POLITICAL GOVERNANCE AND CONSTITUTION-MAKING IN KENYA: IN SEARCH OF POPULAR PARTICIPATION

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DECLARATION BY CANDIDATE

I, John Macharia Mukuna, do hereby declare that this thesis entitled "Political Governance and Constitution-Making in Kenya: In Search of Popular Participation", for the Degree of Doctor of Laws (LLD) in the North-West University hereby submitted, has not previously been submitted by me for the degree at this or any other university, that it is my own work in design and execution and that all materials contained herein have been duly acknowledged.

.....

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NOVEMBER 2012

DECLARATION BY PROMOTER

I, Professor Melvin L.M Mbao do hereby declare that this thesis by candidate No 20788932, John Macharia Mukuna, entitled: "Political Governance and Constitution-Making in Kenya: In Search of Popular Participation," for the Degree of Doctor of Laws (LLD) in the School of Postgraduate Studies and Research, be accepted for examination.

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PROF. M. L. M. MBAO

NOVEMBER 2012

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LIST OF ABBREVIATIONS

ACHPR:	African Charter on Human and Peoples' Rights.
AIDS:	Acquired Immuno Deficiency Syndrome.
ANC:	African National Congress
APRM:	African Peer Review Mechanism
AU:	African Union
CCCC:	Citizens Coalition for Constitutional Change
CCSA:	Constitutional Court of South Africa
CIC:	Commission for Implementation of the Constitution
CIPEV:	Commission of Inquiry on Post-Election Violence
CJ:	Chief Justice
CKRA:	Constitution of Kenya Review Act
CoE:	Committee of Experts
CRA:	Commission on Revenue Allocation
DP:	Democratic Party
DPP:	Director of Public Prosecutions
DRD:	Declaration on the Right to Development
EACC:	Ethics and Anti-Corruption Commission
EACJ:	East African Court of Justice
ECK:	Electoral Commission of Kenya
eKLR;	Electronic Kenya Law Reports
EMBs:	Electoral Management Bodies
EU:	European Union
FORD:	Forum for the Restoration of Democracy
FORD-K:	Ford-Kenya

G.D.P:	Gross Domestic Product
GEMA:	Gikuyu Embu Meru Association
HDC:	Harmonised Draft Constitution
HDR:	Human Development Report
HIV:	Human Immuno Deficiency Virus
HRBA:	Human Rights Based Approach
ICC:	International Criminal Court
ICCPR:	International Covenant on Civil and Political Rights
ICESCR:	International Covenant on Economic, Social and Cultural Rights
ICJ:	International Commission of Jurists
IEBC:	Independent Electoral and Boundaries Commission
IIBRC:	Interim Independent Boundaries Review Commission
IICDRC:	Interim Independent Constitutional Dispute Resolution Court
IMF:	International Monetary Fund
IPPG:	Inter-Party Parliamentary Group
IREC:	Independent Review Commission
JSC:	Judicial Service Commission
KACC:	Kenya Anti-Corruption Commission
KADU:	Kenya National Democratic Union
KNCHR:	Kenya National Commission of Human Rights
KANU:	Kenya African National Union
KAU:	Kenya African Union
KCA:	Kikuyu Central Association
KADU:	Kenya National Democratic Alliance
KANU:	Kenya African National Union

KHRC: Kenya Human Rights Commission

KNDR: Kenya National Dialogue and Reconciliation

KPU: Kenya People's Union

KTN: Kenya Television Network

LDP: Liberal Democratic Party

LSK: Law Society of Kenya

MDGs: Millennium Development Goals

MoU: Memorandum of Understanding

MP: Member of Parliament

MPs: Members of Parliament

NAACP: National Association for the Advancement of the Colored People

NAK: National Alliance Party of Kenya

NARC: National Rainbow Coalition

NCC: National Constitutional Conference

NCCK: National Council of Churches of Kenya

NCEC: National Convention Executive Council

NCPC: National Convention Planning Committee

NEPAD: New Partnership for Africa's Development

NLC National Land Commission

NPC: National Police Service Commission

OAU: Organisation of African Unity

ODM: Orange Democratic Movement

ODM-K: Orange Democratic Movement-Kenya

OECD: Organization for Economic Cooperation and Development

PCEA: Presbyterian Church of Eastern Africa

PNC:	Proposed New Constitution
PNU:	Party of National Unity
PSC:	Public Service Commission
SADC:	Southern African Development Community
SAPS:	Structural Adjustment Programmes
SONU:	Students' Organization of Nairobi University
SSA:	Sub-Saharan Africa
TI:	Transparency International
TJRA:	Truth, Justice and Reconciliation Act
TJRC:	Truth Justice and Reconciliation Commission
UNDP:	United Nations Development Programme
UNECA:	United Nations Economic Commission for Africa
UDHR:	Universal Declaration of Human Rights
UN:	United Nations
UNCAC:	United Nations Convention against Corruption
UNDP:	United Nations Development Programme
UNDRD:	United Nations Declaration on the Right to Development
UNESCAP:	United Nations Economic and Social Commission for Asia and the Pacific
UNHCHR:	United Nations High Commissioner for Human Rights
USA:	United State of America
WB:	World Bank
YKA:	Young Kavirondo Association

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ABSTRACT

This thesis examines the evolving ideal of popular participation in the context of Kenya's experience in the intertwined areas of political governance and constitution-making. The thesis is primarily motivated by the spirit and intent of the country's constitution-making initiatives which commenced in earnest after the 2007 post-election violence in which about 1,300 precious lives were lost, over 300,000 people displaced and property destroyed.

The study adopts a qualitative approach. This method enabled the researcher to view phenomenon in its context, therefore making the enquiry more exhaustive. Unstructured interviews were also conducted with personalities quite conversant with Kenya's democratic trajectory. Key in this thesis is a hermeneutic or textual analysis of the relevant constitutional and legislative materials and court decisions on the same. In this regard, South Africa's experience on the ideal of popular participation was illuminating in view of its wealth of jurisprudence on popular participation ushered in 1994 by its post-apartheid constitutional order.

The aim of the 2010 constitution-making process, underpinned by the Constitution of Kenya Review Act 9 of 2008, was that the people of Kenya would be involved in the making of their own constitution, and also participate in the management of the apparatus of state. The paradigm shift in the country's political and constitutional map was imperative because, since independence from Britain in 1963, Kenyans have experienced deplorable governance characterised by the personification of power by the presidency, dissipation of the doctrine of separation of powers and violation of the rule of law. This scheme was executed through a mutilation, as shown in the study, of the architecture of the 1963 Constitution. The new

constitutional project was therefore intended to transition Kenya from a representative democracy, which had all the hallmarks of a failed system, to a participative democracy.

The thesis therefore demonstrates that Kenya's dismal governance record cannot be separated from the people's clamour for constitutional reforms. It is on this basis that the thesis examines the 2010 constitution-making process and key provisions of the Constitution. The aim is to evaluate the extent to which the constitution-making process and the substance of the Constitution, deal with the over-arching ideal of popular participation and this is the central research question of the study.

The conclusion derived from a thorough investigation of these cardinal issues in Kenya's democratisation initiatives is that Kenya's 2010 constitution-making process did not significantly embrace the noble ideal of popular participation. Second, the 2010 Constitution does not substantially and fully incorporate one of the key aims of the review process which is the participation of the people in the management of the affairs of state. Therefore, the hypothesis of this study is that Kenya's 2010 constitutional project does not significantly embrace the ideal of popular participation. In this regard, the main findings of this thesis are that:

- The process of the 2010 constitution-making was fundamentally flawed.
- The 2010 Constitution lacks legitimacy.
- The 2010 Constitution does not significantly espouse the ideal of popular participation in the management of the affairs of state.

