HISTORY OF CONSTITUTION MAKING IN KENYA

MEDIA DEVELOPMENT ASSOCIATION

Konrad Adenauer Stiftung

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First printing 2012

Contributors:
Macharia Nderitu
Ivy Wasike
Thuita Guandaru
dorothy Momanyi
Jane Kwamboka
Joseph Kibugu

Editors:
Stephen Ndegwa
Patrick Mwagi
Susan Kasera
Henry Owuor
Iris Karanja

Acknowledgement

The making of this book has been a gradual process since conception of the idea. Having published *Katiba News* since 2002, the Media Development Association (MDA) felt that we could crown our efforts with the publication of a book that would add to the wealth of existing documentation on the Constitution of Kenya review process.

Mainly, we are greatly beholden to Konrad Adenauer Stiftung (KAS) as a whole for their support of both our *Katiba News* flagship for the last ten years and the publication of this book.

Special mention goes to the current KAS Representative, Ms Anke Lerch, who has been very kind and supportive of our ideas. And also to Ms Iris Karanja, KAS programmes officer who has worked tirelessly in the editing of the publication. Indeed, all KAS representatives over the years have shared MDA's passion for civic education and capacity building in the media.

Our gratitude also goes to all stakeholders in the review process without whom we would have had no partners to work with or event to write about.

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Foreword

In August 2010 Kenya successfully promulgated a new Constitution. This was the culmination of a long struggle for a Constitution that would be responsive to the social, economic and political needs of the people.

Between 1961 and 1963, negotiations were held at Lancaster House, London to develop a Constitution for the country. Subsequently, the Independence Constitution facilitated the granting of independence in 1963.

The negotiations were largely conducted by a mix of elected and unelected political leaders, chosen by political parties and the Crown but with no special mandate granted by the people to the negotiators. The Constitution, being the *grund norm*, requires that the citizenry be involved intimately in negotiating its contents.

Since then, Parliament exercised its powers of amendment more than 30 times. It has been argued that the myriad amendments carried out on the previous document without any consultation with the people fundamentally altered its structure.

This publication seeks to provide insights on constitutional developments in Kenya since independence through five broad key phases in our constitutional history:

1. Negotiations on the independence Constitution
2. Development of the Constitution between 1963 and 1982
3. Constitutional development in times of political repression: 1982 to 1991
4. The Clamour for reforms in the multiparty era of 1992 to 2010
5. Implementing the Constitution Post August 2010

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Further, we have examined the review process with a view to providing lessons on the most effective and efficient means to achieve a new Constitution. This includes an analysis of the process post the 2007-2008 post election crisis and lessons from comparable jurisdictions.

The Media Development Association, through *Katiba News* monthly news journal, has documented major issues and events on the review process since 2002. Initially, the journal, fully supported by the Konrad Adenauer Stiftung, was published in partnership with the Prof Yash Pal Ghai led Constitution of Kenya Review Commission (CKRC).

But even with the disbandment of CKRC, KAS has continued to support the journal till today. *Katiba News* is distributed free of charge to various players in Constitution making in the country including Government, media, civil society, institutions of higher learning and the public.

One of the main aims of this book is to help people in developing a culture of constitutionalism from a point of knowledge through the documentation of the history of the process. And, although the book is a record of historical facts, it is in no way meant to be exhaustive. We have simply added to the existing literature with the hope that we shall fill some of the existing information gaps and motivate more people to share their varied experiences and points of view on this subject.

Stephen Ndegwa Mwangi
Chairman
Media Development Association

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Chapter 1

The Independence Constitution
The Constitutional History of Kenya before 1963

Defining a Constitution

A Constitution is a set of laws and rules establishing the machinery of the government of a state and which defines and determines the relations between different institutions and areas of government - the Executive, the Judiciary and the Legislature including the central, regional and local governments. A Constitution is the source, the jurisprudential fountain head from which other laws must flow, succinctly and harmoniously[1]. The first well known case of a written Constitution is that of the United States of America, which is famous for its brevity, restraint and simplicity[2].

A state is characterised by a permanent population, defined territory, a government and the capacity to enter into relations with other states[3]. The Constitution is the first law that in principle takes precedence and supremacy over the more detailed regulatory arrangements created by Acts of Parliament.[4] Such Acts must conform to the supreme law, the Constitution, and are void to the extent of their inconsistency with the Constitution.

The Constitution is the creation of a sovereign act. It is the result of an extraordinary legislation approved directly by the people acting in their sovereign capacity enabling the government structure to be set up, laying down the methodology and extent of distribution of its powers, the methods and principles of its operation, as well as embracing the spirit of a nation. Ordinary laws address certain contingencies, situations or areas whereas the Constitution is rigid and cannot be easily amended. It is framed for the future and is intended to be permanent.

The Constitution is the scheme of

1 M.V. Pylee, The Constitutions of the World, Universal Law Publishing Ltd, Page ix.

2 Adopted after a Constitutional Conference made up of representatives of all States in 1776.

3 Prof. J. B. Ojwang, *The Constitutional Development in Kenya: Institutional Adaptation and Social Change*, Acts Press, 1990, Page 11.

4 M.V. Pylee (above), Page 13.

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organisation of public responsibilities which must be performed in any community. It defines the responsibilities and vests them in particular institutions of the state. These particular roles are intended to be performed in the interests of the people as a whole. A documentary Constitution describes the basic character of the governmental system (Republic), establishes the main divisions of public power (the Presidency, the Executive, the Legislature, the Judicature, Public Service) and makes provisions on the relationship between the state authority and the individual[5]. The relationship of the state and the individual is primarily guided by the Bill of Rights, which limits the actions of the state and which is enforced by the Judiciary in the event of a dispute or a violation.

Constitutionalism means that the government is subject to restraint in the interest of ordinary members of the community, and that the government is not arbitrary or totalitarian. A constitutional scholar, Montesquieu, stated that 'constant experience shows that every man vested with power is liable to abuse it, and to carry his authority as far as it will go. To prevent this abuse, it is necessary from the very nature of things that one power should be a check on another'. Where the Constitution contains clear checks and balances to the exercise of public power, it serves as an underpinning for the principle and practice of constitutionalism. The mere existence of a Constitution is not proof of a commitment to the principle of constitutionalism.

As already noted, separation of powers means that the government is divided into three separate branches. Each of the branches is granted a specific function including law making, execution and adjudication. Each branch is confined to its activities and acts as a check on the activities of the other arms of government. For example, Bills passed by Parliament come into law on receiving presidential assent. The President has the right to veto such Bills and refer them back to Parliament for revision. The judiciary interprets laws enacted by Parliament. It has the power to declare the constitutionality or otherwise of a particular law.

The Kenyan Constitution in the Colonial Period

Pre-colonial Kenya lacked both centralised authority responsible for the administrative machinery and a formal judicial institution. Judicial powers were exercised by informal tribunals that were binding only within specific communities[6]. Kenya was transformed into a colony in 1920. The coastal strip was retained as a

5 M.V. Pylee (above) Page x.
6 Prof J. B. Ojwang (Above), Page 30.

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protectorate. In 1897, a Commissioner appointed by the Queen was the chief executive of the protectorate; he had wide powers including setting up the necessary administrative machinery[7], making of laws and establishing courts of law. The Commissioner was not accountable to any local official or body. The Commissioner was, however, subject to the instructions of the Secretary of State for the Colonies[8].

The 1902 East African Order in Council divided the country into provinces and districts for administrative purposes. The Commissioner was also granted the power to exercise the prerogative of mercy. In the 1905 East African Order in Council, the title of the Commissioner was changed to Governor and Commander in Chief. He was empowered to appoint all judicial officers, including High Court judges. The Legislative Council was empowered to make ordinances[9].

The Governor served as the Speaker of the Legislative Council until 1948. In this capacity, the Governor made all the necessary regulations and Standing Orders to guide the operation of the Legislative Council. The British government retained the right to legislate directly for the territory. The Governor could veto any proposed ordinance. The Executive Council was established to advice the Governor on matters of administration. This introduced the concept of collective participation in the administration.

In 1939, considerable powers were granted to the Executive Council. The first African was appointed to the Legislative Council in 1944[10]. The Lyttelton Constitution[11] introduced policy measures intended to give Africans a limited degree of participation in constitutional machinery.[12] The reforms created a limited franchise of Africans who were to elect eight Members to the Legislative Council. The ministers were required to exercise collective responsibility for decisions on Government policy. This collective responsibility required the ministers to support and vote with the Government in the Legislative Council and to support that policy of the government. This form of collective responsibility was limited since most ministers were government officials. Further, the Legislative Council was neither independent nor representative[13].

7 The administrative system set up by the Governor created districts and imposed chiefs on Africans. The system was a precursor to the Provincial Administration.

8 Prof J. B. Ojwang (Above), Page 30.

9 Prof J.B. Ojwang (Above) Page 31.

10 Eliud Mathu was nominated by the Governor to the Council. He was not elected.

11 Adopted in 1954.

12 Prof. J. B. Ojwang (Above), Page 33.

13 Prof J. B. Ojwang (Above Page 32.

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The Lennox Boyd Constitution[14] abolished the Executive Council and replaced it with a Council of Ministers. The Constitution increased African membership in the Legislative Council to 14 members. It further provided for Specially Elected Members who would be elected by the Legislative Council sitting as an electoral college. The Council of Ministers was enlarged to 16, with half of the membership being appointed from elected Members of the Legislative Council.

The Constitution also established a Council of State comprising 10 members and a chairman. The Council was appointed by the Governor and served at the pleasure of the Monarch. The Council scrutinised intended legislation. African leaders protested that they were not consulted at the conception and formulation stages of the Lyttelton and the Lennox Boyd Constitutions[15]. The Colonial Government had adopted a strategy of imposing non-negotiated constitutions on Kenya. This strategy proved unsuccessful[16].

There was no attempt by the colonial administration to promote negotiations among the leaders of dominant political groups, especially the Africa majority[17]. At the time, all forms of nationally organised political entities had been banned in the aftermath of a declaration of a state of emergency. The declaration resulted in the banning of the Kenya African Union with the eruption of the Mau Mau insurgency. The Secretaries of State for the Colonies at the time imposed constitutional plans on Kenya.

The only consultation was with European and Asian representatives to the exclusion of the majority African population. This strategy led to African opposition to the imposed Constitutions. With the breakdown of the Lennox Boyd Constitution in 1959, a different approach was sought by Britain. It was now clear that consultation with the African majority was necessary. This created the opportunity for the First Lancaster House Conference in 1960.

First Lancaster House Conference

The First Conference was held in January to February 1960. The aim of the African leaders at the conference was to secure non-restriction by releasing all political leaders, opening up the democratic process to Africans and negotiating for commanding positions in government and the Legislative

[14] Adopted in 1958.

[15] Prof J. B. Ojwang (Above), Page 34.

[16] Prof J. B. Ojwang (Above), Page 34.

[17] Robert Maxon, *Constitution Making in Contemporary Kenya: Lessons from the Twentieth Century,* KSR Vol. 1, December 2009.

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Council based on the principle of the majority rule. At the time, a number of African political leaders, including Jomo Kenyatta, were still held in restriction in the northern part of the Kenya. The British government stated that it was committed to ensuring the operation of a democratic system of government based on the parliamentary institution and designed on the Westminster model. Some negotiation took place between the different racially defined groups present at the Conference. However, no comprehensive agreement was reached. This forced the Secretary of State for Colonies, Iain Macleod, to impose a constitution.

The Macleod Constitution increased the Members of Legislative Council to 65 of which 53 were to be elected on a common roll and 12 were to be national members elected by an electoral college. The franchise requirements for voters were liberalised. The requirements included the ability to read and write, be of age 40 and above, be an office holder of certain range of posts at the time of registration, and to have an income of more than 75 Pounds. Twenty seats were reserved for Europeans, Asians and Arabs. The Constitution provided for a **justiciable** Bill of Rights for the first time, which provided for right to personal liberty, private family, right to life and to property, and the freedoms of conscience, expression, and assembly. The Constitution was implemented in April 1961 by which time the demands for constitution reform were overwhelming.[18]

In the meantime, two leading African political parties had been formed. The Kenya African National Union (Kanu) was formed on March 27, 1960 in Kiambu. The leadership of the party was viewed as dominated by the Luo and Kikuyu political leaders. The leaders of the party included Hon James Gichuru, Hon Tom Mboya and Hon Oginga Odinga. The representatives of other communities, besides the Kikuyu and the Luo, felt that they would be marginalised in the party.

On June 25, 1960, Kenya African Democratic Union was formed. Kadu comprised the Maasai United Front, the Kalenjin Political Alliance, the Coast Political Union and the Kenya African People's Party. The leaders of Kadu included Hon Ronald Ngala, Hon Daniel Moi and Hon John Keen. The political parties reached independence as federated ethnic loyalties grouped around individual personalities. Kanu was concerned about the transfer of power while Kadu was interested in limitation of power in the interests of ethnic minorities[19].

Elections were held in 1961 under

[18] Robert Maxon (Above)

[19] Prof H.W.O Okoth-Ogendo, Politics of Constitutional Change in Kenya since Independence, 1963 to 1969, January 1971, St Anthony College, Oxford United Kingdom, African Affairs, pp 9-34.

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this new Constitution with Kanu and Kadu being the dominant political competitors. Membership of the Legislative Council was divided along party lines for the first time. This provided an opportunity for the operationalisation of the Westminster model of government. The government leadership was to be determined by the state of political representation in the Legislative Council, with the majority party forming the government.

The majority party, Kanu, declined to form the government on the basis that there still existed restrictions against leading African politicians like Kenyatta. The second largest party, Kadu, was invited and agreed to form the government. The government was dominated by colonial officials with the Governor and his bureaucrats exercising real powers. There was lack of mutual trust among the members of the Council of Ministers, which led to discord in operations and decision making in the government.

Second Lancaster House Conference

The Second Lancaster Conference was convened in 1962[20]. The Africans from all major communities were represented. European and Asian communities were also represented at the conference. However, by this time it was acknowledged by the colonial office that the future of Kenya was as an African democratic country. The main agenda of the conference was an agreement on a constitution for internal self government. The proposals that emerged sought a quasi-federal structure with a strong central government, which was responsible to a bicameral parliament. The Governor was to appoint a Prime Minister on the basis of the party with majority representation in the Lower House of the National Assembly. The other ministers were to be appointed by the Governor acting on the advice of the Prime Minister.

The Prime Minister could be dismissed if the government lost a vote of confidence. The Governor could remove a minister on advice of the Prime Minister. The Cabinet was chaired by the Prime Minister and its role was to advise the Governor on general administration. The Cabinet was collectively responsible to the two Houses of Parliament 'for everything done by or under the authority of any minister in execution of his office'.

As a result of the deliberations at this conference, the Internal Self Government Constitution was unveiled on June 1, 1963. The Governor, acting on his own discretion was responsible for defence, including naval, military

[20] The Conference was intended to break a stalemate between Kadu and Kanu over the system of Government. The major point of departure was the majimbo system of government that was supported by Kadu but vehemently opposed by Kanu.

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and air force, external affairs and internal security. The executive powers of the State were thus still vested in law in the Governor and not the Prime Minister and the Cabinet. The Constitution ensured that a politically organised government supported by a popularly elected legislature was in power. In the ensuing elections, Kanu won with an impressive margin. Its party leader, Kenyatta, became the first Prime Minister.

The Independence Constitution

The Independence Constitution was a long, detailed and highly complex document that sought to balance the positions of the negotiating parties. It sought to capture the fragile compromise that parties thrashed out at the Lancaster House conferences[21]. The protagonists showed little faith in the resulting Constitution[22].

While Kanu was not satisfied with the entrenchment of regionalism in the Constitution, Kadu felt that the regional governments were not adequately protected from the vagaries of the central government[23]. The Constitution was a symbol of independence of the State and the creation of a new State. It provided a measure of legitimacy for the new rulers and was proof of national unity since it had been endorsed by a majority of the political leaders. It served as a vehicle for introducing new values, including the notion of constitutionalism[24].

The Constitution was based on the principles of parliamentary government based on the Westminster model and protection of minorities[25]. Protection of minorities created a contradiction in the Constitution since a parliamentary system is in essence a centralised and unitary system while a regional system is fragmented and federated system. The main features of the Independent Constitution can be summarised as[26]:-

a. The Constitution was a written constitution vested with special legal sanctity. It was the basic law and any other laws inconsistent with it were void to the extent of such inconsistency[27].

21 Githu Muigai, *the Structure and Values of the Independence Constitution.*

22 Ibid.

23 Indeed, Hon Oginga Odinga noted that Kanu accepted the document for the purposes of accelerating internal self government and independence with a stated intention of carrying out amendments on the Constitution. See Oginga Odinga, *Not Yet Uhuru*, Page 229.

24 Githu Muigai, *the Structure and Values of the Independence Constitution.*

25 Ibid.

26 See Ghai & Mac Auslan, *Public Law and Political Change in Kenya*, (Oxford University Press) 1970.

27 Githu Muigai, *the Structure and Values of the Independence Constitution.*

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b. The Constitution established a Westminster form of Government where a Prime Minister was appointed by the Governor General from amongst the Members of the House of Representatives from the political party with the highest majority of members. The Executive power reposed in the Monarch who delegated it to the Governor General. The Governor retained executive power on defence, external affairs and internal security. Kenya still remained a dominion of the United Kingdom.

c. The National Assembly was bicameral. The upper House, the Senate, was a safeguard for regionalism or *majimbo*. Any constitutional amendment required a 90 per cent vote in the Senate for entrenched provisions and 75 per cent for other provisions. This was in addition to 75 per cent in the House of Representatives. The House of Representatives could pass a vote of no confidence in the Government. This House of Representatives was designated to guard national interests. The constitutional amendment process was rigid and inflexible.[28] Senate representation was distributed over 40 districts and Nairobi area. The Senate was a forum for tribal representation in Kenya[29].

d. Regionalism or *majimbo* was established. Kenya was divided into seven regions with each having a regional legislature and Executive. Regionalism was a loose form of federalism. Voters in a region had to demonstrate genuine connection to the region, for example place of birth. The boundaries of the regions could not be changed by the central government without approval by the regional government. The president of a region was elected to office by elected members themselves or persons qualified to be elected as such. The legislative powers of the regions were subject to intervention by the central government[30].

e. The Constitution secured the rights of minorities through a Bill of Rights. The Bill of Rights was modeled on the European Convention on Human Rights.[31] Europeans were concerned about obtaining their retirement benefits and compensation in cases of premature retirement and the fate

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28 Githu Muigai, *the Structure and Values of the Independence Constitution.*

29 Prof H. W. O. Okoth-Ogendo (Above).

30 Githu Muigai, *the Structure and Values of the Independence Constitution.*

31 The Convention was the first treaty based and binding human rights instrument in the world and was adopted by the Council of Europe in 1950. It came into force in 1953.

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of their property, including land, in Kenya and protection against discrimination for those who wanted to stay while Asians were apprehensive about the security of their investments and the right to continue working and residing in Kenya.[32] No special seats were reserved for non Africans. Since Asians were deeply distrusted by Africans, a majority preferred to keep their British passports[33].

f. The Judiciary was independent and impartial with judges serving secured terms. The Judiciary was intended to regulate public power and prevent abuse and corruption. The security of tenure applied to the Attorney General, who served as the principal legal adviser to the Government and the Controller and Auditor General.

g. The civil service was independent and apolitical, with the functions of its recruitment and promotion vested in the Public Service Commission. The Controller and Auditor General and the Attorney General enjoyed security of tenure and could not be removed by the Commission. The Commission had to consult the Prime Minister or the Regional President concerned when appointing senior civil servants[34].

h. The Constitution created an independent Electoral Commission of Kenya responsible for delimiting constituency boundaries and supervising, organising and managing elections. The Constitution demanded impartiality and honesty in elections. The Electoral Commission comprised of the Speakers of the two Houses of Parliament and one nominee by the Prime Minister and each of the Regional Presidents[35].

i. The Constitution provided for citizenship. All indigenous communities automatically became citizens by operation of law. Other residents, who were British subjects, qualified to become citizens on application. A section of migrant communities also automatically acquired citizenship[36].

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32 Githu Muigai, *the Structure and Values of the Independence Constitution.*

33 About 120,000 out of a total of 176,000 Asians sought to retain their passports. Majority of them held British passports.

34 Githu Muigai, *the Structure and Values of the Independence Constitution.*

35 Ibid.

36 Ibid.

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j. The Constitution affirmed the validity of existing titles. Where land was subject to an adjudicated claim under the Land Titles Ordinance, the land was subject to such adjudication. The Crown land was vested in the regional governments while the central government acquired public and trust land in Nairobi. Trust land was vested in county councils, which held the land in trust for the residents.

The Independence Constitution created checks and balances on the exercise of governmental power. However, it was a complex document that did not have the full support of the political leadership with the suspicions of Kanu and Kadu running deep. The fact that European and Asian political parties supported Kadu positions on protecting the minorities during the negotiations of the Independence Constitution further fuelled the mistrust. It was clear that it was just a matter of time before the Constitution was amended. However, the Independence Constitution was an important symbol of the creation of a new nation and confirmation that political power could be truly exercised by the African majority. As stated above, the Independence Constitution insulated the amendment process from unilateral and partisan action. Changes would require a majority of 75 per cent of each House except any amendment seeking to alter entrenched rights of the individual and the regions, citizenship, elections, the Senate, the judiciary and the amendment process, which required 90 per cent vote in the Senate in addition to the 75 per cent vote in the House of Representatives[37].

[37] Ibid.

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The Constitution Evolution between 1963 and 1982

Introduction

Between 1963 and 2005, the Constitution was amended many times that it could no longer be classified as rigid[1]. Most of the amendments were not intended to improve the quality of the Constitution but to entrench an authoritarian and undemocratic administration. Other amendments were intended to solve political problems facing the government from time to time. Most of the amendments were carried out by a Parliament dominated by members of one political party.

In the post independence period, the relationship between KANU and KADU did not demonstrate healthy political competition. KADU played the negative role of obstructing KANU while the KANU government reacted by using its solid majority to thwart the opposition irrespective of the merits of the particular issue fronted by KADU. In 1964, KADU was dissolved to join KANU. The leaders of KADU pledged to work together to build the nation socially, economically and politically.

Summary of Amendments

Kenya assumed the Republican status in 1964. This was the first Constitutional amendment to the Independence Constitution. It created the office of the President, who was the Head of State and the Commander in Chief of the Armed Forces.[2] The first President would be the person who before 12th December 1964 held the office of the Prime Minister under the Constitution. A candidate for the Presidency had to be a candidate for the House of Representatives. The candidate had to be supported by 1, 000 registered voters during nomination.

The candidate who won a seat in the House of Representatives and received the majority number of votes would be elected as President. If a vacancy occurred at a time when there were no General Elections, the House of Representatives, acting as an electoral college, would elect a successor. The amendment reduced the powers of the regional assemblies by further and substantially weakening the quasi-federal structure, especially with regard to sources of funding

1 Githu Muigai,. *Amending the Constitution: Lessons from History*, The Advocate, Vol. 2, No. 3, February 1993.

2 The Constitution of Kenya (Amendment) Act, No 28 of 1964.

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and provided that the Vice President would be appointed from among the elected Members by the House of Representatives[3].

The first amendment further granted the President the unfettered discretion to appoint the Attorney General, members of the Public Service Commission, the Controller and Auditor General and the Permanent Secretaries. The President was later granted the power of constituting and abolishing offices in the public service and making appointments to any such offices and terminating such appointments. The Constitution provided that every person who held office in the service of the Republic of Kenya held such office during the pleasure of the President. The Public Service Commission was thus relegated to a limited auxiliary role[4].

The Constitution provided that elections would be held to elect the President of the Republic after dissolution of Parliament or whenever the office of the President fell vacant in between elections. The outcome of the Presidential elections depended on the strength of support given by successful parliamentary candidates. The Constitution provided that where occasion arose for an election of a President otherwise than by reason of dissolution of Parliament, the Speaker of the House of Representatives would as soon as practicable summon a meeting of all members of the House for the purpose of electing a new President.

The new system of presidential election favoured the dominant political parties since prospective MPs preferred to associate with presidential candidates nominated by the dominant party. The President was empowered to make all Ministerial appointments, including Vice President. Each political party participating at the election was required to propose a presidential candidate. A single vote would be cast for the President and MP. Presidential candidates outside the time of General Election were required to be serving MPs and nominated by a political party.

The Second amendment[5] reformed the relationship between the regions and the central government as relates to finances and the method of alteration of boundaries. The Regional Presidents were re-designated as Chairmen. The powers to alter regional boundaries were transferred to Parliament. Such powers were formerly vested in Regional Assemblies and exercisable in consultation with other Regional Assemblies. The amendment repealed provisions allowing the Regions to levy

3 Act Number 28 of 1964.

4 Prof Ojwang, (Above) Page 90.

5 Act Number 38 of 1964.

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independent regional revenue. The regions were thus fully dependent on grants from the central government[6].

The third amendment reduced the parliamentary majority required for the approval of a state of emergency from 65% in both Houses to a simple majority[7]. The period during which the parliamentary approval for a declaration of a state of emergency must be sought was extended from seven days to twenty one days. The amendment reduced the threshold for amending the Constitution to 65% of the members in both Houses of Parliament for all purposes and abolished the specially entrenched provisions concerning the executive powers of the Regional Assemblies, which were renamed Provincial Councils. Parliament had power to confer functions upon these Councils. It further abolished the right of appeal to the Privy Council and the Supreme Court was renamed the High Court. It extended the validity of a declaration of state of emergency from two months to three months.

The fourth amendment provided that Commonwealth citizens resident in Kenya were eligible to apply for citizenship[8]. Any MP, who was sentenced to prison for more than six months, was required to vacate his seat. An MP who failed to attend eight consecutive parliamentary sessions without permission of the Speaker would lose his seat. The President could, however, waive this rule. This provision was clearly intended to promote party discipline through constitutional means and extending presidential control over parliamentary affairs.

At the time, there was dissent among the factions in KANU. The amendment was a follow up to the significant political decisions made at the KANU conference in Limuru[9]. The President was empowered to appoint and dismiss public servants. The President could create and abolish offices in the public service, without necessarily consulting the Public Service Commission. The amendment provided that all persons serving in public service did so at the pleasure of the President.

The fifth amendment required an MP who resigned from the party that sponsored him during the election, at a time when that party was still a parliamentary party, to vacate his

6 Prof. H. W. O. Okoth Ogendo (Above).

7 Act Number 14 of 1965.

8 Act Number 17 of 1966.

9 Prof J.B. Ojwang, (above) . KANU created seven seats of Vice Presidents representing the regions in place of the Vice Presidency of the Party occupied at the time by Hon Oginga Odinga. The following day, 28 MPs announced plans to form a rival party and Hon Odinga resigned from KANU one month later.

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seat[10]. This amendment was intended to respond to the outflow of sitting MPs from KANU to Kenya Peoples Union (KPU). These amendments were proposed soon after the formation of the KPU by Hon Jaramogi Oginga Odinga who had served as the Vice President from 1964 until he resigned in 1966.

KPU advocated for accelerated land reform and increase in employment opportunities and the realignment of the foreign policy towards the Soviet Union. This was another example of an amendment that was solely intended to solve political disputes between political groups that earlier belonged to the ruling party. Indeed the split resulted from ideological differences between two factions of KANU.

KPU was banned in 1969 leaving KANU as only legal political party and thus Kenya was converted into a *de facto* one party state. The sixth amendment empowered the President to exercise special emergency powers that could lead to curtailing the freedoms of movement, assembly and expression[11]. This amendment was enacted during the Shifta insurgency in the North Eastern region when a section of Somali community was proposing cessation from Kenya.

The seventh amendment provided for the merger of the Senate and the House of Representatives to establish a unicameral legislature[12]. The Senate was abolished and the life of Parliament was extended by two years. It created 41 new constituencies for the former Senators and postponed the dissolution of the first Parliament from 1968 to 1970.

The ninth amendment abolished the Provincial Councils and deleted from the Constitution all references to provincial and district boundaries[13]. The amendment dealt a death blow to regionalism.

The tenth amendment provided for direct election of the President and provided that all candidates for an election would be nominated by a political party[14]. Every party would be required to nominate a presidential candidate. If the office of president became vacant other than during the General Election, a presidential election would be conducted within 90 days. In the interim, the Vice President would exercise the functions of the office of the President. However, in matters of appointment of Ministers and in declaring a state of emergency, the Vice President would only act

10 Prof J.B. Ojwang (Above). Page 91.
11 Act Number 189 of 1966.
12 Act Number 40 of 1966.
13 Act Number 16 of 1968.
14 Act Number 45 of 1968.

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on a resolution by the Cabinet. The amendment replaced 12 specially elected MPs with 12 MPs nominated by the President. The amendment provided for a presidential election in the event of a vacancy replacing the parliamentary role with direct election. It sanctified the role of political parties in elections and proscribed independent candidature.

In 1969, a revised Constitution[15] was published incorporating all previous amendments. Some amendments were made including the alteration of the membership of the Electoral Commission, whose members would be appointed by the President. Previously, the Speaker of the National Assembly was the Chairman of the Electoral Commission of Kenya.

After the consolidation and revision of the Constitution in 1969, no further amendments were made for five years. The twelfth amendment which was effected in 1974 lowered the voting age from 21 to 18 years[16]. This amendment was enacted prior to the General Elections scheduled during that year and was intended to increase the pool of voters. The thirteenth amendment made Kiswahili the official language of the National Assembly[17].

The amendment was motivated by cultural nationalism and was preceded by a meeting of the National Governing Council of KANU which proposed the use of Kiswahili as the national and official language for all purposes. One year after the amendment, Parliament repealed the thirteenth amendment and provided the legislative Bills would be presented in English in Parliament and debated in either English or Kiswahili[18]. It was not necessary to effect a constitutional amendment to declare which languages Parliament could use in its debates. Indeed the amendment was in conflict with section 34 (c) of the Constitution which required a candidate for election as a Member of the National Assembly to be fluent in English but not Kiswahili.

The fifteenth amendment extended the power of mercy exercisable by the President under section 27 of the Constitution to persons who had been found guilty of an election offence by an Election Court[19]. A person found guilty of an election offence was barred from contesting for elections for five years. This amendment followed the finding of guilt against Hon Paul Ngei who served as a Minister at the time.

Hon Ngei had been detained in the pre-colonial period with the Late

[15] Act Number 5 of 1969.
[16] Act Number 2 of 1974.
[17] Act Number 2 of 1974.
[18] Act Number 1 of 1975.
[19] Act Number 14 of 1975.

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President Kenyatta at Kapenguria. The amendment was intended to save the political career of Hon Ngei. The Bill was published one day before it was tabled for debate and was debated and passed in one afternoon. The Bill was signed into law by the President the next day and was granted a retrospective application from 1st January 1975.

The sixteenth amendment established the Court of Appeal after the East African Court of Appeal collapsed alongside the East African Community[20]. The amendment also abolished the right to remit compensation for land compulsorily acquired without compliance with foreign exchange regulations. The Chief Justice became both a High Court Judge and a Judge of the Court of Appeal creating administrative difficulties for the operation of the office.

It meant the Chief Justice could theoretically sit on appeal on a matter he or she had determined as a High Court judge. The seventeenth amendment provided for fluency in Kiswahili and English as a requirement for the purposes of qualifying for nomination as a candidate for the National Assembly[21]. This amendment corrected the situation where debates in Parliament could be conducted in English or Kiswahili but there was no requirement that candidates vying for parliamentary seats must be proficient in Kiswahili.

The eighteenth amendment required certain public officers to resign within six months to the date of the General Election if they intended to contest in the election[22]. The amendment was intended to ratify a directive issued to all civil servants intending to contest in elections to resign by 15th May 1979. The amendment was ostensibly to prevent abuse of office by persons holding public offices who intended to venture into elective politics. After the enactment of the amendment, the Attorney General stated that he would issue a statement on the offices covered by the amendment even though no such discretion had been conferred upon that office by the law[23].

Impact of Constitutional Amendments on Constitutionalism and independence and impartiality of Constitutional Institutions

The amendments to the Constitution were solely carried out by Parliament. Parliament was an important centre for high stakes political game. There was no attempt at all to engage in participatory constitution making. The

[20] Act Number 13 of 1977.

[21] Act Number 1 of 1979.

[22] Act Number 5 of 1979.

[23] Githu Muigai, *Amending the Constitution: Lessons from History*, The Advocate, Vol. 2, No. 3, February 1993.

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effects of these amendments can be summarized as:-[24]

a. Creation of a strong centralist government through the establishment of a Republic and the dismantling of regionalism. The practice of frequent amendments represented the legal endorsement of increasingly authoritarian politics and constitutional decay. The constitutional imperative of division of power between the executive, the judiciary and legislature was gradually distorted, resulting in a close to dictatorial presidency[25].

b. Removal of specially entrenched provisions of the Constitution and reduction of the thresholds for approving constitutional amendments thus making it easier to amend the Constitution. The single chamber National Assembly could carry out any type of amendment of the Constitution without reference to any other constitutional organ.

c. Concentration of power in the Presidency and whittling down of the watchdog role of the Legislature over the Executive. Moreover, the existence of one political party, KANU, meant that the political career of an MP depended on his support for the ruling party position. Any dissent could easily end his political career.

