

**TOWARDS CONSTITUTIONAL LEGITIMACY
A STUDY OF THE PRINCIPLES AND PROCESSES OF
CONSTITUTIONAL DEVELOPMENT AND CONSTITUTION
MAKING IN KENYA FROM COLONIAL TIMES TO 2010**

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DEDICATION

I specially dedicate this work to my late father Christopher Oyaya Ogada and my late mother Mary Anyango Oyaya for teaching me that the fear of God is the beginning of knowledge. To my dear wife Mary who has been a true blessing in my life in every way. To my friend and inspiration the late Professor H W O Okoth Oendo who gave me the confidence to get into this field of study.

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ABSTRACT

This study has involved an extensive assessment of constitutional developments and the challenges of constitutional governance and change in Kenya from tin-colonial times to 2010. In particular, the study has examined the extent to which both colonial and post-colonial constitutional developments and constitution making processes contributed to building of constitutional legitimacy in Kenya.

The study finds that throughout its constitutional history, Kenya has experienced one constitutional crisis after another. While the basic characteristics of the colonial constitutional order was incurably exclusive, imperial, oppressive and unaccountable, the political elite in post independence Kenya continued the colonial legacy of manipulating the law to secure themselves special economic and political advantages. The study therefore finds that both colonial and postcolonial constitutional developments grossly fell short of the key ingredients of democratic constitutionalism. To this end, neither colonial nor postcolonial constitutional developments contributed to building of constitutional legitimacy until the promulgation of the Constitution of Kenya 2010.

The study further finds that although the novelty of the Constitution of Kenya review from 1997 to 2010 centred on extensive public participation in the review process, the mere act of public participation in Constitution making is not in itself sufficient to secure the legitimacy of the process and its outcome. To be effective, a participatory constitution making enterprise must be based on solid constitutional and legal foundation. The political elite must also demonstrate sustained commitment and willingness to support meaningful

public participation in the process. More importantly, enabling mechanisms must be established to ensure that people's participation is meaningful and that processes of ratifying the proposed Constitution are credible and represent the will of the people's will.

Finally, the study finds that fundamental constitutional change does not take place during peacetime. Typically, as demonstrated both during the colonial and post independence periods, all the major and fundamental constitutional changes in Kenya were, preceded by periods of intense civil unrest and violence. The study thus argues that the ruling elite will not support fundamental constitutional reforms unless the *status quo* is threatened by civil unrest.

The study therefore contends that in order to secure functional and political legitimacy, both Constitution making and management of the constitutionality must seek to guarantee meaningful people's participation. The study concludes hence that what matters is not the mere presence of a written Constitution, but rather how the Constitution is, made to work for the benefit of the people. This, is what will ultimately, determine the respect and honour that the Constitution commands as the pre-eminent norm of the society. In this, there is likely to be a contestation of the legitimacy of the Constitution, which will most often lead to a break down in law and order and ultimately the collapse of the state. It is against this background that the study recommends the design of Constitution making and management that not only nurtures popular constitutionalism but also ensures that constitutional development functionally, tied to the vision of democratic governance and social justice

ABBREVIATIONS

ADC	Agricultural Development Corporation
3Cs	Constituency Constitutional Committees
AEM	African Elected Members
AEMO	African Elected Members' Organization
APP	African People's Party
CBG	Consensus Building Group
CBK	Central Bank of Kenya
CBOs	Community Based Organizations
CCBC	Conference Consensus Building Committee
CCE	Constituency Civic Educators
CCF	Constituency Constitutional Forum
CEMO	Constituency Elected Members' Organization
CEPs	Civic Education Providers
CIPEV	Commission of Inquiry into Post-Election Violence
CKRC	Constitution of Kenya Review Commission
CMD	Centre for Multi-Party Democracy
CNU	Coalition for National Unity
CoE	Committee of Experts
CO	Colonial Office
CSOs	Civil Society Organizations
DCs	District Commissioners
DOs	District Officers
EAA	East African Association
ECK	Electoral Commission of Kenya
eKLR	Electronic Kenya Law Report
EU	Electors Union
FIP	Federal Independence Party
FORD	Forum for the Restoration of Democracy
FORD- P	Forum for the Restoration of Democracy-Peopic
GNU	Government of National Unity

GSU	-	General Service Unit
HCCC	-	High Court Civil Case
IBEA Co.	-	Imperial British East Africa Company
IBRC	-	Independent Boundaries Review Commission
ICC	-	International Criminal Court
ICCPR	-	International Covenant on Civil and Political Rights
ICCRG	-	International Centre for Constitutional Research A Governance
ICJ-K	-	International Commission of Jurists Kenya Section
IDP	-	Internally Displaced Person
UCDRC	-	Interim Independent Constitutional Dispute Resolution Court
IIEC	-	Interim Independent Electoral Commission
IPCC	-	Inter-Parties Consultative Committee
IPCF	-	Inter-Parties Consultative Forum
'PPG	-	Inter Parties Parliamentary Group
IREC	-	Independent Review Commission
IRI	-	International Republican Institute
ISCDG	-	Independent Sector Consultative and Dialogue Group
KA	-	Kikuyu Association
KACC	-	Kenya Anti-Corruption Commission
KADU	-	Kenya African Democratic Union
KANU	-	Kenya African National Union
KASU	-	Kenya African Study Union
KAU	-	Kenya African Union
KBC	-	Kenyan Broadcasting Corporation
KCA	-	Kikuyu Central Association
KCB	-	Kenya Commercial Bank
KCCT	-	Kenya College of Communication Technology
KEPSA	-	Kenya Private Sector Alliance
KFL	-	Kenya Federation of Labour
KGGCU	-	Kenya Grain Growers Cooperative Union
KHRC	-	Kenya Human Rights Commission

Kenya Institute of Administration
Kenya Independence Conference
Kenyatta International Conference Centre
Kenya Industrial Estates
Kenya Land and Freedom Army
Kenya National Dialogue and Reconciliation
Kenya Posts and Telecommunications Corporal
Kenya Peoples Union
Kenya Socialist Party
Kenya Shilling
Legislative Council
Liberal Democratic Party
Local Native Council
Law Society of Kenya
Movement for Dialogue and Non-violence
Memorandum of Understanding
Member of Parliament
Multi-Sectoral Forum
Multi-Sectoral Review Forum
Multi Sectoral Review Steering Committee
National Alliance Party of Kenya
National Rainbow Coalition
Nyayo Bus Corporation
National Convention Assembly
National Constitutional Conference
National Convention for Constitutional Change
National Convention Executive Council
National Consultative Forum
National Cohesion and Integration Commission
National Cereals and Produce Board
National Dialogue Conference
National Development Party

NGOs	Non-Governmental Organizations
NKP	New Kenya Party
NTZ	Nyayo Tea Zones
NTZC	Nyayo Tea Zones Development Corporation
NYC	National Youth Consortium
ODM	Orange Democratic Movement
ODM-K	Orange Democratic Movement-Kenya
PCK	People's Commission of Kenya (Ufungamano Group i
PCs	Provincial Commissioners
PEAP	Panel of Eminent African Personalities
PEV	Post Election Violence
PLGP	Progressive Local Government Party
PNCK	Proposed New Constitution of Kenya
PNU	Party of National Unity
PSC	Parliamentary Select Committee
RG	Reference Group
SPSS	Statistical Package for Social Sciences
TJRC	Truth Justice and Reconciliation Commission
TWCs	Technical Working Committees
UP	United Party
US	United States
USA	United States of America
UCC	Ugandan Constitutional Commission
WHP	White Highlands Party
YKA	Young Kikuyu Association
YKA	Young Kavirondo Association
ZANU-PF	Zimbabwe African National Union-Political Front

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Stanley K. Mosonik and others v. Attorney-General and 8 Others, High Court Miscellaneous Civil Application No. 49 of 2002 [2005] eKLR.

Stephen Mwai Gachigo and Another v. Republic, High Court at Nairobi Miscellaneous Application No. 302 of 2000 [2000] eKLR.

Teo So Lung v. Minister for Home Affairs [1990] LRC, 490.

Suave v. Canada, 3 S.C.R., 519 [2002] (Canada).

Timothy Njoya and 6 Others v. Attorney-General, CKRC and the National Constitutional Conference, High Court Misc. Application No. 82 of 2004 [2004] eKLR.

Uwe Meixner and Another v. Attorney-General, Civil Appeal 131 of 2005 [2005] eKLR.

Veronica Njeri v. Republic, High Court Miscellaneous Criminal Application No. 29 of 2005 at Kakamega [2005] eKLR.

CHAPTER ONE

STUDY BACKGROUND AND METHODOLOGY

"The good or bad fortune of a nation depends on three factors: its constitution, the way the constitution is made to work and the respect it inspires "

Georges Bidault'

1.1 Introduction

Constitutions have evolved to assume a pivotal role in the organization and management of the modern state. However, while there has been an evident political commitment to the idea of the Constitution as an instrument of organizing the state, the constitutional history of Kenya also reveals, almost on equal measure, the political rejection of the ideals of democratic constitutionalism.² It also demonstrates the fact that having a Constitution is not the same thing as living under a system of constitutional government. To this end, instead of securing the stability of the political system and the wellbeing of all citizens, Kenya's constitutionality, like that of many other African states, has tended to shore up problems for the people and the state⁴ leading to a crisis of legitimacy of the Constitution and its institutions.

It is against this backdrop that this study has extensively examined Un-constitutional developments and the challenges of constitutional governance

¹ Georges Bidault (5 October 1899- 27 January 1983) was a French politician who served as Foreign Minister and Prime Minister after the Second World War in France. [http://www.fredhutch.edu/jgarreaw/50.3 76/resource, htm](http://www.fredhutch.edu/jgarreaw/50.3%2076/resource.htm).

² H.W.O Okoth Ogendo. "Constitutions without Constitutionalism: Reflections on African Political Paradox", in Issa G. Shivji (ed), *State and Constitutionalism: An African Perspective - Democracy (SAPES)*. 1991 p.8.

³ H.W.O. Okoth Ogendo "The quest for constitutional government." in Goran HvJen. [V.O. Olowu & H.W.O. Okoth Ogendo (1999) *African Perspectives on Governance*. Africa World Press, Trenton. (1999).

⁴ "Yash Pal Ghai in his address to the National Constitutional Conference on 11th August 1992 at the Opening of the Second Session of the Conference at the Bomas of Kenya. Nair & Sons

and change in Kenya from the colonial times to 2010. In particular, the study has examined the extent to which constitutional developments and constitution making processes over time have contributed to building of constitutional legitimacy in Kenya.

This Chapter presents the general background to the study including thesis structure, problem statement, the study questions, **objectives**, assumptions, justification and methodology.

1.2 The thesis structure

This thesis is, organized into ten chapters as follows:

Chapter One (1) presents the background to the study including problem statement, research questions, study objectives and assumptions **study** justification and methodology. Chapter Two (2) presents the review of a wide range of literature and theoretical underpinnings relevant to the study

Chapter Three (3) presents an analysis of the formative stages of Kenya's constitutionality from 1887 to the end of the Second World War as well as the African response to the emerging colonial constitutionalism. Chapter Four (4) assesses the challenges of constitutional governance and change in colonial Kenya. Chapter Five (5) presents an assessment of the post independence constitutional amendments and the struggle for reforms in Kenya

Chapter Six (6) examines the principles, processes and challenges of Kenya's participatory approach to Constitution review from 1997 to 2007.

Chapter Seven (7) examines the post 2007 election constitutional crisis and the steps towards the completion of the Constitution of Kenya review process

Chapter Eight (8) presents an analysis of the nexus between participatory constitution making and constitutional legitimacy. Chapter Nine (9) examines the legal challenges and jurisprudential issues in participatory Constitution making in Kenya. Chapter Ten (10) presents the overall conclusion and recommendations of the study.

1.3 Problem statement

Kenya like the rest of Africa has gone through three sets of constitutional crises.⁵ The first constitutional crisis related to the trauma of colonialism and extractive imperialism leading to a protracted struggle for independence. The second crisis related to the trauma of irresponsible post independence politics and undemocratic constitutionalism leading to clamour for constitutional reforms and reconstruction. The third crisis is, reflected in the state's inability to discharge its functions leading to a breakdown in law and order, civil unrest, violent conflicts and poverty.⁶ Njuguna Ng'ethe and Musambayi Katumanga have characterized this contemporary constitutional crisis in Africa thus

"This crisis is manifested by the crisis of identity (the tendency by the people to identify themselves more as members of their ethnic group as opposed to the nation state), the crisis of legitimacy (the effective feeling that the government has no moral right to rule), the crisis of penetration (manifested by the diminishing capacity of the state to implement rule throughout its territory), the crisis of participation (inability to provide channels through which citizens can influence state decisions), and the crisis of resource distribution and allocation (manifested by the inability of the state to provide legitimate

⁵ H.W.O. Okoth Ogendo "The quest for constitutional government." *op cit*

⁶ *Ibid*

mechanisms through which resources can be accessed by all social sectors in society)."⁷

Consequently, Africa has since the 1990s experienced consistent popular demands for constitutional reconstruction leading to many attempts at constitutional reforms. As part of the reforms, the participatory model of Constitution making has become one of the most prescribed policy tools for conferring legitimacy to new constitutions.

Questions, have however, arisen as to why most constitutional reform initiatives in Africa have failed to bring about meaningful constitutional and democratic transition in spite of their claims to popular participation. Francois Venter has in this regard observed the general hollowness of most of the recent fine-sounding constitutional texts that do not have any practical meaning or relevance to the people.⁸ It is against this background that there is growing interest in the question of constitutional legitimacy and in particular, the role of participatory Constitution making in conferring constitutional legitimacy. Despite this, there is still general lack of empirical evidence on the nexus between public participation in Constitution making and constitutional legitimacy. Furthermore, there is little discourse on the legal imperatives for an effective participatory Constitution making process.

⁷ Njuguna Ng'ethe and Musambayi Katumanga, "Transition and The Politics of Constitution making: A Comparative Study of Uganda, South Africa and Kenya" in Oyup Walter O. Wanyande Peter and Odhiambo Mbai C. (eds). *The Politics of Transition in Kenya: I r i n k > .* to NARC, Heinrich Boll Foundation. Nairobi (2003), p. 305.

⁸ Venter Francois. *Constitutional Comparison: Japan, Germany, Canada and Somh V- i a Constitutional States*, Juta and Co. Ltd. Cape Town South Africa (2000).

It is for this reason that this study examines the principles and processes of constitutional development and Constitution making in Kenya and their implications for the development of constitutional legitimacy.

1.4 Research questions

From the foregoing, the study investigated five basic research questions as follows:

- a) To what extent did constitutional developments in colonial and postcolonial Kenya contribute to the building of constitutional legitimacy?
- b) Can meaningful constitutional change take place during peacetime or in an environment of relative peace?
- c) What makes a participatory Constitution making process effective¹
- d) Is there significant relationship between public participation and constitutional legitimacy? Is the mere act of public participation in a Constitution making process sufficient to endow its outcome with legitimacy?
- e) What are the legal challenges and jurisprudential issues in participatory Constitution making in Kenya?

1.5 The study objectives

The broad objective of the study was to examine the principles and **processes** of constitutional development and Constitution making in Kenya from colonial

times to 2010 and their implications for building of constitutional legitimacy

Specifically, the study sought to:

- a) Assess the colonial constitutional developments and its effects on the contemporary constitutional governance in Kenya.
- b) Assess the post independence constitutional developments and the challenges of constitutional legitimacy and constitutional reconstruction in Kenya.
- c) Assess the principles and processes of participatory Constitution making in Kenya from 1997 to 2010.
- d) Analyse the nexus between public participation in Constitution making and constitutional legitimacy.
- e) Assess the legal challenges and jurisprudential issues in participaii'is Constitution making in Kenya.

1.6 Study assumptions

Broadly, the study tested the following six basic claims or assumptions

- a) That for a Constitution making process to secure a legitimate outcome it must be anchored on a deeper appreciation of the people's **aspirations** and not undertaken merely to achieve short term goals or to secure **the** interests of a few elite or sections of the society.
- b) That to secure legitimacy, a constitutional order must be inclusive of the aspirations of all the groups that exist in the society and that it must not be designed only to secure the interests of a few elite or sections of the society.

- c) That the effectiveness of a participatory Constitution making process very much depends on the commitment the ruling elite demonstrate in supporting the process at every stage and in ensuring that the **process** succeeds.
 - d) That fundamental constitutional change does not take place in an environment of relative peace and that unless civil unrest threatens the *status quo*, the ruling elite will not support fundamental constitution*! reforms.
 - e) That there is significant relationship between public participation in Constitution making and constitutional legitimacy.
- 0 That to be effective, a participatory Constitution making **process** including its guiding principles and structures must be entrenched in **the** existing Constitution.

1.7 Justification of the study

This study is justified from a number of fronts. Firstly, although many legal and constitutional scholars have offered opinions on constitutional law with respect to constitutional interpretation, few have interrogated the normative question of what makes a constitution legitimate. The study hence explores very important and often neglected area of constitutional law, that is. how do constitutions attain legitimacy and what has been Kenya's experience over time? The study therefore proceeds from the perspective that unless we openly confront the question of what makes a constitution legitimate, we may never

empirically know what essentially motivates the people to respect, obey and support the Constitution or even ignore it altogether.

Secondly, few studies have so far taken a comprehensive and systematic look at Kenya's constitutional development since the colonial times. Practically, majority of the studies and writings on Kenya's constitutional development have tended to focus on specific constitutional epochs or events such as the pre independence constitutional negotiations, the post independence constitutional amendments or constitutional reforms of the 1990s. It is for this reason that this study undertook a comprehensive assessment of Kenya's constitutional developments since the colonial times with the primary focus on the normative question of whether or not constitutional developments in Kenya contributed to the development of constitutional legitimacy.

Thirdly, although in recent times participatory approach has been widely prescribed as a policy tool for ensuring broad based ownership of Constitution making process and its outcome, not much analysis has focused on two basic issues, namely the soundness of the participatory model, and the adequacy of public participation in Constitution making in conferring the outcome with legitimacy. In this regard, the study contributes to the theoretical discourse on the participatory approach to Constitution making while attempting to bridge the knowledge gap in the general understanding of the nexus between public participation and constitutional legitimacy. In addition, the study provides an assessment of the key legal challenges and jurisprudential issues in participatory Constitution making in Kenya.

Finally, the study makes significant contribution to the pool of knowledge on constitutional development and constitution making in Kenya. It therefore provides a useful reference material to scholars, legal practitioners, researchers and policy makers not just in constitutional development but also in the emerging jurisprudence of participatory Constitution making in Kenya.

1.8 Definition of key variables

The study analysed two key variables namely, public participation and constitutional legitimacy.

1.8.1 Public participation

In this study, public participation was analysed as an independent variable. In this study, public participation is used to refer to the process of active and meaningful involvement of the people in the Constitution making process. For public participation to be effective in conferring legitimacy to a Constitution making process and its outcome, it must be meaningful and sustained throughout the process. The Constitution making organs must also demonstrate respect for the people's views. Most importantly, they must ensure that the outcome faithfully reflects the people's views and aspirations.⁹

Public participation has been measured by assessing five variables. First, the study assessed the level of people's involvement in the various stages of constitutional development especially during the Constitution of Kenya's

⁹ The concept, theory, application, principles and conceptual imperatives of public participation and participatory approach in Constitution making are discussed in greater detail in (i) section 2.6 on participatory constitution making; sub section 2.7.2 on participation in constitution making; and section 2.8 in the conceptual framework.

process between 1997 and 2010. Second, the study assessed the level of people's knowledge of the Constitution and the Constitution of Kenya review process. Third, the study assessed the level of people's access to civic education on the Constitution and the Constitution review process. Fourth, the study assessed the level of people's awareness and knowledge of their role in the Constitution making process. Fifth, the study assessed whether the people believed that the various Constitution review organs respected their views and whether they believed that the outcome reflected the people's views.

1.8.2 Constitutional legitimacy

In this study, constitutional legitimacy was analysed as a dependent variable. It referred to a constitution and constitutional order endowed with a superior normative effect and that enjoys a sufficient degree of public acceptance, support, obedience and confidence. Constitutional legitimacy implies a standard of constitutional good based on a democratic culture that bears a positive impact on the people's wellbeing." This study therefore tested the claim that it is sustained public participation in Constitution making process that will confer its outcome with legitimacy.

The variable was measured by assessing first, whether the people believed that they adequately participated in the Constitution making process

Detailed examination and empirical analysis of the variables including the principle of participatory Constitution making in Kenya from 1997 to 2010 is presented in Chapter Five.

The concept of constitutional legitimacy is discussed in greater detail in Chapter 2. Section 2.1 on the concept of legitimacy and section 2.5 on what makes a constitution legitimate. Section 2.8 outlines the six imperatives for attaining constitutional legitimacy. Chapter 5 interrogates the nexus between public participation in Constitution making and legitimacy.

especially between 1997 and 2010. Second, whether they believed that the final outcome represented the people's interests and aspirations.

1.9 Study methodology

This section presents the study methodology highlighting the study design, methods of data collection, analysis and presentation, ethical considerations as well as the study limitations. The aim of the methodological approach is to enable a critical examination of the principles and processes of constitutional development and participatory Constitution making in Kenya and their implications for the development of constitutional legitimacy.

1.9.1 Study design

To address the study objectives, a survey research design and methodology was adopted involving both qualitative and quantitative **techniques**. The methodological approach involved extensive literature review, document analysis, review of other survey reports and structured **interviews using** a questionnaire.

The survey research design and methodology was therefore considered most appropriate for two reasons. First, it allowed collection and triangulation of data from both secondary and primary sources. Second, it provided the most appropriate means of exploring examining both historical and current issues in constitutional development and Constitution making in Kenya including the normative question of what makes a constitution legitimate. The specific methods of data collection and analysis are described below.

1.9.2 The library' research method

The library research method constituted the main technique used to collect secondary data on various aspects of the study. The aim of the library method was to collect, review and analyse relevant information and to make **inferences** from various documented sources on constitutional development and participatory constitution making in Kenya overtime. The information collected and reviewed using the method included among others, issues of constitutional development and the challenges of constitutional governance and change in Kenya since the colonial times, the principles, processes and legal **issues** of participatory Constitution making as well as the factors that affect constitutional legitimacy in Kenya.

The library method involved extensive search and review of literature and documents from various university libraries and information resource centres including the High Court Library, National Assembly Library, and the relevant websites. The main sources of secondary data included relevant journal articles, constitutional documents, statutes, law reports, survey, study and research reports, books, newspapers and other grey materials.

The library method was especially useful at the study formulation stage and helped in identifying the key theoretical instruments that informed the study. In particular, the method was used to assess the key concepts and constitutional issues including the Constitution and its application, constitutional development and challenges of constitutional governance, constitutional legitimacy; participatory Constitution making; and constitutional

|| theory. The method was also most useful at the analysis stage and in drawing up conclusions.

1.9.3 The survey research method

The survey method was used to collect primary data from a cross-section of the population to supplement the data derived from the literature review, document review and other survey findings. The aim of the survey method was to obtain empirical views, insights, perspectives or perceptions from a cross section of Kenyans on the Constitution of Kenya review process from 1997 to 2005 and the question of constitutional legitimacy in a more structured and systematic manner.

To ensure balance in the views and opinions gathered, the survey covered all the eight provinces of Kenya, namely, Nairobi, Central, Rift Valley, Eastern, North Eastern, Coast, Western and Nyanza. The survey findings thus supplemented findings from secondary sources including literature review and other surveys including opinion polls, surveys and studies conducted by such agencies as Synovate, the Committee of Eminent Persons (COEP), International Republican Institute (IRI) and International Commission of Jurists-Kenya Chapter (ICJ-Kenya).

1.9.3.1 The sampling approach and framework

For the purposes of this survey, the study targeted a population of adult men and women of 18 years and above drawn from Nairobi, Central, Rift Valley, Eastern, North Eastern, Coast, Western and Nyanza provinces. Since the main

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aim of the survey was to capture diverse empirical views from a cross section of the population on the principles and processes of participatory Constitution making and constitutional legitimacy in Kenya, the study adopted purposive sampling approach to select the respondents. The main consideration in the selection of the respondents included age, gender, geographic factors, regional diversity and level of education among other factors.

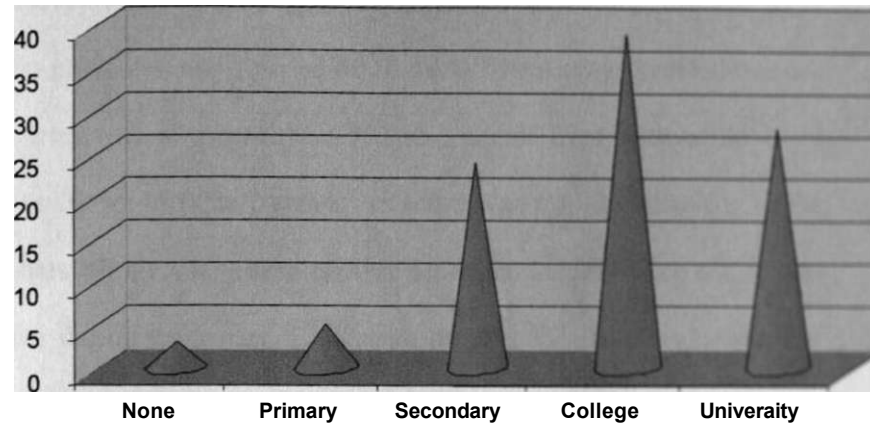
In total, 553 respondents were purposely selected and interviewed from all the eight provinces of Kenya as shown in Table I below. Of the respondents selected and interviewed, 321 (58 percent) were males and 232 (42 percent) were females.

Table 1: Distribution of respondents interviewed by province

Province	No. of respondents interviewed	%
Nairobi	95	17.2
Central	60	10.8
North Eastern	47	8.5
Eastern	58	10.5
Western	59	10.7
Nyanza	54	9.8
Rift Valley	120	21.7
Coast	60	10.8
Total	553	100

In relation to education, more than nine out of ten of the respondents had secondary and post secondary level of education with only five percent of the respondents reporting having primary level education and three percent saying that they had no formal education as shown in Chart below.

Chart 1: Respondents Level of Education



Source: Study findings

In terms of occupation, almost three quarters of the respondents were engaged in business, farming or formal employment. Only about a quarter of respondents interviewed said that they were unemployed as shown in Chart below.

1.9.3.2 The survey instrument

To collect the data from the selected respondents, the study used a closed-ended questionnaire as shown in Appendix 1. The aim of using a closed-ended questionnaire was to facilitate standardized conduct of the face-to-face interviews with respondents from diverse backgrounds across the country.

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1.9.3.3 Organization and process of the field survey

The field survey using structured questionnaires was carried out concurrently in all the eight provinces over a period of 10 days. The survey involved face-to-face interviews with all the selected 553 respondents from each of the eight provinces as shown in Table 1 above. In addition to the administration of the questionnaires, all the team members were sensitized to make keen and critical observations during the survey. Each team member therefore took necessary field notes on key observations including relevant events and behaviour patterns observed during the fieldwork.

To carry out the fieldwork, the Principal Researcher recruited a team of 12 Research Assistants drawn from each of the eight provinces and four Field Supervisors. On the one hand, the Field Supervisors were persons holding at least a Masters degree in either law or the social sciences with reasonable experience in research. On the other hand, the Research Assistants were persons holding at least a first degree in either law or the social sciences with demonstrated knowledge and understanding of research methodology

The Principal Researcher was responsible for the overall coordination of the fieldwork and supervised data collection activities in Nairobi and Central provinces and parts of South Rift region. The four Field Supervisors were each responsible for field supervision, coordination of data collection and administration of questionnaires in the following clusters, respectively) **Eastern** and North Eastern provinces; Coast province; North and Central Rift Valley, and Nyanza and Western provinces. Each of the 12 Research Assistants was responsible for administering the questionnaire through face-to-face **interviews**

|| in their respective provinces or regions. The Field Supervisors technically made sure that the respective Research Assistants carried out proper interviews and made correct entries.

Before proceeding to the field, all the Research Assistants underwent thorough training in the methodological aspects of the study including the purpose and significance of the study; the techniques and methods of data collection; field procedures and rules; administration of the questionnaire making observations and translation of observatory notes; and ethical considerations. At the end of the fieldwork, the research team met to review their fieldwork experiences and to discuss the emerging trends, problem areas, and alternative explanations of issues.

1.9.3.4 Quality control

The responsibility over the quality of data during and after the fieldwork rests with the Principal Researcher and the Field Supervisors. To ensure data quality during the fieldwork, at the end of each data collection day, the Principal Researcher got electronic feedback on key daily activities from each of the Research Assistants as well as the Field Supervisors. The Research Assistants subsequently forwarded the administered questionnaires to the respective responsible Field Supervisor at the end of every week for purposes of data verification.

Before the questionnaires were coded and passed on for data entry and analysis, each questionnaire underwent editing to check on the consistency of recorded responses and to ensure that there were no or little

omissions. After data verification, the Principal Researcher submitted the completed and verified questionnaires to a team of three data entry clerks for data coding, entry, cleaning and analysis.

As an indicator of the general quality of the information collected, a comparison of the findings of this study with other studies has indicated a high level of consistency as illustrated in the relevant analysis sections of this study

1.9.4 Ethical considerations

All the persons involved in the conduct of this study were guided by clear ethical standards and considerations in research. To this end, a number of measures were taken to maintain high ethical standards throughout the study

First, all the research team members were inducted to endeavour, at all times, to abide by the laws and rules that prohibit unethical behaviour in research. Moreover, the research team members were particularly required to protect and respect the trust given by the respondents. In this regard, the respondents' confidential information and privacy were fully protected.

Secondly, all the team members were required to adhere to the principle of voluntary consent to ensure that every respondent willingly participated in the research process. In this respect, the team members were required to identify themselves; disclose the purpose of the study; guarantee confidentiality, and to disclose the benefits or lack of it that may accrue from his or her participation in the research. This was to enable each respondent to make an informed decision whether he or she wished to participate or not in the research.

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Thirdly, the research team members were inducted not to ask embarrassing questions or even express shock, disapproval or disgust at the responses given by the respondents. The team members were also inducted not to use threatening statements or to compel a respondent to say something he or she did not believe in or to cause fear and anxiety among respondents.

Fourthly, adequate care has been taken to acknowledge all the sources of information. In addition, the role and intellectual contributions of various persons have been fully acknowledged.

Finally, the results of the study have been presented and reported in the most open, objective, accurate and honest manner while recognizing the freedom of exchange of ideas and information.

1.9.5 Data analysis and presentation

The analysis of the data involved both qualitative and quantitative techniques. The secondary data gathered through literature and document review were compiled and organized according to themes and analyzed using content analysis techniques. The primary data collected through the administration of the questionnaires was analysed using the Statistical Package for Social Sciences (SPSS). Both descriptive and inferential analysis including frequencies and chi square analysis were performed.

At the analysis and interpretation stage, both primary and secondary information were triangulated and logical inferences made. The findings were subsequently presented in the form of narratives, frequencies, graphs, charts and quotes, among others.

1.10 Study limitations

The study faced three main limitations. The first limitation related to the dynamic and unpredictable nature of the Constitution of Kenya review process especially between 1997 and 2010. Thus due to the dynamism and unpredictability of the process as explained in Chapter Six, the scope of **analysis** of this study also became fairly dynamic in response to the frequent changes in the course of the review process.

Secondly, due to resource constraints, the scope of the survey aspect of the study scaled down with the number of days spent in each region reducing from 10 to 5 days. As a result, the Candidate dropped such complementary methods of data collection as Focus Group Discussions (FGDs) and Key Informant Interviews (KII). To mitigate this challenge, the Candidate captured expert and scholarly insights from extensive literature review.

Thirdly, in order to appreciate the present constitutional **developments** and the complexity of the subject of participatory constitutional making and constitutional legitimacy in Kenya, it became imperative for the study to adopt a historical perspective to the analysis. As a result, the scope of **the** study significantly expanded to include an analysis of both colonial and post independence phases of constitutional development in Kenya.

1.11 Conclusion

This Chapter has presented the general background to the study including the problem statement, the study questions, objectives, assumptions, justification and methodology. The next Chapter Two (2) presents the literature review and theoretical framework for the study.

CHAPTER TWO

LITERATURE REVIEW AND THEORETICAL FRAMEWORK

2.1 Introduction

Chapter One (1) has presented the background to the study including the problem statement, research questions, study objectives and assumptions. Justification and methodology. This Chapter presents a comprehensive literature review including the basic theoretical instruments and conceptual framework for the study.

The aim of this Chapter was to identify the gaps, which the study endeavoured to fill. The literature review therefore focuses on a wide range of areas touching on the concept and application of the Constitution, constitutional development and governance, constitutional legitimacy, participatory Constitution making approaches and constitutional theory.

2.2 The Constitution and its application

Although there is no minimum set of principles that define the content of a "model" Constitution, what is considered, as "the Constitution" should nevertheless bear some organic character, which should be generally recognized as the primary point of reference for governance of society.¹

Kenneth Clinton Wheare has broadly classified constitutions in terms of written versus unwritten; flexible versus rigid; supreme versus subordinate, federal versus confederal versus unitary; presidential executive versus

parliamentary executive; and republican versus monarchical constitutions.' In modern times, the constitution generally takes the form of a written document. B. Akzin refers to such constitutions as formal constitutions.¹⁴ Although an unwritten constitution is not assembled into a single document, J.B. Ojwang argues that unwritten constitutions such as the British Constitution are not completely unrecorded.^b The difference between unwritten and written constitutions often lies in the fact that in the case of a written constitution, there is a single document referred to as the "constitution" such as the Constitution of Kenya.

According to E.C.S. Wade *et al*, a constitution is a document having legal sanctity, which sets out the framework and the principles governing the operations of state organs. Its defining elements are the constituent act and constituent power. The *constituent act* means a constitution constitutes a *sovereign* of government, and *the constituent power* means that the authority to constitute a government derives from the citizens.¹⁶

B.O. Nwabueze defines a constitution as a formal document having the force of law by which a society defines, organizes and limits the government and its powers.¹⁷ G.W. Kanyeihamba describes a constitution as the fundamental laws, customs and practices, which the inhabitants of a state

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¹⁵ Kenneth Clinton Wheare, *Modern Constitutions*. 2nd Edition Oxford University Press 1963: 14

¹⁴ B. Akzin, "The Place of the Constitution in the Modern State." *Israel Law Review* 4: 1 (1967).
KW: *Constitution and Modern state* (1967).

^b J.B. Ojwang. *Constitutional Development in Kenya: Institutional Adaptation and Institutional Change*. ACTS Press. Nairobi. 1990 pg 213.

^c Emlyn Capel Stewart Wade; George Godfrey Phillips; Anthony Wilfred Br-Kilo *Constitutional and administrative Law*, 9th Edition Longman. London (1977).

^d B.O. Nwabueze *Constitutionalism in the Emergent State*. Hirst. London (1973)

II consider essential for their governance and wellbeing.¹⁸ According to J.B Ojwang, a constitution is the scheme of organization of public roles and responsibilities performed in the interest of the people as a whole."

Daniel J. Elaazar has captured the essence of the modern constitution as a frame of government and protector of rights; tempered political code, tempered political ideal; a revolutionary manifesto; and a modern adaptation of an ancient traditional constitution.²⁰

According to H.W.O. Okoth Ogendo, the following phenomena can be as much a constitution as a document, which bears the nomenclature of a constitutive act; a fundamental norm, value, or moral principle; a set of common aspirations or expectations; a social and economic programme; or an important juridical fact.²¹ As such no society is, therefore, without a constitution. However, whatever is recognized, as "the Constitution," should have some organic character that is generally recognized as the primary point of reference for governance."

From a social contract perspective, a constitution, whether embodied in a single code or scattered in numerous fundamental or organic acts, is a concrete manifestation or expression of the social contract to organize and found a state.²³ It breathes life to its juridical existence, laying down the

¹⁸ G.W. Kanyeihamba, *Constitutional law and Government in Uganda*. EALB. Nairobi < I 1
" J.B. Ojwang, *Constitutional Development in Kenya: Institutional Adaptation and S< 1*
Change, *op. cit.*

Daniel J. Elaazar, "Constitution making: The Pre-eminently Political Act. in Keni <
Banting and Richard Simeon, eds.. *Redesigning the State: The Politics of Constitutional Chanpe*
(Toronto: University of Toronto Press, (1985).

²¹ H.W.O. Okoth Ogendo "The quest for constitutional government," *op. cit.*

²² *Ibid.*

²³ Ralph A. Sarmiento, *The Constitution as a Social Contract* 07 November 2015 <1 ;
A. Sarmiento

||
framework, by which it is to be governed, enumerating and limiting its powers, and declaring certain fundamental rights and principles to be inviolable.⁴ In the Marcos v. Manglapus case," the Court declared, "The Constitution, aside from being an allocation of power, is also a social contract whereby the people have surrendered their sovereign powers to the State for the common good."

J.B. Ojwang' has argued that the idea of a constitution is also best understood in relation to the principle of constitutionalism.²⁶ Constitutionalism stands for a government that is subject to restraint in the interest of the ordinary members of the community.²⁷ J. Alder identifies four ways of restraining governmental action in constitutions. These are first, the formulation of principles of justice and declaration of justiciable rights; second, the division of powers amongst governmental bodies; third, the adoption of representative institutions which allow the people to vote governments into and out of office and fourth, provision for direct participation by the people in governmental decision making through, for example, a referendum.²⁸

By restraining governmental action, ensuring fair play and rendering the government responsible,²⁹ constitutionalism fundamentally demands habitual respect for the rule of law. The idea of constitutionalism in this respect implies that a society acknowledges its constitution as a living standard with which the conduct of public behaviour should conform and against which it must be

²⁴ *Ibid.*

²⁵ Marcos v. Manglapus G.R. No. 88211, September 15, 1989.

²⁶ J.B. Ojwang, *Constitutional Development in Kenya: Institutional Adaptation and S>ku! Change, op. cil.*

²⁷ *Ibid.*

²⁸ J. Alder. *Constitutional and Administrative Law (2nd Edn) London. Macmillan (P P 40).*

²⁹ C. J. Friedrich, *Man and His Government. McGraw-Hill New York (1963).*

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evaluated. Evidence of adherence to the principles of constitutionalism will therefore indicate public respect for the constitution, which is an important indicator of popular sovereignty.³⁰

Although in common discourse, any mention of the word constitution immediately brings to mind a legal document that provides a framework from which specific laws of a country are derived, it does not give us a full picture of what a constitution is. In particular, it does not immediately draw our attention to the fact that besides being a legal document, a constitution is also basically a political instrument that is central to governance.³¹

Is the mere existence of a constitution therefore proof of commitment to the principle of constitutionalism? Essentially, governance, which is the link between statements of constitutional intent and a full state of constitutional government, is the contextual variable which society requires before public respect for the Constitution and other elements signifying commitment to constitutionalism can be translated into a vibrant system and process of constitutional government.³²

2.3 Constitutional development and governance in Africa

Francois Ventor traces the classical understanding of the Constitution to three countries. These include England, the longest surviving constitutional system, which inspired the current system of constitutionalism but without a written

³⁰ H.W.O. Okoth Ogendo "The quest for constitutional government," *op cii*

³¹ P. Wanyande. "Recent Constitutional Developments in Kenya." in *Politics, Governance and Cooperation in East Africa*, in Saida Yahya-Othman (ed), Research and Education ; Democracy in Tanzania. Mkuki na Nyota Publishers (2002).

³² H.W.O. Okoth Ogendo "The quest for constitutional government," *op cii*

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constitution; the United States of America, the first to adopt a written Constitution: and France, the first European Constitution writing nation.¹¹

Ventor also identifies six neo-classical manifestations of the modern constitutional system as follows:³⁴ First, the British dominions such as Canada, Australia and South Africa with Westminster type constitutions but modified to include federal elements. Second, the French, Spanish and American influenced presidential-cum-federal system of Latin America. Third, the Netherlands France, Belgium, Italy and Scandinavian type of constitutional monarchy-cum-cabinet government systems of the 19th century. Fourth, the German and Austrian-Hungarian constitutional monarchies. Fifth, the unique Swiss federal Constitution of 1848. Sixth, the Japanese Meiji Constitution of 1889.

The current constitutional dispensation, however, has its roots in the aftermath of the Second World War, which ushered in fundamental political and economic transformation of the world. This transformation manifested itself in the global proliferation of constitutions modelled along the classical and neo-classical notions of the British, American and French constitutionalism as well as the German Basic Law 1949.³⁵

The constitutional developments and reconstruction after the War was largely motivated by a desire to safeguard the state against past mistakes and excesses that had contributed to the outbreak of the war. They were also driven by the desire to establish conditions of stability and security within individual states and good relations among the states that had been involved in the War

⁵³ Francois Ventor, *Constitutional Comparison: Japan, Germany, Canada and South Africa as Constitutional States*, Juta and Co. Ltd, Cape Town, South Africa (2000).

³⁴ *Ibid.*
"Ibid.

The reconstruction however, took place under different ideological standpoints, a situation that directly mirrored the conflict between the ideologies of Soviet communism that took root in Eastern Europe and neo-liberalism that took root in Western Europe.

In Western Europe, constitutional reconstruction emphasis was put on three main areas. First, it emphasized the establishment of parliamentary democracies. The new constitutions were designed to confer full legislative authority on elected assemblies, which were also responsible for installing and sustaining the executive arm of government. In this system, political parties became the main instruments of representation and rule.

Second, there were determined efforts to decentralize the state in order to remove the oligarchic rule of pre-Second World War continental Europe. The answer was the establishment of federal models, which would vary from state to state, depending on the country's historical underpinnings.

Third, the constitutional reconstruction put emphasis on the **recognition of** civil and political rights. Most of the post-war constitutions therefore proclaimed and recognized the basic civil and political rights **of** individuals leading to the adoption of the Universal Declaration of Human Rights in 1948.

The post war constitutional developments in Europe had **repercussions** for the rest of the world, most of which were still under colonial rule. The constitutional developments in the colonial territories therefore brought extensive bodies of law and administrative systems intrinsically linked with **the** developments in the colonial power's country. Most independence **constitutions**

⁵⁴*ibid.*

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Goran Hyden and Denis Venter have identified four main phases of constitutional development in Africa. These include the idealist phase, the opportunist phase, the realist phase, and the constitutionalist phase." Goran Hyden and Denis Venter have also pointed out that in all the phases of constitutional development in Africa,³⁴ the constitutions not only had little to do with people's realities but also failed to command people's respect including the respect of the governors themselves.⁴⁰

The idealist phase, which lasted a relatively short period, coincided with the transition from colonial administration to independence in the post war period. This phase was regarded idealist because the constitutional documents enacted had little to do with African realities but represented the departing colonial powers' own ideas of how the constitutional order should work in the independent countries.⁴¹ However, the new states ended up moulding their own unique constitutional heritage and practices, which certainly were not direct imitations of the inherited models.⁴²

The opportunist phase of constitutional development in Africa commenced soon after independence of most African states. In this phase, most

"Ibid

⁸ Goran Hyden and Denis Venter (Eds), *Constitution making and Democratization in Africa*. Africa Institute of South Africa. Pretoria, (2001).

³⁹ *Ibid*

^M H.W.O. Okoth Ogendo "The quest for constitutional government," *op. cit*

"Ibid

J.B. Ojwang. *Constitutional Development in Kenya: Institutional Adaptation and Change*, *op. cit*.

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of the post independence constitutions in Africa underwent rapid but fundamental amendments mainly with the primary objective of state consolidating political power in the presidency.⁴³ As a result, the new rulers ended up exercising power far in excess of what even colonial administrators ever exercised.⁴⁴

Ng'ethe and Katumanga also observe that during this period, the ruling elite used the constitutions as instruments of political survival. Thus, whenever the governments faced any given political crisis or opposition, they responded by constitutional amendments.⁴⁵ In Kenya, for example, the Constitution was amended twenty-four (24) times during this phase mainly to respond to various political challenges as discussed in Chapter Five (5).⁴⁶

According to Flanz H. Gisbert, in Tanzania, there were some 72 amendments to the Constitution between the proclamation of the Interim Constitution on 11th July 1965 and 1995.⁴⁷ He points out that although some of these amendments in Tanzania especially after the 1977 Fifth Amendment contained provisions designed to promote greater democracy and respect for human rights, their implementation was nevertheless frustrated by the one party political system. In practice therefore, the fundamental freedoms were violated and the executive often interfered with the functions of the Judiciary "

⁴³ H.W.O. Okoth Ogendero. "The quest for constitutional government," *op cit*

"H.W.O. Okoth Ogendero. "Constitutions without Constitutionalism: Reflections on an African Political Paradox," *op. cit.*

⁴⁵ Njuguna Ng'ethe and Musambayi Katumanga. "Transition and The Politics of Constitution making: A Comparative Study of Uganda, South Africa and Kenya." *op cit*

⁴⁶ Chapter Four provides detailed analysis of the constitutional developments and amendments in post colonial Kenya including the reasons behind the constitutional amendments

⁴⁷ Flanz H. Gisbert, *Constitutions of the Countries of the World. Tanzania: Introductory and Comparative Notes*. Oceana Publications, Inc. New York (2000).

⁴⁴ *Ibid*

A direct consequence of the opportunistic amendments was the emergence of a class of leaders who were least motivated by the values of the rule of law, public interest, checks and balances or separation of powers.⁴ The constitutions during this phase therefore became stunted documents that the ruling elite used in a bid to rationalize their illegitimate and unpopular albeit constitutional rule.⁵⁰ H.W.O. Okoth Ogendo has characterized this phenomenon as the paradox of "constitutions without constitutionalism."⁵¹

The realist phase of constitutional development is largely associated with the Africa's "second liberation" movement of the 1990s. The end of tin-cold war following the collapse of Soviet Union ushered a new era characterized by growing international demand for democratic constitutionalism. As a result, the phenomena of coups de tat. counter-coups and arbitrary constitutional amendments that had characterized much of the 1970s and 1980s began to give way to orderly processes of political and constitutional debate and transition.⁵²

The realist phase also coincided with the period of intensified implementation of the International Monetary Fund (IMF) and World Bank supported structural adjustment programs that required stringent fiscal or

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⁴⁹ Githu Muigai. *Constitutional Amendments and the Constitutional Amendment Process in Kenya (1964-1997): A Study of the Politics of the Constitution*. PhD Thesis. University of Nairobi (2001).

⁵⁰ Njuguna Ng'ethe and Musambayi Katumanga. "Transition and The Politics of Constitution making: A Comparative Study of Uganda, South Africa and Kenya." *op cit*

" H.W.O. Okoth Ogendo. "Constitutions without Constitutionalism: Reflections on an African Political Paradox" in Greenberg D. et al. (Eds), *Constitutionalism and Democracy: Transition in the Contemporary World*, New York: Oxford University Press (1993.), pp. 65-81

⁵¹ Larry Diamond, *Developing Democracy: Towards Consolidation*. John Hopkins University Press (1999).

economic and political reforms.⁵¹ This period is called a "realist" phase because it was characterized by a tendency to accept the necessity of constitutional reform to deal with deepening economic decline, political uncertainty¹ and to arrest the drift towards state collapse.⁵⁵ According to Donna Lee Van Cott, between 1990 and 2000, 17 African countries, 14 Latin American countries, and nearly all the post-communist states in Eastern Europe and the former Soviet Union drastically altered or replaced their constitutions.

The constitutionalist phase constitutes the ongoing constitutional reforms in Africa, which are a direct response to the failure of the constitutional reforms during the realist phase."⁷ This phase has seen several African countries reviewing their constitutions including those made during the realist phase. Constitutional development during this phase has been occasioned by the general lack of commitment by the political elite to undertake fundamental constitutional reforms including the continued violation of the constitution.

Overall, the post-colonial constitutional experience in Africa is one in which most leaders did not believe in the Constitution.⁵⁹ As a result, they made

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⁵³ Goran Hyden and Denis Venter (Eds). *Constitution making and Democratization in Africa*.

op. cit.

⁵⁴*Ibid.*

⁵⁵ W. Zartman, *Collapsed States: The Disintegration and Restoration of Legitimate Authority*. London. Lynne Rienner Publishers (1995)

Donna Lee Van Cott. *The Friendly Liquidation of the Past: The Politics of Democracy in Latin America* (Pittsburgh. Pa.: University of Pittsburgh. 2000).

⁵⁷ Goran Hyden and Denis Venter (Eds), *Constitution making and Democratization in Africa*.

op. cit.

"Ibid

Macharia Munene, "Constitutional Development in Kenya: A Historical Perspective" in Yash Vyas *et al* (eds). *Law and Development in the Third World* (2001).

very little effort to protect the fundamentally and sanctity of the Constitution as the basic law of the land.⁶⁰

Broadly, the manifestation of the constitutional governance crisis in the post independence Africa presents itself in seven forms. First, the crisis manifests in the drastic alteration of the Constitutions to suit the interests of a few ruling elite in the post independence Africa. Second, the crisis manifests in the many military takeovers and attempted *coups de tat*. Third, the crisis slums in the lack of respect for checks and balances, and separation of powers in the governance of the state including the subservience of the judiciary and legislature to the executive. Fourth, the crisis manifests in the over concentration of state power in the person of the president. Fifth, the crisis is indicated in the high prevalence of human rights violations and abuses Sixth the crisis of constitutional governance has manifested in the collapse of the state as a framework for the management of public affairs including the inability of the state to discharge its functions and deliver services to the people. The post independence constitutional governance challenges in Kenya are discussed in detail in Chapter Five (5).

From the foregoing, it is therefore clear that in order to understand the many constitutional challenges in Africa it is imperative to interrogate the link between constitution making and its application. In this regard, a more holistic and historical approach is required to examine the intractable normative

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^w Githu Muigai. *Constitutional Amendments and the Constitutional Amendment IVkca* - Kenya (1964-1997): A Study of the Politics of the Constitution, op. cit.*

⁶¹ H.W.O Okoth Ogendo, "Constitutions without Constitutionalism: Reflections on an Air Political Paradox" *op. cit.*.

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question of what makes a constitution legitimate against the manifold constitutional governance challenges in Africa today.

However, much of the analyses of the constitutional problems in Africa still tend to treat the challenges as positive legal problems. They seldom link the present day constitutional challenges with the historical and societal foundations, which have combined to undermine the efforts towards constitutional reconstruction and transformation in Africa. It is against **this** background that Chapters Three (3), Four (4) and Five (5) assess both the colonial and post-colonial constitutional developments in Kenya and whether these developments contributed to building of constitutional legitimacy in the country.

2.4 The concept of legitimacy

Although a broad range of literature exist on the concept of legitimacy in general, what legitimacy means is a matter of controversy and is approached in different ways by lawyers, political theorists and social scientists. Max Weber, the influential German legal sociologist most famous for his exposition of the concept of legitimacy as a tool of social science, pioneered a path **towards** understanding how authority is legitimated. His essay "the three types of legitimate rule" translated in English and published posthumously in 1958. is the clearest explanation of his legitimacy theory.

Max Weber thought that the state could not be legitimated by any absolute standards based on natural law and that all social systems ought to

⁶² Max Weber, "The three types of legitimate rule." *Berkeley Publications in Sociology* . . . : Institutions, Translated by Hans Gerth. (1958) 4(1): 1-11.

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have some mechanisms that give them legitimacy without which the outcome suffers from a "legitimacy deficit."^{6j} Weber argued that a regime is legitimate provided that enough people believe it to be so to make it effective.⁶⁴

At the heart of Weber's conception of legitimacy are three key concepts, namely, power, authority and domination. Weber defined power as the chance that an individual in a social relationship can achieve his or her own will even against the resistance of others.⁶⁵

On the other hand, he defined authority as legitimate forms of domination, that is, forms of domination, which followers or subordinates consider to be legitimate. Legitimate in this regard, does not necessarily imply any sense of rationality, right, or natural justice. Rather, domination is legitimate when the subordinate accept, obey, and consider domination to be desirable, or at least bearable and not worth challenging. It is therefore not so much the actions of the dominant that creates a sense of legitimacy, but rather the willingness of the subordinate to believe in the legitimacy of the claims of the dominant. According to Weber, authority is thus power accepted as legitimate by those are subjected to it.

As to the concept of domination, Weber defines it "as the probability that certain specific commands (or all commands) will be obeyed by a given group of persons."⁶⁶ Features associated with domination are obedience, interest, belief, and regularity. Weber notes, "every genuine form of domination

⁶⁵ N. Abercrombie, S. Hill and B.S. Turner. *Dictionary of Sociology*. Penguin Rel'circncc. London (1988) p. 136.

^M John Alder, *Constitutional and Administrative Law*, second edition. Macmillan. 1994. p. 17

⁶ Max Weber. "The three types of legitimate rule," *op. cit.*

⁶⁶ *Ibid.*

implies a minimum of voluntary compliance, that is, an *interest* (based on ulterior motives or genuine acceptance) in obedience."⁶⁷

Examples of dominance could include political rule that is generally accepted and obeyed. That is, a power relation, which is one of dominance, involves, first voluntary compliance or obedience. Individuals are not forced to obey, but do so voluntarily. Second, those who obey do so because they have an interest in so doing, or at least believe that they have such an interest. Third, belief in the legitimacy of the actions of the dominant individual or group is likely (although this is defined by Weber as authority). That is. "the particular claim to legitimacy is to a significant degree and according to its type treated as 'valid'." Fourth, compliance or obedience is not haphazard or associated with a short-term social relationship, but is a sustained relationship of dominance and subordination so that regular patterns of inequality are established.*'

Mainly concerned with the legitimate sources of authority and domination, Weber identified three sources of authority, namely charismatic, traditional and legal-rational.⁶⁹ R. Collins observes that, for Weber, these categories of authority "do not exist merely for the sake of labelling and classifying history; they are embedded in a larger network of concepts and in an image of how they work."⁷⁰ They show how it is possible for some people to exercise power over others.

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⁶⁷ *Ibid.*

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

⁷⁰ R. Collins. *Weberian sociological theory.* Cambridge: Cambridge University Press. 1990 ;
6.

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"authority and norms represent polar principles of social organization: in the one case, organization rests upon orientation to a rule or a principle; and in the other instance, it is based upon compliance to commands."⁷¹

The charismatic authority rests on devotion to exceptional sanctity, heroism, or exemplary character of a person and of the normative patterns or order revealed or ordained by him. Weber saw a charismatic leader as the head of a new social movement, and one instilled with divine or supernatural powers. The sole basis of charismatic authority is the recognition or acceptance of the claims of the leader by the followers. While it is irrational, in that it is not calculable or systematic, it can be revolutionary, breaking traditional rule and can even challenge legal authority.⁷²

The traditional authority rests on established belief in the sanctity of immemorial traditions and the legitimacy of those exercising authority under them.⁷³ The traditional authority on the other hand is legitimated by the sanctity of tradition. The ability and right to rule is passed down, often through heredity. It does not change overtime, does not facilitate social change, tends to K

⁷¹ M. E. Spencer, "Weber on legitimate norms and authority." *The British Journal of Sociology*, 21 (1970) 21 (2): 123-134.

⁷² Anthony Giddens. *Capitalism and Modern Social Theory: An Analysis of the Writings of Karl Marx, Emile Durkheim and Max Weber*. Cambridge. Cambridge University Press, 1984. pp. 154 ff.

Max Weber. "The three types of legitimate rule," *op. cit.*

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irrational and inconsistent, and perpetuates the *status quo*. Weber notes that traditional authority blocks the development of rational or legal forms of authority.⁷⁴ Three different types of traditional authority might include gerontocracy or rule by elders, patriarchalism where positions are inherited, and feudalism.

The legal or rational authority rests on a belief in the legality of enacted rules and the rights of those elevated to authority under such rules to issue commands. Weber thought the best example of legal-rational authority **was** a bureaucracy.⁷⁵ The legal-rational type of legitimate domination is the one closest to the modern democratic constitutionalism. In fact, Weber stated that the "development of the modern state is identical to that of modern officialdom and bureaucratic organizations just as the development of modern capitalism is identical to increasing bureaucratization of economic enterprise." Edward G. Grabb also points out how this can happen from a small group exercising **power** by using economic and physical force to dominate a territory.

In the Weberian construct of rational legitimate authority, as the political or legal system develops, authority relations also take on a legal form with those who govern or rule on the one hand, obtaining, or appearing to have, a legitimate legal right to do so. On the other hand, those who are subordinate within this system accept the legality of the rulers, believing that they have the legitimate right to exercise power. Those with power then exercise **power based**

⁷⁴ Hans Heinrich Gerth and C. Wright Mills, *From Max Weber: Essays in Sociology*. New York: Oxford University Press, 1958. H33 W3613 195.8 p. 297.

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

⁷⁷ Edward G. Grabb, "Theories of Social Inequality: Classical and Contemporary Perspectives" • second edition, Toronto. Holt, Rinehart and Winston, (1990). p. 65.

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on this right of legitimacy. This rational-legal form of authority may however be challenged by those who are subordinate.⁷⁸ Weber viewed the future as one where rational-legal types of authority would become more dominant

Broadly, legal authority rests on the acceptance of the validity of five mutually interdependent ideas.⁸⁰ These include, first, that any given legal norm may be established by agreement or by imposition, on grounds of expediency or value rationality or both, with a claim to obedience at least on the part of the members of the organization. Second, that every body of law consists in a consistent system of abstract rules, which have normally been intentionally established and approved or at least not disapproved in the order governing the organization. Third, that the typical person in authority is himself subject to an impersonal order by orienting his actions to it in his own disposition and commands. Fourth, that the person who obeys authority does so, as it is usually stated, only in his capacity as a "member" of the organization and what he obeys is only "the law." And fifth, that the members of the organization insofar as they obey a person in authority, do not owe this obedience to him as an individual, but to the impersonal order. In other words, there is an obligation to obedience only within the sphere of the rationally delimited jurisdiction, which, in terms of the order, has been given to him.

The obedience expected of both the subjects and holders of authority is owed to the legally established impersonal order. It extends to the persons exercising the authority of office by virtue of the formal legality of their

¹⁸ George Ritzer and Douglas J. Goodman. "Sociological Theory", sixth edition. New York: McGraw-Hill. 2003, pi 29.

"Max Weber. "The three types of legitimate rule," *op. cit.*

¹⁰ *Ibid.*.

commands. Nevertheless, it is by no means true that every case of submission or obedience to authority is primarily (or even at all) oriented to this belief.

Loyalty may be hypocritically simulated by individuals or by whole groups on purely opportunistic grounds including material self-interest or gain. Alternatively, people may submit from individual weakness and helplessness because there is no acceptable or safer alternative.⁸² Ben Sihanya has also argued that, a law may be efficacious because too much force has been applied to secure obedience or compliance.⁸³ Obedience is therefore largely a formal obligation and can be exercised without regard to the actor's own attitude to the value of the content of the command of which obedience is expected.

Conceptually, Weber's three forms of authority appear hierarchical with social organizations or political systems progressing from charismatic authority to traditional authority and finally, reaching the state of legal-rational authority which is characteristic of a modern democracy.⁸⁴ Anthony Giddens has discussed how Weber's three forms of authority might become established over a period of time.⁸⁵

Where people develop uniform types of conduct, Weber refers to this as usage. Long established usages become customs. These can emerge within a group or society based on continued interaction, and requires little or no

»' *Ibid*

¹² *Ibid.*

¹³ Ben Sihanya, "Reconstructing the Kenyan Constitution and State. 1963-2010: Lessons from German and American Constitutionalism", Vol. 6. 2010. No. 1. *the Law Society of Kenya Journal* (2010) pp. 1-35.

⁸⁴ Ben Sihanya "The presidency and public authority in Kenya's new constitution. *Kenya Constitution Working Paper Series No. 2. Society for International Development (SID) & Central Africa. Nairobi* (2011). p. 4-5.

⁸⁵ Anthony Giddens, *Capitalism and Modern Social Theory: An Analysis of the Work of Karl Marx, Emile Durkheim and Max Weber* *op. cit.*

enforcement by any specific group. A stronger degree of conformity is convention, where the compliance is not just voluntary or customary, but where some sort of sanctions may exist for those who do not comply with convention. Usage and custom often become the basis of rules, and violation of these may ultimately have some sanctions applied.⁸⁶

Where convention is adopted by an individual or a group that has the legitimate capacity and duty to impose sanctions, the convention can become law. This can begin to create a legal order where a group exercising some authority may assume the task of applying sanctions to punish transgressions' Where this can be applied over a territorial unit, with order safeguarded by the threat of physical force, then this can create a political order, the threat and application of physical force by a legitimate organ with legal, administrative, military, or police functions.⁸⁸

Overall, Max Weber's three types of authority although constructed hierarchically with political systems organically progressing from charismatic authority to traditional authority and ultimately, to modern legal-rational authority, his perspective on legitimacy lends to our understanding of the contemporary problem of constitutional legitimacy in Kenya. In particular, it does provide a conceptual window to understanding the contemporary constitutional governance challenges in the context of a polity in which

"Ibid,
"ibid.
"Ibid.

different segments of the society may still be at different stages of political development such as Kenya.⁸⁹

2.5 What makes a constitutional order legitimate?

In political science, the question of what makes a particular regime legitimate is, labelled as the problem of legitimacy.⁹⁰ Political theorists largely view legitimacy as the popular acceptance of a governing regime or law as an authority. Legitimacy of authority is therefore an attribute of political consent, both explicit and tacit, that is, "the government is not legitimate unless it is carried on with the consent of the governed."⁹¹ In this respect, legitimacy is considered a basic condition for rule without which a government will experience frequent deadlocks or even collapse.

Legitimacy and democracy thus have one common element, that is. both are ideas inspired by the principle that public authority should be by the consent of the people.⁹² On this measure, H.W.O. Okoth Ogendo has pointed out that the constitutional history of Africa indicates that governments throughout the region "are yet to attain a full measure of political legitimacy."⁹¹

Daniel J. Elaazar considers constitutional choice as an art that brings the constituency to endow the constitution with legitimacy, a commitment that cannot be coerced. He explains:

" This will become clearer in Chapters Three and Four where the legal construct, operations and governance challenges of both the colonial and post colonial state in Kenya are discussed
John Alder, "Constitutional and administrative Law", *op. cit.*

⁹¹ Richard Ashcraft. John Locke: Critical Assessments, London: Routledge (1991). p 524

J.B. Ojwang. Constitutional Development in Kenya: Institutional Adaptation and S.* i Change, *op. cit.*

⁹³ H.W.O. Okoth Ogendo "The quest for constitutional government," *op cil*

"Constitutional legitimacy involves consent. It is not a commitment, which can be coerced — however much people can be coerced into obedience to a particular regime. Consensual legitimacy is utterly necessary for a constitution to have real meaning and to last. The very fact that, while rule can be imposed by force, constitutions can only exist as meaningful instruments by consent is another demonstration that Constitution making is the preeminent political act."⁹⁴

Randy E. Barnett, however, argues that since the Constitution binds all citizens, such consent would need to be unanimous. This is impractical. In reality even those who advocate popular sovereignty realize that there is no real consent to obey the laws made pursuant to the Constitution. Nevertheless, they might contend that because unanimous consent to a constitution is obviously impossible, majoritarian consent is the closest we can come to real consent. In the absence of unanimous consent therefore, legitimacy requires that limits or constraints be imposed on majoritarian governance.⁹⁵

From a legal positivist perspective, it is widely believed that to call a constitution legitimate means no more than that the constitution is broadly effective and that its rules fit together.⁹⁶ In law, what matters is that the officials who work the constitution, including the courts, recognize its rules, and that the regime is broadly effective, at least to the extent that there are no rival constitutions likely to be more effective.⁹⁷ The concept of effectiveness in this regard applies to the whole system since the legitimacy of particular bodies within the system such as courts, parliament or the executive depend upon

⁹⁴ Daniel J. Elazar, *Constitution making: The Pre-eminently Political Act, Constitutionalism and American Experiences* - Chapter I, 1985, *op. cit.*

⁹⁵ Randy E. Barnett, *Constitutional Legitimacy*, *The Columbia Law Review* (2003), 103 *Colum. L. Rev.* 111.

⁹⁶ John Alder, "Constitutional and administrative Law," *op. cit.*

⁹⁷ *Ibid.*

whether they are playing their proper roles within the system and respecting the

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limits on their powers.

According to Hans Kelsen, a jurist and legal philosopher, the validity of a law is based on another law, the basic norm or the grundnorm,¹⁰⁰ which some scholars have equated to the Constitution because it establishes the foundation of the state's legal system. The grundnorm or basic norm refers to a fundamental norm, order, or rule that forms an underlying basis for a legal system.¹⁰¹ The grundnorm in Kelsen's system of legal norms is the highest form of validity.¹⁰² To Kelsen, however, the grundnorm need not arise from a legal or constitutional process. This is because the grundnorm is not entirely the product of legal action or enactment. It may be the product of a conquest, a rebellion or a revolution, or the act of an adventurer.¹⁰³ Thus, whether the Constitution is the supreme law is validly enacted by agreement or by imposition, or on grounds of expediency or value rationality or both,¹⁰⁴ all must obey it until such a time it is changed in accordance with the established order or rules. Isagani A Cruz perhaps has captured the essence of the Constitution as the supreme law thus:

"Ibid.

Grundnorm is a German word meaning "fundamental norm." The jurist and legal philosopher Hans Kelsen coined the term to refer to the fundamental norm, order, or rule that forms an underlying basis for a legal system. Grundnorm is the highest form of validity in Kelsen's system of legal norms and is usually stated as the basic norm that gives validity to the constitution (Mrindushi Swarup, "Kelsen's Theory of Grundnorm," http://www.manupatra.com/roundup/330/Articles/Article_1).

¹⁰⁰ Ben Sihanya, "Reconstructing the Kenyan Constitution and State, 1963-2010: Lessons from German and American Constitutionalism," *op. cit.*

Mrindushi Swarup, "Kelsen's Theory of Grundnorm," http://www.manupatra.com/roundup/330/Articles/Article_1.

" Ibid

¹⁰³ Ben Sihanya. "Reconstructing the Kenyan Constitution and State, 1963-2010: Lessons from German and American Constitutionalism", *op. cit.*

¹¹⁴ Max Weber, "The three types of legitimate rule", *op. cit.*

"The Constitution is the basic and paramount law to which all other laws must conform and to which all persons, including the highest officials of the land, must defer. No act shall be valid, however nobly intentioned, if it conflicts with the Constitution. The Constitution must ever remain supreme. All must bow to the mandate of this law. Expediency must not be allowed to sap its strength nor greed for power to debase its rectitude. Right or wrong, the Constitution must be upheld as long as it has not been changed by the sovereign people lest its disregard result in the usurpation of the majesty of the law by the pretenders to illegitimate power."¹⁰⁵

Legal positivism, however, overemphasizes technical validity thereby offering a narrow conception of legal validity and constitutional legitimacy since the constitutional order is deeper than the technical legal validity. Several writers have therefore disputed the legal positivist conception of legitimacy.

Ralph A. Sarmiento argues that the Constitution does not become legitimate just because it is a constitution and validity and legitimacy do not mean the same thing. Validity of the constitution, on the one hand, is an attribute of governmental acts and laws that do not contravene the Constitution. Legitimacy, on the other hand, is an attribute of governmental acts and laws including the Constitution that makes them at the least juridically right, socially acceptable, and necessary.¹⁰⁷

Mehmet Fevzi Bilgin states that the notion of legitimacy should be grounded on the moral, legal and sociological foundations of the Constitution

¹⁰⁵ Isagani A. Cruz. *Philippine Political Law*. Central Lawbook Publishing, Co.. In, <1991i p 11.

¹⁰⁶ Ben Sihanya, "Reconstructing the Kenyan Constitution and State, 1963-2010: Lcs*<n< fwnn German and American Constitutionalism." *op. cit.*

¹⁰⁷ Ralph A. Sarmiento. *The Constitution and its Legitimacy* 23 November 2005 <iAtt> Rn'r*¹ A. Sarmiento *op. cit.*

itself. This should take into account six things. First, the way the Constitution is framed; second, the authority it involves; third, the justification it carries; fourth, the legality it endows; fifth, the consent it enjoys; and sixth, the support it draws.

Ben Sihanya points out that the efficacy of the Constitution or laws is not just a narrow, legal issue, but rather includes the questions of politics, sociology, anthropology and culture, which have played a key role in blocking genuine constitutional reconstruction and development in most African states

To be legitimate, a constitution requires genuine social acceptance where the relevant public reveres and honours both the political intention behind the Constitution and the legal forms and foundations instituted by the

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Constitution. According to Richard H. Fallon, the term legitimacy invites appeal to three distinct kinds of criteria that in turn support three distinct but partly overlapping concepts of legitimacy - legal, sociological, and moral. It writes:

"When legitimacy functions as a legal concept, legitimacy and illegitimacy are gauged by legal norms. As measured by sociological criteria, the constitution or a claim of legal authority is legitimate insofar as it is accepted as deserving of respect or obedience. A final set of criteria is moral. Pursuant to a moral concept, legitimacy inheres in the moral justification, if any, for claims of authority asserted in the name of the law."

K.C. Wheare therefore argues for comprehensive and inclusive criteria in the interpretation of the validity of the Constitution. This should involve both legal

¹⁰⁸ Ben Sihanya, "Reconstructing the Kenyan Constitution and State. 1963-2010: lessons from German and American Constitutionalism." *op. cit.*

¹⁰⁹ Mehmet Fevzi Bilgin, "Democratic Legitimacy and Constitutions." Paper presented at the annual meeting of the Law and Society Association. TBA. Berlin, Germany. Jul 25, 2007

¹¹⁰ Richard H. Fallon Jr., Legitimacy and the Constitution, Harvard Law Review. Volume 118 Number 6. April 2005. pp 1790-1791.

and non-legal techniques in order to reflect the operational realities of constitutional practice.¹¹¹ Thus since legitimacy is salient in undergirding constitutionalism, every constitution should strive to be as inclusive as possible of the aspirations of all the groups that exist in the society."²

In the landmark case of *Javellana v. Executive Secretary*,¹¹¹ the legitimacy of the 1973 Philippines Constitution was put into question. Five questions were agreed upon as reflecting the basic issues involved. First, is the issue of the validity of Proclamation No. 1102 a justiciable, or political and therefore non-justiciable question? Second, had the Constitution proposed by the 1971 Constitutional Convention been ratified validly (with substantial, if not strict, compliance) or in conformity with the applicable constitutional and statutory provisions? Third, had the people acquiesced, the aforementioned proposed Constitution (with or without valid ratification)? Fourth, were petitioners entitled to relief? Fifth, was the aforementioned proposed Constitution in force?

Ralph A. Sarmiento points out that the second, third and fifth questions are important because they give us an insight into how the Philippines Supreme Court understands and regards the legitimacy of the Constitution. "

The second question deals with the validity of the ratification of the Constitution, which is simply a question of whether the applicable procedure for ratification was followed. On this second question, a majority six (6) members

^{1.1} K.C. Wheare, *Modern Constitutions*, 2nd Edition (1966).

Njuguna Ng'ethe and Musambayi Katumanga. "Transition and the Politics of Constitution making: A Comparative Study of Uganda, South Africa and Kenya", *op. cit.*

^{1.5} *Javellana v. Executive Secretary*. G.R. No. L-36142, March 31, 1973.

¹¹⁴ Ralph A. Sarmiento. *The Constitution as a Social Contract* 07 November 2005 </ Any Ki r' A. Sarmiento *op. cit.*

of the Javellana Court"⁵ held that the 1973 Constitution was not validly ratified while three (3) members held that in their view, there was in effect substantial compliance with the constitutional requirements for valid ratification.

On the third question, although in the view of the Court, the acquiescence by the people could be a sufficient basis for the effectiveness of the Constitution and that acquiescence could substitute for the requirement of valid ratification, the Court reached no majority vote. With a majority saying on the second question that there was no valid ratification, and there being no majority vote reached on the third question, the 1973 Constitution apparently had no basis for its effectiveness.

The Court nevertheless proceeded to consider the fifth question on whether the 1973 Constitution was already in force. On this fifth question, four members of the Court held that it was in force by virtue of the people's acceptance thereof while another four members cast no vote thereon. They argued that on the premise stated in their votes on the third question, they could not state with judicial certainty whether the people had accepted or not accepted the Constitution. The remaining two members voted that the 1973 Constitution was not in force, which meant that there were not enough votes to declare that the 1973 Constitution was not in force.

In the final analysis, the Court found that the 1973 Constitution took effect not by virtue of a valid ratification or by the acceptance of or acquiescence by the people but by the sheer technicality of failure to muster the required two-thirds vote to strike it down and declare it as not in force **Against**

¹¹⁵ Chief Justice Concepcion and Justices Makalintal, Zaldivar, Castro, Fernando, Tanchico, Makasiar, Antonio, Esguerra and Barredo.

this court's finding, Ralph A. Sarmiento has stated, "one would search for the legitimacy of the 1973 Constitution and would find it empty."¹¹⁶

Because the act of ratification is the act of voting by the people, that is, on whether or not they approve a proposed constitution, it is important in the life of a constitution because it is usually the reckoning point of its effectiveness. Most modern constitutions therefore contain a provision that says that they take effect upon their ratification. The procedure and threshold for ratification may however differ from country to country.

Beetham David has proposed some basic criterion for assessing the legitimacy of a constitution. The first is whether the officials who work to implement and apply the constitution recognize and believe in the rules and procedures of the system. The second is whether the regime is broadly acceptable, at least to the extent that there are no rival constitutions likely to be more competitive within the same regime-jurisdiction. The third is whether the constitution, the regime and its structures and rules are relevant to the people's expectations and livelihood needs.¹¹⁷ John Adler also points out that the constitution itself may set out some basis for assessing its own legitimacy. For example, the United States and German constitutions (and the Constitution of Kenya, 2010) appeal to the ultimate sovereignty of the people.¹¹⁸ This is particularly important in evaluating the manner in which the whole governance system of the constitutional state is constructed.

¹¹⁶ Ralph A. Sarmiento, *The Constitution as a Social Contract*, 07 November 2005 >A"%
Ralph A. Sarmiento *op. cit.*

¹¹⁷ Beetham David, *The Legitimation of Power*. Palgrave Macmillan (1991).

¹¹⁸ John Alder. *Constitutional and Administrative Law*. *op. cit.*

How do the foregoing arguments and perspectives play out in the context of Kenya's constitutionality? Largely, most writings on Kenya tend to be more descriptive of the constitutional trends that depict the general absence of legitimacy or validity within the legal and political system. Some writers such as Ben Sihanya and J.B. Ojwang have however, attempted to contextualize some of the legal, sociological and political theories of legitimacy to explain constitutional governance in Kenya. Ben Sihanya, for example, applied the Weberian, Kelsenian and Marxist theories of legal validity and legitimacy to explain the phenomena of constitutional change and reconstruction in Kenya

Drawing from the German constitutionalism. Sihanya argues that war and political crises provide an opportunity for national reconstruction or renewal and that the "quest for a reconstructed identity and the basic law has been coterminous with the reconstructed state - socially, politically, economically, ideologically, geographically and judicially."¹²⁰

J.B. Ojwang' in his book, *Constitutional Development in Kenya Institutional Adaptation and Social Change* engaged the instruments of constitutional theory to interrogate the relevance and application of classical conception of constitutionalism to the Kenyan and African constitutionality and especially multi party democracy. In this, he asserted that there was hardly an\ similar basis of durable multi-party formation in Africa. The obvious basis of party solidarity in Africa today is the ethnic group, but the divisive and even atavistic tendencies likely to mark the political goals of ethnic groups would be

Ben Sihanya. "Reconstructing the Kenyan Constitution and State. 1963-2010: Lessons from German and American Constitutionalism." *op. cit.*

¹²⁰ *Ibid*

distinctly inimical to state management in accordance with constitutionalism.'

He concluded that the prescription of multi-partyism as a factor in constitutionalism was misconceived-certainly in the case of Africa and that failure to consider constitutional practice in different political arrangements and unique circumstances could lead to dislocation between the popular reality and the scheme of public affairs. Many analysts however, interpreted Ojwang's assertions then as a way of seeking to justify the one party rule and the constitutional amendments leading to the reality of this governance situation

Macharia G. Munene, although affirming that J.B. Ojwang's writings came close to an analysis of constitutionalism in Kenya, to him. the timing of Ojwang's publication in 1990 was completely out of tune with the prevailing political reality at the time. Macharia G. Munene argued that Ojwang misread his times and the history of post-colonial Africa, particularly in Kenya b> attempting to justify mono-partism at the very time that **Kenyans** were demanding for re-introduction of multi party democracy.¹²¹

Aside from constitutional amendments, Njuguna Ng'ethe and Musambayi Katumanga have identified three models of Constitution making during the post independence period.¹²ⁿ⁴ The first model, views Constitution making as a means of state reconstruction. In most cases, the process is initiated by former resistance leaders after capturing power with the aim of legitimizing

^{1:1} J.B. Ojwang, *Constitutional Development in Kenya: Institutional Adaptation and Social Change op. cit.*
ibid.

^{1:3} Macharia G. Munene. "Constitutional Development in Kenya; A Historical Perspective *cit.*

^{1:4} Njuguna Ng'ethe and Musambayi Katumanga, "Transition and the Politics of t onstitutkm making: A Comparative Study of Uganda. South Africa and Kenya", *op cit.*

the state, its institutions and leadership. The Constitution making processes undertaken in Uganda and Ethiopia fell in this category.¹²⁵

The second model, which Ng'ethe and Katumanga describe as zero option, involves the elite engaging in Constitution making as a means of saving the state from collapse. Under this model, the ruling elite opt to negotiate with their opponents in order to end unwinnable conflicts. Kenya's Constitution making after the 2008 post-election violence (PEV) under the Kenya National Dialogue and Reconciliation (KNDR) agreement as discussed in Chapter Seven (7), falls in this category.¹²⁶

The third model is characterized by a situation in which the ruling elite see the Constitution making process as the means through which they can entrench themselves in power. While their engagement in the process may be contingent upon pressure, their continued interest in the constitutional reform process, however, remains a function of their ability to control and manipulate the process in their own interest. The Kenyan Constitution making process between 1990 and 2007 as discussed in Chapter Five, section 5.5 and Chapter Six (6), falls in this category.¹²⁷

With specific reference to Kenya, Githu Muigai points out that most post independence constitutional amendments were largely meant to entrench personal rule over institutional rule. They were also meant to undermine the

¹²⁵ *Ibid.*

¹²⁶ Chapter Five, section 5.5. discusses in detail the post 2007 elections crisis and the process towards the completion of the Constitution of Kenya review process (2008-2010) under the Kenya National Dialogue and Reconciliation (KNDR) agreement

¹²⁷ Chapter Five, sections 5.3 and 5.4 discusses in detail the Constitution of Kenya review process (1997-2005) as a model of participatory constitution making as well as the process; November 2005 referendum initiatives (2006-2007) to restart and complete the review process before the December 2007 elections.

claim of the Constitution as the supreme law and fountain of political stability. A direct

consequence of the opportunistic amendments was the emergence of a class of leaders who were least motivated by the values of the rule of law, public interest, and constitutionalism.

To H.W.O. Okoth Ogendero, the struggle for constitutional reforms in Kenya has been defined by the fear of loss of power among the ruling elite. He typifies the struggle for constitutional reforms in three ways, first, the struggle over the design and management of the Constitution making process; second, the struggle to control the Constitution making process itself; and third, the struggle over the outcome of the Constitution making process.¹³⁰ As such, much of the constitutional reform processes are a little more than a re-enactment of the past - some sort of *deja vu* where the mistakes of the past are again reproduced under new guises and idioms.¹³⁰ Consequently, the critical question for Kenya and Africa in general, is no longer, whether constitutionalism matters, but what it should take to develop a holistic and popular constitutional order.¹³¹

2.6 Participatory Constitution making

The participatory approach to Constitution making as part of the democratization enterprise has today assumed greater prominence than at any time in history. By most accounts, the primary goal of the recent Constitution

¹²⁸ Githu Muigai, *Constitutional Amendments and the Constitutional Amendment Process in Kenya (1964-1997). A Study of the Politics of the Constitution*, PhD Thesis. University of Nairobi (2001) *op. cit.*

¹²⁹ *Ibid.*

¹³⁰ H.W.O. Okoth Ogendero "The quest for constitutional government." *op. cit.*

¹³¹ *Ibid.*

making activities in Africa has been to build widespread public support for the new constitutions being created and to establish popular constitutional culture within society.

B.H. Selassie has pointed out that sustained public discussion of the constitution prior to its enactment is critical. He argues that where there is no popular participation, the legitimacy of the Constitution making process and its product is bound to be contested.¹³² Broadly, the importance attached to the participation of the people in the Constitution making process follows from the nature of the constitution as a compact among the people on governance.¹³³

According to J.B. Ojwang, the pertinent explanation for the need for participatory Constitution making is that the true sanctity and durability of a constitution is linked to its mode of origination. He explains that because a constitution has both practical meaning and durable life, it must be evolved in the context of the social reality of the country in question. It will be artificial and somewhat brittle, where a small group of elite enacts it largely to serve minority interests. Typically, where it is a document planted upon a people by a departing imperial power. Alternatively, where it is entirely the brainchild of the political elites for public relations purposes, that constitution is likely not to command the necessary support from the people.¹³⁴

¹³² B.H. Selassie, "Constitution making in Eritrea: Democratic Transition through Popular Participation in Constitutionalism in Africa: Creating Opportunities. Facing Challenges" in Onyango-Oloka J. (ed). 2001, *Constitution in Africa: Creating Opportunities Facing Challenges*, Fountain Publishers, Kampala.

¹³³ Constitution of Kenya Review Commission, the People's Choice Report of CKRC (Sixth Version) dated, sealed and issued by CKRC in Mombasa at 10.00 a.m on Wednesday 18th September 2002.

¹³⁴ J.B. Ojwang, "Constitutional Trends in Africa-The Kenya Case." 10 *Transnational U» am) Contemporary Problems*. 517 (2000).

Hussein Ebrahim points out that recent studies on participatory Constitution making processes reflect new guiding principles including legitimacy; inclusivity; empowerment of civil society; openness and transparency; accessibility; accountability; and public participation and consultation.¹³⁵ As such, Constitution making is no longer a matter of legal expertise alone. As was the case in Kenya, the role of experts is now narrowed to listening to the people and translating their views into constitutional principles and provisions within the set terms and values of the Constitution making process.

The new participatory model relies on some independent structure such as a Commission specially created by law with the mandate to organize public debates, collect views and draft a constitution while also considering expert opinion.¹³⁶ The effectiveness of a participatory Constitution making **process**, however, lies in the right combination and balance between the views expressed by ordinary citizens, political elites and the experts while taking into account their competing interests and roles. It is also imperative that people are educated on constitutional issues through civic education to facilitate their meaningful and informed participation.¹³⁷

In modern constitutions, the act of ratification as a way of expressing the "consent of the governed" is now regarded as one of the core elements of

¹³⁵ Hussein Ebrahim, "Constitution making in southern Africa -challenges for the millennium Paper presented at a conference on the Process and Content of Constitution making in P&M Colonial Africa at the J.F. Kennedy school of Government. Harvard University. (2002).

¹³⁶ B.H. Selassie, "Constitution making in Eritrea: Democratic Transition through Popular Participation in Constitutionalism in Africa: Creating Opportunities. Facing Challen[^]-v

cit.
¹³⁷*ibid.*

constitutional legitimacy. The mechanisms used for ratifying constitutions must, however, be participatory, credible and truly representative of the people.

Benjamin Odoki, the former Chairman of the Ugandan Constitutional Commission, emphasizes that the manner in which the people finally adopt a constitution is very important in demonstrating the legitimacy, popularity and acceptability of the constitution. Thus to command loyalty, obedience, respect, and confidence, the people must identify themselves with it through involvement and a sense of attachment. The involvement of the people in Constitution making is therefore important in conferring legitimacy and acceptability to the constitution.¹³⁸

However, Coren Devra Moehler, in a study on public participation and support for the Constitution in Uganda,¹³⁹ cautions against the blanket rhetoric of the developmental theory of participation. Coren argues that in a context where the political opposition is stronger, participatory Constitution making could lead to a decrease rather than an increase in constitutional support.

In Uganda, for example, Coren found that the high level of popular support for the Constitution was due to the high level of support among the Ugandan elites. Thus since most citizens rely on elites for information and opinions, Coren argues for the need to pay attention to what the elite communicate about the fairness of the Constitution making process, the impact

¹³⁸ H.B.J. Odoki, 'The Challenges of Constitution-making and Implementation in Uganda.' Paper read at International Conference on Constitutionalism in Africa, at International Conference Center, Kampala, Uganda, (1999). p.6.

³⁹ Coren Devra Moehler. "Public Participation and Support for the Constitution in Uganda" *Journal of Modern African Studies*. 44(2): 275-308 (2006)..

of their participation, and the resulting constitutional document. In this regard,

Coren concludes that:

"If only perception mattered then citizens in all areas where participation took place would support the constitution. If only the content of the constitution mattered, then all individuals who knew about the content of the constitution would be equally supportive. My analysis shows that this did not happen. There were pockets of negative attitudes about the constitution even in areas with high rates of participation and with relatively knowledgeable citizens. Simply including participation in the Constitution making process was not sufficient to ensure support."¹⁴⁰

From the foregoing it is evident that despite the growing interest in the participatory model of Constitution making among scholars, policy makers and civil society activists, there is little empirical research on the nexus between participatory Constitution making and constitutional legitimacy. Instead, much of the rhetoric on the participatory approach considers the act of participation as a civic duty and democratic requirement with little focus on how the act of participation in Constitution making contributes to inculcation of constitutional legitimacy within the overall continuum of the management of constitutionality

Consequently, although participation is among the most often prescribed policy tools for enhancing the legitimacy of new constitutions, there is general lack of empirical evidence that participation does indeed enhance legitimacy at various levels of analysis. Chapters Six (6) and Seven (7) therefore provide an examination of the principles and processes of participatory Constitution making in Kenya from 1997 to 2010. In particular, in Chapter Eight (8), the study interrogates the nexus between public participation in Constitution

'Ibid.

making and constitutional legitimacy and tests the claim that there is significant relationship between public participation and constitutional legitimacy. It also tests the claim that to confer its outcome (the Constitution) with legitimacy, public participation in a Constitution making process must be sustained throughout the process.

2.7 Theoretical framework

Thomas E. Baker in his article, "Constitutional theory in a nutshell." states that theory helps us to master our subject, see the big picture, understand how a doctrine came to be, how it might evolve, where an academic argument is coming from and where it might take us.¹⁴¹ For the purposes of this study, two theoretical instruments have been utilized to guide the analysis, namely the critical liberal constitutional theory, and the participatory model of constitution making.

2.7.1 Critical liberal constitutional theory

Many schools of legal philosophy help explain how constitutional systems develop, work and affect the development of societal norms, relations and wellbeing. For the purposes of this study, I apply the critical liberal constitutional theory, an offshoot of the liberal branch of constitutional theory.

According to Jack M. Balkin, constitutional theory studies **how** constitutional systems work and develop over time. It focuses on **how**

¹⁴¹ Thomas E. Baker. *Constitutional Theory in a Nutshell*, 13 *William & Mary Bill of Rights Journal* 57 (2004), at <http://scholarship.law.wm.edu/wmborj/voll3/iss1/3>.

government and political institutions influence and interact with each other, and how features of politics and institutional structure influence the creation and development of constitutional doctrine.

Constitutional theory in general helps to assign meaning to the past and shapes their arguments over the future of constitutional law and constitutionalism. It also helps us understand constitutional law better and see how different constitutional doctrines fit into the overall scheme of constitutional law.¹⁴²

At the foundational level, constitutional theory takes three basic forms, namely positivism, normativism and post modernism. Positive constitutional theory championed by John Austin and others postulates that law and the state are neutral value free arbiters independent of, and unaffected by, social, political and economic relations.¹⁴³ As such, historically scholars in the common law jurisprudence did not investigate the symbiotic relationship between socio-economic phenomena and the law.

A.V. Dicey, for example, taught that constitutional law consisted only of the rules affecting the structure and powers of government, which were only enforceable in courts of law.¹⁴⁴ The positivists therefore did care about the social, economic and cultural factors and patterns of official behaviour that developed around the constitution, and which equally affected the practice of constitutionalism. Thus while positivist theory is important because it sheds

¹⁴² Jack M. Balkin, *What Brown Teaches Us about Constitutional Theory*. Social Science Research Network Paper Collection, at <http://ssrn.com/abstract=555685>(2004).

¹⁴³ Louis Fisher and Neal Devins, *The Democratic Constitution*, Oxford University Press, New York (2004); John Austin, *The Province of Jurisprudence Determined and the Uses of the Study of Jurisprudence*, *op. cit.*

¹⁴⁴ A.V. Dicey. *An Introduction to the Study of the Law of the Constitution*. 10th Edition. Macmillan, London, (1959).

light on how the machinery of the political and constitutional system affects the subsequent development of constitutional norms, it does not address the nexus between politics, law and society.¹⁴⁴

The normative constitutional theory unlike the positivist theory, adopts a more embracing view of the constitution considering it within a broader context of the social, economic, political, gendered and cultural milieu wherein the constitution operate.¹⁴⁶ One branch of normative constitutional theory concerns constitutional design and another branch concerns interpretation of existing constitutions. However, most normative constitutional theorists have focused on the interpretive aspect of constitutional theory.¹⁴⁷

The anti-thesis of the positivist and normative schools is the postmodern theory. Postmodernists consider constitutionalism as impossible to find in terms of a set of moral principles by which the process of constitutionalism is guided. In other words, constitutionalism and the processes and structures it engenders are incoherent, manifestly contradictory and indeterminate.¹⁴⁸ Peter Schanck admits that most people and even many academics find these ideas "inconceivable, ridiculous, or abhorrent". He nevertheless makes the case that postmodernism has become one of the dominant theories in the legal academy.¹⁴⁹

Largely, the debate on constitutional theory plays out in two basic prescriptive forms, namely, conservative and liberal. Both the conservative and

B.O. Nwabueze. Constitutionalism in the Emergent State *op. cit.*

¹⁴⁶ Upendra Baxi, Alice Jacob and Tarlok Singh. *Reconstructing the Republic*. Mar Anand Publications, New Delhi. (2000).

¹⁴⁷ James Baker. *Constitutional Theories in a Nutshell op. cit.*

¹⁴⁸ Jack M. Balkin. "What Brown Teaches Us about Constitutional Theory." *op cit*

¹⁴⁹ Peter C. Schanck, *Understanding Postmodern Thought and Its Implications for SMutory Interpretation*, 65 S. California Law Review (1992). 2505.

liberal theories follow John Locke's liberalism.¹⁵⁰ Locke's liberalism is rooted in the enlightenment with emphasis put on the rights-bearing individual either to the right or to the left.

On the one hand, the modern conservative constitutionalism takes to the right and is protective of property rights and more comfortable with inequality in wealth and status, at least more so than modern liberals. On the other hand, liberal constitutionalism takes to the left. It emphasises a sphere of individual liberty guaranteed by a fixed government constituted by majority consent expressed in regular elections participated in by an enfranchised citizenry '

In the Kenyan context, the constitutional struggle over the years, since colonial times, has similarly been fought along the lines of conservative and liberal constitutionalism. On the one hand, the quest of the conservative forces since the colonial and post independence period has been to protect property rights, control of wealth, maintain the *status quo* and deepen centralized governance. Consequently, as Karuti Kanyinga points out. from independence politics and economy in Kenya became constitutionally intertwined and the control of state power became the fulcrum around which political competition would be played.¹⁵²

On the other hand, the forces of liberal constitutionalism have championed the cause of better governance, human rights including the rights of the marginalized groups, gender equality, and social justice, equitable

¹⁵⁰ John Locke, *Two Treatises of Government* (various editions) especially Book II. Chapter* XI-XIV (1690).

¹⁵¹ Wil Waluchow. "Constitutionalism", *Stanford Encyclopaedia of Philosophy*. Spring Fditmn (2004).

Karuti Kanyinga. 'Ethnic inequalities and governance of the public sector in Ken> Bangura. Yusuf (ed). *Ethnicity. Inequalities and public sector*. London: Pclgrave M.u- (2006).*

distribution of national resources and devolution of power. In this regard. Peter Wanyande states that the struggle for constitutional reforms in Kenya has been dominated by four interrelated issues, namely democratization of the political system, presidential succession, human rights and equitable distribution of national resources.¹³

The struggle between the conservative and liberal forces in Kenya is perhaps best illustrated by Prime Minister Raila Odinga, in his contribution during National Assembly debate on the Draft Constitution 2010. He stated that:

"The struggle for democratization and the struggle to get this country a new democratic Constitution is as old as this country has been independent...There have been all the time historically, two forces pulling in two diametrically opposite directions. The forces on the retention of the *status quo*, those who wanted to inherit the privileged positions that were left by the outgoing colonial masters and use them to lord it on their people versus those who wanted to make independence more meaningful by giving the people a wide participation in the decision-making process in their country. It is against this background that you can understand the struggle that has taken place from independence right through to today."¹⁴

In terms of influence, the liberal constitutional theory, in its diverse forms, has dominated the global constitutional discourse since the Second World War. According to Thomas Grey, the liberal constitutional theory family tree consists of several branches including first, the progressive movement; legal realism; second, process-based jurisprudence; third, civic republicanism or neo-republicanism; fourth, critical legal studies, including feminist and race

¹³ Peter Wanyande. "Recent Constitutional Developments in Kenya." in Saida Yahy»-Othman (ed) *Politics, Governance and Cooperation in East Africa, Research and Education for Democracy in Tanzania*. Mkuki na Nyota Publishers (2002).

¹⁴ Republic of Kenya. National Assembly Official Report (Hansard). Tuesday, 30th M r,' 2010, p.33.

theories with variations; fifth, law and economics; sixth, law and literature; and seventh, pragmatism.¹⁵⁶

Over time, liberalism has shifted emphasis between its different paradigms with some scholars taking a more critical perspective of liberalism itself leading to the formulation of the critical liberal constitutional theory. The critical liberal constitutional theory represents a progressive development of constitutional theory. It turned against the traditional left and went beyond legal realism to deconstruct liberalism.¹⁵⁷

The critical liberal constitutional theory hence asserts that no law is value free and that a mechanistic jurisprudence that views law in a simple cause and effect paradigm is of little value in the analysis of constitutional problems. In this respect, it challenges the positivist assumption that there exists a necessary and logical dichotomy between the law and politics.¹⁵⁸

The critical liberal constitutional theory argues that the law including constitutional law is a powerful tool, which dominant groups have used historically to maintain their superior status and to pursue their own political ideologies. In this regard, the law has imposed a serious affront to democracy leading to suppression of some groups such as women, minority racial and ethnic groups, the poor, and so on. As a result, these groups' interests are often

¹⁵⁵ Thomas Grey. "Constitutionalism: An Analytic Framework", in R. Pennock & J. Chapman (eds). *Constitutionalism: (Nomos XX)*, New York University Press. New York. (1979). p. 8-20

¹⁵⁶ Gerald Gaus and Shane D. Courtland, "Liberalism". *Stanford Encyclopaedia of Philosophy* Winter Edition (2004).

¹⁵⁷ *Ibid.* Crenshaw Kimberle, Gotanda Neil, Peller Gary and Thomas Kendall. "Critical Race Theory." in *Encyclopedia of American Constitution*. 726, Vol. II, 2nd Edition. (2000).

¹⁵⁸ Wil Waluchow, "Constitutionalism". *Stanford Encyclopaedia of Philosophy*. Spring Edition (2004). *op.cit*

not adequately recognized and protected by the dominant mainstream ideologies to which political elites including judges have an affinity.¹⁵⁹

Critical liberal theorists are therefore sceptical of constitutional theories that applaud liberal constitutionalism as a bulwark against oppression. They argue that constitutional law has been used first, to play the powerful role of legitimizing and perpetrating conservative hegemony; second, to protect the dominant system of social and power relations; and third, to de-politicize or remove crucial issues from the public agenda. Thus, instead of curbing arbitrary government power for which the idea of constitutionalism is supposed to stand, very often, political suppression of certain groups is disguised in the cloak of false constitutional validity.¹⁶⁰

The rationale of the critical liberal constitutional theory is hence to effect reforms that improve the situation of underrepresented and oppressed groups. In this regard, the critical liberal constitutional theory addresses four key issues. First, the theory emphasizes the open-ended character of the social and political contexts in which substantive law is shaped.

Secondly, it rejects the positive law's attempt to separate the law and politics and to portray law as standing above and apart from politics. The theory thus proceeds from the perspective that the Constitution by its very nature is a political document, which is the product of political negotiations and compromises that do not in any case alter its legal character and processes.

¹⁵⁹ *Ibid.*

¹⁶⁰ *ibid.*

Daniel J. Elaazar. "Constitution making: The Pre-eminently Political Act." *op cii*

Thirdly, the critical liberal theory challenges the argument that neither formal logic nor purposive analysis can produce legal reasoning shorn of substantive value choices. Fourthly, it argues that legal institutions ought to be transformed to accommodate disputes over the power structures and social hierarchies that are taken for granted in the current legal culture.

According to the critical liberal constitutional theory, rules of constitutional law embody a set of values and fundamental assumptions about how political power should be structured and how social life should be organized. " Progressive constitutional scholarship should hence address three issues. First, it should investigate the dialectical relationship between constitutional form and substance. Second, it should explain why there exists a lacuna between constitutional ideals and constitutional practice. Third, it should investigate the ontological causality between the form of government a constitution establishes or endorses and the socio-economic and cultural structure of the society.¹⁶³

The critical liberal theory has, however, been criticized for at least three reasons. First, it has been criticized for its inability to explain the phenomenon of constitutionalism in different contexts, and to distinguish between
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interpreting and rewriting the constitution in the context of democracy. According to J. Rubinfeld, liberal constitutional theory has asked the wrong question in the past. To him, the right question to ask is why should the

¹⁶² Robert B. Siedman, "The Reception of English Law in Africa Revisited". *Eastern Africa Law Review* (1969).

