
The Emerging Jurisprudence on Kenya's Constitutional Review Law

Kithure Kindiki*

1. INTRODUCTION AND BACKGROUND

From independence, Kenyans never owned the process of writing their constitution.¹ The Lancaster House conferences² that hastily canvassed a constitution for the country, was fraught to the end, with suspicions by selected leaders of different Kenyan interest groups against each other. Nonetheless, they managed to broker a graceful consensus that furnished Kenya with a constitution, hence paving the way for independence.³

Critical subsequent amendments to the independence constitution,⁴ and their negative impact on Kenya's social, political and economic fabric, ignited the clamour for constitutional reforms. The core aversive amendments included;⁵ the 1964 amendment which unified "the offices of the Head of State and the Head of Government"⁶; the 1964 and 1968 removal of "the constitutional protection against the redrawing of regional and district boundaries or the creation of new regions or districts"⁷; the 1965 amendment that changed the state of emergency approval from 65% to simple majority⁸ and the 1966 amendment that removed the time limitations on state of emergencies; the 1966 amendment requiring Members of Parliament who defect or start a new party, to seek a fresh mandate from their constituents;⁹ the 1968 abolition of the Senate;¹⁰ the 1968 amendment that gave the President the authority to appoint the twelve nominated Members of Parliament; the 1975 amendment that allowed the President to waive the penalty on persons found guilty of an election offence, not to contest elections for five years; and, the 1982 constitutional amendment that made Kenya a *de jure* one party state.¹¹

The clamour for constitutional review grew gradually after 1982, leading to the repeal of Section 2A in 1991 which restored multi-partism,¹² and following sustained pressure from the opposition and civil society, the 1997 enactment of the Constitution of Kenya Review Commission Act¹³ under the umbrella of the Inter-Party Parliamentary Group (IPPG) reforms. This ushered the formal constitutional review process.

Despite the CKRC Act (hereinafter the Review Act) having been passed,

* LL.B, LL.M, Ph.D: Senior Lecturer of Law, University of Nairobi

the general feeling was that it was yet another tool for governmental implementation, and thereby would not effectively encompass the various interest groups in the review process. Between June and October 1998, stakeholder negotiations were conducted in Nairobi at Bomas of Kenya and Safari Park Hotel. The same yielded consensus on amendments to the Act, which would facilitate a more inclusive process. Following disagreement on effecting these amendments especially on the issue of the nomination of review commissioners, one group calling itself the Ufungamano Initiative¹⁴ decided to start its own parallel review process. It established the People's Commission of Kenya (PCK) and appointed a review team under it.

The Review Act was amended in 2000 with the Commission being reduced from a body of twenty-five commissioners to fifteen as well as two ex-officio members. Later that year, the Commission was formed with the appointment of the fifteen commissioners. The Chairman of the CKRC, as constituted, reached out to the Ufungamano group to negotiate a merger between the two groups. In June 2001, the two groups merged and following a subsequent amendment of the Act, twelve commissioners from the Ufungamano group were brought on board.

The Review team collated views and came up with a draft constitution. However, the review process was halted in the run up to the 2002 General Elections. It assembled again in 2003, with the Bomas Conference being constituted. The Bomas Conference went through two highly charged sessions and eventually amended the initial draft and adopting the same as a document to be put forth to be passed by Parliament. However some disgruntled delegates, who felt isolated and that their rights were grossly violated in the period before the adoption of the draft, went to court to challenge the constitutionality of the process.

The Constitution of Kenya Review Act was held to be unconstitutional to the extent that it required of Parliament the adoption of the draft constitution. It was also held that Parliament had no constitutional authority to promulgate a constitution with the said authority vesting in the people who ought to exercise their constituent power through a referendum.

Following this decision, Parliament passed the Constitution of Kenya Review Amendment Act to facilitate the promulgation of a new constitution, following the debate and establishment of proposals on contentious issues within the Bomas draft constitution. The said changes were redrafted into the draft constitution by the Attorney General, and put to the vote in a referendum. The draft constitution was rejected at the referendum, leaving

large lacunae regarding the prospects of putting the review process on track again.

2. THE LEGAL FRAMEWORK OF THE CONSTITUTION REVIEW PROCESS

2.1 The Current Constitution of Kenya

The current Kenyan Constitution has provisions that envisage its amendment in section 47. The section states that Parliament may alter the Constitution by at least sixty five percent of all the members of the National Assembly voting for the proposed alteration during both its second and third reading in Parliament¹⁵. The section clarifies that alteration of the Constitution means the amendment, modification or re-enactment of any provision of the Constitution, the suspension or repeal of such a provision or the replacement of a provision of the Constitution.

In addition, the provisions of section 47 are geared at safeguarding the Constitution from arbitrary changes, and the procedure for alteration proposed in the section differs from that which applies to ordinary legislation, which requires a simple majority of members of the National Assembly who make a quorum. Quorum requirements in Parliament are one third of all Members of Parliament.

Parliament's powers to amend the Constitution arise from the concept of separation of powers, whereby the law making functions of government have been entrusted in Parliament, as a constitutional check against misuse of powers by those that are entrusted with governance of the country. Parliament in this regard considered a representative body, consisting of officials chosen by the electorate in free and fair elections.

The major weakness of the section is that it does not (nor does any other section of the Constitution) provide for the procedure for replacement of the entire Constitution with a new one. As was explained in a recent court decision¹⁶:

“...The constituent power is reposed in the people by virtue of their sovereignty and the hallmark thereof is the power to constitute or reconstitute the framework of government; or in other words, make a constitution that being so, it follows *ipso facto*, that Parliament being one of the creatures of the constitution it cannot make a new constitution. Its power is limited to the alteration of the existing constitution only. Thirdly the application of the doctrine

of purposive interpretation of the constitution leads to the same result. The logic goes this way: - since the constitution embodies the peoples' sovereignty;

(i) Constitutionalism betokens limited powers on the part of any organ of government;

(ii) The principle of the supremacy of the constitution precludes the notion of unlimited powers on the part of any one 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 and no less..."

The other weakness is that the Government may not be able to push through constitutional amendments in instances when it does not have a clear majority in Parliament, and this factor can be used to hold the Government at ransom so to speak, in its efforts to restart the constitutional review process that may require constitutional amendment. It could on the other hand also induce negotiations with the opposition on the legal framework for constitutional review.

The lack of appropriate constitutional provisions has been a problem that has beset the review process from its inception, initially with calls for the entrenchment of the review process in the Constitution so that it could be shielded from manipulation and legal challenge; and also later on with calls for the replacement of the current constitution with a new one to be provided for in the current constitution.

The Constitution of Kenya, albeit with different approaches of interpretation, has always been the cornerstone of the constitution-making process. In appreciation of this fact, the Constitution of Kenya Review Act was modeled to comply with the Constitution and all-throughout the process, due respect was accorded to the current constitutional order.

There were questions as to the legality of the review process, considering that the Constitution had no express provision allowing for the enactment of a new constitution or setting out the procedure for doing so. Legal flexibility was invoked in creating a foundation for the review process under the current constitutional order.

The key provisions, always under the microscope for scrutiny, were Section 3, 30, 47 and 123 (9) (b) of the Constitution. Section 3 provides:

"This Constitution is the Constitution of the Republic of Kenya and shall have the force of law throughout Kenya and, subject to

section 47, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void”.

Section 30 provides:

“The legislative power of the Republic shall vest to in the Parliament of Kenya, which shall consist of the President and the National Assembly”.

Section 47 provides:

“(1) Subject to this section, Parliament may alter this Constitution.

(2) A Bill for an Act of Parliament to alter this Constitution shall not be passed by the National Assembly unless it has been supported on the second and third readings by the votes of not less than sixty-five per cent of all the members of the Assembly (excluding the ex officio members)...

(6) In this section-

(a) references to this Constitution are references to this Constitution as from time to time amended; and

(b) references to the alteration of this Constitution are references to the amendment, modification or re-enactment, with or without amendment or modification, of any provision of this Constitution, the suspension or repeal of that provision and the making of a different provision in the place of that provision. Restrictions with regard to certain financial measures”.