It has been argued that these amendments were intended to tackle the challenges of governance in the newly independent nation. Some amendments were proposed by the political elite to eliminate political opposition and instill discipline in the party and in Parliament. Party indiscipline was presented by the government as a constitutional issue[26]. Other amendments were intended to consolidate and create opportunities for political dominance in the future[27].

The Independence Constitution introduced an alien concept of binding rules which were hitherto not available to the colonial administrators. The colonial structures were authoritarian. The initial amendments were therefore intended to harmonize and fuse the operations of a democratic constitution with an undemocratic authoritarian administrative structure with the result that democratic principles were undermined and the quality and

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[24] Ibid.

[25] Andreassen, B.A, Of Oranges and Bananas: The 2005 Kenya Referendum on the Constitution, CMI Working Paper, 2006, Page 1.

[26] Prof. H.W.O Okoth Ogendo (Above).

[27] Githu Muigai, *Amending the Constitution: Lessons from History*, The Advocate, Vol. 2, No. 3, February 1993.

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legitimacy of the Constitution was downgraded[28].

The parties negotiating the independence Constitution did not accept some provisions that were included in the final document. KANU did not accept regionalism and even used financial and administrative mechanisms to ensure that the regional structure did not function effectively. When KADU voluntarily dissolved and joined KANU in 1964, the concept of regionalism was no longer tenable. KANU members had ideological differences in the development path that the new state should have adopted. However, these ideological differences were subsumed by the unanimous demand for self rule and independence[29].

The differences resumed in earnest after attainment of independence. The existence of two factions in the ruling party explains the attempt to solve party discipline matters through constitutional amendments. This split also led to the strengthening of the provincial administration to replace regionalism. Officers serving in the provincial administration were part of the Executive. The formation of a rival party, KPU, occasioned amendments which concentrated the security functions in the Executive, postponed elections by two years and facilitated assignment of new constituencies to Senators after the abolition of the Senate[30].

28 Ibid.

29 Ibid.

30 Ibid.

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Chapter 2

Political Repression And The Constitution: 1982 to 1992

Introduction

The first President of the Republic died in office in August 1978. His Vice President, Hon Daniel Moi assumed office of the President immediately, initially for a period of 90 days during which elections for the office of the President would be conducted. The transition was carried out in scrupulous compliance with the Constitution. Hon Moi was shortly elected as the President and pledged to follow in the foot steps on the first President. Indeed and true to this spirit, further amendments to the Constitution followed during his reign. Whereas the amendments were fewer, they were very far reaching. Some amendments completely altered the constitutional architecture of Kenya and severely undermined the enforceability of the Bill of Rights.

Further Amendments in the New Era

The nineteenth amendment turned out to be the most controversial amendment to the Constitution[1]. Indeed, it was a turning point in the constitutional history of Kenya. The amendment undermined any pretensions of Kenya's commitment to democratic ideals. The amendment introduced section 2A to the Constitution, which converted Kenya into a *de jure* one party state. It outlawed all forms of political opposition and gave KANU, the ruling party, the monopoly of power. No person could be elected into any political office unless he was a member of and was nominated by KANU. Cessation of KANU membership led to loss of political office. The amendment was motivated by leaked information that Hon George Anyona and Hon Oginga Odinga had an intention of forming a new political party. Hon Odinga was expelled from KANU while Hon Anyona was detained.

A KANU National Governing Council meeting ordered the Attorney General to prepare legislation making Kenya a *de jure* one party state. The directive by the Governing Council was interference with the independence of Parliament and the office of the Attorney General[2]. As noted earlier, all MPs belonged to

1 Act Number 7 of 1982.

2 Githu Muigai, *Amending the Constitution: Lessons from History*, The Advocate, Vol. 2, No. 3, February 1993.

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KANU which was the only political party at the time.

The amendment stated that there shall be one political party in Kenya known as KANU. This amendment required that all candidates for parliamentary and presidential elections must be members of KANU. Any person who was not a member of that party could not contest for any political office at the General Election including the President, Member of Parliament or Councillor. Further, the political career of an MP would be ended through an expulsion from the party.

The amendment ordained unanimity on the operative approach to presidential election. The true locus of the presidential election was the framework of the party. The importance of the Vice Presidency was evident from the party practice and from the fact that only a substantive holder of the office of the President had the competence to appoint a Vice President. Indeed, in case of the President ceasing to hold office, the Vice President took office in an acting capacity for 90 days before General Elections were held[3].

The amendment was in strict constitutional theory outside the power of Parliament to amend the constitution under section 47 of the Constitution. The amendment was an affront to democracy and was a constitutional *coup d'etat*. The ruling political party simply legislated itself into power with the effect of rewriting the Constitution and the Bill of Rights in a fundamental and unconstitutional way[4]. The amendment was effected in disregard of procedure by reducing the time required for publication of constitutional Bills. Further, the debate in Parliament was a simple chorus of approval, with only two MPs dissenting.

The amendment created the office of the Chief Secretary who was the head of Public Service and exercised supervision over the office of the President and general supervision and coordination of all other government departments. The post was later abolished. The period of enacting the Bill also featured a massive crackdown on lecturers who were viewed as sympathetic to the opposition[5]. After the attempted coup *d'etat* later in August 1982 by junior officers of the Kenya Air Force, a period of great political tension and repression followed[6].

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3 Ibid.

4 Ibid.

5 Ibid.

6 This repression has been officially acknowledged by the Government. It is part of the terms of reference for the Truth Justice and Reconciliation Commission. Several suits have been filed against the Government seeking compensation.

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The twentieth amendment[7] made the High Court the final court as concerns matters of determination of questions of membership of the National Assembly under section 44 of the Constitution. The amendment provided that a High Court Judge who was appointed to the Court of Appeal could be allowed to continue and complete cases he was hearing while sitting as a Judge of the High Court. The membership of the Public Service Commission was increased to fifteen Members excluding the Chairman and the Vice Chairman. The twenty first amendment repealed section 89 of the Constitution which provided for acquisition of citizenship to any person born in Kenya after 11th December 1963. Only persons who had a mother or father of Kenyan citizenship by virtue of being born in Kenya would be entitled to acquire citizenship irrespective of their parentage[8].

The twentieth second amendment was far reaching and elicited local and international criticism akin to the 1982 amendment. The amendment removed the security of tenure of the offices of the Attorney General and the Controller and Auditor General[9]. The two offices had been insulated from political vicissitudes and interference since they were independent offices serving as watchdogs of public good. The Law Society of Kenya, the National Council of Churches of Kenya and Kenya Episcopal Conference criticized the amendment. The rationale of the amendment was not clear. It can be viewed as a measure to emasculate and curtail the independence of the two offices. The Bill was passed in record time with only two MPs dissenting.

The debates rationalized the Bill as necessary to avoid the growth of alternative centres of power. It was argued in Parliament that power should thus be centralized in the Presidency and that alternative centres of power should be eliminated from the Constitution[10]! The sitting Attorney General eloquently defended the justification to undermine his office. The amendment abolished the office of the Chief Secretary, which had been created four years earlier. This demonstrated that little thought had gone into the design of the amendment creating the office. The amendment altered the number of constituencies by providing for a minimum of 168 and a maximum of 188[11].

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7 Act Number 6 of 1985.

8 Act Number 15 of 1986.

9 Act Number 14 of 1986.

10 Prof J.B. Ojwang (Above). Page 91.

11 Githu Muigai, *Amending the Constitution: Lessons from History*, The Advocate, Vol. 2, No. 3, February 1993.

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The twentieth third amendment to the Constitution was an attempt by the legislature to overrule the judiciary. [12]In the case of *Republic vs. Margaret Magiri Ngui*[13], the High Court sitting as a Constitutional Court held that an ordinary statute like the Criminal Procedure Code could not breach the fundamental rights and freedoms guaranteed by the Constitution. The case related to the right of an accused person to apply for and be granted bail. The amendment made all offences which are punishable by a death sentence, for example murder, treason and robbery with violence, non bailable.

This was an interference with judicial discretion to award or decline to award bail based on the facts and circumstances of each case. Bail is a fundamental right since all accused persons are presumed innocent until they are found guilty after a full trial. Compulsory incarceration of a suspect undermines that presumption. Indeed and by practice, the courts had not been granting bail to suspects of capital offences since such suspects were deemed flight risks who would fail to turn up for trial when required. The amendment was therefore unnecessary. It was intended to compromise judicial independence and impartiality.

The twentieth fourth amendment further eroded the rights of suspects and accused persons by providing that police would hold suspects of capital offices for up to 14 days before arraigning them in court.[14] The period was increased from 24 hours to 14 days. The initial Bill had intended to extend the period of holding suspects of all offences to 14 days. This proposal was roundly condemned by civil society and the public. At the time, there were many and serious allegations that police and other security agencies were involved in perpetrating torture and other human rights abuses on suspects held in their custody. The amendment was ill timed and it was unnecessary and irrelevant[15]. Courts had always permitted the police to hold suspects for longer periods than the stipulated 24 hours after presenting them in court in order to finalize investigations where this was deemed necessary. The government was clearly insensitive to public views. The amendment further removed the security of tenure for judges of the High Court and the Court of Appeal and members of the Public Service Commission[16].

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12 Act Number 20 of 1987.

13 High Court Criminal Application Number 4 of 1985(Unreported).

14 Act Number 4 of 1988.

15 Githu Muigai, *Amending the Constitution: Lessons from History*, The Advocate, Vol. 2, No. 3, February 1993.

16 Ibid.

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There was no justification for the amendment and it was outrageous. The amendment undermined the doctrine of separation of powers, which includes independence and impartiality of the judiciary and political neutrality of the civil service. The amendment undermined jurisprudential basis of the Constitution[17]. The executive could now freely interfere with the judiciary and the civil service. The amendment concentrated further powers in the Executive and reduced the mechanisms for holding it accountable. The amendment made one arm of the government subservient to another. The amendment recognized the creation of the offices of the Chief Magistrate and the Principal Magistrate as part of the subordinate courts.

Synthesis of the Amendments and Agitation for Reform

The amendments carried out between 1982 and 1990 were intended to concentrate power in the Executive, undermine the functioning of other arms of the Government and independent offices and entrench an undemocratic and authoritarian system of government. The system of checks and balances envisaged in the Independence Constitution was clearly weakened. The creation of a *de jure* one party state was intended to stifle dissenting voices in Parliament. Any MP who dissented from the official government position risked swift expulsion from KANU which was the only political party at the time. The judiciary was subjugated through removal of the security of tenure provisions for the judges of the High Court and the Court of Appeal. Likewise, the Attorney General and the Controller and Auditor General could be removed from office by the President at will as the security of tenure provisions had been repealed.

This sad state of affairs led to agitation for reforms which were headlined by agitation for the introduction of a multiparty state. A large class of politicians who had been excluded from mainstream politics through expulsion from KANU or by being rigged out during the infamous queue voting elections of 1988 led the calls for reforms[18]. The international community and religious leaders weighed in with demands for reform. The government, at the time, was dependent on donor funding and the donor community threatened to cancel the aid package and the budgetary support to the government, unless reforms were carried out. The process of repairing the Constitution was therefore commenced in 1990 as a result of intense local and international pressure.

[17] Ibid.

[18] The KANU Constitution created nomination procedures that created opportunities for rigging of elections. At the time, KANU was the sole political party. The injustices and malpractices during the elections partly fuelled the public outcry for reforms.

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The twentieth fifth amendment sought to correct the whittling down of constitutional jurisprudence that had been effected on the Constitution. The amendment restored the security of tenure for judges of the High Court and the Court of Appeal, the Attorney General and the Controller and Auditor General and members of the Public Service Commission[19]. The Attorney General, though intended to act independently, was directed to draft a Bill effecting the changes[20]. The same Parliament that had a few years earlier eloquently dismissed the primacy of judicial independence in a democracy argued and supported the need for separation of powers and reaffirmed the need for judicial independence and impartiality[21]. The removal of security of tenure for judges of the High Court and the Court of Appeal and the independence offices of the Attorney General and the Controller and Auditor General had been roundly condemned in Kenya and internationally as an affront to the judiciary and intended to emasculate the institutions ability to function. The international criticism and calls for enhanced transparency and accountability in governance contributed to the change of heart by the Government.

The twentieth sixth amendment increased the number of parliamentary constituencies to a minimum of 188 and a maximum of 210[22]. This amendment was carried out without the recommendation of or recourse to the independent Electoral Commission of Kenya as was required by law. The Commission was mandated to function without being subjected to the direction of any other person or authority. Since the boundaries had been reviewed in 1986, the earliest that another review could have been carried out within the law was 1994[23]. The amendment was therefore an unlawful interference with the functions of the Commission and was enacted in a manner that violated the Constitution.

The twentieth seventh amendment[24] repealed section 2A of the Constitution paving way for multi- party politics and ending the *de jure* one party status. The amendment resulted from widespread criticism of the government which had failed to accommodate any form of opposition or alternative view. The amendment responded to international political and economic pressures that emphasized increased

19 Act Number 2 of 1990.

20 This Directive was reportedly given in November 1990.

21 Githu Muigai, *Amending the Constitution: Lessons from History*, The Advocate, Vol. 2, No. 3, February 1993.

22 Act Number 10 of 1991.

23 The revision of constituency boundaries was required to be carried out in 8 to 10 year intervals. This period had not lapsed since the last revision in 1986.

24 Act Number 12 of 1991.

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democratic space after the fall of the Berlin wall and had reduced Cold War tensions. However, locally, the clamour for reforms and especially the expansion of democratic space had taken a violent turn.[25]

Official Recognition of the need for Comprehensive Reform

The Government published a Bill to amend the Constitution in 1992[26]. This Bill proposed wide ranging reforms to the Constitution. The Bill proposed a revision of the Constitution with far reaching consequences. The review of the Bill is important in light of the clamour for a new Constitution that followed. The Bill proposed the following changes[27]:-

a. Abolition of the office of the Vice President

b. Speaker of the National Assembly was to act in the office of the Presidency whenever the office of the President was vacant.

c. The term of the President was limited to two five year terms.

d. Defined the functions, powers and duties of the President.

e. Provided for the holding of referenda on fundamental constitutional issues, including removal of the President. The Bill provided for impeachment of the President for unconstitutional conduct through a referendum vote.

f. Created a dichotomy between the Head of State, an office occupied by the President, and the Head of Government, an office proposed to be occupied by a Prime Minister.

g. Clarified the role of the Electoral Commission of Kenya in the conduct and management of elections.

h. Provided for parliamentary supremacy over veto of legislation by the President.

i. Created a legal aid scheme for victims of human rights violations.

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[25] For example, in a rally called by the proponents of multi-party state in July, 1990, scored of people were killed in major towns when police sought to violently stop the holding of the politically rally. Subsequently, further rallies were convened which elicited similar governmental response. Foreign diplomats condemned the Government's violent reaction to the meetings.

[26] Prof. H.W.O Okoth Ogendo (Above).

[27] Githu Muigai, *Amending the Constitution: Lessons from History*, The Advocate, Vol. 2, No. 3, February 1993.

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The Bill proposed a mechanism to resolve a dispute that may arise between the President and the National Assembly over veto to a Bill. The sharing of power between a President and a Prime Minister, however, could have created instability especially if the two officials were not members of the same political party. Most of the amendments were progressive and creative. However, the Bill was not enacted by Parliament.

The lessons from the amendments made to the Constitution up to 1992 can be summarized as follows[28]:-

a. The Constitution was not perceived by the political class as a rigid and certain constitution which was the fundamental law of the land. The Constitution was used as a weapon in power politics which was to be used to subdue or eliminate opposing political views.

b. The constitutional amendments were not sufficiently debated in parliament and were not sufficiently scrutinized prior to drafting. Most amendments were ill thought and intended to respond to whimsical political directives.

c. Most amendments served the sole purpose of concentrating power in the Executive and dismantling and checks and balances offered by the judiciary and parliament. The amendments further undermined the functions of independent offices intended to protect the public good, for example the Attorney General and the Controller and Auditor General.

d. The sanctity and integrity of the Constitution was compromised by too many amendments. The Constitution was deemed illegitimate and hence the agitation for constitutional reforms.

The Constitution must be respected as the fundamental law of the land. This will involve making the process of amendment difficult and rigorous and providing that any fundamental change to the structure of the constitution must be approved in a referendum.

The key milestones during this period can be stated as declaration of Kenya as a de jure one party state, which severely limited political choices of Kenyans and rewrote the Bill of Rights as envisaged in the Constitution. The removal of security of tenure for judges of the High Court and Court of Appeal, the Attorney General, the Controller and Auditor General

[28] Githu Muigai, *Amending the Constitution: Lessons from History*, The Advocate, Vol. 2, No. 3, February 1993.

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and members of the Public Service Commission eroded the separation of powers necessary for the functioning of a democratic state. The process of reversal of these amendments was equally remarkable with the restoration of security of tenure for judges and independent offices as well as restoration of a democratic multiparty state. With public agitation for change, the movement towards reforms was unstoppable.

Reintroduction of Multi-partism and Its Impact on the Reform Process

The repeal of section 2A of the Constitution which restricted political dissent was a watershed moment for the reform process. The repeal of that section marked the accelerated reversal of the amendments carried out to undermine Kenya as a democratic state. The pro-reform forces coalesced and were supported by the international community. However, the focus of the politicians who had led the agitation for the reforms at the time was the General Elections of 1992. Little effort was put to demand the carrying out comprehensive reforms by the Government prior to the elections.

At the time, Parliament being the locus of any constitutional or legislative reforms, consisted solely of MPs from KANU party. Reforming the Constitution became an important agenda after the General Election, partly because the opposition was defeated by KANU. KANU was not ready to carry out any reforms as the *status quo* obtaining at the time clearly favoured the party.

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Chapter 3

Clamour for Reform: 1992 to 2002

Introduction

The clamour for comprehensive constitutional reform in Kenya began with the mass protests and activities which characterized the demand for the repeal of section 2A of the Constitution by parliament on December 4, 1991. As noted earlier, the 1982 amendment created a *de jure* one state with political power monopolized by the ruling party, KANU. Parliament amended the Constitution in 1992 to facilitate the holding of the General Elections in that year.

The amendments included the requirement that the President was required to receive majority of the total votes cast and a minimum of 25% of the valid votes cast in 5 provinces, that a President shall not hold office for more than two terms and vesting the powers to conduct elections, including presidential elections, on the Electoral Commission of Kenya.[1] The members of the Electoral Commission were appointed soon thereafter. Previously, the Provincial Administration had played a key role in organizing and managing elections leading to allegations of electoral malpractices and manipulation. The Electoral Commission was now solely responsible for organizing and conducting elections.

The opposition lost the General Elections in 1992 to KANU. President Moi won a further five year term. The reality for the urgent need for constitutional reforms dawned on the opposition political parties and the civil society. It was not clear to the opposition political parties at the time that mere amendment of the Constitution to permit registration of opposition political parties would not lead to fundamental changes in the structure of government.

The reform movement coalesced around the opposition parties and the civil society. The diplomatic community tried to mediate between the government and the reform movement and provided material support to the reform movement. The international situation had changed precipitating a wave of democracy. At the time, Kenya was highly dependent on donor funding for its budgetary support.

[1] Constitution of Kenya (Amendment) Act Number 6 of 1992.

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The West no longer felt compelled to support dictatorial regimes in Africa with the end of cold war. However, the government was not keen to move the reform process forward.

Mobilizing for Reforms

After the 1992 General Elections, religious groups and the civil society emerged as important drivers of the reform process. Soon after the said elections, ICJ Kenya, Kenya Human Rights Commission and Law Society of Kenya revived the agenda for a National Constitutional Convention to spearhead comprehensive reform of the constitution in February 1993. The three organizations commissioned the writing of a draft model constitution, dubbed the 'Kenya Tuitakayo'.

The draft Constitution would help popularize the call for reforms and the convening of a National Constitutional Convention. The other aim of the initiative was to create a core constituency comprising the political parties, religious groups and civil society, which would effectively lobby for comprehensive reform of the constitution. This was the first representation of the views of the public on the Constitution they wanted. The model Constitution was an important lobbying tool and helped to visualise constitutional reforms.

The civil society and the opposition political parties initiated calls for comprehensive overhaul of the constitutional order. The writing of a draft model constitution was commissioned to help create a core constituency, comprising all stakeholders which would effectively lobby for comprehensive reform of the constitution. The proposed model constitution received overwhelming support from the public, religious groups and opposition political parties.[2] In November 3 1994, ICJ Kenya, LSK and KHRC launched the proposed model constitution at Ufungamano House. This was the pioneer comprehensive document highlighting some of the envisaged reforms to the constitution of Kenya.

A steering committee of the proposal for a model Constitution was formed drawing members from the main civil society groups represented at the launch. These efforts would eventually lead to the convening of the National Constituency Assembly that would adopt the new Constitution. Among the proposals in the model constitution was that persons without high school education were not eligible to vie for the office of the President and that persons over the age of 70 years were not eligible to vie for Presidency.[3]

[2] The Proposed Constitution dubbed 'Kenya Tuitakayo' was sponsored by the ICJ Kenya and LSK.

[3] Prof Macharia Munene,*The Manipulation of the Constitution of Kenya*, 1963-1996; a Reflective Essay.

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The civil society led public awareness campaigns to enable the public understand the need for constitutional reforms. The mismanagement of the economy at the time by the government was linked to political misrule thereby adding pressure on the government to carry out reforms[4]. The international donors demanded that the government carry out governance reforms before any further budgetary support could be availed.

In January 1995, the President promised to invite experts to prepare a draft Constitution. This promise was not implemented. The civil society resorted to mass action which led to violence and deaths. Since the Government was not constructively engaging the reform movement, there were real fears of escalation of violence. By 1996, many groups, including religious groups, political parties and the civil society were openly calling for constitutional reform. There was a widespread view that the constitution was defective and there was an urgent need to carry out reforms.

The opposition parties recognized that the constitutional and legal landscape was heavily tilted against them. In that legal environment, it was very difficult to win political power from the ruling party, KANU. The popular view was a constitutional overhaul was necessary. Parliament was no longer regarded as the sole entity that would spearhead reforms but rather one of the stakeholders in a consultative process[5]. The role of Parliament in the past of completely overhauling the constitution through myriad amendments without any reference to the citizenry was the cause of the constitutional crisis.

The Inter-Parties Parliamentary Group Reform Package

The opposition parties, in 1997, negotiated a minimum reform package through the Inter Parties Parliamentary Group[6] (IPPG). The reforms which were negotiated by the MPs and agreed upon included:-

a. Reform of the Electoral Commission of Kenya[7]. This was through the securing the independence of the Electoral Commission of Kenya by increasing the membership of the Commission from 12 members

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4 Ibid.

5 Ibid.

6 Amendments were effected through the Constitution of Kenya (Amendment) Act, Act Number 9 of 1997. This was a group composed of MPs sourced from all parliamentary parties. The opposition parties recognized the need fir some minimum reforms before elections since a new Constitution could not be realized before the elections in 1997.

7 Section 41 of the Former Constitution.

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to 22. Parliamentary opposition parties were invited to nominate the 10 extra Commissioners. The slots were divided among the parties based on their parliamentary strength.

b. The Constitution was amended to expressly state that Kenya was a multiparty democratic state.[8]

c. The nomination of MPs by the President was to be based on the strength of parliamentary parties. Nominations were previously carried out by the President at his sole discretion and inevitably benefiting members of his party[9].

d. The President could appoint Ministers from members of the National Assembly who did not belong to the political party that sponsored him to contest for the Presidency[10]. This created room for the formation of a government of national unity in future.

e. A petitioner challenging an election under section 44 of the Constitution could appeal to the Court of Appeal if he or she was not successful at the High Court. This right of appeal had earlier been abolished.

f. A number of statutes that restricted civil and political rights were repealed, for example annulment of the offence of sedition, laws inhibiting freedom of association and expression.

The Group agreed to carry out wide ranging reform after the 1997 General Elections and enacted the Constitution of Kenya Review Act, 1997. The Act was promoted by the Government without adequate consultation with the civil society and the opposition political parties. The government was anxious to assume control of the process and minimize popular participation[11].

Negotiating the Legal Framework for Constitutional Review

The Constitution of Kenya Review Bill was published in August, 1997 as part of the IPPG package. The negotiations were carried out between the government and the opposition to the exclusion of the civil society, religious groups and other stakeholders. The Bill was

8 Section 1A of the Former Constitution.

9 Section 33 of the Former Constitution.

10 Section 16 of the Former Constitution.

11 Jill Cottrell & Yash Ghai, The Role of Constitution Building Process in Democratization: Case Study- Kenya, International IDEA, 2004(www.idea.int/conflict/cbp/)

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enacted by Parliament[12] and assented to by the President[13] in November 1997. The Act intended to create a comprehensive legal framework to carry out the constitutional reform. The Act codified the modalities of reviewing the constitution. This was after intense negotiations between the government and the opposition. The Act provided a parliamentary route to constitutional review. This approach received little public support and was rejected by the civil society[14].

The protests by the civil society and the opposition parties about the structure of the reform process necessitated negotiations to identify an acceptable procedure. The negotiations took place in June and October 1998 in a series of National Conferences held at Safari Park Hotel in Nairobi. The negotiations were carried out by the IPPG, the opposition and civil society. The agreements reached at the conferences were incorporated in the Act. The Act was later amended by the Constitution of Kenya Review (Amendment) Act, 1998. The amended Act received presidential assent on December 30, 1998. Public participation was recognized as the driving principle of the review process. The Act listed 54 stakeholder groupings that would be represented in the Constitution of Kenya Review Commission. It provided for 25 commissioners, of which 13 were reserved for political parties, to be appointed by the president from a list of 49 nominations from stakeholders.

The government and the opposition parties disagreed on the process of nominating members in the Constitution of Kenya Review Commission. The Act allowed the government to pick the members of the Commission without further consultations and in an exclusive and final manner.

In October 1999, a Parliamentary Select Committee on the Constitutional Review was formed with the mandate of collecting and collating views from Kenyans and to recommend how the Constitution should be reviewed in respect of the Constitution of Kenya Review (Amendment) Act, 1998, to facilitate the formation of the Review Commission, and to co-ordinate the process of review.

The membership of the committee was drawn from all parliamentary political parties. Parliament adopted the Select Committee's report in April 2000. Honourable Raila Odinga chaired the committee. The report recommended that parliament nominates 21 persons from whom the president would appoint 15 members to the Commission. The

12 On 6th November 1997.

13 On 7th November 1997.

14 Andreassen, BA (Above), Page 1.

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collection of views from the people by the Commission should be done at the constituency level. These proposals if enacted would have locked out the civil society from participating in the review process as per the Act.

The government revised the Act and provided for goals of the review process and wide participation of the people. It created an independent Commission which would consult the people and draft the Constitution. The opposition parties boycotted the process and did not participate in enactment of this law. The civil society had similarly been sidelined. The Government therefore handpicked members of the Commission.

The civil society commenced a parallel review process under the leadership of main religious groups. On April 27, 2000, the Peoples' Commission of Kenya was inaugurated by the Ufungamano Initiative. The Ufungamano Initiative consisted of religious organizations and civil society. The People's Commission of Kenya was appointed based on provisions of the Act. It operated despite limited financial resources and lack of parliamentary support. The Commission's mandate was to collect and collate the views of Kenyans on the constitution review.

The Act was later amended in March 2001 to incorporate the report of the Select Committee by increasing the number of commissioners and thereby facilitating the merger of the two commissions. Ten members of the Peoples Commission of Kenya were incorporated into the original fifteen members. The Act raised the number of commissioners to 27 thereby facilitating the merger of Commission and the People's Commission. These Commissioners were appointed from a list of its twelve nominees forwarded to the President. The Attorney General and the Secretary to the Commission served as *ex officio* members.

The review process was therefore guided by the Constitution of Kenya Review Act, 2000 as amended in 2001. The process was designed as a people driven process. In November 2000, the chairperson of the Commission, Prof Yash Pal Ghai, promoted the idea of a joint commission formed by the parliamentary-led commission and the Ufungamano Initiative[15]. Such process was intended to be inclusive – accommodating the diversity of the Kenyan people[16]. The people were to be granted opportunities to actively, freely and meaningfully participate in generating and debating proposals

[15] ICJ, Kenya- *Attacks on Justice,* 11th Edition.

[16] Section 5(b) of the Act.

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to alter the Constitution. The process was required to ensure that the final outcome faithfully reflected the views and wishes of the people. The organs of review were to be accountable to the people and the process was to be conducted in an open manner and be guided by respect for universal principles of human rights, gender equity and democracy[17].

Structure of the Review Process

The Constitution of Kenya Review Act established the organs that were intended to superintend the reform process. These organs of the review were[18]:-

i) The Constitution of Kenya Review Commission

The members of the Commission were appointed by the President on approval by Parliament. It was intended to be an independent expert body which reflected the diversity of Kenya. The Commission would provide civic education to the public on constitutional issues, seek the views of the people on reforms, and prepare a draft Constitution for consideration at a National Constitutional Conference. The Commission was to establish Constituency Forums of locally elected leaders in each constituency to promote discussions on reform and facilitate its consultations with the residents in the constituency. The Commission appointed a coordinator in each of the 74 districts for the purposes of maintaining a library and to assist the work in the constituencies.

ii) National Constitutional Conference

The Conference comprised all MPs, 3 delegates elected from each district, 42 representatives of political parties and 125 representatives of religious groups, women groups, and youth groups, the disabled, trade unions and NGOs. The Conference was representative and was set up to reflect public concerns and to be the primary negotiating forum in the review process. Its function was to debate and if necessary to amend, and adopt the Draft Constitution presented by the Commission. The Conference got underway in April 2003. The plenary sessions of the Conference were chaotic and anarchic.

The delegates did not endear themselves to the public by putting their own remuneration as the first agenda. Once committees were formed, the debates moved with reasonable dispatch, especially in the Committees where the Chairpersons had a good understanding of the subject under review. There was a boycott by

17 Jill Cottrell & Yash Ghai (Above).

18 Ibid.

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the Government at the end of the second session in January to March 2004. The system of Government adopted by the plenary was termed unacceptable. The contentious issues were identified as system of the Executive and devolution. The issues were to be resolved by consensus which did not hold and soon there was a major disagreement among the political groups. The consensus committee report was rejected by the delegates[19].

iii) National Assembly

The Assembly was to enact changes to the Constitution by formal amendments. Parliament formed the Parliamentary Select Committee on the Constitution which paled a critical role in the review process, marshalling support for party positions, determining the extension of time for the process. The importance of the Committee led to jockeying among MPs for its Chairmanship.

iv) Referendum

This was a device for solving differences among delegates of the Conference. A negative vote by the Conference would have automatically triggered referendum. Due to the many issues that could have triggered a referendum, it would have been impossible to explain the choices to the public or to incorporate the results of the referendum in the Draft Constitution as some issues were fundamental and would have required a reconstruction of the Draft Constitution. The provision of two thirds of the total number of delegates at the Conference was later amended to two thirds of the delegates present and voting[20].

The Conference and Parliament were the critical decision making organs in the process. The Conference had to adopt the draft Constitution by voting for it by two-thirds majority of all its members. Failure to approve the provision by that threshold would lead to a referendum. The results of the referendum would be incorporated into the Commission's draft before it was transmitted to the National Assembly. The National Assembly could either approve or reject the Draft but had no power to modify the draft Constitution as a result of section 47 of the Constitution. The assumption was that once the draft was approved by the Conference, the enactment by the National Assembly would be a formality. The Commission published its report and the draft Constitution in September 2002. The inaugural meeting of the Conference was convened on 2nd December 2002. The National Assembly was dissolved soon thereafter thereby effectively suspending the process until April 2003.

19 Ibid.

20 Ibid.

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The process was designed with clear tasks, sequencing and correct specialization. The noble intentions of the Act were undermined by the way the Commission was formed[21]. The independence of the Commission was subverted by the government and political parties[22]. The political manipulators down played expertise available at the Commission and used serving Commissioners to undermine the process. The process suffered from lack of expertise, willingness to serve political masters and determination to block the use of expertise outside the Commission[23].

Reforming Parliament

One significant constitutional amendment that was enacted during the period was the Section 45A and 45B of the Constitution. Parliament was finally asserting its independence after decades of subjugation under the authority of the Executive. The Constitution established parliamentary service and created the office of the Clerk of the National Assembly. The Constitution further created the Parliamentary Service Commission chaired by the Speaker of the National Assembly. The Parliamentary Service Commission had the power to constitute and abolish offices in parliamentary service, appoint persons to serve in those offices, provide services and facilities to ensure effective and efficient functioning of the Assembly, direct and supervise the administration of the services and facilities by and exercise budgetary control over the service among other functions. The amendment was proposed as a private Members Bill but was eventually adopted by the government and enacted. The amendment restored parliamentary independence. Since then, Parliament was been more effective in carrying out its legislative, watchdog and representation roles.

