

JUDICIAL INTERVENTION IN KENYA'S CONSTITUTIONAL REVIEW PROCESS

LAURENCE JUMA*
CHUKS OKPALUBA**

INTRODUCTION

The constitutional reform process in Kenya, which culminated in the promulgation of a new constitution in August 2010, has been a subject of much study and scholarly deliberation.¹ That it ended on a rather positive note as compared to those in Zambia, Malawi, and even Zimbabwe, is seen by many as proof that Africans could, after all, redesign their constitutional frameworks to weed out moribund structures and entrenched systems of democratic governance. But the Kenyan experience also indicates a rather unfortunate trend where constitutions are never allowed to grow or mature with statehood. Instead, they are replaced whenever a new wave of political thinking abounds or dissatisfaction with the so-called “ancient regimes” gathers sufficient momentum to upset the status quo. Considering that stable democracies in the western world rarely overhaul their constitutions, this trend is an indictment of the efforts to consolidate constitutionalism and establish a tradition of respect for the rule of law in the continent. Nigeria, Africa’s most populous nation, has changed its constitution five times in the fifty-one years of its independence, and there are still signs that another change is imminent.²

* LL.B. (Nairobi); LL.M. (Pennsylvania); M.A. (Notre Dame); LL.D. (Fort Hare); Associate Professor of Law, Rhodes University, Republic of South Africa.

** LL.B., LL.M. (London) Ph.D. (West Indies), Professor of Law, National University of Lesotho, Adjunct Professor, University of Fort Hare, Republic of South Africa.

1. See, e.g., WILLY MUTUNGA, *CONSTITUTION-MAKING FROM THE MIDDLE: CIVIL SOCIETY AND TRANSITION POLITICS IN KENYA, 1992–1997* (1999); P.L. ONALO, *CONSTITUTION-MAKING IN KENYA* (2004); TAYA WEISS, *THE CULTURE OF CONSTITUTIONAL REFORM IN KENYA* (1999); Laurence Juma, *Ethnic Politics and Constitutional Review Process in Kenya*, 9 *TULSA J. COMP. & INT’L L.* 471 (2002); Stephen N. Ndegwa & Ryan E. Letourneau, *Constitutional Reform, in DEMOCRATIC TRANSITIONS IN EAST AFRICA* 83 (Paul J. Kaiser & F. Wafula Okumu eds., 2004); J.B. Ojwang, *Constitutional Trends in Africa—The Kenya Case*, 10 *TRANSNAT’L L. & CONTEMP. PROBS.* 517 (2000); BRIAN KENNEDY & LAUREN BIENIEK, *CENTER FOR STRATEGIC AND INTERNATIONAL STUDIES, MOVING FORWARD WITH CONSTITUTIONAL REFORM IN KENYA: A REPORT OF THE CSIS AFRICA PROGRAM* (2010), available at http://csis.org/files/publication/101203_Kennedy_MovingForwardKenya_Web.pdf.

2. See Julius O. Ihonvbere, *The Nigerian State as an Obstacle to Federalism: Towards a New Constitutional Compact for Democratic Politics*, in *FEDERALISM IN AFRICA: THE IMPERATIVE OF DEMOCRATIC DEVELOPMENT* 187 (Aaron T. Gana & Samuel G. Egwu eds., 2003); see also J. ISAWA ELAIGWU, *THE POLITICS OF FEDERALISM IN NIGERIA* (2007); Eyene Okpanachi & Ali Garba,

Ghana has just begun reviewing its 1992 constitution, which is the fourth since it attained independence in 1957.³ Uganda is on its third.⁴ Kenya⁵ and Democratic Republic of Congo,⁶ among others, are on their second, while a number of states are currently in the process of replacing their original constitutions.⁷ These changes may have been a result of what Professor Julius Ihonvbere, a leading constitutional reform scholar, describes as the “changing character of national, regional, and global politics.”⁸ However, these changes also indicate the failure of judicial systems in Africa to nurture and protect the constitutions through interpretations that permit flexibility for the ever-changing social, political, and economic environments as well as the expanding regimes of individual rights and freedoms. And because judicial organs have abdicated their role, constitutions have become labels that attach to regimes in power, and which have to change when the regimes themselves change.

In making the argument that judicial organs should nurture and protect constitutions, we are not oblivious to the fact that the power that these organs exercise are derived from constitutions that they play no part in drafting or making. In other words, judicial organs have no control over processes that establish the constitutional frameworks on which they depend to execute their functions. But even as important as this fact may be, the judiciary must still be the guardian of the constitution, especially

Federalism and Constitutional Change in Nigeria, 7 FED. GOVERNANCE 1 (2010); George Swan, *The Constitution of the Second Republic of Nigeria* 20 J. ASIAN & AFR. STUD. 42 (1985).

3. For the history of constitutional changes and the current debates on its reform agenda, see Stephen Kwaku Asare & H. Kwasi Prempeh, *Amending the Constitution of Ghana: Is the Imperial President Trespassing?*, 18 AFR. J. INT'L & COMP. L. 192 (2010).

4. See CONSTITUTION (1995) (Uganda), http://www.ugandaembassy.com/Constitution_of_Uganda.pdf. This is the current constitution which repeals the 1967 constitution. See § 288(1). The first constitution was enacted in 1962 when the country gained independence. See *Extracts from the Constitution of Uganda, 1962*, <http://www.buganda.com/const62m.htm> (last visited Aug. 14, 2012).

5. See CONSTITUTION (2010) (Kenya), available at <http://www.kenyaembassy.com/pdfs/The%20Constitution%20of%20Kenya.pdf>. It replaces Constitution of Kenya 1963, available at http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CI/WPFD2009/pdf/Kenyan_constitution_amended_2008.pdf, which was repealed immediately the new constitution came in force. See CONSTITUTION § 264 (2010) (Kenya).

6. See CONSTITUTION, art. 228 (2006) (Democratic Republic of the Congo), available at http://www.wipo.int/wipolex/en/text.jsp?file_id=193675.

7. One example is Zimbabwe, which is currently on the throes of replacing its independence constitution. See, e.g., Sara Rich Dorman, *NGOs and the Constitutional Debate in Zimbabwe: From Inclusion to Exclusion*, 29 J. S. AFR. STUD. 845 (detailing how the government's refusal to allow public participating in the constitutional reform process led to the defeat of the draft in the 2000 referendum).

8. See Julius O. Ihonvbere, *Politics of Constitutional Reforms and Democratization in Africa*, 41 INT'L J. COMP. SOC. 9, 9 (2000).

when acting as a check on excesses of the other arms of government. However, this role is not unfettered. Indeed, it is by the same constitution that judicial functions are constrained. One such constraint is encapsulated in the doctrine of separation of powers, the notion that judicial organs should not encroach on functions that clearly fall within the legislative or the executive domain.⁹ The other constraint is constitutionalism, which affirms the supremacy of the constitution above all other laws and demands that the powers conferred on organs of government be exercised in a manner consistent with the ethos of the constitution.¹⁰

In modern constitutional systems, therefore, both the nature of judicial power and the manner in which it is dispensed are defined by the constitution. The same constitution sets out how judicial officers are to be appointed, the manner in which their offices may be vacated, the contours of judicial review, the powers of interpreting the bill of rights, and several other functions that define the role of judicial organs in modern democratic states.¹¹ But given this fact, would the role of the judiciary change when the constitution upon which its mandate is founded is to be replaced? Undoubtedly, judicial organs, like other organs of government, share in the responsibility of ensuring a smooth transition to a new constitutional order. Thus, it may be reasonable to expect that they will arbitrate the disputes that are inevitably generated by the review process and even punish those who violate the reform rules. However, this still

9. See generally J.B. OJWANG, *CONSTITUTIONAL DEVELOPMENT IN KENYA: INSTITUTIONAL ADAPTATION AND SOCIAL CHANGE* (1990); J. K'Owade, *Separation of Powers and Kenya's Judicial Performance Since 2003*, in *JUDICIAL REFORM IN KENYA 2003–2004* 33 (Maurice Odhiambo Makoloo & Philip Kichana eds., 2005).

10. See Ali Mazrui, *Constitutional Change and Cultural Engineering: Africa's Search for New Directions*, in *CONSTITUTIONALISM IN AFRICA: CREATING OPPORTUNITIES, FACING CHALLENGES* 22 (J. Oloka-Onyango ed., 2001); Issa G. Shivji, *State and Constitutionalism: A New Democratic Perspective*, in *STATE AND CONSTITUTIONALISM: AN AFRICAN DEBATE ON DEMOCRACY* 28 (Issa G. Shivji ed., 1991). A discussion of the influence that the principle could have on the interpretation of the constitution can be read in the South African case of *Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC). See also Matthew Chaskalson & Dennis Davis, *Constitutionalism, the Rule of Law, and the First Certification Judgment*, 13 S. AFR. J. ON HUM. RTS. 430 (1997). For a historical analysis of how the ideas of constitutionalism developed in western political thought, see Howell A. Lloyd, *Constitutionalism*, in *THE CAMBRIDGE HISTORY OF POLITICAL THOUGHT: 1450–1700* 254 (J.H. Burns & Mark Goldie eds., 1991). See also Bruce Ackerman, *The Rise of the World of Constitutionalism*, 83 VA. L. REV. 771 (1997); Adam Czarnota, *Inclusion, Exclusion, Constitutionalism and Constitutions*, 25 AUSTL. J. LEGAL PHIL. 333 (2000). On the interplay between separation of powers and constitutionalism, see generally M. J. C. VILE, *CONSTITUTIONALISM AND SEPARATION OF POWERS* (1998), and GERHARD CASPER, *SEPARATING POWER: ESSAYS ON THE FOUNDING PERIOD* (1997).

11. These are long-established principles of constitutional law. See, e.g., Abram Chayes, *How Does the Constitution Establish Justice?*, 101 HARV. L. REV. 1026 (1988); Samuel Freeman, *Constitutional Democracy and the Legitimacy of Judicial Review*, 9 LAW & PHIL. 327 (1990).

raises the question whether in doing so, the judiciary should be bound by existing constitutional standards, or be at liberty to apply general principles that they consider to be more in tune with the current values in society? And if the latter is to be the case, what guarantees, if any, are there to ensure that judicial powers will not be misused or exceeded?

Balancing the existing order and the demands of the changed societal values is clearly the greatest challenge that judicial organs working in a constitutional reform environment face. And yet, there are no easy prescriptions on how to attain such a balance. What is readily apparent is that by arbitrating disputes generated by the reform process, the judiciary confirms its status as a prominent actor in the creation of a new constitutional order. But while it does so, its role as the guardian of a constitutional order is never dissipated; otherwise, judicial powers could be exercised in a vacuum.

In this Article, we show how the courts in Kenya interacted with the review process while seeking to maintain their constitutional character. We draw on the assumption that if the courts lived up to their constitutional calling, then the outcome of their work should have facilitated the reform agenda rather than inhibited it. To elicit an understanding of whether the courts in Kenya lived up to this bidding, we examine the review process over the past two decades from the early 1990s, when pro-democracy activism forced Moi to initiate the reform to August 2010 when a public referendum approved the new constitution that was finally promulgated into law. We identify and critically evaluate the jurisprudence that emerged during this period to put in perspective the nature of the problems that were encountered and the role that the courts played.

Our analysis is in three parts. In Part I, we discuss the emergence of the reform agenda and situate it within the context of the prevailing political climate. In Part II, we canvass the role of courts and analyze the major decisions affecting the review which came between 2002, when Kibaki came to power, and 2007, when his government oversaw the most problematic election in Kenya's history. In Part III, we analyze the impact of the legislative infrastructure and the institutions that came into being in the post-2008 period. We also appraise how these institutions affected the manner in which the courts dealt with disputes generated by the review process.

I. THE CALL FOR CHANGE IN 1990S–2002: THE EARLY KENYAN CONSTITUTIONAL REFORM PROCESS

The constitutional review process in Kenya, which began in the early 1990s, was not without intrigues. The review process had its fair share of frustrations and political attrition, occasioned by the inviolate intervention of politics furthering agendas opposed to the common will of the people.¹² That is why it took well over twenty years to deliver on its promise.¹³ But is the Kenyan situation unique? Probably not—constitution-making in post-colonial environments has not always been an easy task.¹⁴ Some believe that the process is contingent upon the pace at which political transformation takes place in society.¹⁵ In a military take-over, or where the ruling elite are overthrown through military action, the process towards enacting a new constitution may be expedited and its outcome molded to reflect the will of the new rulers. In a relatively peaceful environment, constitution-making is a laborious and painstaking exercise that only comes to fruition under drastic circumstances.¹⁶ This postulation draws us closer to the realization that the whole idea of constitutionalism is

12. For the earlier history of the review process, see Juma, *supra* note 1; Alicia Bannon, *Designing a Constitution—Drafting Process: Lessons from Kenya*, 116 YALE L. J. 1824 (2007); see also Waitthaka Waihenya, *Kenya's Constitutional Headache*, GUARDIAN (Mar. 16, 2010), <http://www.guardian.co.uk/commentisfree/2010/mar/16/kenya-constitution-2010>.

13. The new constitution was promulgated into law on August 27, 2010. See Murithi Mutiga, *Kenya Takes Its Place Among World's Top Democracies at Emotional Ceremony*, DAILY NATION (Nairobi) (Aug. 27, 2010), <http://www.nation.co.ke/Kenya+Referendum/Kenya+takes+its+place+among+worlds+top+democracies/-/926046/998460/-/qj4gq3/-/index.html>; Xan Rice, *Kenyan Constitution Signed into Law*, GUARDIAN (Aug. 27, 2010), <http://www.guardian.co.uk/world/2010/aug/27/kenya-constitution-law>; Peter Greste, *Kenya's New Constitution Sparks Hope of Rebirth*, BBC NEWS (Aug. 27, 2010, 7:35 AM), <http://www.bbc.co.uk/news/world-africa-11103008>.

14. In Zimbabwe, for example, the latest attempt, which began in 1997, fell apart when the public, in a referendum, voted against the draft because it had been amended heavily by President Mugabe. See John Hatchard, *Lessons on Constitution-Making from Zimbabwe*, 45 J. AFR. L. 210 (2001). The path of constitutional reform in Zambia has been equally tumultuous. See Melvin Mbaio, *The Politics of Constitution-Making in Zambia: Where Does the Constituent Power Lie?* in FOSTERING CONSTITUTIONALISM IN AFRICA 87 (Charles Manga Fombad & Christina Murray eds., 2010). For general appraisal of constitution-making problems in Africa, see Muna Ndulo, *Constitution-Making in Africa: Assessing Both the Process and the Content*, 21 PUB. ADMIN. & DEV. 101 (2001).

15. See, e.g., James Thuo Gathii, *Popular Authorship and Constitution Making: Comparing and Contrasting the DRC and Kenya*, 49 WM. & MARY L. REV. 1109 (2008). In the case of South Africa, for example, the urgency in erasing the legacy of a horrible past dictated a rather quick pace towards constitutional affirmation of democracy. Constitution-making took only two years. *Id.* at 1110; Jeremy Sarkin, *The Drafting of Final South African Constitution from a Human Rights Perspective*, 47 AM. J. COMP. L. 67, 69 (1999).

16. See *infra* Part III. Kenya is a case in point where the post-election violence of 2008 was the catalyst to the renewed effort by government to complete the reform process. See discussion regarding the Phase IV of the Reform Process *infra* Part III.A.

“inextricably enmeshed in transformative politics.”¹⁷ Therefore, constitution-making is not merely a legal exercise but also a political one.¹⁸ Clearly, courts must be cautious in the manner in which they deal with disputes that the process is bound to generate. Particularly, courts must remember that the political motivations and extra-legal interests that drive the transition to a new constitution do not always further the ends of justice nor does the transition necessarily take legal forms that existing constitutional frameworks cover, textually or otherwise.

This Part discusses the first two of the four distinct phases of Kenya’s constitutional review process. Phase I was the *nascent phase* where groups opposed to the Moi regime gained ground and were able to project the review agenda as the most compelling political issue of the day.¹⁹ In this phase, there were no judicial contests that were directly related to the review process because the courts were not used since many in the opposition and civil society groups had lost all faith in the courts.²⁰ Rather, they found mass political action and demonstrations more effective in jostling the government and keeping the review process on course as opposed to litigating issues in court.²¹ Also, the fact that Moi had a firm grip on all government institutions, including courts, made it the least preferable forum for resolving constitutional issues.²² Phase II began with the defeat of Moi’s Kenya African National Union (“KANU”) government and the rise of Kibaki to the helm of Kenya’s political leadership.²³ This period saw the re-emergence of Kikuyu nationalism that had been dormant

17. Ruti Teitel, *Transitional Jurisprudence: The Role of Law in Political Transformation*, 106 YALE L. J. 2009, 2076 (1997); see also Vivien Hart, *Constitution-Making and the Transformation of Conflict*, 26 PEACE & CHANGE 153, 154 (2001).

18. Constitutions often carry two identities—that of a political charter and a legal instrument. See Githu Muigai, *Political Jurisprudence on Neutral Principles: Another Look at the Problem of Constitutional Interpretation*, 1 E. AFR. L. J. 1 (2004).

19. See Juma, *supra* note 1, at 506. Daniel Arap Moi came to power after the death of Kenya’s first president, Jomo Kenyatta in 1978. *Id.* Moi was the first to announce in 1995 that his government would undertake a process of enacting a new constitution review because the existing one did not meet the expectations and needs of Kenyans. *Id.*

20. See Ahmednasir Abdullahi, *Restoring Public Confidence in Kenya’s Discredited, Corrupt, Inefficient and Overburdened Judiciary: The Judicial Service Commission Agenda for Reform*, a paper read at the judges colloquium, Nairobi, Aug. 14–15, 2011, <http://www.kenyalaw.org/klr/index.php/fileadmin/pdfdownloads/bills/2011/index.php?id=894>.

21. See Juma, *supra* note 1, at 515.

22. See Makau Mutua, *Justice Under Siege: The Rule of Law and Judicial Subservience in Kenya*, 23 HUM. RTS. Q. 96, 99 (noting how Moi had resisted the installation of democracy and used the courts to protect his political interests by making all judges completely subservient to him, and for this reason, aggrieved parties could not expect “the rule of law to be upheld by the Kenyan courts” if the offender was connected to Moi).

23. Mwai Kibaki succeeded Moi in 1982 and in an election that was mostly viewed as a successful transition to democracy. For further discussion, see *infra* Part I.B.

in the Moi era as well as the encroachment of a cohort of right-wing Gikuyu, Embu, and Meru Association (“GEMA”) politicians into the mainstream of political leadership in the country.²⁴ The third phase, discussed in Part II.C, was a period of political uncertainty, ushered in by the post-election violence of 2008 and fueled by the wrangles in the coalition arrangement set up in the interim. Phase IV, the final phase, discussed in Part III, was the victory phase, when legislation was enacted to formalize the reform process and the new constitution was finally promulgated. The first three phases were understandably marked by political milestones because the whole process of review was political.

A. Phase I of the Constitutional Reform Process: The Nascent Period and the Unfavorable Antics of the Moi Regime

Like a patient under a treatment regime based on misdiagnosis, Kenya's constitutional review process has suffered a great deal of disservice from its judicial organs as much as from the petulance of its political emperors. At first, Moi's dictatorial style of governance stood in the way.²⁵ The combination of external pressure and civil society mass mobilization, however, forced him to concede to the removal of Section 2A, which outlawed multiparty politics, from the constitution.²⁶ The opening of the political space reinvigorated claims for individual rights, freedom of speech and political participation, and campaigns against retrogressive legislation.²⁷ Moi also conceded to the establishment of an inclusive forum for setting the political reform agenda. This resulted in the Inter-Party Parliamentary Group (“IPPG”) negotiations.²⁸ Among the

24. See Karega Munene, *Production of Ethnic Identity in Kenya*, in *ETHNIC DIVERSITY IN EASTERN AFRICA: OPPORTUNITIES AND CHALLENGES* 48 (Kimani Njogu, Kabiru Ngeta & Mary Wanjau eds., 2010); JOHN OUCHO, *UNDERCURRENTS OF ETHNIC CONFLICTS IN KENYA* 50 (2002); Ali Mazrui, *Ideology, Theory and Revolution: Lessons from the Mau Mau*, 28 *RACE & CLASS* 53 (1987).

25. See Juma, *supra* note 1; see also BETHWELL OGOT, *ETHNICITY, NATIONALISM AND DEMOCRACY IN AFRICA* 24 (1996); Korwa G. Adar & Isaac M. Munyae, *Human Rights Abuse in Kenya Under Daniel Arap Moi, 1978–2001*, 5 *AFR. STUD. Q.* 1 (2001).

26. See generally DAVID THROUP & CHARLES HORNSBY, *MULTI-PARTY POLITICS IN KENYA: THE KENYATTA AND MOI STATES AND THE TRIUMPH OF THE SYSTEM IN THE 1992 ELECTION* (1998); Rok Ajulu, *Kenya: The Survival of the Old Order*, in *VOTING FOR DEMOCRACY, WATERSHED ELECTIONS IN CONTEMPORARY ANGLOPHONE AFRICA* 128 (John Daniel et al. eds., 1999); Stephen N. Ndegwa, *The Incomplete Transition: The Constitutional and Electoral Context in Kenya*, 45 *AFR. TODAY* 193 (1998); Roger Southall, *Reforming the State? Kleptocracy and the Political Transition in Kenya*, 26 *REV. AFR. POL. ECON.* 93 (1999).

27. See, e.g., DAVID THROUP & CHARLES HORNSBY, *MULTI-PARTY POLITICS IN KENYA*, *supra* note 26, at 63.

28. For an analytical discussion of the IPPG, see Rok Ajulu, *Kenya: One Step Forward, Three Steps Back: The Succession Dilemma*, 88 *REV. AFR. POL. ECON.* 197 (2001). See also Pal Ahluwalia,

issues agreed upon were the removal of oppressive laws such as the Public Order Act,²⁹ the Chief's Authority Act,³⁰ the establishment of a representative Electoral Commission of Kenya,³¹ and the immediate start of the process of constitutional reform.³²

In November 1997, the government presented to parliament the Constitution of Kenya Review Act,³³ which was promptly passed. Apart from creating the Constitution of Kenya Review Commission ("CKRC"),³⁴ the Act established the methods of conducting the review. It created four other organs to carry out the review: the Constituency Constitutional Forums,³⁵ the National Constitutional Conference ("NCC");³⁶ the referendum;³⁷ and the National Assembly as the final body to enact the new constitution.³⁸ The main function of the Commission was "to collect and collate the views of the people of Kenya on proposals to alter the Constitution and on the basis thereof, to draft a bill for presentation to the National Assembly."³⁹ It gave the CKRC an unrealistic deadline of twenty-four months within which to complete its work.⁴⁰ But even before the Act could be put into operation, the process immediately succumbed to the same political tensions that had been the hallmark of its

The Vulgarization of Politics: Ethnic Violence in Kenya, in VIOLENCE & NON-VIOLENCE IN AFRICA 51 (Pal Ahluwalia et al. eds., 2007).

29. The Public Order Act, (2009) Cap. 56 (Kenya). The initial version of this Act was passed by the British colonialists to limit association and gathering of African people. See Diane Ciekawy, *Constitutional and Legal Reform in the Postcolony of Kenya*, 25 ISSUE: J. OPINION 16 (1997). For a discussion of the historical developments that lead to the enactment of this Act, see Y.P. GHAI & J.P. W.B. MCAUSLAN, *PUBLIC LAW AND POLITICAL CHANGE IN KENYA: A STUDY OF THE LEGAL FRAMEWORK OF GOVERNMENT FROM COLONIAL TIMES TO THE PRESENT* (1970). In the post-independence period, the Act became a major source of irritation for opposition politicians and civil society activists because it was used by the government to deny them permits for public gathering. See Makau wa Mutua, *Human Rights and State Despotism in Kenya: Institutional Problems*, 41 AFR. TODAY 50 (1994).

30. The Chief's Authority Act, (1988) Cap. 128 (Kenya). This was the former Native Authority Ordinance, which was adopted wholesale upon attainment of independence in 1960. See GHAI, *supra* note 29.

31. See Joel Barkan, *Toward a New Constitutional Framework in Kenya*, 45 AFRICA TODAY 221 (1998).

32. *Id.*

33. Constitution of Kenya Review Act (1997) Cap. 13 (Kenya).

34. *Id.* § 3.

35. *Id.* § 20.

36. *Id.* § 27(1)(c).

37. *Id.* § 27(6).

38. *Id.* § 4.

