

CONSTITUTION MAKING AND DEMOCRATIZATION TRENDS IN AFRICA

THE KENYAN CASE

ODUOR DAN JUMA*

Abstract

Constitution making and constitutionalism has today assumed a greater prominence than at any time before in the struggle for democracy. The last decade has witnessed an ever-increasing number of constitutional reform processes taking place, particularly in Africa. While most constitutional moments are essentially a negotiated process between competing political forces, very few countries have gone beyond this and through the interactive and inclusive process of truly making their constitution. But an essential feature of the emerging trend has been the extent to which the people have been involved in the making of their constitution. Examples of this can be found from the Eritrean, Malawian, Ugandan, South African, Rwandan and more recently the Kenyan experiences. This trend is set to escalate in the coming years. This paper sets out the broad constitutional reform agenda and the institutional framework for the review in Kenya. It examines some relevant practices in constitutional reform in African countries and concludes that constitutional reform is an imperative in the democratization trajectory in Africa.

Introduction

The making of a new constitution for any country marks an important watershed in its history. It demonstrates the desire of

the people to fundamentally change their system of governance. The process gives the people an opportunity to make a fresh start by reviewing their past experiences, identifying the root causes of their problems, learning lessons from past mistakes and making efforts to provide solutions for their better governance and future development. In Kenya, the primary goal is the establishment of a democratic order in which the rule of law, constitutionalism and the people's participation in public affairs prevails. It is argued in this paper that in the trajectory to democratization, constitutional reform is an imperative - an almost *conditio sine qua non*.

This paper seeks to set out the broad constitutional reform agenda and the institutional framework for the review. It examines some relevant concepts and proposed content of the constitution and their interplay with democracy. It is argued that the institutionalization of the principles and practices under consideration, among other fundamental tenets will buttress a democratic system in Kenya. The paper then concludes that constitutional reform should be a component - a major component albeit of large-scale political and socio-economic reform in a society confronted with dangers of institutional decay. It must not be used as an aesthetic

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or rhetorical enterprise quite harmless to the *status quo*; it must be a process of institutionalizing fundamental constitutional values in governance.

Two preliminary words of warning are necessary. First, this is an extremely wide subject with intricate ramifications. Thus this paper can make no pretence of comprehensiveness in its identification of the democratization process and constitutional reform issues in Kenya. What shall be set out, however, are areas of reform crucial to the realization of democracy. And not every aspect of the same can be covered, even in outline. Some matters will have to be oversimplified if they are to be explained at all. Secondly, a grasp of general concepts and principles is obviously important. Thus a better part of the essay is devoted to a discussion of constitutional concepts and principles.

Understanding the Nature and Character of a Constitution

The term constitution carries a broad meaning today. As is the case with many definitions especially those of a legal nature, there exists not a single definition that has been accepted universally. The many definitions of a constitution that have been advanced by legal scholars all envisage the idea that constitutions are there to express the general will of the people and to control governments. A constitution describes the framework, structures and form of government and the interplay between the main branches of government inter-se and with the people.

In ancient Greek political thought, a constitution comprised the principles, institutions, laws, practices and traditions by which a people carried on their political and governmental life.

Although it may be a difficult task to pin down the concept, the basic idea is that a constitution is the legitimization of government. Thus Wade states that 'a constitution is a document having special legal sanctity which sets out the framework and the principal functions of a government of a state and declares the principles governing the operation of those organs.'¹ Wade's definition captures the fundamentality of the constitution and the critical role in state stability particularly in light of the concepts of the rule of law and separation of powers.

Nwabueze defines a constitution as 'a formal document having the force of law by which a society organizes a government for itself and defines and limits its powers and prescribes the relations of the various organs *inter-se* and with citizens.'² Nwabueze presents the constitution as a set of rules and principles on the form of government, the political structures in the society and the interplay between the main branches of government, as well as between the government and the citizens.

According to De Smith:

Constitutions are primarily about political power, the confinement, distribution and limitation of power among the organs of the state. They are concerned with matters of procedure as

well as substance, more often than not, they include explicit guarantees of the rights and freedoms of individuals.³

And Allot captured this thesis in the following words:

All government is a conspiracy. Each governmental conspiracy has a constitution as its alibi. The constitution describes the way in which the political power of the society is concentrated and places the source of that concentration somewhere other than in the mere act of power. Because of that dislocation, the constitution is the source not only of political power but also of political duty. The subjection of the organs of government to the constitution runs parallel to the subjection of the people to the organs of government. The constitution justifies constitutional power and constitutional duty by making both of them the derivatives from one and the same source.⁴

Seen in this light, a constitution is a body of law by which a community has agreed to be governed. In this regard, it embodies the political will of the people and hence is supreme. For instance, the Kenyan Constitution declares itself as the supreme law of the land and any other law that conflicts with it has neither legal effect nor force to the extent of that inconsistency.

To achieve the distinction of a supreme law, the constitution should be a popular code emanating from the people, who in turn give it legitimacy by identifying with it. This, however, is not true of all constitutions. Some constitutions are a product

of violent revolutions, change, upheavals and turmoil and do not necessarily reflect the wishes of the majority. Experiences over the last century suggest that constitutions have emerged from a changing social order usually at both the local and regional level.⁵ The two world wars each gave rise to the formation of new nation states and constitutions based on changed local, regional and international power relations. The fall of colonialism and the birth of new independent countries in Asia and Africa produced a number of new constitutional dispensations. More recently with the emergence of a global economy, we are beginning to witness the emergence of renewed pressures for the making of new constitutions.

From the above renditions on the constitution, we can clearly identify four salient features of a constitution. First, there is supposition that a constitution is an identifiable document or group of documents embodying a selection of the most important rules about the government of a country. It consists of the basic fundamental laws, customs and practices which the inhabitants of the state consider essential for their governance and well-being.⁶ Second, constitutions safeguard the use of political power which when excessive turns those in authority into dictators. The guarantee of basic rights, the rule of law, democracy and separation of powers serve as such limits of political power. Third, the nature of a constitution and hence its definition may well depend on the social, economic, cultural and political environment of a given society. Natu-

rally, the forms and powers of governments will vary from society to society. Fourth, there are no hard and fast rules about the form of a constitution.⁷ Most constitutions are 'written', such as those of Kenya, Uganda and Zimbabwe, while others are 'unwritten', like the case of the United Kingdom.

In a nutshell, the functional aspects of a constitution are transformation of political power into legal power, information and regulation. A constitution has two distinct audiences, internal and external to the country. For the internal audience, a constitution represents a compact between those who wield power and those who are subjected to such power. It is in this regard that the rights and duties of citizens (both individually and collectively) as well as the checks and balances against those who wield power, become essential components of a constitution. Constitutions are also important to external audiences. They define the essential characteristics of a country's sovereignty, including its national territory, citizenship and the interaction between a country and those outside its borders. Other auxiliary functions of the constitution include: entailing a commitment to an ideology; serving state nationalism or the nationalism of the particular groups within the state; structuring political expectation; expressing political wishes, aims and convictions; serving as a birth certificate for the nation, and marking the establishment of sovereignty and legitimacy of a new state.