The thesis therefore makes these key proposals to reform the existing law:

- The process of constitution-making should be commenced *de novo* for the people of Kenya to truly consider themselves the owners of their own Constitution.

- Pending the commencement of a fully people-driven constitution-making, and due to the complex nature of constitution-making, the thesis recommends, among others, the enactment of legislation to operationalise certain provisions of the Constitution, in particular, people's involvement in law-making at a national level. Reforms which would enhance transparency and probity in governance should also be adopted, including the enactment of legislation to realise the constitutional right of access to information and the protection of witnesses by an independent agency.
- The thesis thus contributes to the profound need of transforming Kenya's constitutional and political trajectory from a representative democracy to one in which the phrase, "We the people," in the Preamble to the Constitution, would be a reality. It is also hoped that this approach would preserve and enlarge freedom which the great jurist, John Locke, said is the end of the law. In addition, the thesis recommends that the security of tenure of the Attorney-General should be restored as that would enhance any resolve by the Attorney-General to institute civil proceedings for the recovery of public resources lost through impunity and corruption perpetrated by successive regimes.

In addition to the foregoing contribution, it is hoped that the thesis makes a modest contribution to the improvement of the spirit and ambition of Kenya's constitutional review project. It is also hoped that the study will provoke debates, further research and development of discourses on the emerging constitutional direction. This would include:

- The role and place of "experts," in constitution-making and or review. This is motivated by the role played by the Committee of Experts (CoE), one of the central organs in the 2010 constitutional review process. Research would, probably, investigate whether the CoE exceeded its statutory mandate by partially converting

itself into a constituent assembly and therefore an investigation of the legitimacy of anything done *ultra vires* the Review Act.

- Questions on the need and usefulness of the two-chamber legislature under the new Constitution, considering that this new structure is not a bi-cameral legislature. This enquiry would also dwell on whether Kenyans are now "over-represented."
- The suitability of *ad hoc* courts, like Kenya's Interim Independent Constitutional Dispute Resolution Court (IICDRC), in the determination of constitutional review disputes.
- The new and powerful role of Parliament viewed against the background of inherent fissures in Kenya's political parties.

CHAPTER 1: **INTRODUCTION**

1.1 BACKGROUND TO THE STUDY

This thesis is an examination of the political governance trajectory in Kenya and its constitution-making process, specifically the 2010 Constitution. The aim of the thesis is to address two intertwined issues. First, an inquiry is made of the extent to which the people of Kenya have been involved in crafting their Constitution. Secondly, the thesis investigates the extent to which the constitutional architecture of Kenya has embraced the ideal of participation of the people in the governance or management of public affairs. To fully appreciate the nature and the depth of these central issues, the study lays down a conceptual framework of "good governance" from whose vista the foregoing aims of the study are critically evaluated.

The issues being examined are intertwined and therefore inseparable on two grounds, for the purpose of this thesis: First, it is submitted that in contemporary constitution-making, the people should be fully involved in the crafting of their own constitution. That approach not only vests the constitution with legal and moral legitimacy but it also attracts fidelity to the instrument because the people can then claim ownership thereof. As observed by Sachs, J., in the seminal case of *Doctors for Life International v Speaker of the National Assembly and Others*,[1] full popular participation of the people of South Africa in the making of the 1996 Constitution gave the imprimatur of legitimacy to the final product.[2] Second, the intention of a modern constitution-making exercise is to create key public institutions for a nation's public governance under the doctrines of separation of powers, constitutionalism and popular

[1] *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (6) SA 416 (CC).
[2] *Doctors for Life*, *ibid* note 1 para 230.

participation. Participation of the people in public governance, especially in the law-making process, is a crucial aspect of political governance. As further observed by Sachs, J., continuous involvement of the people ensures that democracy does not go "into a deep sleep after elections, only to be kissed back to short spells of life every five years."[3]

The nexus between the two issues is that emerging philosophy in constitutional law posits that after the people have participated fully in the making of their constitution, they must then be meaningfully engaged in the operationalisation of the ideals which they formulated. This would, perhaps, be the only assurance that after elections, democracy remains awake throughout the electoral cycle.[4] In other words, the people themselves should be the guardians and the bulwarks of their own constitution as encapsulated in the famous and immortal stanza "we the people", found at the beginning of the 2010 Constitution of Kenya and other constitutions.

From a Kenyan perspective, these are the profound issues in the country's 2010 constitution-making. As argued in this thesis, the process of the making of the Constitution of Kenya 2010 was predicated on the philosophy of popular participation of the people and the need for their continued participation in the management of public affairs. For this reason, the law which lays that foundation, the Constitution of Kenya Review Act 9 of 2008, is critically examined. Also to assist in the determination of the central question of the extent of people's participation in the twin issues is a critique of the Constitution of Kenya 2010.

In addition to the foregoing arguments, the two components of this thesis are momentous to Kenya on one more ground, namely the 2007-post election violence. In the 2007 election,

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[3] *Doctors for Life, ibid* note 2 para 230.
[4] See generally, *Doctors for Life, ibid* note 3.

President Mwai Kibaki, the incumbent, was in very bewildering circumstances, declared the winner, narrowly defeating his closest rival and former coalition partner, Raila Odinga. Immediately after the announcement, the nation was "on the brink of the precipice."[5] As this thesis shows, the violence was indeed what ignited the fire of Kenya's constitution-making. It is submitted that the fire had started after Kibaki reneged on his promise of a new constitution within 100 days after winning the presidency under a coalition agreement in December 2002.

At the core of the agreement on ending the 2007 post-election violence were genuine constitutional reforms intended to address key obstacles to good governance and the enjoyment of fundamental human rights. These are the predicaments which have bedeviled the country since independence from Britain in 1963. It is therefore necessary that every attempt be made to maintain the reform agenda which begun in earnest after the 2007 post-election crisis. The hope is that the recommendations of this thesis will play a part in that crucial national endeavour. The above key matters are briefly examined below and further adumbrated throughout the study. However, it is imperative to first appreciate the underlying historical and legal antecedents of the study.

The precursor of colonial rule in Kenya was the Imperial British East Africa Company (IBEAC). IBEAC was at the forefront of British imperial and colonial penetration in what is now Kenya. Through a Royal Charter issued under the Foreign Jurisdiction Act 1890, the Company could appoint administrators, promulgate laws, acquire and occupy land and operate courts of justice.[6] In 1895, the declaration of East Africa Protectorate (Kenya) by the British Government brought the IBEAC operations to an end.[7]

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[5] See generally, Kenya National Commission on Human Rights, "On the Brink of the Precipice: A Human Rights Account of Kenya's Post 2007 Election Violence," available at **www.knchr.org/documents/KNHCR%20doc.pdf**. Accessed on 5 August 2009.