39. Constitution of Kenya Review Act (1997) Cap. 13 § 10(b) (Kenya).

40. *Id.* § 26(1). Parliament however reserved the right to extend this period. *Id.* § 26(3).

failure since 1991.⁴¹ Groups that were suspicious of the government's intent were reluctant to cede the management of the process to an entity controlled by government.⁴² At the time, the main contention was the failure of the Act to allow for the participation of civil society groups. Indeed this concern had already resulted in these groups forming a parallel constitutional review process which was known as the Ufungamano process.⁴³ Through the mediatory efforts of Professor Ghai, who was appointed to head the Commission in November 2001, a consensus was struck and an amendment introduced in the Act that saw that twelve members of the opposition group join the commission.⁴⁴ This was the fourth amendment that the Act had suffered since its enactment in 1997.⁴⁵

The Ghai Commission began its work with an aura of political suspicion hanging on its neck. Also, the commission had to endure efforts by the judiciary to frustrate its progress, especially after it adopted an ambitious law reform agenda that was aimed at streamlining the justice sector. The problems between the Commission and the judges bubbled to the surface because of Ghai's personality and the judge's blatant ambivalence towards critical appraisal of the performance of the judiciary as a whole. In a report presented to the Parliamentary Select Committee in September 2002, which also contained the draft constitution, the Commission had called for urgent reform of the judiciary.⁴⁶ The Commission claimed that if the reform in the judiciary was not carried out, then "the whole future of constitutionality in Kenya will be placed in jeopardy."⁴⁷ According to the Commission, most judges had been appointed for wrong reasons, were incompetent, and lacked integrity. For this reason, it recommended that all judges should be retired once the new constitution came into effect.⁴⁸ Additionally, the report proposed that those judges who wish to remain had to re-apply and be vetted by the Judicial Service Commission to determine their fitness for office.⁴⁹ The report also

41. See Juma, *supra* note 1; see also MAKAU MUTUA, *KENYA'S QUEST FOR DEMOCRACY: TAMING LEVIATHAN* (2008).

42. Juma, *supra* note 1, at 516.

43. Adams Oloo & Winnie Mitullah, *The Legislature and Constitutionalism in Kenya*, in 1 *WHEN THE CONSTITUTION BEGINS TO FLOWER: PARADIGMS FOR CONSTITUTIONAL CHANGE IN KENYA* 35 (Lawrence Murugu Mute & Smokin Wanjala eds., 2002).

44. See Macharia Munene, *Kibaki's Moment in History: The Election of 2002 and Its Aftermath*, 1 *E. AFR. J. OF HUM. RTS AND DEMOCRACY* 75 (2003).

45. *Id.*

46. CRCK, *THE PEOPLE'S CHOICE: THE REPORT OF THE CONSTITUTION OF KENYA REVIEW COMMISSION* (2002), available at <http://www.sarpn.org.za/documents/d0000008/index.php>.

47. *Id.* at 70.

48. *Id.*

49. *Id.*

proposed that Kenyans should consider reducing the retirement age of judges from seventy-five to sixty-five.⁵⁰

The judges were outraged by the direction the review was taking. Two judges, Justice Moiwo Ole Keiuwa and Justice Vitalis Juma, filed a suit in the High Court in September 2002 to stop the Commission from debating the recommended constitutional changes affecting the judiciary.⁵¹ Two lawyers, Tom K'Opere and John Njongoro, were also dissatisfied with some of the provisions in the draft law and went to court seeking to stop the Commission from continuing with its work.⁵² Their complaints were that the Commission had invited foreigners to draft the constitution and that the proposal that all judges retire would compromise their work and prejudice their clients.⁵³ They also alleged that the Commission had already drafted the constitution and that its claim that it was collating public views was a mere public relations exercise.⁵⁴ Justice Richard Kuloba, who heard the application, agreed with these claims.⁵⁵ In his opinion, the reform process was being used to discriminate against the judicial arm of government, and therefore he ordered that the Commission's report should exclude coverage of the judiciary.⁵⁶ He also viewed with serious concern the fact that suspicious foreigners were allowed to participate in the important project of writing a national constitution.⁵⁷ He therefore issued an injunctive order stopping Ghai and his Commission from undertaking any further work of preparing the constitution.⁵⁸ Although the order was later quashed by the Court of Appeal by consent of both parties, the matter put further strain on the relationship between the Commission and the judiciary.⁵⁹ The suit by judges Ole Keiuwa and Juma fizzled out after the former was appointed to

50. *Id.*

51. M.M. Ole Keiuwa and Vitalis Juma v. Yash Pal Ghai, (2002) Misc. App. No. 1110 of 2002 K.L.R. (H.C.K.).

52. Tom K'Opere and John Njongoro v. Yash Pal Ghai and Constitution of Kenya Review Commission, High Court, Nairobi, Misc. App. No. 994 of 2002 (Unreported); *see also* Zachary Ochieng, *Transition in Jeopardy*, AFRICA NEWS-Kenya Election Watch, Sept. 15, 2002, *available at* http://web.peacelink.it/afrinews/kenya_election/sept.htm; INT'L COURT OF JUSTICE, THE JUDICIARY IN REVIEW 2000–2002 16 (2002), *available at* http://pdf.usaid.gov/pdf_docs/PNACW012.pdf.

53. *See* George Kegoro, *Forces Putting Brakes on Ghai Commission*, *Daily Nation*, Nairobi, Sept. 8, 2002, *available at* http://pdf.usaid.gov/pdf_docs/PNACW012.pdf.

54. *Id.*

55. *Id.*; Pamela Chepkemei, *Kenya: Judge Blocks Writing of the Constitution*, *DAILY NATION* (Nairobi), Aug. 31, 2002, *available at* <http://allafrica.com/stories/200209010011.html>.

56. Kegoro, *supra* note 53.

57. *Id.*

58. Chepkemei, *supra* note 55.

59. *See* Ochieng, *supra* note 52.

the East African Court of Justice and the latter suspended on corruption allegations.⁶⁰

Despite the difficulties in its relationship with the government and the judiciary, the Commission did its job and delivered a Draft Constitution in September 2002, just before the crucial general elections of that year.⁶¹ The commission seemed quite willing to speed up the process so that Kenyans could elect their leaders under a new dispensation. Thus, they were ready to call the NCC and have the draft debated and approved according to the Review Act.⁶² But the Moi government, suspicious of the new arrangements, put a number of hurdles in the Commission's way. Moi dissolved Parliament abruptly in October 2002 thus depriving the NCC of its core membership, and thus eliminating any possibility that NCC could convene.⁶³ Ghai was then forced to postpone the NCC until after the elections.⁶⁴

B. Phase II of the Constitutional Reform Process: New Issues, New Actors, and the Test to Constitutionalism

In the 2002 general elections, KANU was voted out of office and Mwai Kibaki became the new president under the umbrella of National Rainbow Coalition ("NARC"), a coalition of thirteen parties and two civil society organizations.⁶⁵ The smooth transfer of power to a new regime was

60. The late Justice Ole Keiwa later became a judge in the East African Court of Justice. See Henry Onoria, *Botched up Elections, Treaty Amendments and Judicial Independence in East African Community*, 54 (1) J. OF AFR. L. 81 (2010). Justice Juma's career came to an end after he was dismissed. See Caroline Maina, *Dismissed Judge Flops in Bid to Get His Job Back*, THE STAR, Dec. 22, 2010, available at <http://the-star.co.ke/national/national/9651-dismissed-judge-flops-in-bid-to-get-his-job-back>.

61. See Beth Elise Whitaker & Jason Giersch, *Voting on a Constitution: Implications for Democracy in Kenya*, 27 J. OF CONTEMPORARY AFR. STUD. 5 (2009).

62. See Bannon, *supra* note 12, at 1834; *Ghai Team Sticks to Plan for Law Talks*, DAILY NATION (Nairobi) (Oct. 27, 2002), <http://www.nation.co.ke/News/-/1056/304376/-/swhn8r/-/index.html>.

63. Reportedly, Moi had promised Ghai that the election would be postponed until March of the following year to allow the commission to finalize the review process. See Jill Cotrell & Yash Ghai, *Constitution Making and Democratization in Kenya 2000–2005*, 14 DEMOCRATIZATION 7 (2007); Juma Khayera, *Ghai on Ministers Who Stifled the Work of His Review Team*, THE STANDARD (Nairobi), <http://www.standardmedia.co.ke/?id=1144027975&cid=591&articleID=1144027975> (last updated Nov. 8, 2009).

64. See Cotrell & Ghai, *supra* note 63, at 7; Francis Openda, *Ghai Stops Review Talks Indefinitely*, THE STANDARD (Nairobi) (Oct. 28, 2002), <http://allafrica.com/stories/printable/200210280719.html>.

65. KANU managed to get only 31% of the votes against NARC's 61%. NARC was, in essence, a combination of two factions that had organized themselves around the leadership of Mwai Kibaki and Raila Odinga. The Kibaki faction comprised the Democratic Party ("DP"), FORD Kenya, National Party of Kenya and two civil societies. This faction formed itself into National Alliance Party of Kenya ("NAK"). The Raila faction comprised the Rainbow Alliance, which was formed by a group of

particularly remarkable. Stephen Ndegwa, then a professor of political science at the College of William and Mary and a keen commentator on Kenya's democratic transition, described it as "the most significant political event in the history of Kenya since British colonial rule formally ended."⁶⁶ Thus, Kibaki came into office with a significant amount of goodwill. Throughout the country, there was a general feeling of relief and hope that things would change and democracy would be allowed to flourish.⁶⁷ Internationally, the Kenyan democracy was heralded as a continental success story to be emulated by others.⁶⁸

But no sooner had Kibaki settled in state house did things began to unravel. First, Kibaki trashed the Memorandum of Understanding ("MOU") he had signed with his coalition partners from the non-GEMA communities and showed them the door.⁶⁹ Second, his regime began to dismantle the little triumphs that the anti-Moi crusade had achieved while trying to establish itself as the new oligarchy. According to one analyst, Kenyans began to realize that nothing had changed, and that the powers had merely shifted from the Kalenjin elites to the Mt. Kenya Mafia.⁷⁰ Soon, Kibaki emerged as the defender of the Kikuyu Bourgeoisie rather than a democrat—the image that had propelled him to the helm of Kenyan leadership prior to his election. That his regime had absorbed some of the civil society activists such as Githongo, then a director of Transparency International (Kenya), and Kiraitu Murungi, a renowned human rights lawyer, into its ranks, was no evidence that the Kibaki regime had changed from the kleptocratic tendencies its leaders were accustomed to in their

KANU dissidents who left the party after Moi nominated Uhuru Kenyatta for president and the Liberal Democratic Party ("LDP"). The Rainbow Alliance was later swallowed by LDP. During the run up to the elections, NAK and LDP united to form the National Rainbow Coalition and agreed on a memorandum of understanding that they would field Kibaki as their presidential candidate. For detailed account of the party formations before the 2002 general elections, see Dean E. McHenry, *Political Parties and Party Systems*, in *DEMOCRATIC TRANSITIONS IN EAST AFRICA* 38, 42 (Paul J. Kaiser & F. Wafu Okumu eds., 2004). Analysts attribute NARC's success to this unity. See Steven Orvis, *Moral Ethnicity and Political Tribalism in Kenya's "Virtual Democracy"*, 29 *AFR. ISSUES* 8, 9–10 (2001).

66. Stephen N. Ndegwa, *Third Time Lucky?*, 14 *J. DEMOCRACY* 145, 145 (2003).

67. See generally Musambayi Katumanga et al., *THE MOI SUCCESSION: THE 2002 ELECTIONS IN KENYA* (2005); Peter Kagwanja, *'Power to Uhuru': Youth Identity and Generational Politics in Kenya's 2002 Elections*, 105 *AFR. AFFAIRS* 51 (2006).

68. See, e.g., Jennifer Cooke & David Throup, *New Chance for Kenya: US Policy Should Help Make the Most of It*, 13 *AFR. NOTES* 1 (2003).

69. See Edwin Odhiambo Abuya, *Consequences of a Flawed Presidential Election*, 29 *LEGAL STUDIES* 127, at 130 (2009); Peter Kagwanja, *Courting Genocide: Populism, Ethno-nationalism and the Informalisation of Violence in Kenya's 2008 Post-Election Crisis*, 27 *J. CONTEMP. AFR. STUD.* 365, 372 (2009).

70. See Godwin R. Murunga & Shadrack W. Nasong'o, *Bent on Self-Destruction: The Kibaki Regime in Kenya*, 24 *J. CONTEMP. AFR. STUD.* 1 (2006).

KANU days.⁷¹ Instead the regime showed that it was fortifying an ethnic oligarchy that would be used to fend off opposition from non-Kikuyu groups.

The greatest disappointment was how the regime handled the constitutional review process. Just before elections, the NARC coalition had promised that if it came to power, it would deliver the new constitution within 100 days. Indeed, constitutional reform was one of the major platforms for the anti-Moi campaigns in the 2002 general elections.⁷² Moreover, as Ndegwa correctly points out, the acceptance by opposition groups to be banded under NARC may have been influenced by the ongoing constitutional reform process. "Had the constitutional-reform process not been going on at the time of the campaign," he writes, "it is virtually inconceivable that any opposition leader would have agreed to give up his or her slim chance at the imperial presidency and settle for the certainty of exclusion in its shadow."⁷³

The regime not only failed to nurture the coalition politics that brought it to power but also did everything possible to stall the constitutional review process.⁷⁴ Soon after becoming President, Kibaki announced that the target date for enacting the new constitution had been pushed back by six months.⁷⁵ Thus it was not until April 2003 that the first NCC got under way, with 629 representatives converging at the Bomas of Kenya.⁷⁶ The process began amid political squabbling and bitter rivalry between politicians pursuing different agendas. There were also serious divisions on issues of governance, religion, and even representation, and these issues became the central points for major political competition during the conference.⁷⁷ These divisions resulted in the conference becoming a circus of sorts, with controversies emanating from the political realignment that occurred soon after Kibaki assumed office bubbling to the surface.⁷⁸ Despite Kibaki's announcement that the NARC parties would be

71. *Id* at 8.

72. *See, e.g., National Rainbow Coalition*, CENTRE FOR MULTIPARTY DEMOCRACY (2009), <http://www.cmd-kenya.org/party.php?ppid=27&partyname=National%20Rainbow%20Coalition>.

73. *See* Ndegwa, *supra* note 66, at 154.

74. Stephen Brown, *Theorising Kenya's Protracted Transition*, 22 J. CONTEMP. AFR. STUD. 325, 334 (2004).

75. *See* Bannon, *supra* note 12, at 1836.

76. For a full discussion of the "Bomas" process, see generally THE ANATOMY OF BOMAS: SELECTED ANALYSES OF THE 2004 DRAFT CONSTITUTION OF KENYA (Kithure Kindiki & Osogo Ambani eds., 2005).

77. *See* Bannon, *supra* note 12, at 1837.

78. *See, e.g.,* Muriithi Muriuki & Tony Kago, *Raila and Kiraitu in New Clash over Ghai*, DAILY NATION (Nairobi) (Nov. 24, 2003), <http://www.nation.co.ke/News/-/1056/274476/-/shppo/-/index.html>.

dissolved,⁷⁹ a feat that would have allowed his government more leverage in dealing with dissenting views, this did not happen. Instead, each party consolidated its position and clamoured for positions in the new government. Pursuant to the MOU signed before the elections, the Liberal Democratic Party (“LDP”), asked for the creation of the Prime Minister’s position so that the same could be occupied by its leader, Raila Odinga. Predictably, Kibaki rejected this request completely.⁸⁰

When the NCC convened in April, daggers were already drawn. The main point of contention was the limitation of executive power.⁸¹ Notably, the powers conferred on executives under the old constitution were significant, and the enormity of executive power was why the reform process became a priority in the first place.⁸² Interestingly, however, ministers in Kibaki’s government, some of whom had been most vocal about this aspect of the constitution during the Moi days (such as Kiraitu Murungi, Paul Muite, and Professor Kivutha Kibwana), suddenly changed sides and became the proponents of a hybrid system that would retain most powers in the presidency.⁸³ In other words, the icons of human rights of the Moi days now became the ardent supporters of a political system bent on frustrating the review process and constricting human rights. One analyst captured this change:

The expediency of Murungi and Muite’s political struggles have become clear with their total about—turn on issues, particularly corruption and a people—driven constitution review, and their insensitivity to pro-democracy forces. Others such as Kamau Kuria have capped their career by instituting nepotistic claims to

79. See Ngumbao Kithi et al, *Narc Parties Are Now Obsolete, Says Kibaki*, DAILY NATION, Nairobi, Dec. 30, 2003, available at http://www.accessmylibrary.com/coms2/summary_0286-19866616_ITM; *Uproar Over Kenya’s Leaders Decree*, BBC NEWS (Dec. 30, 2003), <http://news.bbc.co.uk/2/hi/africa/3356431.stm>.

80. See Abuya *supra* note 69; Mulisa Tom, *Public Participation in Constitution Making: A Critical Assessment of Kenya’s Experience 21* (2009) (unpublished LL.M. dissertation, University of Pretoria) (on file with authors).

81. *Freedom in the World Country Reports Kenya, 2003*, in FREEDOM IN THE WORLD 2003: ANNUAL SURVEY OF POLITICAL RIGHTS AND CIVIL LIBERTIES 306 (A. Piano & A. Puddington eds., 2004).

82. See, e.g., Pheroze Nowrojee, *Why the Constitution Needs to be Changed*, in IN SEARCH OF FREEDOM AND PROSPERITY: CONSTITUTIONAL REFORM IN EAST AFRICA 386 (Kivutha Kibwana et al. eds., 1996).

83. Laurence Juma, *The Legitimacy of Indigenous Legal Institutions and Human Rights Practice in Kenya: An Old Debate Revisited*, 14 AFR. J. OF INT’L & COMP. L. 191 (2006).

monopolising government contracts even in areas where such monopoly smacks of conflict of interest.⁸⁴

At Bomas, Raila Odinga's LDP rooted for a parliamentary system with an executive prime minister and a ceremonial president, the abolition of provincial administration, devolution of powers to the regions, and the establishment of two houses of parliament.⁸⁵ These requests were contested by Kibaki's inner clique who saw LDP's position as an affront to the power that they were already holding. Kibaki instead wanted a hybrid system where executive power would be shared between the president and the prime minister.⁸⁶ And because the CKRC's draft contained provisions that were more or less in tandem with the LDP position, the Kibaki faction were fiercely opposed to it.⁸⁷ Key Kibaki supporters even questioned the legitimacy of the NCC. They claimed that the conference was unrepresentative of the Kenyan people because it had three representatives from each district, irrespective of the population.⁸⁸ In the absence of a compulsory referendum, they argued, the people's participation in constitution making would be limited. Ironically, the Kibaki faction also demanded that the process needed to be entrenched in the constitution.⁸⁹ In the meantime, the rivalry between the two camps intensified, with accusations and arrogant displays of power on the part of the government becoming rampant.⁹⁰ One of the LDP thinkers, Dr. Crispin Odhiambo Mbai, a university lecturer who was regarded by the Kibaki faction as the main architect of the devolution, was murdered at his home in circumstances that raised grave questions about the government's complicity.⁹¹ These differences between the major political players

84. See Murunga & Nasong'o, *supra* note 70, at 14.

85. See Beth Elise Whitacker & Jason Giersch, *Voting a Constitution: Implications for Democracy in Kenya*, 27 J. CONTEMP. AFR. STUD. 1, 6 (2009).

86. *Id.*

87. *Id.*

88. See Cotrell & Ghai, *supra* note 63, at 18 (noting how this position to become the main point of contention in Njoya case, *infra* Part II).

89. But a motion to amend the constitution brought by Mirugi Kariuki, a key Kibaki supporter, was roundly rejected by delegates. See Zachary Ochieng, *Controversy Mars Constitution Conference*, AFRICA NEWS (Apr. 16, 2003), http://web.peacelink.it/afrinews/kenya_election/may_03.htm.

90. See generally Cotrell & Ghai, *supra* note 63 (giving the example of the government effecting sweeping reforms in the judiciary without waiting for a revamped Judicial Service Commission to be established as was anticipated by the new Constitution).

91. See Evelynne Asaala, *Exploring Transitional Justice as a Vehicle for Social and Political Transformation in Kenya*, 10 AFR. HUM. RTS L. J. 384 (2010). Some view this as the first political murder under the Kibaki regime. See Kenya: *Murder Most Foul, Again*, AFRICA CONFIDENTIAL, Sept. 26, 2003, at 1; see also *Standard Boss, Editors Quizzed over Mbai Leakage*, DAILY NATION (Nairobi), Sept. 30, 2003, at 4; Muriithi Muriuki & Njeri Rugene, *50 MPs Walk Out in Mbai Protest*, DAILY

impeded the work of the NCC and it was forced to adjourn several times.⁹² When it finally reconvened in January 2004, for the third and final session, the process had lost its momentum and the public had little faith in it.⁹³

Nonetheless, despite the odds and continuing interference, the conference deliberated and finally made recommendations that the president should have the power to appoint the prime minister who in turn appoints members of the cabinet.⁹⁴ The Kibaki faction rejected this recommendation and, before it could be passed, government ministers, led by then Vice President Moody Awori, walked out.⁹⁵ The delegates, undeterred by the government antics, passed the draft but with the amendment that its implementation occur after 2007, when Kibaki's term of office would end. This became what would later be known as the "Bomas draft." Although the conference approved the draft, the government was unhappy with it primarily because of its proposed parliamentary system and the devolution aspects.⁹⁶ However, for fear of the backlash that may have resulted from outright rejection, the government proposed that meetings between the factions be held to try and remove the contentious parts of the draft. As discussed in Part IIC of this article, this process culminated in the production of a whole new draft dubbed the "Wako Draft." But what became of the review process after the "Bomas Draft" was influenced partly by judicial intervention: the critical questions of constitutionality of the process and the role of parliament fell to be considered by a judiciary described by one analyst as "executive minded" amid the raging political contests between the coalition factions.⁹⁷

II. THE BATTLE TO REFORM CONTINUES 2002–2008: THE CHANGING ROLE OF COURTS AND THE PEOPLE'S RESPONSE TO FAILED REFORM

The storm that the NCC had generated by adopting a draft constitution without support of the ruling party deepened the divide between

NATION (Nairobi), Oct. 3, 2003, at 1.

92. Cotrell & Ghai, *supra* note 63, at 12, 18.

93. See Fred Oluoch, *Daggers are Drawn as Bomas III Kicks Off*, NEWS ON AFRICA FROM AFRICA (Jan. 2004), http://www.newsfromafrica.org/newsfromafrica/articles/art_2828.html

94. See G Kibara, *The State of Constitutionalism in Kenya*, in CONSTITUTIONALISM IN EAST AFRICA: PROGRESS CHALLENGES AND PROSPECTS IN 2002, 70 (B Tumasirwe eds., 2003)

95. Cotrell & Ghai, *supra* note 63, at 12.

96. *Id.* at 16.

97. C. Odote, *So Near Yet So Far Away: The State of Constitutional Development in Kenya*, in CONSTITUTIONALISM IN EAST AFRICA: PROGRESS CHALLENGES AND PROSPECTS IN 2002 109 (B Tumasirwe eds., 2003)

politicians. At the same time, the political pressure on the Kibaki government to deliver on its promise to give Kenyans a new constitution had not relented. And yet the contentious issues around which much of the acrimony and political fighting revolved were not entirely within the power of the government alone to resolve. It became inevitable that the intervention of the courts had to be sought. In this Part, therefore, we explore how this intervention came about, the main areas of dispute, and the effect that it had on the reform process as a whole. In Section A we discuss the famous *Timothy Njoya v Attorney General*⁹⁸ case and illustrate how although it was, more or less, an effort to settle political differences and maybe, even scuttle the reform process, it ended up creating a new trajectory in the reform agenda by expanding the role of ordinary citizens in the process. In Section B we summarize the effect of *Njoya* on cases that followed it, by focusing on the *Patrick Ouma Onyango v Attorney General*⁹⁹ case. In the last section, we discuss the government reaction to the *Njoya* and *Onyango* cases, especially its efforts to capitalize on the uncertain situation rendered in the aftermath of the two judgments—that had effectively halted the reform process—which efforts ended up in smoke anyway when the attempt to unilaterally produce a constitution was rejected by the masses in the 2005 referendum.

A. *Judicial Response to Transitional Bottlenecks*

Most challenges to the review process focused on the constitutionality of the review organs and their prescribed methods of operation. In essence, however, the courts were being called upon to ascertain the extent to which the old constitution should guide the promulgation of a new one. Nobody disputed that the old constitution was good law until a new constitution replaced it. Nor did anyone dispute that the spirit of the old constitution, together with existing institutions, must guide the promulgation of the new law. Despite these undisputed premises, it became evident during the lengthy review process that the influence of existing constitutional framework was fuzzy and always contestable.

We posit two reasons for this anomaly. The first and probably the most apparent was that, until 2008, the constitution did not provide for methods through which it could be wholly replaced. Undoubtedly, constitutionalism is about honouring the aspiration of the people and placing constraints on the exercise of governmental power. But people's

98. (2004) 4 LRC 559 (Kenya HC).

