TOWARDS A NEW CONSTITUTIONAL DISPENSATION IN KENYA: THE POLITICS OF THE CONSTITUTION AND THE CONSTITUTION MAKING PROCESS.

A thesis submitted in partial fulfilment of the requirements of the degree of Master of Laws (LL.M.) of the University of Nairobi.

By:

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"Since the struggle against colonialism, [Kenyans] have retained undying struggle to protect their rights under just systems of governance. They want democratic governance: proper dispersal of functions and powers amongst the organs of government; an executive subject to real checks; a fair system sensitive to all including minorities; a fair and just electoral system that guarantees representation to all ….. Above all [Kenyans] demand a right to a livelihood. They want to control and direct land ownership and utilization away from the grabbing hands of the ruling class. They are calling for equitable opportunities to produce, to be employed, to run business and to practice one's calling, plus equal access to available resources". ***The constitution review process therefore exemplifies the quest for self actualisation and realisation by Kenyans within an environment of equity and equality of all persons.*** (emphasis mine)

Prof. Edward Sumpebwa, Dialogue and Compromise in Constitutional Review Reforms, Keynote address Delivered at National Dialogue Conference 1 – July, 2006

Declaration

I, **D. K. NJAGI MARETE**, do hereby declare that this is my original work and has not been submitted and is not currently and or is not currently being submitted for a degree in any other University.

Signed: _____

D. K. NJAGI MARETE

This thesis is submitted for examination with my approval as University supervisor.

Signed: _____

PROFESSOR H. W. O. OKOTH-OGENDO

Dedication

This thesis is dedicated to Murugi, Mwende, Magambo, and the late Margaret Gikonye Marete, the jewels of my life.

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Abbreviations

Art. – Article

CCBG – Conference Consensus Building Group

CCE – Constitution Conference of Eritrea

CKRC – Constitution of Kenya Review Commission

CKRC - Constitution of Kenya Review Committee

EPLF – Eritrean People Liberation Front

FIDA – Federation of Women Lawyers

IPCC – Inter Parties Consultative Committee

IPCF – Inter Parties Consultative Forum

IPGG – Inter Parties Parliamentary Group

ISCDG – Independent Sector Consultative and Dialogue Group

KANU – Kenya African National Union

KCCT – Kenya College of Communication and Technology

LDP – Liberal Democratic Party

MRSC – Multi – Sectoral Review Steering Committee

NAC – National Alliance for Change

NARC – National Rainbow Coalition

NCC – National Constitutional Committee

NCC – National Constitutional Conference

NDC – National Dialogue Conference

NDP – National Development Party

NKJV – New King James Version

NRM – National Resistance Movement

S. - Section

SUPKEM – Supreme Council of Muslims of Kenya

Acronyms

1. Wanjiku – This is a *Kikuyu* name for a girl or a woman. It is in this context used to mean the ordinary people of Kenya
2. Mwanainchi – This is *Swahili* for an ordinary person
3. Bomas – This refers to a recreation and conference facility which was the *seat* of the National Constitutional Conference
4. Utu – *Swahili* for Humanity
5. Uhai – *Swahili* for life
6. Uraia – Swahili for citizenship

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To God for dear life, the greatest treasure in eternity, and, the energy to live on.
Halleluiah, may your name *ride on high*.

Introduction

0.1 The Problem of Research

Kenya has gone through a turbulent and circuitous constitutional crisis for the last 40 years since independence. This is because the practice of constitutionalism, the rule of law and democracy were hampered by the imposition of an unacceptable West Minister constitutional model that was not in tandem with the aspirations of the majority of those who took state power at independence[1].

The country has throughout its independence gone through a cyclic period where the constitution was amended ostensibly to cater for the interests of the state but in reality these were intended to fit the interests of the ruling elite. This saw a mutilation of the basic structure of the constitution so fundamentally that the same was defaced to the extent of non recognition[2].

Constitutional amendments served to dismantle the established system of checks and balance of government power in the hands of the executive and the then ruling party, KANU. This eroded the consensual system of governance agreed upon at independence to the extent of authoritarianism. The people of Kenya were therefore up in arms in a

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[1] G. Macharia Munene, Constitutional Development in Kenya: A Historical Perspective, in, Law and Development in the Third World. P. 51.
[2] Ibid

quest for a constitutional dispensation that embraced the tenets of democracy, good governance and the rule of law[3].

The partisan approach to constitutional practice in Kenya was not only instrumental in dethroning constitutionalism but is currently responsible for the constitution making stalemate experienced in this country to date.

The problem of research is the current constitutional review crisis in Kenya. Whereas one appreciates that the review process was initiated about eight (8) years ago by the establishment of a Parliamentary Select Committee on constitutional review in 1999[4] it is apparent that many years down the line and even with the establishment of the requisite infrastructure for the establishment and accomplishment of the constitution review process[5], the process continues to be dogged by acrimony and confrontation. It is so to speak, an exercise in circumlocution that has frustrated the efforts of the Kenyan polity in the attainment of a viable constitutional order. This is my thesis and area of investigation and research.

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[3] It would appear that this trend was repeated in other African jurisdictions. Respect for the constitution and the law by those in power was not only a problem of Kenya but was experienced elsewhere in East Africa. See Ibrahim H. Juma, Constitutional making In Tanzania: The case for a nation conference in Law and the Struggle for Democracy in East Africa, Joseph Olaka-Onyango (Eds) Claripress, Nairobi. P.393.

[4] Katiba News, November 2003, P. 1

[5] Besides the establishment of various parliamentary select committees to steer the Constitutional Review, parliament also enacted the constitution of Kenya Review Act, Chapter 3A of the Laws of Kenya, an Act of parliament intended to manage and execute the Review process. Budgetary allocations and other facilitations has been provided but this has been to no avail. The Constitutional review process remains a pipe dream and has refused to bear fruits.

The constitutional review process is bedeviled with problems that have been instrumental in the snarl-up. Despite the long span of time, there does not seem to be light at the end of the tunnel. The pace and tempo of the process is as frustrating as it is unsatisfactory.

The constitutional review process is also polarized by partisan political interests of those in power to the exclusion of the participation of the people of Kenya who are the actual proprietors of the constitution. It therefore creates a confrontation between the governor and the governed in the establishment of defined political and socio-economic interests that must be accommodated in the body and spirit of the constitution.

The legal basis of the constitutional review process has also come under the scrutiny of the populace and the court system. It is the intention of this paper to evaluate the review process in the context of the existing legal establishment and come up with a finding on its efficacy.

The problems of the constitutional review process can be summarized as:-

- Lack of a clear cut road map in the constitutional review process.
- Delay and confusion arising out of lack of consensus on contentious issues of the constitution like land, devolution, Kadhis Courts, the Executive *et al.*
- Lack of political good will to facilitate a smooth conduct of the process.

This paper therefore attempts to understudy the current constitution review crisis in Kenya. It is an attempt to explore the rationale for the current constitution making stalemate in the country as it also seeks to look for a possible way out of the problem.

0.2 Justification for the Study

The government of Kenya gave in to the clamour for a new constitution order in 2001. This was occasioned by overwhelming pressure from various forces which included the civil society and the people of Kenya in general. The constitutional review process has been ongoing for the last eight years yet it does not seem to bear fruit. This paper is intended to understudy and highlight the pitfalls of the constitutional review process and also seeks to come up with a way forward and out of the stalemate. It is also appreciable that a lot of study has gone into the constitutional development and practice in Kenya with emphasis on its historical perspectives. However, the constitutional review process being a new development in our legal jurisprudence has, as yet, not received adequate scholarly appreciation and attention thus justification of this study.

Constitution law and the practice of constitutionalism has developed to direct power relations and government in society. This paper shall attempt to demystify the role of the constitution as a political tool and power relations instrument as opposed to the traditional perception of the same as a strictly legal entity. It would further emasculate a constitution's pretensions to neutrality conventionally upheld in the study of constitution's. This would also enlighten and open up the wrong impressions and perceptions of the constitution created by successive political regimes. This paper

ultimately attempts to fill the void and provide coverage of this new area of study. It is an update of earlier studies on the concept of constitutionalism and its practice and application in Kenya.

The broad objective of this research is to make a contribution to this new area of study in the context of the Kenyan environment. It seeks to further knowledge by an account of the case for the constitutional review process, its effect, impact and outcome on constitutionalism and constitutional practice in Kenya. The specific objective of the study is to do a comparative analysis of the review process in Kenya and other jurisdictions so as to establish the course of events leading to this tumultuous exercise as experienced. It seeks to ascertain that constitution making is not magical but can be easily accomplished in a society at peace with itself where political goodwill flows like a river.

0.3 Research Questions

This paper primarily seeks to answer the following questions:-

- What are the historical and legal foundations of the constitutional review crisis experienced in Kenya today?
- Why is the constitutional review process in Kenya at a crisis?
- What is the role and direction of the courts on the constitutional review process?
- Where goeth Kenya? What is the future of the constitution making process in Kenya?

0.4 Hypothesis

- That Kenya is at the cross road and suffers a constitutional crisis due to past abuse of constitutional practice by the ruling elite in the entrenchment of parochial self interests.

- That the current constitutional crisis is a consequence of its lack of legitimacy arising out of the reluctance of the ruling class to incorporate participation of the people of Kenya with a view to accommodating their views and interest in the new constitutional dispensation.
- That the courts have not issued clear directions on the matters relating to the constitutional review process.

- That the constitution review stalemate can be overcome by the equipment and initiation of political good will from the ruling elite which good will has been lacking and therefore creating the crisis in the review process.

0.5 Theoretical Framework

This thesis is grounded on the post modernist school of thought which upholds and supports a social democratic system of governance where the tenets of governance are free and participatory. It imbues the Lincolnian concept of democracy as a government of the people, by the people and for the people. This espouses governance through participation, consultation, consensus and the will of the people as opposed to the whims of the governor. Here, participation can be direct or through freely elected representatives as appropriate. I also subscribe to the Kelsenian theory of the supremacy of the

constitution and its position as the *grund norm*. In this school of thought, the constitution stands above all other laws and any deviation by such legislation becomes void to the extent of such deviation. It is on this standpoint that the Kenyan review process is mirrored and reflected in this research.

0.6 Research Methodology

Library research is adopted as a means of compiling material for this thesis. Whereas this has strong points in that one can access data on several concepts and experiences on constitutional review it lacks the emotional aspect that combines people's experience and feelings on constitutional review which is only achievable through involvement, interrogation and participation of the people through direct interview. The other basic limitation is that the intensity of the problem of governance is only appreciated in a theoretical perspective.

0.7 Literature Review

The constitution of Kenya which is the supreme law of the country is the will of the people or the mandate they express indicating the manner in which they ought to be governed. It is a social contract involving all the people in a definition of the socio-economic, political and cultural interactions in the development of their society. Literature review relating to the study of constitutionalism and the constitution making process must therefore analyse the subject from a historical perspective.

In this regard Y.P. Ghai and J.P.W.B. McAuslan[6] give a broad outline of public law and constitutional development in Kenya from the colonial period to the first republic. They identify class and power interests and relations in the direction and development of the constitution and governance patterns.

In tracing the development of historical and legal basis for constitution making and constitutionalism in Kenya, Githu Muigai's[7] analysis of constitutional amendments in Kenya notes that these were manipulative and opportunistic and intended merely to serve the interests of those in power. This is fortified by the understanding that a constitution is a political document and constitution making is pre-eminently a political process that aims at establishing and settling certain political equations. J.B Ojwang[8] also echoes the problem of constitutionalism in Kenya as arising out of vested interests in constitution making and development. He has further related constitutional development in Kenya to the English experience and comes up with a basis upon which Kenyan constitutional development has taken root.[9] This shall form a reference in the introductory chapter of this paper.

The constitution making process in Kenya was from the onset clogged with confusion arising out of lack of consensus on the contentious issues.[10] The hottest issue may

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[6] Y. P. Ghai and J.P.W.B. McAuslan: Public Law and Political Change in Kenya, O.U.P., 1970

[7] Githu Muigai, Constitutional Amendments and the Constitutional Amendments Review in Kenya (1964-1997). A Study in the Politics of the Constitution, (PhD Thesis, UoN), 2001.

[8] J. B Ojwang, Executive Power in Kenya's Constitutional Context, (Ll.M. Thesis, Uon, 1976.) See also J. B Ojwang, Constitutional Development in Kenya

[9] Katiba News, A Publication of its Media Development Association and Rural Urban Information Network, August, 2003

[10] Article 35, The Proposed New Constitution of Kenya Gazzette Supplement No 63 of 2005 famously known as The Wako Draft

perhaps be said to be that of the premiership and the amount of power to be held by this office. Members of parliament were not agreed on this and other issues thus blockading attempts to make a forward move in the constitution making process. Other contentious issues that were germane to the stalemate were the issue of land, retention or otherwise of the provincial administration, Kadhis Courts and their entrenchment into the constitution, devolution of power, the judiciary, abortion and the issue of the right to life[11], the inconspicuous issue of gay marriages. It is notable that besides the value rated issues of culture and property rights, most issues of contention arose out of politics and political alignments both in the Moi Kanu and Kibaki Narc regimes. The issue of autochthony or people's participation in the review process is critical in legitimising the ultimate constitutional document. This is derived from the constitutional doctrine of people's sovereignty and the principles of democratic governance that all state authority should emanate from the people.[12]

The politics of the constitution making process is further illustrated in the judicial arena through court rulings in the cases of Njoya vs Attorney General[13] and The Yellow Movement cases.[14] In a commentary and analysis of the Njoya case[15], Professor Y.P. Ghai, then chairman of the Constitution of the Kenya Review Commission insinuated that the proceeding by Njoya and others were instigated to stop or derail the work of the National Constitutional Conference (NCC) and also prevent parliament from enacting the draft constitution adopted by the NCC in accordance with the Constitution of Kenya

[11] Wako Draft, Supra, Article 42 (2) (9)
[12] Katiba News, Supra, P.12
[13] [2004] LLR 4788 (HCK)
[14] [2005] eKLR
[15] Chapter 3a, Laws of Kenya, See Section 26

Review Act. This is a pointer at the participatory role of the courts in the politics of the constitution making process with disastrous consequences to the advancement of the same.[16] The controversy of the Njoya decision aforesaid also prompted the reaction of Professor H. W. O. Okoth Ogendo[17] who proposed the way forward in the enactment of a new constitution in Kenya as follows:-

- Formulae one; followed *inter alia* by Tanzania, Guyana and Zambia, is to simply repeal independent constitutional instruments and to enact a new constitution in its place. This signals a radical break with the British parliament which, in our case, is still the ultimate basis of the legitimacy of the current constitution.

- Formulae two; followed most recently by Malawi (1994) is a variant of formulae one. Under this formula, parliament will simply adopt/enact a new constitution and in the process repeal the existing one.

- Formulae three; followed by Kenya (1969) and Trinidad and Tobago (1976), would go by way of section by section amendment/alteration/repeal. This is the "section 47" approach.

- Formulae four; followed by many countries emerging from political turmoil (the United States of America, countries of the former Soviet Union, Africa's Coup belt stretching from Uganda to the whole of Central and Western Africa) would proceed by way of a national convention/constituent assembly/ referendum or ratification whenever this formulae has been used some sort of enabling law must be crafted to facilitate the process. The Ringera Court does not indicate who has the "constitutional" authority to craft that law. In a revolutionary context, of course, the revolutionaries themselves would do so. That, for example, is what Uganda did.

In formulae one to three draft documents were offered. He argues that a referendum is not the only feasible way of enacting a constitution or instituting legitimacy to the said constitution.[18] It would also require an amendment of the constitution to legitimise the process and the enactment of a referendum act to facilitate the exercise. Professor Okoth-Ogendo does not seem to agree with the court orders on the need for a referendum as this route would be circuitous , bumpy and unpredictable thus offering a fertile ground for sabotage of the constitution making process.

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[16] Y. P. Ghai, An Analysis of the Decision In Re: Constitution Of Kenya, Njoya V Attorney- General P.1
[17] Prof. H. W. O. Okoth – Ogendo, Alternative Enactment Formulae for The Bomas Draft, April 20, 2004,
[18] Ibid, P. 3

The controversy over the efficacy and validity of The Constitution of Kenya Review Act in the promulgation of a new constitution order was defended by Prof. Yash Pal Ghai[19] who argued that the Constitution of Kenya Review Act and Section 47 of the current constitution[20] had set a substantial agenda for constitutional reforms and that the amendment and alteration clauses provided by S.47 were adequate and enabling to effect a new constitutional order in Kenya. The excuse for the disability of the law as provided was therefore lame duck and intended to frustrate the spirit of the people's sovereignty as provided for in the Review Act. Professor Ghai further disparages the attitude of the political elite to the Constitution Review Process and the excuse of consensus.[21]

> "I think of the engagement of these ordinary Kenyans to the review process, and the commitment to change, and wonder at the insolence of political groups, determined to sabotage the draft constitution which encapsulates peoples hopes and aspirations"[22]

He postulates that the problem at Bomas was one of differences on the entrenchment of the positions of the various political factions and that this should not be permitted to strangle the process as it is selfish. Consensus is not the province of any political faction or figure to employ at will. It is not unanimity either and in its absence the law had provided for voting as a method for determination of contentious issues and therefore providing avenues for the way forward.

The rest is history. The constitution referendum was ultimately held on 21st November, 2005 and lost despite massive government support and abundant employment of resources to entrench a case for the draft constitution. This was defeated by an

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[19] Y. P. Ghai, There's nothing wrong with The Review Act, Daily Nation, May 6, 2004.
[20]. Act No. 5 Of 1969
[21] Y. P. Ghai, Consensus is not the same as Unanimity, Daily Nation, May 6, 2004.
[22] Ibid

overwhelming majority, that not withstanding. The people of Kenya have continued to demand that the government sets out the course for clear road map to finalisation of the review process. This was followed by a long lull until February, 2006 when The Committee of Eminent Persons was established to chart a way forward to the review process.[23] The committee was mandated with the task of evaluating the review process with a view to establishing where we were coming from, that is, the history of the process so far.[24] The committee was further mandated to seek and advise on ways and means of national healing and reconciliation besides coming up with a recommendation for a way forward in the review process.[25]

The establishment of The Committee of Eminent Persons may have been well intended but this received hostile reception from stakeholders and members of the public alike. It was argued that this body would not be ideal for charting a way forward in the process in the absence of the involvement of other stakeholders and especially the combatants and opposing sides in the referendum. Moreover, the President the appointing authority of the committee was an interested party and had previously taken sides openly on the review process. Amolo Otiende[26] has challenged legality of the committee and posited that its appointment was only a gazzettement (read notification) and not imbued with any legal basis. He further argues that the committee was neither competent nor appropriate in making useful recommendations on the process as there was nothing new to offer on the review, the position of the stakeholders having been established and publicly expressed to

[23] Y. P. Ghai, Consensus is not the same as Unanimity, Daily Nation, May 6, 2004
[24] Katiba News, Supra, June, 2006
[25] Ibid P. 9
[26] Ibid

the government. The same views are shared by Ahmed Nassir Abdullahi, a prominent legal practitioner and former chairman of the then Law Society of Kenya.[27]

The committee has now completed its task and submitted its report which *inter alia* recommends reconciliation as a method for healing and a way forward to the conclusion of the review process. However, it must foremost be noted that the process is strictly political and its lock and keys are in the custody of the government and the political elite whose survival and continuity is largely dependent on the contents and outcome of the review process. Here lies the future to the review process.

The constitution review process of Kenya has not received extensive academic scholarship. Its literature is to be found in various articles, reviews and commentaries in the media, particularly the print media. It is the intention of this paper to gather and consolidate these with a view to formulating a reference on the subject.

0.8 Chapter Breakdown

Chapter 1

This chapter is intended to highlight the clamor for a new constitutional dispensation in Kenya. The background of the problem, the historical and legal basis for a new constitutional order is highlighted at this point. It also makes a justification for a new constitutional order and makes concluding remarks on its findings.

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[27] Katiba News, Supra P. 9

Chapter 2

This chapter undertakes an analysis of the constitution making process in Kenya. It seeks to understudy the legal basis and politics of the constitution making process and the issue of autochthony or people's participation in the process. It further traverses the road towards Bomas, Naivasha, Kilifi, and the constitutional referendum and rationalises the causatives for such circumlocution. It concludes with an analysis of the constitution review process and role of the Committee of Eminent Persons in the constitution review processes besides a synthesis of its reports and findings. A conclusion is made.

Chapter 3

This chapter shall attempt to define the role, approach and direction of the courts in the constitution making process. The same shall be achieved by an analysis of various references of constitution making issues to the courts including the celebrated cases of Njoya and others vs. Attorney General[28] and others and the Yellow Movement case,[29] again, a conclusion on the subject is undertaken.

Chapter 4

This chapter undertakes an analysis of constitution review processes in other jurisdictions. The case for Uganda and Eritrea besides recitals of experiences from other countries is made to illustrate that constitution review is not magic and is achievable where there is political goodwill.

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[28] (2004) LLR 4788 (HCK)
[29] (2005) LLR

Chapter 5

Chapter five is a comparative analysis of the Bomas and Wako provisions of the constitutional drafts.

Chapter 6

This is the concluding chapter of the paper. It highlights the pitfalls of the road towards a new constitutional order and also seeks to come up with a justification and rationale for the tumultuous path towards a new constitution order in Kenya. It seeks to validate the notion that the current constitution making crisis is a creation of our own and a consequence of class and power struggles in society.

This concluding chapter also offers the way forward to the constitution review process and endeavors to come up with a conclusion of the subject matter and the entire paper.