¹⁶³ *Ibid.*

¹⁶⁴ Jed Rubinfeld, *Freedom from Time: A Theory of Constitutional Self-Government* <←>

constitution have any legitimacy over time? Why should we even try to interpret and obey it, in the first place?¹⁶⁶

Secondly, largely, constitutional scholars have tended to relate liberal constitutionalism with certain established practices of government in Western democracies. However, most of these practices are only relevant to specific socio-economic conditions in the west, which are not universally agreed as ideal conditions to be included in understanding the core notion of constitutionalism elsewhere. H.W.O. Okoth Ogendo, for example, identifies two fallacies in Africa's constitutionality that date back to the colonial times. These include first, the mistaken notion that the imposition of a unitary constitutional (i.e. nation-state) model is the best strategy for national integration. Second, that adoption of Western constitutional and legal models is the only way to consolidate democracy.¹⁶⁶

J.B. Ojwang has also argued that failure to consider constitutional practices in different political arrangements and unique circumstances is what has led to dislocation between popular reality and the scheme of public affairs in Africa. He therefore argues, "untranslatable Western trappings of the popular notion of constitutionalism cannot possibly be in complete harmony with African conditions."¹⁶⁷

Thirdly, the critical liberal constitutional theory has been criticised for detaching legitimacy from justice. Thus, for many liberals, so long as the constitution of a political order is sufficiently or reasonably just, then the

¹⁶⁶ *ibid.*

¹⁶⁶ H.W.O. Okoth Ogendo. "The Quest for Constitutional Government." *op cit*

¹⁶⁷ J.B. Ojwang, *Constitutional Development in Kenya: Institutional Adaptation and Structural Change*. 1990, *op. cit.*

general structure of authority is legitimate. This separation is inadequate since it leads to an inadequate response to the existing constitutional and socio-political challenges including the realities of social injustice.

Overall, despite its weaknesses, the critical liberal constitutional theory provides an adequate theoretical framework to interrogate the principles and challenges of constitutional development and the factors that affect constitutional legitimacy in Kenya. It is noteworthy that historically, constitutional struggle in Kenya has been between the forces of conservative and liberal constitutionalism in terms of foundational concerns as well as between positive and normative approaches in terms of philosophy.

Largely, the constitutional review process in Kenya from 1997 to 2010, as discussed in Chapters Six (6) and Seven (7), adopted a critical liberal approach to Constitution making. It put emphasis on three key basic concerns of critical liberal theory. These included first, how to expand the sphere of individual rights and liberty; second, how to establish a democratic government constituted by majority consent expressed in regular elections; and third, how to improve the situation of the underrepresented, marginalized, oppressed and minority groups in society.

For instance, in line with the critical liberal constitutional theory, the Constitution of Kenya Review Act (Cap 3A) required the review process to secure provisions in the new Constitution that, among other things, would establish a free and democratic system of Government characterized by good governance, constitutionalism and the rule of law, human rights and gender equality. Second, ensure respect for ethnic and regional diversity and communal

rights including the right of communities to organize, and participate in cultural activities and the expression of their identities. Third, ensure the provision of basic needs of all Kenyans through the establishment of an equitable framework for economic growth and equitable access to national resources.¹⁶⁸

In terms of process, the Review Act required the review organs to ensure that the Constitution making process accommodated the diversity of the Kenyan people including socio-economic status, race, ethnicity, gender, religious faith, age, occupation, learning, persons with disability and the disadvantaged." The review organs were further required to facilitate respect for human rights and gender equity as indispensable and integral aspects of the enabling environment for economic, social, religious, political and cultural development.'

2.7.2 Participatory model of constitution-making

There are many theoretical accounts of the effect of participation on a range of different political attitudes and behaviours. The developmental theory of participation, for example, holds that engaging in political activity directly affects the attitudes of the participants, irrespective of any effect on policy

Classical scholars of democracy, such as Jean Rousseau,¹⁶⁹ Alexis de Tocqueville¹⁷³ and J.S. Mill¹⁷⁴ argue that the primary function of participation is to develop the democratic characteristics of the participator, including support for the

¹⁶⁴ Constitution of Kenya Review Act (Cap 3 A) section 3(b), (e) (0-

¹⁶⁹ Constitution of Kenya Review Act (Cap 3 A) section 5(b).

¹⁷⁰ Constitution of Kenya Review Act (Cap 3 A) section 17 (d) (iii).

¹⁷¹ Coren Devra Moehler "Public Participation and Support for the Constitution in Uganda" *Journal of Democracy*, vol. 23, no. 2, pp. 10-21, 2002.

¹ : J.-J. Rousseau. *The Social Contract*. Harmondsworth: Penguin (1968).

¹⁵ A.D. Tocqueville. *Democracy in America*. New York: A. A. Knopf (1945).

¹ J.S. Mill, *On Liberty : Representative Government: The Subjection of Women*. London. New York: Oxford University Press (1948).

political system. According to these and other scholars, participation raises an individual's interest in and knowledge of the system, produces a psychological attachment to the community and its institutions, inculcates a sense of duty to abide by the rules, and fosters dedication to the well-being of the person.'

The more recent participatory theorists such as Benjamin R. Barber' and Carol Pateman¹⁷⁷ have also argued that the primary function of public participation is to develop the democratic characteristics of the state and to ensure support for the political system.

Carol Pateman has interpreted the political philosophies of Rousseau and Mill to contribute to a theory of participatory democracy. She argues that democracy is justified through the human results that accrue from participation¹⁷⁸ and that it is built around the assertion that individuals and their

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institutions cannot be considered in isolation from one another.

Pateman therefore asserts that a governmental democracy based on participation must be based on a "participatory society" in which all institutions utilize a participatory decision making process. Without this, citizens would not be educated in the ways of participation. This would result in citizens, first, having no will to participate in government; second failing to develop a sense of

¹⁷⁵ Coren Devra Moehler, "Public Participation and Support for the Constitution in Uganda," *cit.*

¹⁷⁶ B.R. Barber. *Strong Democracy: Participatory Politics for a New Age*. Berkeley: University of California Press (1984).

¹⁷⁷ C. Pateman. *Participation and Democratic Theory*. Cambridge: Cambridge University Press (1970).

¹⁷⁸ C. Pateman. *Participation and Democratic Theory* pp. 42-43, *op. cit.*

¹⁷⁹ *Ibid.*

political efficacy; third lacking a sense of dignity, worth and freedom; and fourth, being less willing to accept societal decisions.¹⁸⁰

Benjamin Barber posits that in a strong democracy, citizens govern themselves to the greatest extent possible rather than delegate their power and responsibility to representatives acting in their names. To him, representative or "thin" democracy is rooted in an individualistic "rights" perspective that diminishes the role of citizens in democratic governance. He argues that radical individualism that underpins liberal theory actually undermines democracy. The weak representative democracy produces less legitimate outcomes as compared to a stronger democratic structure. Barber's work therefore offers a theoretical critique of representative or liberal democracy and argues for strong participatory democracy.¹⁸¹

A number of African scholars such as Y.P. Ghai,¹⁸² H.W.O. Okoth Ogendo,¹⁸³ J. Oloka-Onyango and J. Ihonvbere,¹⁸⁴ Issa Shivji¹⁸⁵ and B.H. Selassie¹⁸⁶ have identified lack of popular constitutionalism as a major obstacle to democratic consolidation in Africa. According to these scholars and others, the participatory model of Constitution making, also referred to as "democratic

¹⁸⁰ *Ibid.*

¹⁸¹ B.R. Barber. *Strong Democracy: Participatory Politics for a New Age. op cit*

¹⁸² Y.P. Ghai. "The Theory of the State in the Third World and the Problematics of Constitutionalism." in H.J. Steiner and P. Alston (eds). *International Human Rights Law in Context: Law, Politics, Morals.* . New York: Clarendon Press (1996).

¹⁸³ H.W.O. Okoth Ogendo. "Constitutions without Constitutionalism: Reflections on an African Political Paradox," *op. cit.*

¹⁸⁴ J. Oloka-Onyango and J. Ihonvbere. "Towards Participatory and Inclusive African Constitutionalism." paper read at International Conference on Constitutionalism in Africa, at International Conference Center. Kampala. Uganda (1999).

¹⁸⁵ I.G. Shivji, "State and Constitutionalism: A New Democratic Perspective." in I.G. Shivji (ed), *State and Constitutionalism: An African Debate on Democracy.* Harare. Zimbabwe SAPES Trust (1991).

¹⁸⁶ B.H. Selassie, "Creating a Constitution for Eritrea." *Journal of Democracy* (1998). Chap. 9. pp 164-74.

Constitution making" or "new constitutionalism," has gained increasing acceptance as an adept model in Constitution making. It borrows from the ideas of democracy and emphasizes the right to participation in the Constitution making process as a key defining feature of modern constitutionalism. In the participatory model, the public are directly involved in the making, debating and ratification of the constitution. The role of experts is largely limited to listening to the people and translating their views into constitutional principles and proposals.

According to H. Ebrahim, the participatory model consists of six key elements as follows.¹⁸⁷ The first element is **control**, which involves actual determination of what a decision should be. The second element is **involvement** which means being part of the decision making process. The third element is **influence** which implies being able to affect decision-making. The fourth element is **consultation**, which means being asked what one thinks about a decision to be made or an action to be taken. The fifth element is **information** which means being informed of what the factors are and what decisions are being made and how they are being implemented. The sixth element is **monitoring** which means being involved in watching and assessing how decisions are carried out, or how processes work.

The above six elements are what Alexander Hamilton and James Madison,¹⁸⁸ have called, auxiliary precautions. They provide the normative

¹⁸⁷ Hussein Ebrahim. "Constitution making in Southern Africa: Challenges for the Millennium *op. cit.*

A. Hamilton and J. Madison. The Federalist No. 51 (1788).

basis upon which authority can be exercised and the constitution made to command loyalty, obedience and confidence of the people.

In terms of process, H. Ebrahim points out that most participatory Constitution making processes, have adopted a methodology involving three

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stages. The first stage starts with a process of empowerment and education about the importance of the Constitution making process. The second step moves through a process of engagement to ensure maximum participation and ownership. The third stage ends with a process of popularization.

In each of the stages, the Constitution making process should be credible, inclusive, transparent, participatory and receptive to the divergent views existing in society. This approach has been applied with certain modifications in Kenya, Uganda, South Africa, Zimbabwe, Eritrea, Malawi, Namibia and Zambia, among other countries. In Kenya, however, the participatory Constitution making process was more elaborate as discussed in Chapter Five.

B.O. Nwabueze points out that the elaborate process involved in the participatory model is critical in entrenching and inspiring a sense of respect, confidence, loyalty and overall legitimacy that the constitution requires. The participatory model thus not only adds legitimacy to the final constitution and

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its institutions but also strengthens the ground for democratic governance.

The participatory theorists have therefore argued that without popular participation in the Constitution making process, there is less assurance that

¹⁸⁹ Hussein Ebrahim. "Constitution making in Southern Africa -Challenges for the Millennium." *op. cit.*

¹ Nwabueze B.O.. *Constitutional History of Nigeria*. C. Hurst & Co. Publishers. London (1981)

either the constitution or rule of law generally, will be willingly accepted and respected.

The participatory model of Constitution making has, however, been criticised from about three fronts. First, some critiques have contended that the principles of participatory model are largely unattainable. They argue that not all citizens have the same desire to be actively involved in Constitution making. Others are perfectly happy to let those in positions of power to make decisions on their behalf. Thus, not all attempts to involve the people in Constitution making are successful.

Secondly, the development theory of participation is inadequate as it assumes that the mere act of participation is sufficient to engender legitimacy. Developmental theory of participation holds that citizens' engagement in a political activity is the most important thing since they will experience full development of their civic attitudes and behaviours.¹⁹¹ Coren Devra Moehler, however, has argued that it is not the mere act of participation, as suggested by the developmental theory of participation, which is most important. To her, the act of participation itself may be superfluous to an individual's judgment of constitutional legitimacy since it depends largely on the source of the dominant political influence on the individual at any given time.

Practically, participation does not happen in a vacuum nor do citizens form their views on the constitution in a vacuum. The success or failure of a participatory enterprise will hence depend on the prevailing political

¹⁹¹ Coren Devra Moehler "Public Participation and Support for the Constitution in Uganda." *op cit.*

¹⁹² *Ibid.*

¹⁹³ *Ibid*

environment and the interests at play by the key players involved. These may include the political elites, the dominant social movements, civil society formations and even the international community. An individual's perception on the legitimacy of the constitution making process and its outcome will thus depend significantly on the source of the dominant political influence on his or her views regardless of whether or not he or she personally participated in the creation of the constitution.¹⁹⁴

Thirdly, the adequacy of the consensual element of the participatory approach in conferring constitutional legitimacy has been brought into question. Ralph A. Sarmiento in his article, "the Constitution and its Legitimacy," has raised six key questions regarding what makes a constitution legitimate¹⁹⁵

First, is the positive consent of the majority of the people in the ratification process that confers legitimacy? Does the legitimacy of the constitution depend merely on the empirically discoverable consent of the governed or is there something more to it like the need for the intrinsic validity of the principles and rules that it embodies? Second, is the mere acquiescence of the people it seeks to govern that confers legitimacy? Third, is the validity of the ratification sufficient to endow the constitution with legitimacy? Fourth, is the people's acquiescence independent of the validity of its ratification? Fifth, is the vote of a bare majority in a plebiscite sufficient to bring legitimacy to the constitution and make it binding on the whole citizenry? Sixth, if so, and being a document of founding or re-founding of a polity, how can the constitution be

¹⁹⁴ *Ibid*

¹⁹⁵ Ralph A. Sarmiento *the Constitution and its Legitimacy op.cit*

legitimately binding on the minority who have not given their positive consent to its mandate?

The above questions present legal and jurisprudential questions that have elicited a lot of controversy. For example, Randy E. Barnett has argued that because unanimous consent to a constitution is obviously impossible, majoritarian consent is good enough to legitimize governance.^{1*} However, other scholars have held extreme positions by arguing that when it comes to consent coming close is not good enough. Consent is either present or it is absent. Nothing short of consent is consent.

Daniel J. Elaazar argues that since making a constitutional choice by consent is an art that brings the constituency to endow the constitution with legitimacy, it cannot be coerced. He explains:

"Constitutional legitimacy involves consent. It is not a commitment, which can be coerced - however much people can be coerced into obedience to a particular regime. Consensual legitimacy is utterly necessary for a constitution to have real meaning and to last. The very fact that, while rule can be imposed by force, constitutions can only exist as meaningful instruments by consent is another demonstration that Constitution making is the preeminent political act."¹⁹⁷

Overall, although there is still no unanimous agreement on the ideal model of participatory Constitution making, there is a broad agreement that meaningful public participation is a major contributor to constitutional legitimacy. The participatory model therefore provides an adequate complementary theoretical framework for the study especially in interrogating the nexus between public participation in Constitution making and constitutional legitimacy.

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Randy E. Barnett. *Constitutional Legitimacy without Consent op. cit*

¹⁹⁷ Daniel J. Elaazar. *Constitution making: The Pre-eminently Political Act. Constitutionalism The Israeli and American Experiences - Chapter 1 op. cit.*

2.8 Conceptual framework

Conceptually, this study is premised within a continuum of management of constitutionality as shown in Figure 1 below. As part of the overall management of constitutionality, the process of Constitution making starts with the people making *demand* for constitutional change in exercise of their constituent power. The demand, expressed in terms of political, economic, social, cultural and/or governance problems that need to be addressed through constitutional means, are mediated by various interest groups within the political system. The key interest groups may include state institutions, civil society groups, academia, the business community, political parties, the media and even the international community.

Within the political system, the various interest groups will engage with each other in dialogue and negotiations on proposals for action. The dialogue and negotiations relate to a number of aspects. These include first, the guiding constitutional principles; second, the legal framework, constitutional safeguards and mechanisms for consensus building and dispute resolution; third, the objects of the process; fourth, the structure and organization for managing the process; fifth framework for public education and participation; sixth, the constitution design and drafting, and seventh, the content of the constitution and other intended outcomes.

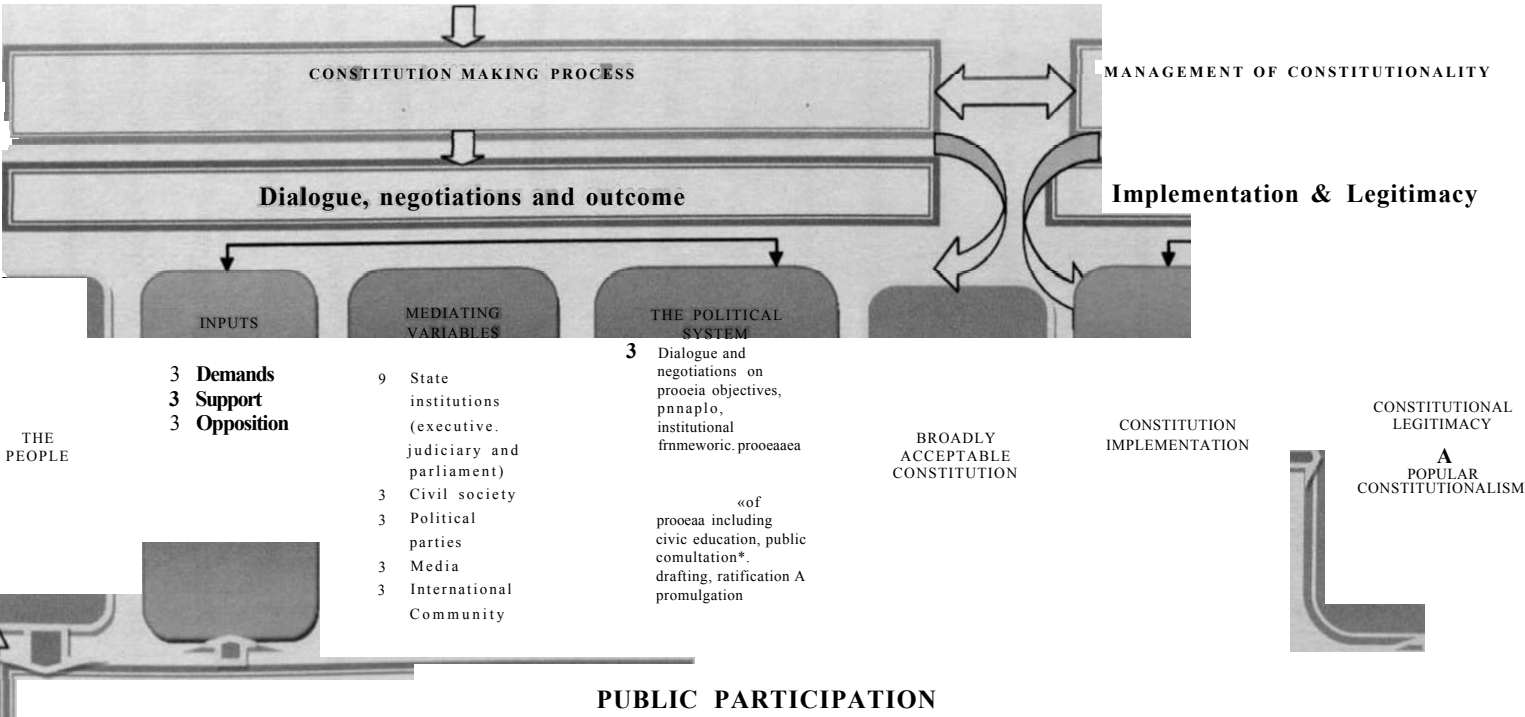
Crosscutting the entire process is active and meaningful public participation at every stage of the process guided by the principles of social inclusion, mutual respect and accountability. Public participation can be realized through debate, consultation, feedback and/or exercise of constituent

power via agreed mechanism such as referendum or constituent assembly. The process at every stage will have to take into full account the prevailing interplay of various political, social, cultural, economic and environmental factors that may either positively influence or negatively influence the process and its outcome. Ultimately, the outcome of the process will have to reflect the views and aspirations of the people.

From the process there will emerge a broadly acceptable constitution ratified and supported by the greatest majority of the people. As part of the overall continuum of constitutionality, the consequential action and implementation framework should ensure that the Constitution is effectively implemented and that it continues to draw public support and respect. More importantly, that it is made to work in a way that bears positive impact on the people's wellbeing. It only then that the resulting constitutional order will be deemed to be enjoying legitimacy hence a sense of popular constitutionalism.

Figure 1: Conceptual Framework: Constitution making and continuum of constitutionality

POLITICAL, SOCIAL, ECONOMIC AND CULTURAL ENVIRONMENT



2.9 Conclusion

This Chapter has presented the review of a wide range of literature relevant to the study including the concept and application of the Constitution, constitutional development and governance, constitutional legitimacy, participatory Constitution making approaches and constitutional theory. The literature review has illuminated the gaps that the study sought to fill and the basic theoretical instruments that the study utilized to interrogate the nexus between public participation and constitutional legitimacy.

From the foregoing, the study proceeds from the premise that constitutional legitimacy is simply a reflection of constitutional good that results from an inclusive process of constitution making and management of constitutionality in general. It is about the constitution and its institutions reflecting the aspirations of the people and having a positive impact on their wellbeing.

Conceptually therefore, to engender and sustain constitutional legitimacy, there must be consistent and sustained public engagement in the making of the Constitution. There must also be consistent and sustained public benefit arising from the implementation and management of the Constitution. Without these two important attributes, there is likely to be a contestation of the legitimacy of the constitution and its institutions leading to a break down in law and order and ultimately, the collapse of the state.

The next Chapter Three (3) presents an assessment of the formative stages of Kenya's constitutionality since the English law took effect in Kenya in 1897 up to end of the Second World War.

CHAPTER THREE

LAYING THE FOUNDATION OF KENYA'S CONSTITUTIONALITY

3.1 Introduction

Chapter Two has presented a comprehensive review of relevant literature including the theoretical framework. This Chapter presents an analysis of the formative stages of Kenya's constitutionality from 1887 to the end of the Second World War and assesses the African response to the emerging colonial constitutionalism. The Chapter explores the question of whether constitutional developments during the early period of Kenya's constitutionality contributed to the building of constitutional legitimacy.

The Chapter tests the claim that to secure legitimacy, a constitutional order must be inclusive of the aspirations of all the groups that exist in the society and that must not be designed only to secure the interests of a few elite or sections of the society.

3.2 Laying the foundation of colonial constitutionality in Kenya

This section assesses the processes of Kenya's constitutional formation since the British set foot in Kenya in 1887 and highlights the key constitutional foundations that spawned Kenya's post independence constitutionality as discussed in Chapter Five (5).

The scramble for colonies in Africa among European countries reached fever pitch in 1884 following the Berlin Conference whose main objective was

to partition Africa amongst European colonial rivals.¹⁸⁸ Among British acquisitions, was the territory today, called Kenya.

A British East African Association and a trading company, the Imperial British East Africa Company was subsequently set up to administer the territory.¹⁸⁹ First, the Imperial British East African Company (IBEAC) signed a fifty-year lease Agreement with the Sultan of Zanzibar over the coastal strip in 1887. Subsequently, the Imperial British East African Company (IBEAC) received a Royal Charter in 1888 making the Company the principal guarantor of the British imperial interests in East Africa. The fifty-year lease was later converted into a concession in 1890 thereby giving the Company powers to appoint commissioners to administer districts, make laws, operate courts and acquire and regulate land.²⁰⁰

On 1 st July 1895, the British Government took over the territory from the IBEAC Company, declared it a Protectorate under a separate treaty and posted the first Commissioner, Sir Arthur Hardinge, to establish a formal British administration.²⁰¹ In 1896, the Government named the territory East African Protectorate and subsequently, enacted the first East Africa Order in Council in 1897.

The 1897 Order in Council provided for a judicial system and increased powers of the Commissioner over the natives. However, it recognized that in law, the natives were not British subjects and that their territory was foreign. The

**** Museums of Kenya. Political History - Journey into Kenya's Past, at <http://www.enzimumuseum.org>**

ibid.

²⁰⁰ Constitution of Kenya Review Commission, The Final Report of the Constitution of Kenya Review Commission, approved for issue at the 95th Plenary Meeting of the Commission on February 2005.

Museums of Kenya, Political History - Journey into Kenya's Past. *op. cit.*

1897 East Africa Order in Council thus not only established the initial Government machinery in Kenya, but also became the first British Government's comprehensive constitutional instrument for the administration of the Protectorate.²⁰²

In 1902, the Government repealed the 1897 Order in Council and replaced it with a new one. The 1902 Order in Council expanded the Commissioner's legislative powers and empowered him to create provinces and districts. The pieces of legislation made by the Commissioner became known as ordinances instead of regulations.²⁰³

The period between 1905 and 1923 marked the most significant phase in constitutional development in Kenya as Kenya constitutionally evolved from being a British Protectorate to a British Colony.²⁰⁴ In 1905, the Government formulated another Order in Council to establish the position of Governor, the Executive Council and the Legislative Council. The purpose of these institutions was to oversee both the executive and legislative functions of the Protectorate. In the same year, the Government transferred the responsibility of supervising the Protectorate from the Foreign Office to the Colonial Office.²⁰⁵ In 1907, the first legislative Council (Legco) in Kenya was established. It was a kind parliament. The title of the commissioner was also changed to that of governor. Colonel Sir James Hayes Sadler became the first Governor of Kenya."

²⁰² Constitution of Kenya Review Commission, *The Final Report of the Constitution of Kenya Review Commission*, *op. cit.*

²⁰³ Museums of Kenya. *Political History - Journey into Kenya's Past*, *op. cit.*

²⁰⁴ Constitution of Kenya Review Commission. *The Final Report of the Constitution of Kenya Review Commission*, *op. cit.*

²⁰⁵ Museums of Kenya. *Political History - Journey into Kenya's Past*. *op. cit.*

²⁰⁶ *Ibid.*

Fifteen years later in July 1920, the British Government through Letters of Patent under the Great Seal and Royal Instructions declared Kenya a "Colony". According to John L. F. Buist²⁰⁷ as a Colony, the Kenya Government was to act in the imperial interests of the British Government as it was conceived by and for the white settlers. Thus, even though it was treated as a self-governing entity, the Governors of Kenya came effectively under the instruction of the Colonial Office. In the same vein, every single piece of legislation (Ordinance) passed by the Colony's Legislative Council could, in theory, be disallowed by the Secretary of State.²⁰⁸

Preceding the declaration of Kenya as a Colony, the Legislative Council Ordinance was enacted in 1919 to give effect to European settler representation in the Legislative Council.²⁰⁹ The Royal Instructions of 1919 also permitted the nomination of two Indians and one Arab to the Legislative Council to represent their community of interest. There was, however, no provision for the representation of the African interests in the Legislative Council.²¹⁰

The overt exclusion of the African population from the governance of the Colony and land related grievances led to the beginning of the African agitation for direct political representation.²¹¹ Indeed, the Africans were increasingly

²⁰⁷ John Latto Farquharson (Ian) Buist was a career British civil servant who served in various capacities in the Colonial Office (East Africa department) from 1952 rising from Assistant Principal, Colonial Office (E Africa department), 1952-54 to Under Secretary, Foreign and Commonwealth Office (Overseas Development Administration), 1976-90. He was seconded to Kenya Government in 1954-56 and became Principal, Colonial Office, (E Africa department) in 1956-61.

²⁰⁸ John Latto Farquharson (Ian) Buist. CB. Interview with Malcolm McBain on Tuesday 8 April 2008, *copyright: Ian Buist*.

Constitution of Kenya Review Commission, *The Final Report of the Constitution of Kenya Review Commission, op. cit.*

²⁰⁹ *Ibid*

²¹⁰ *Ibid.*

becoming uncomfortable with the British move to consolidate their control over Kenya through the establishment of the Colony.²¹²

According to Makhan Singh, the reason for declaring Kenya a Colony was to ensure that the British could deal with the land and labour of African people as they thought fit. It was also to guarantee, first, that the land taken away from the African people and given to settlers would remain settlers' land, and second, that the forced labour system prevailing in Kenya could be further tightened. More importantly, there was a conspiracy among the settlers to make Kenya a "white man's country" and to establish a white settlers' government

It is therefore noteworthy that important political movements that started taking place among African communities following the declaration of Kenya as a colony were mainly attributed to the land question and labour issues. On the land question even though the Maasai lost the largest part of their land to the white settlers under two the treaties of 1904 and 1911.²¹⁴ the Kikuyu, became the most bitter. By the 1920s, therefore, there were already considerable disputes over land between individual European settlers who thought they had been given a Crown Lease, and the Kikuyu, particularly around Nairobi who felt that their land had been taken away from them without any compensation.¹¹

According to John L. F. Buist, by the end of the Second World War. 3,000 European settlers owned 43,000 square kilometres of the most fertile land. The Kikuyu, for example, who were expelled from their ancestral homes to

^{2.2} Makhan Singh. *History of Kenya's Trade Union Movement to 1952*. Nairobi. East African Publishing House (1969) pp. 10-1*1.

^{2.3} *Ibid.*

²¹⁴ Museums of Kenya. *Political History - Journey into Kenya's Past. op. cit*

Shiraz Durrani: *Never be silent: publishing and imperialism in Kenya. 1884-1963* 2006. London: Vita Books.

make way for the settlers, lost over 500,000 acres. Of these. Lord Delamere. one of the earliest settlers, took up over one hundred thousand acres. Other aristocrats like Lord Francis Scott, uncle of the Duchess of Gloucester, and Earl of Plymouth secured about 350,000 acres between them. The son of the Duke of Abercorn acquired an estate of 30,000 acres.²¹⁶

On the labour issue, one of the first challenges that the colonial authorities faced was how to force Africans to work for them in the settler farms and in the newly created sectors of employment such as the Kenya-Uganda Railways. The colonial Government therefore began in earnest to increase repression by introducing the "*kipande*",²¹⁷ pass system similar to the one in South Africa, to consolidate the forced labour system. The *Kipande* system required all African males to be registered which was enforced through the Native Registration Ordinance of 1919.²¹⁸

Jomo Kenyatta speaking at the First Session of the History of the Pan-African Congress in London on October 17th, 1945 stated of the Native Registration Ordinance:

"The Ordinance requires each African to carry his registration certificate on his person, so it is worn around the neck in a little box and must be produced on demand by the police or employer. Failure to produce means prison for one to two months or a fine of £7. The wage paid to the holder is entered upon the certificate, and as the labourer cannot read or write, they find when they receive their money at the end of the first month that very often they have been cheated. It often occurs that when a labourer has asked for 12/- a month he is given 5/-, and when he refuses to work further, he is

¹⁶ Museums of Kenya, *Political History - Journey into Kenya's Past, op cit*

Kipande was a registration certificate recording work periods, wages, comments by employers, and other employment-related matters. From 1920, all adult males were required to carry the Kipande under penalty of heavy fines. Also see Sicherman (1990).

¹⁸ Makhan Singh. *History of Kenya's Trade Union Movement to 1952. op cit*

chased by the police and forced to work a contract he has never signed."^{2,9}

From the constitutional developments during the formative years of Kenya's constitutionality, the study concludes that to secure legitimacy, a constitutional order must be inclusive of the aspirations of all the groups that exist in the society. It must not be designed only to secure the interests of a few elite or sections of the society. Its vision must therefore, be tied to the overall vision of democratic governance and social justice both of which were not part of the colonial constitutional design from the onset of Kenya's constitutionality in 1897.

3.3 The early African struggle against colonial constitutionalism in Kenya

This section highlights the organizational foundations of the early African struggle against British colonial constitutionalism in Kenya as well as the colonial Government's response to the Africans' demand for inclusive governance systems including land and labour reforms. This section tests the claim that fundamental constitutional change does not take place in an environment of relative peace and that the ruling elite will not support fundamental constitutional reforms unless the *status quo* is threatened by civil unrest.

The effects of the First World War and the emergence of an educated African class had perhaps the greatest bearing on the early political movement among Africans against the colonial rule in Kenya. First, the participation of

^{2,9} George Padmore (editor). *History of the Pan-African Congress: The East African Picture. October 17th. 1945. First Session, London (1947).*

Africans in the First World War increased their awareness that colonialism could be defeated through organised political activities. Aware of this risk, the colonial Government sought to divide the African population from the Indian community by various policies to divide African and Asian workers who were beginning to form a working class alliance.²¹⁰

Secondly, during the First World War, although thousands of Africans working as carrier corps lost their lives, the colonial Government took no steps to compensate them after the War.²²¹ On the other hand, after the War. "soldier settler" schemes for Europeans were set up. Through such schemes, the Government gave them large tracts of land for practically nothing.²²²

Thirdly, the mission educated Africans increasingly began to question missionary motives and objectives. It is no wonder that most, if not all, of the early group of mission-educated young men were to become the future political leaders and intellectuals of the "first generation".²²³

Against the above background, Africans started organising themselves into various social and political formations against British rule in Kenya. In 1919, a group of people who saw no other way to fight colonialism formed the

Shiraz Durrani: *Never be silent; publishing and imperialism in Kenya. 1884-1963. op cit*
²²¹ Jomo Kenyatta speaking at the First Session of the History of the Pan-African Congress in London on October 17th. 1945 estimated that 300,000 Africans were conscripted in 1914 to go and fight the Germans during the First World War. Of these. 60.000 did not return and those who returned found that their land had been taken away under the Crown Land Ordinance of 1915. See George Padmore (editor). *History of the Pan-African Congress: The East African Picture. October 17th. 1945, op.cit.*
— John Latto Farquharson(Ian) Buist, CB. Interview with Malcolm McBain on Tuesday 8 April 2008. *copyright: Ian Buist op. cit.*

²¹ Shiraz Durrani: *Never be silent; publishing and imperialism in Kenya. 1884-1963. op cit*

Kikuyu Association (KA). The Association opposed the land alienation as well as forced labour, tax increases, and the proposed wage cuts.²²⁴

Subsequently, Harry Thuku, Secretary of the Kikuyu Association formed the Young Kikuyu Association (YKA) was formed on 10th June 1921.²²⁵ He felt that the Association was not demanding enough from the colonial authorities in Kenya and that they should have sent directly to London their grievances.""" The Young Kikuyu Association immediately presented a Memorandum to the Chief Native Commissioner asking the colonial administration to desist from reducing the African wages and to enjoin the settlers to do likewise. The Memorandum denounced forced labour, opposed the *Kipande* registration system and complained of the high rates of hut tax.²²⁷

In July 1921, the Young Kikuyu Association (YKA) changed its name to the East African Association (EAA) in order to allow all Kenyan and East African nationalities to come together in one organization. The East African Association's main grievances included the proposed reduction in African wages, land alienation, compulsory labour recruitment, proposed increases in hut and poll taxes, and the *Kipande* laws. To EAA, the aim of these changes was to

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identify and locate African labourers and to control their movements."

The same year on 23rd December 1921, the *Piny Owacho* - Young Kavirondo Association (YKA) was, founded at a meeting at Lundha. Gem

²²⁴ *Ibid*

² Shiraz Durrani, *Never Be Silent: Publishing and Imperialism in Kenya. 1886 - 1963. op cit*

²²⁶ *Ibid.*

²²⁷ E.A. Atieno Odhiambo, "Politics and Nationalism in East Africa 1919-1935. in *General History of Africa VII: Africa under Colonial Domination 1880-1935. A. Adu Boahen (edit) Unesco. International Scientific Committee for the Drafting of a General History of Africa. Heinemann Educational Publishers, London (1985) p. 667.*

²²⁸ Makhan Singh: *History of Kenya's Trade Union Movement to 1952. op. cil*

attended by about 8.000 people.²²⁹ Other political movements formed to fight colonial rule included the Kavirondo Tax payers Association, an offshoot of Young Kavirondo Association, Taita Welfare Association, Akamba African Association, North Kavirondo Association and the Kikuyu Provincial Association.

From the labour movement front, after the First World War. Africans mainly organized as associations. Among these were the Kenya African Civil Servants Association and the Railway African Staff Association both formed after the First World War. The early trade unions which Africans were not allowed to join included the Indian Trade Union (Mombasa and Nairobi, 1914). Workers Federation of British East Africa (for European workers) formed in 1919, and the Indian Employees Association formed in 1919." Characteristically, most of the associations aimed to articulate African grievances against forced labour, low wages, heavy taxation, continuing land alienation, and racial discrimination.

The growth of strong organisations among the African and Indian peoples and the unity among them was beginning to worry the colonial Government and the settler community.²³¹ The petition presented by the Young Kavirondo Association to the Governor at Nyahera, Kisumu on 8th July 1922. however, triggered the alarm. The petition arose from the extraordinary public meeting, "Piny Owacho," held in Lundha, Gem on 23rd December 1921.

²²⁹ Shiraz Durrani. *Never Be Silent: Publishing and Imperialism in Kenya. 1886 - 1963. op at*

²³⁰ Museums of Kenya. *Political History - Journey into Kenya's Past, op cit*

²³¹ Shiraz Durrani: *Never be silent; publishing and imperialism in Kenya. 1884-1963 (2006). London: Vita Books*

Unlike the other associations such as the Young Kikuyu Association whose grievances revolved around land, labour and taxation issues, the Young Kavirondo Association questioned the legitimacy of the colonial Government and demanded self-determination for the people of Nyanza. The Association felt that the declaration of Kenya as a Colony represented not only an ominous attempt by the British to expose the lands in western Kenya to European settlement but also to change the status of Africans.²³²

According to E. A. Atieno Odhiambo, the petition presented to the Governor by the delegation of the Young Kavirondo Association consisted of eight key demands.²⁴ The first demand was the revocation of the Crown Colony status and reversion to the Protectorate status. The second demand was the establishment of a separate legislature for Nyanza as an autonomous administrative unit with elected African President. The third demand was the immediate abolition of the infamous *Kipande* registration system. The fourth demand was the reduction of hut tax and poll tax with a view to excluding women from taxation. The fifth demand was an increase in wages. The sixth demand was the granting of individual title deeds to land. The seventh demand was the abolition of forced labour and the dissolution of the labour camps at Yala, Rabuor, Nyahera and Pap Onditi. The eighth was the building of a government school in Central Nyanza.

²³² E.A. Atieno Odhiambo, "Politics and Nationalism in East Africa 1919-1935, p. 659. *op cit*
" *Ibid*

Although the colonial Government did not immediately grant any of the demands, the lesson was that the colonial government could only go so far with an increasingly aware and assertive mission educated young African leaders.²³⁴

The East African Association was also becoming more militant with the support of other nationalist associations in East Africa. As a result, the colonial Government decided to arrest its leader, Harry Thuku, on March 14, 1922. The Government had hoped that by arresting Harry Thuku, the organisation would consequently collapse.²³⁵ The working class, however, saw the arrest of Harry Thuku as a direct attack on their economic and political interests and therefore called a general strike.

Two days of demonstrations followed to protest his arrest. On the second day of demonstration on March 16, 1922, a crowd of seven to eight thousand gathered around the Central Police Station to demand his release from detention. The police and White civilians at the Norfolk Hotel responded by shooting the demonstrators killing twenty-five (25) people. The Government consequently exiled Harry Thuku to Kismayu without trial only to return to Kiambu in January 1931 after his release.²³⁶ The year 1922 therefore marked an important milestone in the African struggle against colonial rule. Makhan Singh states of the situation in Kenya by early 1922:

"The African people in Kenya were struggling united for their rights under the leadership of the East African Association. The militancy, enthusiasm and unity of Africans of all [nationalities] were being built from the Coast to Nyanza. Co-operation between Africans,

²³⁴ *Ibid*

Museums of Kenya. Political History - Journey into Kenya's Past. *op. cit*; Shiraz Dumini Never be silent, publishing and imperialism in Kenya. 1884-1963 2006 *op cit*

²³⁵ *Ibid*

Indians and progressive Europeans was also moving forward from strength to strength."²³⁷

However, after the detention of Harry Thuku and the disbanding of the East African Association (EAA) in 1925, the struggle against the colonial Government became more ethnic based. Consequently, East African Association was transformed into the Kikuyu Central Association (KCA) led by James Beuttah and Joseph Kang'ethe to champion the Kikuyu cause. In 1927. Jomo Kenyatta³⁸ joined KCA and became its General Secretary in 1928.

In 1929, Kenyatta was sent to London to be the KCA representative and to present a petition to the British Parliament. The KCA petition outlined its aims as the attainment of security of land; increased educational facilities of a practical nature; the abolition of hut tax for women; and elected representatives to the Legislative Council.²³⁹ Kenyatta however, stayed in England to return in 1946. The Kikuyu Central Association was eventually banned in 1940 when the Second World War reached East Africa.²⁴⁰

Against the backdrop of intensifying African struggle against colonial rule, the missionary societies assumed the responsibility of championing Africans' rights. It is perhaps due to their pressure that the British Government through the Devonshire White Paper of 1923 declared, "the interests of the African population would be paramount."²⁴¹ The Paper, however, stated that it was not yet time for the direct representation of Africans in the Legislative

Makhan Singh: History of Kenya's Trade Union Movement to 1952, *op.cil.*

⁸ Jomo Kenyatta's original name was Johnston Kamau.

⁹ E.A. Atieno Odhiambo, "Politics and Nationalism in East Africa 1919-1935. *op cil*

²⁴⁰ John Latto Farquharson (Ian) Buist. CB, Interview with Malcolm McBain on Tuesday 8 April 2008. *copyright: Ian Buist op. cit.*

³¹ Constitution of Kenya Review Commission, The Final Report of the Constitution of Kenya Review Commission, *op. cit.*

Council, presumably because they were not yet educated enough to engage in legislative deliberations.²⁴² Interestingly, Devonshire White Paper's declaration that the interest of the African population was paramount got backing from Lord Delamere and other white settlers even though for a different reason. They saw in this declaration, a means of preventing a large influx of Asians from the Indian sub-continent, and the formation of a common electoral roll that would turn Kenya into a country like Fiji or Mauritius.²⁴³

As result of the Devonshire White Paper, in 1924. the Government nominated a Scot, Dr John Arthur, a Missionary with the Presbyterian Church and one of the champions of Africans' rights, to represent African interests in both the Legislative and Executive Councils.²⁴⁴ In the same year (1924). the Government established the non-elective Local Native Councils (LNCs) under the Local Authority Ordinance to confine the African politics at the local level. The Local Native Councils operated under the District Commissioners, Field Officers and nominated Africans to sit in them.²⁴⁵ These measures remained far inadequate to satisfy the Africans' demands for fair representation.

The Hilton Young Commission (1929-1930) established to consider the prospects of greater Union in Eastern Africa presented another opportunity for various racial groups including Europeans, Indians and Africans through 37 political associations to present their grievances.²⁴⁶ The African groups complained about political marginalisation, lack of direct representation in both

²⁴² *Ibid.*

²⁴³ *Ibid.*

²⁴⁴ *Ibid.*

²⁴⁵ *Ibid.*

²⁴⁶ *Ibid.*

the Legislative and the Executive Councils, and the Crown Lands Ordinance of 1915²⁴⁷ that reduced Africans to tenants on their own land.²⁴⁸

The colonial Court in *Isaka Wainaina wa Gathomo and Another v. Murito wa Indangara and Others*²⁴⁹ interpreted the Crown Lands Ordinance to the effect that Africans were mere tenants at the will of the Crown with no more than temporary occupancy rights to the land.²⁵⁰ According to Ghai and McAuslan, "the disinheritance of the Africans from their lands was complete" by the time the Crown Lands Ordinance was enacted.²⁵¹

Despite the Africans' complaints, the Hilton Young Commission held the view that Africans were not, and could not be, in a position to protect their own interests in the central legislature. To this end, Sydney Webb, the New Colonial Secretary under the Labour Government, agreed in 1929 to nominate two people to represent Africans' interests in the central legislature. He also increased the importance given to the Local Native Councils. The spirit of Webb's constitutional vision was however, still that it was not yet time for Africans to

²⁴⁷ The Crown Lands Ordinance of 1915 defined crown land as "All public lands in the colons which are for the time being subject to the control of His Majesty by virtue of any treaty, convention, or agreement, or by virtue of His Majesty's Protectorate, and all lands which have been acquired by His Majesty for the public service or otherwise howsoever, and shall include all lands occupied by the native tribes of the colony and all lands reserved for the use of the members of any native tribes" (section 5 Crown Lands Ordinance of 1915)..

²⁴⁸ Constitution of Kenya Review Commission. The Final Report of the Constitution of Kenya Review Commission, *op. cit.*

²⁴⁹ *Isaka Wainaina wa Gathomo and Kamau wa Gathomo v. Murito wa Indangara*. Ngangj wa Murito and Attorney-General (1922-23) 9 (2) KLR 102.

²⁵⁰ George Mukundi Wachira, *Vindicating Indigenous Peoples' Land Rights in Kenya*. Doctor of Laws (LLD) Thesis, Faculty of Law, University of Pretoria (2008).

²⁵¹ Y.P. Ghai and J.P. McAuslan. *Public Law and Political Change in Kenya: A Study of the legal Framework of Government from Colonial Times to Present*. Oxford University Press. Oxford (1970).

actively participate in the Legislative Council as they still lacked the necessary capacity to do so."⁵ⁿ

The colonial Government therefore continued through coercion, detention, divide and rule policy and cooption of some of the African leaders to curtail the activities of the African political movements. Despite this, the African movements continued to articulate their grievances against the colonial rule. They challenged the legitimacy of the colonial regime and raised the land question through media and petitions to the British Parliament.

Because of the unceasing petitions by African delegations on the land question for example, the British Parliament eventually recommended in 1931 that the African land problems be looked into.^{25j} This led to the setting up of the Morris Carter Kenya Land Commission (1932-1934).⁵⁴ After listening to the African grievances, the Carter Commission made several recommendations." " Among the recommendations was the need for more land rights to Africans." "

In response to the Commission's recommendations, the colonial Government designed three new laws and introduced further amendments to two existing legislation.²ⁿ⁷ These included first, the Native Lands Trust

²⁵² Constitution of Kenya Review Commission, *The Final Report of the Constitution of Kenya Review Commission, op. cit.*

²⁵³ George Mukundi Waehira, *Vindicating Indigenous Peoples' Land Rights in Kenya, op cit*

^{nM} The Kenya Land Commission, popularly known as the Carter Land Commission, was appointed by His Majesty's Government through the Secretary of State for Colonics, in 1932. Charged *inter alia* with the recruitment of investigating the grievance and claims of the Africans to land that had been alienated for European settlement. The conclusions and recommendations of the Commission were accepted by the Imperial Government as the final settlement of all such claims and grievances in 1934.

^{'''} Carter. Morris; *et at. The Kenya Land Commission Report*. London: Government Printer (1934).

²⁵⁶ George Mukundi Waehira, *Vindicating Indigenous Peoples' Land Rights in Kenya, op cit*

²⁵⁷ T.O.A Mweseli, "The Centrality of Land in Kenya: Historical Background and Legal Perspective" in S.C. Wanjala (2000), *Land Ownership and Use in Kenya: Past, Present and*

(Amendment) Ordinance 1934; second, the Crown Lands (Amendment) Ordinance 1938; third, the Native Lands Trust Ordinance 1938; fourth, the Kenya (Natives Areas) Order in Council 1939; and fifth, the Kenya (Highlands) Order in Council 1939. The colonial Government also devised plans to co-opt the "civilized" Africans in order to deal with the dangers posed on the colonial hegemony and state.*

The land and agrarian reforms undertaken however skirted the fundamental constitutional questions raised by the Africans about the legitimacy of Crown Lands Ordinance and the historical land dispossession and injustices. Instead, they were based on the wrong assumptions that the problems in the native reserves were "due to overpopulation, bad land use, and defective tenure arrangements."²⁵⁹

Practically, the Commission's conclusions, recommendations and concessions to Africans were so conservative that any chance of a peaceful resolution of the African land grievances was becoming increasingly remote. Indeed, by the failure of this Commission to give an equitable settlement to the African claims of the Africans, particularly those of the Kikuyu, such grievances intensified egged on by the adamant refusal of the Kenya Government to reopen questions related to land.²⁶⁰

future. Essays on Land Law: The Reform Debate of Kenya. University of Nairobi. Nairobi (2000).

* T.O.A Mweseli, "The Centrality of Land in Kenya: Historical Background and Legal Perspective", *op. cit.*

\ George Mukundi Wachira. Vindicating Indigenous Peoples' Land Rights in Kenya *op cit*

Michael Simon Corav. The Kenya Land Commission 1932-34 and the Kikuyu. PhD Dissertation. University of California, Santa Barbara. USA (1973).

3.4 Emerging features of the colonial constitutionality

In final analysis, the study notes that the period from 1887 up to the beginning of the Second World War in 1939 was significant in the constitutional development of Kenya. The first two decades up to 1910 saw the occupation of Kenya and the establishment of the colonial constitutional order including political, administrative and economic infrastructure. The period after 1910 up to 1940 was essentially one of consolidation of the colonial governance system.

Essentially, the objectives of constitutional formation during the first fifty years of colonialism were first, to satisfy the exclusive imperial interests of the British in Kenya, and second, to secure the interests of a few aristocrats and the white settlers in Kenya. It is for this reason that the constitutional foundation established during this period would significantly influence and define the subsequent political economy of Kenya in many ways. Indeed, some of the exclusive, imperial and oppressive foundational elements of the colonial constitutionality would take over 100 years to unravel until the promulgation of the new Constitution of Kenya on 27th August 2010.

Overall, four key foundational features of Kenya's constitutionality emerged during the first fifty years of the British rule. First, the basic architecture of Kenya's colonial constitutional order was typically exclusive, imperial and oppressive against the majority African population. On the one hand, it guaranteed the rights and freedoms of a few settlers while on the other it negated the rights of the majority Africans through its oppressive and discriminatory legal and administrative system. This did not just plant the seed

of resentment and mistrust but also established the foundation for conflict between the colonial Government and the "native" Kenyans and between Kenyan communities themselves.

Secondly, the colonial Government established a system in which it conducted political engagements along ethnic and racial lines while confining African political participation to the local government level. This had the effect of stifling cross ethnic and racial political engagement as well as a nationalist approach to political debate.

Thirdly, to sustain the colonial state, the British resorted to force and deception through a repressive legal system supported by a rigid system of decentralised autocratic prefecture consisting of provincial and district commissioners, divisional officers, chiefs, sub-chiefs and headmen. This did not just establish a culture of authoritarianism but also bred the culture of impunity based on racial (and later ethnic) privilege and patronage. To this end, the colonial Government did not only use the law as a tool to control, dominate and suppress Africans and other minority racial groups but more importantly, used the legal system to secure and sustain the superior status of the white settlers in Kenya.

Fourthly, the colonial system from the very beginning was characterised by punitive and discriminative economic, social and political policies including alienation of land for white settlement, and enactment of harsh labour laws. Invariably, this situation entrenched massive social and economic inequalities in Kenya, which persisted to date.

Briefly, therefore, from the events leading to and after the detention of Harry Thuku and the Government's failure to address the pertinent African grievances, the study concludes that the British built an extremely perilous foundation for Kenya's colonial constitutionality. Thus in order to sustain the system, the Government resorted to violence and deceit. For this reason, the early colonial constitutional developments did not contribute, in any way, to building any sense of constitutional legitimacy in Kenya.

3.5 Conclusion

This Chapter has examined the formative stages of Kenya's constitutionality and the African response to the emerging colonial constitutionalism. The Chapter has explored the question of whether constitutional developments during the early period of Kenya's constitutionality contributed to building of constitutional legitimacy. The Chapter has in particular tested the claim that to secure legitimacy, a constitutional order must be inclusive of the aspirations of all the groups that exist in the society.

Overall, the study concludes that to secure legitimacy, a constitutional order must be inclusive of the aspirations of all the groups that exist in the society. More importantly, its vision must be tied to the overall vision of democratic governance and social justice both of which were fundamentally lacking in the early colonial constitutional system in Kenya leading to a crisis of legitimacy for the colonial administration.

The next Chapter (4) presents an assessment of the challenges of constitutional governance and change in colonial Kenya.

CHAPTER FOUR

**THE CHALLENGES OF CONSTITUTIONAL
GOVERNANCE AND CHANGE IN COLONIAL KENYA**

4.1 Introduction

Chapter Three has presented an analysis of the formative stages of Kenya's constitutionality. This Chapter assesses the challenges of constitutional governance and change in colonial Kenya. It interrogates the question of whether constitutional developments during the colonial period contributed to building of constitutional legitimacy in Kenya, and whether meaningful constitutional change can take place in an environment of relative peace.

This Chapter tests two basic assumptions. First, that for a Constitution making process to secure a legitimate outcome, it must be anchored on a deeper appreciation of the people's aspirations. It must not be undertaken merely to achieve short-term goals or to secure the interests of a few elite or sections of the society. Second, that fundamental constitutional change does not take place in an environment of relative peace. The ruling elite will not often support fundamental constitutional reform unless the *status quo* is threatened by civil unrest.

4.2 Constitutional governance challenges in colonial Kenya

This section assesses the constitutional developments in Kenya after the Second World War. It highlights the key constitutional challenges faced by the Government in sustaining colonial rule against the intensifying African political activity. The section tests the claim that for a constitutional order to secure legitimacy, it must be anchored on the aspirations of the people. The constitutional order must not be used just to secure the interests of a few elite or sections of the society. The study also tests the claim that fundamental constitutional change does not take place in an environment of relative peace. The ruling elite will not often support fundamental constitutional reforms unless the *status quo* is threatened by civil unrest.

The period after the Second World War saw phenomenal change in the colonial approach to governance in Kenya. This was largely influenced by the global political dynamics and lessons learnt from the War. At the global level, the major world powers saw the need to safeguard the state against the excesses that led to the outbreak of the war, which motivated constitutional reconstruction.²⁶¹

According to Francois Ventor, the main objective of the reconstruction was to establish conditions of stability and security within individual states and good relations among them.²⁶² The reconstruction, however, took place under different ideological standpoints. It directly mirrored the conflict between the ideologies of Soviet communism that took root in Eastern Europe on the one

^{•bl} Ventor Francois, *Constitutional Comparison: Japan, Germany, Canada and South Africa as Constitutional States*, *op. cit.*

²⁶² *Ibid*

hand, and liberal democracy that took root in Western Europe on the other hand.²⁶³

In Western Europe, the constitutional reconstruction process put emphasis on three main areas. First, it emphasized parliamentary democracy in which new constitutions conferred full legislative authority on elected assemblies. In this system, political parties became the main instruments of representation and rule.

Second, it emphasised decentralization of state power in order to remove the oligarchic rule of pre-Second World War continental Europe. The answer was the establishment of federal models, which would vary from state to state, depending on the country's historical underpinnings.

Third, emphasis was put on the recognition of civil and political rights, with most of the post-war constitutions proclaiming, in different ways, basic civil and political rights. This movement eventually resulted in the adoption of the Universal Declaration of Human Rights in 1948.^{2W}

The constitutional developments in Europe had repercussions in the rest of the world including Kenya. One such effect was the emergence of the liberation movements in the colonial territories due to their exposure to these developments. The constitutional developments in these territories would therefore be later patterned along those of their respective colonial powers or

²⁶³ *Ibid*

^{2W} *Ibid*

along the ideologies of those countries that had dominant political and military influence over them.²⁶¹

In Kenya, African opposition to colonial rule became even stronger after the Second World War as African political activity intensified and became more sophisticated. This was attributed to three key factors.

First, the African ex-soldiers who fought alongside the British during the Second World War realized that the white man was after all, not invincible. Upon their return, they joined the political movements while some of them formed an organization the Kenya Central Association with its military wing known as *Aanake A Forty* (The Forty Group) which later came to be known as Kenya Land and Freedom Army (KLFA) or "Mau Mau."²⁶⁶

Secondly, as more Africans moved to towns and cities and mixed with other ethnic and racial backgrounds, the first cross-ethnic and racial political movements developed. This led to the formation of Kenya African Study Union (KASU) in 1945 with Harry Thuku as the President. In 1946 KASU was renamed Kenya African Union (KAU) with James Gichuru as President. With an expanded agenda of gaining independence, the movement was considered by the colonial authorities as an enemy of the colonial state. As a result, it was refused registration while its leaders were constantly harassed and often arrested.²⁶⁷

Thirdly, the convergence of African political associations and multi-racial trade unions provided a more powerful and forceful platform to drive the

²⁶⁵ J.B. Ojwang, *Constitutional Development in Kenya: Institutional Adaptation and Social Change*, *op. cit.*

³⁴⁶ *Museums of Kenya, Political History - Journey into Kenya's Past. op. cit.*

²⁶¹ *Ibid.*

struggle against colonial rule. For example, there was close co-operation between the trade unions and the Kenya African Union (KAU) with many union officials such as Fred Kubai being active in the political movement. In 1949, the East African Trade Union Congress was formed. It quickly became a ginger group within the dominant nationalist political party, the Kenya African Union (KAU).²⁶⁸

As the struggle against colonial rule intensified, the first African, Eliud Mathu, was nominated to represent Africans in the Legislative Council after L.J. Beecher, a European Missionary, then representing African interests, resigned. Although Mathu was supposed to represent all Africans in Kenya, it was practically difficult for him to understand the problems experienced by Africans in every part of Kenya.

As a result, Africans demanded for their increased representation in the Legislative Council forcing the Government to nominate a second African, F.W. Odede, to the Legislative Council in 1946. Subsequently in 1947. B.A. Ohanga was nominated to the Legislative Council. In 1948, the number of nominated Africans in the Legislative Council increased to four and then to six in 1952.²⁶⁹

Jomo Kenyatta's return in 1946 added impetus to the political struggle. While KAU became the centre of African political activity, the Electors Union (EU) became the principal mouthpiece of the settler community in Kenya. KAU, on the one hand, fought for the total emancipation of Africans from

f Ibid

²⁶⁹ Constitution of Kenya Review Commission. The Final Report of the Constitution of Kenya Review Commission, *op. cit.*

British rule and agitated for full independence. Its goal was to overturn colonial rule, end racist and exclusionist policies, and replace the colonial Government with an indigenous one. Related concerns included reclaiming alienated land, defending the indigenous cultural heritage, and promoting the economic social development of Kenyans.²⁷⁰

On the other hand, the European Electors' Union considered constitutional plans that would have provided self-government for the white highlands while leaving the rest of Kenya under colonial control. Such provincial autonomy plans were meant to give Europeans the greatest possible measure of control over their own affairs. In 1948 therefore, the European Electors Union (EU) declared that its objective was to entrench the supremacy of white rule in Kenya and to move towards self-rule under the British Commonwealth.²⁷¹

Consequently, the Electors' Union published its Kenya Plan in 1949." The Plan advocated for greatest degree of local government autonomy in non-native areas of the colony under European leadership. Development and control of local government was seen as key to this Plan as it was to provide the means for greatest possible executive control by the European community."⁷³

The Electors Union's ideals, however, failed to win support from the majority of settlers, the colonial Government and the Colonial Office who did

²⁷⁰ *Ibid.*

²⁷¹ *Ibid*

Robert Maxon. *Constitution making in Contemporary Kenya: Lessons from the Twentieth Century. Kenya Studies Review: I, 1. 11-30. Kenya Scholars and Studies Association (KESSA) (2009).*

^m *Ibid.*

not favour the idea of provincial autonomy or devolution.²⁷⁴ Instead, both the colonial Government and the Colonial Office favoured a multi-racial unitary system of government, which also found support among such influential colonial political leaders as Earnest Vasey, Michael Blundell, and Sir Wilfred Havelock.²⁷⁵

However, with the slow political and economic change, the independence struggle greatly intensified and the African resistance became militant. To deal with the unfolding political crisis, the British Government adopted a four-pronged strategy involving military, economic, political and constitutional interventions.

From the military front, the Mau Mau insurgency brought about considerable political uncertainty and crisis in the 1950s.²⁷⁶ The Mau Mau or the Kenya Land and Freedom Army (KLFA), was born out of the military wing of the defunct Kenya Central Association called the Forty-Group.² The major grievances of Mau Mau included land alienation, racial discrimination and lack of political progress.²⁷⁸ Indeed, from 1952, due to the Mau Mau uprising, sensational accounts of violence flooded world news at the time.²⁷⁹

²⁷⁴ The idea of provincial autonomy was later taken up by KADU in the name of Majimbo and became a major point of negotiations during the Lancaster House Constitutional Conference II and III as discussed under sections 3.5.2 and 3.5.4

²⁷⁵ Robert Maxon, *Constitution making in Contemporary Kenya: Lessons from the Twentieth Century*, *op. cit.*

²⁷⁶ Mary L. Dudziak *Working toward Democracy: Thurgood Marshall and the Constitution of Kenya*, at <http://la.v.bcpress.com/usclwps/lewps/art47>. Hosted by The Berkeley Electronic Press(2006); Keith Kyle. *The Politics Of The Independence Of Kenya* (1999) pp 102-107; Robert L. Tignor *The Colonial Transformation Of Kenya: The Kamba, Kikuyu, And Maasai From 1900 To 1939*(1976).

²⁷⁷ *Museums of Kenya. Political History - Journey into Kenya's Past. op. cit.*

²⁷⁸ *Ibid*

Caroline Elkins (2005). *Imperial Reckoning: The Untold Story of Britain's Gulag in Kenya* (2005); E.S. Atieno Odhiambo and John Lonsdale (Eds), *Mau Mau and Nationhood: Arms, Authority, and Narration* (2003).

In response to the insurgency, on 24th August 1952, the British administration imposed curfew in three districts on the outskirts of Nairobi where arsonists were setting fire to homes of Africans who refused to take the Mau Mau oath. On 9th October 1952 Chief Waruhiu, a staunch British loyalist was shot and killed allegedly by Mau Mau gunmen.²⁸⁰ The British Government saw this as the first serious threat to the colonial state in Kenya.²⁸¹ Consequently, on 20th October 1952, the Governor, Sir Evelyn Barring, declared a state of emergency. On the following day, 21st October 1952, Operation Jock Scott was launched.²⁸²

During the Operation Jock Scott, the police carried out mass arrests and detention of people perceived to be either KAU leaders or Mau Mau sympathisers. These included Jomo Kenyatta, Achieng Oneko, Bildad Kagia, Kung'u Karumba, Fred Kubai, Paul Ngei and 180 other leaders.²⁸³ As a response to the Operation Jock Scott, on 25th November 1952, the Mau Mau declared open rebellion against British rule in Kenya. The British forces responded by arresting over 2000 Kikuyus suspected of being Mau Mau members. Within the first 25 days of the Operation Jock Scott, up to 8,000 people had been arrested.

In January 1953, six of the prominent detainees arrested for being KAU leaders in Operation Jock Scott were put on trial. They were charged with jointly managing a proscribed society, the Mau Mau, which had conspired to murder all white residents of Kenya. The court convicted and sentenced the six

²⁸⁰ Museums of Kenya. *Political History-Journey into Kenya's Past. op. cit.*

²⁸¹ *Ibid.*

²⁸² *Ibid.*

²⁸³ *Ibid.*

KAU leaders to seven years with indefinite restriction after release. In addition, Kenyatta received three years of hard labour." At the height of the emergency, there were more than 70,000 people held in various detention camps such as Hola and Manyani without trial.

Because of the increased threat to the stability of the colonial state, the Colonial Office directly assumed a greater role in the management of the affairs of the Colony. This was necessitated by the fact that the political crisis complicated Kenya's economic outlook and threatened the British interests in the global economic market since this was tied to the large-scale white dominated agriculture in Kenya among other colonies.^{28"}

To bring the Mau Mau insurgency under control, the colonial Government imposed a total ban on African political organization countrywide between 1953 and 1956.⁸⁷ The British also adopted a two pronged strategy that John Buist states involved first, luring the Mau Mau into open countryside to do battle; and second, creating protected villages surrounded and defended by the "loyalist" Kikuyu Home Guards to ensure that they had much less access to sources of food and support. The British in particular capitalized on what became known as the Lari Massacre³⁸⁸ to turn the Kikuyu opinion against Mau Mau.

Z md

Ibid; John Latto Farquharson (Ian) Buist. CB. Interview with Malcolm McBain on 'lue<l i> 8 April 2008. copyright Ian Buist op cit

Constitution of Kenya Review Commission. The Final Report of the Constitution of Kenya Review Commission, on cit

" Museums of Kenya. Political History - Journey into Kenya's Past, op cit

On 26th March 1953 the Mau Mau attacked loyalist (Home Guard) families in the area which came to be known as the Lari massacre. Approximately 14 people were killed and 50 wounded. The Lari massacre targeted Chief Luka Mbugua Kaliangara village. 28" Msndi <5t

On 21st October 1956, the colonial Government captured Field Marshall Dedan Kimathi and subsequently executed him on 18th February 1957.⁸⁹ Nevertheless, despite the execution of Dedan Kimathi, the state of emergency, the imprisonment of key nationalist leaders and the banning of political organization among Africans, the African political resolve for independence intensified. Instead of paralysing the African political momentum, these actions only acted to catalyse Africans' political activities. Some Mau Mau remnants also continued with the struggle in the forest.²⁹⁰

With the total ban on African political organization and activities, trade unions, which were exempt from the political restrictions, provided the alternative platform for agitation for independence. Members of these trade unions included lawyers and doctors, clerks, teachers, small merchants, urban workers, cash crop fanners and peasant farmers, among others. They became increasingly concerned and vocal about the running of the Colony just as the political elite had. Prominent leaders of the trade unions included Makhan Singh, Pio Gama Pinto and Tom Mboya.²⁹¹

The labour (trade union) movement under the Kenya Federation of Labour (KFL) led by Tom Mboya carried the banner of those nationalists

the night of the Mau Mau attack has come to be known as 'the Night of the Long Knives. Also see Museums of Kenya. *Political History-Journey into Kenya's Past, op. cit.*

²⁹⁰ Museums of Kenya, *Political History-Journey into Kenya's Past, op. cit.*

In fact, even after Kenyatta became the Chief Minister, these Mau Mau remnants continued with their activities. This forced Kenyatta to send troops to deal with them. In demanding that they (Mau Mau) stop their activities. Kenyatta told them thus: "we have got what we were asking for; we are on the way to independence, it's going to be achieved shortly; and that we are not having you (Mau Mau) terrorising ordinary people any longer."Perhaps because of Kenyatta's change of attitude towards the Mau Mau. it was to remain banned for nearly 40 years. The ban was only lifted in 2003 by the NARC government. See John Latto Farquharson (Ian) Buist, CB. Interview with Malcolm McBain on Tuesday 8 April 2008. *copyright Ian Buist op. cit.*

John Latto Farquharson (Ian) Buist, CB. Interview with Malcolm McBain on Tuesday 8 April 2008, *copyright: Ian Buist op. cit.*

clamouring for change. Mboya's tactical skills displayed as Secretary General of the Kenya Federation of Labour had greatly endeared him to the American

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unions.

The Kenya Federation of Labour fought against the injustices done to African workers and raised funds to assist those who had been evicted from the "white highlands." Because of the role of the trade unions, when in 1956 the colonial administration allowed the formation of political parties (at the district level) most of the leaders of the parties that sprang up were from the labour movement. Later when Africans were allowed to form national parties, leaders of the labour movement became deeply involved in the organisation of the political parties.²⁹³

From the economic front, the Colonial Office and the Kenya Government designed a strategy to create a "non Mau Mau" middle class through land and agricultural reforms. On land reforms, the Colonial Office established a task force consisting of Rowton Simpson, who was the Colonial Office Land Tenure Adviser, Anthony Webb, who was the Solicitor General in Kenya, and John Buist, Principal, Colonial Office (East Africa Department). The task force worked out in detail the land laws, which would confer absolute freehold tenure upon the owners of redistributed land in the white highlands."

With the land tenure reform in place, the Swynnerton Plan (1955) came in handy. Roger Swynnerton, the Director of Agriculture, had produced a plan to transform African lands into productive farms through production of cash

* *Ibid*

²⁹³ *Ibid*

²⁹⁴ *Ibid*

crops and modern farming at a small scale. In the Plan's estimation, the mounting political problems in Kenya over land could only be resolved through a restructuring of the property rights regime in the areas that were occupied by Africans."

As H.W.O. Okoth Ogendo has stated, while the goal of individualization of land tenure in Kenya was officially economic, it was also motivated by a desire to "create a middle class population which was anchored to the land and which had too much to lose by supporting the Mau Mau style revolt." The middle class who would have acquired western education and embraced its form of civilization would eventually be groomed to take over the reins of power." Thus, given the trappings that individual land tenure promised and the security of title it offered, the elites, who would later accede to power, chose to retain the *status quo*.^{2*7} Indeed, by the time Kenya gained independence in 1963, the individual land tenure had taken centre stage and all legal and policy frameworks were geared towards entrenching the *status quo*. Mweseli explains the reason for the retention of the *status quo* thus:

"Recognition of colonial land titles was the bedrock of transfer of political power. The nationalists accepted not only the sanctity of the private property but also the validity of colonial expropriations. The independence Constitution immortalized this negotiated position by declaring that there would be no state expropriation without due process. It is clear from historical processes that by the end of the 1960s, a distinct social category with stakes in the continuity of colonial property and political processes had emerged. This accounts

H.W.O Okoth Ogendo. *Tenants of the Crown: Evolution of Agrarian Law and Institutions in Kenya*, ACTS Press. Nairobi (1991).

^{2,6} *Ibid*

T.O.A Mweseli, "The Centrality of Land in Kenya: Historical Background and Legal Perspective" *op. cit.*; George Mukundi Waehira, *Vindicating Indigenous Peoples' Land Rights in Kenya*, Doctor of Laws (LLD) Thesis *op. cit.*

for the remarkable lack of transformation of the colonial land policies and property law regime after independence."²⁹⁸

In addition to the economic (land and agrarian) reforms, the British Government needed to craft a broader constitutional reform agenda to deal with both the immediate and long term aspects of the crisis.²⁴⁴ In May 1951 therefore, the British Government set forth a road map for future constitutional development in Kenya. The road map envisaged a consultative process and clearly laid down the achievement of consensus as a key ingredient in the process. To this end, the Secretary of State for the Colonies, James Griffiths, proclaimed that decisions regarding Kenya's future constitution would rest on realizing a broad agreement among the leaders of Kenya's racial groups including Africans, Arabs, Asians, and Europeans.³⁰⁰

He proposed the establishment of a body where all Kenya's people would be represented. The body would then consult and make constitutional recommendations to the colonial state and ultimately, to the British Government. An independent Chairman from outside the Colony would be appointed to lead the process. To support the body, the Secretary of State was prepared to obtain the services of a constitutional expert to advise on technical questions, if the delegates so desired. The consultative body, Griffiths hoped, would be able to reach agreement that could be reflected in a new constitution

²⁹⁸ T.O.A Mweseli, "The Centrality of Land in Kenya: Historical Background and Legal Perspective" *op. cit.* p. 22

Robert Maxon, *Constitution making in Contemporary Kenya: Lessons from the Twentieth Century*, *op.cit*

³⁰⁰ Great Britain. *Parliamentary Debates (Commons)*, 5th Session. 488 (31 May 1951): 408-09

that could be brought into force either in 1956 or an earlier date, if there was general agreement to do so.³⁰¹

Mr. Griffiths' road map, however, proved impossible to implement due to the outbreak of the Mau Mau rebellion and the consequent declaration of the State of Emergency in October of 1952. It did not just seem practicable during the emergency to hold talks of the nature contemplated in his roadmap.³⁰²

The new Secretary of State for the Colonies, Oliver Lyttelton therefore told members of the African Legislative Council (LegCo) in October 1952 that it would not do any good to call a multi-racial constitutional conference, which would meet to disagree.³⁰³ Mr. Lyttelton nevertheless stated that it remained imperative that no constitutional changes should be undertaken without the concurrence of representatives of all of Kenya's racial groups. The British and Kenya governments, however, were forced to revise this assessment in 1954 as the problems facing them because of the on-going insurgency called for urgent constitutional reform.³⁰⁴

According to Robert Maxon, perhaps out of fear for the future brought about by the Mau Mau rebellion, European leaders from the White Highlands Party (WHP) and Kenya Empire Party strongly advocated for provincial autonomy for the White Highlands.³⁰⁵ The two parties consequently merged in

³⁰¹ *Ibid*

³⁰² Verbatim Report of Meeting of SofS with African Representative Members on 30 October 1952, British National Archives (BNA): CO 822/460 cited in Robert Maxon. *Constitution making in Contemporary Kenya: Lessons from the Twentieth Century*.

³⁰³ Baring to SofS. secret and personal. 24 February 1953 and Lyttelton to Baring, secret and personal, 5 March 1953. BNA: CO 822/598; Also see Robert Maxon. *Constitution making in Contemporary Kenya: Lessons from the Twentieth Century*. *Kenya Studies Review*, *op cit*

³⁰⁴ Robert Maxon. *Constitution making in Contemporary Kenya: Lessons from the Twentieth Century*, *op. cit.*

³⁰⁵ *Ibid.*

February 1954 to form the Federal Independence Party (FIP). The Party's federalist message was heavily laden with anti-Asian rhetoric while believing that the provincial autonomy would appeal to the African population.³⁰⁶

In the Federal Independence Party's 1954 federal framework for Kenya's future, it called for separate governments for Africans and Europeans. They asserted that a government for Africans was essential because African political systems demanded political forms, which were not satisfactory to Europeans.³⁰⁷ The Party's federalism was designed to support certain core principles including first, irrefutable reservation of the white highlands for European settlement; second, the halting of Asian immigration to Kenya; third, racially segregated schools; and fourth, total opposition to racial intermarriage.³⁰⁸

In 1954, the British Government sent a British parliamentary delegation to Kenya to look for ways of resolving the escalating political situation. The delegation made a recommendation on the need to permit Africans to participate more in the politics of the country and to cultivate a multi-racial society. The delegation further recommended the need for an acceptable basis for the election of African representatives to the Legislative Council at the next general election. Consequently, the Government established a Commission to study the modalities of electing African representatives to the Legislative Council. The Government, however, decided that there would be no changes to the existing

³⁰⁶ *Ibid*

³⁰⁷ *Ibid*

³⁰⁸ *Ibid*

communal basis of franchise for Africans until the next general election

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expected in 1960.

The British Government therefore embarked on a significant political and constitutional reform process culminating in two key constitutional reform initiatives undertaken by two Secretaries of State for the Colonies, namely Sir Oliver Lyttelton in 1954 and Alan Lennox-Boyd in 1958. The two initiatives led to what became, known as the Lyttelton and Lennox-Boyd Constitutions.³¹⁰

The 1954 *Lyttelton Constitution* sought to, first, promote the principle of multiracialism; second, correct the anomaly in the powers and composition of the Executive Council; and third, regulate African political participation.¹¹

The Lyttelton Constitution established the ministerial system by creating the Council of Ministers and a cabinet office. The Council of Ministers consisted of three European representatives; two Asian representatives, one Muslim and one Hindu; and one African, appointed for the first time, to be Minister in charge of community development. The rest of the administration was taken up by the Chief Secretary, the Minister for Finance and other officials appointed by the Governor. There were also Assistant Ministers of which one was African and one an Arab. Although the portfolios were very unequal in weight, this distribution of office meant that all the non-Europeans had the first taste of Government.³¹²

¹¹ > Constitution of Kenya Review Commission. *The Final Report of the Constitution of Kenya Review Commission, op. cit.*

¹² *ibid.*

" Robert Maxon, *Constitution making in Contemporary Kenya: Lessons from the Twentieth Century, op. cit.*

Ibid

The Lyttelton Constitution further increased African representation in the Legislative Council (LegCo) and created the constitutional foundation for a future legislative assembly. Africans were also for the first time allowed to elect their representatives to the Legislative Council even though the communal electors' roll was very restricted based on education and property.¹¹ The Africans, in their election manifesto therefore, called for complete equality in representation in the Legislative Council.

To facilitate the electoral process, in 1956, the Government allowed formation of district political associations. The elections were subsequently held in early 1957. At the election, eight African leaders were elected. These included Daniel Arap Moi (Rift Valley); Ronald Ngala (Coast); Oginga Odinga (Central Nyanza); Tom Mboya (Nairobi); Masinde Muliro (North Nyanza); Lawrence Oguda (South Nyanza); James Muimi (Ukambani), and Bernard Mate (Central).³¹⁴

During the election campaign, the Federal Independence Party (FIP) sought to demonstrate that the call to a federal system of government enjoyed considerable backing among Europeans living in Kenya. To this end, the FIP sponsored candidates in the 1956 elections against the Leader of the European elected members in the Legislative Council, Michael Blundell, and his ally Norman Harris. In the election however, European voters failed to support the

¹¹ Museums of Kenya, *Political History-Journey into Kenya's Past. op. cit.*
^{3,4} *ibid.*

FIP position³¹⁵ as there was little support for provincial autonomy among Europeans.

The Federal Independence Party's failure in the election convinced its leaders that they needed to make a direct approach to the Colonial Office since it seemed that everything done by the Kenya Government was devised on some desk in Whitehall and then sent to Kenya for implementation."¹⁶ Consequently, Major F. W. Day, a coffee farmer and rancher, visited the Colonial Office in April 1957 to plead the FIP case. He met with W. A. C. Mathieson of the East African Department.

Mathieson suggested to Day that what he and the Federal Independence Party (FIP) really wanted was not a self-governing province in the White Highlands but a European county in the highlands with a county council vested with full powers over education and other social services. Such matters as agricultural practices and extension services would however, be left with a government at the centre controlled by civil service officials.³¹⁷

Based on Mathieson's advice, and with the eight African members joining the Legislative Council in March 1957 adopting a united nationalist stance, the Federal Independence Party (FIP) was forced to change its approach. It developed a new plan with greater emphasis on devolution rather than federalism or provincial autonomy. In the new Plan, the FIP claimed that since most Africans were still very primitive, the FIP plan would ensure that civilized modes of life spread to them.

³¹⁵ Robert Maxon, *Constitution making in Contemporary Kenya: Lessons from the Twentieth Century. op. cit.*

^{3.6} *Ibid.*

^{3.7} *Ibid*

As far as the constitutional future was concerned, FIP asserted that it should rest on the development of local government to decentralize administration as much as possible. On the one hand, FIP leaders believed that only the European dominated local government bodies were capable of running their areas efficiently. On the other hand, they believed that Africans lacked capacity to run government affairs in their areas. As such, in these areas, the colonial administrative system needed to continue. In their devolution plan, the Party identified the extension of powers for county councils in European settled areas as the basis for its revised policy.³¹⁸

Meanwhile, the new African members stepped up agitation for widened representation and formed the African Elected Members Organization (AEMO). They rejected the Lyttelton Constitution and demanded fifteen (15) more seats for the Africans in the Legislative Council as well as far reaching reforms across the board. They also refused to take up the positions reserved for them in the Council of Ministers until their demands were met. They were, however, unable to stop the participation of separately and specially elected Africans as well as Asians and Europeans elected on a new Common Roll.³¹⁹

The above events precipitated a governance crisis in the Colony that needed urgent solution. Alan Lennox Boyd, the new Secretary of State for the Colonies thus decided to take a fresh look at the constitutional arrangements of the Colony even though the Lyttelton Constitution was to last until 1960. He

² *ibid*

¹⁹ Constitution of Kenya Review Commission. *The Final Report of the Constitution of Kenya Review Commission, op. cit.*

called for the resignation of all ministers and initiated far-reaching changes in the constitutional order of the Colony.

The new 1958 Lennox-Boyd Constitution while retaining the key tenets of the Lyttelton Constitution especially with respect to multi-racialism abolished the Executive Council and increased the number of Africans in the Council of Ministers from one to two. The new Council of Ministers consisted of two (2) Asians, four (4) European ministers without portfolio, eight (8) Europeans and two (2) Africans. The powers of the Governor, however, remained unchanged under the new Lennox-Boyd Constitution.

The Lennox-Boyd Constitution increased the number of electable Africans to the Legislative Council from eight (8) to fourteen (14), the same number as Europeans. It also established an electoral college consisting of elected members to choose twelve (12) specially elected members to represent all communities. These were four (4) each for European, African and Asian communities. The Council of State was also established to protect minority rights.

In spite of the changes, the African representatives in the Legislative Council rejected the Lennox-Boyd Constitution and demanded total control of Government given their numerical superiority. They also demanded unrestricted universal suffrage. They refused to cooperate in the implementation of the Lennox-Boyd Constitution and even boycotted the Legislative Council save for the Council of Ministers. They further declared Jomo Kenyatta a respected leader of the country and demanded that 20th October, the day Kenyatta and others were detained, becomes a national day.

In November 1958, AEMO published a memorandum entitled "Our Pledge, Our Goals and Our Constitutional Proposals." The AEMO pledge was to "observe, perpetuate and safeguard" the ideals which included basic human rights within a democratic society in which equality of opportunity and of political and legal rights were key. The primary goal was thus to establish a "democratic society in Kenya, organized politically in accordance with the principles and patterns of parliamentary government."³²⁰

Sir Evelyn Baring, the Governor of the Colony, however refused to accept AEMO's demands leading to their withdrawal from participating in all proceedings of the Legislative Council. In response, all African members, one Asian and one European formed the Constituency Elected Members Organization (CEMO) to demand for further constitutional reforms. CEMO subsequently sent a multi-racial delegation to London to demand for the appointment of a Constitutional Advisor and a Constitutional Conference to discuss a new constitution that would lead to majority rule. The British Government later in 1959 acceded to the CEMO demands and appointed Professor W.J.M. Mackenzie of Manchester University to be the Constitutional Advisor.³²¹

From European and other racial groups' side, two distinct movements emerged. On the one side, there was an emergence of multi-racial politics, led by Michael Blundell and his influential friends from the European, Asian and Arab

³²⁰ Robert Maxon. *Britain and Kenya's Constitutions. 1950-1960*. Cambria Press. New York (2011).

³²¹ Constitution of Kenya Review Commission, *The Final Report of the Constitution of Kenya Review Commission, op. cit.*

groups. In March 1958. Mr. Blundell therefore formed a multi-racial group, the New Kenya Party.

The New Kenya Party manifesto included opening the White Highlands to all races. Based on this call, in October 1958, the Kenya Government issued a Sessional Paper proposing that the White Highlands be opened up. This was, however, to be based on good husbandry, supervised by a multi-racial Board. From these events, it was all too clear that Kenya would not be a settler country as the settler community's Electors Union (EU) had earlier wished in 1948

On the other side, Federal Independence Party (FIP) leaders⁵²³ moved to rebrand the party and developed their devolution plan in 1958. The Party's change in policy was accompanied by a change in name. The Party's conference held in Nakuru in May 1958 thus authorized a change of name from Federal Independence Part (FIP) to the Progressive Local Government Party (PLGP).⁵²⁴

A month after its formation, the Progressive Local Government Party published its constitutional blueprint in the form of a pamphlet titled *Kenya Constitution*. This blueprint had much in common with the 1957 plan and called for the rapid development of local government and Local Financial Control in all areas to the extent possible with sound administration.

However, despite the change of name and policy emphasis, neither the Colonial Office nor the majority of Europeans in Kenya supported the PLGP plan. Effectively, the British policy for future constitutional change in Kenya

»Ibid

^m These leaders included farmers in the Londiani and Fort Ternan areas of western Kenya such as B. P. Roberts and A. T. Culwick, a Nairobi construction firm owner L. E. Vigar, a coffee farmer and rancher. Major F. W. Day, and a western Kenya farmer A. E. C. Prescott.

⁵²⁴ Robert Maxon, *Britain and Kenya's Constitutions, 1950-1960, op cit.*

was that any alteration in the Constitution had to command reasonable support among all races. There was never any possibility that the new plan would be considered for Kenya's future/"⁵

By and large, the constitutional developments during the 1950s were neither based on any real negotiation nor consensus among Kenya's racially defined political groups and elites. Instead, the Colonial Office and the Governor of the Colony, Sir Evelyn Baring, worked out in advance what they wished to see implemented. Typically, therefore, both the Lyttelton and Lennox-Boyd constitutions were impositions by the Colonial Office (CO) and the Governor and had very little to do with the aspirations of the various racial groups and contexts within which they were made. African opinion and consent were not deemed critical and therefore not sought. However, in both instances, the strategy of non-negotiated, imposed constitutions proved unsuccessful.

Both the Lyttelton and Lennox-Boyd constitutions also failed to conform to any basic criteria associated with democracy. First, the Executive created after 1954 was dominated by a large number of unelected ministers and the holders of portfolios were racially determined to fulfil the aim of Britain in establishing a multi-racial Executive. Secondly, the makeup of the Council of Ministers did little to reflect the colony's population. Although, the great majority of the population was African, only a single African served as a minister under the Lyttelton Constitution while the Lennox-Boyd Constitution increased the number to two ministers.

ⁿ*ibid.*

Thirdly, the Executive was completely unaccountable to the Legislature under the Lyttelton and Lennox-Boyd constitutions. Since the Governor had the power to nominate unofficial members of the Legislative Council, the Council of Ministers could never lose a significant vote in the Legislature. Even more important, a vote of no confidence in the Executive could never succeed as such nominated members (as well as the *ex officio* members) had to vote as the Government desired. This practice ended up upsetting the democratic principles of checks and balances as well as separation of powers thereby entrenching a culture of impunity in which the Executive was never accountable to the Legislature.

Fourthly, the electoral system that was established was highly undemocratic. For example, while some racial groups such as Asians, Arabs and Europeans enjoyed universal suffrage, the Africans did not. Worse, the electoral system entrenched ethnic gerrymandering. For instance, during the first African elections held in 1957, the constituencies were arranged and voting qualifications set to make sure that at least one Kamba and one Kalenjin candidates were elected to the Legislative Council while making it difficult through a loyalty test for any Kikuyu candidate to be elected.

The electoral process was hence organized in such a manner as to punish or reward as the Governor deemed fit. On the one hand, the Kikuyu were to be excluded because they were seen by the Governor to have caused the state of emergency and Mau Mau rebellion. On the other hand, the Kamba and Kalenjin were to be included because they provided the bulk of the local security forces

^{3:6} **Robert Maxon, Constitution making in Contemporary Kenya: Lessons from the Twentieth.**
op. cit.

that fought the Mau Mau. The election produced just such an outcome as no Kikuyu was elected while the Kamba and Kalenjin members took seats in the Legislative Council.

When additional seats for African elected members were created in 1958, ethnic considerations continued to hold sway. In an interesting turn of events, the Governor, Sir Evelyn Baring, and the Colonial Office now desired a Kikuyu loyalist to be in LegCo as a reward for behaving so far. Constituencies were also structured to ensure the return of a second Kalenjin and Kamba member as well as a Maasai.

On the other hand, the colonial state made certain to structure the constituencies for the 1958 election so that no Luo or Luhya would be elected. This was because Luo members, namely Odinga, Mboya, and Lawrence Oguda together with the Luhya Muliro had distinguished themselves by what the colonialists viewed as radical nationalist demands for constitutional change and a campaign of non-participation in the Executive.³²⁷ Here again, ethnic electoral engineering was successful from the perspective of the colonial state. Unfortunately, the ethnic based electoral system, often at odds with concepts of majority rule and democratic governance, has continued to characterize Kenya political fabric down to the present.

Fundamentally, the processes of formulating including the form and content of both the Lyttelton and Lennox-Boyd Constitutions lacked broad support from various groups of the society. As a result, instead of resolving the

³²⁷ *ibid.*

crisis, they fomented a deep political and constitutional crisis forcing the Colonial Office to accept a negotiated constitutional process.

The study therefore concludes that for a Constitution making process to secure a legitimate outcome, it must not be undertaken merely to achieve short term goals and to secure the interests of a few elite or sections of the society. It must be inclusive of the aspirations of all the groups that exist in the society. Its vision must be tied to the overall vision of democratic governance and social justice both of which were fundamentally lacking in both the 1954 Lyttelton and 1958 Lennox-Boyd Constitutions.

The events of the 1950s including the Mau Mau rebellion also affirm the claim that first, fundamental constitutional changes do not take place in an environment of relative peace, and second, that the ruling elite will not support fundamental constitutional reforms unless the *status quo* is threatened by civil unrest.

4.3 Assessment of the constitutional developments towards Independence

This section assesses the Constitution making processes in Kenya through the Lancaster House constitutional conferences between 1960 and 1963. It highlights the shortcomings of the Lancaster House Constitution making processes and demonstrates how the failure to entrench democratic constitutionalism during this period set the stage for a protracted post independence search for a democratic constitutional order in Kenya.

This section therefore tests the claim that for a Constitution making process and its outcome to be legitimate, it must not be undertaken merely to

achieve short term goals and to secure the interests of a few elite or sections of the society.

4.3.1 The road to independence constitutional negotiations

The African opposition and refusal to accept both the Lyttelton and Lennox-Boyd constitutions doomed both to a much shorter life span than their planners had hoped. With the breakdown of the Lennox-Boyd Constitution and the multi-racial philosophy upon which it was built in 1959, a different path for constitutional change was set.³¹⁸ The Colonial Office by accepting a constitutional conference process where all Kenya's political elite would meet to negotiate the Colony's constitutional future therefore seemed to return to James Griffiths' multiracial consultative and consensus building process set out in 1951.³²⁹

Preceding the first Lancaster House Constitutional Conference two important events took place. First, Iain Macleod Alan succeeded Lennox-Boyd as the Colonial Secretary for Colonies. Secondly, the Colonial Office tapped Professor W.J.M. Mackenzie, a political scientist from Manchester University, as the constitutional adviser.

Besides offering advice to the Colonial Office, Professor Mackenzie paid two visits to Kenya during the second half of 1959. During his visits, he met with leaders of all the racially defined political groups. Professor Mackenzie's visits and advice not only helped the Colonial Office in preparing for the

³²⁸ *Ibid.*

³²⁹ *Ibid.*

Conference but also in setting the agenda for the first Lancaster House Constitutional Conference convened in January 1960.³³⁰

In general, the period leading to the 1960 Lancaster House Constitutional Conference was an unsettling time in the Colony of Kenya. First, although in January 1960 the government rescinded the state of emergency, many European settlers remained wary about the upcoming constitutional talks in 1960, especially the possibility of African rule in Kenya. At this time, the Colonial Office believed that Kenya might become independent in about fifteen (15) years time, that is, by 1975.³³¹

Secondly, although a seven-year state of emergency had ended, the ban on colony-wide political organizations remained in place. The Government also enacted the Detained and Restricted Persons legislation, which gave the Governor, and the Government, respectively, powers to control African political activities and to detain and hold persons for security reasons without trial.ⁱⁱⁱ

Thirdly, Jomo Kenyatta continued to be in detention even though he had completed his sentence.³³³ Finally, the white settlers felt that the whole idea of African rule was simply unacceptable and that no safeguards would be strong enough to protect the settlers' interests in an event of an African run government.

TM*Ibid*

Mary L. Dudziak, *Working toward Democracy: Thurgood Marshall and the Constitution of Kenya*, at <http://law.bepress.com/usclwps/lewps/art47>. Hosted by The Berkeley Electronic Press (2006).

Records of the Department of State. January 8. 1960. Despatch No. 337.

Mary L. Dudziak. *Working toward Democracy: Thurgood Marshall and the Constitution of Kenya. op. cit.*

³⁵⁴ *Ibid*

Against this background, the April 1959 announcement that a constitutional conference would be held in London in early 1960 to discuss Kenya's constitutional future triggered a political realignment especially among European politicians.

The New Kenya Party (NPK) earlier formed in March 1958 emerged as the voice of those advocating for a multiracial unitary government and power sharing among the racial groups. The Progressive Local Government Party (PLGP) leaders immediately opposed the New Kenya Party Plan. They made therefore common cause with Group Captain L. R. Briggs, a Nanyuki rancher and member of the Highlands Board, to form the United Party (UP) in August of 1959. While Briggs became United Party Leader, the Progressive Local Government Party (PLGP) stalwart, B. P. Roberts, became Deputy Leader and T. Culwick, became Chairman.³³⁵ Both B. P. Roberts and A. T. Culwick were farmers from the Londiani and Fort Ternan areas of western Kenya.

The United Party quickly put before the Kenya public its constitutional plan in August 1959. The Plan strongly opposed racial integration and called for Kenya's division into local government units based on racial and tribal divisions. Local government devolution was to provide each racial or tribal group full scope to develop along lines fitted to their own ideas. The central government was to rest in British hands, but there would be no legislative branch as the United Party called for the abolition of the Legislative Council.³³⁶ It is against this backdrop of political uncertainty that the Colonial Secretary, Iain Macleod,

³³⁵ Robert Maxon, *Constitution making in Contemporary Kenya: Lessons from the Twentieth Century, op. cit.*

³³⁶ *Ibid*

convened the first Lancaster House Constitutional Conference on 18th January 1960 as discussed below.

4.3.2 The first Lancaster House Constitutional Conference

The First Constitutional Conference convened on 18th January 1960 consisted of the colonial Government representatives and four delegations. The first delegation was made up of African Elected Members (AEM) or African nationalists who were all men born in Kenya. The second delegation, the multi-racial New Kenya Group, consisted of Africans, white British settlers and Indians. The third delegation consisted of Asian Indians only. The fourth delegation, the United Party, consisted of white settlers only.³³⁷ Thurgood Marshall, an advisor to the nationalist delegation, described the United Party delegation as worse than the Ku Klux Klan:

"...and the best way I can explain them is that if you compared them to the Ku Klux Klan, in its heyday in this country (United States of America), the Ku Klux Klan would look like a Sunday School picnic. These were real rabid, awful."³³⁸

At the Conference, Professor Mackenzie circulated papers setting out possible plans for the franchise and legislature under a new constitutional arrangement. These, however, failed to draw support from the two most important groups at the conference, namely the African Elected Member Organization (AEMO) delegation and the New Kenya Party (NKP).

³¹⁷ Mary L. Dudziak, *Working toward Democracy: Thurgood Marshall and the Constitution of Kenya, op. cit.*

³³⁸ Columbia Oral History Research Office, 1977: 445 cited in Mary L. Dudziak *Working toward Democracy: Thurgood Marshall and the Constitution of Kenya, op. cit.*

Professor Mackenzie had nevertheless made sure that federalism was not a part of discussions even though he recognized that the United Party had made devolution of power to local government bodies a part of its constitutional plan following its formation in August 1959. He further recognised that some New Kenya Party (NKP) leaders had also toyed with such ideas in late 1958 and early 1959. Professor Mackenzie urged party leaders and the officials at the Colonial Office to avoid discussion of the devolution system for Kenya, as it was likely to raise emotions on all sides and provoke strong opposition from African and Asian delegates.

However, by the time the first Lancaster House Conference began in January 1960, the United Party had lost most of its enthusiasm for devolution. As such, party leaders failed to raise the issue at the Conference and, as noted earlier, Professor Mackenzie worked to ensure that the issue did not come up for consideration.³⁹ The United Party leaders instead sought to gain support from Kenya's European population by pointing to what they claimed was sell out by Britain.

The change in policy that opened the White Highlands to farmers of other races was particularly a major issue that the United Party leaders emphasized. To this end, they now championed the cause of farmers who wished to sell their farms and depart from the Colony. This drew considerable support from the European farming community after the conclusion of the first Lancaster House Conference as most felt that their future in Kenya was bleak

³⁹ Robert Maxon. *Constitution making in Contemporary Kenya: Lessons from the Twentieth Century*, *op. cit.*

and the sooner they left the better.³⁴⁰ Devolution schemes had little appeal in

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these circumstances.

The Conference, however, started with a dispute over the nationalists' choice of Peter Mbiyu Koinange, a nationalist in exile, as one of their two advisors. The other advisor was Justice Thurgood Marshall³⁴¹ from the United States of America.³⁴³

Whereas Blundell's New Kenya Party and the rival United Party's all-white group were prepared to sit down with the African Elected Members, they were completely opposed to anyone taking part that had anything to do with Mau Mau. Knowing this, the African Members deliberately insisted that they wished to have as their permitted delegation Adviser, Peter Mbiyu Koinange.⁴¹ On the other hand, the British Government objected strongly to Koinange, calling him "one of only two men outside Kenya regarded as having special responsibility for the unhappy events which led to emergency in Kenya."

The African Elected Members, however, insisted that they would boycott the Conference if Koinange were barred from playing his advisory role. The Africans insisted on Koinange partly because they had given in to "the whites'

³⁴⁰ *Ibid.*-, Extract from Kenya Intelligence Committee Appreciation No 10/60. BNA: CO 822/2107, cited in Robert Maxon, *Constitution making in Contemporary Kenya: Lessons from the Twentieth Century*, *op. cit.* Constitution making

⁵⁴¹ Robert Maxon. *Constitution making in Contemporary Kenya: Lessons from the Twentieth Century*, *op. cit.*

³⁴¹ Justice Thurgood Marshall is one of the major figures in American law. Before he began writing constitutional law as a Justice in the United States. Marshall played the role of a Framers, crafting constitutional principles in the first instance.

³⁴³ Mary L. Dudziak. *Working toward Democracy: Thurgood Marshall and the Constitution of Kenya*, *op. cit.*

⁴⁴ Koinange was a son of the senior chief believed to have organised the murder of senior chief Waruhiu, which had triggered off the Emergency. Peter Koinange was in effect in exile in Britain; he knew he would have been detained instantly if he had returned to Kenya.

³⁴⁵ Mary L. Dudziak. *Working toward Democracy: Thurgood Marshall and the Constitution of Kenya*, *op. cit.*

insistence that Jomo Kenyatta, convicted and exiled on a charge of leading the Mau Mau terrorists in 1952, could not be one of their delegation."³⁴⁶ In this regard, the African delegation feared that if they gave in to the objections to Koinange's role, the people back home would accuse them of selling out and any agreement they would make at the conference would be regarded with

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suspicion.

The delay went on for about two weeks until the dispute was resolved by Macleod negotiating a compromise. The agreement was that each delegation was entitled to one adviser in attendance at the sessions in Lancaster House. There, however, would be badges issued to unnamed "advisors" to each delegation, which they could allocate as they wished but on the condition that such "advisors" could not attend sessions. They could nevertheless be present in the building.³⁴⁵ The African Members promptly gave theirs to Peter Koinange.^{34"}

During the Conference debate, the African Elected Members emphasized the importance of moving towards democratic self-governance and a Bill of Rights enforced by an independent judiciary. They argued against the idea of reserving seats in the legislature for the racial minorities stressing that the "best

³⁴⁶ Cleveland Call and Post of January 30, 1960:3A. cited in Mao L. Dudziak "Working toward Democracy: Thurgood Marshall and the Constitution of Kenya", *op. cit.*

³⁴⁷ Mary L. Dudziak. Working toward Democracy: Thurgood Marshall and the Constitution of Kenya, *op. cit.*

³⁴¹ Telegram No. 3666. January 23, 1960, Records of the Department of State. R.G. 59. cited in Mary L. Dudziak "Working toward Democracy: Thurgood Marshall and the Constitution of Kenya", *op. cit.*

³⁴⁹ John Latto Farquharson (Ian) Buist. CB, Interview with Malcolm McBain on Tuesday 8 April 2008. *op. cit.*

form of safeguard for all races in Kenya was the Bill of Rights enforced by an independent judiciary."³⁵⁰

The New Kenya Group shared the view of the nationalist group on the question of reserved seats, protection of individual rights and importance of an independent judiciary. The Asian group while supporting the move towards self-rule and protection of human rights also emphasized the importance of Asians in the economic progress of Kenya.³³¹

The United Party members stressed not voting rights, but broader education for the Africans instead of their full enfranchisement. The United Party leader L.R. Briggs, however, expressed deep fear about the unfolding events at the Conference stating that:

"... if a constitution were introduced which would have the effect of placing the Europeans under the dictatorship of the Africans, then we would naturally wish to enable our people to leave the country if they wished to do so."³⁵²

Against this background, Iain Macleod argued for a gradual transition in Kenya to provide time for the races to work together. He pointed out that "this should help to generate mutual goodwill, respect and understanding."³

In the final analysis, the emotive issues of safeguards and property rights are what drove a wedge between groups and bogged down the Conference. Indeed, the Africans were "getting uneasy about the extent to which they had

³⁵⁰ Mary L. Dudziak. *Working toward Democracy: Thurgood Marshall and the Constitution of Kenya*, *op. cit.*

Record of the Fourth Plenary Session. Kenya Constitutional Conference. 1960. January 25, 1960, p. 5-6.

