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## THE CONSTITUTIONAL REVIEW CASES: EMERGING ISSUES IN KENYAN JURISPRUDENCE

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What is the argument on the other side? Only this, that no case has been found in which it has been done before. That argument does not appeal to me in the least. If we never do anything which has not been done before, we shall never get anywhere. The law will stand still whilst the rest of the world goes on: and that will be bad for both.<sup>1</sup>

### I. INTRODUCTION

The question as to whether the law can appositely address all of humanity's infinite problems has always preoccupied the minds of legal scholars. There are two broad responses to the question. Of these, the first would probably be found in Ronald Dworkin's theory of Adjudication. According to Dworkin, the legal system is a seamless system with its own autonomy in which the law is only one of the alternative standards for resolution of difficult questions.<sup>2</sup> Under the scheme, it is possible to find the correct answer to any legal question, however difficult, by searching through the rules, precedents, principles and spirit of the law. Accordingly, there is no room for unbridled judicial discretion since the (seamless) system has adequate standards for addressing every conceivable legal dispute. In short, the adherents of the teachings of Dworkin would answer the question in the affirmative.

On the other hand, some scholars have held the view that there are inadequate legal standards for addressing all of humanity's infinite disputes. This argument has been advanced by, *inter alia*, Prof. HLA Hart who held the view that the law is open-textured.<sup>3</sup> In this scheme, judges have discretion in deciding hard cases particularly where there are inadequate rules governing the matter at hand. The relevance of this argument is of course its underlying postulate, that unlike precision instruments, words, humanity's main tools of expression are invariably indeterminate, problematic and imprecise. Rules of

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\*LL.B., University of Nairobi. For a detailed analysis of the matters raised in this article, See Muthomi Thiankolu, 'The Njoya Case: Emerging Issues in Kenyan Jurisprudence,' University of Nairobi LL.B. dissertation, 2005 (Unpublished).

<sup>1</sup> Denning LJ in *Packer v. Packer* [1954] P.15 at 22. See A Denning, *The Discipline of Law* (London: Butterworths, 1979).

<sup>2</sup> See <<http://www.jasononline.com/law/juris.html>> (Last accessed on 27 July 2004.)

<sup>3</sup> *Ibid.*

law are usually expressed in words. Consequently, rules of law often carry with them some inherent imprecision.

Linguistic imprecision and the appurtenant question as to whether the law can adequately address every conceivable dispute have come under judicial scrutiny. It has been stated that whenever a statute comes up for consideration, it must be remembered that it is not within human powers to foresee the manifold sets of facts which may arise. Even if it were, it is not possible to provide for them in terms free from all ambiguity; that the English language (read 'Language') is not an instrument of mathematical precision; that it would certainly save judges trouble if Acts of Parliament were drafted with divine prescience and perfect clarity. In the absence of such divine prescience and perfect clarity, when a defect appears, a judge cannot simply fold his hands and blame the draftsman, he must set to work on the constructive task of finding the intention of Parliament, and he must do this not only from the language of the statute, but also from a consideration of the social conditions which gave rise to it, and then he must supplement the written word so as to give 'force and life' to the intention of the legislature.<sup>4</sup>

In scholarly circles, it has been argued that gone are the days when it was considered almost indecent to suggest that judges make law. Judicial law making, however unpalatable, is a necessary evil, since no lawmaker can provide for a law for all times and all circumstances.<sup>5</sup>

Law is not a completely logical, self-contained set of clear rules of determinate meaning. It cannot be expected to supply one right answer to every conceivable legal problem through a logical process of induction and deduction from case law and legislation.<sup>6</sup> The Kenyan Constitution is not exempt from this inadequacy. Our courts have often been called upon to fill the lacuna, clear the vagueness and remedy the imprecision. This often involves expounding the tacit, subtle, inarticulate and non-textualised parts of the constitution.<sup>7</sup>

The primary function of the judiciary is to delineate the meaning and scope of rules of law. This entails interpretation and construction. The twin tasks of constitutional interpretation and construction pose one of the judiciary's most intractable challenges.<sup>8</sup>

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<sup>4</sup> Lord Denning in *Seaford Court Estates v. Asher* [1949] 2 KB 481.

<sup>5</sup> See <[http://www.hcourt.gov.au/speeches/mchughj/mchughj\\_london1.htm](http://www.hcourt.gov.au/speeches/mchughj/mchughj_london1.htm)> (last Accessed on 30 July 2004).

<sup>6</sup> Horrigan, 'Is the High Court Crossing the Rubicon? A Framework for Balanced Debate,' 6 *Public Law Review* (1995) p. 284 at 293-294.

<sup>7</sup> For further insights into this issue, see M Moore, 'Do we have an unwritten Constitution?' 63 *South California Law Review* (1989), p. 107. On constitutional abeyances and lacuna, see generally, M Folley, *The Silence of Constitutions* (Kentucky, U.S.A. Routledge, 1989).

<sup>8</sup> G Muigai, 'Political Jurisprudence or Neutral Principles: Another Look at the Problem of Constitutional Interpretation,' *East African Law Journal* (2004), p. 1.

The difficulties attending constitutional interpretation and construction have been explicated, *inter alia*, on the constitution's dual identity; first as a political charter and, secondly, as a legal instrument.<sup>9</sup> Generally, the courts' jurisdiction is limited to granting justice according to the law. However, the claims made in the name of justice are not always founded on the letter of the law. In the *Njoya case*, the notion of the constituent power of the people was described as "an extra-constitutional one in the same plane as the law of God; a very good notion, something to be aspired for but lacking in constitutional validity."<sup>10</sup>

In constitutional litigation, interests other than those textualised in the Constitution often drive litigants. These extra-constitutional interests may be political or apolitical. More often than not, they are neither pleaded nor admitted. Two important notes must thus be made at this preliminary level of discourse. First, owing to the difficulties and complexities surrounding constitutional litigation, constitutions (with their infinite variability in texts, values, doctrine and institutional practice) may be interpreted differently by different yet equally well-meaning people.<sup>11</sup> Secondly, people will applaud or condemn the courts' interpretation of the constitution not necessarily on the basis of its legal or scholarly merits. Such applause or criticism invariably depends on whether the particular interpretation is conformable to subjective perceptions of justice. The applause or criticism, as the case may be, and the passion with which it is made, depends on whether the particular decision is favourable or inimical to the inarticulate and/or extra-constitutional interests in the matter the subject of the litigation.

## II. THE CONSTITUTIONAL REVIEW CASES<sup>12</sup>

### (a) Background

The Kenyan Independence Constitution was fashioned along the lines of the Westminster model. It established a parliamentary system of government with a Prime Minister as Head of Government. The Governor-General represented the British monarch as Head of State. The independence constitution contained the parliamentary system's traditional safeguards<sup>13</sup> for ensuring democracy and protection of individual rights. It was designed to ensure regular, free and

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<sup>9</sup> *Ibid.*

<sup>10</sup> See the judgement of Justice Aaron Ringera (hereinafter cited as "Ringera") at p. 36 last para.

<sup>11</sup> Muigai, *supra* note 8.

<sup>12</sup> The cases the subject matter of this discourse are the *Njoya Case* (High Court of Kenya Miscellaneous Civil Application No. 82 of 2004) and the *Referendum Case* (High Court of Kenya Miscellaneous Civil Case No. 677 of 2005) For purposes of brevity and simplicity, the two cases shall be referred to as 'the constitutional review cases.'

<sup>13</sup> For a detailed exposition of the safeguards entrenched in the Kenyan independence constitution, see YP Ghai, 'Reviewing the Constitution: A Guide to the Kenya Constitution' (2002), pp. 28-30. The book was authored mainly for civic education in Kenya during the Constitutional Review Process. The author was then the Chairman of the Constitution of Kenya Review Commission, CKRC.

fair elections. It was designed to ensure an independent judiciary and an apolitical public service. By the late eighties, however, the Kenyan constitution had been so mutilated, through amendments, as to lose both the safeguards and its original character.<sup>14</sup>

Many people were dissatisfied with the removal of valuable aspects of the constitution and the consequent legal/political order. Several factors have been propounded as having provided impetus to the clamour for constitutional reform in Kenya.<sup>15</sup> These include:

### A Dangerously Powerful Presidency

Of the 127 sections of the Kenyan Constitution, at least 16 confer upon the institution of the Presidency wide and, arguably, illimitable powers. These include approval of foreign visits by Vice-President and cabinet ministers,<sup>16</sup> exercise of the executive authority of the Republic,<sup>17</sup> and constitution of offices in the public service

Further, the Kenyan President cannot be charged in criminal proceedings, nor be sued in a civil court until he has left the presidency.<sup>18</sup> The Kenyan president cannot be impeached even for gross misconduct.<sup>19</sup>

The arguments against an inordinately powerful presidency are legion. Consequently, only a few may be cited for purposes of this discourse. First, an exceedingly powerful Presidency weakens the judiciary<sup>20</sup> and, in the Kenyan experience, the legislature. Further, it undermines the immutable doctrine of separation of powers. It may give the political class a leeway to adopt extra-legal mechanisms for avoiding and suppressing political dissent. Consequently, it negates the rule of law,<sup>21</sup> creating a society founded on fear rather than the values embodied in the Constitution.

