Searching for a more perfect union?

Scenarios for Kenya’s Constitutional Referendum

Society for International Development
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The Society for International Development

The Society for International Development (SID) is an international non-governmental network of individuals and organizations founded in 1957 to promote social justice and foster democratic participation. Through locally driven international programmes and activities, SID strengthens collective empowerment and facilitates dialogue and knowledge-sharing worldwide. In addressing issues from a multi-disciplinary perspective the Society emphasizes systemic and long-term approaches with a central focus on institutional and social transformation. SID has over 55 chapters, 50 institutional and 3,000 members in 125 countries. Its secretariat is located in Rome, Italy and it operates a Regional Office for Eastern Africa based in Nairobi, Kenya.

Since 1998, working with local partners and through its national chapters in East Africa, SID has, through its East African Futures Programme, engaged a broad selection of East African policy actors in a process of reflecting on the possible alternative futures that the region might have to face. The process of scenario building has sought to create a better understanding of the structural dynamics shaping the region and the assumptions that key policy actors are grappling. The Programme sought to build common ground between the same actors that would enable them to find common points of engagement. The following publications have resulted from this process:

- 2000  Kenya at the Crossroads & the Kenya Scenarios Research Compendium (www.kenyascenarios.org)
- 2003  Tufafika Tanzania: Imagining our Future (www.scenarios.ws/tufafika)
- 2004  The Story of Uganda (www.scenarios.ws/uganda)
- 2008  East Africa Scenarios Project Research Compendium
- 2008  What do we want? What will we become? Imagining the Future of East Africa – The East Africa Scenarios to 2040

You can find more information on SID and its activities by visiting its websites at: www.sidint.net and www.sidint.org.
Acknowledgements

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The conversations that led to this publication were facilitated by Aidan Eyakuze, Arthur Muliro and Duncan Okello of the SID East Africa Regional Office.
On August 4, 2010, Kenyan voters will be called upon to cast their ballots to decide upon the fate of their future as a country – the country’s proposed constitution. This constitution has been a long time in the making. Thousands of hours have been spent debating what form it should take. Thousands of people have marched in the streets and taken part in all manner of demonstrations calling for a new constitutional dispensation. Many have been injured and some even killed in this quest.

Why the quest for a new constitution? Why has it been imperative for Kenyan’s to invest their energies searching for a new constitutional order? What forces have found it necessary to resist, delay and impede this search? The answers are many and varied, but there is convergence of views that the institutional character and behavior of the post-Lancaster House Kenyan state has outlived its usefulness. The rather prescient Kenya Scenarios Project (www.kenyascenarios.org) concluded that the institutional and economic model that the country adopted at independence had reached its limits. The social contract is in tatters and both the Kenyan state and society need thorough transformation. Kenya has had a very powerful state that has abused its power and authority at the expense of its citizens. Kenyans have continuously demanded that the institutions that govern their lives become more accountable, transparent and equitable in their actions. Kenyans hold the view that the structure of government and the practice of politics has marginalized, excluded, and even punished some communities and in so doing, has sharpened tensions within society undermined national cohesion. Our ethnicity has been abused to the extent that some amongst us now see members of other communities as enemies and not as co-citizens. In our search for security and opportunity, many of us have happily retreated to the womb, convinced that these are to be found in the native rather than the civic arena. We have become a republic of natives; rather than a republic of citizens and our regular appearances in the ‘failed states’ columns are indicative. Access to state power has benefited some immensely whilst others have suffered greatly at the hands of the state with seemingly no recourse to justice. Corruption seems incurable. The zero-sum nature of our politics has raised the stakes to the extent that there are almost no limits to the underhand practices that will be unleashed in attempts to capture and cling to power. In a zero-sum game no one can win without someone else losing,
and there is no attempt to create a good result for all. Kenya is increasingly fragile as various divisions multiply and gnaw away at the tattered fabric of national unity.

After the General Elections of 2007, Kenya stared into a deep, dark abyss when the speed and ferocity of the post-election violence shattered all myths of the country as a peace-loving nation. The violence was a dramatic demonstration of the frayed social contract – and our continued inability to renegotiate and renew it. From the edge of that abyss, we have begun to walk backwards to renegotiate those things that we hold essential to our nationhood. The constitutional referendum will be a milestone in this process. If approved, it will herald the beginning of a new institutional and governance architecture that will hopefully allow us to overcome our divisions and to focus our energies on strengthening our nation. However, if our political culture does not change to embody the spirit of the new constitution, we will not resolve the problems that we have set out to address. And if the constitutional draft is rejected, we will still need to find a way to heal our collective wounds and advance the national cause within the current constitutional framework. Most importantly, and regardless of the outcome of the referendum, the challenges that have accompanied us on our journey thus far shall not disappear. Indeed there will be new and additional burdens that shall test our capacity and patience to find lasting solutions and continue our walk together as one united nation.

Through this publication, the Society for International Development seeks to make a contribution to the debate as the nation approaches this critical moment in its history. The title of the publication ‘Searching for a more perfect union?’ echoes another nation’s founding document and encapsulates the challenge – and responsibility of this moment. The three scenarios that are presented seek to outline some of the conditions that Kenyans might face in the period immediately before and after the referendum. It is important to highlight that the scenarios are not predictions of what will happen but descriptions of possible futures that we, as Kenyans, might have to face. How we respond to these possible futures is much more important than assigning probabilities about what will happen. As this momentous date approaches, Kenyans should remember that their responsibilities do not end immediately after they have cast their ballots and the result is announced. It is our humble submission that the real challenges for us, as a nation, will begin after the result is announced and we must thus prepare for this new phase of the journey. The convictions, the passion and the integrity that we hold individually will need to find space and contribute to smoothing the contours of our jagged nationhood. Yes, there will be lions in the new and uncharted future we will be entering and the one thing we can least afford to leave behind is our courage.