The Challenge of Democracy in Constitution Making

Today, the word democracy is back in vogue. However, it is trite that a general agreement as to what constitutes democracy is lacking as shown by the flouting of variant definitions. For purposes of conceptual clarity, we accept Blacks's definition. He says that '[d]emocracy is that form of government in which the sovereign power resides in and is exercised by the whole body of free citizens directly or indirectly through a system of representation and is distinguished from a monarchy, aristocracy, or oligarchy'.⁸ The concept of democracy dates back in history. In about 422 BC Cleon noted 'that it shall be democratic which shall be of the people, by the people, for the people'.⁹ Pericles noted that '... our government is called a democracy because its administration is in the hands, not of the few, but of the many...'.¹⁰ Democracy is associated with various structures and processes of self-government established and guided by the rule of law. These include pluralism, constitutionalism, parliamentary representation, proportional representation, regular elections and the secret ballot.¹¹ But democracy is much more than political pluralism, the ballot and even the national assemblies. And to build a truly democratic society and culture takes a long time of determination and purposefulness on the part of the people and their leaders. This is captured in the following terms:

...democracy cannot be decreed. Unlike instant coffee, there is no instant democracy. You cannot move from to-

talitarianism to democratic practice from one day to another... Democracy is more than just the ballot boxes, the political parties and all the institutional trappings. It is a way of life...¹²

The Constitution of Kenya describes Kenya as a democratic State.¹³ The Basic Law of the Federal Republic of Germany contains a similar clause which declares that all state authority emanates from the people.¹⁴ The description of Kenya as a multiparty democracy is notably vague; the constitution does not define with precision parameters of the contemplated democratic practice leaving room for "feckless pluralism". Besides, it does not state the repository of the sovereignty. It has been argued that these silences have rendered the Kenyan people strangers to the governmental process. Outside elections, the people's participation is almost non-existent. The upshot is that the citizenry feel alienated from the structures and processes of government. The classical theory of democracy, albeit qualified by another word 'representative' has been considered as 'the institutional arrangement for arriving at political decisions which realize the common good by making the people to decide issues through the election of individuals who are to assemble in order to carry out its will'.¹⁵ Further, the relationship between democracy and constitutionalism is explained by one common element: both ideals are inspired by the principle that the management of public authority should be guided by the rights and welfare of the citizens. The constitutionalist

emphasizes individual liberty and limitations on governmental power, even when it is responding to public opinion; the democrat stresses popular rule and processes to effectuate that rule.

Constitutional Reform in Kenya: The need for a Democratic Constitution

In theory and practice, constitutional reform is the process through which a country debates and establishes the constitutional principles and rules that it wishes to be governed through. Stripped of all technicalities, it involves the re-evaluation of the social contract¹⁶ especially in view of changing circumstances since the existing constitution was adopted to ensure congruence with the modern realities of democracy and freedom. It is an opportunity to make democratic adjustments, and to consolidate the new found order in a firm constitutional design. In the words of leading constitutional expert J.B. Ojwang:

It is inevitably a new learning process; a landmark marked with fundamental reflection, identification of and dedication to new values and tenets. The sanctity of such values has ultimately to be captured in the print of the law (to) the formulation of a new constitutional instrument.¹⁷

In Kenya, the present constitutional reform initiative lies at two levels. First, the ordinary one, that applies to law reform in general, and which dictates that the somewhat rigid anatomy of the law in operation be reviewed regularly to keep

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it in conformity with real life as expressed in changing social, economic, political and cultural trends. Talukdar explains this concept of law reform thus:

... [E]very nation, every generation with new socio-economic, with new political ideas, with scientific discoveries and technological developments demands changes in the existing legal system. Law cannot remain a silent spectator to the developments around it, and it can ill afford to remain stagnant in the dynamic society of today. It cannot lag behind the developments and other spheres of life. If it fails to keep pace, if the legal system fails to adjust to changing needs of the society and their aspirations, it is feared it loses its value.¹⁸

The constitution is the resultant of a parallelogram of forces, political, economic and social which operate at the time of its adoption. Society however is always in a continuing state of interaction and change. To sustain its high stature as the mirror of the people's aspirations therefore, the constitution must always keep in step with the dynamics of society. It must, of essence, keep abreast of changing social circumstances and mutating values. It has been observed that a constitution, if it is out of touch with the people's life, aims and aspirations, becomes rather empty, if it falls behind those aims, it drags the people down. It should be something ahead to keep people's eyes and minds up to a certain high mark

It is trite that every constitution making process is influenced by what has happened in the past, and today's constitu-

tional moments also respond to Kenya's unique history, marked by several decades of single-party government, and by the attendant restrictions to broad based participation in the governmental process. The reform initiative is premised on the need to address the crises of governance, popular participation and the need for alternative public management paradigms in the normative framework of politics. This is well captured in section 3 of the Constitution of Kenya Review Act (Cap 3 a) Laws of Kenya which stipulates that the object and purpose of the review of the constitution is to secure provisions therein:

- (b) Establishing a free and democratic system of government that enshrines good governance, constitutionalism, the rule of law, human rights and gender equity;
- (c) recognizing and demarcating division of responsibility among the various state organs including the executive, the legislature and the judiciary so as to create checks and balances between them and to ensure accountability to the people of Kenya;
- (d) promoting the people's participation in the governance of the country through democratic, free and fair elections and the devolution and exercise of power;
- (j) ensuring the full participation of people in the management of public affairs; and
- (k) enabling Kenyans to resolve national issues on the basis of consensus.

And as Kenya joins the list of "transitional countries", an interest in institutionalizing democracy demands that the new government pursues comprehensive reforms that will strengthen all formal institutions of governance and give them practical legitimacy. That means enacting a new democratization script. The challenge for the ruling National Rainbow Coalition, like for most new governments is the dilemma whether to espouse reforms, meaning institutionalizing democracy or to entrench itself in power. The two can only be reconciled with great political adroitness. The recent elections that resulted in a change of government should not be regarded as representing the ceiling of Kenyans' democratic ambitions. The consolidation of a new democratic script and the democratization of the constitution through reforms is imperative in the transition continuum. This is the challenge and opportunity for Kenya. The argument for reforms holds it further that the series of constitutional amendments initiated soon after independence were so rapid and profound as to alter the value content and significance of the basic law.¹⁹ Further, many developments have arisen since the enactment of the independence constitution in 1963, which make the case for a new constitution. This is asserted by a distinguished constitutional expert who observes:

This also entails the need to respond to the call of a more globalized world, in which international law and broader world developments, have established new government standards, that today

demand incorporation in national governance systems. Thus the constitution making initiative is meant to embrace the local and universal changes in state relations, international legal order, the political environment, economic and social realities such as good governance, observance of human rights, minority rights, environmental rights (and management), sustainable development and popular will (participation) in governmental processes and structures.²⁰

Broad Reform Agenda

The framework for Kenya's constitutional review is located in the Constitution of Kenya Review Act (Cap 3 A) Laws of Kenya. Section 3 of the Act provides that the object and purpose of the review and ultimate design of a new constitution is to address the following matters of constitutional magnitude: national unity and integrity; democratic systems of government; good governance; political parties; constitutionalism; the rule of law; human rights and gender equity; separation of powers-checks and balances; popular participation, devolution of power and the electoral process; international and regional relations and management of national resources. This is Kenya's broad constitutional reform terrain.

