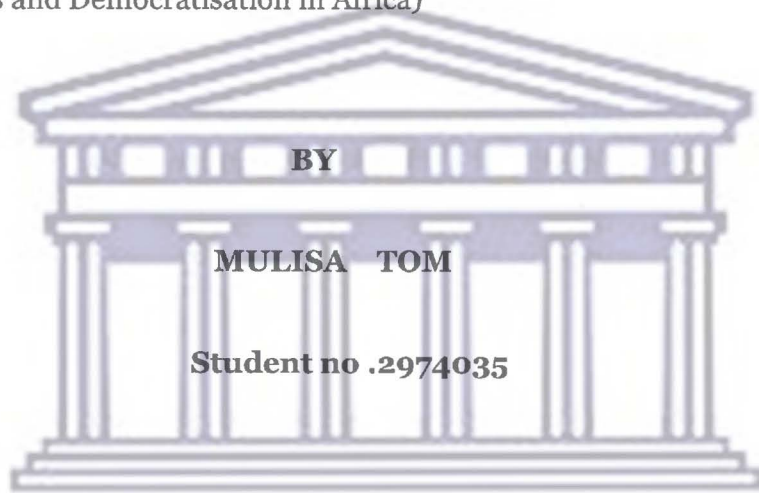


**Public participation in constitution-making: A critical assessment of
the Kenyan experience**

A dissertation submitted to the Faculty of Law of the University of Pretoria in
partial fulfillment of the requirements for the degree of masters of law (LLM in
Human Rights and Democratisation in Africa)



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PREPARED UNDER THE SUPERVISION OF
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30 OCTOBER 2009.

DECLARATION

I, Mulisa Tom, hereby declare that this dissertation is original and has never been presented in any other institution. I also declare that any secondary source information used has been duly acknowledged in this dissertation

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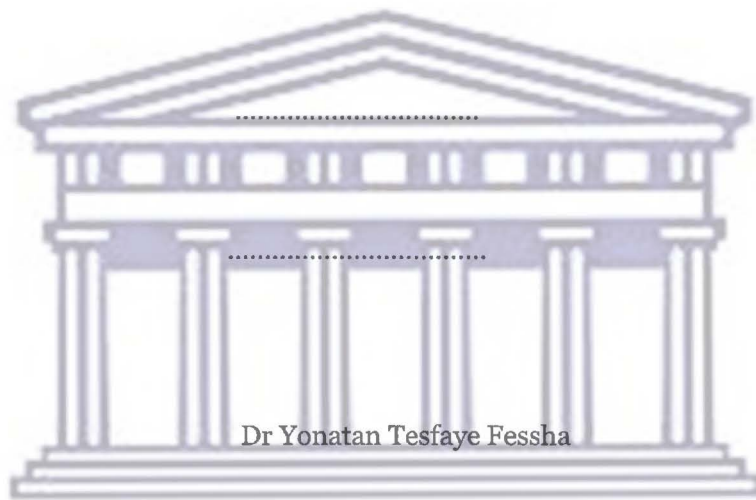
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DEDICATION

This dissertation is dedicated to my parents Teddy Kayitesi, and Athanasia Murekatete and the late Rwantagare Bazigaga Grace. With you, all was possible.

To all those who have strived for Kenya's new constitutional dispensation.



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LIST OF ABBREVIATIONS

CoE	Committee of Experts
CKRC	Constitution of Kenya Review Commission
IPPG	Inter-Party Parliamentary Group
KANU	Kenya African National Union
LDP	Liberal Democratic Party
NAK	National Alliance Party
NCC	National Constitutional Conference
NCEC	National Convention Executive Council
NaRC	National Rainbow Coalition
ODM	Orange Democratic Movement
OSISA	Open Society Initiative for Southern Africa
PSC	Parliamentary Select Committee
PNU	Party of National Unity



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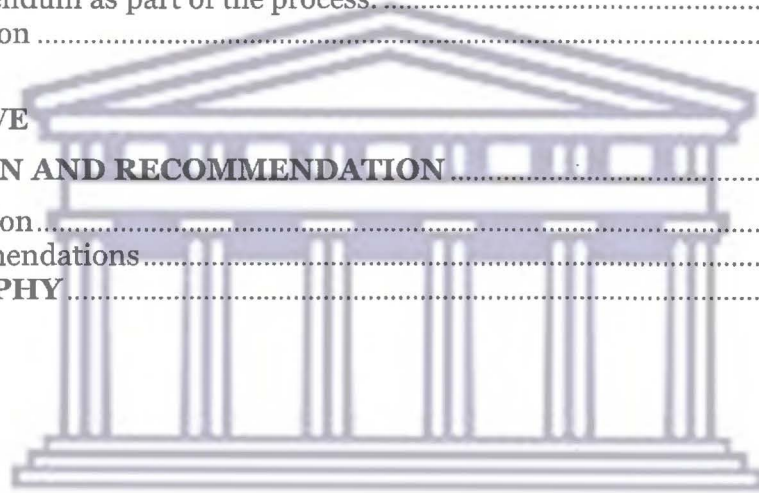
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CHAPTER ONE

INTRODUCTION

1. Background

Kenya has embarked on a constitutional making process that is hoped to ensure a transition to democracy. The current constitution making process is not the first of its kind in post independence Kenya.¹ Since the Lancaster House Conference² that gave Kenya its very first constitution after independence, constitution making processes have been fraught with controversies.³ The periods after independence saw the Kenyans glamour for constitutional change and reforms.⁴ A number of amendments have been effected to the Kenyan constitution since independence. The clamor for constitutional review gradually grew leading to the repeal of section 2A of the Constitution in 1991 which restored multi-parties.⁵ The pressure from civil society organizations in 1997 led to the enactment of the Constitution of Kenya Review Commission Act⁶ and this was considered as the formal beginning of the Constitutional Review Process in Kenya.⁷ The next major constitutional review process came in after the end of the term of President *Daniel Arap Moi* in 2002. A review process, commonly known as the

-
- ¹ AN Abdirizak *Constitutional Making and Legal Reform Processes in Kenya* (2004) 2 at <http://www.indiana.edu/~wow3/papers/wow3_nunow.pdf> (accessed 15 August 2009)
 - ² Lancaster is situated in London and it was there that the negotiations and adoption of the first Kenyan constitution took place. That was between the British government and the representatives of the Kenyan Legislative Council. The first conference was chaired by Secretary of State for the Colonies, Ian Macleod, in 1960 but did not result in an agreement, leading McLeod to issue an interim constitution. The second conference took place in February 1962 and a framework for self-governance was negotiated while the third conference of 1963 finalized constitutional arrangements for Kenya's independence as a dominion, marking the end of more than 70 years of colonial rule.
 - ³ K Kindiki *The Emerging jurisprudence on Kenya's constitutional review law* Kenya Law Review (2007) 115.
 - ⁴ Abdirizak (n 1 above) 2.
 - ⁵ Kindiki (n 3 above) 153.
 - ⁶ The Constitution of Kenya Review Commission Act of 1997 as amended in 2000 and 2001. The Constitution of Kenya Amendment Act 1997, and the Statute Law (Miscellaneous) Amendment Act 1997.
 - ⁷ Kindiki (n 3 above) 153. The pressure group was spearheaded by the Inter-Party Parliamentary Group (IPPG).

*Bomas*⁸, ensued but the Bomas draft constitution was rejected through a referendum.⁹ As a result, the prospects of Kenya having a constitution before the 2007 elections disappeared and, it seemed, there was no prospect of a new constitution before elections. Throughout these series of constitutional amendments and reforms, the major question that has been asked is the involvement of the Kenyan people in the successive constitutional reform process that took place since independence, casting doubt on the ownership of the successive constitutional amendments by the people of Kenya.¹⁰

In December 2007, Kenyans went to elections which were later marred by violence that resulted in loss of lives.¹¹ It is often argued that the lack of constitutional reforms was at the centre of the post election violence.¹² An important part of the agreement that brought the violence to an end is the drafting of a new constitution.¹³ In accordance with the road map agreed among the parties on 4th March 2008, the constitutional review process is supposed to be completed within a period of 12 months.¹⁴

2. Statement of the problem

The Constitution of Kenya Review Act, 2008 provides a legal framework for the making of a new constitution. The Review Act provides for the organs to facilitate the process and sets out the procedures according to which the four organs¹⁵ will work and how the referendum will be

⁸ The Bomas ground was the place where the stake holder negotiations and discussions on the draft took place. The draft was later named after the *Bomas* grounds.

⁹ Kindiki (n 3 above) 153.

¹⁰ Abdizirak (n 1 above) 2.

¹¹ Kenya National Commission on Human Rights Report, on the brink of the precipice: a human Rights account of Kenya's post -2007 Election violence (2008) 123.

¹² 'Kenya in crisis available at

< <http://www.internaldisplacement.org/Kenya+in+Crisis.pdf> > (accessed on 21 February 2008)

¹³ The Kenya National Dialogue and Reconciliation mediated by Koffi Annan as Chair and the panel of eminent African personalities saw the agreement between the factions on the statement of principles on long term issues and solutions and among which was Constitutional, institutional and legal reform.

¹⁴ Kenya National Dialogue and Reconciliation, Preamble of Statement of Principles on long term issues and solutions, signed 23rd may 2008 1.

¹⁵ The Constitution of Kenya Review Act 2008 section 5 provides for the Committee of Experts, the Parliamentary Select Committee, The National Assembly and the Referendum (people of Kenya).

conducted.¹⁶ A Committee of Experts (CoE) has been selected and divergent views have appeared on who decides the contentious issues and to what extent the people should get involved in the process.

The Committee of Experts will not go to every constituency like the previous Constitution of Kenya Review Commission prior to the National Constitutional Conference known as the *Bomas*.¹⁷ The identification of contentious issues and consultations with reference groups is supposed to take 160 days.¹⁸

Constitution making becomes complex when constitutional reforms happen during a post conflict scenario and where constitutions themselves are 'a pact' that seeks to end periods of protracted conflict.¹⁹ Constitution making processes in countries at risk of internal violence poses difficulties because decision making is highly contested and the trust essential to compromise may be absent.²⁰ Considering the fact that it is a constitution making process that is happening at the back drop of the recent 2007 post election violence, the current process of making the constitution in Kenya is as equally important, if not more, as the end product in strengthening democracy and achieving relative peace in Kenya.²¹ The present research focuses on the procedural aspect of the constitution making that is currently underway in Kenya and examines the consultative nature of the process. It specifically looks to what extent the process involves the people of Kenya.

3. Focus and objectives of the study

This research seeks to evaluate the current constitutional making process in Kenya. It focuses on the process undertaken by the coalition government in Kenya and the extent to which the people of Kenya have been involved in the process.

¹⁶ The Constitution of Kenya Review Act (2008).

¹⁷ *The Standard* (n 22 above) 29.

¹⁸ *The Standard* (n 22 above) 29.

¹⁹ <<http://verfassungsweltdel.files.wordpress.com/2008/07/simeon.pdf>> 14 (accessed 14 August 2009).

²⁰ See Simeon (n 19 above) 14.

²¹ M Ndulo *Constitutional making in Africa: Assessing both the process and the content* (2001) 113.

4. Significance of the study

This study is important because the current coalition government in Kenya is expected to deliver a constitution before Kenya goes to elections in 2012. It is hoped that this study contributes to the constitutional making process that is currently underway in Kenya. It emphasizes the point that a people-driven process is necessary if governments that have suffered political violence and instability are to become stable and inclusive. Furthermore, evaluating the Constitutional making process in Kenya would contribute to constitution making in states like Zimbabwe that are undertaking constitutional reforms in order to restore democracy and the rule of law.

4. Delineations and limitations

This study intends to analyse the current constitutional making process in Kenya under the coalition government. The study will only evaluate the procedural aspect of constitution making in Kenya. It does not look at substantive issues that dominate some of the constitutional debate in that country.

5. Methodology

This study will mainly adopt a library-based research. The work will involve the analysis of the existing literature on Kenya's constitution making process and an evaluation of the process undertaken today by the coalition government. The existing legislation in Kenya and the Constitutional Review Act of 2008 will be important for this study.