³⁵² Ghana Times of February 9, 1960.

³⁵³ Secretary of State for the Colonies to Kenya (O.A.G.). Telegram no. 30. February 15, 1960, cited in Mary L. Dudziak "Working toward Democracy: Thurgood Marshall and the Constitution of Kenya", *op. cit.*

accepted the Colonial Office's and Blundell group's proposals. While they recognized the merits of the proposals, they worried about the reaction of their constituents in Kenya."⁴

In Macleod's view, while the Africans were willing to compromise except for fear of repudiation at home, the main obstacle to consensus building seemed not to be the New Kenya Party as a whole, but Humphrey Slade who he described as "something of a fanatic." For this reason, Macleod considered bringing Slade to see the Prime Minister. He felt that an appeal to Slade on the wider grounds of the importance of the Kenya agreement to the whole of Africa would be the only possible way of breaking through his rigid position as reason alone would not do it.³"

With no consensus on the questions of safeguards and property rights, Macleod imposed a new Constitution and brought the Conference to early conclusion. The all European United Party delegation refused to accept the new plan which provided for an African majority in a reconstituted Legislative Council, but Macleod did not let this European opposition stand in his way

As a way forward, Macleod, however, proposed that legal provisions be made in the proposed Constitution to provide for the judicial protection of human rights. This was to be drafted along the lines of the provisions in the Nigeria (Constitution) Order in Council while taking into account the special

^{1,4} Telegram no. 4088. February 18. 1960. Records of the Department or State. RG 59, cited in Mary L. Dudziak "Working toward Democracy: Thurgood Marshall and the Constitution of Kenya", *op. cit.*

Macleod to Prime Minister. February 20. 1960. cited in Mary I. Dudziak "Working toward Democracy. Thurgood Marshall and the Constitution of Kenya," *op. cit*
Ibid

circumstances of Kenya as well as the draft prepared by Dr. Thurgood Marshall.³⁵⁷

The Conference Report was placed before the British Parliament on February 25, 1960. The British Parliament and Her Majesty's Government subsequently endorsed the Macleod constitutional proposals. The outcome became known as the "Macleod Constitution" or the Kenya (Constitution) Order in Council. 1958 to 1961.³⁵⁸

The Macleod Constitution made a number of key provisions including first, a Legislative Council of sixty-five (65) members.³⁵⁹ The second provision was election of constituency members based on a common roll. The third provision related to nomination of certain members to the Legislative Council. The fourth provision related to establishment of a Council of Ministers appointed by the Governor. The fifth provision was related to a Bill of Rights based on the corresponding provisions of the Federation of Nigeria.^{3*0}

Of the sixty-five members of the Legislative Council, thirty-three (33) seats were reserved for Africans on a wider and qualified franchise while the other seats were distributed as follows: Europeans (10), Indians (8) and Arabs I (2). There were also twelve (12) national seats distributed to Europeans (4), Africans (4), Indians(3), and Aiabs (I). The Governor however, retained powers of nominating additional members³⁶¹ to the Legislative Council.³⁶²

³⁵⁷ *Ibid.*

The Kenya Gazette. Vol. LXII (February 25, 1960). p. 247.

The 65 members were elected in March 1961 and it is them that represented Kenya at the second Lancaster House Constitutional Conference in February-April 1962.

" Robert Maxon. Constilution making in Contemporary Kenya: Lessons from the Twentieth Century, *op. cii.*

On May 10 1961, the Governor nominated 10 members to the Legislative Council out of which four were Africans. He also nominated four officials including the Chief Secretary and

In a major departure from the previous constitutional processes, Iain Macleod viewed African agreement to his plan as significant. Thus unlike the 1954 Lyttelton and 1957 Lennox-Boyd constitution development processes, there were some negotiations between the largely racially defined political groups represented at the Conference even though this inter-racial bargaining produced no bargain.³⁶³

At the end of the day, none of the members present at the first Lancaster House Conference felt satisfied with the outcome. For the African leaders, the Constitution was insufficient as far as it left intact the communal and racial basis of representation. The Macleod Constitution was therefore not an outcome that they would fully embrace except for the fact that it formed a basis for future negotiations.

On their part, the European settlers felt that the Macleod Constitution was a betrayal. The United Party therefore denounced the Conference as a deathblow to the European community as "the reported proposals would virtually mean that Europeans and Asians would no longer have genuine representation."³⁶⁴ Although the New Kenya Party accepted Macleod's imposition, the lack of agreement among the other political groups over Kenya's constitutional future greatly diminished the legitimacy of the Macleod Constitution.

Ministers of Defence, Legal Affairs and Finance. This brought the total membership of the Legislative Council to 79 consisting of 53 elected members; 12 national members; 10 nominated members and 4 officials.

⁵⁶² Wanyiri Kihoro, *A vision of the future from the past. Essential Public Documents in the Making of the New Constitution*. Edited with Commentary by ABANTU for Development. Nairobi (2002).

Robert Maxon. *Constitution making in Contemporary Kenya: Lessons from the Twentieth Century*, *op. cit.*

³⁶⁴ Ghana Times, February 15, 1960.

Overall, from the events both in London and Nairobi, it would appear that the colonial authority in Kenya had reached its limits and that Britain had made up its mind to divest itself of its colonial responsibilities as expeditiously as feasible.³⁶⁵ At the end of the first Lancaster House Constitutional Conference, therefore, the issue was no longer, if Kenya would become independent but when that would happen.

4.3.3 The second Lancaster House Constitutional Conference

Although African political parties remained banned, nationalist leaders continued to agitate for independence, and by 1960, it had become clear that majority rule was on its way. Indeed, despite the Macleod Constitution designed to last until 1961, by 1960, the demands for constitutional change had become overwhelming.

The implementation of the Macleod Constitution, however, brought to the fore divisions among the political elite especially Africans. On the one hand, on 27th March 1960, about 120 African nationalists met at Kirigiti stadium in Kiambu where the Kenya African National Union (KANU) was founded to mobilize the people for the final assault on colonialism. On W* June 1960, KANU was registered as a political society.³⁶⁶ KANU at this time had a generally left-of-centre ideology. It called for immediate independence, a

³⁶⁵ Mary L. Dudziak. *Working toward Democracy: Thurgood Marshall and the Constitution of Kenya*, *op. cit.*

³⁶⁶ *Museums of Kenya. Political History - Journey into Kenya's Past. op. cit.*

unitary state, a republican government, and a strong state presence
r c c o o o a i y . * *

the other hand, in April 1960, Ronald Ngala, Masinde Muliro and
M rejected positions KANU offered them. They soon propagated the
t Majimbo or regionalism. These leaders and others who feared
k « r h > the larger ethnic groups therefore joined forces at a meeting held
◊ n 25* June 1960 to form the Kenya African Democratic Union
KADI was essentially a coalition of a number of parties representing
tribes" and those who favoured a federal system of government. These
k.ilenjin Political Alliance; the Maasai United Front; the Coast
I num. the Baluhya Political Union and the Somali National
A. « « n b l y ^H *

I like KANI . KADU demanded independence, but it wanted a federal
irjic ant I miteJ central government in order to protect the interests and rights
n • ethnic groups. While the coastal Arabs and the Somalis in the
n. • extern Kenya demanded secession, the Maasai wanted their areas to
under the British rule.³⁶⁹ Both Africans and the British rejected these
rmt claims and the demands by the Maasai. In ideology, KADU was
. more conservative and favoured a capitalist economic system with
interference.³⁷⁰

• v - a R o i c w Commission. The Final R e p o r t o f the Constitution of Kenya
approved for issue a. the 95* Plenary Meeting of the Comm. ssion on 10
XXH. c p c k
. (onuiition making in Contemporary Kenya: Lessons from the Twentieth
< r < *

From 1960 onwards, the independence constitutional struggle in Kenya therefore oscillated between KANU - the National Union - and KADU - the Democratic Union. The latter represented the smaller ethnic groups against the former that represented the dominant Kikuyu-Luo alliance. The two nationalist parties would hence make constitutional bargaining a central feature of their political struggles and would eventually form two separate delegations to the second Constitutional Conference in 1962.

In 1961, the British Government finally conceded to the principle of majority rule and began the Lancaster House constitutional process. It also lifted the ban on African political parties/⁷¹ This not only allowed KANU and KADU to operate legally as political parties but also paved the way for the first general elections in Kenya in which African political parties were free to compete for power.

The first election on a broad electoral register was consequently held in March 1961. KANU won the elections with 61 percent of the vote and 19 seats in the Legislative Council compared to KADU's 16 percent and 11 seats.^{37*} However, in protest at the continued imprisonment of Jomo Kenyatta, KANU refused to take office.

KADU members of the Legislative Council with support from European and Asian members therefore moved to form the Government. KADU had hoped that by taking the lead in forming the Government, the Party would seize the opportunity to lead Kenya to independence. However, when it became clear that the British Government would not agree to this, KADU leaders turned

TM*fbid*

¹ ² Museums of Kenya, *Political History - Journey into Kenya's Past, op. cit.*

strongly to embrace the concept of regionalism or *majimbo*.³⁷³ KADU leaders came to recognize the party's minority status in Kenya as the March 1961 election had demonstrated.³⁷⁴

The second half of 1961 was therefore, to witness a new approach to federalism, this time from KADU. Just as with the European-inspired schemes of the 1958-1959, the KADU plan was defensive in nature based upon the question of ownership of land.

Given KADU's and a few other Europeans' strong positions on the federal question, the Colonial Office decided to drop Professor Mackenzie as a constitutional advisor at the second Lancaster House Conference mainly due to his strong opposition to the idea of federalism. Instead, the Secretary of State turned to a former colonial civil servant then serving as legal officer for the Commonwealth Relations Office, Sir Ralph Hone. Mr. Hone, a former Attorney-General of Uganda, had considerable experience with constitutions, notably the federal system established in Malaya.

As Colonial Office Advisor, he therefore spent parts of December 1961 and January 1962 in Kenya.³⁷⁵ From his arrival in Nairobi, his lack of sympathy for KADU's *majimbo* ideal was apparent. Indeed, after an initial submission on 11 December 1961, KADU leaders had nothing to do with Hone.³⁷⁶ KADU hired their own constitutional advisor, Dr. Edward Zellweger, who worked

¹ ' Robert Maxon, *Constitution making in Contemporary Kenya: Lessons from the Twentieth Century*, *op. cit.*

³⁷⁴ *Ibid*

³⁷⁵ *Ibid*

³⁷⁶ KADU Initial Submission to Sir Ralph Hone. 11 December 1961. Blundell Papers. Box 19/4. RH. Mss. Afr. s 746 cited in Robert Maxon, *Constitution making in Contemporary Kenya: Lessons from the Twentieth Century*, *op. cit.*

secretly with them to develop a constitutional plan that they presented at

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Lancaster House II.

Hone on the other hand, worked more closely with KANU particularly those allied to Tom Mboya as the party put in shape its constitutional model. He also sent reports to the Colonial Office in January 1962 setting out what he thought might be the positions of KADU and KANU at the conference.³⁷⁸

Although it was hoped that the Colonial Office would use Hone's recommendations to find some common ground between the constitutional plans of KADU and KANU, this did not happen. Hone's discussions with Mboya convinced him that KANU was deeply divided between moderates and radicals. Hone reported to London that the moderate elements under Tom Mboya's leadership supported by the Europeans in the party were gravely worried over the activities of the radicals led by Jaramogi Oginga Odinga, Paul Ngei, and others on the left of the party. Hone concluded that this radical group within KANU was almost certainly getting considerable financial and other support from Communist sources.³⁷⁹

What was particularly worrying about this left wing faction in KANU according to Hone was that they would likely not abide by the party's official position on land. This analysis led Hone to recommend to the Colonial Office that British strategy at the Conference should be to provoke a split in KANU

TM*Ibid*

^{3 5} Robert Maxon. *Constitution making in Contemporary Kenya: Lessons from the Twentieth Century, op. cit.*

³⁷⁹ *Ibid*

and encourage Mboya, James Gichuru and other moderates in KANU to join

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forces with the moderate elements in KADU.

Hone's recommendation was adopted by Secretary of State, Reginald Maudling, prior to the start of the conference. This may explain why KADU's constitutional plan received some sympathy from the Colonial Office despite its total lack of support for the regionalism or *majimbo* plan for Kenya's future constitution. However, because of KADU's stubborn and uncooperative tactics at the conference, the anticipated split between the moderates and radicals in KANU did not materialize.³⁸¹

Overall, the period leading to the Conference was essentially characterized by tensions among many African politicians jostling for positions of leadership. Jomo Kenyatta's role whether in or out of prison was a point of disagreement within the African leadership. For instance, when Odinga asserted that Kenyatta was the leader of the Africans, Kiano retorted that the only legitimate African leaders were "those of us whom you elected and the chiefs." Kiano could not conceive of people other than those approved by the colonial Government as leaders.³⁸²

To address some of the sticking issues among the political elite before the start of the second conference, therefore, the Colonial Secretary, Reginald Maudling, mandated the Governor, Sir Patrick Muir Renison, to convene pre-

⁵⁵⁰ Hone, Conference Prospects, nd. enclosure in Griffith-Jones to Monson. secret and personal. 15 January 1962. BNA: CO 822/2238.

¹⁸¹ Robert Maxon. Constitution making in Contemporary Kenya: Lessons from the Twentieth Century, *op. cit.*

⁵¹¹ Macharia Munene. *Constitutional Development in Kenya; A Historical Perspective*, text from Law and Development in the Third World, *op. cit.*

conference talks in Nairobi. The talks began in September 1961 under the Chairmanship of the Governor.³⁸³

The pre-conference talks aimed to first, explore the possibilities of finding an agreed approach to Kenya's constitutional problem. Second, determine specific and early steps to bring Kenya to full internal self-Government. Third, form a joint government that would depend on the agreement reached by the different political leaders. Fourth, prepare the constitutional framework, which would offer the best chance for Kenya to move smoothly through internal self-government towards a stable independence. Fifth, enable the different parties to reach an agreement in-so-far-as the principles on which Kenya's new Constitution would be framed.³⁸⁴

The Colonial Secretary, Reginald Maudling, also eventually visited Kenya in November 1961. During this visit, Maudling, while appreciating the exciting and almost boundless prospects for Kenya if the constitutional process went well, also warned the parties of the dangers facing the country if the talks failed.³⁸⁵

The Second Lancaster House Constitutional Conference convened from 14th February 1962 to 6th April 1962. The delegates to the Conference consisted of six main groups. These were KANU Parliamentary Group led by Mr. Jomo Kenyatta; KADU Parliamentary Group led by Mr. Ronald Ngala; the Kenya Coalition led by Mr. L.R. Maconochie Welwood; the Mwambao United Front

Wanyiri Kihoro. A Vision of the Future from the Past. Essential Public Documents in the Making of the New Constitution. Edited with Commentary by ABANTU for Development Nairobi (2002)

The Report of the Kenya Constitutional Conference 1962 cited in Mary L. Dudziak Working toward Democracy: Thurgood Marshall and the Constitution of Kenya, *op. cit.* *Ibid.*

led by Mr. O.S. Basaddiq; the Kenya Cross-Benchers; and the Government officials and their advisors.

Only the sixty-five (65) elected members of the Kenya Legislative Council were allowed to participate in the Conference.³⁸⁶ Because of this restriction, a number of potential contributors were left out among them, Paul Ngei, who later established the African People's Party (APP). Kenyatta barely managed to be part of the delegation because a member of the Legislative Council, Mr. Kariuki Njiiri, stepped down for him/⁸⁷

Unlike the first Lancaster House Constitutional Conference, the main political protagonists at the second Conference were not Africans and white settlers but the Kenya African National Union (KANU) and a coalition of Kenya African Democratic Union (KADU), Asian interests, European interests, and the preferences of the British Government.³⁸⁸ The Conference was therefore set against the backdrop of fractured nationalist politics due to both ethnic and ideological differences.

The primary concerns of constitutional negotiations at the second Lancaster House conference had thus significantly shifted from issues of safeguards, land and the Bill of Rights to issues of regional versus national governance or unitary versus quasi-federal systems of government.

^{3,6} Report of the Kenya Constitutional Conference 1962. cited in Mary L. Dudziak. *Working toward Democracy: Thurgood Marshall and the Constitution of Kenya*, *op. cit.* Also see G.G.W. Nthenge. "Building on the Lancaster Experience" in the CKRC, Report of the Constitution of Kenya Review Commission. Volume Five Technical Appendices. Part One. Approved for Issue at the 68th Meeting of the Commission Plenary Held on 10th April 2003.

¹⁵ Macharia Munene, *Constitutional Development in Kenya: A Historical Perspective*, in *Law and Development in the Third World op. cit.*

^{3W} *Ibid.*

While KANU's stated goal was to unite Kenyans under one party in preparation for independence, KADU's main objective was to protect the minority (indigenous) communities through federalism.³⁸⁹ KADU wanted a constitution that provided for regional assemblies with power over land as well as responsibility for various government functions such as education and health care.

KADU further made the creation of a democratic and non-authoritarian system for Kenya a key characteristic of its constitutional model. Such a model, it was assumed, would provide opportunities for leadership roles and patronage opportunities for party leaders. The latter aspect clearly distinguished the KADU plan from that earlier propounded by the Federal Independence Party (FIP), the Progressive Local Government Party (PLGP) and the United Party. KADU called for an independent republic with a two-house parliament and executive, which aimed at power sharing (i.e. the cabinet had to include a minister from each region). In particular, KADU's plan called for a Head of State to be elected annually by the Council of Ministers. Such a leader could only serve two consecutive terms.

To effectively deal with the key issues of contention among and between parties at the conference, the Conference set up a number of committees. These included first, the Steering Committee; second, Committee on the Structure of Government; third, Committee on the judiciary and the public service; fourth, Committee on land and citizenship; fifth, Committee on the Bill of Rights; and

⁵⁸⁵ Githu Muigai, *Constitutional Amendments and the Constitutional Amendment Process in Kenya (1964-1997), A Study of the Politics of the Constitution, op. cit.*

' " Robert Maxon, *Constitution making in Contemporary Kenya: Lessons from the Twentieth Century, op. cit.*

sixth, a working party. In addition, the Conference established two special representative groups to receive delegations, respectively, from the Maasai and the people of the Northern Frontier District of Kenya to address their respective special issues.

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For the First time during the Lancaster House II Conference, there were extensive negotiations involving the leaders of Kenya's political elite and the British Government. The Conference Chairman also allowed and indeed encouraged different parties and leaders and their legal advisers to speak as long as they wished without interruption.² At the same time, the Conference staff secretly lobbied each group to bring them closer to a compromise.

Contextually, the leaders of all parties realized that if they failed to come up with an agreed constitutional framework, there would be increased frustration and bitterness in their respective constituencies. The failure to reach an agreement could potentially lead to a total breakdown in law and order, and even fratricidal strife when the British leave Kenya. The experience of the Congo was very fresh in all the delegates' minds."³

However, despite the interchange of views that took place in plenary sessions and the various committees set up to facilitate consensus building on a constitutional framework, no agreement was reached whatsoever. This was largely due to the stance of the KADU delegation whose leader, Ronald Ngala, adamantly refused any agreement unless KADU's demand for a federal or

^{3.1} Report of the Kenya Constitutional Conference 1962, cited in Mary L. Dudziak. *Working toward Democracy: Thurgood Marshall and the Constitution of Kenya*, *op. cit.*

³⁹² F.R.S. De Souza. (2003), 'Building on the Lancaster Experience' in the CKRC. Report of the Constitution of Kenya Review Commission, Volume Five Technical Appendices. Part One. Approved for Issue at the 68th Meeting of the Commission Plenary Held on 10th April 2003.

Ibid.

majimbo constitution was accepted. Even though KADU's intransigence irritated and frustrated the KANU leadership and Maudling, Ngala and company refused to budge. Moreover, KADU kept secret its detailed plan for a *majimbo* constitution. It only revealed the whole of the party's constitutional model more than three weeks into the Conference.³⁹⁴

Thus after almost three months of continuous discussions and 20 plenary sessions without an agreement, it was left to the Secretary of State, Reginald Maudling, to impose a settlement. Maudling prevailed by offering both KANU and KADU something that they had advocated. He especially targeted KANU, which in turn, accepted a two-house parliament as well as the creation of other governing authorities for future regions.

Building on KANU's acceptance of bicameral parliament and regional authorities, rather than a constitution, Maudling prescribed a framework on which a new constitution could be based. The Framework for the Kenya Constitution therefore included some of the basic demands of each party while excluding others. The Framework specifically provided for an elaborate decentralized system of government and renamed the Legislative Council, the Central Legislature. It pleased no party while at the same time not totally displeasing any of them.³⁹⁵

According to Macharia Munene, the Colonial Office proposals offered Mr. Kenyatta's party the strong central government it demanded, while granting the asked for regions to Mr. Ngala's party. The regions and local authorities

³⁹⁴ Robert Maxon. *Constitution making in Contemporary Kenya: Lessons from the Twentieth Century. Kenya Studies Review op. cit.*

F.R.S. De Souza, (2003), "Building on the Lancaster Experience," *op. cit.*

would have a say in matters affecting land, education, and housing and the powers of the region would spring from the Constitution, not the Central Legislature. An upper house representing the local authorities would be able to

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veto changes in the Constitution. To protect the Constitution from unnecessary amendments, the Framework of Kenya Constitution 1962 provided that:

"Except with a 75 percent vote in the House of Representatives and a 90 percent vote in the Senate, no amendment should be made to the entrenched rights of individuals, Regions, Tribal Authorities or Districts and that all other amendments should require a 75 percent vote in each house."³⁹⁷

On the one hand, KANU, confident of its electoral popularity in Kenya, decided to accept the British constitutional formula that appeared to favour KADU's position.⁸ According to Odinga, Kenyatta had told KANU delegates to reach a settlement if they did not want to have government snatched from their hands. Thus with little chance of its constitutional desires prevailing at Lancaster House II, KANU was forced to accept a constitution they did not want. They nevertheless believed that once they formed the government, with their numerical strength in the Central Legislature, they could change the constitution

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to establish the unitary form of government that KANU desired."

For KANU, the acceptance of the Framework, according to the party Vice President, Jaramogi Oginga Odinga, was driven by a desire to move quickly to self-government and independence. The acceptance was thus meant to

>**ibid*

³⁹⁷ Framework of the Kenya Constitution 1962 cited in Mary L. Dudziak. Working toward Democracy: Thurgood Marshall and the Constitution of Kenya, *op. cit.*

^{3,8} Macharia Munene, *Constitutional Development in Kenya; A Historical Perspective, in Law And Development In The Third World op. cit.*

¹*ibid*

enable KANU leaders to assume power as soon as possible without necessarily believing in the content of the document they had accepted.

On the other hand, KADU's acceptance of the Framework owed much to the formula for constitutional amendments included in the framework by the British. Led by Ronald Ngala, the KADU delegation had even refused to discuss detailed constitutional issues unless the KANU and British delegations accepted the Party's demand for regional assemblies with powers and responsibilities. Eventually, the party convinced the British, though not KANU, that six (6) regional assemblies and a bicameral legislature should be created in the new constitution. Nevertheless, Reginald Maudling insisted that Kenya must have a strong central government, based on the British model of an executive branch rather than that advocated by KADU. The outcome of Lancaster House II thus represented only a partial victory for KADU and KANU even though both parties could not agree on all constitutional issues.⁴⁰⁰

A key element accepted at Lancaster House II was that both KANU and KADU would join in an interim coalition government until the next general elections to be held in May 1963. The Governor would head the Coalition Government while the party leaders including Kenyatta of KANU and Ronald Ngala of KADU would be Ministers of State. It was also agreed that based on the Framework for Kenya Constitution, 1962, the Coalition Government represented by equal numbers of KANU and KADU ministers, would negotiate the details of the final Constitution. However, given the lack of agreement at Lancaster House II, this was a daunting prospect as KADU and KANU ministers

⁴⁰⁰ Robert Maxon, *Constitution making in Contemporary Kenya: Lessons from the Twentieth Century*, *op. cit.*

remained divided over the details of the Constitution. It therefore took almost one year from April 1962 to April 1963 to finalize the Self Government Constitution that came into effect on 1 June 1963.⁴⁰¹

According to Robert Maxon, the main task of the Coalition Government was fourfold. First, the task of the Coalition Government was to increase national confidence and unity and to ensure stable governance during the transitional period. Second, enter into discussions with Her Majesty's Government on the detailed constitution based on the agreed Framework of the Kenya Constitution. Third, establish the necessary instruments for an internal self-government constitution as negotiations on arrangements for full independence could only be conducted after the general elections. Fourth, prepare for the next General Election planned for May 1963.⁴⁰² The preparation for the general election included registration of voters and delineation of the regional boundaries. The Central Legislature during the transitional period, however, had no powers to amend the Constitution even though the Framework for the Kenya Constitution 1962 had made provisions on constitutional amendment.

KANU, despite being a signatory to the new arrangement did not believe in the Constitution under which they were expected to work. Their interest was to move as quickly as possible to gain power and change the Constitution. In a letter to the Editor of the anti-KANU *Sunday Post*, Kenyatta therefore made it

⁴⁰¹ Oginga Odinga, *Not Yet Uhuru op. cit.*

⁴⁰² Robert Maxon, *Constitution making in Contemporary Kenya: Lessons from the Twentieth Century, op. cit.*

clear that the only reason KANU had accepted "a defective constitution" was that it did not want "indefinite delays to our independence."⁴⁰³

Kenyatta stated that the majority of Kenyans believed "in the dynamic of national unity," and not "tribal chauvinism" including the "schismatic attitude formulated into the policy of regionalism by a number of the extremist Europeans who led KADU."⁴⁰⁴

To Kenyatta, KADU with the support of Europeans and Asians had managed to impose itself through the 1962 "Majimbo Constitution" without reference to the electorate.⁴⁰⁵ Tom Mboya also issued several statements claiming that the Constitution was not permanent insisting that it would be changed following a KANU victory in the elections especially to remove regionalism.⁴⁰⁶

On its part, Paul Ngei's African Peoples Party (APP) contested the legitimacy of the Self Government Constitution since it was not a signatory to the Constitution. The party termed the Constitution as "the new half-majimbo, half-centralized constitution in Kenya".⁴⁰⁷ APP had wanted a unitary government constitution because to them, a federated constitution was a clear manifestation of divided loyalty, divided efforts and divided purpose.

To APP, the Self Government Constitution was imposed on Kenyans. It therefore called for the making of a new constitution through a convention in which all parties would be involved. The APP believed that the result of such an

⁴⁰³ Mary L. Dudziak. *Working toward Democracy: Thurgood Marshall and the Constitution of Kenya, op. cit.*

⁴⁰⁴ *Ibid.*

⁴⁰⁵ *Ibid.*

⁴⁰⁶ For example. *East African Standard*, 15 May 1963.

⁴⁰⁷ Macharia Munene. *Constitutional Development in Kenya; A Historical Perspective, in Law And Development In The Third World, op. cit.*

inclusive convention would be an acceptable constitution to all since it would be of their own making.⁴⁰⁸

The run up to the May 1963 election exposed the dissatisfaction with the new constitutional order making the Constitution a major subject of political campaigns. In fact, due to its support for regionalism, by the time the electoral campaign got under way, KADU's chances of winning a majority in the Lower House were slim.⁴⁰⁹

KADU put forward 59 candidates while KANU nominated 91 candidates for the 117 House of Representatives constituencies. For the Upper House, KADU put forward 24 candidates to KANU's 28.⁴¹⁰ This meant that since KADU could not possibly gain a majority and form a cabinet, the party adopted a defensive strategy. Key to this strategy was to ensure that KADU won sufficient seats in the lower house and in the Senate to be able to block any major changes to the Self Government Constitution in order to entrench a unitary system of government.⁴¹¹

KANU won the 27th May 1963 election easily. In the end, KANU held 72 seats in the lower house to KADU's 32. The African Peoples Party (APP) held eight. In the Senate vote, KADU's defensive strategy paid off as the party and its APP ally won 17 seats to KANU's 21. Three Senate seats, all in the

⁴⁰⁸ *Ibid.*

⁴⁰⁹ *Ibid.*

⁴¹⁰ Robert Maxon. *Constitution making in Contemporary Kenya: Lessons from the Twentieth Century, op. cit.*

⁴¹¹ *Ibid*

North Eastern Region, were not filled as the Somali residents boycotted the 1963 elections.⁴¹²

Kenya consequently attained Internal Self Government on June 1, 1963, today celebrated as Madaraka Day. On December 12, 1963, Kenya attained independence, today celebrated as Jamhuri Day. Jomo Kenyatta became the first Prime Minister with a Cabinet of 13 ministers. In his acceptance speech, Kenyatta stated that "independence will give KANU the opportunity to work unfettered for the creation of a democratic African Socialist Kenya."

Armed with a popular mandate, KANU sought a final constitutional conference, which was granted for September 1963. Indeed, the outcome of the House of Representatives poll had given KANU reason to claim a mandate for constitutional change arguing that the majority of voters were anti-*majimbo*. Among the issues to be sorted out was what Kenyatta termed as "a constitutional strait-jacket, where 75 percent and 90 percent majorities are laid down" for amendments. KANU had preferred a simple majority in Parliament and in any subsequent referenda⁴¹³ to amend the Constitution.

Thus soon after the new Government took office on 1 June 1963, Mboya, Kenyatta, Odinga and other party leaders launched the first Kenya's change the constitution campaign. Mboya travelled to London in June 1963 to impress upon the new Secretary of State, Duncan Sandys, the need to amend the Constitution, and set the date for independence. While he was successful with the independence date, he failed on the question of constitutional amendment.⁴¹⁴

^{4,2} *Ibid.*

^{4,5} *Ibid*

⁴¹⁴ *Ibid*

Odinga, as Minister of Home Affairs, also undertook two initiatives in June - July 1963 aimed at significantly reducing the powers and responsibilities of the regional assemblies set up under the Self Government Constitution. Neither was successful, but these and other attempts to change the Constitution prior to the third constitutional conference, which KADU leaders strongly opposed, pointed to difficulties in obtaining agreement on the Independence Constitution.⁴¹⁵

Like in the earlier Constitution making efforts, the British Colonial Office intervened to force an agreement when the parties failed to reach a consensus. In fact, when the Secretary of State, Reginald Maudling, visited Kenya in July of 1962 to try to speed up the process of Constitution making, he forced the leaders of both parties to agree on a way to overcome disagreements as to the specifics of the Constitution. The formula was that if the two parties could not agree, he would impose a decision, which the leaders would accept as final.⁴¹⁶

In the final analysis, the fact that many significant aspects of the Constitution were decided by the Secretary of State pointed to future problems in achieving consensus as to what the content of the Independence Constitution should be.

;•> *ibid.*

⁴¹⁶ Extract from Minutes of the Secretary of State's Sixth Meeting with Ministers of the Kenya Government, 9 July 1962. BNA: CO 822/2239 cited in Robert Maxon, *Constitution making in Contemporary Kenya: Lessons from the Twentieth Century, op. cit.*

4.3.4 The third Lancaster House Constitutional Conference

With deep disagreements between KANU and KADU and among political leaders on the system and structure of Government, it was unlikely that achieving the independence Constitution by consensus was possible. As already stated, following its electoral victory in both the House of Representatives and Senate elections in May 1963, KANU ministers quickly set a goal of changing the Constitution in significant ways to eliminate *majimbo*.

KANU was, however, not successful in its initial attempts to change the Constitution since KADU leaders were strongly opposed to the scheme and the British Government reluctant to make wholesale changes. This left the KANU Government's demands for changes in the Self Government Constitution to be considered at the third Lancaster House Constitutional Conference that would open in London in September 1963⁴¹⁷

The Third Lancaster House Constitutional Conference or the Kenya Independence Conference (KIC) convened as planned from 25th September to 19th October 1963 under the Chairmanship of Duncan Sandys, the new Secretary of State for Commonwealth and Colonies. The purpose of the Kenya Independence Conference was to agree on the form of Kenya's Independence Constitution and all other outstanding issues from the Second Lancaster House Constitutional Conference talks.⁴¹⁸ On the one hand, Prime Minister Kenyatta led a strong Government delegation to Lancaster House **III**. On the other hand, Ronald Ngala and Masinde Muliro led the opposition delegation, which was

⁴⁷ *Ibid*

⁴⁸ *Report of the Kenya Independence Conference 1963 Par. 27 cited Mary L. Dudziak. Working toward Democracy: Thurgood Marshall and the Constitution of Kenya, op. cit.*

much smaller in numbers. Other delegates included European representatives mainly representing white settler interests in Kenya and the officials from the Colonial Office and the Commonwealth Relations Office.⁴¹⁹

As the Conference began, the Kenya Government was primarily concerned with national unity whereas the opposition KADU was concerned with minority safeguards. On the one hand, in its argument, the Kenya Government drew attention to paragraph seven (7) of the 1962 Framework of Kenya Constitution, which stated, "there should be a strong and effective Central Government."⁴²⁰ The opposition KADU, on the other hand, based its arguments on paragraph nine (9) which stated, "there should be the maximum possible decentralization of the powers of Government to effective authorities capable of a life and significance of their own."⁴²¹

KANU further demanded the relaxation of the rule and procedure of amendment of the Constitution, a position that the British Government also supported. In this respect, Duncan Sandys, the Conference Chairman, pointed out that it was his duty to consider not merely the formulae agreed in 1962 but also the purpose it was intended to serve, namely to make the Constitution more durable. In respect of the amendment procedure, he held the view that:

"If the Constitution is so rigid that necessary changes are made virtually impossible, there is the danger that frustration may drive people to amend it by unconstitutional means. Once a breach is made in any part of the constitution, the whole of the remainder is liable to crumble. Thus, the over-entrenchment of the rights, which are not fundamental, could well result in the destruction of the basic liberties, which it is our prime aim to protect."⁴²²

⁴¹⁹ *Ibid*

⁴²⁰ *Ibid*

⁴²¹ *Ibid*

⁴²² *Ibid.*

Duncan Sandys therefore brought to the attention of the delegates that it was necessary to consider and address the shortcomings of the 1962 Framework of Kenya Constitution with a view to making it more durable and workable.

In all, the KANU ministers called for more than twenty amendments to the 1962 Framework of Kenya Constitution.⁴²³ The more controversial of these included, first, the demands for a change to a single civil service commission for regions and central government (rather than the eight called for in the Self Government Constitution). Second, the demand for complete central government control over the police. Third, the demand that executive authority of the regions be vested in civil secretaries (the post created in the Constitution to replace provincial commissioners). Fourth, that Kenya should become a Dominion at independence. KADU had favoured Kenya becoming a republic at independence.⁴²⁴

In a separate paper, the Kenya Government put forward its proposal for amending the requirements for constitutional amendments. These would now require 65 percent in both houses of Parliament with the amendment being submitted to a national referendum if the bill did not receive the 65 percent in both houses.⁴²⁵ The KADU delegation strongly opposed the latter change as well as the proposed amendments relating to the police, civil service commissions and executive authority.

⁴²³ Kenya Independence Conference (KIC) (63) 2. Amendments to be Made to the Present Constitution Memorandum by the Government of Kenya, 25 September 1963. BNA: CAB 133/215 cited in Robert Maxon, *Constitution making in Contemporary Kenya: Lessons from the Twentieth Century, op. cit.*

⁴²⁴ *Ibid* Constitution making

⁴²⁵ *Ibid* Constitution making.

Consequently, after seven plenary meetings between 25th and 30th September 1963, the KADU delegation refused to discuss any further amendments proposed by the Kenya Government. By this time, the parties had agreed on several amendments to the Framework of Kenya Constitution 1962.⁴²⁶

The KADU delegation argued that all the necessary decisions of substance had been approved at the 1962 Lancaster Conference. They also argued that since the Framework of Kenya Constitution 1962 embodied a number of keenly debated compromises, it was ill advised to introduce any changes, which conflicted with the provisions of the basic document. They argued that any amendments could only be taken if they were deemed to be not merely desirable, but necessary, in order to make the Constitution workable. This position taken by KADU made it practically impossible for the Conference to make any further progress in plenary sessions.⁴²⁷

Thus, after the seventh plenary session held on 30th September 1963, the Conference Chairman, Secretary of State, Sandys and his advisers decided not to hold any further plenary or committee sessions.⁴²⁸ Instead, Sandys and Governor Malcolm MacDonald met separately with the Kenya Government and KADU

⁴²⁶ The amendments agreed upon at the plenary meetings related to: (a) Agriculture; (b) Appointment of the Attorney-General, Permanent Secretaries and Secretary to the Cabinet; (c) Functions of the office of the Attorney-General; (d) Boundaries descriptions; (e) Citizenship; (f) Compulsory acquisition of property; (g) Assimilation of Crown Land in Northern Province into the Trust Land in other parts of Kenya; (h) Executive and legislative responsibilities of Central Government and the Regions over the education system and in regulating the terms and conditions of employment of teachers; (i) Enforcement of the authority of the Central Government; (j) Explosives; (k) Fisheries; (l) Qualification for voting and candidature; (m) Regional revenues and taxation of motor spirits and diesel oils; (n) Weights and measures; and (o) Schedules 4 and 5 of the 1962 Constitution.

⁴²⁷ Robert Maxon, *Constitution making in Contemporary Kenya: Lessons from the Twentieth Century*, *op. cit.*

⁴²⁸ * Record of Seventh Meeting Held on 30 September 1963 at 10:30 am. BNA: CO 822/3138 cited in Robert Maxon, *Constitution making in Contemporary Kenya: Lessons from the Twentieth Century*. *Kenya Studies Review op. cit.*

delegations to try to negotiate an agreement regarding the constitutional changes demanded by the Kenya Government.^{4ⁿ4} Sandys was particularly concerned with the legitimacy of the Conference process and its outcome stressing that:

"ultimately, the strength and durability of any constitution depends upon the respect it enjoys among those who work it, and the confidence it inspires among those who look to it for protection."⁴³⁰

Despite the efforts of Sandys and MacDonald to broker an agreement between the parties, no agreement proved possible as the Conference moved well into October 1963. Instead, both KADU and KANU delegations threatened to abandon the talks and return to Kenya. As a result, after 18 days of difficult and protracted discussions and negotiations without an agreement, Duncan Sandys decided to propose a raft of 23 amendments and provisions.⁴³¹ He believed that his proposed amendments would make the Constitution not only workable but also more durable.⁴³² The British Government also decided to come down on the side of the Kenya Government leaving KADU leaders most dissatisfied. Consequently, Duncan Sandys convened the final plenary session of the

⁴⁻⁹ Robert Maxon, *Constitution making in Contemporary Kenya: Lessons from the Twentieth Century. Kenya Studies Review op. cit.*

⁴³⁰ Report of the Kenya Independence Conference (KIC) 1963, Par. 29.

⁴³¹ The proposed amendments included: (a) Audit of Local Government accounts; (b) Central Land Board; (c) The power of the central government to organize, coordinate and provide advisory services to the Regions; (d) Executive authority of the regions; (e) Farm planning advisory services in connection with resettlement; (f) Publication of the Kenya Gazettes; (g) Graduated personal tax; (h) Health; (i) Local authority loans; (j) Local Government Staff Commission; (k) National Assembly; (l) National Plans for social development; (m) North Eastern Region; (n) Police; (o) Prerogative of Mercy (p) Procedure of amendment of the Constitution; (q) Rights of the individual (r) Procedure of altering regional and District boundaries; (s) Regulation of the structure, composition, franchise and procedure of the Regional Assemblies; (t) The role of tribal authorities in regulating trust lands and agricultural lands; (u) Regulation of the structure, composition, franchise and procedure of the Senate; (v) Regional budgets; and (w) the public service.

⁴³² Report of the Kenya Independence Conference 1963 cited in Robert Maxon. *Constitution making in Contemporary Kenya: Lessons from the Twentieth Century. Kenya Studies Review op. cit.*

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⁴³² Report of the Kenya Independence Conference 1963 cited in Robert Maxon. *Constitution making in Contemporary Kenya: Lessons from the Twentieth Century. Kenya Studies Review op. cit.*

Conference on 19th October 1963 to approve his proposals and the way forward.⁴³³

On the one hand, after long discussions, KADU dropped its refusal to accept the new Constitution. This was not because of their agreement with the many changes that resulted from the Conference but rather, it was a product of a now divided party leadership. Their change of heart was also because British Government did not implement some of the amendments opposed by the KADU delegation. These included executive authority in the regions vesting in the regional assembly's finance and establishment committee rather than in the civil

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secretary.

On the other hand, Duncan Sandys informed the Conference that the Prime Minister of Kenya, Mr. Jomo Kenyatta, had formally accepted in writing on behalf of his Government not to make any further amendments unless these were shown to be necessary in light of subsequent experience.⁴³⁵

Mr. Sandys further informed the Conference that the Prime Minister had reaffirmed in writing, the intention of the Kenya Government to transfer to the regions the remaining departments and services. The transfers would become effective on 1st December 1963 and completed no later than 1st January 1964.⁴³⁶ The necessary funds would also be transferred from the centre to the regions promptly. Most important was the promise made by Kenyatta to implement the

Constitution, which was one of the major demands made by KADU prior to and

⁴³³ Robert Maxon. *Constitution making in Contemporary Kenya: Lessons from the Twentieth Century*, *op. cit.*

⁴³⁴ *Ibid.*

⁴³⁵ Kenyatta to Sandys. 19 October 1963, BNA: CO 822/3139. This, like the other promises, proved to be a worthless promise cited in Mary L. Dudziak, *Working toward Democracy: Thurgood Marshall and the Constitution of Kenya*, *op. cit.*

⁴³⁶ *Ibid.*

during the conference. Sandys made the following statement regarding the Kenya Government's acceptance of the proposed amendments:

"The willing acceptance of this settlement by the Kenya Government will increase confidence in the country's political stability and will more than anything else, contribute to the safety of the minorities, whose interests have been so much in our minds. I am firmly convinced that for Kenya and all her peoples, the advantages of this settlement will more than justify the constitutional amendments, which have been made to secure it."⁴³⁷

With amendments accepted by all parties albeit with reservations, the Conference Chairman confirmed that 12th December 1963 would be the day of Kenya's independence.⁴³⁸ The Conference in its resolution expressed the desire that Kenya becomes a member of the Commonwealth and that Queen Elizabeth II becomes Queen of Independent Kenya.⁴³⁴

The British Government undertook to draft the final Independence Constitution taking into account the comments of the Kenya Government. The Secretary of State, however, reserved the right to decide on any further points of contention. The final Independence Constitution contained in the Second Schedule to the Independence Order in Council 1963 was a highly complex document that tried to satisfy all the diverse interests of the parties involved in its negotiation.

Broadly, the final Independence Constitution was underpinned by two overriding principles, namely, parliamentary government, and protection of

⁴³⁷ *Ibid.*

⁴³⁸ *Report of the Kenya Independence Conference 1963. op. cit.*

F.R.S. De Souza, "Building on the Lancaster Experience," *op. cit.*

minority and property rights.⁴⁴⁰ It provided for a single Public Service Commission and gave the central Government control over the police.

To amend provisions relating to the judiciary, tribal authorities, districts, the Senate, and the structure of regions, 75 percent and 90 percent majorities was required in the House of Representatives and Senate, respectively, to effect any such amendment. All other amendments required 75 percent majorities in both houses with regard to the powers of regional assemblies. The Independence Constitution also provided for the option of a national referendum, which required approval by 65 percent of the votes cast.⁴⁴¹

In the final analysis, to the extent that the Conference Chairman sought to assure the Independence Constitution's acceptance and durability, its legitimacy was contested from the first day. To KANU, the Independence Constitution was primarily a transitional document never to be the ideal Constitution for Kenya.

Kenyatta had, for example, argued in his letter to the Editor of the *Sunday Post* that to go into independence with an unpopular Constitution was asking for trouble and that it was ridiculous to expect such a novelty of a document to be a workable blueprint, virtually incapable of being amended. He concluded therefore, "a vote of the Kenya Parliament, not of the British House

⁴⁴⁰ Y.P. Ghai and J.P. McAuslan, *Public Law and Political Change in Kenya: A Study of the legal Framework of Government from Colonial Times to Present*, *op. cit.*

⁴⁴¹ Great Britain. Kenya Independence Conference 1963, Cmd 2156 (London: HMSO. 1963). 19-22.

of Commons, is the act upon which the legality of the Kenya Constitution will rest at the achievement of independence"⁴⁴¹

The overall assessment of the Independence Constitution reveals that it was inherently defective in a number of ways. First, the Independence Constitution did not refer to the people's struggle for independence, nor did it specify national values or aspirations or the principles underlying the exercise of the powers of state or its organs.⁴⁴³

Secondly, the Bill of Rights was marked by a limited vision. It provided too many limitations while completely ignoring the social, economic and cultural rights of the people. Practically, the limitation clauses virtually gave the Government a free hand to violate the rights and fundamental freedoms as long as it could claim some sort of threat to public security, public interest or law and order.⁴⁴⁴

Thirdly, while the Constitution provided for a democratic system, there were inadequate provisions for separation of powers and insufficient participation by the people in the affairs of state. The Governor-General had power that essentially made the Legislature a subordinate institution. For instance, the Constitution vested in the Governor-General the power to prorogue or dissolve Legislature at will. The fact that the Governor-General could terminate the life of Legislature at any time for whatever reason virtually made the Legislature to exist at his will.

⁴⁴¹ Macharia Munene, *Constitutional Development in Kenya; A Historical Perspective*, in *Law And Development In The Third World*, *op. cit.*

⁴⁴² Constitution of Kenya Review Commission. *The Final Report of the Constitution of Kenya Review Commission*, approved for issue at the 95th Plenary Meeting of the Commission on 10th February 2005, *op. cit.*

⁴⁴⁴ *Ibid.*

The Constitution was also silent on what was to be done in the event that the Governor-General failed to give assent to a bill or constitutional amendment. The Constitution further neither provided a time limit as to when the Governor-General had to make a decision nor the action to be taken in case he failed to perform his duty. This constitutional lacuna in effect gave the Governor General, and later, the President, some implied veto power not only on ordinary laws but also on constitutional amendments without providing a mechanism for overriding the veto if need be.⁴⁴⁵

More significantly, the Constitution was silent on the removal of the Governor-General from office in case of abuse of office or gross misconduct. The Constitution provided for a vote of no confidence in the Government and the Prime Minister after which the Governor-General had the choice of whether to dissolve Parliament or not. However, the Governor-General was insulated and would not be affected by the vote of no confidence. A vote of no confidence in the Government would require the Governor General to dissolve Legislature in three days failing which the Legislature would automatically stand dissolved on the fourth day.⁴⁴⁶

Fourthly, and perhaps, the most serious weakness of the Independence Constitution lay with the system of *majimbo* and local government, which was the primary feature of the Constitution. First, the provisions on regional and local government were detailed and complex requiring high administrative skills and maximum political will to implement. Second, it was unacceptable to those entrusted with its implementation. Third, it permitted extensive

"Ibid
⁴⁴⁶ *ibid.*

intervention by the central Government in regional affairs, which undoubtedly provided a source of conflict between the two levels of Government.

According to Macharia Munene, KANU only "agreed to a modified form of regionalism to serve for the period of internal Self-Government."⁴⁴⁷ As such, the KANU Government could not wait to amend the Constitution in order to eliminate any provisions relating to the regional Government at the earliest opportunity.

Overall, the governance system created by the Independence Constitution was entirely new. It diffused power to numerous institutions⁴⁴⁸ while continuing with the vestiges of the key tenets of colonial legal and administrative structures especially relating to the exercise of executive authority, property rights and maintenance of law and order. Thus, as much as the three Lancaster House Constitutional Conferences appeared deliberative, the final Independence Constitution was still an imposition by the British Government. As such, the outcome neither reflected nor represented the will of the people of Kenya. To this end, the Constitution of Kenya Review Commission stated thus:

"When Kenya became independent, the Constitution was not made directly by the people. It was negotiated in London at Lancaster House between the British Government and the representatives of Kenya's political parties who were members of the Legislative Council. The people of Kenya were therefore not consulted in the making of the Constitution, and the British Parliament, not the Kenya legislature, adopted the Constitution. The final act of ratification was not a vote of the people, but the signature of the Queen of England."⁴⁴⁹

⁴⁴⁷ Macharia Munene, *Constitutional Development in Kenya: A Historical Perspective, in Law And Development In The Third World, op. cit.*

Githu Muigai, *Constitutional Amendments and the Constitutional Amendment Process in Kenya (1964-1997). A Study of the Politics of the Constitution, PhD Thesis, op. cit.*

Constitution of Kenya Review Commission, *The Final Report of the Constitution of Kenya Review Commission, approved for issue at the 95th Plenary Meeting of the Commission on 10th February 2005 op. cit.*

4.4 Conclusion

This Chapter has assessed the challenges of constitutional governance and the struggle towards independence in colonial Kenya. The Chapter has in particular interrogated two questions of whether meaningful constitutional change can take place in an environment of relative peace and whether constitutional development during the colonial period did contribute to building constitutional legitimacy in Kenya. In addition, two assumptions have been tested that first, for a Constitution making process to secure a legitimate outcome, it must be based on a deeper appreciation of the people's aspirations; and second, that it must not be undertaken merely to achieve short term goals or to secure the interests of a few elite or sections of the society.

In the overall analysis, the study concludes that constitutional developments in colonial Kenya grossly fell short of the key ingredients of democratic constitutionalism. The basic character of the colonial constitutional process was not just exclusive, imperial and oppressive but built on the foundations of deception, violence, racial and ethnic divisions supported by an openly autocratic and unaccountable governance system. Functionally, the colonial constitutionality possessed the dubious character of serving a few elite and community interests of the white population in Kenya.

Politically, the governance of the colonial state remained neither representative nor inclusive of the aspirations of the majority of the people of Kenya. Thus, while official racism ruptured with independence, the much-anticipated transition from imperial constitutionalism to constitutional democracy failed to materialise. On the one hand, the colonial legal and

administrative systems remained intact and on another, the new ruling elite continued with the legacy of using state power to secure themselves special political and economic advantages at the expense of the vast majority of the population.

The Constitution under which Kenya became independent therefore lacked not just functional but also political legitimacy. It neither enjoyed the support of the vast majority of the people nor guaranteed the rights and wellbeing of the majority of the population. The colonial constitutionality therefore suffered serious legitimacy crisis as manifested in the protracted and violent struggle for independence in Kenya. Very clearly, therefore, constitutional developments in colonial Kenya contributed neither to building constitutional legitimacy nor to establishing a strong foundation for democratic constitutionalism. Instead, it shored up more problems and crises for the state and the people. The study thus argues that for a Constitution making process to secure a legitimate outcome, it must be anchored on a deeper appreciation and assessment of a country's past history and people's collective aspirations. The process must first, be inclusive of the aspirations of all the groups that exist in the society. Second, it must not be undertaken merely to achieve short-term goals or to secure the interests of a few elite or sections of the society. Third, its vision must be tied to the overall vision of democratic governance and social justice.

The next Chapter Five (5) presents an assessment of the post independence constitutional developments and the struggle for constitutional reconstruction in Kenya.

CHAPTER FIVE

POST INDEPENDENCE CONSTITUTIONAL AMENDMENTS AND THE STRUGGLE FOR REFORMS IN KENYA

5.1 Introduction

Chapter Four has presented an assessment of the challenges of constitutional governance and change in colonial Kenya. This Chapter presents an analysis of the constitutional amendments in post independence Kenya and the struggle for constitutional reforms. The Chapter interrogates the question of whether the post independence constitutional developments contributed to building of constitutional legitimacy in Kenya.

The Chapter tests two basic assumptions. First, that to be legitimate, the Constitution must command the respect of the ruling elite who must believe in it and must demonstrate commitment to its implementation. Second, that fundamental constitutional change does not take place in an environment of relative peace and that unless the *status quo* is, threatened by civil unrest, the ruling elite will not often support fundamental constitutional reforms.

5.2 Overview of constitutional developments in post independence Kenya

As discussed in the subsequent sections, constitutional developments in post independence Kenya mainly took the form of constitutional amendments. From 1964 to 2009, the Constitution of Kenya underwent thirty-three (33) amendments. Of the 33 post-independence constitutional amendments, Parliament enacted twenty-four (24) representing 73 percent within the First 25

years of independence (1964-1989) with the remaining nine (9) amendments enacted within a period of 19 years between 1990 and 2009.

Within the first five years of independence (1964-1969), eleven (11) amendments were undertaken. These amendments saw the conversion of Kenya from a parliamentary dominion to a Republic as well as the systematic dismantling of the key pillars of the Independence Constitution. Parliament enacted the next 13 constitutional amendments between 1974 and 1989. These amendments saw the deepening of presidential and executive powers towards constitutional dictatorship.

Parliament enacted the remaining nine (9) constitutional amendments between 1990 and 2009. These amendments sought to secure democratic reforms, resolve the post 2007 political crisis and facilitate comprehensive constitutional review. Of the nine (9) amendments, six (6) were enacted between 1990 and 1997 while the remaining three (3) amendments were enacted as part of the Agenda Four (4) of the Framework of the Kenya National Dialogue and Reconciliation (KNDR) between 2008 and 2009.

5.3 The immediate post independence constitutional amendments, 1964-1969

This section assesses the immediate post independence constitutional amendments from 1964 to 1969 and demonstrates how the unresolved constitutional issues during the Lancaster House Constitutional Conference I, II and III provided the excuse for the first post independence Government to pursue a systematic agenda of dismantling the Independence Constitution.

Indeed, the constitutional developments during this period led to a crisis in constitutional governance setting in motion a protracted struggle for democratic reforms and the search for popular constitutionalism in Kenya. This section therefore tests the claim that to be legitimate, the Constitution must command the respect of the ruling elite who must believe in it and must demonstrate commitment to its implementation.

From the events of the second and third Lancaster House Constitutional Conferences, it was clear that Kenya African National Union (KANU) and its leaders had no faith in the new Constitution. To them, the Constitution was in many ways unworkable and that it was only a matter of time before changing it.

As discussed in Chapter 4, the process leading to the Independence Constitution left the door open for the new leaders to, either nurture the fragile constitutional compromise or to tinker with it to suit their own momentary interests. The new leadership unfortunately chose the latter and developed concurrent plans for full-scale constitutional amendments in order to make the Constitution what they had wished it to be during the Lancaster House constitutional negotiations. According to H.W.O. Okoth Ogendo, Kenyatta and his close advisors believed that the main constitutional hurdles to the exercise of his full authority as President were fourfold: first, the bicameral Parliament; second, the regional system of government; third, the rigid amendment procedures; and fourth, the entrenched constitutional safeguards.⁴³⁰

Consequently, within the first five years of independence (1964-1969), the Government engineered eleven amendments to the Independence

⁴³⁰ H.W.O Okoth Ogendo. "Constitutions without Constitutionalism: Reflections on an African Political Paradox," *op. cit.*

Constitution, which resulted in a markedly new constitutional makeup and a complete metamorphosis in the spirit and substance of the Constitution and its institutions. The Government executed amendments so rapidly and clinically as though it was fighting some conspiracy.⁴⁴¹ In fact, the speed with which Parliament made the amendments goaded the belief that Parliament was invincible in the exercise of its amendment powers under section 47 of the Constitution.⁴⁵²

The first constitutional amendment⁴⁵¹ converted Kenya from a parliamentary dominion to a Republic with a strong presidency. Consequently, the President became the Head of State, Head of Government and Commander-in-Chief of the Armed Forces. The Amendment Act also gave the President power to dissolve Parliament any time at his absolute discretion. Through the amendment of Schedule 1 to the Constitution, the Regional Assemblies also lost all, except their specially entrenched, powers.

The second amendment⁴⁵⁴ altered certain specially entrenched clauses concerning the regional governments such as the financial relations between the centre and the regions, and the method of alteration of regional boundaries.

The third constitutional amendment,⁴⁵⁵ implemented retrospectively to 12^h December 1964, renamed the regions, *provinces* and the regional assemblies, *provincial councils*. The Amendment Act removed the regions'

Ibid.

" Githu Muigai. *Constitutional Amendments and the Constitutional Amendment Process in Kenya (1964-1997)*, A Study of the Politics of the Constitution, PhD Thesis. University of Nairobi, *op. cit.*

^{4,5} The Constitution of Kenya (Amendment) Act (No. 28 of 1964).

⁴¹⁴ The Constitution of Kenya (Amendment) Act (No. 38 of 1964).

⁴⁵⁵ The Constitution of Kenya (Amendment) Act (No. 14 of 1965).

exclusive authority including the Regional Assemblies' exclusive legislative competence.

The fourth amendment⁴⁴⁶ gave the President power to appoint and dismiss officers from civil service. In effect, all civil servants were to serve at the pleasure of the President. The amendment also extended the President's power to rule by decree in North-Eastern Region to include Marsabit, Isiolo, Tana River and Lamu districts.

The fifth constitutional amendment⁴³⁷ introduced section 42A of the Constitution to stem defections from one political party to another. It required that a Member of Parliament who resigned from a party that had supported him or her at the time of his or her election, vacate his or her seat at the expiry of the session.⁴⁵⁸ The purpose of this amendment was to prevent Members of Parliament from defecting from KANU to join the Kenya People's Union (KPU).⁴⁵⁹

F.R.S. De Souza explains that the Fifth Amendment was so skilfully steered through Parliament by Tom Mboya that many MPs voted for the Bill believing that the provisions of the Bill would not apply retrospectively. They only learnt of its retrospective application after it became effective.

⁴⁵⁶ The Constitution of Kenya (Amendment) Act (No. 16 of 1966).

⁴⁵⁷ F.R.S. De Souza.. "Building on the Lancaster Experience" in the CKRC. Report of the Constitution of Kenya Review Commission, Volume Five Technical Appendices, Part One. Approved for Issue at the 68th Meeting of the Commission Plenary Held on 10th April 2003

⁴⁴ The Constitution of Kenya (Amendment) Act. (No 17 of 1966).

⁴⁵⁰ Wanyiri Kihoro, A Vision of the Future from the Past. Essential Public Documents in the Making of the New Constitution. Edited with Commentary by ABANTU for Development. Nairobi (2002).

The sixth amendment⁴⁶⁰ re-introduced the draconian detention without trial law and clawed back the fundamental rights of movement, association, assembly and expression.

The seventh constitutional amendment⁴⁶¹ introduced the merger of the House of Representatives and the Senate. The Amendment Act declared all elected members of the House of Representatives and the Senate, members of the new National Assembly. The Act also declared the twelve (12) specially elected members of the House of Representatives, specially elected members of the new National Assembly. Consequently, the Act extended the life of Parliament by two years from June 1968 to June 1970. To ensure that the former Senate members retained their seats, the Act increased parliamentary constituencies to 117 and assigned each one of them a constituency. The term of the Senate members would have otherwise ended in 1970.

For avoidance of doubt, the eighth constitutional amendment⁴⁶² clarified that the application of section 42A of the Constitution introduced through the Fifth Amendment, was retrospective. It stated that Members of Parliament who had resigned from KANU pursuant to the new section 42A had lost their seats. The provision also applied to the Members of Parliament who had lost their seats prior to the Fifth Amendment, which clearly violated the principles of natural justice.

⁴⁴⁰ **The Constitution of Kenya (Amendment) Act (No. 8 of 1966).**

The Constitution of Kenya (Amendment) Act. 1966.

⁴⁴³ **The Constitution of Kenya (Amendment) Act (No. 4 of 1967).**

The ninth amendment⁴⁶³, repealed all laws made by the Provincial Councils and the former Regional Assemblies and abolished the Provincial Councils. It also deleted from the Constitution, all references to the provincial and district boundaries and alterations thereof, thereby removing the last vestiges of the regional government system.

The tenth amendment⁴⁶⁴ altered the method of presidential election and laid down the physical, electoral and party requirement of a presidential candidate. The Act provided for direct election of the President at a general election.

The eleventh amendment⁴⁶⁵ consolidated all the first ten amendments into a single constitutional document. The Amendment Act also altered the membership of the Electoral Commission and gave the President power to appoint all its members.

In all the eleven constitutional amendments, the pattern was one of imposing executive desires on the Constitution without reference to or direct involvement of the people. Starting as a multi-party state in 1963, the new Republic drifted into a *de facto* single party state while all the entrenched safeguards and pillars of constitutional democracy were systematically dismantled. Thus before its fifth anniversary, the new Republic had succeeded in re-establishing the imperial edifice of power concentrated in the President but without any set of legitimate rules to check or limit it. As Professor Ben Sihanya has pointed out:

⁴⁶³ The Constitution of Kenya (Amendment) Act (No. 16 of 1968).

⁴⁶⁴ The Constitution of Kenya (Amendment) Act (No. 45 of 1968).

⁴⁶⁵ The Constitution of Kenya (Amendment) Act (No. 5 of 1969).

"Immediately after independence (1964-1969), the KANU elite sought to dismantle the Independence Constitution in order to implement the Kenyatta-Mboya-Nyerere theory of singular executive authority (one centre of power). On December 12, 1964, Kenyatta, the Prime Minister, was transformed or transmuted into a President complete with full executive authority and ceremonial powers. This was done by a constitutional fiat rather than through popular elections or referendum."⁴⁶⁶

According to Macharia Munene, the immediate post independence constitutional amendments were not acceptable to the majority of Kenyans as an opinion poll conducted in 1968 indicated.⁴⁶⁷ It showed that people wanted multi-partyism; that they wanted independent candidates to stand for elections; and that they wanted a popular election of the President and of the Vice-President. They neither wanted the President to appoint a Vice-President nor to nominate special Members of Parliament. They wanted Parliament to nominate special members. Most disturbing, 70 percent of the respondents complained that "fear of informers and secret police had become serious in Kenya."⁴⁶⁸

Broadly, five factors explain the Government's appetite for constitutional amendments in the immediate post independence Kenya. First, during the Lancaster House Constitutional Conferences II and III, KANU had already shown disdain for three key features of the Constitution: first, the parliamentary system of government especially the bicameral parliamentary structure; second, the regional system of government; and third, the rigid amendment clauses. On coming to power therefore, they treated these aspects of the Constitution with such contempt that they refused to implement certain constitutional requirements

⁴⁶⁶ Ben Sihanya, *Reconstructing the Kenyan Constitution and State. 1963-2010: Lessons From German and American Constitutionalism*. The Law Society of Kenya Journal-6(1)(2010) p. 10.

⁶ Macharia G. Munene. *Constitutional Development in Kenya: A Historical Perspective*, text from Law And Development In The Third World 15-09-2001.

^ *ibid*

especially regarding the regional government.⁴⁶⁹ Thus, when KADU finally dissolved itself in 1964 and joined KANU, the time to change these "undesirable" features of the Constitution unhindered had come.

Secondly, KANU came to power as a broad coalition of various forces only united by their belief that self-rule and independence were of immediate concern. Thus, their hitherto ideological and ethnic differences that surfaced towards the second Lancaster House Constitutional Conferences and soon after independence came to play a role in the constitutional amendments.

With the dissolution of KADU and its subsequent merger with KANU, therefore, two major groups emerged within the party with loyalties divided along the President Kenyatta and Tom Mboya group on the right, and the Jaramogi Oginga Odinga group on the left. These divisions partly explain why the Government treated some of the party problems as if they posed some serious constitutional problems for the country.⁴⁷⁰ For instance, when the "left wing" of KANU led by Jaramogi Oginga Odinga abandoned the party to form the Kenya Peoples Union (KPU), the Government responded by enacting the fifth and eighth constitutional amendments to deal with the instability in Government as discussed above.

Thirdly, the structure of governance created by the Independence Constitution was not only in complete variance with the colonial structure but was also unknown to both the outgoing governors and the incoming ones. As

F.R.S. De Souza, "Building on the Lancaster Experience in the CKRC, Report of the Constitution of Kenya Review Commission, Volume Five Technical Appendices, Part One, Approved for Issue at the 68th Meeting of the Commission Plenary Held on 10th April 2003 *op cit.*

⁴⁷⁰ **H.W.O Okoth Ogendo,** "Constitutions without Constitutionalism: Reflections on an African Political Paradox" *op. cit.*

Duncan Sandys, the Colonial Secretary and Chairman of the third Lancaster House Constitutional Conference observed of the 1962 Framework of Kenya Constitution:

"The formulation of Kenya's unique constitution, which is neither federal nor unitary, has raised problems on which there are no exact precedents or experience to guide us, particularly with regard to allocation of functions between the Centre and the Regions. It must moreover, be recognized that the present provisions are a product of inter-party bargaining rather than of any objective planning. It is therefore, not surprising that some unworkable features have already revealed themselves; and that it is certain, as time goes on, others will emerge. There is therefore a strong case for leaving some element of flexibility, so that corrections can be made in the light of experience."⁴⁷¹

Fourthly, some features of the new Constitution such as the regional government system were in complete variance with the colonial legal and administrative structure. One of the reasons for the immediate post independence constitutional amendments albeit misguided was hence to harmonize the operational structure of the new Constitution with the inherited colonial legal and administrative structures. Thus, instead of overhauling the colonial legal and administrative structures to make them consistent with the new Constitution, the new leadership altered the Constitution to fit with the *status quo*. This invariably had the effect of downgrading the value of the Constitution as supreme law of the land.

Fifthly, the new political elite saw in the constitutional amendments an opportunity to personalize state power in the President as a means of controlling and accumulating capital.⁴⁷²

⁴ Report of the Kenya Independence Conference 1963 par. 26 cited in Mary L. Dudziak. *Working toward Democracy: Thurgood Marshall and the Constitution of Kenya, op. cit.*
" Karuti Kanyinga, "Ethnic inequalities and governance of the public sector in Kenya." *op. cit.*

Overall, the constitutional developments in Kenya between 1964 and 1969 have demonstrated the failure of the new constitutional order to institute checks and balances and to regulate the exercise of power. Devastatingly, the developments demonstrate the fact that the new political elite only valued the Constitution to the extent that it enabled them to secure their political and economic interests. Consequently, like in the colonial era, the new Constitution ended up playing three key roles: first, the role of perpetuating and perpetrating conservative hegemony; second, the role of protecting the dominant system of social and power relations against political, ideological and even physical challenges; and third, the role of serving to remove crucial issues of accountability from the public agenda.

In the final analysis, the first eleven immediate post independence constitutional amendments succeeded in achieving four basic undemocratic results. First, they blatantly contravened the principles of democratic constitutionalism. Second, they sowed the seeds of constitutional deconstruction, which inevitably undermined the development of constitutional legitimacy in Kenya. Third, the amendments destroyed the basic tenets of the Independence Constitution. Fourth, the amendments effectively compromised the process of constitutional institution building and value formation leading to a rapid decay of the new post independence constitutional order in Kenya.

From the foregoing, this study argues that to be legitimate, the Constitution must command respect of the ruling elite who must believe in it and must demonstrate commitment to its implementation.

5.4 Amendments towards constitutional, dictatorship, 1970-1989

This section assesses the post independence constitutional developments towards constitutional dictatorship and the challenges of constitutional governance in Kenya from 1970 to 1989. The section tests the assumption that to be legitimate, the Constitution must command respect of the ruling elite who must believe in it and must demonstrate commitment to its implementation.

After the eleventh amendment of 1969, there was a period of relative constitutional calm with no further constitutional amendments initiated until 1974. Subsequently for the next fifteen (15) years, the Government made thirteen (13) further constitutional amendments. Of these amendments, it is the nineteenth, twenty-second, twenty-third and twenty-fourth amendments that entrenched constitutional dictatorship in Kenya as discussed below.

The twelfth constitutional amendment,⁴⁷⁵ the first after the 1969 amendment, reduced the age of persons allowed to register as voters from 21 years to 18 years. The aim of this amendment was to boost the pool of available voters to give the Government greater legitimacy in the context of the *de facto* one party rule.

The thirteenth amendment⁴⁷⁴ or the "the *Kiswahili* amendment" made *Kiswahili* the only language of business of the National Assembly. Although this amendment looked insignificant, it acted to demonstrate the President's uncontrolled influence over legislative processes. According to Githu Muigai, on 4th July 1974 at a KANU Governing Council meeting, President Jomo Kenyatta declared that henceforth the national and official language for all purposes

⁴⁷³ The Constitution of Kenya (Amendment) Act (No. 2 of 1974).

⁴⁷⁴ The Constitution of Kenya (Amendment) Act (No. 10 of 1974).

including parliamentary proceedings would be *Kiswahili*,⁴⁷⁵ When Parliament convened the next day, it was not clear whether Parliament should obey the Constitution or the President's directive, which in Kenya's constitutional jurisprudence had no legal basis unless provided specifically in the law.⁴⁷⁶

The Attorney-General quickly drafted and tabled a Bill before Parliament to make Kiswahili the official language of the House. To fast track the Bill, Parliament waived the 14 days publication period rule as well as the provision that Parliament takes no more than one stage of a Bill at the same sitting. The Attorney-General, albeit unconstitutionally, further amended the Bill during debate to provide for its retroactive application.⁴⁷⁷

The fourteenth amendment⁴⁷⁸ sought to resolve the conflict between sections 53 on official languages and 34(c) on qualification for election of the Constitution brought about by the thirteenth amendment. Section 34(c) if one to qualify as a member of the National Assembly he or she needed to have a good command of English and not Kiswahili.

The fifteenth amendment⁴⁷⁹ or the "Ngei amendment" extended the prerogative of mercy exercised by the President. This amendment allowed the President to remove, in whole or in part, the non-qualification or the disqualification of a person because of the report of an election Court under the provisions of the National Assembly and Presidential Elections Act. The Bill was published a day before it was debated on 10th December 1975 and went

Githu Muigai. Constitutional Amendments and the Constitutional Amendment Process in Kenya (1964-1997), A Study of the Politics of the Constitution, PhD Thesis, University of Nairobi (2001) *op. cit.*

⁴⁷⁶ *Ibid*

⁴⁷⁷ *Ibid*

⁴⁷⁸ **The Constitution of Kenya (Amendment) Act (No. 1 of 1975).
The Constitution of Kenya (Amendments) Act (No. 14 of 1975).**

through the first, second and third readings in one afternoon! This amendment process not only undermined the integrity of the Constitution and Parliament but also the rule of law in general.

According to Wanyiri Kihoro, what made this amendment significant is the fact that an election Court had found Hon. Paul Joseph Ngei, a friend of President Jomo Kenyatta and a co-accused at the Kapenguria trial, guilty of an election offence, which barred Ngei from contesting any elections for five years.⁴⁸⁰ To save Ngei from political oblivion, President Kenyatta, in his wisdom, decided to intervene by initiating a constitutional amendment to enable him lift Ngei's disqualification from contesting an election. By all intents and purposes, the fifteenth amendment best illustrates the cavalier attitude assumed by Parliament in exercising its amendment powers.⁴⁸¹

The sixteenth amendment,⁴⁸¹ the last during the Kenyatta regime, established the Court of Appeal as a superior court of record with jurisdiction and powers in relation to appeals from the High Court of Kenya. The Court of Appeal was to replace the East Africa Court of Appeal following the breakup of the East African Community in 1977.⁴⁸³

The seventeenth amendment,⁴⁸⁴ the first during the Moi regime, further dealt with the conflict created between sections 53 and 34(c) of the Constitution

⁴⁸⁰ Wanyiri Kihoro. *A Vision of the Future from the Past. Essential Public Documents in the Making of the New Constitution*, *op. cit.*

⁴⁸¹ Githu Muigai, *Constitutional Amendments and the Constitutional Amendment Process in Kenya (1964-1997). A Study of the Politics of the Constitution*. PhD Thesis, University of Nairobi (2001) *op. cit.*

⁴⁸³ The Constitution of Kenya (Amendment) Act (No. 13 of 1977).

Githu Muigai, *Constitutional Amendments and the Constitutional Amendment Process in Kenya (1964-1997). A Study of the Politics of the Constitution*. PhD Thesis, University of Nairobi (2001) *op. cit.*

The Constitution of Kenya (Amendment) Act (No. 1 of 1979).

through the thirteenth ("*Kiswahili*") amendment. It made both Kiswahili and English official languages of Parliament. It provided that in future, unless one was incapacitated by blindness or other physical cause, ability to speak in both English and Kiswahili would be a prerequisite for election to Parliament.

The eighteenth constitutional amendment⁴⁸⁵ disqualified persons serving in certain offices in the public service, judicial service, constitutional office, armed forces or a local government authority from seeking nomination for election. However, the amendment did not specify which "certain public officers" were required to resign. Perhaps realizing the anomaly, after the Act became effective, the Attorney-General promised to issue a statement to clarify which public servants the amendment affected even though it was not within his powers to do so.⁴⁸⁶

While the eighteenth amendment ostensibly sought to eliminate abuse of office by persons in public office intending to venture into politics, in reality, its intention was to protect some incumbent MPs from potential opponents who may have been working in Government at the time⁴⁸⁷ Like the thirteenth ("*Kiswahili*") amendment, the eighteenth amendment was a result of a Government "directive" through a notice that all civil servants wishing to contest elections had to resign by 15th May 1979⁴⁸⁸

^{4,5} The Constitution of Kenya (Amendment) Act (No. 5 of 1979).

"Ibid.

Wanyiri Kihoro. A Vision of the Future from the Past. Essential Public Documents in the Making of the New Constitution, *op. cit.*

^{4"} Githu Muigai. Constitutional Amendments and the Constitutional Amendment Process in Kenya (1964-1997). A Study of the Politics of the Constitution, PhD Thesis, University of Nairobi (2001) *op. cit.*

The nineteenth amendment⁴⁸⁹ was perhaps the most iniquitous since 1969. The amendment introduced section 2A which converted Kenya from a *de facto* one party state to a *de-jure* one party state. The amendment outlawed all political opposition and the right to form political parties or similar associations thereby ushering in an era of absolute dictatorship. No person could therefore hold any elected political office such as the office of President, Member of Parliament or Councillor unless he or she was a member and nominee of the Kenya African National Union (KANU). In fact, one ceased to hold an elective political office when he or she ceased to be a member of KANU.

The nineteenth amendment further established the office of the Chief Secretary. It made the Chief Secretary the Head of Public Service with power to supervise and coordinate all the departments of Government.

Politically, the nineteenth amendment was a response to the expressed intention by Jaramogi Oginga Odinga and George Anyona, among others, to form a new political party, the Kenya Socialist Party (KSP). To deal with this apparent political threat, KANU expelled Jaramogi Oginga Odinga from the party and put him under house arrest while it arrested and detained George Anyona without trial.

The KANU Governing Council also ordered the Attorney-General to prepare a Bill to amend the Constitution in order to make Kenya a one party state. In its consideration of the Bill, Parliament kept the debate to a bare minimum with the Bill's passage being unanimous except for two Members who voted against the amendment.

⁴⁸⁹ **The Constitution of Kenya (Amendment) Act (No. 7 of 1982).**

According to Githu Muigai, the manner in which the Government initiated the nineteenth amendment not only interfered with the sovereignty of Parliament but also compromised the independence and integrity of the office of the Attorney-General.⁴⁹⁰ Githu Muigai therefore argues that because the amendment sought to enable the ruling party KANU hold on to power in perpetuity, section 2A was in terms of strict constitutional theory unconstitutional or invalid, *ab initio*⁴⁹¹

As Parliament debated the Bill, the Government embarked on a massive crackdown of university lecturers and other political dissenters believed to be unsympathetic to its cause. The country descended into a state of great political tension. On 1st August 1982, some junior Kenya Air Force officers attempted *coup de tat*. The Government put down the *coup* attempt forcefully with an estimated 600 to 1,800 people losing their lives. This attempted *coup de tat* not only accelerated but also solidified Moi's authoritarian rule.⁴⁹²

The twentieth amendment⁴⁹³ was basically an administrative amendment. It gave the High Court appellate jurisdiction to hear and determine questions relating to the membership of the National Assembly. It further allowed Puisne Judges of the High Court posted to the Court of Appeal to continue handling proceedings in the High Court. Technically, this amendment elevated a simple

⁴⁹⁰ Githu Muigai, *Constitutional Amendments and the Constitutional Amendment Process in Kenya (1964-1997). A Study of the Politics of the Constitution*. PhD Thesis. University of Nairobi (2001) *op. cit.*

⁴⁹¹

In Latin *ab initio* means "from the beginning". In law, the Latin phrase "*ab initio*" is often added as a qualifier. For instance, the term, "void *ab initio*" means "to be treated as invalid from the outset".

⁴⁹² B. Andreassen *et al* (1993), *A hobbled democracy: the Kenya General Elections 1992*. CMI: Bergen. Report No 5. Also see Andreassen, B., "Kenya", in *Human Rights in Developing Countries Yearbook 1993*. B. Andreassen and T. Swanehart, Editors. 1993. Copenhagen: Nordic Human Rights Publications, p. 193.

⁴⁹³ The Constitution of Kenya (Amendment) Act (No. 7 of 1984).

administrative matter to the level of constitutional significance. Ordinarily, Parliament could have just simply amended the relevant statutes to deal with matter without necessarily amending the Constitution.⁴⁹⁴

The twenty-first amendment⁴⁹⁵ made provisions on Kenyan citizenship. The amendment stated that every person born in Kenya after 11th December 1963 was a citizen of Kenya provided that at the date of his birth one of his parents was a citizen of Kenya. A person would however, not be deemed a citizen of Kenya under two circumstances. First, if at the date of birth either his father possessed immunity as was accorded to foreign envoys accredited to Kenya; or second, his father was a citizen of a country with which Kenya was at war and the birth occurred in a place then under occupation by that country.

The twenty-second constitutional amendment⁴⁹⁶ was another iniquitous amendment after the nineteenth amendment with far reaching consequences on the independence of key constitutional offices as well as the principles of separation of powers and checks and balances. It removed the security of tenure for the Attorney-General and Controller and Auditor General while abolishing the office of the Chief Secretary. The amendment further gave the President power to appoint permanent secretaries and the Secretary to the Cabinet. It also altered the number of electoral constituencies by providing for a maximum of 188 and a minimum of 168.

^{4.4} Githu Muigai. *Constitutional Amendments and the Constitutional Amendment Process in Kenya (1964-1997). A Study of the Politics of the Constitution. PhD Thesis. University of Nairobi (2001) op. cit.*

^{4.5} - The Constitution of Kenya (Amendment) Act (No. 6 of 1985).

^{4.6} The Constitution of Kenya (Amendment) Act 1986 (No. 14 of 1986).

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^{4.4} Githu Muigai. *Constitutional Amendments and the Constitutional Amendment Process in Kenya (1964-1997). A Study of the Politics of the Constitution*. PhD Thesis. University of Nairobi (2001) *op. cit.*

^{4.5} The Constitution of Kenya (Amendment) Act (No. 6 of 1985).

^{4.6} The Constitution of Kenya (Amendment) Act 1986 (No. 14 of 1986).

Subsequent to the twenty-second amendment, although not enshrined in the Constitution, KANU introduced the queue voting system in 1986, which technically replaced the secret ballot system. In the new system voters lined up behind parliamentary candidates of their choice. The candidates who secured more than 70 percent of the votes did not have to go through the process of the secret ballot in the General Elections. Through this sham nomination process, KANU declared President Moi elected as the President of the Republic of Kenya unopposed for a third term in office. The President, personally as the final arbiter, handled all the disputes arising from the nomination process.⁴⁹⁷.

Politically, the architects of the twenty-second amendment intended to curtail any possible opposition to the President including the growth of any alternative centre of power. The President through the queue voting system therefore did not just extend his strangle hold on the electoral process but also managed to tighten his grip on Parliament. In many respects therefore, the twenty-second amendment had far-reaching consequences on the integrity of the state and its institutions. It also denied Kenyans the freedom and right to elect candidates of their choice.

To complete the onslaught on the independent constitutional institutions and offices initiated through the twenty-second amendment, the next set of amendments aimed to undermine the authority of the courts and the independence of the Judiciary and the Public Services Commission (PSC) respectively.

⁴⁹⁷ Korwa G. Adar. *"The Interface between Elections and Democracy: Kenya's Search for a Sustainable Democratic System. 1960s - 1990s"*, (1999) pp. 340-360. in *African Democracy in the Era of Globalization*, J. Hyslop. Editors. 1999. Johannesburg: Witwatersrand University Press.

The twenty-third amendment⁴⁹⁸ came against the backdrop of the landmark case of *Margaret Magiri Ngui v. Republic*⁹⁹. In this case, the applicant had challenged the constitutionality of section 123 of the Criminal Procedure Code⁵⁰⁰ on the ground that it barred a person charged with a capital offence from obtaining bail contrary to section 72(5) of the Constitution. Section 72(5) of the Constitution stated that any accused person was eligible for bail irrespective of the nature of his or her offence.

In its ruling, the High Court sitting as a Constitutional Court held that an ordinary statute like the Criminal Procedure Code could not breach the fundamental rights guaranteed by the Constitution including the right to bail. Consequently, the court declared section 123 of the Criminal Procedure Code unconstitutional to the extent that it was inconsistent with section 72(5) of the Constitution.

Against the court ruling, the twenty-third amendment made all offences punishable by death, that is, treason, murder, robbery with violence and attempted robbery with violence non-bailable. This amendment therefore, for all practical purposes, constituted a blatant case in which Parliament did not only overrule the court but also compromised both the independence and integrity of the Judiciary.

The twenty-fourth amendment⁵⁰¹ completed the onslaught on the independence of key constitutional institutions and offices. It removed the security of tenure for members of the Public Service Commission and Judges of

^{4,8} Constitution of Kenya (Amendment) Act (No. 20 of 1987).

⁴ **Margaret Magiri Ngui v Republic* Criminal Application No. 4 of 1985.

⁵⁰⁰ The Criminal Procedure Code. Chapter 75 Laws of Kenya.

⁵⁰¹ The Constitution of Kenya (Amendment) Act (No. 4 of 1988).

the High Court and Court of Appeal and introduced the office of Chief Magistrate. In justifying the removal of security of tenure for judges and members of the Public Service Commission, the Attorney-General. Mathew Guy Muli, argued that the provisions were inconsistent with the Constitution, which gave the President the prerogative to appoint and dismiss all public servants at will. It was therefore necessary, he argued, to repeal such a provision, as it was effectively null and void.⁵⁰²

Perhaps in relation to the twenty-third amendment, the twenty-fourth amendment extended the maximum period before the police could arraign in court, a person charged with a capital offence, that is, murder, treason, robbery with violence and attempted robbery with violence from 24 hours to 14 days. According to Githu Muigai, this aspect of the amendment was not only ill advised but also unnecessary because as a matter of practice, courts often permitted the police to hold suspects after bringing them to court to enable them finalize investigations where this was deemed necessary.⁵⁰³

Cumulatively, the manner in which Parliament enacted the first twenty-four (24) constitutional amendments from 1964 to 1989 was not only reckless but also self-serving. K.C. Wheare explains this phenomenon of reckless exercise of amendment power by Parliament as follows:

"The fact is that the ease of the frequency with which a constitution is amended depends not only on the legal provisions which prescribe the method of change but also on the predominant political and social groups in the community and the extent to which they are satisfied with or acquiesce in the organization and the distribution of political power which the constitution prescribe. If the constitution suits them,

⁵⁰² Daily Nation 7th December 1990 pp 1-2.

Githu Muigai. *Constitutional Amendments and the Constitutional Amendment Process in Kenya (1964-1997). A Study of the Politics of the Constitution.* PhD Thesis. University of Nairobi (2001) *op. cit.*

they will not alter it much, even if the alteration requires more than an ordinary act of parliament. Against their opposition, attempts at amendment by dissatisfied minorities cannot hope to succeed. If on the other hand, enough of them wish to see the constitution altered, it will be done even if the process involves the surmounting of special legal obstacles."⁵⁰⁴

Indeed the primary purpose of these amendments was to neither entrench democratic constitutionalism nor build a democratic constitutional culture. Instead, they sought to undermine the sanctity of the Constitution as the basic law and to institutionalize personal rule, impunity and political expediency at the expense of institution building. More importantly, the amendments sought to neither strengthen constitutionalism nor make the Constitution and its institutions work for the greater public good and welfare of the people. Rather, the ruling elite used constitutional amendments to undermine the very essence of the Constitution and to secure themselves special political and economic advantages.

The overall outcome of the post independence constitutional developments is what Brad. R. Roth describes as "*desuetude*" - the negative legal effect of custom whereby public officials consistently violate constitutional norms resulting in negative effect of the constitutional order on society.⁵⁰⁵

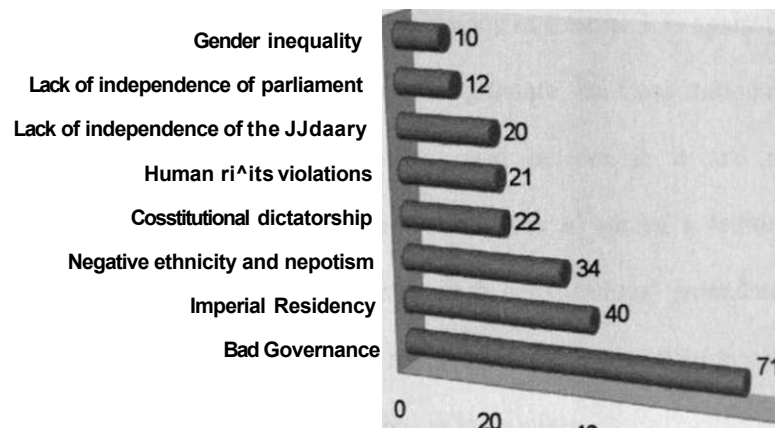
Indeed, when asked whether the post independence constitutional amendments had any positive effect, six out of ten of the respondents said that

⁵⁰⁴ Kenneth Clinton Wheare, *Modern Constitutions*, 2nd Edition Oxford University Press (1966) cited in J.B. Ojwang, *Constitutional Development in Kenya: Institutional Adaptation and Social Change* ACTS Press, Nairobi. 1990 p.224.

Brad R. Roth, *Governmental Illegitimacy in International Law*, Clarendon Press, Oxford. (1999) p.206.

the amendments had negative effects on the society and their wellbeing as reflected in the high levels of poverty, insecurity, unemployment and regional inequalities. This they attributed mainly to bad governance including impunity, corruption, patronage, negative ethnicity and lack of respect for human rights. Chart 2 below shows the respondents' views of the negative effects of post independence constitutional amendments in Kenya.

Chart 2: Negative Effects of the Post Independence Constitutional Amendments



• Negative Effects of the Post Independence Constitutional Amendments

Source: Study findings.⁵⁰⁶

Putting the above findings into perspective, Karuti Kanyinga points out that within five years of independence, the new Government had succeeded in personalizing state power in the President.⁵⁰⁷ Consequently, from independence politics and economy became constitutionally intertwined while the state

⁵⁰⁶ These are findings of the survey aspect of the study that covered a total of 553 respondents interviewed from all the eight provinces of Kenya, namely, Nairobi, Central, Rift Valley, Eastern, North Eastern, Coast, Western and Nyanza.

⁵⁰⁷ Karuti Kanyinga. "Ethnic inequalities and governance of the public sector in Kenya," *op. cit.*

became the institution critically necessary for changing the economic fortunes of the ruling elite and their ethnic constituencies. The control of and access to state power would therefore become the fulcrum around which inter-ethnic political competition and the struggle for constitutional reforms would be centred and played⁵⁰⁸.

From the foregoing, it is evident that the post independence constitutional developments between 1964 and 1989 did not attempt to contribute towards building constitutional legitimacy in Kenya. It is against this background that the study concludes that to be legitimate, the Constitution must command respect of the ruling elite who must believe in it and must demonstrate commitment to its implementation. Thus to secure a legitimate outcome, a constitution making whether through constitutional amendments, must be anchored on people's aspirations and must not be undertaken merely to secure the interests of a few elites or sections of the society.

5.5 The struggle for democratic reforms in Kenya, 1990-2010

This section assesses the struggle for democratic reforms and constitutional reconstruction in Kenya from 1990 to 2010. It assesses constitutional reform amendments and interrogates the question of whether meaningful constitutional change is possible in an environment of relative peace.⁵⁰⁹ This section therefore tests the claim that fundamental constitutional change does not take place in an

[^] *Ibid*

Professor H.W.O. Okoth Ogendo a respected Kenyan scholar citing various examples from around the world always argued that meaningful constitutional change does not take place in peacetime and that the Kenyan attempt at constitution making during peacetime was unlikely to yield different results.

environment of relative peace and that unless civil unrest threatens the *status quo*, the ruling elite will not often support fundamental constitutional reforms.

5.5.1 Overview of the struggle towards democratic reforms

As already highlighted in section 5.4, the Moi Government embarked on massive crackdown on political dissidents following the 1982 *coup de dat*. Arrests and detention without trial, suppression of fundamental freedoms and human rights violations became the order of the day.⁵⁰ With no opposition political parties as a result of the nineteenth amendment converting Kenya into a *de jure* one party state, the church, lawyers, academicians and human rights non-governmental organizations (NGOs) became the alternative political voices against the regime's excesses. As one cleric, for instance, put it:

"The absence of other organizations of political nature (e.g. political parties) that can confront the excesses of the state means that the Church is the only nationwide body which because of its institutional strength and its sense of obligation for public morals and social justice can speak and act in implicitly political ways. The social evils of our time (e.g. corruption, political patronage in employment, interference of the state with basic human freedoms, electoral rigging, detention without trial, torture, gagging of the press etc.) are so great...that Christians with any compassion cannot be indifferent to or complacent about the effects of such evils upon human lives in Kenya."⁵¹

Despite the growing voices against the excesses of Moi's regime, the crackdown on reform advocates grew. However, giving the pro-democracy movement impetus despite the crackdown was the increasing Western countries' demand for democracy, the rule of law and good governance as

⁵⁰ Korwa Adar and I. M. Muniya. *Human Rights Abuse in Kenya under Daniel Arap Moi. 1978-2001*, the *Online African study Quarterly* 5(1) *op. cit.*

⁵¹ G. Sabar-Friedman (1997), "Church and State in Kenya, 1986-1992: The Churches' Involvement in the Game of Change", *African Affairs*, 96, pp. 25-52.

critical pre-conditions for aid support to the Government. This followed the end of the Cold War resulting from the dramatic collapse of the one party communist regime in Eastern Europe and the former Soviet Union.⁵¹²

Thus facing growing international criticism over human rights abuses and civil disobedience, in June 1989, President Moi released all political prisoners detained without trial. Moi also granted an amnesty to dissidents in exile. This however, did not deter the reform crusaders from pursuing their "second liberation" agenda.

The year 1990 was however, to become a defining year in the reform movement. In February 1990, Kenya's Foreign Affairs Minister, Dr. Robert Ouko died in suspicious circumstances. This led to anti-government riots amid allegations of Government complicity in his death.⁵¹³ On 3rd May 1990, pro reform activists including academicians, lawyers, human rights crusaders, church leaders and politicians such as Kenneth Matiba, Oginga Odinga and Charles Rubia formed an alliance to demand the repeal of section 2A of the Constitution, dissolution of Parliament and a referendum to decide Kenya's future.⁵¹⁴

To stop the mounting tide of civil disobedience and unrest, President Moi ordered the arrest of Kenneth Matiba, Charles Rubia, Raila Odinga and John Khaminwa. As a result, serious riots broke out on 7th July 1990, popularly known as *saba saba* in Nairobi and its environs. President Moi's Government

Larry Diamond (2001), *Developing Democracy in Africa: African and International Imperatives*. Hoover Institution, Stanford University, CA, USA.

¹³ Korwa Adar and I. M. Munyae. Human Rights Abuse in Kenya under Daniel Arap Moi, 1978-2001. the Online African study Quarterly 5(1) *op. cit.*

ruthlessly crushed the demonstrations branding the pro-reform demonstrators drug addicts and their leaders as "tribalists and puppets of foreign masters." In the process, tens of people were killed while hundreds of demonstrators were wounded and arrested.⁵¹⁵

More significantly, earlier on 21st June 1990, President Moi appointed the KANU Review Committee consisting of ten (10) members under the Chairmanship of his Vice President, Professor George Saitoti. They were to look into three areas: KANU nomination rules, election rules and code of discipline.⁵¹⁶

While it would appear that the President established the Review Committee to look into KANU's in house matters, it was in fact a response to the growing demands for political change. Nothing however, dramatized the extent of public disaffection with the prevailing political situation and yearning for sweeping reforms than their reaction to the composition of the Review Committee and its narrow mandate. In response to the public outrage, President Moi enlarged the Committee membership from 10 to 19 to include representatives from trade unions, women's organizations, the Law Society of Kenya (LSK) and the churches. The President also expanded the Committee's to include hearing public views on all national issues.⁵¹⁷

According to B.A. Ogot, majority of Kenyans who appeared before the Review Committee made seven key demands. These included first, the abolition

⁵¹⁵ *Ibid*

⁵¹⁶ B.A. Ogot "Transition from Single-Party to Multiparty Political System 1989-1993", Chapter Nine, Part Four Epilogue 1989-1993 in Ogot B.A. and Ochieng W.R. (eds), *Decolonization and Independence in Kenya 1940-1993*. James Currey Ltd. London (1995) pp 239-262.

⁵¹⁷ *Ibid*

of the queue voting system. Second, the dissolution of Parliament as it was no longer representative of the wishes of the majority. Third, they demanded the repeal of section 2A of the Constitution to allow multi-party democracy. Fourth, they wanted limitation of presidential tenure. Fifth, they demanded restoration of the security of tenure of the Attorney-General, judges, the Controller and Auditor General and the Public Service Commission. Sixth, they demanded immediate abolition of detention without trial. Seventh, they called for immediate release of all political detainees and observance of human rights and the rule of law.⁵¹⁸

Despite the clear demands for far reaching reforms, the KANU Review Committee concluded that Kenyans were happy with the existing Constitution and that most of the issues raised were outside its mandate. President Moi subsequently called a special KANU Delegates Conference on 4th December 1990 to discuss and adopt the Saitoti report. The Conference adopted the report with only a few minor amendments. On KANU related matters, the delegates abolished the queue voting system including the 70 percent rule⁵¹⁹ and expulsion from the party as a method of discipline. The other party reforms agreed included establishment of a new National Disciplinary Committee; creation of the post of National Vice Chairman; establishment of an anti-

^{Z, bid}

The 70 percent rule provided that candidates who secured more than 70 percent of the votes in queue voting system did not have to go through the process of the secret ballot in the General Elections. They were deemed to have been elected. Also see section 5.4 on the twenty-second amendment.

corruption tribunal; and abolition of the Kshs. 40,000 ceiling on campaign expenditure.⁵¹⁰

President Moi, however, categorically rejected any attempts to push Kenya into adopting multi-party democracy even though he gave some concessions by instructing the Attorney-General, Justice Mathew Guy Muli, to introduce a Constitution of Kenya (Amendment) Bill to restore the security of tenure of the affected constitutional office holders. This nevertheless set in motion a series of democratic reform amendments as discussed below.⁵²¹

5.5.2 Assessment of the amendments towards democratic reforms

As instructed by the President, the Attorney-General, Justice Mathew Guy Muli, introduced the twenty-fifth constitutional amendment.⁵²² The amendment restored the security of tenure of judges of the High Court and Court of Appeal, the Attorney-General, the Controller and Auditor General and other constitutional office holders. The amendment also defined the procedure for appointment and removal of constitutional office holders including judges. According Githu Muigai, the same members who during the enactment of the 22nd amendment of 1986, had spoken eloquently on the insignificance of security of tenure for constitutional office holders now fell over themselves

⁵²⁰ *Ibid.*

⁵²¹ *Ibid.*

⁵²² The Constitution of Kenya (Amendment) Act (No. 17 of 1990).

trying to demonstrate why the security of tenure for constitutional offices was

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important only four years later.

Despite the 25th amendment, the Government crackdown on the reform crusaders continued while the quest for democratic reforms continued unabated. Donors withdrew their budgetary support or aid to Kenya to add pressure on the Government to undertake the democratic reforms demanded. In his New Year message, Jaramogi Oginga Odinga declared 1991 as the year of the repeal of section 2A of the Constitution and reintroduction of multiparty democracy in Kenya.⁵²⁴ Subsequently, on 13th February 1991, Jaramogi Oginga Odinga announced the formation of a new political party, the National Democratic Party (NDP). The formation of NDP was in total disregard of the constitutional *de jure* one party state status of Kenya.⁵²⁵

In August 1991, Jaramogi Oginga Odinga, Masinde Muliro, Joseph Martin Shikuku, George Nthenge, Ahmed Salim Bamahriz and Philip Gachoka formed the Forum for the Restoration of Democracy (FORD). FORD described itself as a pressure group rather than a political party. FORD's key objectives included the review of the Constitution to abolish detention without trial, restoration of multi-party politics in Kenya, and limitation of the presidential tenure to two terms of five years each.⁵²⁶

The Government finally gave in to popular demand for democratic reforms and on 3rd December 1991, the President convened the KANU National

Githu Muigai, Constitutional Amendments and the Constitutional Amendment Process in Kenya (1964-1997). A Study of the Politics of the Constitution. PhD Thesis, University of Nairobi (2001) *op. cit.*

⁵²⁴ Nairobi Law Monthly. August (1991).

⁵²⁵ *Ibid.*

⁵²⁶ Nairobi Law Monthly. August (1991).

Delegates Conference at Kasarani Sports Centre, Nairobi. The 3600 KANU delegates adopted a recommendation by the KANU Governing Council, to ask Parliament to, among other things, repeal section 2A of the Constitution. Subsequently, the Government initiated the twenty-sixth and twenty-seventh constitutional amendments in 1991.

The twenty-sixth amendment²⁷ prescribed a minimum number of 188 and a maximum of number 210 of electoral constituencies. Like the 1986 twenty-second amendment that also set minimum and maximum number of electoral constituencies, it is not clear why Parliament deemed its power to determine the number of constituencies from time to time on the advice of the Electoral Commission of Kenya unnecessary.

The twenty-seventh constitutional amendment⁵²⁸ which was passed on 10^h December 1991, seven days after the KANU National Delegates resolution, repealed section 2A of the Constitution to reverse the nineteenth amendment that established Kenya as a *de jure* one party state. Despite the repeal of section 2A of the Constitution, it was not until the twenty-ninth amendment⁵²⁹ that the Constitution in section 1A unequivocally defined Kenya's political system as "a multiparty democratic state."⁵³⁰

The twenty-eighth amendment⁵³¹ sought to secure broad national acceptance of a successful presidential candidate. It required that a successful presidential candidate must garner a majority of valid votes cast in a

" The Constitution of Kenya (Amendment) Act (No. 10 of 1991).

²⁷ The Constitution of Kenya (Amendment) Act (No. 12 of 1991).