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<sup>14</sup> Ringera, p. 76.

<sup>15</sup> For an analysis of the deficiencies in the Kenyan constitution, and the need for reform, see P Nowrojee, 'Why the Constitution Needs to be Changed' in Kivutha Kibwana, et al., eds., *In Search of Freedom and Prosperity* (Nairobi: Claripress, 1996), p. 386. The reader is however alerted that a few of the matters raised in the article have since been overtaken by events.

<sup>16</sup> Section 20, *Constitution of the Republic of Kenya*.

<sup>17</sup> Section 23, *ibid*.

<sup>18</sup> Section 14, *ibid*. For judicial interpretation of the President's immunity from the civil and criminal processes, see *Sam Karuga Wandai v. Daniel Arap Moi* and *Jean Njeri Kamau & Another v. The Electoral Commission & Daniel Arap Moi*, both cases discussed in Muigai, *supra* note 8.

<sup>19</sup> There are no provisions in the Kenyan Constitution for the impeachment of a wayward President. Surprisingly, under section 59(3), the National Assembly may pass a vote of no confidence in the government, in which case the President may either resign or dissolve Parliament. He may even stand in the ensuing elections!

<sup>20</sup> Nowrojee, *supra* note 15 at 389.

<sup>21</sup> The expression "Rule of Law" has at least three distinct but kindred meanings: "it means, in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of

### **i. A Structurally Deficient Constitutional and Legal Order**

It has been argued that the Kenyan legal system is replete with legislative enactments whose overall effect is to fetter, clog, dilute, transgress, vitiate and defeat the Fundamental Rights and Freedoms of the individual guaranteed under the Bill of Rights.<sup>22</sup>

### **ii. An Unresponsive Judiciary**

Over the years, the judiciary had exacerbated the foregoing problems through an “unprincipled, eclectic, vague, pedantic, inconsistent<sup>23</sup>...” and conservative approach to constitutional interpretation. In *Gibson Kamau Kuria v. The Attorney General*,<sup>24</sup> the Kenyan High Court declined to uphold the applicant’s contention that the impounding of his passport infringed his constitutional right to travel to and from Kenya. In the Court’s reasoning, the entire Bill of Rights as contained in Chapter 5 of the Constitution was unenforceable because the Chief Justice had not, as at the time of the application, made the procedural rules provided for in section 84(6) of the constitution.<sup>25</sup>

In *Joseph Maina Mbacha & Three Others v. The Attorney General*,<sup>26</sup> the applicants applied *inter alia*, for a declaration that their prosecution for asserting that an election had been rigged violated their freedom of expression as guaranteed under section 79 of the Constitution. It was stated that the right of access under the section was “as dead as a dodo” and could only be revived by the grace of the late chief justice.<sup>27</sup>

### **iii. A Hybrid, Dysfunctional Government Structure**

Though Kenya attained independence with a Westminster model parliamentary system, the Constitution was soon amended to create an executive

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arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government...it means, again, equality before the law, or the equal subjection of all classes to the ordinary law administered by the ordinary law courts...” See AV Dicey, *Introduction to the Study of the Law of the Constitution*, Tenth Edition at p.202

<sup>22</sup> Nowrojee, *supra* note 15 at 389.

<sup>23</sup> Muigai, *supra* note 8.

<sup>24</sup> High Court Misc. Application No. 279 of 1985.

<sup>25</sup> Section 84 (6) provides “the Chief Justice may make rules with respect to the practice and procedure of the High Court in relation to the jurisdiction and powers conferred on it by or under this section (including rules with respect to the time within which applications may be brought and references shall be made to the High Court).”

<sup>26</sup> High Court Misc. Application No. 356 of 1989.

<sup>27</sup> *Ibid*, per Dugdale J.

presidency.<sup>28</sup>The presidency was clothed with both the functions of Head of Government and Head of State. The President, unlike his predecessor, the Prime Minister, was no longer truly answerable to parliament. This arose because as Head of State, Parliament could not grill him on the day-to-day operations of Government-yet he was the Head of Government! The amenders of the Kenyan constitution had made twin blunders; on the one hand, there were elements of the British system through a Head of Government who emanated from Parliament-yet lacking the British practice of accountability to Parliament. On the other hand, there was an American-styled executive presidency-yet lacking the American stricter theory and practice, which involve a tighter separation of powers.<sup>29</sup>

The calls for constitutional reform had also been informed by other arguments. The most interesting one is probably the suggestion that the modern liberal constitution is so alien to Africa [read 'Kenya'] that it cannot serve the needs of the people;<sup>30</sup> that the notions of power, the political community, democracy, human rights and the mechanisms for them, are not understood or supported by the ordinary people and therefore remain paper provisions and do not enter the domain of reality.<sup>31</sup>

The gist of this argument was that the modern liberal constitution was socially irrelevant, having been grafted into African social systems without regard to the unique ontological realities of the African society.<sup>32</sup>

Owing to the foregoing factors, among others, the Kenyan Government was beset with unswerving demands for comprehensive changes to the constitution. The demands emanated from the political opposition, the civil society, the church and social movements.<sup>33</sup>The Government eventually bowed to these demands. The constitutional review process began in earnest during the late 1990's after the enactment of the Constitution of Kenya Review Act<sup>34</sup> [the Review Act. The Review Act stipulated the various stages and organs through which the reform process was to go.

Of the sundry organs established by the Review Act, the Constitution of Kenya Review Commission [CKRC] was the most instrumental. It was given a period

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<sup>28</sup> The Constitution of Kenya (Amendment) Act No 28 of 1964. The Act established Republican status, with the president as the Head of State.

<sup>29</sup> Nowrojee, *supra* note 15 at 392-394.

<sup>30</sup> Ghai, *supra* note 13 at p. 9.

<sup>31</sup> *Ibid.* My emphasis.

<sup>32</sup> HWO Okoth-Ogendo, 'Constitutions Without Constitutionalism,' in VC Jackson & M Tushnet, eds., *Comparative Constitutional Law* (New York: Foundation Press, 1999), p. 222 at 225.

<sup>33</sup> Ringera, p. 2.

<sup>34</sup> Chapter 3A, Laws of Kenya, since lapsed.

of twenty-four months to complete its work.<sup>35</sup> It was mandated to visit all the constituencies in Kenya. Its duties extended to compiling reports of the constituency forums, conducting and recording the decisions of the referendum and on the basis thereof, drafting a bill for presentation to parliament for enactment. Thereafter the review process was to proceed in accordance with the provisions of sections 27 and 28 of the Review Act.

### *(B) The Njoya Case*

As the review process entered its final stages, a certain Rev. Dr Timothy Njoya and six other persons filed an action in the Kenyan High Court challenging the constitutionality and validity of several provisions of the Review Act. The crux of the applicants' case was that there exists a constituent power of the people (the power to make a constitution) and that this power is embodied in sections 1, 1A, 3 and 47 of the Kenyan constitution. Further, according to the applicants, the constituent power of the people necessarily meant that the applicants in common with other Kenyans had a right to ratify any proposed new constitution through a referendum.<sup>36</sup>

The claim for the existence of the constituent power of the people was anchored on the argument that the sovereignty expressed in the constitution inhered in the general citizenry of the Republic. The applicants, in this contention, relied on section 1A of the Constitution, which provides that "the Republic of Kenya shall be a multiparty democratic state."

Parliament itself was a creature of the Constitution and therefore, so went the argument, could not abrogate the Constitution and replace it with an entirely new document. The abrogation of the constitution required the exercise of the people's constituent power. Parliament's power in regard to changing the Constitution as contained in section 47 was, as understood by the applicants, limited to making minor alterations to the constitution.

The applicants claimed that the makers of the Constitution limited the power of Parliament to amending the constitution and recognized that the residual power to constitute a frame of government reposed in the people. The applicants claimed that the supremacy of the Kenyan Constitution over other laws was recognition of the sovereignty of the people by whom constitutions are made.

The applicants contended that although Parliament had enacted the Review Act to provide an institutional mechanism and framework for the people of Kenya

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<sup>35</sup> Ibid, s 26 (1) and (3). This period was extendable by Parliament on the strict basis of demonstrated necessity.