We, The People of Kenya

The present Constitution has no preamble or preliminary statement of its foundational principles. The lack of a preamble to the Constitution of Kenya signals Kenya's lack of a set of coherent na-

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tional values or a shared constitutional ethos²¹. Most modern constitutions have enshrined a preamble setting out the foundations and spirit of the entire constitutional framework. These values include fundamental rights and freedoms, equality, human dignity, the participation of the people in governance and decentralization of power and justice. Other features that should be captured in the preamble should include reference to history,²² sources of authority of the constitution, community support among other specific goals.

The constitution of the Central African Republic²³ asserts in its preamble that 'The Central African People' are "convinced that universal suffrage is the only source of legitimacy of political powers." This is buttressed further by article 18 thereof, which provides, *inter alia*: 'The principle of the Republic is Government of the People, By the People, For the People. The national sovereignty belongs to the people who exercise it directly by means of referendum or indirectly by their representatives.' What is innovative in some constitutions is the inclusion of statements of guiding principles or directives in addition to the more traditional constitutional preamble.²⁴ The Constitution of South Africa enshrines Constitutional Principles, which have been described by the Constitutional Court as a "solemn pact." The drafters of Kenya's constitution have endeavored to draw from these new generation constitutions elements that constitute an entry point into our basic law and have prefaced the Draft

Constitution with a preamble, which runs thus:

"We, the People of Kenya
AWARE of our ethnic, cultural and religious diversity and determined to live in peace and unity as one indivisible sovereign nation:

COMMITTED to nurturing and protecting the well-being of the individual, the family and the community within our nation:

RECOGNISING the aspirations of our women and men for a government based on the essential values of freedom, democracy, social justice and the rule of law:

EXERCISING our sovereign and inalienable right to determine the form of governance of our country and having fully participated in the constitution making process:

Do adopt, enact and give to ourselves and our future generations this Constitution.

GOD BLESS KENYA"

The Electoral Process

A primary component of democracy is the people's right of choice by way of free and fair elections. Although we do not purport that elections equal democracy, the importance of regular and genuine elections cannot be gainsaid. Not only do elections give new governments democratic legitimacy, but also serve to broaden and deepen political participation and the democratic accountability of the state to its citizens. The structures and

processes of electioneering must be re-defined to ensure that voting is perceived not only as a right but also a civic responsibility. Whereas it may not be possible to have all interests represented, the electoral system must be redesigned to ensure the participation and accommodation of as many interests as possible in the legislative process. The challenge here is to adopt an electoral system that would ensure representation of women, youth, special interests, the disabled and minorities in this vital process of government. The Draft Bill to amend the Constitution of Kenya provides for elections on the basis of proportional representation as a strategy for ensuring this.

Devolution of Power and Checks and Balances

Democracy is probably better served by having a devolved system that is constitutionally provided for rather than having informal administrative systems of deconcentration or delegation which can be easily done away with. Of course there exists a continuum of possibilities but relevant here is the democratic criterion; how devolution can contribute to the deepening of democracy. We posit that this should be the major consideration in choosing the mode, levels and structure of devolution for Kenya's new constitutional order. The Draft Bill to amend the Constitution has provided in Chapter 10 thereof for a framework for devolution of power, the structure of the proposed system and the functions and powers of the

devolved governments. It provides for four main levels of devolution, with the District as the principal unit. These provisions have also entrenched the principles guiding devolution such as popular participation, good governance and accountability among others. Further, the new constitutional order should be devised as to enable government to 'govern' effectively, accountably and democratically. The objective is to avoid both anarchy and tyranny. The limitation of government power is also desirable as it checks abuse and enlarges the scope of individual self-fulfillment and the enjoyment of fundamental rights. One of the effective remedies is to distribute both political and economic power and responsibility vertically and horizontally, and to institutionalize control devices on the organs of government. Such limitation is to be associated with the sister goals of the rule of law and separation of powers which are both fundamental ingredients of constitutionalism - an indispensable component in flourishing constitutional democracies.

If Democracy, then Human Rights?

As it has been said, 'human rights are tied to democracy and it is difficult to bypass a discussion of democracy in relation to human rights in the contemporary world'.²⁵ Notably, the Review Act gives a high priority to human rights. It refers expressly, or by implication to protection of human rights and democracy. What the drafters considered is that democracy, as

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understood today, cannot exist without human rights - right to assemble, associate, vote and be candidates, expression, minority protection and so on. Article 33(5) of the Constitution of Ghana (1992) stresses this linkage in the following way:

The rights, duties, declarations and guarantees relating to the fundamental human rights and freedoms specifically mentioned in this chapter shall not be regarded as excluding those not specifically mentioned which are considered to be inherent in a democracy and intended to secure the freedom and dignity of man.

A similar gesture is located in Article 7 of the Constitution of the Republic of South Africa which provides that the "Bill of Rights is a cornerstone of democracy in South Africa." It enshrines "the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom." The verdict is that human rights, equal rights and government under the rule of law are important attributes of the democratic practice. Part of the challenge of the Technical Working Group on the Bill of Rights at the Conference is to make recommendations with a view of enriching Kenya's catalogue of human rights proposed in the Draft Constitution. Section 17 (d) (i) enjoins the Review Commission to ensure that the people of Kenya examine and recommend constitutional commissions, institutions and offices that would facilitate constitutional governance and the respect for human rights and gender equity. What

must be distilled from this is that additional or alternative mechanisms for the enforcement of fundamental rights must find expression in the constitution. The Review Commission has proposed the establishment of a constitutional Commission on Human Rights and Administrative Justice comprising commissioners with thematic duties and a Public Protector. The idea in these proposed institutions is to provide accessible fora for efficient redress of "human wrongs." In structuring these institutions, the challenge is to ensure the design of independent and effective bodies.