[6] Ghai and McAuslan, **Public Law and Political Change in Kenya: A Study of the Legal Framework of**

The Foreign Jurisdiction Act 1890 placed the jurisdiction over the subjects in the protectorate under Her Majesty. However, although the 10-mile coastal strip also became part of the Protectorate, it was held on behalf of the Sultan of Zanzibar.[8] The British settlers were able to acquire land in the Protectorate with the application of the Indian Land Acquisition Act, 1894.[9] In 1920, the Protectorate (now Kenya) became a colony under the Kenya (Annexation) Order in Council. The justification for this transformation was that it was necessary for enhancing ties between Kenya and the British Empire and for the exploitation of financial opportunities created by the Colonial Stock Acts 1877.[10]

The chief agent and architect of British imperialism in the continent of Africa, Sir Frederick Lugard, had a vision that economic benefits for Britain could not be attained without vesting land in the settlers and sidelining Africans from the mainstream political governance.[11] Therefore, the main feature of settler colonialism in Kenya which, incidentally, is central to this thesis, was the exclusion of the people of Kenya from the mainstream governance, a phenomenon worsened by alienation of land owned by Kenyans. Instead of involving the people in governance processes, Lugard's model of indirect rule was predicated on the belief that, as with the Baganda of Uganda, all Africans had chiefs or tribal leaders. To Lugard, indirect rule "was to build colonial administration on the substratum of local hierarchies."[12] Unlike in Uganda, most tribes in Kenya did not have clear lines of political authority. For this reason, most leaders were chosen by British administrators and only in a few cases were they

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Government from the Colonial Times to the Present Day, London: Oxford University Press 1970 p8.

7 Ghai and McAuslan, *ibid* note 6 p3.

8 Ghai and McAuslan, *ibid* note 7 p50.

9 Ghai and McAuslan, *ibid* note 8 p51.

10 Ghai and Mc Auslan, *ibid* note 9 p51.

11 Kervinen, "Tribes of the Indirect Rule," Masters' Thesis, University of Joensuu, 26 July 2007 p13. Available at www.epublications.uef.fi/pub/URN.../URN/_NBN_FI_joy-20090066.pdf. Accessed on 2 May 2011. Also see generally, Ndege, "Colonialism and its Legacies in Kenya," Lecture Delivered During Fulbright-Hays Group Project Abroad Programme, 5 July to 6 August 2009, Moi University Main Campus. Available at www.international.iupui.edu/kenya/.../colonialism-and-its-le...-unitedStates.Accessed 12 April 2011.

12 Kervinen, *ibid* note 11 p14.

selected by the people. These leaders were used in, among others, keeping order and the recruitment of forced labour for the administration.[13]

The exclusion of Africans from the political process and the grabbing of African land were the main reasons for agitation, freedom and nationalism. This was mainly driven by the Kikuyu Central Association (KCA) and the Young Kavirondo Association (YKA).[14] Decolonisation initiative through violence was inevitable because of the manner in which many African tribes were treated. . The tribes most affected were those living in the fertile parts of the country which the settlers had forcefully occupied. The tribes included the Agikuyu (Kikuyu), the Abagusii (Kisii), Ababukusu (Bukusu) and the Giriama.[15]

In 1952, a Kikuyu military group, the *Mau Mau*, adopted a violent and forceful strategy to topple white rule. Their main target was the settler farmers who were occupying the fertile land in central Kenya.[16] The *Mau Mau* forces killed hundreds of white people and destroyed property on the occupied lands. This included the burning down of the Treetops Hotel in 1954. This was the place in which Princess (now Queen) Elizabeth of England first learnt about her father's death.[17] The response of the British Government was so swift and brutal that over forty thousand Africans, mainly of the Kikuyu tribe, were arrested and about eleven thousand killed.[18]

Although Jomo Kenyatta had publicly voiced his displeasure at the *Mau Mau* and its armed struggle, the British administration in Kenya assumed that he was the leader of the military outfit. For this reason, Kenyatta was arrested in 1953 and sentenced to prison for seven years

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13 Kervinen, *ibid* note 12 p20.
14 Mwaruvie, "A Political History of Kenya," available at . p9. Accessed on 17 November 2010.
15 Ndege, "Colonialism and its Legacies in Kenya," lecture delivered during Fulbright Hays Group Project Abroad," Moi University, 5-6 July 2009 p.4 p4.
16 African History, "Timeline: Mau Mau Rebellion," Part 1p1. Available at http://africanhistory.about.com p1. Accessed on 10 May 2010.
17 African History, *ibid* note 16 Part II p2.
18 African History, *ibid* note17 p1.

with hard labour. .[19] One of the actual and militant leaders of the *Mau Mau* was Dedan Kimathi who was captured and hanged in 1959.[20] The state of emergency, declared after the eruption of the *Mau Mau*, was lifted in 1960. For the first time, political parties became lawful with Africans forming a majority in the Legislative Council.[21]

The main parties were the Kenya African National Union (KANU) and the Kenya National Democratic Union (KADU).[22] KANU won the 1961 election but its leaders refused to form a government until Kenyatta was released. Kenyatta was released in July 1961 and in May 1963; he was elected the country's first Prime Minister. On the 12th December 1963, Kenya gained independence from Britain. One year later, Kenyatta became the first President of the new Republic. The country was governed under a Constitution crafted after deliberations at the Lancaster House constitutional talks of 1960, 1962 and 1963.[23]

The Constitution contained a Bill of Rights and a government system anchored on separation of powers, especially the protection of minorities who included the "small tribes" and colonial settlers.[24] Kenyatta almost single-handedly ruled the country until 1978 when he died. He was peacefully succeeded by his deputy, Daniel arap Moi, the Vice-President for twelve years.[25] Moi, like Kenyatta, ruled with an iron fist as he sidelined the big tribes in favour of the numerically smaller tribes.[26] He was in power for 24 years. In December 2002, his preferred successor, the late President Kenyatta's son, Uhuru Kenyatta, lost to the current

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19 African History, *ibid* note 18 p1.

20 See generally, New World Encyclopaedia, "The Mau Mau Uprising," available at **http://www.newworldencyclopedia.org/Mau_Mau_Uprising.**Accessed on 12 December 2009. Also see, John Lonsdale, "Mau Mau of the Mind: Making Mau Mau and Remaking Kenya," 31:3(1990) **The Journal of African History** pp393-421.

21 See, Parliament of Kenya, "The History of Parliament of the Republic of Kenya." vailable at **http://www.parliament.co.ke**. Accessed on 12 January 2010.

22 State House, "Kenya History," available at**http://www.statehousekenya.go.ke**.Accessed on 12 January 2010.

23 Kituo Cha Katiba, East African Centre for Constitutional Development: Kenya: "Historical and Constitutional Developments." Available at **http://kituochakatiba.org**. Accessed on 12 February 2011.

24 Ghai and McAuslan, *op. cit.* note 6 p177.

25 See generally, Onyango, "Ethnic Discourse on Contentious Issues in the Kenyan Press After the 2007 General Election," Codesria 2008. Available at **www.codesria.org** . Accessed on 12 June 2011.

26 Onyango, *ibid* note 25 p4.

President, Mwai Kibaki. Kibaki had served in the Kenyatta Government as Finance Minister and was the Vice-President in the first ten years of Moi's reign.[27]

As examined in Chapter Three of this thesis, the people of Kenya have, since independence, suffered immensely due to the country's unsatisfactory political governance architecture. They have not generally enjoyed the fruits of the struggle against colonialism. Such a painful legacy has been acknowledged in the new 2010 Constitution. The Preamble to the new Constitution honours "those who heroically struggled to bring freedom and justice to our land."