Society for International Development
Nairobi, July 2010
Introducing Scenarios

We all think about the future. In a period of profound uncertainty, we try to imagine the impact of events – near and distant – on our daily lives, our institutions, on the choices that we make. There are no easy answers. Indeed, no one can accurately predict what will happen in the future. We can however learn to handle uncertainty. We can prepare ourselves to deal with outcomes we may neither anticipate nor wish for. This is where scenarios are useful. They help us to think about the future and to prepare for what might happen. Scenarios describe different paths into the future. They are tools to bring out people's thoughts and to help them think through different possibilities. They can be useful in helping identify what needs to be done to achieve a desired goal.

This booklet is the outcome of two days of conversations amongst concerned Kenyans which were facilitated by the Society for International Development. The forthcoming constitutional referendum raises new challenges for the country who implications and consequences need to be thought through. The stories presented aim to draw attention to and provoke conversations amongst Kenyans some of these issues. By so doing, Kenyans might begin to understand the forces shaping the politics around the referendum and imagining how they might want to respond.

But as the future is unpredictable, these scenario stories aim to:

- **Anticipate and influence change**: Scenarios help identify surprises and interruptions in trends. They highlight factors that are shaping Kenya's future. Through this revelation, scenarios can help major actors identify pitfalls, provide opportunities to chart new directions and provide long-lasting strategies to avoid being caught off-guard by unforeseen events.

- **Lead to new ways of thinking**: Scenarios encourage thinking beyond traditional approaches to problem solving. This new way of thinking can serve as a catalyst for radical change. These scenarios will bring a new dimension to ongoing discussions on the issues and challenges facing Kenya.

- **Reduce future risk**: The use of scenarios can help key actors in government; private sector and civil society groups better determine the outcome of certain actions before they are actually taken. In addition, by being able to recognize various signals, surprises can be minimized and the responses become more effective.

- **Help develop a common framework and language**: It is often very difficult to direct a focused vision in an entire country. The scenarios could provide a framework and language for handling complex conditions and options. Most importantly they can build and expand common ground that will be critical for Kenyans to find creative solutions to the challenges they face.
The events described in the scenario stories overleaf may never come to pass. Nonetheless, they might help us understand much more clearly some of the pitfalls on the road ahead, and allow Kenyans to find ways and means of negotiating the risks the country is likely to have to face before and in the immediate aftermath of the referendum. Various signals are highlighted in the stories and it might just happen that surprises are minimized and responses and action are made more effective.

Finally, it is hoped that the stories will help stimulate new ways of thinking beyond traditional approaches to problem solving, serving to break stereotypes and encourage radical as opposed to incremental changes. Remember, the stories are not predictions – merely sketches of a future Kenyans might have to face whether they like to or not.
A chronology of key constitutional change moments in Kenya since independence

<table>
<thead>
<tr>
<th>When?</th>
<th>What happened?</th>
</tr>
</thead>
<tbody>
<tr>
<td>1963</td>
<td>Kenya gains independence and adopts a multiparty parliamentary system where Jomo Kenyatta is installed as Kenya's first Prime Minister.</td>
</tr>
<tr>
<td>1964</td>
<td>Kenya abolishes the Prime Minister position and Jomo Kenyatta becomes Kenya's first President.</td>
</tr>
<tr>
<td>1964</td>
<td>Devolution principles (majimbo) and Senate abolished from Constitution</td>
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<tr>
<td>1964-1978</td>
<td>A series of constitutional amendments are instituted that strengthen the office of the President, abolish and emasculate key institutions such as the Senate, the Police Authority, other constitutional offices and dilute the Bill of Rights.</td>
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<tr>
<td>1982</td>
<td>Section 2(a) of the constitution is amended by Parliament. Kenya becomes a <em>de jure</em> one party state with ruling party, KANU (Kenya African National Union), as the only legal party in the country.</td>
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<tr>
<td>1991</td>
<td>Section 2(a) of the Constitution repealed under mounting pressure within the country and from the international community. Multi-party politics are one again possible in Kenya. This change introduces term limits to the Presidency.</td>
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<tr>
<td>1997</td>
<td>An Inter-parties parliamentary group (IPPG) agree to minimum constitutional reforms to facilitate the holding of the general elections and ease pressure for constitutional reforms.</td>
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<tr>
<td>2003-2005</td>
<td>Constitutional Conference known as the 'Bomas Process' results in the so-called 'Bomas Draft Constitution'. This draft proposes to transfer most of the powers of the office of the President (elected by the people) to the Prime Minister (elected by Parliament) in addition to introducing checks on executive appointments and radical devolution structure.</td>
</tr>
<tr>
<td>2005</td>
<td>The Attorney General, at the behest of the Government, publishes a counter proposal to the Bomas Draft. This document, ‘the Wako Draft’ is a slightly modified version of the current constitution. It preserves a centralized executive and does not address the questions of devolution that the Bomas draft contained.</td>
</tr>
<tr>
<td>Year</td>
<td>Event</td>
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<tr>
<td>2005</td>
<td>In a historic first referendum held in Kenya, the Wako Draft, which had been adopted by the government and presented to the voters, is rejected by a majority of Kenyan voters.</td>
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<tr>
<td>2007</td>
<td>Kenyans go to the polls to elect the 10th Parliament. The outcome of the election is contested and violence breaks out around the country. Kenya is at war with itself.</td>
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<tr>
<td>2008</td>
<td>In March 2008, following protracted negotiations between the two main political factions involving external mediators, the National Assembly of Kenya passes ‘The National and Reconciliation Accord Act’, a temporary change to the constitution and introduces the position of Prime Minister and two Deputy Prime Ministers.</td>
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<tr>
<td>2009</td>
<td>Parliament prioritizes constitution reform through Agenda 4. A ‘Committee of Experts’ is appointed to harmonize the various constitutional drafts proposed over the years and present a draft constitution to Parliament. The Committee completes its work in December 2009 and hands over its proposed draft to the Parliament.</td>
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<tr>
<td>April 2010</td>
<td>Parliament unanimously approves the Committee of Experts draft on April 1st after having failed to muster support from the floor to incorporate a series of proposed amendments.</td>
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<tr>
<td>May 2010</td>
<td>The Attorney General officially publishes the proposed constitution on May 6, 2010.</td>
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<tr>
<td>August 2010</td>
<td>The proposed constitution will be subjected to a nation-wide referendum on August 4, 2010. Voters will be asked to vote ‘yes’ or ‘no’ to the following question: “Do you approve the proposed new constitution?”</td>
</tr>
</tbody>
</table>
What are our hopes/fears as the present constitutional debate advances?