<sup>36</sup> S 1 of the Constitution of the Republic of Kenya provides that "Kenya is a sovereign Republic."

to exercise their constituent power to make and adopt a new constitution, the Act was fraught with weaknesses, contradictions and ambiguities that impeded the realization of that noble goal. Further, the applicants contended that their right in common with other Kenyans to adopt and ratify a new constitution through a national referendum was the centrepiece of a “people-driven” constitutional review process and fundamental to realization of comprehensive review of the constitution by the people of Kenya.

The applicants prayed for several declarations including:

- 1 A declaration that sections 26 (7) and 27(1) (b) of the Review Act “transgresses, dilutes and vitiates” the constituent power of the people of Kenya including the applicants which is embodied in Section 3 the Review Act.
- 2 A declaration that subsections (5), (6) and (7) of section 27 of the Review Act were unconstitutional to the extent that they converted the applicants’ right to have a referendum as one of the organs of reviewing the Kenyan constitution into a hollow right and privilege dependent on the absolute discretion of the delegates of the National Conference.
- 3 A declaration that section 27(2) (c) and (d) of the Review Act were infringed on the applicants’ rights not to be discriminated against and their equal protection of the law embodied in sections 1A, 70,78, 80 and 82 of the Constitution.
- 4 A declaration that section 28(3) and (4) of the Review Act were inconsistent with section 47 of the constitution and therefore null and void.
- 5 A declaration that the constitution gives every person in Kenya an equal right to review the constitution which right embodies the right to participate in writing and ratifying the constitution through a constituent assembly or a national referendum.
- 6 A declaration that Article 21 of the Universal Declaration of Human Rights (UDHR) 1948, which is embodied and implied in section 82 of the constitution barred the respondents from constituting the constitutional conference in a discriminatory manner.

The respondents made a number of preliminary objections. The first objection was that the action did not seek or raise any matter which required the interpretation of the Constitution but was merely requiring the court to interpret an Act of Parliament. Further, the respondents contended that the issues raised by the applicants were in any event not justiciable. Accordingly, in their view the court had no jurisdiction to entertain those issues.



The respondents also contended that the law did not provide for the rights claimed by the applicants. They urged the court to confine the applicants to the "cold text" of the Constitution. IF the court granted the orders sought, so went the argument, it would have engaged in a legislative act. If the Court granted the orders, it would have overstepped the limits of its powers and usurped the role of Parliament contrary to the principle of separation of powers.

The court understood the dispute as raising the following issues for determination:

- 1 The proper approach to constitutional interpretation.
- 2 The constitutional status of the constituent power of the people and its implications for the constitutional review process.
- 3 The constitutional right to equal protection of the law and non-discrimination.
- 4 The scope of the power of Parliament under section 47 of the Constitution of Kenya and whether the provisions of sections 28(3) and (4) of the Review Act were inconsistent therewith.
- 5 The appropriateness of an injunction to stop the review process in the circumstances of the case.

In its decision the court held, *inter alia*-

- 1 That the interpretation of the Constitution should be approached broadly in order to achieve the purposes of the Constitution and particularly in order to ensure that the values and principles of the constitution are respected and promoted.
- 2 That subsections (5), (6) and (7) of section 27 of the Review Act were unconstitutional to the extent that they converted the applicants' right to have a referendum as one of the organs of reviewing the Kenyan Constitution into a hollow right dependent on the absolute discretion of the delegates of the National Constitutional Conference and were accordingly null and void.
- 3 That the Kenyan Parliament has no power under section 47 of the Kenyan Constitution to abrogate the Constitution and enact a new one in its place, its power being limited to amendment of the existing Constitution.
- 4 That the constituent power [the power to make a constitution] belongs to the people of Kenya as a whole, including the applicants.
- 5 That in the exercise of that power, the applicants, together with other Kenyans, were entitled to a referendum on any proposed new Constitution.

### 3. *The Referendum Case*

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<sup>38</sup> Per Justice Kubo, p. 31 last para.

The referendum case arose partly as a result of the majority decision in the Njoya case on the notion of the constituent power of the people and its exercise; and partly from events that unfolded after the decision in Njoya. The most notable of these events was that Parliament had, through the Consensus Act, altered the Draft Constitution that had been adopted by the National Constitutional Conference at Bomas on 15<sup>th</sup> March 2004.

The crux of the Applicants' case was that Parliament had, by amendment to the Review Act and subsequent acts, usurped the role of the people. The usurpation was contrary to the majority decision in *Njoya* and an affront, vitiation, infringement and dilution of the constituent power of the people as expounded in the *Njoya* case. Further, the applicants submitted, Parliament had, in altering the Draft, acted *ultra vires* and contrary to the provisions of *inter alia*, sections 1, 1A, 3, 8 46, 47,70, 84 and 123 (8) of the Kenyan Constitution.

According to the applicants, it was a cardinal rule that the sovereignty and constituent power of the people must be recognized, preserved, respected and adhered to in the making of a new constitution. In This regard, there was no escape from the provisions of sections 1 and 1A of the Kenyan Constitution. The applicants, basing their prayers on the foregoing arguments, sought an injunction to stop the referendum that had been scheduled on the Proposed New Constitution of Kenya. As in *Njoya*, the respondents raised a number of preliminary objections. Most of these touched on the issue of *locus standi*. The court, however, declined to hear the objections, preferring instead to hear the substantive aspects of the application. The respondents' main argument was that constitution making is a political process. Accordingly, the dispute before the court was predominantly political and, in those premises, it was imprudent for the court to intervene. The Court framed, *inter alia*, the following issues for determination:

1. Interpretation of the Constitution vis-à-vis an Act of Parliament;
2. Whether the applicants had *locus standi*;
3. Whether the validity of the proposed New Constitution was dependent on the existing Constitution;
4. The interpretation of the constitution as against an Act of Parliament;
5. The meaning of political question; and
6. Whether there is one set way of making a constitution.

In its unanimous ruling, the court held, *inter alia*:

- 1 That in the exercise of the constituent power of the people, the touchstone of validity is not the existing constitution [or the existing legal order];
- 2 That in a very special way what gave the applicants standing was the great public interest element and the great constitutional law issues raised;

- 3 That there are areas the court has to shy away from, for example on the grounds of the Political Question Doctrine and non-justiciability. However, it is for the court to delineate, define and make a finding on these outer limits of its jurisdiction and no other arm of Government has the powers to do so.

### **III. EMERGING ISSUES IN KENYAN CONSTITUTIONAL LAW**

#### **(A) Judicialisation of politics and the Political question doctrine**

An allusion was made in the preliminary parts of this article to certain extra-legal (extra-constitutional) interests and considerations that may inspire constitutional litigation. An assertion was also made that these "extra-constitutional" factors are seldom pleaded or admitted. The constitutional review cases bring into focus such issues; issues invisible to a casual-eyed bystander. One of these is a phenomenon commonly known as judicialisation or juridification of politics. Judicialisation or juridification of politics is the tendency by the Government and other political actors to refer difficult socio-political issues to the court for determination. It invariably involves veiling real nature and causes of political controversies under the garb of legality. This way, the political actors are able to use the law to achieve political ends. Kenyan politicians have in recent years to shift their battles from the traditional battlefields (political forums) to the courts.

The issues raised in the constitutional review cases were as much political as they were legal. In the *Njoya* case, the respondents dismissed the issues raised by the applicants as misleading the court, frivolous and meaningless. They were "on the whole apprehensive" about the real motive of the applicants coming to court with the matter. They dismissed the applicants as "playing political ping pong."

Might the applicants have been "playing political ping pong," whatever the meaning of the adage? If so, why were they seeking legal redress for an essentially political problem? Why were the respondents apprehensive of the real motive of the applicants? One would have thought that their only motive was to vindicate their rights! These sentiments only serve to reinforce the assertion that once in a while constitutional litigation is informed by factors that are not purely legal. These factors are often political. This fact was not lost to Justice Kubo, who was of the opinion that "the [Referendum] issue is predominantly a political one and calls for a political solution."<sup>38</sup>

The approach by Justice Kubo, which pervades the judgment in the Referendum case, raises an important issue for this discourse. One might wonder whether the learned judges were not abdicating their duties by refusing to adjudicate on the issues merely because they were more political than legal.

Aren't the Courts the ultimate arbiters in all of humanity's infinite disputes? This seems to have escaped the minds of the learned judges. To dismiss a case as merely political is to abdicate that sacred duty.

