TRAINING REPORT

TRAINING OF THE NATIONAL CONSTITUTIONAL CONFERENCE DELEGATES FROM PASTORALIST AND HUNTER-GATHERER COMMUNITIES

17-18 October 2002
NAIROBI

Hosted by:
Centre for Minority Rights Development (CEMIRIDE)

Supported by:
International Labour Organization, Project to Promote ILO Policy on Indigenous and Tribal Peoples; and
Minority Rights Group International (MRG).
ACKNOWLEDGEMENTS

First, the PHGEMN on behalf of the Indigenous Peoples of Kenya, would like to thank the Project to Promote ILO Policy on Indigenous and Tribal Peoples (ITPs) and Minority Rights Group International (MRG), for accepting to support this Seminar, and specifically, Ms Marianne Jensen, the Project’s Chief Technical Advisor and Chris Chapman, MRG’s International Advocacy Officer.

While the Constitution of Kenya Review Process stands suspended due to the dissolution of parliament to pave way for elections, it is still our hope that it will be put back on track immediately elections are over.

We thus look forward to the National Constitutional Conference to which this particular training was targeted. That this National Constitutional Conference did not proceed does not necessarily mean that the review process has reached its end of the road – it is the hope of all and sundry that the next parliament, just as the immediate one, will exhibit alacrity in ensuring that Kenyans are allowed to establish proper administrative structures that are a pre requisite for any good and democratic governance, the only political environment known to spur growth equitably, in ant given society.

Secondly, our appreciations go to Constitution of Kenya Review Commission for the encouragement and advice that it has accorded us during the whole period of our participation in this process. It must be singled out that this went a long way in ensuring that the principle of participation, which leads to ownership of the outcome of any process such as this one, was greatly enhanced by the review commission, through its flexibility and being available at all times, even under very short and inconveniencing notices. And for this, without any shadow of doubt, the Commission has done Kenyans proud.

To the Institute of Economic Affairs (IEA), and more specifically Betty Maina, the immediate former Executive Director, and Duncan Okello, the Programmes Coordinator, we say thank you for being with us all the way since the beginning. We must reiterate that without your support both technical and financial, much that was achieved would still be on the drawing board. It is our hope, therefore, that the relationship that evolved as a result of this process will forever remain for the mutual benefit of both organisations.

Panos Eastern Africa (PEA) and specifically Dr Sarah Osiya, the Pastoralist Programme Coordinator, must be singled out for accepting to financially support the media part of this whole project. That the media are a very important factor in achieving recognition across the board of society is a fact that needs no belabouring. It is within this context that we find the contribution of PEA, geared towards production and publication several articles to inform the participation of indigenous peoples in the review process, very welcome, and we hope that finally, we shall continue with this relationship as a review for accepting to support this initiative technically.

To the Pastoralist Parliamentary Group (PPG) and specifically Hon David Ekwee Ethuro (Secretary) we hope that you will continue working with us till the end of the Review Process. It is important to note that the visibility that was created by the parliamentarians was very important in legitimising the concerns of the indigenous peoples of Kenya. It is thus our hope that with the new parliament, this relationship will be enhanced.

Appreciations also go to all the organisations, which were involved in this initiative, The Northern Nomadic Forum (NNDF), The Maa Pastoralist Council (MPC), the Sengwer, and The Ogiek Peoples National Assembly (OPNA) including all other organisations at the grassroots level that took part in this initiative or which participated in their own ways to promote the voice and aspirations of indigenous peoples in the review process.

Lastly, to all members of CEMIRIDE staff, including Adam Adam, O’lendo Owino, Ms Jane Kithuka, Sinzole Minade and Ochong’ Elly Oreyo for enabling the success of this project, through the period of its existence to date.

The analysis and recommendations contained in this report and its annexes reflect the views of the workshop participants, and do not necessarily reflect those of the organizations with which they may be associated, or those of the ILO.
I BACKGROUND

By Nyang’ori Ohenjo, Secretary, Pastoralists and Hunter-Gatherers Ethnic Minorities Network

The process of the informed participation of indigenous peoples in the Constitution of Kenya Review Process (CKRP), started in 2001 with the November National Conference after which a series of other activities, consultations and follow up processes at the national and grassroots level.

The review process is divided into two distinct phases. The first phase was the collection and collation of views from Kenyans, with the result being a draft constitution. The second phase will involve debate on the draft constitution, culminating in the national constitutional conference, with representatives from all stakeholders participating, to refine the document, and pass it over to parliament to enact it.

During the first phase, the main activities of PHGEMN were consultative meetings throughout the communities, geared towards ensuring informed participation during the collection of views phase. Additionally, from the views collected during these meetings, the PHGEMN, as mandated by the November 2001 Workshop was able to come up with a draft memorandum to be presented to the CKRC. This memorandum was debated, refined, and adopted by representatives of the communities, during a National Conference held in July 2002 and was presented to the CKRC on the 15th of July 2002.

It must be noted here that this achievement was due to the concerted efforts by the Pastoralists and hunter-gatherers ethnic minorities network, the regional networks, individual organisations and the Pastoralist Parliamentary Group. That this process to this time, was able to achieve the synergy of the inputs of the various groups, and hence the achievement of the informed participation initially sought, is something that merits commendation.

The abridged report of the proposed constitution is already out and in circulation. After going through this report, it can be said that most of the proposals that the members of the pastoralists and hunter-gatherer communities gave have been given due consideration. The report acknowledges the fact that there was uniformity in views given to the commission, by members of the pastoral and hunter-gatherer communities across the country, from the local levels, regional levels to the national level.

The foregoing this means that the objective of this project, to ensure informed participation and uniformity of views with regard to the needs and aspirations of the PHG communities was largely met.