This thesis argues that the deplorable leadership and governance trajectories of the three Presidents bolstered by institutional weaknesses are the key reasons why the majority is not enjoying the freedom and justice set out in the Preamble to the new Constitution. Further, and as the central feature of this thesis, freedom and justice would only be enjoyed if there is a popular approach towards the country's constitutional and institutional architecture. It is argued that this approach would boost efforts towards stemming the disturbing state of the country's political governance. As observed by Kenya's former Minister of Justice in January 2010, National Cohesion and Constitutional Affairs, Mutula Kilonzo, Kenya "seems to be stuck in the mud of bad governance."[28]

The exigency for strong institutions of governance in Kenya and Africa in general is well captured in the assessment report of the United Nations' Economic Commission for Africa

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[27] Olaleye, EISA Democracy Seminar Series, "Legitimation or De-legitimation of Electoral Process: Role of Electoral Domestic Observes in Kenya's 2002 General Elections," p1. Available at **www.eisa.org**.Accessed on 12 March 2011. Also see, State House, Nairobi, "Profile of President Mwai Kibaki." Available at http://www.staehousekenya.go.ke/presidents/kibakiprofile.htm

[28] "*The Standard*," 21 January 2010, available at **www.standardmedia.co.ke**. Accessed on 21 January 2010.

(UNECA).[29] The UNECA's findings refer to some positive developments in governance. However, the continent's institutions need to be strengthened so as to effectively deal with issues of tax evasion, anti-corruption,[30] elections, law enforcement, service delivery, justice and law-making among others. It is submitted that an effective, people-involved democratic process especially in law-making from the constitution to legislative enactments, is central in efforts to enhance democracy and combat bad governance practices. It is for this reason that popular participation in constitution and law-making is the central thesis of this study.

In Kenya, the governance problems identified by the UNECA are reinforced by the perennial problems of political tribalism, ethnicity, tribal cleavages, run-away corruption and impunity. These problems have engulfed Kenyans from the regime of President Kenyatta in 1963 to the present. It is necessary to point out that the deeply entrenched existing culture of dysfunctional political leadership has its roots in Kenyatta's leadership. His regime had little regard for the interests of the majority but was basically anchored on a few elite dominated by his "tribe's people." It was not surprising then that the government in the 2009 Population and Housing Census failed to abandon the colonial approach of classifying Kenyans on the basis of tribe. This is a politically designed method which has over time translated into "a double-edged sword in pushing for national integration and cohesion."[31]

The concentration of power in the presidency had the unintended consequence of popular exclusion in the management of the affairs of the state. It was affected by fundamental

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[29] United Nations Economic Commission for Africa: **Striving For Good Governance in Africa: African Development Forum IV**, October 2004. Available at **www.uneca.org/arg/**... Accessed on 5 January 2010.

[30] In 2008, Kenya was the world's 20th most corrupt country, see "Forbes" as graphically illustrated in **http://www.mibazaar.com/corruptcountries**. Accessed on 26 January, 2010. The status of corruption is quite disturbing considering the abject poverty for the majority of its people. In 2008, the country's per capita income was US $1,712, occupying position 148 in the world. See **http://en.wikipedia.org/wiki/List_of_countries_by_GDP_(PPP)_per_capita**. Accessed on 8 January, 2010.

[31] *The Standard*, "Kenya's Population Results Out,"31 August 2010. Available at **http://www.standardmedia.co.ke/InsidePage.php?id=2000017245&cid=4**. Accessed on 19 September 2010.

amendments to the independence Constitution whose basic structure, including protection of fundamental human rights, was severely mutilated by the Kenyatta and Moi regimes. In the course of time, the need for a new constitution became greater by the day, culminating in the 2007 post-election violence. This thesis argues that the violence was the key trigger of events which led to the formation of the 2010 Constitution.

The new Constitution was promulgated in August 2010. It is worth noting that the Constitution was promulgated one-year into this study. Apart from minor adjustments, the new dispensation did not shift the theme of participatory democracy which underpins this thesis. The new Constitution and the entire constitution-making architecture are predicated on the painful struggle against the governance ills experienced by Kenyans since independence. The legal pillar of the new Constitution is the Constitution of Kenya Review Act 9 of 2008 (The Review Act). This Act was a major breakthrough given previous attempts which failed to give birth to a new Constitution.

However, it is argued in this thesis that the new Constitution dismally fails to effectively articulate and entrench the ideal of public participation as envisaged in the Review Act. This leads to the question of the legitimacy of the new Constitution. The crucial argument is that the making of Kenya's new supreme law is fatally defective and that the process has to be re-started. However, bearing in mind the difficult nature of Kenya's political landscape especially in constitution-making, this thesis recommends, as a stop-gap measure, constitutional amendments so as to entrench a robust participation of the people in the management of public affairs. This should be done so as to endeavour to fit within the objects and the spirit of the constitutional review as contained in the Review Act. It is hoped that the

approach would significantly align the Constitution with the democratic ideal of popular participation as enshrined in the Review Act.

One of the over-arching themes in this thesis is that the institutions of state in Kenya that are vested with the constitutional and legal mandate to safeguard and protect democracy and the aspirations of the people have failed in their fidelity to the law and the broader principle of constitutionalism. The majority of Kenyans have little faith in the country's political and governance institutions.[32] A 2010 opinion poll by Infotrak shows that the worst institutions of government are the Kenya Police, the Judiciary, the Kenya Anti-Corruption Commission, Ministry of Transport,[33] Ministry of Internal Security, the Coalition Government, Ministry of Water, Ministry of Agriculture and, the Parliament.[34] It is the central argument of this study that liberty and development will not be effectively guaranteed and enjoyed in a Constitution where the powers of the executive are reduced or shared among other organs of State with little or insignificant direct participation of the people in their institutions of governance.[35] Such an exercise is mere paper work as Kenya's history and experience show. Justice Learned Hand would have told Kenyans that these are false hopes.[36]

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[32] See generally chapter five of the study. Parliament declined to pass a law for suspected perpetrators of the post-election violence to be tried in the country as they had no faith in the local judicial process. The parliamentarians preferred the International Criminal Court instead, see BBC News, "Kenyan MPs Reject Violence Court," 12 February 20o9, available at **http://www.bbc.co.uk** p1, accessed on 30 August 2011.

[33] The Chairman of the Kenya Airports Authority, who co-founded the Democratic Party with the current President, Mwai Kibaki in 1992, did not, contrary to the law, quit his position in 2007 to campaign for Mr. Kibaki but took leave and he only resumed duty after the re-election of Mr. Kibaki as President in January 2008, see "*Daily Nation*" 25 January 2010. Available atwww.nation.co.ke/News. Accessed on 25 January, 2010.

[34] Infotrak Opinion Poll reported in *The Standard*, 3rd January 2010. Available at **www.standardmedia.co.ke**. Accessed on 4 January 2010.

[35] The 1963 Constitution of Kenya did not contain provisions for popular participation except in election of people's representatives. The new Constitution is a key departure as it contains participation of the people as one of its themes. However, and as argued in this study, the Constitution does not demonstrate serious commitment to people's participation in decision-making in the manner envisaged in the Review Act.

[36] Hand, **The Spirit of Liberty**. Available at **http://craighodkins/wordpress.com/2007/11/10/judge-leonard-hand-and-the-spirit-of-liberty/**. Accessed 10 November 2009.

Participation of the people of Kenya in their country's decision-making, in particular constitutional and legislative-making is the central theme underpinning this study. This approach is fundamentally different from the traditional, non-exhaustive Westminster conceptualisation of democracy which is grounded on regular elections under a multi-party democratic system.[37] As discussed in Chapter 6.4 of this thesis, this approach is founded on key international instruments on popular participation, namely the International Covenant on Civil and Political Rights (ICCPR), the Universal Declaration on Human Rights (UDHR), the Constitutive Act of the African Union and the African Charter on Human and Peoples' Rights (ACHPR). Kenya is a state party to these instruments. This thesis has critically evaluated the extent to which Kenya's laws and institutions conform to the norms and obligations prescribed by these instruments.