I have been favoured with views by Kenyan scholars on this aspect of the Kubo ruling. Dr A.O. Adede, a lecturer at the University of Nairobi's School of Law and a member of the defunct CKRC, supported the practice in the United States of America where the Supreme Court of that country declines to hear matters that are more political than legal.<sup>39</sup> Our judges must have drawn inspiration from that practice<sup>40</sup> in respect to the political aspects of the constitutional review cases. The decline to adjudicate on political matters is founded on the Political Question Doctrine.

The interpretation given by our judges to the Political Question Doctrine is worrying. What is a political question? Since the Doctrine is American in origin, an American authority would probably give insight. In American jurisprudence, certain constitutional questions are inherently non-justiciable. These "political questions," it is said, concern matters as to which department of government other than the courts or perhaps the electorate as a whole, must have the final say. With respect to these matters, the American judiciary does not define constitutional limits.

However, Professor Louis Henkin has forcefully criticized the idea that there are parts of the constitution to which the courts must be blind. The political question cases, he argues, do not support such a proposition. In these cases, the Supreme Court concluded or could have concluded that a particular legislative or executive action fell within a constitutional grant of authority and without the scope of any constitutional limitation, and thus the action at issue, because constitutionality proper was open only to political challenge. Alternatively Henkin urges, the court ruled or could have ruled that a particular constitutional restriction was unenforceable because it did not confer standing to sue upon the parties who sought to invoke it or because it required for its enforcement remedies which were judicially unmanageable or equally unwise. Accordingly, argues Henkin, no one should accept lightly the proposition that there are provisions of the Constitution which the courts may not independently, interpret, since it is plainly inconsistent with *Marbury v. Madison's* basic assumption that the Constitution is judicially declarable law<sup>41</sup>

In American law<sup>42</sup>, courts can dismiss a matter as involving a political question if (1) the American Constitution has committed decision-making on the matter

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<sup>39</sup> Interview with Dr Adede in September 2005.

<sup>40</sup> The Referendum ruling actually confirms this.

<sup>41</sup> LH Tribe, *American Constitutional Law*, 2<sup>nd</sup> Edition at p.97. 2000: Foundation Press Quoted in the Referendum Judgment at p. 143 last para.

<sup>42</sup> [http://en.wikipedia.org/wiki/Political\\_question](http://en.wikipedia.org/wiki/Political_question) (last accessed on 23 January 2006).

to another branch of the federal government; (2) there are inadequate legal standards for the court to apply; or (3) the court feels it is prudent not to interfere. The rationale for the doctrine is the American Judiciary's desire to avoid plunging into conflicts between branches of the federal government. It is justified by the notion<sup>43</sup> that some questions are best resolved through the political process i.e. voters approving or correcting the challenged action by voting for or against it.

From the foregoing, it is clear that even in the United States the Political Question Doctrine is invoked within narrowly defined limits. I am not sure whether our justices in the constitutional review cases had assured themselves that the three prerequisites discussed in the foregoing paragraph had been satisfied. First, no evidence was tendered to the effect that the Kenyan Constitution had removed the issues of the referendum, constituent power of the people or constituent assembly from the cognizance of the Kenyan court. There was no evidence that the Kenyan Constitution had assigned the determination of questions arising from these matters to another branch of Government.<sup>44</sup> As for the second requirement, no one can say with any degree of seriousness that there were no legal standards for the court to use. In the Referendum Case, the legal standards for adjudicating on the issues had already been defined in the Njoya ruling. A close scrutiny of the majority ruling in the Referendum Case reveals that the only reason the dispute was dismissed as involving the Political Question Doctrine was that the court felt imprudent to intervene.<sup>45</sup> This is a very narrow view of the doctrine. Though the court alludes to the maintenance of harmony among the various arms of Government, a keen reader fails to see how an adjudication of the case on the merits would have undermined such harmony<sup>46</sup>.

With respect the court in the Referendum Case stretched the political question doctrine to hitherto unknown and unacceptable limits. Even in America, from where the doctrine was borrowed, it is not universally accepted as a sound judicial approach to issues. American critics of the Doctrine argue, for instance, that it has little or no basis in the text of the American Constitution and is only used by courts to shirk responsibility for deciding difficult questions.<sup>47</sup>

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<sup>43</sup> Not strictly legal.

<sup>44</sup> On the contrary, the Kenyan High Court is established as a court with unlimited original jurisdiction in civil and criminal matters and such other jurisdiction as may be conferred on it by law. Further, the High Court has a special jurisdiction to determine all matters relating to the interpretation of the Constitution and the protection of the fundamental rights and freedoms of the individual. See, *inter alia*, sections 60, 67 and 84 of the Kenyan Constitution.

<sup>45</sup> The *Referendum case* at p. 58.

<sup>46</sup> The years of 2003-2005 saw the executive arm of the Kenyan Government disregard many court orders. Most of these orders related to disputes which were essentially political in nature-especially on the vexed and perennial land question.

<sup>47</sup> [http://en.wikipedia.org/wiki/Political\\_question](http://en.wikipedia.org/wiki/Political_question) (last accessed on 23 January 2006).

The Court was of the view that the process of generating and assembling constitutional proposals and the giving of consent to them was a "a political [one] ... The court is not equipped to adjudicate on this part of the process under the political question doctrine principle since it is not justiciable."<sup>48</sup>

Although the process might have been political, a keen reader wonders whether this removed it from the scope of justiciability, another largely American concept borrowed by the court. What is justiciability? Lawrence H. Tribe<sup>49</sup> states that in order for a claim to be justiciable as an Article II<sup>50</sup> matter, it must present a real and substantial controversy which unequivocally calls for adjudication of the rights asserted. In part, the extent to which there is a real and substantial controversy is determined under the doctrine of standing,<sup>51</sup> by an examination of the sufficiency of the stake of the person making the claim, to ensure the litigant has suffered an actual injury which is fairly traceable to challenged action and likely to be redressed by the judicial relief requested. The substantiality of the controversy is also in part a feature of the controversy itself. Justiciability calls for an examination of the necessary to ensure that courts do not overstep their constitutional authority by issuing advisory opinions. The ban on advisory opinion, according to Tribe,<sup>52</sup> is further articulated and reinforced by judicial consideration of two supplementary doctrines. The first is that of ripeness which requires that the factual claims underlying the litigation be concretely presented and not based on speculative future contingencies. The second is mootness, which reflects the complementary concern of ensuring that the passage of time or succession of events has not destroyed the previously live nature of the controversy. Finally related to the nature of the controversy is the political question doctrine, barring decision of certain disputes best suited to resolution by other governmental actors.

From the foregoing, a number of observations are noteworthy. First, matter is justiciable if it is capable of being settled by a court of law. In order for an issue to be so capable of being settled by a court of law, there must be an actual controversy between the parties-that is to say that the legal right in issue must have been claimed by one party and denied by the other.<sup>53</sup> It is hard to say that the Referendum Case involved no such controversy, legally, politically or otherwise. The question as to whether Parliament had usurped the people's

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<sup>48</sup> The *Referendum Case*, at p. 83.

<sup>49</sup> See Tribe, *supra* note 41 at p. 68-69.

<sup>50</sup> Article II of the Constitution of the United States of America.

<sup>51</sup> The issue of standing has always been a controversial one in Kenyan jurisprudence. It arose in the constitutional review cases. In the *Referendum Case*, the court was of the view that the special nature of the litigation before it conferred locus on the applicants. That "special nature of the litigation" can confer standing on the litigants is a novel development in the court's grasp of the concept of standing.

<sup>52</sup> Tribe, *supra* note 41.

<sup>53</sup> <<http://en.wikipedia.org/wiki/Justiciability>>. (Last accessed on 23 January 2006). See *Uskrat v. United States*, 219 U.S. 346 (1911).

constituent power touched on the infringement of a fundamental and inalienable right. It is difficult to accept the court's finding that the issues raised by the applicants were merely hypothetical and academic.

Secondly, in order for a matter to be justiciable, the plaintiff must have standing to sue in the proceedings. In order to have standing, (i) the plaintiff must be a party who has been or will be harmed if no remedy is provided; (ii) the Defendant must be a party to whom the harm can be traced; and (iii) the court must have the ability to provide a remedy that will relieve the harm to the plaintiff. Further the question must be neither unripe nor moot. An unripe question is one for which there is not yet at least a threatened injury to the plaintiff. A moot question is one for which the potential for an injury to occur has ceased to exist.