6. Literature Review

In the last decade, constitutional making in the world has assumed prominence and great importance in the quest for democracy and good governance.²² Modern constitution making requires the participation of ordinary people. This has introduced the concept of ownership by the majority as a fundamental prerequisite to the legitimacy of institutions and governments.²³

²² HH Mavuto *Popular involvement in the Constitution making: experience of Malawi*, paper presented at the World Congress of Constitutional law, Athens, Greece, 11-15 August (2007)3.

²³ Mavuto (n 22 above) 3.

Jill Cottrell and *Yash Ghai* examined the constitutional making process in Kenya prior to 2005 and the notion of popular participation especially with reference to marginalized ethnic groups in Kenya.²⁴ They demonstrated how high levels of people's participation can be curtailed by those in power.²⁵

Morris Odhiambo is of the opinion that the regime that come to power after President *Daniel Arap Moi* was reformist and despite the challenges constitutional reforms would take place gradually.²⁶ However, his prediction never materialized and in 2005 the Draft Constitution was rejected by the people of Kenya through a referendum.

*Lawrence Mute*²⁷ and *Wanza Kioko*²⁸ argued that the delays and failures in constitutional review would be used to entrench status quo and avail all powers to the president setting a bad precedent for Kenya. *Mwagiru* provides a narrative account of the post election violence and takes us through the constitutional issues pertaining to the process of negotiations that led to the signing of the National Accord and Reconciliation Act.²⁹ *Ongaro* and *Ambani* discuss the importance of constitutionalism in Kenya and its relevance in healing ethnic divisions that characterise Kenyan politics.³⁰ *Kindiki*³¹ 's analysis of the emerging jurisprudence on Kenya's constitutional Review law and *Muli's*³² analysis of the legal and political processes involved in the *Bomas* will provide some lessons into an inquiry of the current constitutional review process. *Mutua* takes us through the dilemma of constitutional making in Kenya and his work is relevant especially as he takes on the aspirations of the Kenyan people in the advent of the Mwai Kibaki era and the challenges to constitutional making in Kenya after the 2007 post election

²⁴ J Cottrell & Y Ghai *Constitution making and democratization in Kenya (2000–2005)* (2007) 1.

²⁵ J Cottrell & Y Ghai (n 23 above) 2.

²⁶ M Odhiambo *Constitutionalism under a reformist regime in Kenya: One Step forward, two steps backwards?* (2004) 141.

²⁷ L Mute *Constitutionalism in East Africa* (2004) 11.

²⁸ W Kioko *The State of constitutional development in Kenya* (2003) 15.

²⁹ M Mwagiru (n 16 above) 157.

³⁰ See B Ongaro, O Ambani 'Constitutionalism as a panacea to ethnic divisions in Kenya: A post election crisis's perspective' in *GW Mukundi* (ed) *Ethnicity, human rights and constitutionalism in Africa* (2008) 27.

³¹ Kindiki (n 3 above) 153.

³² K Muli *The Draft Constitution of Kenya 2004 (Bomas Draft): Reflections and commentary on the issues of content and process* (2009)² available at <<http://wikileaks.org/wiki/images/Kenya-bomas.pdf>> (accessed 8 august 2009).

violence ³³ However, recent studies on constitutional making under coalition governments and specifically Kenya are still lacking.

In sum, there has been a lot of literature on constitution making processes in Africa and Kenya in particular. The authors have discussed the need to involve the people in constitution making processes as a basis for legitimacy and ownership. The authors on Kenya 's constitutional history have not yet analysed the constitution making process that is currently taking place under the coalition government. It is this gap that this study seeks to address.



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³³ M Mutua *Kenya's Quest for Democracy: Taming the Leviathan* (2008) 117.

CHAPTER TWO

THE ROAD TO CONSTITUTION MAKING IN KENYA

2.1 The independence constitution: The Kenyatta regime (1963-1978)

Kenya gained its independence from Britain on 12 December 1963.³⁴ The 1963 Constitution of Kenya, also known as the Lancaster Constitution, provided for a multiparty democracy and a decentralised form of governance. The Kenyan legislature was not directly involved in drafting of the constitution, much less the people of Kenya.³⁵ Despite the lack of popular participation that characterised its making, Kibara argues that the Lancaster Constitution was regarded by some as 'a fairly progressive liberal Constitution because it provided for checks and balances as well the devolution of powers'.³⁶ The post independence leadership in Kenya immediately amended the Constitution to create the post of President, abolishing that of Prime-Minister.³⁷ This represented the first amendment in 1963 and Kenya was declared a republic with an executive president who wields enormous powers.³⁸

The position of Prime Minister, which had facilitated power-sharing, was scrapped and so was the regional assemblies that were designed to share power with the two Houses of Parliament, namely, the Senate and the House of Representatives.³⁹ President Kenyatta abolished multiparty democracy and created a *defacto* one party state.⁴⁰ These changes were followed by successive enactments and amendments that concentrated power in the hands of the president, undermining the capacity of the judiciary and parliament to hold the executive accountable. ⁴¹ The concentration of power in the executive contrasts to the Lancaster Constitution that was largely based on an entrenched separation of powers.⁴²

³⁴ B A Ogot & W R Ocheing (eds) *Decolonization and independence of Kenya* (1995) 54.

³⁵ Abdirizak (n 1 above) 2.

³⁶ G Kibara *The State of constitutionalism in Kenya* (2003) 2 available at <www.kituoachakatiba.co.ug/Constm%202003%20Kibara%20K.pdf> (accessed 7 September 2009).

³⁷ Kibara (n 36 above) 2.

³⁸ Kibara (n 36 above) 2.

³⁹ Kibara (n 36 above) 3

⁴⁰ C Leys *Underdevelopment in Kenya: The political economy of neo-colonialism* (1975) 212.

⁴¹ Inter Africa Group, Conference on *Constitutionalism and human security in the horn of Africa* Sheraton Addis, 1st October, 2007 (2007) 17.

⁴² Mutua (n 33 above) 62.

For the purpose of this study, it suffices to note that the post independence constitution remained a tool of political manipulation by the elite of the time. The people remained in the background and the amendments were usually spearheaded by the executive. The death of the leading father of the nation *Jomo Kenyatta* in 1978 saw President Daniel Arap Moi coming to power.⁴³

2.2. The Moi Period (1978- 2002)

After the death of President *Jomo Kenyatta* in 1978, power was transferred to the then vice president *Daniel Arap Moi*. As mentioned above, the independence constitution of Kenya went through significant revisions. The *Moi* era also saw further amendments to the Constitution. President Daniel Arap Moi's term of office saw the strict censorship of the opposition and denial of the public the opportunity to participate in the democratic process. This included the repealing of a constitutional provision which turned Kenya into a one party state.⁴⁴ These changes, which, for all intents and purposes, were driven by personal interests of the ruling class, undermined the fundamental values and principles underlying the post independence constitution that had provided for a power sharing regime and political participation.⁴⁵ Civil society organisations did not enjoy free political space and they were rather intimidated by the strong government machinery. Civil society organizations had no role in the constitutional development since most of them had been intimidated into silence through de-registration, denial of licence and those that remained active had been incorporated into state apparatus and programmes.⁴⁶

2.3. From defacto one party state to de jure one party state

In 1982, the ruling KANU regime enacted a constitutional provision, section 2A amendment, which turned Kenya from a *defacto* one party state to a *dejure* one party state.⁴⁷ The section,

⁴³ Mutua (n 54 above) 65.

⁴⁴ Repeal of section 2A of the Constitution of the Republic of Kenya.

⁴⁵ GK Kuria The Constitutional implications of the East African cooperation in, K Kibwana, (ed) *Human rights and democracy in East Africa: The Constitutional Implications of East Africa cooperation* (1997)33.

⁴⁶ A Fowler *Political dimensions of NGO expansion in eastern and southern Africa and the role of international Aid* (1990) 60.

⁴⁷ Abdirizak (n 1 above) 1

which was strongly opposed by the civil society and academia, outlawed political parties from participating in Kenyan politics.⁴⁸ Although a number of factors could be attributed to this particular measure of the KANU government, the need to muzzle and prevent opposition parties and other political actors from springing up was visible.⁴⁹ Massime and Kibara believe opposition and civil society organisation had a false notion that pluralism would naturally lead to democracy and constitutionalism.⁵⁰

The constitutional history of Kenya was at stake again in 1988 when President Daniel Arap Moi abolished the secret ballot and introduced queue voting. This was happening at a background of fear for repression among the population and opposition politicians.⁵¹ This was a defining moment in Kenya's quest for democracy since the population could not freely participate in governance issues of the day because of the fear perpetrated by the regime in power. From the period of 1964-1990, thirty amendments were made to the constitution and the net effect was the legitimisation of the dictatorship and denial of the opposition to participate in government.

⁵²

The rising opposition from the academia, civil society groups and internal political party dissent from those who had been sidelined engaged the regime. President Daniel Arap Moi and the KANU party could not stand the political pressure and international criticism.⁵³ In December 1991, international pressure, coupled with domestic agitation to free the political space, saw President Arap Moi succumb to the wishes of the people and a new era of multiparty politics began in Kenya.⁵⁴

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⁴⁸ Kibara (n 36 above) 2.

⁴⁹ Abdirizak (n 1 above) 1.

⁵⁰ K Massime & G Kibara *Kenya's constitutional evolution (1895-2001)* (2001)18.

⁵¹ Matua (n 33 above) 67.

⁵² Abdirizak (n 1 above) 1.

⁵³ D Throup & C Hornsby *Multi-Party politics In Kenya: The Kenyatta & Moi States & the Triumph of the System in the 1992 Election* (1998) 2

⁵⁴ Throup & Hornsby (n 64 above) 2.

2.4. Kenya under multipartism (1993- 2002)

In 1991 Section 2A of the Constitution was repealed and that paved the way for multiparty politics.⁵⁵ The return to multiparty politics was welcomed by the international donors community and internal political opposition.⁵⁶ The introduction of multiparty politics saw, among others, the removal of the responsibility of elections to a newly constituted Electoral Commission, the restriction of the tenure of the President to two five years terms and the restoration of the security of the tenure of the High Court and Court of Appeal Judges, among others.⁵⁷

The 1992 general elections, the first after the restoration of multiparty system, were won by the incumbent President Arap Moi despite claims of irregularities and lack of transparency.⁵⁸ The opposition parties and civil society organisations teamed up to form the National Conventional Assembly whose executive organ was the National Convention Executive Council (NCEC).⁵⁹ They were convinced that regime change was not possible without constitutional reforms.⁶⁰ A group of parliamentary political parties, including those that had agitated for the formation of the NCEC, known as the Inter-party Parliamentary Group,⁶¹ agitated for reforms that were geared towards levelling the ground for political parties to participate in the 1997 general elections.⁶²

After the 1997 elections, an act of parliament was passed providing for the setting up of a commission to comprehensively review the constitution. The emerging opposition and the pressure from civil society organisation led President Moi to assent to the formation of the Constitution of Kenya Review Commission (CKRC) that would spear head the process of

⁵⁵ E Nowrejee 'Kenya: Political pluralism, government resistance and the United States responses' *Harvard Human Rights Law Journal* 5 (1992) 149.

⁵⁶ Norwejee (n 56 above) 149.

⁵⁷ S Schmidt & G Kibara *Kenya on the path toward democracy? An Interim Evaluation: A qualitative assessment of political development in Kenya between 1990 and June 2002*, (2002) 14.

⁵⁸ See Mutua (n 33 above) 86.

⁵⁹ Abdirizak (n 1 above) 3.

⁶⁰ W Mutunga *Constitution making from the middle: Civil society and transition politics in Kenya* (1999) 112.

⁶¹ Kindiki (n 1 above) 153.