CHAPTER ONE

The Historical and Legal basis for Constitutional Reforms in Kenya

1.0 Introduction

Constitutional law and constitutionalism concern themselves with the regulation and operation of the law to deal with the practical aspects of every day life[1]. It has developed in societies to enable a balance of power and operations arising out of peoples personal and social interactions. In the course of these interactions amongst different classes and other actors, there is bound to be conflicts arising out of the divergent interests represented therein and therefore the law and the constitution come in to adjudicate and direct the management of power and government under these circumstances[2].

> "... the constitution is a selection of legal rules and principles that determine the form of government and the political structures in society: the constitution should embody the political will of the people. It stipulates legislature's role in making law, the executive's power to govern and implement laws, and judiciary's mandate to adjudicate. All other statutes strive to uphold the spirit of the constitution, and to elaborate on the basic law of the constitution, which therefore remains supreme."[3]

A constitution therefore is an embodiment of rules and regulations that lay out the basic and fundamental structures and means of governing people in society. It is borne out of the realization that a government is necessary in facilitating order in any society. Societal relations require the existence of certain codes regulating the relationship between the people *per se* and the government. A constitution donates power to the government to

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[1] Wachira Maina, Constitutionalism and Democracy, in, In The Search for Freedom and Prosperity, Constitutional Reform in East Africa, Kivutha Kibwana, Chris Maina Peter, Joseph Oloka-Onyango (eds), Claripress Limited, Nairobi, P. 1-2.

[2] Githu Muigai, Constitutional Amendments and the Constitutional Amendments Review in Kenya (1964-1997). A study in the politics of the constitution. (Phd Thesis, University of Nairobi, 2001).

[3] Kennedy J. Omolo, the Constitution and the executive, in, When the Constitution Begins to Flower, Paradigms for Constitutional Change in Kenya, Vol. 1, Claripress, Nairobi, 2002, P. 11.

enforce order in society. However, this power must be regulated and limited by the said constitution in order to facilitate fairness and social justice[4].

Constitutions also define the form and content of government and legitimize the states principal institutions and procedures. Their main objective is to ensure the sustenance of a lawful, peaceful and sustainable government. A constitution likewise, embodies the doctrine of constitutionalism which broadly refers to the adherence to all the body of law that establishes and runs a system of governance. Constitutionalism means commitment to governance by established laws rather than the will of men.[5]

1.1 The Historical Foundations of the Constitution and Constitutionalism in Kenya.

Pre-colonial Kenya did not have a constitution as understood today. The different societies or tribes had there own dispute settlement systems where elders were an integral comportment of dispute resolution. The onset of colonialism saw a drastic change in the structure of societal interactions and method of governance upon the introduction and entrenchment of a centralized government based on a foreign legal system that was founded on constitutionalism.

The colonial constitutional development was intended to entrench the legal foundations of colonialism. It was more emphatic on the rights of foreigners as opposed to those of Africans or Kenyans who were totally ousted from the political mainstream and only

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[4] Mugambi Kiai, Why Kenya Needs Another Constitution, in, In Search of Freedom and Prosperity, Constitutional Reform in East Africa, Kivutha Kibwana *et al* (eds) p.270.
[5] Kennedy J. Omolo, supra, p. 11.

recognized for their labour potential and production of wealth for the said foreigners. Colonial constitutions were therefore twofold:-

(a) Constitutions which described the structure of the colonial government when the country was administered by a British company (IBEA) before direct colonization and after 1895 to the 1940's.

(b)Constitutions developed in the 1950's and 1960's to cater for the interests of the African.[6]

> "From 1895 to 1950 constitution arrangements established by the British Government guaranteed that Kenya was run for the benefit of the colonial power and his people. The Africans did not participate in such constitution design since the political and socio-economic demands would have undermined colonial rule. Through successive constitutional arrangements the colonial elite and the British government were able to control and exploit Kenyans and her people."[7]

Constitutional developments during the colonial period were expressed to suit the politics of the moment. During 1940's and 1950's when the Africans waged a war of liberation and exerted pressure for self government, the colonial government developed five constitutional arrangements as follows:-

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[6] Kivutha Kibwana, The people and the Constitution: Kenya experience, A Paper written for the NCCK seminar on Kenya Our Common Future, (held at the Limuru conference centre from 21 to 25 February 1995), in, In Search for Freedom and Prosperity, Constitutional Reform in East Africa, Kivutha Kibwana, Chris Maina Peter, Joseph Oloka Onyango (eds), Claripress Limited, Nairobi. P. 344

[7] Kivutha Kibwana, Constitution-Making and the Potential for a Democratic Transition in Kenya, in Building an open Society, The Politics of Transition in Kenya, Lawrence Murugu Mute *et al* (eds) Claripress, Nairobi 2002, P. 271.

(1) Lyttelton Constitution, 1954;[8]

(2) Lennox-Boyd constitution 1958;[9]

(3) 1960 Constitution;[10]

(4) Self Government Constitution, 1963;[11]

(5) Independence Constitution, 1963.[12]

The Independence Constitution was negotiated when it became obvious and inevitable that African rights and interest had taken supremacy and that independence and African leadership was the only way out[13]. It was therefore negotiated between the British government and representatives selected from the Kenyan elite on the basis of political party, racial group and minority ethic groups[14]. The issue of direct people's participation or consultation was a luxury the colonial government could ill afford.

The Lancaster house conferences of 1960, 1962 and 1963, (named after Lancaster house, London, the *seat* of the negotiations) resulted in Westminster model constitution for Kenya. This was based on the concept of liberal democracy and market economy for Kenya, concepts that were removed from colonial rule and foreign to the incoming African ruling elite. British rule in Kenya, like many other places was autocratic,

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[8] Additional Royal Instructions, 13th April 1954, Government Notice No. 583 of 1954.
[9] Kenya (Constitution) Order –in- Council, 1958 (Statutory Instrument, 600.)
[10] See Y. P. Ghai and J. P. W. B Mcauslan, Public Law and Political Change in Kenya: A Study of the Legal Framework of Local Government from Colonial Time to the Present, Nairobi/London/New York: Oxford University Press, 1970, P. 177.
[11] Statutory Instrument, 791/1963
[12] Second Schedule, Independence Order in Council, Statutory Instrument of 1968 of 1963.
[13] Kivutha Kibwana, Supra P. 271.
[14] Ibid

authoritative, tyrannical, repressive and arbitrary and therefore the independence constitution was a revolution in governance.

This process was not essentially consensual due to the diverse interests of the feuding groups resulting in a constitution that was inadequate to propel the nation into appropriate governance.

> "... it is clear that Kenya became independent on the basis of a constitution so severely limiting of public power as to be ill geared to the major tasks of integration and development which were imperative following on independence (sic)."[15]

In as much as the Independence or Majimbo Constitution incorporated modern democratic tenets articulated in the U.S. constitution and other international standards incorporated in the 1948 Universal Declaration of Human Rights and also went out of its ways to encapsulate democracy, freedom, individual rights and checks and balances amongst the arms of government, these were not acceptable to the emerging leadership who felt constrained in their exercise of power and power relations.

> "According to the Kenya African National Union (KANU) the independence constitution did not reflect the interest and aspirations of the majority. For example, KANU felt that the issue of regionalism or Majimboism was not supported by the majority. However, KANU accepted the independence constitution so as to hasten the granting of independence status of the century."[16]

This scenario of disaffection with the independence constitution led to a confrontation in constitutional implementation and practice after independence. It was also coupled with multifarious post-independence constitutional amendments, which resulted in a mutilation of the original document to the extent of inapplicability and irrelevancy and an

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[15] J. B. Ojwang, Executive Power in Kenya, (LL.M. Thesis, University of Nairobi), 1976, P. vi
[16] Kivutha Kibwana, in, In Search for Freedom and Prosperity, Constitutional Reform in East Africa, Kivutha Kibwana, Chris Maina Peter, Joseph Oloka-Onyango (eds), Claripress Limited, Nairobi, P 344

abrogation of its basic structure. These amendments further eroded the political structures envisaged by the independence constitution and replaced the same with a presidential constitution and an autocratic government dictatorial to the people of Kenya.

It is against this background that the clamour for a new constitutional dispensation takes root in Kenya from the early 1990's to the present.

1.2 The Need for Constitutional Review in Kenya

Kenya has not had constitutional stability since independence. This is because, as has been pointed out earlier,[17] the independence constitution has been mutilated and manipulated to fit the whims of those in power at the expense of the polity.

The road to the current constitutional review started with people's calls, clamour and agitation for a constitutional reform in the early 1990's. These were as usual rebuffed by the omniscient government on the pretext that these reforms should be left to the parliament as this was the elected people's representative.[18] Whereas this may be a *de facto* truism the government was not bold enough to inform that it had total control and manipulation of parliament and had merely reduced the institution into a rubber stamp of the executive. The possibility of successfully initiating, spearheading, supervising or even presiding in reforms that are pro-people did not exist due to this compromised

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[17] G. Macharia Munene. Constitutional Development in Kenya; a Historical perspective in Law and Development in the Third World P. 51

[18] Mugambi Kiai, Why Kenya Needs Another Constitution, in, In search of Freedom and Prosperity, constitutional reform in East Africa., Kivutha Kibwana *et al* (eds), Claripress Limited, Nairobi, 1996, P. 270

position. It also lacked legitimacy and confidence of the people due to massive erosion of trust resulting from its conduct of public affairs.

> "The country is following a slow pace evolutionary path towards political reforms. The ruling elite has in the past decade adroitly sabotaged struggle for political transformation. This class considers people driven constitution making subversive since it would predictably dismantle personal rule, authoritarianism and with it the privatisation and monopolization of power. Loss of power – political, economic and social- is seen as a direct consequence of constitution making and democratization. Clearly the ruling elite have the justification to frustrate the democratization process." [19]

The amendment and review of a constitution becomes necessary when its provisions are found to be inadequate for the just, fair and orderly management of societal relations. This would arise where the government usurps the sovereignty of the people and amasses too much power to the detriment of the people. It ceases to be a democracy - a government of the people, by the people and for the people and tends towards arbitrary rule and tyranny.[20]

The practice in Kenya has been and still remains one of an oligarchy and dictatorship against the people. The government remains unaccountable to the people of Kenya as in various financial and economic scandals which successive governments have been reluctant to unravel. Ethnic cleansing and genocide in the Rift Valley and other parts of the country continues unabated and no action is taken despite clear evidence and identification of the culprits[21].

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[19] Kivutha Kibwana, Constitution-Making and the Potential for a Democratic Transition in Kenya, in, Building an Open Society, the Politics of Transition in Kenya, Claripress Limited, Nairobi, 2002, P. 262.
[20] Ibid
[21] Ibid, P. 270 - 272

The realization of human rights continues to be a pipe dream and even the NARC revolution seems to have faltered in its realisation of the ideals of the revolution. It is my postulation that the practice of constitutionalism and democracy in Kenya has not met the above basic tenets of democratic practice and therefore resulted in unchecked and confrontational governance that has prompted the people of Kenya to rise and agitate for a new constitutional dispensation.

In a rejoinder on the need for a new constitutional order in Kenya, Pheroze Nowrojee[22] elicits five critical reasons for constitutional change as follows:-

- Because the checks upon a Kenyan president are now extremely weak.
- Because there is now total concentration of power in only one individual office.
- Because there are structural deficiencies in our constitutional and legal structure.
- Because our government structure and practice is presently based on no theory of constitutional forms or practice.
- Because democratic processes can still be and are being subverted unlawfully. There is therefore, need to connect these pathologies in our constitutional system.

The need and justification for constitutional reforms in Kenya cannot be gainsaid. It has been argued that the independence constitutional dispensation that provided for a political system based on a liberal democratic system and also provided for checks and balances

[22] Pheroze Nowrojee, Why the Constitution Needs to be Changed, in, In Search of Freedom and Prosperity, Constitutional Reform in East Africa, Kivutha Kibwana *et al* (eds), Claripress Limited, Nairobi, 1996, P. 386-387.

has been manipulated and dismantled in constitutional amendments leading an authoritarian, repressive and autocratic regime.

The Kenyan presidency under the current constitutional regime is a demigod who is above the law.[23] Various constitution amendments and the enactment of other protective legislation has led to an abrogation of the concept of checks and balances and accountability as espoused and set out in the Independence Constitution that anticipated international standards of governance and democracy. This office lacks checks and is thus endowed with too much power to the extent that this nurtures a dictatorship that is not good for good governance.[24]

Pheroze Nowrojee further postulates that constitutional amendments made between 1963 and 1993 were a confusing dichotomy of the British parliamentary system of government and the American presidential system and the divergent constitutional traditions that are contradictory and difficult to practice in an emerging democracy.[25]

> "What all these dangerous contradictions also show is that all the constitutional amendments between 1963 and 1993 were made not in conformity with any constitutional theory, but only to entrench incumbents in power. That is why our constitutional system just now is a failure and why there are no democratic structures in place."[26]

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[23] See Sections 14, 52, 59 of the current constitution which provide that the president cannot be charged in criminal proceedings or be sued in a civil court while in office. Section 52 and 59 give him overwhelming powers which render parliamentary censor futile in the circumstances.
[24] Pheroze Nowrojee. Supra P 387 – 388.
[25] Ibid, P. 392-395
[26] Ibid, P. 395

Willy Mutunga asserts that the need for constitutional change and reforms in Kenya has been assumed and taken for granted for a long time now due to political expediency of the ruling elite[27]. He underlines the need for a new constitutional order on grounds that:-

> "The constitution reflects a society's social contract, a pact between the government and the governed. Any contract is also moulded by the interests of third parties as well as changing circumstances. No society is static. In the Kenyan context, foreign interests form crucial third party interests. Over thirty years after the first constitution, it is argued there is need for a new social contract that has to be reflected in a new constitutional order."[28]

Other reasons adduced as a justification for constitutional change and still relevant in the current political order are:-

(a) Projected and anticipated economic reforms that are being undertaken or even opined cannot be implemented fully without corresponding political reforms. There is, therefore, the need for a constitution that reflects a liberal democratic economy the various social groups can support.

(b) Amendments to the independence constitution have had a consequence of a one party dictatorship with the executive that has powers of an absolute monarchy. This absolutism should be dethroned with a constitution that reflects a multi-party political environment.

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[27] Willy Mutunga. The need for a Constitutional Changes in Kenya, in, In search of Freedom and Prosperity, Constitutional Reform in East Africa, Kivutha Kibwana *et al* (eds), Claripress Limited, Nairobi, 1996, P. 410.

[28] Kivutha Kibwana, Guiding principles on which to build Kenya's new constitution: Some Thoughts, in, When the Constitution Begins to Flower, Vol. 1, Lawrence Murugu Mute and Smoking Wanjala (eds), Claripress, Nairobi. P. 6 and 9.

(c)People's participation in constitution making has never been appreciated in Kenya. In the present circumstances, they would have to be involved in order to imbue legitimacy and ownership of the new constitution.

(d)A new constitution is likely to diffuse the various transitions (ethnic, racial, economic, political, social and cultural) that are threatening national survival... the debate on constitutional changes is about all the problems that are currently plunging our country and their solutions.

(e)A constitutional reform entails discussions of the strengths and weaknesses of the current constitution and thus respects the wisdom of the saying "do not throw the baby out with the bath water".

(f)A new constitution would nurture and reinforce a vibrant civil society and create institutions involving the same in the political affairs of the nation. The people of Kenya would have to sanction treaties, regional corporation and be instrumental in the decisions pertinent to good governance and politics.

(g)A new constitution forebears a culture of openness and reflects new vested interests in society addressed by political parties. An open society shall give birth to new ideologies and new leadership in society.

(i)It shall entail a test to the commitment of foreign interests to the democratization process in this country. It will reflect the relationship between parties to this contract and their foreign third party counterparts.

(j)A new constitution shall debate our countries survival in a new world order or disorder.[29]

It is my thesis that the political incumbency in Kenya correctly understands and visualizes constitution making as anti-thesis over an authoritarian political framework. Such leadership will strive to preserve the existing constitutional framework and political culture thereby undermining attempts to establish a new constitution order. The transition can only be successfully realised through efforts of reform inclined elite and peoples vigilance in seeking a redirection for further democratisation and mobilisation in search of a new constitution dispensation. This thesis therefore seeks to investigate and interrogate the rationale for this state of affair and come up with an answer to the problem in issue.

1.4 Conclusion

In its simplest form constitutional reform refers to the amendment of an existing constitution or the passage of an entirely new constitution. This, according to the Kenyan

[29] Willy Mutunga, Supra, P. 410-411.

experience can be an uphill task as authoritarian regimes tend to scuttle attempts at reforms as these are a threat to their power base.[30]

A people's constitution must of necessity pursue the fundamental pillars of democracy, namely, liberty and equality. Liberty ascertains the realisation of human dignity inherent in man while equality means that every citizen has an equal claim to all goods, services burdens and benefits that are collectively vested in the citizen[31].

The need for a new constitutional order in Kenya should not be belabored. This is because constitutional practice since independence has resulted in a massive erosion of constitutionalism to the extent of threatening our nation's cohesion and survival. Kenyans now have little choice between a new constitutional dispensation and actually acknowledging the essence of democratic practice or risk anarchy and disintegration.

> "If a country has a fair constitution, which is sensitive to justice for all, and the constitution is obeyed and followed by all, life in such a country is pleasant. The people stand a chance of being reasonably happy and contented. If a constitution is unfair and unjust, as far as its rules are concerned, or a section of a society manipulates it to serve its partisan interests and advantage, then the people in that country face an unpleasant life. The constitution and the leaders are a burden. Through the constitution the leaders seek to become masters and the people are made servants. The people then must be made aware that the existence of a sound constitution is a matter of life and death. Such a constitution becomes a shield, a protector of the people. It is a firm foundation upon which society can build itself into a prosperous society."[32]

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[30] Kivutha Kibwana, Constitution-Making and the Potential for a Democratic Transition in Kenya, in, Building an Open Society, The Politics of Transition in Kenya, Claripress, Nairobi, 2002, P. 267.
[31] Wachira Maina, Supra, P. 8.
[32] Kivutha Kibwana, The People and the Constitution; Kenya's Experience, in, In Search of Freedom and Prosperity, Constitutional Reform in East Africa., Kivutha Kibwana *et al* (eds), Claripress Limited, Nairobi, 1996, P. 341.

From the above premise, it is appreciated that the constitution is a social contract that must be developed in a participatory manner for the benefit of society. It operates from the constitutional principle of equality of all persons and groups before the law and therefore facilitates a situation where the entire society must enter into a constitutional dialogue as a process of constitution building. No section of society should be allowed to impose a constitution and constitutional values or principles on society. The constitution must be a genuine pact between leaders and citizens and also between sections of the citizens themselves.[33]

Again, it requires no emphasis that in a democracy, sovereignty lies with the people, not with the government and when people make a constitution they want to ensure that the government does not take away their sovereignty. Constitutions are designed to distrust power – disallow a relationship of exercise of power by mutuality of trust, which is ultimately bound to fail.[34]

Constitution making should further and principally be premised on the fact that society should always be guided by dialogue, harmony, negotiation, tolerance, trust, understanding *et al* so that consensus is always developed on critical, contentious and key

[33] Kivutha Kibwana, Guiding Principles on Which to Build Kenya's New Constitution: Some Thoughts, in, When the Constitution Begins to Flower, Paradigms for Constitutional Change in Kenya, Vol. 1, Claripress Limited, Nairobi, 2002, P. 6.
[34] Wachira Maina, Supra, P. 3.

issues. Each view that is presented in the constitution making process must be respected and processed. No view should be rejected without due consideration.[35]

It is therefore against this background that I wish to study the constitutional review process in Kenya. This study therefore endeavours to find answers as to why the review process has stagnated and appears unachievable despite massive support from the Kenyan public.

[35] Kivutha Kibwana, Guiding Principles on Which to Build Kenya's New Constitution: Some Thoughts, in, When the Constitution begins to flower, Paradigms for Constitutional change in Kenya, vol. 1, Claripress Limited, Nairobi, 2002, p. 9.

CHAPTER 2

The Constitution of Kenya Review Process

2.0. Introduction

The constitution making process in Kenya has since the 1990's been dogged by the state's interference, frustration and sabotage. Even the futile piecemeal amendments in 1991, 1992, and 1997 were at the slightest opportunity negated by the government as these were viewed as the nemesis of dictatorship that the Moi regime wished to perpetuate.[1]

The 1997 IPPG (Inter Parties Parliamentary Group) constitutional changes were a consequence of the mobilisation of the people of Kenya and combative and ferocious street demonstrations mounted and by the people of Kenya, especially in the urban areas.[2] Kenyans had for a long time realised that the government was not concessionary and that democratic change and space was only realizable through people's pressure and vigilance. This is even recognized by Ringera, J, in his opening remarks in the celebrated constitutional case of Njoya and Others Vs Attorney-General and Others[3] as hereunder:-

> "In 1997, the government of Kenya yielded to persistent pressure by the political opposition, the civil society, the church and social movements for comprehensive changes to the constitution. The government published a bill to facilitate the people of Kenya to participate in the process of constitutional reform. That bill was enacted as the constitution of Kenya review commission act of 1997. It was subsequently amended four times as a result of negotiations by interested stakeholders with a view to making the process all inclusive and "people driven" the end result was the Constitution of Kenya Review Act, Chapter 3A, Laws of Kenya ..." [4]

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[1] Kivutha Kibwana, Constitution Making and the Potential for a Democratic Society Transition in Kenya, in, Building an Open Society. The Politics of Transition in Kenya, Wanza Kioko *et al* (eds), Claripress Ltd, Nairobi. P. 262 at P. 274

[2] Ibid, p. 275

[3] [2004]LL.R 4788(HCK)

[4] Ibid, P.1

The unyielding character of the state, the KANU government and its president forced the populace into mass action and political violence and pressure to which the said government succumbed and opened up to negotiations for a review of the constitution and incorporation of a democratic process.