<table>
<thead>
<tr>
<th>Our hopes</th>
<th>Our Fears</th>
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<tbody>
<tr>
<td>• The new constitution will change everything for the better</td>
<td>• Centres of power will be reorganized; nothing will change as the old forces reorganize to recapture and stifle the reform process</td>
</tr>
<tr>
<td>• We are nearing the end of the constitutional project</td>
<td>• The church is being isolated</td>
</tr>
<tr>
<td>• We will establish a culture and system of accountability</td>
<td>• Ethnic interests are being disguised in the debate</td>
</tr>
<tr>
<td>• Beginnings of conversation on ‘Kenyanness’ and what it means to be Kenyan</td>
<td>• The debate is dishonest</td>
</tr>
<tr>
<td>• We can remake Kenya</td>
<td>• Extremist views are being legitimized</td>
</tr>
<tr>
<td>• The Coalition government will actually deliver a new constitution</td>
<td>• Our willingness to use hate and violence to win the day</td>
</tr>
<tr>
<td>• The margin for a ‘yes’ victory will be convincingly large</td>
<td>• There is an increasing tension between reason and faith</td>
</tr>
<tr>
<td>• No single group/person will be able to monopolize power again</td>
<td>• The decision will be based on ignorance</td>
</tr>
<tr>
<td>• Devolution will encourage positive competition as counties vie to be seen as performers</td>
<td>• We fear to disagree with one another</td>
</tr>
<tr>
<td></td>
<td>• We cannot trust each other to make the big, important decisions</td>
</tr>
<tr>
<td></td>
<td>• We may not be able to afford the changes we want to see</td>
</tr>
<tr>
<td></td>
<td>• Fundamental change is tough to bring about</td>
</tr>
<tr>
<td></td>
<td>• People might be forced to leave their homes</td>
</tr>
<tr>
<td></td>
<td>• We are just decentralizing bad governance</td>
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</tbody>
</table>
What is the new proposed constitution all about?

The Kenyan proposed constitution is one that has been crafted using the principles for uniting ‘deeply divided societies’. But its provisions also exhibit the conflicting nature of the soul of the nation – the aspirational, the pragmatic, and the conservative. In this sense, it speaks to the unsettled nature of terms of this new social contract thus acknowledging that the search for a more perfect union continues. It is the reason that it has provided for additional negotiations to be captured in resultant statutes. The big question that we face is how we might ensure stability in the country – taking into account the cultural fragmentations existing (ethnicity). Our ethnic cleavages make us vulnerable to political conflicts of different kinds. There are over 40 ethnic groups in Kenya, but only 5 of them constitute over 70% of the population. Three others constitute some 16% of the national population. In summary, 8 ethnic groups constitute about 86% of the national population.

This structure of ethnicity reflects itself in how political power has been accumulated, controlled and accessed. The centralized executive system has meant that competing for power is always going to be an intense process and that people will always form alliances to access this power since there is no group that is numerically superior to the other. This could lead to conflict as groups are obliged to form coalitions to outcompete others (which they then disown once they get to the power). The first-past-the-post electoral system means that the most important element of the political contest is mobilizing numbers to access power and not ideas that are transformational.

There are 4 principles that have been generally identified as a means to stabilizing fragmented societies such as that in Kenya. These are:

i) **Inclusive government** – In Kenya, a crude principle of inclusivity has been used since 1969, where other groups are deliberately included in government, but only recently did the inclusive government principle come into play in a constitutionally structured way – through the National Accord.. In India, where the country is divided along religious and caste lines for instance, the convention is that an attempt is made to recognize the differences in society within government as it is formed at all levels – whether through cabinet or other government positions.

ii) **Proportional representation** – An argument has been made that the people who are likely to be marginalized in the process of forming alliances can be taken care of through a system of proportional representation.

iii) **Devolution** – The notion of devolution recognizes regions where they are and that people have their own identity and the autonomy of the regions where they live. If one were to talk about ethnicity, this framework recognizes ethnic groups and suggests that they need to be given their own regions, as their aspiration and philosophy are very different from each other.

iv) **Recognition of minorities** – the minority right to veto what everyone else does.
Normally none of these principles are applied on their own. To what extent does the proposed constitution lead us to political stability? Since 1998, Kenyans have been struggling to find a constitutional dispensation that would lead to democratization of society, to accountability of public institutions and that would make the state and its representatives accountable to the society. To a very large extent, and in a very unprecedented manner, if approved and implemented properly, the proposed constitution will lead to political stability in many different ways. In many respects, the foundations for the four principles have been laid.