⁶² Abdirizak (n 1 above) 7.

constitutional amendments.⁶³ This did not ease the process as a pressure group formed by the religious leaders called *Ufungamano* formed the NGO people's Commission of Kenya to draft a new Constitution.⁶⁴ The Kenyan people thought that Kenya was finally going to be blessed with a constitution that was people driven.⁶⁵

The CKRC was, however, vulnerable to the executive and the National Assembly because of the influence and meddling by the Parliamentary Select Committee (PSC), which was made up of members of parliament charged with the constitutional review process.⁶⁶ The President appointed the chair of the CKRC and its commissioners. The impartiality and transparency of the CKRC was compromised since they had to work according to the tunes of the regime. Since they were nominated by the president, they remained accountable to him rather than to the people. The people were not involved and this denied the people of Kenya the opportunity to participate in the process of constitutional making.⁶⁷

While KANU and its ruling partners argued for a parliamentary review process, the *Ufungamano* Initiative pushed for a people driven, an all inclusive and participatory process. The two divergent positions were later reconciled and a compromise was reached that saw the adoption of a parliamentary review and the participatory process by the *Ufungamano* through the 2001 Constitution of Kenya Review Act.⁶⁸ After a period of protracted political struggle and differences regarding the process of constitution making, President Moi, using his powers under the Constitution of Kenya, dissolved Parliament and this brought an end to the constitutional review process as Kenyans headed to elections in 2002.⁶⁹ The opposition parties had learnt some lessons from the previous elections and, sensing a defeat, teamed up to form the National Rainbow Coalition (NaRC) that eventually triumphed over the giant KANU regime on 27 December 2002.

The various attempts to review the Constitution of Kenya were unsuccessful in so far the participation of the public is concerned and the process remained elite driven. The opposition could not push for constitutional reforms and a people driven constitution making process

⁶³ Mutua (n 33 above) 118.

⁶⁴ Mutua (n 33 above) 112.

⁶⁵ Mutua (n 33 above) 113.

⁶⁶ Mutua (n 33 above) 125.

⁶⁷ Mutua (n 33 above) 125.

⁶⁸ Abdirizak (n 1 above) 3.

⁶⁹ SN Ndegwa 'The Incomplete transition: The constitutional and electoral context in Kenya' (1998) 45 *Africa Today* 197.

because the KANU government needed to protect its regime by keeping the people out of the participatory processes. The victory by the coalition parties that brought President Mwai Kibaki⁷⁰ to power was regarded by many as an opportunity to have a new constitution in place.

2.5. The Kibaki Era: The promise of a new constitution (2002 -to the present)

NARC had campaigned for reformist tendencies and a return to constitutional order. When the Kibaki government came to power in 2002, it promised the people of Kenya a constitution within 100 days of its inauguration.⁷¹ The national leaders of NaRC signed an agreement with religious leaders to effect constitutional reforms.⁷² The coalition partners had agreed on power-sharing that gave the National Alliance Party of Kenya (NAK) the presidency while the premiership was reserved for the Liberal Democratic Party (LDP).⁷³ The power sharing deals are important. Once the political players are not satisfied with the outcome of the deal, then the efforts of the people to come up with a constitution are frustrated by the politicians whose interests have not been served, leading to the politicisation of the constitution making process.

2.5.1. The National Constitutional Conference (the Bomas)

As soon as they assumed power, differences emerged over the composition and roles of the Constitution of Kenya Review Commission (CKRC)⁷⁴, the Parliamentary Select Committee (PSC) on constitutional review⁷⁵ and the National Constitutional Conference (NCC).⁷⁶ Differences on the composition of the delegates and regional representation threatened to derail the process

⁷⁰ President Mwai Kibaki was elected third president of Kenya and KANU's long standing reign came to end. The coalition parties had agreed on a power sharing deal.

⁷¹ Open Society Initiative for Southern Africa (OSISA) *Constitutional review and reform; and adherence to the democratic principles in constitutions in southern African countries* (2007) 9.

⁷² Abdirizak (n 1 above) 4.

⁷³ Mutua (n 33 above) 151.

⁷⁴ This was a commission set up to spearhead the constitutional review process.

⁷⁵ A Committee made up of members of parliament to deal with the constitutional review process. This is one of the parliamentary committees.

⁷⁶ Mutua (n 33 above) 151. This would be a composition of all groups and people representative in the constitution making process.

and frustrate the opportunity for the NCC to have a constitution drafted. The first conventional conference meeting, known as the *Bomas I*, deemed to fail as it collected only views of the delegates just as the previous Constitution of Kenya Review Commission (CKRC) had done under President Daniel Arap Moi.⁷⁷ The second conference, known as the *Bomas II*, which was held in late September 2003, created technical working groups that would report to the plenary.⁷⁸ The working groups again become battle grounds for the various factions similar to what had occurred to the previous CKRC under the Moi regime without inclusively involving the people. The last conference, known as *Bomas III* of March 2004, was more contentious as the LDP-KANU majority voted the Draft Constitution while the other parties walked out of the conference.⁷⁹ The failure of the parties to agree to a common draft showed the weakness and institutional problems that affected Kenyan moment of having a constitution.

The Kibaki government delayed the key reforms included in the draft that emerged from the National Constitutional Conference, such as the reduction of presidential powers, the creation of a new post of a prime minister, parliamentary oversight of the central government, land rights and judicial independence. The government finally put the draft to a national vote in 2005 and *Raila Odinga*, leader of Orange Democratic Movement(ODM) and those opposed to the draft, won an easy victory as the draft was rejected by the people of Kenya. Kenya's struggle for constitutional reform was back to square one and it went to the 2007 election without constitutional reform.⁸⁰

Although many have hailed the *Bomas* draft as inclusive and participatory, *Muli* believes that many Kenyans do not know the provisions of the *Bomas* draft.⁸¹ A meaningful participation can only be ensured if the people are sensitized and are aware of the process and the content. The legitimacy of a constitutional process and the constitution itself should be measured on how the process has been participatory, inclusive and democratic.⁸²

⁷⁷ Mutua (n 33 above) 151.

⁷⁸ Mutua (n 33 above) 151.

⁷⁹ Kindiki (n 33 above) 154.

⁸⁰ Mutua (n 33 above) 159.

⁸¹ Muli (n 31 above) 3.

⁸² P R William *The Constitution Making Process* (2006) 1.

2.6. The post election violence and the Coalition Government.

The 2007 Kenyan disputed presidential elections claimed more than 1200 lives and displaced an estimated 350,000 people.⁸³ The violence came to an end following the signing of an agreement that led to the establishment of the coalition government. The Coalition Agreement was signed on 28th February 2008 by Raila Odinga of the Orange Democratic Movement and President Mwai Kibaki for the government and the party of National Unity.⁸⁴ The most important point for the purpose of this research is the process of constitutionalisation of the Agreement and the Act by the coalition government.

While discussing the state of constitutionalism in Kenya today and analysing the current constitutional review process, there is need to look at the effect of the National Accord and Reconciliation Act and the constitutionalisation of the Accord.

The Kenya National and Reconciliation Act had set an agenda and time limit to deal with the long term issues including the constitutional review process. The parties agreed that the constitution belongs to the people of Kenya and they should be consulted at all stages of the process, including the formation of the process itself, the draft, the parliamentary process and the final enactment.⁸⁵ The proceeding section discusses the constitutional review process that is currently underway and its legal frame work.

2.7 The Constitution of Kenya review process of 2009

2.7.1 Constitutional review as part of the peace pact.

The constitutional review process in Kenya was among the major items listed during the Kenya national reconciliation dialogue that brought together the protagonists to a power sharing agreement. The Kenya National Dialogue and Reconciliation Act, which was adopted to address the post election violence, has included, among its objective, three specific agenda: the immediate cessation of hostilities after the post election violence, the aversion of the

⁸³ See report (n 11 above) 1.

⁸⁴ See Agreement signed 14th march 2008 by the coalition partners and Oluyemi Adenji as session chair from the group of eminent persons available at <<http://www.dialoguekenya.org/agreements.aspx>> (accessed 15 September 2009).

⁸⁵ See Agreement (n 84 above).

humanitarian crisis and the promotion of reconciliation and healing.⁸⁶Agenda four dealt with long term issues like institutional reforms and ensuring a constitutional review process for Kenya before the 2012 elections. The question remains on whether the deadline set for the coalition government to have a constitution in place can be achieved without necessarily neglecting the need for meaningful participation of the people.

2.7.2 The legal framework for the constitution making process.

2.7.2.1 The Constitution of Kenya Amendment Act and the Constitution of Kenya Review Act 2008

The constitution review process in Kenya was initiated by the Constitution of Kenya Amendment Act and the Constitution of Kenya Review Act. The Constitution of Kenya Review Act 2008 provides the legal framework for the review process. It establishes four organs to facilitate the review process and sets out the procedure through which the four organs will work to achieve consensus on contentious issues and to be followed by a referendum in which all eligible voters will decide on the proposed constitution.

2.7.2.2 Guiding principles of the review process

Sections 4,6,23 and 29 of the Review Act provide for the guiding principles for the review process. This is aimed to serve as framework that guides the organs responsible for the review process. The guiding principles set out in the Review Act include:

- Ensuring that national interests prevail over regional or sectoral interests and that there should be accountability to the people of Kenya;⁸⁷
- The review process should be able to accommodate the diversity of the people and to ensure that the people of Kenya have the opportunity to actively, freely

⁸⁶ Kenya National Dialogue and Reconciliation Act available at <<http://www.dialoguekenya.org/docs/Project%20context%20and%20summary%20of%20findings.pdf>> (accessed 15 September 2009).

⁸⁷ See section 6(a) (b) The Constitution of Kenya Review Act, 2008 on the guiding principles 7.

and meaningfully participate in generating and debating proposals on a new constitution;⁸⁸

- The process must be guided by the principles of stewardship and responsible management, respect for principles of human rights, equality, affirmative action, gender equality and democracy.⁸⁹

The above principles are aimed at ensuring that the outcome of the process faithfully reflects the wishes of the people of Kenya.

The four organs established by the Review Act include; The Committee of Experts, the Parliamentary Select Committee, the National Assembly and the Referendum.⁹⁰ In addition, section 31 of the Review Act provides for a reference group of representatives of interest groups to be identified in the Act and will be an integral component of the process. We shall examine the role of the Committee of Experts and the Parliamentary Select Committee in the review process.

2.7.2.3 The Committee of Experts

The Committee of Experts is expected to finalize its work within 12 months.⁹¹ The time allocated to the Committee of Experts seems to have been set in accordance with the term of office of the coalition government and the period of the transition to the elections. The Committee of Experts is supposed to have a constitution before Kenya goes to elections. It seems that the period was set up to see the end of the transition without putting much emphasis on the participation of the people and the differences that might take time to be resolved.⁹² The failure to agree especially by the coalition partners on the form of government and devolution of power might require the extension of the set period.

The Committee of Experts (CoE) is required among other things to:

⁸⁸ See section 6(c) (d) (i) (n 88 above) 7.

⁸⁹ Section (6) (d) (ii) (IV) Kenya Review Act, 2008 8.

⁹⁰ See section 5 Constitution of Kenya Review Act, 2008.

⁹¹ <<http://www.coekenya.go.ke/>> constitutional Review map (accessed 15 August 2009).

⁹² Committee of Experts should have flexible time frames to accommodate any differences and delays that may occur see OSISA (n 71 above) 28.

- identify the issues already agreed upon in the existing draft constitutions;
- identify issues that are contentious and not agreed upon in the existing draft Constitutions,⁹³
- solicit and receive from the public written memorandum and presentations on the contentious issues,⁹⁴
- undertake thematic discussions with caucuses, interest groups and other experts facilitate civic education in order to stimulate public awareness on constitutional issues,⁹⁵
- articulate the respective merits and demerits of the proposed options for resolving contentious issues,
- make recommendations to the Parliamentary Select Committee on the resolution of contentious issues, and
- prepare a harmonized draft constitution for presentation to the National Assembly and liaise with the Interim Electoral Commission to hold a referendum on the Draft Constitution.