Section 123 (9) provides:

“In this Constitution, unless the context otherwise requires

(b) words in the singular shall include the plural, and words in the plural shall include the singular”.

2.2 Arguments used to justify the Constitution Review process under the Current Constitution

In the period before the *Ringera Judgment*, proponents for the review of the current Constitution without amending it predicated their arguments on Section 3, 30, 47 and 123 (9) (b).

The core argument relied upon was premised on the interpretation of Section 47 (6) (b). Reference to alteration of the Constitution therein, being “amendment, modification or re-enactment” in the consideration of Section 123 (9) (b), was interpreted to mean that Parliament, in the exercise of its legislative power vested in it vide the provisions of Section 30 of the Constitution and in the method provided in Section 47 (2),¹⁷ was constitutionally authorized to alter any section, and therefore all sections of the Constitution. It followed therefore, from their contention, that Parliament was duly authorized to change the Constitution.

This position is supported in the Commonwealth, by the decision of the High Court of Singapore in the case of *Teo So Lung v Minister for Home Affairs*.¹⁸ In that case it was stated:

“If the framers of the Constitution had intended limitations on the power of amendment, they would have expressly provided for such limitations. But Article 5, which provided that any provisions of the Constitution could be amended by a two third majority in Parliament, did not put any limitation on that amending power. For the courts to impose limitations on the legislature’s power of constitutional amendment would be to usurp Parliament’s legislative function contrary to section 58 of the Constitution. The *Kesavananda* doctrine... did not apply to the Singapore Constitution as it did to the Indian Constitution”.

Proponents of this position buttressed their arguments by the historic and far-reaching amendments previously made to the Kenya including those that led to;

- i. Change from Dominion to republic status.
- ii. Abolition of Regionalism.
- iii. Change from a Parliamentary system of executive governance.
- iv. Abolition of a bicameral legislature.
- v. Alteration of the entrenched majorities required for constitutional.
- vi. Abolition of the security of tenure for Judges and other constitutional office holders (now restored).
- vii. The making of the country into a one party state (now reversed).
- viii. The 1969 consolidation of all the previous amendments, the introduction of new ones and reproduced the Constitution in a revised form by Parliament vide Act number 5.¹⁹

Because this viewpoint was the dominant reasoning in the run-up to the Bomas conference and before the Ringera decision, it was widely expected that following the Conference, Parliament would pass as a constitutional amendment, a Bill published by the Attorney General encompassing the draft constitution.²⁰

This position was however dispelled by the Ringera Judgment, which held that Parliament had no power to enact or repeal the existing constitution.²¹

3. THE COURT CASES: THE RINGERA & YELLOW MOVEMENT DECISIONS

Kenyan constitutional review case law can be classified into two categories:

- i. the period before the judgment in the *Njoya* case (famously called the *Ringera* Judgment)²²; and
- ii. the period after the *Ringera* Judgment.

The rationale behind this dichotomy is the legal lacunae the decision sought to fill. Essentially, prior to that decision which set precedents on the legal pillars of constitution making in this country, certain constitutional matters were argued and handled under suppositions.

3.1 The Ringera Judgment

The *Ringera Judgment*, comprised three separate decisions; Justices Ringera and Kasango concurring on most issues, with Justice Kubo dissenting. Their judgment dealt with four issues affecting the legal regime on which the review process was based. These were:

3.1.1 Constitutional Interpretation

The Judges delved into the province of the interpretation of the provisions of the Constitution. Justice Ringera and Kasango were in parity opinion, holding that the Constitution should be interpreted as a living document, and not like an Act of Parliament. Ringera captured their postulations on the Constitution as follows:

“It is the supreme law of the land; it is a living instrument with a soul and a consciousness; it embodies certain fundamental values and principles and must be construed broadly, liberally and purposely or teleologically to give effect to those values and principles”.

Justice Kasango in supporting this position cited section 3 of the Constitution which affirms its own supremacy, posited that “[t]he Constitution of Kenya having so clearly stated its supremacy means that the rules of interpretation cannot be the same as other statutes which are subordinate to it”.

Ringera relied upon the decisions in the Kenyan High Court case of *Njogu v. Attorney-General*²³ and the Tanzanian Court of Appeal case of *Ndyanabo v. Attorney-General*.²⁴ In the relevant portion relied upon by Ringera, in *Njogu v. Attorney-General* on Constitutional interpretation it was averred:

“We do not accept that a Constitution ought to be read and interpreted in the same way as an Act of Parliament. The Constitution is not an Act of Parliament. It exists separately in our statutes. It is supreme...it is our considered view that, Constitutional provisions ought to be interpreted broadly or liberally, and not in a pedantic way, that is restrictive way. Constitutional provisions must be read to give values and aspirations of the people. The court must appreciate throughout that the Constitution, of necessity, has principles and values embodied in it; that a Constitution is a living piece of legislation. It is a living document.”

While in *Ndyanabo v. Attorney-General*, relied upon by Ringera and Kasango, the court Tanzanian Court of Appeal held, Samatta CJ commenting:

“We propose to allude to general provisions governing constitutional interpretation. These principles may, in the interest of brevity, be stated as follows. First, the Constitution of the Republic of Tanzania is a living instrument, having a soul and consciousness of its own as reflected in the preamble and fundamental objectives and directive principles of state policy. Courts must, therefore, endeavor to avoid crippling it by construing it technically or in a narrow spirit. It must be construed in (tune) with the lofty purposes for which its makers framed it. So construed, the instrument becomes a solid foundation of democracy and the rule of law. As Mr. Justice EO Ayoola, a former Chief Justice of the Gambia stated ... ‘A timorous and unimaginative exercise of the Judicial power of constitutional interpretation leaves the Constitution a stale and sterile document’. Secondly, the provisions touching fundamental rights have to be interpreted in a broad and liberal manner, thereby jealously protecting and developing the dimensions of those rights and ensuring that our people enjoy their rights, our young democracy not only functions but also grows, and the will and dominant

aspirations of the people prevail. Restrictions on fundamental rights must be strictly construed.”²⁵

By siding with these decisions, Ringera and Kasango ultimately extinguished the *El Mann* doctrine in the case of *Republic v El Mann*. The thrust of the doctrine was that although there were exceptional circumstances for liberal connotation, the Constitution should be interpreted as any other ordinary statute, especially where the words used are precise and unambiguous.

Justice Kubo on the other hand, did not find the *El Mann* doctrine of interpretation vis-à-vis the Crispus Karanja Njogu doctrine of interpretation, mutually exclusive. He observed that the *El Mann* doctrine did not exclude other forms of constitutional interpretation, merely calling for contextualisation of the issues in question. He thus stated:

“As I see it, *El Mann* did not lay down a rule carved in stone that a statute and a Constitution have to be interpreted in exactly the same way. The crux of *El Mann*, in my construction, lies in the following part of the quotation from *Craies on Statute Law* at 359: “The tribunal that has to construe an Act of a legislature, or indeed any other document, has to determine the intention as expressed by the words used”.”²⁶

On the question of context, he invoked the case of *Keshava Menon v State of Bombay*²⁷ wherein it was stated:

“...but a court of law has to gather the spirit of the Constitution from the language of the constitution”.”²⁸

He concludes:

“If *El Mann* is given the interpretation indicated in the expressions cited above, its approach to interpretation of legal instruments, including the Constitution, is shorn of distinction from Crispus Karanja Njogu. And that is my interpretation of *El Mann*”.

From the foregoing arguments, the thrust of the Judges' position on the issue of constitutional interpretation is that the Constitution is a living document that should be interpreted broadly and liberally. Nowhere did Justice Kubo dispute this. However his postulation that the *El Mann* doctrine could in certain situations be used for Constitutional interpretation is extinguished by the opposing views of Ringera and Kasango. The two asserted that the *El Mann* doctrine provided for the Constitution to be interpreted like ordinary statutes, and was therefore bad in law.

This approach used by the Judges, was the foundation for the other parts of the judgment.