So what is new?

- **Protection for minorities** – the new constitution offers protection to minorities. The new rights regime and the electoral process proposed will usher in protections for minority groups.

- **The structure of governance is altered** – whereas patronage politics might not be eradicated, the limits to which patronage can be used to create loyalty to a particular individual are significantly altered. The new structure of governance undermines patronage and lends itself to the principle of inclusive government it is made much more accountable to society in different ways. Parliament for instance will debate the executive’s appointments to strategic public sector positions. Furthermore, there are many centres of power established and for the first time, Kenyans will not vote as they have in the past. They will be voting for many representatives: MPs, senators, counties, governors, civic leaders and the President.

- **Land** – has been an emotive issue in Kenyan politics and it has been used to represent different lacks within our society: political marginalization and minority rights. In agrarian societies such as ours, the structure of land ownership is equivalent to the structure of political power. The proposed constitution does not radically alter the structure of land ownership. It democratizes access to land and offers a series of principles in the land chapter that the politicians will have to negotiate subsequently.

- **Devolution** - People have an identity that is territorialized. Territory and identity are one of the same. The proposed constitution gives more developmental and administrative power to the devolved units of government (counties). Devolution transfers resource allocation powers to the counties but not real sovereignty on political issues – this is however limited. The amount of money the devolved governments will be dealing with is unprecedented – up to 15% of the national budget. They will have the authority and autonomy on how to use these resources.

- **The Bill of Rights** – the proposed constitution embeds the discourse of rights in an unprecedented manner. It promotes the social charter in a different way. Thus, if citizens are able to mobilize carefully, the right to development is embedded in the constitution. Rights become all-pervasive and can be demanded for by citizens through the courts.
In many respects, the proposed constitution is a hybrid formed of our aspirations as a people and our conservative nature. It tries to strike a balance between change and stability. In many respects, we can consider it to be a transitional document, a milestone in our search for a more perfect union as Kenyans. Yet, it makes certain bold proposals that may create the foundations for more profound changes in the future.

**Who benefits from a Yes/No victory?**

Much as the quest for a new constitutional order has preoccupied us of the past twenty years, it is not certain that the proposed draft will be approved. In our first ever referendum in 2005, Kenyans voted down an earlier draft constitution. It is clear that there will be winners and losers once a result is declared. Why? There are those groups and individuals who have benefitted immensely from the current constitutional order and its topography of power. Any rearrangements in how power is distributed might affect them negatively and so they are obliged to resist and undermine any such attempts to change the constitution. As such, the fight to resist a new dispensation is not only personal but also extremely passionate.

Our conservative nature is also at play. We are afraid of the future and what it might hold for us. Some of us prefer to remain within the boundaries of the familiar than to risk a journey into the unknown. Some of us are comfortable with what we have and see little reason for change. Some of us are ‘impunees’ – we have something to hide and good reason to fear that we might be held to account for our actions. We have also introduced new ‘non-negotiable’ issues to the debate – our religious precepts and how we think that they might be undermined by a new constitutional order.

Yet, and in spite of the above, some of us are still keen to rethink our country, Kenya. Questions of how we live together, how we relate to one another and how we make decisions that affect us collectively have challenged us to revisit and rethink our foundational document – the constitution.

So who wins and who loses? We have tried to map out some generic categories of groups and individuals that might – in the short-term – find cause to celebrate a ‘yes’ victory or a ‘no’ victory. It is by no means a definitive clustering and does not intend to imply that all the members of a particular category are rooting for one outcome or another. But nonetheless, it seeks to provoke us to think of what might be at stake for whom and which groups.
<table>
<thead>
<tr>
<th>'Yes' is good for them...</th>
<th>‘No’ is good for them...</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. President</td>
<td>1. Political class</td>
</tr>
<tr>
<td>2. Prime Minister</td>
<td>2. Parastatal heads</td>
</tr>
<tr>
<td>3. Women</td>
<td>3. Senior civil servants</td>
</tr>
<tr>
<td>4. Business elite</td>
<td>4. Provincial administration</td>
</tr>
<tr>
<td>5. Youth</td>
<td>5. Security sector</td>
</tr>
<tr>
<td>6. Muslim community</td>
<td>6. Local authorities</td>
</tr>
<tr>
<td>7. Trade unions</td>
<td>7. Foreign land owners</td>
</tr>
<tr>
<td>8. Agenda 4 commissions</td>
<td>8. Church</td>
</tr>
<tr>
<td>11. The East African Community</td>
<td></td>
</tr>
<tr>
<td>12. Teachers</td>
<td>11. Government contractors</td>
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<tr>
<td>13. Civil society</td>
<td></td>
</tr>
<tr>
<td>14. Kenyans abroad</td>
<td></td>
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<tr>
<td>15. Bi/multi-ethnic Kenyans</td>
<td></td>
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<tr>
<td>16. Junior civil servants</td>
<td></td>
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<tr>
<td>17. Traditional/old minorities</td>
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<tr>
<td>18. Professionals</td>
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</tbody>
</table>
What is inescapable?

No matter the outcome of the referendum, there are certain pressures within our society that we cannot avoid. There are demands for reform that are interacting with existing divisions within society. Most of this interaction is unhealthy – you have various groups in society that express a sense of inequality and injustice that is violating their deeply held norms and expectations. Opposing these demands are existing interests – of wealth or position. As most of this interaction is laden with friction, disagreement and conflict abound. As we look to the period immediately before and after the referendum, these are amongst the key driving forces that we shall have to contend with. We will either have to learn to live with and/or defuse this unhealthy interaction of forces.