As regards ripeness, the Referendum court was unwilling to address the requirement in the Constitution of Kenya Review (Amendment) Act for security of costs (Ksh. 5 million) by any applicant intending to challenge the results of the referendum. The Applicants' contention was that since fifty six percent of Kenyans lived below the poverty line, this clause would deny them access to justice contrary to the provisions of the Constitution on the right to equal protection of the law. It is hard to see how the court arrived at the finding that the matter was unripe. Was there not at least a threat of infringement of this right? Although the judgment of the referendum court does not say so, the court again opted for a narrow and legalistic approach on the issue of discrimination<sup>54</sup>:

Counsel went further to consider section 82 of the Constitution which provides protection against discrimination. It is argued that poverty is not one of the categories set out under that section.<sup>55</sup> On this issue, it was finally submitted that the claim is not ripe for adjudication because the right has not yet been infringed. ...The applicant's attention was also drawn to the provisions of the Civil Procedure Act<sup>56</sup> on pauper briefs if he cannot afford the costs.<sup>57</sup>

Although the Referendum court found most of the issues unjusticiable and moot,<sup>58</sup> it nonetheless found that the applicants had standing in the

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<sup>54</sup>It is interesting to note that both the Njoya and Referendum courts, though agreeing on a liberal and purposive approach to constitutional interpretation, chose to interpret the prayers touching on discrimination narrowly. It is difficult to explain this strange similarity in the two judgments.

<sup>55</sup>The listed categories are race, tribe, place of origin or residence or other local connection, political opinions, colour, creed and sex.

<sup>56</sup> Chapter 21 of the laws of Kenya at Order XXXII (subsidiary Legislation).

<sup>57</sup> The *Referendum Case* at p. 61.

<sup>58</sup> *Ibid* at p. 83.

proceedings.<sup>59</sup>The inconsistencies in the court's analysis of the political question doctrine are demonstrable from its finding that the current government was elected by the electorate on the promise to bring into existence a new constitution<sup>60</sup>

How did the court establish that the current Government had been elected with a mandate to bring into existence a new constitution?<sup>61</sup> Wasn't that a political question? It appears that the court's application of the doctrine was selective. Having found the whole process political and therefore outside the purview of the court's jurisdiction, the referendum court nonetheless goes into great lengths to show that the constitutional review process was not flawed. <sup>62</sup>By finding that the process was not flawed, the Court contradicts its earlier claim of being "ill equipped"<sup>63</sup> to adjudicate on the sufficiency or legitimacy of the process.

We need to check the adoption and domestication by our courts of the American Political Question Doctrine.<sup>64</sup> Reading through the Referendum Case, one discerns a predetermined inclination to expediency as opposed to a determination of underlying legal and philosophical issues. Though this is manifestly sensible for a judiciary with a huge backlog of cases, the legal and theoretical aspects of the case should have been addressed rather than dismissed. It is Justice Ringera's willingness to delve into the philosophical foundations and underlying postulates to the issues in Njoya that persuaded many critics that the constituent power of the people was not just academic.

We owe it to the majority ruling in Njoya that today Kenyans can assert their sovereignty against State institutions. Suppose the issue had been dismissed as political? Our jurisprudence would not have developed the way it has done in the last two years. Most (if not all) constitutional law disputes are political in nature. This flows from the political character of the constitution –the constitution is not merely a legal document. It is a political document as well. I do not know whether the court in the Referendum Case, or Justice Kubo in the Njoya case, appreciated that the constitution is both a legal and a political

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<sup>59</sup> *The Referendum Case*, at p. 174. In the *Njoya case*, in one of the inconsistencies in his judgment, Justice Ringera had found that the Applicants lacked *locus* to challenge the composition of the National Constitutional Conference. For

<sup>60</sup> *The Referendum Case* at p. 86.

<sup>61</sup> The issue of the mandate of the current Government is not one over which courts may take judicial notice under section 60 of the Evidence Act (Chapter 80, Laws of Kenya). It is difficult to appreciate how the court came to determine this issue since it was not raised by the parties.

<sup>62</sup> The court ultimately arrived at this conclusion in its summation of the judgment. See the *Referendum Case*, p.173.

<sup>63</sup> *Ibid*, at p. 83. Justice Kubo took a similar approach in the *Njoya case*, resulting in a similar contradiction. See the Judgment of Justice Kubo, at p. 30-31.

<sup>64</sup> For an analysis of the influence of English Jurisprudence in Kenyan constitutional adjudication, see Muthomi Thiankolu, 'The Njoya Case: Emerging Issues in Kenyan Jurisprudence,' LL.B. dissertation, University of Nairobi (2005), at p.32. (unpublished).



charter. In these premises, the jurisdiction to interpret the constitution necessarily extends to adjudicating on political issues. The foregoing, notwithstanding, there are certain extra-legal and quasi-legal disputes which the court, as a matter of sound judicial practice, should not entertain. With respect, however, I am of the view that the constitutional review cases did not involve any such issues.

The referendum court's approach to the political question doctrine dealt a major jolt to the hitherto emerging trend of juridification of politics. Prior to the Referendum case, juridification of politics was most discernible in Njoya-though the stage for juridification had already been set by earlier cases.<sup>65</sup> The Referendum court may have been inspired by a desire to check on the Ringera approach which opened up a wide flood gate for quasi-legal and political issues. However, rather than bridle the excesses of the Ringera approach, the Referendum court went to the opposite extreme.

### **(B) The Constituent power of the people and the locus of sovereignty**

Aristotle posed the question as to the repository of the sovereign power of the state. Where ought the sovereign power of the state to reside? With the people? With the propertied classes? With the good? With one man, the best of all the good? With one man, the tyrant? There are objections to all these.<sup>66</sup>

These questions are important as regards the constitutional review cases, more particularly with regard to the notion of the constituent power of the people, the nub of the disputes in both cases. The notion of the constituent power of the people rekindled the old, somewhat antiquated debate on the meaning and locus of sovereignty in a legal system. In the both cases, the debate on the constituent power of the people revolved around the true meaning and scope of section 1 of the Constitution, which declares that Kenya is a sovereign Republic.<sup>67</sup>

Before delving into this aspect of the discourse, some insights into the concept of sovereignty must be given.

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<sup>65</sup> E.g. the KACA case and the Goldenberg cases, among others. For further insights on these cases and juridification, see K Mungai, 'Using the Courts to Solve Political Problems,' *37 Lawyer*, September 2001, at p. 25.

<sup>66</sup> Questions posed by Aristotle. See *Encyclopedia britannica*, vol. 17, at p. 310. 1957 Chicago, Encyclopedia Britannica, Inc. 1957

<sup>67</sup> Incidentally, this provision was reproduced in article 4 (1) of the Draft Constitution of Kenya, adopted by the National Constitutional Conference on 15<sup>th</sup> March 2004, which was prepared by CKRC - the second respondent.

### i. The concept of sovereignty<sup>68</sup>

What is sovereignty? The etymology of the word “sovereignty” traces it to Old French *soveranaité*, from Medieval Latin *supremitas*, or *suprema potestas* (“supreme power”).<sup>69</sup> In modern parlance, the term may be understood to refer to any one or more of several concepts, i.e. internal sovereignty, external sovereignty, legal sovereignty, political sovereignty, popular sovereignty (in the sense that all power derive from the people) and limited sovereignty.<sup>70</sup> In this article, I shall confine myself to only one of the several versions of the term, popular sovereignty.

After Aristotle, the notion of sovereignty rarely preoccupied the minds of legal scholars. The renaissance period rekindled intellectual enthusiasm on the concept. Jean Bodin was arguably the first scholar during this period to formulate the theory of sovereignty.<sup>71</sup> Bodin’s conception of sovereignty was that it existed in some determinate person or persons who had the power to promulgate law. Such person or persons, argued Bodin, was above the law: The sovereign, according to Bodin, was not in any way subject to the commands of another. The sovereign could make and abrogate the laws of the land.<sup>72</sup> Who was the sovereign at the time?

In every independent community governed by law there must be some authority, whether residing in one person or in several, whereby the laws themselves are established, and from which they proceed. And this power, being the source of law, must itself be above the law; not above duty and moral responsibility as Bodin carefully explains, but above municipal ordinance of the particular state—the positive laws in the modern phrase—which it creates and enforces. Find the person or persons whom the constitution of the state vests with such authority, under whatever name, and you have found the sovereign. Sovereignty is power over citizens and subjects, itself not bound by the law.<sup>73</sup>

These views have informed notable jurists and scholars and, as an analysis of the constitutional review cases reveals,<sup>74</sup> continue to inform some legal minds up to date. An alternative view of the concept of sovereignty, particularly as

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<sup>68</sup> A detailed exposition of the concept of sovereignty is beyond the scope of this discourse. Consequently, the reader is advised to read, *inter alia*, the works cited in this part of the discourse.

<sup>69</sup> *Britannica*, *supra* note 66.

<sup>70</sup> *Ibid.*

<sup>71</sup> See PB Mihyo, *The Development of Legal Philosophy* (Nairobi: Kenya Literature Bureau, 1977) at p. 58.