3.1.2 The Constituent Power of the People and its Implications

Ringera J. first established that the Constituent Power of the People, had juridical status- is a legal concept, and could therefore be subject to legal determination under a court of law. He based his finding on the fact that Kenya is a democracy, and in a democracy, the people are sovereign and therefore the sovereign will (Constituent Power), vests in them. He affirms that the Constituent Power of the People is a primordial one. In taking this position, he sided with BO Nwabwueze's contention that:

“The nature and importance of the constituent power need not be emphasized. 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. Sovereignty has three elements: the power to constitute a frame of Government, the power to choose those to run the Government, and the powers involved in governing. It is by means of the first, the constituent power that the last are conferred. Implementing a community's constituent power, a Constitution not only confers powers of Government, but also defines the extent of those powers, and therefore their limits, in relation to individual members of the Community. This fact at once establishes the relation between a Constitution and the powers of Government; it is the relation of an original and a dependent or derivative power, between a superior and a subordinate authority. Herein lies the source and the reason for the Constitution's supremacy.”²⁹

Ringera J. opines that because the Constituent Power is primordial, it is the basis of the creation of the Constitution and cannot thereby be granted or conferred by the same. He states:

Indeed it is not expressly textualized by the Constitution and, of course, it need not be. If the makers of the Constitution were to expressly recognize the sovereignty of the people and their constituent power, they would do so only *ex abundanti cautela* (out of an excessiveness of caution). Lack of its express textualization is not however conclusive of its want of juridical status. On the contrary, its power, presence and validity is writ large by implication in the framework of the Constitution itself as set out in sections 1, 1A, 3 and 47.”³⁰

Ringera then argued that the Constituent Power of the People could only be upheld in a Constitution Making Process after the following steps are taken;

- i. Views³¹ are collated from the people and processed into constitutional proposals;
- ii. A Constituent Assembly is formed, where these views are debated and concretized into a draft constitution;³²
- iii. A referendum is conducted to confirm whether the draft constitution is acceptable to the people and envelops their constitutional expectations;

Kasango J. approached the issue of the constituent power of the people by investigating whether “the concept of constituent power [could] be found in the Constitution of Kenya”. She went on to analyze section 1A of the Constitution which provides: “The Republic of Kenya shall be a multiparty democratic State”. Citing BO Nwabueze who said, the Constitution “is supposed to be a permanent charter which endures for ages”, she delving specifically into the definitions of the words “Republic” and “Democracy”³³ therein, and revealed:

“The words that jump out of these two definitions are, in the case of Republic ‘Open to all the citizens’ and in the case of Democracy ‘Sovereign Power resides in and exercised by the whole body of free citizens’.³⁴

She then concluded that:

“The Constitution of Kenya which is the supreme law of this country is the will of the people or the mandate they give to indicate the manner in which they ought to be governed. That being the case the people of Kenya, having in mind the definitions given herein above, have a right embodied in section 1A of The Constitution of Kenya, to be consulted if that law is to be changed. That to the court’s mind is a fundamental right which can be said to be the constituent power ... this power (constituent power) is non-tangible and yet its existence cannot to the court’s mind be denied.”³⁵

Kubo J. on the other hand, did not dispute the constituent power of the people. However, he was of the view that on assessing the Kenyan legal and political history, it was clear that the same had been exercised through representation in this jurisdiction, and that this was lawful. He postulated in sum:

“I am persuaded that this is a residual collective power of Kenyans as a sovereign people. The mode of operation of our society is such that a practice has developed and gained acceptance hitherto

whereby this power has been exercised through representation by various organs via mechanisms designed for each specific purpose. It is not expressly provided for in the Constitution of Kenya or any other Kenyan Law but it is an inherent power.”³⁶

The Judges were unanimous in recognizing the existence of the constituent power of the people. Ringera J. and Kasango J. delved into specific provisions in the Constitution that allude to the constituent power, whereas Kubo J. preferred to argue that the said power, was exercised by the people through different institutional mechanisms.

Referendum: There is no provision for referendum in our Constitution. The Constitution of Kenya Review Act (Chapter 3A) does, however, provide for it for purposes of resolving particular issues in the consultative constitutional review and development process at the National Constitutional Conference held at the Bomas of Kenya. Chapter 3A does not, however, define the term. *Jowitts Dictionary* of English Law defines the term as follows:

“Referendum [Fr Plebiscite], a direct vote of electors upon a particular matter.”

3.1.3 Whether Bomas was a Constituent Assembly

Ringera ruled that Bomas did not meet the basis to be qualified as a Constituent Assembly. He argued that members of a Constituent Assembly, had- at least in the majority, to be elected to represent their respective people in the business of constitution making. In analysing the Bomas conference, he found that:

“In the current review process, one can say that the acts of Constitution making have been performed at Bomas. Did the National Constitutional Conference have such a mandate? The Applicants complaint that it did not because none of its membership were directly elected by the people for the purpose of making a new Constitution is not without merit. The entire membership consisted of 629 delegates. Out of those only the 210 elected members of Parliament could claim to have been directly elected by the people. Although they were not directly elected for the specific purpose of making a new Constitution, it is a notorious fact of which the court may take judicial notice that one of the issues in the general elections of 2002 was the delivery of a new Constitution. To that extent the elected members could claim to have had the direct mandate of the people to participate in the making of a new constitution. The other categories of membership were all unelected directly by the people.

210 of them represented Districts (whose councils were constituted into electoral colleges for purposes of selecting them) and the rest (209) consisted of 12 nominated members of Parliament, 29 Constitution of Kenya Review Commission Commissioners, and 168 members representing such diverse interests as trade unions, non-governmental organizations, women organizations, religious organizations and special interest groups. Thus, on the whole, only one third of the membership of the National Constitutional Conference were directly elected by the people. Can such a body be said to be representative of the people for purposes of Constitution making? Strictly speaking one cannot be a representative of another if the latter has not elected him to do so. That being so, it would be to turn logic on its head to describe a body largely composed of unelected membership as a representative one. So the National Constitutional Conference fails the test of being a body with the people's mandate to make a Constitution and the applicant's case that they have been denied the exercise of their constituent power by means of a constituent assembly is, in my view, unassailable."³⁷

Kasango J. steered clear from arguments regarding the necessity and status of a Constituent Assembly in the review process. She however did state that the better part of constitution making had to be done by representation. She also ruled that the composition of the Bomas Conference as provided in section 27 (2) of the Constitution of Kenya Review Act, was discriminatory on account of what she found to be its inequitable representation, but did not make a finding as to whether the Bomas Conference was or was not a Constituent Assembly. In regard to the composition of the Bomas Conference, and stemming from the objects for which the Constitution of Kenya Review Act was enacted as captured in section 3 thereof, she said:

"These noble objectives we vividly subscribe to them. In the courts considered view to ensure that the sparsely populated and over populated provinces are not discriminated it may be best that each province has an equal representation at the National Constitutional Conference. The end result is that the prayer sought by the Applicants... succeeds. The court would hold that there was discrimination in the constituting of the delegates at the National Constitutional Conference which was done in accordance with section 27(2) of The Constitution Review Act. The court so holds because there is indeed discrimination whereby the provinces with less population are represented by more delegates than the provinces with higher population."³⁸

Ringera J. while recognising that there was indeed discrimination in the composition of the Bomas Conference, refused to grant the orders sought,³⁹ on grounds that section 84 of the Constitution expressly recognised individual rights and not group or community rights. This put the decisions by Kasango and Ringera on this matter at odds.

Kubo J. dismissed the claim that there was discrimination, on the grounds that section 82 of the Constitution required that the same be proved against an individual, and not wider entities. He embellished his arguments by stating that:

“The diversity of Kenya is a reality and cannot be ignored. The majoritarian principle espoused by the Applicants as the only factor to inform the boundary setting process, *et cetera* cannot be the sole criterion in constituting districts or public bodies. It has to be balanced with other principles, for example equity.”⁴⁰

On the strict issue of whether a Constituent Assembly was an constitution making imperative, Kubo J., asserted that it was not. His argument was premised on the ground that it was just one of the ways in which the people could exercise their constituent power, and there was no constitutional indication in the Kenyan jurisdiction, that this was paramount. He said:

“Constituent assembly: I find this to be one of various alternative modes of exercising constituent power. It is not provided for in our Constitution or in ordinary law. In the context of Constitution making, if Kenyans desire to have it as their mode of Constitution making, I am of the considered view that it has to be 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.”