The Constitution of Kenya (Amendment) Act (No. 9 of 1997).

B.A. Ogot "Transition from Single-Party to Multiparty Political System 1989-1993", *op. cit.*

⁵³⁰ The Constitution of Kenya (Amendment) Act (No. 6 of 1992).

presidential election than any other presidential candidate. It also required that a successful presidential candidate must receive a minimum of 25 percent of valid votes cast in at least five of the eight provinces of Kenya. The amendment further limited the President's tenure to a maximum of two terms of five years each. However, as ruled by the High Court acting as an Election Court in the *Matiba v. Moi* case,³ this limitation did not apply to the incumbent presidential candidate.

On electoral reforms, the twenty-eighth amendment repealed section 32(3) and instead introduced section 42A. Section 42A gave the Electoral Commission of Kenya (ECK) the power, among other things, to promote voter education throughout Kenya.

The amendment further repealed section 127 of the Constitution on North-Eastern Province and contiguous districts. Section 127 together with the North Eastern Province and Contiguous Districts Regulations, 1966 gave the President power to rule these areas by decree. The repeal of these laws was a therefore big step forward in restoring to the people of northern Kenya their fundamental rights and freedoms as equal citizens. In addition, the twenty-eighth amendment altered section 84 (1) to allow persons (whether detained or not), alleging that any of their fundamental rights and freedoms have been, are being, or are likely to be contravened to apply to the High Court for redress.

³: *Kenneth Stanley Njindo Matiba v. Daniel arap Moi* (Civil Application No. NAI 24 I of 1993) (unreported). This case challenged the validity of Moi's Election at the December 1992 presidential election. This first presidential election petition in Kenya was filed against the background of massive rigging allegations in the 1992. The political stakes were therefore high as the election was the first multi party election in Kenya after the repeal of the infamous Section 2A of the Constitution. The case was struck out on the ground that the petition was not signed by Hon Matiba himself.

It is noteworthy that before the twenty eighth amendment, the Attorney-General, Amos Wako had formulated the Constitution of Kenya (Amendment) Bill dated 3rd March 1992 that if enacted, would have very well been the most fundamental re-organization of the Constitution since 1969. The Attorney-General, however, shelved the Bill after the Government failed to support its introduction in Parliament.

The Amendment Bill sought to first, abolish the office of the Vice-President; second, vest in the Speaker of the National Assembly the powers of the President whenever that office is vacant; and third, to limit the tenure of the President to two five-year terms. The Bill further sought to define specifically, for the first time, the functions, powers and duties of the President; and to create a dichotomy between the President as the Head of State and the Prime Minister as Head of Government.

Other key provisions contained in the Bill related first, it provided for the impeachment of the President for unconstitutional conduct by a referendum vote. Second, it made provisions for referenda to allow the public to participate in making decisions on a range of issues. Third, it provided for the repeal of presidential powers to rule North Eastern Province by decree. Fourth, it clarified the role of the Electoral Commission in the conduct and management of elections. Fifth, the Bill provided for parliamentary supremacy over presidential veto of legislation. Sixth, it made provision for legal aid to victims of human rights violations.

The Bill in many respects addressed most of the governance issues that had persisted since independence and to that extent was progressive. Although

the Bill was widely viewed as a rearguard action by the KANU Government to tamper with the political apparatus to their advantage, the truth may very well be that the proposed amendments were the brainchild of a new Attorney-General who may have seen the moment as ripe to make the long overdue constitutional changes.⁵³³

5.5.3 The struggle for comprehensive constitutional reforms

After the twenty-eighth amendment in 1992, it took another five years before Parliament made the next constitutional amendment in 1997 under the Inter Parties Parliamentary Group (IPPG) deal. During this period, however, political upheaval and brutal crackdown on pro-reform crusaders intensified. Indeed, the events between 1992 and 1997 did not only demonstrate the Government's resolve to stop the pro-reform movement but also the inadequacy of the democratic reforms so far enacted to entrench democratic governance and constitutionalism.

According to Korwa Adar and I. M. Munyae, when Kenya entered the second multi-party era, it was assumed that the democratic space would be automatically expanded.⁵³⁴ On the contrary, human rights violations continued unabated through the security agencies, state sponsored private militias and politically instigated ethnic violence or clashes.⁵³⁵ The ethnic violence around

⁵³¹ Githu Muigai. *Constitutional Amendments and the Constitutional Amendment Process in Kenya (1964-1997). A Study of the Politics of the Constitution*, PhD Thesis. University of Nairobi (2001) *op. cit.*

⁵³² Korwa Adar and I. M. Munyae. *Human Rights Abuse in Kenya under Daniel Arap Moi. 1978-2001. the Online African study Quarterly* 5(1) *op. cit.*

⁵³³ Article 19, *Deadly Marionettes: State Sponsored Violence in Africa*. London: Article 19, October 1997.

the time of elections in 1992 and 1997 was particularly meant to portray the multi-party system as inappropriate for Kenya.⁵³⁶

Despite the political violence and intimidation targeting ethnic communities and individuals deemed to be sympathetic to the opposition,⁵³⁷ the pro-reform movement intensified its campaign. In 1994, the Catholic Bishops issued a pastoral letter calling for a new Constitution. The Kenya Human Rights Commission (KHRC), the Law Society of Kenya (LSK) and the International Commission of Jurists Kenya Section (ICJ-Kenya) also developed a proposed new Constitution, entitled *Proposal for a Model Constitution*. This proposed new Constitution formed the basis for extensive advocacy from 1994 onwards.⁵³⁸

In view of the escalating pressure, President Moi in January 1995 announced plans to invite foreign experts to draft a Constitution for consideration by the National Assembly.⁵³⁹ President Moi had in fact intended to convene a forum of constitutional lawyers and experts from the USA, Germany, France, Britain and Canada to assist in collating the views from Kenyans before putting it to Parliament for debate.⁵⁴⁰ The pro-reform movement through the civil society driven National Convention Assembly (NCA) and its National Convention Executive Committee (NCEC), however,

⁵³⁶ National Council of Churches of Kenya, CPK/ARCH.. Synod Committee Report. April 1992.

⁵³⁷ Carol Sicherman, "Kenya" in *Race A Class*. April-June 1998. Vol. 57 (no. 4): p 63: Amnesty International 1998.

Constitution of Kenya Review Commission, *The Final Report of the Constitution of Kenya Review Commission*, approved for issue at the 95th Plenary Meeting of the Commission on 10th February 2005 *op. cit.*

⁵³⁹ *Ibid.*

⁵⁴⁰ Joseph arap Misoi, *Untold Story of Origin of the 1997 IPPG Deal*. Kalenjin Online. <http://www.kalenjin.net>.

roundly rejected this proposal and called for mass action, which invited heavy state crackdown leading to violence and deaths.

The National Convention Executive Committee (NCEC) demanded a comprehensive people driven Constitution review process and the reform or repeal of various draconian pieces of legislation. These included first, the Preservation of Public Security Act, Cap 157; second, sections of the Penal Code, Cap 63 dealing with sedition and treason; third, the Public Order Act, Cap 56; fourth, the Chiefs Authority Act, Cap 128; fifth, the Administration Police Act, Cap 85; and seventh, the Societies Act, Cap 108.⁵⁴¹

The NCEC further questioned the impartiality of the Electoral Commission of Kenya (ECK) and demanded a fair political party registration process, the removal of restrictions on opposition parties as well as their unhindered access to the broadcast media.⁵⁴²

The Government responded to the intensifying public protests and the civil society and opposition demands for comprehensive constitution reforms with brutal force leading to more violence and deaths. It was however, the 1997 "*Saba Saba*" bloody street clashes that placed the country into serious political violence trajectory. The protests and riots led to destruction of property, injuries and loss of life while the KANU Government remained resolutely adamant, insensitive and violent in its approach to dealing with the demands by the pro-reform movement.⁵⁴⁵

⁵⁴¹ Amnesty International (1997) Report on Violation of Kenya Human Rights. Amnesty International. September 1997.

⁵⁴² *Ibid.*

⁵⁴³ Joseph arap Misoj. Untold Story of Origin of the 1997 IPPG Deal, Kalenjin Online. <http://www.kalenjin.net>.

Concerned with the escalating civil unrest and violence, a group consisting of Dr. P.L.O. Lumumba, Hon. Dr. Joseph Misoi and Nicholas Otieno came together and formed the Movement for Dialogue and Non-violence (MODAN). Launched officially on 29th July 1997,⁵⁴⁴ MODAN's aim was to explore ways of ensuring peaceful constitutional change preferably before the 1997 General Elections. To this end, MODAN convened a meeting of some influential Members of Parliament (MPs) to consult and dialogue on how to initiate a parliamentary process to find a non-violent solution to the Constitution review stalemate. The MPs included Hon. Dr. Oki Ooko Ombaka, Hon. Dr. Phoebe Asiyo, Hon. Dr. Mukhisa Kituyi, Hon. Kipruto Arap Kirwa, Hon. Maoka Maore and Hon. Jilo Falana, among others,⁵⁴ⁿ

MODAN further quietly lobbied President Moi through foreign diplomatic channels. They also reached out to more Members of Parliament including the late Hon. Martin Shikuku, Hon James Osogo, the late Hon Achieng Oneko, the late Hon George Anyona, the late Vice President Kijana Wamalwa, Hon Njenga Mungai, Hon Dr Oburu Odinga and the then Democratic Party Chairman, Hon. Mwai Kibaki.

Perhaps, out of the MODAN initiative and with the increasing spectre of violence and international pressure, on 15th July 1997, President Moi initiated dialogue with Christian and Muslim religious leaders. Two days later, on 17th July 1997, the Government announced its readiness to undertake reforms before

* *Ibid.*

⁵⁴⁵ *Ibid.*

the 1997 General Elections. President Moi also proposed that religious leaders mediate on the reform stalemate.⁵⁴⁶

By asking the religious community to mediate and by agreeing to undertake reforms, President Moi succeeded not just in neutralizing the mounting tension but also in dividing the civil society and opposition forces. With a divided pro-reform movement, President Moi and KANU shifted strategy. They insisted that constitutional negotiations could only involve *bona fide* representatives of the people or parliamentary political parties exclusive of what they called some amorphous civil society groupings.

The Vice-President, Hon. George Saitoti, therefore proceeded to invite KANU and opposition MPs to a meeting to discuss ways of averting a constitutional reform crisis. Subsequently, in August 1997, the parliamentary political parties including those that supported the initiatives of the National Convention for Constitutional Change (NCCC) (formerly National Convention Assembly-NCA) formed the Inter Parties Parliamentary Group (IPPG).⁵⁴⁷

The IPPG, chaired by Hon. Jilo Falana, comprised 36 opposition MPs and KANU Members of Parliament. Those who formed the nucleus of IPPG in secret meetings were Hon Prof Anyang Nyong'o, Hon Paul Muite , Hon. Martha Karua, Hon Musikari Kombo, Hon Kiraitu Murungi, the late Hon Ooko

£ *Ibid.*

The IPPG consisted of an amalgam of parliamentary political parties including KANU and opposition parties such as Ford Kenya, Ford Asili, Democratic Party and Social Democratic Party among others.

Ombaka, Hon Saulo Busolo, Hon Dr Mukhisa Kituyi and Hon Dr Joseph arap Misoi.⁵⁴⁸

According to Professor Peter Wanyande, although some, especially the civil society organizations and a section of the opposition, saw the IPPG initiative as the Government's attempt to control the constitutional reform process, most MPs from the opposition were, divided on whether or not to support the initiative.

On the one hand, some opposition MPs were willing to give the IPPG a chance in the hope that because it included opposition MPs, it would resist any attempts by KANU to manipulate and undermine the reform process. On the other hand, there were MPs who supported the arrangement purely for selfish reasons. These included MPs who believed that the IPPG would at least recommend minimal constitutional changes that would enhance their chances of re-election.⁵⁵⁰

For KANU, the IPPG process presented an opportunity to drive a wedge between the "moderates" and the "radicals" in civil society organizations and Parliament. Some opposition MPs were also not comfortable with the fact that the civil society organizations had taken charge of the constitutional reform process. To them, it was time for Parliament to reassert its control over the reform agenda.

⁵⁴⁸ Joseph arap Misoi, *Untold Story of Origin of the 1997 IPPG Deal*. Kalenjin Online. [Imp://www.kaleniin.net](http://www.kaleniin.net) *op. cit.*

⁵⁴⁹ Peter Wanyande, "Recent Constitutional Developments in Kenya," in Saida Yahya-Othman (ed) *Politics, Governance and Cooperation in East Africa*, Research and Education for Democracy in Tanzania. Mkuki na Nyota Publishers (2002).

⁵⁵⁰ *Ibid.*

More importantly, because some opposition MPs and religious leaders feared the consequences of further escalation of conflict around the constitutional reform process, they were ready to settle for piecemeal reforms.⁵⁵¹ Raila Odinga of National Development Party, however, boycotted the IPPG talks arguing that the process was, structured in a manner that could not ensure comprehensive constitutional reforms before the 1997 elections.⁵⁵²

The IPPG eventually agreed on a raft of constitutional, legal and administrative reforms culminating in the twenty-ninth constitutional amendment and other relevant legislative amendments.⁵⁵³ The twenty-ninth amendment⁵⁵⁴ or the "IPPG amendment" introduced section 1A of the Constitution, which unequivocally stated, "The Republic of Kenya shall be a multiparty democratic state." This was to remove any doubt whatsoever that Kenya was indeed a multiparty democracy following the twenty-seventh amendment that repealed section 2A of the Constitution.

The twenty-ninth amendment further increased the membership of the Electoral Commission of Kenya from four (4) to twenty one (21) including the Chairman. It also enabled parliamentary political parties to participate in the nomination of 12 members to Parliament to represent special interests.

The other aspects of the IPPG Amendment included a provision on the responsibility of the Electoral Commission of Kenya to promote free and fair elections and voter education; a provision outlawing discrimination based on

⁵⁵¹ *Ibid.*

* *Ibid*

⁵⁵³ Constitution of Kenya Review Commission. *The Final Report of the Constitution of Kenya Review Commission, approved for issue at the 95th Plenary Meeting of the Commission on 10th February 2005 op. cit.*

⁵⁵⁴ The Constitution of Kenya (Amendment) Act (No. 9 of 1997).

sex; and a provision on the jurisdiction of the High Court to hear and determine any question relating to membership of the National Assembly.

In addition to the twenty-ninth amendment, Parliament enacted the Statute Law (Repeals and Miscellaneous) (Amendment) Act,⁵⁵ which repealed and effected changes to various statutes. First, the Act repealed such outdated statutes as the Outlying Districts Act, Cap 104, the Special Districts⁵⁵⁶ (Administration) Act, Cap 105, and the Vagrancy Act, Cap 58.

Secondly, in relation to the draconian public order and security legislation, the Act amended the Penal Code, Cap 63 in respect of provisions on seditious publication and legal proceedings in sedition cases. The Act also amended the Police Act, Cap 84 in relation to the control and conduct of the police force in executing its functions. The Preservation of Public Security Act, Cap 157 was amended in relation to the provisions on detention without trial for political reasons. The Act renamed the Chiefs Authority Act, Cap 128 as the Chiefs Act and amended the Public Collection Act, Cap 106.

Thirdly, on matters relating to freedom of expression and association, the Act amended the Kenya Broadcasting Corporation (KBC) Act Cap 221 to provide for fair and balanced allocation of airtime for political broadcasts between different political players especially during election campaigns. It also amended the Films and Stage Plays Act, Cap 222 to remove restrictions on theatre licences and the Societies Act, Cap 108 in respect of the registration and control of societies including the political parties.

⁵⁵ The Statute Law (Repeals and Miscellaneous) (Amendment) Act 10 of 1997.

The districts under the Special Districts (Administration) Act Cap 105 included either whole or parts of the following: Mandera, Wajir, Garissa, Marsabit, Isiolo, Samburu, Tana River, West Pokot, Mukogodo Special Reserve, Narok, Kajiado, Turkana, Lamu and Machakos.

Fourthly, to improve the electoral environment, the Act made amendments to the National Assembly and Presidential Elections Act, Cap 7 in respect of section 33 on nomination of members of Parliament. It also amended the Election Offences Act, Cap 66, and the Local Government Act, Cap 265 especially those sections relating to election and nomination of councillors.

The other IPPG amended statutes included the Prevention of Corruption Act, Cap 65; the Forests Act, Cap 385; the Banking Act, Cap 488; the Council for Legal Education Act, No. 10 of 1995; and the National Council of Law Reporting Act, No. 11 of 1994.⁵⁵⁷

Practically, the IPPG amendments were considered as an interim measure to ensure free and fair elections in 1997 after which a more comprehensive review of the Constitution would be undertaken. For this reason, Parliament enacted the Constitution of Kenya Review Act of 1997. The Review Act 1997 was to provide a framework for a comprehensive Constitution of Kenya review process after the 1997 elections. Chapter 6 discusses in detail, the challenges in operationalizing the Review Act 1997.

The IPPG deal was however, widely criticised for having been superficial to affect the entrenched edifice of constitutional dictatorship in Kenya. According to Professor Ben Sihanya, the IPPG reforms left intact the extensive powers of the President as well as the historical constitutional, legislative and administrative structures that entrenched patrimonialism in the

⁷ Peter Wanyande. Recent Constitutional Developments in Kenya in *Politics, Governance and Cooperation in East Africa* (2002) *op. cit.*

exercise of public authority.⁵⁵⁸ As a result, the ruling elite continued to disregard the law and frustrate reform process with impunity despite the IPPG deal. For example, in spite of the IPPG agreement providing that the political parties would nominate members to the ECK according to political party strength,"⁹ President Kibaki was, to later, unilaterally appoint the Electoral Commission of Kenya (ECK) Commissioners without reference to the political parties.

According to Lawrence M. Mute, the IPPG deal was intended to bribe the masses into silence while enabling the political class to participate in the 1997 General Elections.⁵⁶⁰ Mute further points out that in order to safeguard their interests, the political actors "flocked together when they divined that they would otherwise be swamped by the huge tide of voices linking constitutional, legal and administrative change with the 1997 elections under the clarion call, "no reforms no elections."⁵⁶¹ Willy Mutunga shares this perspective in his book, *Constitution making from the Middle: Civil Society and Transition Politics in Kenya 1992-1997*,⁵⁶² Professor Peter Wanyande has also pointed out that uppermost in the minds of Members of Parliament at that time was the impending elections to be held in December 1997. As a result, their main

⁵⁵⁸Ben Sihanya. *The Presidency and Public Authority in Kenya's new Constitutional Order*. SID Constitution Working Paper Series No. 2, Society for International Development. Nairobi (2011), p. 8-9.

⁹*Ibid.*

Lawrence M. Mute. *The Extent of Implementation of Inter Party Parliamentary Group (IPPG) Package*, Report of Centre for Law and Research International (CLARION) (2000).

⁵⁶¹ *Ibid.*

⁵⁶²Willy Mutunga Willy, *Constitution making from the Middle: Civil Society and Transition Politics in Kenya 1992-1997*, Sareat. Nairobi (1999).

concern was not the broad democratization and constitutional reform agenda but more so how the existing Constitution would affect the scheduled elections.⁵⁶³

Thus, while on the one hand most Members of Parliament found the minimal constitutional and legislative changes attractive, on the other hand, the Government found the IPPG process non-threatening. President Moi and KANU were however, the greatest beneficiaries of the IPPG process. They not only succeeded in diffusing potentially explosive political crisis towards the 1997 General Elections but also ensured that the *status quo* remained. Through the IPPG deal therefore, Kenya's first real chance for comprehensive constitutional reforms since independence was, deferred, to an uncertain post election future. Indeed, since the IPPG reforms left intact the extensive powers of the President, it was difficult to guarantee that any future president would willingly undertake the comprehensive constitutional reforms promised by the IPPG. Chapter 6 discusses in detail, the challenges and intrigues around the post 1997 comprehensive Constitution of Kenya review process leading to the high-stakes presidential elections bitterly fought in December 2007.

Despite its shortcomings, the IPPG deal was significant in Kenya's constitutional history because it contributed to making the governance system more open and tolerant to diverse political views.⁵⁶⁴ After the twenty-ninth (IPPG Amendment), the only other constitutional amendment initiated by the Government was the thirtieth amendment of 1999.⁵⁶⁵ This amendment sought to

Peter Wanyande, Recent Constitutional Developments in Kenya in *Politics, Governance and Cooperation in East Africa* (2002) *op. cit.*

^M**Peter Wanyande, Recent Constitutional Developments in Kenya in *Politics, Governance and Cooperation in East Africa* (2002) *op. cit.***

⁵⁶⁵ The Constitution of Kenya (Amendment) Act (No. 3 of 1999).

secure the independence of Parliament from the Executive control by creating the Parliamentary Service Commission and placing the offices of the Clerk of the National Assembly and other staff under the Commission. The power to prorogue and control the calendar of Parliament, however, remained with the President.

5.5.4 The Post 2007 election violence constitutional amendments

Since the 1997 IPPG deal and the thirtieth amendment in 1999, the country engaged in an endless process of Constitution review until after 27th December 2007 Post election violence. Typically, the ruling elite frustrated the review process at every stage ensuring that the country went through two General Elections in 2002 and 2007 without the promised new Constitution. In many ways therefore, the consistent failure to carry out or complete the desired comprehensive constitutional reforms since the early 1990s is what could be attributed to the political crisis that followed the 27th December 2007 presidential election dispute

Based on the events leading to the declaration of President Kibaki as the winner of the December 2007 presidential elections, many believed that the 2007 presidential election results were fraudulent. Indeed when asked later who in his opinion he thought had won the presidential election, Mr. Samuel Kivuitu, the Chairman of the Electoral Commission of Kenya (ECK), famously claimed that he did not know who actually won the 2007 presidential elections.

With 90 percent of the constituencies having reported their election results, Raila Odinga was leading with 370,000 votes at which stage the

Government ordered media houses to stop broadcasting live, the election results as they streamed in from various stations across the country. Two days later in the late afternoon of 30th December 2007, the Chairman of the Electoral Commission of Kenya suddenly announced that Kibaki had won with a margin of 231 728 votes. The ECK assigned 4,584,721 votes (47 percent) to Mwai Kibaki and 4,352,993 votes to Raila Odinga (44 percent).⁵⁶⁶ Following the ECK announcement, the government blacked out the ODM press conference and ordered security clampdown at the Kenyatta International Conference Centre (KICC) Tallying Centre. Mwai Kibaki was, immediately sworn in at a hurriedly organized ceremony on grounds of State House, Nairobi in the evening of 30th December 2007.⁵⁶⁷

The dispute not only generated civil unrest and political violence of unprecedented magnitude hitherto not witnessed in independent Kenya, but also exposed a deep constitutional crisis. On the one hand, ODM claimed victory and termed Kibaki's presidency and PNU Government illegitimate calling for a million people to march to State House to evict Kibaki. On the other hand, PNU stood its ground that Kibaki won the election⁵⁶⁸ urging ODM to seek for legal redress over its claims of a stolen victory in the presidential election.⁵⁶⁹

⁵⁶⁶ Toni Weis. *the Results of the 2007 Kenyan General Election*. *Journal of Eastern African Studies*. Vol. 2, No.2, 1 A41, July 2008. Routledge. Taylor and Francis.

⁵⁶⁷ *Ibid.*

⁵⁶⁸ While PNU was keen on consolidating its claim to power. ODM was keen to secure its own (legitimate) claim of victory. In its actions, PNU seemed to anchor its arguments on Hans Kelsen's theory which posits that a civilian or military coup or revolution may become valid or legitimate (in the Weberian legal-rational sense) if it becomes efficacious, that is, the orders of the new regime are obeyed (see Hans Kelsen, (2001). *Introduction to the Problems of Legal Theory*, Oxford University Press).

⁵⁶⁹ Ben Sihanya and Duncan Okello, "Mediating Kenya's Post-Election Crises: The Politics and Limits of Power Sharing Agreement" in Karuti Kanyinga and Duncan Okello (eds). *Tensions and Reversals in Democratic Transition*. Society for International Development & Institute of Development Studies. University of Nairobi. 2010. p. 683.

Thus faced with severe governance crisis and the growing possibility of state collapse in Kenya as a result the post 2007 presidential election civil unrest and spiralling violence, the international community responded rapidly. The African Union with the support of the United Nations quickly established the Panel of Eminent African Personalities⁵⁷⁰ (PEAP) to help resolve the obviously unwinnable conflict between Raila Odinga's Orange Democratic Movement (ODM) and Mwai Kibaki's Party of National Unity (PNU) that was fast degenerating into an all out civil anarchy. Under these circumstances, it was widely believed the resolution of the crisis required adjustments to the current constitutional, legal and institutional frameworks.⁵⁷¹

To resolve both the immediate and long-term aspects of the unfolding political and constitutional crisis, three constitutional amendments were proposed under Agenda Four (4) of the Framework of the Kenya National Dialogue and Reconciliation (KNDR). The constitutional imperative for the short and long resolution of the crisis is best illustrated by the statement of the Panel of Eminent African Personalities Chief Mediator, Kofi Annan:

"The crisis has mutated from an electoral dispute into much deeper problems with high potential for recurrence.... Any attempt to resolve the issue must go beyond electoral dispute if a lasting solution is to be found. We must tackle the fundamental issues underlying the disturbances-like equitable distribution of resources-or else we will be back here again after three or four years."⁵⁷²

⁵⁷⁰ The Panel consisted of the Former Secretary General of the United Nations. His Excellency Kofi Annan; His Excellency President Benjamin Mkapa, Retired President of the United Republic of Tanzania; and Her Excellency Madam Graca Machel.

⁵⁷¹ Ben Sihanya, *Reconstructing the Kenyan Constitution and State: Lessons From German and American Constitutionalism* *op.cit.*

East African Standard. 26th January 2008 cited in Ben Sihanya and Duncan Okello. "Mediating Kenya's Post-Election Crises: The Politics and Limits of Power Sharing Agreement" in Karuti Kanyinga and Duncan Okello (eds). *Tensions and Reversals in Democratic Transition*. Society for International Development & Institute of Development Studies, University of Nairobi. 2010. p. 680.

The first of the K.NDR Agenda Four (4) constitutional amendments, the thirty-first amendment,⁵⁷⁰ introduced section 15A on Prime Minister and Deputy Prime Ministers. It also amended section 17 of the Constitution on the Cabinet to entrench and give effect to the provisions of the *Agreement on the Principles of Partnership of the Coalition Government*. Parliament further enacted the National Accord and Reconciliation Act, Cap 4 of 2008, which was also entrenched in the Constitution to protect the *Agreement on the Principles of Partnership of the Coalition Government* from being subverted by any party given the deep suspicion that existed between the two coalition partners,.

The second Agenda Four (4) amendment, the thirty-second constitutional amendment,⁵⁷⁴ introduced a number of amendments including news sections to address specific Agenda Four (4) issues. First, it amended section 41 of the Constitution and introduced sections 41 A, 41B, 47A. Section 47A entrenched the Constitution review process in the Constitution and explicitly provided for the exercise of the sovereign right of the people to make their Constitution. Parliament subsequently enacted the Constitution of Kenya Review Act 2008 to provide a legal framework for the completion of the Constitution of Kenya review process.

Secondly, the thirty-second amendment introduced section 60A of the Constitution to deal with any and only disputes around the Constitution review process. The amendment therefore established the Interim Independent Constitutional Dispute Resolution Court (IICDRC) with exclusive original jurisdiction to hear and determine all and only matters arising from the

⁵⁷⁵ **The Constitution of Kenya (Amendment) Act 3A of 2008.**

⁵⁷⁴ **The Constitution of Kenya (Amendment) Act (No. 10 of 2008).**

Constitution review process. Thirdly, the thirty-second amendment replaced the Electoral Commission of Kenya with the Interim Independent Electoral Commission (IIEC) under section 41 of the Constitution. The amendment vested in the IIEC the powers, rights, duties and obligations of the former Electoral Commission of Kenya. It also given the power to deal with electoral issues identified by the Independent Review Commission (IREC),

Fourthly, the thirty-second amendment established the Interim Independent Boundaries Review Commission (IIBRC) with nine members. The powers and functions of the Commission included first, the delimitation of constituencies, local authority electoral units and the administrative boundaries; and secondly, the setting of optimal number of constituencies on the basis of equality of votes, the density of population, population trends, means of communication and community of interest.

The third of the KNDR Agenda Four (4) amendments, the thirty-third amendment[^] introduced section 3A on the *Statute for the Special Tribunal for Kenya*. Section 3A gave Parliament power to enact a statute establishing a special tribunal with exclusive jurisdiction to investigate, prosecute and determine cases against persons responsible for genocide, gross violations of human rights, crimes against humanity and such other crimes as may be specified in the statute.

However, the Government failed in its attempt to have Parliament pass the Special Tribunal for Kenya Bill 2009 that sought to establish the Special Tribunal on Post Election Violence (PEV). If enacted, the Tribunal would have

investigated, prosecuted and determined the cases against persons bearing the greatest responsibility for committing crimes against humanity in Kenya between December 3, 2007 and February 28, 2008. As a result of Parliament's failure to enact the Special Tribunal for Kenya Bill 2009, the cases of six Kenyans⁵⁷⁶ accused of bearing the greatest responsibility for the post election violence were referred to the International Criminal Court (ICC) at the Hague. Of the six Kenyans, the ICC dropped the charges against three, namely Mr Henry Kosgey, Mr Mohammed Ali and Mr. Francis Muthaura for lack of adequate evidence. The Court, however, committed the other three, namely Hon. Uhuru Kenyatta, Hon. William Ruto and Mr. Joshua arap Sang to stand trial.

Overall, from the civil unrest and violence of the 1990s to the post 2007 election violence and the subsequent KNDR constitutional amendments, the study concludes that fundamental constitutional changes do not take place in an environment of relative peace. The study argues therefore that unless civil unrest threatens the *status quo*, the ruling elite will not often support fundamental constitutional reforms.

⁶ The six accused of bearing the greatest responsibility over the post election violence were : the Minister of Industrialization, Mr Henry Kosgey; the former Police Commissioner, Mr Mohammed Ali, the Deputy Prime Minister Hon. Uhuru Kenyatta, the former Head of Public Service and Secretary to the Cabinet. Mr. Francis Muthaura, Eldoret North MP Hon. William Ruto and KASS FM radio presenter. Mr. Joshua arap Sang.

5.6 Conclusion

This Chapter has presented an analysis of the constitutional amendments in post independence Kenya and the struggle for constitutional reforms. It has interrogated the question of whether the post independence constitutional developments contributed to building of constitutional legitimacy in Kenya. The Chapter has tested the claim that to be legitimate, the Constitution must command the respect of the ruling elite who must believe in it and must demonstrate commitment to its implementation. It has also tested the claim that fundamental constitutional changes do not take place in an environment of relative peace and that unless civil unrest threatens the *status quo*, the ruling elite will not often support fundamental constitutional reforms.

From the foregoing, the study reaches four conclusions. First, that most of the post independence constitutional amendments seldom contributed to the development of constitutional legitimacy and strengthening of democracy. Rather, the ruling elite used the amendments to undermine the sanctity of the Constitution and its institutions. Essentially, much of the constitutional developments in Kenya since independence signified no more than familiar ritual of moving from one unjust constitutional regime to another without any fundamental democratic transition. More importantly, until the start of the Constitution of Kenya review process, the people were neither consulted nor involved in any of the post independence constitutional amendments leading, inevitably, to a crisis of legitimacy of the Constitution and the state.

Secondly, the study concludes that meaningful constitutional changes do not often take place in an environment of relative peace. The study argues that

unless civil unrest threatens the *status quo*. the ruling elite will not often support fundamental constitutional reforms. Typically, and as demonstrated both during the colonial and post independence periods, all the major and fundamental constitutional changes in Kenya were preceded by intense periods of civil unrest and violence.

The study therefore argues that unless civil unrest threatens the *status quo*, the ruling elite would not often support fundamental constitutional reforms, which also supports Professor H.W.O. Okoth Ogendo's consistent view that meaningful constitutional reforms do not take place in peacetime.^{5,7} Indeed, in Kenya, it had to take violence and widespread civil unrest following the post 2007 election crisis for the ruling elite to agree to complete the protracted Constitution of Kenya review process leading to the promulgation of the Constitution of Kenya 2010 on August 27, 2010.

Thirdly, the study concludes that to be legitimate, the Constitution must command respect of the ruling elite who must believe in it and must demonstrate commitment to its implementation. Similarly, to secure legitimacy, a Constitution making process must command the respect of the ruling elite who must believe in it and must demonstrate commitment to supporting the process including implementation of its outcome.

As demonstrated throughout the post independence period, the reason for so many constitutional amendments was simply that the ruling elite neither

⁵⁷⁷ Professor H.W.O Okoth Ogendo consistently expressed this view as a Commissioner at the Constitution of Kenya Review Commission (CKRC) where he also served as Commission Vice Chairman as well as the Chairman of the Research, Drafting and Technical Support Committee. In many of his arguments about the futility of Kenya's Constitution review process during peacetime. Professor H.W.O. Okoth Ogendo always expressed the view that meaningful constitutional reforms do not take place in peacetime.

respected nor believed in the Independence Constitution and its institutions. K.C. Wheare explains that the frequency, with which a Constitution is, amended, depends not just on the legal provisions that prescribe the procedure for its alteration but also on the extent to which the predominant political and social groups are satisfied with it. If the Constitution suits them, they will not alter it much, even if the alteration requires a simple majority in Parliament. However, if on the other hand, enough of them wish to see the Constitution altered, it will be done even if the process involves the surmounting of special legal obstacles.^{5 8}

Fourthly, the study concludes that to secure a legitimate outcome, a constitution making process must not merely seek to secure the interests of a few elites or sections of the society. Rather, the process must be inclusive of the aspirations of all in the society while its vision must be tied to the overall vision of democratic governance and social justice.

As shown by most of the post independence constitutional amendments, the processes were neither inclusive of the aspirations of majority of Kenyans nor driven by the overarching principles of democracy and social justice resulting in a crisis of legitimacy of the Constitution and its institutions. Consequently, in spite of the constitutional reforms in Kenya since the 1990s, the country has achieved little in terms of fundamental changes in governance and people's living conditions.^{7q} The next Chapter (6) presents an examination of the principles, processes and challenges of the Constitution of Kenya review process from 1997 to 2007 as a model of participatory Constitution making.

⁸ Kenneth Clinton Wheare, *Modern Constitutions*, 2nd Edition Oxford University Press (1966) cited in J.B. Ojwang. *Constitutional Development in Kenya: Institutional Adaptation and Social Change* ACTS Press, Nairobi, 1990 *op. cit.*

Njuguna Ng'ethe and Musambayi Katumanga, "Transition and the Politics of Constitution making: A comparative Study of Uganda, South Africa and Kenya," *op. cit.*

CHAPTER SIX

TOWARDS A PARTICIPATORY CONSTITUTION MAKING MODEL: THE PRINCIPLES AND PROCESSES OF CONSTITUTION REVIEW IN KENYA (1997-2007)

6.1 Introduction

Chapter Five has presented an analysis of the constitutional amendments and the struggle for constitutional reforms in post independence Kenya. This Chapter examines the principles, processes and challenges of Kenya's participatory approach to Constitution review from 1997 to 2007. The Chapter interrogates the question of what makes a participatory Constitution making process effective.

The Chapter therefore tests the claim that the effectiveness of a participatory Constitution making process very much depends on the commitment the ruling elite demonstrate in supporting the process at every stage. In this regard, a participatory Constitution making process must command the support of the ruling elite who must believe in it and must demonstrate commitment to ensuring that the process succeeds.

6.2 Constitutional principles and participatory Constitution making

This section examines the role of constitutional principles in securing a participatory Constitution making process and the legitimacy of its outcome. This section therefore avers that establishment of clear guiding constitutional principles are necessary preconditions for an effective participatory Constitution

making process. These principles must however, be entrenched in the Constitution to ensure their enforcement.

According to Professor Kivutha Kibwana, whenever a country is ready to create a new constitutional dispensation, a set of guiding principles must be established and agreed upon on the basis of which the new Constitution is to be built. He points out that such principles act as the theoretical, ideological and visionary framework for the constitutional reform process and, ultimately, implementation of the new constitutional order.⁵⁸⁰

Constitutional principles are essentially values and procedural standards set out by primary groups involved in negotiating a framework for Constitution-making. They pre-date the Constitution-making process and often emerge from a dialogue between the state and civil society formations.⁵⁸¹ As Professor Kibwana states:

"These pillars or foundational principles serve the central purpose of harmonizing the entire Constitution because each section or article of the Constitution must mirror both the spirit and substance of the principles. In the final analysis, the principles are a distillation of the key values that have endeared themselves to the society, which now wishes to undertake comprehensive constitutional review. When Constitution building is finally completed, some of the principles, which were used to guide the process, will themselves have been translated into direct constitutional text. Therefore, a dialectical relationship exists between the principles and the final text of the constitution."⁵⁸²

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Kivutha Kibwana. *Guiding principles on which to build Kenya's New Constitution: Some Thoughts*, in Mute Lawrence Murugu and Wanjala Smokin (eds). *When the Constitution Begins to Flower* Vol. 1 Claripress Nairobi (2002). p. 5.

⁵⁸¹ Devins Neal and Fisher Louis, *The Democratic Constitution*. Oxford University Press. New York (2004).

⁵⁸² *Ibid*

Sam Brooke identifies two purposes of constitutional principles. First, constitutional principles permit the political players to publicly declare and commit themselves to a particular vision of the future.

Second, and often more importantly, constitutional principles provide some insurance to those undertaking the Constitution making experience. To this end, constitutional principles provide assurances that the result, while
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unknown, can be guided in a particular direction.

Constitutional principles are also tools that seek to protect the interests of minority groups by assuring them that certain core issues will be decided beforehand so that they are not disadvantaged by the will of the majority in the process of Constitution making.⁵⁸⁴

Implicitly, constitutional principles encourage an inclusive approach by aiming to create an environment where opposing factions can be encouraged to work with each other. Constitutional principles therefore are often best suited where there are multiple competing factions who do not entirely trust each other but that are committed to bringing about a new constitution and institutional reforms. An example in this regard is that of South Africa where the most well-known and robust constitutional principles were contained in the 1994 Interim Constitution.⁵⁸⁵

⁵⁸³ Sam Brooke. *Constitution making and Immutable Principles*. Master Thesis. Fletcher School Tufts University (2005).

ibid

⁵⁸⁴ Schedule 4 of the Interim Constitution of South Africa specified thirty-four (34) constitutional principles with which the final Constitution had to conform. These constitutional principles fitted into several broad categories including (1) the form of the national government, (2) the power relations between the national and sub-national governments, (3) minority group concerns, (4) human rights concerns, (5) formation of public-sector organizations, and (6) amendment procedures.

In Kenya, key civil society, religious, political and other interest groups engaged in protracted negotiations from 1997 to 2001 to agree on a set of constitutional principles to guide the Constitution of Kenya review process. Largely, the negotiations were informed by the historical distrust among the people, political leaders and the state in general.⁵⁸⁶ On the one hand, the Government preferred an approach that appeared to favour a Constitution-making process led by the political elite in Parliament and experts. On the other hand, the civil society groups insisted on participatory "people-driven"

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process. Ultimately, the stakeholders agreed on a set of constitutional principles that emphasized a participatory Constitution making process.

The principles were enshrined initially, in the Constitution of Kenya Review Act (Cap 3A) and later, in the Constitution of Kenya Review Act 2008. As stated in section 5.5.4, the thirty-second amendment⁵⁸⁸ introduced section 47A of the Constitution to explicitly, provide for the exercise of the sovereign right of the people to make their Constitution.

Broadly, we can group the constitutional principles agreed upon into three categories. First, principles focusing on people's participation in the Constitution making processes. Second, principles concerned with stakeholder relationships and conduct in the Constitution making process. Third, principles relating to the design and content of the Constitution and to which the final Constitution needed to conform.

⁵⁸⁶ Constitution of Kenya Review Commission. *The Final Report of the Constitution of Kenya Review Commission*, approved for issue at the 95th Plenary Meeting of the Commission on 10th February 2005 *op. cit.*

⁵⁸⁷ *Ibid*

⁵⁸⁸ The Constitution of Kenya (Amendment) Act. 2009. *op.cit.*

The principles that related to people's participation put emphasis on active, free and meaningful participation of people, accountability to the people, accommodation of the people's diversity and openness of the process.⁵⁸⁹ The primary aim of the participation principles, based on the universal principles of human rights, gender equity and democracy, was to ensure that the outcome of the review process faithfully reflected the wishes of the people of Kenya.⁵⁹⁰

As discussed in Chapter Two (2) sub section 2.7.2, the role of people in a participatory model is to a large extent about giving views, debating and ratifying the Constitution. The role of experts, on the other hand, is about translating the people's views into constitutional principles and proposals in line with the established design and engagement principles.

The principles that related to the stakeholder relationships and conduct required all organs of the review to serve impartially and independently in good faith, with integrity and without fear, favour or prejudice. The principles further required all the organs of review, political parties, non-governmental organisations, and all Kenyans to conform to the values of confidence building, trust, consensus building, objective constitutional debate, national healing, peace and avoidance of violence or threats of violence or other acts of provocation during the review process.⁵⁹¹

The principles relating to the Constitution design and content sought to provide the framework and direction in examining constitutional issues and formulating constitutional proposals. The design principles also aimed to

[^] Section 5(d). Constitution of Kenya Review Act, Cap 3A.,

Ibid.

Second and Third Schedules. Constitution of Kenya Review Act, Cap 3A.

provide the basic ideological foundation for the new constitutional order. These principles provided that the final Constitution should include provisions on at

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least sixteen aspects.

Asked whether they were aware of these principles, nearly six out of ten of the respondents were indeed aware of the constitutional principles that guided the constitution review process. Of these respondents, seven out of ten of the respondents were most aware of the principles relating to people's participation and stakeholder relationships in the Constitution making process.

However, when asked whether they were aware of the Constitution design principles, none of the respondents mentioned any of the principles. This was attributed to the fact that much of the civic education on the Constitution review process focused on getting people to present their views rather than on the design and content matters.

Regarding the application and enforcement of the constitutional principles, the failure to entrench in the Constitution, the principles guiding the Constitution review process under sections 3, 5 and 17 of the Review Act significantly reduced their significance. For instance, in *Patrick Ouma Onyango and 12 Others v Attorney-General*, the Court held that the complaints about the review organs' failure to adhere to the sections of the Review Act in drafting

⁵⁹² Sections 3 and 17 of the Constitution of Kenya Review Act mapped out a minimum content of the Final Constitution including provisions on: (a) national integration and unity; (b) people's sovereignty and supremacy of the Constitution; (c) the form of the national Government; (d) separation of powers and checks and balances; (e) the structure and power relations between the national and devolved Governments; (e) electoral system and representation of the people; (f) minority and marginalized group concerns and affirmative action; (g) ethnic, religious and cultural diversity; (h) human rights concerns; (i) people's wellbeing and access to basic needs; (j) equitable economic growth; (k) equitable sharing of and access to national resources; (l) public participation; (m) regional and international co-operation; (n) constitutional guardianship of people's sovereignty; and (o) amendment procedures.

the Proposed New Constitution 2005 did not meet "a real and substantial controversy" to warrant the court's redress. In this regard, the court ruled that:

"It is for the people to determine whether the objectives (principles) are reflected in the proposed new Constitution and the applicants have no standing to purport to have this determined on their behalf. What they are claiming cannot immediately be adjudicated upon by the court of law. Their remedy is to vote in the referendum."⁵⁹³

Nevertheless, in the final phase of the Constitution of Kenya review process (2008-2010), the third-second constitutional amendment did not just entrench the review process in the Constitution but also the principles guiding the process. As a result, as discussed in Chapters Seven and Nine, both the Committee of Experts (CoE) and the Interim Independent Constitutional Dispute Resolution Court (IICDRC) had adequate constitutional basis to ensure compliance in formulating the new Constitution, with the constitutional principles set out in sections 4 and 6 of the Constitution of Kenya Review Act 2008.

For instance, against these principles, the CoE in considering the Parliamentary Select Committee on the Constitution Review (PSC)'s recommendations on the Harmonized Draft Constitution found that most of them were indeed non-complaint. As discussed in Chapter Seven (7), most of the PSC's recommendations were found either to have failed to conform to the constitutional principles of the review process or to have deliberately sought to undermine the overall underlying values and purpose of the review process. On the question of whether constitutional principles were, effective in guiding the

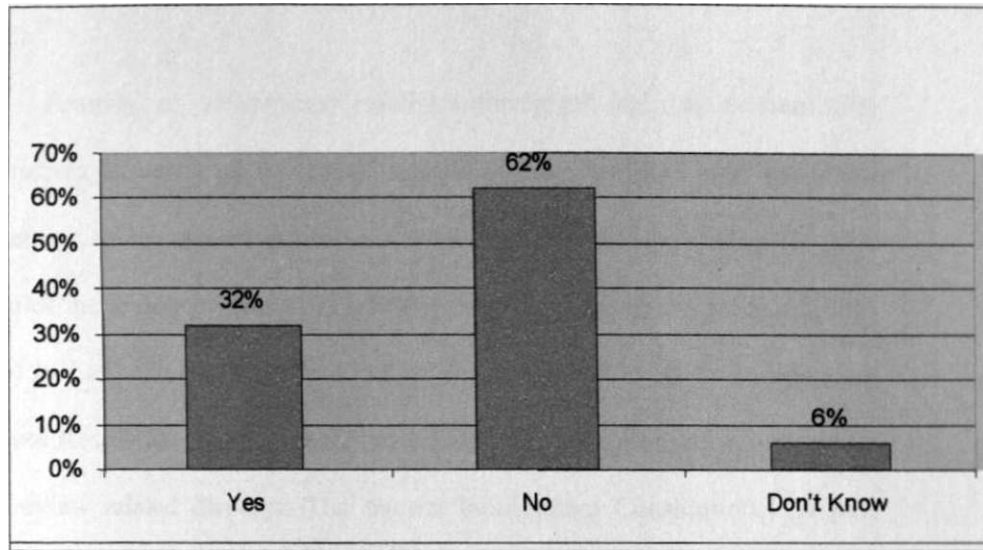
" Patrick Ouma Onyango and 12 Others v Attorney-General, High Court Miscellaneous Application No. 677 of 2005[2005] eKLR.

Constitution review process in Kenya five lessons emerged from the foregoing. First, the mere provision of constitutional principles in an ordinary legislation is in itself insufficient to ensure full compliance with the principles. As a safeguard, constitutional principles should be entrenched in the Constitution. This will assure all parties that the agreed principles will be constitutionally enforceable and honoured throughout the Constitution making process. This is particularly important where there may exist one or multiple groups placed in dominant positions over others in the Constitution making process. Without entrenching the agreed principles, these dominant positions are likely to exploit their political strength to control the proceedings of the Constitution making process in their favour. This is illustrated in the struggle for constitutional reforms already discussed in Chapter Five (5) as well as in the subsequent sections of this Chapter and Chapter Seven (7).

Secondly, an effective monitoring and judicial enforcement mechanism must accompany the constitutional principles. Without such mechanism, the principles are unlikely to be enforced and voluntarily complied with by the concerned parties. Instead, they are likely to become captive to the whims of the dominant groups bent on controlling the Constitution making process.

For instance, when asked whether in their opinion, the constitutional principles guiding the review process were effectively enforced, about six out of ten (62 percent) of the respondents held the view that the review organs failed to enforce and adhere to the principles as shown in Chart 3 below. This they attributed to pursuit of selfish interests by the political elite and lack of an effective enforcement mechanism.

Chart 3: Respondents views on whether review organs followed the principles



Source: Study findings

It is, however, noteworthy that when the constitutional principles were entrenched in the Constitution and the Interim Independent Constitutional Dispute Resolution Court (IICDRC) established vide the thirty-second constitutional amendment, the effectiveness of principles also increased. One can therefore conclude that by entrenching the principles and creating clear enforcement mechanism, opportunities for political gerrymandering in the review process became highly limited with no one group allowed to dominate the process.

Thirdly, the commitment of the principal organ of the Constitution making process to enforcing compliance to the agreed constitutional principles is imperative. This imperative is illustrated in the subsequent sections of this Chapter⁵⁹⁴ in relation to the Constitution of Kenya Review Commission

It is noteworthy that in the first instance, the Constitution of Kenya Review Commission (CKRC) scrupulously enforced and adhered to the constitutional principles outlined in sections

(CKRC) and in Chapter Seven (7) in relation to the Committee of Experts (CoE).⁵⁹⁵

Fourthly, an independent judicial enforcement and dispute resolution mechanism is necessary to guard against possible political and executive subversion of the agreed principles. While this was lacking during the first phase of the review process (1997-2005), the final phase of the process (2008-2010) had an inbuilt independent judicial mechanism, the Interim Independent Dispute Resolution Court (IIDRC), to enforce the principles and adjudicate on any review related disputes. The Interim Independent Constitutional Dispute Resolution Court (IICDRC), the Constitution did not however, vest the court with the power to certify the final draft of the Constitution against the agreed constitutional principles.

In South Africa, the Interim Constitution mandated the Constitutional Court to certify and assure the draft Constitution's compliance with the constitutional principles.⁵⁹⁶ In so doing, the Constitutional Court, for instance,

3.5 and 17 of the Review Act up to the National Constitution Conference (2001-2004). In the second instance however, a section of the same Commission started to undermine the same principles under the influence of the National Alliance Party side of the National Rainbow-Coalition (NARC) in Parliament and the Executive. Indeed, the National Alliance Party side of the ruling coalition (NARC) showed such contempt for some of the agreed principles especially relating to devolution of power and system of government that they made every effort to undermine the review process, and the National Constitutional Conference in particular. They did this first, through a section of delegates at the National Constitutional Conference and later, through a section of CKRC Commissioners and Members of Parliament in the National Assembly.

⁵⁹⁵ As will be seen later, the Committee of Experts (CoE) unlike the Constitution of Kenya Review Commission (CKRC), demonstrated commitment to ensuring that various organs of the review complied to the constitutional principles enshrined in sections 4 and 6 of the Review Act. This was perhaps due to the pitfalls of the previous process as well as moderation by the Panel of Eminent African Personalities under the National Accord.

⁵⁹⁶ Sam Brooke. *Constitution making and Immutable Principles, op. cit.*

found certain provisions of the draft Constitution⁵⁹⁷ non-compliant with the constitutional principles."⁹⁸ It is only after the Constituent Assembly had fully complied with the constitutional principles that the Court certified the final version of the draft Constitution on 4th December 1996.^{5"}

Finally, constitutional principles are only effective where the political players are willing to adhere to them and where they remain committed to working towards their enforcement. To be effective therefore, the parties who agree to the constitutional principles must by necessity submit and remain committed to working together within a common value framework. More importantly, the constitutional principles are more effective when entrenched in the Constitution and supported by an independent judicial enforcement mechanism.

6.3 Towards a participatory Constitution making process in Kenya

Broadly, from 2001 to 2005, the Constitution of Kenya Review Act, Cap 3 A set out one of the most elaborate framework for conducting a participatory Constitution making process in Kenya's constitutional history. The legal framework for the Constitution review process including its issues and challenges is discussed in Chapter Nine (9).

/bid. The provisions that the Constitutional Court in South Africa found non-compliant with the agreed constitutional principles included: (a) powers given to the local and provincial governments; (b) certain statutes shielded from judicial review; (c) entrenchment of fundamental rights, freedoms, and liberties; (d) "special procedures involving special majorities" in amending the constitution; (e) safeguarding the independence and impartiality of certain government institutions including adequate definition of their purpose; and (f) assuring the right of individual employers to engage in collective bargaining.

⁵⁹⁷ *Ibid.*

⁹⁸ *Ibid.*

Institutionally, section 4(1) of the Review Act established five key organs to conduct the review process. These included first, the Constitution of Kenya Review Commission (CKRC) as the principal organ of the review process. The other organs included the Constituency Constitutional Forums (CCFs), National Constitutional Conference (NCC), the National Assembly and the Referendum. The referendum was to be held only if the NCC failed to agree by two-thirds majority on any proposal for inclusion in the Constitution. The Constitutional Court in the *Njoya* case⁶⁰⁰ however, was to later rule that the referendum was indeed a mandatory part of the review process.

Prior to the 2004 Consensus amendments, the Constitution of Kenya Review Commission (CKRC), the Constituency Constitutional Forums (CCFs) and the National Constitutional Conference (NCC) were to remain effective until the enactment of a new Constitution. The Constitution of Kenya Review (Amendment) Act, 2004 (the Consensus Act) however, changed this by providing for the dissolution of these primary organs of the review process whether or not, a new Constitution was enacted. The Consensus Act was expedient to the extent that it sought to force the people to accept the National Assembly and Executive driven Proposed New Constitution (Wako Draft) after the Government rejected the National Constitutional Conference's Draft Constitution of Kenya 2004 (Bomas Draft).

Overall, as seen in the next sections, the study argues that for a participatory Constitution making process to be effective, its basic institutional framework and legislative instrument must be entrenched in the Constitution. In

⁶⁰⁰ *Timothy Njoya and 6 Others v Attorney-General, CKRC and the National Constitutional Conference*. High Court Misc. Application No. 82 of 2004 (2004) eKLR.

a participatory process, the succession of activities from one organ of Constitution making to the next should also be clearly marked and entrenched in the Constitution.

6.4 The processes and challenges of participatory Constitution review in Kenya, 1997-2005

This section examines the processes and challenges of the Constitution of Kenya review process from 1997 to 2005. The section interrogates two basic questions. First, what makes a participatory Constitution making process effective? Second, is the mere act of public participation in a Constitution making process sufficient to endow its outcome with legitimacy?

This section tests two claims. First, that it is sustained public participation in a Constitution making process that will confer its outcome with legitimacy. Second, that to secure legitimacy, a Constitution making process must command the respect of the ruling elite who must believe in it and must demonstrate commitment to supporting the process including the implementation of its outcome.

Overall, the Constitution of Kenya Review Act, Cap 3A outlined clear sequence of the Constitution making activities and the timeframe for achieving the intended outcomes. Initially, the review process was expected to be completed within twenty-four (24) months from the effective date of the Constitution of Kenya Review Act 1997, Cap 3A and in good time before the 2002 General Elections.

However, the complexity and the political risks of the Constitution making process made the process to protract for seven years from 1997 to 2005. After the stakeholders agreed on the review structure in 2001, the CKRC set an eighteen (18) month plan to conclude the process between June 2001 and December 2002. However, due to political challenges around the review process, the Commission was forced to make at least three requests to the National Assembly for extension of its program between November 2002 and March 2004.⁶⁰¹

Broadly, between 1997 and 2005, the Constitution of Kenya review process went through four broad steps as described below.

6.4.1 Step 1: Negotiating the constitution making framework and principles

This step of the review process involved mainly stakeholder negotiations on the framework and constitutional principles for the Constitution making process. The negotiations building on the IPPG Deal⁶⁰² went on for a period of four years between 1997 and 2001. First, both civil society and opposition stakeholders rejected the Review Act 1997 because the Attorney-General had unilaterally published it without reference to them. The rejection of the Review Act led to a new round of multi-stakeholder negotiations towards the end of

⁶⁰¹ Constitution of Kenya Review Commission. *The Final Report of the Constitution of Kenya Review Commission*, approved for issue at the 95th Plenary Meeting of the Commission on 10th February 2005.

⁶⁰² As earlier stated in Chapter Five sub section 5.5.3, the IPPG Deal neither satisfied those demanding comprehensive constitutional reforms nor was sufficient to dismantle the deeply entrenched edifice of constitutional dictatorship in Kenya.

1997 in Safari Park Hotel, Nairobi.⁶⁰³ The negotiations involved representatives of KANU, opposition political parties, civil society and religious organizations

The Safari Park forum eventually agreed to amend the Constitution of Kenya Review Act 1997 to include the agreed a three organ structure for the review process. The organs of the review process agreed included first, the Constitution Review Commission comprising 25 members drawn from all the key sectors of the society. The second organ was the District Forums. The District forums comprised of three (3) elected representatives from each location, an elected representative from major religious organizations, all Members of Parliament, all Councillors from local authorities in the district, and two coordinators elected by the location and religious representatives. The third organ was the National Consultative Forum consisting of all MPs, all Commissioners and representatives from the Districts.⁶⁰⁴

In spite of the agreement, the Attorney-General once again decided to publish the Constitution of Kenya Review (Amendment) Bill 1997 without further consultations with both the opposition parties and the civil society stakeholders. This led to serious disagreements among the parties necessitating a new round of negotiations at the Bomas of Kenya and the Safari Park Hotel between June and October 1998. Out of these negotiations, Parliament once again amended the Kenya Constitution Review Act 1997.

The five main features of the amended Act were first, a review Commission made up of twenty-five (25) members nominated proportionately by stakeholders, not by the President, The second feature was a time-bound

⁶⁰³ *Ibid.*

⁶⁰⁴ *Ibid*

procedure for nominations. The third was the appointment of nominated review Commission members by the president. The fourth feature was the implementation of the one-third policy for women representation. The fifth feature was a new structure of the review process to reflect the "bottom-up" and a people-driven approach to Constitution making. The major political parties however, disagreed on the procedure of nominating review Commissioners leading to a new stalemate.

As a result, on the one hand, the Ufungamano Initiative, under the Chairmanship of Dr. Oki Ooko Ombaka proceeded to appoint a Peoples Commission of Kenya (PCK) based on the provisions of the 1998 Review Act. The opposition political parties, religious and civil society organizations supported this initiative. On the other hand, the Parliamentary Initiative proceeded to establish a Parliamentary Select Committee (PSC) under the Chairmanship of Hon. Raila Odinga.⁶⁰ President Moi's KANU and Hon. Raila Odinga's National Development Party (NDP) supported the Parliamentary Initiative.

The Raila Odinga group went ahead to propose further amendments to the Review Act in 2000 which Parliament passed. The amendments introduced substantial changes to the legislative framework for the review. First, the amendments reduced the size of the Constitution of Kenya Review Commission (CKRC) from twenty-five (25) to seventeen (17) Commissioners including two *ex officio* members. Secondly, the President was to appoint the Commissioners on merit following their nomination by the Parliamentary Select Committee

⁶⁰ *Ibid.*

through a competitive process. Thirdly, ethnic, geographical and social diversity were to be considered in the selection of the Commissioners.⁶⁰⁶ Subsequently, the President appointed fifteen (15) Commissioners and two *ex officio* members⁶⁰⁷ on 10th November 2000. In addition, eight alternate Commissioners⁶⁰⁸ were gazetted.⁶⁰⁹

There was, however, a genuine fear that the two parallel review processes would intensify political conflict and scatter the pursuit for a new constitution since neither party had the capacity to make a new Constitution on its own. Against this backdrop, the newly appointed Chairperson Professor Yash Pal Ghai, declined to take the oath of office. This was to enable him spearhead the merger negotiations between the Ufungamano Initiative and the Parliamentary Select Committee from a position of relative independence. Following these negotiations, the Review Act 2000 was, further amended in May 2001 to incorporate the terms of the merger agreement reached in December 2000.

The amended Act expanded the membership of the Commission from seventeen (17) to twenty-nine (29). Under the new arrangement, twelve (12) additional Commissioners from the Ufungamano Initiative were gazetted on

⁶⁰⁶ *Ibid.*

⁶⁰⁷ The Commissioners were Prof. Yash P. Ghai (Chairperson), Ms. Kavetsa Adagala, Mrs. Phoebe M. Asiyu, Pastor Zablon F. Ayonga, Mr. Ahmed I. Hassan, Mr. J. Mutakha Kangu, Bishop Bernard N. Kariuki, Dr. Githu Muigai, Prof. H. W. O. Okoth-Ogendo, Mr. Domiziano M. Ratanya, Prof. Ahmed I. Salim, Dr. Mohamed A. Swazuri, Mr. Keriako Tobiko, Mr. Musili P. Wambua, Mrs. Alice Yano, Hon. S. Amos Wako, Attorney-General (*Ex officio* member), and Mr. Arthur O. Owiro, Commission Secretary (*Ex officio* member).

⁶⁰⁸ The "Alternate Commissioners" were Christopher G. AM, Bishop (Dr) Gerry Kibarabara, Justice (Rtd) Benna Lutta, Mrs. Mercy M. Mwamburi, Dr. Abdirizak A. Nunow, Timothy O. Omatu, Dr. Wilson Sitonik, and Johnston B. Wepakhulu.

⁶⁰⁹ Constitution of Kenya Review Commission, The Final Report of the Constitution of Kenya Review Commission, approved for issue at the 95th Plenary Meeting of the Commission on 10th February 2005 *op. cit.*

11th June 2001. Members of Parliament allied to the Ufungamano Initiative also joined the Parliamentary Select Committee under the Chairmanship of Hon. Raila Odinga.

It should however be noted that despite calls for entrenchment of the review process in the Constitution, the Government adamantly refused to initiate constitutional amendment to this effect.⁶¹⁰ Thus, because of the weak constitutional foundation for the review process, the Constitution making process in Kenya between 1997 and 2005 experienced numerous political and legal challenges especially during and after the National Constitutional Conference.

6.4.2 Step 2: Public consultations and collection of people's views

Once the stakeholders had agreed on the basic guiding principles and framework for the review, the Commission embarked on the process of public consultation and collection of people's views. This was preceded by a number of preparatory activities including first, defining constitutional issues to guide public hearings through research and studies. Second, establishment of Constituency Coordination Committees (3Cs) to support public sensitization and civic education on the review process at the grassroots level. In practice, civic education permeated the entire review process. Third, organizing expert

⁶¹⁰ In fact there were six failed constitutional amendment attempts to entrench the review process in the Constitution. As already mentioned, the entrenchment of the review process was to be realized later through the thirty-second amendment under the post 2007 election violence Framework of the Kenya National Dialogue and Reconciliation (KNDR). See The Constitution of Kenya (Amendment) Act. 2009. *op.cit.*

seminars and conferences; and fourth, piloting public hearing tools and procedures at provincial and constituency levels.

Subsequently, the Constitution of Kenya Review Commission between 2001 and 2002 carried out extensive public hearings and consultations in all the 210 constituencies. It also carried out private hearings for individuals and organized groups and directly received memoranda. Table 2 below presents the provincial breakdown of the total submissions received by the Constitution of Kenya Review Commission by the end of public hearings.

Table 2: Submissions received by the Commission by province and mode of submission

Province	Memoranda	Written but not memoranda	Oral	Other	Total
Nairobi	169	466	849	14	1498
Central	786	1822	1084	67	3759
Eastern	433	2083	2184	14	4714
North Eastern	93	380	877	2	1352
Coast	368	1121	1781	18	3288
Western	6	2340	2319	2	4673
Nyanza	323	1632	2582	3	4530
Rift Valley	831	2655	4187	5	7678
Direct Submissions	264	765	N/A	79	1108
E-mails	11	78	N/A	98	182
Total	3,284	11,018	13,356	297	35,415

Source: Constitution of Kenya Review Commission (2002)

Following the public consultations and hearings, the Commission proceeded to write and subject the Draft Bill to Alter the Constitution of Kenya, 2002 to extensive public debate. An opinion poll conducted by the International Republican Institute (IRI) at the time found that 74.2 percent of Kenyans felt that the Commission Report and Draft Constitution represented their views.

82.8 percent of Kenyans also believed that the Commission in its work was accountable to the people.⁶¹¹ ,

The Draft Bill, however, elicited some sharp reactions on certain contentious and potentially divisive provisions such as Kadhi's Courts, affirmative action for women and devolution of power. In particular. President Moi and KANU were unhappy about the radical proposals contained in the Draft Bill and showed their determined to stop the presentation of the Bill to the scheduled National Constitutional Conference.⁶¹²

Overall, at the end of public consultations and hearings process, the Commission reached two key conclusions. First, that it was the people's overwhelming expectation that the new Constitution should be a faithful reflection of their wishes for a democratic and participatory constitutional order.⁶ In this regard, it was the people's desire to see, among other things, greater transparency and accountability, social justice, respect for human rights, public participation in governance and promotion of people's welfare under the new constitutional dispensation. Secondly, people expressed the desire to see the new Constitution guaranteeing access to basic needs such as food, shelter, health, education and water for every Kenyan.⁶¹⁴

Nevertheless, despite their great expectations and hopes, the people of Kenya also expressed deep fears about the review process. First, the people

^{6.1} The Daily Nation of Tuesday 10th December 2002.

^{6.1}: Constitution of Kenya Review Commission, The Final Report of the Constitution of Kenya Review Commission approved for issue at the 95th Plenary Meeting of the Commission on 10th February 2005 *op. cit.*

^{6.1} ; Constitution of Kenya Review Commission, The Final Report of the Constitution of Kenya Review Commission approved for issue at the 95th Plenary Meeting of the Commission on 10th February 2005 *op. cit.*

feared that because the process was not entrenched in the Constitution the Government could hijack the process and use it to meet the desires of the ruling elite as opposed to those of the people.

Secondly, the people feared that it was not possible to conduct and complete an independent Constitution review process where it sought to bring about radical changes in the power structure and governance system.

Thirdly, the people expressed fear about the potential negative impact of the transition and succession politics on the review process as the country headed for General Elections later in December 2002.⁶¹³ Indeed, as discussed in the next section, the ruling elite conspired to ensure that the process was not completed before the December 2002 General Elections.

6.4.3 Step 3: The National Constitutional Conference (NCC) process

Following the publication and dissemination of the Commission report and draft Bill to Alter the Constitution, section 27(1) of the Constitution of Kenya Review Act, Cap 3A required the Commission to convene the National Constitutional Conference. The purpose of the National Constitutional Conference (NCC) was to discuss, debate, amend and adopt the Commission's report and draft Bill.⁶¹⁶

The National Constitutional Conference consisted of 629 delegates representing practically every segment of the Kenyan society. Table 3 below

⁶¹⁵ To a large extent, this fear was informed by the failure to carry out comprehensive constitutional reforms before the 1997 General Elections leading to the unsatisfactory IPPG compromise.

⁶¹⁶ The Constitution of Kenya Review Act, Cap 3A.

shows the distribution of the National Constitutional Conference delegates among various categories of representation.

Table 3: Delegates to the National Constitutional Conference

No.	Delegates Categories	Number of Representatives
1	District Delegates	210
2	Members of Parliament and the Speaker	223
3	Constitution of Kenya Review Commissioners <i>ex officio</i> members	29
4	Political parties	42
5	Civil society groups ⁶¹⁷	126
	Total	629

Source: Constitution of Kenya Review Commission (2005)

In general, compared to similar gatherings elsewhere, the sheer diversity of opinions in society represented at the National Constitutional Conference was unprecedented. For instance, in India most of the members of the Constituent Assembly were politicians nominated by the Provincial Legislatures.⁶¹⁸ In Zimbabwe of the 355 members of the Constitutional Commission, 150 were ZANU-PF Members of Parliament while the remaining 205 were party members.⁶¹⁴ In South Africa, the transitional bicameral Parliament acting as a Constitutional Assembly with power to draft and adopt the Constitution consisted of 490 members of which 400 were members of the National Assembly and 90 were members of the Senate.⁶²⁰

However, despite its broad-based membership, the NCC was not established as a constituent assembly. Rather, it was a national forum for the

⁶¹ The civil society groups included religious organizations (35), NGOs (23), women's organizations (24), trade unions (16) and other interest groups(13).

⁶¹⁷ H. R. Khanna. *The Making of India's Constitution* 2nd Edition EBC Webstore. India (2008) Hussein Ebrahim. "Constitution making in southern Africa -challenges for the millennium" *op. cit.*

⁶ East African Law Society (2005), *the Constitutional Law Digest*. EALS Practice Manual Series, No. 3, LawAfrica Publishing Ltd.

discussion, debate and adoption of the Constitution of Kenya Review Commission Report and Draft Bill to alter the Constitution.⁶²¹

6.4.3.1 The first session of the National Constitutional Conference

Although the Constitution of Kenya Review Commission anticipated only one session of the Conference, the Conference went through three sessions between 28th April 2003 and 23rd March 2004. This was attributed to various political factors including the clash between the parliamentary calendar and the Conference schedule.

The Commission's first attempt to convene the National Constitutional Conference was on 28th October 2002. This was preceded by the induction of the delegates on the Conference process and procedures from 21st to 25th October 2002 at the Bomas of Kenya, one week before the expected Conference formal convocation on Monday 28th October 2002.

It had however, become apparent that President Moi was not interested in the Conference and in giving the country a new Constitution before the General Elections expected in December 2002. To ensure that the Conference did not convene as planned, President Moi prorogued Parliament on Friday 25th October 2002. This technically scuttled the Conference since Members of Parliament constituted almost one third of the Conference. The Government also sent a contingent of the dreaded General Service Unit to Bomas of Kenya to disperse the delegates from the venue. Following these events, the

⁶²¹ As discussed in Chapter Nine, the composition of the National Constitutional Conference was to become a matter of legal challenge. In fact, the court in the *Njoya* case held the view that the Conference should have been constituted as a constituent assembly with its members directly elected by the people for purposes of drafting and adopting the Constitution.

Commission called off the Conference on 27th October 2002 until after the 27th December 2002 General Elections.

Following December 2002 General Elections, the Constitution of Kenya Review Commission moved to convene the first session of the National Constitutional Conference on 28th April 2003 at the Bomas of Kenya, Nairobi. The new President of the Republic of Kenya, President Mwai Kibaki, officially opened the Conference on 30th May 2003. In his address to the Conference, President Kibaki stated his Government's commitment to completing the constitution review process.⁶²² On his part, the Chairperson of the Conference, Professor Yash Pal Ghai assured the delegates that the Commission had faithfully followed the principles and the provisions of the Constitution of Kenya Review Act.⁶²³

On 5th May 2003, the Conference convened a special session to honour and share experiences with the veterans of the 1962 Lancaster House Conference.⁶²⁴ The general message from the Lancaster House veterans emphasised the need for a spirit of give and take in the constitutional negotiations; the need to safeguard the unity and integrity of the nation; and the need to avoid the tragedy of constitutional dictatorship witnessed during the first thirty-nine (39) years of independence.⁶²⁵

⁶²² It should be noted that President Kibaki and his National Rainbow Coalition (NARC) came to power on the promise of giving the country a new Constitution within 100 days of coming to power.

⁶²³ National Constitutional Conference. Votes and Proceedings. 30th April 2003.

National Constitutional Conference Documents, The Report of the Rapporteur-General to the National Constitutional Conference on the General Debate held between April 28 - June 6, 2003 at Bomas Of Kenya.

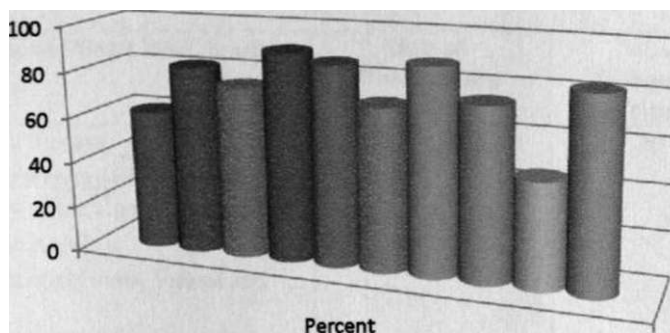
⁶²⁴ *Ibid*

Overall, the first Session of the Conference (Bomas 1) from 28th April 2003 to 6th June 2003 saw the Conference establish its structures and debate the Commission's Report and Draft Bill to alter the Constitution. During the debate, Members of Parliament⁶²⁶ and special interests groups were the least contributors as shown in Chart 4 below. The performance of MPs was rather disappointing. Apart from poor attendance, most MPs appeared to champion their own personal interests and those of their political parties rather than the interests of the people they claimed to represent at the Conference.⁶²⁷

⁶²⁶ While those who negotiated the review framework thought that the inclusion of MPs at the National Constitutional Conference would expedite the enactment of the Draft Bill upon it reaching the Parliament stage, it turned out to be a big mistake. With some hindsight, it may have been more prudent to exclude MPs from the Conference in order to allow them consider the Conference proposals with a free mind at the Parliament stage. In this way, perhaps the Conference would have not ended on a more positive note than it did. Practically MPSs presence at the Conference ended up defeating the intended purpose of their representation.

Professor Yash Pal Ghai, Submission to the Panel of Eminent Persons on constitutional reform and to the Constitution Committee of the Orange Democratic Movement, 4^h May 2006.

Chart 4: Level of the delegates' contributions by category of representation



- Members of Parliament
- District Delegates
- Trade Union Representatives
- Non-Governmental Organization Representatives
- Professional Organizations Representatives
- Women's Organizations Representatives
- Religious Organizations Representatives
- Political Party Representatives
- Special Interests Groups Representatives
- Commissioners

Source: Constitution of Kenya Review Commission (2005)

Table 4 below presents the delegates' contributions during debate.

Table 4: Presentations and delegates' contributions during debate on the Commission's Report and Draft Bill, 2002

Thematic Area and Draft Bill Chapters	Date of Presentation	No. of Delegates' Contributions
The Constitutive Process <ul style="list-style-type: none"> • Chapter 1: Sovereignty of the People and the Supremacy of the Constitution • Chapter 2; The Republic • Chapter 3: National Goals, Values and Principles • Chapter 4: Citizenship 	May 7,2003	60
The Bill of Rights <ul style="list-style-type: none"> • Chapter 5: The Bill of Rights 	May 8. 2003	52
Representative Governance <ul style="list-style-type: none"> • Chapter 6: Representation of the People 	May 9,2003	54
Organs of Government <ul style="list-style-type: none"> • Chapter 7: The Legislature • Chapter 8: The Executive • Chapter 9: Judicial and Legal System 	May 13,2003	97
Devolution of Powers <ul style="list-style-type: none"> • Chapter 10: Devolution of Powers 	May 22,2003	151
Land and Property Rights <ul style="list-style-type: none"> • Chapter 11: Land and Property 	May 27,2003	84
Environment and Natural Resources <ul style="list-style-type: none"> • Chapter 12: Environment and Natural Resources 	May 29,2003	
Public Resources and Capacity Building <ul style="list-style-type: none"> • Chapter 13: Public Finance and Revenue Management 	June 3,2003	61
Managing Constitutionality <ul style="list-style-type: none"> • Chapter 17: Constitutional Commissions and Constitutional Offices • Chapter 18: Amendment of the Constitution • Chapter 19: Interpretation 	June 5,2003	50
The Public Service <ul style="list-style-type: none"> • Chapter 14: Public Service • Chapter 15: Defence Forces and National Security • Chapter 16: Leadership and Integrity 	June 6,2003	25
Transitional and Consequential Provisions <ul style="list-style-type: none"> • Chapter 20: Transitional and Consequential Provisions • Fifth and Eighth Schedules 	June 6,2003	14

Source: Constitution of Kenya Review Commission (2005)

Throughout the general debate, no attempt was made to challenge the importance of the constitutional principles guiding the review process or to reopen debate on the propriety of prior agreement thereon. The debate also revealed areas of broad agreement, areas not resolved; and areas, which required further debate. The issues that attracted most contributions from the delegates included devolution of power, the executive, land and property rights.⁶²⁸

6.4.3.2 The second session of the National Constitutional Conference

The second session of the National Constitutional Conference (Bomas II) promptly started on Tuesday, 18th August 2003. The main task of the second session of the Conference was to discuss and consider the Commission's report and draft Bill. In this respect, the Conference established thirteen Technical Working Committees (TWCs)⁶²⁹ as shown in Table 5 below.

^{62,1} *Ibid.*

⁶²⁹ Technical Working Committee (TWC) "A" - Preamble, Supremacy of the Constitution, the Republic and National Goals, Values and Principles; TWC "B" -Citizenship and the Bill of Rights; TWC "C" - Representation of the People; TWC "D" - The Executive; TWC "E" - The Judiciary; TWC "F" - The Legislature; TWC "G" - Devolution; TWC "H" - Public Finance, Public Service, Leadership and Integrity; TWC "I" - Defence and National Security; TWC "J" - Land Rights and the Environment; TWC "K" - Constitutional Commissions and Amendments to the Constitution; TWC "L" Transitional and Consequential Arrangements; and TWC "M" - Culture.

Table 5: Convenors of the Technical Working Committees

Technical Working Committee		Convenor	Province of Origin/Category
A	Preamble. Supremacy of the Constitution, the Republic and National Goals. Values and Principles	Nyang'au Billy Onuong'a	Nyanza
B.	Citizenship and the Bill of Rights	1. Martha Koome, ⁶³⁰ 2. Cecily Mbarire	Eastern
C.	Representation of the People	Caroline Ng'ang'a	Central
D.	The Executive	1. John Anyara Emukule , 2. Martin Shikuku	Western
E.	The Judiciary	1. Kivutha Kibwana ⁶³² , 2. Bishop Philip Sulumeti	Eastern*
F.	The Legislature	Samuel Arap Ng'eny	Rift Valley
G.	The Devolution	1. Crispin Odhiambo Mbai ⁶³³ , 2. Adhu Awiti	Nyanza
H.	Public Finance. Public Service, Leadership and Integrity	Kerrow Billow Adams	North Eastern
I.	Defence and National Security	Marsden Madoka	Coast
J.	Land Rights and the Environment	Saleh Saad Yahya	Coast
K.	Constitutional Commissions and Amendments to the Constitution	Kiro Wa Ngugi	Central
L.	Transitional and Consequential Arrangements	Joyce Majiwa	Nyanza
M	Culture	Paul Eliud Nakitare	Western

Source: Constitution of Kenya Review commission (2005)

The Technical Working Committees had four key functions. ⁶³⁴ First, the Committees were to examine all issues raised during the general debate and any

⁶³⁰ Following Hon. Martha Koome appointment as Judge of the High Court of Kenya, Hon. Cecily Mbarire was elected to replace her as Convenor.

⁶³¹ Following Hon. John Anyara Emukule appointment as Judge of the High Court of Kenya, Hon. Martin Shikuku was elected to replace him as Convenor.

⁶³² Hon. Bishop Philip Sulumeti replaced Hon. Prof. Kivutha Kibwana following his resignation as Convenor. Bishop Philip Sulumeti had been acting as Convenor in Hon. Kibwana's absence, and the Committee voted to elect him as substantive Convenor despite the fact that he did not originate from Eastern Province.

⁶³³ Following the death of Hon. Dr. Crispin Odhiambo Mbai..Hon. Dr. Adhu Awiti was elected the Convenor.

Guidelines for the National Constitutional Conference *Ad Hoc* and Technical Working Committees released on 6th June 2003 by the Steering Committee.

other issues touching on matters provided for in the Report and Draft Bill. Second, the Committees were to propose amendments or changes to the contents of the Report and/or Draft Bill in relation to matters under their specific thematic mandate. Third, the Committees were to report on their proposed amendments to the Steering Committee or the Conference. Fourth, the Committees were to consider and report on any other matter referred to it by the Steering Committee or the Conference.

As a rule, the Technical Working Committees were required to go *seriatim* through all the articles of the Draft Bill based on motions proposed and seconded by members. The sittings of the Committees were open to all delegates but only the *bona fide* members were permitted to vote on decisions.⁶³⁵

To facilitate cross committee engagement as necessary, the Conference established an inter-Committees consultative forum. The purpose of the forum was to enable Committees to address cross cutting issues including issues of possible conflict at the consideration stage⁶³⁶.

In addition, the Conference allowed Committees to hold joint sittings where necessary. For instance, the TWC "G" on Devolution and TWC "H" on Public Finance held a joint sitting on 22nd January 2004 to address matters of mutual concern relating to devolution and public finance.⁶³⁷ The joint sitting

⁶¹⁵ *Ibid*

⁶¹⁶ Constitution of Kenya Review Commission. The Final Report of the Constitution of Kenya Review Commission, approved for issue at the 95th Plenary Meeting of the Commission on 10th February 2005 *op. cit.*

⁶³ National Constitutional Conference. Minutes of the first joint sitting of the Technical Working Committee 'G' on Devolution of Power and Technical Working Committee 'H' on Public Finance, Public Service, Leadership and Integrity on the Draft Bill held on Thursday 22nd January 2004 at Committee Tent 7, Bomas of Kenya at 10.00 am.

received expert presentation from the Treasury. It also considered several issues on public finance and devolved governance. The key issues addressed included first, the functions of the Commission on Government Finance, Commission on Revenue Allocation, the Controller of Budget and the Social and Economic Council. Second, taxation powers of national and regional governments. Third, the joint sitting other matters relating to consolidated funds, borrowing; administration of revenue, treasury control and public procurement.

The second session of the Conference was, however disrupted in two occasions. First, the death of the Vice President, Hon. Michael Christopher Wamalwa Kijana on 23rd August 2003 in London disrupted the Conference. As a result, the Conference adjourned for two weeks from Monday 25th August 2003 to Monday 8^h September 2003.

One week after the Conference reconvened, the killing of Dr. Crispin Odhiambo Mbai on Sunday 14th September 2003 at his Nairobi residence again disrupted the second session.⁶³⁹ Dr. Mbai was the Convenor of the Technical Working Committee on Devolution of Powers.⁶⁴⁰ The murder of Dr. Mbai temporarily disoriented the Conference and raised concerns about the safety and security of delegates.

The second session of the National Constitutional Conference (Bomas II) formally adjourned on Friday 26th September 2003 after five weeks of

⁶³⁹ Constitution of Kenya Review Commission. The Final Report of the Constitution of Kenya Review Commission, approved for issue at the 95th Plenary Meeting of the Commission on 10^h February 2005 *op. cit.*

⁶³⁹ Constitution of Kenya Review Commission, The Final Report of the Constitution of Kenya Review Commission, approved for issue at the 95th Plenary Meeting of the Commission on 10^h February 2005 *op. cit.*

⁶⁴⁰ Dr. Crispin Odhiambo Mbai was also the Chairman of the Department of Political Science and Public Administration at the University of Nairobi.

protracted debate in Technical Working Committees. The adjournment was, occasioned by the need to allow Members of Parliament to resume their parliamentary duties.

Although the Committees were expected to have completed their tasks by the time the Conference adjourned, this was not possible due to two factors. First, the disruption of the Conference proceedings due to the deaths of the two delegates as aforementioned. Second, due to protracted and sometimes, acrimonious debates in some Committees especially those on devolution, executive and transitional provisions.

6.4.3.3 Third session of the National Constitutional Conference

The Conference was, scheduled to reconvene on Monday 17th November 2003 for the third and final session. This, however, did not happen until 12th January 2004. The decision not to reconvene the Conference on 17th November 2003 was reached at a joint meeting of the House Business Committee, the Parliamentary Select Committee on Constitutional Review and the Constitution of Kenya Review Commission. The meeting was held on Wednesday 22nd October 2003 at the County Hall, Nairobi.

At the meeting, the parties decided that Parliament had urgent business to deal with to allow Members of Parliaments as delegates to attend the Conference. Since the Conference could not re-convene without Members of Parliament, the Commission had to postpone the reconvening of the Conference indefinitely.

Although the reason for postponement of the Conference was that Parliament had urgent House business to attend to, the truth may well be that a section of the Coalition Government was no longer interested in completing the review process. By the time the second session of the Conference was adjourning, there was already a clear division within the National Rainbow Coalition (NARC) Government around the review process.

The division was attributed to President Kibaki renegeing on the pre-election Memorandum of Understanding (MoU) between his party, the National Alliance Party of Kenya (NAK) and the Liberal Democratic Party (LDP) on power sharing.⁶⁴¹ The MoU had pegged the full power sharing arrangement between the two parties on the completion of the review process within 100 days of forming Government.⁶⁴²

Earlier in August 2003 just before the start of the second session of the Conference, NAK had engineered the removal Hon. Raila Odinga as the Chairman of the PSC. Biketi Kikechi explains the circumstances under which the PSC replaced Hon. Raila Odinga thus:

⁶⁴¹ The main elements of the MoU were: First, Mwai Kibaki would be nominated as the single NARC Presidential candidate. Second, the membership of the Cabinet would be determined on a fifty-fifty power sharing formula between NAK and LDP and would be composed of individuals proposed by the respective political parties. Third, the positions in cabinet, namely, one position of Vice President and two positions of second and third Deputy Prime Ministers would be allocated to NAK while one position of Vice President, the Prime Minister, the first Deputy Prime Minister and one position of Senior Coordinating Minister would be allocated to LDP cited in Ben Sihanya and Duncan Okello, "Mediating Kenya's Post-Election Crises: The Politics and Limits Of Power Sharing Agreement" (2010) pp. 663-664.

The understanding at the time had been that a bill would be prepared by the Attorney-General and tabled in Parliament, based on the Bomas recommendations. At that stage Parliament would have no authority to amend the Bill. Also see the Speaker's comments, *Hansard*. 9* Parliament. 4* Session, Vol. 1, No. 62, 20 July 2005, pp. 2553-2554.

"Cracks within the Narc Coalition Government deepened towards the end of 2003, creating more pitfalls for the constitution review. The tensions between the National Alliance of Kenya (NAK) and Liberal Democratic Party (LDP) over the constitutional reform process culminated into the removal of Liberal Democratic Party Leader, Raila Odinga, from the Chairmanship of the Parliamentary Select Committee on the Constitution. Raila had served the PSC since 1999, and was instrumental in the constitution of the Constitution of Kenya Review Commission (CKRC) chaired by Prof Yash Pal Ghai. Justice Minister Kiraitu Murungi mobilised MPs to vote against him, and replaced him with another pro-reform MP and Saftna party leader Paul Muite."⁶⁴³

The National Constitutional Conference was therefore to become the main arena of political contest with each faction seeking to control both the process and its outcome. Thus as much as President Kibaki had stated during his official opening of the Conference that his Government would support the review process and not interfere with it by the end of the second session, he had practically withdrawn his support for the Conference. It is against this backdrop that the postponement of the third session of Conference sparked off widespread fear among the delegates and the public that the Government was determined to scuttle the Conference and the review process as a whole.

Thus worried about the Government's machinations to stop the Conference, some delegates went to Court to challenge the Commission's action and the legality of the Conference postponement. They were, led by Hon. W. Ole Kina, one of the Vice-Chairpersons of the Conference, and Hon. Kiriro wa Ngugi, the Convenor of the Technical Working Committee on Constitutional Commissions. They argued that before the Conference concluded

⁶⁴³ **The East African Standard, 4th August 2010**

its business, no authority other than the Conference itself had the power to determine its calendar and place of its sittings⁶⁴⁴

In the midst of the controversy, an inter-parties group calling itself the Coalition of National Unity held a high profile meeting 10th and 11th November 2003 at the Safari Park Hotel. The group consisted mainly of the opposition KANU and Ford People. The aim of the meeting was to build consensus on the perceived contentious constitutional issues. The initiative was however, abandoned when it became apparent that group was acting at the behest of the Government. Nevertheless, its most significant outcome was the announcement of the 12th January 2004 date for the reconvention of the National Constitutional Conference.⁶⁴⁵

Subsequently, the Government gave the Commission the green light to convene the third session of the National Constitutional Conference (Bomas III) on 12th January 2004.⁶⁴⁶ The deepening rift between NARC partners in their approach to the National Constitutional Conference and the Constitution review process in general would however, turn the third session (Bomas III) into an arena for political contest rather than an arena for Constitution making and negotiations.

Overall, the agenda for the third session of the Conference was fourfold. First, the third session sought to finalize the Technical Working Committee work as rapidly as possible. Secondly, consensus building on identified

⁶⁴⁴ Constitution of Kenya Review Commission. **The Final Report of the Constitution of Kenya Review Commission, approved for issue at the 95th Plenary Meeting of the Commission on 10th February 2005 *op. cit.***

⁶⁴⁵ *Ibid*

⁶⁴⁶ *Ibid.*

contentious issues⁶⁴⁷ became a key objective of the Conference. Thirdly, the Committee of the Whole Conference had to receive, consider and adopt the Technical Working Committees' reports and recommendations. Fourthly, it was the objective of the third session to finalize the work of the National Constitutional Conference by adopting the Draft Bill to alter the Constitution for onward transmission to Parliament for enactment.

The third session of the Conference resumed with a great sense of urgency among the delegates to conclude the within the shortest time possible due to the increasing fear that the Government was determined to scuttle the Conference.⁶⁴⁸ Thus by 31st January 2004, all the Technical Working Committees had finalized their work including considering the recommendations of the Consensus Building Group (CBG) as well as the Zero Draft Constitution of Kenya 2004. Table 6 below shows the dates of completion of the TWCs business.

⁶⁴⁷ At the end of the second session of the national Constitutional Conference, Professor H.W.O. Okoth Ogendo, the Conference Rapporteur-General, identified a raft of contentious issues that emerged which were presented to the Steering Committee and approved as the basis for consensus building during the third session of the National Constitutional Conference. See National Constitutional Conference Documents. The Report of the Rapporteur-General to the National Constitutional Conference on the General Debate held between August 18, 2003 and September 26, 2003 at Bomas Of Kenya.

⁶⁴⁴ Constitution of Kenya Review Commission, The Final Report of the Constitution of Kenya Review Commission, approved for issue at the 95th Plenary Meeting of the Commission on 10th February 2005. *op cit*.

Table 6: **Date of Completion of Technical Working Committees Business**

Technical Working Committee	Thematic Area Covered by Committee	Date of completion⁶⁴⁹
A	Preamble, Supremacy of the Constitution, the Republic and National Goals,	24 ⁿ February, 2004
B	Citizenship and the Bill of Rights	26 ⁱⁿ February, 2004
D	The Executive	26 ⁿ February, 2004
C	Representation of the People	26 ⁿ February, 2004
E	The Judiciary	26 ⁱⁿ February 2004
F	The Legislature	24 ⁿ February, 2004
G	Devolution	25 ^{tn} February, 2004
H	Public Finance, Public Service, Leadership and Integrity	18 ⁱⁿ February, 2004
I	Defence and National Security	27 ⁿ February, 2004
J	Land Rights and Environment	26 th February, 2004
K	Constitutional Commission and Amendments to the Constitution	26 th February, 2004
L	Transitional and Consequential Arrangements	26 ^{tn} February, 2004
M	Culture	26 ^h February, 2004

Source: Constitution of Kenya Review Commission (2005).

One key feature of the third session was the consensus building initiatives that took centre stage of constitutional negotiations at the Conference. From the Technical Working Committees, the Conference Rapportuer-General, Professor H.W.O. Okoth Ogendo, had identified ten contentious issues⁶³⁰ that required consensus building among the delegates.⁶³¹

⁶⁴⁹ The dates of completion include the dates when each Technical Working Committees' recommendations were finally included in the "Revised Zero Draft of the Constitution of Kenya".
⁶³⁰ The contentious issues included dual citizenship; the right to marry and found a family; the right to life and definition of life; recall of Members of Parliament; the term of office for Members of Parliament; mixed member proportional representation; the registration and supervision of political parties; devolution of power and levels of Government; the structure of the executive and system of government, that is, presidential versus parliamentary system; and the number and composition of constitutional commissions.

⁶³¹ National Constitutional Conference Documents. The Report of the Rapporteur-General to the National Constitutional Conference on the General Debate held between August 18,2003 and September 26,2003 at Bomas Of Kenya.

It should be noted that the most contentious issues identified during the Conference date back to the pre and post independence periods but remained unresolved as discussed in Chapters Four (4) and Five (5). These included such unresolved historical issues as the structure and system of Government i.e. unitary v. federal system and parliamentary v. presidential system; devolution of power; and marginalization and social exclusion. These issues not only generated deep historical, regional and ethnic grievances but also dominated debate at every stage of the Conference.

To build consensus around the contentious issues, the Steering Committee established the Consensus Building Group (CBG)⁶² on 2nd February 2004. The mandate of the Group was to "use all possible means to promote dialogue among all key stakeholders in the review process and to facilitate resolution of contentious issues." The CBG, however, had no mandate to make any binding decisions. Its recommendations could only be incorporated into the Technical Working Committee recommendations if they so decided.

The Consensus Building Group (CBG) held numerous meetings between 3rd February and 19th February 2004 and presented its report to the Steering Committee on 20th February 2004. The Steering Committee

⁶² The CBG consisted of 48 members, namely **Bishop Philip Sulumeti (Moderator), Nancy Lung'ahi (Assisting Moderator), Sammy Naibei Chemwey, Njuguna Kung'u, Nicholas Mugo, Yusuf Abubakar, Gacuru wa Kareng'e, Ahmed Maalim Omar, Ruth Kibiti, Wahu Kaara, Daniel Ole Osoi, Oduor Ong'wen, Sheikh Ali Shee, Neera Kent Kapila, Otieno Ogingo, Kenneth Marende, Joe Khamisi, Bonaya Godana, Sophia Abdi Noor, Rhoda Maende, David Musila, Henry Obwocha, Oburu Oginga, Sultana Fadhil, Wilfred Kiboro, Grace Ogot, Raphael Mwai, Roselinda Simiyu, Charles Lwanga Lxvole, Irene Magut, Kenneth Njiru, Ogembo Masese, Margaret Muchai, Otieno Kajwang', Uhuru Kenyatta, William Ruto, Naomi Shaaban, Soita Shitanda, Danson Mungatana, Moses Wetangula, Mirugi Kariuki, Bonny Khalwale, Amos Kimunya, Koitamet Ole Kina, H. W. O. Okoth-Ogendo (ex-officio), Amos Wako (ex-officio), Yash Pal Ghai (ex-officio) and PLO Lumumba (ex-officio).**

subsequently forwarded the CBG recommendations to the relevant Technical Working Committees (TWCs) for their consideration and adoption.

While the various TWCs adopted most of CBG's recommendations relevant to them, a number of issues relating to the structure of the Executive remained largely contentious and emotive. For instance, of the 16 recommendations made by CBG to the Committee "D" on the Executive, the Committee only accepted 11 of the 16 recommendations. The Committee rejected five key recommendations,⁶⁵³ which it referred to the Committee of the Whole Conference to resolve.

The Technical Working Committees tabled their reports and recommendations drafted as "Zero Draft Constitution" before the Committee of the Whole Conference from 1st March 2004 to 4th March 2004. This was in accordance with Regulation 45 (16) and (17) of the Constitution of Kenya Review (National Constitutional Conference) (Procedure) Regulations, 2003.⁶⁵⁴

The Committee of the Whole Conference subsequently proceeded to consider, the Technical Working Committees reports and recommendations from Monday, 8th March 2004 to Monday, 15th March 2004. At the Committee

⁶⁵³ The five CBG recommendations that the Committee "D" on the Executive rheeted included: (a) that the executive authority of the Republic of Kenya will repose in the President, the Prime Minister and the Cabinet; (b) that the President is the Head of State, Head of Government. Commander-in-Chief of the Armed Forces and Chair of the National Security Council; (c) that the President shall appoint the Prime Minister from the party or coalition of parties with the majority support in Parliament and shall submit the name of the appointed Prime Minister to the Parliament for approval by at least 50 percent vote of all Members of Parliament; (d) that if Parliament does not approve the person nominated to be the Prime Minister, the President shall nominate the Leader of the second largest party or coalition of parties and if Parliament rejects the second nominee, then the President shall nominate the third nominee who shall be accepted by the Parliament; and (e). that the Cabinet should reflect the Kenyan cultural and ethnic diversity.

⁶⁵⁴ The Constitution of Kenya Review Act. Cap.3A, the Constitution of Kenya Review (National Constitutional Conference) (Procedure) Regulations, 2003, Legal Notice No. 42 of 22nd April 2003.

of the Whole Conference stage, the delegates registered 415 amendment motions. Of these only sixty-eight (68) motions were moved on the floor of the Conference. Of the motions moved, thirteen (13) were moved and carried, thirty-eight (38) were moved and negatived, four (4) were consolidated, eight (8) were withdrawn and five (5) amendments were not considered.⁶⁵⁵ The Table 7 below shows the sequence of debate and adoption of the "Revised Zero Draft" by the Committee of the Whole Conference and the Conference Plenary.

Table 7: Sequence of debate and adoption of the "Revised Zero Draft" by both the Committee of the Whole Conference and the Conference Plenary

Chapters and Articles Adopted	Date of debate and adoption
<ul style="list-style-type: none"> • Chapter 1: Sovereignty of the People & Supremacy of the Constitution (Articles : 1, 2 , 3 & 4) • Chapter 2: The Republic (Articles : 5 , 6 . 8(1). 9 , 10 , 11 & 12) 	Monday. 8/3/2004
<ul style="list-style-type: none"> • Chapter 2: The Republic (Articles : 7 & 8 (2)) • Chapter 3: National Goals, Values & Principles (Articles: 13) • Chapter 4: Citizenship (Articles : 14 to 25) • Chapter 5: Culture (Articles: 26 to 33) 	Tuesday, 9/3/2004
<ul style="list-style-type: none"> • Chapter 6: The Bill of Rights (Articles: 34 to 83) • Chapter 7: Land & Property (Articles: 84 to 91) • Chapter 8: Environment (Articles: 92 to 100) • Chapter 9: Leadership & Integrity (Articles: 101 to 108) 	Wednesday, 10/3/2004
<ul style="list-style-type: none"> • Chapter 13: Judicial & Legal System (Articles: 207 to 230) • Chapter 16: The Public Service (Articles: 302 to 312) • Chapter 17: National Security (Articles: 313 to 328) 	Thursday, 11/3/2004
<ul style="list-style-type: none"> • Chapter 18: Constitutional Commissions (Articles: 329 to 343) • Chapter 19: Amendment of the Constitution (Articles: 344 to 346) • Chapter 10: Representation of the People (Articles : 109 to 131) 	Friday. 12/3/2004
<ul style="list-style-type: none"> • Chapter 11: The Legislature (Articles : 132 to 170) • Chapter 12: The Executive (Articles : 171 to 206) • Chapter 14: Devolution (Articles: 231 to 272) • Chapter 15: Public Finance (Articles: 273 to 301) • Chapter 20: General Provisions (Articles: 347 to 348) • Chapter 21: Transitional & Consequential Provisions (Articles: 349 to 352) • Preamble • The Schedules 	Monday. 15/3/2004

Source: Constitution of Kenya Review Commission (2005)

Constitution of Kenya Review Commission. The Final Report of the Constitution of Kenya Review Commission, approved for issue at the 95th Plenary Meeting of the Commission on 10th February 2005, *op. cit.*

What was however, notable is that even some of the issues presumed to have been resolved at the Technical Working Committees stage and by the Consensus Building Group, resurfaced either as TWC minority amendment motions or as delegates' amendment motions. As a result, the Conference resolved to establish a Conference Consensus Building Committee (CCBC) on 9th March 2004 to address some of the issues. The CCBC consisted of eight members.⁶⁵⁶ This time round, the composition of CCBC excluded political party players even though the Conference allowed them to make submissions to the Committee.

The mandate of the CCBC was to reconsider three key issues of contention including first, the structure of the executive including the sharing of powers between the President and the Prime Minister. The second issue related to devolution of power while the third issue related to transitional and consequential arrangements.⁶⁵⁷ The CCBC commenced its work on 10th March 2004 at Bomas of Kenya and presented its report to the Steering Committee on 12th March 2004.