<sup>72</sup> J Bodin, *The Six Books of the Republic* (trans. by J Toodey) in Lloyd, *Introduction to Jurisprudence*, (London: Stevens & Sons, 1959), p. 122.

<sup>73</sup> Pollock, “*Politics*,” pp CS-CB, quoted in H.F. Jolowicz, *Lectures on Jurisprudence* (London: Athlone Press, 1963), p. 73.

<sup>74</sup> See the *Referendum case* on promulgation.

regards its locus, is found in Jean-Jacques Rousseau's *Social Contract*.<sup>75</sup> Rousseau located sovereignty in the people's will. His theory posits that sovereignty derives only from the people's will. This will, apart from being absolute, is inalienable.<sup>76</sup> The gist of Rousseau's theory is that all governmental power, including law-making power, derives its authority from the people. It is subject to the people's general will. The governor's authority/right to govern does not derive from divine source, nor does it naturally inhere in him.

Though appealing on a quick glance, the Social Contract theory is quite problematic. Who are the parties to the contract envisioned in the scheme? The state and the people? Parliament and the people? The President and the people? I can only say that whichever way the theory may be understood, the general citizenry (the people?) is an indispensable part of the equation. Even at this point, problems still persist. Which people would be the parties to the contract? Persons who are *sui juris*? The voters? The term "contract" might be more apt in the realm of private law rather than in constitutional law which is a branch in public law. The Constitution (the basic document upon which the modern State and the powers, duties and obligations of governments are founded) is of utmost relevance to all categories of humans – children, lunatics, persons held in custody *etcetera*. In ordinary contract law, the contractual capacity of some of these persons is greatly limited. It would be erroneous to suppose that a constitution founded on Rousseau's Social Contract theory does not confer rights, benefits and obligations on these persons. One might therefore be pardoned for suggesting that Rousseau's *Social Contract* theory is of little significance in contemporary constitutional theory.

In spite of the foregoing paragraph, some questions still swirl in the mind of a keen reader of the judgments in the constitutional review cases. Are the inclinations of Kenyan lawyers and Judges towards Rousseau's ideas? Do Rousseau's predecessors persuade them? These questions are tackled in the analysis of the notion of the constituent power below:

## ii. The constituent power of the people and the locus of sovereignty

In the constitutional review cases, the applicants' complaints against the transgression, vitiation and dilution of the constituent power of the people revolved around the concept of popular sovereignty, although this aspect of the case was not comprehensively articulated. The gist of the Applicants'

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<sup>75</sup> See generally J. Rousseau, *The Social Contract*. 1969: Penguin USA.

<sup>76</sup> Ibid at p. 69. Plato propounded the social contract theory more than a millennium before Rousseau was born. See Generally Plato, *Republic*, Book II. The theory was later advanced by, *inter alia*, Richard Hooker, Hugo Grotius (both of whom believed that once the contract was made it was binding forever), John Locke and Johannes Althusius. It was Althusius who gave it a revolutionary tune by locating sovereignty in the people, though credit went to Locke and Rousseau. For further insights on this, see Mihyo, *supra* note 71 at p. 61 *et seq*.

argument was that the ultimate sovereignty of the Kenyan Republic, expressed in section 1 of the Constitution, lay in the people. It did not lie in the State or any of its organs, including Parliament.

The notion of the constituent power of the people connotes popular sovereignty, the kind of sovereignty advanced by Jean-Jacques Rousseau. What is the constituent power of the people? It is a power to constitute a frame of government for a community, and a constitution is the means by which this is done. It is "...a primordial power, the ultimate mark of a people's sovereignty."<sup>77</sup>

As stated in the earlier parts of this article, the respondents in the Njoya case were of the view that the notion of the constituent power of the people was destitute of the elements of legality and justiciability. The object of this article is to demonstrate the philosophical and jurisprudential inclinations of Kenyan judges and lawyers in matters pertaining to constitutional interpretation and construction. How do their statements on the juridical status of the constituent power demonstrate these inclinations? We start with Justice Benjamin Kubo. The authority he adopted on the meaning of sovereignty is not very different from the views of Bodin, who says that "In any state sovereignty is vested in the institution, person or body having the ultimate authority to impose law on every one else in the state and the power to alter any pre-existing law."<sup>78</sup>

Although Justice Kubo does not state it, he finds the Kenyan Parliament to be the kind of institution or person or body described in the works of Bodin and Pollock. His finding on its powers under section 47 reinforces the point. According to Justice Kubo, if Parliament could alter one provision, it could alter more; and if it could alter more, it could alter all.<sup>79</sup>

The approach by Justice Kubo puts Parliament above the Constitution.<sup>80</sup> It is a denial of any limitations, express or implied, on Parliament's legislative power. Put another way, Justice Kubo's pronouncements are a repudiation of the idea of popular sovereignty. The amazing contradiction in his argument is that he found the constituent power of the people (and by extension, the notion of popular sovereignty) to be "*a residual collective power of Kenyans as a sovereign people.*"<sup>81</sup> If the people retain a residual power after the social contract that the

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<sup>77</sup> BO Nwabueze, *Presidentialism in Commonwealth Africa*, 1974 New York St. Martin's Press L. Hurst & Company, 1974), at p. 392.

<sup>78</sup> Kubo, at p. 30.

<sup>79</sup> *Ibid*, at p. 15.

<sup>80</sup> After finding the Kenyan parliament to be supreme, though tacitly, the learned Judge creates a contradiction in the Constitution. This is because the idea of an all-powerful and unlimited parliament is irreconcilable with the supremacy of the Constitution declared in section 3.

<sup>81</sup> Kubo, at p. 29, last para (My emphasis).

constitution is supposed to textualise, then ultimate sovereignty must lie in the people!

Professor Ghai opines that the notion of the constituent power of the people is extra-legal. Accordingly, it has no legal implications. According to Ghai, it may be all right for political scientists to recognize the existence of extra-constitutional constituent power, but for judges it is dangerous ground. The judge is a non-elected, fundamentally non-accountable (*sic*), officer sworn to uphold the Constitution and the law [as it is]. If the judge "starts to apply the constituent power of the people, he or she is stepping into essentially non-legal territory."<sup>82</sup>

Professor Ghai's arguments are dispelled at first instance. He ignores the fact that some countries, including African countries, have at one time or another provided for the constituent power of the people in their constitutions.<sup>83</sup> The description of the notion of the constituent power of the people as extra-constitutional is not, therefore, entirely correct. Ghai's denial of the notion of the constituent power of the people looks more pretentious after a passing glance at the provisions of his,<sup>84</sup> nay, CKRC's proposed Draft Constitution. The Bomas draft provided that all sovereign authority belongs to the people of Kenya<sup>85</sup>

Justice Ringera was of the view that the notion of the constituent power of the people was not only real but also that it had juridical implications. The referendum court was of the view that the constituent power of the people was higher than the apex of the legal system. Accordingly, its exercise could not be curtailed by any of the rules of the existing legal system. The court was of the view that it could not injunct, stop or restrain any of the processes leading to the referendum vote. The exercise of judicial power to injunct or to stop or to restrain people from exercising their constituent power would, in the court's view, constitute usurpation of the people's power and a serious contradiction, in that judicial power is exercised on behalf of the people. This being so,

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<sup>82</sup> Y Ghai, 'An Analysis of the Decision in Re: Constitution of Kenya, *Njoya v AG*,' April 2004 at p. 4.

<sup>83</sup> Article 1 of the Constitution of Ghana, 1960, for instance, provided that "the powers of the state derive from the people, as the source of power and the guardians of the state, by whom certain of those powers are now conferred on the institutions established by the constitution and who shall have the right to exercise the remainder of those powers, and to choose their representatives in parliament now established".

<sup>84</sup> Yash Ghai was, at the time of the institution of the *Njoya* case, Chairman of the Constitution of Kenya Review Commission (CKRC), the body that had authored the Draft Constitution the subject matter of the dispute in the *Njoya* case.

<sup>85</sup> See Article 1(1) of The Draft Constitution of Kenya 2004, adopted by the National Constitutional Conference at Bomas on 15<sup>th</sup> March 2004. Also reproduced in Article 1(1) and expounded in (2) of the Proposed New Constitution of Kenya, popularly known as the "Wako Draft" (Kenya Gazette Supplement No. 63 of 22<sup>nd</sup> August 2005), the subject matter of the proceedings in the *Referendum Case*.

judicial power could not be exercised against them. The people should not remain pegged to an existing constitution<sup>86</sup>

However, it is in Justice Ringera's ruling that we got the first exposition of the sanctity and juridical superiority of the constituent power of the people. His pronouncements are a firm declaration of the concept of popular sovereignty.