So what are some of the inescapable that we must deal with?

- Divisions remain (class, ethnic, religion, region, political)
- Demands for reform remain (Agenda 4 issues: land, boundaries, historical injustices, national cohesion, electoral reform, constitutional reform, youth unemployment and inequality)
- The interests of the old order remain
- Displacement/demand for resettlement and migration
- Kenya’s importance in the region remains

What is uncertain?

When we consider those elements that are inescapable (above), we must recognize that as we are not in control of all the forces at play, we must prepare for uncertainty. There are many things we are unsure about, and how they will play out. Some of the questions we must ask ourselves are:
• What will be the size of the margin (fat or thin)?
• Will the vote count be smooth?
• Will the referendum takes place as scheduled?
• Will the 10th Parliament complete its full term?
• Will the transition to a new constitutional order be peaceful should ‘yes’ win?
• How strong will the popular demands for reform be should ‘no’ win?
• Will the referendum campaigns be peaceful?
• What new political alliances might emerge?
• What will the relationships between church and state; and church and society look like?
• How solvent are the finances of the country?
• Will Kenya remain intact?

One question about our future...

Faced with old and new pressures, we are going to vote in a referendum that could determine the future of this country. As we prepare to vote, we must ask ourselves one important question:

How might our votes affect the divisions in Kenya?

There are generally two possible outcomes from the referendum:

A majority of Kenyans, in spite of the efforts made over the last decades in the search for a new constitutional order, determine that the new constitutional draft does not offer them the changes they would like to see. We are determined that until we get a draft that fully satisfies and respects our ideas and values, we are better off with the constitution we have. The controversial questions around land, around the Kadhi courts and abortion have resonated with the majority of us. The ‘No’ vote carries the day. This is the ‘Hatutaki’ story.

Or we might feel emboldened by the steps we have made in the long journey to August 4th. We know and appreciate that the current draft offers us a new opportunity to reshape our differences and rethink how we relate to one another as Kenyans. The campaign to get to the referendum ballot box has been a difficult one but in spite of the issues raised by the ‘No’ camp, we are confident that those questions can be tackled once we have a new constitutional dispensation in place. A majority of the voters have ticked the ‘Yes’ box on the ballot. This is the ‘Ndoto’ (Dreamland) story.
But... and there is a but! We are Kenyans. Some of us love intrigue and mischief. There could be attempts to make sure that none of us, whatever our voting inclination, gets to have our say. Some amongst us are too scared to think of what might emerge from the ballot box. We think our interests ride supreme and refuse to bend to the will of the people. Through a combination of old-habits, the inordinate use of force to settle our disagreements and political skulduggery, some of us choose to create chaos and mayhem that spreads around the country and that forces the vote to be postponed or cancelled. This is the ‘Kula Vumbi’ story.

None of the stories described overleaf might come to pass. We cannot predict the future, but we can at least try to imagine it. The stories that we are presenting try to describe some of the events that might happen in Kenya over the next two years. As we have said before, some of them we will be able to control; others will surprise us. The challenge, as you read each of the stories, is not to try and ascribe a probability to it unfolding but rather to ask yourself what you will do; how you will respond if you found yourself having to live in the Kenya depicted by each of the three stories. What choices are you called upon to make? What are those things that you would like to achieve? What is it that you would like to encourage and what would you like to prevent and/or avoid?

As we make our rendezvous with destiny, we must remember that we all have a choice to make. Whether we vote ‘yes’ or ‘no’; whether we choose not to vote on August 4th, we are making a decision. And that decision will be a fateful one not just for us and our friends and families; but for the entire nation for one simple reason: we will determine which way our country turns and with that turn, there will be new challenges and new responsibilities that we will have to respond to.

We hope that the stories presented will help clarify some of these challenges and opportunities and will enable us to make our decision not in fear and not out of ignorance, but with confidence that we are making the best decision for our collective future as a nation.
Hatutaki!…

‘Hatutaki!’… ‘We do not want!’… Many of the ‘no’ campaigners used this word to declare their opposition to the proposed constitution. The objects of their discontent varied. Some were opposed to land reform; others bemoaned the absence of regional governments; others wanted the Kadhi’s Courts struck out, while other thought that the presidency created was still too strong. Many abhorred the insertion of the so-called ‘abortion’ clause. One word ‘Hatutaki!’ – had energized their campaign rallies. Their color was red In this story, the proposed constitution is rejected. It imagines the aftermath of the ‘no’ victory. What might happen around the country?

The Referendum came to an end. Kenyans turned out in massive numbers to have their say. The Interim Independent Electoral Commission announced the results of the referendum on schedule. This time, there were no issues, no hesitation as had been the case with the 2007 General Election. It was clear and unequivocal. ‘No’ votes had carried the day and the ‘No’ camp was euphoric and their margin of victory didn’t matter. Their supporters crowded the streets in various towns around the country. The placards that had been hoisted at the various rallies were once again visible. At their Secretariat in Nairobi, various leaders – drawn from amongst politicians and the clergy, explained why they had won.

The President and the Prime Minister immediately announced at press conference that he acknowledged the verdict and that Kenyans had chosen differently. Who knew what they – the Principals – were thinking. They had invested all their political capital to get the proposed constitution approved. They had gambled and lost. Was it the end of their political careers? Would they pull a rabbit out of the hat to resuscitate their political lives? In an attempt to regaining the initiative they announce their commitment to a new constitutional review process, with them still in office on the basis of the National Accord. But this is challenged and the authority of the two offices begin to be eroded.