The Committee will study the existing draft constitutions and other related material and prepare a report on the issues that have been agreed upon as being contentious and those that are not contentious.⁹⁶ The identification of these issues will be prepared with the consultation of the public, interest groups and experts on contentious issues and a harmonized Draft Constitution will be prepared.⁹⁷ The harmonized draft constitution will be published and the public will have 30 days to comment and make suggestions.

The Committee has met various representatives of political parties on what should be included as contentious issues. It has already met the 47 representatives of the political parties⁹⁸ and has received submissions from two major parties namely the Orange Democratic Party (ODM) and

⁹³ See Section 23 (b) (c) of the Review Act.

⁹⁴ See (n 87 above).

⁹⁵ See section 30(2) of the Review Act.

⁹⁶ Section 23, Review Act.

⁹⁷ 'The Road to Review of the Constitution of Kenya' *The Standard* 18 June 2009 28.

⁹⁸ *The Standard* (n 97 above) 1.

the Party for National Unity (PNU).⁹⁹ It has identified the following issues as contentious issues: the type of government, devolution of power and transitional measures. The 47 registered party representatives want the inclusion of equal representation, right to life, *Khadi courts*, land distribution and land ownership among the list of contentious issues.¹⁰⁰ The representatives of the parties, especially those dominated by coastal Muslims, have proposed the inclusion of *Khadi courts*¹⁰¹ and the two protagonists' parties have submitted proposals with different views on the structure of government and the devolution of power.¹⁰² The issue of land and the rights of women to inherit land have been ignored by the Committee.¹⁰³

The final document that will include the views of the public will then be consolidated and presented to the parliamentary select committee for deliberation and consensus building on the contentious issues.

2.7.2.4. The use of draft constitutions

Section 29 of the Review Act mandates the Committee of Experts to use as reference the records of the views that were received from the Kenyans by the dissolved Constitution of Kenya Constitutional Review Commission (CKRC), The Constitution of Kenya Review Commission draft submitted to the *Bomas* Constitutional Conference later known as the (*Ghai* Draft)¹⁰⁴, The Constitutional Conference Draft (*Bomas* Draft) and the proposed new Constitution 2005(*Wako* Draft).¹⁰⁵ Both the *Bomas* and the *Wako* draft were rejected and a question remains whether the decision to consider using drafts rejected by the people of Kenya would not jeopardize the legitimacy of the process. The committee of experts is supposed to ensure a people driven

⁹⁹ 'Bomas ghost threatens to scuffle review' *Sunday Nation* 21st May 2009 1.

¹⁰⁰ 'The Coast not yet clear for Law Review Team' *The Standard* 09 June 2009 1.

¹⁰¹ 'Committee of Experts over looked key issues in the review' *The Standard* 6 September 2009 1, See also in the same paper the Comments by the Sheikh Sharrif Hussein the organizing Secretary of the Supreme Council of Kenya Muslims, 2.

¹⁰² *The Standard* (n 101 above) 1.

¹⁰³ *The Standard* (n 101 above) 2.

¹⁰⁴ Yash Ghai is an expert on Constitutional law that once chaired the Constitutional Review Process but later resigned citing interference from the government.

¹⁰⁵ Wako was the state attorney general and the draft was named after him.

process. As it has been demonstrated in the past, if the legislature or parliament decides matters without the approval and participation of the people, the process will be challenged.¹⁰⁶

2.7.2.5 The Parliamentary Select Committee.

The Review Act requires that the Parliamentary Select Committee reaches a consensus on draft constitution. The Committee of Experts will revise the draft constitution in accordance with the consensus achieved by the Parliamentary Select Committee. The select committee will then table the draft constitution before the National Assembly which may approve the draft without amendments or propose amendments.¹⁰⁷

In situations where the National Assembly approves the draft constitution, it will submit it immediately to the Attorney General for preparation of a referendum. If amendments have been proposed, the Committee of Experts must revise the draft and resubmit it again to the Assembly. It becomes more problematic in situation where the National Assembly does not reach agreement and this will necessitate the Committee of Experts, the Parliamentary Select Committee and the reference groups to meet and discuss the problematic issues. However, this process is limited by time and may take more than 7 days that have been scheduled.¹⁰⁸ The National Assembly must approve the final draft within 14 days and submit it to the Attorney General for publication.¹⁰⁹ The

2.7.2.6 Conclusion

The Constitution making process in Kenya is underway and it should be completed within 100 days. The Committee of Experts have identified the contentious issues as including devolution of power and structure of government, on whether it will be Parliamentary or a hybrid system.¹¹⁰ The central question remains whether the ordinary citizens have played meaningful

¹⁰⁶ See *Njoya and others v Attorney and others* [2004] LLR 4788 (HCK). The *Njoya* and others brought by the applicants on 17th February 2004 shows how the citizens of Kenya have used Courts to challenge process that denies the people the right to participate.

¹⁰⁷ *The Standard* (n 97 above) 28.

¹⁰⁸ *The Standard* (97 above) 28.

¹⁰⁹ *The Standard* (97 above) 28.

¹¹⁰ <<http://kenyaun.org/documents/contentiousissues.pdf>> (accessed 15 October 2009) 1-3.

role in deciding the contentious issues and whether the Committee of Experts has consulted the various communities and sections of people in Kenya.

In order to ensure meaningful participation and bring in a constitution that enjoys legitimacy, there are some normative and basic principles of constitutional making that should be adhered to. The next chapter explores the contextual understanding of meaningful participation in a constitutional making process



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CHAPTER THREE

NORMATIVE STANDARDS AND THE CONCEPT OF PUBLIC PARTICIPATION

3.0. Introduction

An examination of Kenya's road to constitution making begs the question whether there are normative guidelines against which constitution making in Kenya can be judged. There are no universally accepted norms and standards that apply to constitution making. Different modalities and methods of constitution making have been adopted by different countries. The starting point for any constitutional system is necessarily a political fact and the process is a political decision that aims at addressing a political and sociological fact often known as the *Grundnorm*.¹¹¹ Kelsen has argued that the *Grundnorm* determines the process and the content.¹¹² There seems to be a consensus that people are the custodians of democracy and should be involved at all stages of constitution making. The process must empower the people rather than inhibit them by creating opportunities and avenues for individual effective participation.¹¹³ A Zimbabwean High Court judge, Ben Hlatshwayo, succinctly summarized the point by emphasising that 'modern ideas on constitution making place emphasis on popular participation and wide spread consultation in order to produce a constitution and which the people feel is truly their own'.¹¹⁴ This says that citizen's level of involvement in the process of constitution making determines the legitimacy of the process. There is also need to ensure the involvement of civil society organisations.¹¹⁵

By making reference to relevant literature and various international legal instruments, this chapter outlines some of the normative standards that apply to constitution making. Whenever relevant, it seeks to illustrate the norms by making reference to the experience of other countries.

¹¹¹ The Grund-norm is like the prior Constitutional question that needs to be answered. It is like the foundation and the basis of the constitution process and substance.

¹¹² E McWhinney *Constitution- making: principles, process and practice* (1981) 12.

¹¹³ S Mwale *Constitution review: The Zambian search for an ideal constitution making*, paper presented at the 10th African Forum for Catholic social teaching (AFCAST) working group meeting, 02 may 2006, Nairobi Kenya 2.

¹¹⁴ I Mawire *Democratisation and constitutionalism through constitution-making process in zimbabwe* <<http://zimpolitical.blogspot.com/2009/07/democratisation-and-constitutionalism.html>> (accessed 9 July 2009).

¹¹⁵ M Hansungule *Experiences at Constitution-making in SADC: The Zambian experience* (2004) 28.

1. Normative standards for constitution making

1.1. Effective Participation: The right of rights.

The notion of public participation has not been fully defined. It is, however, a concept that is widely recognised by both international and regional legal instruments. Participation purports the legitimation of a new political order by creating a link between the framers of the constitution and the public.¹¹⁶ The right to constitution making is derived from the right to 'democratic participation' as provided under the United Nations Declaration of Human Rights. Article 21 of the United Nations Declaration on Human Rights recognises the concept of public participation as 'democratic participation' where as Article 25 of the International Covenant on Civil and Political rights provides for every citizen's rights to take part in the conduct of public affairs.¹¹⁷ Article 13 (1) of the African Charter provides for public participation.¹¹⁸ The content of public participation¹¹⁹ has been expanded and developed to include other rights like political equality, freedom of speech and association.¹²⁰ In the context of constitution making, public participation has been viewed to include openness throughout the constitution making process, access to information and shared responsibilities between the government and the civil society.¹²¹

Effective public participation implies the involvement of the public at all stages of the constitution making including in the selection of members of the review process. The process of constitution making can only claim legitimacy and credibility if the people have been meaningfully involved in each stage of the process. There is need to involve the people at all levels whether in a constituent assembly or through a referendum.¹²² In some cases, the role of the public is limited to providing input in the drafting of the constitution and in the final

¹¹⁶ G Hyden & D Venter *Constitution-making and democratization in Africa* (2001) 20.

¹¹⁷ V Hart *Democratic constitution making: (2003)* 5 available at <<http://www.usip.org>> (accessed 20 October 2009). See also United Nations Human Rights Committee General Comment on Article 25 of the ICCPR, 12 July 1996 about citizen participation of public affairs especially in choosing and changing their constitution.

¹¹⁸ C Heyns & M Killander (eds) *Compendium of key human rights documents of the African Union* (2007) 32.

¹¹⁹ S De Villiers *A people's government. The people's voice* (2001) 159.

¹²⁰ V Hart (n 117 above) 6. See the right to participation and the accompanying 'penumbra rights'.

¹²¹ De Villiers (n 119 above) 159.

¹²² M Thiankolu *The Constitutional review cases: emerging jurisprudence* (2006) available at <http://www.kenyalaw.org/Downloads_Other/thiankolu_landmarks.pdf> (accessed 8 August 2009) The Kenyan Courts have in the *Njoya* case implicitly mentioned the 'constituent power' of the people being the constituent assembly and a compulsory referendum.

decision making process of voting through referendum.¹²³ Often, the public is not informed about the key individual players including the review commissioners and experts although the selection of the commissioners and experts marks the formal beginning of the process.

Issues like how and when the people should be involved in constitution making process have been a subject of debate.¹²⁴ In constitution making, public participation can come in different forms namely a constituent assembly, public meetings and a referendum.¹²⁵ Public participation can also be conducted in various ways, such as using the media and organising public meetings, depending on the available resources and the geographical area of coverage.¹²⁶ This is not always an easy task. The South African constitution making process demonstrates the difficulty of engaging in effective dialogue with a wide population of 40 million people in a constitution making process.¹²⁷ The people should decide whether the process should be carried out by a general convention gathering, target groups or visiting each constituency in order to get their views on the process and content.¹²⁸ Effective participation also implies that each community, including minorities and the disadvantaged should be consulted.¹²⁹ The quality of the process is determined by ensuring the participation of all those who have views and grievances which makes participation genuine and not a charade.¹³⁰

1.2 Consultation on the process and the content

The process of constitution making should be guided by consultation which yields to accountability.¹³¹ The consultation process should be transparent and inclusive.¹³² The South African Constituent Assembly pursued consultation based on the fundamental components of political representation, organized formations outside parliament and individual citizens.¹³³ The

¹²³ Y Ghai, 'The Constitution reform process: Comparative perspectives 'towards inclusive and participatory constitution making' 3-5 August, 2004 Kathmandu, Nagarkot 7.

¹²⁴ Mc Whinney (n 112 above) 27.

¹²⁵ Mc Whinney (n 112 above) 27.

¹²⁶ H Ebrahim *The Soul of Nation: Constitution making in South Africa* (1998) 242.

¹²⁷ Ebrahim (n 126 above) 241.

¹²⁸ De Villiers (n 119 above) 159.

¹²⁹ V Hart (n 117 above) 9.

¹³⁰ V Hart (n 117 above) 9.

¹³¹ S Skjelton *Public participation in the South African constitution making* (2006) 43.

¹³² Skjelton (n 131 above) 51.

¹³³ Skjelton (n 131 above) 40.

