following: -
• 290 members, each elected by the registered voters of single member constituencies;
• 47 women, each elected by the registered voters of the counties, each county constituting a single member constituency;
• 12 members nominated by parliamentary political parties according to their proportion of members of the National Assembly in accordance with Article 90, to represent special interests including the youth, persons with disabilities and workers; and
• The Speaker, who is an ex officio member.

The Role of the National Assembly as outlined in Article 95 include: -
• Represents the people of the constituencies and special interests in the National Assembly;
• Deliberates on and resolves issues of concern to the people;
• Enacts legislation;
• Determines the allocation of national revenue between the levels of government;
• Appropriates funds for expenditure by the national government and other national State organs;
• Exercises oversight over national revenue and its expenditure;
• Reviews the conduct in office of the President, the Deputy President and other State officers and initiates the process of removing them from office;
• Exercises oversight of State organs, and;
• Approves declarations of war and extensions of states of emergency.

Organs in charge of the 2010 Constitution Review
1. Committee of Experts (CoE) - collected, collated, analysed and drafted new harmonised Constitution based on old constitutional drafts.
3. Parliament – considered the draft and proposed 281 amendments, none of which was passed.
4. Referendum – held in 2010 and Kenyans accepted the Constitution.
**Problems and Lessons Takeaways**

The need to decentralise power from the presidency and central government fuelled the need to review the Constitution. Other key factors include the need to redistribute national resources and the need to strengthen human rights.

Information sought on Parliamentary processes was inadequate which resulted in a National Assembly that was more powerful than the Senate. Advice - if Sierra Leone adopts the bicameral system, then should consider the need to balance powers by clearly defining each House's role.

The adoption of the presidential system begs the question of having Cabinet Secretaries (CS) rather than Ministers (with parliamentary seats) – consider how effective it is for Sierra Leone's context. Kenya is still grappling with this new reality.

Judiciary is becoming very powerful and parliament is afraid. Moreover, the creation of the independent Office of the Director of Public Prosecutions (DPP) under Article 157 to exercise State powers of prosecution independently has further reduced Parliament and executive powers over judicial proceedings (*Office of the Director of Public Prosecutions Act 2013*). For instance, the DPP cannot discontinue a prosecution without the permission of the court.

**On election of House Speaker**

Adopting a Two-Houses or One-House parliament will determine what system is adopted for electing or appointing the speaker. Compare Kenya's system versus the UK or USA. Kenya elects speakers with the only proviso that they be eligible to be elected as members of parliament (Article 106(1) 'from among persons who are qualified to be elected as members of Parliament but are not such members'. However if elected from among seating MPs, then the speaker must resign the seat. In the UK, the MPs elect the Speaker from among their ranks and the person retains their MP seat whereas the USA is flexible, the Speaker may be elected from within the House or out of it. If former, they retain their seats.

**Duration of Parliament and the issue of a vacuum**

The Constitution provides for a fixed term and when parliament must be reconvened within a particular period. Article 102 states that the term of each House of Parliament expires on the date of the next general election. After elections, as long as the new Parliament has not been sworn in, the previous House is assumed to be still in charge. The process to begin election is also fixed - 3 months (American way.) Previously, the Speaker had to dissolve parliament to usher in the elections process. In addition, the law provides for the presidency and executive change over (*Assumption of the Office of President Act 2012*).

Financial implication of the process and implementation must be factored.

**Structure of government**

This can be presidential, parliamentary or hybrid. New changes in Kenya include presidential appointments must be approved by parliament, which is still on a learning curve in this regard. Parliament considers that Judiciary is supreme in the new constitutional dispensation whereas previously, parliament was supreme.

**Amending the Constitution.**

Parliament can amend but both Houses must participate. Certain constitutional provisions are subject to referendum notably the Bill of Rights and the Devolution provisions. Parliament or the people (one million people) can initiate a constitutional amendment. The problem is that a bill amending the Constitution once introduced in parliament can only be discussed after 90 days (the lengthy period was put in place to avoid the old system of 30 days that was regularly abused). Advice – the current may prevent abuse but it would be
prudent to include a proviso that allows room to handle crisis where the amendment may be required at a short notice period.

**Budget**

Only the National Assembly can approve the nation’s budget; this applies for all arms of government. This is an autonomous power; the Executive has no input because it no longer has a representative in Parliament as previously applied. However, Parliament is constrained from abusing this power. By for instance the Constitution makes it imperative to provide a certain amount of funds to the Judiciary as a matter of law. But be wary of the danger in granting such powers to parliament because there is need to have further checks to prevent abuse of power by the House. In Kenya, there is Presidential veto.

Also, to address parliamentary abuse of budgetary powers, the Salaries and Remuneration Commission (SRC) was established under Article 230. The SRC sets and regularly reviews the remuneration and benefits of all State officers (including MPs); and advise the national and county governments on the remuneration and benefits of all other public officers.

In Kenya 2 terms triggers pensions entitlement for MPs and other elected officials. This is also another learning curve for country.

**Parliamentary Procedures**

The right of parliament to regulate its own procedure is given. Kenya’s concern has been that the Constitution may have been too detailed. Fortunately, with respect to Parliamentary procedures, it states that each house may regulate itself. In addition, Article 124 provides that each House of Parliament may establish committees, and shall make Standing Orders for the orderly conduct of its proceedings, including the proceedings of its committees.

However, since the court system is robust, the Judiciary can injunct parliamentary actions e.g. the recent decision by the Senate to impeach a County Governor was restrained by the courts. Parliament is a master of its won business. Advice – do not detail how parliament operates in the Constitution.

**Role of President in legislation**

There is need to create a balance to prevent the presidency from becoming another law making centre. Presidential election - Kenya is 50%+1

**For devolved system**

Must clearly define each body’s role, and the number of members of Parliament - this has to be realistic

**Implementation**

Mandatory enactment and Parliamentary dissolution (5th Schedule of the Constitution) - failure to enact law within specified period, can petition court for declaratory order, which triggers course for parliamentary dissolution by the President. However, Parliament provided an escape route to extend for one year by the NA by 2/3rds majority. So if goodwill is lacking, this is a good provision to include ensuring implementation. Balance important laws v other laws. Gauge the mood. But must give Parliament the autonomy to act.

Article 257 popular initiative requires 1 million people. Popular propositions main issue is the threshold of numbers. For environmental imperatives of international source is addressed by article 2.

**International obligations**

Parliamentary involvement is provided for the Constitution and various laws.
Final Word

Personalities do determine the success of the implementation of the Constitution. Also must give justification or rationale and reasoning for any action and or position taken with respect to a provision/direction. So the court has a pointer to lead the way for interpretation.

3.2 Meeting with Senate’s Committee on Legal Affairs And Human Rights

The Team was led by Chairman Sen. Wako Sitswila Amos.

Review & background of the CR process in Sierra Leone

- Propose to recommend that Sierra Leone create two Houses. The country currently has 149 paramount chiefs in 12 districts which each sends a member to parliament. The Chieftaincy would like their own House as exists in Ghana since they feel they inutile in Parliament as it is presently constituted.
- Citizenship laws - a father’s father must be of negroid descent
- Natural resources in developed system
- Believes that a second strong chamber will work well for the country provided the members include additional nominated members. But what role will they play? Assist.
- In western region (colony) and in eastern (protectorate) ownership of the land is vested in the paramount chief and the council.
- Proposes proportional representation to address the gender element
- Seeking working document to assist the women caucus fine tune their fight for empowerment. Also seeking safe seats.
- Local government system
- Taxation system - are there taxes paid to local government? Sierra Leone does have.
- What happens to 5th Schedule after implementation?

Kenya Senate

Article 98 establishes that the Senate shall consist of the following:-

- 47 members each elected by the registered voters of the counties, each county constituting a single member constituency;
- 16 women members who shall be nominated by political parties according to their proportion of members of the Senate elected under clause (a) in accordance with Article 90;
- 2 members, being one man and one woman, representing the youth;
- 2 members, being one man and one woman, representing persons with disabilities; and
- The Speaker, who shall be an ex officio member.

The role of the Senate (Article 96) shall be: -

- Representing the counties, and serves to protect the interests of the Counties and their governments;
- Participating in the law-making function of Parliament by considering, debating and approving Bills concerning Counties, as provided in Articles 109 to 113 of the Constitution;
- Determining the allocation of national revenue among Counties, as provided in Article 217 of the Constitution, and exercises oversight over national revenue allocated to the county governments; and
- Participating in the oversight of State officers by considering and determining any resolution to remove the President or Deputy President from office in accordance with Article 145 of the Constitution.

Human Rights

Kenya's Bill of Rights was drafted by individuals with a human rights background and expertise.

People driven instrument - sovereignty of the people must be considered.

Rights – any person can challenge government depending on availability of resources for social and economic rights. Figure out how the will of the people is reflected in the final product. Current Bill to strengthen Senate is to reflect the will of the people. Citizenship - protect the interests of the citizens

Terms such as 'progressive realisation of these rights' is vague. Article 21(1) states that it is the fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights. And adds that the 'State shall take legislative, policy and other measures, including the setting of standards, to achieve the progressive realisation of the rights guaranteed under Article 43. The Preservation of Human Dignity and Enforcement of Economic and Social Rights Bill seeks to redress this.

An African problem - fundamental challenge is enforceability of the rights. E.g. Kenya has devolution but the culture is still centralist. Adage - post conflict societies have a greater capacity to choose a wider diversity of opportunities.

The more everything changes, the more it remains the same. Tanzania's election is a case in point. Leadership options are recycled from the same pot. In Kenya, in striving to create a presidential system, tried to equalise opposition and rulers perks e.g. majority whip and minority whip enjoys the same perks. To minimise the previous system of winner takes it all.

Justiciability of Constitutional Provisions

Essential meaning that provisions such as the economic and social rights should not be left open ended. The right to proper housing case in the India Supreme Court illustrative (Olga Tellis & Ors vs Bombay Municipal Corporation 1985). The petitioner's argument was that the right to life includes the right to livelihood, and since the pavement dwellers would be deprived of their livelihood if they were evicted from their slum and pavement dwellings. This eviction would be tantamount to deprivation of their life, and hence unconstitutional. The Supreme Court upheld their right to livelihood that would require the respondent to provide alternative proper housing, failure to which they should be allowed to live along pavements and slums. Hence the The Preservation of Human Dignity and Enforcement of Economic and Social Rights Bill.

Land & Revenues

Land is work in progress for community land, which holds lots of natural resources. The issue also need to be addressed because of resources straddling neighbouring counties.
Revenue collection shifted from local government to counties governments. County - taxes referred to as levies, charges and rates, which are limited.

*Transition Mechanisms*

What happens to 5th Schedule after implementation? It lapses

It is important to include and it should be such that makes it easier for reference, too understand and interpret the real intention of the Constitution. This bears with the position that the CRC must justify their every action.

*Balancing of minority rights*

Consider also having the equalisation of regions as well as the usual vulnerable persons provisions.

*Negotiations*

Reviewing constitution on possible amendments to avoid duplications to strengthen role of Senate and role of the National Assembly.

*People’s Will and Public Participation*

Citizens should not be denied the right to participate. Must ensure that whatever comes out in the draft reflects the people’s will so their views and opinions sought during consultation must be taken on board. E.g. appointment of the CRC membership was to be presidential but people wanted interest appointed. Tried to allow nomination and presidential appointed but still unacceptable as gives president leeway to manipulate the system. Hence failure of Wako I Draft. Since the constitutional process is political, be wary of giving too much power to politicians. Tendency has always been that for the government in power is reluctant to cede powers.

    The People must be the centrepiece. Remember – the Will of the people must be respected.

*Gender Mainstreaming*

Gender issues must be included - Advice to go for 50% (Rwanda) rather than a third like Kenya did. Aiming for the sun will not deliver the moon, but aiming for the stars just might.

Failing to provide for a clear formula for gender mainstreaming at the national level unlike the county level where it was well prescribed) has resulted in implementation problems. The Senate has just tabled a bill to address the problem, the Two-Third Gender Rule Laws (Amendment) Bill 2015 and the Constitution of Kenya (Amendment) Bill No.143 of 2015.

Representation without empowerment creates a culture of dependency. It erodes belief in oneself. If one does the affirmative action without a sunset, then the beneficiaries will relax and never work for it. Must look for programmatic was to eventually empower the women such that they do not rely on the laws to benefit, but do it competitively. Otherwise, it will perpetuate the system of recycling extant in the political class - super elite. Only ones who have been affirmed. So the proposed Kenyan Bill has a sunset clause as well.

The Kenyan women caucus is to support their Sierra Leonean equivalent in creating the ideal clauses for the Constitution.

*In Sum*

The Sierra Leone Team had more issues raised than were answered and urged the Chair (who was also the AG during the lifetime of Kenya’s Constitution Review period of 20 plus years) to visit Sierra Leone to impart his experience and lessons to a wider audience.
The Women representatives also expressed hope that the Kenya Women’s Caucus and Minority and Vulnerable Group representatives could extend additional assistance in circumventing the pitfalls they had experienced in the last 5 years.

### 3.3 Judiciary

The following constitutional requirements with respect to the Judiciary were highlighted during the course of discussion with the various institutions and individuals (and additional information from http://www.judiciary.go.ke/portal/home).