On the executive, there remained a contention on whether the system of Government should be parliamentary with an executive Prime Minister or presidential with an executive President. Regarding devolution of powers, the main contention was about the levels of Government. While some delegates advocated for four levels (national, regional, district and location), others

⁶⁵⁶ The Conference Consensus Building Committee (CCBG) members were Bishop Philip Sulumeti (Moderator), Ruth Kibiti, Sheikh Ali Shee, Sophia Abdi Noor, Grace Ogot, Kimaiyo arap Sego, Gitu wa Kahengeri, Marsden Madoka, Wangari Maalhai, Yash Pal Ghai (Ex Officio), H. W. O. Okoth Ogendo (*ex-officio*) and PLO Lumumba (*ex-officio*).

⁶⁵⁷ Constitution of Kenya Review Commission. The Final Report of the Constitution of Kenya Review Commission, approved for issue at the 95th Plenary Meeting of the Commission on 10th February 2005 *op. cit.*

wanted two levels of government (national and district). On transitional arrangements, the issue in contention was on the effective date of the new Constitution.

Overall, on the executive, the Conference Consensus Building Committee's recommendations were similar to those earlier presented by the Consensus Building Group (CBG). However, on devolution of powers, the CCBC's recommendations were fundamentally different from those of the Consensus Building Group (CBG), which the Technical Working Committee "G" on Devolution had adopted.⁶⁵⁸

In its recommendations on devolution of powers, CCBC eliminated the regional level of Government while retaining the national, district and local levels with the district becoming the principal unit of devolution. It also assigned legislative and executive functions to the various levels of Government. The CCBG further made recommendations on legislation on the capital city and urban areas and equitable distribution of resources at the national and district Government levels. However, by going beyond its mandate, questions arose as to whether the CCBC was still an independent arbiter or whether it had been infiltrated by the Government faction that was not supportive of the Conference and the regional level of Government.

The questions about the impartiality of the CCBC was given credence by the fact that on the same day, the Office of the President circulated a document on devolution of powers that did not just advocate against the

^{6.8} **The Consensus Building Group had recommended that "there shall be four levels of Government at the National, Regional, District and Location Level. It had also recommended that "the boundaries of devolved levels shall be reviewed by an independent Boundaries Commission."***

regional level of Government but also called for the retention of the provincial administration. It should be noted that provincial administration had long been omitted even in the Commission's Draft Bill 2002 and was therefore not under consideration at the Conference.

The CCBC tabled its report and recommendations to the Conference on Friday, 12th March 2004 with the debate, consideration and adoption of the Committee's report taking place on Monday, 15th March 2004. The weekend preceding the debate and consideration of the CCBC report was however, characterized by intense lobbying.⁶⁵⁹ There were also allegations of bribery by politicians including senior Government officials to influence the delegates to vote in favour of the CCBC report.⁶⁶⁰ Following these bribery allegations, the Steering Committee directed the Chairperson of the Conference to write a formal letter to the Attorney-General and Kenya Anti-Corruption Commission (KACC) to investigate the allegations.⁶⁶¹

Consideration on the Executive in the CCBG report or the "Sulumeti Report" proceeded based on amendment motions on articles contained in the "Revised Zero Draft Constitution." As the voting continued, however, it became apparent that a section of the delegates leaning on the side of the National Alliance Party (NAK) faction of the Government was unhappy with the outcomes of the voting on the CCBG amendment motions. They therefore demand for secret balloting. This led to protracted debate, acrimony and

Constitution of Kenya Review Commission, The Final Report of the Constitution of Kenya Review Commission, approved for issue at the 95th Plenary Meeting of the Commission on 10th February 2005, *op. cit.*

The National Constitutional Conference, minutes of the Steering Committee 15th March 2004.

The findings of the investigations were however, not been presented to the Conference by the time the Conference adjourned *sin die* on 23rd March 2004.

controversy about the procedure consideration and adoption the Sulumeti amendment proposals.⁶⁶

To enable the consideration process to move forward, the Chairperson of the Conference presented the Conference with two options. The first option was "that the Conference debates and approves, with or without amendments the principles in the Consensus Report after which the legislative Draftspersons would revise the relevant chapters in the "Revised Zero Draft." The second option was "that the Secretary of the Conference introduces CCBC Report as amendments to the relevant Articles of the "Revised Zero Draft" for consideration by the Committee of the Whole Conference." The delegates voted for the second option.⁶⁶ The Chairperson also ruled that the amendments relating to the amendment proposals of the CCBC be disposed of first.

Subsequently, the first two amendment motions were proposed by the Chairperson of the CCBC and were unanimously passed. The two amendments that passed respectively provided thus:

"the Executive authority of the Republic of Kenya will repose in the President, the Prime Minister and the Cabinet;" and that "the President shall be elected in accordance with the rules which require the President to garner majority of votes countrywide and certain percentages in specified number of Regions."⁶⁶⁴

The Committee of the Whole Conference however, rejected the third amendment motion on Article 173 of the Revised Zero Draft Constitution with a vote of 144 affirmative and 307 negative. The third amendment motion provided that:

⁶⁶² *Ibid*

⁶⁶³ National Constitutional Conference. Votes and Proceedings 15th March 2012.

⁶⁶⁴ *Ibid*

"The **President** is the Head of State, the Head of Government, and the Commander-in-Chief of the Kenya Defence Forces, the Chairperson of the Cabinet, and the Chairperson of the National Security Council."⁶⁶⁵

The Committee of the Whole Conference also proceeded to reject the CCBC's fourth amendment motion on Article 174(3) of the Revised Zero Draft Constitution, with a vote of 57 affirmative and 324 negative. The fourth amendment motion provided that:

"the President, in accordance with this Constitution, shall appoint and may dismiss: (a) the Prime Minister; (b) the Deputy Prime Minister; (c) the cabinet ministers and deputy ministers; (d) the judges of the superior Courts of record; and (e) any other public officer whom this Constitution requires the President to appoint."⁶⁶⁶

The rejection of the third and fourth amendment motions proposed by Conference Consensus Building Committee (CCBC) was to be the turning point for the National Constitutional Conference and the entire Constitution process in Kenya thereafter. After losing the third and fourth Sulumeti amendments conducted under the open voting system, the delegates including Government Ministers who had demanded for the change in the secret voting system to open balloting changed their mind. They moved a motion calling for the adoption of secret ballot instead of the open further acrimony and confusion.

The upshot of the rejection of the third and fourth amendment motions proposed by Conference Consensus Building Committee (CCBC) was that the Conference adopted a parliamentary system of government. This led to the

⁶⁶⁵ *Ibid*

⁶⁶⁶ *Ibid*

eventual withdrawal of the remaining CCBC amendment motions on the Executive.⁶⁶⁷ As George Omari Nyamweya protested:

"Mr. Chairman. I want then this to be on record for historical purposes. That you are asking me now to move motions when you have removed the foundations of any of those motions' existence that is really the point. If you have already ruled that you are not going to have a presidential system, how can you now ask me to move motions, when you have already ruled that you are not having that! ... that is water beneath the bridge... I will withdraw them but it is because the very foundation of my motions has been taken by you."⁶⁶⁸

It appeared that the dominant faction of NARC Government was ready to accept the NCC outcome only if the Conference fulfilled three conditions. First, if it maintained a unitary rather than a federal system of government. Second, if it retained the dual presidential powers with the President as the Head of State and Government. Third, if the Conference retained a unicameral rather than a bicameral legislature structure.⁶⁶⁹

Since majority of the delegates were unwilling to support these demands, one faction of the Government and a section of the delegates who supported the CCBC Report and the presidential system of Government walked out from the Conference to consult but never to return. The walk out was led by Mr. Moody Awori, the Vice-President, and Mr. Kiraitu Murungi, the Minister for Justice and Constitutional Affairs.⁶⁷⁰

⁶⁶⁷ *Ibid*

⁶⁶¹ *Ibid*. Also see the National Constitutional Conference Verbatim Report of 15th March 2004, pp. 61-75, where Mr. George Nyamweya, Delegate number 615 and Prof. Wangari Maathai, Delegate number 084 sought clarification as to the fate of their motions.

Preston Chitere, Ludeki Chweya, Japhet Masva, Arne Tostensen and Kamotho Waiganjo. Kenya Constitutional Documents: A Comparative Analysis, CMI report, 2006. Also see IPAR Working Paper No. 7/2006.

⁶⁷⁰ As already mentioned, by the end of the second session of the Conference, President Kibaki had for all practical purposes, withdrawn support for the Conference. The Government walk out from the Conference was therefore a culmination of a protracted struggle between the Coalition Partners, NAK and LDP to control or influence the Conference proceedings in their favour.

Soon after the "Government" walk out, the Chairperson of the Conference called for a quorum check. Finding that the walk out did not occasion lack of quorum the Chairperson ruled that the Conference proceeds with its consideration and adoption of the Revised Zero Draft Constitution.⁶⁷¹

The "Government" walkout however, brought a sense of fear among the delegates that the Government had decided to stop the Conference. Due to this threat, the Conference resolved to extend its sitting hours until outstanding business was completed.⁶⁷² Indeed, the Conference moved with utmost urgency and within a record three hours from 16 hours to 19.10 hours, it had considered and adopted all the remaining articles.⁶⁷³

Subsequently, at 19.10 hours on Monday 15th March 2004, the Chairperson of the Conference declared the adoption of the Draft Constitution by the Committee of the Whole Conference subject to the final adoption act by the Conference Plenary.⁶⁷⁴

The Drafting Team spent one week between March 15, 2004 and March 22nd, 2004 to come up with final Draft Constitution of Kenya 2004. The Steering Committee subsequently received and circulated the Draft Constitution 2004 to all the delegates on Monday, 22nd March 2004. On Tuesday, 23rd March

⁶⁷¹ The total number of delegates was 629. of which 600 had voting power. The 29 CKRC Commissioners being *ex officio* delegates did not have power to vote. The quorum was determined by the presence of 315 delegates with voting powers but there were 451 present and voting delegates. See the Constitution of Kenya Review (National Constitutional Conference) (Procedure) Regulations 2003.

⁶⁷² Constitution of Kenya Review Commission, The Final Report of the Constitution of Kenya Review Commission, approved for issue at the 95th Plenary Meeting of the Commission on 10th February 2005, p. 467. *op. cit.*

⁶⁷³ At this moment, a total of 178 Articles of the Revised Zero Draft including Articles 174 to 352. the Preamble, the Schedules and the Title were yet to be considered and adopted.

⁶⁷⁴ *Ibid.*

2004, Hon. Grace Ogot moved a motion for the adoption of the Draft Constitution of Kenya 2004 in accordance with Regulation 21 (5) (6) (7).⁶⁷⁵

The Chairperson of the Conference, Professor Yash Pal Ghai, then symbolically presented an advance copy of the Draft Constitution of Kenya 2004 to the Attorney-General.⁶⁷⁶ This was to signify the passing over the button to Parliament to enact the Draft Constitution of Kenya 2004.⁶⁷⁷ Subsequently, Mr. Martin Shikuku, delegate number 595, pursuant to section 4(2) of the Constitution of Kenya Review Act, successfully moved a motion to adjourn the Conference *sine die* on 23rd March 2004.⁶⁷⁸

Consequently, in accordance with section 28(1) of the Review Act, the Commission proceeded to prepare the final report and Draft Constitution of Kenya 2004.^{6.v} After verification of the Draft Constitution 2004 against the

⁶⁷⁵ *Ibid* at p. 472.

⁶⁷⁶ See *Sjuguna Michael Kung'u, Gacuru wa Kareng'e A Nicholas Mugo v. the Republic, Attorney-General and CKRC*. High Court Misc. Application No. 309 of 2004. The case was filed on 22nd March 2004 just a day before the formal adjournment of the National Constitutional Conference *sine die* on 23rd March 2004. They sought an injunction under certificate of urgency to stop the Constitution of Kenya Review Commission from finalizing and presenting its report and the Draft Constitution of Kenya 2004 to the Attorney-General pursuant to sections 27 and 28 of the Review Act.

⁶⁷⁷ *Ibid* at pp. 471-472

⁶ Constitution of Kenya Review Commission. The Final Report of the Constitution of Kenya Review Commission, approved for issue at the 95th Plenary Meeting of the Commission on 10th February 2005, *op. cit.* p. 472

⁶⁷⁹ Section 28 of the Review Act. Cap 3A required the Constitution of Kenya Review Commission based on the decisions of the Conference, to prepare and submit a final report and Draft Constitution of Kenya (draft Bill) to the Attorney-General for publication and onward submission to the National Assembly for enactment.

Conference decisions,⁶⁸⁰ the Commission printed the final Draft Constitution of Kenya 2004 as a separate volume of its Final Report.⁶⁸¹

Overall, as already stated, the National Constitutional Conference concluded with considerable acrimony. Professor Yash Pal Ghai, the Chairperson of the National Constitutional Conference has identified some weaknesses or shortcomings of the Conference process.⁶⁸² First, he points out that the Conference took too long to get to the serious work of detailed consideration of the Commission's Report and Draft Bill. Most often, the delegates engaged in numerous speeches rehashing points repeatedly made.. Secondly, some problems stemmed from the large size of the Conference body. Even the Technical Working Committees were too large for serious engagement.

Thirdly, despite the large size, attendance was sometimes problematic with some meetings adjourned due to lack of quorum. Fourthly, one faction of the Government made consistent attempts to discredit individual delegates with a view to de-legitimatising the National Constitutional Conference itself. Some delegates however, did not help themselves by their squabbles over allowances, articulated in plenary sessions and broadcast to the nation.

⁶⁸⁰ The Commission undertook a verification exercise from the 16th August 2004 to 16th September 2004. This was to ensure that the provisions of the Draft Bill of 2004 as circulated on 23rd March 2004 faithfully reflected the decisions of the Conference. The verification was done based on the "Revised Zero Draft" dated 26th February 2004 together with the accompanying corrigenda as well as the summary of Conference decisions made between 8th and 15th March 2004.

The Constitution of Kenya Review Commission formally approved the Final Report and the Draft Constitution of Kenya 2004 for issue at its 95th plenary meeting held on 10th February 2005.

⁶⁸² Professor Yash Pal Ghai. Submission to the Panel of Eminent Persons on constitutional reform and to the Constitution Committee of the Orange Democratic Movement. 4th May 2006.

6.5 The Post Conference review stalemate and challenges

The final act of adoption of the Draft Constitution of Kenya 2004 on 23rd March 2004 took place under a cloud of political and legal uncertainty about the future of the Constitution review process. In response to its humiliation at the National Constitutional Conference, the Government faction that walked out of the Conference adopted a two-pronged strategy to either stop or recast the review trajectory under its control.

The political prong involved a high profile political campaign by cabinet ministers, Members of Parliament as well as sections of the religious leaders, private sector, civil society organizations and former delegates through the media against the National Constitutional Conference and its outcome, the Draft Constitution of Kenya 2004 (Bomas Draft). They accused the National Constitutional Conference of being unrepresentative and unfairly favourable to KANU. They attacked the character of delegates and the legitimacy of the Conference.⁶⁸⁴

From the legal front, a section of the delegates moved to court to challenge the validity of the National Constitutional Conference and its outcome. Notable among the court cases filed towards the end of the National Constitutional Conference against the Conference were the *Reverend Timothy*

^m It should be noted that the County Councils during the KANU regime lected the district delegates. However, despite this argument, there was little evidence of a clear KANU position on the review process including the National Constitutional Conference after its defeat at the December 2002 General Elections or KANU's attempts to push a particular agenda at the Conference. On the contrary, KANU's leadership tried to play a constructive and conciliatory role when deadlocks emerged during the Conference.

⁶⁸⁴ Professor Yash Pal Ghai. Submission to the Panel of Eminent Persons on constitutional reform and to the Constitution Committee of the Orange Democratic Movement. 4th May 2006.

*Njoya and six others!*⁶⁸⁵ and the *Njuguna Kung'u and two others*⁶⁸⁶ Chapter Nine (9) discusses these cases in detail.

On the one hand, the *Rev. Dr. Timothy Njoya* case, filed just two weeks into the third session of the Conference on 27th January 2004, sought to invalidate the National Constitutional Conference. The applicants argued *inter alia*, that there was discrimination against residents in some provinces and districts and of certain political opinions in constituting the National Constitutional Conference. To this end, the Conference failed the test of being a body with people's mandate to make a Constitution.

On the other hand, the *Njuguna Kung'u* case, filed just one day to the final adoption of the Draft Constitution of Kenya 2004 on 22nd March 2004, sought to stop the Constitution of Kenya Review Commission from finalizing and presenting its report and Draft Constitution of Kenya 2004 to the Attorney-General. The applicants argued that the National Constitutional Conference on 15th March 2004 purported to adopt the Draft Constitution of Kenya 2004 in violation of the Review Act.

In the final analysis, the two courts ruled in favour of the applicants. In the *Njoya* case, short of declaring the National Constitutional Conference invalid, the Court ruled that for the Draft Constitution of Kenya 2004 to be valid, the people through either a constituent assembly or a referendum must ratify it. In the *Njuguna Kung'u* case, the Court in its ruling stopped the

⁶⁸⁵ *Rev. Dr. Timothy Njoya, Kepta Ombati, Sophie O Ochieng", Joseph Wambugu Gaita, Peter Gitahi. Muchemi Gitahi, and Ndungu Wainaina v Attorney-General, the Constitution of Kenya Review Commission and the National Constitutional Conference. High Coun Misc. Application No. 82 of 2004.*

⁶⁸⁶ *Njuguna Michael Kung'u, Gacuru wa Kareng'e and Nichasius Mugo v. the Republic, Attorney-General and CKRC, High Court Misc. Application No. 309 of 2004.*

Constitution of Kenya Review Commission from preparing and presenting its final report and Draft Constitution of Kenya 2004 to the Attorney-General for publication and onward transmission to Parliament.

6.5.1 Resolving the review stalemate

Essentially, the two court rulings created a lacuna and complete deadlock in the Constitution making process. The situation was such that there was neither a draft Constitution to take to the referendum as ruled in the *Njoya* case. Nor was the Review Act any longer adequate to conclude the Constitution review process itself. To resolve both the legal and political imbroglio created by the two cases, a number of initiatives came forth.

From the political side, MPs and cabinet ministers allied to the National Alliance Party of Kenya (NAK) in the National assembly came together to form an informal consensus-building group. They organized a workshop in Mombasa for allied MPs and held meetings with the Constitution of Kenya Review Commission to explore options of completing the review process. This group was completely opposed to the National Constitutional Conference process and its outcome. This group formed an informal

From the civil society side, various civil society organizations (CSOs) supported some former NCC delegates, MPs and the Liberal Democratic Movement faction of Government came together to form a lobby group calling itself, "*Katiba* Watch" or "Yellow Movement," This group supported the National Constitutional Conference and its outcome. It therefore sought to

champion and to protect the Draft Constitution of Kenya as adopted by the National Constitutional Conference.

The Katiba Watch group dismissed the work of the National Assembly's consensus building group, which they felt was pursuing one Government faction's anti reform agenda. They organized a series of events and protest meetings calling for the adoption of the Draft Constitution of Kenya 2004 (Bomas Draft) by 30th June 2004.⁶⁸⁷

Determined to ensure that its position on the contentious issues prevailed, the Government, on 30 June 2004, reconstituted the Parliamentary Select Committee (PSC) on Review of the Constitution of Kenya under the chairmanship of Hon. William S. Ruto. The Parliamentary Select Committee (PSC) on the Constitution Review immediately moved to appoint a sub-committee to consider the contentious issues in the Draft Bill and make recommendations thereon.

The PSC mistakenly believed that the main obstacle to the realization of a new Constitution was the so-called contentious issues contained in the Draft Constitution of Kenya 2004 (Bomas Draft). The PSC also believed that if the political leadership could agree on resolving the contentious issues, Parliament could easily amend the Constitution and pass a law validating the Draft Constitution of Kenya 2004 before its presentation to the people in the

⁵⁸⁷ Constitution of Kenya Review Commission, *The Final Report of the Constitution of Kenya Review Commission*, approved for issue at the 95th Plenary Meeting of the Commission on 10th February 2005 *op. cit.*

referendum. It is against this background that the PSC sought to look into the twin matters of contentious issues and amendment to the Constitution.⁶⁸⁸

The PSC sub-committee presented its report to the PSC in a retreat attended by 22 of the 27 PSC members in Naivasha in November 2004. At this meeting, the Constitution of Kenya Review Commission (CKRC) once the engine of the review process attended as an observer. The Commission took advantage of its presence to hand over to the PSC a written Memorandum dated 4th November 2004.

In this Memorandum, the Commission advised the PSC not to reopen issues already resolved. The Commission warned that reopening already settled issues would expose the review process to greater dangers. A large proportion of Kenyan people would also feel cheated if they lost what they gained through previous negotiations and compromises.

During a retreat at Naivasha on 4-7 November 2004 the PSC produced the so called Naivasha Accord, which was a compromise on some of the contentious issues, but not all. Its report was tabled in Parliament on 9 December 2004.^{68,1} The Naivasha Accord identified several issues as contentious and made proposals on how to resolve them. In particular, the Naivasha Accord reintroduced Articles 173 and 174(3) of the Revised Zero Draft Constitution that the National Constitutional Conference had rejected. On

⁶⁸⁸ The Attorney General also advised the PSC on 25 August 2004 that neither section 47 of the Constitution nor the judgement by the Constitutional Court (the Njoya case) could repeal the existing Constitution in its entirety and give birth to a new one. He furthermore supported, for the avoidance of doubt, a constitutional amendment of section 47 to provide for a referendum and urged the Committee to come up with a constitutional amendment Bill to safeguard the review process from further legal challenges. None of these recommendations were ever acted upon.

The National Assembly, *Report of the Parliamentary Select Committee (PSC) on the Constitution Review on the Contentious Issues and the Naivasha Accord*. April 2005.

the one hand, Article 173 of the Revised Zero Draft Constitution provided that the President is the Head of State, the Head of Government, the Commander-in-Chief of the Kenya Defence Forces, the Chairperson of the Cabinet, and the Chairperson of the National Security Council.⁶⁹⁰

On the other hand, Article 174(3) provided that the President, in accordance with this Constitution, shall appoint and may dismiss: (a) the Prime Minister; (b) the Deputy Prime Minister; (c) the cabinet ministers and deputy ministers; (d) the judges of the superior Courts of record; and (e) any other public officer whom this Constitution requires the President to appoint.⁶⁹¹ The PSC however, agreed that although the President would appoint the Prime Minister, he would have no power to sack him or her directly. To dismiss the Prime Minister, a 50 percent vote in Parliament would be required.⁶⁹²

The PSC also agreed to a two-tier devolution structure at national and district levels. The proposal to have a bicameral Parliament with a Senate was however, done away with and replaced with a National Forum to meet at least 4 times a year.⁶⁹³

To move forward the review process, the Naivasha retreat agreed that the Attorney-General publishes a Constitution of Kenya (Amendment) Bill to provide the procedure for the replacement of the existing Constitution with a new Constitution and the referendum. In addition, the PSC agreed to revise the

^{6,0} National Constitutional Conference. *Votes and Proceedings 15^h March 2012, op.cit.*

- *Ibid.*

' T h e National Assembly. *Report of the Parliamentary Select Committee (PSC) on the Constitution Review on the Contentious Issues and the Naivasha Accord, April 2005, op.cit.*

⁶⁹³ *Ibid.*

Draft Constitution of Kenya (Bomas Draft) in order to incorporate the Naivasha Accord before its presentation to the people in the referendum.⁶⁹⁴

The Government however, backtracked on its promise to implement the Naivasha Accord. First, contrary to the Naivasha Accord, the Government withdrew the Constitution of Kenya (Amendment) Bill 2004 from the Government Printers. Secondly, in order to exert greater influence over the parliamentary process of the Constitution review, the Government orchestrated a move to remove Hon. William Ruto MP, as the Chairman of the PSC. Thus, on 5 May 2005 the Select Committee on Review of the Constitution of Kenya was reconstituted under the Chairmanship of Hon. Simeon Nyachae.⁶⁹⁵

However, the official opposition, KANU objected on the grounds that a select committee already existed and that there was no need for a new one with a different membership. The Liberal Democratic Party (LDP) faction of NARC also had reservations because some of its key members had been removed from the list submitted by the Business Committee for approval by the House (Parliament). In fact, the re-appointment of the PSC under Nyachae's Chairmanship contravened Standing Order 154, which provided that a PSC once established cannot be reconstituted unless there are vacancies.⁶⁹⁶ The move to reconstitute the PSC therefore immediately led to the withdrawal of KANU and Liberal Democratic Party (LDP) members from the Committee.

^m The National Assembly. *Report of the Parliamentary Select Committee (PSC) on the Constitution Review on the Contentious Issues and the Naivasha Accord*. April 2005.

^{6.5} Mr. Simeon Nyachae. MP at the time was the Ford-People Leader and Cabinet Minister. Preston Chitere, Ludeki Chweya. Japhet Masya, Arne Tostensen and Kamotho Waiganjo, *Kenya Constitutional Documents: A Comparative Analysis*. CMI report. 2006. *op. cit.*

Thirdly, the PSC moved quickly to establish a Consensus Building Group (CBG). The CBG consisted exclusively of Members of Parliament either supporting or from the National Alliance Party faction of NARC Government. The mandate of CBG was to chart a new direction for the completion of the Constitution review process. Hon. John Koech, MP, of KANU and Mr. Jimmy Angwenyi, MP, of Ford People convened the CBG.

The work of the Consensus Building Group resulted in the publication on 28th June 2004 of the Constitution of Kenya Review (Amendment) Bill, 2004, commonly referred to as the Consensus Bill. The object of the Bill was to provide for the making of a new Constitution in accordance with the decision of the High Court in the *Njoya* case with respect to the exercise of the constituent power of the people through a referendum.

The "Consensus Bill" repealed and replaced the entire Part IV of the Review Act, Cap 3A and renamed it "the making of a new Constitution." *The National Assembly* passed the Bill on 5th August 2004. President Kibaki, however, declined to assent to the Bill on grounds that 65 percent majority requirement to amend the Draft Constitution of Kenya 2004 (Bomas Draft) was in conflict with section 54 (1) of the Constitution. Section 54 (1) of the Constitution provided that:

"except as otherwise provided in this Constitution, any question proposed for decision in the National Assembly shall be determined by a majority of the votes of the members present and voting."

¹ Section 54 (1) of the Constitution of Kenya.

The National Assembly amended the offending provision of the Consensus Bill and the President immediately assented to it. The Consensus Act established a new framework that vested the review process almost exclusively in National Assembly. It limited the role of the Constitution of Kenya Review Commission (CKRC) to mere facilitation and monitoring of civic education. It also vested in the Attorney-General, the power to draft and submit the proposed new Constitution to a referendum without further scrutiny by the National Assembly.⁶⁹⁸

Despite the Consensus Act, there was still widespread belief that without entrenching the review process in the Constitution, the Act, by and of itself, was still inadequate to midwife the successful completion of the Constitution review process. The PSC therefore established another subcommittee to consider and propose appropriate amendments to the Constitution. Based on the subcommittee's work, the PSC submitted its report to the National Assembly on 7th December 2004. The report primarily recommended amendments to section 47 of the Constitution as well as how to resolve the contentious issues. The National Assembly, however, adjourned *sin die* before debating the PSC report.⁶⁹⁹

⁶⁹⁸ Professor Yash Pal Ghai, Submission to the Panel of Eminent Persons on constitutional reform and to the Constitution Committee of the Orange Democratic Movement 4th May 2006.

⁶⁹⁹ Constitution of Kenya Review Commission, The Final Report of the Constitution of Kenya Review Commission, approved for issue at the 95th Plenary Meeting of the Commission on 10th February 2005. *op. cit.*

6.5.2 PSC's consultations and consensus building process

Under the Constitution of Kenya Review (Amendment) Act 2004 (Consensus Act), the PSC began consultations on proposals for amendment of the Draft Constitution of Kenya (Bomas Draft). The pro-Bomas MPs and Katiba

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Watch/Yellow Movement, however, boycotted this process.

However, undeterred by public protests, the PSC organized a retreat for Members of Parliament in Kilifi to work on the recommendations for the amendment of the Draft Constitution of Kenya 2004 (Bomas Draft). The MPs not only proposed amendments and new provisions to the Bomas Draft but also went further to prepare a Draft Constitution that became known as the "the Kilifi Draft."

The Committee tabled its report to Parliament on 29 June 2005. When the report was debated in Parliament on 20-21 July 2005, the opposition KANU and the LDP faction of NARC fiercely contested it. Among other things, the critics claimed that the Committee had gone beyond its terms of reference and resurrected issues that had been agreed upon earlier. Others argued that the motion to adopt the Nyachae PSC report violated sections 30, 46 and 47 of the Constitution as well as Standing Orders 154 and 155.⁷⁰¹

⁰⁰ Katiba Watch/Yellow Movement was a civil society lobby consisting of various democracy and human rights civil society organizations (CSOs), former NCC delegates, some MPs and the Liberal Democratic Movement faction of the NARC Government. It supported and defended the National Constitutional Conference and its outcome through organized protest meetings and litigation. In fact, the Katiba Watch/Yellow Movement through Patrick Ouma Onyango and 13 others moved to court to challenge the parliamentary process. See the Patrick Ouma Onyango and 13 others v Attorney-General and 2 others. High Court Misc. Application No. 677 of 2005.

⁰¹ Preston Chitere, Ludeki Chweya, Japhet Masya, Arne Tostensen and Kamotho Waiganjo, Kenya Constitutional Documents: A Comparative Analysis. CMI report, 2006. *op. cit.*

To this end, the Speaker of the National Assembly, Mr. Francis ole Kaparo, ruled that the PSC had indeed exceeded its mandate by purporting to prepare a Draft Constitution instead of making recommendations for Parliament's consideration. Despite spirited opposition by the Opposition KANU and the Liberal Democratic Party, the National Assembly subsequently debated and passed the PSC Report with its amendment proposals on 21st July 2005. The PSC subsequently submitted its report and amendment proposals to the Attorney-General to prepare a draft Constitution for the referendum.

Upon receipt of the PSC report and its amendment proposals, the Attorney-General, Mr. Amos Wako, proceeded to prepare and publish, *the Proposed New Constitution of Kenya* (Wako Draft) in readiness for the referendum as discussed in the next section.

The Katiba Watch/Yellow Movement through *Patrick Ouma Onyango and 13 Others*⁷⁰, however, moved to Court to challenge the Parliament driven process and to stop the presentation of the Proposed New Constitution of Kenya (Wako Draft) to the people in a referendum. The applicants argued that the Consensus Act 2004 was unconstitutional to the extent that it purported to confer excess powers on the National Assembly to make, debate, amend, alter or work on another or new Constitution. They further challenged the constitutionality of the Consensus Act for conferring powers excess to the Constitution on the President to promulgate the Constitution.

As discussed in Chapter Nine (9), the Court, however, ruled that the people's constituent power could not, be restrained by anybody. Consequently,

⁷⁰ *The Patrick Ouma Onyango and 13 others v. Attorney-General and 2 others. High Court Misc. Application No. 677 of 2005.*

the court declined to declare the Consensus Act 2004 unconstitutional and to stop the impending referendum on the Proposed New Constitution of Kenya (PNCK).

From the foregoing, the study concludes that the effectiveness of a participatory Constitution making process and the legitimacy of its outcome very much depend on the commitment the ruling elite demonstrate in supporting the process at every stage. As demonstrated throughout the review process, the process protracted without success because both President Moi and President Kibaki respectively, withdrew their support. As Professor Yash Pal Ghai points out, it is very rare that a Constitution making process succeeds without the support of the Government of the day. New constitutions, in many African states with a much more troubled situation than Kenya's, succeeded mainly because of the support of the Government. Examples of such countries include Uganda, Ethiopia, Mozambique and South Africa.⁷⁰³

6.6 Referendum on the Proposed New Constitution of Kenya, 2005

This sub-section examines the referendum stage of the Constitution making process in Kenya. It tests the claim that it is sustained public participation in a Constitution making process that will confer the outcome with legitimacy.

Following the Constitutional Court ruling in the *Njoya* case in April 2004, the referendum became a mandatory part of the review process. Parliament also enacted the Constitution of Kenya Review (Amendment) Act

⁷⁰³ Professor Yash Pal Ghai, *Submission to the Panel of Eminent Persons on constitutional reform and to the Constitution Committee of the Orange Democratic Movement*, 4th May 2006 *op. cit.*

2004 (Consensus Act) to provide for the exercise of the people's sovereign right and constituent power in making the Constitution through a referendum.

Thus, the Attorney-General upon receipt of PSC report and amendment proposals, published the Proposed New Constitution of Kenya (PNCK) 2005 (Wako Draft) on 22nd August 2005 in readiness for the referendum. The Katiba Watch/Yellow Movement through *Patrick Ouma Onyango and 13 Others*⁷⁰⁴ had nevertheless moved to Court to stop the Attorney-General from presenting the Proposed New Constitution of Kenya (Wako Draft)⁷⁰³ to the people in the referendum. However, on 15th November 2005, therefore the Constitutional Court⁷⁰⁶ in the *Patrick Ouma Onyango* case unanimously ruled that no one could stop referendum on the Proposed New Constitution. The court ruled:

"Not the existing Constitution, Parliament, Executive nor the Judiciary has the power to stop the exercise of constituent power of the people to enact a new Constitution by way of a constituent assembly or by way of referendum."⁷⁰⁷

Consequent to the court ruling, the Electoral Commission of Kenya (ECK) held a national referendum on the Proposed New Constitution on 21st November 2005. As expected, the referendum turned into a political contest between the Liberal Democratic Party (LDP) and the National Alliance Party of Kenya (NAK) factions of the NARC Government.

⁷⁰⁴ *The Patrick Ouma Onyango and 13 others v Attorney-General and 2 others*. High Court Misc. Application No. 677 of 2005, *op.cit.*

The Attorney-General published the Proposed New Constitution of Kenya on 22nd August 2005. Its main features included (a) an executive President and a non-executive Prime Minister. The president was given the power to appoint and dismiss the Prime Minister; (b) two-level devolution, national and district (as opposed to four level in the Bomas draft), and (c) a one chamber Parliament (as opposed to two chambers in the Bomas draft).

⁷⁰⁶ Per J.G. Nyamu J., R. Wendo J., and M.J. Anyara Emukule.

⁷⁰⁷ *The Patrick Ouma Onyango and 13 others v. Attorney-General and 2 others*. High Court Misc. Application No. 677 of 2005

On the one hand, the Liberal Democratic Party (LDP) faction led by Raila Odinga and the opposition KANU led by Uhuru Kenyatta combined forces under the umbrella of Orange Democratic Movement (ODM) to campaign against the Proposed New Constitution. They roundly dismissed the Proposed New Constitution as a betrayal of the aspirations of people of Kenya for a democratic constitutional order. They campaigned on the platform of defeating the Wako Draft to restart the process to enact the Bomas Draft.⁷⁰⁸

On the other hand, for the National Alliance Party of Kenya (NAK) faction, the referendum presented an opportunity to take full control of the Government. To this end, President Kibaki's faction political strategy was to maintain the *status quo* either through the existing Constitution or through its engineered Proposed New Constitution of Kenya.

The referendum was held on 21st November 2005. The "NO" (Orange) campaign, led by LDP and KANU, garnered 3.5 million votes (57 percent) against the "YES" (Banana) campaign's 2.5 million votes (43 percent). The Draft Constitution was therefore rejected marking a symbolic victory for LDP, KANU and other supporters who had pushed for radical proposals at the national Constitutional Conference.⁷⁰⁹

As expected, with the defeat of President Kibaki faction's at the referendum, the President moved quickly to reconstitute the Government. He

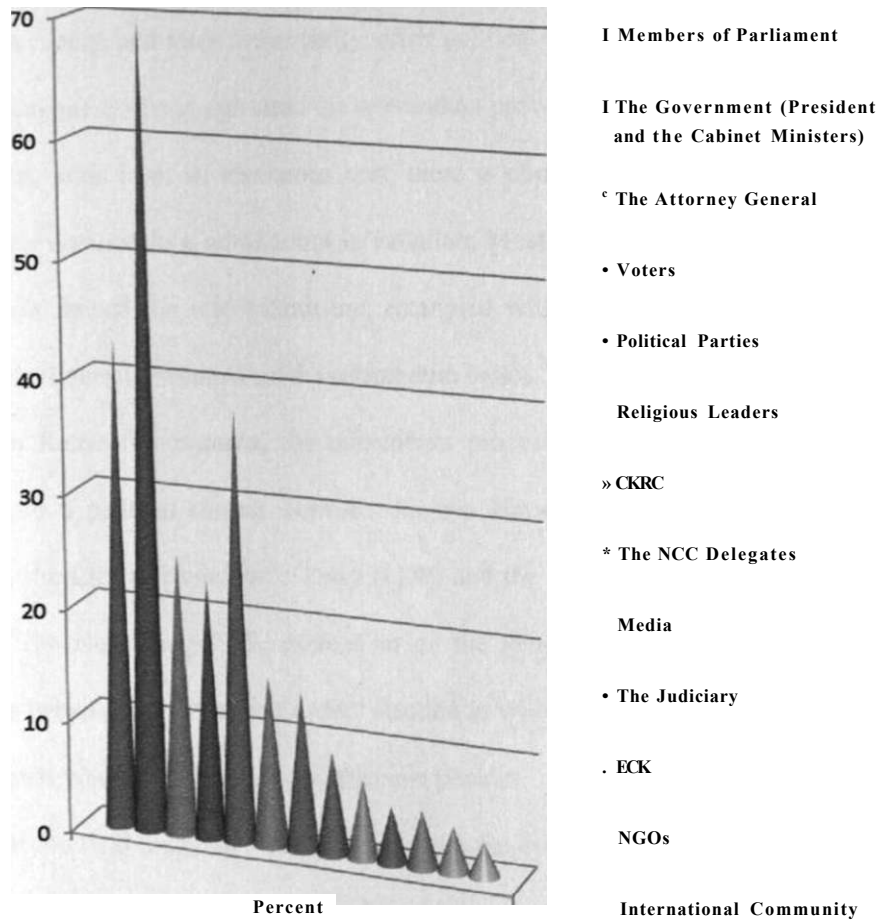
⁷⁰⁸ It should be noted that the Consensus Act provided that whether or not the Proposed Constitution passed at the referendum, the Constitution of Kenya Review Act would stand repealed, and the review organs including CKRC and Constituency Constitutional Forums, wound up. Before the Consensus Act, the Review Act, Cap 3A, provided that the CKRC, the National Constitutional Conference and the Constituency Constitutional Forum could only wind up unless a the draft Bill to Alter the Constitution was enacted.

⁷⁰⁹ Ben Sihanya and Duncan Okello, "Mediating Kenya's Post-Election Crises: The Politics and Limits Of Power Sharing Agreement" (2010). *op. cit.*

fired all the Liberal Democratic Party ministers and their allies from the cabinet. The President then appointed new ministers from KANU, FORD-People and other small parties to form what they called "Government of National Unity (GNU)." The parties and individuals from KANU included in the Government had supported the National Alliance Party's referendum campaigns.

When asked who in their opinion was responsible for the rejection of the Proposed New Constitution (Wako Draft) at the November 2005 referendum, seven out of ten (70 percent) of the respondents blamed the political elite including the President and the cabinet. Majority of the respondents (63.3 percent) also did not believe that the political leadership of the country was interested in ensuring that the Constitution making process succeeded in giving Kenyans a good Constitution. In fact only 12.5 percent of the respondents said that they believed the political leaders were genuine in their desire to give the people a good constitution. Another 24.2 percent of the respondents said they did not know, whether the political leadership was genuinely interested in giving Kenyans a good constitution. Chart 5 below presents the respondents' views on who was responsible for the rejection of the Proposed New Constitution 2005.

Chart 5: Respondents views on who was responsible for the rejection of the Proposed New Constitution 2005



Source: Study findings

From this referendum experience, two drawbacks emerge in using referenda as instruments for decision-making and resolving national issues in environments of deep political divisions. First, referenda are neither perfect nor obvious tools for conferring legitimacy as people may be presented with constitutional

proposals to make decision(s) upon which do not necessarily represent their views or wishes.

Secondly, and more importantly, other political issues not related to the referendum question may surround the referendum process. As Leduc Lawrence points out, aside from its enormous cost, there is concern that voters do not make their decision in a referendum in isolation. Most often, people's choices and debate around the referendum are, entangled with other political factors beyond the issue(s) presented on the referendum ballot.⁷¹⁰

In Kenya for example, the referendum process as already mentioned, turned into a political contest between the two National Rainbow Coalition partners, the Liberal Democratic Party (LDP) and the National Alliance Party (NAK). The November 2005 referendum on the Proposed New Constitution therefore became like a "second order" election in which both parties sought to demonstrate who between them was the most popular.

In the final analysis, what emerges from the events leading to the 2005 referendum on the Proposed New Constitution is that effectiveness of a participatory Constitution making process very much depends on the commitment the Government and the ruling elite demonstrate in supporting the process at every stage. The process must therefore command the respect of the ruling elite who must believe in it. They must not only demonstrate commitment to supporting the process but also the implementation of its outcome.

⁰ Lawrence Leduc. Opinion Change and voting behaviour in referendums" *European Journal of Political Research* Vol. 41. 2002. p. 712.

6.7 The post referendum review revival initiatives, 2006-2007

This section examines the post referendum efforts to restart the Constitution review process and challenges thereof. The section tests the claim that effectiveness of a participatory Constitution making process very much depends on the commitment the ruling elite demonstrate in supporting the process.

With the Constitution of Kenya Review Act, Cap 3A repealed and all the review structures wound up after the rejection of the Proposed New Constitution at the November 2005 referendum, there was no clear direction on the future of the Constitution review process. On the one hand, some members of President Kibaki's faction of the Government argued that the rejection of the Proposed New Constitution meant an endorsement of the existing Constitution. They therefore argued that there was no need to pursue the Constitution review process further.

On the other hand, the Orange Democratic Movement including the Liberal Democratic Party (LDP) and KANU as well as civil society organizations argued that the rejection of the Proposed New Constitution meant that majority of Kenyans wanted the Bomas Draft Constitution 2004. They refused to accept the Government's argument that the rejection of the Proposed New Constitution was an endorsement neither of the *status quo* nor the end of the vision of constitutional reconstruction in Kenya. This marked the beginning of a new phase of agitation for the restart and completion of the comprehensive Constitution review process in Kenya.

6.7.1 Civil society initiatives

With lack of post referendum legal and political direction on the future of the constitutional reforms in Kenya, a number of civil society groups started conversations on how to reignite the Constitution review process. Some of the civil society organizations that started grappling with the challenge of giving new direction and impetus to the completion of the review process included the National Convention Executive Council (NCEC), Citizens Coalition for Constitutional Change (4Cs), the International Centre for Constitutional Research & Governance (ICCRG), Action Aid International-Kenya and the Law Society of Kenya (LSK).⁷¹ Other new civil society initiatives also progressively emerged to address the same challenge.

Indeed, by the end of February 2006, there were already over 21 civil society initiatives advocating for the immediate resumption of the Constitution review process. With time, and arising from the internal consultations, it emerged that no one initiative could single-handedly restart the process. As a result, various individual civil society initiatives began to reach out to each other. Through such outreach, it became apparent that a majority of the initiatives did not just share common concerns on the review process, but also their stakeholder membership.⁷¹²

On its part, the Independent Sector Consultative and Dialogue Group (ISCDG) convened a national consultative forum (NCF) on Constitution review on 27th February 2006 at the Kenyatta International Conference Centre (KICC),

⁷¹ "The Citizens Coalition for Constitutional Change (4Cs). Report of the Post Referendum Constitution Review Initiatives' Interfacing Discourse meeting held on Monday 10th April 2006 in the Canna Room. Nairobi Serena Hotel. Nairobi. Kenya. April 2006.

⁷² *Ibid.*

Nairobi. The main objective of the forum was to explore ways of re-starting the review process. The participants at the Forum resolved to hold a broad based national dialogue conference (NDC) on the Constitution review as soon as practicable. By the end of March 2006, the civil society initiatives had crystallized into seven main initiatives.⁷¹³ It would also appear that these increased civil society activities on restarting the review process forced the Government to rethink its position on the future of Constitution review process as discussed in the next sub section.⁷¹⁴

Meanwhile as agreed at the national consultative forum, ISCDG held the first national dialogue conference (NDC) on 7th-8th July 2006 at Kenya College of Communication Technology (KCCT), Mbagathi, Nairobi. The conference brought together more than 450 participants drawn from various sectors of the society. Ms Martha Karua, MP. and Minister for Justice and Constitutional Affairs officially opened the conference.

The conference resolved to, among other things, push for a new Constitution before the next General Elections expected in December 2007. To this end, the Conference settled on Madaraka Day, 1st June 2007 as the "sunset date" for the promulgation of the new Constitution of Kenya. The conference

" The seven civil society initiatives on the post referendum Constitution review process included: the Ufungamano Initiative around which individual faith based groups coalesced; the National Convention Executive Council (NCEC); the National Youth Consortium (NYC); the Multi-Constituency Forum facilitated by Action Aid International; the Independent Sector Consultative and Dialogue Group (ISCDG) facilitated by Sayari Think Tank; the International Centre for Constitutional Research & Governance (ICCRG); the Law Society of Kenya (LSK); the Multi-Sectoral Forum (MSF - Yellow Movement/4Cs Reflections); and the Kenya Private Sector Alliance (KEPSA).

⁴ It should be noted that perhaps because of the increased civil society activities and pressure for the restart of the constitution review process, the Government start its on process on the Constitution review process. To this end, President Kibaki moved to appoint a Committee of Eminent Persons consisting of fifteen (15) members on 24^h February 2006, three days before the civil society national consultative forum on the restart of the Constitution review process.

resolutions, were immediately, forwarded to the Minister for Justice and Constitutional Affairs.⁷¹⁵

To implement the conference resolutions, the Independent Sector Consultative and Dialogue Group (ISCDG) established a technical team to draft a new Constitution of Kenya Review Bill for the completion of the review process. The technical team subsequently presented its draft Completion of the New Constitution of Kenya Bill ("*Mswada Wa Kutamatisha Uundaji Wa Katiba Mpya Ya Kenya*") at the ISCDG's second national dialogue conference held on 10th-11th November 2006 at the Kenya College of Communication Technology (KCCT), Mbagathi, Nairobi.⁷¹⁶

What emerged from the second national dialogue conference and the general civil society movement for the completion of the review process was twofold. First, that it was no longer attainable for the Government to argue for maintenance of the *status quo*. Second, that the rejection of the Proposed New Constitution at the referendum was by no means an endorsement of neither the existing Constitution nor the end of the vision for constitutional reconstruction in Kenya.

⁷¹⁵ The Independent Sector Consultative and Dialogue Group (ISCDG). Report of the First National Dialogue Conference held at the Kenya College of Communication Technology (KCCT). Mbagathi. Nairobi from 7th to 8th November 2006.

⁷¹⁶ The Independent Sector Consultative and Dialogue Group (ISCDG). Report of the Second National Dialogue Conference held at the Kenya College of Communication Technology (KCCT). Mbagathi. Nairobi from 10th to 11th November 2006.

6.7.2 The Government initiative

With civil society initiatives gaining ground, the Government decided to chart its own agenda on the future of Constitution review process. As a result, President Kibaki appointed a Committee of Eminent Persons on 24th February 2006, to evaluate the Constitution of Kenya review process and recommend a roadmap for successful conclusion of the process.⁷¹⁷ The Committee consisted of fifteen (15) members^{715*} under the Chairmanship of Ambassador Bethwel Kiplagat. As already mentioned in the previous sub section, the Government appointed the Committee of Eminent Persons just three days to the civil society led National Consultative Forum on the future of the Constitution review process held on the 27th February 2006 at the KICC, Nairobi.

The Committee of Eminent Persons conducted public hearings at its Kenyatta International Conference Centre (KICC) base in Nairobi. The Committee further carried out a national survey to supplement the views gathered from its public hearings in Nairobi. The Committee subsequently presented its report⁷¹⁸ to the President on Tuesday 30th May 2006 at State House Nairobi.

In its report, the Committee made recommendations around four key areas. The first set of recommendations related to the legislative framework for

⁷¹⁷ Republic of Kenya, Report of the Committee of Eminent Persons to undertake an evaluation of the constitution review process and recommend a roadmap for the successful conclusion of the process. 30th May 2006.

⁷¹⁸ The members of the Committee of the Eminent Persons included Ambassador Bethuel A. Kiplagat (Chairperson), Dr. Kaendi Munguti (Vice-Chairperson), Prof. Onesmo ole Moi Yoi, Dr. Karuti Kanyinga, Mr. Juma Mwachihi, Mr. Mwambi Mwasaru, Dr. Jacinta Muteshi, Dr. Richard Barasa, Eng. Peter Wambura, Dr. Nemwel Nyamwaka Bosire, Prof. Ng'ethe Njuguna, Prof. Patricia Kameri Mbote, Justice (Rtd.) Abdul Majid Cockar, Ms. Wanza Kioko and Prof. Kassim Farah. See the *Kenya Gazette* Vol. CVIII-No.14, Nairobi, 24th February 2006.

⁷¹⁹ Republic of Kenya. Report of the Committee of Eminent Persons. 30th May 2006.

completing the review process. The second set of recommendations focused on the process and institutional options for completing the review process. The third set related to the procedure for resolving the contentious issues in the review process. The fourth set of recommendations focused on the roadmap for completing the review.⁷²⁰

In terms of process, the Committee reached two key conclusions. First, that the President held the key to unlocking the review process. Second, that only dialogue between the different political factions that manifested during the referendum would bring about a new Constitution. The Committee therefore urged President Kibaki to reach out to the opposition and those who opposed the Proposed New Constitution of Kenya to discuss mechanisms and modalities for restarting the review process. This, in the Committee's opinion, would be the beginning of the process towards national healing and settling ethnic differences that continued to deepen because of mistrust and suspicion among the politicians.⁷²¹

However, throughout its work, the public treated the Committee of Eminent Persons with deep suspicion. First, the main opposition political parties and most civil society organizations shunned the Committee given the unilateral way the President had appointed members of the Committee. They argued that the President's action was contrary to the principles of public participation and stakeholder consultations, which were hitherto, the hallmarks of the review process.

⁷²⁰ *Ibid.*

⁷³¹ *Ibid.*

Secondly, the credibility of the Committee was put into serious doubt because of two key factors. First, unlike the previous review process that endeavoured to cover all parts of the country, the Committee's public hearings and consultations were only held in Nairobi. Secondly, the fact that Committee avoided giving specific direction or timeframe for the start and completion of the review process raised questions as to its resolve to ensure "successful conclusion of the process."

Thirdly, the public doubted the Government's commitment to genuine completion of the review process given its earlier efforts to manipulate and control the review process through Parliament and the courts. The main opposition political parties and most civil society organizations therefore perceived the Committee in two ways. First, they perceived as being part of the wider Government scheme to revive its failed agenda after the rejection of the Proposed New Constitution. Second, they perceived as part of the Government efforts to forestall any genuine initiative that was in the offing to restart the review process before 2007 General Elections. To this end, most stakeholders had strong misgivings about the Government's real intentions behind the Committee's work. On its own admission for instance, the Committee stated thus:

"The Committee worked under a difficult political environment. Many people expressed misgivings about the Committee and doubted our objectivity because of what they considered as lack of adequate consultations prior to our appointment. This perception of the Committee is, in our view, one of the reflections of a divided society. In all, ethnic hatred, suspicion and mistrust among leaders and Kenyans are problems that require urgent action."⁷²³

⁷²² *Ibid*, p. iii.

Fourthly, the failure by the Government to give firm political guarantees on the implementation of the Committee's proposed roadmap inevitably led to a general loss of direction as to the future of the Constitution review process.

Overall, what emerged from the Committee of Eminent Persons' work was that the Government was not willing to commit to completing the review process any time soon. It is against this background that both the civil society organizations and opposition political parties continued to pile pressure on the Government to give a definite commitment and time line for the completion of the review process before the 2007 General Elections.

6.7.3 The inter-parties and multi-sectoral review initiative

As the pressure intensified for the Government to restart the Constitution review process, Ms. Martha Karua, MP, and Minister for Justice and Constitutional Affairs invited representatives of various political parties to a meeting held on the 22nd August 2006 at the Windsor Golf and Country Club. The agenda of the meeting was threefold, first, to explore various options for the conclusion of the constitutional review process. Second, the meeting sought to establish a mechanism for inter-parties dialogue. Third, the meeting aimed to agree on a common legislative agenda to facilitate the prioritization of the enactment of key review legislation in Parliament.⁷²³

At the Windsor meeting, two alternative views emerged on the way forward. One school of thought was that it was indeed possible, with political

⁷²³ The Multi-Sectoral Review Steering Committee, Report of the Multi-Sectoral Review Steering Committee to the Multi-Sectoral Review Forum. 31st October 2006.

will, to finalize the review process before the next General Elections in 2007. The alternative view was that it was practically impossible to complete the review process before the 2007 General Elections. Those who held the latter view argued for minimum legal and constitutional reforms to secure a fair playing ground for the elections to take place as well as to entrench the review process in the Constitution.

To move the dialogue process forward, the meeting agreed to two things. First, the meeting agreed to establish an Inter-Parties Consultative Forum (IPCF) to provide the structure through which to conduct future discussions and negotiations on the Constitution review process amongst political parties. Second, the meeting agreed to establish an Inter-Parties Consultative Committee (IPCC) to advise on the feasibility of completing the review process before the next General Elections 2007. If not, to identify the necessary constitutional, legal and policy reforms to put in place before the next General Elections.⁷²⁴ The IPCC consisted of one (1) member nominated from each of the political parties represented at the meeting and the Centre for Multi-Party Democracy (CMD).

After lengthy deliberations in nine meetings,⁷²⁵ the IPCC presented its Report to the Inter-Parties Consultative Forum (Safari Park I) held on the 15th of September 2006 at the Safari Park Hotel, Nairobi. The Committee proposed a raft of essential constitutional, legal and administrative reforms that it felt were

⁴ **The Multi-Sectoral Review Steering Committee. Report of the Multi-Sectoral Review Steering Committee to the Multi-Sectoral Review Forum, 31st October 2006. *op.cil*.**

The IPCC in its work also consulted the Attorney-General, the Electoral Commission of Kenya, the Registrar of Persons and the Kenya National Commission on Human Rights.

necessary to ensure free and fair General Elections.⁷²⁰ This suggested that the Committee had concluded that it was not possible to complete the review process before the 2007 General Elections.

In its deliberations, the Forum resolved to transform the Inter Parties Consultative Forum (IPCF) into a Multi-Sectoral Review Forum (MSRF) and the IPCC into a broad based Multi Sectoral Review Steering Committee (MSRSC). The Multi Sectoral Review Steering Committee would consist of thirty-two (32) members from the initial 16 members to accommodate representatives from the religious, civil society and private sectors.⁷²⁷

Consequently, the Minister for Justice and Constitutional Affairs, Ms Martha Karua, MP, invited representatives of the three sectors to a meeting held on 25th September 2006 at Safari Park Hotel, Nairobi.⁷²⁸ This second Safari Park meeting (Safari Park II) agreed that the religious sector would nominate six (6) representatives while the civil society and the professional and private sectors would nominate five (5) representatives each.

The meeting further agreed to expand the membership of the Multi Sectoral Review Committee (MSRSC) from thirty-two (32) to forty (40) with another twenty (20) alternate members. This was to ensure that at least one-third of members were women. All the additional eight (8) substantive members were therefore, to be women.⁷²⁹

⁷²⁰ **Recommendations of the Inter Parties Consultative Committee annexed as Appendix II to the Report of the Multi-Sectoral Review Steering Committee to the Multi-Sectoral Review Forum. 31 October 2006. pp. 51-62.**

⁷²⁷ *Ibid*

⁷²⁴ *Ibid*

⁷²⁹ *Ibid*

The broad mandate of the MSRSC was twofold. First, to look at and cause to be drafted the necessary legal and constitutional amendments for the completion of the review process. Second, to consider and cause to be drafted the necessary legal and constitutional amendments to secure free and fair

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General Elections.

In the context of this broad mandate, the Committee specifically sought to achieve five main objectives⁷¹. The first objective was to discuss the nature and content of the constitutional amendments to entrench the review process in the current Constitution and to anchor the referendum. The second objective was to discuss the policy issues as well as the nature and content of the agreed legislative enactments. Thirdly, the MSRSC sought 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 review law. The fourth objective was to discuss the policy issues as well as the nature and content of other necessary and immediate constitutional and/or legislative amendments (if any). Finally, the MSRSC sought to discuss any other relevant and necessary issues relating to constitutional reform, facilitative constitutional and legal matters that may be necessary for the successful comprehensive review of the constitution.

The Multi Sectoral Review Committee (MSRSC) commenced its work on 3rd October 2006 and presented its report to a Multi Sectoral Review Forum

⁷³⁰ *Ibid.*

⁷³¹ *Ibid*

(MSRF) held on 31^s October 2006. From the meeting, the MSRF made a raft of recommendations around eleven key areas.⁷³²

However, upon receiving the MSRF report, Ms Martha Karua, the Minister for Justice and Constitutional Affairs, dismissed the recommendations and the proposed roadmap as unrealistic and un-implementable.⁷³³ This gave credence to the fears that the Government was not after all interested in any form of constitutional and legal reforms before the 2007 General Elections. It against this background that the Government appeared displeased with the MSRF's strong recommendations that if the completion of the Constitution review was not possible before the 2007 elections, then minimum or essential constitutional reforms were imperative.

Following the Government's refusal to accept the MSRF's recommendations and road map. in February 2007, the pro-reform civil society, political parties and the Parliamentary Committee on Administration of Justice and Legal Affairs,, teamed up to form the "Muungano wa Katiba Mpya." The objective of the Muungano wa Katiba Mpya was to demand for essential constitutional reforms before the General Elections expected in December 2007.⁷³⁴

¹² The MSRF recommendations focused on the following: (a) the entrenchment of the review process; (b) the review law; (c) t the review principles; (d) the structure of the review process; (e) the review process roadmap; (0 the referendum law; (g) the threshold for referendum approval of the new Constitution; (h) referendum petitions; (i) the hate speech and negative ethnicity; () the Political Parties Bill; and (k) the affirmative action.

⁷³³ It should be noted that earlier on in August 2006. President Mwai Kibaki had stated categorically that there would be no minimum or partial constitutional reforms before the 2007 General Elections.

⁷³⁴ Joyce Mulama. Politics-Kenya: Renewed Demands for Partial Constitutional Review. Feb 19. 2007. Inter Press Service (IPS) News Agency accessed at: <http://ipsnews.nct/print.asn?idnews=36640>.

Muungano wa Katiba Mpya while acknowledging that undertaking the completion of the constitutional review process was no longer possible before the 2007 elections, demanded for "essential reforms" to ensure fair elections. They threatened that if the Government failed to enact essential reforms by April 15 2007, they would launch a national campaign under the theme, "No Reforms, No Elections."⁷³⁵ They also demanded that the political parties with approval of Parliament appoint the Electoral Commission of Kenya (ECK) Commissioners in line with the 1997 IPPG agreement. They further called for reduced presidential influence over the judiciary, amongst other constitutional amendments.

In response the *Muungano wa Katiba Mpya* demands, Ms Martha Karua, the Justice and Constitutional Affairs Minister, reiterated the Government's opposition to piecemeal reforms before the 2007 General Elections. She was categorical that no party could intimidate or dictate the Government to undertake the proposed reforms before the General Elections.⁷³⁶

With no hope of either completing the review process or enacting essential reforms, just like in 1997 and 2002, the issue of comprehensive constitutional reforms became a major campaign tool toward the December 2007 elections. The Orange Democratic Movement (ODM)⁷³⁷ for example, promised to enact the Draft Constitution of Kenya 2004 (Bomas Draft) within six months of coming to power.

"ibid

JJ Ibid.

Orange Democratic Movement (ODM) was itself a creation and symbol of and a platform for the "No" to the Proposed New Constitution (Wako Draft) referendum campaigns.

From the foregoing therefore, the study concludes that the effectiveness of a participatory Constitution making process very much depends on the commitment the ruling elite demonstrate in supporting the process at every stage. To succeed, a participatory Constitution making process must command the respect of the ruling elite who must believe in it and must demonstrate commitment to supporting the process including the implementation of its outcome.

6.8 Lessons from the review process, 1997- 2007

The overall assessment of the Constitution of Kenya review process from 1997 to 2007 reveals two key lessons with respect to participatory model of Constitution making. First, participatory Constitution making process is a very complex political process fraught with dynamic interests, which require multi prong and long-term strategy to deal with. Mr. Kiraitu Murungi, MP, perhaps best illustrates this phenomenon in his contribution during the National Assembly debate on the Draft Constitution of Kenya 2010:

"When we entered this struggle for constitutional reforms, that time we were fighting for justice. We were trying to lift the burden of oppression and tyranny from the backs of Kenyans. Over the years, the constitutional reform struggle has changed in both form and character. These days, constitutional reform is about power. It has been reduced to a complex political game. The reason why it is taking us such a long time to agree on this constitution is because there are too many political intrigues. There are endless ethnic caucuses, backroom political machinations and cloak and dagger politics, all masked as constitutional reforms."⁷³⁸

⁷³⁸ The National Assembly Official Report (*Hansard Report*). Tuesday, 30th March, 2010. p. 52.

The second lesson is that for a participatory Constitution making process to be effective, there must be a critical mass of committed champions within the Government and civil society spheres throughout the process however long it takes. As demonstrated in Kenya's protracted constitutional reform struggle however, some of the reform champions of yester years became the greatest impediments to the Constitution reform process as soon as they got Government appointments following the regime change.⁷⁵⁹ Ng'ethe and Katumanga, for example, have asserted that most states in Africa lack reform minded leadership and institutional capacity to facilitate democratic and constitutional transformation.⁷⁴⁰

It is against this background that much of the Constitution making processes in Kenya from independence, for instance, have signified no more than the now too familiar ritual of talking about constitutional reforms, without any commitment to ensuring fundamental constitutional and democratic transition.

6.9 Conclusion

This Chapter has examined the principles, processes and challenges of Kenya's participatory Constitution making from 1997 to 2007. The Chapter has interrogated the question of what makes a participatory Constitution making process effective. The Chapter has tested the claim that the effectiveness of a

^{7.9} In Kenya, the most notable include Kiraitu Murungi. MP. Professor Kivutha Kibwana. MP. Ms Martha Karua. MP and Rev. Mutava Musyimi. MP. among others.

Njuguna Ng'ethe and Musambayi Katumanga. "Transition and The Politics of Constitution making: A Comparative Study of Uganda. South Africa and Kenya", *op.cil.*

participatory Constitution making process very much depends on the commitment the ruling elite demonstrate in supporting the process at every stage. In this regard, a participatory Constitution making process must command the support of the ruling elite who must believe in it and must demonstrate commitment to ensuring that the process succeeds.

Overall, the study holds the view that the novelty of the Kenya's participatory Constitution making process from 1997 to 2007 was, centred on its e extensive involvement of the public in Constitution making process. At a broader level, it provided the people with an elaborate opportunity to participate actively in the Constitution making process. It gave the people a chance to ventilate their frustrations and concerns with the governance of the country and the Constitution making process itself. More importantly, the process gave the people an opportunity to critically audit, the state of their constitutionality.

At the individual level, public participation in the Constitution making helped in creating a critical mass of citizens who know about the Constitution, its purpose and content. Through public participation, a good number of Kenyans were, not just enabled to contribute meaningfully to the making of the Constitution but also to develop positive attitudes towards the Constitution and constitutional governance in general.

From the foregoing however, it is evident that to be effective a participatory Constitution making process must first of all be guided by clear constitutional principles entrenched in the Constitution. All the parties involved in the process must nevertheless demonstrate their commitment and willingness to adhere to them.

Secondly, for a participatory Constitution making process to be effective, its basic institutional framework and legislative instrument must be entrenched in the Constitution. This will make frivolous legal challenges and political gerrymandering difficult in the Constitution making process.

Thirdly, to be effective, a participatory Constitution making process must command the support of the ruling elite who must believe in it and must demonstrate commitment to ensuring that the process succeeds. In this respect, it is important to pay attention to what the elites communicate to citizens about the impact of their participation, the significance of the process, and their expectations of the outcome of the process.

The next Chapter Seven (7) examines the post 2007 election constitutional crisis and the steps towards the completion of the Constitution of Kenya review process.

CHAPTER SEVEN

THE POST 2007 ELECTION VIOLENCE AND THE ROAD TO A NEW CONSTITUTIONAL ORDER IN KENYA

7.1 Introduction

Chapter Six (6) has examined the principles, processes and challenges of participatory Constitution making in Kenya from 1997 to 2007. This Chapter examines the post 2007 election constitutional crisis and the steps towards the completion of the Constitution of Kenya review process. The Chapter interrogates two basic questions, namely what makes a participatory constitution making process effective? Is meaningful constitutional change is possible in an environment of relative peace?⁷⁴¹

The Chapter therefore tests two basic claims. First, that fundamental constitutional change does not take place in an environment of relative peace and that unless civil unrest threatens the *status quo*, the ruling elite will not often support fundamental constitutional reforms. Second, the effectiveness of a participatory Constitution making process very much depends on the commitment the ruling elite demonstrate in supporting the process at every stage.

⁷⁴¹ As stated earlier, Professor H.W.O. Okoth Ogendo a respected Kenyan constitutional scholar citing various examples from around the world repeatedly argued that meaningful constitutional change does not take place in peacetime and that the Kenyan attempt at constitution making during peacetime was unlikely to yield different results.

7.2 The post 2007 election crisis agenda for review process completion

This section examines the context of Constitution making after the post 2007 election violence in Kenya. In the run up to the 2007 general elections, two major political developments took place that significantly altered the political equation thereby influencing the course of the 2007 general elections.⁷⁴² First, in early 2007, KANU Chairman Uhuru Kenyatta, walked out of the ODM-Kenya political union to support President Kibaki's bid for a second term. This was significant development because it reeked of ethnic solidarity triumphing over party or ideology.⁷⁴³

Secondly, in August 2007, Kalonzo Musyoka, one of the Presidential aspirants under the ODM-Kenya umbrella attempted a party coup by pulling out of the Orange union, together with the nominal party officials and the party registration certificate. He entered a political union with Dr. Julia Ojiambo's Labour Party of Kenya. This was also significant because Kalonzo Musyoka robbed the Orange Alliance of some of the Eastern Province support base. The Orange leaders then secured the Orange Democratic Movement (ODM) Party of Kenya registered by one Mugambi Imanyara. In September, Kibaki would also launch a new party, the Party of National Unity (PNU) as his re-election vehicle.⁷⁴⁴

With the Government showing lack of commitment to restarting and completing the Constitution review process after the 2005 referendum, the

⁷⁴² Ben Sihanya and Duncan Okello (2010), "Mediating Kenya's Post-Election Crises: The Politics and Limits of Power Sharing Agreement," pp. 654-707, *op. cit*

⁷⁴³ *Ibid.*

⁷⁴⁴ *Ibid.*

country went to the December 2007 elections in a politically precarious situation. It is noteworthy that since 1992, the political elite always promised to ensure that the country held the next general elections under a new Constitution. However, this was never to be in 1997, 2002 and 2007.

Perhaps. Mr. George Saitoti, MP, contribution during the National Assembly debate on the Proposed Constitution of Kenya 2010, best illustrates the challenges of Constitution making as well as the serial betrayal of the people of Kenya by the political elite in their pursuit of a new constitutional order since 1992: He stated thus:

"We promised Kenyans immediately after the 1992 elections that we would give them a new constitution.... We could not agree. In 1997 we got nearer there and we had done nothing. The situation was very precarious at that particular time. We ended up with the IPPG agreement, under which we looked for the minimum constitutional, legislative and administrative reforms.... Since we did not have a new Constitution, in 1997 once again Kenyans' blood was shed. We promised Kenyans that once we were elected and had a new Parliament, they would be given a new Constitution. In 2002 we did not deliver the new Constitution to Kenyans. We betrayed Kenyans."⁷⁴⁵

According to Mr. George Saitoti, MP, the political class had perfected the art of betraying Kenyans over the constitutional reforms time and again. He stated:

We went to the 2002 elections and [again] we promised everybody that we would give Kenyans a new constitution within 100 days. Those who were in the NARC Government during that time will remember that although we told Kenyans we would do so, we never did it. We betrayed Kenyans. We then made an attempt and ended up with the referendum in 2005. Due to the emotions, hatred and hostility amongst ourselves we, as Members of Parliament, divided Kenyans. We went to the general election in 2007 without a new constitution."⁷⁴⁶

⁴⁵ The National Assembly Official Report (*Hansard Report*), Tuesday, 30th March 2010, p. 54.
⁷⁴⁶ *Ibid.*

The issues that shaped the 2007 General Elections however, date back remotely to 1963 and even before independence. As already discussed in Chapters Four (4) and Five (5), the country was under the clutches of a structural conflict since independence. This expressed itself through the agitation for comprehensive constitutional reforms that promised to, among other things, review the "social contract" long frayed by economic, social and political developments since independence.⁷⁴⁷

Overall, it is repeated failure to address the deeply entrenched historical grievances including structural and ethnic conflicts through constitutional reconstruction that set the stage for the 2007 General Elections as the make or break process. Thus going into the December 2007 elections without a new Constitution illuminated the dangers the country faced. The platform for political campaigns was therefore inevitably set along the lines of change and *status quo*.

As expected therefore, on the one hand, Raila Odinga's Orange Democratic Movement (ODM) campaigned on the platform of constitutional reforms and new beginning ("*kazi ianze*" or "let the work begin"). On the other hand, President Mwai Kibaki's Party of National Unity (PNU) campaigned on the platform of *status quo* and continuity ("*kazi iendelee*" or "let the work continue"). Kalonzo Musyoka's Orange Democratic Movement-Kenya (ODM-K) played the third force role.⁷⁴⁸

⁷⁴⁷ Ben Sihanya and Duncan Okello (2010), "Mediating Kenya's Post-Election Crises: The Politics and Limits Of Power Sharing Agreement," pp. 654-707, *op. cit.*
⁷⁴⁸ *Ibid.*

It is against this background that the December 2007 elections, without a new Constitution in place, set the stage for a closely contested 2007 General Elections. So close was the contest that President Kibaki was declared the winner with a margin of only of 231 728 votes. The Chairman of the Electoral Commission of Kenya (ECK) declared President Kibaki the winner with 4,584,721 votes (47 percent) against his closest rival, Raila Odinga who

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garnered 4,352,993 votes to (44 percent).

Mr. Sainwel Kiviutu, Chairman of the Electoral Commission of Kenya (ECK) was to however, later claim that he did not know who actually won the 2007 presidential elections.^{7m0} As discussed in Chapter Five sub section 5.5.4, many believed therefore, that the 2007 presidential election results were fraudulent^{7^1} and that it this that triggered the widespread protests and violence witnessed following the declaration of President Kibaki as the winner.

In the ensuing post election conflict, widespread and ethnically motivated violence erupted and rapidly spread engulfing six of the eight provinces except North eastern and Eastern provinces.^{7^} Over the ensuing six or seven weeks, approximately 1,133 people were killed, property damage ran to billions of Shillings and some 300 000 Kenyans were forced to flee their homes and

^{7k)} Toni Weis, the Results of the 2007 Kenyan General Election. *Journal of Eastern African Studies*. Vol. 2. No.2. 1A 41. July 2008. Routledge. Taylor and Francis, *op.cii*.

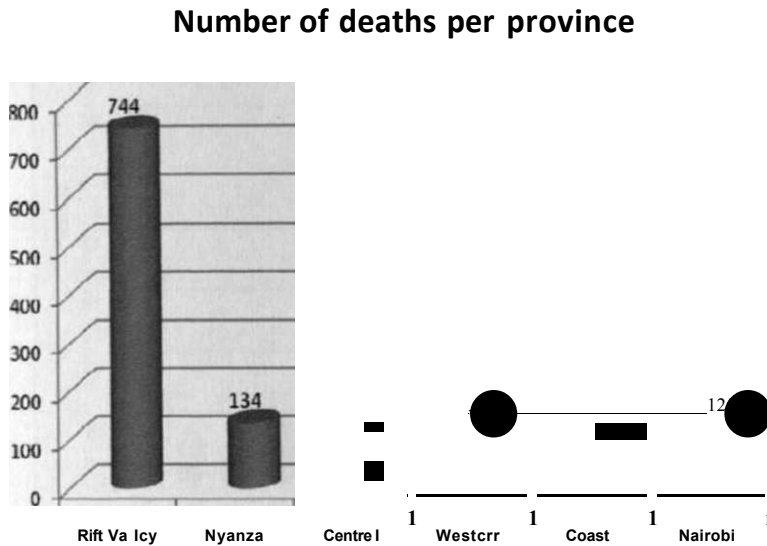
^{7.0} *Ibid*.

⁷⁵¹ *Ibid*

⁷⁵² The dispute over the results of the presidential election held on 27^h December 2007 appeared to have only acted as a trigger of a time bomb that had been ticking since the immediate post independence period but allowed to progressively tick to explosion..

livelihoods.⁷⁵³ Most of the deaths occurred in Rift Valley, Nyanza, Nairobi and Western provinces as shown in Chart 6 below.

Chart 6: Number of post-election violence deaths per province



Source: The Commission of Inquiry into Post-Election Violence (CIPEV) Report (2008)

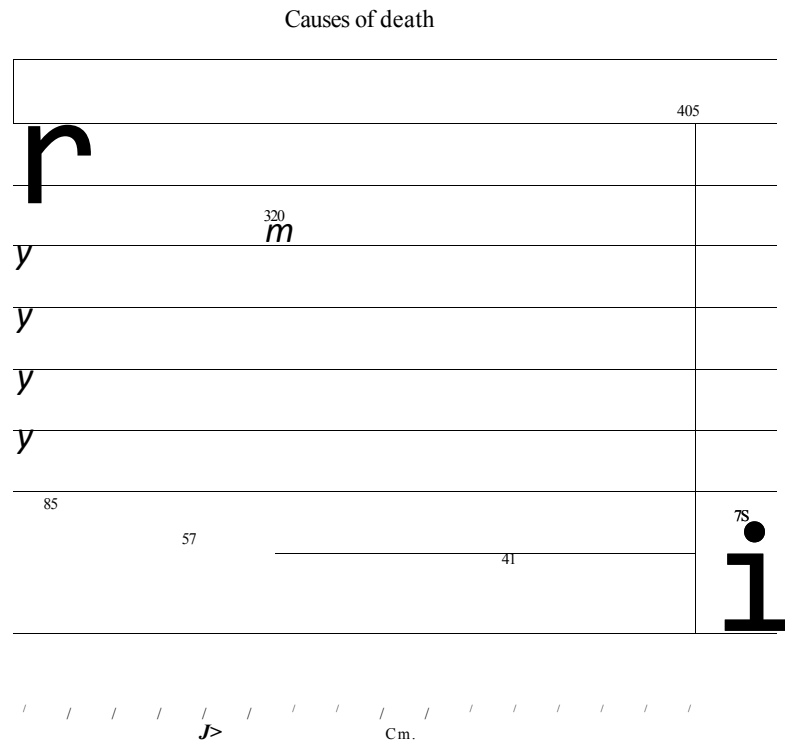
Of the 1,133 post-election violence deaths, majority resulted from gunshot wounds representing 35.7% (405) and through injuries sustained because of sharp pointed objects estimated at 28.2% (320). Chart 7 below present causes of deaths.⁷⁵⁴ Of the total deaths, there were 11 children. 74 females and 1,048 males killed.⁷⁵⁵

⁵³ The Independent Review Commission, Report of the Independent Review Commission on the General Elections held in Kenya on 27 December 2007, 17th September 2008

^M The causes of deaths as documented included bums, arrow shots, mob- injustice, blunt object, severe wounds, sharp pointed object assault drowning, hypothermia, suffocation injury, stoning, shock, hanging, gunshots and unknown causes.

⁵⁵ The Commission of Inquiry into Post-Election Violence (CEPEV), Report of the Commission of Inquiry into Post-Election Violence (CIPEV), September 2008, pp 308-311.

Chart 7: Causes of the post-election violence deaths



Source: The Commission of Inquiry into Post-Election Violence (CIPEV) Report (2008).

According to the Commission of Inquiry into Post-Election Violence (CIPEV) report, the post-election violence was more than a mere juxtaposition of citizens-to-citizens opportunistic assaults. It therefore concluded that.

"These were systematic attacks on Kenyans based on their ethnicity and their political leanings. Attackers organized along ethnic lines, assembled considerable logistical means and travelled long distances to bum houses, maim, kill and sexually assault their occupants because these were of particular ethnic groups and political persuasion. Guilty by association was the guiding force behind deadly 'revenge' attacks, with victims identified not for what they did but for their ethnic association to other perpetrators. This free-for-all was

made possible by the lawlessness stemming from an apparent collapse of state institutions and security forces.⁷⁵⁷

The Commission of Inquiry into Post-Election Violence (CIPEV)⁷⁵⁷

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attributed the post election violence to four key factors. The first factor related to the growing politicization and proliferation of violence in Kenya over the years, specifically, the institutionalization of violence following the reintroduction of multi-party democracy in 1991. Over time, this deliberate use of violence by politicians to obtain power since the early 1990s, and the decision not to punish perpetrators has led to a culture of impunity and a constant escalation of violence.⁷⁵⁹

The second factor related to the growing personalization of power around the President. This gave rise to the view that it is essential for the ethnic group from which candidates come to win the presidential election to assure them of access to state resources and services. It also led to a deliberate denudation of the authority and legitimacy of other oversight institutions that could check abuses of power and corruption. As a result, in many respects, the public lost confidence in the state institutions leading to legitimacy crisis.⁷⁶⁰

Thirdly, there was a feeling among certain ethnic groups of historical marginalization relating to the allocation of national resources including land

⁷⁵⁶ The Commission of Inquiry into Post-Election Violence (CIPEV), Report of the Commission of Inquiry into Post-Election Violence (CIPEV), September, 2008. p. ix-x.

Members of the the Commission of Inquiry into the Post Election Violence (CIPEV) Mr. Justice Philip Waki, a judge of Kenya's Court of Appeal (Chairperson);, Mr. Gavin McFadyen (New Zealand). Mr. Pascal Kambale (Democratic Republic of Congo) Mr. David Majanja (Counsel), and Mr. George Kegoro (Commission Secretary).

⁷⁵⁸ The Commission of Inquiry into the Post Election Violence (CIPEV), Report of the Commission of Inquiry into Post-Election Violence (CIPEV). September 2008. pp. 23-24.

op cit.

**Ibid.*

⁷⁶⁰ *Ibid*

and access to public goods and services. The opposition political elite readily-tapped this feeling to articulate historical grievances, which resonated with certain sections of the society. This created an underlying and potentially explosive climate of ethnic tension, hate and conflict.⁷⁶¹

The fourth factor related to the increasing problem of a growing population of poor, unemployed and youth, educated and uneducated, who readily agreed to join militias and organized gangs. These gangs were, alleged to intersect with parts of the Government and the security forces and that politicians used them to attack their opponents to secure their own security, and to gain power.⁷⁶²

According Ben Sihanya and Duncan Okello therefore, the 2007 post-election violence represented a maturation of a simmering structural conflict in Kenya, coming as it did, after the failure to give the country a new Constitution after the National Rainbow Coalition (NARC) came to power in 2003.⁷⁶³ It is against this background that Ben Sihanya and Duncan Okello have pointed out that:

"The historical injustices dating back to 1963, and especially Kibaki's intense ethnicization of Kenya's political economy and now the electoral fraud coupled by an electoral process that did not meet constitutional and judicial standards, tested Kenya's constitution, its institutions and political stability to the limit."⁷⁶⁴

As a result, as the Independent Review Commission (IREC) found in its public hearings, the common theme encountered virtually everywhere was

⁷⁶¹ *Ibid.*

⁷⁶² *Ibid.*

⁷⁶³ Ben Sihanya and Duncan Okello (2010). "Mediating Kenya's Post-Election Crises: The Politics and Limits of Power Sharing Agreement," pp. 654-707, *op. cit.*

⁷⁶⁴ *Ibid.*

about the call for change - to the Constitution, to the political system, to the electoral system, often an inchoate longing for things to be done differently.⁷⁶⁵ The

Independent Review Commission (IREC) stated in its report:

"At the public hearings and the technical workshops IREC heard, time after time, cries for societal change by means of statutory amendment. 'Change the Constitution to cut down the powers of the presidency.' 'Change the Constitution to strengthen the separation of powers.' 'Change the Constitution to do away with the pernicious winner-take-all system.' 'Change the Constitution to promote devolution of power.' 'Consolidate the diverse body of laws governing Kenyan elections.' 'Confirm the IPPG arrangement statutorily.' 'Have the ECK commissioners appointed by Parliament' - no, 'by a multidisciplinary body, not by the President alone'."⁷⁶⁶

Thus as part of the solutions to the underlying problems that brought about the post election political and constitutional crisis, it was recognized that resolution of the crisis would require adjustments to the current constitutional, legal and institutional frameworks.⁷⁶⁷

To this end, on 1st February 2008, the Panel of Eminent African Personalities⁷⁶⁸ (PEAP) and the National Dialogue and Reconciliation Committee⁷⁶⁹ after intense negotiations, reached an agreement to deal with long-term issues and solutions that may have constituted the historical and

⁷⁶⁵ The Independent Review Commission. Report of the Independent Review Commission on the General Elections held in Kenya on 27 December 2007. 17' September 2008. p.6.

⁷⁶⁶ *Ibid.* p.22.

⁷⁶⁷ *Ibid.*

⁷⁶⁸ The Panel consisted of the Former Secretary General of the United Nations. His Excellency Kofi Annan; His Excellency President Benjamin Mkapa. Retired President of the United Republic of Tanzania; and Her Excellency Madam Graca Machel.

⁷⁶⁹ The National Dialogue and Reconciliation Committee consisted of three members from the Panel of Eminent African Personalities, five representatives from the Party of National Unity (PNU) and five representatives from the Orange Democratic Movement (ODM). The Party of National Unity was led by Ms Martha Karua. MP and Minister for Justice and Constitutional Affairs and consisted of Professor Sam Ogeri. Minister for Education; Mr. Moses Wetangula. Minister for Foreign Affairs; Mr. Mutula Kilonzo. MP. and Mr. Gichira Kibara. Director Legal Services. Ministry of Justice and Constitutional Affairs. The Orange Democratic Movement was led by Mr. Musalia Mudavadi. MP and consisted of Mr. James Orengo. MP. Dr. Sally Kosgei. MO, Mr. William Ruto. MP and Mr. Caroli Omondi.

enduring injustices. Consequently, on 4th March 2008, the Parties reached an agreement on the need to complete the Constitution of Kenya review process and the modalities for the process.⁷⁷⁰

Specifically, the Kenya National Dialogue and Reconciliation (KNDR) Framework identified four main agenda items that were deemed critical for addressing the causes of the crisis including reconciliation of communities, and prevention of future conflicts in the country. The first Agenda provided for the immediate action to stop violence and restore fundamental rights and liberties. The second Agenda made provisions for the immediate measures to address the humanitarian crisis, promote reconciliation, and healing.

While the third Agenda addressed measures on how to overcome the political crisis, the fourth Agenda sought to address long term issues. These included constitutional, legal and institutional reforms; land reforms; tackling youth unemployment, poverty, inequity and regional development imbalances; consolidating national unity and cohesion; and addressing impunity, transparency and accountability.

As to the Constitution of Kenya review process, the Parties to the Kenya National Dialogue and Reconciliation Framework (KNDR) agreed to complete the process within a period of twelve months. To facilitate this process, Parliament enacted both the Constitution of Kenya (Amendment) Act (No. 10 of 2008)⁷⁷¹ and the Constitution of Kenya Review Act 2008 which came into

⁷⁰ Ben Sihanya and Duncan Okello. "Mediating Kenya's Post-Election Crises: The Politics and Limits Of Power Sharing Agreement" *op. cit.*

⁷¹ The Constitution of Kenya (Amendment) Act (No. 10 of 2008).

force on 23rd December 2008.⁷⁷² Subsequently, in accordance with the Review Act 2008, the President appointed the Committee of Experts (CoE) consisting of 12 members⁷⁷³ on 2nd March 2009 to facilitate the completion of the Constitution review process within twelve months from the date of its appointment as discussed in detail below.

Overall, the Kenya National Dialogue and Reconciliation Framework and its National Accord and Reconciliation Act are, credited for opening a new constitutional chapter in the history of Kenya. According to Ben Sihanya and Duncan Okello, the Accord demonstrated that executive power could indeed, be shared between the President and the Prime Minister, and by extension Parliament and other constitutional and statutory organs.⁷⁷⁴

In the immediate, the National Accord brought stability to the socio-economic, cultural and political environment while opening up space for a degree of inclusive governance in Kenya. The Accord further encouraged the debate of sensitive governance issues such as equity and ethnicity. In the past, the public could not openly debate these issues in the absence of democratic political space and partisan Governments.⁷⁷⁵

More importantly, the post-election conflict mediation process contributed to fast tracking the constitutional review process towards a complete reconstruction of the Kenya Constitution and the state. It is

⁷⁷² The Constitution of Kenya Review Act 2008.

Members of the Committee of Experts included Mr. N/amha Gitonga (Chairperson). Ms Atsango Chesoni (Vice Chairperson). Prof. Christina Murray (South Africa), Dr. Chaloka Beyani (Zambia), Prof. Fredrick E. Ssempebwa (Uganda). Ms Njoki E. Ndungu. Mr. Abdirashi Abdullahi. Mr. Otiende Amollo. Mr. Bobby Munga Mkangi. Mr. Amos Wako, Attorney-General (*ex officio*) and Dr. Ekuru Aukot, Director (*ex officio*).

⁷⁷⁴ ⁴ Ben Sihanya and Duncan Okello (2010). "Mediating Kenya's Post-Election Crises: The Politics and Limits of Power Sharing Agreement." pp. 654-707. *op. cit.*

⁷⁷⁵ *Ibid.*

noteworthy that achieving such a feat had been severally subverted since the pre-independence Lancaster House constitutional negotiations as well as the post independence period as discussed in detail in Chapters Four (4) and Five (5).

From the foregoing, the study concludes that indeed, fundamental constitutional change does not take place in an environment of relative peace. As demonstrated by the constitutional developments after the post 2007 election violence in Kenya, without the short but intense period of civil unrest and violence, there were all indications that Kenyans would have once again gone to the next general elections without a new Constitution.

Practically, it had to take violence, widespread civil unrest, destruction of property and deaths for the political elite to agree to complete the protracted process of constitutional and state reconstruction in Kenya. It is against this background that the study finds plausible, the claim that unless civil unrest threatens the *status quo*, the ruling elite will not agree to initiate far reaching constitutional reforms.

7.3 Institutional framework for the Constitution review completion

This section examines the framework for the completion of Constitution of Kenya review process. It tests the claim that for a participatory Constitution making process to be effective, its basic institutional framework and legislative instrument must be entrenched in the Constitution.

The Constitution of Kenya Review Act 2008 established five key organs to complete the comprehensive review of the Constitution. These included the

Committee of Experts (CoE); the Parliamentary Select Committee (PSC) on the Constitution Review; the National Assembly; the Reference Group; and the Referendum.

Since the defunct review organs had accomplished already much work, the new organizational arrangement for the review was, tasked with the responsibility of completing the review process within the shortest time possible. For this reason, the Review Act, 2008 did replicate the elaborate Cap 3A institutional arrangement including the Constituency Constitutional Forums and the National Constitutional Conference that drove the review process between 2001 and 2005.

The Committee of Experts (CoE) was established as the principal organ for completing the review process. Its basic operational structure and core functions remained the same as those of the defunct Constitution of Kenya Review Commission (CKRC).

The Committee had seven core functions. The Committee's first function was to identify contentious issues and the issues already agreed upon in the existing draft constitutions. The Committee's second function was to solicit and receive public views on contentious issues. Its third function of the Committee was to make recommendations to the Parliamentary Select Committee on the resolution of the contentious issues. The fourth function of the Committee was to prepare a Harmonized Draft Constitution for presentation to the National Assembly.

The Committee's fifth was to revise the Draft Harmonised Constitution taking into account the agreement and consensus reached by the Parliamentary

Select Committee. Its sixth function was to facilitate civic education while the seventh function was to liaise with the Interim Independent Electoral Commission of Kenya to hold a referendum on the Draft Constitution.

The main function of the Reference Group⁷⁷⁶ was to assist the Committee of Experts maintain effective interface with key stakeholders especially in the civil society. Specifically, the Reference Group was, to first, participate in joint meetings involving both the Parliamentary Select Committee and the Committee of Experts. Second, it was expected to consider the contentious provisions of the draft Constitution not approved by the National Assembly. Thirdly, the Reference Group was, to make recommendations to the National Assembly.

Section 7 of the Review Act gave the National Assembly power, in accordance with its Standing Orders, to establish the Parliamentary Select Committee (PSC) on the Review of the Constitution. In constituting the PSC, the Act required the National Assembly to ensure regional and gender balance in the composition of the Committee. The main function of the PSC was to assist the National Assembly in the discharge of its functions under the Act.⁷⁷⁷

As a key organ of the review process, the core functions of National Assembly were fivefold. First, it was the function of the National Assembly to nominate persons for appointment by the President as members of the Committee of Experts. The second of the National Assembly was to receive and

⁷⁷⁶ The Constitution of Kenya Review Act, 2008 in the Fourth Schedule published in July 2009 provided for a Reference Group of thirty representatives chosen by the interest groups identified under the Act.

⁷⁷⁷ The National Assembly appointed the Parliamentary Select Committee on the Review of the Constitution through a resolution of the House on Wednesday, December 17, 2008.

consider the Harmonized Draft Constitution from the Parliamentary Select Committee upon receiving the same from the Committee of Experts.

The third function of the National Assembly was to debate, approve and submit the Harmonized Draft Constitution without amendment to the Attorney-General for publication. Or fourthly, to debate and propose amendments to the Harmonized Draft Constitution and submit the same to the Committee of Experts for consultation, consideration and redrafting, The Fifth function of the National Assembly was to receive the final Draft Constitution from the Committee of Experts and submit the same to the Attorney-General for publication.

The Review Act 2008 established the Referendum as one of the organs of the review process to ratify the Proposed Constitution. To this end, the Act required the Interim Independent Electoral Commission (IIEC) to organize, conduct and supervise a referendum on the Proposed New Constitution after its publication by the Attorney-General. The IIEC was to also frame and publish the referendum question in consultation with the Parliamentary Select Committee and to publish the result of the referendum in the Kenya Gazette.

The Constitution of Kenya (Amendment) Act, 2008 also established the Interim Independent Constitutional Dispute Resolution Court (IICDRC) with exclusive original jurisdiction to determine all and only matters arising from the Constitution review process. As discussed in Chapter Nine, the IICDRC in total presided over seven Constitution review cases.

Overall, unlike the the previous Constitution of Kenya review process between 1997 and 2005 as discussed in Chapter Six, the institutional framework

for the final phase of the process (2008-2010) was designed with inbuilt mechanisms to safeguard the integrity of the process. As discussed in the next section, the Committee of Experts was therefore able to function independently without the undue influence of the political elite. The study therefore concludes that for a participatory Constitution making process to be effective, its basic institutional framework and legislative instrument must be entrenched in the Constitution.

7.4 Processes towards the Constitution of Kenya review completion

This section examines the processes and steps towards the completion of the Constitution of Kenya review between 2008 and 2010. The section tests the claim that effectiveness of a participatory Constitution making process very much depends on the commitment the ruling elite demonstrate in supporting the process at every stage. In other words, to be effective, a participatory Constitution making process must command the support of the ruling elite who must believe in it and must demonstrate commitment to ensuring that the process succeeds. The succession of activities from one organ of the Constitution making process to the next should also be clearly marked and entrenched.

Overall, the Review Act 2008 set out an elaborate but time bound process with clear outline of tasks and responsibilities for different organs of the review. Broadly, the process of completing the Constitution of Kenya review process between 2008 and 2010 went through nine steps as discussed below.

7.4.1 Step 1: Public consultations on contentious issues

This step involved carrying out public consultations, thematic consultations with caucuses, interest groups and other experts as well as research studies to identify the issues already agreed upon and issues not agreed or contentious in the existing draft constitutions.⁷⁷⁸

With respect to consultation on contentious issues, the Committee of Experts asked the public to submit their views by 30th March 2009. From a total of 12,133 responses received, the CoE identified three main contentious issues. These were first, system of government, that is, the nature of executive and legislature; second, the devolution of power; and third transitional clauses.⁷⁷⁹ On the basis of these, the Committee again published an advert in the daily newspapers on 19th June 2009 inviting the public to submit their views on the three issues.⁷⁸⁰

As discussed under Chapter Six sub section 6.4.3.3, it should be noted that the above three issues the public identified as contentious were similar to the three key contentious issues that both the Consensus Building Group (BCG) and the Conference Consensus Building (CCBG) dealt with during the National Constitutional Conference without much success in resolving.⁷⁸¹

⁷⁷⁸ Sections 23 and 30 of the Constitution of Kenya Review Act, 2008.

⁷⁷⁹ The Committee of Experts on Constitutional Review, the Preliminary Report of the Committee of Experts on Constitutional Review, Issued on the Publication of the harmonised draft Constitution. 17th November. 2009.

Z ^{ibid}

⁸¹ For example, the three key issues of contention that CCBG was mandated to deal with the system and structure of government including the sharing of powers between the President and the Prime Minister; devolution of power; and the transitional and consequential arrangements.

Following the publication of contentious issues, the CoE collected 19,133 views by way of written memoranda and oral submission from members of the public, which it classified into highly contentious, resolvable and agreed upon issues. From the public views, the CoE identified four additional contentious issues. These included Kadhi's Courts, land, the electoral system, affirmative action, prisoners' rights and limitations of rights in the Bill of Rights.⁷⁸²

Thus, having identified the main contentious issues, the Committee of Experts adopted ten guiding principles to resolve the issues identified.⁷⁸⁴ As to the process of resolving the contentious issues identified, the Committee of Experts adopted a six prong strategy. The strategy encompassed holding regional, thematic consultations and sectoral consultations. It also encompassed CoE's participation and presentations in panels and forums, seeking expert opinions and holding consultation with the Parliamentary Select Committee and Agenda Four Institutions.⁷⁸³

The Committee of Experts on Constitutional Review, the Preliminary Report of the Committee of Experts on Constitutional Review, Issued on the Publication of the harmonised draft Constitution, 17th November, 2009. *op.cit.*

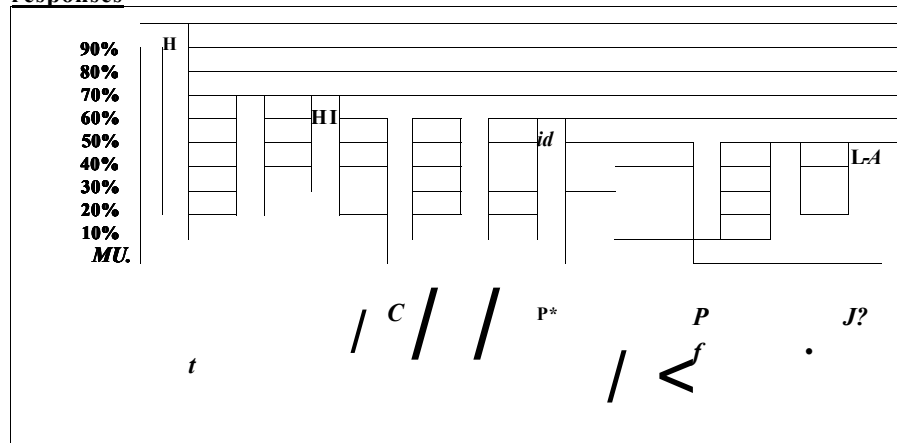
⁷⁸³ The ten guiding principles included: (a) ensuring the unity and integrity of the nation of Kenya; (b) constraining executive power through separation of powers and checks and balances; (c) decentralization of power; (d) avoidance of dangerous and acrimonious presidential/national elections; (e) avoidance of the winner take it all in elections; (f) deepening democracy; (g) ensuring effective, accountable and stable Government; (h) ensuring equity in distribution of resources; (i) strengthening and regulating political parties; and (j) ensuring ethnic, regional and gender balance.

⁸⁴ The Committee of Experts on Constitutional Review, the Preliminary Report of the Committee of Experts on Constitutional Review, Issued on the Publication of the harmonised draft Constitution, 17th November, 2009. *op.cit.*

The Agenda Four Institutions that the CoE engaged with on various issues of concern included the Interim Independent Electoral Commission (IIEC), the Interim Independent Boundaries Review Commission (IIBRC), the National Cohesion and Integration Commission (NCIC) and the Truth Justice and Reconciliation Commission (TJRC).

According to the report of the Committee of Experts (CoE), most of the views received related to the overall format of the document, concerns with specific technical aspects of the draft and editorial content of the draft⁷⁸⁸ Overall, most of the views focused on ten key chapters of Harmonized Draft Constitution as shown in Chart 8 below.

Chart 8: Chapters of the Harmonized Draft Constitution with most public responses



Source: the Committee of Experts (2010).

To effectively address the issues raised from the public debate on the harmonized draft Constitution, the CoE grouped the views and issues in three categories. The first category related to issues where the Committee had extensive debate and consciously elected to decide on in one way or another. The second category related to issues where the concerns were not considered, or which required fresh consideration in light of the weight of recommendations

⁷⁸⁸ *Ibid.*

received, new facts or evidence adduced. And the third category related to issues where there was general consensus.⁷⁸⁹

In the final analysis, most of the public views received related to the three key issues that CoE had initially identified as contentious, namely, system of Government, devolution of powers and the transitional clauses. In addition, the Committee of Experts received public views on issues which were generally not considered contentious such as representation of the people, land, public service, Bill of Rights, the judiciary and public finance. Based on the public feedback on the Harmonized Draft Constitution, the Committee of Experts expeditiously revised the Harmonized Draft within the 21 statutory days required by the law.⁷⁹⁰

7.4.3 Step 3: PSC Consensus building processes and recommendations

Section 32(1) (c) of the Review Act required the Committee of Experts to present its report and the draft Constitution to the Parliamentary Select Committee for "deliberation and consensus building on the contentious issues." To this end, the Committee of Experts presented its final report and the Revised Harmonized Draft Constitution⁷⁹¹ to the Parliamentary Select Committee on Constitutional Review on Friday, 8 January 2010.