South African process aimed at not only ensuring that people are part of the process but also that the process had to be seen transparent and open. Consultation empowers the people since they are able to make effective contributions and submissions, indicating what they want to be included in the constitution.¹³⁴

The people as the custodians of the constitution should be involved in identifying the contentious issues and setting up the agenda for the constitution review commissions. Empirical evidence regarding the process of constitution making indicates that the process itself is not decisive without considering its prior creation and adoption.¹³⁵ In situations where the people are not consulted in determining the contentious issues and challenging the credibility of the commissioners, the process risks legitimacy.¹³⁶ Mavuto indicates that the Malawian constitution making process lacked legitimacy as the process was dominated by the local and international experts.¹³⁷ Further more, none of the members of the National Constitution Commission held office by virtue of elections or had any direct mandate from the people.¹³⁸ As a result, the Malawian constitution making process reflected the views of international experts who were influenced by western donors; it is thus no wonder that it was considered one of the world's most liberal constitutions.¹³⁹ The lesson is that the choice of members of the commission and the process to be employed should not be reserved only to the political parties and the executive. The process of consultation should not be limited to the residents of urban areas but should be also extended to rural population. The process must also be inclusive so as to cater for the various interests of the different groups in society, otherwise the process might end up being an elite driven process rather than a people driven process.

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¹³⁴ H Ebrahim (n 126 above) 241.

¹³⁵ A Sajo *Constitution with out constitutional moment: A view from the new member states* (2005) 3 International Journal of Constitutional law 243.

¹³⁶ Mavuto (n 22 above) 15.

¹³⁷ Mavuto (n 22 above) 14.

¹³⁸ J Banda *The Constitutional change debate of 1993-1995(1998)* quoted by HH Mavuto *popular participation in constitution making: The experience of Malawi* (2007) 15.

¹³⁹ FE Kanyongolo *'the limits of liberal democratic constitutionalism in Malawi'* in K M Phiri & K R Ross *Democratisation in Malawi* in HH Mavuto *Popular participation in constitution making : The Malawian experience* (2007) 16.

1.3 Inclusiveness of the process

1.3.1 The role of civil society organisations.

Civil society organisations have been recognised as an important force in constitution making process.¹⁴⁰ Members of the civil society, both registered and unregistered, should be allowed to present their views both on the content and the process of constitution making. The South African constitution making process demonstrated the important role of the civil society in constitution making. The submissions by gender activists groups and other civil society organisations clearly had an impact on the constitution making process.¹⁴¹ The South African experiences shows that civil society organisations were successful when they worked together on issues, especially lobbying for a comprehensive bill of rights in the constitution.¹⁴² Civil society organisations in South Africa, such as the Legal Resource Centre and the National Association of Democratic Lawyers provided submissions for the inclusion of socio economic rights in the constitution.¹⁴³

During the South African constitution making process, members of the civil society took ownership of the process by contributing substantially to the process and carried out and disseminated information about constitution making to the members of their organisations.¹⁴⁴ Ebrahim has noted that, since the South African constituent assembly could not reach more than 40 million people, the strategy of reaching the 'people who reach the people' worked out better and had an impact on the constitution making process.¹⁴⁵

It has been argued that since most African societies are divided along ethnic lines, initiatives from civil society groups will address divisions. This is especially true of civil society organisations that are representative of groups, tribes and ethnicities. The capacity of these civil society organisations to listen and represent their people is drawn from Bratton's argument that ethnic heterogeneity in leadership and staffing is as relevant to maintaining legitimacy in civic

¹⁴⁰ Hansungule (n 115 above) 29.

¹⁴¹ De Villiers (119 above) 134.

¹⁴² See 'the cooperation of the Black Sash and the National Coalition for Gay and Lesbian Rights' in De Villiers (n 119 above) 134.

¹⁴³ De Villiers (n 119 above) 135.

¹⁴⁴ De Villiers (n 119 above) 104.

¹⁴⁵ De Villiers (n 119 above) 104.

organisations as in the African state.¹⁴⁶ The civil society organisations that are capable of representing the people are those that have are ethnically based and structured

1.3.2 The role of religious leaders

The right to religion and belief is enshrined in most international human rights documents. Each religious group ought to be represented and their views need to be taken into consideration. Religion plays an important role in society 's organisation and functioning. The constitution making process ought to include the various religious leaders and faith groups so as to achieve an inclusive constitution.

1.3.3 The role of women

Constitution making ought to be inclusive and must protect all especially vulnerable members of the community. In most African patriarchal societies where women have limited or no rights, constitution making is an opportunity to address gender inequality. Women participation in the constitution making process is also very important for fostering democracy and human rights. Women associations, both rural and urban, should be involved in the consultation phase. In South Africa,

[w]omen played an important role in the... constitution making process...were able to bring shared experiences and perspectives, across party lines. More important women were able to act in a united way in respect of gender-related issues like treatment of rural women under customary law. These issues were later resolved in favour of equality of women.¹⁴⁷

The South African experience of involving women had been adopted by the Afghanistan constitution making process that took place in 2003 although the treatment of women differ in

¹⁴⁶ G R Murunga 'Review essay civil society and democratic experience in Kenya: A review of constitution making from the middle: Civil society and transition politics in Kenya, 1992-1997' (2000) 4 African Sociological Review 97.

¹⁴⁷ De Villiers (n 119 above) 13. See also IDEA report on the South African constitution making process and the role of women (2000) 37-8.

the two societies, especially with regard to culture and religion.¹⁴⁸ The Rwandan process of constitution making provides more practical examples of a post conflict society, where network organisations through out the country mobilised a multifaceted campaign to address gender equality in the constitution making process.¹⁴⁹ In Rwanda, women organisations organised consultative forums aimed at encouraging women to participate in the constitution making process.¹⁵⁰ The empowerment and involvement of women in the constitution making process is a paramount factor in ensuring inclusiveness.

1.3.4 Minorities and marginalised

The process of constitution making should put into account the concerns of minorities and the marginalised. The minorities could be tribal, religious or other divides depending on a particular society. The disadvantaged include all those who have been exploited by the political, economic and social structures.¹⁵¹ In any process of decision making, equal rights and justice should be of primary consideration.¹⁵² The exclusion of minorities from the process of constitution making affects the democratic character of the process. As noted by Osisa,

...if an elite group determines the fundamental rights which are essential component of democracy they face the charge of being undemocratic. If it is left to the majority to determine these rights, the majority, in its own interest, exclude a norm, such as that of equality, which by some international standards is regarded as an essential component of democracy.¹⁵³

¹⁴⁸ De Villiers (n 119 above) 13. The Afghanistan constitution making process was characterized by intimidation, threats and harassment of women. The Afghanistan society is mainly Islamic with strict Islamic laws that hinder women's right to association and movement.

¹⁴⁹ AM Banks 'Challenging political boundaries in post conflict societies' (2007) 29 University of Pennsylvania Journal of International Law 105.

¹⁵⁰ Banks (n 149 above) 150.

¹⁵¹ B Knight et al; *Reviving democracy: citizens at the heart of governance* (2002) 76.

¹⁵² Knight (n 151 above) 76.

¹⁵³ Osisa (n 71 above) 27.

1.4 Control of the agenda

Constitutional law expert Vivien Hart suggests that the people should be involved in all stages including the pre, during and post phases of the drafting of a constitution.¹⁵⁴ The constitution making process should be controlled and owned by the people who form the 'constituent power'. McWhinney weighs the role of the technicians and the people to whom he refers to as the general community.¹⁵⁵ He is of the view that even if both are needed, the people need to have greater role on what should be included in the Constitution.¹⁵⁶

The question of control of the agenda arises in especially situations of power sharing where the constitution becomes a negotiated instrument among political players. In both South Africa and Rwanda, the elites framed the campaigns and provided personnel to the constitution making process but gave room for the public to effectively participate in the process by receiving submissions and visiting the rural communities.¹⁵⁷

In some situations Parliament and political parties drive the process and the people are often neglected throughout the process. There have been controversial debates on the repository of the sovereign power since even constituent assemblies are representatives of the people.¹⁵⁸ The people ought to participate through a structured process at all stages and the parliament should not determine the process. There were instances where the people have clearly rejected the role of parliament to control the agenda of constitution making.¹⁵⁹ Political struggles and infighting within the various political parties in parliament may usurp the process from being a people driven process to a parliamentary driven process. This renders the people's participation marginal as the process becomes politicised. The element of ownership leading to legitimacy can only be effective in case there has been enough civic education and understanding by the public. The participation can only be effective when the public understands the process as well as the content.

¹⁵⁴ Osis (n 71 above) 7.

¹⁵⁵ Mac Whinney (n 112 above) 26.

¹⁵⁶ Mac Whinney (n 112 above) 26.

¹⁵⁷ De Villiers (119 above) 13.

¹⁵⁸ Thiankolu (n 117 above) 17.

¹⁵⁹ Muli (n 31 above) 3.

1.5. The level of civic education and awareness campaigns

The process of constitution making must empower the people through civic education programmes. The population must be educated about the role they are supposed to play in the process of constitution making. The people must be informed about the constitutional framework and the possible considerations available to them in forming the constitution.¹⁶⁰ The Rwandan and South African constitution making processes have been hailed for the levels of education campaign they conducted both in the rural and urban communities.¹⁶¹

The South African experience of constitution making provides a good example on the role of a civic education programme that target grassroots.¹⁶² The South African Constituent Assembly decided to run an extensive constitution education programme before seeking for public submissions. It has been noted that constitutional education is not only important for quality submissions but it also creates awareness in the community.¹⁶³ The public education programmes help in situations where the process is politicised and the people are inclined to vote for parties and leaders instead of the document.¹⁶⁴

Civic education programmes should target all groups of people including women, the marginalised and disadvantaged communities. Civic education can take various forms including disseminating information in public gatherings, workshops and the media. It should also include visiting constituencies since the majority of the people can not access newspapers, radio and television. In the case of South Africa, Skjelten notes that,

Due to the fact that a significant proportion of South African population, often illiterate or semi illiterate was unable to access information about the constitution- making process, either

¹⁶⁰ S Brooke 'Constitutional-making and immutable principles (2005) in HH Mavuto *Popular participation in constitution making: The Malawian experience* (2007) 3.

¹⁶¹ Osis (n 71 above) 30.

¹⁶² Skjelten (n 131 above) 77.

¹⁶³ Skjelten (n 131 above) 77.

¹⁶⁴ Some politicians who think the Document does not favour them will often incite the population to vote against it. A clear example is the Kenyan Constitution making process popularly known as the Bomas Draft which despite the fact that some people think it was inclusive and participatory was rejected due to the political battles among the party leaders.

in print media or television, the need for constitutional education about the public participation programme was crucial.¹⁶⁵

The provision of information is one of the basic elements of rule making as the beneficiaries are aware of their role in the process of rule making.¹⁶⁶ The people should be provided the necessary tools, making it possible for them to make effective contributions to the debate. A constitutional making process need workshops, seminars, public meetings and people that are trained and knowledgeable about the process and the constitutional issues involved. In some countries, local offices are established all over the country to provide an access point to equip the people with relevant information pertaining to the constitution.¹⁶⁷ In particular, this should be the case with the disadvantaged and marginalized.¹⁶⁸

1.6. Credibility and competence of the reviewing organ

The organs tasked to carry out the review process must enjoy a sense of credibility in the process.¹⁶⁹ The commissioners and experts must be trustworthy, reliable, competent and persons of integrity. The organs of the review process must be de-linked from the political struggles of those in power and be able to serve the interest of the people who are the custodians of the process. The credibility and competence of the organs, commissioners and experts has an impact on the out come of the process. The commissioners and experts should work towards implementing the wishes of the people than safeguarding the interests of the various political players in government. The credibility and competence of organs, commissioners and experts has an impact on the outcome pf the process.

Since independence it has been a practice for many African countries to adopt constitutions through the use of commissions and experts.¹⁷⁰ These commissions and committees of experts have come under criticism for failing to produce durable and long lasting constitutions.¹⁷¹ The

¹⁶⁵ Skjelten (n 131 above) 76.