Article 159 provides that judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution. The institution is mandated to deliver justice in line with the Constitution and other laws. It is expected to resolve disputes in a just manner with a view to protecting the rights and liberties of all, thereby facilitating the attainment of the ideal rule of law.

The Judiciary and its related institutions (Judicial Service Commission (JSC); Kenya Law, previously National Council for Law Reporting (NCLR); Tribunals, and the Judiciary Training Institute (JTI) perform the following functions;

1. Administration of justice
2. Formulation and implementation of judicial policies
3. Compilation and dissemination of case law and other legal information for the effective administration of justice

#### Judiciary Independence

The Judiciary shall be subject only to this Constitution and the law and shall not be subject to the control or direction of any person or authority in the exercise of judicial authority (Article 160). Further, the office of a judge of a superior court shall not be abolished while there is a substantive holder of the office and he remuneration and benefits payable to judges shall be a charge on the Consolidated Fund.

#### Independent Judicial Service Commission

Article 171 establishes a Judicial Service Commission (JSC) consisting of the Chief Justice (chairperson), one Supreme Court judge; one Court of Appeal judge; one High Court judge and one magistrate, one a woman and one a man; the Attorney-General; two advocates, a woman and a man; one person nominated by the PSC; and a woman and a man to represent the public, not being lawyers, appointed by the President with the approval of the National Assembly. The judges are elected by their peers. The Chief Registrar of the Judiciary shall be the Secretary to the Commission.

The JSC promotes and facilitate the independence and accountability of the judiciary and the efficient, effective and transparent administration of justice and shall (Article 172 & Judicial Service Act Part III):

(a) recommend to the President persons for appointment as judges;

(b) review and make recommendations on the conditions of service of judges and judicial officers, other than their remuneration; and the staff of the Judiciary;

(c) appoint, receive complaints against, investigate and remove from office or otherwise discipline registrars, magistrates, other judicial officers and other staff of the Judiciary, in the manner prescribed by an Act of Parliament;

(d) prepare and implement programmes for the continuing education and training of judges and judicial officers; and
advise the national government on improving the efficiency of the administration of justice.

In the performance of its functions, the Commission shall be guided by competitiveness and transparent processes of appointment of judicial officers and other staff of the judiciary; and the promotion of gender equality.

Appointment and Tenure of Office

The appointment of judicial officers is done by the president on the recommendation of the JSC (Article 166). The recruitment is transparent and competitive, and the interviews are public (aired by the media). Though the Chief Justice and the Deputy Chief Justice appointments are also subject to the approval of the National Assembly. The Chief Justice shall hold office for a maximum of ten years or until retiring on attaining the age of 70 years, whichever is the earlier (Article 167(2). Removal from office of judge can only be initiated by the JSC acting on its own motion, or on the petition of any person to (Article 168) on the grounds of (a) inability to perform the functions of office arising from mental or physical incapacity; a breach of a code of conduct prescribed for judges of the superior courts by law; bankruptcy; incompetence; or gross misconduct or misbehaviour. A tribunal will make the determination.

Vetting of Judicial Officers

Judicial independence demands judicial accountability to restore public confidence. A Judges and Magistrates Vetting Board was established to vet judges and magistrates in accordance with the provisions of the Constitution (Sixth Schedule section 23) and the Vetting of Judges and Magistrates Act 2011. The Board is independent, and obligated to the principles and standards of judicial independence, natural justice and international best practice in the exercise of its powers and performance of its functions. At one point, half of the Court of Appeal was removed on various grounds including competence. The Board’s process and determination are open to the public (http://www.jmvb.or.ke).

Judiciary Transformation Framework

The Judiciary developed a Judiciary Transformation Framework that has placed it on the path of institutional transformation. The JTF, the 2012-2016 plan is the Judiciary’s strategic reform blueprint anchored on four pillars, namely;

1. People-focused delivery of justice - the Judiciary is pursuing strategies aimed at creating a legal system, which ensures equality of all before the law and an equitable legal process. Judicial authority is derived from the people, and should be exercised for their benefit and welfare.
2. Transformative Leadership, Organizational culture, and Professional and Motivated Staff
3. Adequate Financial Resources and Physical Infrastructure
4. Harnessing Technology as an Enabler for Justice

Creation of a Higher Courts and Judicial Offices

The Supreme Court is established as the apex court in the land (Article 163). The Judiciary consists of the judges of the superior courts, magistrates, other judicial officers and staff. The office of the Chief Justice, Deputy Chief Justice, and Chief Registrar of the Judiciary are established and their functions are elaborated in the Judicial Service Act. The Chief Registrar shall be the chief administrator and accounting officer of the Judiciary. Specialists courts with the status of the High Court to hear and determine disputes relating to (a) employment and labour relations; and (b) the environment and the use and occupation of, and title to, land, are established.
Decentralisation of Services

The Court system has been decentralised with the Supreme Court and the Court of Appeal having their own Presidents and the High Court having a Principal Judge as heads of the respective institutions. The High Court has also been restructured into four divisions: Division of Land and Environment; Division of Judicial Review; Division of Commercial and Admiralty; and, Constitution and Human Rights Division. The Judiciary has also opened more channels for people’s participation in the judiciary operations through the National Council on the Administration of Justice (NCAJ) established under Section 34 of the Judicial Service Act to ensure a coordinated, efficient, effective and consultative approach in the administration of justice and reform of the justice system. The Council is also expected to establish linkages with court user committees and Bar-Bench Committees at the county level. These latter provide an avenue at the local county level for all users of the courts to address problems in the administration of justice.

Financial Independent

Article 173 establishes the Judiciary Fund, which is administered by the Chief Registrar of the Judiciary. It is used for administrative expenses and other purposes for the discharge of the functions of the Judiciary. The Chief Registrar prepares annual estimates of expenditure for the following year and submits to the National Assembly for approval (Judiciary Fund Regulations). Upon approval, the expenditure of the Judiciary will be a charge on the Consolidated Fund and the funds paid directly into the Fund. Improved on previous system, which means they no longer have to wait for the general budget via the treasury. The budget went up from KES 3 billion to 16 billion most of which went towards improving and developing the infrastructure.

4 DEVOLUTION

Constitution Chapter 11

4.1 Meeting with Council of Governors

The team was led by CEO Mrs. Jacqueline Mogeni

Overview of CR process and Subnational Governance in Sierra Leone

- Sub-committee to deal with thematic constitutional issues
- Sierra Leone Local government system was suspended for 30 years
- People want local governance entrenched in the constitution
- Chieftaincy – are 149 with 12 representatives in Parliament. However, they want to be above politics so would rather have their own House of Chiefs.
- Customary restrictions of women’s participation in government/chieftaincy
- Dual system - Chief an Council & Local Council
- Body representing the 19 Councils of SR.
- Local Government Act 2004

The Council of Governors is composed of the Governors of the 47 counties and its main functions are the promotion of visionary leadership; sharing of best practices and; offer a collective voice on policy issues; promote inter-county consultations; encourage and initiate
information sharing on the performance of County Governments with regard to the
execution of their functions; collective consultation on matters of interest to County
Governments. Basically, through the Council, Governors identify priority issues and deal
collectively with matters of public policy and governance at the County and the National
levels.

Article 174 states that the objects of the devolution of government are: -
(a) to promote democratic and accountable exercise of power;
(b) to foster national unity by recognising diversity;
(c) to give powers of self-governance to the people and enhance the participation of
the people in the exercise of the powers of the State and in making decisions affecting
them;
(d) to recognise the right of communities to manage their own affairs and to further
their development;
(e) to protect and promote the interests and rights of minorities and marginalised
communities;
(f) to promote social and economic development and the provision of proximate,
easily accessible services throughout Kenya;
(g) to ensure equitable sharing of national and local resources throughout Kenya;
(h) to facilitate the decentralisation of State organs, their functions and services, from
the capital of Kenya; and
(i) to enhance checks and balances and the separation of powers.

The Secretariat has received mixed feedback that Kenya devolved too fast and some too slow
or just right. The key element of 2010 Constitution is devolution that Kenyans have wanted
for a long time. Any change to the devolution provisions requires a referendum
(Constitution Chapter 11). Legislation to operationalise system of devolved government
includes:

- County Government Act
- Intergovernmental Relations Act 2012
- Transition to Devolved Government Act 2012
- Urban Areas and Cities Act 2011
- Public Finance Management Act 2012

**County Government**
The 47 county governments created by the Constitution are based on the delineation of
administrative districts as created under the Provinces and Districts Act of 1992. The
county government structure includes: county assemblies, county executive committees and
county public service. Citizen Participation Structures are also part of county government.

County Assemblies functions include: -

- making laws for the effective performance of the county government.
- exercising oversight over the county executive committee.
- receiving and approving plans and policies for: managing and exploiting the county’s
resources, and developing and managing the infrastructure and institutions.

County Executive Committees – the executive authority of the county is vested in the
county executive committee. The committee consists of the county governor and the deputy
county governor; and members appointed by the county governor, with the approval of the
assembly, from among persons who are not members of the assembly. The number of
members of the committee should not exceed: one-third of the number of members of the county assembly, if the assembly has less than thirty members; or ten, if the assembly has thirty or more members. Functions of county executive committees are to:

- implement county legislation.
- implement, within the county, national legislation to the extent that the legislation so requires.
- manage and coordinate the functions of the county administration and its departments.
- prepare proposed legislation for consideration by the county assembly.
- provide the county assembly with full and regular reports on matters relating to the county.

County Governor and Deputy County Governor - The county governor is directly elected by the voters registered in the county at a general election for a term of 5 years and, if re-elected, can serve for another final term of 5 years.

Responsibilities and functions of County Governments

County Governments Act 2012 section 5

- Enact County legislation in accordance with article 185 of The constitution
- Exercise executive functions in accordance with Article 183 of the constitution
- Any other functions that may be transferred to County governments from national government under article 187 of the constitution.
- Establishment and staffing of its public service as contemplated under article 235 of the constitution
- Functions provided for in Article 186 and assigned in the Fourth Schedule of the Constitution;
- Any functions agreed upon with other county governments under Article 189(2) of the Constitution; and
- Establishment and staffing of its public service as contemplated under Article 235 of the Constitution.

Distribution Of Authority and Competences

The operating principles of governance for both governments include democratic, separation of powers, subsidiarity, non-discrimination, recognition of diversity, cooperation/complementarity, gender equity, core Constitutional values, etc.

Central government retains following functions (Fourth Schedule): -

- Foreign affairs, foreign policy and international trade; tourism policy and development.
- Immigration and citizenship
- Courts
- National economic policy and planning; monetary policy, currency, banking
- IPRs; consumer protection; labour standards
- Health, housing, agricultural, veterinary, energy, and education policies
- Transport and communications; and national public works
- Protection of the environment and natural resources
- Public investment.
County governments in charge of:

- County health services; and control of pollution
- Cultural activities, public entertainment and public amenities
- County transport
- Trade development and regulation
- Animal control and welfare
- County planning and development
- Pre-primary education, village polytechnics,
- Home craft centres and childcare facilities
- County public works and service; fire fighting services and disaster management;
- Control of drugs and pornography
- Ensuring and coordinating the participation of communities and locations in governance at the local level.

Local Government in Kenya

Council system still exists with appointment system for townships, cities, etc. The former provincial administration was restructured to create positions for chiefs, sub county commissions and county commissions who represent national government at the county level.

Difference between County and local government

- Devolved authority rather than delegated authority
- Devolved to county organs
- Clearly stipulated function

County and National government

The main role of the County is services provision while national government maintains judiciary, security and defence. The guiding ethos is: two governments are interdependent - cooperation and consultation. The main Intergovernmental Organs are (Intergovernmental Relations Act 2012): -

1. National and County Government Co-ordinating Summit comprising of the President or in the absence of the President, the Deputy President, who shall be the chairperson; and the governors of the forty-seven counties (section 7). Intergovernmental Relations Technical Committee.(Section 11)supports the Summit.

2. Council of County Governors which shall consist of the governors of the forty-seven counties (section 19).

3. Inter-governmental Sectoral Committees - provide forum for technical county personnel to meet

4. Council of Governors – to iron out one voice for negotiations

Principles of intergovernmental relations

The intergovernmental relations structures shall be based on the following principles (Intergovernmental Relations Act 2012): -

(a) recognition of the sovereignty of the people as provided for under Article 1 of the Constitution;
(b) inclusive and participatory governance;
(c) respect for the functional and institutional integrity of the two levels
of government;
(d) promotion of national values and principles of governance provided under Article 10 of the Constitution;
(e) respect for the constitutional status of the levels of government and the institutions of government established at either level of government;
(f) promotion of equality and equity in service delivery;
(g) objectivity and impartiality in decision making;
(h) the requirement for consultation and cooperation as provided under Article 6(2) of the Constitution;
(i) the need to minimize intergovernmental disputes while co-operating in exercising their functions;
(j) promotion of accountability to the people in decision making and actions taken; and
(k) institutionalized protection of marginalized groups.

Objects of intergovernmental structures
(a) facilitating the realization of the objects and principles of devolution provided for under Articles 174 and 175 of the Constitution;
(b) facilitating co-operation and consultation between the national and the county governments and amongst county governments as provided under Articles 6 and 189 of the Constitution;
(c) providing a forum for co-ordinating governments’ policies, legislation and functions;
(d) providing a forum for sharing and disclosing of necessary data and information;
(e) providing for mechanisms for the transfer of power, functions and competencies to either level of government; and
(f) promoting accountability between the two levels of government or amongst the county governments.