99. (2005) 3 K.L.R. 84 (H.C.K.).

aspirations as well as modes of governance change over time. For this reason, the original constitutions, or those through which nations are born, are not immune to assaults on their legitimacy because circumstances change and their frameworks of protection or governance may engender a shortfall in meeting the people's current needs. Unfortunately, the framers of the Kenyan Constitution never envisaged that there would come a time in the sovereign life of the country when change would be necessary. In our view, this was understandable considering the history and the circumstances through which the first constitution was negotiated and finally enacted. What the framers anticipated was that change in social life or political circumstances might only necessitate "amendments" or "alterations," but even these were to be undertaken when it was absolutely crucial and in very stringent circumstances.¹⁰⁰

The second reason rests with the inability of the judicial system to articulate the spirit of constitutionalism. In absence of a constitutionally sanctioned replacement process, the role of the judiciary became crucial, especially because political goodwill was lacking. Considering that courts have the power to exercise judicial authority and thus, are able "to make binding decisions against all persons and organs of the state,"¹⁰¹ the proposition that they should be the guiding light through the maze of interpretations necessary to carry the review process forward was not entirely misplaced. Be that as it may, the judiciary rarely rose to the occasion. Its status was worsened by the reorganisation and pruning that occurred immediately when the Kibaki clique arrived in state house.¹⁰²

100. Probably that is why section 47 of the Constitution allowed "alteration" of its provision(s) only with an affirmative vote of 65% of members of Parliament. See HWO Okoth-Ogendo, *The Politics of Constitutional Change in Kenya Since Independence, 1963-69*, 79 AFR. AFFAIRS 9 (1972) (noting that constitutional alterations must be guarded because of the important role the constitutions serve, of being an "arbiter over political activity"); Githu Muigai, *Towards a Theory of Constitutional Amendment*, 1 E. AFR. J. HUM. RTS. & DEMOCRACY 1 (2003) (suggesting that "alterations" must not be aimed at making fundamental changes to the constitution itself).

101. See Chuku Okpaluba, *Justiciability, Constitutional Adjudication and the Political Question in a Nascent Democracy: South Africa (Part 1)*, 18 SAPR/PL 331 (2003).

102. Examples of these contests include the forced removal of Chief Justice Bernard Chunga, a non-Kikuyu, and the so-called "radical surgery" that culminated in the removal of twenty-three senior High Court and Court of Appeal judges (non-Kikuyus) and eighty-five Magistrates on charges of corruption, without due process. See Evelyn Kwamboka, *Court Reassures Judge Over Suit*, E. AFR. STANDARD (Nairobi) (May 12, 2009), <http://www.standardmedia.co.ke/InsidePage.php?id=1144013938&cid=159&>; see also Wahome Thuku, *How Suspended Judge Got Justice*, E. AFR. STANDARD (Nairobi) (Apr. 26, 2010), <http://www.standardmedia.co.ke/InsidePage.php?id=2000008502&cid=159&story=How%20suspended%20judge%20got%20justice>; Joel D. Barkan, *Kenya After Moi*, 83 FOREIGN AFF. 87 (2004); Marc Lacey, *A Crackdown on Corruption in Kenya Snares Judges*, N.Y. TIMES (Oct. 26, 2003), <http://www.nytimes.com/2003/10/26/world/a-crackdown-on-corruption-in-kenya-snares-judges.html>.

Indeed, throughout the constitutional review process, and as we shall show, the inconsistency of courts and its poor moral and legal judgement added to the political squabbles to slow down the process.

It is this context that we examine the *Njoya* and *Onyango* cases and others that came later. In our view, however, *Njoya* provides the first entry point to the discussion on the role of courts in the whole constitutional reform process because of the way in which the judges framed the overarching issues and articulated what they considered to be the law. That it put a brake to the reform process thus helping to galvanise the government's position, does not in itself take away from the aptitude with which it identified the issues to be confronted. *Onyango* merely followed in its footsteps despite coming to a different conclusion with regard to the immediate dispute before it and offering a less robust opinion. In the discussion below, we highlight the major legal issues that the two cases canvassed with a view to illustrating the impact that the courts were bound to have on the constitutional reform process going forward.

1. *The Timothy Njoya Case: Political Ping Pong?*

The *Njoya*¹⁰³ case is a milestone in Kenya's constitutional jurisprudence for two reasons. First, it signified the first serious attempt by the High Court to engage an issue of political significance and make its voice heard. Whether the decision was right or wrong is not the point. That the court confronted the contemporary political questions was itself remarkable. Further, the court instituted itself as key player in the constitutional reform process, thus sending a firm signal to the politicians and members of the civil society that their actions had to be beyond reproach. Something needs to be said, as well, about the depth of legal reasoning, systematic delineation of principles of law and the wide range of jurisprudence that was consulted, all of which were by any measure commendable.

But why does the case attract such accolade? It would appear from available case law that historically the courts had a propensity to succumb to executive pressure and abdicate their duty to protect human rights or to enforce rules for the common good of the people of Kenya. They would do this by resorting to technical grounds to dismiss politically charged disputes without delving into their merits. For example, in *Maathai v. Kenya Media Trust*,¹⁰⁴ the court summarily dismissed the application to

103. *Timothy Njoya v. Attorney General*, (2004) 4 LRC 559 (Kenya HC).

104. *Maathai v. Kenya Times Media Trust Ltd*, (1989) K.L.R. 267 (H.C.K.). For a discussion of

stop a government agency from constructing a highrise building in a public park in the middle of the city of Nairobi on grounds of lack of standing. In *Joseph Maina Mbacha v. Attorney General*,¹⁰⁵ an application for the declaration that the prosecution violated their freedom of expression as guaranteed in the constitution was denied by the court on the bizarre grounds that section 84, under which the complaint had been brought, was inoperative because the Chief Justice had not made procedural rules, pursuant to Section 84(6), for the enforcement of the rights guaranteed by the constitution. In *Gibson Kamau Kuria v. Attorney General*,¹⁰⁶ the court rejected an application seeking orders declaring the holding of the applicant's passport by government to be in violation of a constitutional right, relying on the *Joseph Maina Mbacha* reasoning. In *Kenneth Njindo Matiba v. Attorney General*,¹⁰⁷ the court dismissed an application seeking to compel the Attorney General to facilitate the swearing of an affidavit for purposes of filing a constitutional reference because the applicant did not state the actual provisions of the Constitution which had been contravened.¹⁰⁸

Second, the *Njoya* decision opened avenues for judicial activism that were completely absent before the decision. The Court examined many issues that were strictly extrajudicial, such as the role of the constituent power of the people and sovereignty in the constitution making process.¹⁰⁹ The judges, especially Justice Ringera, a former University of Nairobi law lecturer, imported decisions from other parts of the world to give semblance of alignment of reasoning to Commonwealth judicial practice.¹¹⁰ This decision has now opened up Kenya's constitutional

this case, see Laurence Juma, *Environmental Protection in Kenya: Will the Environmental Management and Co-ordination Act (1999) Make a Difference?*, 9 S.C. ENVTL. L.J. 181, 194 (2002). See also Jackton B. Ojwang, *Kenya's Place in International Environmental Law Initiative*, 5 AFR. J. INT'L & COMP. L. 781, 799 (1993).

105. High Court (Nairobi) Misc. App. No. 356 of 1986 (Unreported); see also Gibson Kamau Kuria & Algeisa M Vazquez, *Judges and Human Rights: The Kenyan Experience*, 35 J. AFR. L. 142 (1991); Tom O Ojienda, *Inventory of Kenya's Compliance with International Human Rights Obligations: A Case study of International Covenant on Civil and Political Rights*, 1 E. AFR. J. HUM. RTS. & DEMOCRACY 91 (2003).

106. High Court (Nairobi) Misc. App. No. 279 of 1985 (Unreported). See Kuria & Vazquez, *supra* note 105, at 142.

107. High Court (Nairobi) Misc. App. No. 666 of 1990 (Unreported). See also Kuria & Vazquez, *supra* note 105, at 142; Maina Kiai & Anthony Kuria, *The Human Rights Dimension of Corruption: Linking Human Rights Paradigm to Combat Corruption*, 4 J. GLOBAL ETHICS 247, 250 (2008).

108. See also Anarita Karimi Njeri v. Republic, High Court (Nairobi) Crim. App. No. 180 of 1990 (Unreported). For detailed discussions of these limitations under the old constitution, see Ojienda, *supra* note 105, and Kuria & Vazquez, *supra* note 105.

109. Timothy Njoya v. Attorney General, (2004) 4 LRC 559 at 574, ¶ c (Kenya HC).

110. *Id.* at 590, ¶ b. Ringera relying on the Indian case of *Kessevanada v State of Kerala 1973 AIR*

litigation to comparative standards from other parts of the globe.¹¹¹ It will be interesting to see how courts adopt international standards in determining issues of human rights, environmental protection, and gender parity in the days to come.

As far as constitutional review is concerned, the *Njoya* case created new pathways in looking at the review instruments. It affirmed more than ever the need to entrench the process in the constitution, something which was to occur five years later. And even though the primary objective of applicants was to derail the process of reform and curtail the *Majimbo*¹¹² (regionalism) aspirations—an objective fuelled by an ethnic agenda—the decision also provided support for constitutionalism in Kenya.

a. The Facts of the Njoya Case

Reverend Timothy Njoya and several Christian leaders were aggrieved after the Constitution of Kenya Review Act accorded NCC the power to enact the new Constitution.¹¹³ In their view, Sections 28(3) and (4) of the Act were inconsistent with the Constitution because they denied the people the power to make the new law.¹¹⁴ They claimed that their right, together with other Kenyans, to ratify the new constitution through a referendum would be abrogated if the NCC were to enact the new constitution.¹¹⁵ They also argued that the role of parliament under Section 47 of the Constitution was limited to alteration of the constitution, not the complete removal of it.¹¹⁶ And therefore, section 27 of the Act which purported to give authority to NCC to “discuss, debate, amend and adopt a draft Bill to alter the Constitution through two thirds present and voting at a meeting of NCC” was in contravention of the Constitution.¹¹⁷ They also requested the Court to order the Attorney General to “recommend amendments to section 47 of the Constitution . . . in order to ensure the

(SC) 1461, stated: “All in all, I completely concur with the dicta (*quoted* in para. b) in *Kessevanada* case 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 or enact a new constitution.”

111. *See, e.g.*, Patrick Ouma Onyango v Attorney General 2005 3 KLR 84 (HCK) (raising the same issues and citing the same cases as *Njoya*).

112. For a discussion of the origins and nature of the *Majimbo* politics, see David M. Anderson, “*Yours in Struggle for Majimbo.*” *Nationalism and the Party Politics of Decolonization in Kenya, 1955–64*, 40 J. CONTEMP. HIST. 547 (2005).

113. *Timothy Njoya v. Attorney General*, (2004) 4 LRC 559, 560 (Kenya HC).

114. *Id.*

115. *Id.* at 569, para. f.

116. *Id.*

117. *Id.* at 569, para. c.

fulfilment of the objects of the review process”, in other words, that the review process be entrenched in the Constitution.¹¹⁸

The respondents opposed the application on several grounds. First, they argued the application did not raise any matter which required constitutional interpretation, since the dispute fell squarely within the confines of an Act of Parliament.¹¹⁹ Second, they contended that if the court granted the orders sought, the court would have overstepped the limits of its authority and usurped the powers of the legislature.¹²⁰ This was in violation of the principle of separation of powers. Third, they raised the issue of justiciability and argued that the court had no jurisdiction to adjudicate on the matter.¹²¹

The court delineated five main issues of contention in the case: (1) the proper approach to constitutional interpretation, (2) the question of constituent power of the people, (3) the scope of the power of parliament, (4) the question of infringement of individual rights and freedoms, and (5) whether an injunction (interdict) could be issued to stop the review process.¹²² For the purposes of this article, it is important to set out the court’s reasoning on only two issues—constitutional interpretation and constituent power of the people. These issues outline in broad terms the main areas of contestation that have necessitated judicial intervention in Kenya’s constitutional review process.

b. Constitutional Interpretation

The Constitution of Kenya does not outline how its provisions should be interpreted. Like most constitutions, its provisions are abstract and open-ended. The court therefore assumes the role of an interpreter of the abstract notions which the constitutional provisions often portend. Ronald Dworkin, a leading human rights jurist, has asserted that rights lay down “general, comprehensive moral standards that government must respect but that leaves it to statesmen and judges to decide what these standards mean in concrete circumstances.”¹²³ A court’s interpretative role is perhaps its greatest strength. However, this role must be exercised within certain limits. To begin with, there is general recognition that the

118. *Id.* at 570, para. d.

119. Timothy Njoya v. Attorney General, (2004) 4 LRC 559, 573, para. f (Kenya HC).

120. *Id.*

121. *Id.*

122. *Id.* at 574.

123. RONALD DWORKIN, LIFE’S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM 119 (1993).

constitution is the supreme law of the land and therefore its interpretive regime cannot, or should not, be the same as that of other statutes. In Kenya, this principle is long established in cases such as *Njogu v. Attorney General*,¹²⁴ and it was equally affirmed by *Njoya*.¹²⁵ This understanding implies that constitutional interpretation must anchor on the constitution itself, the values that it espouses, and the aspirations of a people with a commonly shared national identity. The court in *Njoya* acknowledged these implications. Judge Ringera labelled the constitution as a “living instrument with a soul and a consciousness,”¹²⁶ whose content must be “construed broadly, liberally and purposely”¹²⁷ to give effect to the values

124. (2000) L.L.R. 2275 (H.C.K.).

125. Subsequent cases, such as *Patrick Ouma*, have equally affirmed this position. This is a departure from what is often referred to as the “Elman doctrine” (emanating from *Republic v. Elman*, (1969) E.A.L.R. 357). This position also finds favor in other jurisdictions. For example, in Namibia, a court has observed:

A Constitution is an organic instrument. Although it is enacted in the form of a Statute it is *sui generis*. It must be broadly, liberally and purposively be interpreted so as to avoid the “austerity of tabulated legalism” and so as to enable it to continue to play a creative and dynamic role in the expression and the achievement of the ideals and aspirations of the nation, in the articulation of the values bonding its people and in disciplining its Government.

Namibia v. Cultura 2000, (1994) S.A. 407, 418 (NASC) (Namib.).

126. See Timothy Njoya v. Attorney General, (2004) 4 LRC 559, 576, para. c (Kenya HC). Two eminent American judges in the nineteenth and twentieth centuries made the same point by emphasizing the concept of a “living constitution.” By this approach, the language of a constitution written several hundreds of years ago should be interpreted in the light of the experience of the day. This approach recognizes the right of each generation to adapt the constitution to suit its own needs in so far as that adaptation is reconcilable with the language of the constitution. See *McCulloch v. Maryland*, 17 U.S. 316, 415 (1819) (Marshall, C.J.); *Missouri v. Holland*, 252 U.S. 416, 433 (1920) (Holmes, J.); see also *Tuffour v. Attorney General*, [1980] G.L.R. 637, 647 (Ghana) (Sowah, J.S.C.); C. HERMAN PRITCHETT, *THE AMERICAN CONSTITUTION* 35 (1977); W. Friedmann, *Statute Law and Its Interpretation in the Modern State*, 26 CAN. B. REV. 1277, 1287–88 (1948).

127. See *Njoya*, (2004) 4 LRC at 576, para. c. The liberal and purposive approach was catapulted into prominence in Commonwealth constitutional adjudication as an essential method of constitutional interpretation by Lord Diplock in a Privy Council judgment involving the enforcement of the fundamental rights entrenched in the Constitution of Bermuda. *Minister of Home Affairs v. Fisher*, [1980] A.C. 319, 328 (P.C.) (appeal taken from Bermuda). See also *Hinds v. The Queen*, [1976] All E.R. 353, 359 (P.C.) (appeal taken from Jamaica); *Ong Ah Chuan v. Public Prosecutor*, [1981] A.C. 648, 670 (P.C.) (appeal taken from Singapore); *Attorney-General of the Gambia v. Momodou Jobe*, [1984] 1 A.C. 689, 700 (P.C.) (appeal taken from Gambia); *Attorney General of St. Christopher, Nevis & Anguilla v. Reynolds*, [1980] 2 W.L.R. 171, 182 (P.C.) (appeal taken from West Indies); *Mustapha v. Mohammad*, [1987] L.R.C. (Const.) 16, 108 (H.C) (Tan, J.) (Malaysia); *Regina v. Big M Drug Mart Ltd.* [1985], 18 D.L.R. 321, 359–60 (Can.) (Dickson, J.); *Regina v. Oakes* [1986], 26 D.L.R. 200, 201 (Can.) (Dickson, C.J.C); *Nafiu Rabi v. The State*, [1981] 2 NCLR 293, 321, 326 (Nigeria); *Archbishop Okogie v. Attorney General of Lagos State*, [1981] 2 NCLR 337, 348, 53 (Nigeria); *Bronik Motors Ltd. v. Wema Bank Ltd.*, [1983] 1 SCNLR 296, 321 (Nigeria); *Savannah Bank of Nigeria Ltd. v. Ajilo*, [1989] 1 NWLR 97 305, 326 (Nigeria). See generally Chuks Okpaluba, *JUDICIAL APPROACH TO CONSTITUTIONAL INTERPRETATION IN NIGERIA* 13–16, 159–65, 375–79, 529–56 (1992); G.E. DEVENISH, *A COMMENTARY ON THE SOUTH AFRICAN BILL OF RIGHTS* 585 (1999) (discussing the

and principles embodied in the Constitution.¹²⁸ Notably, these three components do not completely rule out a strict textual or literal approach, but rather they expand the array of interpretive tools available to a judge to promote constitutionalism and arrive at a fair and just decision when adjudicating constitutional claims. The warning of the Constitutional Court of South Africa in *State v. Zuma*¹²⁹ is apt here:

While we must always be conscious of the values underlying the Constitution, it is nonetheless our task to interpret a written instrument. I am well aware of the fallacy of supposing that general language must have a single “objective” meaning. Nor is it easy to avoid the influence of one’s personal intellectual and moral preconceptions. But it cannot be too strongly stressed that the Constitution does not mean whatever we might wish it to mean.

We must heed Lord Wilberforce’s reminder that even a constitution is a legal instrument, the language of which must be respected.¹³⁰

What is envisaged here is that whereas unravelling the purpose may be important, the text, or any part of it, cannot be completely ignored. This is because the text often “sets the limit of a feasible interpretation.”¹³¹ Thus, in so far as the *Njoya* court sought to minimize the role of the text, the judges opened themselves up to the possibility that a wide array of issues not necessarily pertinent to the determination of the questions at hand could be brought to bear on the decision.

This then brings us to the next issue: determining the nature of values that could inform constitutional interpretation. What does it mean to talk of constitutional values? Admittedly, if the values are reduced to fundamental rights and freedoms—equality, human dignity, and the rule of law—then there are sufficient textual references in the Constitution that one could negotiate with ease.¹³² Constitutional *values* must therefore mean something much more profound, an insight from which a judge can draw to give meaning to a constitutional provision. For example, one identifiable source of values in the South African Constitution could be the

South African and Namibian cases and the relevant literature); Janet Kentridge & Derek Spitz, *Interpretation*, CONSTITUTIONAL LAW OF SOUTH AFRICA Ch. 11 (Chaskalson et al. eds., 1998).

128. See *Njoya*, (2004) 4 LRC at 576, para. c.

129. *State v Zuma*, 1995 (2) S.A. 642 (CC) (S. Afr.)

130. *Id.* at 652, paras. 17–18.

131. IAIN CURRIE & JOHAN DE WAAL, *THE BILL OF RIGHTS HANDBOOK* 148 (2005).

132. See, e.g., S. AFR. CONST. 1996, § 9 (equality), § 10 (dignity).

range of ideas expressed in the preamble.¹³³ The other source of values could be the founding provisions.¹³⁴ The third source, which supports the purposive approach to interpretation, could be the supposition that a judge could interpret the Constitution with regard to the underlying value of the provision in question. In this regard, if a provision guaranteed a right, then the proper scope of that right could be determined by reference to the purpose of that right. The purpose underlying the right is taken to be the value that the constitution intended to enhance or protect. Admittedly, determining the values underlying any provision is not an easy task. While there may be latitude for a judge to make value judgments, there is absolutely no room for personal idiosyncrasies or “biased views.” For example, a judge may not personally favor homosexuality, but the judge is expected to uphold the right to one’s sexual choices if the Constitution guarantees sexual freedom and the right to privacy. According to Mahomed A.J.A. in the Namibian Supreme Court decision, *Ex parte Attorney General of Namibia: In Re Corporal Punishment by Organs of State*,¹³⁵ the value judgment must be objectively articulated and identified but with “regard being had to the contemporary norms, aspirations, expectations and sensitivities of the Namibian people.”¹³⁶ This, though, should not be equated to public opinion.

Interpretation of the constitution should give effect to the aspiration of the people sharing a common identity. In a country such as Kenya, which has over forty-two different ethnic groups, it may be challenging to find a common identity. Nonetheless, the idea is that the judge remains conscious of a people’s culture, history, and political aspirations. Rites, language, religion, and all other aspects of culture play an important part in galvanizing the national identity.¹³⁷ That is why interpretation of the constitution could be “generous” as well as “contextual.” In *Njoya* there is more than one reference to “purposeful” and “contextual” interpretation.¹³⁸ Yet there is little reference to the explicit circumstances or the nature of a people’s culture, way of life, or history that had been taken into account to

133. S. AFR. CONST. 1996, pmb1.

134. *See id.*

135. *Ex-Parte Attorney General: In Re Corporal Punishment by Organs of State* (1991) (3) S.A. 76 (NmSC) (Namibia).

136. *Id.* at 91, paras. d–f.

137. *See, e.g.,* Anne Lise Kjær & Lene Palsbro, *National Identity and Law in the Context of European Integration: The Case of Denmark*, 19 DISCOURSE & SOC’Y 599 (2008) (arguing that cultural identity discourse in Denmark is shaping the legal response to European integration). *See generally* PATRICK HANAFIN & MELISSA S. WILLIAMS, *IDENTITY, RIGHTS AND CONSTITUTIONAL TRANSFORMATION* (1999).

138. *See, e.g.,* Timothy Njaya v. Attorney General, (2004) 4 LRC 574 para. g, 576 para. b.

inform the process of constitution-making. What the judge puts emphasis on are the universal values of constitutionalism and equality,¹³⁹ but fails to connect these with the peculiar circumstances of Kenya. It is one thing for a judge to vociferously propagate these principles, but it is another to appropriately apply them in the adjudication of a constitutional dispute.

c. The Idea of a Constituent Power of the People

One way in which the court in *Njoya* contextualized the aspirations of the Kenyan people is by elevating the principle of the constituent power of the people from a mere subject of political discourse to a legal concept. According to Justice Ringera it was the power “reposed in the people [of Kenya] by virtue of their sovereignty and . . . the hallmark thereof is the power to constitute or reconstitute the framework of Government, in other words, make a new Constitution.”¹⁴⁰ Although not expressly provided for in the Constitution, it existed as a matter of course. “If the makers of the Constitution were to expressly recognize the sovereignty of the people and their consistent power,” the judge observed, “they would do so only *ex abundanti cautela* (out of an excessiveness of caution).”¹⁴¹ After the court read into the Constitution the notion of the constituent power of the people, it postured its prominence as rising above the legislative authority of parliament. But to do this, the court first extended the breadth of “sovereignty,” as mentioned in Section 1 of the Constitution, to imply the existence of a power even greater than the Constitution itself; it then assumed authority to allocate rights based on that power.

The question then arises: does a constitutional court have power to do this? The answer is no. A constitutional court is bound by the Constitution. Before we delve into this issue further, it is pertinent that we interrogate what is meant by the term “constituent power of the people,” or at least how we understand it, and how it finds expression in constitutional theory.

Finding the locus of authority to change the constitution and construct a new political order has taken political theorists into a foray of interpretations of the notion of sovereignty. Sovereignty may be used as an exclusionary term that sets the nation state apart from other states or polities, and it can also confer a distinct political identity to the people forming that nation state. In sovereignty, the people can exercise power to decide how they should be governed and the laws to which they will be

139. *Id.* at 576, paras. f–g.

140. *Id.* at 580, para. i.

141. *Id.* para. g.

subject. The people can choose to exercise these powers in different ways. In modern society, they often channel it through a constitution which sets out levels of representation and creates organs of government.¹⁴² In this case, sovereignty is delegated but not ceded altogether. However, if this is done, then the constitution becomes the kingpin of the power of the people. It is no wonder that constitutions such as that of the United States begin with the words, "We the people."¹⁴³ The declaration of sovereignty as contained in Section 1 of Kenya's Constitution,¹⁴⁴ for example, is an affirmation of the people's power that has now been channelled through its Constitution.

In constitutional theory, the power that the people have to create a constitutional order is often referred to as the constituent power of the people. Abraham Lincoln once said, "This country . . . belongs to the people who inhabit it. Whenever they should grow weary of the existing government, they can exercise their constitutional right of amending it, or their revolutionary right to dismember or overthrow it."¹⁴⁵ But where do people get this power? The observation that "[a] constitution constitutes The People who in turn constitute it" is an indicator of the complex dynamic inherent in locating the source of this power.¹⁴⁶

It might very well be, and indeed this is our view, that constituent power derives from the governing institution of a constitutional order and not merely on the construction of that order. Otherwise, the constituent power would have to be traced back to the social contract theories and the state of nature, or the idea of international territorialism, all of which construct distinct identities of a "people" imbued with the power to create polities.¹⁴⁷ We also recognise that constituent power in its orthodox formulation is constantly being challenged. For example, globalization and the rise of multinational companies are major factors that now shift the

142. See, e.g., U.S. CONSTITUTION (1876); S. AFR. CONST. 1996; CONSTITUTION (2010) (Kenya).

143. See Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 2 (1987) (discussing the meaning of the first three words in the preamble of the U.S. Constitution).