2.1. The Law Regulating the Constitutional review process

The Law relating to the constitutional review process has developed in leaps and bounds, an indicator of the government's reluctance to streamline the process of constitutional change. Four legal regimes have been developed with a view to accommodating this task;

(a)The Constitution of Kenya Review Act, 1997[5] which was designed by KANU without substantial input from the opposition or civil society and which guaranteed clear presidential control of constitutional review.

(b)The Constitution of Kenya Review (amendment) Act, 1998[6] negotiated between politicians and civil society at Bomas of Kenya and Safari Park. This law provided a substantial role for citizens in constitution making within the social contract theory.

(c)The Constitution of Kenya Review (amendment) Act, 2001 that was basically created by KANU and the National Development Party (NDP) through a

[5] Act No. 13 of 1997
[6] Act No. 6 of 1998

parliamentary select committee. It envisaged and created a lead role for parliament in constitutional review.[7]

(d)The current Constitution of Kenya Review (amendment) Act, 2001 which was the product of some negotiations between a religious sector – lead - civil society initiative and the mainstream opposition groups on the other hand and the KANU - NDP axis on the other.

It is noted that despite the presence of this enabling legislation for the entrenchment and realisation of the constitution review process, this has not yielded fruits due to lack of commitment on the part of the Moi-KANU and Kibaki-NARC regimes in shaping direction on the review process. Despite enormous political hostility and calculated judicial disruptions the government has to date only made lukewarm attempts at facilitating the making of a new constitution through the Constitution of Kenya Review Act.[8] As has always been evident, the government lacks the enthusiasm to propel an effective constitutional review process and the current legal regime is deficient and intended to and not appropriate for the delivery of a new constitution to Kenya. This is deliberate and a case of practical politics.

Other weaknesses of the Constitution of Kenya Review Act are *inter alia*:-

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[7] Kivutha Kibwana, supra, p. 276-277
[8] Ibid, p.276

(a)The Constitution of Kenya Review Commission comprising 27 commissioners, the Secretary and the Attorney-General or his representative, is too large a body to entrench efficacy. The commission is also appointed to represent specific interests and cannot be sensitive to professional and moral competence. The commission should be leaner, technically competent and non-partisan.

(b)The parliament select committee is domineering and can potentially compromise the independence of the organs of constitutional reform under the act.

(c)The Secretary of the commission is not an *ex officio* member as envisaged by the 2000 Act but is an eligible voter in the commission decisions making process. This dilutes the administrative independence and structures of the commission.

(d)The constitution forum as conceived does not provide for grassroots participation in constitution making. It does not provide for permanent constituency forum as envisaged in the 1998 law.

(e)There is no specification for completion of the work by the national forum. This makes a joke of a very serious matter, as it places the completion in the

constitution review process at the mercy of the National Constitutional Conference or Forum.

(f)The Chairperson of the commission is also the Chairperson of the National Forum. He may preside over the National Forum in a manner to ensure the prior work of the commission is accepted without much question. This dilutes people's scrutiny and debate.

(g)A referendum is envisaged on a question or questions where the National Conference has not reached consensus. The people are not invited to ratify the entire draft constitution.

(h)Parliament can vote against the draft constitution bill approved by the national forum thus rendering all the work of the other constitution making organs a nullity.

(i)The Act assumes that the president will, as of course, and further assumes that he shall immediately upon passage of the draft bill on the constitution give his assent and that the draft bill shall be published in the Kenya Gazette so that it becomes law. The Act thus premises its efficacy on the will of the person of the president which is fallacious.

(j)Parliament is still authorized to amend the constitution doing the process during the review.

(k)The Constitution of Kenya Review Act has not been constitutionalised via amendment of section 47 of the current constitution to accommodate a process of changing the constitution other than parliament. This could be interpreted to mean that the current work of the commission is unconstitutional.

(l)The Constitution of Kenya Review Act lacks the requisite time frames for the steps of constitution making as aforementioned. Some steps and procedures are given time frames while others are not. A commission that lacks goodwill can prolong constitution making *ad infinitum*. This also provides an avenue for scuttling of the process by a recalcitrant state system.[9]

The act has resulted in a process that is acrimonious and indecisive due to lack of a harmonized and non partisan commission that has the interests of the nation at heart. Civic education, a critical cog in constitution making has been hampered by lack of proper co-ordination and political goodwill as much as lack of adequate financing. Overall, it would appear that the commission is founded on quick sand and therefore the disabilities experienced during the review process from 2001 to date cannot be wished away.

[9]Kivutha Kibwana, Supra, P. 278-280

The above is an illustration of the constitution review law was fallacious *ab initio* and this fact coupled with the politics of constitution making led to a review process that was circuitous all the way through.

2.2. The Constitution Making Process

As aforementioned, the legislative framework for reviewing the constitution of Kenya is the current Constitution of Kenya Review Act, Chapter 3A, Laws of Kenya that was finally agreed on in November 2001.[10] This established the pace and tempo for starting the review process by the establishment and appointment of the Constitution of Kenya Review Commission which initially comprised of 17 (seventeen) commissioners, a secretary and 8 (eight) alternate commissioners.[11]

The establishment of the official Constitution of Kenya Review Commission was done at a time when a parallel initiative to review the current constitution had been started by the religious groups and civil society organizations and other non governmental stakeholders who had become impatient with the political intrigue involving the government and the ruling party and its elite. The *ufungamano initiative*, as the alternative review process and formulae was known was also founded on the premise that the formal commission was not inclusive, was decentred, not comprehensive or people driven.[12]

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[10] Constitution of Kenya Review Commission (CKRC), 2005. The final report of the Constitution of Kenya Review Commission, P. 3.
[11] Ibid, P. 3.
[12] Ibid, P.4

Due to the polarised political environment existing and the massive distrust and fracture in the political landscape, it became incumbent on the chairperson of the commission to broker a ceasefire with a view to facilitate a merger of the two institutions and founding of a united process which bore fruits in December, 2000.[13]

2.4. The Mandate of the Commission

The primary mandate of the Constitution of Kenya Review Commission was to ensure a comprehensive review of the current constitution *"by the people of Kenya"*. The preamble to the Constitution of Kenya Review Act provides that it is an Act of Parliament to facilitate the comprehensive review of the constitution by the people of Kenya and other connected purposes.[14] It also provides the following as the objects and purpose of review:-

(a)Guaranteeing peace, national unity and integrity of the Republic of Kenya in order to safeguard the people's well being;

(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 divisions of responsibility amongst the various state organs including the executive, the legislature and the judiciary so as to create checks and balance between them; and, to ensure accountability of the government and its officers to the people of Kenya;

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[13] Constitution of Kenya Review Commission (CKRC), 2005, Supra P. 5. The Review Act was again amended in may 2000, to incorporate the terms of the merger agreement – see P. 43.
[14] Chapter 3A, Laws of Kenya

(d)Promoting the people's participation in governance through democratic, free and fair elections and devolution and exercise of power;

(e)Respecting ethnic and regional diversity and communal rights, including the rights of communities to organise and participate in cultural activities and the expression of their identities;

(f)Ensuring provision of basic needs of all Kenyans by establishing an equitable framework for economic growth and equitable access to national resources;

(g)Promoting and facilitating regional and international corporation to ensure economic development, peace and stability and to support democracy and human rights;

(h)Strengthening national integration and unity;

(i)Creating conditions conducive to a free exchange of ideas;

(j)Ensuring full participation by people in managing their affairs; and

(k)Enabling Kenyans to resolve national issues based on consensus.[15]

In the performance of these functions, the commission and all other organs of the review must, *inter alia*:-

(a)Be accountable to the people of Kenya;

(b)Ensure that the review process accommodates the diversity of the people of Kenya, including socio-economic status, race, ethnicity, gender and religious faith, age, occupation, learning, persons with disabilities and the disadvantaged;

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[15] Constitution of Kenya Review Commission (CKRC), 2005. The final report of the Constitution of Kenya Review Commission, P 9.

(c)Ensure that the review process;-

(i)Provides the people of Kenya with an opportunity to actively, freely and meaningfully participate in generating and debating proposals to alter the constitution;

(ii)Subject to the act conducted in an open manner; and

(iii)Is guided by the universal principle of human rights, gender equity and democracy; and

(d)Ensure that the outcome of the review process faithfully reflects the wishes of the people of Kenya.

The commission is further obligated to accommodate the following in the review process:-

(a)Examine and recommend the composition and functions of the organs of state, including the executive, the legislature and the judiciary and the operations, to maximise their mutual checks and balances and secure their independence;

(b)Examine the various structures and systems of government assisting, including the federal and unitary systems, and recommend an appropriate system for Kenya;

(c)Examine and recommend improvement in the existing constitutional commissions, institutions and offices and the establishment of additional ones to facilitate constitutional governance and respect for human rights and gender equities as an

indispensable and integral part of the enabling environment for economic, social, religious, political and cultural development;

(d) Examine and recommend improvements in the electoral systems in Kenya;

(e)Without prejudice to sub-paragraph (a), examine and make recommendations on the judiciary, generally, and, in particular, the establishment and jurisdiction of courts, aiming at measures necessary to ensure judicial competence, accountability, efficiency, discipline and independence;

(f)Examine and review the place of local government in the constitutional organisation of the Republic of Kenya and degree of devolution of power to them;

(g)Examine and review the place of property and land rights including private, government and trust land in the constitutional framework and the law of Kenya and recommend improvement to secure the fullest enjoyment of land and other property rights;

(h) Examine and review the management and use of public finances and recommend improvements;

(i) Examine and review the rights of citizenship and recommend improvements to ensure, in particular, gender parity in conferring of those rights;

(j)Examine and review the socio-cultural factors that promote various forms of discrimination, and recommend improvements to secure equal rights for all;

(k)Examine and review the rights of the child and recommend mechanisms to guarantee their protection;

(l)Examine and review succession to office and recommend a suitable system for a smooth and dignified transfer of power after an election or otherwise;

(m)Examine and note recommendations on treaty making and treaty-implementation powers of the republic and any other relevant matter to strengthen good governance and observance of Kenya's obligation to international law;

(n)Examine and make recommendations on the necessity of directive principles of state policy;

(o)Establish and uphold the principle of public accountability by holders of public or political offices; and

(p)Examine and make recommendation on any other matter connected with or incidental to the foregoing and achieve the overall objective of constitutional review process.[16]

The mandate of the Constitution of Kenya Review Commission as above illustrated was adequate to propel a new constitutional order in Kenya. However, the politics of constitution making and the constitution took sway with disastrous consequences as experienced in the review process.

2.4. The Implementation of the Commission's Work

Section 17 of the Constitution of Kenya Review Act provides for the functions of the commission and the method of achieving these as follows;

(a)Conduct and facilitate civic education in order to stimulate public discussion and awareness of the constitution issues;

(b)Collect and collate the people's views on proposals to alter the constitution and, on that basis, to draft a bill to alter the constitution for presentation to the national assembly; and

(c)Carry out or cause to be carried out such studies, researches and evaluations on Kenya's and other constitutions and constitutional systems as may, in the

[16] Constitution of Kenya Review Commission, (CKRC), 2005. The final report of the Constitution of Kenya Review Commission, P. 9-11.

commissions opinion inform the commission and the people of Kenya on the state of Kenya's constitution.

Section 18 further mandates the commission to:-

(a)Visit every constituency to receive the people's views on the constitution;

(b)Without let hindrance, receive memoranda, hold public or private hearings throughout Kenya and in any other manner collect and collate people's views and opinions, whether resident in or outside Kenya and, for that purpose, the commission may summon public meetings of the inhabitants of any area to discuss any matter relevant to the functions of the constitution; and

(c)Summon any public officer to appear in person before a committee or to produce any document, thing or information that may be considered relevant to the functions of the commission.[17]

In the implementation of the functions of the commission the Act establishes the following organs of the review of the constitution:-

(a)The Constitution of Kenya Review Commission (Commission or "CKRC").

(b)The Constituency Constitution Forum.

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[17] Constitution of Kenya Review Commission, (CKRC), 2005. The final report of the Constitution of Kenya Review Commission, P. 11.

(c)The National Constituency Conference.

(d)The Referendum; and

(e)The National Assembly.[18]

These are the established organs for conducting the Constitution of Kenya review process.

From the foregoing, it is evident that the spirit and approach of the Review Act was different from earlier constitution making processes in that this placed the people at the centre of the process. It aimed at a participatory and inclusive process where the contract between the people and the state would be undertaken through appropriate process and procedure with a view to establishing the relevant content of the constitution.

2.5. The Objects and Goals of the Review

Section 3 of the act provides the objectives of the review which are binding to all organs of the review as follows;[19]

(a)**National Unity and Ethnic Identity**.

This is one of the most critical objects of the review process. It aims at guaranteeing peace, national unity and integrity for the republic of Kenya in order to safeguard the well being of her people (section 3 (a) and 3 (h)) it also aims at enabling Kenyan's to resolve

[18] Section 4 (1) Constitution of Kenya Review Act, Chapter 3A, Laws of Kenya. For a detailed analysis of this subject, see also, Constitution of Kenya Review Commission, (CKRC), 2005. The final report of the Constitution of Kenya Review Commission, p. 52-53.

[19] Constitution of Kenya Review Commission, (CKRC), 2005. The final report of the Constitution of Kenya Review Commission, p. 44-49.

national issues based on consensus and also emphasises respect for ethnic, regional diversity and community rights.

(b) **Democracy and good governance**.

It is also intended that the new constitution must establish a democratic system of government with good governance as a key criterion.

This entails that;

(a)The process of government must be transparent;

(b)Public authority must be accountable to the people;

(c)Administration must be fair;

(d)Public officers, including ministers must be free from corruption or other forms of abuse of power;

(e)State resources must be well managed with an improvement on the system of managing and using public finances;

(f)Civil society organisations should have a role in managing public affairs (section 17 (d)).

(c) **Human Rights**

This was in recognition of the inadequacy of the provisions for human rights in the current constitution. The review act regards the protection of human rights and gender equity along with constitutional governance as an indispensable and integral part of enabling environment for economic, social or religious, political and cultural

developments. The implementation of international human rights obligations was found necessary for Kenya.

(d) **Equal rights for all**

The Act also went out of its way to defuse various forms of discrimination occasioned by socio-cultural factors and review these with a view to ensuring equal rights for all. This was by eradication of practical obstacles to human rights like poverty, corruption, police brutality and arbitrary acts by the government and its agents.

(e) **Gender equity**

This was also considered a critical issue of review. It entails the equal treatment of men and women in public affairs, social life and even family. This is part of a democratic system that is essential to social and economic growth and development.

(f) **Basic needs for all Kenyans**

Another important objective of the review process is to secure the provision of basic needs for all in the constitution.

Basic needs are those essential to human life in comfort and dignity and include food, health, shelter, education, a safe and clean environment, culture, economic and other security. The constitutional review is duty bound to compel the state to provide and protect these rights.

(g) **People's participation in government**

Democratic practices demand people's full participation in the management of public affairs. This is promoted through free and fair elections, devolution and exercise of power.

(h) **Devolution of powers**

This is intended to examine and review the place of local government in the constitutional organisation and devolve power to local authorities. This would ensure people's participation in government issues affecting their lives and of others. The issue of whether Kenya should be a federal or a unitary state is examinable at this level.

(i) **Constitutional commission and offices**

The act requires an examination of the existing constitutional commissions and offices and to make recommendations for improvements and for new bodies to facilitate constitutional governance and respect for human rights and gender equity. This is in tandem with modern constitutions that have gone beyond the traditional three tier system of the executive, legislature and judiciary and established independent commissions and offices to further and facilitate democratic space, practise and constitutionalism.

(j) **Foreign affairs, regional and international co-operation**

The act also requires the constitution to be reviewed with a view to promoting and facilitating regional and international co-operation and to ensure economic development and to ensure peace, stability and support for democracy and human rights. It specifically

provided for a review and incorporation of recommendations of treaty making and implementation of powers of the republic on Kenya's obligations under international law.

These goals of the review process were seen as critical ingredients for constitutional governance and the enhancement of liberty, the rule of law, democracy and the people's participation in the governance process. This would also create institutions necessary for the enhancement of democratic space and provide mechanisms for ensuring equity and equality on the sharing of the national resources.

2.6. Stages of the review

The act as anticipated that the review process will be conducted in the following Stages:-[20]

Stage 1

Civil education: preparing the people for participation

This would have been achieved by preparing the commission as well as the people for the review by way of civic education in order to stimulate debate and awareness of the constitutional issues at hand.

[20] Constitution of Kenya Review Commission (CKRC) 2005. The final report of the Constitution of Kenya Review Commission, p 53-54.

Stage 2

Research studies and seminars: defining the issues

Here, the commission was expected to undertake studies on constitutional and socio-political issues that lead to defining and operationalising its mandate. This would also include seminars, workshops and other participatory forum where the issues at hand would be discussed and debated.

Stage 3

Public consultations:

At this state, the commission would consult individuals, groups and organisations with a view to establishing the public's expectations and response to constitution making. This would be followed by a combination of a memoranda or a code of oral presentation from which a report and recommendations including a draft bill for altering the constitution would be made.

Stage 4

Writing the report and preparing the draft bill:

The commission was also required to analyse and collate review of the public and on this basis write a report and prepare a draft bill to alter the constitution.

Stage 5

Debating the commissions report and recommendations:

The next stage was distribution of the report, recommendations and the draft bill prepared by the commission to the public and civil society for scrutiny and debate. This would be followed by the last stage of drawing the final report and draft bill which would be

handed over to the Attorney-General for tabling before parliament for enactment of a new constitution.

The process stalled at this point to the disappointment of the Kenyan polity and to date there is no positive development in this matter.

2.7. People's participation in the constitution making process

The clamour by the people of Kenya for a constitutional review is attributable to deficiency in the current constitution that frustrated efforts at the attainment of good governance. This pressure for reforms was not a preserve of Kenya but a global wave for democratisation and constitution reform.[21] Professor H. W. O. Okoth-Ogendo has the following to say about this trend;

> "Following the democratic fall of the Berlin wall in 1989 and the collapse of the Soviet Union soon after, demands for political change which had started as mere ripples in the late 1970's began to pound political establishments, both civilian and military throughout the Sub-Saharan African Region."[22]

The New World Order dominated by the global capitalist market encouraged openness and public participation in governance as enshrined in the concepts of a liberal constitution that ushered in democratic practice.[23]

The making of the independence constitution and the numerous subsequent amendments thereon were not made with the inclusion of the people of Kenya. This compromised the

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[21] Constitution of Kenya Review Commission, the final report, supra, P 39.
[22] Professor H. W. O. Okoth - Ogendo. The Constitution Review debate in Kenya will Wanjiku ever drive? (revised draft of a presentation made at the Faculty of law, University of Wisconsin, Madison on Friday, February 25, 2000, P. 3.
[23] Constitution of Kenya Review Commission, (CKRC), 2005, supra, P. 39.

efficacy and legitimacy of the current constitution as one that does not reflect the aspirations of the polity. In this regard, it was necessary that the constitution review process incorporates the spirit of people's participation and this indeed was incorporated in the Constitution of Kenya Review Act.

> "….. The act placed people at the centre of the review process, referred to in popular term as "people driven". It aimed to be a participatory and inclusive process. Since a constitution is a contract between the people and the state for the governance of society two aspects of constitution making are vital. The first is the *process and procedure* by which the contract is negotiated and adopted. The second is the contract of the constitution, that is, the *outcome* of the process."[24]

The role of W*anjiku* or the ordinary Kenyan in constitution making was initially challenged by former president Daniel Arap Moi who argued that constitution making is a highly technical exercise that requires expertise in constitutional design and therefore outside the ambit of the ordinary "Mwananchi" – or, person"[25]

Professor Macharia Munene underlines the importance of the people driven constitution and identifies this with the constitution making process in Kenya.

> "In Kenya, this kind of constitution making has come to be labelled Wanjiku-driven or people driven. Wanjiku is the name of a woman who presumably is a representative of ordinary people rather than the political class or elite. The name Wanjiku acquired its constitutional connotation after Kenya's President Daniel Toroitich Arap Moi used it to disparage the competence of rural women to understand constitutional complexities. In this sense, a constitution is an agreement by all the Wanjiku's in a place on how they want to live, safeguard, and advance their interests without losing their natural rights to an individual or a clique of individuals occupying positions of authority.[26]

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[24] Constitution of Kenya Review Commission (CKRC) 2005. The final report of the Constitution of Kenya Review Commission, supra, P. 44

[25] Professor H. W. O. Okoth-Ogendo, Supra, P. 2

[26] Professor Macharia Munene. The Manipulation of the Constitution of Kenya, 1963-1996. A reflective essay, P. 1

Despite the initial feelings of the Kenyan political elite, public pressure, agitation and vigilance eventually led to the adoption of the W*anjiku* style constitution making method as espoused by section 5 of the Constitution of Kenya Review Act that particularly provided her with an opportunity to actively, freely and meaningfully participate in generating and debating proposals to alter the constitution. It also mandated the Constitution of Kenya Review Commission to ensure that the final outcome or product of the review faithfully reflects the wishes of the people of Kenya.[27]

The role of W*anjiku* as the propelling force or driver of the constitution review process has been questioned and debated at length. Professor H. W. O. Okoth-Ogendo has opined that a classification of urban elite in the form of opposition parties and civil society actually hijacked and used W*anjiku* as an excuse to propel their political and other agenda and never at any time configured the place of W*anjiku* in the constitution making process. This is reflected in the various approaches to the process which were based on political expediency and experiences on the ground.[28]

> "This outcome was intended to ensure that the design of the vehicle was the product of the executive. Parliament and the public literati. It is interesting that at no point was it suggested that ordinary members of the public "Wanjiku" should be involved in the design of the vehicle. This was primarily an "engineering" and not an "operational" excuse. Wanjiku would drive after the engineers had done their job."[29]

Wanjiku was an excuse and not the rationale for constitution making. Professor H. W. O. Okoth-Ogendo says;

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[27] Section 5 (c) (1).
[28] Section 5 (d)
[29] Professor H. W. O. Okoth-Ogendo, supra

> "What is evident is that Wanjiku is being asked to find answers to questions which the protagonists in Nairobi had identified in advance. Consequently, if anything was clear from the act, it was the fact that Wanjiku would have no opportunity to determine for herself what the constitutional agenda would be."[30]

The involvement of W*anjiku* was therefore half hearted and she was indeed a pawn in the power game of succession politics in which everybody except herself had a stake.[31] It has also been asserted that W*anjiku* at the end of the day may not have a decisive role in the constitution making process due to the reluctance of the urban stake holders to entirely release the constitution review process to the people.