¹⁶⁶ CM Kerwin, *Rule making: How government agencies write law and make policy* (2003) 52.

¹⁶⁷ See Osisa (n 71 above) 29.

¹⁶⁸ H Ebrahim 'Constitution making in southern Africa-challenges to for the millennium' (2002) in HH Mavuto *Popular Participation in Constitution Making: The Malawian experience* (2007) 3.

¹⁶⁹ Ndulo (n 21 above) 114.

¹⁷⁰ Ndulo (n 21 above) 114.

¹⁷¹ Ndulo (n 21 above) 114.

commissions and committees have always been susceptible to manipulation by those in power who have often imposed their own constitutional order.¹⁷² The Zambian experience of the draft Constitution of 1996 demonstrates how constitutional making by the Commissions can be influenced by the government in power for their own interests and commissioners being divided along the different power struggles.¹⁷³ The selection and final appointment of the commissioners should be credible and impartial so as to gain legitimacy and confidence from the public who are the custodians of the constitution. The danger of constitutional elitism surfaces in cases where those engaged in the constitution making process are well known politicians with vested interests.¹⁷⁴ Sajo describes the authenticity of a constitution as a product of the personal credibility of individuals who are not influenced by socially acceptable interests and whose personal integrity is respected in the community.¹⁷⁵

1.7. Political will

Constitution making is also a political process. The people in position of power will ensure a process and machinery that protects their interests. The opposition parties will see this as an opportunity to change the government. In power sharing governments, the question seems to be more complex as there is always no consensus on leadership and policy issues. It has been argued that governments, aware of the politics involved in constitution making, have often shaped the choice and process of constitution making with the view to protect their interests.¹⁷⁶ The Eritrean and the Kenya previous Bomas conference are constitutional making process which fulfilled most of the requirements of participatory democracy but were brought down by leaders.¹⁷⁷ It has been suggested that the political leadership needs to be an honest broker throughout the whole process with the spirit of nation building.¹⁷⁸ It is believed that '*Society will not attribute legitimacy to the constitution if the leadership is seen corrupt or having mala fides.*'¹⁷⁹ Political will remains one of the fundamental and underlying foundations of achieving a constitution order.

¹⁷² Ndulo (n 21 above) 114

¹⁷³ Ndulo (n 21 above) 114

¹⁷⁴ Sajo (n 135 above) 16.

¹⁷⁵ Sajo (n 135 above) 16

¹⁷⁶ Whinney (n 112 above) 27.

¹⁷⁷ Osisa (n 71 above) 25.

¹⁷⁸ Osisa (n 71 above) 26.

¹⁷⁹ Osisa (n 71 above) 26.

1.8 Timing

In constitution making, the time allocated for each stage and phase matters.¹⁸⁰ The problem is that in most countries, constitution making process set the foundation in post conflict countries for incoming elections.¹⁸¹ This leads the drafters and the organs to work under time constraints, some times even omitting important information that would have been received from the public. It is also more problematic when the constitution making process is happening immediately after or before a political moment in country's history.¹⁸² In countries that are preparing for election, it would be difficult to identify the genuine interests of the various groups and parties as some of contributions will be based on partisan politics and power. Ebrahim provides the difficulty of timing in South Africa as the constitution making process happened after what he describes as a " liberation election'. It was difficult for the ordinary south African citizens to distinguish the process and the government's delivery of services.

More important are the time frames allocated for the constitution making process and how they impact the outcome. The South African constitution making process took six years owing to the history of apartheid and the prolonged dialogue between the stake holders.¹⁸³ The Nigerian Debate Coordinating Committee in Nigeria was given two months and this was criticised as minimal and impugned upon the quality of the content.¹⁸⁴ If the time allocated to the organs and a commission charged with constitution making is minimal, it will have an impact on the outcome of the process. An effective constitution making process should allocate sufficient time to each stages of constitution making process to allow effective, professional and efficient process.¹⁸⁵

¹⁸⁰ H Ebrahim (n 12 6 above) 240.

¹⁸¹ In South Africa, they needed a constitution before going to elections in 1994. The Kenyan constitutional review commission must complete its work in 12 months before Kenya goes to elections.

¹⁸² H Ebrahim (n 126 above) 241.

¹⁸³ Osisa (n 71 above) 25.

¹⁸⁴ Osisa (n 71 above) 25.

¹⁸⁵ Osisa (n 71 above) 25

1.9 The referendum

The constitution making process sometimes ends with the people deciding through a referendum. A referendum is a mechanism which provides an opportunity to the people to decide on a particular issue or decision made by a governmental body.¹⁸⁶ In constitutional making, the referendum will be the endorsement of the people to the constitution by the people.

The process of how a referendum is organized is as important as the out come of a referendum. The public should be educated about the referendum politics. In some situations, this becomes an opportunity for those who are not satisfied with the process to hinder the constitution making process. The people must be educated and knowledgeable about the referendum process and how it is conducted. The people should be aware of what they are approving and disapproving through a referendum. The choice of the terminology of what to vote for in a referendum is as important as the contents of the referendum. The referendum organizing body should determine what people are voting for and against other than the referendum being an extension of political scuffles and fights. Referendums should be seen as making decisions on laws that will affect policy and decisions not voting for political parties in power.

1.10 Conclusion

Modern Constitution making has introduced normative principles and paradigms under which the process should take place. In order to have legitimacy, the process of constitution making should satisfy certain requirements. The people should be able to understand the importance of the constitution and should have knowledge of both the process and the content. The role of political parties is necessary but should not be given prominence over the people who are the custodians of the constitution as political parties often pursue partisan interests.¹⁸⁷ The role of experts should also be recognized but they should only play an advisory role and they can not replace the role of the public in the drafting process.¹⁸⁸ Experience from various countries has shown how the process of constitution making reveals a pattern of actors, including political

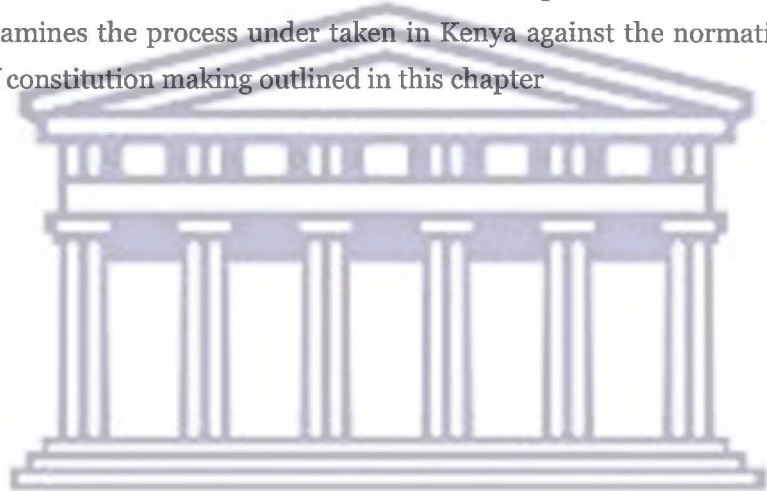
¹⁸⁶ M Suksi *Bringing in the people; A comparison of constitutional forms and practices of the referendum* (1993) 6.

¹⁸⁷ Mavuto (n 22 above) 4.

¹⁸⁸ Mavuto (n 22 above) 4.

parties and donors.¹⁸⁹ This influence on the constitution making process by donor countries affects public participation since the views of the donors are given importance.

Referendums have been highly politicized without considering the process, time and resources at the expense of party politics. Even process that people have effectively participated in contributing to the making of the constitution have been rejected at referendums due to politicization by the politicians. Kenya makes no exception; it has had a difficult experience of constitution making and rejections through referendums. The coalition government through the Constitution of Kenya review commission has embarked on the process of constitution making. The next chapter examines the process under taken in Kenya against the normative standards and requirements of constitution making outlined in this chapter



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¹⁸⁹ Mavuto (n 22 above) 4.

CHAPTER FOUR

EVALUATING THE CONSTITUTION MAKING PROCESS IN KENYA

4.0 Introduction

The constitution making process, as demonstrated in the preceding chapter, is a legal and scientific process that ought to adhere to some basic principles and standards. Kenya is currently undergoing a constitution making process. The history of constitution making in Kenya has been linked to the search for good governance and democracy.¹⁹⁰ The process of constitution making should consider the history in order to learn from the past and build the future.¹⁹¹ This chapter evaluates the constitution making process in Kenya against the background outlined in the preceding chapter and in light of past experiences of constitution making in Kenya. The focus is on the role of the people at each stage of constitution making in Kenya.

4.1 The principle of effective participation

As indicated earlier, the basis of a people's driven constitution review aims at ensuring people's participation throughout the entire process beginning from the collection of views, to determining contentious issues, building consensus and other debates related to the referendum.

4.1.1. The consultation process

The process of constitution making creates an opportunity for dialogue with the people through consultation.¹⁹² The Committee of Experts has embarked on a consultation process that targets political parties, reference groups and calls for individual submissions on contentious issues that need to be included in the draft constitution.¹⁹³ The consultation process in Kenya is taking place

¹⁹⁰ Muli (n 31 above) 3.

¹⁹¹ Muli (n 31 above) 4.

¹⁹² K Samuels 'Post Conflict peace building and constitution- making' (2006) 2 *Chicago Journal of International law* 663.

¹⁹³ The road to the review of the Constitution of Kenya, *The Standard* 19 June 2009, 28.

in a backdrop of suspicion that the Committee of Experts has already drafted the constitution and would soon table it before the parliament.¹⁹⁴ Article 23(b) and 30(1) (b) of the constitution of Kenya Review Act 2008 mandated the committee to identify issues that are contentious and not agreed upon in the constitution review process.¹⁹⁵ The committee has met and discussed with reference groups¹⁹⁶ and received submissions from the major political parties on what they deem as contentious and not agreed upon. The ordinary Kenyans have been tasked to write proposals and send emails to the offices of the committee offices and website, as indicated in the advertisement and notices published in the newspapers and posted on the website of the committee of experts.¹⁹⁷ There is a need to understand the literacy levels in Kenya and the accessibility of the internet mainly in the rural areas of Kenya.

After inviting the public and all the political stakeholders to submit proposals on contentious issues, the committee identified executive, legislatures, devolution of power and bringing the constitution into effect as contentious issues.¹⁹⁸ The type of executive government, whether parliamentary or a hybrid system and whether there will be one a parliament and a senate is also identified as contentious issue. The Kenyan people ought to have played a role in determining the reference groups and the people that make up the reference groups.

4.1.2. The inclusiveness of the process

4.1.2.1 .The role of civil society organisations

The need to empower and involve civil society organisations is fundamental in constitution making processes. ¹⁹⁹ The civil society in Kenya has proposed to the committee of experts to come up with two drafts in which one provides for a presidential system while the other provides

¹⁹⁴ 'Constitutional review hits new turbulence' *The Standard* 6 September 2009 1.

¹⁹⁵ <<http://www.coekenya.go.ke/images/stories/contentiousissues.pdf>> (accessed 8 October 2009).

¹⁹⁶ These are specific target groups representing the various people in Kenya including youth and women.

¹⁹⁷ <<http://kenyaun.org/documents/contentiousissues.pdf>> (accessed 12 October 2009).

¹⁹⁸ *The Standard* (n 101 above)2

¹⁹⁹ W Mutunga 'A Review essay; civil society and democratic experience in Kenya: A review of Constitution making from the middle: civil society and transitional politics in Kenya 1992-1997' (2000) 4 *African Sociological Review* 97.

for a parliamentary system and let the people of Kenya decide through referendum.²⁰⁰ The Kenyan civil society organizations have constantly echoed the need for an all inclusive process of constitution making.²⁰¹ The role of civil society in constitutional engineering is not a new phenomenon in Kenya.²⁰² The previous constitution making process known as the *Bomas* conference did involve the civil society organisations in the process of constitution making.²⁰³ However, after the draft Constitution was rejected in 2005, less effort have been employed by the civil society organisations in the constitution making process compared to the previous role of civil society organisations.