144. See CONSTITUTION, art. 1 (2010) (KENYA).

145. See *Abraham Lincoln's First Inaugural Address*, in, AMERICAN CONSTITUTIONAL LAW: ESSAYS, CASES AND COMPARATIVE NOTES 1050 (Donald P. Kommers et al. eds., 2004).

146. See Duncan Ivison, *Pluralism and the Hobbesian Logic of Negative Constitutionalism*, 47 POL. STUD. 83, 84 (1999).

147. See, e.g., Zoran Oklopčic, *The Paradox of Constitutionalism: Constituent Power and Constitutional Form*, 6 ICON 358 (2008) (describing the "circular" nature of a people's constituent power as resident in their identity, which may, in turn, have territorial significance in international law).

constituent power from the original localized terrain to other centres, similar to *coup d'états* and political revolutions.

In this regard, we find Hans Lindahl's argument on the reflexivity of the meaning of a people very persuasive.¹⁴⁸ Here, the meaning of "people" could extend beyond the traditional view that directly links people to constituent action. He argues that an act of the "people" may be recognised as such only by raising what he calls a "representational or attributive claim."¹⁴⁹ This conceptual invocation of the term renders it feasible as a constitutional theory mechanism that respects the representational quality of a political society, and by the same token, casts suspicion on the recital of its primordial character.

In a constitutional democracy the constituent power must be construed as emanating from the organs of the constitution and not in conflict with them. In *Njoya*, the judges recognised the primacy of the constitution but posited the constituent power of the people as standing above that constitution. And yet, the glimpse we get from the judgement of how such power should be exercised in a constitution-making process suggests that the structures that are called upon to accept the constitution derive their powers by the same constitution. The court said that the power entailed the following: the views of citizens are collated and processed into constitutional proposals, which are then put before a constituent assembly; the assembly concretizes these into a draft constitution, which is then subjected to a referendum.¹⁵⁰ Presumably, all these attributes must be driven through processes underwritten by the old Constitution, otherwise, the same court would still question their legality.

The point we seek to make here is that these elements, which the judge attributes to the exercise of constituent power, articulate roles that are sanctioned by the constitution. Therefore, the view that constituent power cannot originate from the constitution, which the judges have adopted wholesale from Nwabueze's last century postulation,¹⁵¹ is at best insensitive to modern constitutional practice. Even Nwabueze admits that modern constitutional practice puts much premium on its representative character because "people in their great mass cannot all join in

148. See Hans Lindahl, *Constituent Power and Reflexive Identity: Towards an Ontology of Collective Selfhood*, in *THE PARADOX OF CONSTITUTIONALISM: CONSTITUENT POWER AND CONSTITUTIONAL FORM* 23 (Martin Loughlin & Neil Walker eds., 2007). Hans Lindahl is a Professor of philosophy at Tilburg University.

149. *Id.*

150. See *Timothy Njoya v. Attorney General*, (2004) 4 LRC 559, 583, para. b (Kenya HC).

151. B.O. NWABUEZE, *PRESIDENTIALISM IN COMMONWEALTH AFRICA* 392 (1974).

governing.”¹⁵² It likely would have been different if we were talking about Kenya of the pre-1963 era when there was no constitution in place. But even then, the negotiators at the Lancaster House conference had an inkling of working within some framework of representativeness.¹⁵³ The point is that it does not matter whether the Constitution is made through a national convention, a constitutional commission, constituent assembly, or even parliament. The key is to secure the peoples involvement in the process, and such involvement can be through representation.¹⁵⁴

Let us now go back to the role of a constitutional court *vis-a-vis* the constituent power of the people. Constitutional adjudication in most jurisdictions is commenced under the model of a supreme law to which all other laws are subject. Thus, the constitutional court will have the competence to annul unconstitutional law and quash conduct that is below the threshold set by the constitution. In other words, constitutional standards are the yardstick for all governmental action, including the legislative function. But constitutionalism is not simply about standards. It is also about establishing mechanisms that guarantee democratic and constitutional stability, and the creation of space for the enjoyment of individual liberty. De Smith, a renowned Professor of constitutional law, describes constitutionalism as follows:

The idea of constitutionalism involves the proposition that the exercise of governmental power shall be bounded by rules, rules prescribing the procedure according to which legislative and executive acts are to be performed and delimiting their permissible content Constitutionalism becomes a living reality to the extent that these rules curb arbitrariness of discretion and are in fact observed by wielders of political power, and to the extent that within the forbidden zones upon which authority may not trespass there is significant room for enjoyment of individual liberty.¹⁵⁵

The duty to defend the constitution, which a constitutional court shoulders, translates contemporaneously to that of defending the democracy. What

152. *Id.* at 393.

153. Individuals who went to the Lancaster Constitutional conference in the early 1960s, such as Oginga Odinga, Masinde Muliro, Ronald Ngala, Kiano and Tom Mboya, were themselves elected representatives serving in the Legislative Council. See B.A. Ogot, *The Decisive Years 1956–1963*, in *DECOLONIZATION & INDEPENDENCE IN KENYA 1940–93* 48, 60–61 (B Ogot and W Ochieng eds., 1995).

154. See Chris Maina Peter, *The Magic Wand in Making Constitutions Endure in Africa: Anything (Lessons) to Learn from East Africa*, 6 *AFR. & ASIAN STUD.* 511, 522 (2007).

155. S.A. DE SMITH, *THE NEW COMMONWEALTH AND ITS CONSTITUTIONS* 106 (1964).

this means is that the court technically supervises how constitutional authority is harnessed and exercised by organs created by that same constitution. This power of the court is not abstract. It is real. Apart from the foregoing, constitutional courts also have a duty to interpret the constitution. In both these functions the court uses the constitution as its pillar. Thus, removing the constitution from the tool kit of constitutional adjudication, or simply minimizing its relevance in a dispute by appealing to some other source of rights, is akin to denying the jurisdiction of the court. Moreover, a constitutional court cannot annul an act of parliament for any reason other than if it contradicts the constitution.¹⁵⁶

2. *Constituent Assembly and Referendum*

What does the constituent assembly mean and is it any different from the NCC whose constitutionality was contested? The *Njoya* ruling rejected the view that NCC had power to enact a new constitution, instead holding that such a power resided in the people.¹⁵⁷ One of the ways in which the power could be exercised is through a constituent assembly and a compulsory referendum. The court borrowed this view from Nwabueze's contention that proposals of a new constitution should be put through discussions in a constituent assembly or through a plebiscite before being adopted.¹⁵⁸

What, exactly, a constituent assembly should look like is not exactly clear. It would appear from Nwabueze's postulation, which Justice Ringera adopted, that any form of a collective meeting, outside parliament, wherein the purpose is to draft or approve the constitution, could be regarded as a constituent assembly. One criterion, according to Justice Ringera, was that assembly must be broadly representative of the people of Kenya.¹⁵⁹ In his view the NCC process lacked this quality:

The entire membership [of the NCC] consisted of 629 delegates. Out of those only 210 elected Members of Parliament could claim to have been directly elected by the people . . . The other categories of membership were all unelected directly by the people. 210 of them represented Districts . . . and the rest (209) consisted of 12 nominated Members of Parliament, 29 CKRC Commissioners,

156. The principle of judicial review is also based on this notion. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 1 (1938).

157. See *Timothy Njoya v. Attorney General*, (2004) 4 LRC 559, 582, para. g (Kenya HC).

158. B.O. NWABUEZE, *supra* note 151, at 393.

159. *Njoya*, 4 LRC at 581, para. i.

and 168 members representing such diverse interests as trade unions, non-governmental organizations, women organizations, religious organizations and special interests groups Can such a body be said to be representative of the people for purposes of Constitution making?¹⁶⁰

In Justice Ringera's view, the NCC failed the test of being a constituent assembly.¹⁶¹ Surprisingly, however, the judge proceeded to hold that the applicants had not been discriminated against and were therefore not entitled to remedy under Section 84 of the Constitution. The court's reasoning was that the applicants did not have standing to enforce group rights under the Constitution since it only applied to claims made by individuals. If indeed, the constituent power was violated, it could not have been so unless the collective rights of the applicants, together with others, had been violated.

An interesting variation to this argument was posited by Justice Kubo, the dissenting judge.¹⁶² First, he rejected the notion that the constituent assembly is the only avenue for constitution making. Second, he rejected the notion that there was no constitutional imperative to decreeing the necessity of a constituent assembly in Kenya's constitution making process or that the people of Kenya preferred it to any other method. In his view, if this method is preferred, then it should have been expressly provided for in the Constitution.

We associate ourselves with Justice Kubo's opinion. Just like we have argued with respect to the constituent power of the people, this was a constitutional matter brought before a constitutional court. There must be a basis for the court to prescribe what the will of the people entails. There is a grave danger if the court on its own volition can impose methods for constitution making without constitutional, statutory, or common law authority.

As for the requirement of a referendum, Justice Ringera described it as a right emanating from the constituent power of the people.¹⁶³ Sections 27(5) and (6) of the Constitutional Review Act, which had made the referendum contingent upon absence of a consensus at NCC, was declared unconstitutional. Here, too, the dissenting judge disagreed with the majority opinion. He argued that since the referendum was not a creature

160. *Id.*

161. *See id.* at 582, para. g.

162. *Id.* at 611.

163. *Id.* at 583, para. d.

of the Constitution, the Act providing for it could not be deemed unconstitutional simply because the Act did not make the referendum mandatory.

B. The Spin-off from the Njoya Decision: Patrick Ouma Onyango v. Attorney General

The *Njoya* judgment sent a shock wave through the system and created a lull in government circles. The inactivity disillusioned civil society. A group calling itself Katiba Watch led by an octogenarian politician, Martin Shikuku, emerged to fill the vacuum.¹⁶⁴ The group was joined by opposition politicians, and they began calling for mass action to force the government to restart the constitutional reform process. The government reacted by creating the Constitution of Consensus Group, in an attempt to deal with the effects of the *Njoya* judgement and generally put the review process back on track. As the result of the work of this group, two bills were published: (1) the Constitution of Kenya (Amendment) Bill 2004, which sought to amend Section 47 of the Constitution to make referendum a mandatory requirement in the reform process, and (2) the Constitution of Kenya Review (Amendment) Bill 2004 which gave Parliament the power to audit, amend and replace the Constitution approved by the NCC.¹⁶⁵

The two bills did not get a wonderful reception from civil society and opposition groups because they were largely seen as part of an attempt by the government to defeat the will of the masses. Indeed, after the publication of the bills in April 2004, calls for intensified mass action increased.¹⁶⁶ As the possibility that the country would revert back to the dark days of multi-party demonstrations became real, the President quickly instructed the minister for justice to withdraw the bills.¹⁶⁷ A series of negotiations then ensued, culminating in the introduction of another version of the Constitution of Kenya Review (Amendment) Bill 2004 in November.¹⁶⁸ The Bill was introduced in Parliament and readily passed,¹⁶⁹

164. See Philip O. Nyinguro & Eric E. Otenyo, *Social Movements and Democratic Transitions in Kenya*, 42 J. ASIAN & AFR. STUD. 5, 18 (2007).

165. See *East Africa: Kibaki Acts to Head Off July 3 Protests*, ALLAFRICA.COM, (June 29, 2004), <http://allafrica.com/stories/200406290299.html>; Morris Odhiambo, *Constitutionalism Under A "Reformist" Regime in Kenya: One Step Forward, Two Steps Backward*, in CONSTITUTIONALISM IN EAST AFRICA: PROGRESS CHALLENGES AND PROSPECTS 51, 76 (Lawrence M. Mute ed., 2007).

166. See Morris Odhiambo, *supra* note 165, at 76.

167. *Id.* at 77.

168. *Id.*

169. *Id.*

despite opposition and boycott from the Raila Odinga faction.¹⁷⁰ Key features of this bill were provisions for a mandatory referendum,¹⁷¹ and the introduction of a stricter regime for challenging its outcome.¹⁷² The introduction of the referendum was largely a reaction to *Njoya*. Nonetheless, the amendment could have been a great victory for the Kenyan public had it not reaffirmed the role of parliament in the reform process.¹⁷³

1. *The Facts of Patrick Ouma Onyango v. Attorney General*

Before the dust had settled on *Njoya*, another case was filed in which the applicants sought similar orders, *Patrick Ouma Onyango v. Attorney General*.¹⁷⁴ Perhaps inspired by the *Njoya* decision, a group of civil society activists went to court seeking to annul sections of the Constitution of Kenya Review (Amendment) Act of 2004 that allocated powers to Parliament and the National Assembly to enact the new constitution.¹⁷⁵ Second, the applicants were aggrieved that Parliament, on the strength of the amendment, had inserted amendments on the NCC approved draft constitution. Therefore, they relied on the *Njoya* reasoning affirming the primacy of the constituent right of the people above Parliament to seek a declaration that “the National Assembly has no power to debate, alter or amend the draft Constitution of Kenya 2004 as adopted by the National Constitutional Conference on 15 March, 2004.”¹⁷⁶ Third, the requirement for the deposit of security for costs introduced by Section 28 B (4) was contested on the grounds that it amounted to a violation of the applicant’s right of access to courts.¹⁷⁷

170. See Bannon *supra* note 12, at 1839.

171. Kenya Review (Amendment) Act 2004, § 27(6,7).

172. *Id.* § 28B(5).

173. See Cotrell & Ghai, *supra* note 63, at 16; Bannon, *supra* note 12, at 1839; Said Yahya-Othman & Joseph Sindi Warioba eds., MOVING THE KENYA CONSTITUTION REVIEW FORWARD: REPORT OF THE FACT-FINDING MISSION TO KENYA, 8 (2007), http://www.kituoachakatiba.org/index2.php?option=com_docman&task=doc_view&gid=1196&Itemid=27.

174. (2005) 3 K.L.R. 84 (H.C.K.).

175. The disputed sections of the Act were §§ 4, 5. See *id.* at 95–98.

176. *Id.* at 96, para. 30.

177. *Id.* at 98, para. 1. It is noteworthy that although the Kenyan Constitution, unlike the South African one, does not have a general provisions guaranteeing right of access to judicial remedy, it is inferred from the right to seek enforcement of fundamental rights contained in the Bill of Rights. In South Africa, the right, which is contained in Section 34, has generated a body of jurisprudence that now gives it a concrete meaning. See, e.g., Metcash Trading Ltd. v. Commissioner, South African Revenue Services, (2001) (1) S.A. 1109 (CC); Chief Lesapo v Northwest Agricultural Bank, (2000) (1) S.A. 409 (CC); First National Bank of South Africa Ltd. v. Land Agricultural Bank of South

The contentious issues in this case were somewhat similar to those dealt with in the *Njoya* case. That the court did not come to the same conclusion as *Njoya* might appear curious. For example, on the issue of constituent power of the people, it is interesting that despite the judges expressing agreement with the *Njoya* on the meaning of it, they could not find the basis of the exercise of such power in the Constitution. “In our view,” the court said, “the constituent power need not be expressed as a constitutional right in order to be exercised because some constitutions such as ours do not provide for its death.”¹⁷⁸ The court then went into the foray of distinguishing between “legislative power” and the “constituent power,” and suggesting that in the case of Kenya, where the Constitution expressly confers power of amendment to Parliament, the constituent power is thereby vested in Parliament.¹⁷⁹ This was a rather curious conclusion because it denied the exercise of constituent power a constitutional expression. This was tantamount to telling the parties that the Constitution has sanctioned Parliament’s usurpation of their citizenship role in constitution-making, and also that the remedy they were asking for was beyond the purview of a constitutional court and could not, therefore, be granted. In this regard, this court misdirected itself even further than its predecessor.

The other issue that arose in this case and which touches on the general principles of constitutional adjudication is the application of the doctrine of justiciability. Constitutions often vest judicial power on the judiciary.¹⁸⁰ A constitution can go further by vesting jurisdiction in a constitutional court to review legislation or censure an executive conduct, which in any event is unfettered. However, the jurisdiction that the judiciary assumes is contingent upon a functioning constitutional system, where every component making up the system has a role and compliments each other. Otherwise, the whole concept of constitutional democracy becomes ineffectual. Certainly, Constraints based on counter-majoritarianism considerations, separation of powers, and the infinite elements of the rule of law echo a more cautious approach to the exercise of judicial review

Africa, (2000) (3) SA 626 (CC); *Contra Peens v Minister of Safety and Security*, (2000) (4) SA 727 (T).

178. *Patrick Ouma Onyango v. Attorney General*, (2005) 3 K.L.R. 84, 123, para. 30 (H.C.K.).

179. *Id.* at 152, para. 10.

180. *See, e.g.*, S. AFR. CONST. 1996 § 165 (expressly vests judicial authority on courts). For a discussion of the concept of judicial power in Kenya see Laurence Juma, *Institutions of African Law and Justice Administration in Kenya*, 17 LESOTHO L.J. 1, 22 (2007); Chuks Okpaluba, *Constitutionality of Legislation Relating to the Exercise of Judicial Power (Part I): The Namibian Experience in Comparative Perspective*, J. S. AFR. L. 308 (2002).

prerogatives. Justiciability then becomes a doctrine of self-restraint that the courts have imposed on themselves when exercising judicial review. Although devoid of any precise definition, it generally relates to situations where the courts would decline adjudication, such as “where the question posed would require solutions of a non-judicial nature, or where the dispute could be better settled by the executive, the legislature, the politician, the political parties or other government or quasi-public bodies or private organisations.”¹⁸¹ In the American judicial practice, justiciability covers a whole range of subjects, including: courts will not issue advisory opinions, but will act only on matters involving adverse parties with true controversies; courts will reject feigned or collusive cases; courts will decide only the issues actually presented by the matter before them; courts will not consider political questions; courts will not act until the matter is ripe for decision, or on a matter that has become moot; and courts will not act on a matter brought before them by a plaintiff who lacks standing to bring it.¹⁸²

2. *Standing*

A litigant in a constitutional dispute must have sufficient interest in the matter to be able to appear before the court. This is a cardinal principle of justiciability and has firm foundation in common law jurisprudence.¹⁸³ The requirement under the common law is that one has to have a right which is above anyone else's—a private right and not a public one—to be able to sue. This traditional approach is represented by the view of the court in the English case of *Gouriet v. Union of Post Office Workers (& Others)*,¹⁸⁴ where the court stated:

It can properly be said to be a fundamental principle of English law that private rights can be asserted by individuals, but that public rights can only be asserted by the Attorney-General as representing the public. In terms of constitutional law, the rights of the public are vested in the Crown, and the Attorney-General enforces them as an

181. See Chuks Okpaluba, *Justiciability and Constitutional Adjudication in the Commonwealth: The Problem of Definition (I)*, 66 THRRH 424, 429 (2003).

182. See Jonathan R. Siegel, *A Theory of Justiciability*, 86 TEX. L. REV. 73 (2007).

183. See Chuks Okpaluba, *Standing to Challenge Governmental Acts: Recent Case Law Arising from South Africa's Constitutional Experiment*, 1 SPECULUM JURIS 205 (2002); Chuks Okpaluba, *Justiciability and Standing to Challenge Legislation in the Commonwealth: A Tale of the Traditionalists and Judicial Activist Approaches*, 36 COMP. & INT'L L.J. S. AFR. 25 (2003) [hereinafter Okpaluba, *Justiciability and Standing*].

184. *Gouriet v. H.M. Attorney-General*, [1978] A.C. 435 (HL).

officer of the Crown. And just as the Attorney-General has in general no power to interfere with the assertion of private rights, so in general no private person has the right of representing the public in the assertion of public rights. If he tries to do so his action can be struck out.¹⁸⁵

The understanding would be that if a group of people having a common right wish to assert it collectively as a group, they will have to call upon the Attorney General to do so on their behalf, or alternatively, seek leave of the court. For many years this has been the law in Kenya as illustrated by a long line of cases such as *J.J. Campos v. ACL De Souza*,¹⁸⁶ *Wangari Maathai v. Kenya Media Trust*,¹⁸⁷ *Law Society of Kenya v. Commissioner of Lands*,¹⁸⁸ *Nginyo Kariuki v. Kiambu County Council*.¹⁸⁹

In recent years, however, the requirement of standing has experienced a moderate shift towards the relaxation of its rigid application in circumstances where public interest and claims of infringement of fundamental rights are involved. In Canada, the trend towards liberalization of the doctrine is believed to have begun with *Thorson v. Attorney General of Canada*,¹⁹⁰ where the court rejected the traditional approach as being incapable of “wholesale transfer to a field of federal public law concerned with the distribution of legislative power between central and unit legislatures, and with the validity of the legislation of one or other of those two levels.”¹⁹¹ In public interest litigation, therefore, the court asserted its discretion to determine a litigant’s standing to challenge the constitutionality of an act. The court defined the criteria during adjudication: (1) whether there is a serious issue that affects the validity of the act, (2) whether the applicants are significantly affected by the Act such that they would be adversely affected if the matter was not

185. *Id.* at 477; see also *Victorian Council of Civil Liberties Inc. v Minister of Immigration & Multicultural Affairs* [2001] FCA 1297 (Austl.).

186. *J.J. Campos v. ACL DeSouza*, (1933) 15 K.L.R. 86.

187. (1989) eKLR (H.C.K.). See also Juma, *supra* note 104, at 194; Patricia K. Mbote, *Towards Greater Access to Justice in Environmental Disputes in Kenya: Opportunities for Intervention* (Int’l Envtl. Law Research Ctr. Working Paper 2005-1), available at <http://www.ielrc.org/content/w0501.pdf>.

188. (2001) eKLR (H.C.K.).

189. High Court Civil Case No. 464 of 2000, Nakuru (Unreported). The case is also discussed in Alnashir Visram, *Review of Administrative Decisions of Government by Administrative Courts or tribunals*, a paper that was presented at the 10th Congress of International Association of Supreme Administrative Jurisdictions, Sydney Australia (Mar. 2010), <http://www.aihja.org/images/users/1/files/kenya.en.0.pdf?PHPSESSID=f83dg63dqj61vokoep4kk44fu>.

190. [1974] 1 S.C.R. 138. (Can.).

191. *Id.* at 150.

adjudicated, and (3) whether there is no other reasonable and effective way the issue of validity could be brought before the court.¹⁹² It should be noted that standing in public interest cases in Canada is not granted as a matter of course. In most cases the Canadian courts have to find compelling reasons in line with the criteria set in *Thorsons* and as adopted and modified in subsequent cases.¹⁹³

In Kenya, it seems almost settled law that in a constitutional challenge to legislation, standing will be granted as a matter of course, which may be a little disconcerting. In *El-Busaidy v. Commissioner of Lands*,¹⁹⁴ one of the objections raised to the suit was that the plaintiff did not have *locus standi* in a suit where he had sought to restrain the defendants from alienating a public park. The defendant's argument was that the plaintiff did not have sufficient stake or legal interest in the property.¹⁹⁵ In any event, any interest that he could have was equal to that of many other people. For this reason, he could only come to court in a representative capacity. This, however, demanded that he comply with Order 1 Rule 8 of Civil Procedure Rules.¹⁹⁶ That Order required him to obtain leave from all other interested parties before lodging a claim. The defendant argued that the only person who could bring a representative suit without being encumbered by the requirements of Order 1 was the Attorney General.

192. See also *Canadian Council of Churches v. Canada*, [1992] 1 S.C.R. 236, 253 (denying applicants who were representatives of churches standing to challenge the validity of certain provisions in the Immigration Act of 1976); cf. *Re Canadian Bar Association v. British Columbia Attorney General* (1993), 101 D.L.R. 4th 410 (Can.); *Vriend v. Alberta* (1998), 156 D.L.R. 4th 385 (Can.). In *Canadian Bar*, a provincial bar association and the Law Society challenged the validity of an act that imposed responsibility on their members to collect social service tax from clients. In *Vriend*, gay and lesbian organizations challenged an act which had omitted sexual orientation as one of the grounds for prohibited discrimination. In both cases the court found that the organizations had standing. See Okpaluba, *Justiciability and Standing*, *supra* note 183, at 56–57.

193. For the subsequent developments of post-Charter Canadian case law, see Okpaluba, *Justiciability and Standing*, *supra* note 183, at 54–63.

194. *El-Busaidy v. Commissioner of Lands*, (2002) 1 K.L.R. 479 (H.C.K.).

195. *Id.* at 487, para. 20.

196. The rule provides as follows:

(1) Where there are numerous persons having the same interest in one suit, one or more of such persons may sue or be sued, or may be authorized by the court to defend in such suit, on behalf of or for the benefit of all persons so interested.

(2) The court shall in such case direct the plaintiff to give notice of the institution of the suit to all such persons either by personal service or, where from the number of persons or any other cause such service is not reasonably practicable, by public advertisement, as the court in each case may direct.

(3) Any person on whose behalf or for whose benefit a suit is instituted or defended under subrule (1) may apply to the court to be made a party to such suit.

Civil Procedure Act, LAWS OF KENYA, Ch. 21 (2009), available at <http://www.kenyalawreport.co.ke/Downloads/Acts/The%20Civil%20Procedure%20Act.pdf>.