As it is, the draft document can be said to be one that has largely, addressed the concerns of the PHG Communities. If passed as it is, the new constitution it will ensure the recognition, respect and protection of members of indigenous communities in Kenya. It must be mentioned though, that while there is not direct mention of 'indigenous Peoples' in
the report, there is an explicit recognition that group rights are important and will be protected under the new constitutional dispensation. Further, the new document places an obligation on the government that will come to power to ensure ratification of all pending international treaties that are of relevance to Kenyans, within a year of the new constitution. Thus, even if the draft document may not mention ‘indigenous peoples’ the ratification of the ILO Convention 169 for instance, is still the will of the pastoralists and hunter-gatherers who have participated in this process.

As Kenyans prepared for the next phase, the debate of the draft, it was and still is quite apparent that there still exists some resistance to some of the proposed changes, and especially those pertinent to indigenous peoples. It was thus important that representatives of the PHG Communities at the constitutional conference be able to lobby and defend the draft proposals that are pertinent to them, and for new ones that will make their position even more secure.

This required that the representatives of these communities be taken through the document so as to understand it thoroughly, and be trained on their rights. The fact that we were able to convince the Review Commission to take our proposals seriously was no mean achievement. There was, however, danger that left to their own, these recommendations could still be struck out at the National Constitutional Conference.

Not many people who represent the PHG communities will be at the Conference. For instance, the PHG EMN has been allocated only one observer position through the Special Interests provision, while other members of the Network went through the Districts and the NGO Council.

In view of the foregoing, it became apparent that a training Seminar for the representatives of the PHG Communities and some of the MPs be organised as a matter of urgency with the main goal being to ensure that the representatives of these communities will be properly equipped to lobby and defend the interests of the PHG Communities during the national Conference.

The Specific Objectives of the two day training that was carried out in October were;

1. To analyse the draft Constitution, and alienate areas that will still be of concern, with a view to try and introduce some changes, especially with regard to the term ‘indigenous peoples.’
2. To equip the participants with lobbying skills so that they can effectively lobby for changes that will be of benefit to the PHG Communities.
3. To equip the participants with lobbying skills to enable them defend the gains already achieved in the draft constitution by engaging other stakeholders to support the recommendations made by CKRC.
II SUMMARY

As already mentioned, this training seminar was objectioned at equipping the delegates targeted with the necessary skills to not only enable them defend the achievements of the draft constitution with regard to the proposals made by members of minorities and indigenous communities in Kenya, but also, to be able to single out areas that needed improvement in the draft, and lobby for the changes, to enable a more effective protection and promotion of minority and indigenous peoples’ rights in Kenya through a proper constitutional dispensation.

During collection for views, the Constitutional of Kenya Review Commission (CKRC) was urged by the indigenous peoples in their memorandum that it should recognize the fact that Kenyans generally, and indigenous communities and minorities in particular, have suffered historical injustices.

1. Human Rights abuses;
2. Forced Displacements from their ancestral lands;
3. Discrimination in many areas of their lives; and
4. Exclusion in the decision-making process especially in the areas that directly affect their lives.

Specifically, members of these communities told the commission:

a. That the current Constitution does not address the specific situations, characteristics and needs of Indigenous peoples. This explains why they are the most impoverished and disadvantaged groups in Kenya.

b. That the current Constitution of Kenya recognizes people only as individuals; not as communities. This arrangement is not fair to PHG communities and minorities who view themselves fundamentally as such in the first instance. Hence, there is need to strike a balance between the place of the individual and that of the community.

c. That Constitutional provisions and laws relating to land are inherently biased against traditional/customary land rights and/ or interests of these peoples. Further, that the thrust of official policy has been to systematically replace communal systems of land tenure with individual land tenure in utter disregard of the unique lifestyle of pastoralist and hunter-gatherer communities and the negative consequences engendered thereof. This constitution should as a consequence guarantee effective protection of the rights of ownership and possession of the ancestral lands of PHG communities, in terms of Article 14 of ILO Convention 169 of 1989.

d. That certain unfettered constitutional provisions have undermined communal property rights.

They thus called on the commission to be informed, when coming up with the draft, to be informed by the international standards of human rights that promote and protect minorities and indigenous peoples.

It was, therefore, a great achievement to notice that the basis of the draft constitution under debate were the international standards which call for the principles of consultation and participation for the enhancement of good governance and protection as well as promotion of minority and indigenous peoples rights.

However, after going through the whole document that is the draft, it becomes apparent that some of the provisions that indigenous peoples and minorities specifically called for were not incorporated. Given that there are various other interest debating the draft, it was, therefore, the feeling of the PHG EMN that there was an urgent need to ensure that proper skills are passed on to the delegates who will represent these groups at the National Constitutional Conference that was to be held October/ November 02.
At a glance, therefore, these were the outcomes (proposed changes) of the training seminar.

1. In the preamble, the racial diversity should be recognised.

2. The representatives of ethnic groups to avoid double dominance of both the lower and upper houses by some ethnic groups should constitute the upper chamber of parliament.

3. The Mixed Member Representation (MMP) should be done away with as it does not achieve the representation of minorities, indigenous peoples as well as other vulnerable groups. Instead, there should be provision that these groups elect their own representatives.

4. To attain the proper representation of women, the three district women representatives should be elected on a separate roll.

5. There should be functional clarity between the village, location and district administrations, bearing in mind the cultural orientations of diverse ethnic racial groups.

6. The District should be the focus of legislative authority in the devolved structure.

7. There should be established District Civil Service Commissions.

8. The Village Councils should be renamed Ujamaa Councils to be more accommodative of all the Kenyan diversities.

9. Individuals should be barred from holding more than one elective positions of whatever nature.

10. The Bill of Rights should be strengthened to specifically protect minorities, indigenous peoples and other vulnerable groups. The draft provision that all other rights not included are also protected is not strong enough.