Political parties

Political parties must be considered not as ends in themselves, but as means to an end. And the end itself must not be selfishly personal and tribal, but instead republican. The end must be to democratize and constitutionalize governance. It must be to republicinize governance.²⁶ In emphasizing on the inalienability and importance of political parties in democratic and constitutional governance, M. Carter²⁷ wrote of them thus:

They are the indispensable links between the people and the representative machinery of government. Their role is most obvious when an election is in prospect. But in fact, they need to be continuously operative if a democratic system is to operate effectively. They are vehicles through which individuals and groups work to secure political power.

The German Basic Law has very elabo-

rate provisions on the role of political parties in democratizing and constitutionalizing governance. Article 21(1) provides in this regard as follows: '[T]he parties shall help form the political will of the people. They may be freely established. Their internal organization shall conform to democratic principles'. In Kenya, political parties are not given clear and specific provisions in the current constitution. Given the juridical character of political parties and the fundamental role they are expected to play in the governmental process, the Draft Constitution has entrenched detailed provisions on the management of these entities.

Additionally, there should be checks to curtail arbitrariness of the ruling party or coalition of parties. To achieve this, political clientelism, the state machinery and politics must be isolated from each other. The German experience is worth pointing to in this discussion. Article 21(2) of the Basic Law of the Federal Republic of Germany, empowers the Federal Constitutional Court to rule on the unconstitutionality of parties whose aims or conduct (of their adherents) is inimical to free democratic order. There should be such a balance of forces in the new constitutional order that no single social force, coalition or group should be able to establish its hegemony to the extent of flouting the established democratic principles. Indeed, political parties must internalize the culture of democracy within their frameworks. This is particularly im-

portant in a country where political competition is between deeply entrenched parties that essentially operate as patronage networks and seem never to renovate themselves. Internal bickering over power and internecine subterfuge are the characteristic features of these groups. The process must also address the dominant power politics that has characterized Kenya's political landscape. The new framework should enable politics that is oriented on public well being, is universalistic and obeys rational democratic and bureaucratic principles. The words of De Smith are relevant to this discussion:

I am very willing to concede that constitutionalism is practised in a country... Where political groups are free to organize and to campaign in between as well as immediately before elections with a view to presenting themselves as an alternative government...; and I am not easily persuaded to identify constitutionalism in a country where any of those conditions is lacking,²⁸

Of constitutionalism the same author made an observation germane to this essay:

Constitutionalism is practiced in a country where the government is genuinely accountable to an entity or organ distinct from itself, where elections are freely held on wide franchise at frequent intervals, where political groups are free to organize in opposition to the government in the office and where there are effective legal guarantees of fundamental civil liber-

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ties enforced by an independent judiciary.²⁹

Parliamentary reforms

Considering the advantage of bicameral legislatures including their capacity to hinder the passage of flawed or reckless legislation, and provide oversight or control of executive, we posit that the new constitutional design should establish a second parliamentary chamber and a framework for an independent parliament. Article 101 of the Draft Constitution of Kenya proposes an Upper House, to be called the National Council and a Lower House, to be called the National Assembly. Detailed provisions on the role of Parliament in the new constitutional instrument further buttress this. What must be underscored in this discussion is that internal institutional weaknesses such as lack of support including research facilities and assistance, inadequate secretarial and library services along with modern information systems and adequate power to control the administration should also be addressed in these reforms. There should be a scheme of arrangement to enhance the technical and institutional capacity of parliament to question the wisdom, soundness or effectiveness of a government's actions, policies, budgets and legislative programmes. Effective control devices such as the vote of no confidence and impeachment should find expression and support in the new law. Other innovations may include the strengthening of existing control devices such as the parliamentary question. In Madagascar, for example, the prime minister and all cabi-

net ministers appear before the full National Assembly on live radio and television to report on the annual activities, their performance and results. Their individual presentations are followed by a tough question session.

Another important candidate for the restructuring of the Legislature is the question of the committee management system. Needless to say, almost all democratic legislatures depend on committees to conduct their business. It is notable that some constitutions stipulate that the legislature's committee meetings be open to the public. Open committee meetings allow citizens to closely follow debate on matters of public interest. It is, besides, the "access point" for citizen participation in the legislative process. Of course there are also demerits of open committees but this practice has been used elsewhere to achieve higher levels of direct participation in the governmental process. What is innovative is that Article 146 of the Draft Constitution enjoins Parliament to conduct its business in an open manner and to facilitate public involvement in the legislative and "other procedures of Parliament and its committees".

Democratizing the Constitution Making Process: A New Approach

The experiences in constitutionalism and constitution making in Eritrea, Uganda, Malawi, South Africa, Zimbabwe and more recently in Kenya has provided a dynamic and new international trend that will change the way in which constitu-

tions are drafted henceforth. The key difference has been the involvement and participation of the broader population particularly through the engagement of the civil society in the constitution making process. This is an experience that has fundamentally altered the defining architectures of constitutions. Until now constitutions have been considered purely in legalistic sense to justify the way in which society has been ordered and governance managed. New constitutions require a new ingredient- the participation of ordinary people beyond the traditional power brokers. This has introduced the concept of ownership by the majority as a fundamental prerequisite to legitimacy. Hence the process by which constitutions are now made has as much of an impact as the substance of the provisions contained in them.

This explains the desire amongst many countries, particularly in Africa, to arrive at truly democratic and legitimate constitutions. To achieve this, governments have been advised to adopt '*Best Practices in Participatory Constitution Making*' and to ensure that the process of constitution making is, and is seen to be, as important as the substantive content of the constitution itself.³⁰ They are further encouraged to ensure that the management and the administration of the process is credible, inclusive, transparent, participatory and receptive and open to the diverse views existing in society. Mechanisms used for adopting or ratifying constitutions should also be credible and truly representative of the people. At the same

time, constitution makers should have sufficient and easy access to international experience, precedents and materials to enable them to take informed decisions. These principles are no doubt a shift from the independence or revolutionary constitutions.