2.8. The process and the end product

It is notable that the constitutional review stalemate Kenya finds itself embroiled in today cannot be entirely be blamed on the shortcomings of the Review Act or process. From the onset, one realises that political interest's bred intrigue that was insurmountable, more so, at a time of political succession and other alignments in this country. The political elite are used to entrenchment of power and a dictatorship to *Wanjiku* and therefore only pay lip service to constitutionalism and democratization.

> "What emerges from this assessment is only losses not victories. The heaviest losers may well be opposition leaders ... who may have to look for a third framework for political activism. My hunch is that as had appeared in 1997, they may well streak back to parliament to stake their claims there. This is not fraud; it is *real politik*. Prevarication, realignment, intrigue and inconsistency have since 1957 when Africans were first elected into the legislative council become the strongest threats in the pursuit for political power in Kenya."[32]

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[30] Professor H. W. O. Okoth-Ogendo, The Constitution Review debate in Kenya will Wanjiku ever drive? Supra, P. 6

[31] Ibid, P. 8

[32] Professor H. W. O. Okoth -Ogendo. The constitution review debate in Kenya will Wanjiku ever drive? Supra, p. 17

This is a demonstration that the question for constitutional reforms and the consequential review of the constitution was indeed aimed at the satisfaction of the whims of the political elite - either retention for those who were in possession of political power or acquisition of the same by those outside the realms of power. It is no wonder that even with the eventual draft constitution bill, the process towards a new constitutional dispensation in Kenya is still alluring.

The Constitution of Kenya Review Commission undertook all the procedural aspects and ultimately came up with a compilation of its report and draft bill in accordance with sections 27 and 28 of the Constitution of Kenya review act. However, one finds that despite public debate and production of the final draft which was handed over to the Attorney-General,[33] the Attorney-General did not pursue his part of the bargain but instead entertained and entered into the debate on consensus and the suitability or otherwise of the draft bill.

The basic agreement was that the debate at the National Constitution Conference at the Bomas of Kenya was a polarised and titled towards a certain political camp and power house which argument was explained on grounds of the constitution of the National Constitutional Conference. Although a referendum was, in accordance with the act, an optional method of constitutional making, one finds that this was adopted after the collapse of the Naivasha and Kilifi consensus attempts and the intervention of the courts[34] but this was also ultimately rejected by the people of Kenya on the 21st

[33] Section 28 (2), Constitution of Kenya Review Act, Cap 3A, Laws of Kenya.
[34] Njoya & Others Vs. The Attorney General & Others, Supra

November, 2005 when the political duping of the people, intrigue and power games were brought to a close in a no vote for the referendum.

2.9. Conclusion

Here, as elsewhere, one realises the intrigue and acrimony that is the constitution review process of Kenya. The presence of the viable legislative framework for constitution making is not adequate to cure the effects of political intrigue and inconsistency befalling the process. It is no wonder that in both the Moi KANU – NDP axis present before the 2002 national elections and the Kibaki-NARC regime that was propelled to power on the platform of reforms in December 2002, nothing has yielded and the issue of comprehensive constitutional reforms for the people of Kenya remains a pipe dream.

Wanjiku, who remains undefined and unidentified and whose road-map and agenda in the constitutional review process remains unclear has not had an opportunity of determining her destiny through a free and fully participatory process. Power politics continues to be a bottleneck to her endeavour to realise her aspirations through the constitution.

The courts have also been adventurous at a corresponding constitutional jurisprudence and establishing direction of the constitutional review process in Kenya. This would be an interesting read in the next chapter of this thesis and analysis.

CHAPTER 3

The Role of the Courts in the Constitution Making Process

3.0 Introduction

In this chapter, I shall attempt to examine the role of the courts in defining the direction of the constitutional review process in Kenya. As has been noted elsewhere in this paper, constitutional review and reform has been a heated subject in Kenya as elsewhere and therefore various references of issues of contention by stakeholders to court for determination. These are highlighted at this point.

3.1. The Role of the Courts in Shaping Direction for the Review Process

At this point, it will be honest to state that one feels uncomfortable with the role and direction the courts took in shaping the constitutional review process. It is tempting to conclude that the courts, even with their vociferous attempts at creating a clear path for constitutional reform and review may have sided with some obvious and entrenched interest of the review process. In as much as the courts are seen to propel a case for a people driven constitution and their full participation in the review process, one finds a tendency by the judicial system to capture the spirit of the ruling elite and government in power as against the masses of Kenya. Despite the eloquence in the Ringera judgement and the plausible tone of the Nyamu judgement in the Yellow Movement case one finds a disturbing pattern in the logistics and flow of the decisions. Their reasoning is, to a large extent pretentious and suspect.

3.1.0 Rev. Timothy Njoya & 5 others Versus Attorney General & Others[1]

In this case, the applicants, Rev. Timothy Njoya, Kepha Ombati, Joseph Wambugu Gaita, Peter Gitahi, Sophie O. Ochieng, Muchemi Gitahi and Ndung'u Wainaina who were delegates in the National Constitutional Conference representing different bodies and or interested parties were dissatisfied with the foregoing and the manner in which the review process was conducted and went ahead to apply to court seeking orders to halt the process as they felt aggrieved by the legal issues which surrounded the Constitutional review process and they therefore sought legal redress against the Attorney General, the Constitution of Kenya Review Commission, Kiriro Wa Ngugi and Koitamet Ole Kina. The Muslim Consultative Council and the Chambers of Justice where included as interested parties[2] whereas the Law Society of Kenya appeared as *amicus curia.*

Held,

The majority judgement of Ringera J., Kasanga Ag. J, with Kubo J, (dissenting),

1. Parliament has no jurisdiction or power under Section 47 of the Constitution to abrogate the existing constitution and enact a new one in its place. Parliament power is limited to only alterations of an existing constitution. The power to make a new constitution (constituent power) belongs to the people of Kenya as a whole, including the Applicants. In the exercise of that power, the Applicants together with other Kenyans are, in the circumstances of this case, entitled to have a referendum on any proposed new constitution;

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[1] [2004] LL.R 4788 (H.C.K.).
[2] The Kenyan Section of the International Commission of Jurists. Constitutional Law Case Digest, Vol. 11, P. 113

2. That the Applicants have not established that they have been discriminated against by virtue of the composition of the National Constitutional Conference;

3. That the Applicants are not entitled to an injunction to stop the National Constitutional Conference; and

4. Every party will have to bear their costs of the Originating Summons.

This case affirmed, recognized and entrenched the doctrine of a liberal construction of the constitution. That the constitution must be interpreted in a broad, liberal and purposive manner to effect its values and principles. In line with this interpretation, the court brought to the fore the concept of constituent power inherent in the people of Kenya which gives them the power to determine and make a new constitution.

This is a derivation of the fact that in a democratic state, sovereignty belongs to the people and so is constituent power and therefore the power to make a new constitution.[3]

The dissenting judgement of Kubo, J, posited that a Constituent Assembly was one of the various modes of exercising constituent power and since it was not provided for in the constitution or in ordinary law, if Kenyans decided to have it as their method of constitution making, it would have to be expressly provided for in written law and can

[3] The Kenyan Section of the International Commission of Jurists. Constitutional Law Case Digest, Vol. 11, Supra, P. 120

not be inferred. He therefore differed with the Ringera judgement on the liberal aspect of constitutional interpretation to infer the constituent power. He further opined that a referendum is not a mandatory constitutional right but again, one of the several methods of legitimizing a constitution and if this was deemed a mandatory right, it would have to be expressly provided for in written law.

He stated:

> "The Applicants contend that the referendum is a mandatory constitutional right. It is not. This process, important though it must be, is one of the several alternative ways of legitimizing a constitution. I put it in the same category as a Constituent Assembly. If Kenyans want a referendum as a mandatory right, it has, in any respectful view to be provided for expressly."[4]

Kubo, J. however agreed with his colleague judges in dismissing the Applicants prayer against discrimination in their participation in the review process but again disagrees on the interpretation of the amendment aspects of Section 47 of the constitution. He was of the considered opinion that Section 47 of the constitution does not limit the power of parliament to amend or repeal the constitution and to replace it with a new one.

He again stated:

> "In any view of Section 47 (6) (b) and 123 (b) of the constitution, it is my respectful view that it is legitimate to interpret parliaments alternative 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."[5]

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[4] The Kenyan Section of the International Commission of Jurists. Constitutional Law Case Digest, Vol. 11, Supra, P. 129
[5] Ibid, P. 132

That the framing of Section 47 of the constitution was adequately clear and did not impose limitations on the power of parliament to amend, re-enact, repeal and or replace the constitution.[6]

It is noted that the Njoya proceedings were instituted to stop the work of the National Constitutional Conference (NCC) and prevent parliament from enacting the draft constitution adopted by the National Constitutional Conference aforesaid. These proceedings were also, at the worst, intended to compel a mandatory referendum on the proposed new constitution.[7]

Professor Ghai is of the view that Kubo, J's, approach to the issues raised in the constitutional application was correct and that the case should have been dismissed.[8]

> "It is my respectful opinion that Kubo, J's approach was correct and the case should have been dismissed. The decision of Ringera and Kasango were based on no authorities, were abstracted from the realities of the Kenyan situation, were contrary to general principles and practice of constitution making, and were, in the circumstances of the case irresponsible."[9]

Ghai further posits that the Ringera and Kasango judgments were preposterous, abstract and of no legal or constitutional value and rating. At the best, these were, with due respect, an ecstasy and figment of the imagination of the aforesaid judges. These were

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[6] This approach had been adopted and utilized in the amendment of the Tanzanian constitution.
[7] Yash Pal Ghai. An Analysis of the Decision in RC Constitution of Kenya, Njoya Vs. Attorney General (unpublished), P. 1.
[8] Professor Yash Pal Ghai was the Chairman of the Constitution of Kenya Review Commission until he resigned in mid 2005,
[9] Y. P Ghai , An analysis Supra, P. 1

hollow and contrary to the general principles and practices of constitution making and far removed from the reality of real politik.[10]

Professor Ghai particularly faults the concept of broad and purposive interpretation of the constitution as lone man, in that this approach had not been practiced by the Kenyan judges who had in the past adopted a narrow and legalistic approach to the interpretation of the constitution. He says:-

> "But this does not give the judges a totally free hand to read into a constitution what they would like to find there, nor disregard what is there. The standing point must be the words of the constitution and a purposive approach is to be used where there is some lack of clarity about the words. Flying in the face of clear words is not interpreting the constitution at all. "Values and Principles", which Ringera purports to rely on, are in nature general and sometimes abstract, and this reliance gives more discretion to judges than is proper and safe, and detracts from the predictability of the meaning of words. Judges who make broad and purposive approaches must do so with caution, conscious that they are not given some special insight into the purposes of a constitution.[11]

The concept of the constituent power of the people, which is an integral ingredient of the Ringera judgement and reasoning, is a derivation of the broad and purposive approach of constitution interpretation which he adopts and chooses to pursue. He rightly avers that this is the people's power to make a constitution which power is extra constitutional and does not derive its foundation from the existing constitution but a derivative of the sovereign power of the people. To Professor Ghai, constituent power is a political concept that would be a feasible tool for politicians and political scientists to recognize and apply but a totally dangerous ground for a judge to tread as this is beyond his jurisdiction and strictly non legal. The same reasoning would be opportune in dismissing

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[10] Y P. GHAI, An analysis, supra P.1
[11] Ibid, P. 3

Ringera's finding on the referendum as a mandatory system of adopting a new constitutional order for Kenya.

Justice Ringera's construction and findings on Section 47 of the current constitution touch on the power of parliament to make a wholly new constitution. Ghai says:-

> "There are two aspects to this: those of form and substance. The issue of form can be phrased in terms of whether parliament can introduce a whole new document. That of substance as whether parliament can change the basic or fundamental or essential features or elements of the constitution."[12]

The judge contradicts the broad, liberal and purposive approach to constitutional interpretation and drastically adopts a narrow, technical and legalistic approach bereft of his earlier reasoning. He therefore rules out the possibility of parliament being able to adopt or make a new constitution or even alter the basic structure of the constitution both arguments of which are not founded on sound legal reasoning or logic. This approach had been utilized in the promulgation of a new constitution in Tanzania, Guyana, Zambia, Malawi, Trinidad and Tobago without as much of a problem.[13]

It is also noted that in rejecting the argument and prayer that the National Constitutional Conference was discriminatory against the Applicants was based on the frivolous ground that the Applicants had not adduced evidence of personal discrimination. This is clearly

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[12] Professor Yash Pal Ghai, An Analysis ... , Supra, P. 8.
[13] Professor H. W. O. Okoth-Ogendo, Alternative Enactment Formulae for the Bomas Draft, Memorandum from Professor H. W. O. Okoth-Ogendo, April 20, 2004, P. 2.

another breach of the broad and purposive interpretation of the constitution earlier envisaged in his reasoning.[14]

Professor H. W. O. Okoth-Ogendo[15] observes that the Ringera judgment was a declaratory judgement that did not issue any orders against any of the respondents, or at all. The import of this is that apart from the specific findings on the unconstitutionality of various sections of the Constitution of Kenya Review Commission Act, Chapter 3A, Laws of Kenya, which are therefore rendered unconstitutional, null and void, the court did not rewrite the Act so as to insert the requirements of a referendum into it and therefore Section 27 (b) of the Act should now be deemed to incorporate the necessity for a referendum for the entire Bomas document.[16]

Ultimately, the Ringera court still left it open for parliament to operationalise the referendum aspect of the judgement and did not bar it from exercising its legislative power under the constitution.[17]

Professor Okoth-Ogendo is in agreement with Professor Yash Pal Ghai that a referendum is not the only route through which a new constitution can be achieved and advises against this bumpy and circuitous method.[18] He offers four alternative formulae

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[14] Yash Pal Ghai, Supra P. 10
[15] Professor H. W. O. Okoth-Ogendo. Alternative Enactment Formulae for the Bomas Draft. Memorandum from Professor H. W. O. Okoth-Ogendo, April 2004.
[16] Ibid P. 1.
[17] Ibid
[18] Ibid, P. 2.

exploited in other jurisdictions, Kenya included, in establishing amendments to constitutions or promulgation of entirely new outfits of constitutions.[19]

> "I have said before that those who argue for the Formulae Four (National Convention/Constituent Assembly/Referendum or ratification.) approach either want to delay the enactment of a new constitution for this country or to achieve a result equivalent to a revolution. A referendum is NOT the only way through which a constitution can be enacted nor is it the ONLY act which gives a constitution legitimacy. Of the more the 200 constitutions worldwide, fewer than 30 have been subjected to referendum and of these, all of them were in countries emerging from political turmoil."[20]

He further argues that a referendum in Kenya cannot be issue based and must if adopted as the appropriate approach to constitution making of necessity involves the entire Bomas document. The end result would be that this would be the constituent act which either enacts or rejects the new constitution and if affirmative would operate to establish a new constitutional order without any regard to the transition provisions established under the Constitution of Kenya Review Commission Act. A legitimization process would be necessary and this would involve an amendment of the constitution and not Chapter 3A as opined by other circles. Besides a referendum Act would have to be enacted (and NOT regulations under Chapter 3A) to facilitate the exercise.[21]

The big question here is the sincerity of choosing the referendum as a mandatory exercise in the legitimization of the constitution making process in Kenya. Is there a possibility that the will of the people had not been adequately expressed through public debate consultation, discussion, collection and collation of their views at the constituency

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[19] Professor H. W. O. Okoth-Ogendo. Alternative Enactment Formulae for the Bomas Draft. Memorandum from Professor H. W. O. Okoth-Ogendo, April 2004, Supra, P.2
[20] Ibid, P. 3
[21] Ibid, P. 3-4.

constitution forums and other organs of the review process? The answer is NO and therefore the proposal for a referendum essentially subjugates and imprisons the spirit, aspirations and feelings of the people.

It is questionable whether the Ringera court and judgment, elaborate as it was comprehensive was intended to serve the spirit of the Kenyan people or was a mere legal ploy to derail the role of the people in constitution making. It is evident from the pleadings in this case that the intention of the Njoya application was to stop or unduly place impossible hurdles on the work of the National Constitutional Conference and ultimately derail and scuttle the constitutional review process and delay the enactment of a new constitution. Whereas public mood and the spirit of the people militated for a situation where the review process would culminate in the enactment of a new constitution, one finds a bench that belabours to come out with a different conclusion even with enormous pretext at recognising and enforcing the will of the people - the constituent power.

Another surprising factor of the Ringera judgement is the coincidence it picks with the mood and aspiration of the political elite subsisting at the time. It is notable that the case springs at a time when the National Constitutional Conference is through with its task and the only remaining aspects to the review process and the promulgation of new constitutional order is the basic and penultimate stages envisaged by Section 28 of the Constitutional of Kenya Review Commission Act. This is the handing of the Draft bill to the Attorney-General who subsequently hands it over to parliament for adoption or

rejection. Is there a possibility that the court played into the hands of the politics of the day and was manipulated to legitimize that which the political clique that was hell bent out on sabotaging the review process could not achieve on the ground? I find this coincidence baffling and cannot synchronize Justice Ringera's unusual attempt to infer pro-people conceptions which were easier to pick from the prevailing public mood and enter judgment in its favour. It is all suspect and contradictory.

3.1.1 Republic Versus The Attorney-General and The Constitution of Kenya Review Commission – *Ex parte* Njuguna Michael Kungu, Gachuru Wa Karenge and Nicholas Mugo Njoka.[22]

This was a judicial review application against the Constitution of Kenya Review Commission, seeking orders, *inter alia*, that;

(e) An order of prohibition be issued directing the Constitution of Kenya Review Commission (CKRC) and prohibiting it from compiling, preparing and or presenting its report on the Draft of a bill to alter the Constitution of Kenya on Chapters 11 (Legislative), 12 (Executive), 14 (Devolution), 15 (Public Finance), and 21 (Transition), of the Zero Draft.

(f) An order of prohibition directed to the Attorney-General prohibiting him from receiving, accepting, publishing or presenting a bill to parliament to alter the Constitution of Kenya on Chapters 11 (Legislative), 12 (Executive), 14 (devolution), 15 (Public Finance), and 21 (Transition), of the Zero Draft.

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[22] High Court (Nairobi) Miscellaneous Application No. 309 of 2004, (Unreported).

(g) An order of certiorari to remove the High Court and to quash the proceedings and adoptions of the National Constitutional Conference held on 15th March 2004 relating to Chapters 11 (Legislative), 12 (Executive), 14 (devolution), 15 (Public Finance), and 21 (Transition), of the Zero Draft.

(h) An order of mandamus directed to the Constitution of Kenya Review Commission directing it to comply with Sections 27 of the Constitution of Kenya Review Commission Act, Cap 3A Laws of Kenya and Regulation 20 of the Constitution of Kenya Review (National Constitutional Conference (procedure)) Regulations, 2003 in respect of Constitution of Kenya on Chapters 11 (Legislative), 12 (Executive), 14 (devolution), 15 (Public Finance), and 21 (Transition), of the Zero Draft.

3. That the leave does operate as a stay of the proceedings of the National Constitution Commission and or the Constitution of Kenya Review Commission until a court constituted for the purpose has heard and determined the matters in issue in this suit.

4. That this matter be and is hereby referred to the Chief Justice to give directions in this matter as to the first determination of the suit.

5. That the Applicants do file a Notice of Motion within seven days from today and all the parties be served.

6. That the costs be in the cause.

The above orders were issued by the court on the 22nd March, 2004 thereby crippling the operations of the Constitution of Kenya Review Commission. It would appear that the Constitution of Kenya Review Commission made attempts to seek a stay of the orders made by the court as these grounded its operations.

The biggest issue that can be raised in view of the application, orders and subsequent conduct of the *Ex Parte* Gacuru Wa Karenge matter is the justification of the application and the forces behind the said application. It would appear that from the conduct of the case, the Applicants were hell bound to cripple the operations of the Constitution of Kenya Review Commission at a time when the enactment of a new constitution was around the corner. The only pending matters and these are the ones this application sought to estop was consideration of some of the politically contentious issues that had earlier threatened to cripple the Constitution of Kenya Review Commission. Orders e, f, and essentially sought to scuttle the operations of the Commission. It is surprising that the matter was not pursued to a logical conclusion and stopped at the issuance of these orders. This may explain the extra legal intentions of the applicants and rightly ascribe their action and pursuit to some undisclosed political agenda. Who knows?

3.1.2. Patrick Ouma Onyango & 12 Others Versus Attorney-General & 2 Others.[23]

This is popularly referred to as the Referendum or Yellow Movement case. It can rightly be argued that the matter was a follow up, confirmation and improvement of the Njoya case and jurisprudence and also went a long way in shaping the direction of the constitutional review process in Kenya.