11. A clear distinction of between the application of group and individuals rights should be given, especially with regard to the institution of marriage.

12. With regard to Article 237 (i) constitutive guidelines for the National Land Commission are required; they should represent the diversity of Kenyans as far as possible.

13. With regard to Article 239, there is need to further empower communities to manage and exploit natural resources within their lands or with very strong symbiotic partnerships with the State and or Private developers. Moreover, there is need to define the extend of “relevance” and “repugnancy” and set mechanisms for determining the same, and under which conditions.

14. The provision that Kenyans can live anywhere is in direct conflict with the assertion that land belongs to Kenyan people, which assertion seeks to restore community land ownership rights. It thus needs qualification.

15. Article 232 (2) should be strengthened to provide for a stronger role for communities with regard to land matters.

16. With regard to implementation of Article 232 (6) (c), there should a strong provision for exhaustive and participatory consultation.

17. There is need for constitutional provision to ensure protection of the environment in areas that are occupied by refuges, and provision for enactment of legislation to this effect, as a matter of urgency.
III DAY ONE: 17TH OCTOBER 2002

3.1 Keynote Address

By PLO Lumumba (Secretary CKRC) Represented By Samuel Wanjohi

Ladies and Gentlemen, I would like to thank you for giving me this opportunity to be with you during this very crucial moment in your lives. I must say that I am very pleased to be with you, as you deliberate and debate on the draft constitution, and I believe and hope that we shall finally come to consensus, as Kenyans, on the way forward. As you prepare, therefore, for the most important stage of the review process, the National Constitutional Conference, it is the commission’s wish that you give due attention to the areas that you believe are of concern to you, but within the context of promoting unity in diversity. In leading you through, I have delineated four areas that I believe are of importance to this process, and to the process of critiquing the constitution. These are the stages of the review itself, the general principles in the draft, citizenship, and some concerns of Kenyans so far. I believe that this will assist you, as you sit through this process of preparing yourselves for the conference, and debating this document.

1. Constitutional Review Process included:
   a) Civic Education
   b) Gathering of views
   c) Collation of views
   d) Preparing Draft Report/ Bill
   e) Public Debate-One month
   f) National Constitutional Conference
   g) Parliament
   h) Presidential Accent
   i) New Constitution

2. General Principles, Values and Goals: Chapter 3 Article 14
   1) National goals, values and principles apply to all.
   2) Republic to promote national unity and nationalism.
   3) Recognize diversity of people and promote cultures of communities.
   4) Based on principles of democracy and promote participation of the people in public affairs.
   5) Ensure open transparent government.
   6) Eradicate corruption.
   7) Access of people to independent, impartial and competent institutions of justice.
   8) Political parties to observe principles and avoid violence and bribery.
   9) Promote role of civil society.
   10) Commitment to respect, protect and promote human rights and fundamental freedoms and enhance dignity of individuals and communities.
   11) Ensure fullest participation of women, persons with disabilities and marginalized in political, social and economic life.
   12) One third of members of all elective and appointive bodies be women.
   13) Recognise special responsibilities that state, society and parents have on children and ensure material and moral well-being.
   14) Committed to social justice and to providing basic needs of food, shelter, clean water, sanitation, education, health, clean environment and security.
   15) Promote equitable development.
   16) Promote sustainable management of environment.
17) Committed to international peace and solidarity.
18) President to report once a year to Parliament and nation on measures taken to advance national goals, values and principles.

**Article 15 - Duties Of Citizens**

- a) Acquaint themselves with provisions of the new Constitution and propagate its ideals and objectives.
- b) Uphold and defend the Constitution.
- c) Vote
- d) Work for common goals and national development.
- e) Develop their abilities to the fullest.
- f) Contribute to advancement of the country.
- g) Foster national unity and live in harmony.
- h) Promote democracy and rule of law.
- i) Promote family life.
- j) Protect and safeguard public property.
- k) Co-operate with law enforcement agencies.
- l) Protect environment and conserve national resources.
- m) Desist from corruption.
- n) Understand and enhance Kenya’s place in the international community.

3. **Public Concerns/ Comments (Nandi District As An Example)**

- a) Unlimited terms of service for Prime Minister and Cabinet.
- b) Presidential age limit/ caveat.
- c) One-third electoral and appointive positions for women.
- d) Differences between President and Prime Minister.
- e) Ninety mixed member proportional representation seats.
- f) High cost of proposed structures and Commissions.
- g) Elected non-executive President/ reduced presidential powers.
- h) Tribal recognition of minority groups – tribal codes for Terik, Dorobo, Njemps e.t.c.
- i) Dissolution of Parliament before enacting new Constitution.
- j) Public understanding/ awareness/ education on new Constitution.
- k) Recall of Members of Parliament/ Councilors.
- l) Why not create majimbo as requested?
- m) Court cases against the Commission by lawyers and judges.
- n) Differences in the Commission.
- o) President no being a member of a party – is it practicable?
- p) Preamble missing struggle for independence.

4. **My Passion for Action (PLO Lumumba)**

I am filled with joy in my when I stand up to share with you what I consider as ‘PASSION FOR ACTION’ for ones country. It pains me a lot to imagine that one can desert his/ her country in times of great need. It reminds me of the biblical Simon Peter who deserted and declines to be associated with Jesus Christ when it dawned on Simon Peter that grave consequences would befall him if he were to do so.

I am not surprised that this is the general tendency of human beings but I am sad that my fellow countrymen have started this practice of dangerous limits.