Public Finance Management object is to ensure that (section 3) public finances are managed at both the national and the county levels of government in accordance with the principles set out in the Constitution; and public officers who are given responsibility for managing the finances are accountable to the public for the management of those finances through Parliament and County Assemblies.

Challenges
2. Inadequate resources - only allocated 15% of resources yet devolved 80% e.g. in health meaning unable to deliver services
3. National assembly enacts laws that purports to claw back devolved functions to national governments
4. Inadequate resources to fight the laws in court.
5. Capacity challenges - technocrats remained at the centre. Central government given responsibility to build capacity but its also lacking that capacity. But now identified KSG as the key partner in capacity building, and determine the nature of technical support each county requires.
6. Suspicion as happens with any new institutions
7. Affirmative action - Gender penalty - penalised for not appointing women a required
8. Ideals in the constitution un implementable so far e.g. sovereignty of the people, integrity,
9. Concurrent functions - Constitution has not clearly demarcated shared functions so
10. Disputes - provide a robust dispute resolution mechanism to minis court appearances

Issues under negotiations
County governments allowed to borrow but government must guarantee. However the framework has not been finalised
Counties need 45% of Kenya’s resources - calculation is based on money retained by national government for devolved functions
Areas identified for drawing revenues e.g. retain 20% and government 80%.
Governor impeachment - constitutional threshold.
Constitutional Lacuna - no elected official can be removed from office through party suspension.

Summary
Devolution had increased accountability. It has also minimised political interference in administration.

4.2 Meeting with Kenya Transition Authority
The team was led by the Chairperson Kinuthia Wamwangi.

Sierra Leone Issues, Interests and Observations
Will allow the discussions to flow as the transitional authority is a new animal to them but the following are of interest to the team:

- Implementation challenges - how rationalising the commissioners functions to assist Sierra Leone.
- Frameworks of implementation
- Documents & frameworks utilised - Vice Chair (angelinehingo@gmail.com, angelinehongo@transauthority.go.ke)
- Transfer of Functions Issues- Advise on whether should constitutionalises local governments in Sierra Leone. LGA 2004 - of the 96 functions, only 55% have been transferred since 2004. Part is because personnel is unwilling to transfer t from central to local level because of finance or prestige reasons. E.g. Heath system - primary, secondary and tertiary systems all devolved. Yet government keeps backtracking by removing the tertiary system from the devolved functions. Have noticed that Kenyan slogan ‘no going back!’
- 149 chieftdoms in SR. - some were previously amalgamated. So lesson to learn in reducing tension in the event of further amalgamation. Chieftaincies are powerful in that they are the custodians of the customary land yet they do not have any administrative powers. People are asking for election of paramount chiefs or to have a limited time of service.

Devolution is the most transformative chapter of the Kenyan Constitution. Devolution is working. Though Kenya has had a brief experience on its implementation since came on
board after the inauguration of the new Constitution. The transfer functions are supposed to take three years after the elections of 2013.

The core mandate of the Authority is to implement Chapter 11 on Devolution. The Authority is an independent body reporting to Kenyans. The Authority comprises of a chairperson and eight other members appointed by the President with the approval of the National Assembly as provided in the Act; and Principal Secretaries responsible for - office of the President, devolution, public service, finance, planning, and justice; the Attorney-General (ex-officio member) and a secretary. The Transition to Devolved Government Act 2012 provided for mechanisms for:

- Transfer for functions to county government
- Transfer of human resources including benefits
- Transfer of Assets and liabilities
- Capacity building for both levels of government
- Ensuring that public are informed and participates

Functions of the Authority (Transition to Devolved Government Act 2012 section 7): -

1. The Authority shall facilitate and co-ordinate the transition to the devolved system of government as provided under section 15 of the Sixth Schedule.
2. Despite the generality of subsection (1), the Authority shall—
   a. facilitate the analysis and the phased transfer of the functions provided under the Fourth Schedule to the Constitution to the national and county governments;
   b. determine the resource requirements for each of the functions;
   c. develop a framework for the comprehensive and effective transfer of functions as provided for under section 15 of the Sixth Schedule to the Constitution;
   d. co-ordinate with the relevant State organ or public entity in order to:
      i. facilitate the development of the budget for county governments during Phase One of the transition period;
      ii. establish the status of ongoing reform processes, development programmes and projects and make recommendations on the management, reallocation or transfer to either level of government during the transition period; and
      iii. ensure the successful transition to the devolved system of government;
   e. prepare and validate an inventory of all the existing assets and liabilities of government, other public entities and local authorities;
   f. make recommendations for the effective management of assets of the national and county governments;
   g. provide mechanisms for the transfer of assets which may include vetting the transfer of assets during the transitional period;
   h. pursuant to section 15(2)(b) of the Sixth Schedule to the Constitution, develop the criteria as may be necessary to determine the transfer of functions from the national to county governments, including—
      i. such criteria as may be necessary to guide the transfer of functions to county governments; and
      ii. the criteria to determine the transfer of previously shared assets, liabilities and staff of the government and local authorities;
   i. carry out an audit of the existing human resource of the Government and local authorities;
(j) assess the capacity needs of national and county governments;
(k) recommend the necessary measures required to ensure that the national and county governments have adequate capacity during the transition period to enable them undertake their assigned functions;
(l) co-ordinate and facilitate the provision of support and assistance to national and county governments in building their capacity to govern and provide services effectively;
(m) advise on the effective and efficient rationalization and deployment of the human resource to either level of government;
(n) submit monthly reports to the Commission for the Implementation of the Constitution and the Commission on Revenue Allocation on the progress in the implementation of the transition to the devolved system of government;
(o) perform any other function as may be assigned by national legislation.

Key milestones
- Enactment of enabling legislations
- Laying foundation for inauguration of devolved units: putting in place interim structures – recruitment, training and deployment of staff, initial budgets, initial functions, identifying offices, Hansard equipment, standing orders; and systems (IFMIS, IPPD).
- A new look government with the inauguration of county governments.
- Sustained capacity building of county governments from leadership to departments
- Phased transfer of functions and resources – human and financial.
- Public education
- Development of administrative guidelines and advisories
- Establishments of intergovernmental structures

Challenges
1. Short Transition period - A 3 year period was provided for transitional work but the amount of work may require more time e.g. auditing all the assets and liabilities for all the public resources, bodies, is tedious, times consuming work.
2. Lacking laws, policies and administrative procedures, norms and standards, to implement.
3. Function overlaps and disagreements resulting in court cases
4. Finance inadequate for activities.
5. Resistance to change.
6. Slow submission of data from government institutions to facilitate transition activities.
7. Political Interference.
8. Duplication of functions between TA and Ministry of Devolution.
9. Intergovernmental mechanisms still at infancy – suspicion between two levels of government.
10. High expectations on devolution coupled with low level of civic awareness among the populace.

Lessons Learnt
- Constitutional provisions for devolution ensures it implementation - anchor essential.
- Timely enactment of laws facilitated TA’s work
• Institutional framework with legal and constitutional backing necessary to facilitate implementation.
• Transition is not cheap, be ready to invest in it.
• Principle of resources must follow functions
• Change management strategies needed to get support for the change.
• Invest in civic education to bring the citizenry along and manage expectations.
• Continuous capacity building needed to entrench change.
• Intergovernmental mechanism is a must for devolved system of government.
• Visionary leadership necessary for transformation.

Transfer of Functions - Constitutional Lessons Learnt
1. Functions to be transferred should have been clarified as day and night.
   The tragedy of decentralisation in Africa is that local system may be anchored in the Constitution but their functions are never anchored as well. The Kenya system has to ensure that the final devolved structures have the full governmental powers to discharge their functions.
2. Must have the functions devolved in the Constitution. In Namibia, they were using administrative circulars to transfer functions, which turned out to be ineffectual. In Kenya, County governments do not receive instructions from central government on how to function, it is laid out in the Constitution. Ministry of Devolution is there to provide policies, standards etc. for national government to facilitate devolution
3. Must provide the transfer numbers in the Constitution e.g. in Kenya, the 15% of national income that should be given to the County government is enshrined in the Constitution
4. Timelines in the Constitution for implementation.
5. Practical implementation has been facilitated by the independent institutions – so must ensure these institutions are truly independent.
6. County governments service delivery must have uniform standards and norms established by the national government - distinct and interdependent and relate through cooperation and coordination.
7. Creation of intergovernmental structures has assisted the implementation as well. Their mandates, functions, required actions, and processes are all outlined.
8. Funds follow function.
9. Ensure realistic costing and not historical costing for devolution functions and transfers. The Authority has been forced to uses costing which does not take into consideration the existing reality. That has been a challenge of implementation for the Authority. The Constitution is too costly
10. Phased devolution of functions should have been applied. For instance, health system devolution should have been phased. The Constitution states all except national referral hospitals remain with national government, but the devolution could have been done in annual phases, rather abruptly. Provide sufficient durations and timelines for the transfers - do not rush the transfer functions as Kenyan did.
11. Depoliticise function transfers - Do not allow Parliament to allocate the devolution/transfering authority’s budget.
12. Must understand the system being created - and functions allocated. Kenya has 3 (national, county, residual) functions. Kenya is a unitary state, not federal.
13. Ensure there is no arbitrary manipulation of devolution provisions. In Kenya, 25 of 47 Counties must agree to change constitutional provisions touching on devolution. This must also go through 2/3rds parliament and a referendum.
14. Diversity appreciation inbuilt in the Constitution. Creation of counties did not cause as much tension because they had a historical basis – they were based on the delineation of administrative districts as created under the Provinces and Districts Act of 1992.

15. County government cannot go to court to complain about the non-transfer of functions. But they can go to court to dispute the work of the Transitional Authority.

16. Advice - Do not have both local government and chieftaincy. Instead have one - chieftaincy as traditional but with political power that subsumes local government functions with democratic processes, etc. Or keep local government with their functions and their sustainability while leaving the chieftaincy as only traditional (cf. Zambia). Resident ministers in Zimbabwe (or Zambia) are impediments to work and democratisation. Also compare how Ghana, Zambia, and Ethiopia have dealt with their chieftaincy. The three government levels must be addressed; otherwise it will become a tension point. So a two-tier system or three-tier system?

17. Transferred funds - once done, only the Auditor General can query its use and expenditure, no other national government official has a say.

18. Controller of Budget - monies to county must pass through this independent office

19. If national government is given power to decentralise national functions and services, ensure that there are personnel to coordinate the functions

20. Devolved human resources - Failed to provide for personnel transfer mechanism when functions devolved since they were locked in counties once the laws became operational. Major issues of contention include disparities in salary structures; capacity development; staff distribution; skills lacking, and; parastatal staff (for those with devolved functions).

21. Assets – subject to a moratorium stating that no transfer of assets would take place during the transitioning period. However, local government assets can be transferred to National Government with County Government’s approval provided an inventory is undertaken. The Authority is compiling 48 registers of assets and liabilities. All the records will be uploaded online for posterity. Assets transfer failure can be enforced in court though the Constitution even by the citizens.

22. Courts have been expanded. No one is denied access to court to demand their constitutional right (apart from challenging court). Also all statutes have inbuilt penalties. Remember that even if rights can only be enforced progressively such as economic, social and cultural rights, it should still be included in the Constitution for future use.
Chapter Three

The CONSTITUTIONAL REVIEW AND IMPLEMENTATION PROCESS

1. REVIEW FRAMEWORK AND PROCESS

1.1 Meeting with Civil Societies Members

The Members were Prof Yash Pal Ghai - Katiba Trust - Former Kenya CRC Chairperson; Gichira Kibara - Executive Director, Capacity Development Institute, and; Kennedy Maasime - Executive Director Centre for Governance and Development (CGD).

1.1.1 First Constitution Review Commission (Bomas)

Prof Yash Pal Ghai and Kennedy Maasime

Sierra Leone Issues

- Justiciability - why have clauses that cannot be enforced?
- Vetting and public interviews – what are the challenges
- Who watches over the Parliament?
- How do you reduce executive powers without diluting its venom?
- Status of Kenyan governance structure
- Gender in customary context because women’s access to land is limited and they are not eligible to become chiefs
- Citizenship issues
- Review funding - Cost - USD14.5 million in Kenya but Sierra Leone only has USD 3 million.

Kenya’s CRC

The National Constitution Conference (constituent assembly) set of principles agreed upon earlier formed the basis of values to be reflected in the Constitution

1. National unity (to counter tribal divisions
2. Re-introduce democracy in the society - right, participatory democracy
3. Social Justice
4. Human Rights
5. Accountability

Decentralisation of power.

Critical but avoided use of terms with baggage like majimbo, regionalism, federalism, Adopted term devolution that is uncommon (though is used in the UK).

CRC Process

The Agenda of the Commission which he chaired was encapsulated in law, a very radical situation, in fact transformatory.
The process of public participation brought out enthusiastically people's views and needs. The CRC team knew that the establishment would reject the proposals requested by the people. So the challenge was how to draft a constitution for the people with all the reforms they wanted while ensuring that the changes affecting the establishment does not alienate them. Of course that balancing act yielded nothing because the team opted to go with transformation.

The intention was to create a radical social document with a lot details where necessary. Providing materials explaining what was done, why it was done and how it was done. They tried very hard to eliminate tribalism (by creating a sense of common identity and common future) but this has become even more evident in the present climate.