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21 Majority of the Commissioners were unilaterally appointed by President Moi without any consultations with other stakeholders. The members were not properly vetted by parliament.

22 Jill Cottrell & Yash Ghai (Above).

23 Ibid.

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Chapter 4

The Reform Process Post IPPG: 2002 to 2005

Introduction

In 2002 General Election, Narc captured the presidency defeating Kanu. President Mwai Kibaki decisively defeated Hon Uhuru Kenyatta, who had vied on a Kanu ticket. President Moi was ineligible to vie for the presidency, as he had served two terms since 1992. The new government was elected on a platform of reforms and fighting corruption. But after assuming power in 2002, the government lost its reformist zeal. There was little support for reduced powers of the presidency and for limiting the age of the president[1].

Political intrigues at the time revolving around President Kibaki and Hon Raila Odinga and all alleged pre-election pact further led to reduced support for the reform process by the Government. The Government showed its intentions to carry out reforms without the support of the Constitution, for example, the radical surgery in the judiciary. The Government retained the Provincial Administration, which was designed to ensure a top-down control of the population. The administration was directed from the president's office.

The Constitution was viewed as a patchwork of political expediency submerged in a sea of illegitimacy. The people had lost confidence in the validity and legitimacy of the Constitution as a tool for governance and for protection of human rights for all. The review process was therefore intended to entrench accountability and transparency, ensure democracy and widest participation of the people, reflect on and respect the dignity of all persons and the wishes of the people.[2] When constitutions are framed and adopted, they tend to reflect the dominant beliefs and interests, or some compromise between conflicting beliefs and interests, which are characteristics of the society at the time[3].

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1 For the record, President Kibaki was opposed to age limits for holders of political offices even before he won the Presidency.

2 Prof Lumumba, Some Thoughts on Constitutional Principles in the Review Process.

3 Prof. K. C. Wheare, Modern Constitutions,

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Many MPs opposed certain clauses in the constitution that they did not want to see implemented. The MPs opposed the recall clause, restrictions on the number of terms they could serve, the selection of ministers from persons who were not MPs and the creation of a second Chamber that could curb the unbridled powers of the National Assembly. Judges were not enthusiastic about the process, especially to the extent that their past conduct would be scrutinised. The religious groups advocated for the abolition of the Kadhi Courts and demanded a referendum on the issue[4].

The president had the power under the Constitution to call for an election at any time[5]. The electoral commission was designed to be ineffective and compliant. The members were appointed in an open process and through a process of application by persons interested in serving as commissioners. Many of the commissioners reported regularly to their patrons[6]. In August 2002, judges filed a suit and obtained an interim injunction barring the commission from making recommendations on the judiciary. This was a clear case of conflict of interest, as the judges who granted the orders were equally subject to the scrutiny proposed by the commission. The litigation galvanised public opinion and the Law Society of Kenya came out in support of the reform process, including reform of the judiciary. The judicial reforms intended to address perceived corruption and incompetence among judges.

Convening the National Constitutional Conference

The National Constitutional Conference was convened in April 2003. Two further sessions were held in 2004 at the Bomas of Kenya. The high participatory process at the conference led to expansion of the agenda, as communities and marginalised groups were given a voice for the first time. The conference was the forum for negotiations. The politicians undermined the process for self preservation as the proposals in the Draft Constitution advocated for participatory democracy, self-government and accountability. MPs threatened to amend the proposals advanced at the conference as the Draft Constitution would be eventually debated in Parliament.

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4 The inclusion of Kadhi's court in the Constitution became a contentious issue. The Kadhis courts had been part of the Kenya legal system since Independence and handled matters of personal law relating to Muslims.

5 President Moi exercised this power to scuttle the reform process in October 2002 when he dissolved Parliament. This meant that the National Constitutional Conference could not be convened without MPs who formed a third of the membership.

6 Cottrell & Ghai, (Above).

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Traditionally, constitutional amendments have been carried out by politicians without any input from the public. The review process sought to reduce the role of politicians and convert them into one of the many categories of stakeholders. Politicians turned out to be better mobilisers of public support than the civil society and they are more willing to introduce and exploit ethnicity in the review process[7].

On the last day of the National Constitutional Conference in March 2004, ministers, led by the Vice President, walked out before the final voting, protesting that the consensus reached by the parties on the structure of the executive had not been honoured. The Constitution of Kenya Review Commission Chairman presented the Draft Constitution as finalised at the conference to the Attorney General, who received it as a delegate and a Commissioner of Constitution of Kenya Review Commission because there was a court order issued in the case of *Rev. Njoya vs. the Attorney General and Others* (referred to as Njoya Case)[8] barring him from receiving the document in his capacity as the Attorney General.

The Act was later amended to provide for revision of the Bomas Draft by simple majority of MPs in Parliament, a mandatory referendum and resolution of contentious issues by the Parliamentary Select Committee. This prompted the civil society led by the Yellow Movement to file a case challenging the Act[9]. The amendments deprived the citizens of their constituent power since there was no provision for a mandatory referendum under the Constitution of Kenya Review Act.

After the disbandment of the conference, the Parliamentary Select Committee on the Constitution Review attempted to build political consensus on the sharing of the executive powers in the Constitution between the President and the Prime Minister, through the Naivasha Accord. The Act was amended to conform to the court ruling and to kick start the process after the conference political stalemate. The Accord stated that executive power would vest in the President, Prime Minister and the Cabinet. The President would appoint a Prime Minister from the political party or the coalition of parties with the majority support in Parliament. The devolution structure was proposed to be three tiers: national, county and district levels.

The civil society weighed in with calls for the process to be completed by experts. In this regard, the National Council of Churches of Kenya and the Law Society of Kenya produced

7 Ibid, Page 29.

8 [2004] KLR

9 See below *Patrick Onyango & Others vs. the Attorney General* [2008] 3 KLR (EP) 84.

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Draft Constitutions. The NCCK Draft Constitution proposed the presidential system and a unitary government. This was in contrast with the conference draft that proposed a parliamentary system and a devolved government. The five options that were proposed at the time to break the stalemate were:-

a. Amend the conference Draft Constitution in Parliament. This option was not supported by law given the ruling in the Njoya case and was very unpopular with the public.

b. Build consensus among MPs. This would depend on the control party leaders had over MPs in their respective parties at the time. This option faced a limitation in that a select team would have no mandate to complete the review process unless the law was amended.

c. Election of a new Constituent Assembly. The Assembly would be constituted through elections with the power to examine the views collected and generate a draft.

d. Conduct a referendum on the draft. The people would have an opportunity to approve or reject the conference Draft Constitution.

e. Enact the Draft Constitution in Parliament and later amend it as needed.

f. Recall the conference for a session to sort out the contentious issues in the draft.

Further Amendments to the Review Framework

The Act (as amended in 2004) sought to legitimise **retrospectivity** by applying the Act to events that had occurred before it was enacted. Such events included the work of the commission and the proceedings of the National Constitutional Conference. The proposed amendment did not fully accord with the judgement in the Njoya Case, which raised questions on the adoption and approval of a constitution and **representativity** of the conference.

The Constitution of Kenya Review Act, 2004 provided for a mandatory referendum to ratify the new Constitution. This complied with the Njoya case decision, which provided for the adoption of a new constitution through a referendum or through an elected constituent assembly. This means that the citizens had the final say in adopting the type of constitution they wanted. The holding of a referendum in the soured political environment that obtained after the conference could translate into an audit of government's performance rather than approval of the constitution.

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The Act did not cure the defect in section 47 of the former Constitution that did not provide for the adoption and coming into force of a new Constitution. Perhaps, the Minister for Justice and Constitutional Affairs at the time did not want to propose a constitutional amendment since the handling of the review process had led to loss of support by many MPs.

The Act, which proposed to complete the process in about 180 days, did not provide for sufficient time to translate the draft Bill into accessible languages, carry out civic education and to create an appropriate infrastructure for conducting the referendum and operationalise the new constitution. The voting on referendum by the citizens was intended to be based on knowledge and choice. There was no consensus on the ideal majority of the referendum vote that was appropriate to approve the constitution in the referendum.

The reform process lacked sufficient constituency building and the support for a new constitution was fragmented in many respects. The fragmentation of the core constituency of the citizenry and the civil society, which has all along supported the review of the constitution, was precipitated by emerging fragmented political interests about the contents of the Draft Constitution.

The divisions were not necessarily driven by the methodology adopted to review the constitution. The so-called 'contentious issues' were to be resolved through consensus. However, the so-called contentious issues were never defined or isolated. Proponents of certain views in the Constitution were responsible for stalling the review process in order to push for the acceptance of their favoured positions.

There were doubts on the technical capacity, independence and impartiality of the Electoral Commission of Kenya to conduct the referendum. The application of the Electoral Offences Act[10] and National Assembly and Presidential Elections Act [11]to a referendum was not appropriate. The right of the citizenry to exercise the constituent power to make a new constitution was not supposed to be tied to registration or non-registration as a voter. The application of such laws disenfranchised Kenyans who had not registered as voters. The vote on the referendum should have been recognised as an exercise of sovereign right available to all Kenyan citizens. It was an exercise to decide on the relationship of the citizen and the Government.

The commissioners of the ECK serving at the time were nominees of political parties. This created doubts as to

[10] Chapter 66 of the Laws of Kenya.

[11] Chapter 7 of the Laws of Kenya.

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their impartiality. As noted, there was no legal framework in place to permit the replacement of the Constitution. The replacement of the current constitution with the new proposed constitution would have required an amendment of section 47 of the Constitution. The amendment to section 47 of the former Constitution would have facilitated compliance with the Njoya case judgement, legitimised the referendum results and created a mechanism of entry into force of the new constitution. The President had no power to proclaim the new constitution as law as was provided in the Act. The President could only set the date for entry into force of the new constitution.

The amendment to the constitution would also clarify who and how the new constitution would be proclaimed and create the necessary transitional mechanisms. In the circumstances, even if the referendum was held and Kenyans came up with a new constitution, it was not clear how it would be brought into force under the provisions of the former Constitution.

The procedures for challenging the results of the referendum were criticised as excluding the poor. Each applicant for review of the referendum results was required to deposit five million shillings in court as security for costs. The Chief Justice was empowered to constitute the Bench that would hear applications to challenge the results of the referendum. There was no prescribed timeframe for conclusion of the hearing of the petitions and the delivery of judgement. It was feared that given the backlog currently bedeviling the judiciary, filing of cases challenging the referendum results would inordinately delay the entry into force of the new constitution.

Determination of the application after say five years or longer would injure, perhaps fatally, the process of implementing the new constitution. It was possible for persons to file such petitions regardless of the sufficiency of grounds given the political and sectarian intrigues that had emerged in the process at the time with the sole intention of delaying the implementation of the constitution. Such petitioners would be driven by sectarian or other narrow self-interests.

The amendments to the Act were based on political expediency and solved few legal problems facing the review process. The amendments were by 'consensus', which was a polite word for political horse-trading than technical legislative consultations. The Act did not promote accountability. It provided that the assets of the commission would vest in the Government without any provision for an audit.

At the political front, there was a change in chairmanship of the Parliamentary Select Committee whereby Hon Simeon Nyachae replaced Hon William

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Ruto on May 5, 2005. The PSC received views from stakeholders (civil society, political parties, and religious groups) and considered the inclusion of the Naivasha Accord in the Draft. The Bomas Draft was revised using the views collected and the product was dubbed the "Kilifi Draft".

Some MPs felt that the committee had recommended changes to the Draft Constitution, which were not considered contentious in the Naivasha negotiations. Parliament deliberated and endorsed the draft paving way for the Attorney General to draft the Proposed New Constitution as required by the Act. This Draft Constitution was widely circulated in the local press and through the civic education conducted countrywide by the commission and stakeholders including civil society and religious groups. The parliamentary debate on the Kilifi Draft did not resolve the contentious issues and the process became embedded in a contest between political leaders fronting different models of the executive[12]. These struggles were marked with ethnic overtones that punctuated the campaigns for and against the Proposed New Constitution during the referendum.

Key Court Decisions on the Review Process and their Impact

The court played a dispute resolution role in the process. In 2004, the case of *Rev. Timothy Njoya & Others vs. CKRC & Others*[13] was heard by Justices Aaron Ringera, Mary Kasango and Benjamin Kubo. The applicants sought to stop the work of the National Constitutional Conference, which they argued was not a properly constituted Constituent Assembly and to prevent Parliament from enacting the Constitution without the holding of a referendum.

The applicants argued that members of the Constituent Assembly should have been directly elected in observance of the principle of one man, one vote. Parliament could not amend the structure of the Constitution without reference to a referendum since the constituent power reposed in the people. It was held that it was not possible to replace the Constitution through the amendment process established in section 47 of the Constitution. It was therefore necessary to amend the Constitution and create a mechanism for replacing the Constitution. By purporting to enact a Bill to replace the Constitution, Parliament was exercising a power that it did not possess under section 47 of the former Constitution.

12 Andreassen, B.A, (Above) Page 3.

13 [2004] 1 KLR 261.

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In the judgement, the court made wide ranging observations on the operation of the Act in facilitating a proper constitutional review process. The High Court of Kenya sitting in Nairobi held that Parliament had no jurisdiction or power under section 47 of the Constitution to abrogate the existing Constitution and enact a new one. Parliament's power was limited to altering or amending the existing Constitution. Since Parliament was a creature of the Constitution, it could not have the power to enact a new constitution while exercising its powers of amending the Constitution.

The court said the power to make a new constitution belonged to the people of Kenya as a whole in exercise of their sovereign right. The citizens of Kenya were entitled to have a referendum on any new proposed constitution. The provisions of section 27(5), (6), and (7) of the Constitution of Kenya Review Act were unconstitutional to the extent that they converted the applicants' right to have a referendum into a hollow right and privilege dependent on the absolute discretion of the delegates of the National Constitutional Conference, section 28(4) of the Act was inconsistent with section 47 of the Constitution and therefore null and void. The judgement overruled the existing precedent of *Republic versus El Mann*[14], which had held that the Constitution was to be interpreted as any other Act of Parliament in that where words were clear and unambiguous they are construed in their ordinary and natural sense.

The court held that the Constitution is the supreme law of the land; a living instrument with a soul and a consciousness which embodies certain fundamental values and principles. It must therefore be construed broadly, liberally and purposefully to give effect to those values and principles. The court further held that the National Constitutional Conference was not a constituent assembly... the conference as constituted was not an elected body. The majority of the membership of the NCC must trace their roots to direct election by the people in whose name they are participating in constitution making. This deprived the citizens of their constituent power since there was no provision for a mandatory referendum under the Act.

Section 27(5) of the Act provided that all questions before the National Conference shall be determined by consensus, but in the absence of this, such decisions shall be determined by simple majority of members present and voting. The section further provided that in case of any question concerning the proposal for inclusion in the constitution, the decision of the conference shall be carried by

[14] [1969] EA 357.

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at least two thirds of the members of conference.

If such proposal was not supported by a two-thirds majority, then a further vote may be taken. Section 27(6) of the Act provided that the commission shall record the decision of the conference and shall in the absence of consensus submit the question(s) to the people for determination through a referendum. Section 27 (7) of the Act provided that such a national referendum would be held within two months after completion of the conference. Section 28(4) of the Act provided that the Attorney General shall table the report of the commission, drafted on the basis of the decision of the people through a referendum and the draft Bill as adopted by the conference before the National Assembly for enactment within seven days from the day the Assembly next sits.

The judgement in the case stopped the review process to enable the Act to be amended. However, at the time, the conference had completed its work. More efforts to build consensus on contentious issues were carried out under the auspices of the Parliamentary Select Committee on the Constitution. The Act was amended permitting Parliament to amend the Draft Constitution generated at the conference through a simple majority. The Attorney General would thereafter prepare the final Bill, which would be subjected to the referendum. The final act was the publishing of the new Constitution by the President within 14 days after ratification of the Constitution. A window of 45 days was provided for any challenge to the results of the referendum.

The cases relating to the constitution making process pending in the High Court at the time when the referendum was about to be conducted in November 2005 were consolidated in the *Patrick Onyango Ouma versus the Attorney General and Others*[15] culminating in the judgement delivered by Justices Joseph Nyamu, Roselyn Wendo and Anyara Emukule. In that case, the court cleared the way for a referendum. The court held that the deliberations at the National Constitutional Conference were not unconstitutional; that the constituent power of the people is a fundamental right vested in the people of Kenya and is fundamentally different from legislative power vested on Parliament; and that the Constitution does not allow Parliament to revoke it or establish a new constitutional order vide section 47 of the Constitution.

The Constitution of Kenya Review Act was not unconstitutional to the extent that it allowed Parliament to make changes to the Bomas Draft Constitution, for further refinement of the Draft Constitution by the Attorney

[15] [2008] 3 KLR (EP) 84.

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General and for promulgation of the new Constitution by the President after the referendum. The court stated that there two ways of validating a proposed constitution in exercise of constituent power of the people: through a referendum or through a Constituent Assembly.

The court held that the power to frame a constitution was a primary power whereas that to amend a rigid constitution was derivative, as it is derived from the Constitution and is subject to the limitations imposed by the prescribed procedure under the Constitution. The amending power must be exercised in accordance with the existing constitution. The constitution was a creature of the people's law making power, the constituent power.

The right of the people to exercise the constituent power is inherent in them. No group, for example Parliament, the executive or the judiciary, has the right to take that right away. The court had no mandate to prohibit the exercise of the constituent power or declare that the people should not exercise their constituent power. The exercise of power to injunct the people from exercising their sovereign constituent power would constitute usurpation of the people's power. Judicial power is itself exercised on behalf of the people and cannot be exercised against the people.

The Referendum and the Aftermath: It's Role in the Process

Consequently, a referendum was conducted on November 21, 2005 in which the Proposed New Constitution was rejected[16]. The referendum was conducted in a peaceful manner and the outcome represented the will of Kenyans. The Electoral Commission of Kenya was able to carry out speedy voting, a well-managed counting process and rapid announcement of results. The referendum campaign confirmed that Kenyan politics were characterised by ethno-political cleavages and political loyalty based on ethnicity[17].

Contentious issues were cited as the major reason for failure. These issues included but were not limited to *inter alia* devolution of power in regions. The conference draft proposed five levels of government including regional government. The jurisdictions and financial autonomy mechanisms of the devolved structures were not clear to the majority. Another contentious issue was the powers of the executive. The majority felt the

[16] The Proposed New Constitution was rejected by 57% of votes cast while 43% were in favour of the draft.

[17] Andreassen, B.A, Of Oranges and Bananas: The 2005 Kenya Referendum on the Constitution, CMI Working Paper, 2006.

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institution of the presidency was too powerful and needed more checks and balances, including sharing power with a Prime Minister. The land tenure reform was another sticking point. The proposals relating to land were not well understood, for example capping the acreage owned by an individual and inheritance of land by women in some communities; the creation and intended functions of religious courts was not well understood by the majority; single or two chamber parliament; the abolition of provincial administration; and that referendum threshold to ratify a new constitution should be raised from simple majority to 65 per cent of total votes cast[18].

There was no agreement on what the contentious issues were. Some of the identified issues were devolution, Kadhis courts, the land tenure question and structure of the executive. There was no clear procedure under the law for resolving the issues that proved divisive. The contentious issues continued to haunt and paralyse the reform effort since they were not comprehensively addressed in an appropriate context and framework. Further, the political groups showed little will in having the issues resolved[19].

The referendum was organised by the ECK, which was at the time chaired by Samuel Kivuitu. The Proposed New Constitution was published by the Attorney General in August 2005. The commission registered referendum committees in September 2005. The campaign period was set for one month. Voters were registered for two months up to October 2005. The Electoral Commission was also responsible for civic education. The commission admitted that the civic education was not carried out satisfactorily. Public debate had moved away from constitutional issues to political debates between different camps. Ethnic division and hostility was substantial in the run-up to the referendum. The campaign was characterised by hostile, aggressive, and inciting utterances[20]. The voting process went smoothly. The officials of the Electoral Commission carried out the exercise professionally. The results were announced on November 22, 2005 by the chairperson of the commission. The 'Yes' Camp conceded defeat and pledged to work with the 'No' camp to promote reconciliation. The 'No' Camp carried the vote in seven out of eight provinces[21].

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18 S, Mundia, *the Merits and Demerits of the Minimum Constitutional Reforms* in ICJ Kenya, Rule of Law Report, 2007, Page 3.

19 Ibid.

20 The Kenya National Commission on Human Rights recommended the prosecution of politicians who were inciting the public through hate speech.

21 Andreassen (Above).

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The vote of 'Yes' or 'No' at the referendum was a vote on a package of proposals. Voters liked parts of the proposals and disliked others. Some voters responded to appeals by their ethnic leaders. The President dismissed the entire Cabinet and declared that he would form a new one in two weeks. He later announced a new Cabinet and excluded the ministers who had supported the 'No' campaign. The ethnic polarisation during the referendum underlined the post-election violence later in 2007. The structure of the executive had proved the most intractable and polarising contentious issue in the review process. The results proved that the review process was not complete and more efforts would be required to realise a new constitution for Kenya. The result was a rejection of the Proposed New Constitution and not a vote to retain the former Constitution.

Options Post 2005 Referendum

After the referendum and given the judgements of the High Court relating to the process, three broad procedures to complete the review were identified. There was no agreement on which method should be adopted to complete the process. In addition, the three methods were not viewed as mutually exclusive. One method was the establishment of a Constituent Assembly to deliberate and agree on the Constitution. The Constituent Assembly would be constituted in a representative manner through an election. This would require an amendment to the Constitution. The proposal was to use the election window in 2007 to elect the members of the Constituent Assembly. The ballots for the elections would incorporate an election of a representative to the Assembly.

The second method was a mandatory referendum. The Patrick Onyango and Njoya judgements had held that Kenyans had a sovereign and inherent right of ratifying a new Constitution. The experience of the referendum on the Proposed New Constitution in November 2005 indicated that the law should provide for the structure of a meaningful referendum.

An amendment to the Constitution was necessary to provide for citizens participation in constitution making. At the time, there were three law making procedures known to the Constitution. These were amending the Constitution, enacting legislative Bills and amending the National Assembly Standing Orders. There was no procedure for constitutional replacement. The structure of the referendum would be established through a Referendum Act.

Some arguments being advanced in support of the Constituent Assembly and against the referendum included the fact that a referendum provided an opportunity for the public to hit back at the government on issues totally unrelated to the Draft Constitution,

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which would be the subject of the referendum. The fact that a sizeable portion of the population is illiterate or semi-illiterate made it easy for politicians to manipulate them. The political landscape in Kenya had been highly ethnicised and, therefore, the debate on the contents of the Constitution was not focused or balanced. The past referendum served to raise tribal suspicions, hostilities and animosities to unacceptable levels. The referendum was a casualty of Kenya's deeply entrenched culture of political mercantilism and electoral corruption.[22]

The third method, which was least favoured by the public, was using the amendment procedure provided for under section 47 of the Constitution to undertake an overhaul of the Constitution. Kenyans were opposed to this method as they believed that politicians were driven by self-interest and not that of the nation. Further, parliament had presided over annihilation of the Independence Constitution through amendments thus necessitating the quest for a new constitutional order. Even some political parties were opposed to minimum reforms championed by parliament. The role of parliament as an organ of reform could not be underrated since even the amendments necessary to streamline and facilitate constitution making process had to be enacted in parliament.

There was an urgent need to amend the Constitution to set up the mechanism for constitution making process and succession. This was by amending Section 47 of the Constitution to provide for a referendum and Constitutional Assembly as well as the procedure of promulgating a new Constitution. In addition to the constitutional amendment, an appropriate legislative framework for the review process was required, including setting up a review commission through an Act of Parliament[23]. However, after the rejection of the Proposed New Constitution, the Government was not keen on completing the reform process immediately.

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[22] Report of the Standing Committee on the Constitution Review of the Law Society of Kenya.

[23] Law Society of Kenya (Above).

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Chapter 5

The Review Process After The 2007 Post-Election Crisis

The road that Kenya had to follow as it rummaged in search for a new Constitution was like in many other nations rutted and snaky. In the early 90s, transforming the Supreme Law into a people oriented one appeared to be a tall order. Changing the *status quo ante* was an idea that the then administration of former President Moi was ready to oppose by any means necessary, including force.

The collapse of the constitution making process had proved the doomsayers right - that constitutions are hardly made during peacetime, but rather in times of crisis. Fortunately for the review process and unfortunately for the victims, the aftermath of the bungled 2007 presidential elections and the resultant scale of national violence presented the necessary crisis that was crucial in jumpstarting the review process. The crisis demonstrated to all Kenyans that getting a new constitutional order was no longer an option but a necessity.

On the basis of the root causes of the violence as established in the numerous official reports, it was ostensibly clear that a majority of the causes could only be addressed by a new constitutional order. An authoritative report on the causes of the 2007 post-election violence was that of the Waki Commission.[1]

The commission found that the 2007 violence could be attributed to four factors. First, it established that the culture of violence had been made into an institution and had been part of the political process since the re-introduction of multi-party politics in Kenya. This deliberate use of violence to acquire political power and the lack of punishment for the perpetrators had given rise to an untamed culture of impunity.

Second, the personalisation of power around the presidency together with the practice of politics of exclusion had given rise to the idea that it was essential for a community to win the presidency in order to access and enjoy

[1] Commission of Inquiry to Investigate the Post-Election Violence (CIPEV) as appointed through Legal Notice no. 4473 of 2008.

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State resources. This second reason is apparent from the way the tribesmen of the three Kenyan presidents have been benefiting at the expense of other or more qualified Kenyans.

Third, the feeling of marginalisation by some ethnic groups had been tapped by politicians to mobilise violence. The fourth reason was that the growing population of poor and unemployed youths had engendered militia and other organised gangs, which had more or less developed into shadow governments in their areas, including the slums.

The commission thus concluded that:

> **"What is needed to address the points discussed above is political will and some basic decisions to change conducted as well as to address its intersection with other issues related to land, marginalisation, inequality and youth. Simply put, the individuals who have benefited in the short term from the chaos and violence need to give up these methods or Kenya could become a failed state".[2]**

In short, the breakdown of good governance in Kenya had inevitably led to the post-election crisis of 2007. The aforesaid causes as outlined by the Waki report were deep-seated reasons for the violence. On the other hand, there were other immediate causes of the violence, which would one way or the other fall into the categories described in the Waki report.

In this regard, the Electoral Commission of Kenya (ECK), an institution established under the old constitution[3] was harshly vindicated both for its composition and for the manner in which it conducted the election.[4] The Kenyan Police was similarly condemned for not only failing in its key role of "maintenance of a law and order, the preservation of peace, the protection of life and property, the apprehension of offenders, and the enforcement of all laws and regulations with which it is charged"[5], but for turning into a monster that unleashed unprecedented gunfire on unarmed protesters.[6]

The muffing of the protesters and the discontent of the losing Orange Democratic Movement (ODM) required a forum through which their dispute could be addressed. However, the

2 Waki Report, 36, (2008)

3 Section 41 of The Repealed Constitution of Kenya.

4 See. Report of the Independent Review Commission (2008)

5 Section 14, The Police Act cap 84 of The Laws of Kenya.

6 See, On the Brink of the Precipice: A Human Rights Account of Kenya's Post-2007 Election Violence, KNHRC, 2008, p 4

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Judiciary, another constitutional body was regarded in high contempt and the ODM flatly rejected calls to go to the courts owing to their structures, compositions and lethargic processes. The Judiciary could not be trusted to deliver a fair and expedient determination of the dispute. Just like the Waki Report, the Kriegler report[7], had its principal recommendation as constitutional and legal reforms. The circumstances prevailing at the time, therefore, called for a constitutional answer to these problems.

The post-election crisis was horrific to the country and to the international community in particular. The hitherto "island of peace in a sea of calamity" was fast disintegrating into a humanitarian crisis. In less than three weeks after announcement of the presidential results, more than 1,000 civilians had died from the activities of violent perpetrators as well as from the police. Hundreds of thousands had also been displaced and were residing in deplorable temporary camps while others had fled to neighbouring Uganda and Tanzania.

Not wanting to stand aside to spectate as a close ally of the west crumbled, the international community strongly supported the appointment of Kofi Annan, the chair of the panel of Eminent African Personalities as the principal mediator to resolve the political crisis. Mr Annan helped to establish the Kenya National Dialogue and Reconciliation Committee (KNDRC), which held various sessions geared to resolving the prevailing political crisis and its root causes.On the first day of February 2008, the parties to the KNDRC agreed on four agendas to address the crisis. The fourth agenda was entitled **"long-term issues and solutions"** and was framed as follows[8]:

> **"Poverty, the inequitable distribution of resources and perception of historical injuries and exclusion on the part of segments of the Kenyan society constitute the underlying causes of the prevailing social tensions, instability and cycle of violence. Discussions under this Agenda item will be conducted to examine and propose solutions for long-standing issues such as; *inter alia***
>
> - **Undertaking constitutional, legal and institutional reform**
> - **Tackling poverty and inequity, as well as combating regional development imbalances**

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7 Report of the Independent Review Commission on the General Elections held in Kenya on 27 December 2007. (2008)

8 See, www.dialoguekenya.org/docs/signed_annotated_agenda_feb1.pdf

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- **Tackling unemployment, particularly among the youth**
- **Consolidating national cohesion and unity**
- **Undertaking land reform**
- **Addressing transparency, accountability and impunity"**

Pursuant to the consensus on this agenda, the stage was now set for the reactivation of the constitutional reform process. The KNDRC continuously monitored and encouraged the process. In its agreement of March 4, 2008, the KNDRC outlined the following five stages that the review of the Constitution was to undergo:

1) Initiation of an inclusive process to be completed within eight weeks through which a statutory constitutional review timetable would be developed
2) Enactment of a Referendum Law by Parliament
3) The provision for the preparation of a comprehensive draft by stakeholders with the assistance of experts
4) The consideration and approval by parliament of the proposed new constitution
5) A referendum for people to consider the constitution[9]

The post-election violence and the crisis accompanying it provided the thrust of political goodwill that facilitated the laying of the foundation upon which parliament was to furnish a legal framework for the acquisition of a new Constitution.

The Legal Framework on the Review Process

Subsequent to the consensus achieved through the KNDRC, parliament enacted two cardinal legislations to kick-start the review process. These were the Constitution of Kenya Review Act (2008)[10] and Constitution of Kenya (Amendment) Act (2008).[11]

The latter legislation sought to entrench in the constitution the political agreements arrived at in the KNDRC regarding the review process. To achieve this end, the Act introduced a new section 47A in the existing Constitution, which set out the procedure for the replacement of the Constitution with a new one through the process of a referendum whereby the electorate was to ratify or reject the proposed constitution. The Constitution of Kenya Review Act (2008) on the other hand made provisions to facilitate the completion of the review process.[12]

9 www.dialoguekenya.org/docs/kenyanationaldialogue_ constitutional review.pdf

10 Act no. 9 of 2008

11 Act no. 10 of 2008

12 See, Preamble of The Constitution of Kenya Review Act (2008).

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The Act outlined its object and purposes as follows:[13]

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

In the subsequent provisions, the Act gave comprehensive step-by-step procedures and actions that were to be adopted in the path towards finding a new constitution. The Act outlined four critical organs for the review namely the Committee of Experts (CoE), the Parliamentary Select Committee, the National Assembly and the Referendum. It also laid out the principles that were to guide the aforementioned organs, including the principle of supremacy of national interest over sectoral and regional interest, accountability to the people of Kenya, accommodating national diversity, inclusiveness, responsible management, transparency, respect for human rights and reflective of the majority's wish.

The second part of the Act related to the establishment and composition of the CoE. In this regard, the CoE was clothed with corporate personality. Its membership was to comprise of nine persons excluding the Attorney General and the director, who were considered ex-officio members. The qualifications, disqualifications and removal of the members of CoE as well as that of the chairperson and his deputy were provided. The part also provided for the appointment of the director and other staff members of the committee.

The third part of the Act related to the functions and powers of the CoE including the procedure in meetings of the committee, the maintenance of records, the broadcasting of its functions and its engagement on civic education to ensure that the public remained fully informed of its activities and the status of the review process.

The fourth and fifth part of the Act supplied the core provisions relating to the steps to be followed till a new Constitution was ratified or rejected. It even provided the requisite timelines. Under the provisions, the CoE was required to complete its work within 12 months of the commencement of

[13] Section 13, Constitution of Kenya Review Act (2008)

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the Act. The provisions also highlighted a number of materials referred to as reference materials, which the CoE was to study and take into account in its work.

The foremost step the CoE was required to take after studying the reference materials was to compile a report identifying contentious and non-contentious issues. Thereafter, it was to invite representations from the public and use those representations to prepare a harmonised draft constitution for debate by the Parliamentary Select Committee. After considering the proposals or amendments by the Select Committee, the CoE was to prepare a Revised Draft, which was to be submitted to the National Assembly for approval or amendment. In the event of an approval, the Attorney General was required to publish the Draft Constitution within 30 days and the Electoral Commission was to facilitate a referendum within 60 days after the said publication.