Kenyans are fond of talking about sharing that national cake but nobody talks about baking the cake. I do not believe that it is fair and just that one should reap where he/ she has not sown. As a famous Swahili saying goes “Mtaka da mvunguni sharti ainame.”
Let us pose for a second and share together the late John Kennedy’s spirit of patriotism or “passion for action.” The late John F. Kennedy to those who do not know him was a former President of the United States of America from 1960 to 1963. He was a person of great zeal and charisma. I assume that he was fed up with his fellow countrymen who waited to reap where they have not sown when he said, “Ask not what your country can do for you but what you can do for your country.” Please allow me to echo the same words before you today.

You as the delegates, what can you do for this country? Assume that Kenya is a boat that is sinking, due to percolation, will you participate in its sealing or will you run away to save your soul.

Those delegates who will run away to save their souls are not the kind of people one may call patriots. Patriotism is love, devotion and commitment to one’s motherland.

Am sure you are familiar with the book of John in the New Testament where he states, “For God so loved the world that He gave His only begotten Son that whosoever believeth in Him shall not perish but have everlasting life.”

Let us embrace the spirit of sacrifice and devotion. I will be the happiest man on earth to learn that Kenyan delegates have sacrificed their soul for the sake of their country.

Let us be faithful to our country’s destiny and always strive to leave it a better place than what we found it.

Let us emulate the charisma of August Caesar who said, “He found Rome of stone and left it of marble.”

My dear friends and fellow countrymen, this is the message that I bring to you today.

Embrace it wholeheartedly and our country will flourish, give it a dear ear and we will absolutely perish.

Thank you.

3.2 Devolution of Power

By Okello Duncan, Programme Coordinator, Institute of Economic Affairs (IEA) Kenya

The debate regarding the devolution of power in Kenya sought to critique the structure of the executive government in relation to the need of enhancing public participation in decision-making processes. Central to this concern was the place of internationally recognized principles regarding the broadening of public participation for achieving good governance and respect for human rights.

The discussant argued that the Draft Constitution provided a dual devolution structure where the Prime Minister and the President form focal points of the Executive. The President is expected to have a running mate during elections, who becomes the Vice President on election. There is also expected to be a cabinet under the Prime Minister, of no more than 15 and which cabinet is to be nominated by the Prime Minister appointed by the President with the approval of parliament.

The position of the draft as indicated was appreciated the provision that Ministers be non-MPs. This, Okello argued, would enhance effective execution of tasks assigned to them. The realisation of a professional governing machinery at this level received unequivocal approval.
Okello pointed out that while there seemed to be consensus on the rationale for the draft’s provision of the upper house the methods of constituting the same failed to achieve this objective. In fact, it was noted that the argument that the upper house would protect minority rights and interests of minorities and other vulnerable groups, may be acceptable except for the exact way in which this could be done.

The fear here was that equal number of representatives drawn from each district to constitute the upper house would still not protect the rights of marginalized communities, minorities or vulnerable groups: A province like Central Province would have more representatives as to carry the day in the processes in the upper house. In short, dominant communities still had more districts than minorities and hence affirmative action will not have been achieved if the districts were used as the basis of constituting the upper house.

It was thus proposed that direct representatives of ethnicities constitute the upper house towards ensuring that the upper house rids itself of the majority factor.

**Grassroots governance**

According to the discussant, the locational government should be seen as the basic unit of governance. However, as also appreciated by the participants, the draft’s position on this unit was weak in various respects:

* Principles of arriving at leadership at the village council were lacking.
* Draft is silent about power and authoritative relationship between the locational council and the locational administration.
* There was lack of definition of the relationship between those elected by people on the one hand and by members of the council on the other.
* There was no clear delineation of the role(s) of political parties during such electoral processes.
* There is lack of information or guidelines regarding the relationship between the professionals at the district level with the civic leaders.

In view of the foregoing, several proposals were agreed upon.

1) The need to introduce or provide functional clarity between the leadership at the village level and district level. This should be tied to the need of providing guidelines for institutional relationships.
2) It was agreed upon that while there was need to provide guidelines and definitions that would go into consolidating clarity of administrative relationships and units, peoples’ cultural orientations still needed to be borne in mind.
3) The District level was seen to be the focus of the legal regime. That all legal and procedural instruments will be promulgated at this level regarding matters that arise within the district.
4) The need for a District Civil Service Commission to oversee the setting up and maintenance of civil service in the district.
5) Amongst the issues related to leaders at the locational and district level, remunerations was cited as an area of concern. That since the draft does not provide guidelines regarding this issue there was need for this provision.

The question of whether politics should be a payment job with a salary and pension, or voluntary was hotly debated. Consensus in the end pointed to the fact that to ensure efficiency, there was need to make the job salaried and pensionable. Another issue tied to this is the nature of their salary. There has been a growing consensus to improve the remunerations as to make it attractive to better-qualified and educated personalities.

**The Village - does the concept portray inclusiveness?**

What would probably be seen as a sticky issue was whether the term ‘village’ as used in the draft to refer to the most basic unit of governance was relevant. It was the realisation of the discussion that the concept of a village
was pegged upon the sedentary based populations; and that the geographical implication of the term as regards nomadic populations would give it a totally different picture. This is based on two assumptions; one that most pastoralist populations are spread out over large tracts of land. The density levels are extremely low in comparison with areas that are sedentary. For instance, the population of Embakasi constituency in Nairobi is 100,000 people, compared to that of Turkana District, which is only about 19,000, with three constituencies.

The discussion settled on the term Ujirani councils loosely seen as ‘neighbourliness’ as the relevant approximation of what would be seen as the basic unit of governance.