Within the next few days, civil society groups had convened a series of events to bemoan the victory of the ‘no’. They insisted that this victory was tainted as it had been achieved on the back of a campaign filled with deceit, fear mongering and a misrepresentation of key facts. What moral legitimacy therefore could the ‘No’ camp claim? But this argument gets no significant political or popular traction, either locally or abroad. Within a week of the ‘no’ victory, it was clear that all was not right. The Cabinet was in disarray as Ministers who had backed the ‘No’ campaign were now openly calling for the Grand Coalition government to resign and pave way for a new election. After all, they claimed, it had failed to deliver a new constitution and thus no longer enjoyed a mandate to govern. The triumphant churches designated a national day.
of thanksgiving when they would hold special services. Some church leaders were now even talking of the need for them to permanently ensure that their gains were not lost. They would field candidates at the next election. Some of them would even run for elective office. But even as the church enjoyed this moment of victory, some within its ranks questioned this triumphalism and warned it not to misinterpret its role within society. But those who saw this victory as a divine sign drowned their voices out. A crack between the politically enthused Evangelicals and the more conservative mainstream begin to show.

However, the pressure for elections mounted. Whether it was from those politicians in the ‘no’ camp or the church or other activists, there was little else that was spoken about. ‘Will the president dissolve parliament?’ ‘Who will run at the next elections?’ – these were the questions that were on the lips of most Kenyans. Politicians regrouped and sought out new alliances in preparation for what seemed to be inevitable. Suddenly we seemed to have forgotten all the reasons why we went to vote for a new constitution. We were told that we needed to find consensus on ‘contentious’ issues. Civil society needed to ‘shut up’ as they were ‘confusing’ Kenyans. The ‘Yes’ team had made a serious mistake and therefore should step aside. All we had to do was wait and the new constitution would eventually come. When? No one dared to say. Certainly not soon. Tension in the country was running high and we had to wait for things to ‘calm down’.

An opinion poll published some months after the referendum sought to find out what Kenyans thought about the reform agenda. The sample size was quite large – unusually so, considering that we were used to samples that were about 2-3 thousand large. This one claimed to have some 250,000 respondents. It had to be credible. From this poll, we learnt that the public was fed up with the idea of continuing the reform agenda. Kenyans were not interested in another constitutional referendum. After all, the politicians would manipulate the outcome once again. Would they vote at the next election, when it was called? Again, a surprising result: they were not interested. Elections were like a circus, a distraction that did little to resolve their daily hardships.

Over time, people had disengaged from politics and other public institutions. Old vices such as corruption were on the upswing. Even the numbers of churchgoers seemed to stagnate – but the pubs seemed to be growing their client base steadily. The ‘No’ camp, which had been triumphant months earlier, had since splintered into different factions. There were those within it who worried by the growing sectarian divides in our society, had sought to make overtures to their opponents and to forge a new consensus around reforms. But they had faced strong and visceral opposition from within their camp and they had been unceremoniously ejected. If there was ever a moment Kenya needed leaders, it was now as virtually all our leaders were quarrelling amongst themselves.

After the vicious attacks on the legitimacy of the Kadhi courts, and a court ruling that had declared them unconstitutional in the current constitution, the uncertainty raises loud to violent murmurs from the largely Muslim areas of Kenya. ‘Can we continue to rely on the Kenyan
state to guarantee our basic rights? Are we not being gratuitously insulted? Is our calm and patience was being taken as a sign of weakness?‘

Talk was heard of seceding from Kenya. Maps were drawn and re-drawn to try and justify this move. Some encouraged it, thinking that they would have a ‘pure’ Kenya if this were to happen. Voices of restraint were faint.

Within the Rift Valley, land skirmishes seemed to be on the upsurge. People from other communities were leaving this province and seeking shelter elsewhere. Local leaders said that the ‘No’ victory had vindicated their view that land issues should be managed locally and that whatever historical grievances existed needed to addressed locally. Vigilante groups were harassing those whom they felt did not belong and repossessing their land.

What did the security services do? Oh... they were busy fighting fires all over the country. Whether it was dealing with land skirmishes or putting down sectarian riots, their hands were full. And they were tired. Even the Army was being deployed to do civilian duty. They too were questioning the point of it all – both at the command level, but also within the ranks. Something had gone terribly wrong.

In the face of confusion, indecision and uncertainty, investment dried up and capital fled... Those of us with foreign currency accounts were withdrawing our money and transferring it abroad. The Nairobi Stock Exchange index plummeted and the government bond yields were shooting up. The government was also having a hard time raising money on the markets – a major bond auction was massively undersubscribed and was cancelled. Kenyans crowded the visa sections of embassies as they sought visas out of the country. Our confidence in ourselves was flagging, or so it seemed.

What could the government do at this point? It was between a rock and a very hard place. It could try to reassert control. But would it succeed given its weakened authority and legitimacy? Or it could call an early election. But what would the outcome be given the prevailing uncertainty?

Hatutaki! We don't want! But what is it that we really wanted?

Key messages
1. Unless the character and tone of the pre-referendum debate is moderated it will exacerbate existing divisions
2. A dangerous rupture has been added to Kenya's existing divisions – religion
3. We should not take Kenya's territorial boundaries for granted
Ndoto

Ndoto... ‘The Dream’. For over two decades, Kenyans have been dreaming of a new constitutional dispensation in which government would be accountable to them; that we will have found a way to deal with our divisions in a way that is not harmful to our national unity. The proposed constitution was not perfect document, but many felt it offered major improvements over the existing one. It was a big first step towards changing Kenya for good. The colour of the Yes’ camp was green. But did this green symbolize new life? Or did it represent a deep naivety?