It appears that the justices were not in agreement on the issue of whether a Constituent Assembly was imperative. Ringera J. held that this was the case. Kasango J did not make a finding on the necessity for one, while Kubo J. stated that although it was an important tool for constitution making, it had equally important substitutes. More importantly, aside from Ringera J., none of the other justices ruled on whether the Bomas Conference, comprised a Constituent Assembly. Yet even if they did, it appears by their latent lack of consensus on whether a Constituent Assembly was obligatory, that the Bomas Conference was and would remain, part of the legitimate constitution making process.

3.1.4 Whether a Referendum is required in Constitution Making

Ringera held that a referendum or plebiscite amounted to a fundamental right of the people in exercise of their constituent power. He postulated that this was a key component of constituent power and could be described as a constitutional right. He stated that “[t]he exercise of the constituent power requires nothing less than a compulsory referendum”.⁴¹ By dint of this fact, it followed that section 27 (5) and (6) of the Constitution Review Act was unconstitutional, to the extent that it made the right to a referendum a contingent one depending on the absence of consensus at the National Constitutional Conference.

In the view of Kasango J. a referendum was the natural corollary of the exercise of the constituent power of the people. To her, it is a fundamental right. In this regard she divulges that:

“Since the court accepted that the notion, nay, the reality of constituent power, is embodied in the Constitution of Kenya then one needs to find out how this constituent power can be exercised. Since it would not be practicable for the whole nation of Kenya to enter into one single stadium to give their views on the kind of Constitution they desire to have, the resounding answer to that question would be a referendum where every Wanjiku, Atieno, Ahmed, Patel and Korir would have a say in the review of their constitution.”

She then quotes BO Nwabueze as follows:

“If the state is a creation of the people by means of a constitution, and derives its power of law - making from them, it may be wondered why people who constitute and grant this power cannot act directly, in a referendum or otherwise, to give the Constitution the character and force of Law.”⁴²

Kubo J. was of the view that a referendum was not a mandatory constitution making procedure, nor was it the only way of verifying the constituent power of the people. He observed that it was not expressly provided for in the Constitution of Kenya, and therefore could not be deemed to be requisite.

From the deliberations of the court on this point, it is apparent that the overriding position, is that a referendum, is an imperative component

of the constitution making process. The court's position, is therefore, for a constitution to be legitimate, the same would have to be confirmed by the people exercising their constituent power under the layout of a referendum.

3.1.5 The Constituent Right to Equal Protection Under the Law and Non-Discrimination

The context in which this issue was brought for determination of the court, was in regard to the purported violation of the Applicants rights to equal representation in the composition of the National Constitutional Conference. This right being canvassed under Section 1A as read with 82 of the Constitution.

Relying on the decision in *Reynolds v. Simms*,⁴³ Ringera stood by the sentiments for equality. He stated that:

“The concept of equality before the law, citizens rights in a democratic state and the fundamental norm of non discrimination all call for equal weight for equal votes and dictate that minorities should not be turned into majorities in decision making bodies of the State. That should be basic and it has evidently not been reflected in the composition of the National Constitutional Conference as demonstrated by the Applicants. However, that cannot be the only consideration in a democratic society. The other consideration is that minorities of whatever hue and shade are entitled to protection.”⁴⁴

However, while recognizing that the representation in the Bomas conference was not entirely equitable, Ringera ruled that the Applicants had no *locus standi* in regard to making a claim under Section 84 of the Constitution on behalf of groups aggrieved by the composition of the Bomas Conference. He stated that the said section of the Constitution referred specifically to the violations of rights that vest in the individual and could not be stretched to include community or group rights.

He supported his position with the case of *Dr Korwa Adar and others v Attorney-General*⁴⁵ where the court said:

“As this court stated in the case of *Matiba v Attorney-General* High Court civil miscellaneous appeal number 666 of 1990 (UR), an applicant in an application under section 84(1) of the Constitution is obliged to state his complaint, the provision of the Constitution which he considers has been infringed in relation to him and the

manner in which he believes they have been infringed. Those allegations are the ones which if pleaded with particularity, invoke the jurisdiction of this court under that section. It is not enough to allege infringement without particularizing the details and manner of infringement”.⁴⁶

The positions of the other justices are highlighted under the head of Constituent Assembly (herein above). It appears therefore, that the overriding position of the court, is that the applicants were not discriminated against regarding the composition of the Bomas Conference, by dint of the fact that they had no *locus standi* under section 82 of the Constitution to bring such a claim on behalf of groups. Ringera J. (in *obiter*) and Kasango J. (in her minority decision on the specific matter), did however point to a discriminatory trend in the way the Conference was constituted.

3.1.6 Inconsistency of section 28 (3) and 4 of the Act, with section 47 of the Constitution

Ringera first made a finding as to whether section 47 of the Constitution allowed for the promulgation of a new constitution. The *modus operandi* for the constitution review process up to this point, was underlined in the Constitution of Kenya Review Act. The Bomas Conference was to debate a draft Bill prepared by the Commission after it had collated views from Kenyans, proffer amendments which the Commission was to incorporate into another draft Bill to presented to Parliament, to be enacted through section 47, as the new Constitution. Ringera considered the scope of Parliament's power under section 47, and held that it could thereby only alter or amend the Constitution but not promulgate another one. He further held that section 47 of the Constitution as read with the interpretation provisions in section 123 (9), expressly allowed for its amendment, and not for its repeal. He stated:

“ I have come to the unequivocal conclusion that Parliament has no power under the provisions of section 47 of the Constitution to abrogate the Constitution and/or enact a new one in its place. I have come to that conclusion on three premises: First, a textual appreciation of the pertinent provisions alone compels that conclusion. The dominant word is “alter” the constitution... Secondly, I have elsewhere in this judgment found that the constituent power is reposed in the people by virtue of their sovereignty and that the hall mark thereof is the power to Constitute or reconstitute the framework of Government, in other words, make a new constitution. Thirdly, the application of the doctrine of purposive interpretation

of the Constitution leads to the same result. The logic goes this way. Since (i) the Constitution embodies the peoples sovereignty; (ii) Constitutionalism betokens limited powers on the part of any 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 and no less.”⁴⁷

He supported this position, on the authority of the decision of the Supreme Court of India in the case of *Kesavananda v. State of Kerala*⁴⁸. He applied himself to the remarks of Justice Khanna in that decision who stated:

“Amendment of the Constitution necessarily contemplates that the Constitution has not been abrogated but only changes have been made in it. The word “amendment postulates that the old Constitution survives without loss of its identity despite the change... As a result of the amendment, the old Constitution cannot be destroyed or done away with; it is retained though in the amended form. The words “amendment of the Constitution” with all their wide sweep and amplitude cannot have the effect of destroying or abrogating the basic structure of the Constitution. It would not be competent under the garb of amendment, for instance, to change the democratic government into a dictatorship or a hereditary monarchy nor would it be permissible to abolish the Lok Sabha (the Indian Parliament).”

He further acknowledged the endorsement of this decision in the case of *Minerva Mills Limited v. Union of India*.⁴⁹ In this regard, he concluded, that “[a]ll in all, the limitation of Parliament’s power was a very wise ordination by the framers of the Constitution which is worthy of eternal preservation”.