One of the participants, Keifa Kiprono Chemwor, expressed worries regarding the strength and functional necessity of the provisioned regional government. He argued that the preoccupation with the district as the focal point of power had its own problems. He saw the need to strengthen the regional government based on the value of homogenized attributes to safeguard interests of people; that in order for the districts to be secure there was need to give it the protection of a stronger regional regime. He exemplified the 1963 Lancaster Majimbo Constitution as the best case for protecting districts.

The general response to the above position was that the substantive reasons to devolve power to the districts encapsulated the vision of empowering the people at the grassroots, as this was the only way to enhance participatory democracy. Again, since the focus of the PHGs was to ensure proper enfranchisement of the communities it would be defeatist to shift powers to the region whose administrative decisions would probably contradict the wishes of the people on the ground.

The latter point brought into sharper focus the recommendations of the draft constitution regarding the provincial administration. This is especially true with the tentative provision that the provincial council is made up of the members of the district councils; the foreseen problem here would be the tendency for overlapping of membership, where the district executive may be the provincial executive.

The participants, therefore, proposed that one should only be allowed to opt for a given leadership role at a single level or tier; for instance the district or province. This, they argued would help avoid a case where a person would be a locational, district and provincial executive at the same time.

This proposition would help create job opportunities, at the same time enhance or expand the floor of public participation and procure efficiency. This is as opposed to a case where a district administrator once again elevated to the level of a provincial administrator becomes the overall leader of other district administrators. On the other note, this would avoid a case where there evolves a crop of power brokers capable imposing decisions upon the people on account of their cumulative power ascriptions or duplicated authorities.

In the same spirit of cultivating the culture of efficiency between the politicians and the professionals at the district level, the participants proposed the establishment of District Civil Service Commissions. These, it observed would liaise with the public service commission at the centre to ensure proper performance of the execution and service of the staff at the district level. This would call for proper mechanisms of enhancing sound institutional relations between the two.

3.3 Bill of Rights

By Nyangori Ohenjo, Media and Advocacy Programme Officer, CEMIRIDE, and Secretary, Pastoralists and Hunter-Gatherers Ethnic Minorities Network (PHGEMN)
The overall aim of this session was to establish the extent to which the draft constitution responded to the critical issues of historical injustices and the general international human rights obligations by the government.

The discussant, observed that there were a good number of favourable provisions in the draft with regard to minority and indigenous peoples’ welfare. However, most of these provisions were nullified by claw-back clauses provided within the same draft. Seemingly, the left technically withdrew provisions made by the right hand.

A number of examples cited included the provisions that indigenous languages are taught in schools. This provision, it was claimed, needed further qualification. For instance, the Asians may not directly benefit from such a provision since their languages may not be defined as “indigenous.” For this matter, it was thought that some qualification that would include the phrase “to those communities finding this favourable,” or as the case might be.

It was also proposed that a definition be appended as to what these indigenous languages are. This is to avoid transgression of other peoples’ rights. For instance providing ethnic rights to indigenous peoples while at the same time trampling upon the rights of other sectors of the national society. Basic to such a definition would be the clear recognition of a peoples’ traditional way of life.

Article 29 (2), it was noted, did not provide in its manner of expression a clear idea of protection for the rights of minorities and indigenous peoples in relation to the provision of rights. While in Article 29 (3) (b) there is a provision for all the other rights not covered in the constitution, and that therefore the rights of minorities and indigenous peoples could be protected under this provision, it was felt that this was a weak provision. There was therefore need to clarify by way of inclusion that:

‘The rights and freedoms set in the Bill will include those of minorities, indigenous peoples, marginalized communities and other vulnerable groups.’

The same case would apply to Article 213 (a), (b), (e), (i) which delineate the general principles and objects of devolution to be giving powers of self governance to the people at all levels by allowing participation of people and communities and also strengthening national unity by recognizing “diversity”. For instance, Article 213 (1) (i) sets out, as one of the principles of devolution, the protection and promotion of the interests and rights of minorities and disadvantaged groups, while these rights are not protected in the Bill of Rights.

While it was the consensus of the participants that the provisions in the Bill of Rights were in line with international expectation, there were reservations, however, in that the draft did not entrench these rights by way of linkage, and hence denying the minorities and indigenous peoples their source of life and identity – land. As is the case, indigenous peoples’ are identified by their maintenance of a separate culture, which is clearly linked to their particular ways of using land and natural resources.

In consideration of the underprivileged status of pastoralists and hunter-gatherer alongside other minority groups, the draft, it was observed, needed to recommend strong affirmative action as not only a correctional facility but also as an emancipator. This would go towards legitimising its claim to being a document truly inspired by democratic principles where equity and unity form the core of its principles. A confirmative action is seen here as a restitutive facility that is temporary.

**Cultural and Individual rights**

Participants observed the need to strike a clear presentation of the relations between individual and cultural rightist was noted that while for instance ILO Convention 169 gives due attention to cultural and individual
rights, however, it was not clear one superseded the other in the case of inheritance laws in the Kenyan situation. Referring to Article 38 (4) of the draft constitution on family and inheritance laws which reads:

    Parties to a marriage are entitled to equal rights in marriage, during the marriage, and at dissolution of their marriage;

It was thus observed that there was need to give clear provisions regarding inheritance rules since mere recognitions of traditional marriages by the Constitution does not make obvious the choices where the family or individuals are locked in conflicts with the regime of communal/ traditional norms.

It was agreed upon that there was need for the Constitution to not only respect traditional marriages but also encourage them.
4.1 Resource exploitation, land ownership and taxation

By Kwame Owino, Programmes Officer, Institute Of Economic Affairs (IEA) Kenya

Discussion on resource exploitation, land ownership and taxation aimed at scrutinising the new provisions for land ownership, the exploration of the taxation regimes and how they relate to each other, as well as the analysis of the question of environmental conservation.