4.1.2.2 The role of religious leaders in the review process

The role of the religious leaders can not be underestimated in the constitution making process since the majority of the population is affiliated to different religious denominations. The process is facing a difficult challenge from religious communities with regard to the determination of contentious issues and, more specifically, the provision of the *Khadi* courts²⁰⁴ in the constitution.²⁰⁵ The *Khadi* courts are recognized by the current constitution of Kenya but this has sparked off debates and opposition from the Christian majority²⁰⁶ on the ground that Kenya is a secular state and that no religion should be provided for in the constitution.²⁰⁷ The Kenyan standard news paper has reported that the refusal by the committee of experts to include the *Khadi* courts was in the interest of the Kenyan people and aimed at avoiding clashes between the Christians and the Muslims as stated below;

²⁰⁰ *The Standard* (n 99 above) 2.

²⁰¹ The civil society has played a vital role in Kenya's attempts to have a constitution including the contributions on the form and substance.

²⁰² National civil society congress, the constitution review agenda briefing paper to partners and collaborators meeting at the finish embassy, September 17 2008, 2.

²⁰³ National Civil Society Congress (n 201 above) 3.

²⁰⁴ These are Islamic courts charged with dealing with marriage and divorce matters between the Muslim communities. See the standard, 06 September 2009 on the number of khadi courts in Kenya 'There are currently 17 *Khadi Courts* in Kenya' 2.

²⁰⁵ 'Committee of experts over looked key issues in review' *The Standard* 06 September 2009.

²⁰⁶ *The Standard* (n 102 above) 1, 'among those strongly opposed to the *Khadi courts* being entrenched in the new constitution is reverend David Oginde of the church of Kenya'.

²⁰⁷ *The Standard* (n 102 above) 1, 'there is section of Christians who were against it being entrenched in the new constitution. Others came to understand that it has been in the current constitution since 1963 and it never harmed anybody. It is only a few who were against it' chief khadi sheikh Hammad Kassim.

I do not wish to comment on khadi courts question because doing so will open wounds and rivalries between Muslims and Christians. I think the committee of experts skipped this matter for a good reason.²⁰⁸

The issues involving religion are highly sensitive and emotive as they cut through all the tribal and regional divides in Kenya and this calls for a thorough examination of the role of religious groups in constitution making. It has been argued that a constitution has to protect the fundamental moral rights of citizens and ensuring the dignity of persons and their moral aspirations.²⁰⁹ The different religious groups have not been engaged meaningfully with regard to the establishment of *Khadi Courts* within the constitution and its implications to other religious grouping. Committee of experts should not ignore such important issues of faith. The churches have promised to boycott the constitution making process in case their concerns are not addressed. In a democratic society, all people are free to exercise their own religions. However, the opposition from the Christians indicates that committee did not consult widely the population on this matter.²¹⁰ Any possible complaints from other religious groups could have been addressed by including all religious denominations in the constitution making process.

4.1.2.3 The role of women

I should like to see the time come when women shall help to make the laws. I should like to see that whiplash, the ballot, in the hands of women. As for this city's government, I don't want to say much, except that it is a shame - a shame; but if I should live twenty five years longer - and there is no reason why I shouldn't - I think I'll see women handle the ballot. If women had the ballot today, the state of things in this town would not exist...²¹¹.

²⁰⁸ *The Standard* (n 102 above) 1.

²⁰⁹ J G Murphy After word : Constitutionalism, moral skepticism and religious beliefs in S Rosenbaum (ed) *Constitutionalism; The Philosophical dimension* (1988) 240

²¹⁰ 'Church leaders threaten to reject law over Khadi Courts' *Daily Nation* 27 October 2009 1

²¹¹ Centre for Rights Education and Awareness *Constitution making power dynamics, intrigues and struggles: Kenyan women reflect* (2003) IV.

The above experience in Kenya highlights the role of women in decision making processes and the impact of women involvement in nation building. Women form part of the section in the Kenyan society whose rights have been undermined by cultural and religious denominations. Women in Kenya have no right to land. Owing to the traditions in Kenya, women do not have equal rights to men to inherit land.²¹² Despite this fact, the committee of experts has not included the land issue as a contentious issue thus indirectly failing to address the plight of women in Kenya.

It seems that women are being continuously marginalized from the process of constitution making. Even the Bomas constitutional making process that was credited for its inclusiveness has been criticized for not providing women a proper forum to participate.²¹³ The same seems to be the case with the current process. The Kenyan constitution making process must give a greater role to women in the consultation process so as to respect and protect their rights in the constitution. The consultation process should involve women movements and groups both from urban and rural parts of Kenya. The Kenyan constitution making process would be upheld inclusive if women are given a sufficient role to contribute to the process.

4.1.3 The role minorities and the marginalised groups

The constitution making process in Kenya should ensure that the voices of the minorities and the marginalized are heard. There seems to be no universally accepted definition of the term minorities.²¹⁴ Minorities may be sexual, religious, tribal or any grouping according to society's classification. This research paper will only look at minorities in terms of representation and numerical. The disadvantaged are all those that are regarded inferior due to historical, political, social and economic reasons. The marginalized are those who can not compete with others because of the socio-political situation they endure in their life. Where as minorities may include a tribe and an ethnic group, the disadvantaged cut through all the groups in society and may

²¹² *The Standard* (n 101 above) 2 states that 'on the question of land ownership, the thorny issue is the proposal that women be accorded equal rights to inherit land. Apparently, this is contrary to the cultural practices and beliefs of many Kenyans'.

²¹³ Centre for Rights Education and Awareness (n 211 above) 8.

²¹⁴ Samuels (n 208 above) citing MN Shaw ' the definition of minorities in international law.'80

include the landless and the internally displaced people.²¹⁵ There exist minority groups in Kenya like the Somali, Samburu, Pokot and other unidentified tribes.²¹⁶ Ethnic minorities happen to occupy the biggest land mass of northern Kenya. A majority of Kenyans do not consider these minorities as civilised and this led to their marginalisation.²¹⁷ In terms of Religion, ethnic minorities include the Hindus, Moslems and other small groups of religion. A fact finding report after the 2002 constitution making process that never materialised, the Kenyan constitutional review team was advised to include the minorities who are marginalised.²¹⁸

The Kenyan constitution making process will be judged, among other things, according to the level at which the minority opinion is included in the constitution making process. The marginalized include those who are disadvantaged by unfair discrimination on one or more prohibited grounds.²¹⁹ This may also mean a community that's has failed to integrate or unable to assimilate and has been kept outside the economic, political and social life of Kenya as a whole.²²⁰ A report by the Kenya *thabitti* task force indicates that the constitutional review process would address the problems of the marginalized communities in the new Constitution.²²¹

4.1.4 The people as the controllers of the agenda

The Kenyan constitution making process raises more issues and it seems that there have been no lessons learnt from the failed *Bomas* processes which the people rejected because they thought the process had been tampered with by the executive. The executive in Kenya, which is mainly the PNU and ODM, have fought on the proposals about the mode of devolution of power

²¹⁵ JB Ejjbwah Intergrationist and accomodationist measures in Nigeria 'Constitutional engineering: success and failures in S Choudhry constitutional *design for divided societies: Integration or Accommodation?* (2008) 255.

²¹⁶ Kituo cha Katiba Report on constitutional review exercise in Kenya, Fact-Finding Mission Visited Kenya between 19th and 22nd September, 2001 and again between 26th and 29th February, 2002 ,12

²¹⁷ Kituo cha Katiba (n 233 above) 12.

²¹⁸ Kituo Cha Katiba (n 233 above) 12.

²¹⁹ E Gayim The concept of minorities in International law (2001) 4.

²²⁰ Gayim (n 218 above) 5.

²²¹ 'Law review experts in Naivasha for talks' *Daily Nation* 18 September 2009.

and the type of government.²²² The pushing by the ODM, in support of the *Bomas* drafts, and the agitation by the PNU to consider both the *Bomas* and the referendum drafts, depicts how the political heavy weights have taken over the process that was supposed to be the result of people's consultation. The differences in approach between the coalition partners will lead to more complexities of choice by the people of Kenya. The Kenyan people have in the past rejected the parliament's role in designing a constitution for Kenya.²²³ The role of parliament today, especially the parliamentary select committee on legal affairs, has been attacked by some members of the coalition government as hijacking the power of the people in constitution making.²²⁴

4.1.5 The level of civic education and awareness campaigns.

In order for the ordinary Kenyan citizens to effectively participate in the process, they should be educated on the process and substance. The process of constitution making assumes that the people, as the custodians of the constitution, are well informed, educated and sensitized in order to make meaningful choices. There is need for a holistic approach to information sharing and education so as to have impartial and accurate content.²²⁵

The Committee of experts in Kenya did not include a civic education programme on its schedule. It simply began with identification of contentious issues and thematic consultations on contentious issues.²²⁶ The failure to educate the public on the process and the content in constitution making is not a new phenomenon in Kenya's constitutional making process. Legal experts have argued that even the much hailed *Bomas* process did not have a feature of civic education that the majority of the population did not know the contents of the *Bomas* Draft.²²⁷ The people only knew what they were told by their leaders and even those who had tried to read were only interested in a few chapters and issues in the constitution. ²²⁸ Muli notes that while the major part of the *Bomas* Draft indicated the contribution of the Kenyans, there was a need

²²² 'Bomas ghost threatens to scuttle review' *The Standard* 21 May 2009,2

²²³ Muli (n 31 above) 3.

²²⁴ Standard (n 101 above) 2, Mr. Kajwang of the ODM attacks Mr. Mohammed head of the Parliamentary Committee on Legal Affairs for Involving in the Activities of the Committee of Experts.

²²⁵ Osisa (n 71 above) 29.

²²⁶ Standard (n 193 above) 28, an illustration road map to the new constitution.

²²⁷ Muli (n 31 above) 3.

²²⁸ Muli (n 31 above) 3.

for civic education since the Constitution contained even what the Kenyan people thought were alien to them.²²⁹ Without a rigorous civic education and mass awareness, one cannot help but wonder what type of choice the Kenyan people will make at the referendum, considering that the consultation process did not reach the people. Of course, civic education is demanding in terms of resources and man power and costly. But the process of civic education is as important as the outcome and that's why the coalition government should have improvised other less costly means of educating the public without necessarily forgoing the process.

4.1.6 The credibility and competence of the committee of experts

In order to have an effective civic education and awareness programme, the body charged with the constitution making should not only enjoy credibility but it must also be competent to carry out the exercise. The selection of the people must be done transparently and they should hold office ensuring representation, professional ability and public credibility.²³⁰ The road map to the Kenyan constitution making process began with an invitation to the members of the public to apply for positions as experts in the committee.²³¹ Those who were interviewed and short listed had their names forwarded by the parliamentary select committee and the AU panel of eminent persons to the National Assembly.²³²

4.1.7 Political will as a necessity

The credibility and competence of the committee of experts cannot guarantee an effective process of constitution making without the absence of political will. Kenya's history and clamor for a constitution review has always been watered down by the leaders and government officers

²²⁹ Muli (31 above) 3.

²³⁰ Osisa (n 71 above) 26.

²³¹ <<http://www.coekenya.go.ke/>> (accessed 6 October 2009). See the Committee of Experts on Constitutional review official website available at <<http://www.coekenya.go.ke/>> (accessed 6 October 2009).

²³² (n 231 above).

who are against reforms in order to sustain their power and influence.²³³ The constitution making process in Kenya has always been affected by leadership and governance issues.²³⁴

The current process of constitution making are happening at a back ground of a highly divided coalition government that espouse diverge interests. While ODM advocates for a parliamentary system of government, the PNU advocates for a hybrid system of government. The sharp ideological difference between the two major coalition partners, if not resolved, will affect the contributions people have made to the constitution making process because of the politicisation of the difference. It should be recalled that President Mwai Kibaki supported the watered down Referendum Act of 2003 while it is believed that the opposition by Raila Odinga to the referendum won the politics of the day. The Bomas Draft was rejected as a result of ,what many my call, leadership and lack of political will from some leaders. Taking place in the backdrop of the recent post election violence and aiming at laying a democratic foundation for 2012 elections, the constitution making process in Kenya can only succeed if the leaders of the two main two coalition partners have political will.