The background of the case is as follows;-

> "From the early 1990's the people of Kenya under the yoke of the monolithic KANU government agitated for a change in the manner of governance in Kenya and clamored for enactment of a new constitution. The government reluctantly gave in to the demands by the people who through opposition parties both in parliament and outside parliament, civil society, religious organizations and other lobby groups. In 1991 changes were introduced into the constitution including the enactment of Section 1A of the constitution which provided that the Republic of Kenya shall be a multi party democratic state ... with this minimum amendment, election (sic) of 1992 were carried out and KANU won clamour for opening the democratic space did not stop and agitation for the change continued leading to the governments realisation that it was inevitable to bring change into the manner of governance. To achieve this, various initiatives were commenced by mainstream churches through (NCCK), Supreme Muslim Council of Kenya (SUPKEM), Hindu Council of Kenya and the Kenya Episcopal Conference representing the Catholic Church and these were collectively called the Ufungamano initiative."[24]

This is the background upon which flourished the constitutional review process in Kenya. The Constitutional of Kenya Review Act and its various amendments culminating in the Consensus Act, 2004[25] had sought to initially formulate a structural process through which a people's participatory constitution making process would be held. The expectations of the legal framework and structures did not stand the test of time and issues of contention arose therefore necessiting consensus building on contentious issues. This is the background of the Yellow Movement case.

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[23] [2005] e KLR
[24] Ibid, P 1.
[25] The Constitution of Kenya Review Commission (Amendment) Act, 2004, Kenya Gazette Supplement No. 90, Act No. 9 of 2004.

This application, or Amended Originating Summons dated 16th May 2005, the Applicants inter alia sought orders and declarations that:-

1. Sections 4 and 5 of the Consensus Act be and are hereby declared null and void for contravening Sections 1, 1A, 3, 8, 46, 56, 70, 77 (9) and 123 (8) of the constitution to the extent inter alia that they introduce unconstitutional amendments and or unconstitutional section to wit, Section 17 (e) and (f), 27 (1) (b) and 3, 28 (1) and 28 A (4), and 28 B (4) and (5) of the Principal Act.

2. Sections 27 and 28 of the Principal Act amended by Section 5 of the Consensus Act be and are hereby declared null and void for contravening Sections 1, 1A, 46, 47 and 56 of the Constitution.

3. Section 28 A (4) and (5) of the Principal Act as amended by Section 5 of the Consensus Act be and are hereby declared null and void for contravening Sections 1, 1A, 8, 46, 47 and 56 of the Constitution.

4. Sections 17 (e) and (f) of the Principal Act as amended by Section 4 of the Consensus Act be and are hereby declared unconstitutional and therefore null and void as it violates the people's sovereignty and the values, principles and spirit of the Constitution.

5. Section 28 (1) of the Principal Act as amended by Section 5 of the Consensus Act be and is hereby nullified for contravening Sections 1 and 1A of the Constitution and the principles, values and spirit enshrined therein.

6. Section 28B (4) and (5) of the Constitution of Kenya Review (Amendment) Act 2004 as amended by Section 5 of the Consensus Act be and are hereby declared null and void for being discriminatory and in conflict with Section 70 and 84 of the Constitution and for denying the third applicant and an overwhelming majority of Kenyans who live below the poverty line (access to the court?).

7. The powers conferred on the National Assembly by Section 27 of the Principal Act as amended by Section 5 of the Consensus Act be and are hereby declared unconstitutional, for being in conflict with Sections 1, 1A, 46, 47 and 56 of the Constitution and are a subversion of democracy and the people's inviolate sovereign right to constitute their state.

and declarations that:-

1. The National Assembly has no power to debate, alter or amend the draft Constitution of Kenya 2004 as adopted by the National Constitutional Conference on 15 March 2004 (hereinafter "the Bomas Draft") in light of the decision in High Court Miscellaneous Civil Application no. 82 of 2004 (OS) (hereinafter "the

Njoya case") or otherwise and of Sections 1, 1A, 46, 47 and 49 of the constitution;

The mandate to make a constitution and or, identify, debate and resolve any perceived contentious issues in the Bomas Draft lies solely with the sovereign people of Kenya in a referendum or any other forum specifically constituted by Kenyans for that purpose and not the National Assembly and such an exercise by the National Assembly is contrary to the provisions and or its spirit, principles and values as enshrined therein.

3. Constitution making is not a legislative process and therefore any law that purports to elevate members of Parliament and or the National Assembly above Kenyans by ascribing a special role in constitutional review process to the former is *ultra vires* the Constitution and therefore null and void.

4. The powers and duties conferred on the President by Section 28A of the Principal Act as amended by Section 5 of the Consensus Act as amended by Section 5 of the Consensus Act are in excess of the Constitution and in violation of Sections 3, 8, 46 and 47 of the Constitution and the collective sovereign will of the people of Kenya since such sovereign cannot be subject to, contingent upon or dependent on the will, act or whims of the President.

5. The people of Kenya, having the inherent power to constitute and reconstitute their state and government and having given their views as to how they want this done, it is a violation of the principles of democracy and the collective sovereign will of the people of Kenya for the 2nd Respondent to conduct civic education on the proposed new constitution (hereinafter "the Parliament Constitution") that is not in line with the views given to it by Kenyan's, its report and the Bomas Draft made with the views of Kenyans and instead to conduct a referendum on the Parliament/National Assembly constitution as envisaged in Section 28 (1) of the Principal Act as amended by Section 5 of the Consensus Act.

6. It is unconstitutional, an abuse of and infringements on the rights of the people of Kenya to subject their collective sovereign will to the National Assembly and the Presidency, the two being non existent unless and until created, defined and limited by the people's collective sovereign will in a constitution.

7. The current Constitution not having any transitional provisions under which either the Presidency and or the National Assembly can, as institution(s) make, participate in the making of a new constitution or promulgating a proposed new constitution to be the new constitution, any law, not being a law within the Constitution that gives the National Assembly or the Presidency such power or right to so make, participate in the making or promulgate a proposed new constitution to be the constitution is *ultra vires* the constitution and therefore null and void.

8. Section 28 B (4) of the Principal Act as amended by Section 5 of the Consensus Act violates the constitutional right of the 3rd applicant who cannot raise Ksh.5 Million in 2 weeks as stated in the said section as it severely limits and restricts his access to justice together with the 56% of Kenyans who live below the poverty line as it contravenes Section 70 of the Constitution.

9. Sections 17, 27, 28, 28A and 28B of the Principal Act as amended respectively by Section 4 and 5 of the Consensus Act violate the constitutional rights of the applicants and other Kenyans (who gave their views and which views were reduced into the Bomas Draft by the 2nd Respondent and the National Constitutional Conference) as safeguarded under Sections 1, 1A and in the principles values and spirit enshrined in the Constitution.

The court dismissed technical objections by the respondents on grounds that the matter was unprecedented and of grave public importance and that the court was duty bound to hear and determine the issues raised on their merit to satiate the growing public interest in the matter.[26] The court can also be said to have endorsed this reasoning and jurisprudence in the Njoya case and judgement and recognised and based its judgement on the concept of constituent power which it declared the touch stone of validity for making a new constitution. It held as follows:-

[26] See P 20-21 of the judgement of Court titled "Objections Raised".

> "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 touch stone of validly in respect of the amending power is the existing constitution. On the other hand, the touch stone of validity in respect of the constituent power is the people ... there is no touch stone of validity in respect of constituent power because it is primary and assumed to exist and always vested with the people.[27]

The court in so doing dismissed the Bomas draft of the review constitution for being borne out of a fallacious legislative framework that did not acknowledge peoples power to make a constitution and vesting the power of enactment with parliament instead of the people of Kenya.

> "This explains why the Bomas initiative failed as a legal process. It was premised on the mistaken view that parliament could enact a new constitution. The Act also purported to take away from the people the right to make that constitution through a referendum. The Act purported to confine the right to a referendum only to some proposals coming out of Bomas and in particular the contentious issues."[28]

The court further disagreed with the application faulting parliaments role in legislating the Constitution of Kenya Review Commission Act and the consensus Acts aforesaid on the ground that parliament acted in excess of its powers. It acknowledges and approves this as long as these are linked to a consultative process as it held was the case for Kenya and if the final product would be endorsed by the people through a referendum. In essence, the endorsed the parliamentary process on consensus leading to the Wako or Parliament drafts and provided for a referendum in which the people of Kenya would have an opportunity to adopt or reject the new constitution.

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[27] See note 122, Supra, P.47-48
[28] Ibid, P. 79

> "The court views the consensus Act as a new linkage by parliament as an originator and facilitator which took into account the holding in the Njoya's case. This parliamentary initiative as stated above appears to have borrowed heavily from the work of the Commission and the work of the NCC, "The Bomas Draft and Report."[29]

The Yellow Movement case therefore developed a new constitutional jurisprudence in Kenya by purporting to overthrow the Bomas initiative on the one hand and adopting the Parliament consensus initiative and yet recognizing the primordial nature of constituent power. Was there a conflict between legality and constitutionalism in so doing?

> "The product of Bomas will remain an important historical document but certainly does not have the legal status it was intended to have. The big mistake was the unforgivable failure by those offering legal services to the government in 1997 and thereafter including the Constitution of Kenya Review Commission not to having thought of or contemplated the role of the people in constitution making. Regrettably important review organs were set up but they all missed one important link merely the role of the people hence the unfortunate fate which befell the Bomas process."[30]

The application was ultimately dismissed and the court held in favour of the review proposals, measures, legislation and the exercise of constituent power by the people of Kenya as the validating instruments for the constitutional review process as opposed to the existing constitution. The court also endorsed the people's right to enact and endorse the new constitution through unrestricted referendum and this was held on 21st November, 2005.

The upshot of the judgement in the referendum case is that Kenyans went into a referendum as aforesaid and the new constitution lost the vote. It is interesting to note that both the Njoya and the Yellow Movement cases went out to endorse the concept of constituent power which is undeniably a constitutional component that endows people

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[29] See note 122, Supra, P. 62.
[30] Ibid, P. 103

with the power to manage and control the instruments of governance. Notable, however, is the line of thought that rubbishes the constitutional review process at Bomas and faults part of the facilitating legislation as unconstitutional. The case for an unconditional or unrestricted referendum is the hallmark of the Ringera judgement and gets an explicit approval in the referendum case. Are we being told the people's participation in the Constitution of Kenya Review Process through collection, compilation, collation, discussion and debate was not an adequate dossier for recognition as an expression of the constituent power of the people of Kenya? One wonders!

What was the rationale for consensus and who engineered the consensus process? It is not in dispute that the Wako draft for all its pretensions was a product of the spirit and sentiment of the ruling class and their cronies in the executive. Had they not made a walk out of the Bomas session enmasse? Why then, would the court have wished to validate and legitimize a process that is class oriented in the pretext of the constituent power of the people of Kenya? Was there a possibility of a flowing and well reasoned dissent judgement as was the case of Kubo, J. in the Njoya case?

The people of Kenya overwhelmingly rejected the new constitution in the historic referendum which was a clear indication of the conflict of the thinking and spirit of the consensus clique and the people of Kenya. Once more, the coincidence between the spirit of the judgement and that of the ruling elite that was instrumental and favoured the Wako draft remains puzzling.

3.3 Conclusion

It is apparent from the aforesaid cases and citations that the courts were especially employed to scuttle, derail or redirect the constitutional review process in Kenya. The court process being open and a basic right to all stakeholders and members of the public, the temptation to result to court to resolve issues of personal interest in the constitution review process is overwhelming. As to why the courts were not able to see through the various applications and direct the review process with the interest of the people in mind is the biggest question today.

Perhaps it would at this juncture be appropriate to bring out an analysis of constitution making process in other jurisdictions if only to highlight the general constitution making is achievable where the element of trust is employed. This leads to an empowered people's participatory process in which the aspirations of the people are realized. This is an expose in the next chapter.

CHAPTER 4

Constitution Making Experience in Other Jurisdictions

4.0 Introduction

The Constitution making process in Kenya has acquired a class of its own. Its uniqueness is not only reflected in the fact that it has been disharmonious, long and circumlocutous but also that it has been one of the most exorbitant and time wasting processes the world over so far. This is despite the fact that unlike most other jurisdictions this is a peace time initiative and does not involve turmoil resolution.

It is therefore on the foregoing background that I attempt a comparative analysis of constitution making processes in other jurisdictions if only as a demonstration that constitution making is not a miracle and is achievable depending on the wishes of the parties that take charge of the process. The case study clearly shows that constitution making has achieved good results in Uganda and Eritrea. Other areas where this has been realized are the Republic of South Africa, Democratic Republic of Congo, United States of America, Pakistan *et al.*

Constitution making is therefore not miraculous or magic. As illustrated here below, it is achievable where there is political goodwill on the part of the ruling class which goodwill permits trust, harmony and bonding within society factors which are critical in facilitating constitution review process. This chapter further endeavours to underscore the need for ownership of the review process by the people hence references to a people driven

process that imbues legitimacy to both the review process and the eventual by product – the new constitution.

4.1. **Uganda**

The making of a new constitution in Uganda marks an important watershed in the history of the country. It demonstrated the desire of the people to fundamentally change their system of governance to make a fresh start by reviewing their past experiences, identifying the root causes of their problems, learning lessons from past mistakes and making a concerted effort to provide genuine solutions for their better governance and future development. It was an epic process lasting over seven years commencing in 1988 when the then Uganda Constitutional Commission was established until 1995 when the constitution was promulgated by the Constituent Assembly.[1]

The major achievement of the constitution making process in Uganda was the popular participation of the people but that was attained through wide consultation and national public debate.[2] This enhanced the building of a national consensus on the most suitable form of governance and promoted the acceptability and legitimacy of the constitution.

The end product, the new constitution enacted in October, 1995 was a unique home grown document imbibed from history, culture, values and aspirations of the people of Uganda and a genuine compromise between diverse interest groups and classes.

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[1] Benjamin J. Ondoki, The Challenges of Constitution making and implementation in Uganda in Constitutionalism in Africa, Creating opportunities, Facing challenges, Foundation Publishes 2001, P. 263.
[2] Ibid

The Constituent Assembly adopted most of the provisions through the consensus of the delegates and the few disagreeable ones by majority vote. Controversial issues like land, the political system especially the issue of suspension of political parties activities, the referendum or political parties activities, the referendum on political parties the entrenchment of the National Resistance Movement (NRM) system into the constitution and federalism.[3]

The constitution making process in Uganda was an absolute necessity for democratic governance. Having had three constitutions since independence on 9th October 1962, it was clear that none of these answered the needs and aspirations of the people. The country experienced political and constitutional instability because the people failed to agree on the most appropriate socio-economic and political framework for their governance.[4]

Uganda adopted a constitution making method that was people inclusive. It gave the people of Uganda ample opportunity to formulate and promulgate a constitution of their own through a commission composed of experts, who would do so after collecting the views of the people and it would be adopted by a Constitution Assembly of freely elected representatives of the people. This accomplished the people's negotiations and

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[3] Benjamin J. Ondoki, Supra, Note 31, P. 263-264

[4] The Uganda Independence of 1962 was a negotiation between the major political actors of the day. It was intended that producing a formulae for balancing the conflicting interest of the elite of the day. This constitution was abrogated in 1966 following a confrontation between the Prime Minister, Apollo Milton Obote and Sir Edward Mutesa the President of Uganda and Kabaka of Buganda and replace with the interim constitution of 1966-the *Pigeon Hole Constitution*. In 1967 Obote further introduced another constitution introducing republican status. He enhanced his powers and became President with excessive powers in running the government. This was the beginning of a constitution crisis lasting the country the next thirty years.

participation and the inclusion of all Ugandans as opposed to a situation that the constitution would be imposed on the people. This involved;

- Ensuring that the population was given adequate opportunity to participate in the process to produce a new constitution of their choice.

- Educating and informing the people about the nature of the constitution, its contents and why a new one was being made so as to make their contributions from a point of knowledge and make informed decisions.

- The collection of the views of the entire country and documentation of the same.

- Carefully study and analysis of the submissions received.

- The drawing up of proposals for a new constitution in a final report and preparation of a draft constitution on the basis of the proposals.

The constitutional making process in Uganda succeeded because the National Resistance Movement (NRM) nurtured the aspirations of a democratic state.

> "The NRM had gone to the bush to fight for democracy. The government formed a vanguard to champion the struggle for constitutional reform after the NRM had liberated country. Therefore the time the NRM assumed power, there was a leadership committed to constitutional reform as well as popular support for the process. Because the NRM government was committed to constitutional reform, it provided the resources necessary for the exercise and or enabling environment for free participation and debate."[5]

The success of the Uganda process is further illustrated by the free process in which the Constituent Assembly was freely and directly elected by the people to enact the constitution instead of the NRC which was largely deemed illegitimate and unrepresentative.[6]

Overall, the success story of the making of the Uganda Constitution which was enacted by the Constituent Assembly on 22nd September, 1995 is a consequence of the commitment of the ruling elite and the current government to the tenets of democracy and constitutionalism. This political goodwill nurtured a healthy environment in which the people of Uganda were freely and openly led through the process by the Uganda constitutional commission. The result was, despite some controversy and contention an overwhelming successes where 80% of the draft constitution was adopted.[7]

The above is in great contrast to the Kenyan constitution review process which from the onset was bedeviled with intrigue and chivalry. It was and remains a manipulative process set on imposing the views of the minority ruling class on the people but broadly pretentious at the notion of a peoples participation in the review process.

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[5] Benjamin J. Ondoki, Supra, P 266-267.
[6] Ibid P. 277
[7] Ibid, P. 280

4.2 Eritrea

The constitution making process in Eritrea was borne out of thirty years of turmoil. A thirty year old war of independence had culminated in a military victory in May, 1991 and two years later Eritreans chose independence other than association with Ethiopia in an internationally observed referendum.[8]

The government of the Eritrean People's Liberation Front (EPLF) thereafter embarked on a transition that was to culminate in the adoption of a new people's constitution. It established the Constitution Commission of Eritrea (CCE) whose mandate was to draft a constitution on the basis of a wide ranging public debate on the matter and through expert consultations.[9]

The Eritrean experience in constitution making as that of Kenya and other African countries in recent years comes in the context of democratic re-awakening in the African continent. The quest for a new path in the democratic process and constitutional emancipation has been an honoured African cause since colonialism. This is besides the post cold war era that ushered in a transition into democracy, stability and the rule of law thus ushering in a new platform for good governance in Africa.[10]

The constitution making process in Eritrea began with a set of questions it set itself to answer before embarking on the drafting of the constitution.

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[8] Berekett Hable Selassie, Constitution Making in Eritrea: Democratic Transition through Popular Participation, in, Constitutionalism in Africa, Creating opportunities, Facing challenges, Foundation Publishes 2001, P. 234

[9] Ibid

[10] Ibid, P. 234-235

These were:-

- What lessons, if any, do historical experiences offer in this respect?
- Do such experiences helpful models or guidelines?
- Is it desirable, or practical, to use models are they transferable like some form of technology?
- What, after all, are the values and goals that a nation needs most emphatically to promote, nurture and protect? and how should these be incorporated into the constitution?
- Should such values and goals is so incorporated, or should they be left out for determination in the crucible or political and social interaction.
- What form of government is best suited for Eritrea?
- What degree of centralism should there be? and,
- Should there be any official language, or languages and if so, which ones should we select and why?

Other issues touch on the question of detail, technicalities and the size of the constitution, whether big or short, details on the chapter or human rights *et al.*[11]

> "The commission reached a consensus at the outset that it should not rely on a ready-made model, whatever its source. It began instead by taking stock of the historical reality and paramount needs of a country. It designed and organized as a research and public consultation activities on that basis. Furthermore, the commission used its statutory mandate to organize and conducted wide ranging public debate. The commission thus attached critical importance to the process; in its estimation, the process was as important as, if not more important than, the product. Another way of putting it is; the end (the constitution) prescribes the means, but the means shape the end. This may be described as the new policies of constitution making. In a nutshell such an approach seeks to involve the public in the act of creation while at the same time adopting and adapting universally-applied institutions and values."[12]

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[11] Berekett Hable Selassie, Supra, note 38, P. 236-237; In total the commission listed 23 questions for considerations.

[12] Ibid, P. 237

Constitution making is a process that brings people and their governments together to shape their future political life. It is a meeting point or crossroad between the past, present and future.[13] This is even the more relevant to the people of Eritrea whose new constitution incorporated the social transformation that was acquired throughout the thirty years of the liberalization struggle. Issues like equality of women, social justice, democracy and human rights had imprinted themselves into the political mien of the people due to experiences in the liberation war. These experiences implanted themselves into the national psyche and were obviously non-controversially reflected in the national constitution without much ado.[14]

After the setting up of the government of Eritrea pursuant to proclamation 37 of 1993 the government was mandated to lay a ground for a constitutional government. The constitutional commission of Eritrea was thereafter established to spearhead the constitution making process. Parliament or the National Assembly was to establish a constitutional Commission.

> "Comprising of experts and other citizens of proven ability to make a contribution to the process of constitution making, and charged with the responsibility of drafting a constitution and organizing popular participation in such a process of constitution making."[15]

The commission emphasized citizen participation in constitution making by organizing public debate and also involved in expert opinion on the experiences of other countries.

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[13] Berekett Hable Selassie, Supra, P. 238
[14] Ibid, P. 239
[15] Ibid, P. 243

Ultimately, the collection, recording, collation and eventual analysis of the people's view was undertaken.

The constitution making process of Eritrea justifies that the active participation of the population is not only a political imperative of the greatest moment, but that it is a practical imperative. It ensures legitimacy of the constitution as well as an empowerment of the people who now own the review process through their involvement and participation.

Again the success of the Eritrea constitution making experience is grounded on the entrenched goodwill of the constitution commission and the political will of the incoming liberation movement to involve the people in the determination of the instruments of governance. Our experience clearly marks the absence of this goodwill and therefore frustrates the participatory process.