Kwame Owino looking at the draft Constitution’s response to the above issues, thought that the provisions for devolution of power to a greater extent took into consideration the communities interests.

The proposals facilitating the devolution of power measured well to the general goal of ensuring closed and effective governance. This is achieved by ensuring that land, property and environmental rights rested with the people more than the state.

That the draft Constitution in chapter eleven (232:1) recognises land as a basic resource upon which peoples’ livelihoods touch off is an affirmative of the empowerment peoples’ rights. Again, that the same provision recognises the need for ‘equitable, efficient, productive and sustainable’ use of the same resource is gained to all.

Regarding conflicts based on land as a resource the draft was celebrated for observing the need to set up a National Land Commission as provided in section 237 (1) of chapter eleven which reads:

> There is established a National Land Commissions consisting of a chairperson, a deputy chairperson and eight other members nominated and appointed in accordance with the provisions of chapter seventeen of this Constitution.

It was observed, however, that while there was cause to celebrate this clause, it still did not provide democratically driven guidelines to arriving at the appointment or nomination of the same eight people who are to serve in the Commission. Arguably, this was seen to be crucial since disregard of procedural imperatives to the constitution of the same Commission was equal to having no Commission at all.

Regarding the domain of environmental rights, the establishment of the National Environmental Management Commission was seen as a necessary step forward. Especially when as per section 239 (2)(a), public participation is seen to be a major pillar in conservation and management. However, the fact that the State was given more power as regards environmental management was a matter of sustained debate as representatives of minorities and indigenous peoples felt cheated out by the provisions. For instance, Article 239(2) states:

> All State officials exercising a power or performing a function involving the administration, protection or exploitation of land or natural resources, shall have regard to the following principles of sustainable development...

Concerns were raised about the genuine of ensuring public participation if the powers were still being given back to the state machinery. The participants felt that this was work for the Community Environmental and Resource Management Committees, which should only be expected to benefit from the technical services of state officials. It was noted that in as much as there was such a provision in the recently enacted Environmental Management Act, little of community involvement, if any, had been achieved, in spite of the Kenyan Government progress Report on Agenda 21 that was released for the World Summit on Sustainable Development.
The principles of sustainable development were thought to have been relevantly captured by the provision in 239 (2)(b) when it states:

The cultural and social principles for the management of the environment or natural resources traditionally applied by any community within Kenya shall be applied... .

It was however observed that the subsequent clauses, that is 240 (i), 240 (ii) which delineates conditions upon which these cultural and social principles may be seen to be Constitutionally viable is countermanding.

They state: [in so far as] 239 (b) (i) they are relevant

239 (b) (ii) not repugnant to justice and morality or inconsistent with other constitutional principles

What is under question is the presumed basis of a universalized moral base. The question hence; who decides the repugnancy claim?

**Land Rights and Land Ownership**

It was significant that the draft undertook the task of defining land, as this would provide clarity of its recognition as a resource. It is important to note that in its report, the Peoples Choice, that documented the Review Process, the Review Commission admits that land is a very important source of identity to many communities like pastoralists, hunter-gatherers and fisher peoples among others.

Participants felt that the draft constitution did not provide an understanding of the complexities surrounding the issue of land and property rights. This was thought to be especially true regarding the rights of the pastoralists and hunter-gatherers.

That most provisions did not reflect necessarily the sensitivity to the rights of these communities hence relying on vague and unqualified assertions.

That there was a tendency to subsume most provisions to a ‘universalised tenure’ when, in reality certain situations demanded a more conscious construction.

A case in point was the criticism that land and property rights cannot be equally provided, since individual and communal interests vary from region to region. There was need to make qualifications regarding which regime would be prevalent and to whom.

As an interpretive facility, the definition of land was not clear. That there was a strong need to give it an ecological construction. The borderline between the property on land and land itself was not clear especially with regard to the case of alienation.

The need was expressed for the government to handle policy at the national level, but allocate more power to the local communities as against provision 232 (2) which does not say anything about the role of local communities.

It was again strongly emphasized that wrongful land alienation in the past had been carried out under the pretext of public interest.
The conference participants were of the view that the National Land Commission had been given unnecessarily too many duties; that it was merely an incarnation of the former Land Boards which had entrenched themselves in corruption.

It was proposed that the National Land Commission be constitutionally committed to consult with peoples and communities regarding dispute resolution based on land.

There was also a need, as it was felt to provide clear guidelines as to the composition and nominations of the eight members serving in the commission. This is necessarily to secure the interest of all peoples and communities. This should be especially necessary if only to ensure representation of pastoralists and hunter-gatherers.

It was also consensually agreed that the established Environmental Management Commission be strongly linked to the various regimes of human rights provisions. This is to galvanize the administration of justice especially from minorities and indigenous peoples’ perspective.

On alienation of land by section 236 by the state, and whereupon there is the adoption of a compensation mechanism, there was dissatisfaction as the provision did not qualify the nature of compensation as it is does not qualify the nature of compensation and the parties role in determination of the manner of the said compensation. Article 236 (2)(c) provides:

provision is made by a law applicable to that acquisition or taking of possession for the prompt payment of full compensation prior to occupation of such land.

In informing the need for clear guidelines, the participants were reminded by one of the participants, Koitamet Olekina of Maasai Education Discovery (MED), that the Maasai were now living in marginalized areas because prime land had been taken away from them. He reiterated that this case owns its place within the purview of historical injustice that lack of clear guidelines to govern compensatory processes and rights often generate volatile issues thereafter.

In another case, the participants heard of the case dispossession of land from the Ogiek, following the gazettement their forestland, relocating them to Chapalungu in Kericho, on land, which is primarily dry and unsuitable for their livelihood; they could be viewed as the proverbial fish on dryland. This explains, as the representatives of the Ogiek clarified, the perennial fight by the members of the community to return to their land in the forests.