Upon conclusion of the referendum, the Electoral Commission was required to publish the results within two days and in the event that the proposed constitution was approved without a challenge in court, then the results were to be final upon expiry of 14 days from the publication of the results. Part VI of the Act concerned the expenses of the review, which were to be charged upon the consolidated fund. Under the Act, the CoE was to stand dissolved 45 days after the Constitution's promulgation by the president and its assets were to be handed to the Government.

The mechanism provided by the Act was not only self-propelling, but was even insulated from interference from a meddlesome Judiciary. The dispute settlement mechanism relating to the constitutional review process was solely to be the province of the Interim Independent Constitutional Dispute Resolution Court established under section 60A of the Constitution. The Kenyan people thus owe their successful review process to the nature and content of the provisions of the Review Act.

Summary of the Mandates of Key Referendum Institutions

The post-2007 elections Constitution review process would not have been successful without the complete participation of nearly all government organs, the Attorney General's office, public spirited individuals, the civil society and the international community. However, the main institutions that were bestowed with the great duties of midwifing the process were the following five';

i) The Committee of Experts (CoE)

The CoE was established in February 2009 pursuant to the provisions of the Constitution of Kenya Review

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Act.[14] This was the technical organ of the Constitution review process. It comprised nine experts and two ex-officio members, all who were nominated by the National Assembly and appointed by the president.[15]

The members of the CoE were as part of their qualification required to have proven knowledge and experience in the areas of comparative constitutional law, system and structures of democratic governments, human rights, gender issues, land law, public finance, electoral systems, anthropology, mediation and consensus building. As such, the team was expected to have what it takes to prepare a product that was attractive to majority of Kenyans.[16]

The mandate of the CoE was expressly provided for by part III of the Review Act and a part of part IV of the Act. Section 23 was the main source of the committee's powers. In the said section, the CoE was required to do the following;

a) Identify issues agreed upon in existing draft constitutions
b) Identify contentious issues for which there was no consensus
c) Solicit and receive submissions from the public
d) Undertake consultations with other experts and interest groups
e) Carry out comparative research on other Constitutions in the world
f) Articulate the pros and cons of proposed options for resolving contentious issues
g) Recommend to PSC the solutions to contentious issues
h) Prepare a harmonised draft for presentation to parliament
i) Undertake civic education on the issues
j) Liaise with the electoral body over the holding of a referendum
k) Perform any incidental role to attain the objects of the review process

The CoE was to perform its task within one year from the commencement of the Act. The required steps it was to follow in achieving its objects were to first consider the reference materials specified in the Act[17], prepare a report on contentious and non-contentious issues[18], invite representations from all interested persons, prepare a harmonised draft constitution[19], convene a reference group of interest groups[20], publish and avail a Draft

14 Section 8 of The Constitution of Kenya Review Act (2008)
15 As above, Section 8(4) & (5).
16 As above, Section 10.
17 As above, Section 29.
18 As above, Section 30
19 As above.
20 As above, Section 31

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Constitution to the public, incorporate public views into the Draft Constitution, submit the draft to the PSC, revise the Draft in accordance with the PSC recommendations, submit a revised draft to PSC for onward transmission to the National Assembly and in the event that the National Assembly proposed amendments, then to revise the draft and submit a final report to the National Assembly for approval and onward transmission to the Attorney General for publication.

The final role of the CoE before winding up was to undertake civic education on the Proposed Constitution as published by the Attorney General pending the holding of the referendum.

ii) The Ministry of Justice, National Cohesion and Constitutional Affairs

The Constitution of Kenya Review Act (2008) did not capture the Ministry of Justice, National Cohesion and Constitutional Affairs as a key organ to the review process. That notwithstanding, the ministry played a major role in the entire process and was the line ministry for such organs such at the CoE.

The mandate of the ministry squarely put it into the review process. This mandate was issued through the Presidential Circular No. 1/2008 dated May 30, 2008 and included, *inter alia*, the formulation of policies on legal issues and the administration of justice, the promotion of national cohesion, the fostering of constitutional governance, the establishment of an effective legal and judicial system, the promotion of democracy and rule of law in Kenya. The ministry's Customer Service Delivery Charter outlines the core functions linked with the review process that include the facilitation of constitutional review and development, the harmonisation of laws with the Constitution and the setting up of structures and institutions for consolidating administration of justice.

Under Schedule 1 of the Review Act, the ministry was also tasked with the function of transmitting the names of nominees for the positions in the CoE to the President for appointment. Subsequent to the appointment of the members of the CoE, the minister was required to convene the inaugural meeting of the committee through which the chairman and vice-chair was to be elected.[21] The ministry also had the role of facilitating the filling of a position within the CoE in case of a position falling vacant, as well as facilitating the removal of a member in the event of a petition being lodged against a member. Under section 17 of the Act, the ministry was to undertake consultations with the Parliamentary

[21] As above, Section 11(1)

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Select Committee with regard to the terms and conditions of service of the director of the CoE.

In this regard much of the coordination, facilitation and assistance accorded to the CoE and other organs of the review came from this ministry. It had the duty of obtaining budget provisions for the review process in general and the CoE in particular. As the CoE continued in its work, the ministry was busy preparing draft legislations on numerous areas in anticipation of a successful constitutional review process. It is important to note that under the KNDRC, the ministry was considered as the focal point of constitutional reform.[22] In this regard, it was charged with the responsibility of undertaking and coordinating consultations on the review as well as drafting and presenting to Parliament the required Bills including the Review Bill, a Constitution Amendment Bill and a referendum Bill.

iii) The Parliamentary Select Committee on Constitutional Review

"The National Assembly shall establish in accordance with its standing Orders, a Select Committee to be known as the Parliamentary Select Committee on the Review of the Constitution (hereinafter referred to as the Parliamentary Select Committee) consisting of 27 members to assist the National Assembly in the discharge of its functions under the Act."

Section 123 of The Constitution read "**Parliamentary Select Committee means the Parliamentary Select Committee on the Review of the Constitution**."

The PSC had a number of functions that were outlined under the Review Act. For starters, it was responsible for the advertisement of positions in the CoE.[23] It was also to consider the applications and make recommendations to the National Assembly for the appointment of members of the CoE. In the event of an application to remove a member of the CoE, the PSC was tasked with the duty of receiving the application from the minister and undertaking an inquiry and a report to the president on whether the chairperson or member ought to be removed.

The input of the PSC on the contents of the Constitution under consideration was substantial. Upon preparation of a Draft Constitution by the CoE, the PSC was to deliberate over it and

22 http://www.dialoguekenya.org/docs/S_of_P_with_Matrix.pdf

23 See, First Schedule, Constitution of Kenya Review Act.

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endeavour to build consensus on the contentious issues. Thereafter, the PSC was to submit its agreement to the CoE so that it would revise the draft in accordance with the consensus reached.

The Revised Draft Constitution together with a draft prepared by the CoE would then be presented to the PSC for tabling before the National Assembly. In the event that parliament failed to approve the Draft Constitution, it was the duty of the PSC to convene a meeting between it and the CoE for the purpose of considering the issues raised by parliament and making recommendations to parliament. Finally, the PSC was to consult with the Electoral Commission on the framing of the referendum question.[24]

iv) Parliament

The mandate of parliament in the review process was brief owing to the fact that its roles had been delegated to the PSC. Nonetheless, those brief roles included the establishment of the PSC in accordance with section 7 of the Review Act. Parliament was also to nominate the nine members of the CoE for appointment by the president.[25]

Thereafter, parliament was to take a back seat and await the preparation and tabling of the Draft Constitution before it by the PSC. It is upon the tabling that it was to debate the report and the Draft Constitution. In the event it approved the Draft Constitution, Parliament was required to pass it on to the Attorney General for publication. Conversely, in the event that parliament failed to approve the Draft, it was to propose amendments and submit them to the CoE for redrafting. Upon the re-drafting, parliament was without the option of rejecting required to approve the Draft and submit it to the Attorney General for publication.[26]

The mechanisms that had been put in place to ensure passage of the new supreme law had been passed by the National Assembly. It is parliament that ensured the passage of the Constitution of Kenya Review Act and the Constitution of Kenya (Amendment) Act in 2008. The amendment by insertion of Section 47A in the Repealed Constitution facilitated the replacement of the old Constitution.

Prior to 2008, there was legal controversy on whether the existing Constitution was possible to be replaced owing to the fact that its provisions only related to alteration of the Constitution. The insertion of Section 47A therefore brought an end

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[24] Section 37, Constitution of Kenya Review Act (2008)

[25] Section 8(4), Constitution of Kenya Review Act (2008).

[26] As above, Section 33(10).

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to this controversy. The section also ensured that the Draft Constitution, once introduced by parliament, would not be rejected by non-reform forces. Any amendment or rejection of the Draft had to be supported by at least 2/3 of the entire House.

v) The Referendum

The basis of holding a referendum in Kenya was introduced by Section 47(A) (2) of the repealed Constitution, which stated,

"(a) the sovereign right to replace this Constitution with a new Constitution vests collectively in the people of Kenya and shall be exercisable by the people of Kenya through a referendum, in accordance with this section".

The mandate for conducting the referendum was bestowed on the Interim Independent Electoral Commission (IIEC).[27] In this regard Part V of the Constitution of Kenya Review Act (2008) provided the substantial provisions on how the Referendum was to be conducted. The Electoral Commission was within seven days after publication of the Draft Constitution required to frame and determine the question, which was to be determined at a referendum.[28] This question was to determine whether the voter approved or did not approve the Proposed Constitution.

The new constitution was to stand ratified if and only if it was supported by 50 per cent of the voters at the referendum. In addition, it had to be supported by at least 25 per cent of the voters in at least five of the provinces. The IIEC in addition through Legal Notice 66 of 2010 published The Constitution of Kenya Review (Referendum) Regulations (2010). These regulations provided details on all matters pertaining to the conduct of a referendum, including the composition of referendum committees and the provisions relating to voting.

The referendum held in 2005 was held without any Legal Framework. However, the presence of the provisions relating to conduct of the 2010 referendum was instrumental in the holding of a well organised and fair referendum.

[27] Section 47(A), Constitution of Kenya (repealed)

[28] Section 37, Constitution of Kenya Review Act (2008)

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Chapter 6

The New Constitution

On the 4th August 2010, Kenyans exercised their sovereign right by overwhelmingly adopting the new Constitution. This exercise marked the end of a long perilous journey towards a new constitutional dispensation. This Constitution is as a result of the struggle of million of Kenyans who desired fundamental changes in political, social and economic governance. Many paid a heavy price for the struggle including undergoing torture, detention, exile while others paid the ultimate price for the love of a new order. Though millions desired it, a slightly lesser number didn't. A great number of politicians and technocrats were less than happy about the changes. They rejected the Constitution during the referendum and they would naturally be expected to frustrate its implementation.

The backdrop of the struggle and the status provides a lesson to Kenyans to guard, protect and promote the Constitution in order to obtain the aspirations and the common good for the society of Kenyans. While large amounts of work have been prepared on the history of the struggle, a lot is yet to be done regarding the immediate history pertaining to the performance of the 2010 Referendum and the role of the Committee of Experts. Upon studying this immediate history, we would be at a suitable level to examine the implementation of the Constitution by various organs, the impacts as a result of the new dispensation and the future prospects.

Analysis of The 2010 The Referendum

The 2nd referendum ever held in Kenya was conducted on the 4th August 2011. Unlike the first which was held in the year 2005, the 2010 referendum was anchored in both constitutional[1] and statutory provisions[2].

The PCK was officially published by the Attorney General on 6th May 2010. Subsequently, the IIEC framed the referendum question on 13th May 2010 in both English and Kiswahili in the following manner "Do you approve the proposed New Constitution?" and in Kiswahili "Je, unaikubali Katiba Mpya inayopendekezwa?" The Voters' answer to this question was to be either "yes" or "no". Bearing in mind the high levels of illiteracy in the country, the IIEC was required by the law to ensure that each answer was accompanied

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by a visual symbol to ensure that the voters were certain about the choices they were making. For this reason the IIEC adopted the visual symbols in the form of colours- green was to be the symbol for "yes" while the colour red was the symbol of choice for the "no" proponents.

The CoE was under the Constitution of Kenya Review Act required to conduct Civic Education nationwide with a view of educating members of the public on the contents of the Proposed Constitution so that they could make an informed choice. The IIEC on its part announced that the referendum campaigns would take place between 13th July 2011 and 2nd August 2011. It also published Referendum rules which were to provide the procedures relating to the conduct of the referendum process. Typical of Kenyans, nearly all institutions launched their campaigns way before the official period but disguised them as Civic Education.

The CoE faced huge challenges in executing its mandate. It was limited by time since the 30 days provided was not adequate to conduct an effective countrywide civic education. It also encountered bureaucratic difficulties in its efforts to access funds from the government to support its programs. These entailed publicity steps including media adverts, road shows, publishing & distribution of drafts, training of civic educators, holding of seminars & workshops.

The CoE in undertaking its Civic Education role published the following training materials including A Handbook for Civic Education on the Proposed Constitution, a manual for Civic Education on the Draft Law, a Curriculum for Civic Education and Information, Education and Communication materials. For lack of resources, the CoE was unable to release enough drafts in the Kiswahili language, its efforts in Civic Education were overshadowed by the onset of campaigns orchestrated by politicians before the statute mandated period and the Civic education was sporadic rather than sustained.[3]

The CoE was not the only cash starved institution as the IIEC was also encountering the same hurdle in its quest to provide a credible referendum process. Nonetheless, funds were provided albeit late by treasury and the process fortunately went on well. The period between the publication of the PCK and the Referendum date was characterized by a flurry of activities by persons and institutions of all kind.

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1 Section 47A, Constitution of Kenya (repealed)

2 Section 37, Constitution of Kenya Review Act (2008)

3 For a detailed insight on the conduct of the 2010 referendum see "Wanjiku's Journey: Tracing Kenya's quest for a New Constitution and reporting on the 2010 referendum, 2010, Kenya Human Rights Commission (KNRC)

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Most senior politicians in the ruling PNU-ODM coalition supported the PCK including President Mwai Kibaki, Prime Minister Raila Odinga, Vice President Kalonzo Musyoka, Deputy Prime Ministers Uhuru Kenyatta & Musalia Mudavadi and nearly all the cabinet Ministers save for the then Minister for Higher Education - William Ruto and the Minister for information – Samuel Poghisio.

The private and public media though attempting to provide equal coverage for the contesting sides apparently favoured the "yes" proponents in its editorials and opinions by columnists. Mr. Mutahi Ngunyi a leading columnist in the Sunday Nation Newspaper had his column deactivated after he sustained a series of articles calling for the rejection of the PCK.[4] The government also described the passage of the new Constitution as a government project and marshaled all personnel and resources towards that end.

The leading lights in the "no" team were the aforesaid ministers, the church leaders and the former president-Daniel Arap Moi. They charged that the Constitution had unworkable foreign ideals, they considered the provisions of land as inappropriate and they were also against the provisions relating to the Kadhi Courts and the section permitting abortion under certain circumstances.

A new development occurred after a case was filed by inmates at the Shimo la Tewa prison through the Kituo Cha Sheria organisation. The case was filed before the Interim Constitutional Dispute Resolution Court (ICDRC) which on 23rd June 2010 ruled in favour of the inmates and ordered IIEC to register all inmates as voters and to gazette prisons as voting centres. This took place and for the first time in the history of the republic, inmates in all the prison exercised their rights of suffrage.

The period immediately prior to the referendum was largely peaceful. However, several incidents of electoral violation during the campaign period were reported. On 13th June 2010, a grenade attack was launched during a "no" campaign rally by unknown assailants. On 20th July 2010, "Yes" supporters allegedly loyal to Water Minister Charity Ngilu attacked "No" sympathizers injuring 6 of them.[5]

There were numerous incidents of incitement to violence especially from politicians. During the launch of the "No" secretariat, Dr. Wilfred Machage-the Member of Parliament for Kuria was reported to have uttered words that were inciting the Kuria and the

[4] Mutahi Ngunyi – why his Sunday Nation Column was deactivated - http://www.kenyanlist.com/kls-listing-show.php?id=40192

[5] "Wanjiku's Journey: Tracing Kenya's quest for a New Constitution and reporting on the 2010 referendum, 2010, Kenya Human Rights Commission (KNRC) page 29.

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Maasai against other communities.[6] It is important to note however that Dr. Wilfred Machage has since been acquitted of the charges of hate speech and incitement.[7] The Standard newspaper, 14th December 2011.

Other reported violations included some actions by the government that may be considered to be contrary to the Public Officer's Ethics Act. Section 16 of this Act prohibits Civil Servants from taking part or organizing political campaigns. However, it is on record that President Mwai Kibaki, Prime Minister Raila Odinga and the head of the Public Service Francis Muthaura commanded all the Permanent Secretaries and senior government officials to join the "yes" campaign band wagon.[8]

Voter bribery was also prevalently exercised by each of the rivals' side. However, due to the financial muscle, the "yes" proponents were the guiltier culprit. President Mwai Kibaki himself went on a spree of dishing out goodies countrywide in an attempt to woe voters to support the PCK. On 22nd July 2010, the president was on a campaign tour of the Kisii region when he agreed to have the Kisii University College elevated into a full University.

The previous day, the president while in Garissa had granted 3 extralegal districts of Balambala, Habswein and Tarbaj. The Vice president, Kalonzo Musyoka on 26th July 2010 was touring the districts of Mwingi, Masinga and Yatta when he promised Kshs. 1,000,000/00 to the district that would cast the highest percentage of votes to the "yes" side.

There were also distortions by proponents that at times bordered on criminal deceit. Each side (mis) interpreted the PCK in such a way that would induce the largely illiterate voters to their side. While the "Yes" side overly-raised the expectations of the Wananchi, the "No" side created an aura of fear to dissuade voters from supporting the PCK. The following are examples of the distortions observed by the Kenya Human Rights Commission[9];

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6 Wilfred Machage was reported to have asserted that: *"Hawa wajaluo watoke kwa ardhi ya wakuria.... Katiba hii itatupea ruhusa kuwatoa hata kwa fujo."*(These Luos should leave the land of the Kuria...the PCK will give us [the Kuria] permission to evict them by force)...*"WaMaasai chenu hakiko Rift Valley, mashamba yenu yote yataenda kwa serikali."* (You, the Maasai, all your land in Rift Valley will be repossessed by the government). *"Nairobi tokeni hii ni shamba la aMaasai."*(People of Nairobi, this land belongs to the Maasai, get out).

7 The Standard newspaper, 14th December 2011.

8 "Wanjiku's Journey: Tracing Kenya's quest for a New Constitution and reporting on the 2010 referendum, 2010, Kenya Human Rights Commission (KNRC) page 23.

9 "Wanjiku's Journey: Tracing Kenya's quest for a New Constitution and reporting on the 2010 referendum, 2010, Kenya Human Rights Commission (KNRC) page 24-27

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"Wakenya wamechanganyikana. Wakamba wakipiga 'yes' kwa hii katiba itamaanisha wale wakamba wetu wako Coast Province and other provinces wafunge virango warudi hapa." (Kenyans are diverse. If the Akamba vote yes, it will mean that those Akamba in the Coast province and other provinces should pack their belongings and they come back [to Machakos]).

Kiema Kilonzo (MP Mutito) addressing a 'No' rally in Machakos on May 15, 2010.

"Utakuta siyo tu abortion, utakuta siyo tu kadhi courts. Utakuta vitu vingine mle ndani. Hata mbwa yako utalipia kodi, hata ng'ombe yako utalipia kodi." (You will not just find abortion, or Kadhis' Courts, but you will find many more in the PCK. You will also pay tax for your dog and for your cow too).

Bishop Mark Kariuki addressing a gathering in Kakamega on June 6, 2010.

"Hii katiba inasema bunge itatunga sheria ya juu ya kumiliki shamba na ya chini ya kumiliki shamba. Hatari moja hapa Trans Nzoia, ikiwa nasikia wabunge wengi wanasema huenda tutaweka acre moja shamba la chini. Hatari ni hii. Bunge ikishapitisha kwamba acre ya chini unayomiliki ni acre moja,ujue kuanzia siku hiyo huwezi kuruhusiwa kununua plot, huwezi enda kununua nusu acre. Sasa vijana,sisi tutaweka wapi familia?" (This PCK provides that Parliament will enact legislation on minimum land acreage of owning land. The danger is that in Trans Nzoia many legislators are saying that it is possible to provide that only one acre will be the minimum. This is dangerous. One parliamentdoes so, it will be illegal to buy a plot of half an acre. Now, as youth, where do we raise our families?)

Joshua Kutuny (MP Cherengany) addressing a 'No' rally in Sabaot constituency at the showground in Kitale on June 19,2010.

"Article 63 (1) of the draft Constitution says: 'Community land shall vest in and be held by communities identified on the basis of ethnicity, culture and similar community of interest.' If the draft Constitution is passed during the referendum, Kenyans who have migrated and settled in areas outside the traditional ancestral lands of their tribes may be evicted by the local communities. In the past, such evictions were illegal and done because of impunity. However, if the draft is passed, then every tribe will be given an excuse to evict anyone they think does not

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belong there, with full support of the National Land Commission."
Linah Jebii Kilimo (MP Marakwet East) speaking at a 'No' rally in Kwanza at the Kwanza grounds on June22, 2010.

"Mkipitisha katba hii, mjue mmepoteza mashamba yenu... katiba hii ni wazi kwamba ni njama ya kunyang'anya wananchi mashamba." (If you pass this Constitution, then you will have lost your land...this Constitution is a ploy to take away land from Kenyans).
Samuel Poghisio (MP Kacheliba)and Sammy Mwaita (MP. Baringo Central) were quoted saying that (in Kiswahili and English respectively), when addressing a 'No' rally in Marigat town on July 17, 2010.

I want to tell Kenyans that this PCK is a danger to the security of this country because it allows the security personnel to participate in the strike like trade unionist workers and I want to ask Kenyans what would happen if the enemy strikes while the security forces are on strike? Your lives and property will be at risk, therefore I am telling you to vote no."
Former President Daniel Arap Moi addressing a 'No' rally in Marigat town on July 17, 2010.

"If 'Yes' wins, the Mombasa port will belong exclusively to the Mombasa County."
Najib Balala, Minister for Tourism, at Makadara grounds in Mombasa, on July 25, 2010.

"Serikali itapea nyinyi bunge nyingine mradi mpitishe katiba." (The government will give you [women] another parliament so long as you vote in favour of the draft).
George Saitoti (Minister for Internal Security and Provincial Administration) addressing women in Marigat Town on August 1, 2010.

"Nyinyi sasa mnaweza zaa ile watoto mntaka na katiba itashughulukia watoto wenu wote." (You can give birth to as many children as you wish, the Constitution will take care of all your children).
Maison Leshomo (Nominated MP) addressing women in Marigat Town on August 1, 2010."

The voting itself took place amid tight security to forestall a repeat of the 2007 like violence. The IIEC took up the daunting task with stride and

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high levels of competence. More than 10,000 observers were deployed in various stations to ensure to protect the integrity of the vote. There was observance of time in opening and closing of the polling stations. Few incidents of irregularities were reported during the voting. However, there were complaints that some voters could not trace their names in the voter register.

The National Tallying Centre was held at the Bomas of Kenya, away from the hitherto centre at KICC where the bungled 2007 votes had been tallied. The results began streaming at the Tallying Centre from 6.00 P.M on 4th August 2011 and were tallied electronically.

The "No" side had initially lead but was overtaken by the "Yes" side along the way. This led to a group of leaders spearheading the "No" campaign to swiftly protest and allege that rigging was taking place. However, the allegations were investigated and the dismissed for lacking merit. The "No" team after being educated on the Tallying conceded and the votes were announced.

Those in favour of "yes" won by garnering a total of 6,092,593 equivalent to 68.55 % against the "no" team which garnered 2,795,059 votes equivalent to 31.45 % of the votes cast.

A Post Mortem on the Role of The CoE[10].

The CoE was established in February 2009 pursuant to the provisions of the Constitution of Kenya Review Act.[11] This was the technical organ of the Constitution Review Process. It comprised 9 experts[12] and 2 ex officio members all who were nominated by the National Assembly and appointed by the president.[13]

The members of the CoE were as part of their qualification required to have proven knowledge and experience in the areas of comparative constitutional law, system and structures of democratic governments, human rights, gender issues, land law, public finance, electoral systems, anthropology, mediation and consensus building. As such, the team was expected to have what it takes to prepare a product that was attractive to majority of Kenyans.[14]

10 Much of the facts under this sub-headline are to be found in The Final Report of the Committee of Experts on Constitutional Review, 2010.

11 Section 8 of The Constitution of Kenya Review Act (2008)

12 The experts were: nationals: Nzamba Gionga (Chair); Atsango Chesoni (Vice Chair); Abdirashid Abdullahi; Otiende Amollo; Bobby Mkangi; Njoki Ndung'u & Amos Wako; and foreigners: Dr Chaloka Beyani; Professor Christina Murray; and Professor Fredrick Ssempebwa.

13 As above, Section 8(4) & (5).

14 As above, Section 10.

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The CoE was to perform its task within one year from the commencement of the Act. The required steps it was to follow in achieving its objects were to first consider the reference materials specified in the Act[15], prepare a report on contentious and non-contentious issues[16], invite representations from all interested persons, prepared a harmonized draft constitution[17], convene a reference group of interest groups[18], publish and avail a Draft Constitution to the public, incorporate public news into the Draft Constitution, submit the draft to the PSC, revise the Draft in accordance with the PSC recommendations, submit a revised draft to PSC for onward transmission to the National Assembly and in the event that the National Assembly proposed amendments, then to revise the draft and submit a final report to the National Assembly for approval and onward transmission to the Attorney General for publication.

The final role of the CoE before winding up was to undertake civic education on the Proposed Constitution as published by the Attorney General pending the holding of the Referendum. The CoE was to stand dissolved 45 days after announcement of the final results whether for or against the Proposed Constitution. The members of the Committee of Experts were sworn in on 2nd March 2009. The fact that the Committee successfully midwifed the birth of a new Constitution is itself an indication that it performed its functions effectively.

The rationale behind the introduction of a Committee of Experts was based on the understanding that despite the review process being a Political Process, it was imperative to remove the entire control of the process from the hands of the Politicians and to vest it in an independent technical team which would work hand in hand with the Politicians to come up with an appropriate product. The functions of the CoE were unlike those of the Constitution of Kenya Review Commission (CKRC). The CKRC was to collect views on what should be in the new Constitution, prepare a draft Constitution based on those views and organize the National Constitutional Conference to debate, review and/or agree on the Draft Constitution.

On the other hand, the main work of the CoE was to analyze the documents and drafts that came out of the CKRC process (CKRC and Bomas drafts) and the Proposed New Constitution of Kenya, 2005 (Wako Draft), identify the contentious issues, facilitate ways of resolving the contentious issues

15 As above, Section 29.
16 As above, Section 30
17 As above.
18 As above, Section 31

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and then come up with a harmonised draft which will be taken to Parliament for approval before subjection to a referendum. While the functions of the CoE may appear straight forward on paper, the process culminating in their fulfilment was extremely challenging. Were it not for the personal resolve and determination of the members, achieving the new Constitution in its present form would have remained a pipe dream.

The first challenge to face the Committee was with regard to the timelines to fulfil its functions. The Review Act had stipulated that the CoE was to complete its work within 12 months after commencement of the Act. However, members were sworn in nearly 3 months after the Act came into place and hence had technically only 9 months to complete their onerous duties. Parliament came to their aid by amending the governing provisions of the Review Act to read that the CoE was to complete its functions 12 months after it was constituted[19]. This challenge was compounded by the fact that the CoE though a temporary entity had to lose so much time in establishing offices, recruiting personnel, sourcing for funds and making other preparations thanks to the government's bureaucratic red tape.

Upon overcoming these initial hurdles, some internal wrangles developed whereby Ms. Njoki Ndung'u a prominent member of the Committee boycotted meetings of the CoE citing inadequate consultations over the contentious issues. However, the functions of the CoE continued nonetheless owing to the fact Ms. Ndung'u was a lone ranger in the boycott and her absence did not interfere with the requisite quorum for holding meetings. The non-reformists also engaged in activities that were aimed at frustrating the efforts of the CoE. There was a plethora of negative media coverage and in some instances the CoE was ridiculed as a "Committee of Quacks".

An attempt was even made to disband the CoE through parliament. A number of court cases whose net effect would have been to scuttle the entire process were also filed. Some sought the dissolution of the CoE, others sought the removal of certain clauses in the harmonised draft while others sought the postponement of the referendum. Fortunately, all these attempts to sabotage the process failed to sail through.

The other main challenge occurred during the identification of the Contentious Issues. Sectoral interest particularly the church leaders purported to bring pressure to bear

[19] Section 28 of the Constitution of Kenya review Act 2008 was amended in July 2009 through the Statute Laws (Miscellaneous) Act (2009)

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on the CoE in order to consider some issues such as "Kadhi Courts" as contentious yet they had been agreed upon during the previous processes that culminated in the 2005 referendum.

The government also frustrated the efforts of the CoE by failing to release the required funds to perform its functions. The supplementary budget of 2010 failed to include the funds needed by the CoE and were it not for the generosity of donors who assisted the Committee with more than USD 5,400,000/00, the committee's independence, impartiality and resolve to succeed would have been seriously eroded.

Despite the existence of such challenges, the CoE soldiered on and faced the challenges with confidence. It began its functions with stride. The CoE began by first studying the existing materials on the process since the time of the CKRC as stipulated under Section 29 of the Act including the following:-

i. The CKRC Draft of September 2002 (Ghai Draft)
ii. The Bomas Draft of March 2004
iii. The Proposed New Constitution (2005) (PNC Draft)
iv. The summary of views collected and collated by the former CKRC;
v. Documents reflecting political agreement on critical constitutional questions;
vi. Analytical and academic studies undertaken by CKRC and the National Constitutional Conference.
vii. Reports related to Agenda Four including:- The Report of the Independent Review Commission on the General Elections held in Kenya on 27th December 2007, 2008 (The Kriegler Report) on electoral reforms; The Report of the Commission to Investigate Post-Election Violence, 2008 (The Waki Report); - The Report of the Committee of Eminent Persons on the Constitution Review Process, 2006 (The Kiplagat Report); The Report of the Task Force on Judicial Reforms, 2009;

Upon studying the above materials, the CoE on both 30th March 2009 and mid April 2009 called for submissions from the public on what ought to be considered as contentious issues. The calls were successful as 12,133 responses were received. Based on these responses and an analysis of the reference materials, the CoE was able to identify three contentious areas:

i. The System of Government i.e. the nature of Executive and Legislature;
ii. Devolution; and
iii. Transitional Clauses or Bringing the New Constitution into Effect

Once again, the CoE invited the public to submit on these areas in contention. The submissions were done through

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various methods including soliciting and receiving from the public written & oral memoranda. This was largely achieved through the regional hearings that took place in all the 8 provinces. Thematic consultations required under the Review Act were held with caucuses, interest groups and other experts. The CoE would in this respect initiate forums for such consultations as well as take part in forums initiated by various other institutions.

Pursuant to Section 23(e) of the Review Act, the CoE set up a library of materials concerning Constitution making globally and conducted in-house research to evaluate the views submitted by Kenyans. It also held meetings with members of the Reference Group as well as meetings with groups in civil society, the religious sector, the private sector, the 47 registered political parties, parliamentary political parties, the two Principals in the Coalition Government, as well as the other review organs, the PSC and parliamentarians with a view to highlighting proposals on the resolution of the contentious matters.

It was upon receiving proposals from the public that the CoE then drafted the Harmonised Draft Constitution which it subsequently revised upon receiving recommendations from the Public and the Parliamentary Select Committee on Constitutional Review to produce the Revised Harmonised Draft Constitution (RHDC) which it submitted to the PSC on 8th January 2010. In producing the harmonized drafts, the CoE rejected calls by the Christian churches to consider the issue of Kadhi court's as contentious. The CoE was of the view that the Kadhi Courts could not be identified as contentious based on the methodology adopted by the Review Act and based on the fact that the Christians opposed to the inclusion of Kadhi courts were only a minority. This decision by the CoE ultimately led to the churches campaign for the rejection of the PCK.

The PSC was under the Act required to reach consensus on the RHDC and submit recommendations to the CoE which in turn had 21 days within which to "revise the draft Constitution taking into account the achieved consensus" of the PSC. The PSC had made substantial changes to the RHDC in many areas some of which were not even considered contentious. The PSC also proposed the merger of certain Chapters and the removal of superfluous clauses for brevity reasons.

Many of the adjustments proposed by the PSC were adopted by the CoE particularly in light of the decision of the PSC to introduce a presidential system of government in place of a hybrid one. However, other proposal failed to be adopted by the CoE for reasons of coherence and in order to adhere to the guiding principles of the process of constitutional review.