4.3 Conclusion

The constitutional experiences of Uganda and Eritrea were discourses intended to propel a people from a period of political instability and turmoil. The processes were cautious at installing a people driven constitutional process and constitution that encompassed the aspirations of the people. This was *not* and still is *not* the case for Kenya. Here, the process lacks political goodwill and an environment necessary for people's participation. Its collapse at the constitutional referendum was expected and a foregone conclusion.

The Kenyan and Zimbabwean processes pursued similar patterns like South Africa, Uganda and Eritrea. However, these were processes of constitution making in peace time. They ignored the historical justifications for constitution making and were a cat and mouse game between the citizen and the governor. They failed disastrously.

The scheming and political intrigue evidenced during the National Constitutional Conference and the entire constitutional review process was indicative of failure and disastrous results in the constitution making process in Kenya. From the conduct and confusion of the delegates a constitution making impasse was inevitable and a foretold conclusion.

The next chapter delves into a comparative analysis of The Draft Constitution of Kenya, 2004 (Bomas Draft), and the Proposed New Constitution of Kenya (Wako Draft) with a view to highlighting the salient differences and deviations in the two bills. This is an attempt to evaluate whether the spirit of the constitution review process as expressed in the Constitution of Kenya Review Act was achieved.

CHAPTER 5

The Draft Constitution of Kenya, 2004 (Bomas Draft) and the Proposed New Constitution of Kenya (Wako Draft): A Comparative Appraisal

5.0 Introduction

In a study like this, it would be an omission if one did not address the controversy and circus occasioned by the amendment and publishing of The Proposed New Constitution of Kenya, popularly referred to as the Wako Draft[1] in place and as a replacement of The Draft Constitution of Kenya 2004, the Bomas Draft.[2] The Bomas Draft was developed on the principle of people's participation and therefore reflected and incorporated the interests, psyche and tastes of the people in matters of governance.

> "... the people of Kenya through the constituency constitutional forums, the Constitution of Kenya Review Commission and the National Constitutional Conference developed a draft constitution that for the first time in Kenya's history gave people hope for genuine change in the promises of the future."[3]

Oyaya adds;

> "...between May 2003 and March 2004, the people at the Bomas Kenya discussed debated *(sic)* and adopted the review commissions draft bill to amend the constitution first published in September 2002. The outcome of the Bomas Constitutional Conference was a draft constitution built around key nine pillars to ensure national unity, stability, prosperity, peace and sustainable development and constitutionality."[4]

The road to the referendum was therefore trodden with feelings of hurt and betrayal. The citizens felt that the government had hijacked the review process leading to a mutilation of the Bomas Draft and thus to a lacklustre and compromised constitutional order that did not address their aspirations as expressed in their clamour for constitutional review.[5]

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[1] Hon. Amos S. Wako is the Attorney-General of Kenya and was instrumental in the development and drafting of The Proposed New Constitution of Kenya, Kenya Gazette supplement no. 63 of 2005 that was ultimately presented and rejected at the referendum on November 21, 2005.
[2] The Draft Constitution of Kenya, 2004 also known as the Bomas Draft is a product of the National Constitutional Conference facility and hence the name.
[3] Charles O. Oyaya, from The Draft Constitution of Kenya 2004 (Bomas Draft) to The Proposed New Constitution of Kenya, 2005 (Wako draft); Acomparative analysis (unpublished), P.3
[4] Ibid
[5] Ibid, P. 5

This chapter therefore attempts to make an analysis of the two drafts with a view to identifying and highlighting their differences and the consequences of these changes to the country. It sets out to answer the question as to what makes Wako so different from Bomas and therefore makes a case for its rejection at the referendum. This is done through a sequential chapter and article analysis of the two draft bills and a commentary on these changes. It is therefore a highlight of the salient differences between the two drafts and the impact these would have on governance and constitutionalism in this country.

5.1 Chapter One: Sovereignty of the People and Supremacy of the Constitution.

Both the Bomas and Wako drafts vest sovereignty to the people of Kenya (Art., however, one realises that a reference to devolved government in the Bomas Draft has been removed and replaced with district government (Art. 1(a) (b) Bomas Draft). This is an illustration of the states intolerance with the total exercise of people's sovereign authority through devolved government as expressed and formulated by the Bomas Draft. It is (as shall be illustrated at a later stage.) an early rebuttal of the doctrine of devolution as encapsulated in the spirit of the constitutional review process.

Another interesting feature is the entire deletion of article 3 on defence of the constitution from the Wako draft. It provides as follows:-

> 3 (1) every person has an obligation to respect and defend this constitution.
> (2)any attempt to establish a system of government otherwise than in compliance with this constitution is unlawful."

The article bestowed the obligation on every person to respect and defend the constitution and outlawed the establishment of any system of government outside the realms of the constitution. With its removal, the reverse is possible, not everyone is bound to respect and defend the constitution and that a system of government can be established outside the constitution. It also creates room for revolution, insurgency or extra constitutional government possible especially in the context of article 1 (2) which provides that *"the*

people may exercise their sovereign power either directly or through their democratically elected representatives."[6] This clause is a development to the Wako draft and is totally absent from the Bomas Draft and is crafting and addition is suspect.

The addition of article 2(2) to the Wako Draft is callous and extremely dangerous as it totally insulates any challenge to the constitution through a court or any other state again.

> 2 (2) The validity or legality of the constitution is not subject to challenge before any court or state organ."

It is difficult to perceive the intentions of this provision more so as read with chapter nineteen of the Wako Draft which provided stringent and extremely rigid procedure for amendment of the constitution. Is this workable or was it a sadistic clamour for chaos and a bloody revolution more so bearing in mind the ownership of the Wako Draft constitution? It is a case of taking the principle of the supremacy of the constitution too far.

5.2 Chapter Two: The Republic

One of the contentious issues propelling the clamour for a new constitution was the issue of sovereignty and the concentration of power around the offices and person of the executive. To this extent, the people's constitution intended to vest sovereign authority to the people who would exercise this through a devolved government. The deletion of the regional and location levels from the agreed terms of devolution and thereby retaining the district and national levels of devolution and the removal of the references to the regions, boroughs, locations and first schedule was an affront and subordination of people's sovereignty. It removes the people from the centre and directly contradicts the objects and principles of self-governance, community participation and the provision of efficient and proximate services. The reference to national government as *"government"*

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[6] Charles O. Oyaya, Supra, P.7

and the other level of government as *"district government"* connotes a subordinate placement of the district government contrary to the spirit of article 6 (2)[7].

5.3 Chapter Three: National Values Principles and Goals.

Article 13 of the Wako Draft on national values omits the provisions of Article 12 (p) of the Bomas Draft and therefore removes the principle of fairness in the management of national resources. This principle is fundamental and critical especially bearing in mind the haphazard handling of the national resources to the exclusion of massive elements of the Kenyan population. This is another pointer of the reckless attitude the government has on people's feelings.[8]

5.4 Chapter Four: Citizenship

The critical issues relating to citizenship was the removal of gender based discrimination on the subject and the provision for double citizenship by the constitution. However, one finds that whereas the Bomas Draft (Article 15) on acquisition of citizenship bestowed this *upon application* the Wako Draft (Article 16) interchanges this with *"may apply"* thus removing the principle of entitlement and thereby creating ground for discrimination against women as is the current constitution. This evil spirit sweeps through Articles 17 and 19 occasioning reduced ownership of citizenship rights.

Article 21 of the Bomas Draft removes the words *"is entitled upon application"* with the words *"may apply to regain citizenship if the person had ceased to be a citizen as a result of acquiring citizenship of another country."* The net effect of the changes on article 20 of the Bomas Draft was to dilute the entitlement to dual citizenship by introducing an element of discretion in providing a former Kenyan citizen with the opportunity to regain his citizenship as this can be used discriminatively to deprive any category of Kenyan citizen of an opportunity for retention of citizenship. The removal of Clause 2 is clear denial for non citizens of the opportunity to become a dual citizen.

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[7] Charles O. Oyaya, supra, P.8

[8] Ibid, P.9

Article 22 (Wako Draft) is critical in that it provides protection for those citizens by birth from being deprived of their citizenship but on the same token leaves a gap in handling cases of those who fraudulently or falsely claim to be citizens by obtaining birth certificates and other documentation by fraud. This would be dangerous for this country.

5.5 Chapter Six: The Bill of Rights

The differential between the Wako and Bomas Drafts here is occasioned by the quest for the state to remove and abdicate its responsibility to ensure that the Bill of Rights is actualised. It therefore removes clause 3 of Article 30 (Bomas Draft) which provides as follows:-

> "Parliament and the Commission on Human Rights and Administration of Justice shall establish standards for the achievement of rights mentioned in articles 60, 61, 62, 63, 64, 65, 66 and 67."

A new clause 3 is introduced to Article 31 (Wako Draft) and totally removes the states obligations on the pretext and guise of availability of resources.

In clause 4, the state further abdicates the responsibility to facilitate civil society and thereby diminishes its role as a watchdog and implementation agent for the Bill of Rights. This is a case of the state disowning a critical facet of governance and thereby compromising its cardinal role as the guarantor of good governance. [9]

Article 35 of the Wako Draft makes changes to the clause on Right to Life and largely dilutes the subject by the obnoxious inclusion of parliament as an actor in dictating this right. The addition of *"except as may be prescribed by the Act of Parliament"* diminishes the spirit of this provision to unintelligible levels. A situation where parliament is the decisive factor in determining the *right to life* is dangerous especially when viewed in the context of the Nazi regime and the use of a similar clause then to *cleanse* the German society of the terminally ill, people with disabilities and the Jews.

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[9] Charles O. Oyaya, supra, P.13-14

The issue of abortion draws much controversy in this country. If parliament or legislation were to be the determinants of the right to life, these contentious issues would remain unsettled as it is clearly visible that even the Bomas Draft was not able to give it an homogenous determination to the satisfaction of Kenyans.

The Wako Draft also deletes Article 43 of the Bomas Draft on minorities and marginalised groups. This is an affront to international human rights standards and also solidarity and group rights of minorities and marginalised groups. It also undermines the principle of affirmative action for minorities and marginalised people by blockading any avenues for defining measures and methods of improving their own.[10]

The Wako Draft therefore only succeeds in killing the aspirations of historically disadvantaged and marginalised communities and groups who continue to have their lives in poverty, squalor, socio-political exclusion, economic injustice, deprivation and discrimination.

5.6 Chapter Seven: Land and Property

Land issues have been emotive and controversial in the history of this country. It therefore called for a thorough system that defines and determines the citizen's rights and interest in land. That minor amendment were made to effect Article 80 of the Wako Draft that did not clarify how benefits accruing from the exploitation and management of national resources like national parks, game reserves, animal sanctuaries *et al* shall be shared between the national and district government other than gate fee collection from game parks and reserves. This leaves a vacuum in a critical area of our national economy. The Bomas Draft had covered this by providing for a natural resource royalty tax[11] by the district government (Fifth Schedule Part II (k)).

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[10] Charles O. Oyaya, Supra, p.16
[11] Ibid, P.21

The entire deletion of Article 82, Bomas draft from the Wako draft is another pointer at the insensitivity of the state on succession rights. It provides:-

> "a surviving spouse shall not be deprived of reasonable provisions of the estate of a deceased person whether or not the spouse died having made a will."[12]

Whereas Article 38 (2) on gender provides that women and men have an equal right to inheritance and access to manage property. It does not protect a widow or widower from being deprived of the estate of his spouse. This derogation of a constitutional right to inheritance especially for widows is fatal more so bearing in mind the patriarchal nature and structure of the Kenyan society.

The other grey area on land is one of land holding to non-citizens and the Bomas Draft intended to confine all land holding by non-citizens to nine-nine year leases. All subsisting tenancies were intended to revert to the state for mandatory conversion to ninety-nine year tenancies. The Wako Draft removes a provision in clause (4) of the Bomas Draft to the extent that parliament shall enact legislation to effect and manage this conversation as encapsulated in clause 3 therein. It is notable this issue is international and has historical, political, emotional and even racial connotations and therefore the need for a specific Act of Parliament to deal with the subject for a period of time. Otherwise, Kenya could also get embroiled in a Zimbabwe style land crisis with devastating racial overtones.

The establishment of the National Land Commission (Article 85, Wako Draft) is good but this does not indicate how the benefits of its management of public land resources and be shared with the district government.

5.7 Chapter Eight: Environment and National Resources

The Wako Draft entirely removes the Bomas provisions of Article 90, that provides for the enforcement of environment of rights as follows:-

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[12] Charles O. Oyaya, Supra, P. 21

(1) If a person alleges that a right to a clean and healthy environment recognized and protected under this Constitution has been, is being or is likely to be contravened, in addition to any other legal remedies which are available in respect to the same matter, that person may apply to the court for redress.

(2) On an application by a person under clauses (1), the court may make such orders, or give such directions as it may consider appropriate, to –
(a) Prevent, stop or discontinue any act or omission which is harmful to the environment.
(b) Compel any public officer to take measures to prevent or discontinue any act or omission which is harmful to the environment; and
(c) Provide compensation for any victim of pollution

(3) A person may make an application under this Article even if he or she cannot show that the Defendant's Act or omission has caused or is likely to cause him or her any personal loss or injury.

This Article providing the framework for enforcing environmental rights and is deleted entirely. This deletion undermines and delimits the provisions of Article 67 and removes the enforcement of environmental rights through a court or a commission by the citizen. This is another illustration of the insensitivity and recklessness of the state even at a time that environmental issues take a centre stage in governance.[13] Article 93 of the Bomas Draft is also amended to fundamentally alter the functions of the National Environmental Commission with a view to diluting and subduing its mandate.[14] This limits the effectiveness of the commission in the enforcement of environmental rights to the citizens.

5.8 Chapter Ten: Representation of the People

The most significant departure of the Wako Draft from the Bomas one is the idea of re-establishing the Electoral Commission as the registrar of political parties. Whereas Article 112 of the Bomas Draft had provided for the establishment of the *"office of the registrar of political parties"* to register and deregister parties, the Wako Draft reverted to the Constitution of Kenya Review Commission (CKRC) Draft, 2002 and empowered

[13] Charles O. Oyaya, Supra, P. 23
[14] Ibid, P.24

the Electoral Commission to be the Registrar of Political Parties. The impact of this omission is dangerous and confusing especially at a time that people required safeguards and certainty as to the issue of registration of political parties to deviate cases of abuse as has been evident in political dealings in our history.

The Bomas Draft had also provided for consultation with the ethnic and integrity commission in the clearance of all presidential, parliamentary and district assembly candidates to stand for elections. This goes against the spirit and principle of Chapter 9 (Art. 117 (2) (f) which calls for adherence to Chapter 9 by the Ethics and Integrity Commission. It is clear that Bomas introduced this provision so as to be assured of the behaviour and personality of those seeking public office thus avoiding the current situation where any loafer can be propelled to public office with disastrous consequences.

The Wako Draft continues to emasculate the role of political parties as instruments of democratisation and constitutionalism.

> "It was the intention of the Bomas Draft to entrench political parties as constitutional institutions in the same way that the other four organs of state (the Judiciary, Parliament, the Executive and Constitutional Commission) are spelt out. To achieve this, the Bomas/Kilifi Drafts clearly defined their roles and functions including the regulations and funding."[15]

The Wako Draft (Article 112) picks from the Article 111 of the Bomas Draft and their proceeds to provide for legislation on political parties vide Article 113. The deletion of 111 A to 119 of the Bomas/Kilifi Draft and providing for political parties under legislation provided by Parliament, the Wako draft undermines the role of political parties as critical instruments of democratisation and constitutional governance as envisaged in all the constitutional drafts preceding Wako. It therefore relegates political parties to the whims of Parliament and the Executive. Therefore, Wako (read government) felt safe with the subsisting state of affairs where political parties are ineffective and are manipulable to serve the interests of the Executive and Legislative

[15] Charles O. Oyaya, Supra, P. 29

arms of government with disastrous consequences to the practice of constitutionalism in Kenya.

Again, the Wako Draft changes viewed against the provisions in the Executive (Part III, Articles 163 and 164) illustrate a clear attempt to alienate political parties from forming the government through competitive elections and relating the government accountable through multiparty politics. Lastly, the changes have compromised the role of political parties as critical instruments and means through which people express their will and decide what kind of government they want. This role is now vested in Articles 163 and 164 of Wako thus facilitating continued executive dictatorship.

5.9 Chapter Eleven: The Legislature

The Wako draft under Article 114 drifts the country back to the days of a unicameral legislature and its antecedent failures. This is by deleting and scrapping all references to senate. Senate and the bicameral legislature was intended to imbue effective representation of marginalised groups, diverse communities of Kenya and district governments in the national legislature and other decision making processes.

The removal of the Senate also has the following impact on governance:-

(i) The element of negotiative, consultative, participatory law making process is undermined.
(ii) Checks and balances in decision making and legislative process are also removed.
(iii) The concentration of legislative authority in the hands of a unicameral legislature at the mercy of an evenly powerful executive is guaranteed.
(iv) The capacity of the district/devolved government to stand against a strong national government and play on effective oversight role is eroded, and;
(v) The difficulty of impeaching the government is guaranteed.[16]

Other effects of this deletion are the loss of effective representation of marginalised groups, diverse communities of Kenya and district government in the national legislative and decision making process.

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[16] Charles O. Oyaya, Supra, P.31

Article 121 (2) fortifies the position of the speaker by increasing the vote for removal of the speaker from 65% to 75% thus making it almost impossible to remove the speaker. It is not clear what this intends to achieve. Article 123 of the Wako retains Article 130 of Bomas but introduces serious discordance with the constitutional provisions relating to the executive. This confusion is not good for constitutionalism and should be eradicated at all costs.[17]

Lastly, Article 135 (2) is introduced to muscle access of parliament by the public and media. Article 135 (1) is a replica of the Bomas Draft article 144 and the limitation introduced in Article 135 (2) amount to giving the right of access with one hand and taking away with the other. The role of regulation of this function is not clear unlike the Bomas Draft which relegated this role to the speaker thus operating floodgates whereby parliament can be invaded by security agents with or without the authority of the speaker.

5.10 Chapter Twelve: The Executive

This chapter is focused on investing the executive authority on the president. The removal of clause (3) of Article 150 in its equivalent of the Bomas Draft (Article 143) which provides as follows:-

> "150 (3) The composition of the national executive shall reflect the regional and ethnic diversity of the people of Kenya."

This leaves wide room for discrimination, ethnic criticism, nepotism, ethnic and political patronage in the constitution and management of executive authority by the President in whom all executive authority is vested by Article 142 of the Wako Draft. This is anomalous and unacceptable and a contradiction of the spirit of the people in pursuit of a

[17] Charles O. Oyaya, Supra, P.34

people driven constitution that would decongest executive authority from the so called imperial presidency.[18]

The changes in this chapter make the president the repository of all executive authority in the Republic. This is in direct conflict with Article 1 which vests sovereign authority and on the same token, executive authority on the people of Kenya which they in turn devolve to the national executive and the executive structures of the devolved or district governments.

Article 163 of the Bomas Draft comes with the position of a toothless Prime Minister in contrast to the one envisaged by Article 172 of the Bomas Draft. The powers of the Prime Minister are redesigned to make him completely subject and subordinate to the president thus taking the country back to the dark down of an imperial executive with the removal of any co-ordinate relationship between the President and the Prime Minister in the day to day running of the government. The office of the Prime Minister becomes redundant and superfluous with no functional difference between him and others like Deputy President, Deputy Prime Minister and Minister. This therefore becomes a constitutional comedy and circus.

5.11 Chapter Thirteen: Judicial and Legal System

The most fundamental differential between the Wako Draft and the Bomas Draft is that Wako's introduced religious courts in Article 179 (3). This is curious in that most religious groups in Kenya with the exception of Muslim do not have any recognised and structural legal and judicial philosophy theory or system. Secondly, *there had not been* any clamour or other agitation for religious courts throughout the entire constitutional debate. Perhaps this was intended to diffuse the tension created by the entrenchment of the Kadhis Courts to prominence in the constitution, a position that was opposed especially by mainstream Christian churches.

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[18] See S.151 Vests executive authority at the national level to the President, Deputy President, the Prime Minister and Ministers who are mandated to work in harmony for the good of Kenya and the progress of the people of Kenya.

The introduction of religious courts in the pretext of treating all religions equally was political appeasement intended to hoodwink Kenyans into accepting and owning the Wako Draft. In the absence of acquiring political mileage for those in power, the provision did not add any value to governance and constitutionalism. It is not justifiable on the basis of any legal theory and the existing legal and judicial system. This would confuse the legal system and encourage judicial claims by religious groups that never existed or do not have any recognised and structured legal and judicial philosophy, theory or system. The diversity of the Christian church with various denominations would also confuse the working of the Christian religious courts.[19]

Again, these are not provided for in their representation in the Judicial Service Commission (Article 196, Bomas Draft). The interests of religious courts in the Judicial Service Commission especially in matters of appointments, discipline, and removal are not provided for thereby creating a vacuum, confusion and a clumsily drafted constitutional provision which is not a plus in governance.

5.12 Chapter Fourteen: Devolved Government

This Chapter comes to confirm the emasculation and derogation of the principles of devolution as evidenced in Article 6 of the Wako Draft. Article 198 of the Wako Draft is a replica of Article 206 (f) that seeks *"to promote the interests and rights of minorities and marginalised groups at all levels."* This frustrates the spirit of the constitutional review process that aimed at a blanket protection of minorities and marginalised groups. It also undermines the provisions of Article 13 on National values, Principles and Goals that seek to protect and promote interests of these groups. Article 199, as is observed elsewhere in this paper implies a subordination of the *district government* to the so called *"Government"* by reference. This *in toto* kills the aspirations of devolution as an organ of expression and participation in governance. It compromises liberty and involvement in governance.

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[19]Charles O. Oyaya, Supra, P.48

Other features of devolution removed are the regional government (Article 211), Bomas Draft and location governments (Article 223). The net effect of this is a delimitation of the representation of the people and their participation in governance.