Weaken Executive and Stronger Judiciary
On the issue of weakening executive (context is devolution and wealth redistribution); and strengthening judiciary at seemingly expense of other arms (Parliament). The executive claim of being weakened is because of limitation of their abuse of power. The British did us a disfavour, they used government as an instrument of coercion and not consent. The African elite who succeeded in power continued the practice. The practice globally favours power sharing. Over 70% of the world has substantial power sharing arrangements with devolving structures.

Politics and Review Process
Politics is basically an inter-elite struggle. Kenya overanalysed the review process and the issues. There are similarities for the two countries - milestones of civil war in SR and PEV in Kenya provided the impetus to draft the document. The shifting of balance of power meant a zero option situation. The compromises made during the process have led to some of the current implementation problems.

Final Analysis on Constitution 2010
The document’s Record is mixed. There is renewed awareness of people’s rights. The Professor’s organisation, Katiba Trust spends all the time in court challenging government unconstitutional actions. Kenya abolished all common law principles and now everyone can go to court to challenge any constitutional violation or inaction, and as an amicus. Courts too have a responsibility to interpret laws purposively (advance the constitution in letter and spirit). In addition the mechanism for implementation

Recommendation
The Team requested Prof Ghai to visit Sierra Leone in order to reach a wider audience on the theory and practice of the CRC process. Visit should cover both geographic areas of former colony and protectorate. The CRC would like to have a transformative document and they need the Professor to explain to the people so that the CRC can get the populace buy-in.

Funding for the review process in Sierra Leone is an issue that UNDP will address.

1.1.2 Constitutional Review Process Civil Society Input
Gichira Kibara

Sierra Leone Concerns and Issues
- Mechanism utilised for human rights
- Interpretation guidelines
* CRC anchored on presidential discretion. Advice on how can secure CRC works and tenure at this stage?
* How can civil society be streamlined constitutionally?
* Judiciary empowerment

Mr. Kibaara began as a member of the CRC. Role was to advise the civil society on how to advocate for changes. Civil society had 23 delegates involved in the CRC as their head. Then he joined government from 2004 to facilitate the reform process from within. 2005 referendum failed as coalition split. H was involved in restarting the process that involved many multi-party discussion. After 2007 PEV – CR process was now driven by the two antagonistic parties rather than government or civil society as previously happened. It was mediated by Kofi Annaan. He became PS for Justice.

Kenya’s constitution making process was one of the longest in the world. This was because of the need for consensus building.

**Advice - avoid making the constitution as a ceasefire document**

The need for constitutional reform was driven by many factors initiated by the civil society. This included:

* Integration and national unity
* Human rights violations
* Land question
* Judiciary reform
* Civil service reform

**Main drivers of Success of 2010 Constitution**

1. Robust legislation for process that governed institutions of reforms and the stages and actors for reforms. There was no ambiguity.
2. Consensus building was emphasised from the very beginning especially because the country was emerging from a conflict situation. A bipartisan Committee had been set up comprising two/four persons from both sides of the political divide. Kibaara was the liaison officer.
3. Unwavering commitment of the leaders from the very beginning. Important because the lengthy CRC process had created entrenched vested interests. E.g. Judiciary members were also part of the process.
4. Good use of expert advice. African experts and leaders involved. Even the Germans were consulted for the grand coalition building.
5. **Public participation** - systems was designed to ensure that at every critical stage, the public was consulted and involved. This got buy-in early. E.g. the elite preferred a constituent assembly to finalise the process while members of the public wanted referendum. The process had been so lengthy most participating individuals never wanted it to succeed as they considered the Review process as an employment for life. Even the churched wanted to be part of the process though they had no expertise. The people’s views removed this elite paralysis.
6. **Iron-clad rules of play** - of the 300 proposed amendments proposed by parliamentary select committee, none went through because they never met the two-thirds majority requirement.
7. **Use of experts was critical.** The involvement of foreign experts meant that no suspicion would fall on the final document based on vested interests (all the Commissions - Kriegler, Truth & Justices, and the Constitution Committee of Experts).

8. The CRC essentially broke and reconstituted all the institutions. The process even bypassed the judiciary and created an interim body to address any potential disputes arising from the *Constitution Of Kenya Review Act 2008* Section 44. The conduct or result of the referendum may be challenged only by petition to the Interim Independent Constitutional Dispute Resolution Court established by Section 60A of the previous Constitution.

8. Development partners led by UNDP which coordinated the donor’s involvement and marshalled necessary resources.

**Human Rights**

Minority rights, marginalised communities, and economic, social and cultural rights are new to Kenya. They are ideals that the country aspires to avoid elite capture of country’s resources. Tensions exist because of counter-majoritarian principle (agree to act even when contrary to majority view) so modern constitutions counter majoritarian; also they also have pre-commitment. The Constitution resolves the inherent conflict. Kenya has empowered the Judiciary and the independent commissions to ensure the rights are respected.

Human rights guaranteed. Now have broad *locus standi* – basis being public interest.

Limitation of laws clause – law is explicit in which rights and how they can be limited.

*Interpretation guidelines.*

Plenty of interpretation aids – directives such as limiting of rights or how to interpret rights.

**CRC Legislative anchor**

The lack of legislation to guide CRC operation is big concern. Everyone always wants the Constitution until it touches their interest. The Tanzania review process is illustrative

**Civil society be streamlined constitutionally**

Opposition parties have their roots in civil society. So the civil society relations with the state are usually negative. Also African states do not fund civil society so they have to rely on donors. This makes them natural enemies of political class. Civil society has been asking of the funding clause in the Constitution to be operationalised. Nonetheless, civil society has more space to operate in the new Constitution (rights, public participation, etc.) but government is also seeking more accountability. Thus the price for increased participation in governance is more accountability.

**Judiciary Reforms**

The Judiciary addressed institutional weaknesses to restore confidence through vetting, accountability, transparency and infrastructure development. Now it enjoys financial independence as well. Appropriation in aid would have no impact since all departments put all monies into treasury.

Appointment of judicial officers is now done by JSC, a process that involves a transparent recruitment, competitive and public interviews. The CJ & DCJ vetted in parliament as well. Vetting of all judicial officers - half of the court of appeal removed on various grounds including competence.
1.2 Committee of Experts Perspective

Former members - Dr Otiende Amollo (Current Ombudsman) and Bobby Mkangi. Bobby has interacted with the CRC Team in Sierra Leone under the civil society aegis so quite familiar with the country’s issues. The discussion focussed on Drafting of the Constitution, Referendum and Implementation of the Constitution.

Sierra Leone Overview, Issues, Concerns and Comments

- Clarity on CoE & CIC
- Devolution system
- Unitary v federal
- Limiting provisions
- Recall clause - significance
- Land - advice especially on changing tenure system
- Independent Commissions empowerment financially
- Plenary - when a Committee tie, how to present to plenary

Kenya’s 2010 Constitution drafting was anchored in the Constitution of Kenya Review Act 2008 (CKRA 2008). The object and purpose of the review of the Constitution was to secure provisions therein (section 4): —

(a) guaranteeing peace, national unity and integrity of the Republic of Kenya in order to safeguard the well-being of the people of Kenya;
(b) establishing a free and democratic system of Government that guarantees good governance, constitutionalism, the rule of law, human rights, gender equity, gender equality and affirmative action;
(c) recognizing and demarcating divisions of responsibility among the various state organs including the executive, the legislature and the judiciary so as to create checks and balances between them and to ensure accountability of the Government and its officers to the people of Kenya;
(d) promoting the peoples' participation in the governance of the country through democratic, free and fair elections and the devolution and exercise of power;
(e) respecting ethnic and regional diversity and communal rights including the right of communities to organise and participate in cultural activities and the expression of their identities;
(f) ensuring the provision of basic needs of all Kenyans through the establishment of an equitable frame-work for economic growth and equitable access to national resources;
(g) promoting and facilitating regional and international cooperation to ensure economic development, peace and stability and to support democracy and human rights;
(h) strengthening national integration and unity;
(i) creating conditions conducive to a free exchange of ideas;
(j) ensuring the full participation of people in the management of public affairs; and
(k) committing Kenyans to peaceful resolution of national issues through dialogue and consensus.
CKRA 2008, which established the Committee of Experts (CoE) (section 8) had the object and purpose to (section 3): -

(a) provide a legal framework for the review of the Constitution of Kenya;
(b) provide for the establishment of the organs charged with the responsibility of facilitating the review process;
(c) establish mechanisms for conducting consultations with stakeholders;
(d) provide a mechanism for consensus-building on contentious issues in the review process; and
(e) preserve the materials, reports and research outputs gathered under the expired Act.

Other organs through which the review of the Constitution was completed were the Parliamentary Select Committee; the National Assembly; and the referendum. The organs were to ensure among other things that the national interest prevails over regional or sectoral interests; were to accountable to the people of Kenya; ensure that the review process accommodates the diversity of the people of Kenya; ensure that the review process provides the people of Kenya with an opportunity to actively, freely and meaningfully participate in generating and debating proposals to review and replace the Constitution; is conducted in an open manner; and is guided by respect for the principles of human rights, equality, affirmative action, gender equity, and democracy; and ensure that the outcome of the review process faithfully reflects the wishes of the people of Kenya.

Committee of Experts (CoE) Conceptualisation & Establishment

CoE was constituted to finalise the constitutional work that had began earlier more than 10 years earlier. Kenya's constitutional disorder led us to the post election violence (PEV). The President created a team after 2005 Wako Constitution rejection – a Panel of Eminent Persons was established to find out why the referendum failed. It was recommended that the process going forward should be incremental and preferably spearheaded by a small group of experts.

The functions of the Committee of Experts (section 23) included: -

(a) identify the issues already agreed upon in the existing draft constitutions;
(b) identify the issues which are contentious or not agreed upon in the existing draft constitutions;
(c) solicit and receive from the public written memorandum and presentations on the contentious issues;
(d) undertake thematic consultations with caucuses, interest groups and other experts;
(e) carry out or cause to be carried out such studies, researches and evaluations concerning the Constitution and other constitutions and constitutional systems;
(f) articulate the respective merits and demerits of proposed options for resolving the contentious issues;
(g) make recommendations to the Parliamentary Select Committee on the resolution of the contentious issues in the context of the greater good of the people of Kenya;
(h) prepare a harmonized draft Constitution for presentation to the National Assembly;
(i) facilitate civic education throughout the review process in order to stimulate public discussion and awareness of constitutional issues;
(j) liaise with the Electoral Commission of Kenya to hold a referendum on the Draft Constitution; and
(k) do such other things as are incidental or conducive to the attainment of the objects and principles of the review process.

The Committee was formulated to be professional, impartial, distinguished from the political class, included 3 foreigners who infused neutrality, professionalism and gave them a confidence perspective for the country to look up to. Advice – consider including foreigners in critical stages where tension may be apparent.

The Committee were able to draft a document that was accepted because of their limited number which created great teamwork; professionalism, and; impartiality (from political, religious, ethnic or economic).

**Recommend – a team of would be relevant in fine tuning the draft.**

**Approach**

The CoE finalised and send the Harmonised Draft Constitution to Parliament. CoE did not adopt unpalatable and unconstitutional recommendations even when there was consensus. But the Committee recommendations did not always hold sway. For instance, CoE wanted parliamentary system while Parliament wanted presidential. CoE wanted Senate, while Parliament did not.

**Design of the Committee**

Approach (Sierra Leone has 8 committees). In Kenya had 4 committees in terms of process (drafting, research, civic education and finance & administration. Content committees were: -

- Land & Environment;
- Structure of Government, Legislature & Executive;
- Elections, Constitutional Commissions & Judiciary and Leadership;
- Multi-level government;
- Sovereignty & other introductory provisions, public service, national security & concluding provisions.

**Amending, reviewing or new document** – the Committee’s work was contested on the basis that it was drafting a anew document though its mandate was to review existing documents. The Court settled that indeed the CoE was reviewing thus were not bound to any document in coming up with a new draft. Advice - important to settle such issues early.

**Review Body** - Prof Ghai was the Chairperson for a review body of 600 member constitutional assembly. Sierra Leone seems to be a cross between Ghai’s body and CoE. Advice - must have thematic grouping before can present to plenary when Committee is big. Problem to avoid - Boma was not internally congruent.

**Membership** - Kenya is highly divided in regional and tribal affiliations. The presence of foreigners diffused any tribal tensions while infusing impartiality and professionalism.

**Strategy Adopted**

1. Collected views - up to a million in some areas.
2. Thematic organisation - and identifying the issues to include in the Constitution.
3. Drafting hastened by fact of impartiality. Interest groups position change all the time so no progress if represented on drafting. Kenya recorded every single discussion point verbatim for posterity.

3. Timelines - CoE work and then review document for all timelines. They discovered that Parliament did not bind itself. Recommended the adoption of timelines for all organs before the review work began. **This thresholds and timelines later defeated Parliament’s proposed 810 amendments.**
4. Drafting and thinking process done concurrently. It is not advisable to leave the drafting for later because draftspersons can change the meaning. Kenya drafted as discussed and reviewed the drafted provisions to confirm correct. Government printers inserted a qualification of human rights on 'national security' grounds negating the entire chapter. To increase suspicion, only half the prints for distribution had this insertion. AG denied culpability.