¹⁸⁹ *Ibid.*

⁷⁹⁰ *Ibid.*

¹⁹¹ **Revised Harmonized Draft Constitution of Kenya, as reviewed by the Committee of Experts on Constitutional Review, pursuant to section 32(1 Xc) of the Constitution of Kenya Review Act, 2008 and presented to the Parliamentary Select Committee on Constitutional Review on 8th January 2010.**

Upon receipt of the Committee of Experts' report and the draft Constitution, the Parliamentary Select Committee⁷⁹² held a one-week retreat from 18th to 22nd January 2010 at the Great Rift Valley Lodge, Naivasha. The purpose of the retreat was to consider the Revised Harmonized Draft Constitution and build consensus on the contentious issues. The PSC was however, not able to finalize its work by 22nd January 2010. It was therefore, forced to extend its sittings by a further five days until Thursday, 28th January 2010.⁷⁹³

Prior to the PSC retreat on the draft Constitution, both Orange Democratic Party (ODM) and Party of National Unity (PNU) declared their positions on the constitutional talks. On the one hand, ODM went to the meeting with two key demands, namely a pure parliamentary system of Government, and a three level system of devolved Government at the national, regional and county levels. The ODM, nevertheless, also said that a pure presidential system was acceptable as long as proper checks and balances properly backed it up.

On the other hand, the Party of National Unity (PNU) went to the meeting with two key sets of demands, namely, a presidential system of

⁹² The Parliamentary Select Committee (PSC) on the Constitution Review consisted of the following members: Mr. Mohammed Abdikadir, MP (Chairperson), Mr. Ababu Namwamba, MP (Vice-Chairperson), Ms Martha Karua, MP. Mr. Uhuru Kenyatta, MP. Mr. Mutula Kilonzo, MP. Mr. David Musila, MP. Mr. Moses Wetangula, MP. Mr. Danson Mungatana, MP. Mr. Wilfred Moriasi Ombui, MP. Mr. Kambi Kazungu, MP. Ms Amina Abdallah, MP. Mr. Peter Munya, MP. Mr. Mwangi Kiunjuri, MP. Mr. Jeremiah Kioni, MP, Mr. Ekwee Ethuro, MP. Mr. Isaac Ruto, MP. Mr. Musalia Mudavadi, MP. Mr. Chachu Ganya, MP. Mr. Najib Balala, MP. Dr. Sally Kosgei, MP. Mr. William Samoei Ruto, MP. Mr. James Orengo, MP. Ms Millie Odhiambo, MP, Ms Sophia Abdi, MP. Mr. Joseph Nkaissery, MP and Ms Charity Ngilu, MP.

The National Assembly Report of the Parliamentary Select Committee on the Review of the Constitution on the revised harmonized Draft Constitution. 29th January 2010.

Government and a two level system of devolved Government at the national and county levels.

The PNU had strong misgivings about the regional level Government that it said was akin to the independence Constitution's majimbo system of Government. Both the pre and post independence debate on the majimbo system of Government is discussed in Chapters Four (4) and Five (5) respectively. PNU was also passionately opposed to the idea of a pure parliamentary system of Government headed by the Prime Minister with a ceremonial President. This was a contention that had pervaded the constitutional negotiations and debate during and after the National Constitutional Conference.

While PNU went to the meeting a strong and united group, the ODM went to the meeting divided with Mr. William Ruto, MP and his supporters mainly from the Rift Valley supportive of the PNU side in the constitutional negotiations. To deal with this situation, the ODM adopted a tactical approach to the negotiations by presenting two alternative positions on the system of Government. On the one hand, it had its most preferred pure parliamentary system of government. On the other hand, it showed willingness to support the pure presidential system of government with checks and balances as an alternative. It is for this reason, that Mr. William Ruto and Mr. Musalia Mudavadi, both ODM Deputy Party Leaders ended up proposing and seconding the motion respectively, for the adoption of a pure presidential system with checks and balances.

In its method of work, the Parliamentary Select Committee (PSC) deliberated on the identified contentious issues and the options of resolving them. It also reviewed the Revised Harmonized Draft Constitution 2010, article by article against the harmonized draft Constitution 2009, the CoE Preliminary Report of 17th November 2009 and the CoE Final Report of 8th January 2010. The Committee further made references the existing draft constitutions including the Draft Bill to alter the Constitution 2002(CKRC Draft), the Draft Constitution of Kenya 2004 (Bomas Draft), and the Proposed New Constitution 2005 (Wako Draft) despite its rejection at the November 2005 referendum.

In total, the Committee had ten sittings some of which extended late into the night. Overall, the PSC reviewed and made recommendations on all the Chapters of the Revised Harmonised Draft Constitution. Where necessary, the Committee invited experts to clarify on certain technical issues such as delineation of electoral boundaries. It should however be pointed out that by resolving to review the entire revised draft Constitution including provisions that were not identified as contentious, the Committee ended opening up even issues that had been resolved, agreed and closed.^{7 m1}

After considerable debate and horse-trading, the Committee came up with several recommendations. Some of the recommendations required some basic editorial attention and minor amendments. But recommendations in seven key areas⁷⁹⁵ as discussed below had fundamental implications. Indeed if the

^{7.4} The National Assembly Report of the Parliamentary' Select Committee on the Review of the Constitution on the revised harmonized Draft Constitution, 29th January 2010 *op. cit.*

^{7.5} The seven areas related to (a) the system and structure of government; (b) the structure of the devolved system of government; (c) public finance and sharing of national resources; (d) ethics and integrity; (e) the structure of the national security system; (f) transitional justice and past

Committee of Experts accepted all the recommendations, they would have fundamentally altered not just the value foundation but also the democratic construct of the Revised Harmonized Draft Constitution.

In design, the recommendations were meant to achieve two objectives: first, to maintain the *status quo*; and second, to ensure that the program for the implementation of the new Constitution came under the full control of Parliament with minimum checks from other organs of the state. The seven key recommendations of the Parliamentary Select Committee (PSC) on the contentious issues are briefly discussed below.

a) The system of Government

After considerable debate on the merits and demerits of the parliamentary, presidential and hybrid systems of Government, the Committee agreed on a pure presidential system. The President would be both head of State and Government with a cabinet of not more than 25 members appointed from outside Parliament.^{7%} The PSC however, made seven other recommendations that appeared to go against the spirit and values of the envisaged new democratic constitutional order.

First, the PSC recommended that Members of Parliament remain eligible for appointment to the cabinet provided, that they resigned their positions as Members of Parliament upon their appointment to the cabinet.

human rights abuses and injustices; and (g) the transitional clauses and the implementation of the Constitution.

^{7%} *Ibid*

Second, the PSC recommended that the Chairpersons of Parliamentary Committees be given a higher profile commensurate with the status equal to ministers.⁷⁹⁷ In other words, the PSC wanted Members of Parliament to remain beneficiaries of state appointment to the cabinet and if not possible, to continue enjoying the benefits of cabinet ministers while serving as Chairpersons of Parliamentary Committees.

Third, the PSC recommended that the provincial administration be retained albeit with some restructuring in accordance with the Constitution.

Fourth, the PSC recommended that the President have the power to establish offices, other than constitutional offices, in the public service.

Fifth, the PSC recommended that provisions in respect of the objects of the devolution of government that sought to enhance checks and balances and the separation of powers be deleted.

Sixth, as if to abrogate the safeguards entrenched in the National Accord and Reconciliation Act 2008, the PSC recommended that section 12 (2) of the Sixth Schedule be deleted.⁷⁹⁸ Indeed, if allowed, this would have given the President the power to appoint or dismiss state officers or the power to reconstitute the Government after promulgation of the new Constitution without reference and consultation with the Prime Minister as required by the National Accord and Reconciliation Act, 2008.

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" The National Assembly Report of the Parliamentary Select Committee on the Review of the Constitution on the revised harmonized Draft Constitution, 29th January 2010, *op. cit.*

Section 12(2) of the Sixth Schedule to the Harmonised Draft Constitution provided that "the provisions of the old Constitution that remain in force under subsection (1) are Articles 4 to 29 but any appointment or dismissal to be made by the President under the old Constitution must be made by the President with the agreement of the Prime Minister.

b) The structure of the devolved system of government

As to the system of devolved government, the PSC made three fundamental recommendations that if accepted would have had far reaching ramifications for the intended philosophy and functionality of the devolved system of government.

First, PSC recommended that Article 6 of the Harmonised Draft Constitution be amended to introduce sub Article 6 (3) thus: "Despite clause 6 (2),⁷⁹⁹ the national government takes precedence over county governments."⁸⁰⁰

Second, the PSC recommended the deletion of provisions that sought to "give powers of self-governance to the people".

Third, the PSC recommended the deletion of the provisions that required Parliament to facilitate public participation and involvement in the legislative and other business of Parliament and its committees.⁸⁰¹

Essentially, if allowed, these PSC recommendations would have had three effects on the intended philosophy, design and operations of the devolved system of Government.

Article 6(2) of the Harmonised Draft Constitution provided that "The governments at the two levels are distinct and inter-dependent and shall conduct their mutual relations on the basis of consultation and cooperation."

⁸⁰⁰ **Revised Harmonized Draft Constitution of Kenya (from PSC to CoE). comprising the recommendations agreed upon as a result of the deliberations of the Parliamentary Select Committee on the Review of the Constitution in accordance with section 32(1) (c) of the Constitution of Kenya Review Act, 2008 and presented to the Committee of Experts pursuant to section 33(1) of the Constitution of Kenya Review Act, 2008 on 29th January 2010.**

National Assembly Report of the Parliamentary Select Committee on the Review of the Constitution on the revised harmonized Draft Constitution, 29th January 2010, *op. cit.*

First, if allowed, the recommendations would have had the effect of diluting the principle of self-governance as well as the exercise of the delegated sovereign power of the people at both national and county levels.

Secondly, if carried, these recommendations read together with the recommendation on the retention of the provincial administration structure would have reintroduced a hierarchy of centralized power structure.

Thirdly, the recommendations, if allowed, would have killed the principles of distinctive, interdependent, consultative and cooperative governance as the basis of managing functional relations between the national and county Governments.

c) Public finance and sharing of national resources

In respect to public finance and sharing of national resources, the PSC made two key recommendations that would have had the effect of maintaining the *status quo* in public finance management system. First, it recommended that Articles 246 - 248 on the Commission on Revenue Allocation be deleted. Instead, the PSC wanted the functions of the Commission to be vested in the Senate. Second, the PSC recommended the deletion of Article 242 (3) that required the Minister responsible for Finance to present to both Houses of Parliament all information concerning public borrowing or loans.⁸⁰²

If allowed, the recommendations would have had the effect of first turning the process of making decisions on sharing national resources into a political process very much like the Constituency Development Fund. Secondly,

^Ibid.

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⁸⁰² *Ibid.*

In addition, the CoE held three joint meetings with members of the Reference Group (RG) on the 11th August, 2009, 24th September, 2009 and 14th - 16th October, 2009. These meetings sought common agreement among stakeholders on the contentious issues and the way forward for the review process.

7.4.2 Step 2: Preparation of the Harmonized Draft Constitution

Sections 23 of the Review Act required the Committee of Experts to undertake three key activities at this stage of the review. First, CoE was required to articulate the merits and demerits of proposed options for resolving the contentious issues. Secondly, it was required to make recommendations to the Parliamentary Select Committee on the resolution of the contentious in the context of the greater good of the people. Thirdly, CoE was required to prepare a Harmonized Draft Constitution for presentation to the National Assembly.⁷⁸⁶

Thus, as required by law, the Committee of Experts prepared and published a Harmonized Draft Constitution, which it subsequently launched on 17th November 2009 at the Kenyatta International Conference (KICC), Nairobi. The Committee also launched a national civic education exercise to stimulate public debate and awareness of the Harmonized Draft Constitution.⁷⁸⁷

The public response, within the one-month statutory period for public engagement debate, was overwhelming with submissions received from diverse sources including Kenyans in the Diaspora and international scholars.

⁷⁸⁶ The Constitution of Kenya Review Act, 2008. *op. cit.*

⁷⁸⁷ Committee of Experts (2010), *The Report of the Committee of Experts on Constitutional Review issued on the submission of the Reviewed Harmonized Draft Constitution to the Parliamentary Select Committee on Constitutional Review. 8th January. 2010.*

the recommendation would have ensured the public finance function remained as a national government function.

Thirdly, by recommending that it was not be necessary for the Minister of Finance to disclose to Parliament all information concerning borrowing or loans, the PSC wanted the management of public debt to remain opaque and out of reach of public scrutiny. This was completely contrary to the principles of openness and accountability in public finance management as well as the principle of generational equity in the use of public resources and borrowing.

Briefly, the PSC recommendations read together with those on the system and structure of Government and devolution meant that PSC wanted the *status quo* in public finance management to remain. This would have had the overall effect of

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undermining the intended principles of fiscal devolution,

d) Ethics and integrity

As to ethics and integrity, the Parliamentary Service Committee (PSC) recommended the deletion of the key pillars of the leadership, ethics and integrity infrastructure entrenched in the draft Constitution. These included Article 91(1) (b) and (2) on the conduct of state officers, Article 92 on finances of state officers and Article 95 on the establishment of Ethics and Anti-Corruption Commission.

In making these drastic, recommendations, the PSC argued that Chapter Six (6) of the draft Constitution had too many details that could be contained in enabling legislation. The truth of matter is however, that Members of
Section 4(7) Constitution of Kenya Review Act, 2008.

Parliament were uncomfortable with the entrenchment of the ethics and integrity clauses including the Ethics and Anti-Corruption Commission in the Constitution.⁸⁰⁴

If allowed, the recommendations would have had the effect of seriously weakening and undermining constitutional and institutional framework for fighting against corruption and impunity. It would have also allowed the vices of self-serving and unaccountable leadership in public service to continue unchecked contrary to the intended constitutional principles and values of servant leadership and public accountability in public service.

e) The structure of the national security system

The PSC recommended almost a total overhaul of Chapter Fifteen on National Security. It recommended the replacement of the Kenya Police Service with the Kenya Internal Security Service. The PSC further recommended the deletion of the functions of the National Security Council, the Director General of the Police Service, the National Intelligence Council and the Inspector General. Instead, the PSC proposed that enabling legislation provide for these

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functions. In effect, the PSC recommendations sought to maintain the *status quo* as far as the control of the national security system was concerned.

It would appear that PSC members were worried about the strict requirements provided in Articles 91 and 92 on public accountability, financial probity and public scrutiny of the conduct of state officer whether in public and official life, in private life, or in association with other persons.

⁵ The National Assembly Report of the Parliamentary Select Committee on the Review of the Constitution on the revised harmonized Draft Constitution. 29th January 2010 *op. cit.*

o Transitional justice and past human rights abuses and injustices

Regarding transitional justice and past human rights abuses and injustices, the PSC recommended the expunging of section 36 of the Sixth Schedule to the Revised Harmonized Draft Constitution. Section 36 (Part 5: Miscellaneous) of the Sixth Schedule on past human rights abuses provided that:

"Parliament may, within six months of the effective date, by legislation, empower the Kenya Human Rights and Gender Commission or any other body established by Parliament to:

- (a) Investigate all forms of human rights abuses by any person or group of persons before the effective date;
- (b) Investigate the causes of civil strife, including massacres, ethnic clashes and political assassinations, and identify those responsible; and
- (c) Make appropriate recommendations regarding -
 - (i) The prosecution of those responsible;
 - (ii) The award of compensation to victims;
 - (iii) Reconciliation; and
 - (iv) Reparation."⁸⁰⁶

Essentially, members of the PSC in their recommendation appeared unenthusiastic to have such provisions entrenched in the Constitution. Thus if allowed, such a recommendation would have rendered the quest for constitutional redress of past human rights abuses and historical injustices unattainable contrary to the intention of the comprehensive Constitution review process.

⁸⁰⁶ The Revised Harmonized Draft Constitution, section 36 (Part 5: Miscellaneous) of the Sixth Schedule, as reviewed by the Committee of Experts on Constitutional Review, pursuant to section 32(1 Kc) of the Constitution of Kenya Review Act, 2008 and presented to the Parliamentary Select Committee on Constitutional Review on 8th January 2010.

g) Transitional clauses

On the transitional clauses, the PSC made a number of recommendations whose main intention was to vest in Parliament the power to control the implementation of the new Constitution.

First, the PSC recommended the replacement of the Commission on the Implementation of the Constitution established under section 5 of the Sixth Schedule of the revised harmonized draft Constitution with a "Parliamentary
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Select Committee on the Implementation of the Constitution.'

Secondly, the PSC recommended amendments to Article 307(5)-(6) of the revised harmonized draft Constitution to exclude the courts from enforcing Parliament's compliance with the timelines set in Fifth Schedule for enacting the required consequential legislation.

Thirdly, the PSC recommended the deletion of Article 307 (7)-(9) providing for the dissolution of Parliament if it failed to enact the required legislation within the specified period under the Fifth Schedule.

Fourthly, the PSC recommended the deletion of section 37 of the Sixth Schedule that required the national Government from the effective date to conduct and facilitate civic education on the Constitution to the people of Kenya, in the national languages and in their local languages.

If allowed, the PSC recommendations would have had the effect of undermining the principles of checks and balances, separation of powers, public participation and constitutional guardianship or oversight in the implementation of the new Constitution and management of transition from the old to the new

⁸⁰ **The National Assembly Report of the Parliamentary Select Committee on the Review of the Constitution on the revised harmonized Draft Constitution. 29th January 2010 op. cit.**

order. More importantly, the recommendations would have had the effect of exposing the Constitution implementation process to the vagaries of political manipulation and power player by the elite.

7.4.4 Step 4: Revision and finalization of the Draft Constitution, 2010

Section 33(1) of the Review Act 2008 required the Committee of Experts (CoE) to receive, revise and finalize the draft Constitution taking into account the consensus or agreement reached by the Parliamentary Select Committee (PSC). To this end, the Parliamentary Select Committee presented its report and recommendations on the Harmonized Draft Constitution to the Committee of Experts on Tuesday, 2nd February 2010.⁸⁰⁸

Consequently, the Committee of Experts (CoE) embarked on the process of revising the draft Constitution taking into account the PSC recommendations and consensus on the contentious issues. In undertaking the revision and finalization of the draft Constitution, CoE was guided by the principles⁸⁰⁹ set out in sections 4 and 6 of the Constitution of Kenya Review Act (2008).

Against the guiding principles, the Committee of Experts considered each and

⁸⁰⁸ The Committee of Experts on Constitutional Review. Report of the Committee of Experts on Constitutional Review. Issued on the Submission of the Proposed Constitution of Kenya, 23rd February. 2010.

⁸⁰⁹ The guiding principles included (a) ensuring the unity and integrity of the nation of Kenya; (b) constraining executive power through separation of powers and checks and balances; (c) devolution of power; (d) avoidance of dangerous and acrimonious presidential/national elections; (e) avoidance of the winner take it all in elections; (f) deepening democracy; (g) ensuring effective, accountable and stable Government; (h) ensuring equity in distribution of resources; (i) strengthening and regulating political parties; and (j) ensuring ethnic, regional and gender balance.

⁸¹⁰ The Committee of Experts on Constitutional Review. Report of the Committee of Experts on Constitutional Review. Issued on the Submission of the Proposed Constitution of Kenya. 23rd February. 2010, *op.cit.*

every recommendation of the PSC including all the key changes proposed to the Revised Harmonized Draft Constitution.⁸⁰

Ultimately, while acknowledging the PSC's efforts to ensure a briefer and more concise constitutional document, it nevertheless rejected most of the PSC recommendations.⁸¹² In rejecting most of the the Parliamentary Select Committee's recommendations, the Committee of Experts felt that first, the recommendations were self serving and not made for the greater good of the people of Kenya. Second, that they did not comply with the core objects and principles of the Constitution review, as contained, in sections 4 and 6 of the Review Act, 2008. Thirdly, that they did contribute to the overall realization of the intentions of constitutional reconstruction in Kenya.

The Committee of Experts upon completion of the process of revision of Draft Constitution submitted its final report and the revised draft Constitution of Kenya 2010 to the Parliamentary Select Committee⁸¹³ on 23rd February 2010 for onward transmission to the National Assembly.⁸¹⁴

7.4.5 Step 5: Debate and adoption of the draft constitution, 2010

At this stage of the review process, the Review Act, 2008 required two activities to be undertaken. First section 33(3) of the Review Act required the Parliamentary Select Committee (PSC to, within seven days of receipt of the

⁸⁰ *Ibid.*

⁸¹ *ibid.*

⁸¹ Section 33(2) of Review Act, 2008 required the Committee of Experts to submit the revised draft Constitution and its final report to the Parliamentary Select Committee (PSC) within 21 days from the date it received PSC's recommendations on the harmonised draft Constitution and the contentious issues.

^{81J} The Committee of Experts on Constitutional Review, Report of the Committee of Experts on Constitutional Review, Issued on the Submission of the Proposed Constitution of Kenya, 23rd February. 2010. *op.cit.*

Committee of Experts' final report and the revised draft Constitution, table them before the National Assembly.

Secondly, section 33(4) of the Review Act, 2008 required the National Assembly to, within 30 days of the tabling of the draft Constitution to perform three tasks. One, debate the draft Constitution, two approve the draft Constitution with or without amendments, and three, submit the draft Constitution including any proposed amendments to the Attorney-General.

The Attorney-General was subsequently required within seven days to either publish or where there were proposed amendments, to submit the draft Constitution and the proposed amendments to the Committee of Experts for consideration and redrafting. To this end, on 23rd February, 2010, the Committee of Experts submitted its final report and the revised draft Constitution, 2010 to the Parliamentary Select Committee.

Thereafter, Mr. Abdikadir Mohammed, MP. the Chairperson of the Parliamentary Select Committee, tabled the CoE's final report and the revised draft Constitution before the National Assembly on Tuesday, 2nd March 2010.⁸¹⁵ As required by section 33 (3) of the Review Act 2008, the PSC tabled the report and the revised draft Constitution together with Notice of Motion for the House to approve the draft Constitution of Kenya, 2010.⁸¹⁶ In accordance with section 33(4) of the Review Act 2008, the National Assembly was expected to conclude the debate and adoption of the draft Constitution 2010 within 30 days, that is, on or before Thursday, 1st April 2010.

The National Assembly Official Report. (Hansard Report). Tuesday, 2nd March 2010 (P).
"Ibid

7.4.5.1 The debate on the draft Constitution 2010

Before the formal debate on the draft Constitution 2010 formally started at the National Assembly stage. Members of Parliament (MPs) made two attempts to reach consensus on what they considered as either outstanding or contentious issues in the draft Constitution. The first attempt by MPs at consensus building took at the Naivasha Great Rift Valley Lodge while the second attempt was at the Kenya School of Government, Kabete, Nairobi.

The attempts at consensus building were informed mainly by the fact the Committee of Experts in preparing the revised draft Constitution had rejected most of the recommendations made by the Parliamentary Select Committee as already discussed above. A section of Members of Parliament especially allied to the Party of National Unity (PNU) side of the coalition Government was therefore determined to have some of the recommendations rejected by the Committee of Experts reintroduced before the formal debate and consideration of the draft Constitution started.

While in Naivasha, there was some level of political agreement reached especially on levels of devolution, the meeting in Kabete ended up with no deal but walk outs.⁸¹⁷ In the final analysis, both consensus building attempts failed to yield any significant agreements on any of the issues they considered contentious. As Mr. William Ole Ntimama, MP, stated of the two consensus building meetings during the debate of draft Constitution:

⁸¹⁷ It should, be noted that although some agreements were reached in Naivasha agreement, these agreements were opened up for re-negotiations in Kabete. This is what mainly led the stalemate between the ODM and PNU members of parliament before the House convened on 23^d March 2010 to start the debate on the Draft Constitution.

"Madam Temporary Deputy Speaker, I opposed the Naivasha retreat because I did not know what we were going to do there. The Kabete thing was forced on us. However, what came out of the Kabete retreat except disagreement? What would have come out of this thing called 'Kamukunji'? Nothing! It is only this Parliament that must decide what we should do about the draft Constitution."⁸¹⁸

In accordance with section 33 (4) (a) of the Review Act the formal debate on the draft Constitution ran from 23rd March 2010 to 30^{*} March 2010. As to the House procedures, the Speaker, Mr. Kenneth Marende, directed that the Chairperson of the Parliamentary Select Committee move a motion for plenary consideration of the draft Constitution 2010. The Speaker also directed that all proposed amendments be handed over by the rise of the House on Wednesday, 24th March, 2010 afternoon sitting to be appended to the Order Paper for the House in readiness for consideration from Thursday, 25th March, 2010.⁸¹⁹

The Speaker, after some considerable debate on procedural matters, then called upon Mr. Mohammed Abdikadir, MP and Chairman of the Parliamentary Committee on the Review of the Constitution to move the Motion:

"THAT, pursuant to the provisions of Section 33(4) of the Constitution of Kenya Review Act, 2008, this House approves the draft Constitution submitted by the Committee of Experts and laid on the Table of the House on Tuesday, 2nd March, 2010."⁸²⁰

Mr. Mohammed Abdikadir, MP, in moving the motion, reminded the House that the document before them was neither a Committee of Experts draft Constitution nor a Parliamentary Select Committee draft Constitution but the Proposed Constitution of Kenya 2010. He pointed out that the action that was

***" The National Assembly Official Report (*Hansard Report*). Wednesday. 24^h March. 2010(P). p. 36.**

The National Assembly Official Report (*Hansard Report*), Tuesday. 23rd March. 2010(P).¹²⁰ The National Assembly Official Report. Tuesday, 23rd March 2010 (P), p.34.

therefore expected of the House was to debate the draft Constitution with the hope that there would be improvements to the document.

However, if no improvements were agreed on, the document would then move forward to the fourth organ of review, namely, the people of Kenya in a referendum. Mohammed Abdikadir, further reminded members of the long and tortuous journey of constitution reforms in Kenya and that the actions of the National Assembly at this stage could not stop the people of Kenya from exercising their sovereign right.⁸¹

In general, during the debate most members who rose to speak supported the approval of the draft Constitution extolling its good aspects and the promise for a better future for the people of Kenya. Most of them reminisced on the long and difficult struggle for a new democratic Constitution of Kenya. They also celebrated the role of many post independence and second liberation heroes.⁸² They applauded the consultative nature of the entire review process and the role of civil society and the media in the struggle for the constitutional reforms in Kenya.

⁸¹ *Ibid.*

⁸² The post independence and second liberation heroes recognized during the debate included the late Jaramogi Oginga Odinga, Marie John Saroney. Philemon Chelagat. Josiah Mwangi Kariuki. Mashengo wa Mwachofi. Koigi Wamwere. Abuya Abuya. Chelagat Mutai, Bishop Alexander Muge. Bishop Henry Okullu. Bishop David Gitari. Rev. Timothy Njoya. the late Chief Justice Magano of the High Court. Achieng' Oneko, the late George Anyona. Prof. Edward Oyugi. John Khamiwa, Pheroze Nowerjee, Titus Tido Adungosi. Makau Mutua. Martin Shikuku. Mukaru Nganga. George Nthenge, Salim Ndamwe. Prof. Wangari Maathai. Masinde Muliro. Wamalwa Kijana. Keneth Matiba. Charles Rubia. Wanyiri Kihoro. Prof. Peter Anwang-Nyong'o, Raila Odinga, James Orengo, Kiraitu Murungi. Ahmed Bamariz, Martha Karua. George Kapten. Dr. Mukhisa Kituyi. Mr. Musikari Kombo. Oki Ooko Ombaka. Prof. Kivutha Kibwana. Dr. Willy Mutunga, Paddy Onyango. Rev. Peter Njoka. Kumuu Kuria, Mutava Musyimi and Otieno Kajwang' among many others. Among the youth mentioned to have fought for the new Constitution included Kabando wa Kabando. Milly Odhiambo. Betty Ndomo, Cyprian Nyamwamu. Duncan Okello. Dan Irungu. Suba Churchill, Jackson Mwalulu and among others. Members also recognised the special role played by the women movement including Prof. Wangari Maathai. Hon. Martha Karua, Hon. Charity Ngilu. Lady Justice Martha Koome. Prof. Maria Nzomo. Ambassador Tabitha Sei. Hon. Dr. Phoebe Asiyo, Mrs Ida Odinga, Betty Murungi, Njoki Ndung'u. Wanjiku Kabira and Wahu Kahara among others.

In respect of the design and content of the draft Constitution, most members appreciated and applauded the inclusion of forward looking provisions while demonstrating its points of departure from the outgoing Constitution. Some of the members reminded themselves about the principles and values upon which the new Constitution and its institutions were founded which are discussed in detail under section 6.2 of this Chapter.

There were however, a number of members who canvassed for amendments to the draft Constitution before they could support it. Among these members was a small but vocal group mainly from Kuria, parts of the Rift Valley, the Meru region and Mount Elgon who spoke very strongly against certain provisions of the draft Constitution. They mainly feared domination by the larger communities within their respective counties. For example, Dr. Wilfred Machage, MP for Kuria, strongly felt that by them not given their own counties, the draft Constitution was, designed to oppress minority and marginalised communities such as the Kuria, the Sabaot and the Teso in their respective counties of Migori, Bungoma and Busia.^{s:j}

Members mainly from the Rift Valley and the Coast regions spoke strongly about land and the exclusion of the regional level of Government from the design of devolution. However, members mainly from Central Kenya spoke against the regional level of Government which they likened to the failed majimbo system of Government of the immediate post independence period. They argued that the regional level of Government would balkanize the county into ethnic enclaves. They cited ethnic cleansing and civil strife witnessed in

^a The National Assembly Official Report (*Hansard Report*). Tuesday, 23rd March, 2010 p. 54.

Kenya in 1992, 1997 as well as the post election violence of 2008 as pointers to the dangers of a majimbo system of government.⁸²⁴

As to the question of land, some members especially from the Rift Valley had strong misgivings about the issue of minimum and maximum ceiling on private land and the function of the National Land Commission with respect to investigation and redress of historical injustice in land.

7.4.5.2 Consideration and adoption of the draft Constitution 2010

After considerable debate on the draft Constitution, the formal consideration of the proposed amendments to the draft Constitution began on Wednesday, 31st March 2010. At the consideration stage, the Speaker directed the attention of Members to Section 47A (b) of the Constitution which stated, *inter alia*, that:

"No alteration can be made to the draft Constitution tabled unless such alternation is supported by the votes of not less than 65 per cent of all the Members of the National Assembly (excluding *ex officio* members)."⁸²⁶

In total, some 152 proposed amendments were, listed in the Order Paper No. 8. Of these, only 34 motions of amendments (22.6%) were moved and negatived while 90 amendment motions (59%) were withdrawn and negatived. Due to the unavailability of the proposers to move their motions, 28 amendment motions (18.4% were dropped and negatived.⁸²⁷

Of the 34 amendment motions moved by the proposers, a majority of them were concerned with the issues of civil and political rights, land,

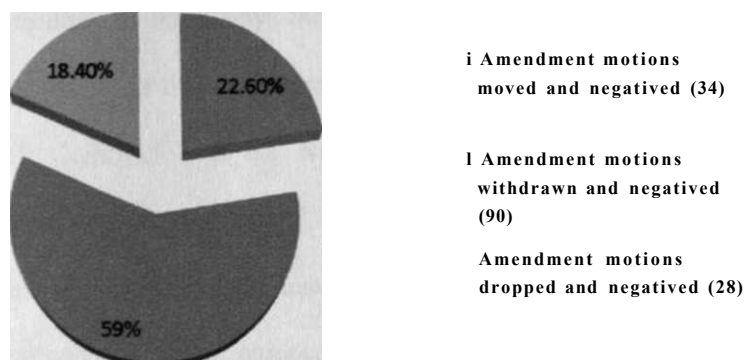
²³ The National Assembly Official Report (*Hansard Report*). Wednesday, 24th March, 2010(P) p. 67.

The National Assembly Official Report (*Hansard Report*). Tuesday, 30th March, 2010. p. 39.
⁸²⁶The Constitution of Kenya. Revised edition 2009 (2008). published by the National Council for Law Reporting with the Authority of the Attorney-General.

²⁷ The National Assembly Official Report (*Hansard Report*). Thursday, 1st April, 2010.

devolution and national security. Chart 9 below shows the distribution of the amendment motions to the draft Constitution 2010.

Chart 9: Consideration of the proposed amendments to the revised harmonized draft Constitution 2010



Source: The National Assembly Official Report (*HansardReport*) 1* April 2010

However as the consideration of the proposed amendments progressed with motion after motion negated, there was a general sense of frustration among some members. These members felt that the House was not rising to the occasion to make their contribution to "improving" the Draft Constitution. Mr. Njeru Githae, MP, best illustrated the members' frustrations when he stood to urge members to withdraw their amendment motions.

"Mr. Speaker, Sir. It is quite clear that we are actually engaging ourselves in an exercise in futility. At this rate, I do not see any amendment, whether good or bad, that will go through. Under the Constitution of Kenya Review Act, even the Committee of Experts (CoE) is not even bound by our resolutions in this House. This has put off the Members. I am requesting if we can now withdraw our amendments. I have withdrawn mine, Hon. Bifwoli and Hon. Kajwang have withdrawn theirs so that we can move "⁸³

⁸²⁸ The National Assembly Official Report (*HansardReport*), Wednesday, 31st March, 2010(P), p.46.

Consequently, the delegates withdrew or dropped 118 amendment motions representing 77.4 percent of amendment motions registered. As Hon. Njeru Githae alluded to, the general "mood of the House" was against the amendment of the draft Constitution. In many ways therefore, the "mood of House" was very similar to the "mood of the Conference" during the consideration of the revised zero draft Constitution at the National Constitutional Conference (Bomas). At Conference, 347 amendment motions, representing 83.6 percent, were either withdrawn or dropped for almost similar reasons.

In his assessment of the proposed amendments, Mr. Mohammed Abdikadir, MP, Chairman of the Parliamentary Select Committee pointed out that about 70 percent of them focused on only two chapters of the 18 Chapters and 6 Schedules contained the draft Constitution. These were the Chapter on the Bill of Rights and the Chapter on devolution.⁸³⁰ On the political issues about devolution, Mr. Mohammed Abdikadir stated:

"Indeed, there has been fear created about devolution. Fear resulting from our history. Fear resulting from majimbo. Fear resulting from exclusion. These are historical fears. They are genuine. The way the Constitution has dealt with it is to try and create some balance so that, indeed, we have devolution. But this country is unitary and we do not want "Bantustans", so to speak. That is what the Constitution provides."⁸³¹

⁸²⁹ Constitution of Kenya Review Commission. *The Final Report of the Constitution of Kenya Review Commission*, approved for issue at the 95th Plenary Meeting of the Commission on 10th February 2005 *op. cit.*

¹³⁰ The National Assembly Official Report (*Hansard Report*), Thursday 1st April, 2010(P). p. 88.

⁸³¹ *Ibid* at p. 88.

Prime Minister Raila Odinga while reminding members of the urgency of passing over the button to the people of Kenya to make their decision stated that:

"Even if we referred this document to the Committee of Experts, then bring the Reference Group and the Parliamentary Select Committee, we will still just be delaying the process of taking the matter to the people of Kenya to make a decision. This may not be the best constitution. None is perfect in the world. We may not have gotten all the amendments that we wanted into it. Some people wanted devolution in three tiers. They did not get it. Others wanted to see a definite structure of financial devolution, but it did not come. There are so many other changes we wanted effected, but what is the test of the pudding? The taste of the pudding is in the eating. Let us not deny the people of this country the opportunity to eat this pudding."⁸³²

With all the amendment motions captured in the Order Paper No. 8 negatived, the House Speaker, Mr. Kenneth Marende, invited the key leaders to make their final statements before inviting the Chairman of the PSC to move the Motion to approve the draft Constitution of Kenya, 2010. Mr. Mutula Kilonzo, MP and Minister for Justice, National Cohesion and Constitutional Affairs, the Right Hon. the Prime Minister, Mr. Raila Odinga, MP, and His Excellency President Mwai Kibaki, MP, to make their final statements

Mr. Mutula Kilonzo, MP, the official Government Responder, on his part thanked the House for putting forward a draft Constitution to the Attorney-General for publication for the people of Kenya to decide their future. Mr. Kilonzo urged all members irrespective of whether they proposed amendments or not to support the draft Constitution when presented to the people in the referendum. He pointed out that the history of Constitution making is such that

^{SJ2} The National Assembly Official Report (*Hansard Report*), Thursday 1st April, 2010(P), p. 86.

not everyone gets satisfied and that even those who are satisfied are left with doubts.⁸³"

In his statement, the Right Hon. the Prime Minister. Mr. Raila Odinga, MP, first congratulated members for making history by approving the draft Constitution in the Chamber where the Lancaster House Constitution was domesticated. He reminded members of the long struggle to overhaul Kenya's constitutional governance structure starting from the pre independence period through to the post independence era up to where the House was about to

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approve a new Constitution.

The Prime Minister stated that by adopting the draft Constitution therefore, the National Assembly was giving a clear signal to the people of Kenya that the country was ready for the task nation building. He equated the task and challenge of the nation building hills that the people must climb after the adoption of the new Constitution. The Prime Minister stated:

"We have the hill of construction of infrastructure in this country; the hill of provision of employment to our people; the hill of uniting our people and addressing ethnicity; the hill of fighting corruption; the hill of ensuring prosperity; the hill to give very clear guidance to the people of our country - that the Kenya that our founding fathers wanted is about to be born."⁸³⁵

President Mwai Kibaki, MP, in his final address congratulated members for their astute debate of the draft Constitution. The President reminded the House of the difficult times the country had experienced in trying to bring about

⁸³³ The National Assembly Official Report (*Hansard Report*). Thursday 1st April, 2010(P).

¹⁵⁴ Sees the discussion on the Lancaster House Constitution Conferences in Chapter Three and

¹³⁵ The National Assembly Official Report (*Hansard Report*), Thursday 1st April, 2010(P), p. 86.

constitutional change. Urging the House to approve the draft Constitution without delay, the President stated:

"This new constitution is for us. It is for all the people who are in Kenya. We shall later on look at it in our own time and amend it. But right now, let us go forward. I want to thank you, Mr. Speaker, for the reason that you looked at these issues and made the judgment right here. You explained them to us in a very bright manner. Thank you very much. *Asante sana.*"⁸³⁶

Mr. Mohammed Abdikadir, MP, Chairman of the Parliamentary Select Committee, in his reply stated that the role of the National Assembly was to safely deliver the new Constitution to the people of Kenya for their final sovereign decision. Noting that it was time to conclude the process, Mr. Abdikadir stated that by passing the document, the country would have made hundreds of institutional, legal and constitutional reforms in one fell swoop.

Finally, at 9.00 pm on Thursday, 1st April 2010, the Speaker put the question for approval of the draft Constitution:

"THAT, pursuant to the provisions of Section 33(4) of the Constitution of Kenya Review Act, 2008, this House approves the draft Constitution submitted by the Committee of Experts and laid on the Table of the House on Tuesday, 2nd March, 2010."⁸³⁷

In response to the questions, the members overwhelmingly voted to approve the draft Constitution of Kenya 2010.

⁸³⁶ The National Assembly Official Report (*Hansard Report*). Thursday 1st April. 2010(P), p. 87.

⁸³⁷ The National Assembly Official Report (*Hansard Report*), Thursday 1st April, 2010(P).

7.4.6 Step 6: Publication of the Proposed Constitution of Kenya

Section 33(10) of the Review Act 2008 required the National Assembly to submit to the Attorney-General the draft Constitution for publication after approval. Section 34(1) required the Attorney-General within thirty days after receiving the draft Constitution from the National Assembly to publish the draft Constitution. Section 34(2) prohibited the Attorney-General from effecting any alterations to the draft Constitution except for editorial purposes but in consultation with the Parliamentary Select Committee (PSC).

Upon receipt of the draft Constitution from the National Assembly, the Attorney-General, Mr. Amos Wako, was quick to assure the public that he would not "alter the draft in any way except for editorial purposes such as commas". To this end, the Attorney-General, at a daylong closed-door meeting at Parliament Buildings, took members of the Parliamentary Select Committee through all the revisions made to the draft Constitution as approved by the National Assembly on 1st April 2010. Satisfied that the Attorney-General had kept his word, the Parliamentary Select Committee cleared the final copy of the Proposed Constitution of Kenya (PCK) 2010 for publication on 5th May 2010. In accordance with section 34 (1) therefore, the Attorney-General published the Proposed Constitution of Kenya on Thursday, 6th May 2010.

The publication of the Proposed Constitution of Kenya (PCK) 2010 on 6th May 2010 did not however, go without controversy following the insertion of the words "national security" into Article 24(1Xd) of the Proposed Constitution of Kenya (PCK) 2010 released by the Government Printers. The

correct version of Article 24(1)(d) of the Proposed Constitution of Kenya, 2010

cleared by the Parliamentary Select Committee read as follows:

"The need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others."⁸³⁸

However, the version of Article 24(1)(d) of the Proposed Constitution of Kenya that the Government Printers published read:

"The need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice 'national security', the rights and fundamental freedoms of others."⁸³⁹

The *Daily Nation*, which first broke the story of the illegal insertion of the words later on May 26, 2010, alleged that:

"A line on a page was replaced with one containing the names 'national security' onto the original works as films were taken in readiness for plate-making. Sources at Government Press said printing was initially stopped twice, which appears to have prepared the ground for the insertions. The first printing of about 20,000 copies was stopped on the grounds that it had been done on white A4 size paper. Such printing is usually meant for official reports such as those of Commissions of Inquiry. The second printing of an estimated 20,000 copies was also stopped because it was printed on blue A4 size paper, which is meant for Bills and circulars.... the change was made in such a hurry that it was not taken back for proofreading as should have been the case."⁸⁴⁰

According to the Members of Parliament*⁴¹ Caucus on the constitutional reforms, the insertion of "national security" in that clause was not by accident. They alleged that the anti-reform forces in Government were trying to create an

The Proposed Constitution of Kenya (PCK). 2010.

Daily Nation May 13, 2010.

⁸⁴⁰ **Daily Nation May 26, 2010.**

⁴¹ The members consisted of Danson Mungatana were: Margaret Kamar (Eldoret East. ODM), Oiago Aluoch (Kisumu Town West. ODM), Cecily Mbarire (Runyenjes. PNU) and Boni Khalwale (Ikolomani, New Ford Kenya).

artificial glitch for this matter to reach the courts and be stopped noting that it came shortly after a constitutional Court ruling that declared Kadhi's Courts, as provided in the revised harmonized draft Constitution 2010, unconstitutional.⁸⁴²

The Attorney-General, however, put the blame on the National Security Intelligence Service, which he alleged, had "unsuccessfully requested the amendments that finally appeared in an earlier printed version" on the Proposed Constitution of Kenya.⁸⁴⁵ On the other hand, although the Parliamentary Select Committee (PSC) denied ever being approached by the spy agency to insert the offending words, the PSC Vice Chairman, Mr. Ababu Namwamba MP, stated "even though the spy agency had not approached the team in its meetings, the issue had come up in their discussions and was not changed."⁸⁴⁴

The Parliamentary Select Committee (PSC) nevertheless reassured Kenyans that there was only one legal and legitimate Proposed Constitution of Kenya (PCK) 2010 approved by Parliament and published by the Attorney-General and that "there was no doubt as to what document Kenyans will be voting for in the referendum."⁸⁴⁵

7.4.7 Step 7: Civic education on the Proposed Constitution of Kenya, 2010

Section 35 of the Review Act, 2008 required the Committee of Experts to facilitate civic education on the proposed Constitution for a period of thirty days. To this end, CoE launched and rulled out the civic education drive on

⁸⁴² *The Daily Nation*. May 13 2010.

⁸⁴⁵ *Ibid.*

⁸⁴⁴ *Ibid.*

⁸⁴⁵ *Ibid.*

Tuesday 1st May 2010 following the publication of the Proposed Constitution of Kenya (PCK) on 6th May 2010 under the theme *Jisomee, Jiamulie, Jichagulie* (Read, Decide and Choose). The civic education program sought to enable Kenyans to consider every provision in the Proposed Constitution of Kenya by reading and understanding it in order to make an informed choice at the referendum.⁸⁴⁶

The civic education on the Proposed Constitution of Kenya was however, affected by the failure of the Treasury to release civic education funds on time,⁸⁴⁷ and the short duration for the exercise. Ideally, civic education should have been pervasive throughout the review process.

The civic education was, further affected by the premature political campaigns and distortion of facts about the provisions of the Proposed Constitution of Kenya. Most distortions and misinformation touched on provisions relating to devolution, land, abortion, freedom of religion, Kadhi's Courts, the Bill of Rights, application of international law and transitional provisions.⁸⁴⁸

⁸⁴⁶ The Committee of Experts on Constitutional Review. Final Report of the Committee of Experts on Constitutional Review. 1st October. 2010.

⁸⁴⁷ The CoE embarked on a civic education programme on the Proposed Constitution without resources allocated to it because, apparently the CoE budget for civic education, was not included in the annual supplementary budget. The CoE therefore found itself in the same position as it had at the beginning of the review process when it had no financial resources.

The Committee of Experts on Constitutional Review. Final Report of the Committee of Experts on Constitutional Review. 1st October. 2010. *op.cit.*

7.4.8 Step 8: Referendum on the Proposed Constitution of Kenya 2010

Section 47A (2) (a) of the Constitution of Kenya vested the sovereign right and power to make and replace the Constitution collectively in the people of Kenya to be exercised through a referendum.⁸⁴⁹

To enable the people exercise this right ratifying the Proposed Constitution, section 47A(4) of the Constitution required the Interim Independent Electoral Commission (IIEC) to hold a referendum within sixty days from the date of publication of the Proposed Constitution.⁸⁵⁰ Section 37 of the Review Act, 2008 specifically gave the IIEC the power to organize, conduct and supervise the referendum on the Proposed Constitution of Kenya.

Sections 36 of the Review Act 2008 required the IIEC to frame and publish the referendum question within seven days of the publication of the Proposed Constitution. The question so framed required the voter to indicate whether he/she approved or did not approve the Proposed Constitution in terms of "Yes" or "No" through secret ballot. After the publication of the referendum question, the IIEC was to announce within 14 days the referendum date through a gazette notice alongside the campaign period. The IIEC was also required within 14 days of framing of the referendum question to the voter registration.

Section 47A(5)(b) of the Constitution set the threshold for the ratification of the Proposed Constitution of Kenya at more than fifty per cent (50%) of the valid votes cast with at least twenty-five per cent (25%) of the votes cast in at least five of the eight provinces were for the ratification.

The Constitution of Kenya, Revised edition 2009 (2008), Published by the National Council for Law Reporting with the Authority of the Attorney-General.

TM*ibid.*

Following the completion of the entire voter registration process on 21st May 2010, the Interim Independent Electoral Commission (IIEC) announced the referendum date as Wednesday, 4th August 2010. The announcement of the referendum date was immediately followed by fully-fledged campaign by the "Yes" (Green) and "No" (Red) sides. President Kibaki and Prime Minister Raila Odinga led the "Yes" campaign⁸⁵¹ while Mr. William Ruto, MP, led the "No" campaign.⁸⁵²

Overall, referendum campaign and debate on the Proposed Constitution of Kenya revolved mainly around issues relating to right to life (abortion), Kadhi's court, land and devolution. However, as already pointed out under section 7.4.7, distortions of facts and misinformation characterized much of the referendum campaigns.

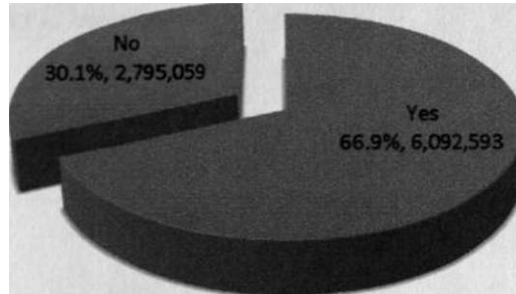
At the referendum held on Wednesday, 4th August 2010, the "Yes" Campaign received overwhelming support with 6,092,593 (66.9%) votes cast to ratify the Proposed Constitution of Kenya. The "No" campaign received 2,795,059 votes (30.1%) to disapprove the Proposed Constitution of Kenya. Chart 10 below shows the results of the referendum on the Proposed Constitution of Kenya.⁸⁵³

⁸⁵¹ Unlike the November 2005 referendum, this time round President Kibaki and Prime Minister Raila Odinga and their parties campaigned on the same side in support of the Proposed Constitution of Kenya.

⁸⁵ It should be noted that despite the Cabinet resolution to support the "Yes" vote for the Proposed Constitution, three cabinet ministers, namely Mr. William Ruto, MP, Mr. Samwel Pogliosio, MP, Dr. Naomi Shaban, MP, and some Assistant Ministers defied this cabinet resolution to oppose the Proposed Constitution. They joined forces with the retired President Daniel arap Moi and the Church to support the "No" campaign. The main Churches in the "No" campaign included the National Council of Churches of Kenya (NCCCK), the Catholic Church, Evangelical Fellowship of Kenya, African Inland Church and Anglican Church of Kenya.

*" In accordance with section 43 of the Review Act, 2008, the Interim Independent Electoral Commission (IIEC) published the final referendum results on Friday, August 6, 2010 and subsequently gazetted the final results in the Kenya Gazette on Monday, 23rd August 2010.

Chart 10: The referendum results final vote Distribution

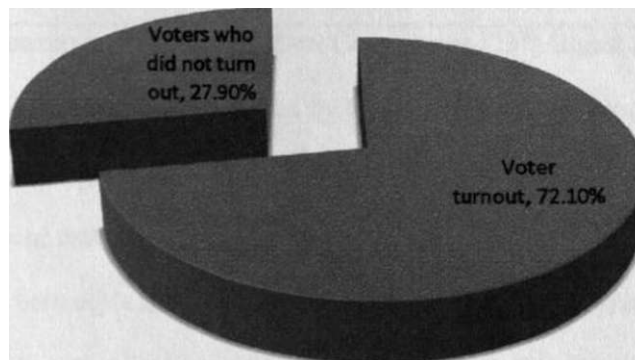


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Source: The Interim Independent Electoral Commission (23rd August 2010)

The referendum attracted a high voter turnout estimated at 72.1 percent of the total 12,537,546 registered voters as shown in Chart 11 below.

Chart 11: The referendum voter turnout

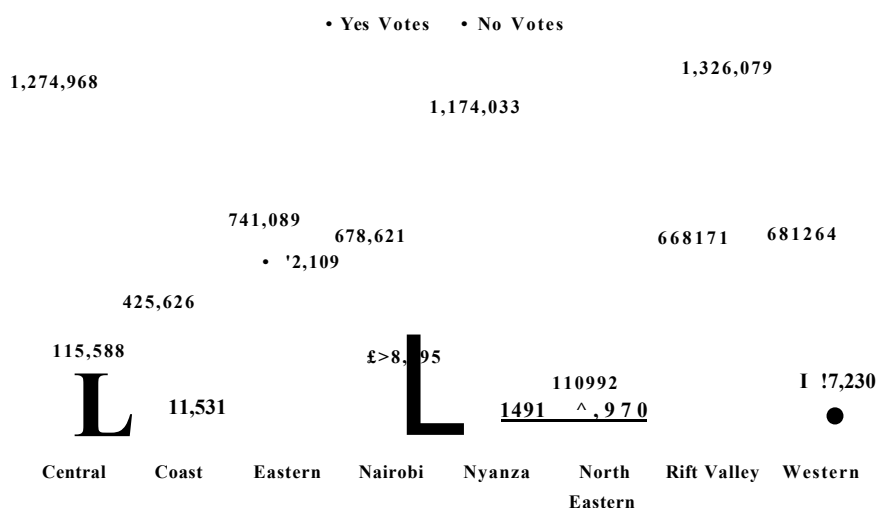


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Source: The Interim Independent Electoral Commission

Overall, the people of Kenya ratified the new Constitution of Kenya by more than 50 per cent and by more than 25 per cent in all the 8 provinces of Kenya⁸⁵⁴ as shown in Chart 12 below.

Chart 12: The final referendum vote tally by province



Source: The Interim Independent Electoral Commission (23rd August 2010)

According to an opinion poll conducted by Synovate between August 7th and 9th August 2010 and published on Thursday 12th August 2010, majority of Kenyans believed that the referendum was fair and well run.⁸⁵⁵ In fact, nearly everyone (98 percent) claimed to be satisfied with the referendum results, irrespective of how they had voted with 88 percent saying that they were "very satisfied" and 10 percent saying that they were "somewhat satisfied" with the referendum outcome⁸⁵⁶

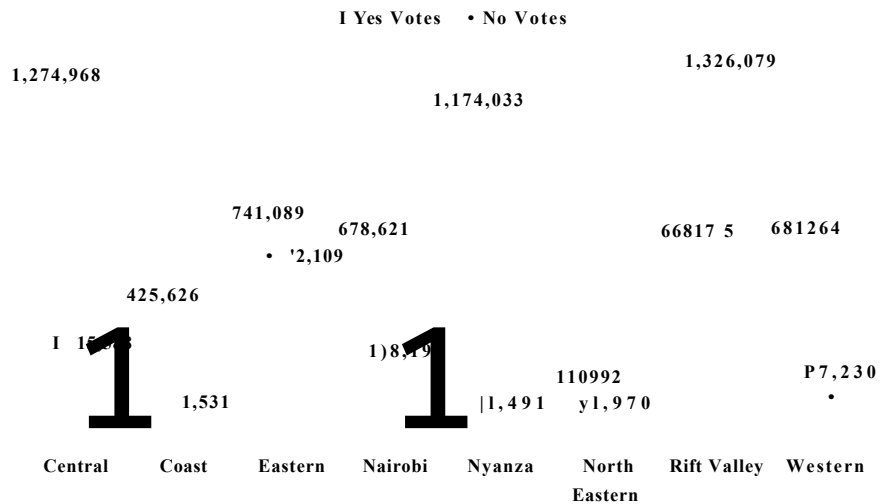
^{8 4} The Chairman of the Interim Independent Electoral Commission (IIEC), Mr Isaack Hassan's official announcement of the referendum results on 6th August 2010.

^{8.5} Daily Nation, Thursday 12th August 2010.

⁸⁵⁶ The Daily Nation. Thursday 12th August 2010

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Source: The Interim Independent Electoral Commission (23rd August 2010) ^{2.}

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³⁸⁷ SM The Chairman of the Interim Independent Electoral Commission (IIEC), Mr Isaack Hassan's official announcement of the referendum results on 6th August 2010.

⁸⁵⁵ Daily Nation. Thursday 12th August 2010.

⁸⁵⁶ The Daily Nation. Thursday 12th August 2010

Because of the successful completion of the Constitution review process, the opinion also found that 76 percent of Kenyans believed that their economic conditions would be better with the new Constitution as compared to 45 percent in December 2009.

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The passing of the new Constitution therefore contributed to three things: first, it restored the Kenyans' confidence in the country's future. Second, it restored people's confidence in their institutions such as the Interim Independent Electoral Commission. Third, it gave a sense of the legitimacy to the review process and its outcome, the Constitution of Kenya 2010.

Speaking on behalf of members of the Panel of Eminent African Personalities, Kofi Annan declared the win a Kenyan victory and called for reconciliation.⁸⁵⁸ To underscore the international significance of the passing of the new Constitution, President Obama of the United States of America (USA) through a statement released by the United States (US) Embassy in Nairobi on Thursday, 4th August 2010 stated that:

"The overwhelming approval of the proposed new constitution reflects the desire of the Kenyan people to put their country on a path toward improved governance, greater stability and increased prosperity... the peaceful nature of the election was a testament to the character of the Kenyan people."⁸⁵⁹

The Daily Nation Thursday 12th August 2010

⁸⁵⁸ **Daily Nation. Friday. 6^h August 2010.**

⁸⁵⁹ *Ibid*

7.4.9 Step 9: The promulgation of the Constitution of Kenya, 2010

Section 43A of the Review Act 2008 vested in the President the power to proclaim the new Constitution to be law within 14 days of the publication of the result of the referendum. Article 263 of the Proposed Constitution also provided that:

"This Constitution shall come into force on its promulgation by the President or on the expiry of a period of fourteen days from the date of the publication in the Gazette of the final result of the referendum ratifying this Constitution, whichever is the earlier."⁸⁶⁰

However, despite the overwhelming approval of the Proposed Constitution of Kenya at the 4th August 2010 referendum there was no let by those who opposed it. Having lost the "No" vote, the opponents of the Proposed Constitution shifted the battle to the courts with three cases filed to stop the promulgation of the new Constitution. These cases included *Mary Ariviza v. the Interim Independent Electoral & Another*,⁸⁶¹ *Nazlin Rajput v. the Attorney-General*⁸⁶² and *Mary Arivisa, Okotch Mondo and Another v. the Interim Independent Electoral Commission and 3 others*.⁸⁶³ These cases were however, all dismissed by respective courts as discussed in Chapter Nine.

With all the legal hurdles cleared, President Mwai Kibaki promulgated the new Constitution of Kenya at the historic Uhuru Park Nairobi on Friday,

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⁸⁶⁰ The Proposed Constitution of Kenya 2010.

⁸⁶¹ *The Mary Ariviza v. Interim Independent Electoral & The Attorney-General*, Misc. Application No. 273 of 2010.

⁸⁶² *Nazlin Rajput v. The Attorney-General & 2 Others*. Constitutional Petition No. 6 of 2010.

⁸⁶³ *The Mary Arivisa and Okotch Mondoh v. The Attorney-General and Another*. Constitutional Petition No. 7 of 2010.

27th August 2010 at 10.27 am. See Appendix 2 for the full text of the President's promulgation statement.

An estimated 150,000 Kenyans attended the promulgation ceremony held at Uhuru Park with millions watching the ceremony on television. Members of diplomatic corps, current and former Heads of State and Governments⁸⁶⁴ and members of the Panel of Eminent African Personalities, among others, also witnessed the ceremony.⁸⁶⁵

7.5 Lessons from the final Constitution review process, 2008-2010

From the processes and experiences of the Constitution making process in Kenya between 2008 and 2010. a number of lessons emerge.

The first lesson is that when the political elite conspire to frustrate or subvert the people's desire for change, it is only a matter of time before it explodes into civil unrest. From the foregoing therefore, we can conclude that largely, the post 2007 election civil unrest and violence was, ignited by two factors. First, the serial political betrayal of the people of Kenya's aspirations for comprehensive constitutional reforms, and second, the repeated failure to address the deeply entrenched historical grievances including structural and ethnic conflicts.

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⁸⁶⁴ The current and former head of State who attended the ceremony included President Yoweri Museveni of Uganda. President Paul Kagame of Rwanda. President Omar Bashir of Sudan. President Daniel arap Moi of Kenya. President Olesegun Obasanjo of Nigeria and President John Kufour of Ghana and President Benjamin Mkapa of Tanzania.

⁸⁶⁵ Members of the Panel of Eminent African Personalities who mediated Kenya's post election violence National Accord and Reconciliation in attendance included former President of Tanzania, Benjamin Mkapa. former South African First Lady, Graca Machel and the former United Nations Secretary General and Chief Mediator. Kofi Annan.

To resolve the conflict, it thus became imperative to fast track the completion of the constitutional review process. Practically, the political elite had severally subverted achieving such a feat for over two decades as discussed in Chapter Five (5).

The second lesson is that there must be clearly marked constitutional safeguards of any fundamental constitutional change process especially from unnecessary control of the political elite especially in parliament if it is to achieve its desired results. The principal reason why the final phase of the review process was successfully completed within a short time is the fact that it was designed in such away as to make parliament neither the sole driver nor the final arbiter in the process. Rather it was just one of the players or organs of the review.

As Mr. Ababu Namwamba, MP, pointed out during the debate on the draft Constitution of Kenya 2010, although parliament's role was critical, it was not divine because despite being the supreme law-making organ of the nation, it was not superior to the other organs of review.⁸⁶⁶ Indeed as discussed in Chapter Six (6), the reason why the review process failed with rejection of the Proposed New Constitution of Kenya at the November 2005 referendum is simply because Parliament hijacked the process through the Consensus Act to become the sole driver of the process of Constitution making.⁸⁶⁷

The third lesson, closely linked to the second lesson, is that to be effective, the functions of each of organs in a participatory Constitution making

⁸⁶⁶ Republic of Kenya. National Assembly Official Report Tuesday, 23rd March. 2010.

⁸⁶⁷ The National Assembly Official Report (*Hansard Report*), Wednesday 24th March 2010, p. 27).

process must be clearly delineated and marked. More importantly, the basic institutional framework for Constitution making including the process itself must be entrenched in the Constitution. The final decision must also lie with a technical organ with the constitutional capacity to function independently without the undue influence of any person or any quarter. Against this background, four key factors explain the overall success of the final phase of the Constitution review process as described below.

The first factor of success was the clear delineation of functions for each organ of the review accompanied with well-marked functional boundaries between them. Indeed, because of this fact combined with clearly marked checks and balances between the organs and supported by very strict statutory and constitutional timelines, each of the organs of the review was able to deliver on its respective mandate on time unlike the previous phase of the Constitution review process (1997-2005).

The second success factor related to the fact that the process was, designed in a time bound self-propelling manner. This enabled the review activities to almost seamlessly move from one stage to the next. It also provided little opportunity, if any, for the process to be detained, delayed or derailed at any particular stage by any organ of the review. It further had the effect of removing any possible political roadblock towards the expeditious completion of the process at any stage of the process. The third factor of success was the strong constitutional anchor for the review process and the Committee of Experts (CoE). This not only guaranteed its independence of the CoE in the management of the review process but also cushioned it from the vagaries of

political gerrymandering and the evident intention by a faction of political elite to subvert the expeditious completion of the process.

Indeed as seen in the various steps of the process as described under section 7.4 of this Chapter, the final phase of the review process was designed in such a way as to ensure that all the decisions made by the political elite in the National Assembly and its Parliamentary Committee remained subject to the technical and objective scrutiny of the Committee of Experts. The reliance on experts in concluding the Constitution review process was therefore a very deliberate departure from the interest driven Constitution of Kenya Review Commission (CKRC), stakeholder based National Constitutional Conference and interest driven and self-serving parliament.⁸⁶⁸

The effect of this arrangement on the success of the review is best illustrated by first, the manner in which CoE considered and rejected most of the Parliamentary Select Committee's recommendations on the revised harmonized draft Constitution. Second, the evident frustration among the political elite that they could not have the last say in determining the content of the Proposed Constitution before it being put to the people for their final decision at the referendum. Mr. Ababu Namwamba, MP, illustrates this fact when he reminded the House that:

"If by any chance we choose not to approve this draft, let us not imagine that that will kill this process, because we will not. This process will proceed onwards only that, unfortunately, rather than this House bringing its influence and collective wisdom to bear on this process, we shall give that responsibility to the Reference Group to make those critical final decisions. We shall give that responsibility to the CoE as an organ of review."⁸⁶⁹

7.6 Conclusion

This Chapter has examined the post 2007 election constitutional crisis and the steps towards the completion of the Constitution of Kenya review process. The Chapter has interrogated two basic questions, namely what makes a participatory constitution making process effective? Is meaningful constitutional change possible in an environment of relative peace?

The Chapter has therefore tested claim that the effectiveness of a participatory Constitution making process very much depends on the commitment the ruling elite demonstrate in supporting the process at every stage. Its basic institutional framework and legislative instrument must be entrenched in the Constitution. The Chapter has also tested the claim that fundamental constitutional change does not take place in an environment of relative peace. In this regard, it has argued that unless civil unrest threatens the *status quo*, the ruling elite will not support fundamental constitutional reforms.

From the foregoing, the study arrives at three conclusions. First, the study concludes that for a participatory Constitution making process to be effective, its basic institutional framework and legislative instrument must be entrenched in the Constitution. As discussed in section 7.6 above what saved the final phase of the review process (2008-2010) was the fact that it was both legally and institutional entrenched in the Constitution unlike the first phase of the review process (1997-2005).

Secondly, the study concludes that effectiveness of a participatory Constitution making process very much depends on the commitment the ruling elite demonstrate in supporting the process at every stage. The study argues that

unlike the first of the review process (1997-2005), the final phase of the review (2008-2010) only succeeded because both President Kibaki and Raila Odinga supported the process. In other words, to be effective, a participatory Constitution making process must command the support of the ruling elite who must believe in it and must demonstrate commitment to ensuring that the process succeeds.

Thirdly as discussed in section 7.2 of this Chapter, the study concludes that fundamental constitutional change does not take place in an environment of relative peace. The study also finds plausible, the claim that unless civil unrest threatens the *status quo*, the ruling elite will not agree to initiate far reaching constitutional reforms.

As demonstrated by the constitutional developments after the post 2007 election violence in Kenya, it needed the short but intense period of civil unrest and violence to make the political elite to agree to a rapid process of completing the review process. This was after almost two decades of consistent struggle. Otherwise, like in 1992, 1997, 2002 and 2007, there were all indications that Kenyans would have once again gone to the next general elections without a

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new Constitution.

The following Prime Minister, Raila Odinga's comparison between the Rwanda's revolutionary and Kenya's evolutional approaches to Constitution

^{K 1} Professor H.W.O Okoth Ogendo often expressed these views in various forums he addressed and at the Constitution of Kenya Review Commission where he served as the Vice Chairman of the Commission and Chairman of the Research, Drafting and Technical support Committee. The Researcher worked under Professor Okoth Ogendo at the Commission and at the African Centre for Technology Studies.

making also lends to the argument that fundamental constitutional change does not take place in an environment of relative peace:

Rwanda which had a very bloody conflict resulting in the death of nearly one million people decided to write a new Constitution, but very drastically. By the time they were through, they not only ended up with a new Constitution, but also a new national anthem and national flag. Mr. Speaker, Sir, Kenya's Constitution making process is evolutionary and not revolutionary like the Rwanda one. That is why we have been going through it slowly. Rwanda started after we had started and finished more than ten years ahead of Kenya."⁸⁷²

The next Chapter Eight (8) presents an analysis of the nexus between public participation in Constitution making and constitutional legitimacy in Kenya.

⁸⁷² The National Assembly Official Report (*Hansard Report*). Thursday 1st April, 2010(P). p. 86

CHAPTER EIGHT

PUBLIC PARTICIPATION AND CONSTITUTIONAL LEGITIMACY

8.1 Introduction

Chapter Seven has examined the post 2007 election constitutional crisis and the steps towards the completion of the Constitution of Kenya review process. Chapter Two sections 2.7 and 2.7.2 have respectively presented detailed literature review on the participatory approach to Constitution making as well as the theoretical accounts of the effect of participation on governance. Chapter Two (2) sections 2.4 and 2.5 have explored the concept of legitimacy and the question of what makes a constitutional order legitimate.

This Chapter presents an analysis of the nexus between participatory constitution making and constitutional legitimacy. The analysis is based on primary data collected using a survey methodology from a cross section Kenyans drawn from the former eight Provinces of Kenya as presented in Chapter One (1) sub section 1.8.3.⁸⁷³

The Chapter interrogates two basic questions. First, is there a significant relationship between public participation and constitution legitimacy? Secondly, is the mere act of public participation in a Constitution making process sufficient to endow its outcome with legitimacy? This Chapter therefore

⁸ ' As highlighted in Chapter One subsection 1.8.3 the aim of the survey method was to obtain empirical views, insights or perspectives on the Constitution of Kenya review process from 1997 to 2005 and the question of constitutional legitimacy in a more structured and systematic manner. To ensure balance in the views and opinions gathered, the survey covered all the eight provinces of Kenya, namely. Nairobi. Central. Rift Valley. Eastern. North Eastern. Coast. Western and Nyanza.

tests the claim that there is significant relationship between public participation in Constitution making and constitutional legitimacy.

8.2 Public participation in the Constitution of Kenya review process

By most accounts, the primary goal of the recent participatory models of Constitution making has been to build widespread public support for both the process of Constitution making and the new constitutions. In his article, "Quest for Constitutional Government", Professor H.W.O. Okoth Ogendo identifies public participation as one of the cardinal "constitutional prudence" rules in Constitution making. In this regard, he argues that Constitution making must secure an informed and active participation of the public not just in the determination of the agenda but also in the promulgation of its outcomes.

B.H. Selassie also argues that for the outcome of a Constitution making process to be widely supported, there must be wide-ranging public debate or consultation every stage of the process.⁸⁷⁴ Justice Benjamin Odoki has also stated that for a constitution to command public respect, and confidence, the people must identify themselves with it (Constitution) through involvement and a sense of attachment.⁸⁷⁵ Bilgin Mehmet Fevzi similarly argues that to be legitimate, a constitution requires genuine social acceptance whereby the public reveres and honours the political intention and expression behind the

⁸⁷⁴ H.W.O. Okoth Ogendo. "Quest for Constitutional Government", *op. cit.* p. 55-56.

⁸⁷⁵ B.H. Selassie. *Constitution making in Eritrea: Democratic Transition through Popular Participation in Constitutionalism in Africa: Creating Opportunities. Facing Challenges* Ed. Onyango-Oloka J. (2001). Fountain Publishers. Kampala (2001).

⁸⁷⁶ Justice H.B.J. Odoki. "The Challenges of Constitution making and Implementation in Uganda." Paper read at International Conference on Constitutionalism in Africa, at International Conference Center. Kampala. Uganda. (1999). p. 6.

Constitution.⁸⁷⁷ The implication is therefore that where there is no popular participation in a Constitution making process, there is bound to be a contestation of the legitimacy of both the process and its outcome. The involvement of the people in all stages of a Constitution making is thus important in ensuring broader acceptance of the Constitution by the people. Nevertheless, "a good and viable Constitution should be generally understood by the people."⁸⁷⁸

Chapter Six (6), section 6.2 has outlined the constitutional principles relating to public participation in the Constitution of Kenya review process. Section 47A of the Constitution placed the sovereign right to make and replace the Constitution collectively in the people of Kenya.⁸⁷⁴ Both section 5 of the Constitution of Kenya Review Act, Cap 3A⁸⁸⁰ and section 6 of the Constitution of Kenya Review Act, 2008⁸⁸¹ required all the organs of the review process to ensure six public participation imperatives in the Constitution review process.⁸⁸²

⁸⁷ Bilgin Mehmet Fevzi. "Democratic Legitimacy and Constitutions" Paper presented at the annual meeting of the The Law and Society Association. TBA, Berlin. Germany. Jul 25, 2007.

⁸⁷⁸ Justice H.B.J. Odoki. "The Challenges of Constitution making and Implementation in Uganda." Paper read at International Conference on Constitutionalism in Africa, *op. cit.*

⁸⁷⁰ Constitution of Kenya. Revised edition 2009 (2008). Published by the National Council for Law Reporting with the Authority of the Attorney-General.

⁸⁸⁰ Constitution of Kenya Review Act, Cap 3A.

⁸⁸¹ Constitution of Kenya Review Act. 2008.

The six public participation imperatives in the Constitution of Kenya review process (1997-2010) included the following: (a), that all the organs of the review remained accountable to the people of Kenya; (b) that the review process accommodated the diversity of the Kenyan people; (c) that the people of Kenya were provided with adequate opportunity to actively, freely and meaningfully participate in generating and debating constitutional proposals; (d) that the review process was conducted in an open manner; (e) that the review process was based on respect for the universal principles of human rights, gender equity and democracy; and (f) that the final outcome of the review process faithfully reflected the wishes of the people of Kenya.

8.3 The respondents' participation in the review process

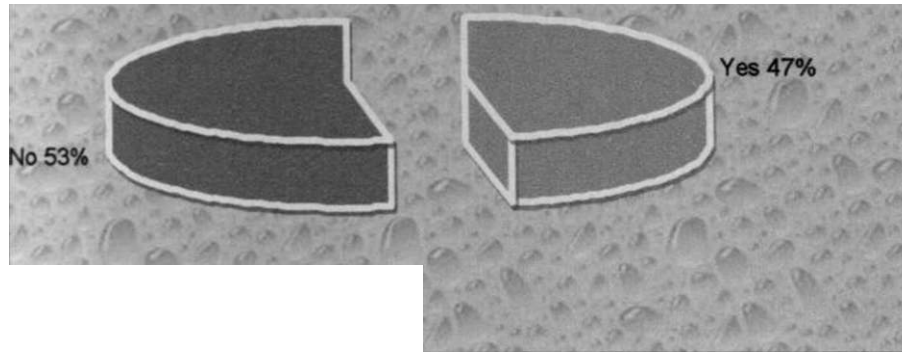
Broadly, the purpose of public participation in the Constitution of Kenya review process was threefold. First, public participation was, intended to provide a means for building widespread support for the Constitution making process and its outcome. Secondly, public participation was, intended as a means of providing citizens with basic knowledge of the Constitution, its purpose and content. Thirdly, public participation was, intended as a means of helping citizens develop a culture of constitutionalism including positive attitudes about the Constitution and its institutions.

Thus to assess the extent to which the Constitution of Kenya review process was participatory, the respondents were asked three basic questions. First, did you participate in any way in the Constitution of Kenya review process between 1997 and 2005? Secondly, do you think that the review process between 1997 and 2005 was participatory? Thirdly, do you think public participation in a Constitution making process is important?

8.3.1 Public participation in the Constitution review process, 1997-2005

When asked whether they participated in the review process between 1997 and 2005, nearly half of the respondents (47 percent) said that they indeed participated in the constitution review. More than half of the respondents (53 percent) however, said that they did not participate in the process as shown in Chart 13 below.

Chart 13: Was the constitution review 1997-2005 participatory?

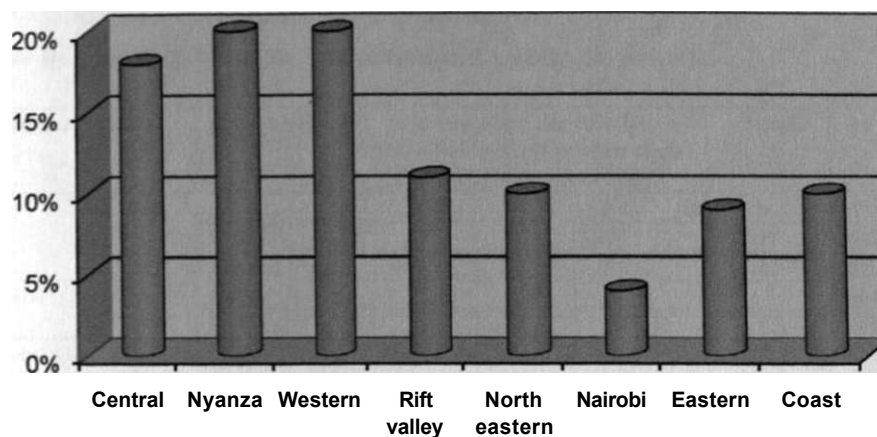


Source: Study findings

Of the respondents who participated in the review process, 80.3 percent participated at the referendum on the he Proposed New Constitution held in November 2005. A significant 52.5 percent of the respondents also reported being involved in the civic education activities while 15.8 percent of the respondents said that they participated in the review process by way of presenting their views to the Constitution of Kenya Review Commission during public consultations and hearings.

While public participation in the Constitution review process was reported across all the provinces, it was highest in Nyanza (20 percent) followed by Western (19.8 percent), Central (17.5 percent), Rift Valley (10.7 percent), North Eastern (9.9 percent) and Coast (9.5 percent) and Eastern provinces (8.7 percent). It was however, lowest in Nairobi (3.5 percent) as shown in the Chart 14 below.

Chart 14: Public participation in constitution review by province (1997-2005)



Source: Study findings

8.3.2 Demographic factors influencing public participation

The key demographic factors that influenced the level of public participation in the constitution review process included occupation, age, level of education and gender. In relation to occupation, the respondents engaged in the formal sectors appeared to have participated more in the review process as compared to their counterparts in the informal sector. For instance, out of 47 percent of the respondents who said that they participated in the review process between 1997 and 2005, majority of them (31 percent) were engaged in the formal sector as compared to 16 percent engaged in the informal and other non-formal sectors. The differences in the participation levels by occupation and sectors may however, be attributed to differences in access to vital information on the constitution and the review process as well as apathy. Table 8 below shows the

level of participation in the review process between 1997 and 2005 by occupation of respondents.

Table 8: Relationship between occupation and public participation

Main occupation	Frequency	Did you play any role in constitution review process since 1997 up to November 2005		Total
		Yes	No	
Farmer				
	Count	9	10	19
	Percent	1.7	1.8	3.5
Pastoralist	Count	1	6	7
	Percent	0.2	1.1	1.3
	Count	60	69	129
Formal employment in non public sector	Percent	11.0	12.7	23.8
	Count	11	13	24
Jua Kali	Percent	2.0	2.4	4.4
	Count	51	35	86
Civil/Public servant	Percent	9.4	6.4	15.8
	Count	59	53	112
Business	Percent	10.9	9.8	20.6
	Count	31	62	93
Unemployed	Percent	5.7	11.4	17.1
	Count	31	41	72
Other	Percent	5.7	7.6	13.3
	Count	253	290	543
Total	Percent	46.6	53.4	100.0

Source: Study findings

In terms of level of education, the study established that education is an important factor in public participation. Out of the 96 percent of the respondents who felt that public participation was either very important (82.4 percent) or important (13.7 percent) in constitution making, 88.2 percent had secondary education and above as compared to those with primary education (5.2 percent); none (1.9 percent) and other forms of education (0.9 percent) as shown in Table 9 below.

Table 9: Respondents level of education by importance of public participation

In your opinion how important is public participation in constitution making		Very important	Important	Not important	Don't know	total
University	Count	135	14	2	1	152
	% within Education level of respondent	88.8	9.2	1.3	0.7	100.0
	% within In your opinion how important is public participation in constitution making	30.4	18.9	16.7	11.1	28.2
	% of Total	25.0	2.6	0.4	0.2	28.2
College	Count	172	31	4	2	209
	% within Education level of respondent	82.3	14.8	1.9	1.0	100.0
	% within In your opinion how important is public participation in constitution making	38.7	41.9	33.3	22.2	38.8
	% of Total	31.9	5.8	0.7	0.4	38.8
Secondary	Count	100	23	5	4	132
	% within Education level of respondent	75.8	17.4	3.8	3.0	100.0
	% within In your opinion how important is public participation in constitution making	22.5	31.1	41.7	44.4	24.5
	% of Total	18.6	4.3	0.9	0.7	24.5
Primary	Count	26	2			28
	% within Education level of respondent	92.9	7.1			100.0
	% within In your opinion how important is public participation in constitution making	5.9	2.7			5.2
	% of Total	4.8	0.4			5.2
None	Count	7	3	1	2	13
	% within Education level of respondent	53.8	23.1	7.7	15.4	100.0
	% within In your opinion how important is public participation in constitution making	1.6	4.1	8.3	22.2	2.4
	% of Total	1.3	0.6	0.2	0.4	2.4
Others	Count	4	1			5
	% within Education level of respondent	80.0	20.0			100.0
	% within In your opinion how important is public participation in constitution making	0.9	1.4			0.9
	% of Total	0.7	0.2			0.9
Total	Count	444	74	12	9	539
	% within Education level of respondent	82.4	13.7	2.2	1.7	100.0
	% within In your opinion how important is public participation in constitution making	100.0	100.0	100.0	100.0	100.0
	% of Total	82.4	13.7	2.2	1.7	100.0

Source: Study findings

In relation to age, the importance of public participation making in constitution making decreased with age. Out of the 96.1 percent of the respondents who felt that public participation was either very important (82.5 percent) or important (13.6

percent) in constitution making, 81.2 percent were aged between 18 and 39 years as compared to 14.9 percent who were aged above 40 years as shown in Table 10 below.

Table 10: Respondents age by importance of public participation

In your opinion how important is public participation in constitution making						Total
Age groups in years		Very important	Important	Not important	Don't know	
50+	Count	20	4		2	26
	% within age groups	76.9	15.4		7.7	100.0
	% within In your opinion how important is public participation in constitution making	4.7	5.6		22.2	5.0
	% of Total	3.8	0.8		0.4	5.0
45-49	Count	17	2	2		21
	% within age groups	81.0	9.5	9.5		100.0
	% within In your opinion how important is public participation in constitution making	4.0	2.8	18.2		4.0
	% of Total	3.3	0.4	0.4		4.0
40-44	Count	35		1		36
	% within age groups	97.2		2.8		100.0
	% within In your opinion how important is public participation in constitution making	8.1		9.1		6.9
	% of Total	6.7		0.2		6.9
35-39	Count	46	8	1		55
	% within age groups	83.6	14.5	1.8		100.0
	% within In your opinion how important is public participation in constitution making	10.7	11.3	9.1		10.6
	% of Total	8.8	1.5	0.2		10.6
30-34	Count	85	17	3	1	106
	% within age groups	80.2	16.0	2.8	0.9	100.0
	% within In your opinion how important is public participation in constitution making	19.8	23.9	27.3	11.1	20.3
	% of Total	16.3	3.3	0.6	0.2	20.3
25-29	Count	134	28	2	3	167
	% within age groups	80.2	16.8	1.2	1.8	100.0
	% within In your opinion how important is public participation in constitution making	31.2	39.4	18.2	33.3	32.1
	% of Total	25.7	5.4	0.4	0.6	32.1
18-24	Count	93	12	2	3	110
	% within age groups	84.5	10.9	1.8	2.7	100.0
	% within In your opinion how important is public participation in constitution making	21.6	16.9	18.2	33.3	21.1
	% of Total	17.9	2.3	0.4	0.6	21.1
Total	Count	430	71	11	9	521
	% within age groups	82.5	13.6	2.1	1.7	100.0
	% within In your opinion how important is public participation in constitution making	100.0	100.0	100.0	100.0	100.0
	% of Total	82.5	13.6	2.1	1.7	100.0

Source: Study findings

In relation to gender, out of 96.1 percent who felt that public participation was either very important (82.3 percent) or important (13.8 percent), there were more males (55.7 percent) as compared to females (40.4 percent) who shared this view as indicated in Table 11 below. Such factors as low literacy levels, cultural constraints and limited access to vital information on governance especially in rural areas, which work to limit women's participation in public decision-making are attributable to this gender differential. Indeed as shown above, education remains an important factor in public participation.

Table 11: Respondents gender by their views on the importance of public participation in constitution making

		In your opinion how important is public participation in constitution making				Total
Gender		Very important	Important	Not important	Don't know	
Female	Count	180	37	5	5	227
	% within Gender of respondent	79.3	16.3	2.2	2.2	100.0
	% of Total	33.5	6.9	0.9	0.9	42.3
Male	Count	262	37	7	4	310
	% within Gender of respondent	84.5	11.9	2.3	1.3	100.0
	% of Total	48.8	6.9	1.3	0.7	57.7
Total	Count	442	74	12	9	537
	% within Gender of respondent	82.3	13.8	2.2	1.7	100.0
	% of Total	82.3	13.8	2.2	1.7	100.0

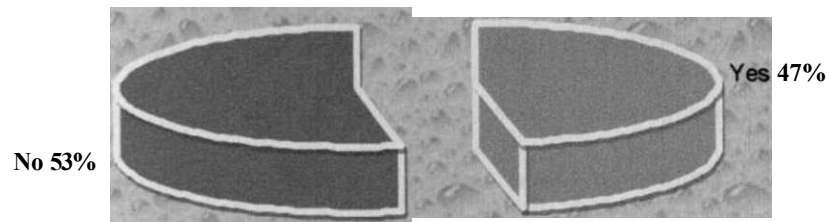
Source: Study findings

8.3.3 Was the review process between 1997 and 2005 participatory?

When asked whether they felt that the Constitution review process between 1997 and 2005 was participatory, 47 percent held the view that it was participatory. More than half of the respondents (53 percent) however, felt the process was not participatory.

From the finding it appears that all the respondents who reported participating in the review process also felt that it was participatory and vice versa. Chart 15 below shows the respondents' responses on whether the review process between 1997 and 2005 was participatory.

Chart 15: Was the constitution review 1997-2005 participatory?



Source: Study findings

The respondents who said that the process was participatory attributed this to a number of factors. The factors included the fact that the Constitution of Kenya Review Commission (CKRC) collected public views throughout the country. They also felt that the people were afforded, adequate opportunity to participate in the review process and to decide on the Proposed New Constitution at the referendum. Other reasons for considering the review process participatory that the respondents reported included widespread dissemination of the draft Constitution and broad representation of Kenyans of different backgrounds at the National Constitutional Conference.

The above findings appear consistent with the Committee of Eminent Persons survey. The survey found that majority of the respondents was satisfied with the fact that the Constitution of Kenya Review Commission (CKRC)

collected public views from every corner of the country. They also appreciated the fact that CKRC gave all Kenyans equal opportunity to present their views

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without any restrictions

However, of the respondents who felt that the review process was not participatory, more than half held the view that the process did not give marginalized and remote areas adequate civic education. About four out of ten of the respondents also felt put off by the negative political overtones and excessive Government control of the review process especially after the National Constitutional Conference. The respondents also said that lack of voter cards disenfranchised most young people and women especially in the marginalized and remote areas from participating in the referendum.

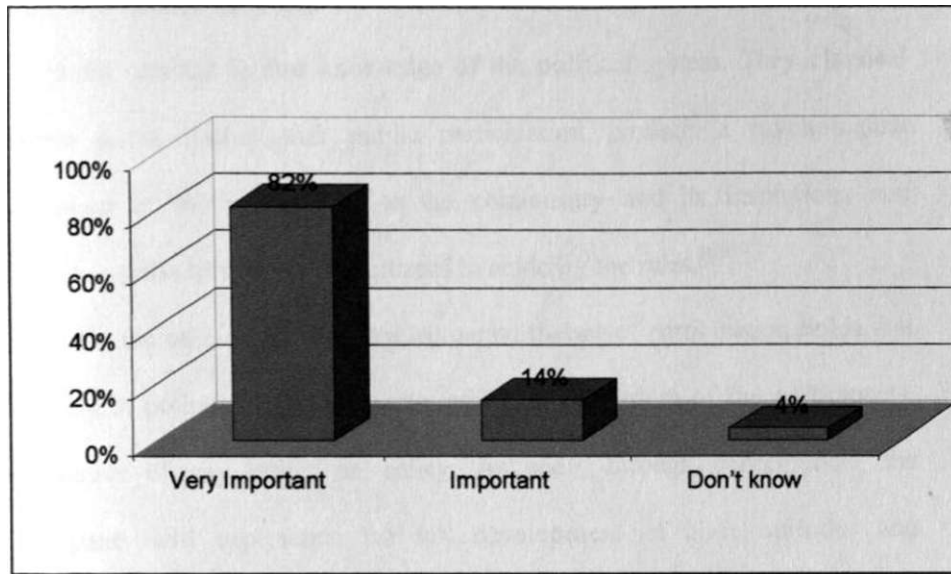
8.3.4 Importance of public participation in Constitution making

On the question of whether or not public participation is important in a Constitution making process, more than nine out of ten (96 percent) of the respondents said that public participation is either very important (82 percent) or important (14 percent) as shown in Chart 16 below. These findings lend credence to Professor Okoth Ogendo's assertion that public participation is one of the cardinal "constitutional prudence" rules in Constitution making.⁸⁸⁴

⁸⁸³ The Committee of Eminent Persons. Report of the Committee of Eminent Persons 2006

⁸⁸⁴ H.W.O. Okoth Ogendo. "Quest for Constitutional Government," *op. cit.* p. 55-56.

Chart 16: Respondents views on the importance of public participation in Constitution making



Source: Study findings

Asked why they felt that public participation is important in Constitution making, majority of the respondents held the view that it increases people's knowledge of constitutional issues as well as their support for and confidence in the constitution and its institutions. They also said that public participation ensure the responsiveness of the Constitution to people has needs and increases the level of public ownership of the Constitution. In the context of the broader Constitution of Kenya review process, public participation was, credited for contributing towards building a national constitutional culture as well as broad based support for the Constitution.

Broadly, the above findings are consistent with the assertions of classical theories of democracy and development theory of participation as discussed in Chapter Two (2), sub section 2.7.2. On the one hand, the classical theories of democracy postulate that public participation is important in

developing democratic characteristics of the participants, including their support for the political system. They also assert that public participation contribute to raising individuals' interest in and knowledge of the political system. They classical theories assert further that public participation produce a psychological attachment of the participants to the community and its institutions and

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inculcate a sense of duty among citizens to abide by the rules.

On the other hand, the developmental theory of participation holds that engaging in political activity directly affects the attitudes of the participants, irrespective of any effect on policy. As such, through participation, the participants will experience the full development of civic attitudes and behaviours thereby becoming supportive of the system than non-participants do.⁸⁸⁶

Overall, ordinarily public participation in the context of Constitution making does not happen in a vacuum, nor do citizens mechanically access information and transform it into opinions. Very often, the political elite have a keen interest in ensuring that the citizens adopt their favoured positions and as such make deliberate efforts to affect public opinion on constitutional issues. As Professor H.W.O. Okoth Ogendo points out even where leaders say that they support public participation, "what appears to be happening instead is that the

⁸⁸⁵ J.J. Rousseau (1968), *The Social Contract*. Harmondsworth: Penguin, *op .cit.-*, A.D. Tocqueville (1945). *Democracy in America*. New York, A. A. Knopf, *op. cit.*: J.S. Mill (1948), *On Liberty: Representative Government: The Subjection of Women*. London, New York: Oxford University Press, *op. cit.*; B.R. Barber (1984). *Strong Democracy: Participatory Politics for a New Age*. Berkeley: University of California Press *op. cit.*; C. Pateman (1970), *Participation and Democratic Theory*. Cambridge: Cambridge University Press *op.cit.*

⁸⁸⁶ Coren Devra Moehier (undated) *Public Participation and Support for the Constitution in Uganda, op. cit.*

political elite are basically looking for popular reaction to items of agenda drawn up in the privacy of political party or cabinet board rooms."

As already discussed in Chapters Six (6) and Seven (7), over the course of the Constitution making process, as the views of the political elite became more polarized and antagonistic so were the views of their supporters. As a result, as the review progressed constitutional debate became so wrapped up with politics of the day that it became impossible to distinguish between the two.

8.4 The role of civic education in participatory Constitution making

One of the key determinants of public participation in Constitution making is access to civic education. In the context of the Constitution of Kenya review process, the main purpose of civic education was to empower, inform and enable the public to engage in the Constitution making process.

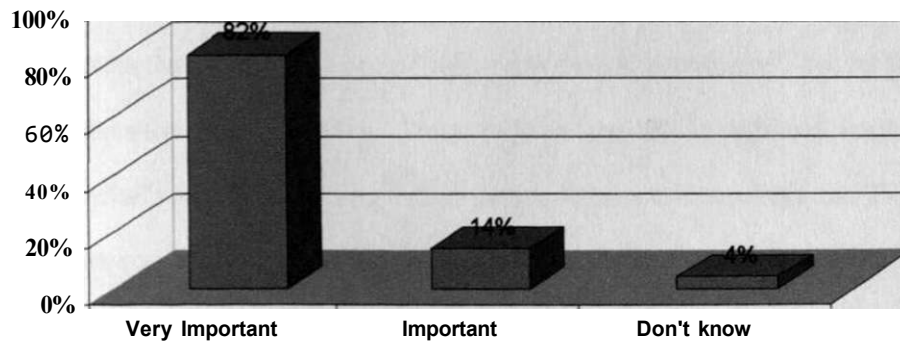
The respondents were therefore, asked two basic questions about the role of civic education in Constitution making. First, the respondents were, asked what in their opinion was the role of civic education is in Constitution making process. Secondly, they were, asked whether they received civic education on the constitution review between 1997 and 2005.

^{8.7} H.W.O. Okoth Ogendo. "Quest for Constitutional Government", *op. cit.* p. 55-56

8.4.1 Civic education in the review process

Nearly all the respondents (96 percent) held the view that civic education is important in a Constitution making process. Of these respondents, 82 percent said that it is very important while 14 percent said that it is important. Only 4 percent of the respondents said that they did not know how important civic education was in a Constitution making process. Chart 17 below presents the respondents' views on the importance of civic education in a constitution making process.

Chart 17: Respondents view on the importance of civic education in Constitution making

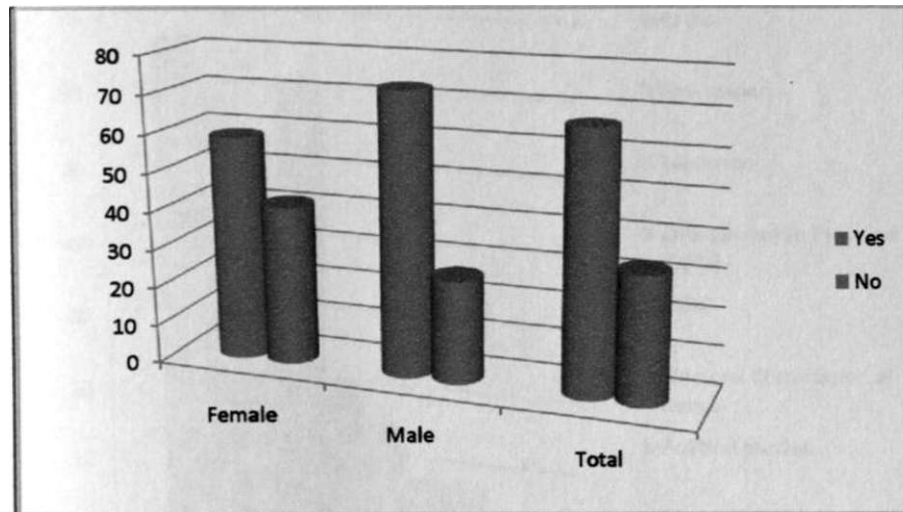


Source: Study findings

8.4.2 Access to civic education on the Constitution review (1997-2005)

In response to this question, more than two thirds of the respondents said that they received civic education on the constitution review. Only 33 percent did not receive any form of civic education on the review process. Of the respondents who had access to civic education on the Constitution review, there were more males (73.25 percent) than females (58.5 percent) as shown in Chart 18 below.

Chart 18: Access to civic education on the constitution review (1997-2005) by gender

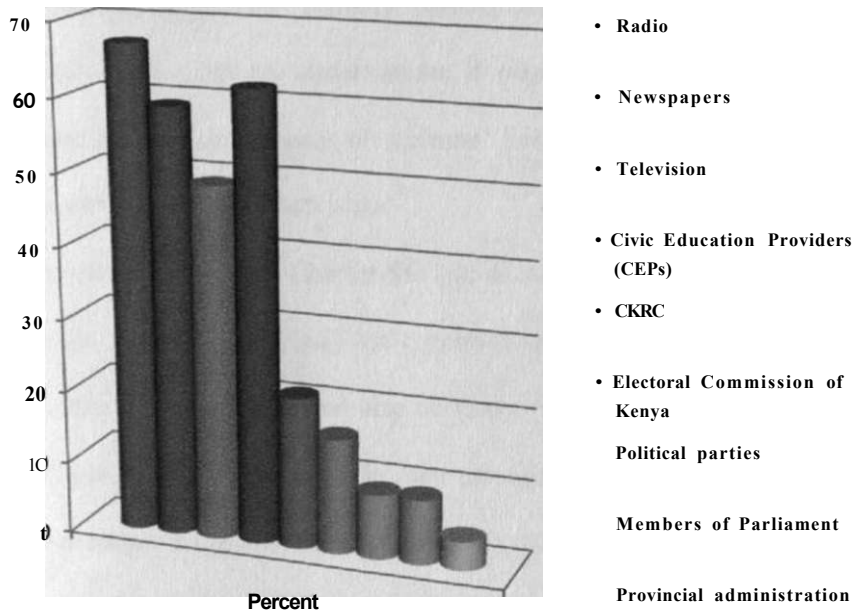


Source: Study findings

The factors that affect women's and other marginalized populations' access to civic education on the constitution review process especially in rural and remote areas include lack of access to communication channels such as radio and TV, low literacy levels and socio-cultural factors that still inhibit women's participation in governance process.

Of the respondents who received civic education, majority received it through radio, civic education providers (CEPS), newspapers and television as shown in Chart 19 below. None of the respondents however, mentioned self-driven search for information on the Constitution and the review process. This implies that much of the civic education was more supply driven than demand driven.

Chart 19: Sources of civic education on the constitution review



Source: Study findings

Thus, first despite the civic education, the opinions of the political elite rather than civic education appeared to be of greater influence on most of the citizens' attitudes towards the Constitution making process and the Constitution. For example, during both the November 2005 and August 2010 referenda, most voters' attitudes towards the proposed constitutions appeared to depend more on the opinions and attitudes of the political leaders from certain areas rather than by their own assessment of the strengths and weaknesses of the constitutional documents presented for their decision.⁸⁸⁸

⁸⁸⁸ In the regions where the key key political players in the referenda processes came from such as Central, Western, Rift Valley and Nyanza provinces, majority of voters voted according to what their political leaders wanted. For instance, some voters stated clearly that once their leaders had read the proposed Constitutions, they did not need to read the documents to make their own choices. Their choices were those of their leaders.

Secondly, the fact that a large proportion of the respondents received information directly from the political parties, Members of Parliament, provincial administration and the media that are, dominated by the political elite may have also had direct influence on citizens' participation in the review process especially at the referendum stage.

As already mentioned in Chapter Six (6), section 6.6, the political elite actively worked not only to convey their opinions to the public especially during the referendum campaigns but also on many occasions, to prevent the public from hearing alternative views in their strongholds. It is therefore not surprising that almost a third of the respondents found the civic education not very adequate and empowering due to the negative political influence on the process.

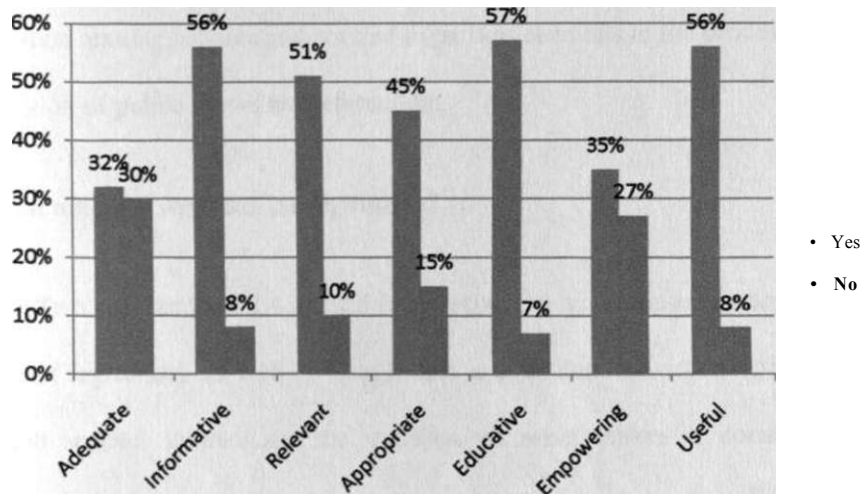
On the quality of the civic education received, most respondents held the view that the civic education was educative, informative, useful, relevant, and appropriate. However, only one-third of the respondents found the civic education received adequate and empowering as shown in Chart 20 below. This may be explained by the fact that civic education became captive to the political elite opinions especially during the National Constitutional Conference and the referendum where, for example, 82 percent of the respondents said they participated.