The Court was persuaded that the conventional position was untenable. Relying on the decisions of the High Court in *Omar v. Edward Murania*,¹⁹⁷ *Niaz Mohammed Jan Mohamed v. Commissioner of Lands*¹⁹⁸ and *Albert Ruturi v. Attorney General*,¹⁹⁹ and despite the objections raised by the defendants, the court found that the plaintiff had sufficient interest in the subject matter to warrant his invocation of the rights sought in his suit.²⁰⁰ His interests, according to the court, were not in conflict with those of any other person who may have used the park as a relaxing place, and he was therefore entitled to stop the defendant from alienating the park.²⁰¹ The court relied on this passage from the judgement in *Albert Ruturi & Others v AG & Others*:

We state with firm conviction that as part of the reasonable, fair and just procedure to uphold constitutional guarantees, the right of access to justice entails a liberal approach to the question of *locus standi*. Accordingly, in constitutional questions, human rights cases, and public interest litigation and class actions, the ordinary rule of Anglo-Saxon jurisprudence, that action can be brought only by a person to whom legal injury is caused, must be departed from. In these types of cases, any person or social groups, acting in good faith, can approach the Court seeking judicial redress for a legal injury caused or threatened to be caused to a defined class of persons represented.²⁰²

With regard to the representative nature of the suit, the court found that the plaintiff had not indicated in his pleadings that he was suing on behalf of others, therefore he could not be held to be in contravention of Order 1.²⁰³ Moreover, the judge was of the view that the use of the word “may” and not “shall” meant that the legislature intended that a party with a right to protect should have freedom to assert such a right even if it will result in a benefit to other members of the same class.²⁰⁴ The judge decreed the inertia and incompetence in the Attorney General’s office that had allowed public land to be “grabbed” by politicians and wondered if it was prudent

197. High Court Civil Case No. 1 of 1996 (Unreported).

198. (1996) eKLR (H.C.K.).

199. *Albert Ruturi v. Attorney General*, (2002) 1 K.L.R. 54.

200. *See El-Busaidy v. Commissioner of Lands*, (2002) 1 K.L.R. 479, 489, 495, 499 (H.C.K.).

201. *Id.* at 500.

202. *See Ruturi*, (2002) 1 K.L.R. at 67.

203. *See El-Busaidy*, (2002) 1K.L.R. at 500, para. 5.

204. *Id.* para. 30.

to expect the protection of public interest from that office.²⁰⁵ Here too, the court relied on the opinion of the judges in *Ruturi*:

Our legal system is intended to give effective remedies and reliefs whenever the Constitution of Kenya is threatened with violation. If an authority which is expected to move to protect the constitution drags its feet, any person acting in good faith may approach the court to seek judicial intervention to ensure that the sanctity of the Constitution of Kenya is protected and not violated.²⁰⁶

In the later case of *Mureithi v. Attorney General*,²⁰⁷ the issue of *locus standi* again arose, but this time in relation to a claim over a parcel of land—allegedly wrongfully acquired from a clan by the colonial government under emergency law during the Mau Mau uprising—over which the claimants sought ownership by virtue of being members of the Mbari-ya-Murathimi clan. The court held that the plaintiffs had standing to bring the suit on their individual capacities as members of the clan and also on behalf of their clan.²⁰⁸ The court did not refer to *Ruturi* or *El-Busaidy* and it is difficult to say whether it was aware of these judgements or not.²⁰⁹

In *Patrick Ouma*, the issue of standing arose by way of a preliminary objection raised by the respondents on the grounds of non-compliance with procedural rules of representative suits delineated in Orders 1 and 8 and Order 1 Rule 12 of Civil Procedure Rules.²¹⁰ The court declined to rule on the objections and instead delved into the merits of the case.²¹¹ However, it indicated in passing that the suit raised matters that were “larger than the constitution itself” and therefore of importance to all Kenyans.²¹² In the court’s view, the applicant’s standing was therefore derived from the very nature of the subject matter, which was of great public interest.²¹³ The court relied on *Ruturi* to support its view.²¹⁴

205. *Id.* at 501, para. 5.

206. *See* Albert Ruturi v. Attorney General, (2002) 1 K.L.R. 54, 70.

207. *Mureithi v. Attorney General*, (2006) 1 K.L.R. 707 (HC).

208. *Id.* at 708, para. 30.

209. The court chose to rely on English cases such as *R v Secretary of State for the Environment ex parte Rose Theatre Trust Co* (1990) 1 QB 504 and *R v Legal Aid Board ex parte Bateman* (1992) 1 WLR 711.

210. These provisions generally require that the representatives obtain leave of the court and issues notice to all interested parties. *See* Patrick Ouma Onyango v. Attorney General, (2005) 3 K.L.R. 84, 170 para. 25 (H.C.K.).

211. *Id.* at 170, para 35.

212. *Id.*

213. *Id.* at 171, para 1.

214. *Id.*

3. The “Political Question” Doctrine

As a theory of interpretive deference, the political question doctrine demands that a court decline to exercise jurisdiction on a dispute that it is either ill-equipped to deal with or where the political organ may render the best possible resolution. The doctrine has its origins in U.S. constitutional jurisprudence, which largely recognises—although in many instances this is contestable—that there are certain matters that are better left to the other organs of government to decide rather than the courts.²¹⁵ While advocating for judicial modesty, Chief Justice Marshall, a strong proponent of judicial review, argued that powers of judicial review were not without limits.²¹⁶ “Questions, in their nature political,” he wrote, “or which are, by the constitution and laws, submitted to the executive can never be made in this court.”²¹⁷ According to Chief Justice Marshall, there were questions or issues over which political organs had the power and discretion to decide, and these fell outside the constitutional competence of the court.²¹⁸ Such issues would fall under one of the following categories: those matters with political subject matter; those that concern the nation and not the individual; and those areas in which the constitution vests the political organs with discretion.²¹⁹ This reasoning was based on his understanding of the distribution of powers by the Constitution, which delineated the respective competence of organs of government. Therefore, when political organs made judgment on matters of policy which fell within their competence, they were fulfilling their constitutional obligations. He believed that although the judiciary had power to say what the law is, it was not the only branch with such a power.²²⁰ Indeed, if such a division of

215. Some American scholars seem to think that the doctrine is on the decline. *See, e.g.*, Jesse H. Choper, *The Political Question Doctrine: Suggested Criteria*, 54 DUKE L. J. 1457 (2005) (arguing that the Supreme Court, as evidenced by its decision in *Bush v. Gore*, 531 U.S. 98 (2000), has demonstrated that there are a few matters in which it may decline jurisdiction); Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 240 (2002) (“[T]he demise of the political question doctrine is of recent vintage, and it correlates with the ascendancy of a novel theory of judicial supremacy.”); Mark V. Tushnet, *Law and Prudence in the Law of Justiciability: The Transformation and Disappearance of the Political Question Doctrine*, 80 N.C. L. REV. 1203, 1233 (2002) (contrasting the Warren Court’s assertion of judicial supremacy and use of prudential decision making with that of the Rehnquist Court).

216. *Marbury v. Madison*, 5 U.S. 137 (1803).

217. *Id.* at 170.

218. *Id.*

219. *Id.* at 166.

220. *See* Walter Dellinger & H. Jafferson Powell, *Marshall’s Questions*, 2 GREEN BAG 375 (1999).

power did not exist, then some functions would end up being swallowed by the judiciary.²²¹

We have taken time to analyze Chief Justice Marshall's postulation so as to show that the classical version of the doctrine had constitutional underpinnings. Undoubtedly, the classical version of the doctrine traces its pedigree to the Constitution of the United States itself.²²² That is why those who may be skeptical of the doctrine's relevance to judicial review may take solace in its limitation when fundamental rights and individual freedoms are at stake. Moreover, the U.S. Supreme Court has refined the doctrine leaning towards limiting blanket deference on political grounds.²²³ Unlike other courts of similar stature, the U.S. Supreme Court chooses its cases and therefore has wide latitude to decline jurisdiction on the basis of the political question doctrine. This discretion, however, has often created doubt as to whether the doctrine in its maiden formulation would be readily applicable in other judicial systems. In Kenya, for example, the High Court (which technically is also the constitutional court) exercises both original and appellate jurisdiction in all matters.²²⁴ As a result, if the court chooses to decline jurisdiction on any basis, the avenues for litigating constitutional questions may be constricted.

The question is whether political organs in Kenya can really be trusted to determine the meaning and scope of a constitutional provision in a climate of political incongruity. Perhaps the best way to examine this issue is to consider the criteria that US courts have adopted and compare it with the Kenyan position. The U.S. Supreme Court set the criteria in *Baker v. Carr*²²⁵ in the following terms:

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of

221. Barkow, *supra* note 215, at 254–55 (citing .Honorable John Marshall, Speech (Mar. 7 1800) in 18 U.S. (5 Wheat) app. Note 1 at 16–17 (1820)).

222. Barkow, *supra* note 215, at 254–55.

223. *See, e.g.*, Bush v Palm Beach County Canvassing Board 531 U.S. 70 (2000); Bush v Gore 531 U.S. 98 (2000).

224. *See* CONSTITUTION, §§ 60, 67 & 84 (1963) (Kenya).

225. *Baker v. Carr*, 369 U.S. 186 (1962).

government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.²²⁶

Professor Jesse H. Choper, of Berkeley Law School, breaks down the criteria for limiting the application of the doctrine set in *Baker* into four considerations.²²⁷ First, courts should not exercise jurisdiction where there is a textual commitment to a coordinate government department, that is, where the constitution expressly confers the authority to a branch of government.²²⁸ Second, courts should not intervene in circumstances where judicial review may not be necessary for preserving the Constitution or its values.²²⁹ Here, Choper has in mind issues of institutional competence and human rights. In his view, courts may reduce “discord between judicial review and majoritarian democracy” when they abstain from deciding issues where political branches may produce sound constitutional decisions.²³⁰ Indeed, this may enhance the court’s ability in the future “to render enforceable decisions when their participation is vitally needed.”²³¹ Third, a court should not attempt to adjudicate issues where its opinion hinges on no coherent tests or formulations because of “lack of judicially discoverable and manageable standards.”²³² This criteria is extremely important for the courts own assessment of its capacity to assist the parties by developing appropriate constitutional standards to guide litigation. Also, it is important for creating some kind of consistency in constitutional litigation. The test, according to Choper, is whether a particular standard is “constitutionally warranted[,] . . . desirable, and sufficiently principled to guide the lower courts and constrain all jurists from inserting their own ideological beliefs in ad hoc, unreasoned ways.”²³³ The fourth criterion, which is Choper’s own, is that when the court is convinced that the constitutional injury suffered is “general and widely shared,” it should decline jurisdiction.²³⁴

The respondents in *Patrick Ouma Onyango* had invited the court to consider the political nature of the constitution-making process and to find

226. *Id.* at 217.

227. *See* Choper, *supra* note 215, at 1462–63.

228. *Id.* at 1463–65.

229. *Id.* at 1465–69.

230. *Id.* at 1466.

231. *Id.*

232. *Id.* at 1463.

233. *Id.* at 1470.

234. *Id.* at 1463.

that questions on the referendum, constituent assembly, and content of the draft Constitution fell within the competence of other constitutional organs and not the court. The court agreed with this view:

The argument that certain objectives were not attained in managing the process is a matter this court would be unable to judicially enforce at this stage since the collection of views, the framing of proposals has already taken place and the question whether or not the objectives were met is largely a political question [T]he process leading up to the publication of the proposed new Constitution is in our judgement non-justiciable . . . due to the political nature of the process²³⁵

In this respect, the court agreed with the dissenting opinion of Justice Kubo in *Njoya*.²³⁶ In that case too, the judge had observed that the process of collating views and assembling proposals was political, and therefore the court was “not equipped to adjudicate on this part of the process under the political doctrine principle since it is also not justiciable”²³⁷

Both courts failed to distil the actual criteria that it used to determine whether particular questions were of a political nature and thus incapable of being adjudicated. Had the court in *Patrick Ouma* done this, this area of the law in Kenya could have been developed in the later cases. Yet, there were weighty constitutional issues involved. Could the very fact that Parliament had established a mechanism for collating views of the public and drafting a proposed constitution insulate the process from judicial inquiry if the applicant's right was allegedly violated? If the court held the view was that it lacked capacity to make an assessment of the process, then it should have articulated more clearly the role of the Constitution in creating a framework for reform, so as to put in context its inability to exercise its powers of judicial review in this regard.

4. *Mootness and Ripeness*

The applicants in *Patrick Ouma* contended that the imposition of security for costs of KSh 5 million was a violation of their right of access to court.²³⁸ They also contended that about 56% of Kenyans were living below the poverty line and that this clause would deny them the right to

235. *Patrick Ouma Onyango v. Attorney General*, (2005) 3 K.L.R. 84, 160, para. 25 (H.C.K.).

236. *See Timothy Njoya v. Attorney General*, (2004) 4 LRC 559, 611 (Kenya HC).

237. *Onyango*, (2005) 3 K.L.R. at 129 para. 15.

238. *Id.* at 162, para. 25.

approach the court.²³⁹ In the court's view, the matter was not ripe for adjudication because the referendum, which would trigger the application of Section 28 B (4), had not occurred yet.²⁴⁰ The court held that "the right or interest must be in existence now for it to be infringed or threatened with infringement under [Section] 70 of the Constitution."²⁴¹

This unsound reasoning was not backed by any constitutional reference or facts. How could the matter be unripe when it was a provision in a statute that was already in force? Moreover, the applicants had alleged that the provision infringed on their right as enshrined in the Constitution. This necessarily should have triggered judicial review and the court ought to have made a finding on the constitutionality of the provision. The argument that any decision on the matter would amount to giving an "advisory opinion" is in our view untenable.

III. PHASE III OF THE CONSTITUTIONAL REFORM PROCESS: THE WAKO DRAFT—A SHORTCUT TO HELL

Upon failure of Parliament to ratify the Bomas Draft, the government quickly mobilized its supporters to impose the task of rewriting the law on parliament.²⁴² This was mainly to save face because it was now evident to many Kenyans that the government was stalling the process of implementing a new constitution. Amid accusations of high level corruption implicating the ministers who vehemently opposed the draft constitution, it was obvious that the government had a hidden agenda.²⁴³ In November 2005, Attorney General Amos Wako hurriedly prepared a new draft constitution without any consultations.²⁴⁴ This new draft, called the Wako Draft, represented the right-wing views of the powerful political elite at the corridors of power.²⁴⁵ Unlike the Bomas Draft, it concentrated executive power in the presidency and removed all the other systems of checks and balances on presidential power that the Bomas Draft had put in

239. *Id.*

240. *Id.* at 162, para. 30.

241. *Id.*

242. Bannon, *supra* note 12, at 1838.

243. See Gladwel Otieno, *The NARCs Anti-Corruption Drive in Kenya: Somewhere Over the Rainbow?*, 14 AFR. SECURITY REV. 69 (2005); John Githongo, *Report on my Findings of Graft in the Government of Kenya*, BBC NEWS (2005), http://www.news.bbc.co.uk/1/shared/bsp/hi/pdfs/09_02_06_kenya_report.pdf; Gray Phombeah, *Corruption Haunts Kenyan Leader*, BBC NEWS (Feb. 23, 2005, 9:23 AM), <http://news.bbc.co.uk/2/hi/africa/4288595.stm>; Letitia Lawson, *The Politics of Anti-Corruption Reform in Africa*, 47 J. MOD. AFR. STUD. 73, 78–83 (2009).

244. Cotrell & Ghai, *supra* note 63, at 16.

245. *Id.*

place.²⁴⁶ It also preferred a strong central government in place of the decentralized system that the Bomas Draft had provided, which had come out of the lengthy stakeholder consultations and the public forums.²⁴⁷ In essence, the Wako Draft was a manifestation of a blatant elitist usurpation of the power vested in the people. It was not at all surprising that the Wako Draft was rejected by the people in a referendum held later that month.²⁴⁸ The LDP of Raila Odinga and elements of KANU teamed up to oppose the Wako Draft, which was heavily supported by the NAK party of president Kibaki. The Wako Draft's downfall was mainly associated with it being seen as representing the interests of the Mt. Kenya region (the GEMA alliance of ethnic groups).²⁴⁹

In many ways, the unwitting intervention by Wako killed the constitutional review process. Its first casualty, of course, was Professor Ghai, who resigned amid speculation that the government did not support his continued stay.²⁵⁰ The idea had been to remove any possibility of leadership devolving of the grassroots and to maintain an all powerful presidency. The fear of *majimbo* (regionalism) by the Kikuyu oligarchs, had prompted the government to write the Constitution and neglect the more transparent Bomas process.²⁵¹ Undoubtedly, the *Njoya* court had danced to this tune by rubbishing the achievements of the Ghai Commission and the National Constitutional Conference.²⁵² In many ways, this same agenda was to be replicated in the cases that followed it, such as *Jesse Kamau*.²⁵³ But with Kenyans expressing their wishes in the referendum and the Commission's term having expired, the lopsided

246. See Gabriella Lynch, *The Fruits of Perception: Ethnic Politics and the Case of Kenya's Constitutional Referendum*, 65 AFR. STUD. 233, 240 (2006).

247. *Id.*

248. In the referendum held on November 21, 2005, 57% of the voters rejected the draft. Bård Andres Andreassen & Arne Tostensen, *Of Oranges and Bananas: The 2005 Kenya Referendum on the Constitution* 6 (Chr. Michelsen Inst., Working Paper No. 13, 2006), available at <http://www.cmi.no/publications/file/2368-of-oranges-and-bananas.pdf>; Mwangi S. Kimenyi & William F. Shughart, *The Political Economy of Constitutional Choice: A Study of the 2005 Kenyan Constitutional Referendum*, 21 CONST. POL. ECON. 1 (2010).

249. See Henry Amadi, *Kenya's Grand Coalition Government—Another Obstacle to Urgent Constitutional Reform?*, 44 AFR. SPECTRUM 153 (arguing that the Wako Draft was rejected partly because it was associated with the interests of those from President Kibaki's ethnic group); Lynch, *supra* note 246, at 240.

250. See Juma, *supra* note 83, at 191–92.

251. 'Majimbo' represented to many in the Kibaki faction a devolved system of government that they opposed from the beginning.

252. See Cotrell & Ghai, *supra* note 63, at 18.

253. *Jesse Kamau & 25 Others v. Attorney General & 2 Others*, (2010) eKLR (HC) http://kenya-law.org/Downloads_FreeCases/73988.pdf.

presidency, perhaps blinded by the quest for wealth, was consigned to a state of torpor.

IV. THE ROAD TO VICTORY: LEGISLATION DEFINING THE REFORM PROCESS AND PROMULGATION OF THE NEW CONSTITUTION

The momentum gained after the *Njoya* and *Onyango* cases somewhat dissipated in the acrimony and competition generated by the campaigns before the referendum. And its outcome polarized the political field even more. However, two major events conspired to provide the final push towards the enactment of a new constitution. The first was the parliamentary and presidential election that came in December 2007 and its violent aftermath. The second was the rise of Raila Odinga, the opposition kingpin, to the position of Prime Minister. His rise to power also meant the inclusion into government of a cohort of reformists such as James Orendo and Otieno Kajwang, the radical lawyers who had made constitutional reform their major preoccupation since the Moi days. In this part, therefore, we discuss the milestones in the constitutional reform journey that were orchestrated directly or indirectly by these two events. Unfortunately, this period also witnessed some of the most pathetic court interventions that could have stymied the process except for the strong winds of change orchestrated by the politics of the day. Our analysis begins with the elections and the establishment of the coalition government. Indeed, it was the legal architecture of the founding instruments of the coalition government that was to shape the reform agenda after 2008. Thereafter, we examine some of the legislative interventions and the institutional arrangements that coalition momentum brought on board. We also interrogate how disputes that ended up in the courts were resolved in light of the changed political and legislative environment. Lastly, we explain how the courts became irrelevant in the final efforts to stitch the draft constitution together and in the organisation and holding of the referendum of August 4, 2010.

A. Phase IV of the Constitution Reform Process: Resuscitating the Stalled Process Through Legislation

Kenyans went to the polls in December 2007 to elect a new president and members of Parliament. In the race up to the elections, the various opposition figures, spirited by their success in the constitutional referendum, regrouped under Raila Odinga's Orange Democratic Movement ("ODM") and mounted a serious campaign to remove Kibaki

from power. This coalition appeared to enjoy the majority support because they provided an acceptable alternative to the weak, ethnic-based, and corrupt government of Kibaki. Already, there had been a marked shift in citizens' perception of the Kibaki government. Unlike in 2002, when the majority of Kenyans had enthusiastically embraced the democratic call to replace the Moi government, a general feeling of frustration was evident. The ODM seized this opportunity to popularize their manifesto, in which they outlined their plans to introduce *Majimbo* as a means to curb the exercises of a powerful central government,²⁵⁴ fight corruption, and complete the constitutional reform process that had virtually ground to a halt.²⁵⁵

In a poll that was heavily rigged, Kibaki declared himself the winner and was secretly sworn in at night.²⁵⁶ With the exception of Kibaki's Kikuyu supporters, Kenyans were enraged. Violence erupted spontaneously across the country; by the time the dust settled, roughly 1000 people had lost their lives and tens of thousands were displaced.²⁵⁷ The negotiations to end the violence, led by Kofi Annan and a team of prominent personalities, resulted in the signing of the Agreement on Principles of Partnership of the Coalition Government between the principals, Raila Odinga and Mwai Kibaki, on February 28, 2008.²⁵⁸

Otherwise referred to as the "National Accord," the agreement established a coalition government and laid down a framework for further negotiations to deal with institutional and political problems that had resulted in the violence. Four main areas meriting attention were identified: (1) the need to stop the violence and restore fundamental rights; (2) a coordinated response to deal with humanitarian crises, especially the resettlement of the Internally displaced persons; (3) the resolution of the political crisis; and (4) the resolution of long standing issues such as

254. For details on the *Majimbo* debate, see Anderson, *supra* note 112. See also Ghai & McAuslan, *supra* note 29, at 218; E.S. Atieno-Odhiambo, *Democracy and the Ideology of Order in Kenya*, in *THE POLITICAL ECONOMY OF KENYA* 177 (Michael G. Schatzberg ed., 1987).

255. See Nic Cheeseman, *The Kenyan Election of 2007: An Introduction*, 2 J.E. AFR. STUD. 166, 175 (2008).

256. Clark C. Gibson & James D. Long, *The Presidential and Parliamentary Elections in Kenya, December 2007*, 28 ELECTORAL STUDIES 349 (2009).

257. See Jacqueline Klopp & Prisca Kamungi, *Violence and Elections: Will Kenya Collapse?* 24 WORLD POL'Y J. 11 (2008); Maarit Mäkinen & Mary Kuria, *Social Media and Post-Election Crisis in Kenya*, 13 INT'L J. PRESS/POLITICS 328, (2008); Michael Chege, *Kenya: Back from the Brink?*, 19 J. DEMOCRACY 125 (2008); Axel Harneit-Sievers & Ralph-Michael Peters, *Kenya's 2007 General Elections and its Aftershocks*, 43 AFRIKA SPECTRUM 133 (2008); Herve Maupeu, *Revisiting Post-Election Violence*, in *THE GENERAL ELECTIONS IN KENYA* 187 (Jérôme Lafargue ed., 2009).

258. See John Githongo, *Fear and Loathing in Nairobi: The Challenge of Reconciliation in Kenya*, 89 FOREIGN AFF. 2, 3 (2010).

constitutional review, legal reform, and land reform.²⁵⁹ Within the framework of National Dialogue and Reconciliation Committee, three commissions were created: (1) the Independent Review Commission on 2007 Elections (“IREC”); (2) the Commission on Enquiry on Post Election Violence (“CIPEV”); and (3) a Truth Justice and Reconciliation Commission (“TJRC”).²⁶⁰ Immediately, Parliament began its sessions, the “National Accord” was enacted into law,²⁶¹ and the Constitution was amended to establish a coalition government. That same Amendment also created the Office of the Prime Minister as well as the two offices for the Deputy Prime Ministers.²⁶²

1. *Legislative Intervention*

Kenya arrived in the year 2008 without any legislative or institutional framework for constitutional review. The Constitution of Kenya Review Act, enacted in 1997 and amended several times, had run its course.²⁶³ The Commission it had created had become moribund, with nothing to show for the fanfare, political wrangling, violence, and amount of tax payer money spent on it. Its proposals and drafts were no more than pieces of paper good for the archives. If nothing else, the constitutional review process in Kenya had showed just how true it is that the more things change, the more they remain the same.

The coalition government, keen to show its commitment to constitutional reform, had to rise above its political constraints and sharp

259. See Tim Muriithi, *Post-Accord Kenya: Between Fragile Peace and Constitutional Renewal*, Briefing, INTERAFRICA GROUP (July 2008), <http://interafricagroup.org/pdf/Human%20Security%20Program/Briefing10.pdf>.

260. See The National Accord and Reconciliation Act No. 4 (2008), available at <http://www.kenyalaw.org/klr/fileadmin/pdfdownloads/Acts/NationalAccordandReconciliationNo4of2008.pdf>; see also Monica Juma, *African Mediation of the Kenyan Post 2007 Election Crisis*, 27 J. CONTEMP. AFR. STUD. 407, 425–26 (2009); G.M. Musila, *Options for Transitional Justice in Kenya: Autonomy and Challenges of External Prescription*, 3 INT’L J. TRANSITIONAL JUSTICE 445, 446 (2009).