With respect to the juridical status of the concept of the constituent power of the people, the point of departure must be an acknowledgment that in a democracy, and Kenya is one, the people are sovereign. The sovereignty of the Republic is the sovereignty of its people...All governmental power is exercised on behalf of the people. The second step is the recognition that the sovereignty of the people necessarily betokens that they have a constituent power.... That power is a primordial one. It is the basis of the creation of the constitution and it cannot therefore be conferred or granted by the constitution. Indeed it is not expressly textualized by the constitution and, of course, it need not be...Lack of its express textualisation is not however conclusive of its want of juridical status.<sup>87</sup>

Like Rousseau, Justice Ringera was of the view that the locus of the sovereignty of the Republic lies in the people. Borrowing from Justice Ringera, and probably inadvertently, the Referendum court held that the juridical status of the constituent power of the people must necessarily be presumed. The amending power must be exercised in accordance with the existing constitution; the touchstone of validity in respect of the amending power is the existing constitution. On the other hand the touchstone of validity in respect of the constituent power is the people. There is no touchstone of validity in respect of constituent power "because it is primary and assumed or presumed to exist and always vested in the people."<sup>88</sup>

The question might be asked at this point as to who was right in the constitutional review cases on the locus of the sovereignty declared in section 1 of the Kenyan Constitution. The simple answer is "none!" The debate on the locus of sovereignty has never been conclusively settled. My observation is that the Respondents' views and those of their sympathizers were more removed from the contemporary perception of sovereignty. As Nwabueze puts it, "*it is not now questioned that in any political community, sovereignty in all its three aspects belongs to the people.*"<sup>89</sup>

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<sup>86</sup> The *Referendum Case*, at p. 87 para 2.

<sup>87</sup> Ringera, pp. 40-41.

<sup>88</sup> The *Referendum case*, at p. 72 last para.

<sup>89</sup> Nwabueze, *supra* note 77 at p. 392. My emphasis.

### iii. The constituent power of the people and Parliament's legislative power

The critics of the *Njoya* ruling<sup>90</sup> were not incensed by the finding on the notion of the constituent power of the people as such. They were incensed by the Court's view that the notion necessarily limited Parliament's legislative power. Section 30 of the Kenyan Constitution vests the legislative power of the Republic in Parliament, which consists of the President and the National Assembly.

Section 47 vests on Parliament the power to alter the Constitution. In the *Njoya* case, the applicants argued that the power of alteration did not include the power to abrogate the Constitution and enact a new one in its place. The reasons for this argument, as explained in the earlier parts of the article, were manifold. For purposes of clarity and lucidity of thought, two of the arguments are recapitulated in here. First, according to the applicants, a textual or literal reading of section 47 revealed that no such power was conferred on Parliament.<sup>91</sup> Secondly, and most important, the sovereign constituent power to make a Constitution reposed in the people as a whole. Hence there was a difference between the *power to amend* the Constitution and the *power to make* a new one. The former was vested in Parliament and the latter in the people themselves.

The *Njoya* Court's finding on the notion of the constituent power of the people dispelled Justice Kubo's and the respondents' supposition that the Kenyan Parliament has the unfettered authority to impose law on every one else in the State and the power to alter existing law. The rationale given by Justice Ringera is quite insightful:

The logic goes this way. Since (i) the constitution embodies the people's sovereignty; (ii) Constitutionalism betokens limited powers on the part of every organ of Government; and (iii) the principle of the supremacy of the Constitution precludes the notion of unlimited powers on the part of any organ; it follows that the power vested in Parliament by sections 30 and 47 of the Constitution is a limited power to make ordinary laws and amend the constitution: no more no less.<sup>92</sup>

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<sup>90</sup> There have been very few critics of the Referendum ruling. This is not necessarily because the ruling was not as controversial but mainly because *Njoya* had paved the way and also because the nation was more preoccupied with the referendum than any other thing. *Njoya* had its unique share of unprecedented postulates, which made it amenable to a lot of commentary.

<sup>91</sup> The issue found its way into the *Referendum Case*—albeit in a different version. In the *Referendum Case*, the Applicants grievance was that Parliament had usurped the people's constituent power through amendments to the Bomas Draft. The Referendum court dismissed the argument, holding that Parliament's role, and indeed the Government's role had all along been facilitative.

<sup>92</sup> Ringera, at p. 71.

The Ringera view cannot be reproached, unless we deny the existence and juridical aspect of the constituent power of the people. An alternative holding would make the notion of the constituent power of the people a sham. It would make it, to use the language of the respondents in *Njoya*, a fanciful notion. Such holding would relegate the notion to the realm of what Professor Ghai refers to as political science.<sup>93</sup> The critics of the *Njoya* ruling on Parliament's powers may have failed to appreciate that the notion of parliamentary sovereignty or supremacy is English and has no place in the Kenyan legal system.<sup>94</sup>

#### iv. Exercise of the constituent power of the people

Since the people indeed have a constituent power,<sup>95</sup> how may such power be exercised? Is it through a referendum? A constituent assembly? Both? How may a people exercise their sovereignty in the area of constitution making? The *Njoya* Court was emphatic that implicit in the concept of the constituent power of the people was a constituent assembly and a compulsory (*sic*) referendum. If the process of constitutional review is to be truly people-driven, "Wanjiku" (the mythical person)<sup>96</sup> must give her seal of approval, her very imprimatur to the proposed constitution. If it is to have her abiding loyalty and reverence, it must be ratified by her in a referendum... The exercise of the constituent power of the people requires nothing less than a compulsory (*sic*) referendum.<sup>97</sup>

Although Justice Ringera explained the foregoing propositions on logic, they have no force of logic, however persuasive they might be. The term "logic" is defined in *Black's Law Dictionary*<sup>98</sup> as the science of reasoning, or of the operations of the understanding which are subservient to the estimation of evidence. The term includes both the process itself of proceeding from known

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<sup>93</sup> Ghai, *supra* note 32 at p. 4 para 3.

<sup>94</sup> The notion of parliamentary sovereignty nonetheless has its manifestations under the Kenyan legal system. One, Parliament may amend the Constitution pursuant to section 47. Secondly, section 30 of the Kenyan Constitution vests the legislative power of the Republic on Parliament. However, unlike its English counterpart, the Kenyan Parliament's powers are limited to the extent that the Constitution is the supreme law of the land (section 3) and also to the extent that Kenyan courts can declare as invalid such of Parliament's enactments as are inconsistent with the constitution.

<sup>95</sup> All the three judges in the *Njoya* court found the existence of the constituent power of the people real, with Justice Kubo differing on the mode of its enjoyment or enforcement. The works of the various scholars cited in the earlier parts of this Chapter (such as Rousseau and Locke) also impel a conclusion in favour of the fact of its existence. Logically, there is nothing that could be cited as militating against holding that the people indeed have such a power.

<sup>96</sup> Page 10 of the judgment in the *Referendum Case* has provisions on the common Kenyan: "For those who do not know, Wanjiku is a popular girl name among the Agikuyu sub-nation of Kenya, and legend has it that she was one of the founding daughters of the house of Mumbi, the progenitor of the Agikuyu. All said, the name 'Wanjiku' in the understanding of Kenyans, represented the ordinary Kenyan." Is the ordinary Kenyan a female? I would have tackled this in a paper on feminist jurisprudence.

<sup>97</sup> Ringera, p. 43-47.

<sup>98</sup> *Black's Law Dictionary*, Sixth edition. 1990 Saint Paul, Minnesota, U.S.A. West Group.



truths to unknown, and all other intellectual operations, in so far as auxiliary to this

There is no basis, logically, for a contention that constitution making can only be performed by representation. Even assuming that representation is a logical prerequisite in the constitution making process, it is not necessarily logical that such representation must be through a constituent assembly. Further, it is not necessarily logical, and indeed it is not, that the constitutional proposals having been made must be ratified through a referendum.. There are alternative ways of making a constitution<sup>99</sup> and, arguably, exercising the constituent power of the people. This brings us to the last fault in Ringera's logic. Logic is, as the definition given above shows *subservient to the estimation of evidence*. The Ringera approach disregards historical evidence of innumerable constitutions in the world, including Kenya's, which were not the products of the process he is propounding. The alternative ways of constitution making include, *inter alia*, National Conventions<sup>100</sup> and Constitutional Conferences.<sup>101</sup> The controversy created by Justice Ringera's insistence on both a constituent assembly and a referendum in exercise of the constituent power of the people brought bothered the Referendum court:

The majority judgement by Justice Ringera and Lady Justice Kasango were in our interpretation only unanimous on the need to have a referendum. However, in the Ringera judgment the alternative of a Constituent Assembly is also mentioned...However as stated above the majority judgment was only unanimous on the need for a referendum. This is the view (which) this court shares and therefore in our circumstances the option of a constituent assembly is unnecessary.<sup>102</sup>

A keen reader of the Ringera judgment can only conjecture the criteria he used in declaring a referendum and constituent assembly as the twin and only avenues for making a constitution. Given the many alternative ways of making a constitution, compelling reasons should have been given as to why these two methods enjoyed greater sanctity. As Justice Kubo explains:

I find this (constituent assembly) to be one of the alternative modes of exercising constituent power. It is not provided for in our constitution or in ordinary law... If Kenyans want to have it as their mode of constitution making, I am of the considered view that it has to be

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<sup>99</sup> On the various ways of making a constitution, see GK Kuria, 'Which Institutions Should Kenya Use in Re-Writing the Constitution?', in K Kibwana et al, eds., *In Search of Freedom and Prosperity* (Nairobi: Claripress, 1996), at p. 426.