Very often therefore, people's choices and debate around the referendum were, entangled with other political factors beyond the issue(s)

presented on the referendum ballot.⁸⁸⁹ Thus, as the Constitution review process became polarized and contentious, most citizens' views became polarized like those of the political leaders they supported and depended upon for information and direction.

Consequently, the level of public participation in the Constitution review process especially at the referendum stage tended to be influenced more by political factors rather than by the content of the messages delivered to the citizens through the formal civic education channels.

Chart 20: Respondents evaluation of the civic education for the constitution review



Source: Study findings

Overall, from the foregoing, it is evident that the civic education delivered throughout the review had significant effect on people's participation in the Constitution review process. It not only contributed to informing and enabling a critical mass of Kenyans to participate in the review process but also helped that

⁸⁸⁹ Lawrence Leduc. *Opinion Change and voting behaviour in referendums.* *European Journal of Political Research*, Vol. 41, 2002, p. 712 *op.cit.*

gaining the critical awareness and knowledge about the Constitution and constitutional governance in general.

The study however, concludes first, that although civic education remains a key ingredient of a participatory constitution making enterprise, it is also important to pay keen attention to what the political elite say and communicate about a Constitution making process and its intended outcome. Secondly, the study concludes that to ensure meaningful public participation and to help citizens form useful opinions about the process and its intended outcome, civic education must be continuous, provided throughout the Constitution making process and not tied to particular events in the process such as collection of public views and referendum.

8.5 What makes a constitution legitimate?

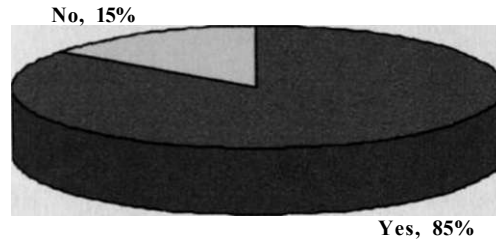
Chapter Two (2), sections 2.4 and 2.5 have respectively, discussed in depth the concept of legitimacy as well as what makes a constitutional order legitimate. This sub section interrogates the question of what makes a constitution legitimate from the respondents' perspective.

8.5.1 What is a Constitution?

The respondents were first, asked if they knew what a Constitution meant. In response more than eight out of ten (85 percent) of the respondents said that they knew what a Constitution meant. Only 15 percent of the respondents said that they did not know what a Constitution meant as shown in Chart 21 below.

Chart 21: Do you know what a Constitution means?

If Respondent Knows the Meaning of Constitution



Source: Study findings

Of the respondents who said they knew what a Constitution meant, more than half (51 percent) described it as the supreme law of the land. More than a third (33 percent) of the respondents also described a Constitution as a formal or written document for the governance of the state. A significant 28 percent of the respondents described a Constitution as a covenant between the people and the government as shown in the table below.

Most of the respondents' descriptions of a Constitution reflected their understanding of the purposes of a Constitution including protection of human rights, organization of government, ensuring welfare of the people, collective or shared national vision, promotion of national unity, promotion of equitable sharing of national resources and limitation of power. It should be pointed out these descriptions largely reflect the constitutional principles that guided the review process as discussed in Chapter Six (6), section 6.2.

Broadly, the apparent high levels of awareness and understanding of what a Constitution entails among the respondents could be attributed to the people's unrestricted access to civic education on the Constitution and Constitution review process especially between 2001 and 2005 as discussed in sub section 8.4.2 above.

Table 12: What does a Constitution mean?

Constitution meaning	Frequency	Percent
Supreme law of the land	240	51%
A formal (written) document for the governance of the state	155	33%
A covenant between the people and the government	130	28%
Framework for protection of human rights	130	28%
Instrument for formation/organization of government	108	23%
Statement of national/goals and values	102	22
Charter that binds people together in a state	93	20
A shared/collective vision of the nation	81	17
Symbol national unity	71	15
Framework for ensuring the welfare of the people	70	15
Framework for ensuring equitable sharing of national resources	56	12
Instrument for limiting the power of the government	43	9
Unwritten customs of the people	28	6
Base	553	100

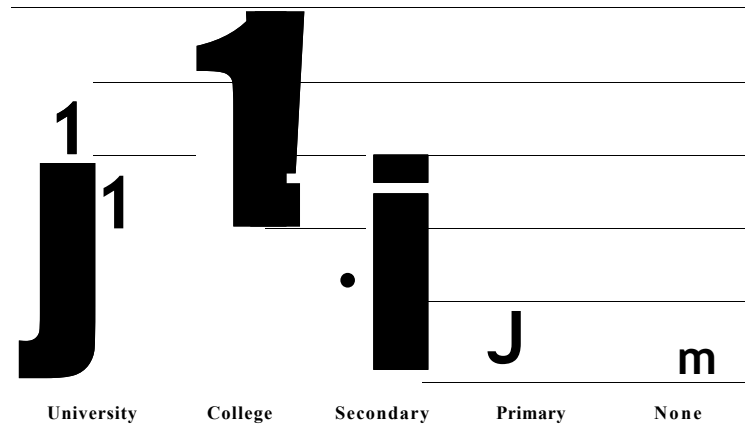
Source: Study findings.

8.5.2 What does constitutional legitimacy mean to you?

Based on their understanding of what a Constitution meant, the respondents were, asked to state what their understanding of constitutional legitimacy was. In response to this question, nearly half (48 percent) of the respondents could describe what they considered as constitutional legitimacy. More than half of the respondents (52 percent) however, said they did not know what it meant.

The knowledge of constitutional legitimacy among the respondents appeared to increase with level of education as shown in Chart 22 below.

Chart 22: Knowledge of what constitutional legitimacy means by level of education



Source: Study findings

8.53 What makes a constitution legitimate?

Of the respondents who could describe constitutional legitimacy, they saw it in terms of popular acceptance and positive effect of the Constitution on their wellbeing. To respondents therefore, the concept of constitutional legitimacy implies a standard of constitutional good and democratic culture that bears positive impact on the people's wellbeing.

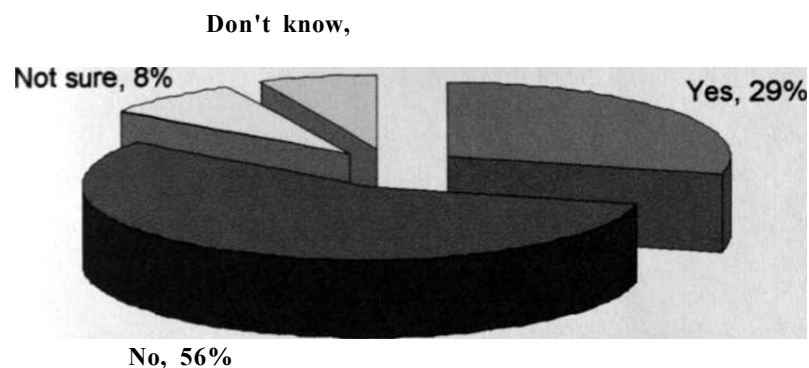
Further to the respondents' response to the question of what constitutional legitimacy means, they were asked what in their opinion, makes a Constitution legitimate and whether they considered the Constitution of Kenya since independence legitimate. The latter question included the various constitutional drafts developed through the Constitution review process (2001-2005), namely

the Draft Constitution of Kenya 2004 (Bomas Draft) and the Proposed New Constitution 2005 (Wako Draft).

First, the respondents were asked if they were familiar with the current Constitution. In response, more than half (55 percent) of the respondents reported that they were familiar with the Constitution. Forty-five (45) percent of the respondents, however, said that they were not familiar with the Constitution. Out of those who were familiar with the Constitution, only 20 percent reported having a copy of the Constitution in their possession.

On the respondents' view on the legitimacy of the current Constitution, more than half (56 percent) of the respondents did not consider the Constitution legitimate. Only 29 percent of the respondents said that the Constitution was legitimate. Another 15 percent of the respondents said that they did not know (7 percent) nor were not sure whether the Constitution was legitimate (8 percent) as shown in Chart 23 below.

Chart 23: Respondents view on the legitimacy of the existing Constitution



Source: Study findings

Of the respondents who considered the Constitution not legitimate, more than six out of ten (62 percent) identified the lack of participation in its making as the main reason. Nearly half (47 percent) of the respondents also felt that the Constitution was not legitimate because it was not relevant to their needs. Further, four out of ten (41 percent) of the respondents held the view that the Constitution was not legitimate because it was not acceptable to the majority of the people.

The other reasons the respondents cited for not considering the Constitution legitimate reflected mainly the negative effect of the Constitution and constitutionality on the society. These included corruption, high crime rate, high poverty levels; high unemployment, gender inequality; unfair legal system, and negative ethnicity among others as indicated in Table 8 below. These findings reflect what Brad R. Roth has described as "*desuetude*" - the negative legal effect of custom whereby those entrusted with public authority consistently violate constitutional norms and public trust resulting in negative effect of the constitutional order on society.⁸⁹⁰

Brad R. Roth (1999), *Governmental Illegitimacy in International Law*, Clarendon Press. Oxford, p. 206.

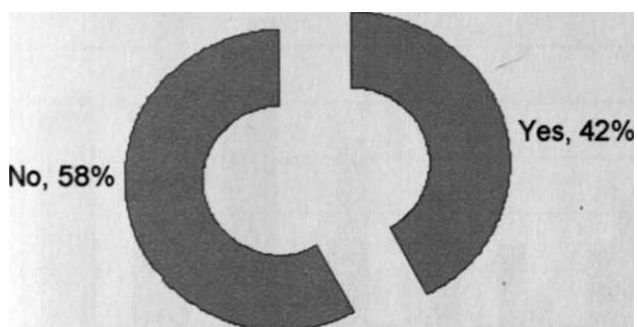
Table 13: Respondents' reasons for considering the existing Constitution as not legitimate

Responses	Frequency	Percent
Lack of public participation in Constitution making	150	62
Lack of relevance of the constitution to people's needs	113	47
The constitution unacceptable to majority of people	99	41
Prevalence of corruption	94	39
Unfairness distribution of national resources	89	37
Lack of independence of judiciary	82	34
Lack of independence of parliament	82	34
High crime rate	75	31
Low public confidence in government	73	30
Human rights abuses	74	31
Lack of respect of the rule of law	69	29
Marginalization of minorities	69	29
Low public integrity	67	28
Nepotism in public service	64	27
High prevalence of poverty	60	25
High unemployment rate	60	25
Gender inequality/inequity	60	25
Inappropriate legal system	52	22
Lack of ethnic tolerance and mutual respect	50	21
Lack of national unity	46	19
Base	242	100

Source: Study findings

In fact when asked whether the Constitution had been used over time to improve their wellbeing, a majority of the respondents (58 percent) felt that this was not the case since independence as shown in Chart 24 below.

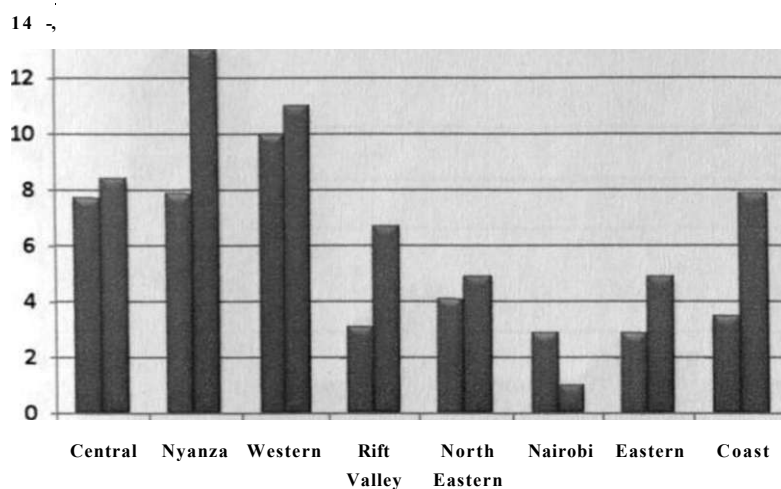
Chart 24: Respondents view on the use of the Constitution to improve their living conditions since independence



Source: Study findings

Indeed, a majority of the respondents in all the provinces except Nairobi shared the view that the Constitution had not been used to improve their living conditions since independence. However, the highest level of discontent was recorded in Nyanza (13.0 percent) and Western (11.0 percent) as compared to Central (8.4 percent), Coast (7.9 percent); and Rift Valley (6.7 percent), Eastern (4.9 percent), North Eastern (4.9 percent) and Nairobi (1 percent) as indicated in Chart 25 below.

Chart 25: Has the Constitution been used to improve citizens' living conditions since independence?_



Source: Study findings

In terms of the responsiveness of the current Constitution to the people's needs, almost seven out of ten (69 percent) of the respondents felt that the Constitution was not responsive to their needs as shown in Chart 26 below. These findings are largely consistent with various assertions about what constitutes constitutional legitimacy and generally reflect H.W.O. Okoth Ogendo's argument that "to have a constitution is not the same thing as enjoying or living under a system of constitutional government."⁸⁹¹

^{8,1} H.W.O. Okoth Ogendo "The quest for constitutional government," *op. cit.*

Chart 26: Responsiveness of the existing constitutional order to their needs and aspirations



Source: Study findings

The findings above reflect the historical inequalities that have dogged Kenyan society since the colonial times and which the constitutional order since independence failed to address.⁸⁹² As result they became the fulcrum around which the struggle for constitutional reconstruction was played.⁸⁹³ It is not surprising therefore, that one of the key directive principles and objects of the Constitution of Kenya review process was to "ensure the provision basic needs of all Kenyans through the establishment of an equitable framework for economic growth and equitable access to national resources."⁸⁹⁴

A further demonstration of the legitimacy deficit of the Independence Constitution and the post independence Constitution (as amended), more than

For more details see Karuti Kanyinga (2006), 'Ethnic inequalities and governance of the public sector in Kenya' in Bangura. Yusuf (ed). *Ethnicity, Inequalities and public sector*, London: Pelgrave Macmillan, *op cit*; and Arne Bigstein (1979), *Regional Inequality and Development: A Case Study of Kenya*. FliD Thesis, Department of Economics, University of Gotenburg, *op. cit*

^m Karuti Kanyinga, 'Ethnic inequalities and governance of the public sector in Kenya,' *op. cit.*

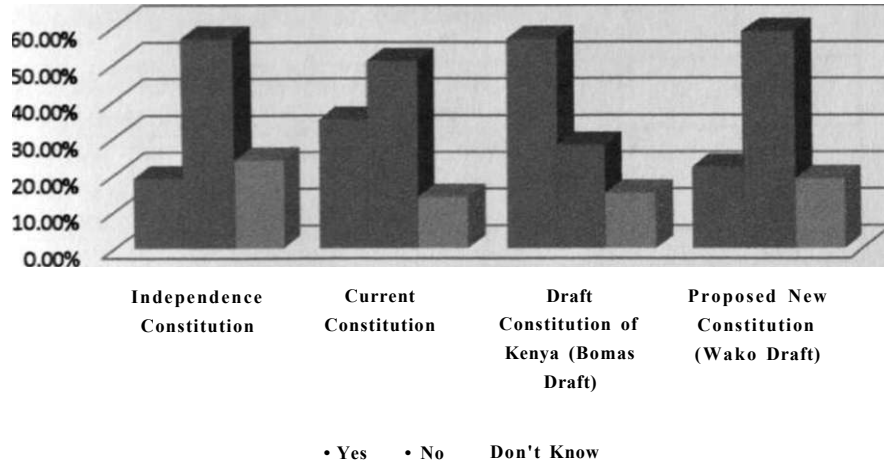
⁸⁰⁴ The Constitution of Kenya Review Act. 2008, s. 4(f); and the Constitution of Kenya Review Act Cap 3A, s. 3 (0-

half (58 percent) and (52 percent) of the respondents respectively felt that the Constitutions did not represent their aspirations.

As to the constitutional drafts generated through Constitution of Kenya review process (2001-2005), on the other hand, majority of the respondents (58 percent) felt that the Draft Constitution of Kenya 2004 (Bomas Draft) represented their aspirations. This perhaps reflects the public's approval of the participatory nature of the Constitution making process leading and up to the National Constitutional Conference.

However, on the other hand, 60 percent of the respondents felt that the Proposed New Constitution 2005 (Wako Draft) did not represent their aspirations. This was as if to demonstrate their general displeasure with the manner in which the political elite took control of the post National Constitutional Conference Constitution making process leading to the rejection of the Proposed New Constitution at the November 2005 referendum. It should therefore, be noted that the respondents felt that the Proposed Constitution of Kenya (2005) least represented their aspirations compared even to the Independence and post independence Constitution as indicated in Chart 27 below.

Chart 27: Whether constitutional documents' since independence represented people's aspirations



Source: Study findings

Overall, when asked what should make a Constitution legitimate, majority of the respondents cited three basic conditions as shown in Table 14 below. First, people must participate in the making of the Constitution. Closely linked to people's participation was the need to educate the people on the Constitution and to implement and manage the Constitution in an open, consensual and democratic manner. In addition, the Constitution must enjoy widespread public support and confidence.

Third, the Constitution must be relevant and responsive to the needs and aspirations of the people; must guarantee the wellbeing of all citizens; and must ensure equitable distribution of national resources. Third, the political elite must not be allowed to interfere with the Constitution. This includes guaranteeing the independences of various arms of Government.

Table 14: What should make a Constitution legitimate?

Condition for Constitution to be legitimate	Frequency	Percent
Public be involved in an informed manner in the constitution making, implementation and management process	367	66.4
The Constitution must be responsive the needs of all citizens Constitution that ensure equitable distribution	163	29.5
Politicians not be allowed to interfere with the Constitution and must be guided by the values of honesty, consensus building and integrity	133	24
Base	553	100

Source: Study findings.

In the final analysis, the findings reveal three characteristics of Kenya's Constitution and constitutionality since independence. First, the study indicates that the Constitution of Kenya since independence and until the promulgation of a new Constitution in 2010 never enjoyed genuine social acceptance. Nor was the Constitutionality inclusive of the aspirations of all the groups in the society.

Secondly, the findings affirm the critical liberal constitution theory's argument that constitutional dominant groups in society to secure and maintain their superior status have historically used law. In that process, the constitutional law has been used to suppress some groups in society such as women, minority and ethnic groups, the poor, and so on whose interests are not adequately recognized and protected by the Constitution. These interests are not also recognized or rather supported by the dominant mainstream ideologies to which the elites in the Judiciary, Executive and Parliament have an affinity.^{8,6}

Ng'etheNjuguna Ng'ethe and Musambayi Katumanga. "Transition and The Politics of Constitution making: A comparative Study of Uganda, South Africa and Kenya". *op. cit.*
Ibid.

Thirdly, the findings demonstrate a serious disconnect between the people and the constitutional system. This has led to feelings of discontent and loss of public trust in the state leading to a crisis of legitimacy of the Constitution and its institutions.

Overall, from the foregoing a good and viable Constitution that claims legitimacy must demonstrate four basic characteristics. First, the people must themselves make the Constitution. Secondly, the people must generally accept and respect the Constitution as the unrivalled framework for governance. Thirdly, it must protect human rights of all citizens and guarantee their fundamental freedoms. Fourthly, the Constitution must have a positive effect on the society and must guarantee the basic needs and wellbeing of all citizens.

However, as H.W.O. Okoth Ogendo has pointed out, the constitutional systems throughout the region "are yet to attain a full measure of political legitimacy."⁸⁹⁷ This, he attributes to lost opportunities for the elite to engage in genuine constitutional reconstruction in Africa. He therefore states:

"Just as colonial authorities made little or no attempt at creating minimum conditions for the establishment and operationalisation of a constitutional order, post-colonial elites equally made no attempts at the design of appropriate structures and institutions of government. What should have been an opportunity for reflective Constitution making or constitutional reform became instead an excuse for dismantling of independence constitutions."⁸⁹⁸

^{8.7} H.W.O. Okoth Ogendo "The quest for constitutional government," *op. cit.*

** *Ibid*

8.6 The nexus between public participation and constitutional legitimacy

Chapter Two (2), sections 2.7, 2.4 and 2.5, have respectively presented literature review on participatory Constitution making, the effect of participation on governance as well as the concept and question of constitutional legitimacy. This sub section interrogates the question of whether a mere act of public participation in a Constitution making process is sufficient to endow its outcome (the Constitution) with legitimacy. The section therefore tests the claim that there is significant relationship between public participation and constitutional legitimacy.

In recent times, there has been a growing academic and policy interest on the nexus between public participation and constitutional legitimacy especially from the 1990s in Africa. This growing interest is attributed largely to two key factors. First, there has been strong appeal for a participatory model of Constitution making based on argument that without popular participation, there is less assurance that either the Constitution or rule of law generally, will be willingly accepted and respected.

Indeed, as discussed in Chapter Two (2), section 2.7, the primary goal of the recent Constitution making activities in Africa has been to build public support for the new constitutions so made and to establish popular constitutional culture within society. To this end, currently, public participation is among the most prescribed policy principles for enhancing the legitimacy of new Constitutions especially in Africa.

Secondly, there is a growing interest in the normative question of what makes a constitution legitimate and what constitutional legitimacy actually consists of. This arises from the apparent failure of the most recent constitutional reform initiatives in Africa to bring about fundamental transition to democratic constitutionalism despite their claims to popular participation. It is against this background, this study proceeded from the perspective that there is a significant relationship between public participation in Constitution making and constitutional legitimacy.

§.6.1 Can a Constitution be legitimate without public participation?

The respondents were asked to state whether they would consider a Constitution legitimate without their public participation in its making. In response, nearly eight out of ten (78 percent) of the respondents said that they would not ordinarily consider a Constitution legitimate if they were not involved in its making. However, about two out of ten respondents (22 percent) of the respondents said that they would still consider a constitution legitimate even if they did not participate in its making. In relation to gender, out of the 78 percent, more male respondents (47 percent) than female respondents (31 percent) held the view that a constitution cannot be legitimate without public participation in its making.

Asked why they would not consider a constitution made without their participation legitimate, the respondents cited three key reasons as shown in Table 15 below.

Table 15: Reasons for not considering a Constitution legitimate without public participation

Reasons for not considering a Constitution legitimate without public participation	Frequency	Percent
People will not accept a Constitution made without their participation as their own	227	46
A constitution made without people's participation will not reflect and represent their views and needs.	161	33
A constitution made without people's participation will serve mainly the interests of the elite.	88	18
Base	487	100

Source: Study findings

First, almost half (46 percent) of the respondents held the view that people will not accept a Constitution made without their participation as their own. The above findings are consistent with writings of many scholars who have vouched for public participation as a key instrument for achieving constitutional legitimacy. For instance, **B.H. Selassie** argues that the legitimacy of the Constitution making process and its product will be contested where there

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is no popular participation.

Benjamin Odoki has also argued that to command loyalty, obedience, respect, and confidence, the people must identify themselves with Constitution through their involvement.⁹⁰⁰ Thus, to be legitimate, a Constitution requires genuine social acceptance where the relevant public reveres and honours both the political intention behind the Constitution and the institutions it establishes.⁹⁰¹

B.H. Selassie (2001), "Constitution making in Eritrea: Democratic Transition through Popular Participation in Constitutionalism in Africa: Creating Opportunities. Facing Challenges." *op. cit.*

H.B.J. Odoki (1999), "The Challenges of Constitution-making and Implementation in Uganda." p. 6. *op. cit.*

⁹⁰¹ **Mehmet Fevzi Bilgin (2007). "Democratic Legitimacy and Constitutions," *op. cit.***

According to Richard H. Fallon, "when legitimacy is measured by sociological criteria, the Constitution or a claim of legal authority is legitimate insofar as it is accepted (as a matter of fact) as deserving of respect or obedience."⁹⁰ B.O. Nwabueze has also pointed out that the essence of public participation in Constitution making is to entrench and inspire a sense of respect, confidence

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and loyalty that the Constitution requires.

Secondly, more than a third (33 percent) of the respondents felt that a Constitution made without public participation would not represent and reflect their views and needs. As such, majority of the people will not be familiar with its content and may therefore, not have affinity or sense of attachment to the Constitution. This finding is consistent with the assertions of classical theories of democracy that public participation contributes not just to raising individuals' interest in and knowledge of the political system but also to their psychological attachment to and inculcation of a sense of duty among citizens to abide by the rules.⁹⁰⁴

Thirdly, almost two out of ten (18 percent) of the respondents held the view that a Constitution made without public participation may only serve the interest of the elite at the expense of the ordinary citizens. As discussed in Chapter Two (2), sub section 2.7.1, this view appears to allude to the critical

Richard H. Fallon Jr. (2005), *Legitimacy and the Constitution*, Harvard Law Review, Volume 118 Number 6. April 2005. pp 1790-1791. *op. cit.*

⁹⁰⁵ Nwabueze B.O.. *Constitutional History of Nigeria*. C. Hurst & Co. Publishers. London (1981)

⁹⁰⁴ J.J. Rousseau (1968), *The Social Contract*. Harmondsworth: Penguin, *op. cit.*; A.D. Tocqueville (1945), *Democracy in America*. New York. A. A. Knopf, *op. cit.*; J.S. Mill (1948). *On Liberty: Representative Government: The Subjection of Women*. London, New York: Oxford University Press, *op. cit.*; B.R. Barber (1984). *Strong Democracy: Participatory Politics for a Next Age*. Berkeley: University of California Press *op. cit.*; C. Pateman (1970), *Participation and Democratic Theory*. Cambridge: Cambridge University Press *op.cit.*

liberal constitutional theory's argument that the law including constitutional law is a powerful tool, which the elite have used to pursue their own political ideologies and to protect the dominant system of social and power relations. Thus, instead of curbing arbitrary government power for which the idea of constitutionalism is supposed to stand, very often, political suppression of certain groups is disguised in the cloak of positive constitutional validity.⁹⁰⁶

On the other hand, a minority of the respondents (22 percent) who said that they would still consider a Constitution legitimate without public participation also gave three main reasons as shown in Table 16 below.

Table 16: Reasons why it can be legitimate without public participation

Reasons why it can be legitimate without public participation	Frequency	Percent
The Government can impose a Constitution on people through Parliament and once enacted people must abide by it whether it is good or bad	33	27
Experts with integrity can draft an acceptable Constitution that caters for and reflects the interest and needs of the general population	64	52
Constitution making is too technical for the ordinary people to understand and citizens will accept the law even without participation in its making	6	5
Base	122	100

Source: Study findings

First, more than half (52 percent) of the respondents who said a Constitution can be legitimate without public participation held the view that experts with integrity can draft an acceptable Constitution that caters for and reflects the interest and needs of the general population. However, such a Constitution will be more acceptable if subjected to a referendum.

⁹⁰⁶ Alachow (2004). "Constitutionalism". *Stanford Encyclopaedia of Philosophy*, Spring 2004. *op.cj.*

Ibid

Secondly, almost third (27 percent) of the respondents who said a Constitution can be legitimate without public participation held the view that the Government can impose a Constitution on people through Parliament. However, once enacted, all must abide by it whether it is good or bad. This view appears consistent with Kelsian grundnorm theory, which posits that a Constitution or grundnorm need not arise from a legal or constitutional process.⁹⁰⁷ However, once the Constitution is, enacted, whether by agreement or by imposition, all must obey it until such a time it is changed, in accordance with the established order or rules.⁹⁰⁸

Thirdly, less than a tenth (5 percent) of the respondents who said a Constitution could be legitimate without public participation held the view that Constitution making is too technical for the ordinary people to understand. In any case, because of its technicality, citizens will accept the Constitution even if they do not participate in its making. These views appear consistent with some arguments against the participatory model of Constitution making as discussed in Chapter two (2), sub section 2.7.2. Those who hold this view contend that the principles of participatory model are largely unattainable since not all citizens have the same desire to be actively involved in a Constitution making process. In any case, there are people who are perfectly happy to let those in positions of power to make decisions on their behalf.

⁹⁰⁷ See Mrindushi Swarup, "Kelsen's Theory of Grundnorm." *op. cit.*

** See Ben Sihanya, "Reconstructing the Kenyan Constitution and State, 1963-2010: Lessons from German and American Constitutionalism", *op. cit.*

8.6.2 Relationship between public participation and constitutional legitimacy

One of the objectives of the study was to analyse the nexus between public participation in Constitution making and constitutional legitimacy. The study therefore performed a chi square test to establish whether there is significant relationship between public participation in Constitution making and constitutional legitimacy. The test was based on the respondents' views on importance of public participation in Constitution making and the legitimacy of the current Constitution.

Overall, out of the 85.2 percent of respondents who said that public participation in constitution making is either very important or important, majority of them (55.8 percent) did not consider the current Constitution as legitimate. Only 29.4 percent considered the current Constitution legitimate as shown in the table below.

Thus, as shown in the results of the Pearson chi-square test in Table 17 below, since the chi-square value (assumption of sig.) of 0.087 falls within the rejected region at 0.05 level of significance, we reject the null hypothesis (H_0) and accept the alternative hypothesis (H_1). We therefore accept the alternative hypothesis (H_1) and conclude that there is significant relationship between the importance of public participation in constitution making and legitimacy of the current constitution. Nevertheless, is the mere act of public participation in a Constitution making process sufficient to endow the Constitution with legitimacy?

Table 17: **Importance of public participation by legitimacy of the current Constitution**

In your opinion do you consider Kenya's current constitution legitimate or acceptable to majority of Kenyans						Total
		Yes	No	Not sure	Don't Know	
Very important	Count	86	157	22	18	283
	% within In your opinion how important is public participation in constitution making	30.4	55.5	7.8	6.4	100.0
	% within In your opinion do you consider Kenya's current constitution legitimate or acceptable to majority of Kenyans	89.6	86.3	88.0	78.3	86.8
	% of Total	26.4	48.2	6.7	5.5	86.8
Important	Count	9	23	3	4	39
	% within In your opinion how important is public participation in constitution making	23.1	59.0	7.7	10.3	100.0
	% within In your opinion do you consider Kenya's current constitution legitimate or acceptable to majority of Kenyans	9.4	12.6	12.0	17.4	12.0
	% of Total	2.8	7.1	0.9	1.2	12.0
Not important	Count	1	2	0	0	3
	% within In your opinion how important is public participation in constitution making	33.3	66.7	0.0	0.0	100.0
	% within In your opinion do you consider Kenya's current constitution legitimate or acceptable to majority of Kenyans	1.0	1.1	0.0	0.0	0.9
	% of Total	0.3	0.6	0.0	0.0	0.9
Don't know	Count	0	0	0	1	1
	% within In your opinion how important is public participation in constitution making	0.0	0.0	0.0	100.0	100.0
	% within In your opinion do you consider Kenya's current constitution legitimate or acceptable to majority of Kenyans	0.0	0.0	0.0	4.3	0.3
	% of Total	0.0	0.0	0.0	0.3	0.3
Total	Count	96	182	25	23	326
	% within In your opinion how important is public participation in constitution making	29.4	55.8	7.7	7.1	100.0
	% within In your opinion do you consider Kenya's current constitution legitimate or acceptable to majority of Kenyans	100.0	100.0	100.0	100.0	100.0
	% of Total	29.4	55.8	7.7	7.1	100.0

Pearson chi-square 15.156, df9, assumption of sig. 0.087, a =0.05

Source: Study Findings

Ho: There is no relationship between the importance of public participation in constitution making and legitimacy of the current constitution.

H1: There is a significant relationship between the importance of public participation in constitution making and legitimacy of the current constitution.

As discussed in sub section 8.3.4 above, there are indeed, factors that may make public participation by itself insufficient to confer legitimacy to a Constitution. In reality, public participation alone does not influence the views of people about the legitimacy of the Constitution since citizens are highly influenced by the elite. This is especially so in an environment where people have limited access to empowering civic education and alternative sources of information. Secondly, the public view about the legitimacy of the Constitution to a significant extent also depends on their historical experiences with the constitutional order and the relationship they have with their leaders.

Thirdly, public participation in Constitution making does not happen in a vacuum nor do citizens form their views of the constitution in a vacuum. The study finds that public participation and its effectiveness will very much depend on the messages received from the political elite. We therefore argue that public participation will only bolster support for the Constitution making process and its outcome where most political elites are supportive. As such, there is no guarantee that in the context where there will be strong opposition there will be supportive attitudes among the citizens towards the Constitution making process and its outcome.

Fourthly, we argue that it is leaders, not public participation *per se* that causes citizens to view the Constitution as legitimate or otherwise. To this end, the study concludes that a mere act of public participation in Constitution making process is not by itself adequate to endow the outcome with legitimacy. To predict whether public participation strengthens or weakens public support for the Constitution making process and its outcome, one must therefore

examine the messages that elites communicate to citizens about their participation, the process, and the resulting document.

8.7 Conclusion

This Chapter has presented an analysis of the nexus between public participation in Constitution making and constitutional legitimacy in Kenya. In particular, the Chapter has interrogated two basic questions. First, is there significant relationship between public participation and constitutional legitimacy? Second, is the mere act of public participation in a Constitution making process sufficient to endow its outcome with legitimacy? The Chapter has therefore tested the hypothesis that there is significant relationship between public participation in Constitution making and constitutional legitimacy.

In the final analysis, the study concludes that there is indeed significant relationship between public participation and constitutional legitimacy. At the conceptual level, public participation is at the heart of the recent discourse on constitutional legitimacy. There is also a general agreement that without popular participation in Constitution making and management of constitutionality in general, the legitimacy of a Constitution making process and its outcome is likely to be, contested. The essence of public participation in Constitution making enterprise is therefore to ultimately, entrench a sense of social acceptance, respect, confidence, loyalty and attachment to the Constitution and its institutions.

Overall, the study concludes, however, that the mere act of public participation is not in itself sufficient to secure the legitimacy of a Constitution making process and its outcome. In reality, public participation will be effective in endowing a Constitution making process and its outcome with legitimacy in so far as three conditions are present. First, there must be demonstrated political will and commitment to ensuring genuine and meaningful public participation in the Constitution making process. Secondly, there must be well-defined measures to ensure sustained public participation supported by an empowering and informative civic education programme throughout the Constitution making process. Thirdly, all stakeholders must remain committed and focused on producing a people focused Constitution.

The next Chapter Nine (9) presents an examination of the legal and jurisprudential issues in participatory Constitution making in Kenya.

CHAPTER NINE

LEGAL CHALLENGES AND JURISPRUDENTIAL ISSUES IN PARTICIPATORY CONSTITUTION MAKING IN KENYA

9.1 Introduction

Chapter Eight (8) has examined the nexus between public participation in Constitution making and constitutional legitimacy in Kenya. This Chapter examines the legal challenges and jurisprudential issues in participatory Constitution making in Kenya. It tests the claim that to be effective, a participatory Constitution making process must be entrenched in the Constitution.

9.2 The legal framework for the Constitution of Kenya review process

This section examines the legal framework for Constitution making process in Kenya and tests the claim that for a participatory Constitution making process to be effective, it must be entrenched in the Constitution.

As already discussed in Chapter Five (5), sub section 5.5.3, one of the key outcomes of the 1997 Inter-Parties Parliamentary Group (IPPG) process was the agreement to enact an enabling legislation to guide the post 1997 General Elections Constitution making process. Consequently, Parliament enacted the Constitution of Kenya Review Act, 1997.^{9(w)}

The Review Act, 1997 was to provide an enabling framework for a people driven, inclusive and participatory Constitution making process. It was

The Constitution of Kenya Review Act 1997 (Cap 3 A) was amended four times in 1998, 2000, 2001 and 2004 (Consensus Act).

therefore, intended to remedy the hitherto elite based approach to Constitution making by seeking to facilitate broad based people driven Constitution making process.

Broadly, between 1997 and 2005, the Constitution making process in Kenya was anchored on sections 1, 1A, 3, 30, 46, 47 and 123 (9) of the Constitution.⁹¹⁰ Sections 1 and 1A of the Constitution which declared Kenya a sovereign Republic and a multiparty democratic state, respectively, provided the philosophical underpinning for the review process. Section 3 of the Constitution provided that:

"This Constitution is the Constitution of the Republic of Kenya and shall have the force of law throughout Kenya and, subject to section 47, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void."⁹¹¹

Section 30 of the Constitution vested the legislative power of the Republic in Parliament consisting of the President and the National Assembly while section 46 gave Parliament the legislative authority to facilitate the comprehensive review of the Constitution. Under section 46 of the Constitution therefore, Parliament enacted the Constitution of Kenya Review Act, Cap 3A to facilitate the comprehensive review of the Constitution by the people of Kenya.

Section 47 of the Constitution envisaged the alteration of the Constitution by at least sixty five percent of all the members of the National

⁹¹⁰ **The Constitution of Kenya. Revised edition 2009 (2008). Published by the National Council for Law Reporting with the Authority of the Attorney-General.**

⁹¹¹ *Ibid*

Assembly voting for the proposed alteration during both its second and third reading in Parliament.⁹¹² Section 47 provided:

- "(I) Subject to this section. Parliament may alter this Constitution.
- (2) A Bill for an Act of Parliament to alter this Constitution shall not be passed by the National Assembly unless it has been supported on the second and third readings by the votes of not less than sixty-five per cent of all the members of the Assembly (excluding the ex officio members)...
- (6) In this section-
- (a) References to this Constitution are references to this Constitution as from time to time amended; and
- (b) References to the alteration of this Constitution are references to the amendment, modification or re-enactment, with or without amendment or modification, of any provision of this Constitution, the suspension or repeal of that provision and the making of a different provision in the place of that provision."⁹¹³

However, between 2008 and 2010, the Constitution making process in Kenya was anchored on section 47A of the Constitution introduced vide the thirty-second Constitution of Kenya (Amendment) Act, 2008⁹¹⁴. Section 47A entrenched the Constitution review making process and provided the sovereign right of the people to replace the existing Constitution with a new Constitution⁹¹⁵ Section 47A further set out the procedure for drafting, ratifying and promulgating the new Constitution.

In addition, to resolve any review related disputes, section 60A of the Constitution established the Interim Independent Constitutional Dispute

⁹¹² Section 46 of the Constitution and the Parliamentary standing orders provided the detailed procedures that were to be followed when Parliament was making laws.

⁹¹³ The Constitution of Kenya. Revised edition 2009 (2008). Published by the National Council for Law Reporting with the Authority of the Attorney-General, *op. cit.*

⁹¹⁴ The Constitution of Kenya (Amendment) Act No. 10 of 2008. *op. cit.*

⁹¹⁵ As indicated in Chapter Six (6), sub section 6.4.1. there were at least six attempts to entrench the review process. However, the Governments of the day adamantly refused to initiate constitutional amendment to this effect. The entrenchment of the review process was therefore to be only realized through the thirty-second amendment under the post 2007 election violence Framework of the Kenya National Dialogue and Reconciliation (KNDR).

Resolution Court. The Court had original jurisdiction to hear and determine all matters arising from the constitutional review process.

The introduction of sections 47A and 60A of the Constitution was therefore meant to cure the inherent weaknesses in section 47 of the Constitution to enable the completion of comprehensive review of the Constitution. The weaknesses of section 47 had prior to the thirty-second constitutional amendment, become such a major impediment⁹¹⁶ to the successful completion of the review that it became a rallying call for amendment."¹⁷

In effect section 47A of the Constitution did not just cure the inadequacy of Parliament's amendment power under section 47 of the Constitution but also provided a textual force to the *Njoya* ruling.⁹¹⁸ In this respect, section 47A (1) (2) (a) of the Constitution of Kenya (Amendment) Act 2008 provided that:

"(1) Subject to this section, this Constitution may be replaced.

(2) Notwithstanding anything to the contrary in this Constitution -
(a) the sovereign right to replace this Constitution with a new Constitution vests collectively in the people of Kenya and shall be exercisable by the people of Kenya through a referendum, in accordance with this section."¹⁹

^{9.6} The concern with the inadequacy of section 47 to deliver a new Constitution initially, expressed itself in the calls for the amendment of section 47 to entrench the review process in the Constitution in order to shield the review process from political manipulation and legal challenges. Later, it expressed itself in the calls for express provision in the existing Constitution on the making and replacement of the existing Constitution with a new one.

" kithure Kindiki (2007), *The Emerging Jurisprudence on Kenya's Constitutional Review Law*, Kenya Law Review. Vol 1: pp. 153-187.

¹⁹ As discussed in section 9.4. the Court in *Njoya* case had ruled that the power to make and replace Constitution reposed in the people to be exercised either through a referendum or a constituent assembly.

¹⁹ The Constitution of Kenya (Amendment) Act. No. 10 of 2008 *op. cit.*

Broadly, given the context of the post 2007 election violence and the resulting constitutional crisis, the Constitution of Kenya (Amendment) Act, 2008⁹ⁿ⁰ together with the National Accord and Reconciliation Act, 2008^{s1n1} were significant, in the sense that they provided the necessary interim arrangements for the completion of the Constitution review process..⁹ⁿ

9.3 Legal approaches to the Constitution of Kenya review process

From the very beginning of the Constitution review process, two distinct but mutually inclusive sets of choices confronted Kenya in terms of the legal approach to anchor and guide the Constitution making process. The first set of choices was whether to adopt a piecemeal or a comprehensive approach to Constitution making. The second set of choices was whether to adopt an expert approach based on the principle of parliamentary sovereignty or whether to adopt a participatory approach based on the principle people's sovereignty in Constitution making. Practically, these two sets of choices fundamentally determined not just the legal philosophy but also the politics of the Constitution of Kenya review process.

TM*ibid.*

^{0:1} The National Accord and Reconciliation Act, 2008.

^{9:2} Significant overhaul of the Constitution or even the creation of a new Constitution in the context of a deeply divided society or conflict often requires interim mechanisms to ensure that Constitution making process, as part of a peace settlement or compact, is completed as scheduled. In Kenya for example, the Constitution of Kenya (Amendment) Act 2008. established a number of interim institutions to help conclude the Constitution making process. These interim institutions included the Interim Independent Electoral Commission (IIEC); the Interim Independent Boundaries Review Commission (IBRC); the Interim Independent Constitutional Dispute Resolution Court (IICDRC). Also see Draft Proceedings of the Conference on Institutions and Procedures in Constitution Building, March 4-7, 2008. Princeton University. Co-Hosted by Princeton University's Bobst Center for Peace & Justice, Inter-peace, the Princeton Law and Public Affairs Program, and International IDEA p. 5.

9.3.1 Piecemeal or comprehensive approach to Constitution making

On the choice between adopting piecemeal or comprehensive approach to Constitution making, Kenya's experience reveals that both options were at play at various stages of the constitutional reform process.

As discussed in Chapter Five (5), section 5.5, many believed that Kenya could realize its constitutional reform objectives through the exercise of parliament's amendment powers under section 47 of the Constitution. However, it soon became apparent that it was not feasible to achieve far reaching constitutional reconstruction agenda through piecemeal constitutional changes. Key among the piecemeal constitutional changes included the restoration of security of tenure for constitutional office holders;⁹²ⁿ⁴ repeal of section 2A to reintroduce multi party democracy; and the Inter Parties Parliamentary Group's (IPPG) introduction of section 1A to unequivocally define Kenya's political system as "a multiparty democratic state"⁹²⁶ and other legislative reforms.⁹²⁷

So inadequate were the constitutional reforms that the pro-reform movement demanded for comprehensive constitutional reforms.⁹²⁸ It is against this background that through the 1997 Inter-Parties Parliamentary Group agreement, Kenya adopted a comprehensive approach Constitution making *de*

^{9:3} The Constitution of Kenya (Amendment) Act (No. 17 of 1990); Constitution of Kenya (Amendment) Act (No. 10 of 1991); Constitution of Kenya (Amendment) Act (No. 12 of 1991); and Constitution of Kenya (Amendment) Act (No. 9 of 1997). *op. cit.*

⁹²⁴ The Constitution of Kenya (Amendment) Act (No. 17 of 1990), *op. cit.*

The Constitution of Kenya (Amendment) Act (No. 12 of 1991), *op. cit.*

⁹²⁶ B.A. Ogot "Transition from Single-Party to Multiparty Political System. 1989-1993," *op. cit.*

⁹²ⁿ The Statute Law (Repeals and Miscellaneous) (Amendment) Act 10 of 1997, *op. cit.*

^{92s} See section 5.5. The Government responded to the civil society and opposition demands for comprehensive constitution reforms with brutal force leading to violence and deaths placing the country' in a political violence trajectory.

*novo*⁹⁷⁹ To this end, the Constitution of Kenya Review Act, Cap 3A was, described as "an Act of Parliament to facilitate the comprehensive review of the Constitution by the people of Kenya."⁹³⁰ However, despite this, questions as to whether to conduct the comprehensive constitutional review under an ordinary legislation, the Review Act, or whether to entrench the process in the Constitution remained.

9.3.2 Parliamentary v. people driven approach to Constitution making

The above question had fundamental implications on whether to adopt a parliament or people driven approach to Constitution making in Kenya. It also had implications on the legal force required to ensure successful comprehensive review of the Constitution.

Initially, the choice on whether to adopt a parliament or people driven approach or both depended on the interpretation of section 47 of the Constitution. In this respect, three fundamental questions arose. First, was parliament's amendment power under section 47 of the Constitution limited or unlimited in Constitution making? Secondly, without express textual provision in the Constitution on the exercise of people's sovereign right and constituent power to make a Constitution how were the people to exercise this right and power in the context of the Constitution review process? Thirdly, should the exercise of people's sovereign right and constituent power in Constitution

^m *De novo* is a Latin expression meaning "from the beginning." "afresh." "anew," "beginning again."

⁹¹⁰ The Constitution of Kenya Review Act, Cap 3A, *op. cit.*

making be necessarily, written into the Constitution? These jurisprudential issues are, discussed in detail in sub sections 9.5.3 and 9.5.4.

Regarding the first question, one school of thought held that that section 47 of the Constitution was adequate to deliver a new Constitution. As already stated in section 9.2 above, section 47 of the Constitution provided:

"(1) Subject to this section, Parliament may alter this Constitution.
(2) A Bill for an Act of Parliament to alter this Constitution shall not be passed by the National Assembly unless it has been supported on the second and third readings by the votes of not less than sixty-five per cent of all the members of the Assembly (excluding the ex officio members)."⁹³¹

The proponents of the parliamentary approach argued that under the principle of parliamentary sovereignty, parliament as a representative body had unlimited power to make laws including the power to alter and make a new Constitution.⁹ " In particular, their core argument appeared to rely upon section 47(6) (b) which provided that:

"References to the alteration of this Constitution are references to the amendment, modification or re-enactment, with or without amendment or modification, of any provision of this Constitution, the suspension or repeal of that provision and the making of a different provision in the place of that provision."⁹³³

Section 123(9) (b) further clarified that:

"In this Constitution, unless the context otherwise requires, words in the singular shall include the plural, and words in the plural shall include the singular."⁹³⁴

"" **The Constitution of Kenya. Revised edition 2009 (2008). Published by the National Council for Law Reporting with the Authority of the Attorney-General, *op. cil.***

" **Kithure Kindiki. The Emerging Jurisprudence on Kenya's Constitutional Review Law Kenya Law Review [2007] Vol I: pp. 153-187**

⁹³³ **The Constitution of Kenya. Revised edition 2009 (2008). Published by the National Council for Law Reporting with the Authority of the Attomev-General.**

⁹³⁴ ***Ibid.***

Thus from the interpretation of the above provisions, the underlying legal philosophy of the Constitution of Kenya Review Act, 1997 was that Parliament had unlimited power to make, alter and replace any provision and all provisions of the Constitution. It followed therefore, from their contention, that Parliament had unfettered power to undertake comprehensive review of the Constitution and to alter and replace the existing Constitution with a new one through a "Bill to Alter the Constitution."⁹³⁵ The Constitution review process under the Review Act, Cap 3A thus proceeded on this premise until the *Njoya* ruling found that parliament's amendment power was indeed limited.

The second school of thought held the view that section 47 was limited and therefore insufficient to facilitate comprehensive constitution review and deliver a new Constitution. They argued that section 47 of the Constitution neither expressly provided for the enactment of a new Constitution nor set out the procedure for doing so. Parliament could not therefore arrogate itself the power to change the basic structure of the Constitution and to make a new Constitution. This power, was instead, vested in the people by virtue of their sovereignty and constituent power. As the court explained in the *Njoya* case:

"...The constituent power is reposed in the people by virtue of their sovereignty and the hallmark thereof is the power to constitute or reconstitute the framework of government; or in other words, make a constitution that being so, it follows *ipso facto*, that Parliament being one of the creatures of the constitution it cannot make a new constitution. Its power is limited to the alteration of the existing constitution only."⁹³⁶

The court therefore ruled:

⁹³⁵ Detailed discussion on this issue is presented in sub section 9.5.3 of this Chapter on the scope of Parliament's amendment power.

⁹³⁶ *Timothy hijoya A Others v CKRC and the National Constitutional Conference*. High Court Misc. Application No. 82 of 2004 (O.S.). popularly referred to as *The Tiinolv Njoya Case*.

"The power vested in Parliament by sections 30 and 47 of the Constitution was a limited power to make ordinary laws and amend the Constitution, no more and no less."⁹⁷

Thus, before and even after the *Njoya* ruling, the proponents of a people-driven approach to Constitution making advocated for the entrenchment of the review process in the Constitution. In particular, they advocated for the amendment to section 47 in order to expressly, provide for the exercise of people's sovereign right and constituent power in Constitution making.

Although the court ruled that the power to exercise popular sovereignty and constituent power in Constitution making was primordial and needed not be written into the Constitution.⁹⁸ the principle was subsequently written into both the review statutes⁹³ and the Constitution of Kenya (Amendment) Act, No. 10 of 2008. Thus following the court ruling in the *Njoya* case, the post National Constitutional Conference Constitution making process appealed to popular sovereignty and proceeded on the premise that the people reserved the sovereign right to make their Constitution.

⁹⁷ *Ibid*

⁹⁸ It should however be noted that although the court in *Njoya* demonstrated the juridical superiority of the constituent power, it failed to give a clear and definite guidance as to the best means of exercising the constituent power by the people in the Constitution making process. On the one hand, the court ruled that a referendum was mandator) while on the other hand, it indicated that a constituent assembly was also good enough.

⁹⁹ Constitution of Kenya Review (Amendment) Act, 2004 ("the Consensus Act" 2004); and the Constitution of Kenya Review Act, 2008.

9.4 Overview of the court cases in the Constitution of Kenya review process

In the course of the protracted Constitution of Kenya review process, several court cases emerged challenging the constitutional validity of the review law, the process and/or its outcomes. In total, there were fifteen (15) cases filed in court. Of these, eight (8) cases were, brought before the High Court while seven (7) were, brought before the Interim Independent Constitutional Dispute Resolution Court (IICDRC).⁹⁴⁰ Characteristically, all the court cases emerged at very critical moments in the Constitution making process. Below is brief overview of each of the cases on the Constitution review process. Analysis of the jurisprudential elements of the cases is presented present in the next section 9.5 of this Chapter.

*The Rev. Dr. Timothy Njoya and 6 others v. the Attorney-General and 2 others case*⁹⁴¹ was the first Constitution review case filed.⁹⁴² The case challenged the constitutionality of certain aspects of the Constitution of Kenya Review Act, Cap 3A as well as the National Constitutional Conference process. The applicants sought the court's⁹⁴³ orders and declarations on 19 prayers most of which sought to challenge the validity of the National Constitutional Conference.

⁹⁴⁰Justice Samuel N Mukunya, Lady Justice Violet Khadi Mavisi, Lady Justice Scholastica Omondi. Justice Jamila Mohamed. Justice Sankale ole Kantai and Justice Mburugu M'Nkanata Kioga. The foreign judges were Justice Michel Bastarache of Canada. Lady Justice Unity Dow of Botswana and Justice Alistair Cameron of the United Kingdom. The the Panel of Eminent African Personalities list also included Malawian Isaac Jamu Mtambo and Tecla Henry Benjamin of Trinidad and Tobago. It is noteworthy however, none of the foreign judges presided over any of the cases that court presided over.

Rev. Dr. Timothy Njoya. Kepta Ombati. Sophie O. Ochieng'. Joseph Wambugu Gaita. Peter Gitahi. Muchemi Gitahi, and Sdungu Wainaina v. Attorney-General, the Constitution of Kenya Review Commission and the National Constitutional Conference. High Court Misc. Application No. 82 of 2004 (Nairobi).

⁹⁴¹This case was filed on 27th January 2004 just two weeks into the third and final session of the National Constitutional Conference (NCC).

⁹⁴²Per Ringera J. and Ksango Ag J; and Kubo J (dissenting).

The case raised three fundamental constitutional issues. First, whether the power of amendment as provided in section 47 of the Constitution and legislated in sections 26, 27 and 28 of the Constitution of Kenya Review Act, (Cap 3A) allowed Parliament to repeal and replace the entire Constitution. The second issue was whether constituent power enjoyed juristic content, that is, whether the exercise of constituent power by the people should be direct through a referendum or indirect through a constituent assembly. The third issue was whether the skewed representation in favour of less populous areas at the National Constitutional Conference amounted to discrimination against the applicants.

Overall, the crux of the application was fourfold. First, the applicants argued that the non-inclusion of a compulsory referendum on the entire Draft Constitution vitiated the constituent power of the applicants. Second, they argued that the two thirds voting majority at the National Constitutional Conference was unconstitutional.

Thirdly, the applicants held the view that the manner of composition of the National Constitutional Conference was skewed and discriminatory against the applicants. Fourthly, they argued that the manner in which the Constitution of Kenya Review Commission and the Conference conducted their functions did not fairly capture the views of applicants.⁹⁴⁴

The applicants therefore averred that there existed a constituent power of the people embodied in sections 1, 1A, 3 and 47 of the Constitution of Kenya. In addition, the applicants argued that the very existence of the

⁹⁴⁴ Law Africa, *Njoya and Others v. Attorney-General and Others*, the Constitutional Law Digest EALS Practice manual Series No. 3, (2004) I EA 1994, the East African law Society.

constituent power meant that the applicants together with other Kenyans had a right to ratify their Constitution through a referendum or constituent assembly.

Overall, the Court granted seven declarations and orders sought by the applicants while rejecting eleven declarations and orders on the ground that the Court had no jurisdiction over them. Briefly, the court made three rulings, which were to henceforth, change the philosophy and course of the Constitution of Kenya review process.

First, the court ruled that the applicants with other Kenyans had a constitutional right to ratify the draft Bill to alter the Constitution by means of a referendum since the exercise of the constituent power required nothing less than a compulsory referendum.⁹⁴ⁿ Secondly, the court ruled that Parliament did not have the power under section 47 of the Constitution, to repeal the existing Constitution and enact a new one. Thirdly, the court declared section 28 of the Constitution of Kenya Review Act null and void to the extent that it was inconsistent with section 47 of the Constitution.⁹⁴⁶

As highlighted in Chapter Six (6), section 6.5.1 the import of the court ruling in *Njoya* was that the review process could not proceed as originally designed as it could no longer ride on the crest of section 47 of the Constitution. As a result, the situation was such that there was neither a draft Constitution to take to the referendum. Nor were section 47 of the Constitution and the Review

^{M5} More discussion on the concept and exercise of constituent power is presented under section 9.5.2 of this Chapter on exercise of constituent power in Constitution making.

⁹⁴⁶ Section 28 of the Constitution of Kenya Review Act, Cap 3A required Parliament to enact the National Constitutional Conference approved Draft Bill to alter the Constitution (Bomas Draft, 2004) within seven days of its publication.

Act Cap 3A by themselves adequate to conclude the Constitution review process.

In his advice to the Parliamentary Select Committee on the Constitution Review (PSC) presented to the PSC on 25 August 2004, the Attorney-General, Mr. Amos Wako made two key observations. First, that neither section 47 of the Constitution nor the judgement by the Constitutional Court (the *Njoya* case) could repeal the existing Constitution in its entirety and give birth to a new one. Secondly, that despite the primordial nature of the people's sovereign right and constituent power in Constitution making, this must flow from the Constitution itself. This, he argued, "is to be prudent to ensure that the birth of a new Constitution is based on a sound constitutional and legal basis." The National Assembly did however, not heed the Attorney-General's advisory opinion.⁹⁴⁷

Njuguna Michael Kung'u and 2 others v. the Republic, Attorney-General and CKRC case⁹⁴⁸ was the second Constitution review case Filed.⁹⁴⁹ The applicants sought to injunct, under a certificate of urgency, the Constitution of Kenya Review Commission from finalizing and presenting its final report and Draft Bill to alter the Constitution to the Attorney-General pursuant to sections 27 and 28 of the Review Act, 2001. The applicants argued that the National Constitutional Conference had on 15th March, 2004 purported to adopt

Preston Chitere. Ludeki Chweya, Japhet Masya, Arne Tostensen , Kamotho Waiganjo, Kenya Constitutional Documents: A Comparative Analysis. Chr. Michelsen Institute (CMI) Report. R 2006:5/ IPAR Working Paper No. 7/2006 p.4, *op cit*.

⁹⁴⁸*Sjuguna Michael Kung'u, Gacuru wa Karengi A Nicholas Mugo v. the Republic, Attorney-General and CKRC*. High Coun Misc. Application No. 309 of 2004 (Nairobi).

⁹⁴⁹ Then case was filed on 22nd March 2004 just one day to the 23^d March 2004 final adoption act of the Draft Constitution of Kenya 2004 by the National Constitutional Conference.

certain chapters of the draft Bill⁹⁵⁰ in violation of the Constitution of Kenya Review Act, 2001 (Cap 3 A).

The applicants further argued that the debate on the particular chapters of the Draft Bill was not only conducted *ultra vires* the provisions of the Review Act, 2001 but also marred by confusion, intimidation and threats. The applicants therefore held the view that they would be prejudiced if the Draft Bill so adopted by the National Constitutional Conference (NCC) was presented to the Attorney-General in terms of the Review Act, 2001.

The court in its ruling prohibited the Commission from preparing its final report and the draft Bill in relation to the said chapters in the draft Bill. It further prohibited the Attorney-General from receiving the final report and the draft Bill from the Commission under section 28 (1) (2) (3) of the Review Act 2001 until the final determination of the matter.

The effect of the court ruling in the *Njuguna Kung'u* case was that there was no draft Constitution to present to the referendum following the earlier *Njoya* ruling that this was mandatory. It is against this backdrop Parliament moved to undo this imbroglio by amending the Review Act 2001 to complete the process.⁹⁵¹

Martin Shikuku case⁹⁵² was largely a reaction to the Court ruling in the *Njoya* case. The applicant sought the court's declaration of all constitutional amendments since 1963 unconstitutional. The applicant also wanted the court to

The Chapters the applicants were concerned about included Legislature; the Executive; Devolution; Public Finance and Revenue Management; and Transitional and Consequential Provisions.

⁹⁵¹ See Chapter Six sub section 6.5.1 on the process leading to the enactment of the Constitution of Kenya Review (Amendment) Act, 2004, commonly referred to as the Consensus Act.

⁹⁵² *Martin Shikuku v Attorney-General*, 2004

order the submission of the Draft Constitution of Kenya 2004 (Bomas Draft) to the people of Kenya for ratification in a referendum as adopted by the National Constitutional Conference (NCC) and without any alteration.

In the interim period, the applicant wanted the court to declare all debates, discussions and actions on the Bomas draft prohibited. After Parliament passed the Constitution of Kenya Review (Amendment) Act 2004 ("the Consensus Act"), this case became moot.

Peter Mwalimu Miwa v. the Attorney-General and the Constitution of Kenya Review Commission (CKRC) case⁹⁵³ sought a declaration that the Review Act was invalid to the extent that it was inconsistent with section 47 of the Constitution. The applicant never pursued the case after the court decision in the *Njuguna Kung 'u* case.

*Patrick Ouma Onyango and 13 others v. the Attorney-General and 2 others*⁹⁵⁴ case sought the court's⁹⁵⁵ orders and declarations on sixteen (16) prayers. The main thrust of the application was the prayer for court to stop the impending referendum on the Proposed New Constitution scheduled for 4th November 2005 pending the determination of the case.

The applicants felt that the Constitution of Kenya Review (Amendment) Act, 2004 (Consensus Act, 2004) was *ultra vires*, unconstitutional and null and void because of a number of issues. First, the Consensus Act was

The Peter Mwalimu Miwa v. the Attorney-General and CKRC. HCCC No. 1 of 2004 (Mombasa).

⁹⁵⁴ *Patrick Ouma Onyango. Bishop Stephen Karemu Muketha. Michael Gitahi Ngonyi, Boa: Waruku. Rebecca Mbithe Kitana. Catherine Wainmu. Samson Oyiayo Owimba. Rone Achoki. Monicah Amolo. Paulo O. Angwenyi. John Indimuh B. O. Oduor. Henry Maina and James Maina Kabute v. Attorney-General. CKRC and ECK, High Court Misc. Application No. 677 of 2005 (Nairobi).*

⁹⁵⁵ Per J.G. Nyamu J.; R. Wendo J.; and M.J. Anyara Emukule. (Justice Emukule was Delegate No. at the National Constitutional Conference and Convenor of the Technical Working Committee "D" on the Executive before his appointment as a Judge of the High Court).

unconstitutional because it introduced unconstitutional amendments to the Principal Act, the Constitution of Kenya Review Act, Cap 3 A.

Secondly, it was unconstitutional because it conferred excess powers on the National Assembly to make, debate, amend, alter or work on another new Constitution and to alter or mutilate the Draft Constitution of Kenya 2004 (Bomas Draft) without reference to the people. Thirdly, the applicants held the view that the Consensus Act conferred powers excess to the Constitution on the President to promulgate the Constitution.

The applicants therefore contended that both the National Assembly and the President had unconstitutionally usurped and desecrated the people's sovereign right to make their own Constitution. In all probabilities, this could lead to the socio-economic and political instability of the Republic of Kenya.

The applicants argued further that it was constitutionally undesirable, undemocratic and against sovereign will of the people for the National Assembly and the Attorney General to usurp the Constitution review process and to impose a Constitution on them contrary to their plain views. To the applicants this was unconstitutional and constituted an abuse and infringement on their rights and sovereignty.

The applicants therefore argued that even if a simple majority at the referendum ratified the proposed new Constitution, it would never win universal acceptance and application in Kenya since it was a product of an illegal and unconstitutional process.

The court was unanimous that no one could fault Parliament for undertaking the role of passing the Consensus Act 2004 and for proposing

certain amendments to the Bomas draft. In any case, the court held that parliament had the mandate of the people to originate debate on the draft, especially so when it had made a marked effort to seek external views and made consultations.⁹⁵⁶

On the question of whether the Constitution making should have been anchored in the express provisions of the Constitution as opposed to an Act of Parliament, the court held that a common thread in the Constitution making in African countries was that the process had been invariably anchored on an Act of Parliament. The court was therefore of the view that section 47 needed not be amended to midwife a new Constitution. The court argued that "the power to amend is derivative whereas the Constitution making power is primary hence it is not provided for in the current Constitution and need not be textualized."⁹⁷

The court finally declined to grant the prayers seeking to stop the referendum. The court stated that nobody could restrain the people's constituent power and that its exercise was not dependent on whether or not it was textualized in the existing Constitution. In other words, any external force could not fetter the exercise of the constituent power.⁹³⁸

Reverend Dr. Jesse Kamau and 25 others''' v. *the Attorney-General and Another case*⁰¹ was filed after the National Constitutional Conference adoption

^{9.6} B.O. Nwabueze. *Presidentialism in Commonwealth Africa* (1974). L. Hurst and Co., p. 407

⁹⁵ *Patrick Ouma Onyango and 13 others v. Attorney-General and 2 others*. High Court Misc. Application No. 677 of 2005 (Nairobi), p. 77.

f *Ibid*

'''' The other 25 applicants include Bishop Silas Yego. Bishop Margaret Wanjiru. the Right Rev. Dr. David Githii. Bishop Arthur Gitonga, Bishop Boniface Adoyo, Bishop Mark Karuiki, Bishop William Tuimising. Bishop Justus Musyoka, Bishop Robert Maliri. Bishop Stephen Kiguru. Bishop Gerry Kabarabara. Bishop Patrick Mungai. Bishop Justus Wanjala, Bishop Peter Njiiri. Bishop Isaiah Kyalo, Bishop Stephen Kanyaru, Bishop Jefferson Nyatuka. Bishop Arthur Kitonga. Bishop Richard Kimwele, Bishop Joseph Ogutu. Bishop Peter Karanja. Rev. Kepha

of the Draft Constitution of Kenya 2004. The applicants wanted the court * to declare that Kadhi's Court Act and the inclusion of Kadhi's Court in the Constitution or any draft Constitution as unconstitutional, discriminatory and of no effect. The applicants' main argument was that section 66 of the Constitution of Kenya⁹⁶³ contradicted and offended the provisions and the spirit of Chapter V of the Constitution on "protection of fundamental rights and freedoms of the individual", and therefore, discriminated against them. They further argued that there was no valid basis whatsoever for the inclusion of Kadhi's courts in the Constitution and to extend its jurisdiction.

The applicants therefore averred that that any or all provision(s) such as Section 66 of the Constitution and relevant articles of the "Bomas draft" that sought to introduce and/or entrench, advance, give special preference to any religion or sectarian religious interests in the Constitution was discriminatory, oppressive, retrogressive, unconstitutional null and void. In particular, the applicants argued that the enactment of the Kadhi's Courts Act and the financial

Omae. Bishop Charles Mugo. Rev. Patrick Murunga. Rev. James Maina and Rev. Ambrose Nyang'au.

The very Rt. Rev. Jesse Kamau & 25 Others v. the Attorney-General and the defunct Constitution of Kenya Review Commission, HC Misc Civ. Appl. 890 of 2004 (Nairobi). This case was filed on 12th July 2004 and was subsequently amended twice, first, on 30th November 2004, pursuant to the order of the court made on 16th November 2004, and second, on 1st February 2005, pursuant to leave of the court given on 31st January 2005.

⁹⁶¹Summary of the Pertinent Facts, Submissions, Holdings and Final Orders in the decision of the Constitutional Court in the case of *Jesse Kamau & 25 others v. Attorney-General* [2010] eKLR. May 25, 2010.

Per G. Nyamu JA. R.V.P. Wendoh. and M.J. Anyera Emukhule. JJ.

* ' Section 66 of the Constitution provided among others that (1) There shall be a Chief Kadhi and such number, not being less than three, of other Kadhis as may be prescribed by or under an Act of Parliament. (3) Without prejudice to section 65 (1), there shall be such subordinate courts held by Kadhis as Parliament may establish and each Kadhi's court shall, subject to this Constitution, have such jurisdiction and powers as may be conferred on it by any law. (5) The jurisdiction of a Kadhi's court shall extend to the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion.

maintenance and support of the Kadhi's courts from public coffers was discriminative and unjust, and to that extent, unconstitutional, null and void.

The court delivered its ruling on the case on 24th May 2010.⁹⁶⁴ In its judgment, the court held that sections 66 and 82 of the Constitution were inconsistent with each other. The court also held that the financial maintenance and support of the Kadhi's courts from public coffers amounted to separate development of one religion and religious practice contrary to sections 70, 78, 82 and 1A of the Constitution. The court further found that the purported extension of the Kadhi's courts through the enactment of the Kadhi's Courts Act beyond the former Protectorate areas was unconstitutional, null and void.

The court therefore granted that any form of religious courts should not form part of the Judiciary in the Constitution as it offended the doctrine of separation of state and religion. It also held that the entrenchment of the Kadhi's courts in the Constitution was discriminatory as it elevated and uplifted the Islamic religion over and above the other religions in Kenya contrary to sections 78 and 82 of the Constitution.

Despite finding section 66 superfluous and inconsistent with sections 78, 82 and 1A of the Constitution, it remained in the Constitution simply because it was not its role to expunge it. Under the doctrine of separation of powers, this role belonged to Parliament and the people of Kenya in a referendum.

⁹⁶⁴ Various analysts questioned the intention and timing of this ruling given the fact that it was delivered on 24th May 2010, fourteen (14) months after its conclusion and only two weeks after the publication of the Proposed Constitution of Kenya, 2010 on 6th May 2010. More curiously, the court delivered its ruling only about two months to the referendum on the Proposed Constitution of Kenya scheduled for 4^k August 2010.

The court decision raised a political storm with various analysts questioning the motive behind the timing of the ruling of a case. To many legal and political analysts, the court ruling was yet another example of the growing menace of judges who decided cases according to their own whims and most probably, that of the ruling elite regardless of the law. Mr. Ababu Namwamba, MP, commenting an article entitled "Judges accused of settling scores over law"⁹⁶⁵, branded the decision as 'irresponsible, mischievous and politically motivated." Mr. Ababu Namwamba, MP, stated:

"The judges' ruling that Kadhi courts' inclusion in the current law unconstitutional was an attempt to use their position to express their dissatisfaction before the axe falls on them. The ruling is inconsequential and should be ignored with the contempt it deserves. It is ill-motivated and made in bad faith with a sole intention of scuttling the Constitution making process."⁹⁶⁶

1. Muganda and B. Biriq also questioned the judges' legal reasoning. They, for example wondered why the judges found section 66 of the Constitution of Kenya and not sections 82 or 65 to be at fault. They posed the question, were the judges trying to tell Kenyans that in terms of importance, the latter section was the test against which the preceding sections are tested thus informing their selection?

QZO

Justice Mohammed Ibrahim in the *Bishop Joseph Kimani* also questioned the jurisprudential competence of the court in the *Jesse Kamau* Case

"•'Ababu Namwamba (2010). "Judges accused of settling scores over law", Sunday Nation, 30th May 2010.

⁹⁶⁶ *Ibid*

⁹⁶ I. Muganda and B. Biriq. "Ruling on Kadhis' Courts was judicial impunity". East African Standard. 2nd June 2010.

^M *Bishop Joseph Kimani Rev Klusyoka Nzui and Agnes Mbinya v. the Attorney-General, the Committee of Experts (CoE) and the Chairman of the Parliamentary Select Committee (PSC)*,

its ruling.⁹⁶⁹ Justice Ibrahim stated that it was jurisprudentially wrong for the judges⁹⁷⁰ to question the constitutionality of the Constitution. He pointed out that "all sections of the Constitution are the same and none is superior to the other."⁹⁷¹ In his opinion therefore, the court as a legal creature of the Constitution is subject and inferior to the Constitution and therefore lacked the power to decide on which section is inconsistent with another. He argued that purporting to do so "would be the height of judicial arrogance and usurpation of the supremacy and legislative functions of Parliament."⁹⁷²

Bishop Joseph Kimani and 2 others v. the Attorney-General and 2 others case^{y13} was filed one month after the publication of the Harmonized Draft Constitution, 2009. The petitioners argued that their rights would be infringed upon by, among other things, the inclusion of Kadhi's courts in the new Constitution. They also complained that the provision for "YES" and "NO" answers in the referendum was undemocratic as it left them with limited options but to only agree or disagree with the entire document.⁹⁷⁴

HC No. 669 of 2009 (Mombasa). It should be noted that Justice Mohamed Ibrahim delivered his judgment in the Bishop Kamau case on 31st May 2010 only about one week after the court in the Jesse Kamau case delivered its judgement 24th May 2010.

⁹⁶⁹ *Jesse Kamau and 25 others v. the Attorney-General and another*, HC Misc Civ. Appl. 890 of 2004 (Nairobi).

⁹⁷¹ Per Joseph Nyamu, J., Roselyn Wendoh, J. and Anyara Emukule, J.

⁹⁷⁰ *Bishop Joseph Kimani, Rev Musyoka Nzui and Agnes Mbinya v. the Attorney-General, the Committee of Experts (CoE) and the Chairman of the Parliamentary Select Committee (PSC)*, HC No. 669 of 2009 (Mombasa).

⁹⁷² *Ibid*

⁹⁷³ *Bishop Joseph Kimani Rev Musyoka Nzui and Agnes Mbinya v. the Attorney-General, the Committee of Experts (CoE) and the Chairman of the Parliamentary Select Committee (PSC)*, HC No. 669 of 2009 (Mombasa).

"This complaint is consistent with the drawbacks pointed in Chapter Six section 6.6 of this thesis on the use of referendum as a tool to decide on whole constitutional documents which may contain constitutional proposals that do not necessarily represent the views or wishes of all people. Also see Leduc Lawrence on "Opinion Change and voting behaviour in referendums" *European Journal of Political Research* Vol. 41, 2002 at 712.

Mr. Justice Mohammed Ibrahim however, ruled that the Court had no jurisdiction over any matter touching on the constitutional review process since this belonged to Interim Independent Constitutional Dispute Resolution Court.

Mary Ariviza v. the Interim Independent Electoral Commission (IIEC) and the Attorney-General case,⁹⁷ⁿ was filed on 18^h August 2010. The applicant sought to quash the Gazette Notice No. 9360, which purported to be a certificate of the results of the Referendum and to stop the promulgation of the new Constitution. Justice H.M. Okwengu however, found that the court had no jurisdiction over the complaint. She therefore referred the applicant to the Interim Independent Constitutional Dispute Resolution Court (IICDRC).⁹⁷⁶

Priscilla Nyokabi Kanyua v. the Attorney-General and IIEC^J case was the first of the seven cases filed before the Interim Independent Constitutional Disputes Resolution Court (IICDRC).

The petition asserted that the inmates of Shimo la Tewa prison acting through the Chairman of the Shimo la Tewa Paralegals Association authorized Kituo cha Sheria to petition the relevant authorities tasked with the responsibility of registering voters for upcoming referendum to consider the need for the prisoners to participate in the exercise. The authorization was contained in an unsigned letter dated 24^h April 2010 by one Dismus Omondi who wrote in his capacity as the Chairman of the said Prisoners Paralegal Association

^{9 5} *Mary Ariviza v. the Interim Independent Electoral Commission (IIEC) and the Attorney-General*. Misc. Application No. 273 of 2010.

⁹⁷⁶ Section 46(1) of the Constitution of Kenya Review Act 2008 read together with section 60(A) of the Constitution gave exclusive original jurisdiction to deal with any and all disputes arising from the Constitution of Kenya review process.

Priscilla Nyokabi Kanyua v. The Attorney-General and IIEC. Constitutional Petition Number 1 of 2010.

The petitioner ⁷⁵ acting on behalf of prisoners sought the court's orders on three key prayers. First, the sought the court's declaration that section 43 of the Constitution of Kenya did not exclude prisoners from voting in a referendum except from voting in Presidential and National Assembly elections. Secondly, the petitioner wanted the court to declare that the HEC's exclusion of prisoners from its voter registration exercise was illegal. The petitioner argued section 41A (d) of the Constitution of Kenya did not expressly prescribe limitation excluding any category of people from fresh registration of voters and creation of a new voters' register for the upcoming referendum. Thirdly, the petitioner argued that the Interim Independent Electoral Commission could not imply the disqualification of prisoners to register to vote in the referendum within the meaning of section 43 of the Constitution of Kenya.⁹⁷⁹

The petitioner therefore wanted the Court to first, instruct the Interim Independent Electoral Commission (IIEC) to create a new voters register for the up-coming referendum and do so by including the inmates in prison for the purpose of upcoming referendum on 4th August 2010. Secondly, that the Interim Independent Electoral Commission (IIEC) extends the period for voter registration for the purposes of including the excluded inmates.

⁷¹ Ms Priscilla Nyokabi Kanyua filed the petition on behalf of inmates of Shimo la Tewa prison through the Chairman of the Shimo la Tewa Paralegals Association after the Chairman of the Interim Independent Electoral Commission failed to act on her letter dated 20th April 2010 petitioning the IIEC to register prisoners as voters for the referendum on the Proposed Constitution of Kenya 2010.

Section 43 (2Xc) of the Constitution disqualified persons detained in lawful custody from registering as voters in national assembly and presidential elections.

In their judgement delivered 23^j June 2010, the judges⁹⁸⁰ made five key orders. First, that section 43 of the Constitution of Kenya⁸¹ did not in any way exclude inmates who were over 18 years of age and of sound mind and who had not committed an electoral offence from voting in a referendum. Secondly, that the Interim Independent Electoral Commission (IIEC) gazettes the prisons as polling stations. Third, that Interim Independent Electoral Commission (IIEC) facilitates the registration of all eligible inmates within 21 days from 24^h June 2010 to enable those who wished to vote in a referendum to do so without any hindrance.

Fourthly, that the Attorney-General and the necessary authorities facilitate the accessibility of prisons and the prisoners' identification documents to enable the Interim Independent Electoral Commission to register those inmates who wished to do so in the time specified. Fifthly, for the avoidance of doubt, the court clarified that the orders made only related to the referendum.

In compliance with the above orders, the prisoners who met the eligibility criteria set out in section 43 of the Constitution did register as voters and all the prisons were subsequently gazetted as polling stations. The case was a landmark in the electoral history of the country as for the first time, it gave prisoners a right to vote in the referendum even though that right was only restricted to the 2010 referendum period.

^{9.0} Samuel N. Mukunya J., Jamila Mohammed J., Scholastica Omondi. J. and Sankale Ole Kantai J.

^{9.1} Section 43(2) of the Constitution provided that "no person shall be qualified to be registered as a voter in elections to which this section applies - (a) if, under any law in force in Kenya, he is adjudged or otherwise declared to be of unsound mind; or (b) if he is an undischarged bankrupt, having been adjudged or otherwise declared bankrupt under a law in force in Kenya; or (c) if he is detained in lawful custody; or (d) if he is disqualified therefrom by Act of Parliament on the grounds of his having been convicted of an offence connected with elections or on the grounds of his having been reported guilty of the offence by the court trying an election petition."

Edris Nicholas Omondi and 8 Others v. the Attorney-General and Committee of Experts case⁹⁸² was instituted by a group of lawyers and doctors concerned about the inclusion of Articles 26(4) on abortion and 32 on freedom of conscience, religion and opinion in the Proposed Constitution of Kenya 2010. Article 26(4) read:

"Abortion is not permitted unless, in the opinion of a trained health professional, there is need for emergency treatment, or the life or health of the mother is in danger, or if permitted by any other written law."⁹⁸⁵

They wanted this article replaced with Article 34(3) as contained in the Bomas draft, which stated:

"Abortion shall not be permitted unless, in the opinion of a registered medical practitioner, the life of the mother is in danger."⁹⁸⁴

The petitioners further wanted Article 32 of the proposed Constitution on freedom of conscience, religion, belief and opinion replaced with Article 32 as contained in the revised harmonised draft. They claimed that CoE exceeded its mandate when it purported to change clauses regarding the rights to freedom of conscience, religion and opinion by entirely drafting new provisions. They wanted the Interim Independent Constitutional Dispute Resolution Court (IICDRC) to strike out the said provisions because they did not represent the views and opinions of petitioners.

The Court in its consideration dismissed the petition arguing that the bulk of the complaints related to issues of substance of the Draft Constitution

⁹² *Edris Nicholas Omondi and 8 Others v. the Attorney-General and Committee of Experts*. Constitutional Petition No. 2 of 2010.

⁹⁵ The Proposed Constitution of Kenya 2010. Article 26(4).

⁹⁴ The Proposed Constitution of Kenya 2004. Article 34(3).

which was outside its jurisdiction. The Court argued that its mandate related only to the process of the review and not the content of the Proposed Constitution of Kenya 2010. The court pointed out that in the petition, no issues of process were raised that the court could determine.

Andrew Omtatah Okoiti and 5 others v. the Attorney-General and 2 others case⁹⁸⁵ raised a litany of complaints encompassing both the process of the Constitution review and the content of the Proposed Constitution of Kenya 2010. The petitioners argued that the final draft Constitution submitted to the PSC by the Committee of Experts was irredeemably in violation of both the constitutional obligations of the CoE and the constitutional rights of all Kenyans. The petitioners therefore asked the Court to stop and postpone the referendum process scheduled for 4th August 2010 to allow the rectification of the errors in the review and referendum process.

The court,⁹⁸⁶ however, in their ruling delivered on 2nd August 2010 declined to issue the orders the petitioners sought arguing that their claim that they would not have a free and fair referendum had no merit. The court also held that the Attorney-General, the Interim Independent Electoral Commission (IIEC) and the Committee of Experts (CoE) on the Constitution Review had exercised their mandate in accordance with the law and that there was no evidence adduced before the court to sustain most of the complaints raised in the case.

Andrew Omtatah Okoiti, Maximilia Muninzwa, Ouma Odera, Frederick Odhiambo Awuor Kyatado, Sarah Nyokabi, and Prof Barrack Otiemo Abonyo v. the Attorney-General, the Committee of Experts and the Interim Independent Electoral Commission. Constitutional Petition Number 3 of 2010.

^{9,6} Samuel N. Mukunya, J. Violet Mavisi, J. and Sankale Ole Kantai J.

The Judges also declined issue the order sought with respect to allowing Kenyans living abroad to register and vote in the referendum. The court held that "issuing such an order would jeopardise the referendum. Such a remedy should be made available in future." The court further dismissed the claims that the Attorney-General irregularly published two different documents. The Judges termed the insertion of words "national security" in the Proposed Constitution of Kenya from the Government Printer as the work of criminals and that it would not give it credit. As to the request to the court to order cancellation and/or postponement of the scheduled 4th August 2010 referendum, the court ruled that giving such an order would jeopardise the referendum.

Bishop Kimani and 2 Others v. the Attorney-General and 2 others case⁹⁸⁷ filed on 12th July 2010 was primarily a sequel to *Joseph Kimani*,^m *Jesse Kamau*⁹⁸⁹ and to some extent, *Andrew Omtatah Okoiti*.⁹⁹⁰

The petitioners stated that they were born again Christians who professed and practised the teachings of the Holy Bible in matters touching on faith, morality, family and true worship. They also said that they were spiritual leaders of numerous churches spread all over the Coast Province of Kenya, other parts of Kenya and the world.

^{*} *Bishop Joseph Kimani Rev Musyoka Nzui and Agnes Klbinya v. the Attorney-General, the Committee of Experts (CoE) and the Chairman of the Parliamentary Select Committee.* Constitutional Petition no. 4 of 2010.

^{QU} *Bishop Joseph Kimani Rev Musyoka Nzui and Agnes Mbinya v. the Attorney-General, the Committee of Experts (CoE) and the Chairman of the Parliamentary Select Committee (PSC),* HC No. 669 of 2009 (Mombasa).

⁹⁹ *Jesse Kamau and 25 others v. the Attorney-General and another.* HC Misc Civ. Appl. 890 of 2004 (Nairobi).

⁹⁹⁰ *Andrew Omtatah Okoiti, Maximilia Muninzwa. Ouma Odera. Frederick Odhiambo Awuor Syatado, Sarah Nyokabi. and Prof Barrack Otieno Abonyo v. the Attorney-General, the Committee of Experts and the Interim Independent Electoral Commission,* Constitutional Petition Number 3 of 2010.

The petitioners claimed that by declaring at the very outset that the Kadhi's courts issue was never going to be a contentious issue, the CoE blatantly abused their human rights. The petitioners therefore held the view that the entire review process was flawed, oppressive and discriminative as it denied them and their followers the inherent power to participate in the Constitution making process.

In their ruling delivered on August 2, 2010, Judges*" rejected the petitioners' argument that section 60A of the Constitution was a superior provision having come into force recently and the other provisions must give way to it. The Judges refused to agree with the proposition that one provision of the Constitution is superior to the others. This was because the Constitution as a supreme law is a wholesome and living document that operates through all the provisions, not one.

The court also refused to associate with the *Joseph Kimani* case judgment stating that it was not binding on them or any other Judge. The court pointed out the fact that Justice Mohamed Ibrahim, J. in Mombasa HC Petition No. 669 of 2009 had criticized the said judgment as not meeting known legal standards of constitutional interpretation.

In respect of the prayer, that the court expunges Kadhi's courts from the Proposed Constitution of Kenya 2010 in view of the court's judgement in the *Jesse Kamau*, the court refused to follow this ruling. Finally, the court found that the petitioners' grievances were both misconceived and lacking valid reason to postpone the referendum scheduled for Wednesday, 4th August, 2010.

⁹⁹¹ V. K Mavisi, J. S. N. Mukunya. J. and S. Ole Kantai. J.

Alice Waithera Mwaura and II Others v. CoE and 2 Others case⁹⁹² arose from an initial case of *Alice Waithera Mwaura & Others v. the Electoral Commission of Kenya & Another*⁹⁹³ filed on 18th January 2007. The January 2007 petition sought *inter alia*, orders to compel the Electoral Commission of Kenya (ECK) to carry out the long overdue constituency review exercise in accordance section 42 of the Constitution of Kenya in order to redress the systematic political marginalization of Nairobi voters.

However, when the petition came up for hearing, the circumstances had not only changed but it was also obvious to the petitioners that the Proposed Constitution of Kenya on 6th May 2010 had failed to redress the grievances that precipitated the filing of the Petition No. 28 of 2007. Thus although the petitioners wished to continue with the petition to its logical conclusion at the High Court, its hearing could now only proceed before the Interim Independent Constitutional Dispute Resolution Court (IICDRC).⁹⁹⁴

The Petitioners complained that the Committee of Experts (CoE) had completely ignored some matters concerning land, Kadhi's courts and the Bill of Rights, which were equally contentious. Instead, CoE only identified and insisted on three issues as contentious, namely Systems of Government i.e. the nature of Executive and Legislature; Devolution; and Transitional Clauses. The

Alice Waithera Mwaura. Consolata Wanjiru Mucuka. Paulina Wambui Njuguna. Margaret Njeri Gakio. Benirita Kerwira Njeru. Bella Kaiondu Mutuku, Peter Ndirangu Kariuki. John Maina. Stephen Okinda. Ronald Orcere, James Kiiru Nderitu. John Mburu Kiarie and Susan Nyagului v. the Committee of Experts, the Hon. Attorney-General and the Interim Independent Electoral Commission, Constitutional Petition No. 5 of 2010.

" *Alice Waithera Mwaura & others v. the Electoral Commission of Kenya & another, High Court Petition No. 28 of 2007.*

Section 60A (I) of the Constitution stated that "notwithstanding section 60 there shall be an Interim Independent Constitutional Dispute Resolution Court which shall have exclusive original jurisdiction to hear and determine all and only matters arising from the Constitutional review process".

Petitioners further complained that the CoE failed to publish a comprehensive summary of the views submitted by Kenyans after soliciting views on the contentious issues. To this end, the main Report published by the CKRC on 18th September 2002 remained the main summary of the views of Kenyans on a new Constitution.

The petitioners were therefore convinced that the Proposed Constitution of Kenya neither faithfully reflected the views of Kenyans nor the consensus of the Parliamentary Select Committee on the Constitution Review. The main thrust of the petitioners' argument was therefore that some of the provisions of the Proposed Constitution of Kenya were either unconstitutional, illegal or a threat to Kenya's sovereignty. The Petitioners therefore asked the Court to redress the matters of content and violations of procedural law and to stop the IIEC from conducting the referendum.

The Court, just like in previous petitions ruled that its mandate rested on issues to do with process and that questions of content were best left to the people to determine during the referendum. It hence refused direct either the CoE or any other organ on what the contents of the Proposed Constitution should be. The Court also declined to stop the referendum arguing that the stage at which the review process the people themselves by their vote at the referendum could alter the contents of the Proposed Constitution. The court thus declined to give all the orders sought by the petitioners.

*Andrew Omlatah Okiiti and 5 others v. the Attorney General and 2 Others case*⁸ raised a litany of complaints encompassing both process and content issues. The petitioners claimed that the three respondents' systematic failure to respect and obey the Constitution of Kenya and statutory provisions gravely, fundamentally and irreversibly compromised their ability to participate fully in the replacement of the Constitution.

In relation to the review process, the petitioners accused the Committee of Experts, the Interim Independent Electoral Commission and the Attorney-Generals for failing in their duties thereby gravely violating their rights. The petitioners accused the Committee of Experts for failing to adequately engage the public and collect their views in identifying, articulating and resolving the contentious issues. They also accused the Committee of Experts for conducting its activities and operations in an opaque and undemocratic manner without reflecting the views and wishes of majority of Kenyans. The petitioners complained about the failure of the Committee of Experts to facilitate impartial and lawful civic education without showing preference for either the Yes or the No side.

Other complaints about the Committee of Experts included its failure to consult members of marginalised communities like the Marakwet, the Teso, the Kuria and the Mbeere to identify several substantial contentious issues such as the Kadhi's courts, and the structures of devolution and to revise the draft

Andrew Omtatah Okiiti. Maximilia Muninzwa. Ouma Odera, Frederick Odhiambo Awuor Nyatado. Sarah Nyokabi. And Prof Barrack Otieno Abonyo vs Attorney General, the Committee of Experts and the Interim Independent Electoral Commission Constitutional Petition Number 3 of 2010

Constitution taking into account the achieved consensus of the Parliamentary Select Committee.

The petitioners accused the Interim Independent Electoral Commission for failing to design a referendum in a manner that would help to resolve the contentious issues either via a multiple-choice referendum on contentious issues or a vote on an addendum of contentious issues. They also complained about the failure of the Interim Independent Electoral Commission to allow adult Kenyan citizens in the Diaspora the facilities and right to register for voting in the referendum, and to cast their votes in the referendum scheduled to replace the Constitution. The petitioners further complained about the failure of the IIEC to comply with the express and implied meaning of section 43 of the Constitution by providing a short registration period of about fifty days and not extending registration to Kenyans in the Diaspora.

On his part, the petitioners claimed that the Attorney General purported to rely on the Review Act to introduce "editorial alterations" in clear and contemptuous disregard of the Constitution and of the rights of Kenyans to participate in a referendum in regard to the draft Constitution approved by Parliament.

In respect of the contents of the proposed Constitution, the Petitioners complained that the Committee of Experts received the PSC draft and revised it beyond the mandate provided in section 33(1) of the Review Act. The petitioners therefore argued that the final draft Constitution submitted to the PSC and then subsequently to the National Assembly by the Committee of

Experts was irredeemably, in violation of both the constitutional obligations of the CoE and the constitutional rights of all Kenyans.

The Petitioners therefore asked the Court to either exercise its supervisory jurisdiction over each organ of the review process. Alternatively, to issue various orders stopping and postponing the referendum process scheduled August 4th 2010 to allow the rectification of the errors in the review and referendum process.

In their ruling delivered on August 2, 2010, the Judges⁹⁹⁶ declined to issue the orders the petitioners sought. The Court held that the Attorney-General, Interim Independent Electoral Commission and Committee of Experts exercised their mandate in accordance with the law and that there was no evidence adduced before the Court to sustain most of the complaints raised in the case. With respect to civic education, the Court absolved the organs entrusted with the duty to conduct civic education of the claims of bias.

On the issue of allowing Kenyans living abroad to register and vote in the referendum, the Judges declined to make specific orders but recognised the need to have eligible Kenyans living abroad registered for future elections. Instead, they recommended the need to Kenyans living abroad with interest in the country's welfare to vote in future.

On the claims that the Attorney general irregularly published two different documents, the Court held that the petitioners failed to show that the editorial alterations made to the draft by Attorney General had the effect of changing the document. The Court stated:

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"The alterations never had the effect to make the document alien. No principle was removed or added and it would be wrong to argue that the document has lost its character."

On the claims that the Attorney general irregularly published two different documents, the judges termed the insertion of words 'national security' in the Proposed Constitution from the Government printers as the work of criminals and that it would not give it credit. As to the request that the Court orders cancellation and/or postponement of the August 4, 2010 referendum on the various grounds raised, the Court ruled that giving such orders would jeopardise the referendum.

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In the *Nazlin Rajput v. the Attorney-General and 2 others* case, the petitioner raised several issues. These included the conduct of civic education by the Committee of Experts (CoE), the lack of an oath by the Prime Minister and whether the date for promulgation should be August 20, 2010 or August 27, 2010. The petitioner in particular asked the court to declare the promulgation date of 27th August 2010 illegal and a violation of the present Constitution. The petitioner argued that failure to promulgate the Constitution on or before 20th August 2010 would lead to a constitutional crisis as there would be no legitimate government in place.

In their ruling delivered on August 24, 2010, just three days to the promulgation date, the Judges⁹⁹⁸ stated that the Review Act, 2008 clearly outlined to the Interim Independent Electoral Commission (IIEC) the flow of events which was dutifully followed. In this regard, the court held that the IIEC,

" Nazlin Rajput v. the Attorney-General, the Interim Independent Electoral Commission (IIEC) and the Committee of Experts (CoE). Constitutional Petition No. 6 of 2010.

Violet Mavisi. J. Samuel Mukunya, J.. Jamila Mohammed. J.. Scholastica Omondi, J. and Sankale Ole Kantai. J.

as required by the law, duly published the results of the referendum of August 4, 2010 on August 6, 2010.

The court further held that the Constitution of Kenya Review Act, 2008 created an in-built mechanism through which the new Constitution would take effect even without the President promulgating it. The court pointed out that for instance. Article 263 of the new Constitution that provided:

"This Constitution shall come into force on its promulgation by the President or on the expiry of a period of fourteen days from the date of the publication in the Gazette of the final result of the referendum ratifying this Constitution, whichever is the earlier."⁹⁹⁹

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Mary Ariviza and Okotch Mondoh v. the Attorney-General and another case sought to stop the promulgation of the new Constitution on the ground that irregularities marred the referendum. The petitioners therefore sought to have the referendum results published on August 6, 2010 cancelled and a recount ordered. This included a scrutiny and recount of all the ballot papers and counterfoils, registers and tally sheets for all votes cast on the polling day of August 4, 2010. They also wanted an independent audit of the software used in transmitting and tallying results from constituencies during the referendum. Most importantly, the petitioners wanted the referendum results declared null and void.

⁹⁹⁹ The Proposed Constitution of Kenya 2010. published on 6th May 2010.

¹⁰⁰⁰ *Mary Ariviza and Okotch Mondoh v. the Attorney-General and the Interim Independent Electoral Commission (IIEC)*. Constitutional Petition No. 7 of 2010. It should be note that this petition was filed a day after the filing of the *Mary Ariviza v. the Interim Independent Electoral A another case* on the 18th August 2010 at the High Court Civil Registry at Nairobi. However, following Justice H.M. Okwengu's ruling dismissing the *Mary Ariviza v Interim Independent Electoral A another case*, on the same day, the petitioner rushed to the Interim Independent Constitutional Dispute Resolution Court (IICDRC) at 4.00 p.m. and filed a Notice of Motion under a Certificate of Urgency dated 24th August 2010.

The petition was however, not served on the respondents until 24th August 2010, five days after filing. This followed Justice H.M. Okwengu ruling delivered on August 24, 2010 dismissing the *Mary Ariviza v. Interim Independent Electoral & another case* on the ground that the High Court had no jurisdiction to entertain the said application.¹⁰⁰¹

In the Notice of Motion under a Certificate of Urgency, the petitioner prayed for four major orders. First, that the court certifies the application urgent and heard *ex parte* in the first instance. Secondly, that the court dispenses with the written request for Interim relief. Thirdly, that the court suspends the whole of the Gazette Notice purportedly giving the final results of the referendum as it was the subject matter before the court. Fourth, the petitioners wanted the court to suspend the promulgation of the Constitution until the hearing and determination of the petition.

The application was on the same day heard by the court and certified as urgent and set for hearing inter parties the following day August 25, 2010. The court nevertheless declined to give other orders sought and ordered that the application be served on all the respondents.

The Judges¹⁰⁰² delivered their ruling on Thursday, 26th August 2010 just a day before the promulgation date of 27th August 2010. In dismissing both petition and application, the court wondered why the petitioner failed to file the

¹⁰⁰¹ Following this ruling, on the same day, the petitioner rushed to the Interim Independent Constitutional Dispute Resolution Court (IICDRC) at 4.00 p.m. to file a Notice of Motion under a Certificate of Urgency dated 24^h August 2010.

¹⁰⁰²: Violet Mavisi. J. Sankale Ole Kantai. J. Samuel Mukunya. J. Scholastica Omondi, J. and Jamilla Mohammed. J.

petition soon after the gazettelement of the referendum results on 7th August 2010 and to serve the respondents in time.

The court declined suspend the promulgation of the Constitution until the petition was heard and determined on the ground that the Constitution of Kenya review Act 2008 was clear on the steps to be followed in the ratification and promulgation of the Constitution.

The Judges hence declared that by asking the court to strike out Gazette Notice No 1019 of 23rd August 2010 that published the final results of the referendum, the petitioners were asking the court to stop the promulgation of the Constitution set for August 27, 2010. To the court, granting such orders was not only an act in futility but also amounted to courting disaster for the country. In any case, the petitioner had failed to activate the petition by failing to pay the Kenya shillings two (2) million as required by law.

9.5 Jurisprudential issues in participatory Constitution making in Kenya

This section discusses the eleven (11) key jurisprudential issues that emerged from the court cases in the Constitution of Kenya review process. The issues touched on not just matters relating to the validity of the Constitution making law, process and content but also the very meaning, nature and character of constitutional law and its application to Constitution making in Kenya.

9.5.1 Meaning of jurisprudence and its application

Broadly, jurisprudence is the general study of law from different points of view, which touch on different aspects of social life, that is, ethical, economic,

political and philosophical among others.¹⁰⁰³ Functionally, jurisprudence is concerned with the making of law and the application of law, its principles and rules. In both respects, jurisprudence is based on social aspects of human life.¹⁰⁰⁴ According to J.W. Harris, in its English sense, jurisprudence refers to the general speculations about the meaning, nature and character of law.¹⁰⁰⁵

According to John Austin in his book, *The Province of Jurisprudence Determined*,¹⁰⁰⁶ jurisprudence has nothing to do with "goodness" or "badness" of law. It is concerned with strictly "laws properly so called" or the positive law¹⁰⁰⁷. He therefore divides jurisprudence into the "general" and "particular". General jurisprudence includes such subjects as are common to all mature legal systems while particular jurisprudence refers to the study of any particular system of law such as constitutional law or any portion of it such as participatory Constitution making.¹⁰⁰⁸

Jurisprudential[^], according to B.O. Nwabueze, any informed and comprehensive view of the Constitution must regard not only its letter. It must also be concerned about the unexpressed ideas of the society in the context of which the Constitution is set and operates. These ideas and postulates are not

¹⁰⁰³ R.S. Bhalla. *Concepts in Jurisprudence*, Nairobi University Press. (1990). p. 1.

¹⁰⁰⁴ *Ibid*

¹⁰⁰⁵ See generally. J.W. Harris, *Legal Philosophies*. 2nd edition. Reed Elsevier(UK) Ltd. London (reprint 2003), p. 1.

¹⁰⁰⁶ John Austin, *Province of Jurisprudence Determined*, Volume 1 (Google eBook). second edition. John Murray.

¹⁰⁰⁷ Positive law is called 'positive' because it is posited—or laid down—by one person or group of persons to another; it does not exist except as it is so posited. Positive law are styled the principles of legislation.