5. Verbatim recording of discussions and the proceedings of every meeting as required by law (CRA section 26(1)).

6. Methodology - divided the issues for ease of work into 3 areas – (a) Agreed Issues so there was no reopening for discussion (e.g. reduce presidential power); (b) Contentious Issues in which it was a 50-50 divide (system of government (Parliament unanimous in picking presidential), devolution settled on middle (limited financial devolution v. full autonomy), and legislature of two houses (but division of powers and which is upper house - COE upper n Parliament no); and (c) Resolvable Issues (women representation; one third gender rule).

7. Owning the document - when CoE was appointed politicians wanted to influence; failing to control, they tried to have it disbanded. Failing all these, they turned the people against the Review team. Luckily, Kenyans owned the document. All the information was available and open with regular weekly updates. The media was also on board daily and facilitated the public buy-in. Publicly, the political parties and government supported the process but privately, they did not.

8. Design of the CKRA 2008 made the process self-propelling with strict timelines for deliverables and all organs responsibility clearly outlined.

9. Balancing the views of the various groups. Some issues may be unresolvable such as the Kadhis Courts. These are headed by Muslim Scholars who are schooled in Islam and are lawyers. Protest by Christians who claimed that they did not receive the same treatment; meanwhile the Kadhis wanted more powers. Resolved by adopting the same wording of the previous Constitution.
Referendum Preparation

This was another key role of the CoE. This included logistics, working with Independent Electoral and Boundaries Commission (IEBC). Another major role was civic education on the proposed Constitution. The Committee prepared relevant materials and distributed the more than 10 million copies of the Constitution and as well as a simplified version of the Draft.

To defuse misinformation and propaganda, the Committee engaged the media and civil society to disseminate the correct information on the issues in the Constitution. CoE created a curriculum on delivery of civic education - to ensure Kenyans received uniform education. The civil society signed an MoU that they would adhere to these materials.

The Referendum is an important instrument for giving legitimacy to Constitution. But in a divided and illiterate society, it is a dangerous tool. Factors for the Kenya referendum success were:

1. The two main leaders publicly supported the 2010 Constitution.
2. The need to shield the process from the courts. Earlier processes and been sabotaged by the court (e.g. Prof Ghai was injunction to avoid discussing the chapter on Judiciary). If they had agreed, the vetting of judges would have been sabotaged. Instead created an Interim Independent Court (of 2 lawyers and 2 foreign judges) to resolve and review issues. There were 7 attempts to thwart the review process.

Source: CoE Supplement 2009
3. Civic education - 70% of CoE budget went to civic education - documents, media, etc. But CRC must determine content. Any misleading culprit should be punished.

4. Citizen buy in - civic education and simplified version

5. Simplification for clarity for the people - managed 28 pages in Kenya. The Ideal is 15 pages.

6. Electoral body - can only be legitimate if it is an independent body and thus independent process. Kenya was lucky because body was new and had adopted a new process - electronic tallying. The referendum succeeded beyond doubt.

Implementation - Programmatic and Institutional

Of the opining that with regard to the Constitution, the naysayers have been too hasty. At the moment, Kenya is at the scaffolding stage, so it is too early to write off the building. Many of the institutions are still at the nascent stage, e.g. the CAJ. Fortunately, Kenyans are able to see them early, and can provide constructive criticism.

There have been some gains and failures in the implementation. But Kenyans have managed their expectations by using the proverb, ‘Kuzaa, mwana si kazi, kazi ni kumlea’ = Giving birth is not hard; the work is in the rearing.

Institutions and programmatic approach adopted with respect to CIC, to retune and rehabilitate the legislative policy and administrative framework. Things have to be made to happen. Tanzania’s process is on going though suspended. They borrowed Kenya’s approach to implementation - programmatic and institutional.

Over 90% of the intended legislation have been enacted though key pieces are still pending. They are time bound hence the expectation that they will eventually be delivered. Considers that in sum, 75% of the Constitution has been implemented, CIC puts the figure at 60%. The 25% is majorly a failure of the spirit of the Constitution.

Unitary v. Federal System

Advice - adapt the system to suit Sierra Leone’s context and issues. In Kenya, the provincial administration began as administrative units but evolved to be political tools used by politicians to influence. Tried to reduce the many structures but failed - no one is willing to cede territory. So adopted a system that adopted the 1992 districts and convert them to County – the division of units was rational back in 1992.

Brought representation closer to the people by decentralising. Ensured devolved units empowered; small enough to feel close but big enough to feel important; large enough to be viable and few enough to be representative. The power to pass on - local government powers while powers important at national level were left at that level. Structures - mirrored presidential system at county level as well e.g. can impeach Governor as well.

Is there too much decentralisation? Believes did not do enough. Only half succeeded. Positive - we have open government; have mechanism of conflict resolution beyond courts - ADR.

Article 203 - determine allocation of funds and the principle applied is determined by a Commission for Revenue Allocation (CRA), an independent Commission. To address historical injustices, economic empowerment, development needs, equalisations (Nairobi and Turkana receive the same though one has a tenth of the population). Devolution is working in some areas to the extend that they have become attractive destination for Nairobi workers.

Sum - model not federal, not financial devolution; but one that empowers but deters secession talks.
New Land Laws

80% were 99-year leases but some were 999-year and others 44-year leases. Land rates were too low. Communal systems of ownership – attached to a people and common areas. Now – private, public and community. 50% of public were gone to private hands. Now two forms of public land – national and county and administered by NLC not an individual. Also stipulates that public land can only be transferred for public purposes, otherwise it is null.

Private – freehold and leasehold. Leasehold limited to 99 years beginning with new Constitution or at start (CoE). Former was adopted. Protects only lawfully acquired land is protected.

Advice – Regrets that they were explicit NLC jurisdiction. Executive has clawed back all NLC powers.

There is no limitation on land size.

Executive powers & Funding of independent Commissions

Regret - County executive have created heavy bureaucracy and wish had put more limitations rather than just 3-10. Now have maximum 10 and also advisors.

Funds - Constitution mandates government to fund all independent Commissions and Officers to execute their functions (Consolidated fund).

Prohibition of legal action

New dispensation is more enabling than before. Informed by history of limitations and abuses. Lancaster records that Kenyan leaders only agreed to accept the original Constitution on the agreement that they would change it immediately. Prof Ghai received views that needed to check state powers. 2010 Constitution begins by bequeathing authority and sovereignty to the people of Kenya and goes on to provide even more provisions to enable this and exercise this authority. Court cases are illustrative of people challenging state authority when it exceeds the Constitution. CAJ actualise Article 47. The Bill of rights too - include widening locus and persons.

Checking the powers of president - Article 143 speaks to immunity of state offers from legal proceedings but immunity is removed when it comes to international crimes. Article 10 on national values and principles. Issue of submitting to an international court system - Kenyans never commented too much when the clause was inserted. Sierra Leone should think hard when creating effective institutions to ensure that the international option is not ever considered.

Significance and Value of Recall

MPs who were non-performing formed the need for this clause. Also the experience of Kenya is that 80% of MPs never defend their seats so they tend to use their term to recoup their campaign expenses. Kenyans needed a mechanism to redress this without waiting for full term while holding members to account. The House emasculated the clause with a rather too high threshold.

Of the opinion that the only redress is to rely on party discipline rather than recall clause provided the party system works. But because Kenya now also allows independent candidates to run, another mechanism is needed in lieu of the weak law. Plus political party provisions were removed from the first CoE Constitution Draft.

In sum

1. Important to have timelines for legislation and specific actions. Schedule 5 - determine which are urgent and which can wait. Transformative Constitution meant e.g. CJ and AG had to leave office immediately to create new institutions. Also with devolution, the
provincial administration had to be removed to facilitate the establishment of new devolved units.

2. Creation of institutions - partly because decongesting powers from president, partly for devolution and partly for elaborate bill of rights. Three (3) independent offices and 13 Independent Commissions were created. Advice - wrong to assume that a Independent Commissions will exercise power when given; yet the executive has residual power which they can use to enforce their position. Thus must provide the CIs implementation and enforcement powers.

3. **Must be explicit.** E.g. stating that all money must go to the exchequer but not outlining the consequences of failure to do so is dangerous.

4. As considered the Constitution lengthy, they avoided details. Land is a case in point and the Right of Recall.

   **Advice - is very important, include it even if it means the document will be long.**

5. Implementation - CIC and enactment. Failure to enact, dissolution of parliament. To avoid parliament regulating itself, created CIC to oversee implementation. In hindsight - failed to insist that CIC must conduct civic education. Should have.

**Closing Remarks**
The Chair of the Sierra Leone CRC stated that he had a mind change on the length of Constitution. If the final CRC draft will need a wheelbarrow to move it, so be it!

### 2. CONSTITUTION IMPLEMENTATION INSTITUTIONS

#### 2.1 Meeting with Constitutional Implementation Oversight Committee (CIOC)

The team was led by the Committee Chairperson, Hon. Njoroge Baiya, MP

**Issue of Interest to Sierra Leone**
- Recall Clause
- Safe Seats for Women
- Local government
- CIOC work with other implementing organs

**Parliament's CIOC**
The Sixth Schedule (Article 262(4) provides that there shall be a select committee of Parliament to be known as the Constitutional Implementation Oversight Committee which shall be responsible for overseeing the implementation of this Constitution and which, among other things:

(a) shall receive regular reports from the Commission on the Implementation of the Constitution (CIC) on the implementation of this Constitution including reports concerning:

   (i) the preparation of the legislation required by this Constitution and any challenges in that regard;
   (ii) the process of establishing the new commissions;
(iii) the process of establishing the infrastructure necessary for the proper 
operation of each county including progress on locating offices and assemblies and establishment and transfers of staff;
(iv) the devolution of powers and functions to the counties under the 
legislation contemplated in section 15 of this Schedule; and
(v) any impediments to the process of implementing this Constitution;

(b) coordinate with the Attorney-General, the Commission on the Implementation of 
the Constitution and relevant parliamentary committees to ensure the timely 
introduction and passage of the legislation required by this Constitution; and
(c) take appropriate action on the reports including addressing any problems in the 
implementation of this Constitution.

Major Lessons

1. When people are comfortable, it is much harder for them to accept constitutional 
changes.
2. Avoid developing a law that seeks to challenge the status quo.
3. Safeguards must be placed to avoid the process of drafting, amending or 
implementing being stalled

Relationship with other organs – CIOC, CIC and KLRC

CIOC primary role was to discover why the implementation timelines stalled by discussing 
with CIC, KLRC and government executive bodies.

The Kenya Law Reform Commission is established by the Kenya Law Reform Commission Act 
2013 (It is the successor to the Law Reform Commission). The Commission has a statutory 
and on-going role of reviewing all the laws of Kenya to ensure that it is modernised,
relevant and harmonised with the Constitution of Kenya. With the Constitution promulgation in 2010, the Commission has an additional mandate of preparing new 
legislation to give effect to the Constitution. The third mandate is found in the County 
Governments Act 2012, which requires the Commission to assist the county governments in 
the development of their laws.

The State Law Office (Office of the Attorney-General) and CIC are two of the major 
partners of KLRC in the law reform process. Under the Sixth Schedule the Commission is to 
coordinate with the AG and CIC in preparing, for tabling in Parliament, the legislation and 
administrative procedures required to implement the Constitution (Section 6 (b) of the Kenya 
Law Reform Commission Act.) In respect of other legislation, the Commission mainly 
compliments the work of the Office of the AG, Ministries, Departments and Agencies (MDAs) 
and Parliament as it is the State Agency that links Government’s policy making 
and legislative processes.

Costing

Major issue especially with all created institutions. Must be realistic on costing. But their 
lack in no way should be used to detract from the utility of the constitutional provision 
requirement.

Recall Clause

Article 104(1) state that the electorate under Articles 97 and 98 have the right to recall the 
Member of Parliament representing their constituency before the end of the term of the 
relevant House of Parliament. This is subject to provisions in the Elections Act section 45.

The electorate in a county or constituency may recall their member of Parliament before the 
end of the term of the relevant House of Parliament on any of the following grounds: -
• is found, after due process of the law, to have violated the provisions of Chapter Six of the Constitution;
• is found, after due process of the law, to have mismanaged public resources;
• is convicted of an offence under this Act.

This shall only be initiated upon a judgement or finding by the High Court confirming the grounds specified; and initiated 2 years after the election of the member of Parliament and not later than twelve months immediately preceding the next general election.

A recall petition shall not be filed against a member of Parliament more than once during the term of that member in Parliament. A person who unsuccessfully contested an election under this Act shall not be eligible, directly or indirectly, to initiate a petition.

Section 46 provides for the process for Recall. It shall be initiated by a petition which shall be filed with the Commission in writing signed by a petitioner who is a voter in the relevant constituency or county and was registered to vote in the election in respect of which the recall is sought; and accompanied by an order of the High Court. The petition shall:

- specify the grounds for the recall as specified under section 45 (2);
- contain a list of such number of names of voters in the constituency or county which shall represent at least 30% of the registered voters; and
- be accompanied by the fee prescribed for an election petition.

The list of names shall contain the names, address, voter card number, national identity card or passport number and signature of the voters supporting the petition and shall contain names of at least 15% of the voters in more than half of the wards in the county or the constituency, as appropriate. The voters supporting a petition shall represent the diversity of the people in the county or the constituency as the case may be.