In this endeavour for Kenya, it is necessary to derive some lessons from the South African experience. This thesis is of the view that the South Africa experience is instructive due to the manner in which the Constitution of that country has elevated the principle of participatory democracy and the manner in which the judiciary has buttressed the ideal. For instance, in the leading case of *Doctors for Life,* Sachs J., observed that the people should be "a permanently engaged citizenry alerted to and involved with all legislative programmes."[38] The *Doctors for Life* case, instituted by a civil society organisation, is a clear demonstration of the governance benefits that are derived from an effective participatory system. This thesis therefore examines the extent to which the 2010 constitution-making process embraced the ideal of participatory democracy and further, whether the Constitution creates enough space for the people of Kenya to be directly involved in the management of public affairs.

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[37] Mbao, "Popular Involvement in Constitution-making: The Case of Zambia," A paper presented to the **VII World Constitutional Conference**, Athens, Greece, 11-17 June, 2007, p6. Available at **www.enelsyn.gr/papers/w1/paper%20by** %20 Melvin%20L%20m%20mbao.pdf.Accessed on 10 February 2010.

[38] *Doctors for Life*, *op. cit.* note 1 para 230.

The thesis argues that there is a direct correlation between democracy and good governance. Commenting on Brazil's democratic evolution and calling for a similar approach in Kenya, Kenya's Minister of Medical Services, Anyang' Nyong'o, argues that there are benefits derived from democratisation.[39] Explaining that "democracy pays," Nyong'o observes that "although Brazil continued to go through hard economic times in the early 1990s, democratisation continued, with the Congress and Senate asserting more power on the executive and enhancing public accountability."[40]

Although the study is essentially not premised on a comprehensive exposition of the concept of democracy, a synopsis of its actual ambit and content is examined from its Greek origins to contemporary discourses. Nwabueze argues that democracy is principally recognition of the supremacy of the people; a right for the exercise of a system of government and the non-concentration of power in one man, as this "is by its very nature arbitrary, capricious and despotic."[41] In other words, democracy entails a government elected by popular majority and with the rule of law to protect those not in the majority.[42]

The existence of the above factors does not guarantee enhanced democracy. Jennings warned us long ago that "we must not assume that a separation of powers in itself is the foundation of liberty, or to put it another way, that tyranny cannot exist where there is separation of powers."[43] However, it would not be an incorrect proposition to state that a political or

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[39] Nyong'o, "Just like Brazil, We Should Stand to Benefit if we Embrace Democracy." P1 Available at **http://www.standardmedia.co.ke**. Accessed on 12 July 2010.

[40] Nyong'o, *ibid* note 38 p1.

[41] Nwabueze, **Nigeria's Presidential Constitution 1979-83: The Second Experiment in Constitutional Democracy,** New York: Longman Inc 1985 p 3

[42] Ratner, "Democracy and Accountability: The Crises-crossing Path of two Emerging Norms," *in* Fox and Roth, **Democratic Governance and International Law,** Cambridge: Cambridge University Press 2000 p 449-490 at p 449.

[43] Jennings, **The Law and the Constitution,** 5th Ed, London: Hodder & Stoughton Educational 1979 p 24.

governance system in which these democratic virtues are substantially non-existent would not pass the legitimacy test and further that it would be the very representative of oppression and bad governance irrespective of any material development.

The study is inter-disciplinary in nature as it transcends the boundaries of sociology and law. Any study concerning people is first and foremost, a sociological exercise before any legal or jurisprudential enquiries are addressed. Law and its scholarship, it is argued, ought to have relevance to society and this should be law's validity test.[44] It is on this basis that the study is not, to a large extent, the common and traditionally normative lawyers' orthodoxy, exposition of legal doctrines and discourses. The eminent former USA Judge, Justice Cardozo reminded us that "the final cause of law is the welfare of society."[45] He further observed that rules were only justifiable if they were a means to an end which could be called upon to justify their existence.[46] Law, it is submitted, should not be conservative, positivistic or rigidly applied all the time as it is a "reservoir of social progress."[47]

Long after Cardozo's sociological exposition of law, his virtue is as true as it was then. To Posner, the major uses of law are to knock ambitious legal theories and "to help in changing the character of the legal enterprise by nudging academic law a little closer to social science."[48] The contemporary notion of 'law' is discussed in chapter two of this study where Lon Fuller's procedural requirements for the validity of law are examined. Also examined is the 'thicker' meaning of law to embrace justice, in particular, human rights as posited by former Justice O'Connor of the USA Supreme Court.

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[44] Cardozo, **The Nature of the Judicial Process,** Virginia: Bookcrafters 1977 p66.
[45] Cardozo, *ibid* note 44 p66.
[46] Cardozo, *ibid* note 45 p98.
[47] Parsons, **Legal Doctrine and Social Progress**. Colorado: Fred B Rothman & Co. 1982 p209.
[48] Posner, **Overcoming Law**, Massachusetts: Harvard University Press 1995 p393.

In this study, the above eminent legal minds have provoked the idea that law should be designed to serve humanity, with the effect that the thesis is not the traditional examination of legal doctrines in splendid isolation. The study falls within the emerging concept of law and development where the scholar looks beyond the doctrines, concepts and legal rhetoric. To demonstrate the benefits of peoples' involvement in public agenda, Handler observes that in the USA, the struggle for liberty for the minority commenced with the Montgomery bus boycott organised by the Montgomery Improvement Association. He adds that the National Association for the Advancement of the Coloured People (NAACP) was the force behind the groundbreaking Supreme Court's decision in *Brown v Board of Education*.[49] In post-independence Kenya, the people as individuals, through progressive civil society organisations have consistently been at the forefront of democratic struggles notwithstanding the odds.[50] The main thrust of this thesis is that these nascent stirrings at popular participation should have been effectively embedded in the new constitutional project.

1.2 STATEMENT OF THE RESEARCH PROBLEM AND SUBSTANTIATION

This thesis analyses and evaluates the extent of popular participation in Kenya's public governance and the 2010 constitution-making. The appraisal is motivated by the effects of a Westminster-style political trajectory in Kenya whose cardinal foundation is a pure representative system and the need to have a paradigm shift as envisaged in the Review Act. This thesis therefore examines the process of making the 2010 Constitution of Kenya from

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[49] Handler, **Social Movements and the Legal System: A Theory of Law Reform and Social Change,** New York: Academic Press 1978 p 1; **Brown v Board of Education** 347 US (483) 1945.

[50] Chapter five of this thesis discusses this aspect . Some of the civil society organisations are the University of Nairobi Students Union; the Law Society of Kenya; League of Kenyan Women Voters; National Council of Churches of Kenya; and the Catholic Church; Transparency International and Citizens' Coalition for Constitutional Change.

the perspective of popular participation and the extent to which the governance system under that Constitution embraces popular participation. As briefly examined below and as further elaborated in chapter three of this thesis, the overarching problem with its political and constitutional history has been weaknesses inherent in a pure representative democratic system.

At independence in 1963, Kenya adopted a Westminster democratic system which is principally underpinned by a pure representative model of political governance. Most importantly, the 1963 Constitution was not a product of engagement with the people of Kenya. Clearly the 1963 Constitution could not be said to represent the views of Kenyans as they were excluded from the processes which culminated in the formation of the country's first constitution. Therefore, the people of Kenya were precluded from playing the key roles of constitution-making and a direct role in the affairs of their country.

The outcome of the marginalisation of the people was that their representatives managed the affairs of the state in a manner that, dismally failed to uphold the interests of the majority of Kenyans. The main strategy, as examined in chapter three of this thesis, was the mutilation of the Constitution through amendments which entrenched an authoritarian presidency and destroyed the basic structure of the Constitution. The impact was on key institutions, especially Parliament and the judiciary, which were no more than appendages of an autocratic presidency.