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After reviewing the proposals by the PSC, the CoE prepared the Proposed Constitution of Kenya (PCK) which it submitted to the National Assembly for deliberation and debate on 23 February 2010.

Upon approval by parliament and publication by the Attorney General, the CoE engaged on its last part of its functions namely to conduct Civic Education over the PCK. This was an important functions as the CoE had to ensure that whatever choice was made was an informed one. During the run up to the referendum, the CoE endavoured to ensure that many Kenyans as possible received a copy of the Proposed Constitution as well as information on the document. To succeed in the above the CoE philosophized civic education under the slogan -JISOMEE. JIAMULIE. JICHAGULIE.[20] The slogan was also informed by the lesson learnt during the 2005 referendum when Kenyans around the country stated that they would not bother reading the then draft (PNC) but would rely on the decisions of their leaders.

As part of its Civic Education, the CoE adopted various techniques including direct engagements with the public through meetings, media engagements such as paid up advertisements, the setting up of a website that had all the crucial information regarding the proposed Constitution and finally the forming of partnership with other groups to facilitate Civic Education. By and large, the CoE succeeded in its Civic Education function. However, it was observed that the CoE encountered bureaucratic hurdles that prevented it from conducting an even better Civic Education programme.[21]

The role of the CoE would not have been successful had it not engaged in high level meetings with influential personalities who would have been able to assist in fast tracking its functions. These include the 2 Principals, the Minister & the Permanent Secretary in charge of Justice, National Cohesion and Constitutional Affairs and development partners. While there may be consensus that the role played effectively by the CoE ensured the passage of the PCK, operationalisation of the Constitution has revealed that the CoE failed to address certain issues appropriately that have now lead to great disputes.

The precise date for the first elections after the promulgation of the new Constitution is a subject that the CoE should have addressed rather than the agony of court cases filed by the CIC. The issue of the minimum of 1/3 of representation in parliament should also have been addressed by the CoE.

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[20] Jisomee (Read for yourself) Jiamulie (Decide for yourself) Jichagulie (Choose for yourself)

[21] "Wanjiku's Journey: Tracing Kenya's quest for a New Constitution and reporting on the 2010 referendum, 2010, Kenya Human Rights Commission (KNRC) page 21

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Implementing the New Constitution

'Implementing the constitution according to its letter and spirit will be a major step forward in countering the culture of impunity, negative ethnicity, and pervasive poverty.' Anonymous

A Constitution is a living document. It goes beyond addressing the needs of the living but the posterity as well.[22] The Constitution of Kenya has received accolades as one of the best in Africa next to South Africa and Botswana.[23] We appreciate this fact, but in order for the people of Kenya to recognize, respect and appreciate the Constitution, we must enjoy and feel protected by this supreme law that is higher than the executive, the judiciary and the legislature. We must see its effects in our day to day life, in our households, in our workplace and most important in the service delivery of our public offices. In order for all the above to be achieved, there must be effective implementation of the Constitution that will adequately and effectively embrace the spirit of constitutionalism that the drafters intended.

Who is to implement the Constitution?

There are three bodies mandated with the task of implementing the constitution;

1. The Commission for the Implementation of the Constitution
2. The Parliament
3. The Attorney General

The role of Commission for the Implementation of the Constitution

This Commission for the Implementation of the Constitution (to be referred to as C.I.C) has been established under section 5 in the Sixth Schedule of the Constitution. Its functions are;[24]

1. monitor, facilitate, and oversee the development of legislation and administrative procedures required to implement the Constitution

2. co-ordinate with the Attorney-General and the Kenya Law Reform Commission in preparing for tabling in Parliament, the legislation required to implement the Constitution

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22 Justice John Marshall's in McCulloch v. Maryland, 17 U. S. 316 (1819) http://supreme.justia.com/us/17/316/case.html. Accessed on 20-12-2012.

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24 Section 5(6) of the Sixth Schedule of the Constitution.

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3. Report at least once every three months to the Parliamentary Select Committee on-
   (i) the progress in the implementation of the Constitution
   (ii) any impediments to the implementation of the constitution

4. work with each constitutional Commission to ensure that the letter and the spirit of the Constitution is respected

To enable the C.I.C carry out its mandate, an Act of Parliament was enacted[25] which restates the functions spelt out in the Constitution.[26] Further, the Commission is allowed to hire experts or consultants whose knowledge and skills are found necessary for the functions of the C.I.C.[27] The progress report that is to be filed every 3 months and submitted to Parliamentary Select Committee, the President and the Prime Minister must contain;

1. Statement of the progress so far in the implementation of the Constitution.
2. Any impediments identified in the implementation of the Constitution
3. A recommendation of any legal and administrative measures to address specific concern that the Commission identified.
4. A statement of any other information the Commission deems necessary.

This report must be published in the Kenya Gazette and its requirement embraces the spirit of transparency and accountability. When the report is gazetted, it achieves two things. First, the Parliamentary Select Committee, the President, the Prime Minister and the C.I.C will not be the only parties privy to the contents of this report. Second the C.I.C will be accounting to the people what it has achieved and we will be able to participate by giving our opinions on the report.

To ensure successful of the Constitution, all Public Officers, State organs and State offices are mandated to co-operate with the C.I.C.[28] Failure to do so, that person will be held in contempt of Parliament and shall be liable on Conviction to a fine not exceeding two hundred thousand or one year imprisonment or both. The functions of the C.I.C means that it is also to interpret all the laws that will be passed in order to ensure that they are in line with the letter and spirit of the Constitution.

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25 Commission for the Implementation Act, No. 9 of 2010

26 Section 4 *ibid*

27 Section 15 *ibid*

28 Section 27, the Commission for the Implementation Act, No. 9 of 2010.

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The Role of Parliament

Parliament plays a key decisive role in the implementation process of the Constitution. The Parliament of Kenya will after the 2012 elections be bicameral and consists of the National Assembly and Senate.[29] The legislative authority of the Republic is derived from the people and at the national level is vested and exercised by Parliament.[30] No person or body other than parliament can make the laws of Kenya, unless this function has been delegated under an Act of Parliament or legislation of a county.[31]

Parliament is mandated to protect this Constitution and promote the democratic governance of the Republic. In enacting legislation they are to comply with the timetable provided for in Schedule 5 of the Constitution. So far, they have not observed this schedule and are behind time. To ensure compliance there is a Select Committee of Parliament known as Constitutional Implementation Oversight Committee.[32] It is mandated to co-ordinate with the Attorney General and the C.I.C to ensure the timely introduction and passage of the legislation required by this Constitution. In addition, the Committee is also mandated to assists in the;

1. Preparation of the legislation required by this Constitution.
2. Dealing with any impediments to the process of implementing this Constitution
3. Taking appropriate actions on the report presented by the C.I.C including addressing any problems in the implementation of this Constitution.

When enacting the laws of Kenya, Parliament has an obligation to ensure that all the Acts passed comply with the spirit of the Constitution.

The Role of Attorney General

The office of the Attorney General (A.G) has been established in the Constitution. The A.G is appointed by the President after the nomination has been approved by the National Assembly.[33] The A.G is the principal legal Adviser to the Government.[34] The role of the A.G's office in the implementation of the Constitution is not specifically provided for but can be construed from its objectives of

[29] Article 93(1) the Constitution of Kenya.
[30] Article 94(1) the Constitution of Kenya.
[31] Article 94(6) the Constitution of Kenya.
[32] Section 4, Sixth Schedule of the Constitution of Kenya.
[33] Article 156 (1) of the Constitution. Our Current A.G is Professor Githu Muigai.
[34] Article 156 (4) of the Constitution.

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drafting laws[35] and advising the cabinet on the same. Before any bill is tabled before parliament for it to pass, it must undergo the law making process. It is in this process that the A.G's office is heavily involved in the enactment of the laws of Kenya.

The A.G's office and the Kenya Law Reform Commission (KLRC)[36] work together with the Ministries and State Departments in generating Bills. Once these Bills have been generated the drafts are released to KLRC and AG's office for their preparation. The draft bills are then forwarded to the C.I.C. The CIC must go through the draft and ensure that it is in line with the letter and spirit of the Constitution. The CIC will then convene a caucus over the draft Bill incorporating the participation of the AG, the KLRC, the relevant Ministries or any Institution involved in the generation of that Bill to finalize the Bill by making various amendments. Remember that these amendments are not just any amendments. When the Bill was forwarded to the CIC, they had made the public and all the stakeholders participate in this Bill. These amendments that will be taken in are the ones that were gathered in the consultation process. The Bill will then be released to the A.G's office who will prepare the Bill and release it to Cabinet for approval. If the Bill is approved by Cabinet, the A.G will publish it. The bill will then be forwarded to Parliament for its debate and enactment. After Parliament debates and passes the Bill, it is taken back to the A.G for preparation of the final draft before being handed over to the President for assent. Once the President assents to the Bill the A.G must publish it within seven days for it to become law.

Major Changes That Impact in the Governance of the Country

A credible implementation of the Constitution will have the following major effects, among others that have not been listed;

1. It will reduce and eliminate negative ethnicity and marginalization.
2. It will effectively address the culture of impunity, land issues,[37] poverty and gender inequality.

[35] The Service Charter of the State Law Office outlines the Drafting of bills, subsidiary legislation and gazette notices, through the **Legislative Drafting Department** as one of the core functions.

[36] The Kenya Law Reform Commission (KLRC) is established by the Law Reform Commission Act, No.2 of 1982, presently Chapter 3 of the Laws of Kenya. The Kenya Law Reform Commission is the one mandated to "keep under review all the law of Kenya to ensure its systematic development and reform, including in particular the integration, unification and codification of the law, the elimination of anomalies, the repeal of obsolete and unnecessary enactments and generally its simplification and modernization"

[37] There will be a National Land Commission, with the power to re-possess illegally-occupied public land.

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3. It will enhance Kenya's democratic stability.
4. It will promote the respect and observance of the rights and fundamental freedoms of every person
5. It will embrace the devolution of Power.
6. It will promote respect of the rule of law by all the organs of state.
7. If all the above occur, it will encourage Investments in the Country.

The above changes will have a heavy impact on the kind of governance that Kenya will have. For every country to thrive and be economically empowered, the government of the day must have policies that promote good governance. So what is good governance? Good governance cannot be defined in a limited scope especially when it comes to the governance of a Country. According to an article found on the Website of the United Nations Economic and Social Commission for Asia and Pacific, good governance has eight characteristics. It is participatory, consensus oriented, accountable, transparent, responsive, effective and efficient, equitable and inclusive and follows the rule of law. It assures that corruption is minimized, the views of minorities are taken into account and that the voices of the most vulnerable in society are heard in decision-making. It is also responsive to the present and future needs of society.[38] I concur with this definition.

Article 3 of African Charter on democracy, elections and governance, 2007 also promotes good governance from the Principles it has stipulated that State Parties observe when implementing this Charter.[39] Our constitution provides that it should be interpreted in a manner that promotes its purpose, values and principles, advances the rule of law, permits the development of law and contributes to good governance. Our Constitution provides for the national values and principles of governance that are to bind all state organs, state officers, public officers and all persons who (i) applies or interprets this Constitution, (ii) enacts, applies or interprets any laws, and (iii) makes or implements public policy decisions.[40]

These national values and principles include;[41]

1. Patriotism, national unity, sharing and devolution of power, the rule of law, democracy and

[38] UNESCAP 2009.http://www.unescap.org/pdd/prs/ProjectActivities/Ongoing/gg/governance.asp. Accessed on 20 December 2011.

[39] African charter on democracy, elections and governance, 2007. Kenya adopted the treaty on 30 January 2007.

[40] Article 10 (1) of the Constitution of Kenya.

[41] Article 10 (2) of the Constitution of Kenya.

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participation of the people.

2. Human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized.
3. Good governance, integrity, transparency and accountability
4. Sustainable development.

In the implementation process, all the bodies that are involved in this process must adhere to the national values and principles. This will mean that all laws of Kenya that will be enacted will promote good governance in all levels of government, protect the rights of the people, and promote self-development of each individual in Kenya.

The Constitution come up with new changes that if well implemented will only turn the governance of this country for the better. This Constitution has subjected the executive, the judiciary and the Legislature to strong checks and balances. No longer is any organ of state above the law. Gone is that error with the old Constitution. To make things even tighter, there is no single organ of power with the right to amend the Constitution at whim. Very tight procedures have been set out in the Constitution.[42]

Our Constitution has empowered the people who value reform. The reformers will now actively advocate for the rights of the people under the Bill of Rights[43] be observed to the letter by the Government. The Bill of Rights touches on the quality of life and states that every Kenyan has the right to such basics as clean water, decent housing, sanitation and an adequate supply of quality food. In addition, they have a right to emergency medical treatment.[44]

The Constitution has embraced devolution of power.[45] Apart from the Central government, we will have County Governments. With time, decentralization and improved checks and balances will have a profound impact on Kenyan life.

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42 Look at Chapter Sixteen of the Constitution of Kenya. It has put a very strict procedure of amending the Constitution which helps prevent a single body of power to just amend the Constitution for it to fit their political needs of the day. This is what happened with our old constitution where it was amended so many times by the Presidents at the time so as to enable them achieve their aims. This has also been well summarized in the Standing Committee on Constitutional Review, *Final Report to the LSK Council, August 2006*. Page 11.

43 Chapter Four of the Constitution of Kenya.

44 This Provision will go to great lengths if exercised and it will help develop the law of Health rights in Kenya.

45 Chapter Eleven of the Constitution of Kenya stipulates on the devolution of government.

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This decentralization will bring the government closer to the people. The devolved government will mean that the County resources will be controlled by the County governments. This means that citizens (including women) are more actively and directly involved in decision-making of the manner in which the resources available will be distributed and effectively allocated to their current and future needs.

Future Prospects

Both the protracted struggle to attain a new constitutional dispensation and the overwhelming support that the PCK received at the referendum is a pointer to the high expectations that Kenyans were placing on the new Constitution. A number of the expectations are already on course; there is revamped judiciary, numerous commissions on governance have been established; parliament has been exercising power to approve high profile appointments; plans are underway to reconstitute the Police and much more. However, the full impact of the new dispensation is yet to be felt. Most of these shall take effect after the 2012 elections and results will be seen over a period of time rather than suddenly.

The new constitution has provided a framework within which a modern government in Kenya shall perform its functions and a framework that lays the basis upon which relations between Kenyans themselves shall be conducted. According to Social Contract Theorist[46], the rationale for the state is that the members have given up a number of their rights in return for protection on life, liberty and property. The presumption is that life without a government would bring a situation of anarchy & lawlessness. Life would be "short, nasty & brutish' as everyone would do whatever pleases himself with no or little consideration for the interests of fellow humans.

It is therefore not a surprise that Kenyans overwhelmingly supported the Constitution for it provided a framework within which the citizens would achieve this "protection of life, liberty and property" and other allied purposes. This framework has recognized the fact that the primary reason for the existence of government is to serve the citizens, to guarantee and to protect its rights. The first Article in the Constitution recognizes that sovereign power resides with the people. The supreme law also introduces an elaborate and advanced Bill of Rights that recognizes all the 3 generation rights and establishes a Commission to prevent, investigate and address human rights violation.

[46] These include Thomas Hobbes in his book "The Leviathan", John Locke in his "Second Treatise on Government" and Jean Jacques Rosseau in his books "The Social Contract" or "Principles of Political Right".

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It further introduces the concept of dual citizenship and removes gender discrimination on matters of citizenship. Gender equity is guaranteed in elective bodies by the provision that no more than 2/3 of members shall belong to same gender. Any member of the Public has a right to bring up a case against the government on the basis of infringement of Human Rights and the Bill of Rights - Article 23(1)(2).

With regard to the structure and substance of the government, it trims the hitherto excessive powers of the executive, removes the age limit for a president and ensures that the President has a popular mandate by requiring that he garners more than 50 % of all votes cast. It gives the people the Right to Recall non-performing legislators, introduces a Chapter on Integrity to ensure compliance with Integrity in all government institutions enhances independence of the Judiciary seeks to sweep the Judiciary of all unsuitable elements through vetting.

An Independent National Land Commission is created to maintain oversight and manage all Land use. There is Devolution of government services to the county level. There is greater separation of power between the executive and legislative branches as MPS shall no longer be able to hold cabinet office. There are increased checks and balances by creation of Independent Offices and Commissions with stringent processes of appointing their officers and there shall be equitable sharing of resources[47].

Such provisions illustrate that the new Constitution is people oriented and requires government service to be people oriented too. A foremost expectation is that there will be peace and stability in the country. The Constitution seeks to address the root causes of conflict in the country. One of these has been the inequalities in resource distribution and scarcity of those resources leading to fights between communities. With the provisions relating to an equalization fund, equitable distribution of resources and affirmative action to assist marginalised communities and individuals, there will no longer be a reason to fight over what is available. Further the extensive provisions relating to land ownership shall forestall violence that has occurred in every election year since 1992.

The Constitution has set up a framework which returns Kenya into the path of democratization. The executive is unlikely to turn dictatorial or to exercise its powers excessively. Corruption is set to be tackled through the provisions on integrity and those establishing the Ethics & Anti-Corruption Commission. There

[47] Article 204 of The Constitution of Kenya.

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are so many checks and balances on what the executive can do and those that it cannot. The size of the cabinet shall be reduced from the current 40 to less than 24. There will no longer be political patronage through the dishing out of seats to loyalists and relatives. This is because every appointment must be based on merit.

The legislature is set to take its ideal role in a democracy. Parliament will strictly be in place to pass legislations and represent the people. The era when MPs double up as cabinet ministers (part of the executive) shall disappear after the 2012 elections. Relations between communities are set to improve. With devolution, the resources shall be channeled to the local communities in the counties. The centralization of power in Nairobi will be a thing of the past. Citizens shall now focus on the local leadership rather than the national. This is a very important step since in the past, acquisition of the presidency by any community was seen as the gateway to a purse of national fund.

Women's role is set to fundamentally change. Their role in the society and fundamental rights have been recognized and pprotected. After the elections, they will occupy at 47 seats in the senate and 1/3 of the seats in the national assembly and all other public bodies. Fundamental rights especially those relating to treatment of accused persons and prisoners by the Police and prison authorities respectively. These developments in the areas of human rights, stability, peace, good governance shall breed other positive developments that shall foster foreign direct investment, economic growth and regional leadership among many others.

Vision 2030 is the national long-term development blue-print that aims to transform Kenya into a newly industrialising, middle-income country providing a high quality of life to all its citizens by 2030 in a clean and secure environment. The Vision comprises of three key pillars: Economic; Social; and Political. The Economic Pillar aims to achieve an average economic growth rate of 10 per cent per annum and sustaining the same until 2030. The Social Pillar seeks to engender just, cohesive and equitable social development in a clean and secure environment, while the Political Pillar aims to realise an issue-based, people-centred, result-oriented and accountable democratic system.

The three pillars are anchored on the foundations of macroeconomic stability; infrastructural development; Science, Technology and Innovation (STI); Land Reforms; Human Resources Development; Security and Public Sector Reforms. With the new Constitution in place, the ground has been laid for achieving the aspirations of Vision 2030. What is needed is commitment by all government organs to give life into the new Constitution and the vigilance of the Kenyan citizens to ensure that the new Law is adhered by all.

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Chapter 7

Getting it Right: Kenya's Journey towards Effective Peace Building

Introduction

The 2008 post election violence (PEV) in Kenya cost about 1,500 lives, displacement of more than 400,000 others and untold destruction of property[1]. An internationally brokered political settlement that ended the conflict also set the pace for institutional and structural reforms that would promote a culture of respect for human rights, rule of law and equitable distribution of resources.

This chapter reviews how strong public institutions are integral in violent conflict prevention. By singling out significant institutions, it further demonstrates how historical shortcomings of diverse government agencies in Kenya contributed to gradual erosion of public confidence in them and how this culminated to PEV. It also highlights the key reforms that have been going on in those institutions under the Agenda Four rubric and how this is clear break from the past. It concludes by highlighting some challenges to the full realization of the aspirations of Kenyans in adopting the current Constitution.

Structural Imperatives for Effective Peace Building

Most violent conflicts sprout from resource allocation contestations when resource deprived groups discern that the prevailing governance structure is unfavorable to fair access of national resources.[2] Since the end of the Cold War, the world has been plagued by more intrastate that interstate conflicts. After studying the nature and causes of such conflicts, there is an emerging consensus among peace-builders on the key factors that advance peace building by reducing chances of violent conflict or a recurrence of violence in post

1 See Report by the Commission of Inquiry into Post-Election Violence(CIPEV) accessible at http://www.dialoguekenya.org/docs/PEV%20Report.pdf *last accessed on December 6, 2011*

2 Collier, Paul. "Economic Causes of Civil Conflict and Their Implications for Policy," in Crocker *et al., Leashing the Dogs of War,* pp. 197-217.

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conflict societies.[3] According to them, successful peace-building strategy involves entrenching democracy and the rule of law; promote devolution and decentralization of government; and encourage respect for human rights.

a) Promoting democracy and the rule of law

Ideal democracy gives the populace a fair opportunity to vote for their leaders at predictable intervals. Rule of law ensures equal application of law regardless of social status, race or ethnic extraction. Institutions that enhance a democratic society include; an independent and impartial electoral body capable of conducting free and fair polls; an independent judiciary that guarantees impartial and effective adjudication of disputes; and a professional law enforcement agency.

Various scholars have empirically demonstrated the promise that democracy holds in preventing conflict.[4] Though their studies vary in rigor and scientific precision, the consensus is that democracies rarely wage war on each other and have significantly less incidences of violent internal conflict.[5] Truly democratic governments, due to multilayered checks and balances, are more likely to promote the welfare of their citizens. There is regular opportunity to elect new leaders if the incumbents are not responsive to the needs of the electorate. A democratic culture across all societal sectors nurtures tolerance, dialogue and persuasion and eschews violence. Establishing strong rule of law institutions assures people of safety and guarantees equity.[6]

b) Decentralization and devolution of government

Devolution of power promotes citizens participation in governance decision at the lowest devolution unit and minimizes perceptions of disenfranchisement by often bureaucratic central governments, whose architecture may not necessarily promote adequate public participation and informed decision making. A devolved offers good localized barometers for the pressing societal needs and aids in crafting an appropriate response. Further, affirmative action in favor

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3 I have adopted the definition of peace building by Stickland et al in Stickland, Richard, and Nata Duvvury, "Gender Equity and Peacebuilding: From Rhetoric to Reality: Finding the Way," International Center for Research on Women, pp. 1-31.

4 See R.J Rummel, Rudolph J. *Death by Government.* New Brunswick, New Jersey: Transaction Publishers, 1994.

5 Rummel, Rudolph J. *Power Kills: Democracy as a Method of Non Violence*. New Brunswick, New Jersey: Transaction Publishers,1997

6 Kritz, Neil J. "The Rule of Law in Conflict Management," in Crocker *et al., Leashing*, pp.401-422.

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of traditionally marginalized ethnic and religious minorities affords the government an opportunity to redress historical economic and social neglect.[7]

c) Respect for human rights

Human rights are individual and collective aspirations and encompass civil and political rights as well as social, cultural and economic rights. Where abuse of human rights consigns people to despair and basic survival means is lacking, they many have little to lose by resorting to either episodic violence such as increased criminal activities, or widespread violence seeking regime change through coups or ethnic conflicts as recently witnessed in the Middle East.[8] Unfair deprivation of resources due to class, ethnic, religious or other bias increased the likelihood of violence.[9]

d) Promotion of non violent conflict resolution alternatives

Credible advocates of non violent conflict resolution representing religious and geographical diversity have historically successfully utilized it as a tool for articulating grievances. Gandhi triumphantly utilized non violent means to protest the British domination of India.[10] Martin Luther King led opposition to institutionalized racial discrimination and created a momentum for historical structural changes.[11] Non violence often lends credibility to the course being pursued. The freedom to strike, boycott, unionize, organize demonstrations and picket encourages tradeoffs, negotiations and compromise rather than coercion and fear.

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7 Gurr, Ted Robert. "Minorities, Nationalists, and Islamists: Managing Communal Conflict in the Twenty-first Century," in Crocker *et al., Leashing*,pp161-175.

8 For example see http://www.nytimes.com/2011/01/22/world/africa/22sidi.html?_r=2&pagewanted=1&src=twrhp *last accessed on November 10, 2011.*

9 For a history of the conflict in Darfur brought about by marginalization, see, Jentleson, Bruce W., Yet Again: Humanitarian Intervention and the Challenges of 'Never Again,'" in Crocker *et al.,Leashing*,287.

10 Gandhi, Mohandas K. "Excerpts from the Essential Writings of Mahatma Gandhi." *In Violence and its alternatives: An Interdisciplinary Reader,* edited by Manfred B. Steger and Nancy S. Lind. New York: St Martin's, 1999. Pp.292-301.

11 King, Martin Luther, "Excerpts from Love, Law and Civil Disobedience." In*Violence and its Alternatives: An Interdisciplinary Reader,* edited by Manfred B. Steger and Nancy S. Lind. New York: St. Martin's 1999,pp. 302-307.

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e) Nurturing a Culture of Tolerance and Respect for 'others'

In a world of ethnic, racial, religious, gender and other diversity, tolerance and respect for alternative opinion is essential given that globalization and interdependence that makes diverse interaction necessary.[12] Any unchecked form of domination breeds resentment, hatred and may crystallize to violence. Use of negative stereotypes and generalizations has led to growing animosity between diverse groups.[13]

While not necessarily calling for the blind embrace of other people's ideals, a culture of causing no harm to our 'enemies' cumulatively reduces suffering in the world brought by material want and violent conflict.[14] Demarcating between our opponents' individuality and the culture they represent helps to better devise pacific strategies to impact the system which perpetuate their behavior.[15]

f) Credible Post Conflict Justice and Truth Telling Mechanisms

A credible transitional justice mechanism in post conflict societies balances the moral and legal imperatives of peace and justice. It considers the need for healing by victims and also deters a recurrence of gross violation of human rights. An accurate historical record of the systematic human rights abuse guards against later distortion of the truth by parties.[16] A credible truth telling mechanism unearths the root causes of conflicts and helps reconstruction of a peaceful and stable society. Issues on marginalization, inequality or other feelings that may have fomented the conflict are dealt with.

Tracing the Journey towards Institutional Reforms

a) The judiciary

The current judiciary is established under Article 10 of the Constitution.

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12 Held, David,Anthony G. McGrew,David Goldblatt, and Jonathan Perraton. "Introduction." *In Global rnaformations: Politics , Economics and Culture,* edited by David Held, Anthony G. McGrew, David Goldbatt and Jonathan Oerraton. Cambridge, UK:Polity,1999.

13 For instance equating the 'war on terror' to fighting the radicalization of Islamic faith.

14 Singer, Peter. "What Should a Billionaire Give - and what should You?" *New York Times Magazine* (71 December,2006)

15 King, Supra note 10.

16 Culbertson, Roberta and Beatrice Pouligny. "Re-Imagining Peace After Mass Crime: A Dialogical Exchange between Insider and Outsider Knowledge." *In After Mass Crime: Rebuilding States and Communities.* edited by Beatrice Pouligny, Simon Chesterman and Albrecht Schnabel. Tokyo: united Nations university Press,2007, p.275.

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It is headed by the Chief Justice, who is also the President of the Supreme Court. Senior judicial offices are appointed by the President on the recommendation of the Judicial Service Commission. They have a security of tenure entrenched in the Constitution, among other in-build safeguards to secure their independence. The Constitution enjoins the judiciary to secure justice expeditiously without being unduly bogged down by procedural technicalities for the interest of justice. Litigants are encouraged to seek alternative means of dispute resolution as long as they are not in conflict with the Constitution or any other written law, or their outcome is not repugnant to justice and morality.

Article 163 (3) (a) gives the Supreme Court exclusive original jurisdiction to 'hear and determine disputes relating to the elections to the office of the president' within the stipulated time. This is a departure from the past where the High Court had original jurisdiction over all electoral disputes.

The Chief Justice has promised conclusion of cases within six months of their filing. In the past cases would take up to 10 years. The current recruitment of judicial officers through a competitive application process, gives room to qualified members of the public to apply for the positions, a departure from the past where the process was shrouded in secrecy. This will hopefully contribute to restoring public confidence in the revamped institutions

Since the promulgation of the new Constitution, more judges have been recruited and a raft of other human and infrastructural reforms put in place.. Judges are increasingly demonstrating unprecedented level of boldness even in making decisions that are seen to be unfavorable to the executive. The Judiciary seems keen on protecting its independence as demonstrated by the Chief Justice's public statement after the executive castigated the judiciary for ruling against it in a case where orders were issued to the government to arrest the President of Sudan should he visit Kenya while under an arrest warrant issued by the International Criminal Court for alleged international crimes in Darfur.[17] The independence currently exercised by the judiciary can only serve to inspire confidence in the public that they can rely on the judicial institutions to have their disputes expeditiously, fairly and competently adjudicated.

[17] See the Speech by the Chief Justice on 'The Imperatives of Living by Our Constitution' December 05, 2011 available at http://www.nation.co.ke/blob/view/-/1284412/data/315231/-/12vy8sxz/-/CJ+on+Constitution+Dec+5+2011.pdf *last accessed on December 06, 2011.*

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b) The Police

The police have traditionally been accused of incompetence, corruption and a high degree of impunity and seen as serving the interest of the executive as opposed to fair enforcers of the law. [18] For instance during a hearing by the Truth Justice and Reconciliation Commission, a former police officer narrated how he was unfairly dismissed by the Commissioner of Police after he refused to falsify evidence against an influential political figure who was viewed as a dissident.[19]

When extortionist gangs with ethnic bases such as Mungiki reared their heads with their macabre signature killings, specialized police squads embraced extra judicial execution of suspects and there was no form of accountability whatsoever.[20] A recent Human Rights Watch Report indicated that more than 300 men were disappeared in the Mount Elgon area in 2007 during an army led crackdown on the Saboat Land Defence Force. Despite the systematic violation of human rights in this region, there has not been any credible accountability mechanism.[21]

Since independence, there has been no independent body to check excesses by the police. Due to lack of constitutional protection of the office of the Commissioner of Police, the previous holders have served at the pleasure of the President. The police have also been known to be greatly under-resourced leading to low morale and have consistently been ranked as the most corrupt public agency. These institutional weaknesses have contributed to serious erosion of public confidence in the police force.

The failure by the police exposed by the 2008 post election violence was multifaceted. First the police were unable or unwilling to quell the violence once it engulfed the cosmopolitan parts of the country. It is alleged that the police provided a safe corridor for one group of protagonists in the conflict

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18 For a comprehensive account of the historical weakness of the Kenyan police, see 'The Police, The People, The Politics: Police Accountability in Kenya' A Joint Report by the Commonwealth Human Rights Initiative and the Kenya Human Rights Commission (2006)

19 Seehttp://www.nation.co.ke/News/Jaramogi+aide+sacked+for+telling+the+truth/-/1056/1284300/-/view/printVersion/-/pt2fp5/-/index.html Daily Nation, December 5, 2011

20 See the report by the UN Special Rapporteur on Extra Judicial, Summary or Arbitrary Executions http://www.unhchr.ch /huricane/huricane.nsf/view0152DF4BE7194A7598C125756800539D79? opendocument *last accessed on November 04, 2011*

21 See 'Hold Your Heart: Waiting for Justice in Kenya's Mt. Elgon Region'. Human Rights Watch, 2011 at http://www.hrw.org/sites/default/files/reports/kenya1011_ToUpload0.pdf *last accessed on November 09, 2011*

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to enable them launch retaliatory attacks.[22] Further, after the cessation of violence, the police were not able to conduct any credible investigations that could sustain prosecution of the perpetrators, one of the grounds advanced in invoking the jurisdiction of the International Criminal Court in the Kenyan situation.[23]

The new Constitution creates a reformed institution to be called the National Police Service.[24] It will be headed by an Inspector-General, to be appointed by the President with parliamentary approval. He/she will serve for a single term of four years and ineligible for reappointment. He may only be removed from office in accordance to the Constitution. The National Police Service Commission will be in charge of recruitment, promotion and discipline in the National Police Service. An independent police oversight body will also be established to receive and investigate complaints against police officers. The measures in the Constitution are partly aimed at ensuring a healthy independence of the police from the executive, which will hopefully enhance professionalism. However, these structural measures will have to be in conjunction more resource allocation to equip the National Police Service effectively discharge its law enforcement mandate.

c)Electoral Commission

Between interdependence and 1991, Kenya was predominantly a single party state (entrenched in the Constitution) with little or no demarcation between the political party leaders and the executive arm of the government. Those willing to contest for political office had to be members of the ruling party and in favor with the executive. Kenya African National Union (KANU), the dominant political party for a long time, introduced a not-so-democratic internal disciplinary process that would expel those who were viewed as not loyal enough to the President. Expulsion of suspension from party membership meant loss of the parliamentary seat.