Ringera delved into the amendments of the Constitution since independence, observing that some of these alterations had the effect of substantially changing the Constitution to the extent that they fundamentally reformed the basic structure. He observed however that at no time while effecting these changes, did Parliament abrogate the Constitution or make a new one, noting that everything was done within the structure of the existing Constitution.⁵⁰

On the issue of the inconsistency of section 28 (3) and (4) of the Constitution of Kenya Review Act, with section 47 of the Constitution, Ringera made a couple of findings. He held that there was nothing constitutionally antagonistic about section 28 (3). He however declare section 28 (4) inconsistent. According to him, the same was premised, not on the grounds that the said Bill to alter the Constitution was prepared in the manner stipulated in Chapter 3A nor the fact that the Attorney-General was required therein to publish the said Bill within seven days. He opined that “[w]hat offends the Constitution is that the National Assembly is required by dint of subsection (4) of section 28 to enact the said Bill into law within seven days”.

He acknowledged that the Act was unconstitutional in so far as it develop a Bill for the replacement of the current Constitution. He affirmed:

“[The Act] offends section 47 of the Constitution in two major respects. First, it invites Parliament to assume a jurisdiction or power it does not have - to consider a Bill for the abrogation of the Constitution and the enactment of a new one. The provision is imposing a duty on Parliament to do that which it cannot do. Secondly, the provision takes away the Constitutional discretion of Parliament to accept or reject a Bill to alter the Constitution. It directs that the National Assembly enacts the Bill presented to it into law... I find nothing in subsection (3) of section 28 of the Act which is inconsistent with section 47 of the Constitution. However section 28(4) of the Act is clearly inconsistent with section 47 of the Constitution.”⁵¹

Kasango J. was in parity with Ringera’s decision on the points of section 28 (3) and (4) of the Constitution of Kenya Review Act and section 47 of the Constitution. She stated that:

“In the court’s considered view section 47 of The Constitution of Kenya does not envisage the total destruction of the Constitution but it envisages the amendment, repealing et cetera of certain provision in the constitution.”⁵²

Flowing from this argument, she held that Parliament is not even competent to enact a statute to repeal the Constitution. It would appear that her sentiments were meant to invalidate the entire Constitution of Kenya Review Act. All in all, her remarks sealed the fate of the validity of sections 28 (3) and (4), as she saw the same.

Kubo J. on the other hand, held a contrary standpoint. He opined that section 47 of the Constitution allowed Parliament to amend any section

of the Constitution, and that being so, Parliament could amend the entire constitution. He said:

In view of sections 47(6)(b) and 123(9)(b) of The Constitution of Kenya, it is my respectful view that it is legitimate to interpret Parliament's alteration power under section 47 to mean that if Parliament can alter one provision, it can alter more; and if it can alter more, it can alter all. And this conclusion flows. From the Constitution itself".⁵³

He observed the findings of the Singapore court in the case of *Teo So Lung*,⁵⁴ where it was stated:

"If the framers of the Constitution had intended limitations on the power of amendment, they would have expressly provided for such limitations."⁵⁵

In reaching his position, he further allied himself with the views of Judge Ray, in the *Kessevananda case*,⁵⁶ dissenting, who said:

"The power to amend is wide and unlimited. The power to amend means the power to add, alter or repeal any provision of the Constitution. There can be or is no distinction between essential features of the Constitution to raise any impediment to amendment of alleged essential features. Parliament in exercise of constituent power can amend any provision of the Constitution. Under Article 368 the power to amend can also be increased. Amendment does not mean mere abrogation or wholesale repeal of the Constitution. An amendment would leave organic mechanism providing the Constitution, organization and system for the State. Orderly and peaceful changes in a constitutional manner would absorb all amendments to all provision of the Constitution which in the end would be "an amendment of this Constitution."⁵⁷

In support of the view that the Bomas process was legitimate, and therefore section 28 (3) and (4), legally sound Kubo J concluded:

"There is no constitutional vacuum in Kenya today. We have a Constitution negotiated by representatives of Kenyans with the colonial power, that is Britain. Applicants' counsel acknowledged that the received Constitution has been amended many times "beyond recognition" by the representatives of Kenyans. The people have not been involved directly before. The Bomas Constitutional Review process is the first of its kind to Involve Kenyans directly in Constitution making. There is no defined procedure for the development of any Bills in for presentation to Parliament in this

country. Bills can take the form of public Bills or private Bills. They still end up in Parliament and it is up to Parliament to decide how to treat them. Why should the Bill expected from the Bomas process be discriminated against? It is not lost on me that the Bomas delegates expect Parliament to accept the Bill without change but Parliament is not bound by this. It can reject the Bill. And I think the rationale for the delegates' wish is that they have bared it on what they understand to be the wishes of Kenyans. Of course if the question arises whether the Bill does or does not represent the views and wishes of Kenyans, the best way to resolve that question is by referring what is considered not to represent Kenyans' views and/or wishes to Kenyans themselves."

The dominant position, from the Judgment, appears to be that section 47 does not sanction a wholesome repeal or change of the Constitution by Parliament. Considering that only one Judge found section 28 (3) of the Constitution of Kenya Review Act inconsistent with the constitution, it appears that instead, section 28 (4) (as held by Ringera J. and Kasango J.) is the provision that is inconsistent with the Constitution.

3.1.7 Extracting the Law from the Ringera Judgment

From the foregoing analysis of the Ringera decision, the strict unified legal position on the constitution making process is as follows;

- i. The Constitution must be interpreted as a living document, when assessing legal compatibility between it and other statutes.
- ii. The Constituent Power of the People is a fundamental right that inheres in the People of Kenya.
- iii. The current Constitution, as is, does not allow for Parliament to revoke it, or establish a new constitutional order, vide section 47 of the Constitution.
- iv. A referendum in a mandatory component in the exercise of the constituent power of the people of Kenya, as a tool of validation of a proposed Constitution.

3.2 The Post-Ringera Judgment Period

Following the Ringera judgment, confusion reigned among interest groups, concerning the implications of the decision. Interest groups sought to interpret the decision, in light of their preferences. They would conveniently ignore parts of the judgment adverse to their notions or positions, only to vehemently alert all and sundry about sections of the decision which supported their case. The period was marked with myriad suggestions on

how to carry the review process forward following the apparent quagmire the initial process appeared to have been placed in the aftermath of the judgment.

The Government established an informal⁵⁸ group known as the Constitution Consensus (Koech) Group, which sought to put the review process back on track by enforcing the judgment in the *Njoya* cases. Eventually, it was left upon the Attorney General to advice on the best way forward.

It was then decided that the Attorney General would publish a Bill to move the review process forward. This Bill, amending the Constitution of Kenya Review Act, was eventually passed by Parliament in a historic but acrimonious debate and although called the Constitution of Kenya Review (Amendment) Act, it came to be popularly known as the Consensus Act.

3.3 The Nyamu Judgment

Following the enactment of the Consensus Act and the ensuing events of on the constitutional review map, a case was brought by persons who felt aggrieved by the said Act, deliberations of Parliament, its recommendations and the proposed draft constitution as amended. The case, whose decision was unanimous, was determined just before the referendum, and in a few respects set new ground in Kenya's constitutional review jurisprudence. The main findings of the case are now discussed.

3.3.1 The Constitutionality of the National Constitutional Conference at Bomas

The court reviewed the decisions of the judges in the *Njoya case*, specifically Ringer's J. position on the National Constitutional Conference, and found that the Bomas Conference was not unconstitutional. They observed that Ringer's statements to the effect that the Bomas Conference did not amount to a Constituent Assembly, was not the same as declaring it unconstitutional. They declared:

“We observe that nowhere does the court in the *Njoya Case* declare the National Constitutional Conference unconstitutional. To say that it was not a Constituent Assembly is not synonymous with saying that it was unconstitutional. For the National Constitutional Conference to be unconstitutional, there must be some provision in the constitution abhorring its existence, or which is inconsistent with its being. The National Constitutional Conference was merely the last organ in the process of constitution- making. It did not have

power to enact the proposed or any constitution. Its mandate was limited to debating the draft Report and draft Bill prepared by the Constitution of Kenya Review Commission under the Constitution of Kenya Review Act.”⁵⁹

3.3.2 Constituent Power

The Court upheld the decision in the *Njoya* case, agreeing with Ringera J.’s decision, that constituent power is inherent and primordial. It however disagreed with his contention that the same was constitutional. The court proclaimed that the Kenyan Constitution was a rigid one, and in that case legislative power and constituent power were distinct. It went on to distinguish between legislative power of Parliament and constituent power.