The scheme to isolate the people from participating in the political governance of their country became clear in the early 1960s. For instance, after Kenya's independence in 1963, Tom Mboya (hereinafter called Mboya), who, ironically, was assassinated under the Kenyatta

regime in 1969, saw opposition politics as irritating and threatened that the government would completely and permanently put an end to it.[51] In addition, politicians who opposed Kenyatta were denied political space, some faced mysterious deaths. . For example, J. M. Kariuki, a prominent Member of Parliament and President Kenyatta critic, was assassinated in 1975.

Kariuki's disappearance and subsequent death demonstrated how the institutions of state, in this case members of the police force, could be used to entrench narrow, sectarian and class interests at the expense of the majority's interests. The Parliamentary Committee appointed to investigate the murder heavily incriminated some members of the police force and called for their prosecution. However, the state, without offering an alternative, dismissed the report arguing that the investigation was not conclusive.[52] As examined in chapter three of this thesis, more wraths came to those who opposed President Moi. Under his *Nyayo* philosophy of peace, love and unity, it was ironical that Moi saw it appropriate to constrain the democratic space through constitutional amendments and ruthless treatment of all forms of opposition.

Therefore, it might not have surprised many observers that during his reign, the Attorney-General, Mathew Muli, presented to Parliament a constitutional amendment Bill which included the removal of his (the Attorney-General) security of tenure. The Bill speedily sailed through Parliament.[53] As Ojwang has observed, the legislature rarely, "reminded the executive that it was not the sole repository of public power."[54] This observation seems to

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[51] Ojwang, **Constitutional Development in Kenya: Institutional Adaptation and Social Change**, Nairobi: Acts Press 1990 p13.

[52] Ojwang, *ibid* note 51 p13.

[53] See generally, Oloo and Mitullah, "The Legislature and Constitutionalism in Kenya," *in* Mute and Wanjala (ed), **When the Constitution Begins to Flower Volume 1: Paradigms for Constitutional Change in Kenya**: Nairobi: Clari Press 2002 pp35-57.

[54] Ojwang, *op. cit.* note 51 p140.

support Muigai's view that the excessive powers of the executive rendered the separation of powers doctrine a mere formality.[55] Trouble was gradually building as democracy was being eroded. In 1998 the former UN Secretary General, Kofi Annan, stated that "in the absence of genuinely democratic institutions, contending interests are likely to settle their differences through conflict rather than through accommodation."[56]

Kofi Annan later in a different capacity played a key role in peace talks after the 2007 post-election violence in Kenya. The governance deficiencies in the country's representative democratic structure heightened by presidential authoritarianism were the bedrock of the violence which erupted after the 2007 post-election. It is submitted that it is for these reasons that Raila Odinga of the ODM could not approach the courts for a remedy after President Mwai Kibaki was declared the winner of the hotly contested election. The lack of faith in the institutions of the state, especially the judiciary, was the principal cause of the violence in which about 1,300 precious lives were lost and thousands displaced from their homes.[57] Indeed, key international organisations, for instance the ICJ, have in the past commented on the disturbing state of the country's judiciary.[58]

The governance challenges inherent in Kenya's representative democratic system were the force behind the struggle for constitutional reforms. Further, these challenges undoubtedly underpinned and indeed motivated the 2010 constitution-making. This view is derived from the philosophy and legislative architecture of the 2010 constitution-making process which is

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[55] Muigai, "Legal and Constitutional Reforms to Facilitate Multi-party Democracy: The Case of Kenya," in Kibwana *et al,* **Law and the Struggle for Democracy in East Africa**, *Nairobi: ClariPress, 1996* pp 526-544 at p 527.

[56] Secretary General's Report to the United Nations Security Council: **The Causes of Conflict and the Promotion of Durable Peace and Sustainable Development in Africa,**New York 16th April, 1998 para 77. Available at **http://www.un.org/ecosdev/geninfo/afrec/sgreport/index.html**Accesses on 10 October 2009.

[57] See generally, Commission of Inquiry into the Post-Election Violence (CIPEV) Final Report 2008.

[58] International Commission of Jurists, "Kenya: Judicial Independence, Corruption and Reform," 2005. Available at **www.icj.org/.../kenya-JudicialindpCorruption&reform-April2005rep.**

examined in chapter five of this thesis. Specifically, the Review Act envisaged a constitution-making process in which the people of Kenya would be fully engaged. Most importantly, the governance philosophy embedded in the 2010 Constitution is one which embraces popular participation in the management of the affairs of state. It is argued that this laudable spirit was borne from the frustrations ensuing from a pure representative political trajectory, the cornerstone of the 1963 Constitution as variously amended.

From the foregoing, this thesis analyses and critically evaluates two inter-twined issues. First is an investigation and evaluation of Kenya's 2010 constitution-making process with a view to identifying the extent to which the people of Kenya were engaged in the constitution-making process. Second, the thesis assesses the 2010 Constitution with a view to determining the extent to which the twin demands of deepening democracy and entrenching popular participation have been provided for.

1.3 OBJECTIVES OF THE STUDY

This study seeks to enquire into Kenya's governance and constitutional trajectory since independence with a view to proposing specific reforms. In particular, the study:

(a) Examines the independence (1963) Constitution of Kenya against the spirit and intent of the independence constitutional talks.

(b) Enquires into the amendments effected on the 1963 Constitution and their impact on democracy, good governance, human rights and the rule of law.

(c) Examines the efforts made towards the country's democratisation including multi-partism and constitution-making initiatives.

(d) Investigates the philosophical underpinnings of the Constitution of Kenya Review Act 9 of 2008 upon which the Constitution of Kenya 2010 is anchored.

(e) Assesses the degree to which the Constitution of Kenya 2010 resonates with, and is in concordance with the spirit and intent of the Constitution of Kenya Review Act 2008

(f) Evaluates the legitimacy of the 2010 Constitution.

(g) Recommends specific constitutional reforms.

1.4 RESEARCH QUESTION

From the synopsis of the problem statement examined above, the purpose of this thesis is to research on and enquire into the following central research question:

> To what extent does the 2010 Constitution of Kenya and the constitution-making process embrace the ideal of popular participation in the Kenyan constitutional project?

1.5 HYPOTHESIS

This study hypothesis is that the 2010 Constitution of Kenya project does not significantly embrace the ideal of popular participation.

1.6 LITERATURE REVIEW

Legal and political discourses on Kenya have for long largely been predicated on two dimensions. These are general public and constitutional law and diverse aspects of reforming the independence Constitution so as to address fundamental aspects of democracy. The key

focus of these discourses, especially by Ghai and McAuslan,[59] Okoth-Ogendo,[60] Ojwang,[61] Kibwana,[62] and Muigai[63] was the country's dismal failure to adhere to the cardinal doctrine of separation of powers. The views of these scholars are perhaps what made the late foremost Kenyan scholar, Okoth-Ogendo, refer to Kenya's Constitution as a Constitution "without constitutionalism."[64] The literature substantially deals with multiple issues of the doctrine of constitutionalism especially the draconian power of the presidency. Presidential power was amassed through myriad constitutional amendments including, among others, making Kenya a *de jure* one-party state in 1982.