4.1.8 Timing

Constitution making is both a legal and political process in that the selection of commissioners, the drafting and framing are carried out in specific time frames that's in most case suit the government in power than empowering citizens. Time frames are an essential factor in the process of constitutional making. Time becomes of special relevance and a political tool in situations when the constitution is the benchmark for the incoming elections. The Kenyan history of constitutional making reveals that constitutional issues take centre place mainly towards election. As a result, the process tends to happen in charged political atmosphere.

The current constitution making process is part of the agreed agenda by the coalition government. This means it is not only a legal document but also a political weapon to deal with the power struggle especially in so far as the issue of separation of powers is concerned. In a context of disputed election that resulted in the loss of lives, there are more expectations to the constitution that are peculiar to the Kenyan society. It is in the context of these expectations and

²³³ The author uses the term leaders to mean the government, opposition, leaders of various groupings including political parties.

²³⁴ Osisa (n 71 above) 25.

anticipations that the committee of experts has been given 12 months to complete the constitution before Kenya goes to elections in 2012.

There exist no standard time frame of drafting constitutions since each society has a different background and history. As indicated in the preceding chapter, the South African,²³⁵ the Nigerian²³⁶ and The Zambian experience²³⁷ show the time frame allocated to the process matters. The allocation of time for each stage is important and the committee of experts in Kenya is under pressure to deliver a constitution before elections in 2012. Although no single method of time allocation can apply to all states and states should be flexible in adjusting to the necessary changes in the process, the 12 months allocation to the committee of experts seem inadequate considering the national coverage. The limitation of time may be politically motivated or financial as the review process needs a lot of funding which some states especially the third world may not afford.

4.2 A referendum as part of the process.

The Kenyan referendum politics have been the most controversial and contested stage of the constitution making process.²³⁸ This is evident from the rejection of the Wako draft by the Raila Odinga camp by a vote of 57 percent to 42 percent, despite the hailing of the draft constitution by president Kibaki as 'one of the most modern and progressive constitutions of the world' marked a turning history of Kenyan constitutional politics.²³⁹ The referendum vote saw president Kibaki dissolve parliament and the deepening of the rift between president Kibaki and his allies the ODM led by the coalition government prime minister Raila Odinga.²⁴⁰

It is important to understand this event since both Kibaki and Odinga are not only the main coalition government partners but they have also presented diverging positions to the

²³⁵ Osisa (n 71 above) 28.

²³⁶ Osisa (n 71 above) 28.

²³⁷ The Zambian government states that the process ought to be open ended and can not be rushed and this has been criticized as an attempt by the government to delay reforms, for more details see Osisa (n 71 above)28.

²³⁸ Mutua (n 33 above) see referendum the detailed account of Kenya' *referendum politics from the Wako draft to the politics after the referendum*' 227-232.

²³⁹ Mutua (n 33 above) 229 citing 'Kibaki's televised speech causes a stir' in the East African Standard, November 21 2005; 'leaders defy ban on campaign,' Daily Nation 21 November 2005 1.

²⁴⁰ Mutua (n 33 above) 231.

Committee of Experts on contentious issues especially the devolution of power.²⁴¹ In the event that there is no consensus reached among the Kibaki and Raila camp, it is certain that the constitution review process in Kenya will face another major challenge. Mutua argues that the failure of the Wako draft was not due to the undemocratic nature of the government but due to the non-consultative nature of president Kibaki and his inability to reach an agreement with Raila Odinga.²⁴² The referendum has been politicized, undermining the efforts of the people in search for a constitution. Kiplagat noted that 'Kenyans would want to see a people driven review process devoid of political interference'.²⁴³ A referendum will be a litmus test to the coalition government's will to have a new constitution and respond to the erstwhile demand of the Kenyan people for a constitution. There are sharp differences between the senior legal advisors of both president Kibaki 's PNU and Prime Minister Raila Odinga' s ODM on the form of government.²⁴⁴ The Kibaki camp accuses the Committee of Experts of promoting partisan interests while the Odinga camp accuses the committee of being dominated by people of certain political inclination.²⁴⁵ Legal and political commentators are worried of the referendum as there is a danger of repeating the 2005 experience;

At this rate, experts say, chances of Kenya getting a new constitution are very slim. However, it is not the wrangles within the Coalition that have commentators worried most, but the referendum waiting ahead.²⁴⁶

The chairperson on the committee of experts has also expressed his worries about the referendum, citing the major political differences and politicization of the referendum politics in Kenya.²⁴⁷ The argument that a Draft Constitution be subjected to a referendum as

²⁴¹ While Kibaki and the PNU have proposed a hybrid form of government, Odinga and the ODM have proposed a parliamentary form of government. see also ' we won't bow to politicians,' says expert , *The Standard* 01 September 2009 1.

²⁴² Mutua (n 33 above) 231.

²⁴³ Mutua (n33 above) 232 citing 'constitution; Kibaki' pledge on the way forward,' *Daily Nation* 31 May 2006. Bethuel Kiplagat is a respected Kenyan diplomat who was appointed to chair the committee of eminent persons to make findings on the on the review process.

²⁴⁴ 'We wont bow to politicians' *The Standard* 01 September 2009 1.

²⁴⁵ ' Referendum on new constitution likely to yield to political whims and ethnicity' *Daily Nation* 12 October 2009 1.

²⁴⁶ *The Standard* (n 2 44 above) 1.

²⁴⁷ *The Standard* (n 244 above) 1.

happened in 2005 has also been received with mixed feelings. There is a view that taking the document to a politically-charged electorate for endorsement or rejection is ill-advised.²⁴⁸

4.3 Conclusion

The normative principles of constitution making must be adhered to in order to have a legitimate process that enjoys ownership by the people. The 2005 rejection of the Wako draft saw Kenya going to elections in 2007 without a constitution. The coalition government that was formed after the post election violence agreed to take various reforms including constitutional reforms as part of agenda four and it was agreed that a constitution would be made within 12 months. There was a sense of optimism that a constitution would be in place and the Kenyans would go to elections come December 2012. In order to have a new constitutional dispensation, there is need for meaningful participation and civic education. More importantly, the value of the political will in guiding the process must be noted. There is a danger that the scramble for power and failure to reach agreement by the major stake holders of PNU and ODM will frustrate the activities of the Committee of Expert and Kenya will go to elections without a constitution.



²⁴⁸ *The standard* (n 244 above) 1.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATION

5.1. Conclusion

The study was intended to analyse the concept of public participation in the constitution making process in Kenya under the coalition government. The purpose of the research was to examine the extent to which the Kenyan constitution making process was a people driven process.

The coalition government in Kenya set up a constitutional of Kenya review law and a committee of experts was designated to carry out the process of consultation and the eventual preparation of a constitution. The constitution making process in Kenya has come under tough criticism from the public and political parties as having learnt nothing from the previous attempts of constitution making in Kenya. The previous constitution making processes were characterized by the influence of the political parties and the parliament, excluding ordinary citizens. The same seems to be true with the current process. The process has been characterized by failure to extensively consult the Kenyan people on the contentious issues. Issues such as land, which is one of the underlying issues for most of Kenya's political problems, were never included among the contentious issues.²⁴⁹ Furthermore, the role of the various groups and sectors in society like the youth, women and those who have been marginalized historically was not well attended to by the committee of experts. It is clear that some issues, like women rights, especially succession matters, are still controversial owing to the traditional customs and laws. The constitution making process could have been opportunity to include those whose rights have been affected the past.

The Kenyan constitution making process is happening at a time where there have been reports of partiality and party affiliation of some members of the Committee of experts, leading to wrangles within the Committee itself. Although the Committee has denied the accusations, its credibility and impartiality remains a doubt among a section of the Kenyan people. The constitution making process is happening at a back ground of a coalition government formed after the 2007 post election violence which makes the process as important as the substance as it seeks to address some of the causes of the post election violence. The differences in views and positions by the major coalition partners of ODM and PNU seem to affect the process of constitution making. While ODM has strongly presented a parliamentary form of government,

²⁴⁹ 'Land also a hot potato, parties tell review team' *The Standard* 6 September 2009 1.

PNU has proposed a hybrid system and this difference is not only threatening the process but will inevitably have an impact on the constitutional referendum. It is a well established practice that during the referendum people vote for the parties positions rather than the substance of the document.

The constitution making process in Kenya falls short of the normative standards of constitution making especially in so far as the element of inclusiveness is concerned. The same applies to civic education. There is no need to include the people who do not understand the contents and purpose of the constitution. Although constitution making process are often expensive and costly, this should not be a reason not to engage in civic education. Cheap and effective means of public awareness should be devised.

Generally, the constitution making process in Kenya is happening at a right time when the Kenyan nation needs to rebuild its society after the post election violence. Constitution making processes are political processes and can not be easily detached from the normal governance of the country and those in power. Political will remains a necessity in order to have a constitution in Kenya before the 2012 election. Unless the major political parties broke a deal and agree to a common mission, the existing political climate and suspicion among the coalition partners as well as the 12 months deadline for the committee of experts might only mean that the likelihood of adopting a constitution that will be rejected by the population through a referendum.

5.2. Recommendations

There is no uniform method of constitution making in the world but there are some basic standards that most constitution making states should fulfill in order to have a constitution that enjoys legitimacy among the people. This calls for a people driven process and the Kenyan constitution making process forms no exception to this principle.

The Kenyan constitution making process needs to put into consideration the following factors if Kenya is to have a constitution before the 2012 elections.

- The consultation phrase should be revisited again to include not only the target groups but all the marginalized members of the society who may include those who have never owned land and the internally displace people in Kenya.
- The consultation phase should include women and youth from both rural and urban areas. The Bomas Constitution making process was criticized for not having a fair

representation of women where the urban Nairobi based women were proportionally more than the others. The number should be determined according to population as per region.

- The public should be given more time to decide on what the contentious issue should be and this should not only be the work of a few individuals and the politicians. Critics have argued that the failure to extensively include the people has led the committee of experts to leave out important issues' like land and the Islamic *khadi* courts. However sensitive these issues are, failure to subject them to debate is just postponing a conflict to later stage.
- The Committee of Experts ought to act impartially and avoid partisan politics. The previous constitution making process have not only been named after their chairpersons but also it is evident that the drafters would be linked to party politics.²⁵⁰ The wrangles between the commissioners affect the credibility of the process and the outcome.
- The parliament and the political parties should not hijack the process from the people. It is evident that after the consultation and drafting, the parliamentary select committee would need to take the issue to parliament for approval. The Kenyan coalition government's parliament is fragile with a lot of political animosity between the major parties of ODM and PNU. In case, the political parties do not reach a compromise on the devolution of power, parliamentary politics will take over the prior contributions of the few and target groups that were consulted by the committee of experts.
- There is need to educate the public and an extensive campaign about the constitutional making process and the contents especially the bill of rights. The people should be informed and educated before they go for the constitutional referendum. It has been a practice that during the referendum, the politicians who are not satisfied with the process and their personal interests sabotage the process by campaigning against the draft constitution. It has been argued that though the Bomas Constitution was highly accredited to have been inclusive, the majority who voted for and against it did not know the contents of the Constitution.²⁵¹

²⁵⁰ See Wako Commission, Ghai Commission etc.

²⁵¹ Kindiki (n 3 above) 4.

The presence of efficient and functioning institutions is an important factor in the democratic governance and the rule of law. Institutions that are credible and impartial render the process and outcome enjoy legality among the people. The people are the primary beneficiaries of the constitution. The Kenyan people should be involved meaningfully in the constitution making process in order to address the fear and concerns of the people. The causes and impacts of the recent 2007 post election violence should inform the coalition government that an accountable, all inclusive and people driven process is the pillar to the foundation of democracy and good governance in Kenya. The South African experience indicates that even when the political parties have differences, a constitution can be managed and negotiated through tolerance and accommodating each other.²⁵²



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