261. The National Accord and Reconciliation Act was passed on March 18, 2008. *Kenyan Leader Signs Power-Share Law*, AL-JAZEERA (Mar. 18, 2008, 11:30 PM), <http://english.aljazeera.net/news/africa/2008/03/200852514721316663.html>.

262. The Constitution Amendment Act, (2008) KENYA GAZETTE SUPPLEMENT No. 14.

263. For example, the first amendment of the Constitution of Kenya Review Act (1997) came when the Act was barely a year old, to allow for the participation of a wider section of the Kenyan society in the constitutional review process. See Juma *supra* note 1, at 511. The amendment in 2000 paved way for the establishment of the Ghai led Constitution of Kenya Review Commission (“CKRC”). In 2001, it was again amended to accommodate the merger between the CKRC and the Ufungamano Commission. See Henry Amadi, *Persistence and Change of Neo-Patrimonialism in Post-Independence Kenya* 4–5 (2009), available at http://www.giga-hamburg.de/dl/download.php?d=/content/fsp1/pdf/amadi_neo_patrimonialism_paper.pdf.

divisions that had characterized its inception. Putting the reform back on track, however, required more than just a political consensus on the contentious procedural issues that had plagued the process from the very beginning. Strategic intervention was needed to address three major areas of concern, namely, an acceptable articulation of the role of parliament *vis-a-vis* that of the people, the entrenchment of the reform process in the Constitution, and the establishment of institutions to be responsible for managing the reform process.

It was imperative to implement a scheme of legislative amendments to reboot the process and put it firmly on course.²⁶⁴ This approach occurred in two fronts. The first front consisted of a series of amendments to the existing Constitution. These were largely aimed at entrenching the reform process, establishing constitutionally mandated organs to facilitate reform process (such as the Interim Electoral Commission), and the creation of institutions that would facilitate political cohesion in the post-election period.²⁶⁵ The second front aimed at establishing a pinnacle reform organ to spearhead the process; one that would replace the Constitutional Review Commission of Kenya whose tenure had elapsed. A review statute was enacted to set procedures for the establishment of such organ and outline its functions.²⁶⁶

a. Constitution of Kenya (Amendment) Act 2008

From the day when the constitutional review was initiated and the run-away Ufungamano group was invited to join the Ghai Commission, the issue of the entrenchment of the process in the Constitution had been constantly debated. There were fears that without a firm constitutional base the process would be susceptible to manipulation by the all-powerful presidency.²⁶⁷ As we have shown, these fears were not unfounded. The Moi and Kibaki regimes have both been guilty of manipulating the process to achieve political gains. The entrenchment of the reform process in the Constitution took the form of the amendment of Section 47 of the Constitution and the inclusion of the referendum process in the Constitution. The Constitution also provided for strict time frames within which the new document would be officially promulgated into law once

264. See Paul Collier & Njunguna S. Ndungu, *Strategies for Growth*, in KENYA: POLICIES FOR PROSPERITY 15, 33 (Christopher S Adam et al eds., 2010).

265. See Amadi, *supra* note 249, at 154.

266. Constitution of Kenya Review Act (2008).

267. See Kithure Kindiki, *The Emerging Jurisprudence in Kenya's Constitutional Review Law*, 1 KENYA L. REV. 153, 156 (2007), http://78.136.28.31/klr/fileadmin/pdfdownloads/Kindiki_Paper.pdf.

the reform process had taken its course. All these changes were effected through a series of amendments beginning in March 2008.

i. Amendment of Section 47 of the Constitution

On March 18, 2008, members of parliament passed the Constitution of Kenya (Amendment) Bill 2008 by a unanimous vote.²⁶⁸ This was the first of the two most important constitutional amendment bills that Parliament passed in that year.²⁶⁹ This amendment entrenched the Office of the Prime Minister. The second amendment was passed in December 2008.²⁷⁰ That amendment brought relief to the controversy surrounding the authority of Parliament in constitution making, a subject which occupied much of the deliberations in the *Njoya* and *Patrick Ouma* cases. This new amendment mainly affected Section 47 of the Constitution. Previously, the section had set out methods of amendment and provided that parliament had powers to “alter” the Constitution. The Constitution then went on to define alteration as “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.”²⁷¹ Justice Ringera in *Njoya* held the view that the power to amend in Section 47 of the Constitution did not entitle parliament to completely replace the old Constitution with a new one. He stated:

I have come to the unequivocal conclusion that Parliament had no power under the provisions of Section 47 of the Constitution to abrogate the Constitution and/or enact a new one in its place. I have come to that conclusion on three premises: First, a textual appreciation of the pertinent provisions alone compels that conclusion. The dominant word is “alter” the Constitution. . . . Secondly, I have elsewhere in this judgement found that the constituent power is reposed in the people by virtue of their sovereignty and that the hallmark thereof is the power to constitute

268. See Constitution of Kenya (Amendment) Bill 2008, available at http://marsgroupkenya.org/pdfs/2008/march_2008/Constitution_of_kenya_amendment_bill_2008.pdf; see also *Parliamentary Developments*, 1 THE WORLD OF PARLIAMENTS QUARTERLY REVIEW No. 30 (July 2008), <http://www.ipu.org/news-e/wop/30/9.htm>.

269. The first amendment created the Office of Prime Minister to give Raila Odinga a parallel executive authority as envisaged in the National Accord.

270. Constitution of Kenya (Amendment) Bill (Aug. 2008), [http://www.marsgroupkenya.org/pdfs/2009/08/Bills/2008/The_Constitution_of_Kenya_\(Amendment\)_Bill_2008_2.pdf](http://www.marsgroupkenya.org/pdfs/2009/08/Bills/2008/The_Constitution_of_Kenya_(Amendment)_Bill_2008_2.pdf).

271. Constitution § 47(6)(b) (1963) (Kenya).

or reconstitute the framework of Government, in other words, make a new Constitution. . . . Thirdly, the application of the doctrine of purposive interpretation of the Constitution leads to the same result.²⁷²

The judge had associated himself with the remarks of Justice Khanna of the Supreme Court of India who had asserted in *Kesavananda v. State of Kerala*²⁷³ that amendment inferred changes to the Constitution and not complete abrogation. “Amendment,” he said, “postulates that the old Constitution survives without loss of identity despite the change. . . . As a result of the amendment, the old Constitution cannot be destroyed or done away with; it is retained though in the amended form.”²⁷⁴ Any supposition that Parliament could, by virtue of Section 47, enact a new Constitution was therefore a nullity. The judge reasoned that the Act offended Section 47 of the Constitution by giving jurisdiction to Parliament to do what it did not have power to do, namely “to consider a Bill for the abrogation of the Constitution and the enactment of a new one,” and by “tak[ing] away the constitutional discretion of Parliament to accept or reject a Bill to alter the Constitution.”²⁷⁵ He then proceeded to strike out Section 28 (4) of the Constitution of Kenya Review Act, which had given Parliament the power to enact the bill into law within seven days, as being *ultra vires* the constitution.

The dissenting opinion of Justice Kubo disagreed with this reasoning. In his view, Sections 28(3) and (4) of the Act merely affirmed the legislative power that Parliament has to exercise by virtue of Section 30 of the Constitution. Therefore, the fact alone that Section 28(4) talked of “enactment” of the bill from the Bomas process does not in itself amount to the usurpation of the people’s right to make a Constitution.²⁷⁶ This in our view reflects a more tenable position. Although there are obvious flaws in Ringera’s reasoning, it reignited the debates on entrenchment of the review process that had been mooted in the 1990s but consistently ignored by the Moi regime.²⁷⁷ Nonetheless, his judgment more or less gave expression to the wishes of the government by way of judicial pronouncement. We must admit, however, that his ideas were very

272. See Timothy Njoya v. Attorney General, (2004) 4 LRC 559, 592, para. a (Kenya HC).

273. A.I.R. 1973 S.C. 1461 (India).

274. *Njoya*, 4 LRC at 590, para. d (quoting *Kesavananda v. State of Kerala*, A.I.R. 1973 S.C. 1461, 1860).

275. *Id.* at 592, para. b.

276. *Id.* at 624.

277. See Kithure Kindiki, *The Emerging Jurisprudence*, *supra* note 267, at 156.

persuasive, as both sides of the political divide made them a part of their rhetoric in the subsequent period.

In *Patrick Ouma*, the court had been invited to stop the referendum because Parliament had acted unconstitutionally by purporting to enact a new Constitution through a referendum and thereby ignoring the Bomas Draft.²⁷⁸ It was argued that for a new Constitution to be enacted in this way, Section 47 of the Constitution must be amended to give Parliament such powers. The court rejected this argument outright. It affirmed its concurrence with *Njoya*, asserting that Section 47 merely conferred the power to amend an existing Constitution and that the power to enact a new Constitution resided on the people.²⁷⁹ However, this power could be exercised in a number of ways not necessarily through the amendment of Section 47.²⁸⁰ The court then proceeded to give examples from other countries. Curiously, the court also suggested that there would be nothing unconstitutional if Parliament initiated the process.²⁸¹ And even though Parliament had been the “originator and facilitator” of the new Act, the new referendum process through which the Wako Draft was to be put was valid because it took into account the holding in *Njoya* case.²⁸²

One could conclude therefore that the two cases gave conflicting views on whether the amendment of Section 47 was crucial to constitution making. Indeed, if the role of Parliament was merely that of an initiator and facilitator of the process as observed by Justice Nyamu, and not necessarily the usurper of the so called “constituent power of the people,” then the process should be validated on account of the general power to exercise legislative authority granted under Section 60 of the Constitution as opposed to Section 47 of the same.

The coalition government, aware of the judicial rigmaroles and the inability of courts to offer consistent opinions on proper pathways for constitution making, decided to prevent any future contests on the authority of Parliament by enacting an amendment to Section 47.²⁸³ The amendment entrenched the role of Parliament in constitution making and the requirement for a referendum. Parliament now had the power to debate a draft proposal and make alterations, but only if such alteration is supported by 65% of all members. The debate must occur within thirty

278. Patrick Ouma Onyango v. Attorney General, (2005) 3 K.L.R. 84, para. 40 (H.C.K.).

279. *Id.* at 169, para. 30.

280. *Id.* at 146, at para. 15.

281. *Id.* at 149, paras. 1–20.

282. *Id.* at 174, para. 10.

283. Constitution of Kenya (Amendment) Bill (Aug. 2008), *supra* note 270.

days, after which the proposal together with the approved amendments must be submitted to the Attorney General. It wasn't clear what the Attorney General should do with the proposed amendments, other than consider them. Other than that, the Attorney General was then required to publish the Draft Constitution in the Kenya Gazette.²⁸⁴ And after publication, the Electoral Commission had ninety days to hold a referendum.²⁸⁵ The draft would be ratified if 50% of the votes cast were valid and at least 25% of votes cast in at least five of the eight provinces supported the draft.²⁸⁶ If ratified, the President had to publish the text of the draft Constitution in the Gazette within 14 days, and thereafter, the new Constitution would become law.²⁸⁷ Undoubtedly, the amendment set a very high threshold for ratification of the draft law.

*ii. Interim Independent Constitution Dispute Resolution Court
("IICDRC")*

The IICDRC was established by the Constitution of Kenya (Amendment) Act, which became law on December 29, 2008.²⁸⁸ The amendment introduced Section 60A, which created an interim constitutional court to deal with disputes arising out of the review process. The effect of this amendment was to create an alternative court to deal with matters which in the ordinary interpretation of Section 60 of the Constitution would fall within the competence of the High Court. The disputes arising out of the review process would ordinarily relate to constitutional interpretation. The power to interpret the Constitution is directly conferred upon the High Court by the Constitution; this raised the questions as to whether the amendment contravened the Constitution.

Did Parliament have the power to create such a court? The issues such as appointment of judges and security of tenure, which are crucial for ensuring judicial independence and impartiality, were not sufficiently addressed by the Act. Moreover, the decisions of IICDRC were not appealable,²⁸⁹ thus affording no opportunity for contesting its decisions in mainstream courts. One scholar argued therefore that the IICDRC was a politician's court, established to protect their interest.²⁹⁰ In his view, the

284. *Id.* § 47A (3).

285. *Id.* § 47A (4).

286. *Id.* § 47A(5)(b)(i)–(ii).

287. *Id.* § 47A (6).

288. Constitution of Kenya (Amendment) Act No 10, 2008.

289. *Id.* § 60A(1).

290. See Gibson Kamau Kuria, *Parliament Is Usurping Power of Kenyans*, CAPITAL FM NEWS

idea of having a court/tribunal outside the “system” was an affront to democracy. He deplored the “outrageous philosophy” embedded in the amendment which inferred that the people of Kenya and their judges were “second rate human beings with no ability to handle disputes which arise in the course of making the constitution.”²⁹¹ A similar argument could be made with respect to another amendment proposed in early 2009, which inserted a new Section 3A to the Constitution.²⁹² The amendment gave Parliament the power to “establish a special tribunal with exclusive jurisdiction . . . to investigate, prosecute and determine cases of genocide, gross violation of human rights and crimes against humanity” committed in the period immediately after the 2007 elections.²⁹³

The judges to the interim court were appointed in January 2010 and immediately began to hear cases.²⁹⁴ Some of their rulings went a long way to facilitate the reform process. For example, the court affirmed the right of prisoners to vote in the referendum in *Priscilla Nyokabi Kanyua v. Attorney General*.²⁹⁵ The petitioner, who acted on behalf of prisoners at Shimo La Tewa prison, brought the action seeking orders allowing prisoners to vote in the referendum. She argued that Section 43 of the Constitution merely forbade prisoners from voting in a general election and not a referendum. The respondents opposed this application on the grounds of lack of standing and jurisdiction. They argued that the procedure for dealing with registration disputes as set out in the National Assembly and Presidential Elections Act was through the registration officers and not the court. The court allowed the petition. It found its jurisdiction on the basis of Section 60A of the Constitution and the fact that the matter was a dispute arising out of the review process. Second, the court was of the view that its mandate was to interpret the Constitution in conformity with the principle of substantial justice. Furthermore, it found that the referendum was different from a general election and that there

(Nairobi) (Dec. 9, 2008), <http://beta.capitalfm.co.ke/news/2008/12/09/parliament-is-usurping-power-from-kenyans/>.

291. *Id.*

292. See Constitution of Kenya (Amendment) Bill (2009), available at [http://www.kenyalaw.org/Downloads/Bills/2009/The_Constitution_of_Kenya_\(Amendment\)_Act_2009.pdf](http://www.kenyalaw.org/Downloads/Bills/2009/The_Constitution_of_Kenya_(Amendment)_Act_2009.pdf).

293. *Id.*, § 3A(1).

294. *Six Judges Now Sworn in to Hear Constitution Review Disputes*, E. AFR. STANDARD (Nairobi) (Jan. 16, 2010), <http://www.standardmedia.co.ke/news/InsidePage.php?id=2000001063&cid=159&>. The judges appointed were Samuel Mukunya, Violet Mavisi, Scholastica Omondi, Jamila Mohamed, Sankale ole Kantai, and Mburugu Kioga.

295. (2010) eKLR, http://kenyalaw.org/Downloads_FreeCases/75044.pdf; see also J. Kadida & O. Mathenge, *Prisoners Will Cast Vote at Referendum*, DAILY NATION (Nairobi), Aug. 15, 2010.

was no legitimate government purpose that would be served by denying the respondents the right to vote.

iii. Interim Independent Electoral Commission (“IIEC”)

The bungling of the 2007 elections greatly damaged the credibility of the Electoral Commission of Kenya (“ECK”).²⁹⁶ One thing that the government and the opposition parties agreed upon was that the commission needed to be disbanded. But this was not going to be an easy thing to do because of lingering political loyalties, legal technicalities, and the instability in the coalition arrangements.²⁹⁷ Indeed, the removal of the commissioner seemed to portend a political nightmare for the coalition government, especially for President Kibaki, whose claim of victory was approved by these same persons. Some of the commissioners had come out openly to blame their colleagues for compromising the elections.²⁹⁸ They claimed that they had done no wrong and should therefore not be victimized. Second, the procedure for removal of commissioners as set out in Section 41 was far too elaborate and was almost certain to generate significant infighting among coalition partners.²⁹⁹ Thus, by amending Section 41 of the Constitution, the government seemed to have achieved their goal without risking too much political capital.³⁰⁰ The amendment took the form of replacing the ECK with two temporary commissions: the Interim Independent Electoral Commission (“IIEC”) and Independent Boundaries Review Commission (“IBRC”).³⁰¹

The task of the commission was to “reform the electoral process and the management of elections and to institutionalize free and fair

296. The Electoral Commission of Kenya had been created under Section 41 of the 1963 Constitution. Under that Constitution, the power to appoint members of the Commission was solely vested on the President. At the time of disbandment, it was headed by the disgraced chairman, Samuel Kivuitu.

297. See Susanne D Mueller, *Dying to Win: Elections, Political Violence and Institutional Decay in Kenya*, 29 J. CONTEMP. AFR. STUD. 99, 107 (2011) (noting that behind all the institutional changes, including the setting up of IIEC to replace ECK, “the incentives that guide political life are much the same”, and that politicians will still be concerned with “positioning themselves and their ethnically rooted parties” for political gains).

298. See Donald B. Kipkorir, *Why Kivuitu Must Be Held Accountable for Poll Chaos*, DAILY NATION (Nairobi) (Jan. 5, 2008), <http://www.nation.co.ke/Features/-/1190/224838/-/tn4ui0z/-/index.html>.

299. Constitution of Kenya (Amendment) Act 2008.

300. See P L O Lumumba, *Electoral Justice: The Antidote for Post Election Violence in Kenya*, in REFLECTIONS ON CITIZENSHIP, VIOLENCE AND THE 2007 GENERAL ELECTION IN KENYA 147, 158 (Kimani Njogu ed., 2011).

301. See Henry Amadi, *Kenya's Grand Coalition Government—Another Obstacle to Urgent Constitutional Reform?*, 44(3) AFR. SPECTRUM 149, 154 (2009).

elections.”³⁰² It had a lifespan of only two years—up to December 2010.³⁰³ By then, it was hoped, a new constitution shall have been promulgated. The commission had a chairman and eight commissioners appointed in May 2009 by the President in consultations with the PSC.³⁰⁴

b. Constitution of Kenya Review Act 2008

The Constitution of Kenya Review Act 2008 established a new roadmap for the constitutional review process.³⁰⁵ It effectively repealed the Constitution of Kenya Review Act of 1997 and its subsequent amendments, and thereby abolishing the institutions that it had created. Although these institutions had become moribund in themselves in the period after 2006, the symbolism of failure could haunt any new organs created in their semblance. Therefore, the Act took a complete new path in creating reform institutions and outlining procedures for transition. The institutions are set out in Section 5 of the Act: the Committee of Experts, the Parliamentary Select Committee on Review of the Constitution, and the National Assembly and the Referendum. The greater part of the Act set out how the organs were to interact with one another in the process of generating a new law.

Apart from assigning functions to these organs, it also established timeframes within which those functions were to be completed. For example, the Committee of Experts (“CoE”) was required to complete its work within twelve months of the commencement of the Act;³⁰⁶ the National Assembly was required to debate the draft and approve or disapprove within fifteen days;³⁰⁷ the Attorney General had thirty days to publish the draft constitution after receiving it from parliament;³⁰⁸ the Electoral Commission had to publish referendum questions within seven days after publication of the draft law by the Attorney General;³⁰⁹ and the Electoral Commission was required to publish the result of referendum

302. Article 41A, CONSTITUTION, art. 41A (2010) (Kenya).

303. *Id.* art. 41(13).

304. Those appointed to the commission were Mr Ahmed Issack Hassan, as the Chairperson, while Douglas Mwashigadi, Tiyah Galgalo, Hamara Ibrahim Adan, Kennedy Nyaudi, Dr. Yusuf Nzibo, Winfred Waceke Guchu, Davis Chirchir, and Abiud Wasike. *President Appoints Members of the Interim Independent Electoral Commission*, STATE HOUSE, NAIROBI KENYA (May 07, 2009), <http://www.statehousekenya.go.ke/news/may09/2009070501.htm>.

305. Constitution of Kenya Review Act No 9 (2008), http://marsgroupkenya.org/pdfs/2010/01/The_Constitution_of_Kenya_Review_Act_2008.pdf.

306. The Constitution of Kenya Review Act No. 9 (2008) § 28.

307. *Id.* § 33 (4).

308. *Id.* § 34.

309. *Id.* § 37.

within two days.³¹⁰ These strict timeframes were meant to ensure that there was no delay once the process begins.

The Act also contained provisions to ensure the independence of the organs. For example, a member of the CoE could not be removed from office for any reason other than death, resignation, and misbehavior or misconduct.³¹¹ In the latter case, the complaint against the member required investigation by the PSCCR and recommendations made to the president.³¹² The PSC, in the conduct of their inquiry, had to afford the members an opportunity to be heard.³¹³ Section 16 expressly prohibited any person or authority from interfering with the work of the CoE. In addition, the Third Schedule to the Act, which was drawn pursuant to Section 20 of the Act, created a code of conduct for members. Thus, it forbade them from conducting themselves in a way that would compromise their independence and impartiality. As far as finances are concerned, Section 52 guaranteed funding for CoE by charging all their expenses to the consolidated fund. The Act also created the Constitution of Kenya Review Fund to be managed by the Director and to be financed from the consolidated fund and any gifts or donations received on behalf of the CoE.³¹⁴

*i. Parliamentary Select Committee on Constitutional Review
("PSCCR")*

The National Assembly, by virtue of Section 7 of the Constitution of Kenya Review Act 2008, was mandated to set a select committee of its members, known as the "Parliamentary Committee on Constitutional Review," to assist the Assembly in discharging its functions. This committee would consist of twenty-seven members and would ensure regional and gender balance in its composition. The committee was constituted through a resolution passed by parliament on December 17, 2008.³¹⁵ The committee's tasks included: (1) the appointment of members of the Committee of Experts, (2) the appointment of judges of the Interim

310. *Id.* § 43.

311. *Id.* § 12.

312. The Constitution of Kenya Review Act No. 9 (2008) § 14.

313. *Id.* § 14(7).

314. *Id.* § 53.

315. REPORT OF THE PARLIAMENTARY SELECT COMMITTEE ON THE REVIEW OF THE CONSTITUTION ON THE HARMONISED DRAFT CONSTITUTION, KENYA NATIONAL ASSEMBLY 2 (2010) [hereinafter HARMONISED DRAFT CONSTITUTION], available at http://www.constitutionnet.org/files/report_of_psc-_naivasha_retreat-final1_0.pdf.

Independent Constitutional Dispute Resolution Court, and (3) receiving and presenting before parliament the draft constitution prepared by the Committee of Experts.³¹⁶

ii. Committee of Experts (“CoE”)

The CoE was set up under Section 8 of the Constitution of Kenya Review Act 2008. It was to be the main technical organ of the reform process. In a manner of speaking, the CoE replaced the Constitutional Review Commission of Kenya.³¹⁷ According to Section 8(2) of the Act, the CoE was to be a “body corporate with a secretariat headed by a Director.” It would comprise of nine members, six of which were to be Kenyan citizens and three foreigners. The Attorney General and the Director sat on the CoE as ex-officio members. According to the Act, the CoE’s functions were to identify contentious issues in the existing draft constitutions, solicit public views, carry out studies and initiate consultations with the view to resolve contentious issues, prepare a harmonized draft of the constitution, make recommendations to the PSCR, facilitate civic education, and liaise with the Electoral Commission in conducting the referendum.³¹⁸ The President formally appointed members to the CoE on February 23, 2009,³¹⁹ and the CoE held the first session on March 2, 2009.³²⁰

316. See The Constitution of Kenya Review Act No. 9 (2008) § 7 (1).

317. The Constitutional Review Commission of Kenya (“CRCK”) was established through the Constitution of Kenya Review (Amendment) Act of 2001. See *supra* Part I. The Constitution of Kenya Review Act 2008 established the COE to effectively take over the functions of the CRCK whose term had expired. See Grace Maingi, *The Kenyan Constitutional Reform Process: A Case Study on the Work of FIDA Kenya in Securing Women’s Rights*, 15 FEMINIST AFR. 64, 67 (2011).

318. See The Constitution of Kenya Review Act No. 9 (2008) § 23; Maingi, *supra* note 317, at 69.

319. Those appointed as members of the committee were Nzamba Kitonga, a Kenyan lawyer; Atsango Chesoni, a Kenyan lawyer; Christina Murray, a law professor at Cape Town University; Chaloka Beyani, a law lecturer at the London School of Economics; Fredrick Ssempebwa, a Ugandan academic; Bobby Mkangi, a children’s law expert; Njoki Ndungu, a Kenyan politician; Abdirashid Abdullahi, a conflict resolution expert; Otiende Amollo, a Kenyan lawyer; and Amos Wako, Kenya’s Attorney General at the time. Dr. Ekuru Aukot was appointed to head the secretariat and as the Director of the Committee. *Profiles of Members of the Committee of Experts*, COMMITTEE OF EXPERTS ON CONSTITUTIONAL REVIEW, http://www.coekenya.go.ke/index.php?option=com_content&view=section&layout=blog&id=9&Itemid=62 (last visited Aug. 20, 2010).