The breath-taking amendments are addressed by Kindiki. He also examines the attempts made towards reviewing the independence Constitution under the Moi and Kibaki regimes.[65] Mutua has examined the amazing degree of executive interference with the judiciary and the rule of law in general. He in particular notes the shocking 1991 remarks by the Attorney-General to Parliament that "a characteristic of the rule of law is that no man, save for the President is above the law."[66] The main thread running through these works is that constitutional and legal reforms under the independence Constitution were necessary so as to reduce the impact of what Ihonvbere and other African scholars refer to as the notion of the "big-man."[67]

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[59] See generally, Ghai and McAuslan, *op. cit.* note 6.

[60] Okoth-Ogendo, "The Politics of Constitutional Change in Kenya since Independence, 1963-69" 71:282 **African Affairs** (January 1972):27 pp9-34. Available at **http://afraf.oxfordjournals.org.** Accessed 5 July 2010

[61] Ojwang, *op. cit.* note 51.

[62] Kibwana, *op cit.* note 55.

[63] Muigai, *op. cit.* note 55.

[64] Okoth-Ogendo, "Constitutions without Constitutionalism: Reflections on an African Political Paradox," *in* Shivji (ed) **State and Constitutionalism: An African Debate on Democracy**. Harare: SAPES Books 1991. Also see Maseko, "Constitution-making in Swaziland: The Cattle-byre Constitution Act 001 of 2005." Draft Paper Presented at **African Network of Constitutional Law Conference on Fostering Constitutionalism in Africa**," Nairobi 2007. Available at **http://www.docstoc.com/docs/18567677/A-CONSTITUTION-WITHOUT-CONSTITUTIONALISM-The-Swaziland**.Accessed on 2 December 2010.

[65] Kindiki, "The Emerging Jurisprudence on Kenya's Constitutional Review Law," 1:153(2007) **Kenya Law Review**. Available at hppt://www.kenyalaw.org/Downloads_Other/kindiki_jurisprudence.pdf.

[66] Mutua, "Justice under Siege: The Rule of Law and Judicial Subservience in Kenya," 23(2001) **Human Rights Quarterly** 96-118 p100. Available at **http://heinonline.org.**Accessed 14 July 2010.

[67] See generally, Ihonvbere, "Towards a New Constitutionalism in Africa," Occasional Paper Series No.4 **Centre**

The writers' main focus was in the fixing of the country's constitutional architecture so as to tame the powers of the presidency and in general to align with the cardinal doctrine of separation of powers. No attempts have been made by the Kenyan scholars to investigate the need for a people-driven constitutional model and governance trajectory as advanced in this thesis. Consequently, international norms of popular participation as espoused in the ICCPR, the ACHPR, and emerging jurisprudence on popular participation especially in South Africa, has had little or no impact on Kenya's legal discourses. The country's academic and indeed judicial landscape has therefore not embraced the jurisprudential trajectory as advocated for in this thesis.

These scholars however fail to observe that, even in African countries where the doctrine of separation of powers is more pronounced, a certain degree of influence of the executive on the legislature and to a lesser extent on the judiciary is still a reality.[68] Further, participation of the people of Kenya in decision-making by public institutions is also yet to be canvassed, traversed and critically examined especially from the perspective of Kenya's new constitutional dispensation.

Although scholars on Kenya's public law dynamics have readily recognised the contribution of the people in the struggle for democracy and good governance, they have not, gone beyond a simplistic and legalistic interpretation of the "rule of law" in the country's clamour for democracy and good governance. Therefore legal pragmatism, the centerpiece of this thesis,

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for Democracy and Development (CDD) London, April 2000. Available at **http://www.kituochakatiba.org/index2.php?option=com**.Accessed 10 November 2010.

[68] Bekker, "Public Sector Governance: Accountability in the State," Paper for CIS Corporate Governance Conference, 10-11 September 2009 p16. Available at **www.ciscorpgov.co.za.** Accessed on 26 February 2010.p 10 .On the influence of the Executive on the Legislature. As regards the Executive influence on the Judiciary, see AfriMAP and Open Society Foundation for South Africa, **"South Africa: Justice Sector and the Rule of Law**,"2005 pp7-15. Available at **www.osf.org.za.**Accessed on 4 February 2010.

is a journey not seriously taken or explored. It is also not a common phrase in the country's legal landscape.

As examined in chapter four of this study, the people of Kenya, individually or collectively, made significant contribution towards positively influencing Kenya's governance paradigm. This included the struggle for the resumption of political pluralism and good economic governance.[69] This thesis advocates for the inclusion of the people of Kenya in decision-making processes of their Government, an endeavour which would contribute to the country's democratisation initiatives. For instance, in May 2009, the Mars Group, a civil society organisation, scrutinised supplementary budgetary estimates presented to Parliament by the Minister of Finance and blew the whistle after it discovered that the legislature was requested to approve an additional Ks 9.2 billion (about US $ 122 million). The matter was then, after disclosure by civil society, taken over by a Member of Parliament and the Minister had to rectify the "discrepancy."[70]

The main thread of this study is fortified by the African ideal of *ubuntu-botho* which is strengthened by the notion of *Batho-Pele* or "People First." According to Mokgoro J., the African concept of *ubuntu-botho* is not easy to define. However, she states some of its virtues as "group solidarity, conformity, compassion, respect, human dignity, collective unity and humanistic orientation."[71] Bennet argues that this African concept has become a key driver of South Africa's jurisprudence of participatory democracy under the constitutional

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[69] Chapter five of this thesis examines the role of the people and various associations in particular the 'mother churches' in the country's democratisation process.

[70] Such aspects of public governance will be analysed in Chapter four of the study. For the Mars Group case, see Mars Group, **Parliament Passes a Supplementary Budget that Contains Discrepancies: Would this Happen Anywhere Else in the World?** Available at **http://blog.marsgroupkenya.org/?tag=budget+&paged=2.**Accessed on 12 September 2010.

[71] Mokgoro, "*Ubuntu* and the Law in South Africa," paper presented at the **First Colloquium Constitution** held at Potchefstroom on 31 October 1997 p3. Available at **http://www.ajol.info/index.**Accessed 12 June 2011. On the notion of *Batho-Pele*, the ideal intends to enhance service delivery to the people; remedying failures and mistakes and giving the best possible value for money, see www.info.gov.za accessed on 2 April 2013.

revolution in that country.[72] Apart from its constitutional significance, Bennett notes that the concept has also been embraced by the courts in other branches of law, such as criminal law, administrative law, contract and private law.[73]

Legal and political scholars identify the judiciary's lack of independence under Kenya's old Constitution as one of the key impediments to the realisation of democratic governance.[74] The argument is to an extent sustainable as discussed in chapter three of this thesis. However, the writers have not approached the discourse on the Kenyan courts from the perspective of recommending a progressive and pragmatic interpretation of human rights law to attain social justice. Indeed, no comparative analysis of a rights-minded judicial approach to the interpretation of the Bill of Rights has been undertaken in any of the Kenyan discourses.

The intense magnitude of the impact of poor political governance has recently attracted the attention of human rights scholars. Some scholars now view bad political governance as a violation of human rights. For instance, a strong nexus exists between the impact of corruption on people and violation of human rights. This argument has been forcefully presented by Terracino[75] and is further elucidated in chapter two of this study. The efforts of the United Nations in its campaign for good governance, anti-corruption initiatives and the respect for human rights are also worth noting. These good governance norms are enshrined in, for instance, the ICCPR (1966); the UDHR (1948); the UNDRD (1986) and the UNCAC (2003) the specific provisions of which are examined in chapter 6.4 of this thesis.

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[72] See generally, Bennett, Ubuntu: An African Equity 14:4 (2011) **Potschefstroom Electronic Law Journal** 30-61. Available at **http://www.ajol.info/index.php/pelj/article/view/68745/56815.**Accessed 10 November 2011.