It observed:

“However the exercise of legislative power and the distinction as outlined above is not applicable to the making of a new constitution by a constituent assembly or a referendum because constituent power is not subject to restraints by any external authority. In other words the constituent power to frame a Constitution is unfettered by any external restrictions and it is a *plenary law making power*. The power to frame a Constitution is a *primary* power whereas a power to amend a rigid Constitution is a derivative power, since 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. In other words 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. Put differently 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.”⁶⁰

3.3.3 Constituent Assembly vis a vis Referendum

The court observed that there was no consensus in the *Njoya* decision, as to whether a Constituent Assembly was mandatory. Instead, the court affirmed that the Bomas Conference was not a Constituent Assembly. Be that as it may, the court citing Professor BO Nabwueze,⁶¹ held that a new

Constitution could be validated and promulgate through a referendum and Constituent Assembly. Whereas the court states that a Constituent Assembly was unnecessary as “[Kenyan] had opted for a referendum”,⁶² it is not clear whether it meant that a Constituent Assembly and referendum are interchangeable for the same purpose.

3.3.4 Parliament passing the Consensus Act and Making Recommendations for Change on the Contentious Issues

The court held that Parliament could not be faulted for undertaking the role of passing the Consensus Act (not unconstitutional) and for proposing certain amendments to the Bomas draft. Drawing from the making of the independence Ghanaian Constitution and BO Nabwueze, the court held that Parliament had the mandate of the people to originate debate on the draft, especially so when it has made a marked effort to seek external views and made consultations.

It stated:

“It is not convincing to the court that alteration of the proposals at the stage of consultation or discussion can invalidate the proposals to be put to the vote by the people. Only the people can invalidate any such process by a No vote. A court of law has no authority to stop the adoption or rejection at a referendum of a constitutional proposals on the basis that one on the other of the draft proposals were altered or mutilated since the court is not equipped to prefer any of the set of proposals and drafts this being substantially a political process.”⁶³

3.3.5 Comparative Constitution Making in other Jurisdictions

The court delved into the question of whether the constitution making should have been anchored in the express provisions of the Constitution or an Act of Parliament, as was the attempt with the Consensus Act. In support of the fact that the Constitution review process could be anchored in statute law, the court opined that “[a] common thread in the constitution making in African countries is that the process has been invariably been anchored on an Act of parliament”. It cited Ghana (1960), Tanganyika (1962) and Uganda (1967) as examples of the same.

3.3.6 Section 47 of the Existing Constitution

The court was of the position that section 47 need not be amended to midwife a new constitution. In its views the two issues were on parallel levels. The court stated that section 47 provided for Parliaments mandate to amend the Constitution, and to amend it to facilitate the constitution review process, would be tantamount to according Parliament the keys to reviewing the Constitution, a role that it was not vested with. It opined:

“The power to amend is derivative whereas the constitution making power is primary hence it is not provided for in the current Constitution and need not been textualized. Even where a Constitution provides that although this would be good constitutional practice and good order such a provision is superfluous. It follows therefore that what was not delegated to Parliament by the constitution was reserved to the people i.e. the constitution making power was so reserved to the people and is inherent in them.”⁶⁴

The Judgment deals with other issues, but the above are the most pertinent in so far as they cover the issues addressed in the *Njoya case*.

4. TOWARDS A REVIEW OF THE LEGAL FRAMEWORK RELATING THE CONSTITUTION REVIEW PROCESS

The review process in this country began on the faith that the existing legal framework was sufficient to take the review process to a remarkable conclusion. Indeed this might have been the case, if active participants of the review process, held on to the broader picture, and entered a compromise. In short, there is no such thing as a perfect legal process for constitutional review. There will always be room for challenges to the legality of the process.

With the benefit of hindsight, the review process which ended in a rejected document, has taught valuable lessons in the form of placing necessary contingencies to cater for situations were parties refuse to engage on the social, political and legal levels. The process has thus far gathered a treasure trove of constitutional views, discussions, debates, literature and insights. The challenge, is to wrap the process once again in fresh legal linen that is acceptable, while at the same time preserving or rejuvenating the constitutional moment of years back.

4.1 Relevant Law

The core laws that can inform the process are the current Constitution, the now non-existent Constitution of Kenya Review Act, Cap. 3A, the Consensus Act, all these as coloured by the Ringera and Nyamu judgments. All documents that have hitherto gone into the review process are also relevant.

Essentially, a review of the legal framework that has been used for the review process would go a long way in resolving the impasse. The idea is to deal with all the legal questions raised in the run-up to the review, during the duration of the review process, and after. The people's faith in the legal framework put in place for the review, is the ultimate barometer for gauging the quality of the review initiative.

The process was deficient the first time round, not necessarily because of the lack of vision by the group that began the first initiative, but rather because of the legal precedents set in the *Njoya case* and the *Patrick Onyango Ouma case*. Clearly there appeared to be some form of posturing by the learned Justices.⁶⁵ How else would they reach into Kenya's historical constitutional cabinet and extract as mandatory concepts that which the country had never applied.

But the acts of judicial activism by the justices, in and of themselves were not the problem. The problem stemmed from the inconsistencies in their decisions. Further having opted for the approach they did, they failed to 'tie-in' the loose ends, by prescribing a full-proof legal procedure for constitution making. This led to many varied interpretations by interest groups.

The justices must nonetheless be commended for attempting to put the people at the centre of the Constitution review process. But whereas many would see the rejection of the draft to be purely the wrath of the constituent power of the people on the body politik, it is clear that the same was an indictment on the role of all arms of government in the process.

4.2 The Constitution

In constitutional theory where ultimately it is deemed that goodwill is lacking in the process, then it is regarded as important that the review initiative be entrenched in the constitution. Anything less, would be a coup of sorts. The Nyamu decision purported that since the constituent power of the people was primordial, then the same need not be expressed in the

constitution. By dint of this fact, the decision went on to purport, that this power could be expressed in a statute through which a new constitution can be conceived.

This reasoning has no basis in constitutional theory. The rationale for this, is that it all too easily forgoes the expression of the constituent power of the people that was used to enact the existing Constitution. Therefore whereas the constituent power need not be expressed in the Constitution, it is. Hence, the very constituent power that is invoked in the constitution-making power of the people, is the same one that birthed the existing Constitution, and the only way to uphold it on both fronts, is for the Constitution to expressly provide for the exercise of this power in constitution making.

In both the Ringera judgment and the Nyamu judgment, too much emphasis has been placed on a non-material form of the constituent power. The danger of this, is that it leaves so many unresolved variants. For instance, it is a historical fact, that before independence and before the colonialists encroached on the region we now know as Kenya, the people herein lived in communities. Does it then follow that because the constituent power reposes in the people, and is primordial, peoples⁶⁶ in Kenya having primordially existed as such before Kenya came into being, can therefore by way of their own mechanism of referendum, decide to form their own country, or exclude certain other peoples from being Kenyan.

Essentially such a metaphysical conceptualization of the constituent power,⁶⁷ leaving to assumption and the imagination, the finer determination of the framework in which the primordial constituent power is to be exercised as of fact, is highly dangerous. It plays into the Kelsenian Pure Theory of Law (duly cited by Nyamu J. *et al* in the Patrick Onyango Ouma case), which disregards the 'burden' of "statements of moral or political value".⁶⁸

Kelsen postulated that ethical and sociological definitions of law were unnecessary and were to be discarded. In his theory, "[t]he thing to do, was to isolate the norms of positive law, which alone would be the subject matter of objective (scientific) description, and then define 'legal' uses of such concepts in terms of those norms".⁶⁹ Following the Kelsenian theory to its logical conclusion, the question of the application of legal norms to their required subject is independent of the considerations of the rationale or motive for doing so.