The petitioner shall collect and submit to the Commission the list of names within a period of 30 days after filing the petition. The Commission shall verify the list of names within a period of 30 days of receipt of that list. A notice to recall is issued to the Speaker of the relevant House if the Commission is satisfied that the requirements are met within 15 days after the verification.

The Commission shall conduct a recall election within the relevant constituency or county within ninety days of the publication of the question.

A member of Parliament who has been recalled may run in the by-election conducted after their removal. A recall election shall be valid if the number of voters who concur in the recall election is at least fifty percent of the total number of registered voters in the affected county or constituency.

Parliament has indeed made it very complicated to remove an MP with a very high threshold is very high. This constitutional provision has been emasculated.

Safe seats and the Two Thirds Gender Rule

The current Parliament has failed to comply with the two-thirds gender rule despite the allocation certain seats to women. To meet, the criteria, it would require a ratio of 117 to 232. The Senate is even worse requiring 23 out of 67 be held by women. Only 18 were allocated to women and not a single woman was elected in as a senator to get the extra 5 required to attain the threshold.

County Assemblies perform much better because Article 177(1) provides that a county assembly consists of the number of special seat members necessary to ensure that no more than two-thirds of the membership of the assembly is of the same gender.
In contrasting experiences of safe seat v. competitive seat, the advice is that both are necessary. The safe seat provided an avenue that would otherwise never have been opened to women. This should then be used to advocate for more opportunities for women that enable them to compete for open seats against the men and other women.

2.2 Meeting with the Commission for the Implementation of the Constitution (CIC)

The team was led by Commissioner Philemon Waisaka.

*Sierra Leone CRC Overview, Issues, Concerns, and Comments*

- Review the reviewed Constitution
- Learnings on processes
- Challenges of implementation
- Ins and outs for 2010 Constitution
- Strategies used to address early challenges
- Resources
- Permanency of a CIC
- Relationship with other government bodies - CIOC, KLRC, CIs.

The *Commission for the Implementation of the Constitution Act 2010 (CIC Act)* established the CIC in 2010 with the following mandate and functions (Constitution Sixth Schedule Clause 5(6) and CIC Act section 4):

1. Monitoring, facilitating and overseeing the development of legislation & administrative procedures required to implement the Constitution.
2. Coordinating with the Attorney General (AG) and Kenya Law Reform Commission (KLRC) in preparing and tabling to Parliament the legislation required to implement the Constitution.
3. Working with each Constitutional Commission to ensure that the letter and spirit of the Constitution is respected.
4. Providing quarterly progress reports to the Parliamentary Select Committee and the President detailing achievements, impediments and recommendations to and on the implementation of the Constitution.
5. Monitoring and overseeing the effective implementation of the devolved system of government effectively.
6. Exercising such other functions as are provided for by the Constitution or any other written law.

The Constitution extends the Commission’s mandate to monitoring the actual observance of the Constitution by various actors under Chapter 15 Articles 248 to 254 on Constitutional Commissions and Independent Offices. This is elaborated by Article 249(1), which sets the objects of the Constitutional Commissions, namely to: protect the sovereignty of the people; secure the observance by all State organs of the democratic values and principles; and promote constitutionalism.

Though the Commission’s mandate is extensive, the Commission is not a direct implementer of the Constitution but works with other public institutions to ensure that the letter and
spirit of the Constitution is respected. This means that the impact of the Commission mandate is to ensure that Kenyan’s aspirations as captured in the Constitution is realised. But the actual execution is the responsibility of other institutions, including other Constitutional Commissions, and the Commission’s work is to facilitate, monitor and oversee their roles.

The Commission consists of a Chairperson and eight (8) Commissioners with experience in public administration, human rights and government. The Commission has a Secretariat headed by the Chief Executive Officer (who is also the Commission Secretary. Each of the Commissioners is a co-convenor of the Commission’s thematic areas, which cover the entire Constitution and oversee a cluster of counties to provide effective monitoring in the country.

**Constitution’s Unique elements**

- Sovereignty - individuals have a right to assert this on their own
- Devolved units
- Bill of rights broad
- Pronunciation of national values
- Implementation mechanisms - legal and political
- Creation of Independent implementing institutions

**CIC Work Process**

Draft Bills emanate from 3 sources. These are referred to CIC from KLRC. CIC opens up the draft legislation and encourages public participation. The draft reviews the:

- constitutionality
- technical soundness
- conflict
- public participation

of a given legislation.

Report progress of CI and its impediments quarterly.

Monitor implementation and effectiveness of the devolution system

Article 249 acting with other CC, protect sovereignty of the people and secure constitutionalism

Oversee the application and adherence to the constitutional values by public officials - governance, ethics, morality, integrity,

The Commission has structured itself into 8 thematic areas to effectively facilitate, monitor and oversee the implementation of the entire Constitution. These are the following each led by a Commissioner:

1. **Land and Environment** - This has the responsibility of coordinating Chapter Five of the Constitution activities relating to land and environment.
2. **Judiciary and Constitutional Commissions** – This coordinates Chapters Ten and Fifteen of the Constitution that deal with the Judiciary and establishment of Constitutional Commissions and Independent Offices respectively.
3. **Executive and Security** - This coordinates the implementation of Chapter Nine of the Constitution on the executive and Chapter Fourteen on security.
4. **Legislature and People** – This coordinates Chapter Seven of the Constitution on representation of the people and Chapter Eight on the legislature.
5. **Devolved Government** - This coordinates the implementation of Chapter Eleven and the Sixth Schedule Section 15(2)(d) of the Constitution, which deal with devolved government. This involves ensuring that the two levels of government work together for effective devolution and ensuring a system of sound foundation.

6. **Bill of Rights and Citizenship** - This coordinates activities dealing with human rights and citizenships as found in Chapters Three and Four of the Constitution.

7. **Public Service and Leadership** - This coordinates the implementation of Chapter Six of the Constitution on leadership and integrity and Chapter Thirteen on public service.

8. **Public Finance** - This guides and coordinates the implementation of Chapter Twelve of the Constitution on public finance.

### CIC Success

- Reviewed laws
- Elections undertaken
- News structures & systems of governance
- Citizen awareness and involvement
- Intervention in the case of violations - AG, DPP & Solicitor General appointments reversed; Failure to gazette institution of NLC.

### Challenges

- Resistance to change from parliamentary members.
- Disregard for the rule of law.
- Power struggles - among parliamentarians, devolved structures
- Impunity - disregarding court orders
- Delays - transfer functions
- Lack of understanding of the constitutional requirements
- Civic education minimal

**Advice** – **Independent Commissions are important to avoid dependency on the political class and Parliament’s goodwill.** In addition, define the role of the new Commission and be very explicit on the job to be done. Fourth Schedule defines each government function and creates a body. Cap 15 sets up oversight bodies providing security of tenure, appointment and firing, and provides constitutional protection.

**Provide a timeframe for a CIC that makes sense** - Kenya provided 5 years or earlier. But now needs more time. CIC - a transitional body that began discharging its functions in late 2010. Are currently seeking extension in Parliament.

**Relationship with CIOC, KLRC, CoE**

CIC must work with KLRC (AG) that assists the Executive draft and develop legislation. Contrast with CIOC. CIC does day-to-day work to assist Parliament’s CIOC to concentrate on oversight. Parliament generally receives periodic reports from all implementing actors; sets up the legislative agenda. CIC reports stop CIOC. The CoE reviewed and drafted the Constitution and it ceased to exist after its promulgation. The law bars a former member of CoE from being a member of the CIC.

The Transitional Authority – CIC of the opinion that it is too government top heavy which hampers their devolution work.
Advice - even as a representative of an interest, a CRC member should discharge functions professionally and impartially. The CoE represented no interest or political party. It was fully independent.

Ideally if the CIs did their work well, then a CIC would not be needed. Reality on the ground is that the amount of political negotiation carried out greatly curtails their work.

CIC oversees Parliament law-making functions

Composition

The socio-political context will determine a Sierra Leonean CIC membership. Kenya’s CIC has diverse professional background. This is mainly a positive but diversity also means it may take time to reach consensus. The public’s involvement helps the process.

Strategies of Operation

1. Organisation - determined their mandate and scope of work and were able to be sure what the implementing institution’s role was.

2. Determined what each of the implementers should do. A circular was developed and shared with the implementers, a sort of ‘Idiots Guide to Implementation’. This was sent from the President’s office

3. Within the Commission, designed work division by assigning each Constitution chapter to a Commissioner. A Commissioner takes lead and coordination on behalf of others, but it is not a solo effort.

4. Always presented a common position in public.

5. Developed statutes to guide the formulation and implementations of certain devolution provisions such as the Intergovernmental Relations Act.

6. Funds - provided by the Constitution and the Commission has even gone to court to assert this right. Parliament tried punishing Judiciary by denying funds stating “we’re going to teach them a lesson”. The donors supplement the government allocation.

7. Implementation is not mechanistic.

The implementation is not insurmountable provided the institution remains loyal to the Constitution and the people.

Advice - CIC or other arrangements? Consider Sierra Leone’s context because the main issue is not the body’s existence but the functions. Also the level of confidence the CRC members have in the country’s institutions. CIC has never asked for a permanent status, and does not intend to.

Finally, a rider - do not assume that having a CIC will deliver.

In sum

Give the professionals the job of implementation.
Chapter Four

LESSONS/RECOMMENDATIONS

1. General

1. People-centred - sovereignty of the people must be considered. The document must be by the people, and for the people. Kenya’s 2005 constitutional referendum defeat of the Wako Draft attests to this. It follows that the relevant constitutional requirements that people must be consulted at all governance decision-making levels must be included. This also means that public participation mechanism must be explicitly described in the constitution.

2. Length should not be deterrence, if clarity can be gained. It is very important to include everything the people want it even if it means the document will be long. Kenya considered the Constitution lengthy, so the Committee avoided details, which would have helped avoid the emasculation of certain constitutional provisions such as the Right of Recall (of non-performing MPs).

3. Simplify the Constitution. The Kenyan Constitution has been made very people friendly by the reduction of the technicalities and the Latin terms. This is the first step in inclusivity.

4. Must anchor the work of CRC in a legal framework. Kenya’s review bodies’ (both CKRC and CoE) success has been attributed to the robust legislation for the review process that governed institutions of reforms and the stages and actors for reforms. There was no ambiguity.

5. Provide for sufficient checks and balance among the three arms of government. Kenya feels like it did not provide for adequate Parliament oversight, which has seen the abuse and numerous attempts to contravene the Constitution by legislators.

6. The Constitution must address issues not personalities or administrations. Otherwise, this will limit the instrument’s utility.

7. Enshrine all the peoples’ requirements irrespective of a government’s current inability to deliver e.g. the economic and social rights. This is because once the rights and freedoms are in the Constitution, they become aspirational and there is no going back.

8. Civic awareness - Kenya at various stages of the review process benefitted greatly from having intense civic awareness initiatives. But, the country has also learnt to regret not creating a specific mandatory constitutional function among the independent commissions to inform the public on the constitution. The public ignorance of constitutional provision means that they rarely demand accountability from their leaders.

9. The document must be explicit and provide clarity. E.g. stating that all money must go to the exchequer but not outlining the consequences of failure to do so is dangerous. Definitions, definitions, definitions so that there is absolutely no doubt what the people intended. This means that mandates of institutions must be clearly defined to avoid the problems Kenya experience with respect to the land reform institution. NLC’s jurisdiction was not explicitly defined and the Executive has clawed back all NLC powers.
10. It is a fallacy to assume that an Independent Commissions will exercise power when given; yet the executive has residual power, which they can use to enforce their position. Thus must provide the independent commissions implementation and enforcement powers.

11. Devolution brought representation closer to the people by decentralising. Thus ensure that the devolved units are empowered enough but deter secession talks: that they are small enough to feel close but big enough to feel important; large enough to be viable and few enough to be representative.

12. Visionary leadership necessary for transformation.

2. Substantive Issues

2.1 Bill of Rights

- Establish standards for systems not persons.
- When gender equalisation is considered, Sierra Leone should aim for a 50% (like Rwanda) rather than 33% like Kenya did, which is proving extremely problematic.
- Prescribe in the Constitution the process of attaining say the 50% gender parity for all institutions. And provide the necessary mechanisms for women empowerment. Representation without empowerment creates a culture of dependency.
- Even if rights can only be enforced progressively such as economic, social and cultural rights, it should still be included in the Constitution.

2.2 Land and Natural Resources

Land

- Protection of property rights is essential.
- Ensure non-discrimination in access to land.
- Ensure clarity in the land tenure system created.
- Ensure clarity in allocating functions to land institutions.

Natural Resource

- To avoid exploitation – a requirement that ‘all natural resources contracts shall be made public’ in the Constitution would increase transparency with the wider scrutiny.
- Enshrine concept of sovereign bonds/funds to provide for the element of future generations.
- Public participation in the allocation of natural resources should be stated clearly in the Constitution. Kenya’s is not well defined, which means that the practice is primarily token and ineffective.

2.3 Governance

Legislative

- Provide adequate oversight over Parliament - in Kenya, Parliament was provided with powers to watch over other administration yet there is no commensurate powers to another entity to watch over Parliament particularly at the County assemblies level.
• If opt for two Houses, ensure a balanced distribution of that the functions between the two Houses.