320. See *Progress on the Constitutional Review Process by the Committee of Experts as at October 2009*, DAILY NATION (Nairobi) (Oct. 26, 2009), http://www.constitutionnet.org/files/CoE_ProgressReport.pdf.

iii. The Referendum

According to the Act, the referendum was to be held fourteen days after publication of the referendum question, prepared in consultation with the PSCR and the CoE.³²¹ Since the question must be published within fourteen days of the publication of the draft Constitution by the Attorney General, this would only allow for twenty-eight days of civic education and campaigns by opposing sides. Upon announcing the outcome of the referendum, the reform would revert back to parliament and the executive to formally promulgate the new law and complete the transition from the old order to a new one. Section 44, however, provided that “the conduct or result of the referendum” could be challenged in High Court through a petition. Such petition must be brought within fourteen days of the publication of the results.³²² Also, the petitioners were required to issue a seven days’ notice to the commission and to deposit KSh 2 million as security for costs. This provision was meant to give the public a final chance to rectify any misconduct in the process of making the new law.³²³

B. Judicial Response to Legislative Intervention

Soon after the passing of the Constitution of Kenya Amendment Act 2008, a group of clergy led by Bishop Joseph Methu filed a petition in court challenging the role of parliament in amending the draft constitutions, and the conduct of the referendum by the Electoral Commission of Kenya.³²⁴ The group also sought a conservatory order suspending the implementation of the Act until Parliament had enacted the rules of procedure for the interim independent Constitutional Court.³²⁵ In a ruling delivered on October 2, 2009, the court declined to give the orders sought.³²⁶ But this position was soon to be tested in court. In *Bishop J. Kimani v. Attorney General*,³²⁷ the petitioners brought suit against the

321. The Constitution of Kenya Review Act, (2008) Cap. 9 §§ 37, 39.

322. *Id.* § 44(1).

323. *Id.* § 44(3).

324. Bishop K. Methu v. Attorney General, High Court (Nairobi), Petition No. 55 of 2009; see also Judy Ogotu, *CJ Picks Judges to Hear Suit Against the Law Review Act*, THE STANDARD (June 4, 2009), <http://www.standardmedia.co.ke/InsidePage.php?id=1144015921&cid=159&>; *Final Report of the Committee of Experts on Constitutional Review* 25 (2010), http://www.ldphs.org.za/resources/local-government-database/by-country/kenya/commission-reports/CoE_final_report.pdf.

325. Judy Ogotu, *Stop State from Implementing Act, Says Group*, E. AFR. STANDARD (Nairobi) (Jan. 26, 2009), <http://www.standardmedia.co.ke/archives/InsidePage.php?id=1144005000&cid=1590>.

326. *Id.*

327. (2010) eKLR, http://kenyalaw.org/CaseSearch/view_preview1.php?link=44998618174561490945869.

Attorney General and the CoE under Section 84 of the Constitution claiming breaches of their constitutional rights.³²⁸ The basis of their claim was that both parliament and the CoE had failed to define what amounted to contentious issues in the review process.³²⁹ They also claimed that the procedure set by the Act, including its timeframes for publication of the new constitution and public debate, could not be attained due to the illiteracy of the majority of Kenyans.³³⁰ The petitioners were also unhappy with certain provisions in the Act, including Sections 30–34 relating to the national discussions and approval by PSCCR, and asked the court to declare these provisions null and void.³³¹

A preliminary objection was raised by the Attorney General on the ground that the High Court had no jurisdiction to hear the matter since the dispute arose out of the constitutional review process.³³² Such matters, he averred, should be placed before the IICDRC. He argued that Section 60A expressly ousted the jurisdiction of the court. The court rejected this argument on the basis of the public policy argument that had founded jurisdiction for most constitutional challenges to the review process.³³³ In its view, the matter carried a potential ramification that would affect the whole nation. The court also observed that the IICDRC had not been established and, therefore, to deny the petitioners access to the court would mean disregarding their inalienable rights.³³⁴ Moreover, since the IICDRC did not exist, the jurisdiction of the High Court under Section 60 of the Constitution was alive and unfettered.

The court's ruling was important in two ways. First, it gave some sort of legitimacy to the legislative arrangements that had been put in place to ensure that the reform process was carried to its conclusion and that the political leaders were eager to deliver a new constitution. Second, the court's intervention on the side of public opinion was remarkable because it created a rather opaque notion that the reform agenda had finally mustered the approval of a wider section of society than was probably the case before the 2008 post-election mayhem. The political forces—galvanized by the delicate support from external forces and reeling from the experiences of violence that ushered the second Kibaki regime—were

328. *Id.* at 3.

329. *Id.*

330. *Id.* at 4.

331. *Id.*

332. *Id.* at 7.

333. *Id.* at 11.

334. *Id.* at 12. It should be noted that the court relied on the earlier case of *Bishop K. Methu v. Attorney General*, High Court (Nairobi), Petition No. 55 of 2009.

thus poised to deliver a new constitution to Kenyans no matter the very unhappy alliance of the institutions that had been created to foster the process. Given these circumstances, the role of the judiciary (notwithstanding its ruling in *Bishop J Kimani*) could be regarded as merely salutary, since the die had been cast.

C. How the Reform Process Unfolded After 2008

In this section, we discuss how the COE went about its work. We also discuss some of the key disputes that arose, how the court resolved them and the impact they had on the overall process of constitutional reform. It may be worthwhile to remember, that the institutional framework for review having been entrenched in the constitution through the Constitution of Kenya (Amendment)Act of 2008, there was really very little room left for the courts to maneuver, even with very intense political pressure being brought to bear upon them by politicians who were still keen to derail the process.

1. Dealing with Contentious Issues

After all the legislative and institutional organs were put in place, attention shifted to the CoE. Section 23 of the Constitution of Kenya Review Act 2008 had mandated the CoE to prepare a memorandum of what it considered to be the contentious issues. This was to create some form of continuity from the earlier reform processes to the new, and also provide a platform for producing a constitution that would be acceptable to Kenyans. The reasoning seems to have been that it was these contentious issues that had frustrated the efforts to produce a new constitution. In preparing this memorandum, the CoE considered the many reports generated by the reform process thus far, and the existing drafts of the constitution.³³⁵ It also called on the public to submit their views.³³⁶

335. Up to this point, there had been several drafts of the Constitution. The main ones, which the Constitution of Kenya Review Act 2008 had directed the Committee to look at, were the Constitution of Kenya Review Commission Draft (2004), Draft Constitution of Kenya (2004) (Bomas Draft), and the Proposed New Constitution of Kenya (2005) (Wako Draft). See Constitution of Kenya Review Act 2008, § 29 (b)–(c); COMMITTEE OF EXPERTS ON CONSTITUTIONAL REVIEW, FINAL REPORT OF THE COMMITTEE OF EXPERTS ON CONSTITUTIONAL REVIEW 39 (2010), available at http://www.ldphs.org.za/resources/local-government-database/by-country/kenya/commission-reports/CoE_final_report.pdf.

336. The call for public views was published in the daily newspapers. See COMMITTEE OF EXPERTS ON CONSTITUTIONAL REVIEW, INVITATION FOR PROPOSALS ON CONTENTIOUS ISSUES, available at <http://www.constitutionnet.org/files/Invitation%20for%20Proposals%20on%20Contentious%20Issues.pdf>.

Out of this process, three main issues were isolated: systems of government (the role of the executive and legislature), devolution, and transitional issues. As for the system of government, the CoE identified the disagreement as arising from the question as to whether Kenya should adopt a presidential, parliamentary, or a hybrid system.³³⁷ The two main parties, Party of National Unity (“PNU”) and Orange Democratic Movement (“ODM”), adopted different positions with regard to this issue: PNU supported a strong presidential system while ODM rooted for a purely parliamentary system with an executive prime minister.³³⁸ Differences also emerged as to whether Kenya should have two houses of parliament. On the issue of devolution, the CoE identified the point of disagreement as the levels of government to be created and the powers to be invested in them. The question of devolution has a long history in Kenya beginning with the *majimbo* debate of the pre-independence days.³³⁹ In the face of the constitutional reform process, however, the debate had come full circle with the proponents of devolution highlighting the ills of central governance and calling for the establishment of regional autonomy to ensure equitable distribution of resources.³⁴⁰ The CoE also identified the challenge of creating a proper and acceptable mechanism of replacing the old constitution with a new one, and it recognized that the transitional arrangements had been the bane of the earlier reform attempts.³⁴¹ Apart from these three main issues, calls had been made to the CoE to consider the whether Kadhis Courts should be entrenched in the constitution.

After collecting views from the public and making consultations, the Committee was expected put in place a mechanism for resolving the contentious issues. The process was expected to yield a harmonized draft constitution that would be placed before the PSC for approval. The CoE was able to accomplish this task within five months. On November 17, 2009, it published the harmonized draft and again invited the public to comment on it as was required by Section 30(1) of the Review Act.³⁴² In

337. *Id.*

338. See Amadi, *supra* note 301, at 156.

339. See David Anderson, *supra* note 112; Walter Oyugi, *Uneasy Alliance: Party State Relation in Kenya*, in *POLITICS AND ADMINISTRATION IN EAST AFRICA* 153 (Walter Oyugi ed., 1994).

340. See Amadi, *supra* note 301, at 157.

341. See COMMITTEE OF EXPERTS ON CONSTITUTIONAL REVIEW, REPORT ISSUED ON THE SUBMISSION OF THE REVIEWED HARMONIZED DRAFT OF THE CONSTITUTION TO THE PARLIAMENTARY SELECT COMMITTEE ON CONSTITUTIONAL REVIEW 14 (2010), available at http://www.ldphs.org.za/resources/local-government-database/by-country/kenya/commission-reports/Final_Report_on_the_Reviewd_Draft.pdf.

342. See COMMITTEE OF EXPERTS ON CONSTITUTIONAL REVIEW, HARMONISED DRAFT

this draft, a hybrid system was proposed in which the President (though elected through universal suffrage) would remain largely ceremonial, except for being the commander-in-chief of the armed forces, appointing the cabinet (with approval of Parliament), appointing High Commissioners and ambassadors, and the powers to declare a state of emergency.³⁴³ The Prime Minister on the other hand was to be the head of government,³⁴⁴ elected from the party or a coalition of parties with the majority members of Parliament.³⁴⁵ The interface between the exercise of presidential powers and those of the Prime Minister was not elaborated, given that the existing coalition arrangement at the time functioned on completely different terms. It was not clear from the draft whether it was the intention of the CoE to retain the existing arrangement with small modifications to remedy the obvious weaknesses.

With regard to the legislature, the draft proposed radical changes that would see Kenya adopt a bicameral parliamentary system.³⁴⁶ It established the National Assembly and the Senate. It was envisaged that two electoral zones would be created: the counties and the constituencies. The senators would come from the counties, with “each county assembly acting as an electoral college,” while members of the National Assembly would represent the existing constituencies. Both houses had to approve a bill before it would become law, except in cases of money bills or those certified as such by the speaker.³⁴⁷

The draft also introduced a devolved government in which regional and county governments were established.³⁴⁸ The idea of “cooperative government” was thus introduced in which a shared function among the three levels—county, regional, and national government—would define management of state affairs. Each county and region would have a government, complete with an assembly and an executive committee.³⁴⁹ The regions were to be headed by a director and deputy director, while the counties were to be headed by a governor and deputy governor.³⁵⁰

CONSTITUTION OF KENYA (2009), available at http://www.africanrealitiesinstitute.com/downloads/Harmonized_Draft_Constitution.pdf.

343. *Id.* § 157–160.

344. *Id.* § 179.

345. *Id.* § 180.

346. *Id.* § 123.

347. *Id.* § 139.

348. *Id.* ch. 14. A schedule of separate functions of each level of government was spelled out in the annexure to the constitution.

349. *Id.* §§ 215–227.

350. *Id.* § 223.

The harmonized draft was presented to the Parliamentary Select Committee on the Review of the Constitution in early January 2010, as was mandated by Section 32(1)(c) of the Review Act 2008. In the month-long deliberations in the tourist town of Naivasha, members of the CoE debated the draft with the hope of reaching an agreement.³⁵¹ Nonetheless, the perennial issues of contention still resurfaced and, in some instances, even threatened to derail the whole process. For example, the issue of abortion drew a lot of interest from the Christian churches, who even threatened to mobilize their adherents against the draft law.³⁵² Similarly contentious was the entrenchment of the Kadhi's courts in the draft.³⁵³ Here too, the Christian churches protested and, as we shall later discuss, the matter even ended up in court. Other matters such as the land question, protection of rights of the disabled persons,³⁵⁴ and judicial reforms, drew all manner of reactions from the civil society and particular interest groups, all of them asking for reconsideration of the harmonized draft constitution.

It was the political jostling between the rival camps of Kibaki (PNU) and Odinga (ODM) that took center stage. A whole host of issues stood between the two groups, key among them were the Office of the Prime Minister and devolution. The Kibaki faction insisted that the proposal by the CoE to introduce the Office of Prime Minister would create two centers of power, which would impede political governance.³⁵⁵ The Odinga group, on the other hand, rooted for a parliamentary system supported by a devolved system of administration.³⁵⁶ Interestingly, the stalemate generated by these differences was diffused abruptly when the Odinga group resolved to concede to the demands of the Kibaki faction,

351. Constitution of Kenya Review Act 2008, § 33(1).

352. Susan Anyangu-Amu, *Clash over Abortion Rights in New Constitution*, IPS NEWS (Jan. 14, 2010), <http://ipsnews.net/news.asp?idnews=49984>.

353. See Mohammed Mraja, *Kadhis Court in Kenya: Current Debates on the Harmonised Draft Constitution of Kenya*, a paper presented at the conference on Kadhi's Courts Debate in Kenya Constitutional Review Process, Cape Town, Mar. 20, 2010, http://www.cci.uct.ac.za/usr/cci/news/big/Limuru_Kenya_Papers.pdf#page=5.

354. Lawrence Murugu Mate, *Shattering the Glass: Ensuring the Right to Vote for Persons with Intellectual Disabilities in Kenya*, 2 THOUGHTS & PRACTICE – J. OF THE PHILOSOPHICAL ASS'N OF KENYA 1 (2010).

355. See STANDARD TEAM, *PNU Disowns Draft, Says It was Doctored*, E. AFR. STANDARD (Nairobi) (Jan. 13, 2010), <http://standardmedia.co.ke/archives/columnists/InsidePage.php?id=2000000931&cid=4&>.

356. See Stephen Makabaila, *Draft: Will PSC Reach Consensus at Retreat?*, E. AFR. STANDARD (Jan. 11, 2010), <http://www.standardmedia.co.ke/InsidePage.php?id=2000000808&cid=289&story=Draft:%20Will%20PSC%20reach%20consensus%20at%20retreat?>; Anthony Kagiri, *Kenya Coalition Partners Differ on Draft*, CAPITAL FM NEWS (Dec. 14, 2009), http://www.capitalfm.co.ke/news/2009/12/kenya-coalition-partners-differ-on-draft/?wpmp_switcher=mobile.

which then paved way for the enactment of the Constitution.³⁵⁷ Effectively, it meant that the hybrid system that had been proposed in the draft was deflated and the Office of the Prime Minister removed.³⁵⁸ The imperial presidency that had been the cause of many problems in the country was retained.³⁵⁹ The devolution agenda was also amended to remove regional levels and retain the counties.³⁶⁰

It must be said that the proposals by the PSC infuriated a large section of Kenyan society.³⁶¹ Many ODM sympathizers felt cheated and completely outmaneuvered because the main selling point for its campaign had been the removal of the provincial administration and replacement with a representative regional authority.³⁶² Moreover, the involvement of Parliament in the reform processes had been very contentious from the beginning.³⁶³ Above all, Kenyans had become very suspicious of their parliamentarians and expressed anger at what was seen as the usurpation of the constituent power of the people to make the constitution.³⁶⁴

Despite the general discontent, the opposition groups and the civil society, fatigued by the review rigmaroles, succumbed to the pressure of the need to deliver a new constitution. It was a question of choosing to accept the gains, however little, rather than being satisfied with the alterations and revisions that PSC had proposed. In the end, the negotiated proposals were reduced into a report which PSC submitted to the CoE at the end of January 2010.³⁶⁵ This report necessitated a redrafting of the draft constitution and its subsequent submission to Parliament for final debate. The draft was passed on April 1, 2010 and was submitted to the Attorney General for publication on April 7, 2010.³⁶⁶

357. See *Kenya: PNU Deletes TSC, NSIS in Naivasha*, NAIROBI STAR (Jan. 27, 2010), <http://allafrica.com/stories/201001270166.html?viewall=1>.

358. *Id.*

359. See Paul Mwaura, *Kenya Moves Closer to Releasing a New Constitution After Two Decades of Waiting*, NEWS TIME AFRICA (Mar. 2, 2010), <http://www.newstimeafrica.com/archives/11099>.

360. *Id.*

361. See *Kenya: Fury as Parliamentary Select Committee "Mutilates" Draft Constitution*, THE NORWEGIAN COUNCIL FOR AFRICA (Jan. 21, 2010), <http://www.afrika.no/Detailed/19234.html>.

362. See COMMITTEE OF EXPERTS ON CONSTITUTIONAL REVIEW, *supra* note 342.

363. See, e.g., *Timothy Njoya v. Attorney General*, (2004) 1 K.L.R. 261 (Kenya).

364. See Yash Ghai, *Stop "Mutilation" of Kenya Constitution*, PAMBAZUKA NEWS (Jan. 28, 2010), <http://www.pambazuka.org/en/category/features/61825>.

365. See KENYA NATIONAL ASSEMBLY, REPORT OF THE PARLIAMENTARY SELECT COMMITTEE ON THE REVIEW OF THE CONSTITUTION ON THE REVIEWED HARMONISED DRAFT CONSTITUTION (2010), available at http://www.constitutionnet.org/files/report_of_psc-_naivasha_retreat-final1.pdf.

366. Alex Kiarie, *Kenya: Parliament Passes Draft Constitution*, VOICES OF AFRICA (Apr. 3, 2010), http://voicesofafrica.africanews.com/site/list_message/26789.

After the publication of the draft law, a number of issues arose that threatened to derail the process. From our point of view, some of these issues were political machinations driven by claims to power based on ethnic regrouping. The tragedy, however, was that the judiciary partially succumbed to some of these claims thereby threatening the review process itself. It became clear after the publication of the draft that some sections of politicians who had hoped to isolate ODM and its leader Odinga from being a major player in the constitutional reform process had not quite succeeded when the ODM leader abandoned his initial position on systems of government and devolution.³⁶⁷ By Odinga supporting the draft law in the form that PNU had proposed, his opponents had been caught flat-footed.³⁶⁸ It seemed that ODM and PNU were going to the referendum with one voice. This naturally gave Odinga more clout than his adversaries wanted him to have. Cracks immediately began to emerge on the political caucus that supported the draft, and some prominent anti-ODM politicians began to question whether the draft law was suited for Kenyans.³⁶⁹ Those who had supported the PSC review process and signed on its report turned around overnight to demonize the same recommendations.³⁷⁰ As the IIEC was busy preparing itself for the referendum, some of those opposed to the process reverted to judicial action, while others began to fan ethnic sentiments in support of their political ambitions.³⁷¹

2. *The Judiciary Response to the New Draft*

Of interest to us is how the judiciary reacted to these developments given its propensity to align itself with powerful ethnic interests. As usual, it did not disappoint. The following discussion illustrates how judicial intervention in the period before the referendum failed to articulate one

367. See Emeka-Mayaka Gakara & Njeri Rugene, *Fear of Raila and the Draft Fallout*, SUNDAY NATION (Nairobi) (May 29, 2010), <http://allafrica.com/stories/201005310205.html>.

368. See *id.*

369. See Eric Kramon & Daniel N Posner, *Kenya's New Constitution*, 22 J. DEMOCRACY 89, 92 (2011).

370. One example is William Ruto, who was the main architect of the PSC proposal but for selfish reasons had now decided to oppose the draft. See Joel D Barkan & Makau Mutua, *Turning the Corner in Kenya*, FOREIGN AFFAIRS (Aug. 2010), <http://www.fondazionebancodisicilia.it/assets/577,27/Scn-37-502-Pdf.pdf> (describing Ruto as an “opportunistic and ethnic demagogue who intends to run for president in 2012”).

371. See Robyn Dixon, *Kenya's Vote on Constitution May Renew Tribal Conflicts*, L.A. TIMES (Aug. 3, 2010), <http://articles.latimes.com/2010/aug/03/world/la-fg-kenya-election-20100804>; see also *A Chance to Improve How Kenya is Run*, THE ECONOMIST (July 29, 2010), <http://www.economist.com/node/16703331>.

voice and thereby squandered the chance to provide guidance on the process of reform.

Judicial challenge to the reform process at this time came in two forms. The first was through the High Court, with parties pitching their opposition to the process on religious grounds. The second was through the IICDRC, and the challenges were based on the unconstitutionality of the whole process and procedural defects. In our view both these challenges, although judicial in nature, represented the vested interests of constituencies that foresaw the weakening of their position in the new dispensation. In addition there were growing fears within the civil society body *politik* that the reform agenda had been completely captured by political forces, and this did not augur well for the common citizens. It was these fears that the judiciary had to negotiate to ensure that the reform process did not collapse.

a. The Unconstitutionality of the Constitution: The Jesse Kamau Case

This was a bizarre decision, the importance of which can only be understood within the context of the on-going reform process and the political climate prevailing in the period just before the referendum. *Jesse Kamau v. Attorney General*³⁷² was filed on July 12, 2004, around the same time that the *Njoya* case was in court, and the hearing did not begin until two years later.³⁷³ However, the judgment was to be delivered four years later on May 24, 2010. Before the hearing, the application was amended several times to accommodate the changing circumstances, given the rather lengthy gestation period. One of the respondents, the Constitution of Kenya Review Commission, had since become defunct.³⁷⁴ Like the *Njoya* case, the applicants in the *Jesse Kamau* case were all leaders of various Christian churches in Kenya. The case was a spinoff from the NCC approval of the draft constitution which occurred on March 12, 2004. The applicants represented the Christian groups that had vehemently opposed

372. *Jesse Kamau v. Attorney General*, (2010) eKLR, [http://kenyalaw.org/ Downloads_Free Cases/73988.pdf](http://kenyalaw.org/Downloads_Free_Cases/73988.pdf).

373. See Caroline Rwenji, *Kadhi Court Case was Filed in 2004*, DAILY NATION (Nairobi) (May 24, 2010), <http://www.nation.co.ke/News/politics/Kadhi%20courts%20case%20was%20filed%20in%202004%20-1064/925130/-11qljpy/-/index.html>.

374. The Commission chaired by Yash Ghai had become defunct after the enactment of Constitution of Kenya Review Act of 2004. See CKRC, FINAL REPORT OF THE CONSTITUTION OF KENYA REVIEW COMMISSION (Feb. 10, 2005), <http://www.ldphs.org.za/resources/local-government-database/by-country/kenya/commission-reports/Main%20report%20CKRC%202005.pdf>.

the retention of the Kadhi's Courts in the new Constitution. The delegates at the conference had voted overwhelmingly in favor of such inclusion.³⁷⁵

The applicants claimed that the entrenchment of the Kadhi's Courts in Section 66 of the Constitution amounted to a violation of their right not to be discriminated upon and also denied them the right to equal protection of the law guaranteed under Sections 70, 78, 79, 80 and 82 of the Constitution.³⁷⁶ In this regard they claimed that Section 66 was inconsistent with Section 82 of the same Constitution. Second, they contested the constitutionality of the Kadhi's Courts Act,³⁷⁷ alleging that its application throughout the country contravened the Constitution and that the continued state funding of such courts amounted to discrimination against other religious establishments.³⁷⁸ They sought orders striking down the Act. Third, they argued that the intended adoption of similar provisions, those entrenching the Kadhi's Courts in the draft constitution, also amounted to discrimination.³⁷⁹ Fourth, the applicants sought orders stopping the constitutional review process until the issues of contention were fully resolved by the court.³⁸⁰

The applicants based their application on a rather curious ground—that the Kadhi's Courts were religious courts and therefore their elevation in the Constitution amounted to the promotion of one religion as against the others. The applicants alleged that the introduction of the Kadhi's Courts was part of a grand scheme to introduce *Sharia* law in Kenya and convert all Kenyans to Islam.³⁸¹ The applicants were thus arrogating to themselves the divine right to protect Kenyans from this “evil” plan of the Muslim community and were asking the court to support them.³⁸² They also raised a more substantive argument regarding separation of powers. In this regard, they claimed that by entrenching Kadhis' Courts which were primarily a religious institution, section 66 of the Constitution had

375. See Anne Cussac, *Muslims and Politics in Kenya: The Issue of Kadhis' Courts in the Constitution Review Process*, 28 J. MUSLIM MINORITY AFF. 289 (2008).

376. See *Jesse Kamau v. Attorney General*, (2010) eKLR, at 7 http://kenyalaw.org/Downloads_FreeCases/73988.pdf.

377. The Kadhi's Courts Act, (1997) Cap. 11 (Kenya).

378. See *Jesse Kamau*, (2010) eKLR, at 7.

379. *Id.* at 5.

380. *Id.*

381. *Id.* at 50.