The prevailing queue voting system did little to secure fairness of the polls due to potential intimidation of voters. After sustained international and domestic pressure, a constitutional amendment in the early 1990s introduced political pluralism. Subsequently several opposition parties sponsored candidates in the ensuing presidential, parliamentary and civic elections.

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22 This is the basis on which the former police commissioner has been indicted by the International Criminal Court at the Hague as one of those bearing the greatest responsibility for violations of international human rights during the post election violence. For details on the response by the police to the PEV, See CIPEV Report, Supra note 1.

23 CIPEV Report, 376 Supra note 1

24 See Chapter 14 of the Constitution generally.

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The perceived opening of the democratic space sooner turned to be a mirage. The government would employ the police, judiciary, electoral commission and other institutions of government to its advantage making political competition terrain uneven in its favour. For instance, political parties had to be licensed by the provincial administration under a colonial-era legislation to hold rallies, which was often denied on spurious security grounds. The Electoral Commission was under the *de facto* control of the President. Contestants running on the ruling party ticket had access to state resources for campaign and 'reward' voters. Violence was occasionally meted opposition supporters without any meaningful intervention by the police. Using state resources, the ruling party engineered 'defections' by opposition members of parliament, weakening the opposition. Cabinet positions were awarded to ardent supporters of the ruling party, leaving out some ethnic blocs and fomenting perceptions of marginalization.

Continued clamor for reforms yielded further piecemeal reforms before the 1997 elections. Political parties were allowed to nominate electoral commissioners based on their numerical strength in parliament. The Electoral Commission did not have the legal mandate to enforce rules such as those outlawing the use of state resources to campaign or even disciplining or barring contestants who would openly bribe voters from competing in the elections.[25] After violence broke up after the contested 2007 elections, the then Electoral Commission of Kenya, perhaps more than any other public agency was widely viewed as most responsible for the outbreak of violence that engulfed the country. It was therefore unsurprising that its radical overhaul was a key Agenda Four priority.[26]

After the country stabilized in the wake of the 2008 post election violence, the Electoral Commission of Kenya was disbanded to pave way for the Interim Independent Electoral Commission (IIEC), whose tenure ended with the appointment of the Independent Electoral and Boundaries Commission (IEBC) established under Article 88 of the Constitution. Unlike in the past where appointment of electoral commissioners was by either the president or political parties based on their parliamentary numerical strength, recruitment to the IEBC was by an independent recruiting panel and the top candidates presented to the President for nomination, with

[25] See CIPEV Report, supra note 1.

[26] For a comprehensive account of flaws in the electoral process in Kenya including 2007 elections, see the Report of the Independent Review Commission appointed after PEV available at http://www.dialoguekenya.org/docs/FinalReport_consolidated.pdf *last accessed on December 06,2011*

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parliamentary approval. The recent recruitment to the IEBC seemed to favor persons who did not have an overt political inclination, which was meant to help perceptions of their neutrality.

The enabling legislation to make the IEBC more effective to by the president in December 2011 empowers it to impound government property including vehicles used in campaigns, bar candidates who contravene the election offences code from contesting, among a raft of other penal and administrative sanctions.[27]

d) Office of the Director of Public Prosecutions

The independence constitution gave prosecution powers to the Attorney General(AG). It was not uncommon for Prosecutorial powers of the State to be used to deal with dissents by maliciously prosecuting them and detaining them indefinitely. Despite criminal activities in the country during the electioneering season especially after the introduction of multiparty era, the office of the DPP has never credibly prosecuted any persons responsible for the politically instigated land clashes that have historically caused death and destruction of property. The lack of political will to equip the prosecutions office was epitomized by fact that by June 2011, there were only slightly over 70 qualified lawyers who were working in the DPP's office as state counsels.[28]

Although police prosecutors had been gazetted to prosecute cases, their number and technical capacity pales in comparison to the needs of the country. Further, despite Kenya consistently ranking abysmally in corruption index, the office of DPP has not successfully prosecuted top public officials for corruption, reinforcing the perception that there is no political will to fight corruption.[29]

The failure by the AG to prosecute perpetrators of the 2008 violent conflict was also cited to invoke the jurisdiction of International Criminal Court as the government was viewed as either incapable or unwilling to prosecute perpetrators of atrocities committed during the violence. Just like the judiciary, the police and the electoral body, it was targeted for reforms to ensure that it henceforth played its rightful role in ensuring the respect for the rule of law.

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[27] See the Elections Offences Act, accessible at http://www.kenyalaw.org/kenyalaw/klr_app/frames.php *last accessed on December 6, 2011.* It is termed as an Act of Parliament to 'prevent election offences and corrupt and illegal practices at elections...

[28] See 'Towards Professionalized Prosecution Services in Kenya: A Situational Analysis of the State of Prosecution Services And the Way Forward on the Directorate of Public Prosecutions, United Nations Office on Drugs and Crime, May 2011, Nairobi.

[29] See Mwangi, Paul, supra note 24

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The current Constitution creates an independent office of the DPP (Article 157) with security of tenure of a one term. In the conduct of his duties, he is not under the control of any person or public body and enjoys complete autonomy from the AG unlike the past where his office was one of the departments under the AG. The DPP may direct the Inspector General of Police to commence investigations of any information of alleged criminal conduct and the Inspector-General is constitutionally obligated to comply with such directive.

There have been some administrative proposals in the structure of the DPPs office since the incumbent was appointed under the current Constitution. These include hiring more staff members, better remuneration and a higher level of specialization. It is hoped that the DPP's office will play its rightful role in combating impunity by professionally and impartially prosecuting criminals regardless of their station in life or political affiliation.

e) Devolution and Resource Allocation

The concentration of power in the executive after independence contributed to selective distribution of national resources to those areas perceived as supportive of the ruling political class. This has applied to both the appointment to national positions and allocation of development funds for education, health, roads and other infrastructural al needs. It is with the knowledge that failure to assume political leadership is likely to consign regions to marginalization that political offices especially the presidency has been highly contested. This has contributed to voting along ethnic lines and interethnic animosity such as witnesses in the run up to and after the PEV.

The devolved government as provided under Chapter 11 of the Constitution gives people in the devolution units the power to participate in decision-making that affects them. Setting aside a guaranteed percentage of national wealth for allocation to the county governments and an Equalization Fund for allocation to historically marginalized areas to improve their infrastructure corrects historical imbalances in funds allocation. Article 81 of the Constitution provides that not more than two-thirds members of elective pubic bodies will be of the same gender; and that there is a fair representation of persons with disabilities. This protects populations groups that have historically been disadvantaged in competition to political offices.

f) Truth, Justice and Reconciliation Process.

Post conflict societies need to deal with past and systematic human rights violations committed by or with

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the acquiescence of the government. Kenya has historically witnessed several cases of systematic human rights violations. These include the Wagalla massacre, the systematic arrest and detention without trial of political activists agitating for reforms, cyclic post election violence especially since the introduction of multi party system in 1991, systematic extra judicial execution of suspected illegal gangs such as Mungiki and the Saboat Land Defence Forces.

There has been no credible investigations and prosecution of those responsible for this systematic abuse of human rights. However, the establishment of the Truth, Justice and Reconciliation Commission[30] with a broad mandate including investigation of human rights violations occurring between December 12, 1963 and February 28, 2008 has offered victims of human rights violations the opportunity to help establish an accurate historical record and also for possible reparations.[31]

Beyond legislation

The checks in the appointment to these key offices are meant to inspire public confidence, free the constitution office holders from political interference in the appointment and discharge of their duties and assure them of a fair adjudication of complaints against them that may result to their removal from offices. The publicly open appointment process to senior constitutional offices has given the public not only 'ownership' of the process, but has inspired confidence and legitimate expectation that these office bearers will discharge their duties in accordance to the Constitution and free from political interference.

The institutional reforms that are already underway aim at shepherding the country towards a new political dispensation that will ensure respect of human rights and the observance of the rule of law. An independent and competent judiciary, a credible electoral body not beholden to the prevailing political interests, a devolved government structure that will be held accountable up to the most localized unit of devolution, a police service free from political manipulation and an independent DPP's office, all herald a structure of multilayered checks and balances at all levels of governance.

The revamped and new institutions require significant financial investment to perform their duties satisfactorily. For instance, the DPP needs to hire more

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[30] See the Truth, Justice and Reconciliation Act No. 6 of 2008 available at http://www.kenyalaw.org/kenyalaw/klr_app/frames.php *last accessed on December 6, 2011*

[31] For the work of the Truth, Justice and Reconciliation Commission, visit www.tjrckenya.org/ *last accessed on December 7, 2011*

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state counsels urgently. More judicial officers are needed to effectively deal with the backlog of cases. Changing the leadership of the police without investing adequate resources for their operation and competitive salaries will not necessarily improve the quality of police service. A strong intellectual conviction and political will to allocate resource to these new institutions is of utmost importance. The government needs to generate sufficient revenue to fund these offices and take public service a notch higher.

In adopting the current Constitution, Kenyans hoped for a better healthcare in government facilities, a food secure country, professional law enforcement, increase in employment levels, equitable distribution of resources and other attendant social, economic and cultural benefits. Unless that dream is progressively realized, the excitement over the new Constitution could dissipate and give way to despondency and perfidy.

Starving women and children in northern Kenya, infants succumbing to preventable causes at Pumwani Maternity Hospital, skyrocketing inflation, unresolved crimes, presence of internally displaced victims of the 2008 post election violence in their camps and their exposure to adverse weather, all serve to remind us that it will take more than mere legislation to realize the dreams of a new dawn.[32] Eternal vigilance by other actors such as trade unions, faith based organizations, civil society including youth and women groups is necessary to ensure that the dreams of Kenyan stay alive and that the responsible government agencies are held accountable to in giving effect to the intended meaning and the spirit of the Constitution.

[32] The October 2011 Kenya National Dialogue and Reconciliation Review Report by South Consulting group, majority of Kenyans cite high inflation, high rate of unemployment and high cost of food as the major challenges facing the general population in Kenya today. See http://www.dialoguekenya.org/docs/KNDRFinalReport12October2011.pdf *accessed on November 10, 2011*

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Chapter 8

Constitution-Making and Constitutionalism: A Comparative Study

On August 27, 2010, Kenya finally adopted her new constitution after a lengthy process that took almost two decades to be completed. This chapter seeks to compare this process and the end product with those of selected countries in other jurisdictions in Africa, Europe, America and Asia. The chapter also seeks to highlight the best practices in the application and implementation of the constitution in those selected countries which Kenya can consider as she embarks on the implementation process.

Legitimacy is important in the constitution-making process as is in the implementation of the Constitution itself. The need to cater for different competing interests means that constitutional schemes often involve 'great compromises', which permit each of the groups to subscribe to the shared framework. These great compromises need to be protected from regular partisan politics, as they form the foundation for the willingness of individuals and groups of people to join the game and see themselves as a part of the civic nation. The need to reach great compromises and to uphold them demands that a good constitution-making process must provide for broad participation and must pay special attention to the rights and interests of the minorities since majority groups often rely on their political power to protect their interests.

It is almost impossible to achieve a comprehensive set of checks and balances and 'big compromises' without a deliberate, transparent and participatory process both at the drafting and ratification stages. Since the constitution sets up the institutions, framework and rules of the game, it should also include an elaborate structure of checks and balances which must be viewed in wholesome by all interest groups because the effectiveness of the system largely depends on the full range of constitutional arrangements which are often inter-related. Therefore, piecemeal amendments that are made in total disregard of the full constitutional arrangement poses the danger of undermining the overall balance that was originally intended thereby weakening societal cohesion and stability. Whereas same

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high standards may not apply to the constitutional amendment process as is to the constitution making process itself, the prevailing principle should be that, amendments should only be effected if it turns out with time that the original arrangement is not optimal.

Once a constitutional regime is established, its sternest test lies in the way it is applied and interpreted. For all practical purposes, the law is what the authoritative interpreters say it is and therefore the calibre of interpreters and the canons of interpretation they employ are of cardinal importance. Thus, the phases of constitutionalism are clearest and most distinct when constitution-making is a deliberate, conscious process, resulting into a constitutional document which specifies how it should be amended and implemented.

Constitution-Making and Constitutionalism in the United States of America

The Constitution of the United States lays the framework for the organization of her government and the relationship of the federal government with the states, citizens, and all people within the United States. It is the second oldest written constitution still in use by any nation in the world after the 1600 Statutes of San Marino and holds a central place in United States law and political culture[1]. It was adopted on September 17, 1787, by the Constitutional Convention in Philadelphia and ratified by conventions in each USA state in the name of "The People". It consists of a preamble, seven original articles, twenty-seven amendments[2], and a paragraph certifying its enactment by the constitutional convention.

The first three articles establish the three branches of the national government: a legislature, the bicameral Congress; an executive branch led by the President; and a judicial branch headed by the Supreme Court. They also specify the powers and duties of each branch. All unspecified powers are reserved to the respective states and the people, thereby establishing the federal system of government.

I.I Constitution-Making Process

The USA Constitution was preceded by fifteen state constitutions. Many of the delegates to the federal convention participated in the state constitution-making processes and therefore drew heavily on and presumed the

1 Casey (1974)

2 The first ten, collectively known as the Bill of Rights, were ratified simultaneously by 1791. The following seventeen were ratified separately over the next two centuries.

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continued vitality of these state constitutions[3]. The decade long experience with constitution-making at the state level was valuable to the delegates because it helped them have basic understanding of what a constitution should contain and how it should be enacted.

As a result of this experience and based on the history of the United States[4], the framing of the USA constitution was informed by certain key principles such as; explicit reliance on the natural law principles enshrined in the Declaration of Independence and widespread understanding that individuals are entitled by nature to the enjoyment of certain rights, and that they have an inherent right to enjoy a republican form of government and cannot be governed without their consent.

Ultimately, they enjoy inalienable right to reform or abolish governments that fail to secure these rights or act for the common good of all[5]. Despite the more than a decade of constitution-making experience, the drafting and adoption of the American constitution took a while to be realised and still went through numerous twists and turns. In September 1786, commissioners from five states met in the Annapolis Convention to discuss adjustments to the Articles of Confederation that would improve commerce and invited state representatives to convene in Philadelphia to discuss improvements to the federal government.

After about five months of intense debate, the Congress of the Confederation endorsed a plan to revise the Articles of Confederation into a workable government. 74 delegates from twelve states were nominated by their respective state legislatures to the Constitutional Convention whose main task was to reconcile the many expectations. The Convention voted to keep the debates secret so as to allow the delegates speak freely, negotiate and compromise.

During the negotiations, it was clear that there were divisions mainly between the big states and the small

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3 It is estimated that as many as one-half of the delegates to the federal convention participated in the framing of the 15 state constitutions

4 American identity has an ideological connection to the "Charters of Freedom". Historians trace the Iroquois nations' political confederacy and democratic government's influences on the Articles of Confederation and the United States Constitution. Prominent figures such as Thomas Jefferson and Benjamin Franklin were more involved with leaders of the Iroquois Confederacy, based in New York. John Rutledge of South Carolina in particular is said to have read lengthy tracts of Iroquoian law to the other framers, beginning with the words, "We, the people, to form a union, to establish peace, equity, and order

5 Samuel P. Huntington christened this as the 'American Creed'. The creed is made up of individual rights, majority rule, and a constitutional order of limited government power.

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states on the issues of representation, the judiciary and slavery among others[6]. On the issue of representation, the big states seemed to favour a bicameral legislature proportioned to population and variable state representation in the Senate[7] while the small states were in favour of a unicameral national legislature with each state legislature sending an equal number to represent it[8].

The two sides also differed on the structure of the judiciary, with one side proposing a judiciary, with life-terms of service and vague powers[9] while the other proposing a judicial branch appointed by the executive[10]. Slavery was also a thorny issue and it remained unresolved during the Convention[11].

After lengthy deliberations, Sherman's "Great Compromise" prevailed on its fifth attempt which provided *inter alia* that every state was to have two members in the United States Senate[12]. The Constitutional Convention created a new, unprecedented form of government by reallocating powers of government[13]. However, it is worth noting that the Convention did not start with national powers from the scratch; it began with the powers already vested in the Articles Congress and also infused influences from Iroquois and Greek[14], Roman as well as English influences[15].

To meet their goals of cementing the Union and securing citizen rights, the framers allocated power among executive, senate, house and judiciary of the central government but each and every state government in their variety continued exercising powers in their own sphere[16]. This informed America's statement of purpose as clearly espoused in her Constitution's preamble;

> *We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquillity, provide for the common defence, promote the general Welfare, and*

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6 Bowen, Catherine Drinker., Miracle at Philadelphia: the story of the Constitutional Convention May to September 1787. (1966) Barnes & Noble p22, 267.

7 James Madison's proposal representing the Virginia Plan in favour of the big states

8 William Paterson's New Jersey Plan in favour of the small states

9 James Madison's proposal

10 William Paterson's proposal

11 It remained unresolved until it was abolished by the 13th amendment of 1865

12 Bowen, op.cit., p. 185-186

13 Every previous national authority had been either a centralized government or a "confederation of sovereign constituent states."

14 Self-governance and the Bill of Rights

15 The English Bill of Rights (1689) was an inspiration for the American Bill of Rights.

16 McDonald, Forrest, *Novus ordo seclorum*: the intellectual origins of the Constitution 1985

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secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

I.II Amendment and Ratification of the Constitution in the USA

The framers of the Constitution were alive to the fact that changes would be necessary if the Constitution was to endure as the nation grew. However, they were also conscious that such changes should not be easy, lest it permit ill-conceived and hastily passed amendments. Nevertheless, they also wanted to ensure that a rigid requirement of unanimity would not block action desired by the vast majority of the population and therefore their solution was a two-step process for proposing and ratifying any new amendments[17].

The constitution also safeguards certain basic principles that cannot be altered. An important feature in this regard is Article V which places a limit on the amending power that, no amendment may deprive a state of equal representation in the Senate without that state's consent. In a nutshell, amendments to the USA Constitution can be proposed in three ways:

- By approval of two-thirds of both houses of Congress[18], and then sent to the states for approval, or
- By application of two-thirds of the state legislatures to the Congress for a constitutional convention to consider amendments, which are then sent to the states for approval, or
- Congress may require ratification by special convention. The convention method has been used only once, to approve the 21st Amendment[19]

Regardless of the method of proposing an amendment, final ratification requires approval by three-fourths of the states. Congress determines whether the state legislatures or special state conventions ratify the amendment. Article VII sets forth the requirements for ratification of the Constitution. Unlike amendments to most constitutions, amendments to the USA Constitution are appended to the body of the text without altering or removing what already exists.

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17 Lutz, Donald (1994). *Toward a theory of constitutional amendment*

18 To date almost all amendments whether ratified or not ratified, have been proposed by a two-thirds vote in each house of Congress. Over 10,000 constitutional amendments have been introduced in Congress since 1789

19 Repealing prohibition, 193

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I.III Judicial Review

The way the Constitution is understood in the US is largely influenced by court decisions, especially those of the Supreme Court. In the 1803 case *Marbury v. Madison*, the Supreme Court established the doctrine of judicial review. Judicial review is the power of the Court to examine federal legislation, executive agency rules and state laws, to decide their constitutionality, and to strike them down if found unconstitutional. Thus the courts play an important role of safeguarding the sanctity of the US constitution.

II. Constitution-Making and Constitutionalism in The Federal Republic of Germany

The Basic Law for the Federal Republic of Germany is the constitutional law of Germany. The drafting of the Basic Law originated from the three western occupying powers of America, Britain and France to first, counter the ideology[20] that the Germans were a superior race (German: *Herrenrasse*) and were entitled to commit genocide, or to treat 'aliens' in barbaric manner and second, to affirm unequivocal commitment to the inviolability and inalienability of human rights.

The draft was prepared at the *Herrenchiemsee* convention by delegates appointed by the leaders of the newly formed states between 10th and 23rd August 1948. After being passed by the Parliamentary Council and approved by the occupying powers on 12 May 1949, it was ratified by the parliaments of all the states except Bavaria which *rejected* it mainly because it was seen as not granting sufficient powers to the individual states. Nevertheless, it resolved that it would still be bound by it, if two-thirds of the other states ratified it. On 23 May 1949, the German Basic Law was promulgated and came into force a day later, then as the constitution of the states of West Germany.

Ultimately, the Basic Law sought to entrench and guarantee democracy, republicanism, social responsibility and federalism by *inter alia*;-

- Affirmation of basic rights as fundamental to the Basic Law as opposed to mere state objectives. Pursuant to the mandate to respect human dignity, all state power is directly bound to guarantee these basic rights.

- Abolishing emergency powers such as those used by the president (*Reichspräsident*) in the Reichstag Fire Decree of

[20] An ideology that was promoted by the Nazi who had usurped Germany's pre-war Weimar Constitution

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1933 to suspend basic rights and to remove communist members of the Reichstag from power, an important step for Hitler's machinations (*Machtergreifung*). Thus, the suspension of human rights would be illegal under Articles 20 and 79 of the Basic Law.

- Strengthening the constitutional position of the federal government and parliamentary authority thereby limiting the presidential powers[21].

- Demanding that the removal of the chancellor by parliament must be based on objective vote of no confidence (*Konstruktives Misstrauensvotum*) and there must be a successful election of a new chancellor. This is to provide more political stability than under the Weimar Constitution, when extremists on the left and right would vote to remove a chancellor, without agreeing on a new one, thus creating a leadership vacuum. In addition it was possible for parliament to remove individual ministers by a vote of distrust. Currently, such a vote is taken against the cabinet as a whole.

- Allowing the states to conduct foreign affairs with other states under supervision of the Federal Government with regards to matters falling within their purview[22]

- Allowing the Federal Government to 'transfer' sovereign powers to international institutions[23]

- To curb against the rising of dictators such as Hitler and in order to strengthen state institutions, the Basic Law establishes a parliamentary democracy with separation of powers into executive, legislative, and judicial branches[24].

The executive branch consists of the largely ceremonial Federal President as the head of state and the Federal Chancellor, the head of government, normally but not necessarily the leader of the party with the majority

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21 In contrast to the Weimar president, the new federal president can neither take the initiative to dissolve the Bundestag nor appoint a new chancellor without the consent of the Bundestag

22 Article 32

23 Article 24

24 A clear separation of powers was considered imperative to prevent measures like an over-reaching Enabling Act, as happened in Germany in 1933. This Act vested legislative powers in the executive arm which effectively finished the Weimar Republic and led to the dictatorship of the Third Reich.

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in parliament (*Bundestag*). Every minister governs his or her department autonomously but the Chancellor may issue overriding policy guidelines. The legislative branch comprises of the Bundestag, elected directly through a mixture of proportional representation and direct mandates; and the *Bundesrat* at the state level, thus, reflecting Germany's federal structure.

The judicial branch is headed by the Federal Constitutional Court, which is the guardian of the Basic Law and oversees the constitutionality of all laws[25]. It is an independent constitutional organ and at the same time part of the judiciary in matters of constitutional law and public international law. Its judgements have the legal status of ordinary law. The Federal Constitutional Court decides on the constitutionality of laws and government actions upon petitioning by an individual after exhausting all possible solutions in the regular courts; or upon referral by regular court; or by abstract regulation control where the federal government, a government of one of the federal states or a quarter of the *Bundestag's* members bring a suit against a law.

Political parties form the backbone of Germany's democracy. For this reason, political parties are explicitly mentioned in the constitution and officially recognized as important players in politics and strengthening of democracy. Parties are obliged to adhere to the democratic foundations of the German state and parties found in violation of this requirement may be abolished by the constitutional court.

11.1 Constitutional Amendments

There have been more than fifty amendments to Germany's Basic Law since promulgation. However, most significant amendments were made upon the reunification of East and West Germany in 1990. Upon reunification, both sides[26] agreed to use the quicker process stipulated in Article 23 of the Basic Law which provides that any new territory can adhere to the Basic Law by a simple majority vote; as opposed to the longer process of adopting a new constitution. As part of the process, East Germany which had been unitary since 1952 re-divided into its original five partially self-governing states (*Bundesländer*), with East and West Berlin reuniting into a new city-state[27].

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[25] The court is famous for nullifying several high-profile laws passed in parliament such as the *Luftsicherheitsgesetz,* which would have allowed the *Bundeswehr* (military) to shoot down civilian aircraft in case of a terrorist attack. It was ruled to be in violation of the guarantee of life and human dignity in the Basic Law.

[26] The Federal Republic of Germany and the German Democratic Republic

[27] Others are Bremen and Hamburg

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Subsequently the preamble and Article 23 were amended. Having realised the reunification, Article 23 was withdrawn to indicate that there were no other parts of Germany that existed outside of the unified territory. Other key changes were introduction of affirmative action in relation to women's rights; making of environmental protection a policy objective of the state[28]; institutionalisation of membership in the European Union as well as the privatisation of the railways and the postal services.

In order to secure the basic principles of democracy, the Basic Law has an entrenched clause[29] which prohibits *ab initio* certain amendments in the German constitution expressly as relates to Articles 1 and 20.[30] All other amendments to the Basic Law must be done explicitly and the affected articles must be cited.

11.1 Constitutionalism

In spite of the strong constitutional and institutional framework in Germany, and the commitment to the protection of basic democratic principles, there have been incidences when this commitment, application and interpretation of the constitution have come under severe scrutiny particularly as relates to early elections. The Basic Law has no clear provisions on early elections and neither the chancellor nor the Bundestag has the power to call elections. The president can only do so if the government loses a confidence vote. However, early elections have been called three times in 1972, 1982, and 2005 with the latter two being referred to the constitutional court for review.

In 1972, Chancellor Willy Brandt's coalition had lost its majority in the Bundestag, so that the opposition CDU/CSU tried to push for a vote of no confidence, thus electing Rainer Barzel as new chancellor. Surprisingly, two representatives of CDU/CSU voted

[28] Article 20a

[29] Article 79 paragraph (3)

[30] They state as follows;-
Article 1
(1) The dignity of man is inviolable. To respect and protect it is the duty of all state authority;
(2) The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world; (3) The following basic rights bind the legislature, the executive and the judiciary as directly enforceable law.
Article 20
(1) The Federal Republic of Germany is a democratic and social Federal state; (2) All state authority emanates from the people. It is exercised by the people by means of elections and voting and by separate legislative, executive and judicial organs; (3) Legislation is subject to the constitutional order; the executive and the judiciary are bound by the law.

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for SPD's Willy Brandt, so that the vote failed[31]. However, the coalition had no majority in the Bundestag and thus new elections were called. In 1982, Chancellor Helmut Kohl intentionally lost a confidence vote in order to call an early election to strengthen his position in the Bundestag. The constitutional court examined the case, and decided with reservations that the vote was valid. It was decided that a vote of no confidence could be engineered only if it were based on an actual legislative impasse.

In 2005, Chancellor Gerhard Schröder engineered a defeat in a motion of no confidence after a power shift in the *Bundesrat*. The president then called for elections on 18 September 2005 and the constitutional court agreed[32] to the validity of this procedure although the elections were to be held within a period of less than one month. The elections duly took place.

Unlike in many other countries, the Basic Law only allows referendum concerning the federal level of legislation specifically, the delimitation of the federal territory. Whereas, this is frowned upon by staunch believers in people's sovereignty and participation in constitution-making processes, the Germans designed this denial to avoid the kind of populism that allowed the rise of Hitler. Nevertheless, Article 20 guarantees the people's sovereignty by providing that "All state authority is derived from the people and it should be exercised by the people through elections and other votes [*Abstimmungen*] and through specific legislative, executive and judicial bodies.'

III. Constitution-Making and Constitutionalism in India

The Constitution of India which was enacted by the Constituent Assembly on 26 November 1949, and came into effect on 26 January 1950 replacing the Government of India Act 1935 as the country's fundamental governing document lays down the framework defining fundamental political principles, establishes the structure, procedures, powers, and duties of government institutions, and sets out fundamental rights, directive principles, and the duties of citizens. It is the longest written constitution of any sovereign country in the world, containing 450 articles in 22 parts, 12 schedules and almost 100 amendments.

It declares the Union of India to be a sovereign, socialist, secular, democratic republic, assuring its citizens of justice, equality, and liberty, and endeavours to promote fraternity

[31] Later it turned out that the GDR secret service had bribed the two dissenting representatives.

[32] On August 25, 2005

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among them. The words "socialist", "secular", and "integrity" were added to the definition in 1976 by constitutional amendment[33]. The provisions of the Government of India Act 1935 had a great impact on the current Constitution of India with many key features being drawn directly from this Act. This includes, the federal structure of government, provincial autonomy, a bicameral central legislature consisting of a federal assembly and a Council of States, and the separation of legislative powers between the centre and provinces.

III.I Constitution-Making Process

The Constitution was drafted by the Constituent Assembly, which was elected by the elected members of the provincial assemblies. A Drafting Committee was appointed which prepared a draft and submitted to the Constituent Assembly[34]. The architects of India's constitution, though drawing on many external sources, were most heavily influenced by the British model of parliamentary democracy[35] and adopted a number of principles from the Constitution of the United States of America, including the separation of powers, the establishment of a supreme court[36], and the adoption, albeit in modified form, of a federal structure[37].

After receiving the draft, the Constituent Assembly met in sessions open to the public for 166 days, spread over a period of 2 years, 11 months and 18 days before adopting the Constitution. After lengthy deliberations and some modifications, the 308 members of the Assembly signed two copies[38] of the document one each in Hindi and English on 24 January 1950.

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33 42nd Amendment of 28 August 1976

34 On 4 November 1947 about 21/2 months after it had been constituted.

35 The President of India is elected by the Parliament and State Legislative Assemblies, and not directly by the people and is the head of state and all the business of the Executive and Laws enacted by the Parliament are in his/her name. However, the President must act only according to the advice of the Prime Minister and the Council of Ministers who themselves exercise their mandates only as long as they enjoy a majority support in the lower house of the Parliament that consists of members directly elected by the people. The ministers are answerable to both the houses of the Parliament and are also elected by members of either house of the Parliament. This way, Parliament exercises control over the Executive.

36 The Judiciary is independent and free of control from either the executive or Parliament. It acts as an interpreter of the constitution, and as an intermediary in case of disputes between two States, between a State and the Union. An Act passed by Parliament or a Legislative Assembly is subject to judicial review, and can be declared unconstitutional by this organ if it feels that the act violates the provisions of the Constitution.

37 The Constitution provides for distribution of powers between the Union and the States.

38 To guarantee access and ensure wide coverage among the public.

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III.II Amending the Constitution

Amendments to the Constitution are made by Parliament, the procedure for which is laid out in Article 368. An amendment bill must be passed by both Houses of the Parliament by at least two-thirds majority and voting. After such approval the bill is presented to the president for his assent, upon whose assent the constitution shall stand amended.

However, if the amendment seeks to make a change as relates to certain sections of the constitution such as Article 54 on election of the President; Article 55 on the Manner of election of the President; Article 73 on the extent of executive power of the Union; Article 162 on the Extent of executive power of State; article 241 on High Courts for Union territories or article 368 Power of Parliament to amend the Constitution; Chapter 4 of part 5 on the Union judiciary; chapter 5 of part 6 on the High Courts in the States; or chapter 1 of part 11; any of the lists in the 7th schedule; or representation of the states in the parliament; then the bill must also be ratified by not less than half of the states before it is presented to the president for his assent.

III.III Judicial Review

Judicial review is provided for in the Constitution of India under Article 13 which provides that,[39]

1) All pre-constitutional laws, after the coming into force of constitution, if in conflict with it in all or some of its provisions then the provisions of constitution will prevail and the provisions of that pre-constitutional law which conflicts the provisions of the constitution will not be in force until an amendment of the constitution relating to the same matter. In such situation the provision of that law will again come into force, if it is compatible with the constitution as amended. This is called the *Doctrine of Eclipse*[40].

2) In a similar manner, laws made after adoption of the Constitution by the Constituent Assembly must be compatible with the constitution, otherwise the laws and amendments will be deemed to be void-*ab-initio*.

III.IV Constitutionalism

There has been a lot of controversy on the power of parliament to amend the constitution. Article 13 of the original

[39] Other relevant articles are 32, 124, 131, 219, 228 and 246

[40] Jain, M.P. (2010). *Indian Constitutional Law*. LexisNexis Butterworths Wadhwa Nagpur. pp. 921

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constitution said that the state shall not make any law that takes away or abridges the rights given to the citizens in Part III and any such law made in contravention of this article shall be deemed void to the extent of contravention. Thus, it seemed that parliament cannot amend the constitution in a way that takes away the fundamental rights of the citizens.

This logic was first tested by the Supreme Court in the case of *Shankari Prasad vs Union of India AIR 1951*. Here, an amendment to add articles 31A and 31B to the constitution was challenged on the ground that they take away fundamental right of the citizens. It was argued that "State" includes parliament and "Law" includes Constitutional Amendments. However, the Supreme Court rejected the arguments and held that power to amend the constitution including fundamental rights is given to parliament by article 368 and that "Law" is article 13 refers only to ordinary law made under the legislative powers.