In this story, the ‘Yes’ vote triumphs. A majority of the voters have backed the new draft constitution. What happens next? How does the country respond to this momentous event?

The day the referendum results were announced we were all very tense. The campaign had been long and hard. Even divisive. The week before the referendum, the last polls to be published had indicated that the referendum was headed for a dead heat. It would be a tied vote. Nobody wanted this result as would plunge Kenya into another period of uncertainty. So when the Interim Independent Electoral Commission announced the victory for the ‘Yes’ vote, everybody was relieved. The margin of victory was slender. It wasn’t overwhelming... but it wasn’t a razor edge victory either. What mattered is that the majority of the voters had said ‘Yes’. The ‘Yes’ camp, led by the Principals began their celebrations, thanking Kenyans for their trust and telling us that a new day had dawned for the country.

The ‘No’ camp grudgingly accepted the result. They had been beaten by a margin that could not justify any challenge of the result. So they changed tack and pointed out that the size of the ‘No’ constituency indicated that there was justification for continued negotiations on the more contentious issues in the new constitution. Fundamentalist church leaders decided to dig in and resist. They claimed to have a mandate that was not subject to earthly powers. Their stand on abortion and the Kadhi courts was non-negotiable. It was either all or nothing. Their shrill pulpit protests on Sundays were startling. One preacher declared that Satan had captured the state and that he had a divine mission to redeem it. Judging by the attendance numbers, such messages resonated with a very large number of Kenyans.

The media was also reporting that minorities were being harassed in some parts of the country, particularly where there had been majority ‘No’ votes. Some lives were lost in skirmishes and people began to migrate to ‘safe’ zones as they were not sure of what would happen next. The memories of the 2007 post-election violence were still fresh. The security services frequently had to create buffer zones between communities and escort convoys of women and children to secure zones. As TVs flashed images of people moving out of their homes, other leaders begun to ask if this is what a new constitutional dispensation meant.
Even as all of this was happening, new political alliances were being increasingly evident. Politicians who had been sworn enemies months earlier were now seen sharing tea in public. They began to talk of how the new political order was going to improve development; how Kenya would now finally join the East Asian tigers and so on. It was dizzying how fast people could change their viewpoints. Some called for elections to be held immediately so that the new governance system could be implemented to reduce the uncertainty that the transition period was causing.

Other politicians filled the airwaves with warnings of impending doom and gloom. The forced displacements of people were proof positive that perhaps we were better off under the old constitution, they said. Yes, it had issues, but there was no need to throw it out completely and wade into unknown waters.

It was a period of confusion as many things were happening at different levels. But it was also exciting – many of us had the feeling that we were creating something totally new that would serve our interests well. We saw new leaders emerge and declare their intention to compete for the new positions created in the counties. Other well-known figures from our political caste reinvented themselves and jumped into the fray.

As new institutions began to take shape, the press reported on the huge difficulties that they faced in coping with various bureaucratic challenges. The old guard it seemed was not ready to roll over and play dead so easily.

The national government was devolving as fast as it could. The demands from the counties were growing and they were impatient to ‘get on with it’. The 2011-2012 national budget had the largest expenditure estimates in Kenya’s history in order to pay for the new constitutional dispensation. But with limited scope to raise tax revenues it was also the largest budget deficit the country had seen.

The government announced that it would approach donors and tap the financial markets to bridge the gap. It could not be closed. The global economic crisis continued to bite and donor countries were continuing to deepen their own austerity measures. The financial markets were also demanding a high price for their funds. Facing a serious cash crunch, government was forced to start negotiations with the county governments about scaling back its commitments to them.

The financial constraints to the implementation of the new constitution caused significant tensions within government. On the one hand, the national government was keen to deliver on the provisions of the new constitution but the reality of the cost was beginning to sink in. How could it survive?
County governments were also under pressure. They needed to deliver development but the lack of resources from the national government was causing them no shortage of problems. A blame game escalated as each pointed fingers at the other. Some suspected that that opponents of the new constitutional order were playing mischief from within the bureaucracy.

Within the counties, new identity groupings emerged as what had previously been united ethnic groups began to fragment as sub-ethnic interests. Ironically, this new reorganization of identities revealed common interests that cut across counties. No one had really envisaged this, but surprisingly these new interest groups were actually working to reinforce national unity as their interests were no longer local per se.

Kenyans were also very excited about their new Bill of Rights. In a flood of new court cases, individuals and groups sued the government for its failure to uphold the Bill. This vibrant demand for the fulfillment of citizens’ constitutional rights was exciting, and expensive. What was the cost of all this litigation?

Parliament was also very busy. Its agenda was dominated by land issues as entrenched interests sought to undermine the reform spirit contained in the new constitution. They wanted to ensure that land legislation was weak and that the National Land Commission was toothless.

The debate around county boundaries was also quite spirited as the various counties sought to influence the process of drawing the definitive boundaries. The Executive also had to deal with an activist parliament who constantly challenged its appointments to constitutional offices in confirmation hearings. It seemed that the clash between old and new interests played itself out in the National Assembly.

However, something fundamental in Kenya had changed. Our politics seemed slightly more mature and issue driven, but it had also assumed a much harsher edge to it. Cultural and value questions were increasingly visible in politics. We now had candidates for office who stood on cultural platforms and sought to block progress on questions of abortion and sexuality for instance. Political positions based on religious faith were much more overt and these continued to test the secular nature of our state. County governments began to compete against each other to attract investment and to promote development. Some Kenyans abroad returned as they saw opportunities to contribute to the development of the counties.