Executive - If Sierra Leone considers the presidential system, then do include a deputy Cabinet Secretary.

Judiciary - Provide Judiciary independence particularly financial independence and judicial officers appointments to enable them freely exercise their authority.

### 2.4 Devolution/Decentralisation

• It is better not to have both a local government and a chieftaincy as different tiers of governance. The issue of three government levels must be addressed; otherwise it will become a tension point.

• Anchor essential decentralisation provisions in the Constitution and make them difficult to revert through political whim.

• Apply the principle of resources must follow functions.

• Invest in civic education to bring the citizenry along.

• Intergovernmental mechanism is a must for devolved system of government. Creation of intergovernmental structures has assisted the implementation as well.

• Functions to be transferred (devolved) must be stated in the Constitution, in numbers if necessary, and the timelines as well. Kenya has been grappling with this problem because the Constitution was not clear enough.

• Ensure realistic costing, not historical costing, for devolution functions and transfers.

• Phased devolution of functions should have been applied in Kenya for better implementation. Thus ensure that the provisions for transfer of functions are practicably time phased.

• Depoliticise function transfers - do not allow Parliament to allocate the devolution/transferring authority’s budget.

• Ensure include mechanism for devolving human resources – Kenya failed to provide for personnel transfer mechanism when functions were devolved.

### 3. Review Process

#### 3.1 The Review Body

• Must anchor the work of CRC in a legal framework. Kenya’s review bodies’ (both CKRC and CoE) success has been attributed to the robust legislation for the review process that governed institutions of reforms and the stages and actors for reforms. There was no ambiguity.

• Consider the type of constitution intend to produce and balance all the competing needs. Consensus building is important. If this fails, the people always know what they want.

• Drafting and thinking process should be done concurrently. It is not advisable to leave the drafting for later because draftspersons can change the intended meaning of a clause.
- Verbatim recording of discussions and the proceedings of every meeting is advisable.
- Methodology - Must have thematic grouping before can present to plenary when Committee is big. Also advisable to divide the issues for ease of work into 3 areas Agreed, Contentious and Resolvable Issues
- Engage the Public – In Kenya, all the information was publicly available and the CoE provided regular weekly updates. To defuse misinformation and propaganda, the Committee engaged the media and civil society to disseminate the correct information on the issues in the Constitution. Civic education comprised 70% of CoE budget.
- Must give justification or rationale and reasoning for any action and or position taken with respect to a provision/direction in the draft Constitution. This assists in future interpretation by e.g. the courts.

3.2 Review Process

- Public participation important for early buy-in. The citizens should be given an opportunity to actively, freely and meaningfully participate in generating and debating proposals.
- Provide ironclad rules of engagement. Kenya had strict and mandatory deadlines for each stage of the review, which meant that no single institution would derail the process for selfish reasons.
- The use of experts is critical. The involvement of foreign experts in Kenya meant that no suspicion would fall on the final document based on vested local interests. Also consider including foreigners in other critical stages where tension may be apparent.
- It is recommended that a Committee of Experts (CoE) type of body would be important in fine-tuning the draft document. Kenya’s drafting was hastened by fact of impartiality whereas interest groups’ positions change all the time.
- Simplify the document the people – Kenyan manage to reduce the Constitution to 28 pages but the Ideal is 15 pages.

4. Implementation Process

- It is important to have timelines for legislation and specific actions. The design of the Kenya’s Constitution of Kenya Review Act 2008 made the process self-propelling with strict timelines for deliverables and all organs responsibility clearly outlined
- Provide mechanism for Implementation in the Constitution – Kenya had a mandatory enactment failure to which leads to Parliamentary dissolution provision. The 5th Schedule provides that failure by Parliament to enact law within specified period; one can petition court for declaratory order, which triggers course for parliamentary dissolution by the President.
- Factor in the cost of transitional mechanisms, and the institutional framework with legal and constitutional backing necessary to facilitate implementation.
- To avoid Parliament regulating itself, the Kenyan Constitution created an implementing mechanism in the form of CIC to oversee implementation. However, it
failed to insist that CIC must conduct civic education, a fact that is hindering implementation. If adopt this route, include civic education.

- When providing transition clauses, do not leave them open-ended or make them vague or use vague language. Must state that it shall be done by 31st August 207 in very explicit language. No use of ‘ensure, oversight, monitor, advise, etc.’ without further defining and clarifying if they must be used.

- Change Management - Continuous capacity building needed to entrench change and change management strategies are needed to get support for the change.

- There is an assumption that the new laws created will be self-implementing. The Constitution must outline their implementation mechanism. In Kenya, practical implementation has been facilitated by the independent institutions – so must ensure these institutions are truly independent.

5. CRC Capacity Building

There is need for technical assistance to the CRC team in the following areas:

- The Sierra Leone Team had more issues raised than were answered during their discussion with Prof Yash Pal Ghai on the theory and practice Review Process and Constitutionalism to visit Sierra Leone and impart his experience and lessons to a wider audience. Visit should cover both geographic areas of former colony and protectorate. The CRC would like to have a transformative document and they need the Professor to explain to the people so that the CRC can get the populace buy-in.

- They team would also like to hold discussion with Senator Amos Wako (who was also the AG during the lifetime of Kenya’s Constitution Review period of 20 plus years) on the legal and political minefields to avoid.

- The CRC also expressed hope that the Kenya Women’s Caucus and Minority and Vulnerable Group representatives could extend additional assistance in circumventing the pitfalls they had experienced in the last 5 years. This includes gender mainstreaming clauses, the challenges and lessons they are learning in their attempt to implement the Two Thirds Gender Rule.

- The team has also been advised to use technical experts in the drafting of the final document to ensure that the people’s intention is captured in the final document, without being derailed by individuals with vested interests. As proposed by Kenya’s former review body, the team should include foreigners to inject impartiality to the document.
### Annex 1
Kenyan Officials Meeting Sierra Leone CRC Team

<table>
<thead>
<tr>
<th>NAME</th>
<th>DESIGNATION</th>
<th>INSTITUTION</th>
</tr>
</thead>
<tbody>
<tr>
<td>Miriam El Maays</td>
<td>Principal Secretary</td>
<td>Ministry of Lands, Housing &amp; Urban Development</td>
</tr>
<tr>
<td>Augustine Masinde</td>
<td>Director Physical Planning</td>
<td>Ministry of Lands, Housing &amp; Urban Development</td>
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<tr>
<td>Francis Ayoo</td>
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<tr>
<td>Ida Munene</td>
<td>Works Secretary</td>
<td>Ministry of Lands, Housing &amp; Urban Development</td>
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<tr>
<td>Ann Sondu</td>
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<td>Ministry of Lands, Housing &amp; Urban Development</td>
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<tr>
<td>Terry Gathagu</td>
<td>Head, Legal Services</td>
<td>Ministry of Lands, Housing &amp; Urban Development</td>
</tr>
<tr>
<td>Peter Kahulu</td>
<td>Lands Secretary</td>
<td>Ministry of Lands, Housing &amp; Urban Development</td>
</tr>
<tr>
<td>Mr Opiyo</td>
<td>Communications</td>
<td>Ministry of Lands, Housing &amp; Urban Development</td>
</tr>
<tr>
<td>Lady - deputy CEO</td>
<td>Deputy CEO</td>
<td>Kenya National Commission for Human Rights</td>
</tr>
<tr>
<td>Ranyangi Washington</td>
<td></td>
<td>Kenya National Commission for Human Rights</td>
</tr>
<tr>
<td>Dr Bernard Mogesa</td>
<td>Research and Compliance</td>
<td>Kenya National Commission for Human Rights</td>
</tr>
<tr>
<td>Patricia Nyaundi</td>
<td>Commission Secretary</td>
<td>Kenya National Commission for Human Rights</td>
</tr>
<tr>
<td>George Morara</td>
<td>Commissioner &amp; Vice Chairperson</td>
<td>Kenya National Commission for Human Rights</td>
</tr>
<tr>
<td>Susan Chibutsya</td>
<td>Commissioner (access to information law)</td>
<td>Kenya National Commission for Human Rights</td>
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<tr>
<td>Ms. Winfred</td>
<td></td>
<td>National Gender Equality Commission (NGEC)</td>
</tr>
<tr>
<td>Paul K. Kuria</td>
<td>Ag. Commission Secretary/CEO</td>
<td>National Gender Equality Commission (NGEC)</td>
</tr>
<tr>
<td>Jacklyn Wekesa</td>
<td>Ag. Head of Programme and Research</td>
<td>National Gender Equality Commission (NGEC)</td>
</tr>
<tr>
<td>Prof Muhammed Swazuri</td>
<td>Chairperson</td>
<td>National Land Commission</td>
</tr>
<tr>
<td>Abigail M. Mukolwe</td>
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<td>National Land Commission</td>
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<tr>
<td>Silas Kioni Murithi</td>
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<tr>
<td>Abdulkadir A Khalif</td>
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<tr>
<td>Dr. Samuel Tororei</td>
<td>Commissioner</td>
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<tr>
<td>Learned Omullo</td>
<td>Director</td>
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<tr>
<td>Bernard Nzau - Deputy Director - National Land Commission</td>
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<tr>
<td>Isaac Kamau</td>
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<tr>
<td>Amos Kasaire</td>
<td>ICT Head</td>
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</tr>
<tr>
<td>Francis Mugo</td>
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<tr>
<td>Wachira Silas</td>
<td>ICT</td>
<td>Ministry of Environment &amp; Natural Resources</td>
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<tr>
<td>Faith Tabu Pesaa</td>
<td>Legal Officer</td>
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<tr>
<td>James Konkoti</td>
<td>Director, Met Department</td>
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<tr>
<td>Eric</td>
<td>Director, Fee Registration</td>
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<tr>
<td>Paul Kereng</td>
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<td>Charity Chepkonga</td>
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<td>Atari Mugambi</td>
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<td>Wilson Busienei</td>
<td>Strategic initiatives</td>
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<td>Gideon Gathara</td>
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<tr>
<td>Mr. Isaac Kiva</td>
<td>Director, Renewable Energy</td>
<td>Ministry of Energy and Petroleum</td>
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<tr>
<td>Benson Mwakina -</td>
<td>Senior Superintendent Engineer</td>
<td>Ministry of Energy and Petroleum</td>
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<tr>
<td>John Gichuru</td>
<td>Secretary of the Energy Tribunal</td>
<td>Ministry of Energy and Petroleum</td>
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<tr>
<td>Najib Balala</td>
<td>Cabinet Secretary</td>
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<tr>
<td>Said Akhmane</td>
<td>CS advisor</td>
<td>Ministry of Mining</td>
</tr>
<tr>
<td>Mr Nodal</td>
<td>Deputy Director Geological Survey</td>
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<tr>
<td>Lillian Wanjama</td>
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<tr>
<td>Deputy Clerk – Michael National Assembly</td>
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<td>Principal Clerk - National Assembly</td>
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<tr>
<td>Dr Otiende Amollo</td>
<td>Commission Chair (Ombudsman)</td>
<td>Commission on Administrative Justice (Ombudsman)</td>
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<tr>
<td>Phoebe Nadupoi</td>
<td>Director, Advocacy &amp; Communications</td>
<td>Commission on Administrative Justice (Ombudsman)</td>
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<tr>
<td>Vincent Chahale</td>
<td>Senior Manager, Legal and Advisory</td>
<td>Commission on Administrative Justice (Ombudsman)</td>
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<td>Vincent Sarara Robi</td>
<td>Legal Officer - Commission on Admin</td>
<td>Commission on Administrative Justice (Ombudsman)</td>
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<td>Bobby Mkangi</td>
<td>Ex-Committee of Experts Member</td>
<td>Ex-CoE member</td>
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<tr>
<td>Hon. Njoroge Baiya</td>
<td>Chairperson, Constitutional</td>
<td>National Assembly</td>
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<tr>
<td>Hon. Mary Wambui</td>
<td>Implementation Oversight Committee (CIOC)</td>
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<tr>
<td>Hon. Humphrey Njuguna</td>
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<tr>
<td>Hon. Benson Mutura Kangara</td>
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<tr>
<td>Hon. Steven Kariuki</td>
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<tr>
<td>Hon. Christopher Omulele</td>
<td>Member, Constitutional Implementation Oversight Committee</td>
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<tr>
<td>Hon. Aramat Lemakanen</td>
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<tr>
<td>61 Hon. Rose Rwamba Mitaru</td>
<td>Member, Constitutional Implementation Oversight Committee (CIOC)</td>
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</tr>
<tr>
<td>62 Rana K. Tiampati</td>
<td>Prinicial Clerk Assistant</td>
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<tr>
<td>63 Donald Mangila</td>
<td>Research Officer</td>
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<td>64 John Mutega</td>
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<td>65 Eva Moricho</td>
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<td>66 Nerbert Ikai</td>
<td>Assistant Clerk</td>
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<tr>
<td>67 Sen. Wako Sitswila Amos</td>
<td>Chairperson, Senate Committee of Legal affairs &amp; Human Rights</td>
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<tr>
<td>68 Sen. Sang Stephen Kipyego</td>
<td>Vice Chairperson, Senate Committee of Legal affairs &amp; Human Rights</td>
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<tr>
<td>69 Sen. Mutula Kilonzo Junior</td>
<td>Member, Senate Committee of Legal affairs &amp; Human Rights</td>
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<td>70 Sen. Adan Dullo Fatuma</td>
<td>Member, Senate Committee of Legal affairs &amp; Human Rights</td>
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<td>71 Sen. Sijeny Judith Achieng</td>
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<tr>
<td>72 Sen. Hassan Omar Hassan</td>
<td>Convenor of the Sub-Committee on Human Rights, Senate</td>
<td>Senate</td>
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<tr>
<td>73 Mohamed Hassan Abdullah</td>
<td>Assistant to Chairperson, Senate Committee of Legal affairs &amp; Human Rights</td>
<td>Senate</td>
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<tr>
<td>74 Jacqueine A. Mogeni</td>
<td>CEO</td>
<td>Council of Governors Secretariat</td>
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<tr>
<td>75 Julius Ndenge</td>
<td>Resource Mobilisation</td>
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<tr>
<td>76 Laura Charles</td>
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<tr>
<td>77 Florence</td>
<td>CEO's Office</td>
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<tr>
<td>79 Prof Yashi Pal Ghai -</td>
<td>Katiba Trust - Former CRRC Chair</td>
<td>Katiba Trust</td>
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<tr>
<td>80 Kennedy Maasime</td>
<td>Executive Director</td>
<td>Centre for Governance and Development (CGD)</td>
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<tr>
<td>81 Gichira Kibara</td>
<td>Executive Director,</td>
<td>Capacity Development Institute</td>
</tr>
<tr>
<td>82 Okero Otieno</td>
<td>Democratic Governance Analyst at UNDP Kenya Office</td>
<td>UNDP Kenya</td>
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<tr>
<td>83 Kinuthia Wamwangi</td>
<td>Chairperson</td>
<td>Transition Authority</td>
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<tr>
<td>84 Mrs. Angeline Hongo</td>
<td>Vice Chairperson (Finance Committee)</td>
<td>Transition Authority</td>
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<tr>
<td>85 &quot;who&quot;</td>
<td>Public finance Head</td>
<td>Transition Authority</td>
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<tr>
<td>86 Mrs. Mary Ndeto</td>
<td>Member (Capacity and capability Development)</td>
<td>Transition Authority</td>
</tr>
<tr>
<td>87 Mr. Bakari Omara</td>
<td>Member (Assets and Liabilities and also Audit Committee)</td>
<td>Transition Authority</td>
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<tr>
<td>88 Dr. Dabar Abdi Maalim</td>
<td>Member</td>
<td>Transition Authority</td>
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<tr>
<td>89 Ms.Safia Abdi</td>
<td>Member (Civic Education and Legal &amp; Intergovernmental Committees)</td>
<td>Transition Authority</td>
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<tr>
<td>90 Mulei Muia</td>
<td>Head of Public Communications</td>
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<tr>
<td>91 Mr. Stephen K.Makori</td>
<td>Secretary/Chief Executive Officer</td>
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<tr>
<td>92 Philemon Mwaisaka</td>
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<td>93 Catherine Mumma</td>
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<td>94 Imaana Kibaaya Laibuta</td>
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<tr>
<td>95 Ibrahim M. Ali</td>
<td>Commissioner</td>
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<td>96 Joseph Kosure</td>
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<tr>
<td>97 Rose Macharia</td>
<td>Director of Management Services</td>
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<tr>
<td>98 Valeries Okumu</td>
<td>Senior Programmes Officer</td>
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<td>99 James Wagala</td>
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<td>100 Natasha Kimani</td>
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<tr>
<td>102 Jeremiah Nyakundi</td>
<td>Senior Programmes</td>
<td>Commission for the Implementation of the Constitution (CIC)</td>
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<tr>
<td>103 Nairimas Ole-Sein</td>
<td>SFSO</td>
<td>Ministry of Foreign Affairs &amp; International Trade</td>
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## Annex 2