The innovation in Kenya is that the Act governing the constitutional review process acknowledges the primacy of the people. The Review Act has set the stage for the making of a constitution that responds to popular will; one that reflects national needs as perceived by the people. This, notably, will be a departure from the present constitution, which from the beginning was the handiwork of elite groups, and the various amendments were not either sanctioned by the people.³¹ It is to be recounted that the constitutional dispensation that came with independence, in its essential features, was by no means the brainchild of the negotiators alone. The law has since then been amended thirty eight or so times. The upshot of this is that the Constitution of Kenya, today, is in an essentially 'patchwork form.' This has negated its value and significance as an instrument of governance. A leading Kenyan constitutional scholar abbreviates the present constitutional status thus:

- (i) [I]t consists of a rather incoherent legal document that has been amended piecemeal over the last thirty-six years;
- (ii) there are no integrating principles linking up key provisions-such as those

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relating to the executive body, the legislative body, civil liberties, management of emergencies, conduct of foreign affairs, and international relations;

- (iii) the constitution lacks an effective scheme for accountability, checks and balances in the exercise of public power;
- (iv) the document, in its mode of implementation and in relation to the vital governance initiatives, is focused upon the primacy of the presidency;
- (v) it is generally deficient of general principles of governance to give context to the functioning of departments of the state; and
- (v) the constitution is the orthodox kind that establishes only the time-honored bodies of state—the legislature, the executive, and the judiciary—but makes no provision for modern agencies such as the Ombud institution. Of vital importance, and lying parallel to such constitutional setup, is the political reality: political leadership rests upon the president who is also leader of an overwhelmingly dominant political party, in a multi-party context marked by ethnicity and the individual-patron factor.³²

Against this background, the Act makes provision for a number of institutions that have ushered constitution making onto a novel path. A common thread in the provisions is the element of popular participation and consultation, directly or indirectly. The pertinent explanation would be that the true sanctity and durability of

a constitution is linked to its mode of origination. A constitution has practical meaning and durable life when it is evolved in the context of the social reality, but it will be artificial and somewhat brittle, where a slim elite enacts it largely to serve minority interests, where it is a 'hit and run' document planted upon a people by a departing imperial power, or where it is entirely the brainchild of technocrats whose primary concern is to have on the ground a reference document to serve public relations purposes. The reform initiative has adopted strategies and mechanisms that ensure that it receives consensus from a broad section of the public. The Act establishes devices that have been universally recognized and employed to direct the unified will of the people towards direct participation in the process of moulding the constitution.

The Constitution of Kenya Review Commission

Since their inception in the late nineteenth century, constitutional commissions have played increasingly important roles in constitutional reform. Constitutional commissions provide expert analysis and advice on constitutional problems and develop proposals designed to address those problems. These proposals may range from individual amendments, to series of amendments, to even entirely new constitutions and accompanying legislation. In some instances, like in Kenya, the commission is mandated to convene and provide this advice to the constitutional conference, providing background study and analysis to lay the groundwork

for the conference deliberations. More frequently, however, commissions are appointed with the expectation that their advice will be directed to the authority that appointed them. In some cases, it comes out in fine print of the law that such a commission is not subject to the direction of the appointing authority.

The main responsibility in the review process in Kenya reposes in the Constitution of Kenya Review Commission, which is to ensure 'the comprehensive review of the constitution by the people of Kenya.' The Commission is required to conduct a systematic recording of the people's input and to process these and formulate a draft constitution³³ to be further debated and adopted by the National Constitutional Conference and National Assembly. Under s. 17 of the Act, the main functions of the Commission shall be to facilitate civic education; to collect the views of the people of Kenya on proposals to alter the constitution and draft a bill to the effect; to carry out research, studies, and evaluations to inform the Commission and by extension the people of Kenya; to examine and make recommendations on the choice between unitary and federal system of government, character of the executive organ, the judiciary, constitutional Commissions, institutions and offices, local government, property and land rights, citizenship, culture, succession and transition, foreign affairs, a case for a bicameral legislature, the necessity of directive principles of state policy, public accountability and the possible creation of new check and bal-

ance institutions, in particular the ombudsman.

Other countries like Uganda have taken the route of a Commission in writing their constitutions. Uganda's Commission has been pointed to by some as a model of success. The Uganda Constitutional Commission Statute No.5 of 1988 was enacted by the National Resistance Council with the aim of restoring the people's quest for a new democratic regime. The innovation is that the statute establishing the Uganda Constitutional Commission (now defunct although the executive has established another Review Commission by Decree) captures the context and background of the constitution making process. The preamble thereof runs in the following terms:

"WHEREAS the history of Uganda is characterized by political and constitutional instability:

AND WHEREAS since independence, Uganda has had a series of constitutions and constitutional instruments, many of which have failed to take account of or satisfy the national aspiration of the time; AND WHEREAS the National Resistance Government recognizes the need to involve the people of Uganda in the determination and promulgation of a national Constitution that will be respected and upheld by the people of Uganda, through the establishment of a Constitutional Commission, with a view to achieving a national consensus on the most suitable constitutional arrangement for their country;

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NOW THEREFORE BE ENACTED by the President and the National Resistance Council.”

The lesson for Kenya as well as for other developing countries is that there should be a firm legal framework for writing a constitution. It is instructive to note that Kenya has drawn a lot from Uganda in terms of the process and the Constitutional Commission. It has however been argued that such Commissions only work best if linked to other structures where the people can debate the content of the new constitution. In Uganda, the Commission prepared a draft constitution and recommended among other things that a Constituent Assembly be elected nationally by secret and direct ballot to debate and promulgate the constitution. In the final report of the Constitutional Commission, it was reported that:

...the body to officially debate the draft constitution should be as fully representative of the people as possible... we recommend ... a new body, the constituent assembly, composed mainly of directly elected delegates plus representatives of some interest groups to carry out those roles on behalf of the people.³⁴

What is innovative is that the said assembly produced several drafts, submitted its final “draft for the reconsideration stage of the constituent assembly” and adopted and enacted the final text of the new constitution of the Republic of Uganda 1995. A good way to circumvent legislative obstruction and inertia! What is clear is that given the spirit of participation in the rec-

ommendations phase, the review process must tap popular sentiment and audit through institutional deliberations and debate.

It is notable that the Commission has put in place measures to ensure inclusivity of the process especially for groups otherwise marginalized in the socio, economic, and political orders. Most of the Commission’s public hearings have been held in rural and disadvantaged communities. What must come out in this discussion is that the future of democracy is at least partly related to the quality of the Commission’s handiwork.

The Constituency Constitutional Forum

As already alluded earlier, the first task of a constitutional reform process is to ensure popular participation hence social stability as a means of preserving the state. This view is corroborated by an earlier observation thus:

Constitutional change is a complex, costly and risky enterprise which should not be indulged lightly or frequently. The aim of debating for constitutional change must be to bring about a smooth transition to a new constitutional order or confirmation to the virtues of the existing one that will be accepted by the whole population.³⁵

The Constituency Constitutional Forum is another organ mentioned by section 4 of the Act as being one of the devices through which the review process is to be conducted. The lowest identifiable level to which the review process can

statutorily go, the purpose of these fora is to facilitate, socialize and advance debate and discussion within the constituencies, and this would facilitate the Commission's discussion with the people during the constituency public hearings. The Commission has sought, through the Constituency Constitutional Fora, to address this need for public input by conducting extensive public hearings throughout Kenya and to receiving submissions from individuals, political parties and significant interest groups. It took the review to all the constituencies and held hearings to discuss issues with the constituents. Each submission made at these meetings were then recorded and transcribed. Of all the Commissions established since independence, the Constitution of Kenya Review Commission is the only one that has been statutorily required to collect views at the *nyalgunga* level. True to the words of J. Nehru:

(Constitution making)... cannot be done by the wisest lawyers sitting down in a conclave. It can only be done effectively when political and psychological conditions are present and the urge and sanction comes from the masses³⁶

Constitution making is no longer a matter of legal expertise alone. To this have been added popular participation, international economics, local sociology, political economy and many other factors. What must be distilled from this discussion is that constitutional reforms must be primarily founded on wide consultation with the people. It must be open, out-

ward looking and inclusive. Such consultation is not only good for the durability of the constitution but is also a firm foundation for peace and stability. The process of consultation and participation has even brought stability to countries which are struggling to arise out of the ashes of war and military strife as in Eritrea; civil conflict as in Uganda and immeasurably unjust systems such as in South Africa. The process also embeds the culture of negotiation as a way of resolving differences rather than violent conflict.