Was the ‘ndoto’ too rosy? Did it ignore the true cost of living with the new constitution? Probably but Kenya was moving ahead. In spite of all the challenges, it seemed to be on the path to becoming a better place for all its citizens.
Key messages
1. The major challenge of the new constitution lies not in getting it, but in implementing it.
2. Healing our divisions and building Kenya and is a permanent work in progress.
Kula Vumbi

‘Kula Vumbi!’ – bite the dust! Not everyone is happy with the idea that there might be a change in the constitution. The current constitutional order serves them very well, and any change must be resisted and defeated. Even getting to the ballot box is a risk that cannot be taken as - the ballot box might deliver an unfavourable result. So, the best strategy is to make sure that the referendum on a new constitution is postponed, preferably indefinitely. But does their strategy work as planned? Can Kenya survive it?

In this story, a Kenyan who lived through this period recounts their experiences.

Looking back to 2010, we should be thankful to be even having this conversation. As a country, we went through events that we hoped we would never have to live through again – not after the 2007 post-election violence. In June 2010, we all knew that things had to change in Kenya. We were happy that after so many years, so much bloodshed and missed opportunities, we would get to have a say – our say – on what constitution we preferred. We knew that we were unlikely to agree on everything. But still, we had hoped that we would have a chance to begin to renegotiate amongst ourselves, what priorities we wanted to pursue as a nation. Perhaps we were naïve; perhaps we were tired after such a long process of haggling over this document.

The government decreed a period of campaign for the proposed constitution. Those who were in favour were assigned to the green camp, and those against, the red camp. Kenyans took to the road with enthusiasm. The campaigns were passionate – particularly those opposed to the draft. But apart from the usual campaign theatrics that we were used to, everything seemed to be going well. Until that Sunday...

At first when the news reports came in of an explosion at the ‘No’ rally in Uhuru Park, many of us thought it was an exaggeration, and an over-dramatization of a small event. How we should have known differently. By the time the sun rose the following day, the death toll from the grenade attacks at the Uhuru Park rally stood at six, with a dozen others grievously wounded in hospital. That was the beginning. After a period of apparent calm, the rhetoric started rising towards a frenzy. The language used at rallies was increasingly coarse. There were clashes between supporters of rival camps. As the referendum date drew closer, leaders were criss-crossing the country pushing their side of the debate. Then it happened again...
At one of these major rallies, a prominent leader was taken out. For a while it was uncertain what had happened. Was it an explosion? Had the dais just collapsed and trapped him beneath? An initial period of confusion was followed by a news blackout. But text messages made it impossible to hide what many feared. A national leader had been killed.

As the news spread around the country, people began to assemble spontaneously. What began as whispers rose into a shout. No! It is a conspiracy. Our leader has been killed. Why? By whom? What for? Riots broke out in various towns. The violence was visceral and uncoordinated. People seemed to be taking out their anger on anything that moved. Cars were overturned, shops set alight. Looters took advantage of the chaos and begun to fill shopping carts with whatever goods they could load onto them. The police were caught flatfooted. Initially, they tried to use non-lethal means to break up the demonstrators but in one town, a police contingent was cornered by a segment of demonstrators. They turned their assault rifles on the crowd and killed dozens of demonstrators. The police became fair game as demonstrators engaged them and other security services in running battles.

As the country crept towards anarchy, politicians began to call for the referendum to be postponed until calm could be restored. Others suggested that it was vital that a full consensus be attained on the content of any new proposed constitution. The existing one was, as far as they were concerned, dead in the water. Church leaders bemoaned the violence and others suggested that the violence was a sign of divine retribution for straying from the righteous path.

The coalition government tottered on the brink as leaders traded accusations on who was to blame for the violence. The split within the coalition solidified into a stalemate. With the government issuing contradictory orders that nobody was obeying, it was evident that nobody was in control. A state of emergency was issued and martial law declared. The military was now running the country – or so we were told. But even the military was unable to hold its own as tensions emerged along ethnic fault lines and in some zones, soldiers were deserting their positions. Skirmishes and conflicts were the order of the day. Communities considered to be ‘alien’ were being ejected as the drive to create ‘ethnically pure’ enclaves accelerated. The national leaders were reinventing themselves as local warlords. The Red Cross reported large population movements towards Kenya’s southern and western borders.

By this time, it was clear that there was going to be no referendum. It was no longer possible to organize polling amid the chaos. Even if people had wanted to vote, the extent of population displacements meant that very many people were no longer close to where they had registered to vote.

The international community were taken by surprise. After the rapid evacuation of foreign staff from Nairobi, they made endless calls for calm, sometimes laced with an occasional threat of sanctions and diplomatic isolation. But it was obvious that no one was willing to step in.
and stop the anarchy. Diplomats initially came to Nairobi for talks. Then after a period they stopped in neighbouring countries from where they conducted their diplomacy. Kenya had become too dangerous for them.

We thought we were going to have a referendum, but we bit the dust. We lost it all. I’m not so sure that even those who wanted to obstruct change were able to gain from it. The Kenya we knew was no more…

**Key Messages**

1. The pre-referendum campaign period is a very dangerous period for the country
2. But even more dangerous is not having a result
3. Vigilance, vigilance, vigilance! The Interim Independent Electoral Commission must be functional and be able to function unimpeachably; heavy investment must be made in the security of the principals; Kenyans’ must beware of manipulation