Hence since the constituent power vests in the people as a primordial right, the people are under no obligations in the exercise of this right. Further

considerations of relative conditions, for instance the determination of how best to exercise this right, is entirely a parallel issue. Thus, the people can stage a revolution in the exercise of their primordial right- as such a right is affect the *grundnorm* (highest legal norm or domain) and not the constitution. This theory has been upheld in used to justify the coup of Obote in Uganda in 1966 overthrowing the constitution, and the Unilateral Declaration of Independence of Zimbabwe from the United Kingdom by their white minority in 1965.⁷⁰

It is unfortunate to note that the justices in their wisdom, failed to realize, that there is no contradiction between the fact that the constituent power of the people is primordial and the representative exercise of the same, its expression within the Constitution, or the need for a part of it to be framed in the body of the Constitution- the very law that was enacted by that power, in order as to enable the establishment of another Constitution. Anything other than this would be a revolution, as it accords and embodies constitution-making, which the current Constitution in all its supreme authority, is blind to.

From the foregoing, for the Constitution review process to be legitimate beyond peradventure, it must be entrenched within the current Constitution. In our case, section 47 ought to be amended, to provide for the enactment of another Constitution. But just as well, if section 47 must be interpreted to be the provision for merely parliamentary amendment to the Constitution, then another provision can be established in which the foundation of reviewing the existing Constitution is outlined. This should embody such issues as the process, including the need for a Constituent Assembly or body of representation wherein views are debated and the constitutional architecture agreed upon, the need for a referendum and what it entails, and the promulgation of the new adopted Constitution.

From such an outline, explicatory Acts of Parliament such as the Constitution of Kenya Review Act, find legitimacy to extensively capture the required review process and procedure. Whereas in the Nyamu judgment, the Constitution of Kenya Review (Amendment) Act was found not to offend the provisions of the Constitution, the same amounted to an ambitious stretch of constitutional interpretation.

For one, the constituent power of the people is sealed in the supremacy of the current Constitution. It would be absurd to argue that this supreme expression of constituent power, should be circumvented in the development of a new Constitution merely because the constituent power is vested and

inherent in the people. The interpretation of constituent power, is abused when it is imagined, as was the case in the Ringera and Nyamu Judgments, that a referendum in and of itself is uncontroverted evidence that the same has been used in constitution-making. This leaves abuse where people with unknown claim to authority on behalf of the people within the sphere of constitution-making, create a draft Constitution and present the same in the name of involving the people, for a referendum.

5. REFORMING THE LEGAL FRAMEWORK: SPECIFIC SUGGESTIONS

5.1 The Constitution

- It should be amended to include a provision for Constitutional Review
- It should be amended to include a Referendum provision
- It should be amended to include a provision for promulgation for a new Constitution

5.2 Salient Features of a Constitutional Provision for Constitutional Review

- It should define what constitutional review entails.
- It should identify the means of initiating the Review Process, for instance the appointment of a Parliamentary Commission to collect views from the people on the question of whether they want the Constitution Reviewed, or say, the collection of a specified number of signatures from Kenyans by a private citizen.
- It should identify an independent body charged with beginning the Review Process proper.
- It should identify the means by which the said body will go about collating views.
- It should identify an official forum of representatives of the people, whether a Constituent Assembly or not, by which the Constitutional issues will be debated to produce a draft.
- It should specify the method of promulgating the said draft Constitution, through a referendum or any other legitimate process of exercising the people's constituent power, either in itself, or through reference to other provisions in the Constitution to this effect.

5.3 Salient Features of a Referendum provision

- It should define what a referendum means.
- It should identify the circumstances under which a referendum will be conducted in Kenya.
- It should identify the body charged with conducting a referendum on the question of the adoption of a new Constitution.
- It should identify how a referendum should be conducted in Kenya, and the persons eligible to participate.
- It should specify the key pillars of the expression of the constituent will of the people, for instance, a vote of 50% in five provinces for the draft, shall be deemed to be a vote in favour of the adoption of the new constitution.
- It should identify a process by which the results of a referendum can be challenged in a court of law.

5.4 Salient features of a provision for promulgating a new constitution

- It should identify the person in whom the promulgation of the Constitution vests.
- It should identify how the existing Constitution extinguishes concurrently with the promulgation of the new Constitution.
- It should identify, or allude to an Act or Acts of Parliament through which the transition from one constitution to another will be made, and over what specific durations.

5.5 A New Constitution of Kenya Review Act²¹

- This Act should gain its validity from the express provisions of the Constitution, preferably the provision on Constitution review.
- This Act should expand the provisions and goals highlighted in the constitutional provision on review.
- The Act should identify a body vested with the power to carry the review process from its infancy, to the enactment or rejection of the draft Constitution.
- This Act should identify the functions of the members of the body charged with conducting the review process.
- The Act should identify the forum through which this body will engage the people to give views and proposals on what should be in the Constitution.

- The Act should identify a Forum and its composition, which would exercise constituent power on behalf of the people, in the process of debating recommendations, and in the wake of preparing a draft constitution.
- The Act should identify how the draft is to be ratified or make reference to the relevant law that does so.

5.6 Referendum Act

- The Act should define what a referendum in the context of Kenya.
- The Act should specify the circumstances under which a referendum should be conducted in Kenya.
- The Act should identify the body charged with the role of conducting the referendum.
- The Act should identify the persons eligible to participate in the referendum process.
- It should specify the key pillars of the expression of the constituent will of the people, for instance, a vote of 50% in five provinces for the draft, shall be deemed to be a vote in favour of the adoption of the new constitution.
- It should identify a process by which the results of a referendum can be challenged in a court of law.

Endnotes

- ¹ Pre- independence colonial constitutions include the 1954 Lyttleton Constitution and the 1960 Lennox-Boyd Constitution. Constitutional development in Kenya however, has been traced by some scholars, to 1887 signing of an agreement between the Sultan of Zanzibar and the British East African Association (later known as the Imperial British East African Company, on the fifty-year leasing of the coastal strip. See for instance, *Report of the Constitution of Kenya Review Commission*, Vol. 1, 4th March 2003, at p. 41.
- ² The first one being held in 1960, the second in 1962 and third in 1963; see F.R.S. De Souza, "Building on the Lancaster House Experience" in *Report of the Constitution of Kenya Review Commission*, Part I, at p. 242; see also in the same publication, articles by Hon. G.G.W. Nthenge, Hon. Joseph Martin Shikuku, Hon. J.J.M. Nyagah, "Building on the Lancaster House Experience", pp. 255, 258 and 262; see also in the same publication for a personalised account of the events, see, Michael Blundell, *A Love Affair with the Sun: A Memoir of Seventy Years in Kenya*, Chapter 14 and 15, at pp. 106- 124.
- ³ The Constitution came into force at independence on 12th December 1963; see for instance, *The Main Report of the Constitution of Kenya Review Commission*, 18th September, 2002, at p. 15.