In the case of *Sajjan Singh vs State of Raj. AIR 1965*, the Supreme Court followed the judgment given in the case of *Shankari Prasad* and held that the words "amendment of the constitution" means amendment of all provisions of the constitution. However, in the case of *Golak Nath vs State of Punjab, AIR 1971,* the Supreme Court reversed its previous judgment and held that parliament has no power from the date of this judgment to amend part III of the constitution so as to take away any fundamental right.

It held that "amendment" is a law as meant under article 13 and so is limited by article 13(2). To overcome this judgment, parliament added another clause[41] to article 13 to say that this article does not apply to the amendment of the constitution done under article 368. A similar clause was added to article 368 to clarify that amendment done under article 368 shall not come under the purview of article 13.

This amendment itself was challenged in the case of *Keshavanand Bharati vs State of Kerala AIR 1973*. The Supreme Court reversed its judgment again and held that "Law" in article 13 only means ordinary law made under legislative power and affirmed the validity of the 24th amendment which in its opinion was only clarifying that position. However, it further held that "amendment" means that the original spirit of the constitution must remain intact after the amendment. Thus, the basic structure and features of the constitution[42] cannot be changed.

[41] By the 24th amendment in 1971

[42] According to C J Sikri, the basic structure of the constitution includes - Supremacy of the Judiciary, democratic republic, secularism, separation of powers among judiciary, legislative, and the executive, and the federal character of the constitution.

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Thus the Supreme Court was ruling that not every constitutional amendment is permissible; the amendment must respect the "basic structure" of the constitution, which is immutable. The effect of this judgment was seen later in the case of *Indra Sawhney vs Union of India 1993,* where the Supreme Court prevented the politicians from running amok in the matter of reservation by holding that, inclusion of creamy layer violates the fundamental right of equality which is a basic feature of the constitution and so its inclusion cannot be permitted even by constitutional amendment.

IV. Constitution-Making and Constitutionalism in Africa

History points to the fact that most of the immediate post-colonial constitutions were either directly imposed constitutions by the colonial masters or were elite-driven processes which unfortunately treated the African people and their ideas with disrespect, if not contempt. These constitutions and the processes towards their realization seldom paid attention to the African people's dreams, pains and aspirations.

Generally, most of these constitutions were drafted by few political elite who were not necessarily keen on the content of the whole document but were obsessed with the attainment of the political freedom. The drafts themselves were weak on governance, social and economic rights as well as the rule of law aspects. Where these were provided, they became the first targets for amendment by the post-colonial regimes.

Naturally, the constitution-making process resulted into constitutions without constitutionalism and therefore was bound to fail due to a number factors including but not limited to one, the narrow-approach that the political elite who participated in the process took[43]; two, lack of public participation[44]; three, lack of comprehensive dialogue and consensus on the contentious issues such as ethnicity, language, gender, accountability, social justice, *difference*, and identity which effectively legitimized amendments of the original constitutions *ab initio;* four misconception that the post colonial constitutions were one-fit-all constitutions for the whole of Africa in total disregard of the diverse values and principles of the people and communities' on matters of democracy, leadership, dispute resolution mechanisms, among others.

[43] Seemed to have been obsessed and in a hurry to realize political independence from colonial masters over and above all other interests.

[44] The drafts were never subjected to popular debates or referenda or where there was such an attempt, the debates were often brief, carefully monitored and manipulated.

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The first two decades of political independence in Africa witnessed the containment of the robust enthusiasm for freedom that had informed the popular challenges to colonial domination. Unfortunately, the new power elite simply Africanized the exploitative, repressive, and arrogant appropriation and deployment of power that had been the tradition of the colonial states. This was often characterized by the containment of the media, the marginalization of certain groups and communities, the harassment of political opponents, and the subversion of the constitution. As a result of this, the continent was littered with coups and counter-coups, ethnic violence, agitations for autonomy, alienation from the state and its custodians, and the withdrawal of support for public policies.

As political decay, uncertainly, violence, and disillusionment replaced the euphoria of political independence, even fractions of the power elite began to construct parallel structures of power and opportunities. The constitutional review processes that have swept the continent mainly from 1990s to date have largely been as a result of courageous and costly pressures from civil society working across ethnic, regional, religious, and other primordial lines, African leaders and political elite have on the other hand adopted all sorts of tricks and underhand strategies to retain power or mediate the impact of popular demands.

Even where the process has been relatively successful, there have been several imperfections, contradictions, and several avoidance mechanisms that have failed to address some of the critical questions of political arrangements such as federalism or unitarism as in South Africa; fiscal federalism or fiscal unitarism as in Nigeria; multiparty or movement system as in Uganda; and dual citizenship or mono citizenship as in Ghana among others.

Beyond the Constitution-Making processes themselves there are several challenges facing constitutionalism in Africa including;-

- Unavailability of and inaccessibility to the constitution by all citizens either due to lack of production of enough copies, or lack of translated copies in native languages or cost of acquiring them. Ideally, all citizens should have a right to a copy of the constitution.

- Lack of direct and deliberate efforts and programs on the part of the state and its agents to make the constitution a *living* document, the basis of determining relations within and between constituencies,

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and encouraging the citizenry to deploy the constitution in the protection and defense of individual and collective rights.

- Lack of commitment on the part of the state and its agents to use the constitution as the basis of governance, protection of the weak and vulnerable as well as a framework for rectifying past violations and injustices.

- Undemocratic mechanisms and irregular monitoring, review or amendment processes that often undermines democratic participation and consolidation.

a. Constitution-Making and Constitutionalism in South Africa

The Constitution of South Africa provides the legal foundation for the existence of the Republic of South Africa; it sets out the rights and duties of the citizens of South Africa, and defines the structure of the Government of South Africa. The constitution consists of a preamble, fourteen chapters and eight schedules.

The Constitution was adopted by the Constitutional Assembly on 11 October 1996 and certified by the Constitutional Court on 4 December[45], signed by President Nelson Mandela on 10 December before it came into effect on 4 February 1997 thus replacing the Interim Constitution of 1993. The reading of the Preamble[46] clearly illustrates the collective purpose of the people of South Africa that is informed by its past and their commitment to start afresh and build a society that is based on democratic values, social justice and fundamental human rights.

i) The Constitution-Making Process

The South African Constitution making process is widely regarded as the most democratic, inclusive[47] and consultative process in modern democracy. Based

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45 In its judgement in the *Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* (4 December 1996)

46 *"We, the people of South Africa Recognise the injustices of our past Honour those who suffered for justice and freedom in our land, Respect those who have worked to build and develop our country; and Believe that South Africa belongs to all who live in it, united in our diversity. We therefore through our elected representatives, adopt this Constitution as the supreme law of the Republic so as to – Heal the wounds of the past and establish a society based on democratic values, social justice and fundamental human rights; Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by the law; Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations…"*

47 Brought together the oppressors and oppressed as well as various sectors and segments of the society that makes up the South African nation.

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on the history[48] and culture[49] of the South African people and communities, the adoption of the Constitution consciously involved the citizenry of the country[50]. The proceedings of the 1996 Constitution making were open and transparent with a very high level of public education on the issues and public input via email, meetings, surveys, and contributions on the internet. Wide consultation and participation resulted into a text that resonated greatly with the general public.

At the beginning of the process, one of the major disputed issues was the process by which the South African constitution would be adopted. The African National Congress (ANC) insisted that it should be drawn up by a democratically-elected constituent assembly, while the governing National Party (NP) feared that the rights of minorities would not be protected in such a process, and proposed instead that the constitution should be negotiated by consensus between the parties and then put to a referendum

Formal negotiations began in December 1991 at the Convention for a Democratic South Africa (CODESA). The parties involved agreed on a process whereby a negotiated transitional constitution would provide for an elected constitutional assembly to draw up a permanent constitution. However, the CODESA negotiations broke down after the second plenary session in May 1992. One of the major points of dispute was the size of the supermajority that would be required for the assembly to adopt the constitution; the NP wanted a 75% requirement, which would have effectively given it a veto.

In April 1993 the parties returned to negotiations, in what was known as the Multi-Party Negotiating Process (MPNP). A committee of the MPNP proposed the development of a collection of "constitutional principles" with which the final constitution would have to comply, so that basic freedoms would be ensured and minority rights would be protected,

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48 The historical precedent of the elaboration of the so called "Freedom Charter" (1955) proved very informative. Several of the older leaders recalled the experience of how the Freedom Charter was drafted through the involvement of 10,000 volunteers in 1954 who went out all around the country to find out among people working in factories, hospitals, schools, and communities, what they believed had to be the basic principles and values for a free South Africa.

49 The culture of inter group bargaining persists and is deeply embedded in many sectors of South African society, including its new political institutions. The conscious involvement of the people has been crucial, as well as placing national interests above the individual interests

50 Cyril Ramaphosa of the African National Congress (ANC), who was chair of the Constitutional Assembly, is on record stating that the final product was drafted by 40 million people (South Africans).

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without overly limiting the role of the elected constitutional assembly. The parties to the MPNP adopted this idea and proceeded to draft the Interim Constitution of 1993, which was formally enacted by Parliament and came into force on 27 April 1994.

The Interim Constitution provided for a Parliament made up of two Houses; a 400-member National Assembly directly elected by party-list proportional representation, and a 90-member Senate in which each of the nine provinces was represented by ten senators elected by the provincial legislature.

The Constitutional Assembly consisted of both houses sitting together, and was responsible for drawing up a final constitution within two years. The adoption of a new constitutional text required a two-thirds supermajority in the Constitutional Assembly, and also the support of two-thirds of senators on matters relating to provincial government. If a two-thirds majority could not be obtained, a constitutional text could be adopted by a simple majority and then put to a national referendum in which 60% support would be required for it to pass.

The Interim Constitution contained 34 constitutional principles with which the new constitution was required to comply. These included multi-party democracy with regular elections and universal adult suffrage, supremacy of the constitution over all other law, non-racism and non-sexism, the protection of "all universally accepted fundamental rights, freedoms and civil liberties", equality before the law, the separation of powers with an impartial judiciary, provincial and local levels of government with democratic representation, and protection of the diversity of languages and cultures. A Constitutional Court which would play a crucial role to mid-wife the new constitution was also created.

All key stakeholders participated in the drafting of a new Constitution for purposes of conflict resolution as well as to ensure the longevity of the new Constitution. The 1993 Interim Constitution was a power-sharing agreement with the main purpose of preventing a counter-revolutionary threat to the new democracy from the bureaucracy and security forces. Concessions were made which was referred to as the "Sunset Clause" to ensure the commitment of these parties and bringing them into the power-sharing agreement (the Government of National Unity). The power-sharing arrangement had a five year timeline which was only replaced by a modified majority-rule democracy.

Like any other constitution-making process, there were several contentious issues where consensus was sought in most instances in a successful manner but in general, the compelling political need to reach agreement on the

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constitution meant that the framers avoided some hard questions on which consensus could not be achieved such as land issues. This led to a realisation of a constitution with open-ended clauses that need to be filled in. Some of that work was also passed on to the Constitutional Court[51].

The process was completed with distribution of millions of copies of the final document in 11 languages thereby underscoring the importance of involvement of the citizenry in the entire process which is a rarity in many African states where such documents would be inaccessible or not available to the majority; and where it happens, this is often fond in the colonial languages of English, French and Portuguese and not in the local languages.

ii) The Constitutional Court

The creation of a Constitutional Court vested with the power of judicial review represented a symbolic and pragmatic break with the past. The old South African judiciary which operated within a Westminster-style parliamentary system was deeply committed to the *status quo*, and could not be trusted to give full meaning to the provisions of the new constitution. Therefore, judicial leadership with broad authority was required if constitutional adjudication was to become an effective partner in the social transformation envisioned by the constitution.

The South African Constitutional Court played an important role in the adoption of the 1996 Constitution. Under the Interim Constitution, Parliament sitting as the Constitutional Assembly was required to produce a new constitution which was supposed to be certified by the Constitutional Court whose main mandate was to ensure compliance with the 34 constitutional principles agreed upon in advance by the negotiators of the Interim Constitution. The court ruled that the constitutional text adopted by the Constitutional Assembly in May 1996 could not be certified because some of the features did not in its view comply with the Constitutional Principles.

The Constitutional Assembly was forced to reconvene and reconsider the text, taking into account the court's reasons for non-certification. Post the constitution-making process, the Court has endeavoured to promote constitutionalism in South Africa. Since its establishment, the Constitutional Court has endeavoured to accommodate the divergent voices of South African society, and exhibited commitment to a vision of judicial activism that can fulfil the democratic and human-rights aspirations

[51] For example; the Court was left to decide whether abortion is a protected right; whether lockouts are permissible or require parliamentary decision among others.

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embodied in the constitution. The Court never hesitated to take on hard cases and make at times unpopular decisions such as the death penalty, which the Court abolished, banning of the single-language state-supported schools and approving amnesty for past human-rights violators to mention but a few.

iii) Amending the South African Constitution

Since its adoption, the Constitution has been amended sixteen times. Section 74 of the Constitution lays the framework[52] by providing that a bill to amend the Constitution can only be passed if at least two-thirds of the members of the National Assembly votes in its favour. If the amendment affects provincial powers or boundaries, or if it amends the Bill of Rights, at least six of the nine provinces in the National Council of Provinces must also vote for it.

To amend Section 1 of the Constitution, which establishes the existence of South Africa as a sovereign, democratic state, and lays out the country's founding values, would require the support of three-quarters of the members of the National Assembly and six of the provinces in the National Council of Provinces (NCOP)[53]. Once an Act is passed by the National Assembly, and by the NCOP if necessary, it must be signed and assented to by the President. As with any other Act of Parliament, an amendment comes into effect when it is published in the *Government Gazette*, but the text of the amendment may specify some other date of commencement, or allow the President to specify the date by notice in the *Gazette.*

There have been interesting amendments to the constitution since its promulgation. Of particular interest regarding the political landscape, the Fourteenth and Fifteenth Amendments

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[52] At least 30 days before a constitutional amendment bill is introduced in the National Assembly, the person or committee introducing the amendment must publish it for public comment, submit it to the provincial legislatures, and, if it does not have to be passed by the National Council of Provinces (NCOP), submit it to the NCOP for debate. When the bill is introduced, the comments received must be tabled in the National Assembly, and in the NCOP when appropriate. Ordinarily, most amendments must be passed by an absolute two-thirds supermajority in the National Assembly, and do not have to be considered by the NCOP. Amendments of the Bill of Rights, and amendments affecting the role of the NCOP, the "boundaries, powers, functions or institutions" of the provinces or provisions "dealing specifically with provincial matters" must also be passed by the NCOP with a supermajority of at least six of the nine provinces. If an amendment affects a specific province, it must also be approved by the legislature of the province concerned.

[53] Entrenched clause

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which were promulgated on 9 January 2009 and came into force on 17 April of 2009, shortly before the general election, repealed the floor-crossing provisions added by the Eighth, Ninth and Tenth Amendments, making it impossible for a legislator to cross the floor without losing his or her seat. They were passed as separate acts because of the special requirements for amendments affecting provincial powers.

b. Constitution-Making and Constitutionalism in Uganda

Uganda has undergone a turbulent constitutional history. The constitution-making process has not always followed the rules of the book as concerns democratic representation[54]. The 1995 Constitution which will form the basis of this particular study is by far the most democratically made constitution having undergone a process that begun in August 1988 and ended in October 1995.

Like many countries that gained independence in 1960s, Uganda's post-colonial constitution of 1962 was drafted in London under the auspices of the British[55]. Among the key features of this constitution was distribution of powers between the centre and the regions though in a disproportionate manner. More powers were given to Buganda Kingdom under a quasi-federal arrangement while the other kingdoms of Toro, Ankole, Bunyoro and the Territory of Busoga were not granted this status[56]. Further, Members of Parliament were to be elected directly under the universal suffrage except for parliamentarians from Buganda who were indirectly elected through the Lukiiko (Council) of Buganda.

In 1966, the 1962 constitution was abrogated by the then Prime Minister Milton Obote who declared himself President under an Interim constitution prior to the enactment of a new constitution a year later. This constitution made the president extremely powerful and adopted a centralized system of government which perpetuated marginalisation and exclusion for the majority of Ugandans as relates to participation in political and governance matters.

i) 1995 Constitution-Making Process

In 1986 upon taking power, the National Resistance Movement (NRM) issued Legal Notice No 1 of 1986 which

54 Hon J. F. Wapakhabulo, 15.09.2001

55 It was elite driven process who fought for state power on the basis of ethnicity and religionalism camouflaged in 'political parties structures'.

56 This to a large extent contributed to the post-independence conflicts that resulted into coups and counter-coups that visited Uganda.

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formed the constitutional basis for the new government. NRM endeavoured to form a broad-based government that would ensure the entire political spectrum was represented. It also wished to restore election of political leaders by the people themselves at all levels. Importantly, it sought to establish a constitution-making process based on principles of consultation with and participation by the population[57].

Under the Legal Notice No 1 of 1986 there was a constitutional framework that would provide constitution-making process that would be all-inclusive, participatory and widely debated. Subsequently, a Constitutional Commission was established consisting of 22 members. This Commission was charged with the duty of gathering information from the people as to the form of governance they would like to have, analysing the views so gathered and prepare a draft constitution as a basis for the final preparation of a new constitution for Uganda.

After touring the country, the Commission advised the government that a majority of the people of Uganda preferred that a Constituent Assembly be elected directly by them to spearhead the constitution-making process. This recommendation was accepted by government and Legal Notice No 1 of 1986 was accordingly amended to provide for it. A statute providing for the establishment of, and elections to, the Constituent Assembly as well as the powers and functions or that Assembly was also enacted. The Constitutional Commission submitted its final report to the President on 31 December 1992 together with a draft Constitution.

The Constituent Assembly consisting of 284 delegates representing 214 electoral areas designated through a population quota and chosen by universal suffrage through secret ballot, and various sectors such as youth, women, trade unions, people with disabilities among others was established. Nevertheless, political parties were prohibited from fielding or sponsoring candidates in a bid to insulate the process from political manipulation[58]. The Constituent Assembly Statute provided that the Assembly completes its work within a period of 4 months which turned out to be too short and therefore extensions were sought that led to the promulgation of the Constitution taking place after 17 months.

In general, the constitution-process itself was keen on ensuring that matters were resolved by consensus. For instance, the rules provided that where a matter became contentious the Assembly was required to go on

[57] A measure that was both populist and revolutionary.

[58] Notwithstanding these restrictions, in reality there were many candidates identified with either the Movement or with other political parties.

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recess of not less than one week to consult their respective constituents before a second vote was taken. If upon the second vote the matter would not be resolved, then a referendum would be held.

This was also tailored to protect the views of a substantial minority by giving- them another chance apart from bringing in the population through consultation or referendum. The rules also provided that before promulgation the President could if he disagreed strongly with any provision agreed upon in the Constituent Assembly call a referendum so that the matter is decided by the voters[59]. Some of the major contentious issues in the draft included:

i) National Language

The draft proposed that English should be the official language with Swahili as a national language of Uganda. Delegates drawn mainly from Buganda rejected the adoption of Swahili as a national language. A second vote could not unlock the stalemate among the delegates hence a compromise was struck which approved English as the official language but tasked parliament through an Act of parliament to decide on whether Swahili could be adopted as a national language to be used in schools, parliament or in other public offices[60].

ii) Land

Like in many other African countries, land remains an emotive issue in Uganda and hence stood out as one of the most contentious issues. The general mood in the Assembly was for land reform in favour of the squatters but due to effective lobbying by the landlords who either owned or had access to public media played a significant role in making the delegates take a cautious approach. Some of the delegates themselves were large scale land owners and could not jeopardise their own status. Just like was the case with the Swahili language, the delegates agreed to leave the matter in the hands of parliament but in the meantime, the *status quo* to remain.

iii) Federalism

After lengthy deliberations and hot debates, the Assembly provided for a decentralised system of government with power distributed between the centre and the districts with the districts as the primary units of local government. As a compromise to

59 The Assembly was sent to consult only once on the question of the national language and no referendum was occasioned either by the Assembly or the President.

60 This has since been adopted in what is widely perceived as mere compliance with the requirements of the East African Community (EAC) and not necessarily the wishes of the people of Uganda.

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federalists it was provided that two or more districts could come together under a charter on account of cultural identity or to share services.

iv) Political system

At independence in 1962, Uganda was governed under a multiparty system but this was systematically eroded over the years. When the Constitution Commission sought public's opinion on whether to re-introduce multiparty politics or extend the movement type of politics introduced by the NRM, the majority view was that political parties were divisive and were in favour of continued freeze on their activities. In the foregoing, the draft constitution recommended that the movement type of politics should be extended for another 5 years and that a referendum be held at the end of each 5 years to decide which of the two systems to be adopted.

In the Constituent Assembly, there were varying views with some delegates supporting the movement system but only for 5 years then multipartyism to be introduced while others were totally opposed to the inclusion of movement system in the constitution. This matter was hotly debated at all levels. In the plenary a vote was taken. Those in favour of the reintroduction of political party activity were 68 and those against it were 199. Those in support of multi party politics walked out and refused to take part in the proceedings. However, there were enough delegates in the house to continue proceedings. At the end of it all some kind of compromise was agreed upon between the "moderates" and the "fundamentalists" within the movement camp.

The compromise was that the movement type of governance was to be extended for another 5 years but that at the end of 3 years following the holding of elections under the new constitution, public debate for and against movement politics would be held[61]. At the end of the 4th year a referendum[62] would be held to give the people of Uganda a chance to choose between the two systems. The two systems were entrenched in the constitution as two forms of governance available to them and a procedure was established in the constitution to enable them to choose what suits them best from time to time[63].

[61] Albeit against strong disapproval from most western democracies namely, the USA and members of the European Union.

[62] This was held in what was perceived to be a controlled process whose outcome was to endorse the movement type of system. This perhaps explains the ongoing political frictions in Uganda between Yoweri Museveni's government and members of the dissenting political class.

[63] Thus the constitution guarantees the right to form political parties and out laws creation of a one party state.

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Significant differences between the 1995 constitution and the 1967 one are;

- Governance structure, where powers are shared between the President, Parliament and some other constitutional institutions. For example the President appoints his Vice President and Ministers with approval of the Parliament. The same applies to the appointment of Judges, senior government officials such as the Inspector General of Police, the Commissioner General of Prisons and heads of Commissions such as the Human Rights, the Judicial Service and Public Service Commissions.

- The President can be impeached by Parliament on various specified grounds and he cannot dissolve Parliament.

- Parliament can over-ride the presidential veto by two-thirds absolute majority where there is a stalemate in any area of legislation[64].

- Independent commissions such as the Public Service Commission and the Judicial Service Commission are responsible for the appointment of their officers a departure from the past where all these powers were vested in the President and the Commissions were purely advisory.

- Inclusion of economic, social and cultural rights such as right to shelter, education and clean environment and cognisance of disadvantaged and marginalised group rights of children, women, the disabled among others.

ii) Amendment of the Constitution

Chapter 18 of the Ugandan constitution provides for the amendment of the constitution which can either be done through parliament[65] or the referendum[66]. Articles I (Sovereignty of the people), 2 (supremacy of the constitution), 44 (human rights and freedoms), 69 & 74 (political systems), 75 (prohibition of one-party state), 79(2) (parliament's express legislative powers), 105(1) (presidential term),128(1) (independence of the judiciary), 259 (constitutional amendment through referendum) and Chapter Sixteen (institution of traditional or cultural leaders) can only be amended through a referendum

64 The Constitution is silent on what should happen in the event that Parliament fails to marshal 2/3 majority

65 Article 258. This must be supported by at least two-thirds of all members of Parliament.

66 Article 259. Must be supported by at least two-thirds of all members of Parliament; and be referred to the people for approval.

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Amendments that require District Councils approval must not only be supported by at least two-thirds of all members of Parliament; but must also be ratified by at least two-thirds of the members of the district council in each of at least two-thirds of all the districts of Uganda[67].

For the amendments to be assented to by president, they must either be accompanied by a certificate of compliance from either the Speaker or the Electoral Commission as the case may be. If all the requirements are fulfilled, the President must assent to the bill but in the event that he fails, the Speaker shall cause a copy of the bill to be laid before Parliament and the bill shall become law even without the assent of the President.

iii) Constitutionalism

Whereas the 1995 constitution-making exercise in Uganda was meant to heal past wounds, to re-establish democracy, the rule of law and to place limits on arbitrariness of state power, sixteen years later, there are still several areas that point to the fact that this is still work in progress that must be safeguarded if the past is to be avoided.

Whether the spirit and letter of the constitution is upheld remains debatable. For instance, there has been a lot of criticism on the government's handling of opposition political leaders particularly after the recent 2011 elections which negates the full enjoyment of every Ugandan citizen's the right of association and assembly. Extension of president Museveni's presidential term also casts doubts on the commitment of the political leadership to respect and uphold the constitution[68].

c. Ghana's Experience

Ghana is one of the countries in Africa that has experienced a fair share of constitutional challenges and political instability since her independence in 1957. It represents a typical case of military civilianization resulting from a combination of pressures from civil society and the international community. From these experiences, she embarked on a road of establishing a new constitutional order that would not only address the past but also propel her future development.

The constitution-making process was based on consultation and a

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67 Article 260

68 Two weeks after President Museveni was voted in for the fourth term which was only possible through constitutional amendment to extend his term, the cabinet and a number of ruling party MPs were already planning to have the presidential term extended from five to seven years.

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broad based and popularly elected constituent assembly. The 1992 Ghanaian constitution is to date one of the most radical in terms of clear provisions on the side of civil society against the illegal seizure of power by the military. It has gone beyond vague and general statements that have never frightened or discouraged the military in a number of African countries including Nigeria.

Ghana's 1992 Constitution came into effect on January 7, 1993. It provides the basic charter for the country's fourth attempt at republican democratic government since independence. It declares Ghana to be a unitary republic with sovereignty residing in the Ghanaian people. Drawn up with the intent of preventing future coups, dictatorial government, and one party state, it is designed to foster tolerance and the concept of power-sharing[69] by reflecting on the lessons from the abrogated constitutions of 1957, 1960, 1969, and 1979. Further, it incorporates provisions and institutions drawn from British and United States constitutional models.

The constitution establishes a National Parliament consisting of a unicameral chamber of elected members and the president. The president has a qualified veto over all bills except those to which a vote of urgency is attached. The Supreme Court is the highest court in Ghana and enjoys broad powers of judicial review. It rules on the constitutionality of any legislative or executive action at the request of any aggrieved citizen.

Like the previous constitutions, the 1992 constitution guarantees the institution of chieftaincy together with its traditional councils as established by customary law and usage. The National House of Chiefs, without executive or legislative power, advises on all matters affecting the country's chieftaincy and customary law.

Some of the other main features of the 1992 constitution are,

- Explicit and comprehensive provisions regarding the system of local government as a decentralized form of national administration.
- Expanded bill of rights that recognise the second generation rights that are justiciable.

Ghana's past constitutional challenges is a classic example of failed colonial and elite-inspired independent

[69] Power is shared among a president, a parliament, a cabinet, a Council of State, and an independent judiciary

[70] Kwame Nkuruma's Ghana's first president was an ardent believer that freedom from colonial masters was an assurance to better tidings in Africa as was espoused in his famous quote ;Seek ye first political kingdom, and the rest shall follow'.

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constitutions in Africa whose main focus was settling and achieving political freedom[70] regardless of the people's desires, aspirations and dreams.

V. Constitutionalism

It is not enough to have a good constitutional text if it is not implemented, respected and upheld by all. Enactment of a constitution by itself or written constraints in the constitution are not constraining by themselves. Tyrants everywhere in the world will not become benevolent rulers simply because the constitution tells them to[71]. In order to safeguard against violations and to ensure that the letter and spirit of the constitution are upheld at all times, there need for a set of institutional arrangements.

Giovanni Sartori[72] defines (liberal) constitutionalism as constituting the following elements:

(1) there is a higher law, either written or unwritten, called constitution;
(2) there is judicial review;
(3) there is an independent judiciary comprised of independent judges dedicated to legal reasoning;
(4) possibly, there is due process of law; and, most basically,
(5) there is a binding procedure establishing the method of law-making which remains an effective brake on the bare-will conception of law.

Further, Louis Henkin[73] defines constitutionalism as constituting the following elements:

(1) government according to the constitution;
(2) separation of power;
(3) sovereignty of the people and democratic government;
(4) constitutional review;
(5) independent judiciary;
(6) limited government subject to a bill of individual rights;
(7) controlling the police;
(8) civilian control of the military; and
(9) no state power, or very limited and strictly circumscribed state power, to suspend the operation of some parts of, or the entire, constitution.

From these definitions, it is clear that the concept of constitutionalism revolves around two issues, rights protection and limitation of state powers[74]. How well these issues are balanced, respected and upheld determines whether a document called

[71] For example in spite of the existence of constitutions in South Africa the system of apartheid "bred intolerance, a culture of violence and lack of respect for life and, indeed, rights in general

[72] Sartori, 1987, p. 309

[73] Henkin, 2000

[74] Through separation of powers and effective system of check and abalances

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a constitution makes sense to the people or not.

Constitutions for all practical purposes must reflect the specificity of particular societies, even if lessons or experiences can be drawn from elsewhere. The constitution should and must reflect a country's historical experiences, history, cultures[75], traditions, and hopes for the future. It must be sufficiently dynamic to reflect the past, the present and to anticipate the future[76].

Thus, constitutionalism must be understood as an expression of culture[77]. For instance in the American case this will include, federalism, separation of powers, judicial review These ideas and principles are complemented by the practical experience of making American democracy work.

VI. Conclusion

Experiences from the various jurisdictions illustrates that an inclusive Constitution making process is beneficial to the legitimacy and longevity of the Constitution. When one group dominates the process, it fails to reach a genuine consensus among all key actors and breeds ground for perpetual conflicts. Nevertheless, this inclusiveness should never compromise substantive agreement on key Constitutional principles.

In the initial stage of constitution-making, the main players are often the special constituent assemblies or regular legislatures with the special assemblies being the most preferred because they are likely to concentrate on the constitution itself without being sucked into the day-to-day political issues. However, regardless of who steers the process, the peoples' views, aspirations, hopes and desires must always be taken into consideration. Only then, can they effectively participate in the crucial stage of application and implementation of the constitution.

It is paramount that all state organs must be guardians of the constitution, and must all be legitimated by it. An effective executive is as important as an independent and courageous judiciary as well as a conscientious and productive legislature; all who must work for the common good of the people.

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[75] The three constitutions of South Africa adopted in 1910, 1961, and 1983 "took little account of the multiethnic, multilingual and multicultural nature of South African society and only catered almost exclusively for the white, Christian, Afrikaans, patriarchal minority allowing the white minority to oppress, exploit, marginalize, brutalize, and dispossess the black majority and other racial groups.

[76] Quote Prof. H.W.O. Okoth-Ogendo

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As most African states including Kenya endeavour to chart their own way forward through various constitutional reforms, they must do so by taking into account the people's dreams, aspirations and desires based on their respective historical experiences, history, cultures and traditions so as to avoid the mistake of crafting statements in a booklet known as a constitution which the majority of the people who are supposed to implement, enforce and respect can neither understand nor identify with[78].

In the foregoing, negative forces, ethnic entrepreneurs, contradictions arising from constructed histories and social relations, corruption, opportunism, limited vision, lack of originality, invisibility of women, urban focus and elitist and excessive focus on raw power and general failure of the new democrats and reformers to deliver must be avoided if constitutional democracy is to take root in Africa. Issues of social justice, human rights, popular participation, transparency, accountability, and equality[79] can no longer be wished away. To make constitutional democracy work, the people must have a level of mutual trust, and ability to cooperate, rather than fragmenting into camps of hate and hostility.

Whichever constitutional model they choose must recognize the importance of institutions in the lives of humans, the significance of history and culture in shaping those institutions so as to render them effective. Further, there is need for a political culture that encourages the values of constitutionalism, democracy, and the rule of law. States should be based on the civic, rather than ethnic or partisan principle.

Whereas the frequency of constitutional changes are often driven by economic, political, and cultural circumstances, as well as the magnitude of unresolved problems at any given point in time, it cannot be take for granted that such changes will always be beneficial to all simply by focusing on the number of veto players and degree of required consensus alone.

This article has shown that the political elite in particular will from time endeavour to modify the constitution to serve their vote based politics and therefore the need for strong and effective checks and balances systems coupled with strong constitutional institutions and vigilance on the part of every citizen cannot be overemphasised.

77 This may work or may not work in another culture hence the need to choose wisely.

78 In most of Africa, the emphasis has been on constitutions with little or no attention to constitutionalism.

79 All citizens should have equal standing in the society

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Chapter 8

Moving Forward

The clamour for constitutional reforms leading to the 2010 Constitution is traceable to the early 1990s when political activists and religious leaders led calls for multi-partyism. A combination of domestic and international pressure forced the Government to cede room for political competition.

This victory was short-lived. Sooner than later, the political players realised that the incumbent held sway with the electoral commission, the Police, the Judiciary, among other crucial State organs. This made the playing field for political competition skewed in favour of the incumbent. Later calls for 'minimum reforms' followed. However, these were limited to the electioneering process and included giving political parties power to nominate representatives to the electoral commission.