Land Leases

Land leases were also of concern. Magadi Soda, a salt manufacturing company provides an instructive instance. With the company processing there almost coming to the end of lease period 999 years, the question remains: to whom does the land revert? Another case is that of Olonanahs (Corrupted to Lenana) agreement with the British colonial rulers, which ends in year 2004. If the assumption holds true that Olononah sealed the agreement on behalf of the Maasai and not Kenya, should the Maasai file claim?

The participants took issue with the length of the lease period observing that this was too long as it contributed to the assigning communities to a perpetual case of dispossession. It was thought that 33 years would have been reasonable.

Categorizing of land in terms public, private and idle land was seen to be misleading in given circumstances. It was felt that to refer to land as idle was a misnomer as it was anti-ethical if not detrimental to pastoralist peoples’ rights.
Public Finance
With regard to public finance and revenue management, it was agreed to that the participation of people, communities and civil societies needed enhancement. The revenue proceeds be equitably divided across various administrative units to ensure the well being of peoples and communities.

It was even though recognised that taxation regimes should not be unfair to peoples and communities who have borne the brunt of grinding poverty.

Land Rights and the Question of Refugees
In Africa, refugees are a common phenomenon. In Kenya for instance there are about 300,000 refugees registered and living in two refugee camps in the Country's North, Kakuma and Daadab. These camps have been established on land that ancestrally belongs to indigenous communities in this area. Apart from the fact that the establishment of these camps went on without the members of these communities being consulted, the fact that they are in fragile ecosystems necessitates the need for specific constitutional provisions. Participants especially noted that the draft that it was silent on the question of environmental rights and refugees. That this was a crucial issue in Kenya and hence needed no emphasis.

4.2 Legislature

By Hon Ekwee Ethuro, MP Turkana Central and Secretary, Pastoralist Parliamentary Group (PPG)

Discussing the legislative provisions in the Draft Constitution, Hon Ethuro started by expressing agreement with the principle of devolution of power to the local authorities. He claimed that this principle would eventually give leverage to the people at the grassroots in the decision-making processes.

He further agreed that indigenous peoples and minorities had for a long time been suffering due to disregard for their rights either advertently or inadvertently. The effect of it all being that sustainable development had all along proved elusive.

Arguing that the draft espoused the principle of devolution of legislative power to the grassroots, he was concerned that it eventually did not provide clear outlines as to how authoritative decisions could be arrived at the locational level.

As the basic unit of government, it was necessary that clarification be made regarding management units and relations between variant units. Hon. Ekwee Ethuro was referring to the relations between the village council and locational administration. He also observed that it was necessary to also provide the role of political parties at this level since it adds to the number of drives of management at the locational level.

As already pointed out in the Devolution of Power in the first section of this report, the discussant reiterated that it was important to have Provisions on the constitution of the Upper House be revised; there will be need to have the constituting rationale based on the representations from the ethnicities to give protection and participatory rights to the disadvantaged and minority groups. Equal representation from the districts would mean that the members from the dominant districts who are by extension members from the dominant ethnicities would always carry the day, it was emphasised.

Participants felt that, due to lack of legislative protection, minorities and indigenous peoples have always found if difficult to promote and protect the needs and priorities of their people. It was also felt that this was partly due to a general attitude that the Kenyan economy is driven by agriculture based on export.
It has been very difficult to engage structures that would develop livestock as an economic activity for instance, as the whole attitude is that livestock yields little to the national economy. This has led to the deterioration of the social-economic conditions of minority and indigenous peoples/groups.

Taking this into account, Hon Ethuro considered the need for a far-reaching affirmative action. That affirmative action should go beyond the gender issue. To avoid conflicts over resources and opportunities there was need to make specific allowances to the communities where social economic conditions are seen to lag.

Hon Ethuro also saw the need to provide a stable and effective electoral commission. Conflicts regarding elections have always led to unpopular MPs being elected to parliament. Again, he decried the quality of MPs who go to parliament; noting that there have been cases has been that MPs are not interested in dealing with issues. Many MPs are incapable of researching issues before making statements in parliament.

### 4.3 Advocacy for the National Constitutional Conference

**By Nyangori Ohenjo, Media and Advocacy Programme Officer, CEMIRIDE, and Secretary, Pastoralists and Hunter-Gatherers Ethnic Minorities Network (PHGEMN)**

The main objective of this session was putting in place mechanisms that will ensure effective participation by delegates from minorities and indigenous peoples (read pastoralists and hunter-gatherers) at the National Constitutional conference.

The participants were reminded that the National Constitutional conference was crucial to the minorities and indigenous and tribal peoples because it was the forum where various stakeholders will highlight their interests, which consequently, may include or disregard other stakeholders’ interests. As a forum for dialogue, it was emphasised that there was need for a proper and responsive mechanism being put in place to ensure that pastoralists and hunter-gatherers needs and priorities are taken into consideration.

In discussing the methods of establishing dialogue that would be useful, it was observed that there was need to not only have a focused structure but also a clear understanding who the dialogue would be conducted with. The following groups were cited as crucial targets, among them:

- Opinion Leaders.
- Various other caucuses for instance members of parliament and professional groups.
- The Media.
- Non-governmental Organizations.
- The Constitutional Review Commissioners.
- Other groups with whom minorities and indigenous peoples shared interests and aspirations.

It was noted that many of the above groups would have crucial influence, hence the need to engage and seek their assistance. However, this did not mean that they did not have interests of their own that would need our support.

Participants noted that in order to avoid conflicting presentations, which could jeopardise their quest for ensuring that the rights of their communities were duly recognised and entrenched into the constitution, there was need to form a vanguard of sorts. This would provide their network with a focused and coordinated approach to the processes at the conference.