- ⁴ See generally, Professor H.W.O. Okoth-Ogendo, “The Politics of Constitutional Change in Kenya Since Independence, 1963- 69”, in *Report of the Constitution of Kenya Review Commission*, Part I, *supra*, at p. 274; and in the same publication, see also Githu Muigai, “Amending the Constitution: Lessons from History”, at p. 302, Macharia Munene, “The Manipulation of the Constitution of Kenya, 1963- 1996: A Reflective Essay”, at p. 319, G. Macharia Munene, “Constitutional Development in Kenya; A Historical Perspective, at p. 336.
- ⁵ There have been 38 amendments to the Constitution; see Professor J.B. Ojwang article, “The Draft Bill for a New Constitution of Kenya: An Appraisal”, in *Report of the Constitution of Kenya Review Commission*, Vol. 5: Technical Appendices, 10th April 2003, at p. 125 where he opines that the Independence Constitution although not perfect, “was a highly detailed one, squarely addressing the... persistent problems of constitutionalism, power sharing and governance”, but was altered “over the years occasion[ing]...a new momentum in the Executive’s dominance in the political and constitutional set-up, which had the effect of entirely excluding the people’s role in the management of the constitutional order”; see also Githu Muigai, “The Structure and Values of the Independent Constitution”, in “”, in *Report of the Constitution of Kenya Review Commission*, Part I, 302, at p. 268.
- ⁶ Act No. 28 of 1964, published on 24th November 1964- this was the 1st Amendment of the Constitution; see Githu Muigai, “Amending the Constitution: Lessons from History”, in *Report of the Constitution of Kenya Review Commission*, Part I, 302, *supra*, at p. 305; see also *Report of the Constitution of Kenya Review Commission*, Vol. 1, 4th March 2003, *supra*, at p. 53.
- ⁷ Act No. 14 of 1965, published on 8th June 1965- this was the 3rd Amendment of the Constitution; see Githu Muigai, *ibid*.
- ⁸ Act No. 38 of 1964, published on 17th December 1964- this was the 2nd Amendment of the Constitution; see also Githu Muigai, *ibid*.
- ⁹ Act No. 17 of 1966, published on 7th June 1966- this was the 5th Amendment of the Constitution; see Githu Muigai, *ibid* at p. 306.
- ¹⁰ Act No. 40 of 1966, published on 31st March 1967- this was the 7th Amendment of the Constitution; see Githu Muigai, *ibid*.
- ¹¹ The enactment of Section 2A into the Constitution.
- ¹² Vide the enactment of Section 1A of the Constitution.
- ¹³ Chapter 3A of the Laws of Kenya.
- ¹⁴ It was mainly sponsored by key national religious organisations and civil society groups.
- ¹⁵ Section 46 of the Constitution and the Parliamentary standing orders provide the detailed procedures that are to be followed when Parliament is making laws.
- ¹⁶ *Timothy Njoya & Others v CKRC and the National Constitutional Conference*, High Court Misc. Application No. 82 of 2004 (O.S.), popularly referred to as *The Timothy Njoya Case*.

- ¹⁷ Requiring a two-thirds majority vote.
- ¹⁸ [1990] LRC 490. For contrary jurisprudence, on the same issue, see, *Kessevananda v. State of Kerala* [1973] AIR (SC) 1461 and *Minerva Mills Limited v. Union of India* [1981] 1 SCR 206.
- ¹⁹ *op.cit*, *Njoya and Others v. Attorney General and Others*, *supra* at p. 25.
- ²⁰ See Section 28 (3) and (4) of the Constitution of Kenya Review Act.
- ²¹ *Njoya and Others v. Attorney General and Others* [2004] LLR 4788 (HCK).
- ²² Two other judges sat on the bench determining the case; Justice Kubo and Justice Kasango.
- ²³ [2000] LLR 2275 (HCK).
- ²⁴ [2001] 2 EA 485.
- ²⁵ [1969] EA 357.
- ²⁶ *Njoya and Others*, *supra*, at p. 54.
- ²⁷ [1951] SCR 228.
- ²⁸ *ibid*, at p. 360 as quoted in *Njoya and Others*, *supra*, at p. 54.
- ²⁹ in his book, *Presidentialism in Commonwealth Africa*, 1974 at p. 392, as quoted in *Njoya and Others v. Attorney-General and Others*, *supra*, at pp. 12 and 13.
- ³⁰ *Njoya and Others v. Attorney-General and Others*, *supra*, at p. 15.
- ³¹ Incidentally he states, in page 16 of the judgment, that “ the generation of views by the people is not an act of Constitution making. It is their expression of opinion”. It is not clear whether he means that generation views by the people does not constitute the constitution making process, or that views collected from the people and systematized, do not constitute a constitution- a fact.
- ³² He states at p. 16 of the judgment that “The act of Constitution making can only be performed by representation”.
- ³³ Kubo J. at p. 58 of the Judgment, notes that the concept of democracy is not defined in the constitution, hence the need for external referencing to do the same.
- ³⁴ *ibid*, at p. 34.
- ³⁵ *ibid*.
- ³⁶ *ibid*, at p. 52.
- ³⁷ *ibid* at p. 16.
- ³⁸ *ibid*, at p. 40 and 41.
- ³⁹ *ibid*, at p. 20 and 21.
- ⁴⁰ *ibid*, at p. 59.
- ⁴¹ *ibid*.
- ⁴² *Presidentialism in Commonwealth Africa*, 1974 at p. 394, as quoted in *Njoya and Others*, *supra*, at p. 35- 394
- ⁴³ [377 US 533, 12 L Ed].
- ⁴⁴ *Njoya and Others*, *supra*, at p. 20.
- ⁴⁵ Miscellaneous Civil Application number 14 of 1994 (UR).
- ⁴⁶ *Njoya and Others*, *supra*, at p. 21.
- ⁴⁷ *Njoya and Others*, *supra*, at p. 24.

- ⁴⁸ [1973] AIR (SC) 1461; see also the opposing position by the High Court of Singapore in the case of *Teo So Lung v Minister for Home Affairs* [1990] LRC 490, which Ringera did not concur with.
- ⁴⁹ [1981] 1 SCR 206.
- ⁵⁰ He further noted at p. 25 and 26 of *Njoya and Others, supra*, that “[e]ven the radical Act number 5 of 1969 which set out the authentic version of the Constitution did not purport to and did not in fact introduce a new Constitution. It was an hybrid of a Consolidating Act, an Amendment Act and a Revisional Act. Section 2 thereof was clear that the “Constitution” meant the Constitution of the Republic of Kenya contained in schedule 2 of the Kenya Independence Order in Council, 1963 as amended by other Acts from 1964 to 1968. And section 6 was equally significant. The revised Constitution which was set out in the schedule to the Act was a revised version of the Constitution as amended by the same Act incorporating revisions as to form only and effecting no changes of substance. In those premises there is no precedent in the Parliamentary practice of Kenya for the proposition that Parliament can make a new Constitution”.
- ⁵¹ *ibid*, at p. 26.
- ⁵² *ibid*, at p. 36.
- ⁵³ *ibid*, at p. 62.
- ⁵⁴ *Teo So Lung v Minister for Home Affairs* [1990] LRC 490, *supra*.
- ⁵⁵ as quoted in *Njoya and Others*, at p. 63.
- ⁵⁶ *Kessevananda v State of Kerala* [1973] AIR (SC) 1461, *supra*.
- ⁵⁷ as quoted in *Njoya and Others*, at p. 62.
- ⁵⁸ See Prof. H.W.O Okoth-Ogendo, Personal Statement on the Constitution of Kenya (Amendment) Bill 2004, Proposed by the Consensus Building (Koech) Group, 2004, at p. 3, where he observes that the group lacked legitimacy in regard to the review process, considering that it was “not a Committee of Parliament...[and] under Cap. 3A, provision is made for the establishment of a Parliamentary Select Committee to assist Parliament in the performance of its functions”.
- ⁵⁹ *Patrick Ouma Onyango and Others v. Attorney-General and Others* H.C. Misc. Application No. 677 of 2005 (O.S.), at p. 50 and 51.
- ⁶⁰ *ibid*, at p. 73 and 74.
- ⁶¹ In *Presidentialism in Commonwealth Africa, supra*, at p. 407.
- ⁶² *Patrick Onyango Ouma and Others, supra*, at p. 77.
- ⁶³ *ibid*, at p. 86.
- ⁶⁴ *ibid*, at p. 92.
- ⁶⁵ The aphorism of Oliver Wendell Holmes, a legal realist comes to mind, “the life of the law has not been logic, it has been experience”. See J.W. Harris, *Legal Philosophies*, 1997, at p. 99, where he said of Holmes, “[h]e did not believe that judges can do what they like, for he delivered judgments in which he pronounced himself bound to hold that the law was not as he would like it to be”.
- ⁶⁶ Read to mean communities.

The Emerging Jurisprudence On Kenya's Constitutional Review Law

⁶⁷ J.W. Harris, *Legal Philosophies*, 1997, *supra*, at p. 73, where it is stated that Kelsen's theory postulates "there were two things universally true of law: that it was coercive, and that it was a system of norms".

⁶⁸ *ibid.* at p. 66.

⁶⁹ *ibid.*

⁷⁰ *See, Madzimbamuto v. Lardner-Burke* [1969] 1 AC 645.

⁷¹ Reference here is made to a new Act, and not Cap 3A as presently constituted.