¹⁰⁰⁸ Also see R.S. Bhalla. *Concepts in Jurisprudence*. Nairobi University Press, (1990), p. 5.

dictates of expediency but values of general validity and acceptance within the society.¹⁰⁰⁹

To B.O. Nwabueze therefore, the principles and values that judges fashion are hence not the product of their mere personal will or their own creation but rather they are expressions of the moral and ethical pre-suppositions of the society. They represent fundamental postulates that underlie the political system and the Constitution. More particularly, they indicate how these postulates operate to control the life of members of the community and limit the powers of its leaders.¹⁰¹⁰

In view of the above, this section highlights and interrogates the key jurisprudential issues in Kenya's participatory Constitution making process. More importantly, the study interrogates how these have contributed to the evolving participatory Constitution making jurisprudence in Kenya.

9.5.2 Is legal purity attainable in a Constitution making process?

In the course of the Constitution review process a question arose as whether a Constitution making process can claim legal purity.¹⁰¹¹ On the one hand, the court in *Timothy Njoya* held the view that all Constitution making processes during peacetime need to strive for legal purity. Justice Ringera in *Timothy Njoya* argued that Constitution making is not an everyday or every generation's affair. It is an epoch-making event and thus:

¹⁰⁰⁹ B.O. Nwabueze. *Judicialism in Commonwealth Africa: The Role of the Courts in Government*, St. Austin Press. New York. (1977).
¹⁰¹⁰ *Ibid.* p. 139.

¹⁰¹¹ This issue of jurisprudential significance arose both in the *Timothy Njoya* and *Patrick Ouma Onyango* cases.

"If a new Constitution is to be made in peace-time and in the context of an existing valid constitutional order (as is being done in Kenya) as opposed to a revolutionary climate or as a ceasefire document after civil strife, it must be made without compromise to major principles and it must be declared in a medium of legal purity. Sound Constitution making should never be sacrificed at the altar of expediency."¹⁰¹²

On the other hand, the court in *Patrick Onyango* differed with the Justice Ringera's view holding that obtaining legal purity in the Constitution making process "is on the ground unrealistic and Utopian."¹³ The court thus argued that in the history of Constitution making no country has so far been able to claim perfection or purity. The court stated:

"It is quite evident to us and to all that even the process that produced perhaps the most honoured, venerated, respected and perhaps one of the oldest constitutions of the world (American Constitution) is far from being perfect or pure. Indeed, the question which was similar to the question being asked by some Kenyans today and also in this constitutional case was asked in America by Patrick Henry - one of the heroes of the American Revolution and we find it relevant to our country's current situation or circumstances. 'What right had they to say - We the people, who authorized them to speak the language of we the people instead of we the states?'"^{WN}

The Court in the *Patrick Onyango* case therefore declared that that which gives purity to the Constitution making process is the enactment of the Constitution by the people in the referendum as they are the touchstone of validity.

In the final analysis, although achieving the vision of legal purity in Constitution making process as envisaged by Justice Ringera may be difficult,

¹⁰¹² *The Rev. Dr. Timothy Njoya and 6 others v. Attorney-General and 2 others* case. High Court Misc. Application No. 82 of 2004 (Nairobi). Also see *Patrick Ouma Onyango and 13 others v. Attorney-General and 2 others*. High Court Misc Application No. 677 of 2005 (Nairobi), p. 63.

Patrick Ouma Onyango and 13 others v. Attorney-General and 2 others. High Court Misc. Application No. 677 of 2005 (Nairobi), p. 63.

^{10.4} *Ibid* p. 69.

what stands out is the fact that people or "*wanjiku*"¹⁰¹⁵ must give their seal of approval if the process and its outcome are to command their abiding loyalty and reverence. This is what will ensure that the Constitution making process and its outcome is, infused with the necessary seal of approval, validity or legitimacy.

9.5.3 People's sovereignty and constituent power in Constitution making

As discussed in section 9.3.2, throughout the Constitution of Kenya review process, the essence of people's sovereignty and the exercise of constituent power in Constitution making arose from time to time. In particular, two jurisprudential questions arose. First, how were the people to exercise this right and power in the context of the Constitution review process? Secondly, should the exercise of people's sovereign right and constituent power in Constitution making be necessarily, written into the Constitution?

The Black's Law Dictionary defines sovereign as the political body consisting of the collective number of citizens and qualified electors who possess the powers of sovereignty and exercise them through their chosen representatives.¹⁰¹⁶ Jean-Jacques Rousseau in his treatise *the Social Contract* locates sovereignty in the will of people. He posits that sovereignty derives only

¹⁰¹⁵ Wanjiku is a popular female name among the Kikuyu sub nation of Kenya. In the context of Constitution making process in Kenya, "Wanjiku" in the understanding of Kenyans represented the ordinary person or Kenyan. It echoed the call by the pro-reform movement that the making of a new Constitution must be "people driven." Thus when former President Daniel arap Moi quipped that "Wanjiku" was not sufficiently informed and educated on matters of Constitution making and could not therefore be directly involved in the process of making a new Constitution, the reform movement cried louder that Constitution making must only be people driven but must have "Wanjiku" on or near the driving seat.

¹⁰¹⁶ Black's Law Dictionary. 8th Edition

from the will of the people, a will that is both absolute and inalienable.¹⁰¹⁷ Jean Bodin states that sovereignty resides in determinate persons who have the power to promulgate law. Such persons not being above duty and moral responsibility can make and abrogate the laws of the land.¹⁰¹⁸

The court in *Njoya* argued that since sovereignty of the Republic is the sovereignty of its people, the power to make the Constitution therefore belongs to the people, which necessarily betokens that they have constituent power. This power is primordial and lack of its textualization is not conclusive of its want of juridical status. The court therefore argued that if the makers of the Constitution were to expressly recognize sovereignty of the people and the constituent power they hold, they would do so only *ex ubundemti cautela* (out of excessiveness of caution). The court thus declared that the constituent power had juridical status within the Constitution and that it was not an extra-constitutional notion without import in constitutional adjudication.¹⁰¹⁹

According to B. O. Nwabueze the constituent power is the ultimate mark of a people's sovereignty. Its three key elements are first, the power to constitute a frame of Government; second, the power to choose those to run the Government, and third, the powers involved in governing.¹⁰²⁰ It is by means of the first, that is, the power to constitute a frame of Government that the last, the power involved in governing is conferred. It is through the exercise of the

¹⁰¹ Jean-Jacques Rousseau, *The Social Contract*. Harmondsworth: Penguin (1968)

¹ Jean Bodin. "The Six Books of the Republic" (translated by J Toodey) extract in Lord Lloyd of Hampstead et al, *Lloyds' Introduction to Jurisprudence*, 5th Ed. (London: Stevens & Sons Ltd 1985. P. 122)

The Rev. Dr. Timothy Njoya and 6 others v. Attorney-General and 2 others case. High Court Misc. Application No. 82 of 2004 (Nairobi).

¹⁰: B.O. Nwabueze. *Presidentialism in Commonwealth Africa* (1974), L. Hurst and Co., p.392

constituent power of the people that the Constitution confers powers of Government and defines the limits of those powers.¹⁰⁰¹

How then, should the people exercise their constituent power? The court in *Patrick Onyango* first, posed the questions: what is the constituent power of the people? How is it exercised and can it be limited? The court described the constituent power as the ability to frame or alter a Constitution and to constitute and/or reconstitute the framework of Government. It is a primary and plenary law making power vested in the people by virtue of their sovereignty. As a primary law making power, the exercise of constituent power does not depend on it being expressed in the existing Constitution.¹⁰²²

The court in *Njoya* indicated that the people could exercise constituent power through either a referendum or a constituent assembly. In the Kenyan situation however, the court felt that the option of constituent assembly was unnecessary arguing that:

"The referendum does in a way, for a split second give the people executive, legislative and judicial powers to determine whether they were sufficiently involved and consulted and whether the final product has the content and the substance, whether the final product was properly framed and whether it is a document they would want to enact. Upon enactment in the referendum they shall have put their final seal of approval."¹⁰²³

The court in *Njoya* however, also pointed that the constituent power of the people cannot be exercised directly in certain aspects of the Constitution making process. The circumstances where the constituent power may not be

¹⁰²¹ *Ibid.*

¹⁰²² *Patrick Ouma Onyango and 13 others v. Attorney-General and 2 others*, High Court Misc. Application No. 677 of 2005 (Nairobi).

¹⁰²³ *The Rev. Dr. Timothy Njoya and 6 others v. Attorney-General and 2 others* case. High Court Misc. Application No. 82 of 2004 (Nairobi).

changes have been made in it. The word "amendment" postulates that the old Constitution survives without loss of its identity despite the change. As a result of the amendment, the old Constitution cannot be destroyed or done away with; it is retained though in amended form. The words "amendment of the Constitution" with all their wide sweep and amplitude cannot therefore have the effect of destroying or abrogating the basic structure of the Constitution.

The court in *Patrick Onyango* pointed out that the Constitution of Kenya review process was premised on "the mistaken view that Parliament could enact a new constitution." Like the majority view in *Njoya*, the court therefore held that the amendment power of Parliament under section 47 did not include alterations that may otherwise affect the basic structure of the Constitution. The court argued that although section 47 was not exclusive of the constituent power of the people, it was a derivative power that could only be exercised in accordance with special procedures defined in section 47(3), (4), (5) and (6). Thus, the Constitution of Kenya being a rigid Constitution, required strict adherence to the prescribed procedure because any amendment made contrary to this special procedure was void or invalid.

However, Justice Kubo in his minority view in *Njoya* argued that Parliament's amendment power under section 47 was wide enough to allow Parliament to enact a new Constitution. He stated:

"I am of the considered opinion that section 47 of the Constitution of Kenya does not limit the power of Parliament to amend or repeal the Constitution and replace it with a new Constitution. The words in section 47 do not in my respectful view impose any limitations as contended by the Applicants."¹⁰²⁸

exercised directed included collation and analysis of people's views, the processing of people's views into constitutional proposals, and the drafting of the constitutional document, which bears the form and name of a Constitution.

The court in *Patrick Onyango* in its judgement shared the view that the referendum as the means of exercising the constitution power of the people in Constitution making was the best option for Kenya under the prevailing circumstances.

Overall, the *Njoya* judgement set a precedent in participatory Constitution making jurisprudence that nearly all the subsequent courts referenced as discussed in section 9.4 above. It contributed by setting legal standards for the interpretation of the meaning, nature, character and application of the juridical concepts of people's sovereignty and constituent power in constitution making in Kenya

9.5.4 The scope of Parliament's amendment power

As discussed in section 9.3.2, one of the most fundamental jurisprudential questions that arose in the course of the review process was whether parliament's amendment power under section 47 of the Constitution^{10:4} was limited or unlimited in Constitution making.

¹⁰²⁴ Section 47 of the Constitution provided, in sub-section (1) that "subject to this section. Parliament may alter this Constitution." Sub-section (6Xb), provided that "in this section - references to the alteration of this Constitution are references to the amendment, modification or re-enactment, with or without amendment or modification, of any provision of this Constitution, the suspension or repeal of that provision and the making of a different provision in the place of that provision." Section 123(9Xb) clarified that "in this Constitution, unless the context otherwise requires, words in the singular shall include the plural, and words in the plural shall include the singular." See the Constitution of Kenya. Revised edition 2009 (2008), Published by the National Council for Law Reporting with the Authority of the Attorney-General.

The majority view of the court in *Njoya* was that the power vested in Parliament by sections 30 and 47 of the Constitution was only a limited power to make ordinary laws and to amend the Constitution. The Constitution therefore did not in any way delegate the constituent power of the people to Parliament to make and enact a new Constitution. Under the doctrine of enumerated powers, the court argued that what the Constitution has not delegated to Parliament nor prohibited, is reserved, to the people. As Justice Ringera in the *Njoya* case concluded:

"I have come to the unequivocal conclusion that Parliament has no power under the provisions of section 47 of the Constitution to abrogate the Constitution and/or enact a new one in its place. It is thus crystal clear that alteration of the Constitution does not involve the substitution thereof with a new one or destruction of the identity or existence of the Constitution altered. That Parliament has no power to and cannot in the guise or garb of amendment either change the basic features of the Constitution or abrogate and exact a new constitution."¹⁰²⁵

The Supreme Court ruling in the *v. State of Kerala* case supports the court's view in *Njoya*.¹⁰²⁶ In *Kesavananda*, the Supreme Court held that the power to amend the Constitution did not include the power to alter the basic structure or framework of the Constitution. Reddy, J., for example argued that the power of amendment was not wide enough to include the power of totally abrogating or emasculating or damaging any fundamental rights or the essential elements in the basic structure of the Constitution.¹⁰²⁷

On his part, Khama, J. argued that amendment of the Constitution necessarily contemplates that the Constitution has not been abrogated but only

¹⁰²⁵ *The Rev. Dr. Timothy Njoya and 6 others v. Attorney-General and 2 others case*, High Court Misc. Application No. 82 of 2004 (Nairobi).

¹⁰²⁶ *Kesavananda v. State of Kerala* (1973). AIR SC 1461.

¹⁰²⁷ *Ibid*

Justice Kubo argued further that:

"if Parliament could alter one provision, it could alter more; and if it could alter more, it could alter all."¹⁰²⁹

The decision of the High Court of Singapore in the *Teo So Lung v. Minister for Home Affairs* supported Justice Kubo's position.¹⁰³⁰ The court in *Teo So Lung* observed that Article 5 of the Singaporean Constitution (similar to section 47 of the Kenyan Constitution) did not put any limitation on that amendment power of parliament. The court therefore had no power whatsoever to impose any limitations on the legislature in exercise of its amendment power. The court held that if the framers of the Constitution of Singapore had intended to limit Parliament's power to amend the Constitution, they would have expressly provided for such limitations.¹⁰³¹

In Kenya, the proponents of parliament's unlimited power in Constitution making cited the far-reaching first ten constitutional amendments undertaken in immediate post independence period as discussed in Chapter Five (5). These amendments did not just alter the basic structure of the Constitution but also led to major reproduction of the Constitution in a revised form through the Constitution of Kenya (Amendment) Act No. 5 of 1969.

Justice Ringera in *Njoya* however, argued that since nobody challenged in court these fundamental alterations to the Independence Constitution, they became part of the Constitution. This was hence contrary to a situation where Parliament was being asked to use its amendment powers under section 47 of

¹⁰²⁹ *Ibid*

¹⁰³⁰ *Teo So Lung v. Minister for Home Affairs* (1990) LRC 490.

¹⁰³¹ *Ibid.*

the Constitution to make and enact a new Constitution. This, Justice Ringera held, was without precedent.

9.5.5 The political question doctrine in Constitution making

The question of the extent to which the courts could apply the political question doctrine in determining the justiciability of certain actions especially by Parliament and the executive in the review process emerged as one of the key jurisprudential issues for the courts to consider.

According to Laurence Tribe, the political question doctrine is, linked to the doctrine of justiciability. He points out that in order for a claim to be justiciable, it must "present a real and substantial controversy", which unequivocally calls for adjudication of the rights asserted.¹⁰³² The substantiality of the controversy is also, in part, a feature of the controversy itself - an aspect of the "appropriateness of the issues for judicial decision and the actual hardship of denying litigants the relief sought. Examination of the contours of the controversy is hence, regarded as necessary to ensure that courts do not overstep their constitutional authority by issuing advisory opinions.¹⁰³³

The court in *Njoya* observed that even though the constitutional review process had a political consequence, it was still subject to the court's scrutiny. The court therefore refused to agree that the review process being a process initiated, regulated and shepherded by Parliament was beyond the scrutiny of

¹⁰³² Laurence H. Tribe (2000). *American Constitutional Law 3rd Edition*, Foundation Press, 68-69.

¹⁰³³ *Ibid*

the court and that any alleged contravention of the Constitution for which there is remedy is justiciable. The court thus ruled:

"While the Courts cannot usurp the legislative mandate of Parliament to make, amend or repeal statutory law, they (Courts) have power to adjudicate on any alleged inconsistency of any Act of Parliament or any provision thereof with the Constitution of Kenya. The doctrine of separation of power does not take away the Court's power to declare when the Constitution has been violated by any legislation or a section thereof."¹⁰³⁴

In *Patrick Onyango* however, the court refused to entertain what it considered as a political question matter. The applicants had sought the court's orders to stop the referendum because the National Assembly had executed its mandate in an undemocratic manner contrary to the applicants' plain views. The court in declining to stop the referendum declared:

"Courts shall continue to resist being tempted to enter into the arena of politics. Political action is out there and it is largely unjusticiable. The courts shall confine themselves to areas where they can effectively enforce their orders because courts of law never act in vain."¹⁰³⁵

From the court's decision based on the political question doctrine, two key questions arise. First, was there evidence that if the court handled the questions on the validity of the parliamentary process of the review there would be conflict between the judiciary and other departments of Government? Secondly, were the issues raised not present any real and substantial controversy, warranting the court's intervention?

According to Muthomi Thiankolu, no evidence was tendered to the effect that the Constitution had removed the issues of the review process from the

¹⁰³⁴ *The Rev. Dr. Timothy Njoya and 6 others v. Attorney-General and 2 others* case. High Court Misc. Application No. 82 of 2004 (Nairobi), *op. cit.*

¹⁰³⁵ *Patrick Ouma Onyango and 13 others v. Attorney-General and 2 others*, High Court Misc. Application No. 677 of 2005 (Nairobi), *op. cit.*

realm of the court's authority. Secondly, there was no evidence that the Constitution had assigned the determination of questions arising from these matters to another branch of Government and which if handled by the court would engender conflict between the state organs.¹⁰³⁽¹⁾ A scrutiny of the court ruling thus reveals that the only reason the dispute was dismissed as involving the political question doctrine was that the court felt imprudent or expedient not to intervene.

9.5.6 Validity of the Constitution making process and its outcome

The question of what makes a Constitution making process valid became a key issue during the Constitution of Kenya review process especially with regard to what should engender the validity of the Constitution making process and its outcome.

In *Njoya*, the applicants questioned the validity of the review process at the National Constitutional Conference stage. In *Patrick Onyango*, the applicants questioned the validity of the review process at the National Assembly stage after the National Constitutional Conference. They argued that that the process after the National Constitutional Conference was invalid because Parliament unilaterally usurped the role of the people and infringed the people's inviolate sovereign right to make their Constitution.

In *Alice Waithera Mwaura*,¹⁰³⁷ the petitioners complained that although the CoE solicited views on the contentious issues it identified in June 2009, it failed to publish a comprehensive summary of the views submitted by Kenyans. The petitioners were therefore convinced that the Proposed Constitution of Kenya 2010 neither faithfully reflected the views of Kenyans nor the consensus of the Parliamentary Select Committee on the Constitution Review. In *Mary Ariviza and Okotch Mondoh*,^{m8} the petitioners sought to stop the promulgation of the new Constitution on the ground that the referendum was marred by irregularities.

According to B.O. Nwabueze, the legitimacy or validity of the Constitution making process leading to the referendum is just as important as the validity of the draft constitutional document to be presented to the people in the referendum. He states:

"It is pertinent to emphasise that a referendum or plebiscite lacks a genuine constituent and legitimising effect unless it is preceded, at the drafting stage or after, by serious discussions of the constitutional proposals on as wide a platform as possible. This is exemplified by the process followed in America when the Constitution was drafted by a convention after thorough discussion followed by even more mature and long deliberations in the ratifying convention in the various states"¹⁰³⁹

In *Njoya*. Justice Ringera held the view that the National Constitutional Conference stage of the Constitution of Kenya review process failed the validity

⁰⁵ *Alice Waithera Mwaura, Consolata Wanjiru Mucuka, Paulina Wambui Njuguna, Margaret Njeri Gakio. Benina Kawira Njeru. Bella Kalondu Mutuku. Peter Ndirangu Kariuki, John Maina. Stephen Okinda. Ronald Onzere. James Kiiru Nderitu. John Mburu Kiarie and Susan Nyagului v. the Committee of Experts, the Hon. Attorney-General and the Interim Independent Electoral Commission, Constitutional Petition No. 5 of 2010.*

^{10,8} *Mary Ariviza and Okotch Mondoh v. the Attorney-General and the Interim Independent Electoral Commission (IIEC). Constitutional Petition No. 7 of 2010.*

¹⁰³⁹ B.O. Nwabueze, *Presidentialism in Commonwealth Africa* (1974), L. Hurst and Co.. p. 394

test because it was not constituted by elected delegates. To this end, Justice

Ringera held that:

"the composition of the NCC was quite flawed and no amount of antecedent history of skewed representation in Parliament or elsewhere could wholly justify it."

The court in *Patrick Onyango*, however, held the view that the review process and its outcome, the Proposed New Constitution, were valid because it had substantially followed the four basic steps in any Constitution making.

According to the court in *Patrick Onyango*, the process followed included first, the framing of proposals for a Constitution as carried out by the Attorney-General and his team of experts. Secondly, popular consultations conducted by the National Assembly in accordance with the law. Thirdly, Parliament debating and formalizing constitutional proposals as an assembly of the people's representatives. Fourthly, the final adoption by the people at a plebiscite or referendum as proposed.

The court was thus not convinced that alteration of the proposals at the stage of consultation or discussions at parliamentary stage could invalidate the proposals to be put to the vote by the people. Only the people could invalidate any such process by a "NO" vote at the referendum.

On the question whether a constituent assembly was necessary to ensure the validity of the review outcome, the court dismissed this contention on the ground that the enactment of the new Constitution could be done by either a constituent assembly elected for that purpose or through a referendum as was ordered by the court in the *Njoya* case.

Overall, the court in *Patrick Onyango* argued that the ultimate validity of the Constitution lay with people, as they were the real judges of the review process at a referendum. At the referendum, the people would not just put their final seal of approval but would also judge for themselves several aspects of the review process and its outcome. First, the people would judge whether they were sufficiently involved and consulted. Secondly, they would judge whether the final product had the content and the substance they desired. Thirdly, they would judge whether the final product was properly framed. Fourthly, they would judge whether it is a document they would want to ratify and enact.

Similarly, the court in *Alice Waithera Mwaura* held that:

"it is the people's right to vote and determine whether or not the proposals contained in the Proposed Constitution of Kenya 2010 will become the supreme law that governs them or otherwise."

9.5.7 The role of the Executive in Constitution making in Kenya

The issue of the role of the executive in constitution making came in *Patrick Onyango*. Although there was no direct complaint about the role of the Executive in the review process, the court found reason to come up in defence of the role of the Executive in Constitution making. To this end, the court argued that historically especially in presidential regimes, governments have always been the dominant parties in the framing of constitutional proposals. In the Kenyan situation, the court pointed out that:

"where a government is elected on the basis of its promise to give birth or bring about a new Constitution, in our view it has a wider mandate to originate and facilitate constitutional proposals."¹⁰⁴⁰

¹⁰⁴⁰ *Patrick Ouma Onyango and 13 others v. Attorney-General and 2 others*. High Court Misc. Application No. 677 of 2005 (Nairobi).

The court however, warned that the Executive should not undermine the significance of the process of Constitution making. This, the court argued, would be:

"Undemocratic and usurpation of the people's power for a Government, to force its proposals as the only proposal for framing a Constitution."¹⁰⁴¹

9.5.8 Can a section of the Constitution be inconsistent with another?

In *Jesse Kamau*, a question arose as to whether a court could under section 3 of the Constitution declare a section of the Constitution unconstitutional or inconsistent with another section of the same Constitution. Section 3 of the Constitution of Kenya provided that:

"This Constitution is the Constitution of the Republic of Kenya and shall have the force of law throughout Kenya and, subject to section 47, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void - Provided that the provisions of this section as to consistency with this Constitution shall not apply in respect of an Act made pursuant to section 15A (3)."¹⁰⁴²

Closely linked to the above question, in *Bishop Kimani*, a question arose as to whether a section of the Constitution could be superior to another of the same Constitution. As already discussed under section 9.4 of this Chapter, the applicants in *Jesse Kamau* prayed that the court declares section 66 of the Constitution unconstitutional and inconsistent with sections 65 and 82 of the same Constitution. Indeed, having regard to the principles and values of the Constitution of Kenya, the court proceeded to declare section 66 of the Constitution inconsistent with sections 65 and 82 of the Constitution. The court

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The Constitution of Kenya, Revised edition 2009 (2008), Published by the National Council for Law Reporting with the Authority of the Attorney-General.

also declared sections 66 and 82 as inconsistent with each other, and found that section 66 was superfluous. In its ruling, the court argued that the real anchor of freedom of worship and conscience in Kenya was not section 66 of the Constitution but section 78. The court stated:

"That section 66 does not advance the values which characterize a secular state. As between the state and religion each had its own sphere, the power of lawmaking for the public good and the latter of 'religious teaching observance and practice'. To the extent that Section 66 sought to give to religious principles and commandments the force and character of law, religion stepped out of its own sphere and encroached on that of lawmaking in the sense that it was made to coerce the state into enacting religious principles and commandments into law."¹⁰⁴³

As already highlighted in section 9.4 of this Chapter, many questioned the judges' legal reasoning on this subject. Justice M.K. Ibrahim in *Bishop Joseph Kimani*, for example, outrightly rejected the idea that a court created by the Constitution could question the Constitution. Justice Ibrahim expressed himself thus:

"The High Court of Kenya is a legal creature of the Constitution and is therefore subject to, and/or inferior to the Constitution. I am of the firm view that the High Court has no legal or moral authority or power to sit on judgment or offer jurisprudential opinion over the Constitution of Kenya."¹⁰⁴⁴

Justice Ibrahim further argued that on the basis of the oaths taken no Judge ought to question the constitutionality, legality, validity or propriety or otherwise of any constitutional provision or the Constitution in its entirety. Equally, a judge sitting in the High Court in its interpretational functions, in law, could not question the Constitution. The judge cannot also purport to

¹⁰⁴³ *Jesse Kamau and 25 others v. the Attorney-General and another*, HC Misc Civ. Appl. 890 of 2004 (Nairobi).

¹⁰⁴⁴ *Bishop Joseph Kimani and 2 others v. the Attorney-General and 2 others case*, HC No. 669 of 2009 (Mombasa).

interpret or construe on any inconsistencies *inter se* or between various provisions of the Constitution.¹⁰⁴⁵ Justice Ibrahim therefore held that:

"There are and cannot be any inconsistencies between sections of the Constitution of Kenya in the eyes of the High Court and if there is such possibility then the High Court has no jurisdiction to entertain any matter inviting it to make any finding to that extent. That can only be the role of the supreme law making body of the legislature or Parliament or when the time comes the referendum by the people of Kenya."¹⁰⁴⁶

George Kegoro, in a critique of the court's ruling in *Jesse Kamau*, also argued that a court couldn't purport to outlaw or declare unconstitutional any provision of the Constitution unless, on a narrow ground that an amendment of the Constitution was procured unprocedurally. In his view, since section 66 on the Kadhi's courts was already part of the original articles of the Constitution this criterion could not apply.¹⁰⁴⁷

However, even on the narrow ground of unprocedural amendment, once the amendment has become part of the Constitution, no court can declare it unconstitutional. As Lord, Campbell pronounced in *Edinburgh & Dalkeith Railway Co. v. Wauchope*:

"...all that a court of justice can do is to look at the Parliamentary role: if from that it should appear that a bill has passed both houses and received the Royal Assent, no court of justice can inquire into the mode in which it was introduced into Parliament, what was done to it previously being introduced, or what passed in Parliament during the various stages of its progress through both houses of Parliament."¹⁰⁴⁸

¹⁰⁴⁵ *Ibid*

Ibid

¹⁰⁴⁷ George Kegoro. Final Instalment of the Critique of the Constitutional Court Ruling on the Kadhi's Courts, the Daily Nation on 31" May 2010.

¹⁰⁴⁸ *Edinburgh A Dalkeith Railway Co. v. Wauchope (1842) 8ClfF 710*

Overall, under the doctrine of supremacy of the Constitution, Article 2 (3) of the Constitution of Kenya, 2010 explicitly disallows any possibility of challenging the constitutionality of the Constitution. It Article 2(3) provides thus:

"The validity or legality of this Constitution is not subject to challenge by or before any court or other state organ."¹⁰⁴⁰

The import of Article 2(3) of the Constitution is that no person can question or declare a provision of the Constitution "unconstitutional," "null and void," "inconsistent" or "illegal". However, as to other laws other than the supreme law, Article 2(4) of the Constitution provides that:

"Any law, including customary law that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid."¹⁰⁵⁰

In other words, the Constitution provides the benchmark against which the validity of all other laws including Acts of Parliament and regulations and rules made under such Acts, customary law and international customary laws are tested.

Very clearly therefore. Article 2(4) does not lend itself the interpretation of the Constitution or any section of it in terms of its validity, consistency, constitutionality or nullity. Thus if one section of the Constitution may appear inconsistent or contradictory with another section, the only available remedy is for the competent authority i.e. parliament to amend or repeal it in accordance with the laid down procedure set by the Constitution. It is not for the court or any other state organ to question its validity, constitutionality or consistency.

¹⁰⁴⁰ The Constitution of Kenya (2010), Published by the National Council for Law Reporting with the Authority of the Attorney-General.

¹⁰⁵⁰ *Ibid.*

Thus, by purporting to declare section 66 of the Constitution "unconstitutional," "inconsistent" and "superfluous," in relation to other provisions of the Constitution, the Judges in *Jesse Kamau* portrayed a peculiar and unprecedented brand of legal reasoning.

On the question of whether a section of the Constitution can be superior to another section of the same Constitution, the petitioners in *Bishop Kimani* explicitly asked the court to consider section 60A of the Constitution superior to sections 56 and 57 of the Constitution. The petitioners argued that sections 56 and 57 of the Constitution of Kenya must give way to section 60A of the Constitution, which was a new provision of the Constitution.¹⁰

In their ruling, the Judges^{10,2} out rightly rejected the idea that a section of the Constitution could be superior to another. The Judges stated:

"With respect, we do not agree that one provision of the Constitution is superior to the others. Suffice to say that the Constitution as the supreme law is a wholesome document it is a living document and operates through all the provisions, not one. To hold otherwise would be to say of the living person: Can the eye say to the nose: you protrude on the face and make it uneven and must be expunged! Or the right hand says to the left hand: 'we are right-handed and do not need you!' This would be illogical and unreasonable."¹⁰⁵³

Justice M.K. Ibrahim in *Bishop Joseph Kimani* also categorically stated that:

"All sections of the Constitution of Kenya are the same and none is superior to the other. On what basis can I as a Judge interpret or construe that section 60 is superior to section 60A and therefore assume jurisdiction over matters or disputes touching on the Constitutional review process?"¹⁰⁵⁴

Bishop Joseph Kimani Rev Musyoka Nzui and Agnes Mbinya v. the Attorney-General, the Committee of Experts (CoE) and the Chairman of the Parliamentary Select Committee, Constitutional Petition no. 4 of 2010. op. cit.

¹⁰ V. K Mavisi, J. S. N. Mukunya. J. and S. Ole Kantai. J.

^{10<1} *Bishop Joseph Kimani Rev Musyoka Nzui and Agnes Mbinya v. the Attorney-General, the Committee of Experts (CoE) and the Chairman of the Parliamentary Select Committee, Constitutional Petition no. 4 of 2010. op. cit.*

Bishop Joseph Kimani and 2 others v. the Attorney-General and 2 others case, HCNo. 669 of 2009 (Mombasa), *op. cit.*

Similarly, I. Muganda and B. Biriq commenting on the *Jesse Kamau* ruling wondered why the judges found section 66 of the Constitution and not section 82 of the Constitution to be at fault.¹⁰⁵⁵ They posed the question: "were the judges trying to tell Kenyans that in terms of importance, the latter section (82) was the test against which the preceding sections are tested thus informing their selection?"¹⁰⁵⁶

9.5.9 The voting rights of inmates in a referendum

In *Priscilla Nyokabi*, two key jurisprudential questions arose: first, whether a referendum was distinct from the National Assembly and presidential elections. Second, whether prisoners had a right to vote in a referendum.¹⁰⁵⁷

On the first question, according to *the Black's Law Dictionary*, referendum, on the one hand, is the process of referring state legislative act, a state constitutional amendment, or an important public issue to the people for final approval by popular vote.¹⁰⁵⁸ A referendum therefore only comes and applies when a major public decision such as constitution requires ratification, which in some cases may not come in one's lifetime.

On the other hand, *the Black's Law Dictionary* defines election as the exercise of choice; especially, the act of choosing from possible rights or remedies in a way that precludes the use of other rights or remedies. The

" I. Muganda and B. Biriq. "Ruling on Kadhis" Courts was judicial impunity," East African Standard, Nairobi dated 2nd June 2010. *op cit*.

""*Ibid*

¹⁰⁵¹ *Priscilla Nyokabi Kartvua v. The Attorney-General and IIEC. Constitutional Petition Number 1 of 2010, op. cit.*

¹⁰⁵⁸ Black's Law Dictionary Eighth Edition.

doctrine by which a person is compelled to choose between accepting a benefit under a legal instrument and retaining some property rights to which a person is already entitled.

The petitioner had urged the court to consider the referendum and election as distinct in view of the ruling in *Njoya* that the people's constituent power vests directly in the people, all people. The main borne of contention was whether section 43(2) (c) of the Constitution could be modified in accordance with section 47A (5) (a) of the Constitution to include the voting rights of inmates in the referendum. On the one hand, section 43(2) (c) provided that:

"No person shall be qualified to be registered as a voter, in elections to which this section applies - if he is detained in lawful custody."¹⁰⁵⁹

On the other hand, section 47A (5) (a) of the Constitution provided that section 43 of the Constitution applied with "necessary modification with respect to the referendum." At a broader level, section 47A (2) (a) of the Constitution provided that:

"The sovereign right to replace this Constitution with a new Constitution vests collectively in the people of Kenya and shall be exercisable by the people of Kenya through a referendum."¹⁰⁶⁰

The Interim Independent Electoral Commission (IIEC) in its submissions had argued that although section 43(2) (c) of the Constitution could be modified in accordance with section 47A (5) (a) of the Constitution, this could not be done to allow the inmates to register as voters and to vote at the referendum.

Thus, to determine the question of whether or not prisoners had a right to vote in a referendum, the Court posed four questions. First, the court posed,

¹⁰ " **The Constitution of Kenya. Revised edition 2009 (2008). Published by the National Council for Law Reporting with the Authority of the Attorney-General.**

¹⁰⁶⁰ *Ibid*

who are "the people" who cannot be disenfranchised in Constitution making through a referendum because they have primordial power? Second, are inmates included in "the people"? Third, if inmates are included in "the people", are all inmates including juveniles, insane inmates and inmates of sound mind eligible for registration? And fourth, what would be the criteria to be applied?"

In its ruling, the court first agreed that the constituent power of the people enabled them to take part in a referendum which is above the Constitution itself and that the court cannot take away such powers from the people including inmates. Secondly, the court held the view that section 43 of the Constitution clearly and plainly referred to the National Assembly and presidential elections about who was qualified and disqualified from voting. It had no mention of a referendum. The court therefore argued that the framers of the Constitution were free to say that this section applied to a referendum had they wanted the referendum to be part of section 43 of the Constitution of Kenya. In this regard, reference to necessary modification of section 43 under section 47A (5) (a) of the Constitution was a constitutional derogation allowed by the Constitution itself for a legitimate purpose and without arbitrariness.

The court thus ruled it could not apply section 43 of the Constitution to disenfranchise the very sovereign people from using their constituent power to replace the Constitution through a referendum. In any case, this right was well settled in *Njoya*, and further received recognition in section 47A (2) (a) of the Constitution.¹⁰⁶¹

¹⁰⁶¹ In *Njoya*, the court concluded that the power to make a new Constitution belongs to the people and that the people have a constitutional right to a referendum and to ratify the

The court in *Priscilla Nyokabi* further considered some key political theories that advocate blanket disenfranchisement of criminals without focusing on the specific crimes committed or length of the prisoners' sentences.¹⁰⁶² These include the Lockean social contract theory and the republican citizenship theory. According to the Lockean theory, criminals have broken the "social contract" and should consequently lose the right to participate in any political process.¹⁰⁶³

The republican citizenship theory on the other hand, avers that criminals are less virtuous than other citizens. Such citizens should therefore, be deprived of the right to vote. This deprivation is to help maintain "purity of the ballot box" and deliver a message to both the community and offenders themselves that the community will not tolerate serious criminal activity.¹⁰⁶⁴ The social rejection of serious crime reflects a moral line intended to safeguard the social contract and the rule of law and to bolster the importance of the nexus between individuals and the community.¹⁰⁶⁵

However, progressive constitutional scholarship has contested the Lockean social contract and the republican citizenship theories for advocating blanket laws that disenfranchise all incarcerated offenders. For example, in 1993, the Human Rights Council proposed that Luxembourg should consider abolishing a Luxembourg Law that mandated voting disenfranchisement for any

Constitution by means of a referendum. The court ruled that the exercise of the constituent power required nothing less than a compulsory referendum.

¹⁰⁶² Jason Schall (2006). "The constituency of felon disenfranchisement with citizenship theory," 22 *Harvard Blackletter Law Journal* 53.

¹⁰⁶¹ Alec Ewald. *Punishing at the Polls: The Case against Disenfranchising Citizens with Felony Convictions* (2003).

¹⁰⁶⁴ Michael Plaxton and Heather Hardy, "Prisoner Disenfranchisement: Four Judicial Approaches", 28. *Berkeley Journal of International Law* 101 (2010).

¹⁰⁶⁵ *Suave v. Canada*. 3 S.C.R. 519 (2002) (Canada).

person convicted of a "serious crime" such as murder or rape while permitting enfranchisement for anyone convicted of a minor crime.¹⁰⁶⁶ In this case, the Human Rights Council thought this law was a "principal subject of concern as it constituted a deprivation of the right to vote as a further sanction of criminal

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cases.

In 2006, the Human Rights Council also considered laws of the United States, which disenfranchised most incarcerated criminals including many criminals released from prison. The Council concluded that:

"The general deprivation of the right (to) vote for persons who have received a felony conviction, and in particular those who are no longer deprived of liberty, do not meet the requirements of the International Covenant on Civil and Political Rights (ICCPR)."¹⁰⁶⁸

The Constitutional Court of the Republic of South Africa in *the State v. T.*

Makwanyane & Mchunu also argued that:

"The very reason for establishing a new legal order and vesting power of Judicial Review of all legislation in Courts was to protect the rights of minorities and others who cannot protect their rights adequately through a democratic process. Those who are entitled to claim this protection include the social outcasts and marginalized people in our society. It is only if there is willingness to protect the worst and weakest among us, that all of us can be secure that our own rights will be protected."¹⁰⁶⁹

In *Suave v. Canada*,¹⁰⁷⁰ the Supreme Court of Canada found that Canada's blanket criminal disenfranchisement law failed to meet the necessary

¹⁰⁶⁶ Human Rights Committee (HRC). Report of the Human Rights Committee, p. 132, UN. Doc. A/48/40 (Part I) (October 7.1993).

¹⁰⁶⁷ *Ibid*

¹⁰⁶⁸ Human Rights Committee (HRC). Concluding Remarks of the Human Rights Committee. p.35. UN. Doc. CCPR/C/USA/CO/3/Rev. I. July 28. 2006.

¹⁰⁶⁹ *The State v. T. Makwanyane A Mchunu*. Constitutional Court of South Africa, Case No. CCT/3/94

¹⁰⁷⁰ *Suave v. Canada*. 3 S.C.R. 519 (2002) (Canada).

proportionality standard. It not only deprived all incarcerated individuals of the right to vote but also violated the Canadian Charter of Rights and Freedoms.

In *Hirst v. United Kingdom*,^{101*} the Grand Chamber of the European Court of Human Rights found that the United Kingdom's criminal disenfranchisement law violated the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950 for depriving all incarcerated individuals of the right to vote. In the court's view, this law failed the proportionality test since it applied indiscriminately to incarcerated individuals. Criminal disenfranchisement must pursue a legitimate aim by proportionate measures,

In *Priscilla Nyokabi*, the court took the path of exerting minimal impairment of the right of prisoners to vote or otherwise take part in public affairs. The court specifically took cognisance that Article 25 of the International Covenant on Civil and Political Rights (ICCPR) 1966 did not completely ban voting restrictions and participation in public affairs. Article 25 (a) of the International Covenant on Civil and Political Rights (ICCPR), 1966 provides that:

"Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without **unreasonable restrictions:**

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives."¹⁰⁷²

The court therefore held that denying the inmates the right to vote in a referendum served no legitimate governmental objective or purpose. The court

Hirst v. United Kingdom. (No.2), App. No. 74025/01, 42 Eur. H.R. Rep. 41 (2006).

¹⁰⁷² Article 25 of the International Covenant on Civil and Political Rights (ICCPR) 1966.

held that the neither the Constitution of Kenya nor the Constitution of Kenya Review Act 2008 disqualified inmates from voting in a referendum. The court nevertheless ruled that in its considered view, the "people" could only apply to the people of sound mind and in control of their faculties. The court stated:

"People of unsound mind cannot be able to take part in any function that requires exercise of choice due to their status. Whether or not they are in or out of prison, they cannot be "the people" in respect of the exercise of their constitutional power to vote in a referendum. The inmates of unsound mind cannot be part of the 'people' in that respect."¹⁰⁷³

9.5.10 Promulgation of a new Constitution

With reference to the promulgation of the Proposed New Constitution 2005, a key jurisprudential question arose as to whether the President could promulgate a new Constitution under an ordinary legislation. The applicants in *Patrick Onyango*^{1 4} had argued that without an express provision in the existing Constitution giving the President power to promulgate a new Constitution, an ordinary Act of Parliament could not purport to give the President such powers.

The court however, ruled that the power to promulgate a Constitution was a primary law making power that was not dependent on its expression in the existing Constitution. The court ruled:

"We hold, find and declare that in the hierarchy of authority, the people rank first because it is the people who give birth to constitutions. The people's constituent power cannot be stopped, inhibited or muzzled by any of the organs of modern government including any existing Constitution especially where the Constitution making is being done under an existing Constitution which is fixed and does not provide for its death."¹⁰⁷⁵

Priscilla Nyokabi Kanvua v. The Attorney-General and IIEC, Constitutional Petition Number 1 of 2010. op. cit.

^{1 4} *Patrick Ouma Onyango and 13 others v. Attorney-General and 2 others. High Court Misc. Application No. 677 of 2005 (Nairobi).*

Ibid

In any case, the court argued, the proposed new Constitution made provisions for its promulgation. Article 289 of the Proposed New Constitution 2005 provided that "the Constitution shall come into force upon its promulgation by the President."¹⁰⁷⁶ In this respect, the court argued that the people in exercise of their constituent power at the referendum would confer the President with the power to promulgate the new Constitution because the Proposed New Constitution 2005 did have a promulgation provision.¹⁰⁷⁷

However, despite the court ruling in *Patrick Onyango*, the need for formal constitutional promulgation could not be, overemphasised. According to B.O. Nwabueze, there can be no doubt that today a referendum or plebiscite is legally accepted way of adopting a Constitution. Nevertheless, he points out that adherence to formalism still sometimes require that after adoption by the people the Constitution should be formally promulgated by a pre-existing state authority, invariably the Head of State.¹⁰⁷⁸

In South Africa for example, the President signed into law a new Constitution based on the Interim Constitution, not just any ordinary law following a popular vote at a referendum held in April 1994.¹⁰⁷⁹

¹⁰⁷⁶ **The Proposed New Constitution of Kenya 2005, published on 22nd August 2005, Government printers. Nairobi.**

¹⁰⁷⁷ *Patrick Ouma Onyango and 13 others v. Attorney-General and 2 others*, High Court Misc. Application No. 677 of 2005 (Nairobi), *op. cit.*

¹⁰⁷¹ B.O. Nwabueze, *Presidentialism in Commonwealth Africa*, L. Hurst and Co. (1974), p.394

¹⁰⁷⁹ Hussein Ebrahim , '*Constitution making in southern Africa -challenges for the millennium*', Paper presented at a conference on the process and content of Constitution making in post colonial Africa at the J.F.Kennedy school of Government, Harvard University, (2002).

In the Irish Republic, the Constitution provided a promulgation clause in Article 46(2) (3) as follows:

"2. Every proposal for the amendment of this constitution shall be initiated in Dail Eitream as a Bill and shall upon having been passed by both Houses of the Oireachtas be submitted by Referendum to the decision of the people in accordance with the law for the time being in force relating to the Referendum.

3. A Bill containing a proposal for the amendment of the constitution shall be signed by the President forthwith upon his being satisfied that the provisions of this Article have complied with in respect thereof and that such proposal has been duly approved by the people in accordance with the provisions of section 1 of Article 47 of this constitution and shall be duly promulgated by the President as a law"¹⁰⁸⁰

In Kenya, in an opinion on 25th August 2004 to the Parliamentary Select Committee, Mr. Amos Wako, the Attorney-General, emphasized the need to engrave the people's primordial power to make a new Constitution in the Constitution itself. This, he argued "is to be prudent to ensure that the birth of a new Constitution is based on a sound constitutional and legal basis."¹⁰⁸¹

The controversy over the promulgation question in Kenya was however, settled through the thirty-second amendment¹⁰⁸² that introduced section 47A. Section 47A (6) of the Constitution provided in respect of promulgation of the new Constitution that:

"if a draft Constitution is ratified pursuant to subsection (5) (b), the President shall, not later than fourteen days from the date of the publication of the final result of the referendum, promulgate and publish the text of the new Constitution in the Kenya Gazette."¹⁰⁸³

¹⁰⁸⁰ See John Maurice Kelly. *The Irish Constitution*. 2nd edition, (1984) p. 685.

" See Preston Chitere, Ludaki Chweya, Japhet Masya. Arne Tostensen , Kamotho Waiganjo, *Kenya Constitutional Documents: A Comparative Analysis*, Chr. Michelsen Institute (CMI) Report. R 2006:5/ IPAR Working Paper No. 7/2006. 4.

¹⁰⁸¹: *The Constitution of Kenya (Amendment) Act (No. 10 of 2008)*.

¹⁰⁸³ *Ibid*

Sub section 47A (7) further provided that:

"subject to any provisions in the new Constitution relating to its commencement, and notwithstanding anything to the contrary in this Constitution, the new Constitution shall become law and have effect when the new Constitution is published, or on the expiry of a period of fourteen days from the date of the publication of the final result of the referendum in the Kenya Gazette, whichever is the earlier."¹⁰⁸⁴

Thus, when the issue of promulgation of the Proposed Constitution of Kenya came up in *Nazlin Rajput*,¹⁰⁸⁵ the court held that section 47A of the Constitution read together with Article 263 of the Proposed Constitution was clear on promulgation question. As earlier highlighted in this section, in *Nazlin Rajput*, the petitioner had asked the court to declare the promulgation date of 27th August 2010 illegal and a violation of the Constitution. The petitioner argued that failure to promulgate the Constitution on or before 20th August 2010 would lead to a constitutional crisis as there would be no legitimate government in place.

The court however, ruled that by virtue of the people's sovereignty and constituent power enshrined in section 47A (1) and (2), the new Constitution once ratified by the people in a referendum could navigate itself to promulgation even if the President failed to promulgate the new Constitution as provided in section 47A (6) and (7) of the Constitution above. Article 263 of the Proposed Constitution of Kenya 2010 provided that:

"This Constitution shall come into force on its promulgation by the President or on the expiry of a period of fourteen days from the date of the publication in the Gazette of the final result of the referendum ratifying this Constitution, whichever is the earlier."¹⁰⁸⁶

Ibid

¹⁰⁸⁵ *Nazi in Rajput v. the Attorney-General and 2 others. Constitutional Petition No. 6 of 2010.*

¹⁰⁸⁶ *The Proposed Constitution of Kenya 2010. published on 6th May 2010. Government Printers. Nairobi.*

9.5.11 Transition from a pre-existing Constitution to a new constitution

With reference to the transition from a pre-existing Constitution to a new Constitution, an important jurisprudential question arose as to whether a new Constitution could replace a pre-existing Constitution under an ordinary legislation. The applicants in *Patrick Onyango* had argued that if section 28A of the Review Act, 2004 took effect, Kenya could technically end up with two constitutions whereby a new Constitution comes into effect without the death of the pre-existing one. Section 28A (4) and (5) of the Review (Amendment) Act, 2004 provided that:

"(4) If the final result of the referendum is that the people of Kenya have ratified the proposed new Constitution, the President shall, within 14 days promulgate and publish the text of the new Constitution in the Gazette.

(5) The new Constitution shall become law when it is proclaimed to be law under subsection (4) and it shall come into operation immediately, subject to any provisions in the new Constitution for its
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commencement.

The court however, declined to give the orders sought on the ground that the legal infrastructure set up for transition from the "old" Constitution to the "new" Constitution left no vacuum for crisis. The court declared that:

"With respect, what is being advocated that Kenya fails to enact a new Constitution because the old does not provide for its demise and that the initiative in making a new one is invalid lacks logic and sounds retrogressive and Utopian."¹⁰⁸⁸

In any case, the court argued that even if there was to be a constitutional break or vacuum because the old Constitution did not provide for its demise, it would not be as serious compared to that of the Irish Republic and India. The court stated that in the case of Eire (Irish Republic), there was a constitutional break,

¹⁰⁸⁷ The Constitution of Kenya Review (Amendment) Act, 2004 (Consensus Act, 2004)

^{1,8} *Patrick Ouma Onyango and 13 others v. Attorney-General and 2 others*. High Court Misc. Application No. 677 of 2005 (Nairobi).

- serious affair than promulgation.¹⁰⁸⁹ Similarly, there was a
... 'ar' is did not invalidate the constitutional process or invalidate
... m t,>fce at any given time.

... 'jrthcr argued that in Ghana in 1960 and India in 1947, the
i into effect based on ordinary legislation. Based on these
... t held the view that the Constitution of Kenya Review
... (Consensus Act 2004) was therefore on all fours with
Act of Ghana.¹⁰⁹⁰

... ever, be noted that both India and Ghana were in transition
... im. m,| sovereign constitutional orders from unwritten British
mi • » tradition. In the Kenyan case, there was a pre-existing
... .r. n in his case, instead of amending the Constitution to provide the
>, Parliament chose to amend the Constitution of Kenya Review
v • provide the same. The question that arose was therefore why
... I it more appropriate to write promulgation and transitional
... hary Act of Parliament and not in the existing Constitution.
,, ... l'irlinnent from amending the existing Constitution to provide
r r. t, r avoidance of doubt, if not for some mischief or ill intentions?
... . • further argued that the Proposed New Constitution 2005 made
... m • • ;|< demise of the pre-existing Constitution thereby allowing no
a >. . im in transition from the "old" to the "new" constitutional order.

"Under the relevant provisions, it is the proposed new Constitution which shall automatically repeal the existing Constitution on the effective date".¹⁰⁹¹

Article 290 of the Proposed New Constitution provided that 'The Constitution in force immediately before the effective date shall stand repealed on the effective date.'¹⁰⁹² First, the court reasoned that Article 289 of the Proposed New Constitution 2005 provided that it would come into force upon its promulgation by the President. Secondly, the court held the view that the effective date was clearly defined in the Proposed New Constitution as the date the new Constitution would come into force. Thirdly, the court pointed out that the repeal of the existing Constitution would be as per Article 290 of the proposed new Constitution.¹⁰⁹³

Very clearly, on the issue of whether a new Constitution could replace a pre-existing Constitution under an ordinary legislation, the court found justification in the provisions of otherwise unripe proposed new Constitution. The question therefore was why the judges found merit in unripe provision to decide a matter such as this. Were the learned judges predicting the efficacy of the proposed new Constitution before the same came into force? Clearly, in this case, the judges appeared to be endorsing the efficacy of an anticipated Constitution before coming into effect or put to test.

On the other hand however, it should be noted that the same court had dismissed the applicants' complaints about the unjust provision of section 28B

^{10,1} *Ibid*

^{1a} **The Proposed New Constitution of Kenya 2005**, published on 22nd August 2005, Government printers, Nairobi, *op. cit.*

' "' *Patrick Ouma Onyango and 13 others v. Attorney-General and 2 others*, High Court Misc. Application No. 677 of 2005 (Nairobi), *op. cit.*

(4) of the Consensus Act 2004 based on the doctrine of "ripeness."¹⁰⁹⁴ In respect of section 28B (4), the petitioners had complained that the Kenya shillings 5 million requirement for the petitioners to pay to challenge the referendum results was prohibitive. In this regard, the court declared that:

"The referendum is an event in the near future and therefore no legal right or interest has arisen capable of being protected by the court. ... Section 28B (4) of the Review Act is obviously intended to apply in the future and for this reason, it is not our wish to deny a future court determining the merits if moved by any aggrieved applicants with legally enforceable rights and interests.... the sole power of the court is to decide and enforce what is the law and not what it should be - now and in the future."¹⁰⁹⁵

Although the controversy momentarily died with the rejection of the Proposed New Constitution of Kenya at the November 2005 referendum, it resurrected with the efforts to restart of the review process as discussed in Chapter Six (6), section 6.7. Eventually, the controversy over the transition from the "old" to the "new" Constitution under ordinary legislation was put to rest in Kenya's jurisprudence through the introduction of section 47A(1) and (2) of the Constitution.¹⁰⁹⁶ Section 47A (1) (2) (a) of the Constitution of Kenya (Amendment) Act 2008 provided that:

"(1) Subject to this section, this Constitution may be replaced.
(2) Notwithstanding anything to the contrary in this Constitution -
(a) the sovereign right to replace this Constitution with a new Constitution vests collectively in the people of Kenya and shall be exercisable by the people of Kenya through a referendum, in accordance with this section."¹⁰⁹⁷

¹⁰⁹⁴ The doctrine of "ripeness" requires that the factual claims underlying the litigation be concretely presented and not based on speculative future contingencies.

¹ *Patrick Ouma Onyango and 13 others v. Attorney-General and 2 others*. High Court Misc. Application No. 677 of 2005 (Nairobi), *op. cit.*

¹ * The Constitution of Kenya (Amendment) Act No. 10 of 2008; The Constitution of Kenya, Revised edition 2009 (2008). Published by the National Council for Law Reporting with the Authority of the Attorney-General.

¹⁰⁹⁷ The Constitution of Kenya (Amendment) Act. No. 10 of 2008 *op. cit.*

Sub section (8) (b) further qualified that:

"references to the replacement of this Constitution are references to the repeal of this Constitution and its replacement with a new Constitution."¹⁰⁹⁸

9.6 Lessons from the Constitution review cases and the legal challenges

From the foregoing, it is clear that the Constitution of Kenya review process started on perilous legal foundation until the enactment of the Constitution of Kenya (Amendment) Act 2008. First, Parliament amended the principal review law, the Constitution of Kenya Review Act, 1997, Cap 3 A three times before its operationalisation in 2001. It was further amended in 2004 before self-repealing after the November 2005 referendum in accordance with the Constitution of Kenya Review (Amendment) Act 2004 (Consensus Act 2004).

Secondly, the review process lacked a strong constitutional anchor. This opened it up to frivolous legal challenges and political gerrymandering. As a result, the first attempt at comprehensive Constitution review (2001-2005) ended without a new Constitution following the rejection of the Proposed New Constitution of Kenya, 2005 at the 4th November 2005 referendum.

Thirdly, the review process lacked strong constitutional safeguards. The legal purity and validity of the review process was therefore to become the subject of constitutional challenges in court.

Fourthly, the review process lacked an independent dispute resolution mechanism until the thirty-second amendment¹⁰⁹⁹ established the Interim Independent Constitutional Dispute Resolution Court (IICDRC). This put into

¹⁰⁹⁹ *Ibid.*
ibid.

serious doubt the independence of the courts in adjudicating the review process.

As Kamotho Waiganjo stated while reacting to the court's decision in the *Jesse*

Kamau:

"In 2003, the Bomas draft required the vetting of judges. The courts ruled against the process in the (Rev Timothy) Njoya case. In 2005, the Wako draft did not require vetting of judges. The court supported the process in the Yellow Movement (*Patrick Onyango*) case. In 2010, the draft Constitution required a vetting process. The judges have for all practical purposes ruled against the draft Constitution. But in the public eye, this predictability, this consistency when their interests are at stake raises serious issues of credibility. "¹¹⁰⁰

Kamotho Waiganjo therefore argued it was in light of this history that Parliament shielded the Constitution review process (2008-2010) from the High Court by establishing a special constitutional court, the Interim Independent Constitutional Dispute Resolution Court to deal with all litigation relating to the review process. "" The apparent "political judgements" in the context of the Constitution review process is what Chief Justice Latham says must not occur in any democratic judicial system. "Political judgements" according to Chief Justice Latham in *Australian Communist Party v. Commonwealth*¹¹⁰² can only happen in less democratic jurisdictions. He stated:

"I can understand courts being directed (as in Russia and Germany in recent years) to determine questions in accordance with the interests of a particular political party. There the court is provided with at least a political standard."¹¹⁰³

¹¹⁰⁰ Kamotho Waiganjo statement in the East African Standard on 30th May 2010.

¹¹⁰¹ *Ibid*

¹¹⁰² *Australian Communist Party v. Commonwealth* (1950-51) 83 CLRI 148-9.

¹¹⁰³ *Ibid*

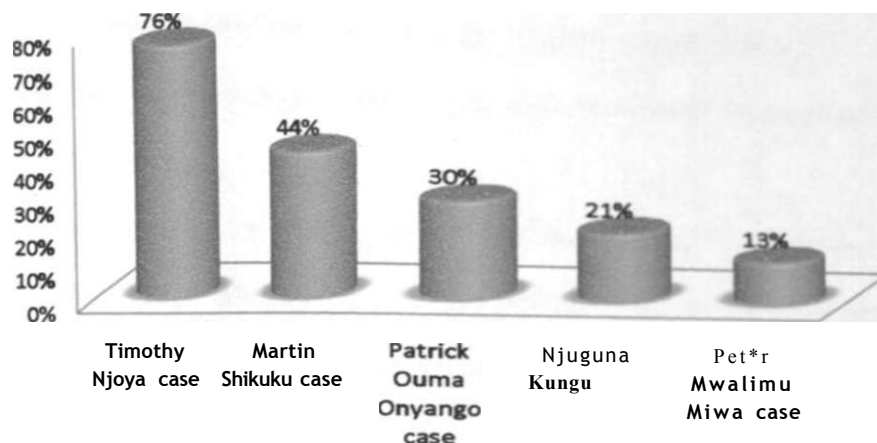
Z.E. Ongoya. for example, has stated in respect of the court's conduct in the *Patrick Ouma Onyango* case and other Constitution review cases:

"When a historian with a genuine bias in favour of matters relating to the Constitution will finally and incisively document, in a sequential manner, the rowdy character of Kenya's attempt at the Constitution making process, the Kenyan judiciary may not be credited with bringing the sanity of law to the process. To the contrary, the judiciary may be accused of having bent backwards to provide a forum for tramps in the theatre of the absurd to trivialize the entire process."¹¹⁰⁴

Indeed when the respondents were asked about their views on the manner the courts handled the review cases between 2004 and 2005, more than seven out of ten (72 percent) said that the courts acted in the interest of the executive and the ruling elite. Almost three out of ten (28 percent) of the respondents attributed the courts' behaviour in the review cases to corruption in the judiciary (16 percent) and unjust legal system (12 percent). Overall, more than eight out of ten (82 percent) of the respondents said that the courts acted in the interest of the Government (Executive) and the ruling elite in general. Chart 28 below shows the review cases between 2004 and 2005 and the respondents' level of awareness of the cases.

¹¹⁰⁴ Z.E. Ongoya. *Patrick Ouma Onyango and 12 others v. the Attorney-General and 2 others: A classical case of mis-applying and Dis-applying Jurisprudence?* (undated article).

Chart 28: Respondents level of awareness of the review cases (2CKU-2005)



Source: Study findings

Fourthly, the courts lacked guidelines on the application of the political question doctrine to the review process. As a result, the courts determined political question doctrine expediently depending on the review dispute at hand as discussed in sub section 9.5.5 above.

From the legal pitfalls of the review process between 1997 and 2005 therefore, the design of the final phase of the Constitution making process (2008-2010) therefore provided adequate safeguards against both political and judicial gerrymandering. As already discussed in Chapter Seven (7) and section 9.2 of this Chapter, this was done by entrenching the review process and building in independent judicial mechanism to adjudicate on the review process disputes in the Constitution.¹¹⁰⁵

Consequently, the review process was to be executed with utmost independence and timeliness. For example, as discussed in section 9.4 of this Chapter, despite the strict time-lines stipulated in the law. the

¹ The Constitution of Kenya (Amendment) Act 2008.

posed of all cases filed before it with absolute independence and in strict
lience with the constitutional principles guiding the review process,
prom the legal challenges of the Constitution making process, four key
therefore, emerge.

First, that Constitution making is as a political process as much as it is
It surpasses the positive law and requires that the legal system constantly
t, - r n p l a t e the powerful forces within the political system that may negatively
• **t h e p r o c e s s** and its outcomes. Thus, Constitution making being a process
r - 1 i r o s **continual** revisiting and reworking as moral and political considerations
n ^ c r n i n g **its** limits are refined and improved.¹¹⁰⁶ As demonstrated by the
- i o w **cases** as discussed in section 9.4 above, the failure of the courts to
«" " **i t i p l a t e** the political dynamics in adjudicating the review disputes may
contributed to the citizens' lose of trust in the courts and judiciary in
i r a l

Secondly, that the textual interpretation without defined standards,
"•tic content is not always fully determinate or stable from one generation
n e x t. Even when the meaning of a word or phrase used in a Constitution
" - » n t and plain for all to see, it is not always the case that it is dispositive.
l r r > p l e, the failure of the Constitution of Kenya Review Act, Cap 3A to
s < - » s c h terms as "Constitution review," "comprehensive review of the
I O n ." and "the people of Kenya" left room for conceptual confusion.
c o n c e p t "review" inclusive of "amending", "altering" or "making a
f « t » j » ; o n **de novo** or "repealing the existing Constitution"? Why did the

"cyclopedia of Philosophy (2004).

Review Act refer to "a Bill to alter the Constitution" while the National Constitutional Conference referred to its outcome as a "draft Constitution of Kenya" and Parliament, to its own, as the "Proposed New Constitution of Kenya"?

Thirdly, that the mere court's declaration of the people's inherent sovereign right and constituent power in Constitution making is in itself inadequate to guarantee people's participation unless unequivocally written into the existing Constitution. Even the mere provision of people's exercise of their sovereign right and constituent power in an ordinary legislation without being entrenched in the Constitution is itself inadequate to secure people's participation in a Constitution making process.

Practically, as discussed in Chapter Six (6), section 6.5, despite the court in *Njoya* and the Constitution of Kenya Review (Amendment) Act, 2004 declaring the people's sovereignty in Constitution making, the review process became even less participatory and more open to political manipulation than before. It was therefore not until the thirty-second amendment^{1,07} entrenched the review process and guaranteed the people's exercise of their sovereign right and constituent power in Constitution making that ultimately assured people's participation and security of the process.

^{1,07} **The Constitution of Kenya (Amendment) Act No. 10 of 2008**

9.7 Conclusion

This Chapter has examined the legal challenges and jurisprudential issues in participatory Constitution making in Kenya and tested the claim that to be effective, a participatory Constitution making process must be entrenched in the Constitution.

From the foregoing, it is evident that the Constitution making process in Kenya started on perilous constitutional and legal grounds until the enactment of the Constitution of Kenya (Amendment) Act 2008. However, despite the many legal pitfalls, the legal challenges illuminated the essential constitutional and legal imperatives for an effective participatory Constitution making enterprise. The court cases for example, did not just expand the jurisprudence of participatory Constitution making in Kenya but also put the jurisprudential significance of people's participation in Constitution making and management of constitutionality in general at the centre of constitutional discourse,

Regarding the effectiveness of a participatory Constitution making, the study concludes that both the Constitution making process and the principles of people's sovereignty in Constitution making must be entrenched in the existing Constitution. The study therefore argues that it is the entrenchment of the people's sovereign right and the review process in the existing Constitution in Kenya that ultimately secured peoples participation rather than the mere court declarations or provisions of an ordinary legislation.

The next Chapter Ten (10) presents the overall study conclusion and recommendations.

CHAPTER TEN

OVERALL CONCLUSION AND RECOMMENDATIONS

10.1 Introduction

Chapters One to Nine have presented extensive literature review and assessment of constitutional developments and Constitution making in Kenya from the colonial times to 2010 and their implications for building of constitutional legitimacy. This Chapter presents the overall conclusion and recommendations of the study.

10.2 Overview of the study objectives, questions and assumptions

The study has assessed the colonial and postcolonial constitutional developments and the challenges of constitutional governance and change in Kenya. The study has further examined the struggle for constitutional reforms from the 1990s up to 2010. The study has in particular assessed the principles and processes of the Constitution of Kenya review from 1997 to 2010 as a model of participatory Constitution making. This assessment has included the analysis of the legal challenges and jurisprudential issues in participatory Constitution making in Kenya. Finally, the study has analysed the nexus between public participation and constitutional legitimacy.

The study has interrogated five basic research questions. First, to what extent did constitutional developments in colonial and postcolonial Kenya contribute to the building of constitutional legitimacy. Second, can meaningful constitutional change take place during peacetime or in an environment of relative peace? Third, what makes a participatory Constitution making process

effective? Is the mere act of public participation in a Constitution making process sufficient to endow its outcome with legitimacy? Fourth, is there significant relationship between public participation and constitutional legitimacy? Fifth, what were the legal challenges and jurisprudential issues in participatory Constitution making in Kenya?

In assessing the constitutional developments and Constitution making in Kenya from the colonial times to 2010 and their implications for building constitutional legitimacy, the study has tested six basic claims or assumption.

First, that for a Constitution making process to secure a legitimate outcome, it must be anchored on a deeper appreciation of the people's aspirations and not undertaken merely to achieve short term goals or to secure the interests of a few elite or sections of the society.

Second, that to secure legitimacy, a constitutional order must be inclusive of the aspirations of all the groups that exist in the society and that must not be designed only to secure the interests of a few elite or sections of the society.

Third, that the effectiveness of a participatory Constitution making process very much depends on the commitment the ruling elite demonstrate in supporting the process at every stage and in ensuring that the process succeeds.

Fourth, that fundamental constitutional change does not take place in an environment of relative peace and that unless civil unrest threatens the *status quo*, the ruling elite will not support fundamental constitutional reforms.

Fifth, that there is significant relationship between public participation in Constitution making and constitutional legitimacy.

Finally, the study has tested the claim that to be effective, a participatory Constitution making process including its guiding principles and structures must be entrenched in the existing Constitution.

10.3 Summary of key findings

From the foregoing, the study has established that throughout its constitutional history, Kenya has experienced one constitutional crisis after another. The manifestations of the crisis include the crisis of the state identity, the crisis of governance and conflict, the crisis of poverty, social inequality and exclusion, and the crisis of insecurity and civil disorder.

During the colonial period, the political, economic and legal system was incurably exclusive, imperial, oppressive and unaccountable. Colonial constitutionality therefore neither enjoyed public support nor positively impacted on the wellbeing of the majority of the population. In short, colonial constitutionality grossly fell short of the key ingredients of democratic constitutionalism neither did the constitutional developments during the colonial period contribute in any way to the building of constitutional legitimacy in Kenya.

The study also finds that the state of Kenya's postcolonial constitutionality was not fundamentally different from that of the colonial era. Just like in the colonial state, the post independence political elite used the Constitution and its institutions not just to secure themselves special economic and political advantages but also to perpetuate the culture of impunity. Thus, instead of working towards constitutional democracy, the post independence

regimes repeatedly tinkered with the Constitution through undemocratic amendments to entrench an edifice of constitutional dictatorship and unaccountable governance system.

Essentially, until the promulgation of the Constitution of Kenya on 27th August 2010, much of the constitutional developments in Kenya since the independence signified no more than familiar ritual of moving from one unjust constitutional regime to another without any fundamental democratic transition. In this respect, constitutional developments from independence 1963 until perhaps after the 1990s did not contribute in any way to the development of constitutional legitimacy in Kenya.

Functionally, both the colonial and post independence constitutionality possessed the dubious character of serving a few elite and community interests. Politically, the governance of the colonial and post independence state remained neither representative nor inclusive of the aspirations of the majority of the people of Kenya.

As a result, the struggle for constitutional reforms and reconstruction from the colonial to post colonial periods mainly revolved around the question of how to evolve a democratic and inclusive constitutional order with greater positive impact on the wellbeing of all citizens.

The study further finds that as part of its constitutional reconstruction process, Kenya implemented perhaps the most elaborate and protracted participatory Constitution making process anywhere in the world. For the first time in Kenya's constitutional history, the people had the real chance to first, actively participate in the making of the Constitution. This allowed the people

not just to ventilate their frustrations and concerns about the state of their constitutionality but also to express their aspirations and hopes for the future. As such, the novelty of the Kenya's participatory Constitution making process from 1997 to 2010 centred on the extensive involvement of the public in the creation of the new Constitution. However, the study also reveals four important issues in participatory Constitution making as follows.

First, the study finds that the mere act of public participation in Constitution making is not in itself sufficient to secure the legitimacy of the process and its outcome. A broader framework that contemplates the dynamics of the political systems and the political leadership is therefore required when considering the relationship between public participation and constitutional legitimacy.

Secondly, the study finds that the mere statement of the participation principles in an ordinary Constitution making legislation is not sufficient to guarantee meaningful public participation at every stage of the process. To be effective in securing public participation, the principles must be entrenched in the existing Constitution. The political elite involved in the Constitution making process must also demonstrate sustained commitment and willingness to support meaningful public participation in the process.

More importantly, a continuous and empowering civic education programme must accompany people's participation to ensure that their participation is meaningful and well informed. In addition, due care must be taken to ensure that the processes of formulating and ratifying the proposed Constitution are credible and truly representative of the will of the people.

Without these considerations, even the use of a referendum to ratify the Constitution will not be effective in conferring legitimacy to the process outcome.

Thirdly, the study finds that an effective participatory constitution making enterprise requires a solid constitutional and legal foundation. If the process is taking place in the context of an existing Constitution, the process, its principles and structures must be entrenched in the Constitution to protect the process from the vagaries of political, judicial and executive manipulation. The Constitution must also unequivocally provide for the principles and means of exercising people's sovereignty and constituent power in the Constitution making process.

As demonstrated by the various court cases on the Constitution review process in Kenya, the mere court declarations that the people's sovereign right and constituent power are inherent and primordial requiring no textual expression to have juridical effect are insufficient to guarantee people's participation in a Constitution making process. It is prudent that such rights and powers must flow from the Constitution itself in order to secure people's sovereignty in the Constitution making process.

Fourthly, the study finds that to be effective, a participatory Constitution making must be accompanied with well established and constitutionally entrenched independent dispute resolution mechanism. As demonstrated by the Constitution review process between 1997 and 2007, without well-defined structures that foster dialogue, compromise, consensus building and dispute resolution, even an elaborate participatory Constitution making process can

collapse. In Kenya, the absence of well-established mechanisms for consensus building and dispute resolution in the Constitution review process is what led to the eventual rejection of the Proposed New Constitution 2005 at the November 2005 referendum.

From the foregoing, the study reaches five main conclusions. First, from the assessment of constitutional developments in both colonial and post independence Kenya, the study concludes that to secure legitimacy, a constitutional order must be inclusive of the aspirations of all the groups that exist in the society. The vision of constitutional development must also be tied to the overall vision of democratic governance and social justice. It must not also be undertaken merely to achieve short-term goals or to secure the interests of a few elite or sections of the society. It is indeed evident that these were fundamentally lacking in both colonial and post independence constitutional systems in Kenya leading to a crisis of legitimacy for the state.

Secondly, from the challenges of constitutional governance and change in Kenya from colonial times to 2010, the study concludes that fundamental constitutional change does not take place during peacetime or in an environment of relative peace. Ordinarily, the ruling elite will not support fundamental constitutional reforms unless the *status quo* is, threatened by civil unrest. Typically, and as demonstrated both during the colonial and post independence periods, all the major and fundamental constitutional changes in Kenya were preceded by intense periods of civil unrest and violence. This conclusion

supports Professor H.W.O. Okoth Ogendo's consistent view that meaningful constitutional reforms do not take place in peacetime."⁰⁸.

Thirdly, from colonial times to the 1990s, the study concludes that both colonial constitutional developments and much of the post independence constitutional amendments seldom contributed to the development of constitutional legitimacy in Kenya. Practically, both constitutional systems neither included people's aspirations in the matrix of constitutional governance nor involved them in Constitution making and management processes. Thus, constitutional legitimacy as a standard of constitutional good and expression of people's confidence, demands that every Constitution making process must be people driven and must be inclusive of the interests and aspiration of all citizens and groups in society.

Fourthly, from the Constitution of Kenya review process between 1997 and 2010, the study concludes that to be effective, a participatory Constitution making process must command the support of the ruling elite who must believe in it and must demonstrate commitment to ensuring that the process succeeds. They must also demonstrate commitment to the implementation of its outcome. As demonstrated throughout the Constitution review process, the reason the process protracted for over 20 years was simply that the ruling elite neither supported the process nor committed to implementing its outcome. In this respect, the study contends that it is important to pay attention to what the elites

⁰⁸. Professor H.W.O Okoth Ogendo consistently expressed this view as a Commissioner at the Constitution of Kenya Review Commission (CKRC) where he also served as Commission Vice Chairman as well as the Chairman of the Research, Drafting and Technical Support Committee. In many of his arguments about the futility of Kenya's Constitution review process during peacetime. Professor H.W.O. Okoth Ogendo always expressed the view that meaningful constitutional reforms do not take place in peacetime.

communicate to citizens about the significance of the process, and their expectations of the outcome of the process.

Fifthly, from the perilous constitutional and legal grounds that the Constitution of Kenya review process was mounted from 1997 to 2005, the study concludes that to be effective, the guiding constitutional principles, process and structures including the basic legislative instrument of a participatory Constitution making enterprise must be entrenched in the existing Constitution. This, the study, argues will compel all the parties involved to abide by the constitutional requirements thereby reducing any frivolous legal challenges and political gerrymandering. The study therefore concludes that the reason the final phase of the review process (2008-2010) was successful is simply that it was constitutionally entrenched unlike the first phase of the review process (1997-2005).

Finally, from the extensive public participation in the Constitution of Kenya review process between 2001 to 2010, the study concludes that there is indeed significant relationship between public participation in Constitution making and constitutional legitimacy. However, the study argues that the mere act of public participation is not in itself sufficient to secure the legitimacy of a Constitution making process and its outcome. In reality, public participation will only be effective as long as there is demonstrated political will and commitment to ensuring genuine and meaningful public participation in the Constitution making process. The events leading to the rejection of the Proposed New Constitution of Kenya 2005 at the November 2005 referendum

and later, to the ratification of the Proposed Constitution of Kenya 2010 at the August 2010 referendum best illustrate this fact.

10.4 Study recommendations

From the foregoing, the study makes recommendations on two broad areas, namely the design and management a participatory Constitution making process, and further research.

10.4.1 The design of a participatory Constitution making process

On the design and management of a participatory Constitution making process, the study makes three key recommendations.

First, if a Constitution making process is to take place in the context of an existing Constitution, the process, its institutional and legislative framework should be entrenched in the Constitution to ensure a solid constitutional foundation and security. Consequently, the enabling legislative instrument should make provisions, at the very minimum, on the objects; organization and structure; powers and functions of various actors; conflict of interest; financial arrangements; dialogue and consensus building on contentious issues; dispute resolution; people's participation; civic education; drafting and publication of draft Constitution; approval and ratification of the draft Constitution; and promulgation of the Constitution.

Secondly, the study recommends the need for an independent judicial mechanism with powers to adjudicate on disputes arising from the Constitution making process. It should also have the power to audit, validate and certify the

draft Constitution against the agreed objects and principles of the process before the people ratify the draft Constitution.

Thirdly, in a post-conflict situation, a two-stage constitutional implementation and evaluation process is required. One process should be devoted to transition to peace and stability based on well-defined transitional and sunset clauses. These would become non-operative after specified periods. The second process should be devoted to building democratic constitutional culture.

10.4.2 Recommendations for further research

With respect to further research, the study makes three recommendations.

First, there will be need for an in depth study on the challenges and issues in the implementation of the Constitution in post participatory Constitution making period. This will enable an analysis of whether or not constitutional legitimacy that comes with public participation in Constitution making is sustainable beyond the popular ratification of the Constitution.

Secondly, the study recommends the need to establish a national Constitution reference library in order to support the growing field of constitutional research and jurisprudence in Kenya.

Thirdly, the study has not interrogated the nexus between the national level Constitution making processes and the ongoing efforts at regional integration and the supra-constitutional formation. The study therefore recommends an exploratory study on the nexus between national level

constitutional reforms and regional political integration and constitutional formation in East African community.

10.5 Overall Conclusion

In assessing the constitutional developments and Constitution making in Kenya from the colonial times to 2010 and their implications for building of constitutional legitimacy, the study proceeded from the premise that constitutional legitimacy is simply a reflection of constitutional good. It is about the Constitution and its institutions reflecting the aspirations of the people and having a positive impact on their wellbeing.

From the overall assessment of constitutional developments in Kenya from the colonial times to 2010, two scenarios have emerged. On the one hand, there is a clear political commitment to the idea of the Constitution as a necessary instrument for organizing and governing the state. On the other hand, there is also, almost in equal measure, the political rejection of the ideals of democratic constitutionalism. It is for this reason, that the study contends that for the reconstruction of the state to be meaningful and for the constitutional order to secure both functional and political constitutional legitimacy, Constitution making and management of constitutionality in general, must seek to guarantee meaningful participation of the people.

Ultimately, it is not, how well written a constitutional document is that will determine the respect and honour that the Constitution commands as the pre-eminent norm of the society. Rather, it is how the Constitution is, made to work for the wellbeing of the people that will determine the sanctity of the

Constitution. Thus to secure constitutional legitimacy, there must be consistent and sustained public engagement in the making of the Constitution. There must also be consistent and sustained public benefit arising from the implementation and management of the constitutionality. Without these two important attributes, there is likely to be a contestation of the legitimacy of the Constitution and its institutions. This will most often lead to a break down in law and order and ultimately, the collapse of the state.

It is against this background that the study concludes that the future of democratic constitutionalism and development in Kenya will depend largely on the leadership commitment to nurturing popular constitutionalism tied with democracy and social justice. In the final analysis as Georges Bidault asserted:

"The good or bad fortune of a nation depends on three factors: its constitution, the way the constitution is made to work and the respect it inspires."¹¹⁹

¹¹⁹ Georges Bidault (5 October 1899 - 27 January 1983), a French statesman made the remarks in the context of the political challenges of the French Fourth Republic (December 1946 and May 1958) during which despite constitutional attempts to bring about political stability. France experienced incessant political instability with twenty-four governments succeeding each other within twelve years, *Facully.uml.edu/jgarreau/50.376/resource.htm*.

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APPENDIX 1: QUESTIONNAIRE

GENERAL INFORMATION

Questionnaire Number_

Name of Respondent_

Place of origin of the Respondent_

Place of interview_

Name of Interviewer_

Date of Interview_

I am (We are) from the University of Nairobi, School of Law mandated to collect information. The research is concerned with public participation in Constitution making process in Kenya and its implications for building constitutional legitimacy. I would like to talk to you about this. The interview will take about 45 minutes. The information we obtain will remain strictly confidential and unauthorized person will never identify your answers. May I start now? (If permission is granted, begin the interview. If the respondent does not agree to continue, thank her/him and go to the next possible respondent).

PERSONAL PARTICULARS

(Tick or record the responses appropriately)

1. Gender
 1. Male
 2. Female

2. Ethnicity of respondent_

3. Age of respondent in years (or date of birth)

4. Main occupation of respondent
 1. Farmer
 2. Pastoralist
 3. Formal employment in non-public sectors
 4. Jua Kali
 5. Civil/public servant
 6. Consultant
 7. Business
 8. Unemployed
 9. Other (specify)

5. Education level of respondent
 1. None
 2. Primary
 3. Secondary
 4. College
 5. University
 6. Other (Specify)

UNDERSTANDING OF THE CONSTITUTION AND ITS PURPOSE

6. Do you know what a constitution means?
 1. Yes (*Go to Question 7*)
 2. No (*Go to Question 8*)

7. If yes, what does a constitution mean to you? (*Multiple response-probe*)
 1. Formal (written) document
 2. Unwritten customs of the people
 3. Supreme law of the land
 4. Statement of national aspiration/goals and values
 5. A shared/collective vision of the nation.
 6. A charter that binds people together in a state
 7. A covenant between the people and the government
 8. Symbol of national unity
 9. Instrument for the formation/organization of government
 10. Instrument for limiting the power of the government
 11. Framework for governance of the state.
 12. Framework for protection of human rights and fundamental freedoms
 13. Framework for ensuring the welfare of the people
 14. Framework for ensuring equitable sharing of national resources
 15. Don't Know
 16. Other specify.

8. Are you familiar with provisions of the current constitution of Kenya?
 1. Yes (*Go to Question 9*)
 2. No (*Go to Question 10*)

9. If yes, do you have a copy of the current constitution of Kenya?
 1. Yes (*Go to Question 11*)
 2. No (*Go to Question 10*)

10. If no, have you seen a copy of the current constitution of Kenya?
 1. Yes
 2. No

11. In your opinion, would you say that the current Constitution represents your aspirations as a citizen of Kenya?
 1. Yes
 2. No

12. If Yes or No, in what ways?

CONSTITUTIONAL CHANGE AND DEVELOPMENT IN KENYA

Between 1964 and 1997, the Constitution of Kenya was amended or changed 29 times by parliament. Between 1964 and 1969, parliament amended the independence constitution 10 times and consolidated it into what we now know as the current constitution. There were no further constitution amendments until 1974. Between 1974 and 1997, the constitution was further amended, 19 times.

13. Were (Are) you aware that the Constitution of Kenya has been amended/changed several times since independence by parliament?

1. Yes (Go to Questions 14-17)
2. No (Go to Question 19)

14. If yes, did you play a role in any of the constitutional amendments/changes?

1. Yes
2. No

15. If yes, what role did you play in the constitutional amendments/changes by parliament? (*Multiple response*)

1. Presented views
2. Advocated/lobbied for the amendments
3. Petitioned Members of Parliament
4. Provided civic education on the amendments
5. Participated in forums on the amendments
6. Played no role
7. Other
(specify)_

16. In your opinion, have the amendments/changes brought about any positive effects?

1. Yes
2. No
3. Both (Yes and No)

17. If yes, what do you consider to have been the positive effects of the constitutional amendments/changes? (*Multiple response - probe*)

1. Promoted and protected public interest
2. Strengthened democratic governance
3. Promoted multiparty democracy
4. Promoted respect for human rights
5. Promoted national unity
6. Promoted peace and security
7. Promoted ethnic tolerance
8. Strengthened checks and balance
9. Strengthened separation of powers

10. Strengthened the rule of law
 11. Promoted integrity in public service
 12. Strengthened the independence of the judiciary
 13. Strengthened Parliament
 14. Promoted gender equality
 15. Improved economy
 16. Increased employment opportunities
 17. Improved equitable sharing of national resources
 18. Improved living conditions of the people
 19. Other (Specify)
18. If No, what do you consider to have been the negative effects of the constitutional amendments/changes? (*Multiple response -probe*)
1. Promoted individual/personal interest
 2. Consolidated power in the Executive
 3. Consolidated power in the President
 4. Promoted patronage
 5. Promoted personal rule
 6. Reduced power and independence of Parliament
 7. Reduced independence of the Judiciary
 8. Established dictatorship
 9. Promoted negative ethnicity and tribalism
 10. Promoted abuse of human rights and fundamental freedoms
 11. Promoted impunity by leaders
 12. Introduced single party politics
 13. Increased national inequalities and disparities
 14. Increased unequal sharing of national resources
 15. Poor economic performance
 16. Increased poverty
 17. Increased insecurity and crime
 18. Increased unemployment
 19. Increased gender inequality
 20. Other (specify)

PARTICIPATORY CONSTITUTION MAKING PROCESS AND PRINCIPLES

Since 1997 to date. Kenya has tried to undertake comprehensive review of the constitution of Kenya. The Constitution of Kenya Review Act was enacted in 1997 and was amended three times before its full operation in May 2001. Between 2001 and 2005 under the Constitution of Kenya Review Act and 29-member Constitution of Kenya Review Commission (CKRC), Kenya engaged in a process of comprehensive review of the constitution of Kenya. This process ended up with a national referendum on Proposed New Constitution of Kenya 2005 (Wako Draft). Earlier the National Constitutional Conference had come up with the Draft Constitution of Kenya 2004 (Bomas Draft). In between the end Bomas National Constitutional Conference in March 2004 and the National Referendum in November 2005 there was a dispute around the constitution review process leading to a number of Court cases.

Role Played In the Review Process

19. Did you play any role in the constitution review process since 1997 up to November 2005?
 1. Yes (*Go to Question 20*)
 2. No (*Go to Question 21*)

20. If yes, what role did you play in the constitution review process?
(*Multiple response - probe*)
 1. Provision of civic education
 2. Participated in the civil society constitution forums and workshops
 3. Participated in community mobilization
 4. Provided expert input
 5. Presentation of views to the Constitution of Kenya Review Commission (CKRC)
 6. Presented a memorandum to the Constitution of Kenya Review Commission (CKRC)
 7. Member or official of the constituency constitutional committee (3Cs)
 8. A delegate at the National Constitutional Conference (NCC)
 9. Participated as an observer at the National Constitutional Conference
 10. Voted at the Referendum for the adoption of the Proposed New Constitution
 11. Voted against the adoption of the Proposed New Constitution at the referendum
 12. Participated as an observer at the Referendum
 13. Presented views to the Kiplagat Committee of Eminent Persons
 14. Participated in the Multi-Sectoral Review Forum
 15. Played no role
 16. Other (specify)

21. If no, why did you not play a role in the constitution review process?
(Multiple response - probe)

1. Lack of opportunity to play a role in the process
2. Not aware of the process
3. Lack of civic education
4. Process taken over by the political leaders
5. Lack of a voter's card
6. Lack of understanding/knowledge of the constitution
7. Not interested
8. Too busy to play a role
9. No particular reason
10. Don't know
11. Other (specify)

Principles Guiding the Constitution making Process

22. Are you aware that the review process was guided by certain principles?

1. Yes *(Go to Question 23)*
2. No *(Go to Question 25)*

23. If yes, do you know any of the principles that guided the constitution review process?

1. Yes *(Go to Question 24)*
2. No *(Go to Question 25)*

24. If yes, which principles guided the review process? *(Multiple response - probe)*

1. Being accountable to the people of Kenya;
2. Ensuring that the review process accommodates the diversity of the Kenyan people
3. Ensuring the people of Kenya have the opportunity for active, free and meaningful participation in the review process
4. Ensuring that the review process is conducted in an open manner
5. Ensuring that the review process is guided by respect for the universal principles of human rights
6. Ensuring that the review process is guided by respect for the universal principles of gender equity
7. Ensuring that the review process is guided by respect for the universal principles of democracy
8. Ensuring that the outcome of the review process faithfully reflects the wishes of the people of Kenya.

25. In your opinion, did the constitution review organs (e.g. CKRC, Parliament, National Constitutional Conference (NCC), Constituency Constitutional Forums (3Cs), Electoral Commission of Kenya (ECK). Attorney-General etc) follow the set principles in their work?
1. Yes
 2. No
26. In either case (Yes or No) explain

Civic Education on the Constitution

27. Between 1997 and 2005, did you receive any form of civic education on the constitution?
1. Yes (*Go to Questions 28-30*)
 2. No (*Go to Question 31*)
28. If yes, who provided the civic education?
1. Radio
 2. Television
 3. Newspapers
 4. NGO
 5. Community based organization (Specify e.g. youth group etc.)
 6. Faith Based organization (specify e.g. Church, Mosque etc)
 7. Political party
 8. Provincial administration
 9. Electoral Commission of Kenya
 10. Constitution of Kenya Review Commission
 11. Constituency Constitutional Committee (3Cs)
 12. Civic education providers (CEPs)
 13. Members of Parliament
 14. Professional organization (e.g. Law Society of Kenya
 15. Other (specify)
29. Which was the most frequent mode of civic education provision?
(*Multiple response allowed*)
1. Radio
 2. Television
 3. Newspapers

4. Public barazas
5. Direct by civic education providers (CEPs)
6. Interpersonal
7. Performing arts (e.g. theatre, drama, puppeteer, songs and dance etc)
8. Other (specify)

30. If you received civic education on the constitution, how did you find it? (probe)

Code	Response	1. Yes	2. No	3. Don't Know
a.	Adequate			
b.	Informative			
c.	Relevant			
d.	Appropriate			
e.	Educative			
f.	Empowering			
g.	Useful			
h.	Other (specify)			

Public Participation in Constitution making

31. In your opinion, how important is public participation in Constitution making?

1. Very important
2. Important
3. Not important
4. Don't know

32. What would you consider the benefits of public participation in Constitution making? (*Multiple response - probe*)

1. Increases people's knowledge of the constitution
2. Allows the people to bring their relevant experiences into Constitution making
3. Makes the constitution relevant to people's needs
4. Makes the constitution acceptable to the majority
5. Makes the people feel they are part of decision making
6. Makes the constitution legitimate
7. Ensures broad ownership of the constitution
8. Ensures that the leaders remain accountable to the people
9. Other (specify)

33. In your opinion, without people participating (public participation) in Constitution making, can the constitution still become legitimate or acceptable to them?
1. Yes
 2. No
34. In either case (Yes or No), explain
35. In your opinion, did you consider the constitution review process between 1997 and November 2005 participatory?
1. Yes (*Go to Question 36*)
 2. No (*Go to Question 37*)
36. If yes, what made the review process participatory? (*Multiple response — probe*)
1. People adequately sensitized to participate in the process
 2. Many forums provided for people to present their views
 3. Peoples' views respected
 4. Views collected throughout the country
 5. People participated in electing representatives to the National Constitutional Conference
 6. Continuous public feedback on the review process through the media
 7. Draft constitution widely disseminated throughout the country
 8. People participated in the referendum
 9. Other (specify)
37. If no, what made the review process not participatory (*Multiple response - probe*)
1. Lack of opportunity to play participate in the process at the grassroots level
 2. Lack of civic education
 3. Public not adequately sensitized to participate
 4. Process taken over by the political leaders
 5. Government control over the process
 6. Lack of a voter's cards for the majority youth
 7. Process affected by ethnic differences
 8. Process affected by political difference
 9. Political leaders pursuing personal agenda
 10. Lack of political will to promote public participation in the process
 11. Majority of the population illiterate to participate meaningfully
 12. Lack of understanding/knowledge of the constitution
 13. No particular reason
 14. Don't know

15. Other (specify)

38. In any future Constitution making process in Kenya, what should be done to ensure that the process is participatory?

39. In your opinion, do you think the political leadership is genuinely interested in giving Kenyans a good constitution that serves their interest?

1. Yes
2. No
3. Not sure

40. If Yes or No or Not Sure, kindly explain

41. Whom would you hold responsible for the people's rejection of the Proposed New Constitution (Wako Draft) at 21st November 2005 Referendum? (*Multiple response - probe*)

1. The President
2. Cabinet Ministers
3. Members of Parliament
4. The Judiciary (Courts)
5. The Attorney-General
6. The Constitution of Kenya Review Commission
7. The National Constitution Conference Delegates
8. The Electoral Commission of Kenya
9. The ruling National Rainbow Coalition
10. Parliamentary opposition parties
11. Non-Parliamentary Political parties
12. NGOs
13. Religious groups
14. The international community
15. The public/voters
16. The Media
17. Other (specify)

Role of the Court in Resolving Disputes in the Review Process

In the review process, a serious dispute arose concerning the direction of the review process and in particular, the method of adopting and enacting the Draft Constitution of Kenya 2004 (Bomas Draft).

42. Are you aware of any of the cases brought before the Courts regarding the Constitution review?
1. Yes (*Go to Questions 43-46*)
 2. No (*Go to Question 47*)
43. If yes, which cases are you aware? (*Multiple response -probe*)
1. Timothy Njoya & Others v. CKRC and the National Constitutional Conference case of 2004;
 2. Njuguna Michael Kung'u, Gacuru wa Kareng'e & Nicholas Mugo v. the Republic, Attorney-General and CKRC case of 2004;
 3. The Martin Shikuku Case of 2004;
 4. Peter Mwalimu Miwa v. the Attorney-General and CKRC case of 2004
 5. Patrick Ouma Onyango and 12 others (Yellow Movement) v. Attorney-General, CKRC and ECK Case of 2005
 6. Others (specify)
44. In your opinion, did the Courts handle these review cases fairly?
1. Yes
 2. No
 3. Don't Know
45. If yes or no please explain
46. In your opinion, in whose interest did the Courts act in determining the review cases? (*Multiple response - probe*)
1. The general public
 2. The President
 3. The Government
 4. Members of Parliament
 5. The Attorney-General
 6. The Constitution of Kenya Review Commission
 7. The National Constitution Conference Delegates
 8. Ethnic groupings in government
 9. Civil society organizations
 10. Individuals in power
 11. Don't know
 12. Other (specify)

CONSTITUTIONAL LEGITIMACY

47. Do you know what constitutional legitimacy means?
1. Yes (*Go to Questions 48-51*)
 2. No (*Go to Question 52*)
48. If yes, what does constitutional legitimacy mean to you?
49. In your opinion, do you consider Kenya's current constitution legitimate or acceptable to majority of Kenyans?
1. Yes (*Go to Question 50*)
 2. No (*Go to Question 51*)
 3. Not sure (*Go to Question 50*)
 4. Don't know (*Go to Question 51*)
50. If yes or not sure, why would you consider the constitution legitimate?
(*Multiple response - probe*)
1. The Constitution reflects people's needs and aspirations
 2. The constitution is acceptable to the majority of Kenyans
 3. The Constitution commands and inspires respect and confidence of the people
 4. The Constitution has not been challenged by anybody
 5. There is no other constitution(s) competing with current constitution
 6. The government formed under the constitution is popular
 7. Government officials respect the rules and procedures set by the constitution
 8. The constitution has protected human rights and fundamental freedoms
 9. The constitution has ensured equality before the law
 10. The constitution has improved the living conditions of all citizens
 11. The Constitution has been used fairly without and impartially
 12. The constitution has ensured democratic governance
 13. Other (specify)
51. If no, why do you consider Kenya's constitution as not legitimate?
(*Multiple response - probe*)
1. People did not participate in the making of the constitution
 2. Lack of respect for the constitution
 3. The constitution is not relevant to people's needs and aspirations
 4. The constitution is not acceptable to majority of people
 5. Lack of confidence in the governments formed under the constitution
 6. Lack of respect for the rule of law

7. Lack of checks and balance in government
8. Lack of independence of the Judiciary
9. Lack of independence of Parliament
10. Prevalence of human rights abuses
11. Prevalence of corruption
12. Legal system not relevant to majority of the people
13. Pre-dominance of personal interest as opposed to public interest in the running of public Affairs
14. Lack of national unity
15. Prevalence of discrimination in public service
16. Lack of fairness in the distribution of national resources
17. Prevalence of poverty
18. Insecurity and crime
19. Disparities in the distribution of national wealth
20. Lack of ethnic tolerance and mutual respect
21. High unemployment
22. Marginalization of minorities and vulnerable groups
23. Lack of gender equity/equality
24. Other (specify)

52. In your overall assessment, do you think the use of constitution since independence has helped in improving your living conditions?

1. Yes
2. No

53. In either case (Yes or No), please explain

54. Which of the following constitutional documents would you say best represent(ed) your needs and aspirations? (*Probe*)

Code	Response	1. Yes	2. No	3. Don't Know
a.	The Current Constitution			
b.	The Bomas Draft (The Draft Constitution of Kenya 2004)			
c.	The Wako/Kilifi Draft (The Proposed Constitution of Kenya 2005)			
d.	The independence Constitution			
e.	None so far			

55. In your opinion, what needs to be done to ensure that any constitution to be made in future becomes acceptable to the majority, if not all Kenyans?

THANK YOU
END

**APPENDIX 2: CONSTITUTION OF KENYA 2010
PROMULGATION STATEMENT¹¹¹⁰**

**THE CONSTITUTION OF KENYA
THE CONSTITUTION OF KENYA REVIEW ACT, 2008 (No. 9 of 2008)
THE NEW CONSTITUTION OF KENYA
PROMULGATION**

By His Excellency the Honourable Mwai Kibaki, President and Commander-in-Chief of the Armed Forces of the Republic of Kenya.

"WHEREAS the people of Kenya, in exercise of their sovereign right to replace the constitution, ratified the proposed new Constitution of Kenya through a referendum held on August 4, 2010 in accordance with the provisions of section 47A of the constitution of Kenya and part 5 of the Constitution of Kenya Review Act, 2008;

AND WHEREAS the Constitution of Kenya (Amendment) Act, 2008 and the Constitution of Kenya Review Acts of 1997 and 2008, as variously amended, provided a legal framework for the comprehensive review and replacement of the current constitution, by the people of Kenya, which ensured that the review process-

- (a) Accommodated the diversity of the Kenyan people, including socio-economic status, race, ethnic, gender, religious faith, age, occupation, learning, persons with disability and the disadvantaged, and was guided by respect for the universal principles of human rights, gender equity and democracy.
- (b) Provided the people of Kenya an opportunity to actively, freely and meaningfully participate in generating and debating proposals to alter the Constitution.
- (c) Resulted in a new constitution which faithfully reflected the wishes of the people of Kenya;

AND WHEREAS for the last two decades the people of Kenya have yearned for a new constitution which-

- (a) Guarantees peace, national unity and integrity of the republic of Kenya in order to safeguard the well being of the people of Kenya;
- (b) Establishes free and democratic system of government that ensures good governance, constitutional order, the rule of law, human rights and gender equity;
- (c) Recognizes and demarcates divisions of responsibility among the various state organs, including the executive, the legislature and the judiciary, so as to create checks and balances between them and to ensure accountability of the Government and its officers to the people of Kenya;

¹¹⁰ The Constitution of Kenya 2010. Published by the National Council for Law Reporting with the Authority of the Attorney-General. Nairobi.

- (d) Promotes the peoples' participation in the governance of the country through democratic, free and fair elections and the devolution and exercise of power and further enhances the full participation of people in management of public affairs
- (e) Respects the pride of the people of Kenya in their ethnic, cultural and religious diversity and their determination to live in peace and unity as one indivisible sovereign nation;
- (f) Ensures the provision of basic needs of all Kenyans through the establishment of an equitable frame work for economic growth and equitable access to national resources;
- (g) Strengthens national integration and unity and commits Kenyans to peaceful resolution of national issues through dialogue and consensus;

NOW THEREFORE, in exercise of the powers conferred on me by section 47A (6) of the Constitution of Kenya Review Act, 2008, I, Mwai Kibaki, President and Commander in Chief of the Armed Forces of the Republic of Kenya, declare that the constitution set out in the schedule shall be the new Constitution of Kenya with effects from the 27th August, 2010.

SCHEDULE (The Constitution of Kenya)