In this regard, it was thought that it would be necessary to organize a one-day workshop geared towards constituting or sharpening a lobbying outfit. It was not lost to the participants that effective participation at
the conference was going to be a challenge; the unity of purpose and performance would be imperative if interests were not going to be compromised. There was, therefore, necessity of developing a system of putting the pastoralists and hunter-gatherers’ agenda on top of the deliberations at the conference and especially through the media.

It was observed that the PHGEMN did not have a good record of using the media as effectively as possible. He however noted that there might be very good reasons for this. Nonetheless, there was need to ensure that the media was fully used this time round.

There was the call that those at the conference adopt strategies to make themselves distinct as a caucus. One way of doing this for instance, would be dressing uniformly. This could be achieved in various ways, which may include being in traditional attire.

Another suggested strategy would include the active use of informal meetings.

To avoid engaging an amorphous caucus at the conference, members seconded Olekina’s call that an effective steering group be constituted. It was agreed upon that such a group may need a backup team to ensure its effectiveness and efficiency.

Saying that a properly developed and executed lobbying strategy could be very effective in delivering the results, Nyang’ori recalled the Johannesburg experience (World Summit on Sustainable Development) where the lobbying strategy was technically refined to a one statement item which eventually so the recognition and use of the concept “indigenous peoples” for the first time in a political Declaration of United Nations without a qualifier. The statement that was used for lobbying was: “we recognize the participation of indigenous peoples in sustainable development”.

It was suggested that meetings by the day or every other two days by delegates and the support group would be crucial if there was to be a properly coordinated participation.

It was further observed that creating linkages or coalitions with other marginalized groups would enhance performance at the conference. For instance, women groups who had a stake in aspects regarding affirmative action and enhanced participation in institutions and political processes.
V CONCLUSIONS

1. It was agreed that a steering committee of 8 people be constituted. That it should serve as the focal point in the lobbying exercise.
2. The committee members were to be extracted from the already nominated list of delegates from the Network by the CKRC.

The following were nominated to comprise the steering committee:
1. Lisa Chepkorir Chelule - Nakuru Delegate
2. Councilor William S. Yiale - Narok Delegate
3. Lorna T. Tetu - Narok Delegate
4. K. Kessendeny - Nakuru Delegate
5. Philip Ole Sironka - NGO Delegate
6. Ole Sisika ML - Kajiado Delegate
7. Koitamet Ole Kina - Narok Delegate
8. Godana Doyo - Isiolo Delegate

Nyang’ori Ohenjo, Secretary, PHGEMN, indicated that CEMIRIDE might be in a position to assist as a secretariat. He further underscored that given the time driven dimension of the constitution, beginning of work by the steering committee was imperative.

It was considered that application for observer status is made as quickly possible. The assumption here was that if the Constitution of Kenya Review Process (CKRC) allowed more observer positions then the backup team would be constituted.¹

It was left to the Network’s secretary to pursue the applications of the observer status positions and communicate this to the other delegates and partners.

5.1 Rationale for the way forward

There were several considerations that informed the way forward chosen by the participants during this training. They were among others, that the participants:
1. Were in consideration that the misgivings they had about certain parts of the draft constitution were in good faith.
2. Felt that clarifications about certain sections of the constitution such as land, the Bill of Rights, Recognition of communities needed be more firm and assuring.
3. That problems affecting minorities and indigenous peoples needed constitutional support if they were to be solved

¹ By the time of this report, the PHGEMN had contacted CKRC and was offered one observer position, which was subsequently given to Stephen ole Timoi, the Vice Chair of the PHGEMN, and the Chair of the Maa Pastoralist Council. Mr ole Timoi also works for Dupoto-e-Maa, an NGO based in Kajiado.
4. That there was the necessity to address historical injustices and appreciation of the existence of minorities and indigenous peoples by other sectors of the Kenyan society to promote peace and peaceful co-existence and hence prevent conflicts.

5.2 Recommendations

1. The proposals by the participants should be communicated to the CKRC as soon as the report was ready.
2. All partners and members of the network should be dully communicated to about the critique for support.
3. Services of (a) lawyer(s), who is/who are (a) member(s) of one communities (is) were needed in the back team to give drafting or legal advice to proceedings at the constitutional conference.
4. The Steering Committee should take up the responsibility to assist in identifying assistance needed, both in terms of human/technical and financial resources.
5. That members of the Pastoralist Parliamentary Group (PPG) be seriously engaged for better results amongst the parliamentarians.
Annex: List of acronyms

<table>
<thead>
<tr>
<th>Acronym</th>
<th>Full Name</th>
</tr>
</thead>
<tbody>
<tr>
<td>CEMIRIDE</td>
<td>Centre for Minority Rights Development</td>
</tr>
<tr>
<td>IEA</td>
<td>Institute of Economic Affairs</td>
</tr>
<tr>
<td>ILO</td>
<td>International Labour Organization</td>
</tr>
<tr>
<td>MPC</td>
<td>Maa Pastoralist Council</td>
</tr>
<tr>
<td>MRG</td>
<td>Minority Rights Group</td>
</tr>
<tr>
<td>NNDF</td>
<td>The Northern Nomadic Forum</td>
</tr>
<tr>
<td>OPNA</td>
<td>Sengwer, and Ogiek Peoples National Assembly</td>
</tr>
<tr>
<td>PEA</td>
<td>Panos Eastern Africa</td>
</tr>
<tr>
<td>PHGEMN</td>
<td>Pastoralists and Hunter Gatherers Network</td>
</tr>
<tr>
<td>PPG</td>
<td>Pastoralists Parliamentary Group</td>
</tr>
</tbody>
</table>