<sup>100</sup> Like that of the USA in 1787.

<sup>101</sup> Kenya held such in 1960, 1962 and 1963. However, these were convened by the outgoing colonial power and thus were not an exercise of the popular sovereignty of Kenyans.

<sup>102</sup> *The Referendum Case*, at p. 75 last para.

expressly provided for. It cannot be inferred, as the question will immediately arise as to why it should be impliedly given preference over other available alternatives.<sup>103</sup>

### (C) Constitutional Values and Principles

The Referendum court barely heard any submissions on constitutional values and principles.. The court was nonetheless exhorted to “rise to the challenge of constitutional interpretation of constitution making and give a way, a lead, in making a people friendly constitution and deliver the people from the current minefield of constitution making.” To do otherwise, submitted the applicants, would cause our young, emerging democracy to stagnate too early in its growth as ours was an evolutionary system. The constitution was like a living tree, it must be watered with a pragmatic and practical and realistic interpretation.<sup>104</sup> On the other hand, the Njoya court, and particularly Justice Ringera, was emphatic on the assertion that the Constitution embodies certain values and principles. These principles were so dear that the rules of interpretation had to be changed.

Does a constitution, absent express textualization, actually embody the kind of values and principles the Judge was alluding to?. According to Nwabueze, any informed and comprehensive view of a constitution must regard not only its letter but also the organizing but unexpressed ideas of the society, in the context in which the constitution is set and operates. These ideas and postulates are not dictates of expediency, but values of general validity and acceptance within the society. The function of the judge is to formulate and articulate them, and to infuse them with meaning and vitality.<sup>105</sup>

Justice Ringera’s insistence on the existence of fundamental values and principles in the constitution was probably inspired by the above views. Nwabueze postulates that the judicial function necessarily involves some aspects of policy –making.<sup>106</sup> He views a constitutional court, *inter alia*, as a fashioner of values and principles. The role of a constitutional court, according to Nwabueze, is necessarily policy-oriented. It is not often that such a court’s decisions on the constitutionality of governmental measures will be a product of a mechanical application of, or logical deductions from, the text of the constitution. Very often, the court’s decision on constitutionality involves a choice between a value embodied in the challenged governmental measure and

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<sup>103</sup> Kubo, p. 30, last para.

<sup>104</sup> See the *Referendum Case*, pp. 27-32.

<sup>105</sup> BO Nwabueze, *Judicialism in Commonwealth Africa: The Role of the Courts in Government* (New York: St. Martin’s Press, 1977) at p. 139.

<sup>106</sup> *Ibid* at p. 138.

another in competition with it. In making the choice, the text of the constitution may afford but little assistance.<sup>107</sup>

Most people would probably accept without hesitation the proposition that the Constitution embodies certain values and principles. However, the Ringera approach to this aspect of the Constitution left many unanswered questions. In the first place, he borrowed his assertions from a judgment rendered on the interpretation of the Tanzanian Constitution. The Tanzanian constitution expressly provides for these values and principles. . The Kenyan Constitution is silent on them. So how did the judge determine that these also exist in the Kenyan Constitution? Ringera went further and identified the principles embodied in the Kenyan Constitution as including, *inter alia*, constitutionalism, equality of all citizens and the enjoyment of the Fundamental Rights and Freedoms. Although these are values which every lawyer properly so called ascribes to, the approach adopted by the Judge is a dangerous one and unacceptable under the common law tradition. If these values are not textualized in the Constitution, then a methodology should have been given on how the learned Judge settled on them. This is the only way to ensure the accountability of the judiciary and ensure stability and predictability in the development of the law.

The Ringera approach exposes the court process to the danger of individual judges reading their own subjective value judgments into the Constitution. Such an eventuality would not only be impermissible but also tragic for the rule of law. According to Nwabueze, the principles they fashion are not the product of the mere personal will or the creation of the judges; they are rather an expression of the moral and ethical presuppositions of the society, the fundamental postulates that underlie the political community and its constitution, operating to control the life of its members and to limit the powers of its leaders.<sup>108</sup>

The particular values and principles propounded by Justice Ringera would undoubtedly pass the test of universality and objectivity. However, his approach is objectionable. If judges were let loose to imply things into the Constitution without giving the methodology and reasons and for their implication, our courts might end up having more power and control over public life than is constitutionally permissible.<sup>109</sup> Judges should be wary of hasty willingness to formulate what they perceive to be the fundamental values and principles of a constitution:

The judge is not of course like an oracle bellowing out divined prescriptions from its deep recesses. He is simply a product of his

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<sup>107</sup> Ibid.

<sup>108</sup> Ibid.

<sup>109</sup> Ghai, *supra* note 82.

society and its culture, an agent whose training and work have endowed him with wisdom and learning in the traditions, philosophy and ethics of his people...the judge should continually try to deepen his insight by immersing himself in the history and the changing conditions of his community and in the thought and the vision of the philosophers and the poets.<sup>110</sup>

The Kenyan society may not be as homogeneous as the society of the judge addressed by Nwabueze above. Ours is an infinitely heterogeneous society with remarkable cultural, ethnic and other diversity. Accordingly, there might be no universal philosophy, ethics or traditions of the Kenyan people—at least in the near future.

It has been stated that the history of constitutional litigation and interpretation in Kenya is marked by adherence to legality and technicality. More often than not, the courts dwelt on the letter (the law as it is?) rather than the spirit of the constitution (the law as it ought?)<sup>111</sup>. A close study of the constitutional review cases and recent judicial and other data reveals the emergence of the concept of constitutional values and principles. It reveals the emergence of Nwabueze's "organizing but unexpressed ideas" of the society, the fundamental postulates that underlie the structure of the modern polity we call the State. This new development in Kenyan jurisprudence has not been without resistance. In the Njoya case, for instance, the respondents vehemently denied the existence of constitutional values and principles. Some lawyers and judges still feel that if at all such values and principles exist, they must be gathered from the letter of the constitution.<sup>112</sup>

So what are the emerging constitutional values and principles? The foremost of course, would be the notion of the constituent power of the people, already discussed in the foregoing parts of the article. The aggregation of the emerging principles is found in the Proposed New Constitution of Kenya.<sup>113</sup> The proposed constitution was replete with principles and values. These included the National Values, Principles and Goals (Chapter 3); General Principles of citizenship (Chapter 4); Principles of Land Policy; Principles of the Executive (Chapter 12); Principles of Judicial Power (Chapter 13) and Values and Principles of Public Service (Chapter 16).<sup>114</sup>

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<sup>110</sup> Nwabueze, *supra* note 105.

<sup>111</sup> *Ibid.*

<sup>112</sup> Kubo, p.15 last para.

<sup>113</sup> The Wako Draft, Kenya Gazette Supplement No. 63 of 22<sup>nd</sup> August 2005. Mr. Amos Wako was the Attorney General of Kenya at the time the draft was published. The political opposition felt that the Attorney General had mutilated the people's popular draft (so called the Bomas Draft), and probably this explains how the document acquired the name "Wako Draft."

<sup>114</sup> For more of the emerging constitutional values and principles, see the Wako Draft, *ibid.*

Of the several emerging principles, only one relates to the nature and role of law in society-the Principles of the exercise of Judicial Power. Article 178 (1) of the Wako Draft Provided:

Judicial power is derived from the people and shall be exercised by the courts and other tribunals, in their name and in conformity with their values, norms and aspirations and with this constitution and the laws, for the common good of the people.

It is noteworthy that although the Wako Draft was rejected at the Referendum,<sup>115</sup> the court in the Referendum Case them, by holding that judicial power could not be exercised against the people had already acknowledged the above principle.

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<sup>115</sup> The referendum was held on 21<sup>st</sup> November 2005. The Wako Draft was rejected by about 3 million voters and supported by about 2 million. Some people have felt that the Draft was not rejected on the merits but rather on account of political differences of the day