Glaring economic inequalities amongst different ethnic and geographical groups fomented perception of ethnic balkanisation. A strong Executive had for a long time whimsically determined access to resources. Only regions that supported the incumbent benefited from State-sponsored development projects.

It was not unusual to find allocation of resources for infrastructural development skewed in favour of areas that had leaders who controlled resources and based on political patronage. A case in point is where electricity poles would be transported to an area to lure the voters to support the political incumbent only for them to be carried away if the State-sponsored candidate lost.

This form of political patronage led to the marginalisation of some areas, characterised by poor road network, lack of portable water and other basic social amenities. Due to the paternalistic nature of the political competition, groups such as youth and women were not adequately represented in the political class, as they did not have the financial means to get into a fair political contest nor was their participation guaranteed by the Constitution.

Corrupt

The rule of law was equally wanting. The Police Force was used as an agent of State terror with endemic corruption and was consistently rated by credible organisations such as Transparency International as among the most corrupt institution. The Judiciary, as recently exposed by the ongoing vetting

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of appellate judges, would occasionally support State practices inimical to the rule of law such as torture and unfair detention.

Election petition decisions highly favoured the supporters of the ruling party. Despite widespread corruption, there was hardly any credible prosecution of senior Government officials. The public confidence in the public justice system had considerably waned.

The gradual deterioration of public justice system institutions was the single most important factor that led to the 2007 post-election violence. Given their history in adjudicating electoral disputes, the runner-up presidential contender could not trust the courts to be fair arbiters on the contested poll results. The Police, either due to bias, incompetence or low morale, were unable to quell the riots that took place in different parts of the country.

Ethnic tension had been whipped up due to the perceived favouritism of some ethnic groups that were seen as having access to political power and State resources. It was, therefore, no surprise that securing comprehensive constitutional reforms was top on the list of the commitments in the post-election pact brokered by the international community to bring a cessation to the violence.

The 2010 Constitution represents a break from the past and attempts the myriad shortfalls of the previous constitutional order and the attendant governance architecture. It introduces multilayered checks and balances of Executive power; an independent Judiciary; independent Police service; and an independent office of the Director of Public Prosecutions.

To cure the historical inequalities that highly disenfranchised some areas, it establishes a devolved governance structure and gives guidelines of the allocation of national resources to the devolution units, including affirmative consideration for previously marginalised areas.

In the past, the president had a lot of control over the Judiciary and Parliament. He had the power to dissolve Parliament without recourse to any other institution. He was also in charge of appointing judges on the advice of the Judicial Service Commission, which was obeyed more in breach, as the president would de facto have a free hand at making such appointments.

However, the new Constitution gives the Judiciary near complete autonomy from the Executive, making it more independent. The appointment of judges is vested in the independent Judicial Service Commission. The Police service will now be headed by an Inspector General, who is similarly independent and enjoys security of tenure, unlike

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in the past where he would serve at pleasure of the president.

The directorate of criminal prosecutions has for a long time been a department within the office of the Attorney General and was grossly under-resourced besides its head serving at the pleasure of the Executive. The Director of Public Prosecutions (DPP) now enjoys security of tenure and constitutionally is shielded from control and direction/interference by any other person or State organ. The electoral body is no longer beholden to the Executive as it similarly enjoys independence. The commissioners are competitively and openly appointed.

Unlike in the past, the Bill of Rights now encompasses social, cultural and economic rights such as basic education, affordable health, food and housing. One of the changes that will contribute to the realisation of these rights evenly in all areas is a new resource allocation formula that should largely be devoid of political manipulation and factors among other issues, the population, size and level of development in a given county.

The current Judiciary has exhibited a good measure of independence. The recruitment of the Chief Justice and other Supreme Court judges, the new openness in recruiting High Court judges and other judicial staff has been fairly open. The independence exhibited by judges in a recent number of judicial decisions, including the recent declaration of the appointment of county commissioners as unconstitutional on the basis of failure to consult and the proportion of women elected to those positions, demonstrate a break from the past directly attributable to the new constitutional dispensation and the manner of appointment of those office bearers.

In a radical shift from the past, the appointments have mostly been public right from the advertisement of the vacancies, the interviews and the final appointments. This has created a measure of public confidence in those institutions and is expected to give institutional allegiance to the public as opposed to the Executive, besides promoting meritocracy.

There is an increasing trend of consciousness of referring to the Constitution by the political class, public servants and the general populace as well. This growing appreciation of the Constitution is perhaps borne out of the open process of promulgating it and bonds well for the future of constitutionalism in Kenya and will promote respect for the rule of law.

For instance, a few years ago, the Police would detain a suspect for days or even weeks before preferring charges. Though this development came before the promulgation of the Constitution, today there is widespread respect by the Police, awareness by the public and enforcement by the courts of the

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constitutional safeguard to arraign a suspect in court within 24 hours of arrest.

The oft-communicated expectation is that national development will take care of the weak and the economically marginalised. The equalisation measures meant to mitigate historical injustices in marginalised areas will hopefully lead to equitable inclusion of all in sharing national wealth.

Ethnic polarisation will hopefully be reduced by the political power distribution that eliminates a strong presidency responsible for making decisions on resource distribution. A region will not need to produce a national leader to enjoy State resources. Economically, the country will benefit from new opportunities to be exploited in the counties, including the previously marginalised areas.

It is expected that county headquarters will grow in economic stature through guaranteed injection of funds and the establishment of institutions to support the county governments. Counties will become the centres of economic development countrywide. A credible justice system will spur investment, since entrepreneurs will have fair and expeditious dispute resolution confidence.

This, coupled with the proper financial policies, may spur economic growth and job creation by way of accelerated foreign direct investment. In addition, the economy is likely to benefit from the stability and uncertainty associated with transitions will be minimised.

Drift

Political parties will enjoy a higher level of discipline as per the Political Parties Act, with checks from the Registrar of Political Parties and determination of any ensuing disputes by the Judiciary. Though this may take a while to be fully realised, there is every possibility that Kenyan voters will drift towards embracing issue-based politics where leaders are elected based on their development record or potential, especially if people from one region compare their pace of economic growth to those from other regions.

Devolution will make citizens more connected with decision making, see the direct nexus between the politics of the day, the leaders they elect and the development dynamics. It is hoped that this will reduce the level of cronyism and corruption and inculcate discipline in management of public affairs.

The improvement of the public justice system institutions including the possibility of recourse to an independent and competent Judiciary for settlement of political disputes ranging from political parties contests, electoral disputes, and denial of rights enshrined in the Constitution will hopefully prevent the kind of ethnic violence that followed the 2007 polls and led to the

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deaths of more than 1,300 people and displacement of hundreds of thousands, not to mention the economic cost of the violence.

The promulgation of the Constitution was a remarkable turning point. Though there have been several obstacles to its full implementation, a combination of watchful citizens and lobby groups' vigilance, and an independent Judiciary has been helpful in pointing out those attempts and correcting them by staying the course. This demonstrates that continuous vigilance by the disparate groups will be indispensable in realising the Kenya envisaged in the new Constitution.

However, the promulgation of the Constitution is not an end to itself. Kenyans expect the quality of their lives to improve. This means improved access to health, affordable education, better economic opportunities including employment, and better infrastructure among other social-economic expectations.

Failure to create wealth and improve economic opportunities may create despondency among the youth and general frustration by the masses that their aspirations have not been met. It may be a recipe for renewed resentment and perception of alienation precipitating political unrest. The promulgation of the Constitution does not mean that the battle has been won. Human development is work in progress.

Does the new Constitution guarantee democracy?

The Constitution provides that the Bill of Rights applies to all laws and binds State organs. The rights shall be enjoyed to the greatest extent consistent with the nature of the right. A court interpreting a right shall promote the values that underlie an open and democratic society based on human dignity, equity, equality and freedom and spirit, purport and objects of the Bill of Rights. The Bill of Rights provides for both civil and political rights and economic, social and cultural rights. Our writer looks at whether the new Constitution has or will increase democratic space in the country.

The civil and political rights, for example freedom of expression and freedom of assembly, prohibit the State from interfering with the rights of the citizenry, while economic, social and cultural rights, like the right to health and to housing, require States to implement positive measures, provide resources and create an enabling framework for their realisation.

The State shall prove that resources are not available to secure and avail economic, social and cultural rights. The State shall allocate resources to ensure the widest possible enjoyment of the rights and shall consider prevailing circumstances, including the

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vulnerability of particular groups. The former Constitution protected only civil and political rights.

The Bill of Rights establishes mechanisms for enforcement. This includes a constitutionally protected commission to promote and protect the rights. The Constitution confers locus standi on any person who alleges his or her rights have been infringed or denied. The enforcement mechanism is through the High Court under Rules made by the Chief Justice. The Constitution recognises treaties and conventions, which Kenya has ratified as part of the laws of Kenya, and obligates the Government to domesticate their provisions.

The State has a fundamental duty to observe, protect, promote and fulfil the rights through legislative, policy and other measures and to set standards to progressively realise economic, social and cultural rights. The State shall enact legislation to fulfil its international obligations in respect of human rights. Most human rights treaties and conventions that Kenya has ratified are not domesticated.

Infringement

The High Court shall have jurisdiction to hear and determine applications for redress of a denial, violation or infringement of human rights. The appropriate relief by the court include declaration, injunction, conservatory order, declaration of invalidity of any law, compensation and order of judicial review.

Since Independence, the Rules to enforce the Bill of Rights under section 84(6) of the former Constitution were promulgated in 1999. The failure by successive Chief Justices to formulate the Rules made enforcement of rights difficult. These rules will apply until new ones are promulgated. The State may, by legislation, limit the application of the rights to persons serving in the Kenya Defence Forces or the National Police Service in regard to the right to privacy, freedom of association, assembly, demonstration, picketing and petition, labour relations, economic and social rights and the rights of arrested persons.

The rights to freedom from torture or cruel, degrading or inhuman treatment or punishment, freedom from slavery or servitude, the right to fair trial and the right to an order of habeas corpus shall not be limited.

Every person has the right to life, which shall begin at conception. A person shall not be deprived of life intentionally, except to the extent authorised by the Constitution or other written law. Though the State has de facto outlawed the death penalty by commuting the sentences to life and the Court of Appeal has held that a mandatory death penalty for murder is unconstitutional, this provision has not outlawed the death penalty.

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Abortion is not permitted unless, in the opinion of a trained health professional, there is need for emergency treatment, or the life or health of the mother is in danger or if permitted by any other written law. The Penal Code provides that a person is not criminally responsible for performing in good faith and with reasonable care and skill a surgical operation upon any person for his benefit, or upon an unborn child for the preservation of the life of the mother, if the performance of the operation is reasonable, having regard to the patient's state of mind at the time and all circumstances of the case.

Every person has a right to freedom of expression, which includes the right to seek, receive and impart information and ideas, freedom of artistic creativity and academic freedom and freedom of scientific research. The freedom does not extend to propaganda of war, incitement to violence, hate speech, advocacy of hatred that constitutes ethnic incitement, vilification of others or incitement to cause harm or expressions that are based on any grounds of discrimination.

The freedom and independence of electronic, print and other types of media is guaranteed. Every citizen has the right to access information held by the State and information held by another person, which is required for the exercise or protection of any right or fundamental freedom.

Every person has the right to acquire and own property of any description in any part of Kenya. Parliament shall not enact a law the permits the State or any person to arbitrarily deprive a person of property or any interest in or right over any property or restrict the enjoyment of the right to property.

Court of law

The State shall not deprive any person any property unless the deprivation results from an acquisition of land for a public purpose and is carried out in accordance with the Constitution and any Act of Parliament that requires prompt and full payment of compensation to the person and allows any person who has an interest in that property a right of access to a court of law.

Where occupants in good faith of the land do not hold title, provision may be made for their compensation. The State shall protect intellectual property rights. The right to property shall not extend to property that has been unlawfully acquired.

The former Constitution stipulated conditions that must be adhered to when the State compulsorily acquires property including the necessity by the State to use the property in the interests of defence, public safety, public morality, public health and related purpose. The State must justify causing hardship resulting from the deprivation

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of the property and must promptly pay full compensation.

Every person has a right to fair labour practices. Every worker has a right to fair remuneration, reasonable working conditions, to form and join trade union activities and to go on strike. Every person has a right to a clean and healthy environment. Every person has the right to the highest attainable standard of health, including reproductive health, accessible and adequate housing and reasonable standard of sanitation, clean, safe water in adequate quantities, social security, and to education.

A person shall not be denied emergency medical treatment. The State shall provide appropriate social security to all persons who are unable to support themselves and their dependents. This will create a constitutional basis for Government intervention and support of the older members of society who may be unable to afford basic human necessities.

The family is the natural and fundamental unit of society and necessary basis of social order, and shall enjoy the recognition and protection of the State. Every adult has a right to marry a person of the opposite sex, based on free consent of the parties. The State shall ensure access to justice for all persons. If any court fee is required, it shall be reasonable and shall not impede access to justice.

An arrested person has the right to be informed promptly, in a language he understands, the reason for his arrest, the right to remain silent and the consequences of not remaining silent; to communicate with an advocate; not to be compelled to make an admission or confession; to be held separately from persons who are serving a sentence and to be brought to court as soon as reasonably practicable, but not later than 24 hours after arrest.

The former Constitution provided for detention up to a period of 14 days if a person was charged with murder, robbery with violence or treason. A person shall not be remanded in custody if the offence he or she is charged with is punishable by a fine only or by imprisonment for not more than six months. Any person, who is detained and held in custody or imprisoned under the law, will retain the rights in the Bill of Rights, except to the extent that any particular right is incompatible with the fact of detention or imprisonment.

Every child shall have a right to name and nationality, free and compulsory basic education, basic nutrition, shelter and health care, to be protected from neglect, harmful cultural practices, violence, inhuman treatment and hazardous or exploitative behaviour, parental care and protection, which includes the equal responsibility of the mother and father to provide for the child whether they are married or not, and not to be detained, except as

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a measure of last resort. If detained, a child shall be held for the shortest period of time and separately from adults.

A declaration of emergency or legislation enacted or other action taken in consequence of any declaration, may not permit or authorise the indemnification of the State or of any person in respect of any unlawful act or omission. The Kenya National Human Rights and Equality Commission shall promote respect of human rights, promote gender equality and equity and facilitate and coordinate gender mainstreaming in national development, promote the protection and observance of human rights, monitor, investigate and report on observance of human rights, receive and investigate complaints on alleged abuses of human rights, research on human rights, act as the principal State organ in ensuring compliance with obligations under treaties and conventions relating to human rights, investigate complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct.

The commission will act as an Ombudsman. Any person has a right to complain to the commission, alleging that a right has been denied, violated or infringed or is threatened. Parliament may enact legislation restructuring the commission into two or more separate commissions.

The Constitution envisages comprehensive judicial reform. In the past, the Judiciary has acted as an impediment to protection of the Bill of Rights. Indeed in the 1980s, accused persons were arraigned in court to plead to charges when they had been subjected to torture and cruel treatment. The judicial reforms will assist in establishing a credible enforcement mechanism for the Bill of Rights. The Kenya National Human Rights and Equality Commission will supplement the role of the Judiciary.

The citizenry has scant awareness of the Bill of Rights and the rights enforcement mechanisms. It is important that the civil society and the Kenya National Human Rights and Equality Commission do carry out countrywide awareness programmes to ensure that the citizenry understands the Bill of Rights. Human rights education, including the provisions in the Bill of Rights, should be integrated into the education curricula. This will assist in creating a culture that respects rights at the school level.

Civil society organisations should support public interest litigation to secure rights of minority groups. This will test the effectiveness of the Judiciary and the commission to protect rights. The test cases will apply international human rights principles in the Kenyan legal system.

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Limitations

The Constitution has removed claw back clauses. Any limitation to the rights must be reasonable and justifiable in an open and democratic society. Further, for economic, social and cultural rights, the rights will be realised progressively since they require State resources to implement. However, the burden of proving that the resources required to realise the rights are not available lies with the State.

The State is obligated to consider the vulnerability of particular groups and individuals in promoting and protecting the rights. The Bill of Rights is more expounded, has few claw backs, has a clear enforcement mechanism and contains more rights than in the former Constitution.

Godfrey Ngotho Mutiso vs. Republic, Criminal Appeal Number 17 of 2008, the Court of Appeal held that mandatory death penalty imposed under section 203 and 204 of the Penal Code for the offence of murder was unconstitutional. The Court held that prior to passing the sentence, the court was obligated to record the mitigating circumstances of the case. This case was litigated under the former Constitution.

In Susan Waithera Kariuki & 4 others vs. The Town Clerk, City Council of Nairobi & 2 others (Petition Number 66 of 2010) the High Court held that the petitioners were entitled to the right to housing under Article 43 of the Constitution. The 1st Respondent had issued a 24-hour notice to the petitioners to demolish their houses and vacate informal settlements in Nairobi. The petitioners filed this suit to prohibit the respondents from demolishing their homes.

The court held that under Article 47 of the Constitution, the petitioners had a right to be given reasons for the action, which would result in violation of their rights. The rights enforcement mechanisms have been reinforced in the Constitution. More cases seeking enforcement of the rights will certainly be filed. The Constitution endeavours to reform the electoral process by creating an independent electoral management body free from political interference. This will restore the public faith in the electoral system. The Constitution provides for democratic elections held every five years. The provisions must be supported by comprehensive electoral legislative reforms.

The Constitution creates a devolved system in which the citizenry will manage resources and elect representatives at the county level. The Constitution has provided for the revision and strengthening of the political parties. This will create a legitimate political opposition, which is a key ingredient to democracy.

Other mechanisms for holding the Government to account to ensuring democratic governance include the

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right to a remedy by the citizens in case of a human rights violation. The Constitution entrenches independence of the Judiciary and constitutional commissions. These institutions will check on unlawful acts of the State or its agents. The Constitution establishes the Supreme Court, which will review the constitutionality of laws. An independent Judicial Service Commission has been reconstituted with powers to competitively appoint judicial officers and carry out an oversight role.

The public will participate in the appointment of State officers through Parliament and through representation to parliamentary committees during the vetting process. Public participation will ensure openness and transparency in the appointment process. The electorate have the right to recall MPs who do not perform.

The Constitution has clear mechanism for separation of powers, which ensure that there are proper checks and balances in exercise of Government powers. The Constitution, therefore, enhances the room for a functional democracy in Kenya with checks and balances to ensure the various arms of Government act in accordance with the law.

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REFERENCES

- Ali A. Mazrui, "African Political Purgatory: The Crossroads Between Collapse and Redemption," Governance Vol. 1, (1) (April 1988)
- Armstrong, Virginia Irving (1971). *I Have Spoken: American History Through the Voices of the Indians*. Pocket Books. p. 14. SBN 671-78555-9
- Articles of Confederation (1777)
- Basu, Durga Das (1965). *Commentary on the constitution of India :(being a comparative treatise on the universal principles of justice and constitutional government with special reference to the organic instrument of India)*. **1–2**. S. C. Sarkar & Sons (Private) Ltd.
- Basu, Durga Das (1984). *Introduction to the Constitution of India* (10th ed.). South Asia Books. ISBN 0836410971.
- Basic Law of Federal Republic of Germany
- Bertrand G. Ramcharan, "The Evolving African Constitutionalism: A Constitutionalism of Liberty and Human Rights," The Review (60) (June 1998)
- B. Kirya, "The 'No Party' or 'Movement' Democracy in Uganda," The Review (60) (July 1998)
- Bo Li, Perspectives, Vol 1, No.6
- Bowen, Catherine Drinker., Miracle at Philadelphia: the story of the Constitutional Convention May to September 1787. (1966)
- Christian G. Fritz, *American Sovereigns: The People and America's Constitutional Tradition Before the Civil War* (Cambridge University Press, 2008) ISBN 978-0-521-88188-3
- Constitution of the German Democratic Republic (German Democratic Republic; GDR, 1949–1990)
- Constitution of the Republic of Ghana
- Constitution of India
- Constitution of the Republic of South Africa
- Constitution of the Republic of Uganda, 1995
- Das, Hari (2002). *Political System of India*. Anmol Publications. ISBN 8174886907
- David Mukholi, A Complete Guide to Uganda's Fourth Constitution: History Politics and the Law (Kampala: Fountain Publishers, 1995)
- Ghai, Yash. "The Theory of the State in the Third World and the Problematics of Constitutionalism." In Greenberg, Douglas, Stanley N. Katz, Melanie Beth Oliviero, and Steven C. Wheatley Eds. Constitutionalism and Democracy: Transitions in the Contemporary World. Oxford University Press, 1993.
- Gros, Jean-Germain Ed. Democratization in Late Twentieth-Century Africa: Coping With Uncertainty. Westport, CT: Greenwood Press, 1998Hassen Ebrahim, The Soul of a Nation: Constitution-making in South Africa (Cape Town: Oxford University Press, 1998).
- Henkin, Louis. "Elements of Constitutionalism." Unpublished Manuscript, 2000
- Human Rights Watch. Hostile to Democracy: The Movement System and Political Repression in Uganda. New York: Human Rights Watch, 1999
- Hutchful, Eboe. "Reconstructing Political Space: Militarism and Constitutionalism in Africa." In Greenberg, Douglas, Stanley N. Katz, Melanie Beth Oliviero, and Steven C. Wheatley Eds. Constitutionalism and Democracy: Transitions in the Contemporary

CC BOOK FF A5.indd 135 10/12/2012 9:19:08 AM

World. New York: Oxford University Press, 1993
- H. W. O. Okoth-Ogendo, "Constitutions Without Constitutionalism: Reflections on an African Political Paradox," in Issa G. Shvji (ed.), State and Constitutionalism
- Issa G. Shivji, "State and Constitutionalism: A New Democratic Perspective," in Issa G. Shivji (ed.), State and Constitutionalism: An African Debate on Democracy
- Ivo Duchacek, *Power Maps: Comparative Politics of Constitutions* (Santa Barbara, Calif.: A.B.C.-Clio, 1973)
- Jain, M.P. (2010). *Indian Constitutional Law*. LexisNexis Butterworths Wadhwa Nagpur ISBN 978-81-8038-621-3
- Jeremy Sarkin, "Innovations in the Interim and 1996 South African Constitutions," The Review (60) (June 1998)
- Julius O. Ihonvbere, Africa and the New World Order (New York: Peter Lang, 2000).
- Kanyeihamba, G. Constitutional Law and Government in Uganda. Nairobi: East African Bureau, 1975
- Kivutha Kibwana and Chris Mama Peter, Eds. Law and The Struggle for Democracy in East Africa. Nairobi: Claripress, 1996
- Louis Henkin, "Elements of Constitutionalism," The Review (60) (June 1998)
- Lutz, Donald (1994). *Toward a theory of constitutional amendment*
- Mamdani, Mahmood "The Social Basis of Constitutionalism in Africa," Journal of Modern African Studies Vol. 28, No. 3, 1990
- Mamdani, Mahmood and Joe Oloka-Onyago Eds. Uganda: Studies in Living Conditions, Popular Movements and Constitutionalism. Kampala: JEP Books No. 2, 1994
- Mazrui, Ali A., "Constitutional Change and Cultural Engineering: Africa's Search for New Directions," Keynote Lecture Delivered at the International Conference on "Constitutionalism in Africa," Organized by Faculty of Law, Makerere University, Kampala, October 5-8. 1999
- Mbaku, John M. Ed. Preparing Africa for the Twenty-First Century: Strategies for Peaceful Coexistence and Sustainable Development. Aldersbot, UK: Ashgate, 1999
- McDonald, Forrest, Novus ordo seclorum: the intellectual origins of the Constitution 1985. SSBN 0-7006-0284-4
- Mee, Charles L., Jr. *The Genius of the People*. New York: Harper & Row, 1987. p. 237
- Mpazi Sinjela, "Constitutionalism in Africa: Emerging Trends," The Review (60) (June 1998)
- Muigai, Githu, "Legal Constitutional Reforms to Facilitate Multi-Party Democracy: The Case of Kenya." In Oloka-Onyango, Joseph; Kivutha Kibwana and Chris Maina Peter, Eds
- Murungi, Kiraitu, "Ethnicity and Multi-Partism in Kenya." In Kibwana, Kivutha Ed. Readings in Constitutional Law and Politics in Africa: A Case Study of Kenya. Nairobi: Faculty of Law, University of Nairobi, 1998
- Odoki, Ben J., "The Challenges of Constitution-Making and Implementation in Uganda." Paper Presented at the International Conference on "Constitutionalism in Africa," Organized by the Faculty of Law, University of Makerere, Kampala, 5-8, October 1999
- Owen Sichone (ed.), The State and Constitutionalism in Southern Africa
- Rosenfeld, Michel Ed. *Constitutionalism, Identity, Difference and Legitimacy: Theoretical Perspectives.* Durham: Duke University Press, 1994
- Sartori, Giovanni. The Theory of Democracy Revisited. Chatham, New Jersey: Chatham

CC BOOK FF A5.indd 136 10/12/2012 9:19:08 AM

House, 1987

- Sen, Sarbani (2007). *The Constitution of India: Popular Sovereignty and Democratic Transformations*. Oxford University Press. ISBN 9780195686494"The Constituent Assembly Debates (Proceedings):(9th December,1946 to 24 January 1950)". The Parliament of India Archive
- Sharma, Dinesh; Singh, Jaya; Maganathan, R.; et al. (2002). *Indian Constitution at Work*. Political Science, Class XI. NCERT
- Slinn, Peter, "A Fresh Start for Africa? New African Constitutional Perspectives for the 1990s," *Journal of African Law* Vol. *35,* 1991
- The Constitution: The certification process, Constitutional Court of South Africa.
- The Six Nations: Oldest Living Participatory Democracy on Earth".
- United States Declaration of Independence (1776)
- Weimar Constitution (1919–1933)
- Willy Mutunga, Constitution-Making From the Middle-Civil Society and Transition Politics in Kenya, 1992-1997 (Nairobi: SAREAT and MWENGO, 1999),

ONLINE SOURCES

- http://www.gavison.com/a2683-legislatures-and-the-phases-and-components-of-constitutionalism
- http://www.nlnrac.org/american/founding-era-constitution-making
- http://www.ratical.org/many_worlds/6Nations/index.html.
- http://parliamentofindia.nic.in/ls/debates/debates.htm
- NARA. "National Archives Article on the Constitutional Convention". http://www.archives.gov/exhibits/charters/charters.html
- http://julius.ihonvbere.com/2008/07/challenges-of-constitutionalism-in-africa/
- http://www.constitutionalcourt.org.za/site/theconstitution/thecertificationprocess.htm.
- http://www.commonlii.org/ke/other/KECKRC/2001/33.html
- http://www.jcpa.org/dje/articles3/constisramer.htm

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Issue	Former Constitution	Bomas Draft	Wako Draft (2005)
1. Basics - setting basis and reason for the constitution	■ -Nil	■ Preamble ■ National Values, Principles and Goals are set	■ Same as Bomas draft
2. Ownership/Membership/ Member rights/Obligations/ Citizenship/Sanctity of Life	■ Sovereignty of the people is not expressed ■ Rights are limited ■ Citizenship discrimination visible	■ Sovereignty belongs to the people ■ Clear conventional rights included i.e. socio-economic and group rights ■ Either parents recognized to confer citizenship	■ Same as Bomas draft
3. Governing structures/ leadership code • Executive • Judiciary • Legislative	■ No leadership code ■ Single unitary structure of government run from Nairobi ■ All powerful presidency ■ No clear separation of powers ■ Role of parliament not clear ■ No independent candidates ■ No supreme court and religious courts, Kadhis courts provided	■ Clear leadership code ■ Government broken down to four levels ■ Strong national, strong district, weak regional and functionary locations ■ Roles between levels clear cut ■ Two levels of parliament, senate to take care of devolved interests ■ Enhanced judiciary ■ President as head of state ■ Presidential actions	■ Clear leadership code ■ Two levels of government (national and district) ■ Roles clarified One parliament, devolved interests to be looked at by an unclear national forum. ■ Judiciary same as in Bomas draft ■ All powerful presidency. As head of both state and government but some actions sactionable by parliament

		sanctioned by legislature ■ Prime Minister as head of government answerable to parliament ■ 30 check and control institutions ■ Cabinet presided over by prime minister with a large No. of members ■ All cabinet ministers are members of parliament ■ Enumerates functions of parliament ■ Provides for independent candidates ■ Provides for a supreme court but no other religious courts	■ Prime minister is any member of parliament and leader of government business in parliament ■ Same 30 institutions as in Bomas draft ■ Mixed member cabinet/non members cabinet can be appointed ■ Independent candidates provided for ■ Same as in Bomas draft but also provides for religious courts
4. Devolution	• No other structures are provided apart from the national level	■ Provides 4 levels of government o National o Provincial o District o Location ■ Emphasis is more on the national and district	■ Provides two levels of government o National o District ■ Sources of funding as in Bomas Draft only that natural resources royalties removed from district to national level

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		functions/ competencies ■ listed sources of funding for the levels provided	spouses rights are removed
5. Public resources/ property ownership	• Not clear cut procedure of allocations• Property ownership recognized• Spouses right missing	■ Clear cut procedures in pale	■ Same as Bomas draft spouses rights are removed
6. Land	• Only trust land is recognized	■ Other land ownership ■ Categories/ tenures are clear cut	■ Same as Bomas draft
7. Political parties	• Not legally recognized apart from the role in clearing candidates	■ Clear functions provided for ■ Public funding also recognized	■ Same as Bomas draft

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ABOUT THE MEDIA DEVELOPMENT ASSOCIATION

The Media Development Association (MDA) is an alumnus of graduates of University of Nairobi's School of Journalism. It was formed in 1994 to provide journalists with a forum for exchanging ideas on how best to safeguard the integrity of their profession and to facilitate the training of media practitioners who play an increasingly crucial role in shaping the destiny of the country.

The MDA is dedicated to helping communicators come to terms with the issues that affect their profession and to respond to them as a group. The members believe in their ability to positively influence the conduct and thinking of their colleagues.

The MDA aims at:

- Bringing together journalists to entrench friendship and increase professional cohesion;
- Providing a forum through which journalists can discuss the problems they face in their world and find ways of solving them;
- Organising exhibitions in journalism-related areas such as photography;
- Organising seminars, workshops, lectures and other activities to discuss development issues and their link to journalism;
- Carrying out research on issues relevant to journalism;
- Organizing tours and excursions in and outside Kenya to widen journalists' knowledge of their operating environment;
- Publishing magazines for journalists, and any other publications that are relevant to the promotion of quality journalism;
- Encouraging and assist members to join journalists' associations locally and internationally;
- Creating a forum through which visiting journalists from other countries can interact with their Kenyan counterparts;
- Helping to promote journalism in rural areas particularly through the training of rural-based correspondents;
- Advancing the training of journalists in specialised areas of communication;
- Create a resource centre for use by journalists;
- Reinforcing the values of peace, democracy and freedom in society through the press;
- Upholding the ideals of a free press.
- Activities of MDA include:
- Advocacy and lobbying;
- Promoting journalism exchange programmes;
- Hosting dinner talks;
- Lobbying for support of journalism training institutions;
- Initiating the setting up of a Media Centre which will host research and recreation facilities;
- Working for the development of a news network;
- Providing incentives in terms of awards to outstanding journalists and journalism students;
- Inviting renowned journalists and other speakers to Kenya;
- Networking and liking up with other journalists' organisations locally and abroad.

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Konrad-Adenauer-Stiftung

Freedom, justice and solidarity are the basic principles underlying the work of the Konrad-Adenauer-Stiftung (KAS). The KAS is a political foundation, closely associated with the Christian Democratic Union of Germany (CDU). As co-founder of the CDU and the first Chancellor of the Federal Republic of Germany, Konrad Adenauer (1876-1967) united Christian-social, conservative and liberal traditions. His name is synonymous with the democratic reconstruction of Germany, the firm alignment of foreign policy with the trans-Atlantic community of values, the vision of a unified Europe and an orientation towards the social market economy. His intellectual heritage continues to serve both as our aim as well as our obligation today.

In our European and international cooperation efforts we work for people to be able to live self-determined lives in freedom and dignity. We make a contribution underpinned by values to helping Germany meet its growing responsibilities throughout the world.

We encourage people to lend a hand in shaping the future along these lines. With more than 70 offices abroad and projects in over 120 countries, we make a unique contribution to the promotion of democracy, the rule of law and a social market economy. To foster peace and freedom we encourage a continuous dialogue at the national and international levels as well as the exchange between cultures and religions.

In Kenya, the Foundation has been operating since 1974. The Foundation's work in this country is guided by the understanding that democracy and good governance should not only be viewed from a national level, but also the participation of people in political decisions as well as political progress from the grass roots level.

Contact Adress:
Mbaruk Road. 27
P.O. Box 66471
00800 Nairobi/ Kenya
Phone: 020 – 2725 957
Mail: info.nairobi@kas.de

Konrad Adenauer Stiftung

www.kas.de/kenia

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