5.13 Chapter Fifteen: Public Finance

Article 218 of the Wako Draft deletes a reference *to the special needs of marginalised communities* in the raising and sharing of national and local resources. This removal eliminates affirmative action as a principle of empowerment in public finance and revenue management.

The other critical area here is Article 228 (Wako Draft) that dilutes the original idea of limiting public debt to 50% of the Gross Domestic Product (GDP). The Wako version gives parliament power to set ceilings in this critical areas thus bestowing parliament the power, authority and leeway to bankrupt the country through reckless, misguided and myopic borrowing as is evidenced today.[20] The debt burden continues to be a major concern to the citizenry and has far reaching implications due to uncontrolled domestic and foreign borrowing. The Wako Draft is therefore an anti thesis of Kenyans desire to squarely deal with the current situation of indebtedness.

Article 232 provides for the budget in the Wako Draft but adds a rider to the extent that *"but parliament may in special circumstances approve a higher percentage"* thereby spoiling the broth. This addendum is dangerous as it opens the budget to political manipulation where the government can voice two or even more budgets at a given financial year without providing the special circumstances. This becomes an open cheque and is a danger to economic development and management.

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[20] Charles O. Oyaya, Supra, P.56

5.14 Chapter Sixteen: The Public Service

Here, the Bomas Draft introduces a contradiction under Article 247 (1) (b) as these powers are also vested in the President under Article 144 (10). The Wako Draft is reluctant to propel an independent and proactive Public Service and chooses to institute the devil that is knows, the *status quo*. The implications of this are that this country continues to enjoy a subservient and subordinate Public Service Commission at the whims of the executive.

The provision for the salaries and remuneration commission (Article 252, Wako) which is largely a derivation of article 301 (1), Bomas Draft is handy but one realises that it does not provide for its membership as in Article 301 (1), Bomas Draft. This is dangerous as it leaves the provision open to manipulation by the executive to the disadvantage of public servants.[21]

5.15 Chapter Seventeen: National Security

The Wako Draft (Article 257) retained the provisions of Article 274 of the Bomas Draft but fundamentally changed this to alter the membership of the National Security Council. Clause 1 (h-k) are deleted to remove the following membership of the council:-

(h) The Chief of Kenya Defence Forces;
(i) The Director-General of the National Intelligence Service;
(j) The Inspector-General of the Kenya Police Services and
(k) The Commandant-General of the Administration Police Service.

This leaves the National Security Council as a cabinet sub-committee or security wholly at the grips of the President and his cronies. It makes no sense to compile a security committee without the membership of those directly manning the security organs and apparatus of the State.[22]

The Wako Draft's version of the National Security Council is as follows:

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[21] Charles O. Oyaya, Supra, P.60
[22] The Kenya National Commission on Human Rights, Annual Report and Accounts, 2004/2005, P. 1.

Article 257 (1)

(a) President
(b) Deputy President
(c) Prime Minister
(d) Minister responsible for Defence
(e) Minister responsible for Foreign Affairs
(f) Minister responsible for Internal Security; and
(g) Attorney-General

What a circus!

Likewise, Article 261 on the establishment of the National Intelligence Service removes the security of tenure of the Director-General and coalesces loose grounds for his removal under abuse (4). This in essence puts the operations of the National Intelligence Service at the control and mercy of the President. The issue of checks and balances is therefore comprised thus leading to mal-governance. This trend is also notable under Articles 265 and 286 that comprise the security of tenure of the Director-General of the Kenya Police Service and also the commandment of the Administration Police Service.

Again, this is clear testimony of the reluctance of the political supremo to nurture participatory governance through recognition and entrenchment of people's sovereignty.

5.16 Chapter Nineteen: Amendment of the Constitution

This chapter and its various articles are retained as provided in the Bomas Draft. A curious observation however, is the retention of the rigid provisions enacted at Bomas. The historical need for rigidity in the amendment of the constitution was necessitated by numerous politically motivated post independence amendments that served to mutilate the independence constitution into a shell void of any legal and constitution power. The amendments actually serve to concentrate and centralise power in the executive and particularly the president. These amendments were not for the welfare of the populace but intended to muscle democratic space, to facilitate human rights abuses and to impoverish the people through corruption, ethnic cleansing, discrimination and other abuse.

The justification for a rigid constitution in the Bomas Draft was grounded on the ground that the final outcome of the review should reflect the view of the people of Kenya expressed through the anticipated participatory process and therefore the constitution would enjoy overwhelming support. Therefore making amendments to such a constitution should therefore be curtailed to avoid the historic manipulative tendencies of the political class as experienced before.

The anti thesis of the entrenchment of the amendment process aforesaid would not therefore be justified in the midst of hijacking the review process from the people by the government and its partisan and unrepresentative parliament leading to the publication of the unpopular and divisive Wako Draft. The feasibility of making amendments to the unpopular and contentious provisions forced by the government into the Draft Constitution would be a pipe dream and difficult if not outrightly impossible. The adoption of rigidity by the Wako Draft therefore is a further entrenchment of the brinkmanship of the government against the interests of the people. This would have caused an outright and immediate overthrowal of the constitution through extra constitutional means. A sad chapter for Kenya.

5.17 Chapter Twenty-One: The Transition and Consequential Provisions

Article 287 (Wako Draft) which is a reflection of Article 308 (Bomas) provides for dilution of the power of the people to refer to court matters where parliament has delayed or is reluctant to enact legislation to facilitate the operation of the constitution. The power to extend time by one year and based on a 2/3 majority in parliament is deflectory on the power of implementation of the constitution.

Conclusion

The referendum on 21st November, 2005 came on the background of these constitutional experiences and was based on the Proposed New Constitution of Kenya, styled as the Wako Draft. That the Wako Draft is a caricature of the constitutional aspirations of the people of Kenya as expressed in the Bomas Draft is not in dispute. The referendum was

therefore a major test of people's direct sovereignty by voting in favour or against the draft constitution as presented. It was historic.

> "The November referendum, ostensibly to ratify or reject the Draft Constitution was easily the single most important event in the socio-political environment in Kenya in 2005. This historic attempt at direct "people power" had both positive and negative attributes. Positive in that it reinforced the Kenyan people's faith in the right to vote as a tool in having their views heard peacefully and negative in the crude machinations of the political class – or both sides of the referendum divide to manipulate, mislead, bribe and intimidate ordinary people to their way of thinking."[23]

It cannot be denied that political alignments were imperative in the direction of the *Yes* or *No* vote at the referendum but it must also be added that at this time, the people of Kenya had realised the direct attempt by the government in power to muscle democratic space and constitutionalism through the lopsided Wako Draft constitution. The consequent lobbying by the opposing political camps therefore brought more division than unity amongst the Kenyan public.

> "The publication of the Draft constitution is late August, 2005 was the penultimate event in a constitutional reform process that caused more division than unity, as key political players sought to settle differences through the draft constitution, rather than through alternate political means. The battle lines were immediately drawn with those in positions of power vowing support, while those on the periphery of state power started their campaign for the rejection of the draft. The referendum, which was supposed to be a moment of unity consensus and civic education, became a zero sum struggle for popular support on ethnic lines ..."[24]

It is against this background of political bickering that the referendum was held and lost. Indeed, it can be rightly said that there were no winners or losers in the entire exercise.[25] This however has not altered the obvious fact that the Wako Draft constitution was a fraud perpetuated by the political elite against the people of Kenya.

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[23] The Kenya National Commission on Human Rights, Annual Report and Accounts, 2004/2005, P, (iii) – (iv)

[24] The Kenya National Commission on Human Rights, Annual Report and Accounts, 2004/2005, P, (iii) – (iv)

[25] Charles O. Oyaya, Supra, P. 6.

The next chapter deals with the events following the collapse of the national constitution conference and the draft bill and offers a way forward for the constitution review process. It also forms the conclusion and a way forward for the constitutional review process.

CHAPTER SIX

Bomas and After: The Events Pursuant to the Collapse of the National Constitutional Conference

6.0 Introduction

The Constitution of Kenya Review Commission was mandated to firstly prepare itself and the people for constitutional review through civic education in order to stimulate public discussion on constitutional issues. This would be followed by public consultation with the commission where views and proposals on constitutional change would be collected by the commission. The commission would thereafter prepare a report and its recommendations including a draft constitution which shall be publicly thrashed and a feedback received by the commission.

The third stage of the review would be the national constitutional conference whereby the commission shall submit its documents to the conference along with the feedback on them received from the public. If the conference is able to reach a consensus on all matters, the commission will, if necessary, redraft the constitution to reflect the decisions of the conference and submit it to the Attorney-General for transmission to the National Assembly. Alternatively, if the conference is unable to agree on one or more matters, those matters shall be referred to the people for resolution in a referendum to be organized by the commission after consultation with the electoral commission.[26]

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[26] Yash Ghai: Reviewing the Constitution, A Guide to the Constitution of Kenya, January 2002, P. 13-15, Constitution of Kenya Review Commission Documents.

6.1. The Search for Consensus

The constitutional review process undertook all procedural aspects and came out with draft constitution known as The Draft Constitution of Kenya Review, 2004 which document was adopted by the National Constitutional Conference on the 15th March 2004.[27] The draft bill aforesaid was a result of extensive debate, discussion and various amendments at the National Constitutional Conference. It enjoyed the confidence of a majority of the delegates and the general Kenyan public.

It would appear that the search for consensus at the Bomas constitutional conference was elusive due to the enormity of emerging contentious issues. This propelled the steering committee of the National Constitutional Conference to set up the Conference Consensus Building Group (CCBG) mandated to build consensus on outstanding contentious issues and report back to the plenary. This informal group was formed on 2nd February 2004.[28]

It was now becoming obvious that the conference had reached a deadlock on several important contentious issues and therefore the necessity for consensus building which as earlier expressed was one of the basic mandates of the commission.[29] The constitutional review impasse at Bomas had started building even long before the Kiraitu Murungi[30] led

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[27] The Constitution of Kenya Review Commission, National Constitutional Conference, The Draft Constitution of Kenya 2004, also popularly known as The Bomas Draft.
[28] The National Constitution Conference Consensus Building Group, Final Report of the Consensus Building Group (Sulumeti 1) and the Consensus Building Committee (Sulumeti II) P, 1.
[29] Section 21 (6) and 27 (5), Constitution of Kenya Review Act, Chapter 3A, Laws of Kenya.
[30] Hon. Kiraitu Murungi is the former Minister for Justice and Constitutional Affairs and the first Narc appointee to the post in January 2003,

storm out of the proceedings and the steering committee was informed that some groups had stopped attending the National Constitution Conference proceedings at Bomas.

The steering committee on 29th January 2004 mandated the Conference Consensus Building Group (CCBG) to use all possible means to promote dialogue among key stakeholders in the review process and facilitate a resolution to the contentious issues. All this time, the steering committee was aware that other stakeholders were making independent initiatives toward consensus.[31]

The Rapporteur – General and the Conference Consensus Building Group (CCBG) in its meeting agreed on the following as contentious issues that required consensus:-

- Dual citizenship.
- The right to life.
- Character of Marriage.
- Recall of Members of Parliament and Councilors.
- Limits on number of terms a person can serve as a Member of Parliament or Councilor.
- The mixed Member Proportional Representation system as a method of elections at any level.
- The authority to register and supervise political parties.
- Judicial powers of the Electoral Commission.
- Devolution
- Constitutional Commissions and Constitutional office holders.

[31] The National Constitutional Conference Consensus Building Group, Supra, P1-2.

- Structure of the Executive.
- Transnational and Consequential arrangements.

The Sulumeti Consensus attempts were variously successful and managed to persuade other stakeholders to participate in their forums. The Constitutional Consensus Building Group dialogued with the Kenya Human Rights Organisation, Federation of Women Lawyers (FIDA), Institute for Education in Democracy, League of Women Voters, the Church of Kenya and the Isahakia Community of Kenya. The Supreme Council of Muslims of Kenya, (Supkem) acknowledged the efforts but appreciated that they had already made their presentations to the Constitution of Kenya Review Commission and were actively and adequately represented at Bomas.[32]

The Conference Consensus Building Group (CCBG) initiative was perceived to be imperative to the completion of the National Constitution Conference bearing in mind the charged political arena and the acrimony occasioned by parochial defence of sectarian political interests. It succeeded in creating a cordial ambience in which there was free and frank exchange of ideas besides willingness to listen and make concessions. Whereas it is noted that these were the initial and basic attempts at consensus, it is notable that the atmosphere at this stage was accommodating and daggers were as yet not drawn and therefore the sustenance for consensus and dialogue.

[32] The National Constitution Conference Consensus Building Group, Final Report of the Consensus Building Group (Sulumeti 1) and the Consensus Building Committee (Sulumeti II), Supra, P 1-2

6.2. The Attempts at Consensus: The Parliamentary Select Committee on the Review of the Constitution.

The National Constitution Committee (NCC) or the Bomas conference was able to complete its sessions and come up with The Draft Constitution of Kenya, 2004 which draft was adopted by the National Constitution Committee on 15th March 2004. The procedural attempts to hand over the draft to the Attorney - General[33] for presentation to the National Assembly were thwarted by bickering, confusion and lack of direction of the process arising out of the volatile Bomas conference talks that had ended in a stalemate bedeviled with lots of acrimony.

As a consequence of this confusion, parliament on the 5th May, 2005 appointed a select committee[34] on the Review of the Constitution of Kenya to provide the badly needed leadership in the constitutional review process. It was mandated to compile and present a report on contentious issues to the National Assembly in accordance with Section 27 of the Constitution of Kenya Review Commission Act, Chapter 3A, Laws of Kenya.[35]

The mandate of the select committee was based on the provisions of the Consensus Act[36] which Act was a parliamentary amendment of the Constitution of Kenya Review Act

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[33] Section 28 (2) Constitution of Kenya Review Act, Chapter 3A, Laws of Kenya
[34] This Parliamentary Select Committee was appointed pursuant to standing order No. 153 and Section 10 Constitution of Kenya Review Commission Act.
[35] National Assembly, Ninth Parliament, 4th Session, 2004, Report on the Select Committee on the Review of the Constitution of Kenya. Parliament Buildings, July 2005, P. 1.
[36]The Constitution of Kenya Review (Amendment) Act, 2004

aimed at imbibing and consolidating the art of consensus building into law, and was broad and revolutionary. It provided as follows:-

The mandate of the Select Committee is as here under:-

1. Section 27 (1) (b), 27 (2) and 27 (3) of Cap 3A which provide that, the National Assembly shall;

   Section 27 (1) (b) submit to the Attorney-General, the draft Bill and recommendations only on the contentious issues as identified and recommended by the Parliamentary Select Committee on the Constitution Review for the approval by the National Assembly.

   Section 27 (2) In considering the report and the draft Bill, the National Assembly may undertake consultations to initiate, facilitate and promote a national consensus on the contentious issues as recommended by the Select Committee on Constitutional Review and approved by the National Assembly.

   Section 27 (3) Within thirty days after the National Assembly submits the draft Bill to the Attorney General, the Attorney-General shall publish the proposed new Constitution Bill or the draft Bill and amendments as approved by the National Assembly.

(ii) The provisions of Section 4 of the Constitution of Kenya Review Act, Cap 3A, which establishes Parliament as an Independent Organ of Review stipulates:-

4 (1) The organs through which the review process shall be conducted shall be-

(a) the Commission;

(b) the Constituency Constitutional Forum;

(c) the National Constitutional Conference;

(d) the referendum; and

(e) the National Assembly.

(2) The organs specified in subsection (1) (a), (b) and (c) shall not be dissolved except in accordance with Section 32.

(iii) Section 5 of the Constitution of Kenya Review Act provides that:

"In the exercise of the powers or the performance of the functions conferred by this Act, the organs specified in Section 4 (a), (b), (c) and (e);

(a) accountable to the people of Kenya;

(b) ensure that the review process accommodates the diversity of the Kenyan people including socio-economic status, race, ethnicity, gender, religious faith, age, occupation, learning, persons with disability and the disadvantaged;

(c) ensure, particularly through the observance of principles through the observance of principles in the Third Schedule that the review process:-

(i) Provides the people with an opportunity to actively, freely and meaningfully participate in generating and debating proposals to alter the constitution;

(ii) is subject to this Act, conducted in an open manner; and

(iii) is guided by respect for the universal principles of human rights, gender equity and democracy;

(d) ensure that the final outcome of the review process faithfully reflects the wishes of the people of Kenya."[37]

The Act[38], which had been necessitated especially by the courts ruling in the case of Njoya and others Vs. Attorney-General and others[39] provided the select committee with a calendar of action to and after the referendum. This position envisaged a situation for the completion of the review process.

The committee set its programme and in its sittings received and held consultations with various stakeholders with a view to building a National Consensus. It further established a sub-committee of thirteen members with the following mandate.[40]

(i) To study the Bomas draft and the Constitution of Kenya Review Commission Report adopted on March 25, 2004 and the Consensus Building Report (Naivasha Accord) and compile a list of contentious issues for presentation to the Main Committee.

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[37] National Assembly, Supra, P 1-4.
[38] The Constitution of Kenya Review Commission (Amendment) Act, 2004, Kenya Gazette Supplement No. 90 Act No. 9.
[39] [2004] LLR 4798 (HCK)
[40] National Assembly, Supra, P 10

(ii) To prepare a new draft bill based on the Bomas Draft and the Consensus Building Report for presentation to the select committee.

(iii) To co-opt such experts as may be deemed necessary.

The Parliamentary select committee had retreats at the Safari Park Hotel from 7th – 9th July, 2005 and again a two day meeting of members of parliament at Kilifi from 14th – 16th July, 2005 which was aimed at briefing the members and also seeking their views on the harmonized draft and prepare members for the actual debate on the Parliamentary Select Committee report and accompanying documents in the house. The penultimate result was that the Parliamentary Select Committee on the review of the constitution undertook its mandate at consensus and harmonization of the Bomas Draft, the Naivasha accord, the Kilifi accord and in the spirit of the newly acquired *"National Consensus"* and come up with The Proposed New Constitution of Kenya which was presented to the people of Kenya at the referendum on 21st November 2005.

The rest is history. Kenyans were treated to this historic moment of voting for or against the new constitution at a referendum and resoundingly voted against it on the 21st November, 2005. It is not difficult to see that the mandate of the select committee on constitutional review was not effective due to partiality and entrenchment of vested political interests. It had created an opportunity for the ruling elite to propagate, propel, entrench and suppress their interests and political philosophy to the people of Kenya. No wonder it was rejected.

It has been variously argued that The Proposed New Constitution of Kenya was a viable document for Kenya but its sweetness was lost in the imbroglio of ethnicity and partisan politics. That the stakeholders lost direction in disregarding a case for a new constitution and went headlong to feud for their political differences is not lost to many. This could be true but was it entirely unexpected? It would require a novice to expect sobriety at a forum on such a controversial and interest oriented fora like constitution making. In any event, it was openly evident that the Wako draft was crafted to defeat the aspirations of the people of Kenya as expressed clearly in the Bomas draft.

Why was it necessary to rubbish the NCC and the Bomas Draft and adopt a contentious approach that was not open? The spirit of the Constitution of Kenya Review Act and the establishment of the Constitution of Kenya Review Commission were geared towards a people driven constitution in which the participation of *Wanjiku* was paramount. Attempts to scuttle this must have been borne out of the elongated period of the Constitution of Kenya Review process and the changing political fortunes of the Kibaki - Narc establishment after the December 27, 2002 national elections. This was bound to fail.

6.3. The Committee of Eminent Persons

The referendum and consequential results for constitutional reforms have not in the least slowed down the quest for constitutional reforms in Kenya. The stalemate subsists and various civil society groups have adopted their personalized strategies towards the

realisation of a new constitutional dispensation for Kenya. The immediate past history of the review is that:-

> "After the 2002 election, the Government and the Constitution of Kenya Review Commission reconvened the NCC at Bomas resulting in the "Bomas Draft" which was later revised at Naivasha leading to the "Naivasha accord" which was in turn adjusted by the "Kilifi draft" and finally mutated into the "Wako Draft" which was then subjected to the referendum."[41]

The defeat of the constitution referendum did not whittle things down but continued the distrust by the protagonists, the banana and orange camps. Each had had made proposals for a different mode in the process towards constitutional review and the Orange Democratic Movement case out strongly for an all inclusive review forum in which their view as victors would be prominent. The banana side, nursing the wounds of defeat would not bulge. It is in this scenario that the Committee of Eminent Persons was appointed by the president with a mandate to study and advice on the way forward for the completion of the constitutional review with emphasis to national healing, reconciliation and fruitful discussion.

The paraphrased Terms of Reference, for the committee were[42]:-

(a) facilitate the airing of views by the people of Kenya on the constitutional review process so far in terms of weakness, strengths and make proposals on the way forward.

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[41] Katiba News, April 2006, P. 3
[42] Katiba News, Supra, P 5.

(b) identify any legal, political, social, economic, religious, governance or other issues or obstacles past or present which stood in the way of achieving a successful conclusion of the review process.

(c) receive written memoranda and or oral presentations on the foregoing matters.

(d) undertake consultations and receive advice from local, regional and international constitutional experts on the foregoing and in particular on how to establish an effective legal framework for the completion of the review process.

(e) prepare and submit a report of its findings to the President recommending a process for national healing to facilitate reconciliation and fruitful dialogue, a process to facilitate resolution of contentious issues and a legislation that will underpin the review process leading to a new constitution of Kenya.

The committee was appointed vide Gazette Notice Number 1406 of 2006 dated the 24th February 2006 to facilitate the airing of views by the people of Kenya on the constitutional review process so far in terms of what Kenyans consider the weaknesses, strengths, successes or failures of the process and make proposals on the way forward. This is because the referendum vote left the review process hanging, a situation that was not envisaged by the Constitution of Kenya Review Act. The Act and consequential process was not attune to the fact that the process would end without a new constitution

for Kenya. The Committee is not and should not be viewed as an organ in constitution making but an evaluate process intended to advise on the way forward for this process.