Uganda, Eritrea, Zimbabwe and South Africa have also engaged in significant consultation exercises with their citizenry. In the South African experience, the element of public consultation essentially started before the actual negotiations with "talks about the talks". These 'talks' also produced an agreement as to the framework within which the constitution was to be negotiated.³⁷ The task was undertaken by the Constitutional Assembly, consisting of the two Houses of the national parliament. Under the joint chairmanship of a member of the majority African National Congress and the minority National Party, the Assembly's work was delegated to a 46-member Constitutional Committee of Members of Parliament based on proportional representation of the parties. The Committee was divided into a number of thematic committees focused on different aspects of the constitution and served by a Constitutional Secretariat and a group of expert advisers.³⁸ The Assembly devoted enormous effort both to solicit the views of

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South Africans on the new constitution and to communicate their ongoing work back to the community in order to create a credible and durable constitution, which would enjoy the support and allegiance of all South Africans. Nelson Mandela said of the process:

Reaching out through the media; opening the process to inputs from across society; and going out across the length and breadth of the country, face-to-face with communities, the Constitutional Assembly reinvigorated civil society in a way no other process in present time has done.³⁹

Notably, even though the opportunity is afforded to the people, it has been argued that inadequate civic education to equip the citizenry with the knowledge, know-how and attitudes has negated their participation in this enterprise. Others argue that the citizens have some 'native common sense' to enable them grapple with constitutional issues. A second level of civic education was the dissemination of the Draft Constitution and Report of the Commission in all the constituencies to seek the comments of the public on the recommendations. This may be viewed as a strategy for making a constitution a living document. When South Africa produced its constitution, it was translated into the eleven official languages of South Africa and twelve million copies produced and distributed. In addition, it set up a Department for Constitutional Development whose mandate was to translate, abridge, produce and distribute the

constitution and teach it to the people of South Africa. In Uganda, this responsibility reposes in the Uganda Human Rights Commission while in Ghana, a constitutional National Commission for Civic Education has been established. The Draft Constitution of Kenya places this responsibility on the Constitutional Commissions established under Chapter 17 thereof.

The National Constitutional Conference

This is another very important organ of review. This Conference which is going on is much more of a negotiating body where different interest groups are represented to debate, discuss and adopt with or without amendments, the report and draft bill prepared by the Commission. It comprises 29 members of the Constitution of Kenya Review Commission, 210 representatives of districts elected by the county councils, all members of the National Assembly, 42 representatives of the disabled, trade unions and non-governmental organizations and 125 representatives of religious, professional, women and youth groups. The idea behind this is to have legitimate delegates elected directly (for the case of parliamentarians, though not solely for that purpose) and indirectly (by the county councils) while also providing an avenue for the nomination of talent into the conference. Notably, parliamentarians attend such conferences pursuant to their law making duty and secondly, as elected representatives of the people. What must also come out

is that the capability and suitability of a conference to legitimate outcomes derives largely from the quality of its members as legitimate representatives. For the Kenyan case, the membership can be said to be legitimate in terms of the selection procedures, territorial representation, equality among parties and 'representativeness'. The Conference is so far the most representative body Kenya has ever had for a discussion of the constitution. This was underscored by the President of the Republic of Kenya H.E. Mwai Kibaki in his speech during the official opening of the conference at the Bomas of Kenya. He asserted:

[T]his Conference is a gathering of the whole nation... Like a Constituent Assembly, we represent the whole nation and are accountable to all the people...⁴⁰

It has been further argued that a broad based and representative National Conference is a far more accurate reflection of the will of the whole people. Such a conference is also viewed as a more independent organ of the reigning political forces than a commission or Parliament. Jacques Nzouankeu comments on the National Conference, which declares full autonomy thus:

...first of all, the very fact of declaring full autonomy is... (with regard to the existing government) to re-examine and appraise it... to call into question the established order... incompatible with the new idea of democracy. The conference also does not wish the existing government to take part in the process of democratic transition.⁴¹

Others also argue that those who participate in them are still the elite as ordinary citizens are usually few in the national conferences.⁴² Typically, National Conferences are held to define a new constitutional order, to register fundamental democratic adjustments or to resolve serious issues of national magnitude. A national conference is a primary mechanism employed for replacing one constitution with another. This seems appropriate in that the conference maximizes the opportunities for popular participation in the process of devising a new constitution. In some jurisdictions, the citizens decide whether a conference should be called, in most countries the standard procedure being to put the question of whether to call a conference on the ballot, and for the voters to decide by majority vote whether to hold one. In the Ugandan experience the voters elected the Constituent Assembly, the deliberative organ akin to the Kenyan conference. This may be viewed as an injunction against parliamentary obstruction of the deliberations of such a conference. Alternatively, the review process and the organs of review should have been entrenched in the Constitution, and vested with sovereign powers. The import of this would have been to insulate the results of the conference from the legislative powers of members of Parliament.

Some fears associated with the mechanism are that it may sometimes not empower the populace but rather merely provide another arena for the continuation of

politics by the political elites. The caucuses and alliances that emerge during such conferences characterize this. This is not to say that alliances are inimical to conferences. An added challenge with such conferences is that agreement is less likely during the final fine-tuning stages. These challenges are apposite to the Kenyan experience. What observers have underscored is that no such conference is likely to be called or succeed without strong political leadership supportive of constitutional reform.

Over to the people: The Referendum

Black's law dictionary defines the referendum as 'the process of referring to the electorate for approval a proposed new state constitution or amendment or of a law passed by the legislature.'⁴³ Although the referendum is mentioned under section 4(1) as one of the organs through which the review process shall be conducted, it is an optional organ. If the constitutional conference⁴⁴ is able to reach a consensus on the constitution, the draft constitution will be sent to Parliament for enactment and there will be no need for a referendum. If, however, the conference is not able to agree on the Draft Constitution, there will be a referendum in which all registered voters will be able to decide on constitutional questions put to them. Constitutional change via the referendum derives legitimacy and validity from the conventional belief that the constitution should have support of the source of the law-making power - the people.