**PROGRAMME FOR THE SIERRA LEONE CRC VISIT TO KENYA:**  

### Scheduled Meetings

<table>
<thead>
<tr>
<th>Date &amp; Time</th>
<th>Activity</th>
<th>Venue</th>
<th>Responsible Official</th>
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<tbody>
<tr>
<td>7:10am</td>
<td>Pick up from JKIA to Reata Apartments off Lenana Road</td>
<td>JKIA-Westlands</td>
<td>Focal person</td>
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<tr>
<td></td>
<td>Lunch with Consular and UNDP team from Sierra Leone in Nairobi</td>
<td>Lavington</td>
<td>Consular/Raymond</td>
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<tr>
<td><strong>Day 2: Monday 26 October, 2015</strong></td>
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<tr>
<td>7.30 am</td>
<td>Pick up from hotel</td>
<td>Venue</td>
<td>UNDP</td>
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<tr>
<td>8:30 -10:00</td>
<td>Meeting with PS-Lands</td>
<td>Lands Office 12&lt;sup&gt;th&lt;/sup&gt; floor, Community</td>
<td>Stella Kinyua</td>
</tr>
<tr>
<td>10.30-13.00</td>
<td>Meeting with Council of Governors Facilitator: Introductions of the CRC team to the Council</td>
<td>Delta House 2&lt;sup&gt;nd&lt;/sup&gt; Floor Boardroom</td>
<td>Rosemary/Sharon</td>
</tr>
<tr>
<td>13.00 -14.00</td>
<td>Lunch Break</td>
<td></td>
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<tr>
<td>14.00 -15:30 pm</td>
<td><em>PS Environment</em> – TBC: Facilitator: Introductions of the CRC team to the Council</td>
<td>5&lt;sup&gt;th&lt;/sup&gt; floor NHIF Building (Community)</td>
<td>Amb. Kandie</td>
</tr>
<tr>
<td>15:45-17:00</td>
<td><em>Nation Land Commission</em>– Facilitator: Introductions of the CRC team to the Council</td>
<td>Lands Office 12&lt;sup&gt;th&lt;/sup&gt; floor, (Community)</td>
<td>Ms. Jennifer</td>
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<td><strong>Day 3: Tuesday, 27 October, 2015</strong></td>
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<tr>
<td>7:30am</td>
<td>Pick up from hotel</td>
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<tr>
<td>8:00 am - 10.00am</td>
<td>Meeting with Kenya National Commission for Human Rights Facilitator: Introductions and Discussions</td>
<td>Lenana Road</td>
<td>Mr. Njoroje</td>
</tr>
<tr>
<td>10.00am-11.30pm</td>
<td>Meeting with Justin Mbundi- Clerk – National Assembly Facilitator: Introductions and Discussions</td>
<td>CBD-Parliament Buildings</td>
<td>Ms. OLesein-MFA</td>
</tr>
<tr>
<td>12:00</td>
<td>Meeting with Legal Committee Senate Facilitator: Introductions and Discussions and thereafter proceed for lunch with the team</td>
<td>CBD-Parliament Buildings</td>
<td>Mr. Mohammed</td>
</tr>
<tr>
<td>13:00 -14.00</td>
<td>Lunch Break with Senators</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Date &amp; Time</td>
<td>Activity</td>
<td>Venue</td>
<td>Responsible Official</td>
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<tr>
<td>14:30-16:30</td>
<td>Meeting with Kinuthia Wamwangi- Kenya Transition Authority</td>
<td>8th fl Extelcom house Haile Selassie street</td>
<td>Ms. safia</td>
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<tr>
<td>18:00-Late</td>
<td>Meeting with parliamentarian Committee @ Intercontinental Hotel-dinner</td>
<td>CBD-Intercontinental Hotel</td>
<td>Mr. Muthomi</td>
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Day 4: Wednesday, 28 October, 2015

<table>
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<tr>
<td>8:30am</td>
<td>Pick up from hotel</td>
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<td>UNDP</td>
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<tr>
<td>9:00 am</td>
<td>Meeting with PS - Ministry of Energy (Eng: Joseph Njoroge) Facilitator: Introductions &amp; Discussions</td>
<td>Nyayo House 6th Floor Boardroom</td>
<td>Martha Kimaru</td>
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<tr>
<td>10:30 am</td>
<td></td>
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<tr>
<td>11-12:30</td>
<td>National Gender &amp; Equality Commission (Chairperson Winnie Lichuma)</td>
<td>Solution Tech Place, 1sr Fl Longonot Road, Upperhill</td>
<td>Ms. Elizabeth</td>
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<tr>
<td>13:00-14:00</td>
<td>Lunch Break</td>
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<td></td>
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<tr>
<td>14:00-15:30</td>
<td>Meeting CS, Mining - Najib Balala Facilitator: Introductions and Discussions</td>
<td>Works Building, 6th Fl Community</td>
<td>Mr. Ogolla</td>
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Day 5: Thursday 29 October, 2015 Meeting with CIC & Civil Society

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<thead>
<tr>
<th>Time</th>
<th>Activity</th>
<th>Venue</th>
<th>Official</th>
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</thead>
<tbody>
<tr>
<td>9:00-11:00</td>
<td>Meetings with Civil Societies Members Yash Pal Ghai Kennedy Maasime Kibara Facilitator: Introductions &amp; Discussions</td>
<td>UNDP Board Room-14th Fl Anniversary Towers</td>
<td>Grace Mburu</td>
</tr>
<tr>
<td>11:30-13:00</td>
<td>Meetings with CIC Commissioners</td>
<td>CIC Offices, Parklands Plaza 3rd Fl, Chiromo Lane</td>
<td>Commission Secretary, Mr Kosure</td>
</tr>
<tr>
<td>13:00-14:00</td>
<td>Lunch Break in Karen</td>
<td></td>
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<tr>
<td>14:30-16:30</td>
<td>Meeting with Professor Lumumba and the Team</td>
<td>Kenya School of Law-Karen</td>
<td>Brenda</td>
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</tbody>
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Day 6: Friday 30, October 2015

<table>
<thead>
<tr>
<th>Time</th>
<th>Activity</th>
<th>Venue</th>
<th>Official</th>
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</thead>
<tbody>
<tr>
<td>9:00-11:00</td>
<td>Dr. Otiende Amollo: Chair- Commission for the Administration of Justice (CAJ)</td>
<td>Westlands</td>
<td>Maureen</td>
</tr>
<tr>
<td>18:30 hrs</td>
<td>Dinner with the Sierra Leone at Reata Apartments - Nairobi</td>
<td>Milimani</td>
<td>George/Lianne</td>
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</tbody>
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Day 7: Saturday 31 October 2015

<table>
<thead>
<tr>
<th>Time</th>
<th>Activity</th>
<th>Venue</th>
<th>Official</th>
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</thead>
<tbody>
<tr>
<td>2.00pm</td>
<td>Departure of the Delegates</td>
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</tbody>
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ANNEX 3
LIST OF LAWS

1. Constitutions and Constitution Review Laws
   1963 Independence Constitution
   1969 Constitution
   1991 Constitution
   2004 Bomas Draft
   2005 Wako Draft
   2009 Harmonised Draft Constitution
   2010 Constitution
   Constitution of Kenya Review Act 1997
   Constitution of Kenya Review Act 2008
   Constitution of Kenya Referendum Regulations 2005
   Constitution of Kenya Review (Referendum) Regulations 2010

2. Other Relevant Laws
   Access to Information Bill 2015
   Basic Education Act 2013
   Commission for the Implementation of the Constitution Act 2010
   Commission on Administrative Justice Act 2011
   Community Land Bill 2014
   Constitution of Kenya (Amendment) Bill No.143 of 2015
   Constitution Of Kenya Review Act 2008
   Consumer Protection Act 2012
   County Government Act
   Elections Act
   Energy (Local Content) Regulations 2014
   Energy Bill 2015
   Environment and Land Court Act 2011
   Environmental Management and Co-ordination Act 1999 (EMCA)
   Fair Administrative Action Act 2014
   Forest Conservation And Management Bill 2015
   Historical Justices Bill
   Intergovernmental Relations Act 2012
   Judicial Service Act
   Kenya Citizenship and Immigration Act, 2011
   Kenya Law Reform Commission Act 2013
   Kenya National Commission for Human Rights Act
   Land Act 2012
   Land Control Act
   Land Policy 2009
   Land Registration 2012
   Media Council Act 2013
Mineral contract must be ratified by Parliament when they surpass USD500 million.

Mining Act 1940
Mining Bill 2015
Nation and Reconciliation Accord Act
Paris Principles on Human Rights Institutions
National Gender and Equality Act 2011
National Land Commission Act 2012
National Police Service Commission
National Police Service (Promotion of Human Rights) Guidelines 2014
National Sovereign Wealth Fund Bill 2014
Natural Resources (Classes of Transactions Subject to Ratification) Bill 2015
Office of the Director of Public Prosecutions Act 2013
Petroleum (Exploration, Development And Production) Bill 2015
Petroleum Exploration, Development And Production (Local Content) Regulations 2014
Preservation of Human Dignity and Enforcement of Economic and Social Rights Bill
Public Finance Management Act 2012
Public Officer Ethics Act
Salaries and Remuneration Commission Act 2011
Supreme Court Act 2011
Traditional Knowledge and Traditional Cultural Expressions Bill 2015
Transition to Devolved Government Act 2012
Transition to Devolved Government Act 2012
Treaty Making and Ratification Act 2012
Two-Third Gender Rule Laws (Amendment) Bill 2015
Urban Areas and Cities Act 2011
Vetting of Judges and Magistrates Act 2011
Wildlife Conservation and Management Act 2013