382. *Id.* at 5. In the claim, the Applicants averred that the entrenchment of the Kadhis' courts was a stepping stone to more sinister moves: that of introducing *Sharia* law in Kenya. And that such a move was “retrogressive, discriminatory, dangerous, as far as the stability of the nation was concerned, unjust . . . and detrimental to all Kenyans.” Also, that it evoked fears of “subterfuge and unconstitutional sabotage.”

contradicted the principle of separation of church and state.³⁸³ The applicants' efforts to enlist the Hindus' support were largely unsuccessful, except for a brief letter that the Hindu Council of Kenya sent to the court that was annexed to one of the affidavits filed in support of the application.³⁸⁴

The claims in *Jesse Kamau* were opposed on similar grounds as the *Njoya* and *Patrick Ouma* cases, namely: the applicants lacked standing; the claim was moot as the draft law had not been enacted; and the matter was not justiciable, as the issue of Kadhis' Courts lay within the competence of the executive and legislature and not the courts.³⁸⁵ The respondents also contended that the court lacked jurisdiction to strike out a constitutional provision for being *ultra vires* of another provision in the same constitution.³⁸⁶ The applicants had submitted that that in view of the Supremacy Clause in Section 3, the court could exercise this jurisdiction and declare Section 66 (which establishes the Kadhis' Courts) unconstitutional.³⁸⁷ They had submitted that the effect of Section 66 was to "entrench one religious community's dogma" and thereby deny the other religious groups a similar right.³⁸⁸ In their view, this amounted to a violation of their rights under Section 82 of the Constitution.³⁸⁹

The court agreed with this contention and found that Section 66 was indeed inconsistent with Section 82; however, it declined to declare Section 66 void on the grounds that it did not have jurisdiction to do so.³⁹⁰ The court observed that, whereas the applicants had the right to come to court to contest Section 66, "the supremacy of the Constitution . . . is over any other law, and not any provision of the Constitution itself."³⁹¹ In the court's view, the power to declare void any other law inconsistent with the

383. *Id.* at 7; see also Jamil Ddamulira Mujuzi, *Separating the Church from State: The Kenyan High Court Decision in Jesse Kamau & 25 Others v Attorney General*, 55 J. AFR. L. 314 (2011)

384. *Id.* at 8.

385. *Id.* at 11.

386. *Id.* at 12, 17.

387. It may be worth noting here that the establishment of Kadhis Courts in Kenya has a long history that stretches from the days of colonialism. For a general discussion of the evolution of these courts, see GHAI & MCAUSLAN, *supra* note 29; Eugene Cotran, *The Development and Reform of the Law in Kenya*, 27 J. AFR. L. 42 (1983); and James R. Brennan, *Lowering the Sultan's Flag: Sovereignty and Decolonization in Coastal Kenya*, 50 COMP. STUD. SOC'Y & HIST. 831 (2008). See also J.B. Ojwang & J.A. Otieno-Odek, *The Judiciary in Sensitive Areas of Public Law: Emerging Approaches to Human Rights Litigation in Kenya*, 35 NETH. INT'L L. REV. 29 (1988).

388. *Id.* at 4.

389. *Id.*

390. *Id.* at 80.

391. *Jesse Kamau v. Attorney General*, (2010) eKLR, at 43, http://kenyalaw.org/Downloads_FreeCases/73988.pdf.

Constitution was expressly limited to such other law. Regarding the inclusion of the Kadhis' courts in the draft law, the court found the applicants' claims to be "moot and speculative" and non-justiciable.³⁹² Despite the foregoing, the court still found the section to be discriminatory against the applicants. With a scant and very unimpressive analysis of foreign law and practices, it found the establishment of the Kadhis' courts through the Constitution and the related financial support of these courts to amount to segregation and to be "sectarian, discriminatory and unjust as against the applicants and others."³⁹³ It declared relevant sections of the Kadhis' Act to be unconstitutional and the inclusion of religious courts as part of the judiciary to be offensive to the principle of separation of state and religion.³⁹⁴ The Court pegged its finding on a rather problematic understanding of what a secular state should be. In its view, Kenya was a secular state because it was a "sovereign state" and had a "multiparty democracy."³⁹⁵ This analysis depicts a rather shallow appreciation of the complexity of secularism. In the end, the Court declined to order the amendment of section 66 of the constitution because its powers were "limited interpretation and constitutional review but not alteration of the constitution."³⁹⁶

It is this holding that attracted substantial criticism from Kenyan lawyers and politicians, particularly because of the timing of the ruling as it came barely two months before the referendum. Just before the court made its ruling, the Christian churches had loudly announced that they would vote against the draft law in the referendum because of its inclusion of the Kadhi's courts, among others.³⁹⁷ Politicians opposed to the draft law sided with the churches and began to emphasize this fact in their campaigns.³⁹⁸ When the ruling was made, a majority of Kenyans saw this as the courts' veiled attempt to frustrate the reform process.³⁹⁹ There were

392. *Id.* at 89.

393. *Id.* at 88.

394. *Id.* at 89. The impugned sections of the Kadhis' Courts Act are 3 and 4.

395. *Id.* at 44, 80. See also Jamil Ddamulira Mujuzi, *supra* note 383, at 318.

396. See Jesse Kamau, *supra* note 372, at 43.

397. See e.g. Richard Allen Green, *Kenya's Churches Unite Against Draft Constitution*, CNN World, Aug. 4, 2010, available at http://articles.cnn.com/2010-08-04/world/kenya.constitution.churches_1_draft-constitution-new-constitution-churches?_s=PM:WORLD.

398. See Kwendo Opanga, *Night Goings-on Will Be Made Public in the Day*, SUNDAY NATION (Nairobi), (May 29, 2010), <http://www.nation.co.ke/oped/Opinion/Night%20goings%20on%20will%20be%20ma>.

399. See, e.g., Yash Ghai, *Why Kenya's Constitution Should Recognise Kadhi's Courts*, PAMBAZUKA NEWS (Apr. 29, 2010), <http://www.pambazuka.org/en/category/comment/64062>; Peter Mwaura, *Kenya: Judges Decision on Kadhis Courts Status was Made on a Knife-edge*, ALLAFRICA.COM (May 28, 2010), <http://allafrica.com/stories/printable/201005280692.html>; see also

also speculations that the judges were probably unhappy with the draft law because, if passed, they would have to be vetted before being reappointed.⁴⁰⁰

The Attorney General, for his part, immediately filed an appeal against the ruling.⁴⁰¹ Professor Makau Mutua, the Dean of Buffalo Law School, writing in a local periodical, described the ruling as a “blatant act of judicial skulduggery” and a “quixotic attempt to derail the referendum.”⁴⁰² In his view, the judges had abandoned their hallowed duty of interpreting the law and were now usurping the functions of the legislature, and that they were doing so in the most “unseemly manner”—that of declaring the constitution “unconstitutional.”⁴⁰³ In all his predictions, Makau saw the judges as using the law to kill the intended referendum, but that such approach was bound to fail. His views were echoed by a wide spectrum of commentators and lawyers. The Prime Minister, Raila Odinga was even more blatant in his reaction. He termed it “a most unfortunate ruling and mischievous at that.”⁴⁰⁴ In his view, the judges were taking political sides by supporting those opposed to the new constitution being approved by the public.

The mischief that was seen in the court’s intervention did not stop the arrangements for the referendum. As if the court did not matter, the IIEC proceeded to frame the referendum question and prepare for the national voting process. Meanwhile, another suit that had been filed by a different

Judy Ogutu, *Kadhis Courts Firestorm*, E. AFR. STANDARD (Nairobi) (May 25, 2010), <http://www.standardmedia.co.ke/InsidePage.php?id=2000010177&cid=4>.

400. See Section 15 of the Seventh Schedule (Transitional and Consequential Provisions of the Laws of Kenya), which was made pursuant to Article 312 of the Harmonised Draft Constitution. HARMONISED DRAFT CONSTITUTION, *supra* note 315. It provides that upon promulgation of the new Constitution, the President must appoint an interim judicial service commission “which shall, in accordance with this section, be responsible for vetting judges in office immediately before the effective date.” *Id.* This section has now been replaced in the new Constitution by Section 23 which allows Parliament a period of one year after promulgation of the Constitution to enact a legislation that will provide for the vetting of the current judges before they can function in a new dispensation. See CONSTITUTION, § 12 (2010) (Kenya). As of writing, two bills dealing with judicial reform have been drafted. See Yash Ghai & Jill Cottrel Ghai, *Judiciary is the Custodian of the New Constitution*, E. AFR. STANDARD (Nairobi) (Dec. 11, 2010), <http://www.standardmedia.co.ke/InsidePage.php?id=2000024469&catid=289&a=1>.

401. See Jiilo Kadida, *Kenya’s AG Files Appeal Against Kadhi Courts Ruling*, THE E. AFRICAN (May 25, 2010), <http://www.theeastafrican.co.ke/news/-/2558/925286/-/pejbp6z/-/index.html>.

402. Makau Mutua, *Courts Must Not Be Allowed to Derail Referendum*, DAILY NATION (Nairobi) (May 29, 2010), <http://www.nation.co.ke/oped/Opinion/Courts%20must%20not%20be%20allowed%20to%20derail%20referendum%20/-/440808/928426/-/18tq7x/-/index.html>.

403. *Id.*

404. See Adrian Croft, *Interview- Kenya PM Blasts Judges Over Ruling*, THE STAR ONLINE, (May 29, 2010), http://thestar.com.my/news/story.asp?file=/2010/5/29/worldupdates/2010-05-29T125129Z_01_NOOTR_RTRMDNC_0_-489012-1&sec=Worldupdates.

set of Christian clergy at the High Court in Kenya's resort city of Mombasa, raising the same issues, also concluded. *Bishop Joseph Kimani v. Attorney General*,⁴⁰⁵ was filed on December 18, 2009, just about the same time that the CoE submitted the harmonized draft to the PSC for debate. Unfortunately for the applicants here, the judge dismissed their claim on the grounds that the court "lacked jurisdiction to question and interpret the constitutionality of the constitution itself."⁴⁰⁶ The judge, on declining to follow *Jesse Kamau* and in direct reference to its effect on the review process, observed: "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 review process?"⁴⁰⁷ In his view, the role of the court was to defend the existing constitution until a new one was promulgated. This decision received wide coverage in the press and more or less put to rest any efforts by the Christian clergy to stop the process.⁴⁰⁸ The only option left for the churches was a political one: to campaign so that the law could be defeated through the referendum.

b. Other Challenges to the Referendum

Legal challenges to the referendum came before and after it was held on August 4, 2010. As already mentioned, apart from the clergy, there were a number of civil society groups unhappy with Parliament taking over the processes, and they were eager to stop the referendum. The first attempt by the civil society groups to challenge their exclusion came before the IICDRC in the form of a petition by Andrew Omtata Okoiti and others.⁴⁰⁹ The petitioners claimed that their sovereign rights to participate in the replacement of the Constitution had been violated. They listed what they perceived as the various shortcomings in the review processes that occasioned the denial of rights, which included: the inability of CoE to perform its functions due to lack of "competences" within its ranks; lack

405. *Bishop Joseph Kimani & 2 Others v. Attorney General & 2 Others*, High Court of Kenya at Mombasa, Petition No 669 of 2009, http://kenyalaw.org/Downloads_FreeCases/Petition_669_of_09_Mombasa_4.pdf.

406. See Harold Ayodo, *Uphold Constitution, Judge Tells Colleagues*, E. AFR. STANDARD (Nairobi) (June 6, 2010), <http://www.standardmedia.co.ke/InsidePage.php?id=2000011040&cid=40>.

407. *Id.*

408. See, e.g., Eunice Machuhi & Jillo Kadida, *Judge Rejects Fresh Case on Kadhi Court*, ALLAFRICA.COM (May 31, 2010), <http://allafrica.com/stories/201006010162.html>.

409. *Andrew Omtata Okoiti v. Attorney General*, (2010) eKLR, http://www.kenyalaw.org/CaseSearch/view_preview1.php?link=86652455280427269782308; see also *Bench Bulletin Issue 13: July*, NATIONAL COUNCIL FOR LAW REPORTING, Dec. 2010, at 83, available at <http://content.yudu.com/Library/A1qd48/TheBenchBulletin13Ju/resources/6.htm>.

of consultations of all Kenyan groups; illegal alterations of the harmonized draft by Parliament which amounted to the usurpation the role of CoE and therefore a violation of the rights of all adult Kenyans; and the framing of the referendum question in a binary fashion (yes or no) instead of open-ended questions.⁴¹⁰ The petitioners also contested the lack of provisions for Kenyans in diaspora to participate in the referendum. On this basis, the petitioners sought an order stopping the referendum.⁴¹¹ This petition had virtually no chance of success because most of its claims had been addressed by express legislation. Thus, the claims were merely a nuisance. Second, it was mischievous for the petitioners to bring their case at the moment when the referendum was just about to be held, when they had more than ample time to do so before then since the Review Act which they were challenging was enacted in 2008. The court had no difficulty dismissing this petition.⁴¹²

Surprisingly, just after the *Andrew Omtata Okoiti* petition, two similar suits contesting the new amendments to the draft law were filed. The first was by thirteen petitioners led by Alice Waithera Mwaura,⁴¹³ seeking a permanent injunction stopping the IIEC from conducting the referendum.⁴¹⁴ The petition was based on the allegations that CoE had unilaterally inserted provisions into the draft law, thereby negating or compromising the purpose and objects of the review process, and that some provisions of the draft law were in violation of the existing (old) constitution.⁴¹⁵ This petition was dismissed with equal ease. The court observed that the petitioners were aware of all the stages that had been undertaken in the review process.⁴¹⁶ Despite this fact, they saw it fit to file their claim barely a month before the referendum. It was therefore the courts view that the applicants' action amounted to abuse of the court processes, especially because there was no proof that the applicants had been denied the chance to participate in the process or were blocked from giving their views to the CoE or any other review organ.⁴¹⁷

410. *Bench Bulletin*, *supra* note 409, at 83.

411. *Id.*

412. See Wahome Thuku, *Court Dismisses Petition Against Referendum*, E. AFR. STANDARD (Nairobi) (Aug. 2, 2010), http://www.standardmedia.co.ke/InsidePage.php?id=2000015268&cid=4&&utm_medium=standrdKeNation&utm_source=standrdkenation.com.

413. Alice Waithera Mwaura v. Committee of Experts, (2010) eKLR. See *Bench Bulletin*, *supra* note 409, at 81.

414. *Bench Bulletin*, *supra* note 409, at 81.

415. *Id.*

416. *Id.*

417. *Id.*

The other suit, *Eric Nicholas Omondi v. Attorney General*,⁴¹⁸ challenged the action of the CoE on the basis that it had exceeded its mandate as given by the Review Act 2008 by inserting in the draft constitution matters that did not reflect the views and aspirations of the Kenyan people; deleting the provisions establishing the Office of the Prime Minister (that were originally contained in the Harmonised Draft Constitution) and thus disregarding the views of the Kenyan people; and opening debate on matters that were “contentious.”⁴¹⁹ The court found the petition to be misconceived since the CoE’s mandate was not limited to issues identified as contentious, and that CoE had acted well within its discretionary public power. The court also ruled that it had no jurisdiction to rectify the draft constitution and could not therefore rule on the legality of its clauses.

After the referendum and the approval of the draft constitution by about 67% of the total vote, Mary Ariviza went to the High Court to challenge the referendum.⁴²⁰ The High Court rejected her judicial review application for lack of jurisdiction and she, joined by Okotch Mondo, went to the IICDRC.⁴²¹ The petitioners sought a declaration that the referendum results released by the IIEC on August 23, 2010 be declared null and void, and that the promulgation of the new constitution be suspended until the petition was heard and final determination made.⁴²² At the hearing, the court learned that although the petition was filed on August 19, 2010, it was not served on the IIEC until August 24, 2010, the day after the IIEC released the referendum results.⁴²³ The IIEC, in publishing the results, had acted within its mandate as required by law and was oblivious of the pending suit. Second, the court noted that the petitioners failed to deposit the security of KSh 2 million with the court as required by Section 44(3) of the Review Act.⁴²⁴ In the court’s view, therefore, the petitioner had not met the procedural requirement for bringing the action. Regarding the injunction sought by the petitioners, the court found that stopping the

418. (2010) eKLR; *see also Bench Bulletin*, *supra* note 409, at 86.

419. *See Bench Bulletin*, *supra* note 409, at 86.

420. *Mary Ariviza v. Interim Independent Electoral Commission*, High Court (Nairobi) Misc. App. No. 273 of 2010, *reported in* (2010) eKLR, http://www.kenyalaw.org/CaseSearch/view_preview1.php?link=27902795876845824259815.

421. *Mary Ariviza v. Interim Independent Electoral Commission*, Constitutional Petition No. 7 of 2010, *reported in* (2010) K.L.R. 88; *see also Bench Bulletin*, *supra* note 409; Jilo Kadida & Oliver Mathenge, *Kenya: Last Ditch Attempt to Delay Second Republic*, ALLAFRICA.COM (Aug. 20, 2010), <http://allafrica.com/stories/201008210119.html>.

422. *Bench Bulletin*, *supra* note 409, at 88.

423. *Id.*

424. *Id.* at 89.

promulgation of the new Constitution would amount to challenging or changing the provisions of the Constitution, and the court had no jurisdiction to do this. The petition was thus dismissed.⁴²⁵

Having lost at IICDRC, the petitioners took their complaint to the East African Court of Justice in Arusha.⁴²⁶ At the regional court, the petitioners sought a declaratory order against the Kenya government and the Secretary to the East African Community that the conduct and process of the referendum and the subsequent promulgation of the Constitution by the Government of Kenya were an infringement of the treaty and, therefore, null and void.⁴²⁷ The main allegation by the petitioners was that there had been irregularities in the conduct of the referendum, which amounted to a violation of rule of law and, by extension, a violation of Articles 5(1), 6(c), 6(d), 7(2)(c), 27(1), 29 and 30 of the Treaty Establishing the East African Community, to which Kenya was a party.⁴²⁸ Also, that there had been an alteration of the draft law because the version put forward for the referendum was different from the one approved by Parliament. At the preliminary stages, the respondents contested the court's jurisdiction, but this objection was overruled.⁴²⁹ Also, the petitioners asked for an injunction to against the respondents restraining any further implementation of the Constitution until the matter was finally determined.⁴³⁰ The court denied the request for injunction, arguing that a lot had happened already and that stopping the process by way of an injunction was bound to cause more harm should the respondents eventually prevail.⁴³¹ On the substantive claim, the court found no

425. *Id.*

426. They filed a reference on September 13, 2010. See *Mary Ariviza & Another v. Attorney General & Another*, Reference No. 7 of 2010, (Final Judgment) (Nov. 30, 2011), <http://www.eacj.org/docs/judgements/Mary-Ariviza-Okotch-Mondoh-Vs-AG-Kenya.pdf> [hereinafter Reference No. 7 of 2010].

427. Article 30(1) of the East African Community Treaty provides:

Subject to the provisions of Article 27 of this Treaty (relating to EACJ's jurisdiction) any person who is resident in a Partner State may refer for determination by the Court, the legality of any Act, regulation, directive, decision or action of a Partner State or an institution of the Community on the grounds that such Act, regulation, directive, decision or action is unlawful or is an infringement of the provisions of this Treaty.

428. Treaty Establishing the East African Community, signed on Nov. 30, 1999, *entered into force* on July 7, 2000, *available at* http://www4.worldbank.org/afr/ssatp/Resources/HTML/legal_review/Annexes_fr/Annexes%20V_fr/Annexe%20V-11.pdf

429. App. No. 3 of 2010, THE EAST AFRICAN COURT OF JUSTICE AT ARUSHA, http://www.worldcourts.com/eacj/eng/decisions/2010.12.01_Ariviza_v_Atorney_General.pdf

430. App. No. 3 of 2010, THE EAST AFRICAN COURT OF JUSTICE AT ARUSHA, <http://www.eacj.org/docs/Application-No-3-of-2010.pdf>.

431. *Id.* at 5.

evidence that proper procedure was not followed.⁴³² Moreover, since the IICDC had already heard the disputed matter, determining whether the IIEC's conduct was proper amounted to a review of the IICDC decision, something which was not within the court's competence.⁴³³ The court therefore dismissed the reference.

From the foregoing court decisions, one can rightly conclude that the IICDC was a much more expedient forum. This could be attributed to its limited mandate and the pressure to deliver within short time frames. Its efficiency may also have been because all the judges were perhaps eager to make a mark on the profession or driven by the passion to effect change. They represented the emerging cohort of young professionals who were neither tainted by ethnic cleavages nor burdened by the insidious schemes of protecting the illegally acquired wealth. However, the court's influence on the review process at this stage was bound to be minimal. Much of what dictated the pace of the review was political, and the wrangling in the courts was a mere sideshow. The draft constitution itself was fought in the campaigns before the referendum on the basis of deep seated political interests rather than on its legalistic ramifications.

CONCLUSION

In the twenty year period of the review process, the courts confronted the problems generated by the process in a conflicting and sometimes contradictory fashion. We find the explanation for the courts behavior in the manner in which the review proceeded. To begin with, the review itself was not a linear process. The institutions that it engendered changed almost as rapidly as the political formations. The primary actors, spirited by hidden agendas, continuously shifted their positions. The courts were the only actors stuck with an old constitution that was being assailed from every direction.

In our view, the role of the judiciary in the process must be mapped against the course of the changing reform climate. For example, when the reforms began in the 1990s, the courts were completely out of the picture. This is because the initial clamour for constitutional change was never really premised on an objective evaluation of the shortfalls of the old constitution, but rather on the belief that it was the best way to get rid of the despotic Moi regime. This had two consequences. First, the process was conceived as purely political and thus outside the judicial province.

432. *Id.*

433. Reference No. 7 of 2010, *supra* note 426, at 28, 29.

Secondly, because constitutionalism was not the reason for which the process was initiated, the turbulence did not cease even after Moi and his cronies were removed from power in 2002. Indeed, things became worse, with the process gaining its own momentum and gathering a multitude of constitutional issues, most of which the Kenyan body *politik* was not quite ready to deal with. This then created an entry point for the courts. The landmark decisions that we have discussed here, such as *Njoya* and *Patrick Ouma*, were intended to show the unity of the political agenda for reform with the legalistic demands of constitutionalism, a necessary unity for the success of the constitutional reform process. Indeed, the lack of unity throughout the 1990s explains why there was vigorous judicial activity on review-related matters from 2002 through 2007.

From 2008 onwards, a different picture emerged. The violence that followed the flawed 2007 elections brought back the sobering reality that constitutional change had to be accomplished if the future of the country was to be secured. This experience, together with the results of the *Njoya* ruling, made it imperative that the process be anchored on a firm constitutional and legislative framework. Many changes were effected, beginning with the amendment of Section 47 of the Constitution to provide for a review mechanism and the passing of the Review Act 2008. These legislative changes not only created a range of review bodies, but it also imposed on them strict time frames which if not followed could them expose to litigation. As we discussed in this Article, the changes into the legislative and judiciary's approach to reform were largely responsible for delivering the Constitution after nearly twenty years of failed reform. But these changes also diminished judicial influence on the process. From then on, much of what happened in courts was a mere side show, not at all crucial to the finalisation of the review. An example of this is *Jesse Kamau*, which declared a Constitutional provision to be unconstitutional, as well as many of the petitions that were heard by the IICDRC.

Now that the Constitution has been enacted, the challenge for the judiciary is to ensure that it grows and delivers the benefit of constitutionalism to Kenyans. The new Constitution is by all measures a progressive one. It has a wider scope of rights for citizens and establishes extensive mechanisms for restraint of political power than hitherto realised in Kenya. Already the government has expressed fears that there may be a flood of cases in courts.⁴³⁴ If Kenya wishes to survive the Nigerian or

434. See Ally Jamah, *State May Lose Sh10b in Courts*, E. AFR. STANDARD (Nairobi) (Dec. 20, 2010), <http://www.standardmedia.co.ke/print.php?id=2000025167&cid=4>.

Ghanaian experience of multiple constitutions, then the judiciary must interpret the constitution more flexibly.

If there is one thing that the long, tumultuous reform process has exposed, it is the endemic lack of judicial independence. This has been the bane of Kenya's judicial practice for years.⁴³⁵ Although the lack of independence could be attributed to many factors, the way in which judicial organs dealt with review problems suggested that they were still captive to what Posner calls "ethnic cleavages."⁴³⁶ Clearly, individual judges were not able to de-link their professional lives from the demands of an overbearing ethnic cosmos that they inevitably found themselves in. Adding in corruption, the core of judicial functioning in Kenya likely suffered its worst spell during that period. Perhaps that is why Kenyans insisted on judicial reform as part and parcel of the new Constitution's implementation programme. Hopefully, in the new dispensation the judiciary will be able to overcome its difficulties.

435. See, e.g., Mutua, *Justice Under Siege*, supra note 22, at 96; see also Hugh Corder, *Seeking Social Justice? Judicial Independence and Responsiveness in a Changing South Africa*, in JUDICIAL INDEPENDENCE IN THE AGE OF DEMOCRACY: CRITICAL PERSPECTIVES FROM AROUND THE WORLD 194 (Peter H. Russel & David M. O'Brien eds., 2001).

436. See Daniel N. Posner, *Regime Change and Ethnic Cleavages in Africa*, 40 COMP. POL. STUD. 1302 (2007).