Scholars have argued that the constitution can find legitimacy either through *pouvoir constituant* (constituent assembly) or *pouvoir constitué* (referendum). Others say that legitimacy is ultimately a function of political socialisation and that a one day exercise (referendum) cannot confer legitimacy for all time a fundamental process as constitution making. Indeed to be truly legitimate, a constitution must grow and become embedded in the psyche of society.

The use of a referendum as an organ in the reform process presupposes a citizenry with the requisite knowledge and attitudes to participate in informed process of law making. This presents a challenge - civic education. It is also our submission that the new constitutional order should also provide that major controversial issues are resolved through national referenda to check polarization of the nation into hostile camps. A case in point in the use of referenda is the Swiss system which relies heavily on direct democracy or referenda. This feature, which dates back more than seven hundred years in Switzerland, calls upon the voters to decide directly whether specific laws should be enacted at the national and canton levels. Consequently the Swiss vote two or four times a year on issues of national importance. Fifty thousand citizens can compel a referendum on a piece of legislation while a hundred thousand are required to initiate a referendum on a constitutional issue.⁴⁵ Caution must, however, be taken as it may have the undesirable effect of undermining representative

institutions or impairing the quality of legislation by stifling the individual responsibility of what is enacted or fails to be enacted.⁴⁶

In Kenya, the question that arises is what the effect of the referendum results would be. The other question that arises is whether the referendum would be the final and constitutive act of constitution making. If not, what would be the constitutional value of the referendum envisaged by section 27 of the Constitution of Kenya Review Act (Cap 3A)? What must also come out in this discourse is that Section 47 of the Constitution of Kenya (Revised edition 1998(1992) is unequivocal that only Parliament can alter the Constitution. It should also be pointed out that there would be no clear constitutional basis of the referendum, although Sections 4 and 27 of the Review Act provides a juridical basis for a referendum.

The final organ of the review is the National Assembly and the President via the presidential assent. It is notable that the results of the national conference and/or referendum are expected to be binding on Parliament. Unlike the other Bills, it is expected that the Constitution Amendment Bill will not undergo the procedural stages before adoption by the National Assembly. The practice in some jurisdictions is that the draft constitution is deliberated by Parliamentary Committees and the Parliamentary Select Committee which publish their own conclusions. The bill is then debated in detail by the whole House and then passed. This would not be nec-

essary for the Kenyan case. The explanation is that parliamentarians have participated fully at the National Constitutional Conference in the debate and the consideration and reconsideration stages of the conference. Another debate on the same would therefore be superfluous. Generally, the people have frowned upon legislatures undertaking constitutional reform, viewing it as an inappropriate intrusion of ordinary politics into what should be an act of extraordinary political solemnity. Thus there was a protracted debate in Kenya until 2001 on whether the reform process should be people-driven or Parliament-driven or expert driven.

In the entire reform process, all the organs of the review shall be expected to comply with certain tenets under section 5 of the Act, styled, the guiding principles. These principles require that the organs and processes of the review should be accountable, nondiscriminatory, inclusive, transparent, accessible consensual and decisive.

Constitutionalism in Kenya: Prospects and Challenges

It is not purported that the analysis made regarding democratization in Kenya with respect to the constitutional reform forecloses any further discussion on the subject. What has been presented is an opinion as to how the content and process of constitutional reform answers the democratic criterion. And it has been posited that the consolidation of the proposed democratic adjustments will purvey a

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framework that “delivers most of the juridical advantages of constitutionalism and the due process of law”.⁴⁷

It is clear from the experiences of many a country that democracy is more than political parties and other institutional trappings. It is a way of life, a culture and a life-style that must permeate all levels of society and all spheres of human endeavor. We must develop an all - pervasive culture of political freedom at both the personal and community levels. The rule of law must prevail and an independent, impartial and credible judiciary must exist. There must be full accountability - political as well as financial. Political and economic empowerment of the people must be accepted as an imperative. Finally, democracy must midwife effective and continuous popular participation in the political process and development, with built in equality, justice and fairness.

It is also to be remarked that the constitutional design setting out a new institutional framework for deepening democracy is necessary, but is not sufficient to safeguard democratic practice. Thus a leading expert in constitutional law has written of “constitutions without constitutionalism” in Africa.⁴⁸ This warning is also apposite in Kenya and by extension Africa. The overall political and constitutional culture will be the key determinant on whether democracy flourishes or not. The development of the constitution and institutions must recognize this.

* LL.B (Nairobi); Programme Assistant Constitution of Kenya Review Commission. An earlier version of this paper was presented at the Constitutional Workshop organized by the German Academic Exchange Service, DAAD and the six Public Universities at Limuru Conference Centre – Nairobi, Kenya on 23rd - 24th May, 2002. I wish to thank Prof. B. Ogot -Chancellor, Moi University, Prof. W. Speitkamp -Giessen University, C. Oyaya-Constitution of Kenya Review Commission and Ms. E. Kamara of Moi University for their comments on the initial draft. The views expressed here are the responsibility for this version is mine.

Notes

1. Wade, E.C., *Constitutional and Administrative Law* (Longman, London, 1977), p.6.
2. Nwabueze, B.O., *Constitutionalism in the Emergent States* (C. Hirst, London 1973), p. 21.
3. de Smith, S. A., *Constitutional and Administrative Law*, 2nd ed. (Longman London, 1973), p. 21.
4. Allot, A., “The Courts and Parliament”, (1979) *C.L.J.*, pp. 79 – 117.
5. Ebrahim, H., *Constitution making in Southern Africa –Challenges for the New Millenium* (A paper presented at a Conference on the Process and Content of Constitution making in Post colonial Africa at the J. F. Kennedy School of Government, at Harvard University, May 9-11th, 2002).
6. Kanyeihamba, G., *Constitutional Law and Government in Uganda*, p. 111.
7. de Smith, S.A., note 3, at p. 22. He observes: “there is no preordained stereotypical type of an ideal constitution. The form and content of a constitution will depend first, on the forces at work when the constitution is established and amended, and secondly, on common sense considerations”.