The legality, viability and efficacy of the Committee of Eminent Persons has been challenged and found wanting. This is because, it has been argued, the appointments were made devoid of any legal basis and also without the consultative spirit so badly needed for the review process. Hostility remains abound because this is a team appointed by the President who is an insider and interest party in the constitution review process.

6.4. Other Attempts at Jumpstarting the Constitution Review Process

As has been earlier observed[43] the results of the constitution referendum, however devastating to the winners and losers alike did not eclipse attempts by Kenyans to seek for a new constitutional order.

> "...the people of Kenya rejected the proposed new constitution in the November, 2005 referendum. At the end of the referendum process, the people of Kenya displayed major divisions manifested along factional, political, ethnic, religious and some cases, social economic lines. Although these divisions pointed to the need for a national reconciliation, they did not entirely put off the desire for a new constitution."[44]

Various attempts have been made to jumpstart the review process and confer a new constitution to satiate the needs and expectations of the Kenyan polity.

The government, after the report, experience and confusion arising out of the Committee of Eminent Persons embarked on a programme of seeking dialogue and consensus

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[43] Katiba News, Supra, note 15.
[44] The Multi-Sectoral Review Steering Committee, Report of the Multi-Sectoral Review Steering Committee to the Multi-Sectoral Review Forum, 31st October 2006, P. 8.

amongst all key stakeholders, especially the political class on the way forward in the constitutional review process. This development came out with the constitution of the Inter Parties Constitution Forum aimed at opening up dialogue and reconciliation. A smaller committee, the Inter Parties Consultative Committee consisting of one (1) member from each political party and the Centre for Multi Party Democracy was formed to steer the mandate of the forum.[45]

The IPPC in the meeting at Safari Park Hotel on 15th September, 2006 recommended an inclusion process in which other stakeholders were brought on board thus forming the Multi-Sectoral Review Steering Committee, (MRSC) and to discuss the details of the constitutional and legislative amendments as proposed in the Report of the Inter Parties Constitutional Committee, (IPCC).[46]

The mandate and terms of reference of the MRSC is as follows:-

- To discuss the nature and content of the constitution amendment to entrench the review process in the current constitution and to anchor the referendum and to issue instructions for drafting and approve the final version of the amendments.
- To discuss the policy issues as well as the nature and content of the agreed legislative enactments and to issue instructions for drafting and receive and approve the final version of the legislation.
- To discuss and agree on the details of the most appropriate options for the finalization of the review process and factor the same in the proposed new law.

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[45] The Multi-Sectoral Review Steering Committee, Supra, P.11
[46] Ibid P. 12-13

- To discuss the policy issues as well as the nature and content of other necessary and immediate constitutional and or legislative amendments (if any), issue instructions for drafting and receive and approve the final version of the constitution and or review amendments (if any).
- To recommend the expansion of the Multi-Sectoral Review Forum to ensure it conforms with the gender equity, inclusiveness and representativeness.
- To discuss any other relevant and necessary issues relating to reform to facilitate constitutional and legal matters that may be necessary for successful review of the constitution, and
- To prepare, discuss and approve the MRSC report for transmission to the forum.[47]

The Committee adopted lofty principles[48] and agenda for completion of the review process as had the Constitution of Kenya Review Commission, (CKRC) but the review being a political process was again bereft of the same political pitfalls that had earlier befallen the process.

The Multi-Sectoral Review Steering Committee, (MRSC) also formulated a realistic roadmap for a new constitutional dispensation for Kenya spanning September, 2005 to September, 2006 but skeptics are awash with the gloom as to the realization of this dream.[49] This was intended to offer a new constitution to Kenya before the general elections scheduled for 2007.

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[47] The Multi-Sectoral Review Steering Committee, Supra P. 14-15.
[48] Ibid, P. 18
[49] Ibid, P. 28-29

In addition to the Multi-Sectoral Review Steering Committee, (MRSC), the National Dialogue Conference, (NDC) is another attempt at unlocking the ever evasive constitutional making process in Kenya. The NDC is the brainchild of Independent Sector Consultative and Dialogue Group (ISCDG)[50] and aimed debating and establishing a way forward for the review process.

The first National Dialogue Conference (NDC 1) was held at KCCT, Mbagathi, Nairobi on the 7th to 8th July, 2006 and had the following three objectives:-

- To provide an independent platform of national dialogue and negotiation on the way forward in the overhaul of Kenya's constitutional order.
- To facilitate the spirit of national harmony, understanding, and dialogue in the search for a new constitutional order in Kenya; and,
- To make pro active and meaningful proposals on how to approach and successfully conclude the constitution making process.[51]

The other competing and parallel force in the review process is the Paul Muite[52] led process that is a lawfully sectioned Parliamentary Constitutional Committee on Legal Affairs and Administration of Justice. Inasmuch as the committee has received views from the public, its jurisdiction in the review process does not have any legal

[50] This group comprises of political parties, faith based institutions, organizations, non-governmental organizations, youth movements, the business sector, women's organizations, professional bodies and social movements. All these were represented at NDC 1, which had about 450 participants.
[51] National Dialogue Conference, Kenya Towards a New Constitution, A Report on the Constitution-Making Law Framework (Proceedings held at Masaai Lodge from 13th to 15th October, 2006.
[52] Hon. Paul Kibugi Muite is a member for Kabete and chairman of the Committee

foundations.[53] Having noted and experienced the political nature and conduct of politicians in the review process, the NDC II is expected to be cautious about its relations with politicians and political groupings.

> "...politicians have been Kenya's enemy towards a new constitution. They have been politically myopic, intellectually bankrupt and skullduggery has been in full glare. Thus, while providing for a comprehensive review, and a pledge to conclude the process by September 2007, NDC II should remain cognizant that the MSRSC is also short sighted and could certainly drag, if not stall, the review process once the "November Package" has been approved by parliament."[54]

The technical taskforce, one of the organs of the review process established the following as the objects and prospects of the constitution making process:-

- Sovereignty of the people of Kenya, where there shall be direct and redirect exercising of power by themselves, who having constituent power and their involvement in decision making, shall reign at all times:
- Supremacy of the constitution and the culture of constitutionalism shall be the deadlock of the process and the final product (new constitution), where the New Constitution shall never be amended without the endorsement of the people of Kenya.[55]
- Peoples rights and dignity of the human person shall be upheld at all times and the principles of *utu, uhai and uraia* shall be zealously protected.
- Equity and equality of all persons or people's shall be promoted.
- The people of Kenya shall determine their form and nature of governance.

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[53] The Multi-Sectoral Review Steering Committee, Supra, P. 8

[54] See Makau Mutua, Voices of Reason: Constitutionalism and Referendum Politics, A Paper Prepared for African Centre for Economic Growth (ACEG) October, 2005, See also various articles by the same author in newspapers in the recent past. This quote is cited in, National Dialogue Conference, Supra, P.8.

[55] This object arises from Kenya's history, Numerously, the Constitution of Kenya (1998) has been amended from its original form – the Independence Constitution (1963) wantonly without involvement of the people. Borrowing from the Constitution of the Republic of Ireland 1997, the Taskforce proposed that this would be part of the object of the process and eventual by product – the New Constitution.

- Respect for the diversity of the Nationalities, Communities, and individual citizens and their cultures, resources and heritage to forge a peaceful coexistence, national unity and integration.
- Guaranteeing the realization of all rights of all the peoples through equitable access to natural and economic resources
- Principles and values of leadership such as moral responsibility, accountability, integrity and honesty shall be upheld at all times.
- Recognition of regional instruments in the spirits of the Banjul Charter[56] to promote the principle of Pan-Africanism and strengthen heritage of the African societies, and,
- Recognition of international instruments that promote a democratic culture and nurture dialogue among world nations.

These various endeavor at constitution making are on going and as yet one is not sure of the possibility or otherwise of attaining a new constitution before the general elections scheduled for December, 2007. Even the alternative of minimum reforms as envisaged by the MRSC and the Muite led faction aforesaid now appear evasive due to renewed acrimony reported in the MRSC where political party factions are not yet agreed on the subject.[57]

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[56] The technical Taskforce made special reference to Section 21 (V) of the Banjul Charter that provides: States party to the present Charter shall undertake to eliminate all forms of foreign economics of politicians particularly that practiced by international monopolies so as to enable their people to fully benefit from the advantages derived from their national resources.

[57] See Daily Nation, The Standard News papers, 17th November, 2006.

The MRSC was dealt a big blow on Thursday, 16th November, 2005 when opposition political parties like the Liberal Democratic Party, (LDP), Kanu, and Ford Kenya *inter alia* pulled out of the review process.[58]

6.5. Conclusion

Constitution making is pre-eminently a political Act.[59] This is true of Kenya as is of any other jurisdiction inasmuch as many political scientist now dismiss the act as one of the formality qualified for dealing as political or governmental acts of constitutionalism. The legalistic aspect of constitution making has been tested in Kenya with varying degree of success. Whereas the constitution review process in Kenya has been founded on appropriate legislation, we would find that the larger political process had had a bigger role to play in its success or failure.

I agree with Prof. H. W. O. Okoth Ogendo's[60] assertion that all law and constitutional law in particularly is concerned not with abstract norms, but with the distribution, exercise and legitimization of power. Constitutional reform is a political act. It is a programme of social, economic and political transformation which must draw on our past experiences and future aspirations.[61] Law therefore and constitutional law particularly is not a casual outfit, it has its basis on power and the politics of power. The constitution making process in Kenya should be viewed and rightly so, as a power relations exercise if

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[58] Daily Nation and The Standard Newspapers,17th - 19th November, 2005.
[59] Daniel J. Elazar, Constitution Making: The Pre-eminently political Act, Http//www.jcpa.org/dje/articles3/constrammer htm, P. 1
[60] H W O Okoth- Ogendo, Constitutions without Constitutionalism: Reflections of an African Political Paradox in State and Constitutionalism, An African Debate on Democracy, Issa G Shivji (Eds) P. 3
[61] Kiraitu Murungi, Democratic Party of Kenya's position on the Majimbo Debate, The case for a Unitary State, December 4, 2001, P. 1.

one has to come up with an explanation of its ups and downs and domineering turbulence.

As an illustration of the aforesaid observation on constitution making, perhaps it would be prudent to observe the expression of National Alliance for Change (NAC) in an earlier rejoinder on the constitution review process.

> "NAC believes that the constitution review process should be conducted in a conducive environment which creates sufficient space for every Kenyan to be involved in every stage of the review process. Every Kenyan must be able to express his or her views on any subject safely, freely, openly, and without any fear. The restrictions imposed by the State on the freedoms of movement, expression, assembly, association and access to the electronic media should be removed forthwith. The constitution making process should provide a national forum for dialogue for Kenyans for all political parties and social classes and promote peaceful co-existence, reconciliation, and national reconstruction. Sufficient public funds should be made available to civic education to educate Kenyans on principles and essence of the Constitution, human rights and democracy. NAC does not believe in inventing the constitutional wheel. Kenyans should be open minded and learn from the experiences of others, as they write their own constitution."[62]

Further;

> "NAC urges all pro-democracy forces to unite and rally all their efforts in removing the obstacles placed on the path of comprehensive reforms by reactionary dictatorial forces which are fighting tooth and nail to preserve the current unjust and oppressive constitutional order."[63]

Coupled with the now famous observation on the enormous powers vested in the presidency and the quip on the imperial presidency, one realizes the then opposition movements commitment to constitutional reforms with a view to attaining a Kenya free from unprecedented poverty, unemployment, widespread insecurity, endemic corruption, monumental public debt, lawlessness, poor infrastructure and generalized institutional

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[62] National Alliance for Change (NAC) , Fundamental Principles to be considered in making the new constitution by the People of Kenya, P. 1-2.
[63] Ibid, P. 2.

and social decay that threatens the threshold of the nation.[64] A truly democratic Kenya. Is this the subsisting position today?

The Kibaki - Narc government was propelled to power in December, 2002 on a platform of change and in an outright rebellion against the reactionary KANU dictatorship that had reigned supreme over Kenyans for a long time. In its campaign manifesto, NARC had promised Kenyans a constitution within one hundred (100) days of attaining power but this now remains a pipe dream. What became of Kiraitu Murungi's hype and emotive sloganeering on purposive dialogue for reconstruction? Is this a power relations exercise being played from the safe side? I would think so. It is obvious that the current political dispensation is not interested in charting a pro-people political or constitution cause. The option for Kenyans is to brazen their ammunitions and turn to war against their oppressors now and until realization of total liberation.

The constitutional review impasse in Kenya today is unfortunate but understandable. Every political regime has utilized the constitution and the constitution review process to enhance and concentrate power on itself.

> "Before acquiring power, Kenyatta had given the impression that Kenyans would hold a convention but since he was not a democrat, he started a process of manipulating the constitution that Moi would intensify so much that it boomeranged and led to the current constitution debate. Instead ... as expected after independence of calling for a people driven constitution, Kenyatta organized for the manipulation of the defective constitutional document to be amended for reasons that were politically and narrow in scope and set the example that Moi followed after 1978."[65]

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[64] Kiraitu Murungi ,See Preamble, Supra, P. 1;
[65] Professor Macharia Munene, The Manipulation of the Constitution of Kenya, 1963-1996, A reflective Essay, P. 4

Commitment to constitutionalism and constitution reform is not the province of dictatorships and authoritarian regimes. This explains the current scenario where the Narc regime continues to manipulate, undermine and frustrate efforts at constitutional reform with a view to perpetuating itself in power.

> "... we have a political class that is fighting a zero sum game over the review process. The ruling elites of a given time whether it is Moi era or Kibaki regime internalize the feeling that the current constitution is ideal instrument to rule and reign and any constitutional reform especially one that is genuinely people driven is a politically well calculated schemes to usurp its constitutional power and authority. The regimes defence becomes that all effort should not be spared to defeat the process."[66]

This explains Kiraitu Murungi's conversion and cold feet at toppling the emergent "imperial monarchy". He is part of the problem and cannot shout at himself.

The clamor for constitutional reforms has lightened as the country draws nearer to the 2007 general elections. This is the claim for minimum constitutional and administrative reforms akin to the 1998 Inter Parties Parliamentary Group ones that were instrumental in updating a level playing group for all parties before the elections. The Narc regime and government is suspicious and insists on a scheme of comprehensive constitution reforms knowing well that it may be an impossible task before elections. This political intrigue and intensified bickering has clamoured in the appointment of the current Inter Parties Parliamentary Group that is also dogged in the controversy of inclusion or non inclusion of the civil society, religious groups and other stakeholders. The politics of constitution making is not about to go away.

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[66] Katiba News, Supra, P. 11

6.6. The Way Forward

The constitution review process has been fruitless in Kenya due to intrigue and lack of commitment on the part of the ruling class. In its endeavor to remain in power under an anti-people legal regime and constitution, the political class has scuttled all efforts at the making and attainment of a people driven and orientated constitution. The following are suggested as methods for getting out of the constitutional stalemate:-

6.6.1. Leadership.

The government no doubt retains a residual duty to provide a legal environment for the attainment of a new and viable constitutional order for this country and therefore it is incumbent upon the president and chief executive of this country to provide appropriate leadership for acquisition and enactment of a new constitution.

Previous attempts at constitutional making have backfired because the ruling elite has indulged in an exercise of self preservation. Politicians do not seem to learn, or at all, but Kibaki should now realise that we are carrying the joke too far and the price is enormous. The people of Kenya have said it and they badly require a new constitution. He is duty bound to offer appropriate leadership and requisite infrastructure for the realisation of the aspirations of the people. The back stops at President Kibaki's door.

6.6.2. National healing, dialogue and reconciliation

The experiences of the constitution review process have polarized our society so badly that the country now requires facilities and an environment for national healing and conciliation. The divisions emerging from the referendum campaigns and the quest and battles for enhancement of persons and other sectarian interest in the constitution document led to animosity and misunderstanding amongst various stake holders and the populace. We remain a nation where mutuality of trust is at the lowest ebb as a consequence of misinformation, historic, economic, social and political in-equilibrium. The concept of mistrust should be addressed with a view to nurturing a cohesive and harmonious society based on mutuality of trust. Reconciliation and dialogue should be genuinely and sincerely sought and nurtured with a view to achieving national healing.

Again, the back falls at the presidency for setting the mood and pace.

6.6.3. Political angle of the constitution making process.

It is not in dispute that the constitution making process is primarily a political and secondarily a legal process. Whereas it is appreciable that all attempts were made at legally sustaining the review process through legislation, one realizes that this was not foul proof as political paradigms would be employed against the process. It is not convincing that legislative lacuna evident in the legal regime supporting the review process is accidental. This could be and was most likely designed as a fall back situation when political parameters refused to play. The numerous court applications made to scuttle the review process are a testimony of the lego-politico underpins. It is now

necessary that appropriate leadership issue so as to circumvent the place of party politics and other partisan interests from interfering with the review process.

The experiences of constitution making have been a big lesson for this country.

> "It has taught us that the review process is not just an exercise of writing a good constitution for the country but an intricate ethno political game that can tear the country asunder."[67]

6.6.4. Consultation and involvement of all stake holders in the review process.

After the referendum was lost, the Orange Democratic Movement requested for the involvement of all players and stakeholders in chanting a way forward for the constitution review process. This was not to be. The appointment of the Kiplagat Committee without consultation of other stakeholders by the president has made poorer an already bad situation. To achieve the trust, national healing and dialogue badly needed in the making of a new constitution for this country avenue for consultation, dialogue and consensus building should be had. Any unipolar decisions on constitution building are likely to fail as is evidenced by the Wako draft and the referendum.

6.6.5. The need for consensus building

The contentious issues of the draft constitution should be debated, discussed and thrashed out in a genuine and all inclusive and participatory consensus building process where all stake holders freely, onerously and actively participate. The philosophy of give and take

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[67] Katiba News, Supra, P. 12

should be nurtured so that people ultimately understand the need for consensus and as much appreciate that consensus is not unanimity.[68]

6.6.6. The Constitution Review Process ultimately must be people driven

Constitutions dictate and relate to the mode of government in society. The dictates of democratic governance ordain that people are cardinal in establishing how they are ruled and therefore must be involved in the process of making the constitution. The dilemma with our review processes has been one of lack of commitment and allegiance to the will of the people in constitution making. As is usual with all tyrannical regimes, bottlenecks are made to frustrate people's efforts at self governance. Our experience has shown that the clamour for not only a constitution but a people driven constitution is now more than ever and any attempt to scuttle this shall ultimately fail. The government is therefore duty bound to honour and recognize the wishes of the people by facilitating a people driven constitution making process.

Wanjiku must take the driving seat. This entails an enabling environment where the people of Kenya would be fully in charge and control of the constitution review process such that as anticipated in the review spirit and law, the process would be entirely people driven. Any other pretensions, as has been experienced, are bound to fail.

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[68] Yash Pal Ghai, "Consensus is Not Unanimity", "Daily Nation, May 6, 2004" P. 6.

6.6.7. Entrenchment of the Review Law into the Constitution and the Amendment of Section 47 of the Constitution

It has variously been argued that one of the basic weaknesses of the constitution review process is that the Constitution of Kenya Review Act is not entrenched in the constitution therefore this creates a lacuna that can be and has been exploited to derail and delay the process. Another argument has been that S. 47 of the Constitution of Kenya would have to be amended so as to accommodate a provision for the total repeal of the current constitution and a replacement of the same with the enactment of a new constitution. Whereas I do not *in toto* subscribe to this school of thought as being the salient factor belying the constitutional review debacle and aver that the absence of political goodwill has been the fatal blow to the process, I would recommend the same with a view to the creation of a clear, definite and final roadmap to the constitutional review process. This would also oust any pretext and excuse at derailment of the process

6.6.8 The case for Minimum Reforms

Professor Githu Muigai brings out a new dimension on the way forward in the constitutional review process by introducing the concept of minimum reforms as a way forward in the process.[69] He argues that minimum reforms may be necessary to safeguard the gains of the review process to date and to ensure that the review process is conducted on sound constitutional basis.

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[69] Githu Muigai. Overhaul or Amend? A discourse on The Future of the Constitutional Change in Kenya. (Unpublished) P. 4.

The basis for constitutional change is that social and political activity is always evolving and that the law must keep pace or loose its relevance.

> "The real dilemma for both politicians and constitutional lawyers alike lies in the fact that political and social activity is in a permanent evolution and law must follow closely or loose its relevance. Constitutional provisions like all other legal texts, are in a state of permanent evolution, since they express, on a normative level certain social relations in motion. A good judicial system should normally be able to give contemporary meaning to old values and principles, but some changes are so profound that they require changes in the constitution itself."[70]

The case for the Inter Party Parliamentary Group (IPPG) is used to illustrate its success of the concept of minimum reform and is acknowledged as overwhelming reform package that has largely catapulted the concept of constitutionalism in Kenya.[71] The call for minimum reforms therefore comes in as an interlude to eventual comprehensive reforms anticipated in the constitutional review process.

The stalled constitutional review process is a milestone in the constitution making process in Kenya, whichever direction the process takes in the future. It remains on record that Kenyans have stamped their authority against dictatorship and impressed on their need for control and supervision of the elements of governance and power. It is sad that a matter of this magnitude would take the circumlocutious cause it has but we take consolation in the fact that constitution making is a relatively political activity and like in our situation is likely to engender much conflict and controversy. It is hoped that appropriate leadership and direction badly needed to jump start the process shall be forthcoming to enable the propulsion of a new pro-people constitutional dispensation in Kenya in the very near future.

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[70]Githu Muigai, Supra, P. 2
[71] Ibid, P. 4

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