- tions of practical convenience and thirdly, on the precedents available to the politicians and their advisors who draw the constitution.”
8. Black's Law Dictionary, 6th ed. (1991), p. 298.
 9. Apter, H., *Marxism and Democracy* (Humanitarian Press, New York, 1965) p.11.
 10. Ibid.
 11. Kibanga, M., *The Role of the Electoral Commission in the Democratic Process in Kenya* (Unpublished Bachelor of Laws (LL.B.) Dissertation, Faculty of Law, University of Nairobi, Nairobi, 2000), p. 42.
 12. Adedeji, A., *Sustaining Democratic Rule for Nigeria's Economic Growth and Development* (A paper presented at a special address at the 32nd annual general meeting of the Nigerian Association of Chambers of Commerce, Industry, Mines and Agriculture, held at Lagos, 1993).
 13. Section 1A of the Constitution of Kenya. In theory and practice, constitutional government and democracy are closely related. For example, constitutional checks and balances are often relied upon to repel threats to liberty by demagogic politicians, even when they are supported by a majority of the people. Of democracy and constitutional government in our time, it can be said that, like love and marriage in an old sweet song, “You cannot have one without the other”.
 14. Article 20(1) of the Basic Law of the Federal Republic of Germany.
 15. Schumpeter, J., *Capitalism, Socialism and Democracy*, 4th ed. (1952), p. 250.
 16. The social contract is a political theory whose objective is to explain that the basis of any government is popular support and that such political authority holds power on behalf of the subjects.
 17. Ojwang, J.B., Constitutional reform in Kenya: Basic Constitutional Issues and Concepts (A paper presented at the Constitution of Kenya Review Commission's Workshop on the Interpretation of its Mandate, held in Mombasa, September 10th, 2001). I rely greatly on this work in the ensuing discussion.
 18. Talukdar, M., *Legal Miscellany* (Avijit Enterprises, Calcutta, 1978), pp.6,7.
 19. Okoth-Ogendo, H.W.O., “The Politics of Constitutional Change in Kenya since Independence” (1972) Vol. 71 *African Affairs*, p. 282. The author observes that most Constitutions in independent Anglophone countries ended up in military dustbins or were changed so radically and rapidly as to alter their value content and significance beyond recognition. He attributes this to the transplantation of complex Westminster models into Africa, lack of constitutionalism and lack of definition of purposes of government in the constitutions. See further, Hansugule, M., “Kenya's unsteady march towards the lane of Constitutionalism” (2003) Vol. 1 *University of Nairobi Law Journal*. Hansugule remarks that the British tailored constitutions of the independence era were not meant to advance democracy in the former colonial territories. Rather, their primary objective was to safeguard and guarantee the interest of the departing colonial state. His verdict is that there's need for Kenya to have its autochthonous (democratic) constitution.
 20. Ojwang, J.B., supra note 17 at p.5.
 21. *Ibid.*
 22. In its preamble, the Ugandan Constitution recounts its exceptionable history of “tyranny, oppression and exploitation,” and restates the people's commitment to a popular constitutional order “based on the principles of unity, peace, equality, democracy, freedom, social justice and progress.”
 23. Adopted by a referendum on 28th De-

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- ember 1994 and promulgated on 14th January 1995.
24. For example, India, Nigeria and Uganda's Constitutions. Uganda's "National Objectives and Directive Principles State Policy" are quite detailed and provide for political objectives *inter alia* democratic principles, national sovereignty, the protection and promotion of fundamental freedoms and rights and environmental management issues among others.
 25. Steiner, H. J., et al. (eds) *International Human Rights in Context – Law Politics Morals* (1996). It is further argued that democracy and human rights have interlinked fates and may rightly be considered twins though not identical.
 26. Mutakha-Kangu, J., *The Role of Political Parties in Constitutionalizing Governance*, A paper presented at the Constitution of Kenya Review Commission's Workshop for Political Parties, held in Nairobi, November 5-6th, 2001.
 27. Carter, M., *Government and Politics in the 20th Century* quoted in Mutakha-Kangu *supra* note 26.
 28. de Smith, S.A., "Constitutionalism in the Commonwealth Today," (1962) Vol. 4 *Malaya Law Review*, pp. 204, 205.
 29. de Smith, S.A., *The New Commonwealth and its Constitutions* (1964), p. 106.
 30. "*Best Practices in Participatory Constitution Making*"₂ A background Paper and Recommendations made by the Commonwealth Human Rights Initiative to the 1999 Commonwealth Heads of Government Meeting (CHOGM), held in Durban, South Africa, 1999.
 31. See generally, Okoth-Ogendo, H.W.O., *supra* note 19 Ghai, Y., and Mc Auslan, J.W.P., *Public Law and Political Change in Kenya* (OUP, Nairobi, 1970) and Ojwang, J.B., *Constitutional Development in Kenya* (Acts Press, Nairobi, 1990). It is to be remarked that the independence constitution was brokered at the Lancaster House Conference(s) I, II, and III in 1960, 1962 and 1963 by the leading independence politicians and a final format thereof concluded and adopted by the said Conference.
 32. Ojwang, J.B., "Constitutional Trends in Africa – The Kenya Case," (Fall 2000) *Transnational Law and Contemporary Problems*, p. 536. I rely greatly on this article in the ensuing discussion.
 33. This has since been drafted and tabled at the National Constitutional Conference.
 34. Republic of Uganda, *The Report of the Uganda Constitutional Commission: Analysis and Recommendations*, (UPCC, Entebbe, 1993).
 35. Burrows, B., et al. *Devolution or Federalism* (Macmillan Press, London, 1980), p. 16.
 36. Quoted in the Report of the Parliamentary Select Committee on Constitutional Reforms (Government Printers, Nairobi, 2000).
 37. Ebrahim, H., *supra* note 5.
 38. What must be distilled from this is that there should be a mix of popular participation and expert input in the review process. The fear with an exclusive expert- approach is that experts would put in place a constitutional order that is not truly informed by the economic and social needs of the people. In some circumstances, it is likely to be a reflection of elites.
 39. Secretariat of the Constitutional Assembly, *Annual Report*, Johannesburg, 1996.
 40. *Katiba News*, (Nairobi), May, 2003, p.1.
 41. "The Role of the National Conference in the Transition to Democracy in Africa: The Case of Mali" Vol. XXI *Issue: A Journal of Opinion*₂, p. 47.
 42. Besides, members of the National Con-

ference are usually not elected directly. It has further been said that they have no mandate and are not representative of the national wishes. In other countries, participants in the National Convention or Constituent Assembly have been elected to ensure representativeness.

43. Black's Law Dictionary, *supra* note 8 at p. 61.
44. No doubt conflict management and deadlock breaking strategies are essential to any constitutional reform process.
45. See generally Flanz, G.H., (ed) "The Federal Constitution of the Swiss Confederation 1999," in *Constitutions of the World*, (Oceana Publications, New York,

1999), p. 167 and Kobach, K.W. "Switzerland" in Butler, D., et al (eds) *Referendums around the World*, (The AEI Press, Washington DC, 1994), pp. 94-80.

46. Young, H., *Essentials of American Government*, 8th ed. (Ray, New York), p. 55.
47. Ojwang, J.B., *supra* note 32.
48. Okoth-Ogendo, H.W.O., *Constitutions without Constitutionalism: Reflections on an African Political Paradox in Shivji, I., (ed) State and Constitutionalism: An African Debate on Democracy (SAPES Books, Harare, 1991), p. 5.*