[73] Bennett, *ibid* note 72 pp32-51.

[74] See generally, Ojwang, *op. cit.* note 51; and Wanyande and Okebe (ed), **Discourses on Civil Society in Kenya**, Nairobi: African Research and Resource Forum 2009.

[75] Terracino, "Hard Law Connections between Corruption and Human Rights."**The International Council on Human Rights Policy. Review Meeting: Corruption and Human Rights Geneva**, 28-29 July 2007 p.1. Available at **http://www.ichrp.org/files/papers/130/131/_-_Julio_Terracino_-_2007.pdf**.Accessed on 10 August 2010.

The UN instruments and discourses on the link between bad governance and the enjoyment of human rights do not go to the extent of recommending and prescribing full and effective involvement of the people individually or through their associational rights in public decision-making. This approach has not been existent in Kenya's constitutional experience. Ihe existing run-away corruption in Kenya negatively affects the enjoyment of human rights. Kenyan scholars, in particular those mentioned in this chapter have not recommended people's involvement in the activities of the country's anti-corruption agencies or in the formulation of anti-corruption initiatives. Possibly, this approach should have been adopted after the 2002 opposition victory because the regime of President Kibaki failed to combat corruption as promised in the campaigns against Moi's KANU.[76]

Kibaki became President in 2002 on the strength of a coalition of opposition parties.[77] Since then, the main focus by scholars has been on the central political and governance challenges facing the Kibaki administration. Their criticisms have largely been against a background of promises that Kibaki had made as an opposition candidate and at his inauguration as President. For example, discourses by Murunga and Nasong'o[78] and Whitaker and Giersch[79] have focused on Kibaki's fall-out with Raila Odinga, a key member of the opposition coalition which defeated KANU and Moi in the 2002 elections. Cottrell and Ghai examine the failed constitution-making experience which was anchored on Kibaki's promise for a new

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[76] Kiambi, "Kibaki's 2002 Inaugural Address and Kenya's Unfulfilled Expectations."**All Academic Research**: Paper presented at the annual meeting of NCA 95th Annual Convention, Chicago Hilton &Towers, Chicago, IL, 11 November 2009. Available at **http://www.allacademic.com/meta/p366844_index.htm**. Accessed on 29 July 2010.

[77] See generally, Kiambi, *ibid* note 76.

[78] Murunga and Nasong'o, "Bent on Self-Destruction: The Kibaki Regime in Kenya," 24:1 (2006) **Journal of Contemporary African Studies** pp.1-28. Available at **http://ejournals.ebsco.com** .Accessed on 12 July 2010.

[79] Whitaker and Giersch, "Voting on a Constitution: Implications for Democracy in Kenya," 27:1 (2009) **Journal of Contemporary African Studies** .Available at **http://ejournals.ebsco.com**.Accessed on 17 July 2010.

Constitution within 100-days as President.[80] Under the Kibaki regime, it seems there has been little or no attention given by scholars to constitution-making initiatives. Their laxity and that of other Kenyans in failing to exert pressure on Kibaki to initiate genuine constitutional reforms proved fatal as manifested in the 2007 post-election violence. When calm was restored, constitution-making process had to commence in earnest.

Since the inception of the new Constitution in 2010, some scholars have made certain comments on the new Constitution. These comments generally relate to the institutional infrastructure in the new Constitution. Aketch notes that "the new Constitution seeks to end presidential hegemony through a number of mechanisms."[81] It should be observed that an examination of the new Constitution by this study does not largely support this view. There are grave concerns that the notion of the "big-man" has, either directly or indirectly, been substantially rolled-over from the old to the new constitutional order. Other academics like Yash Ghai and the Chief Justice, Willy Mutunga, raise doubts about a smooth implementation of the Constitution because of deeply vested interests which could meddle with the process.[82]

It should also be observed that scholars have not commented on or investigated the supremely important question of the robust participation of the people of Kenya in governance, the over-arching objective of the new constitutional enterprise as enshrined in the Review Act. Similarly, there have not been attempts at examining the constitution-making process of the

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[80] Cottrell and Ghai, "Constitution-making and Democratization in Kenya 14:1(2000-2005)," (2007) **Democratization** pp. 1-25. Available at **http://ejscontent.ebsco.com/ContentServer.aspx** . Accessed on 30 June 2010 .

[81] Aketch, "Institutional Reform in the New Constitution of Kenya," International Centre for Transitional Justice," October 2010 p6.Available at http://www.ictj.org/sites/ICTJ-Kenya-Institutional-Reform-2010-English.pdf.

[82] See Ghai, "Decreeing and Establishing a Constitutional Order: Challenges Facing Kenya," **The Royal African Society: African Arguments**. Available at **http://africanarguments.org/2009/08/decreeing-and-establishing-a-constitutional-order-challenges-facing-kenya/-p1**. Accessed 18 September 2011. Also see Willy Mutunga, "Will the new Constitution Really Change Kenya and Society?" Available at the The *Daily Nation*, 28 August 2011 at **http://www.nation.co.ke**.Accessed on 28 August 2011.

new Constitution from the perspectives of popular participation, court decisions or in any other manner similar to what is undertaken in this thesis. Therefore, this thesis seeks to fill in the gaps in the literature. This, in essence, is our point of departure and cardinal justification for this study.

The cardinal thesis in this study is that in Kenya, experience has shown that the people should be closer to the centre of public power for them to influence governance issues as well as "watch" their guardians in politics and administration. They shouldalso scrutinise the manner in which the guardians or fiduciaries are discharging their responsibilities. As noted by Nobel laureate, Leonid Hurwicz in an attempt to deal with the age-old question of 'who will guard the guardians' by Roman poet Juvenal:

> "a casual perusal of daily newspapers should be sufficient to convince us that there is nothing absurd about the day 'guardians, leaders and officials of political, economic, and social entities needing, and indeed getting, a great deal of oversight."[83]

It is a lot of oversight, and indeed participation of Kenyans in the conduct and decision-making of public institutions which this study proposes, unarguably an African democratic model which some western scholars are now referring to as "demo-prudence."[84]

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[83] Hurwitz, "But Who Will Guard the Guardians," **Nobel Prize Lecture**, December 8, 2007 p1. Available at **http://www.nobelprize.org/nobel_prizes/economics/.../hurwicz_lecture.pdf**. Accessed on 23 November 2010.

[84] See generally, Brian, "Demoprudence in Comparative Perspective," 47:11(2011) **Stanford Journal of International Law** 111-174. Available at **http://heinonline.org**. Accessed on 12 April 2012.

After examining the literature on Kenya's constitutional, legal and political works, it is apparent that it does not focus on the following issues which are the main points of departure in this thesis:

- The ideal of popular participation in political governance.
- The crucial Constitution of Kenya Review Act 9 of 2008 (Review Act).
- The philosophy of popular participation in constitution-making from the perspective of the Review Act.
- The key decisions of the courts relating to constitutional review process especially those of the Interim Independent Constitutional Dispute Resolution Court (IICDRC).
- The manner in which the new constitutional architecture upholds the ideals and the spirit of the constitutional review process.
- The legitimacy of the Constitution of Kenya 2010.

The above constitutional issues are weighty and primary in Kenya's jurisprudence. Although they are the core issues under investigation in this thesis, it is submitted that they are so crucial to be fully accommodated here and further scholarly work is necessary. This conviction is premised on the sheer importance of a constitution to its people. According to Mahomed AJ:

> The constitution of a nation is not simply a statute which mechanically defines the structures of a government and the relations between the government and the governed. It is a mirror reflecting the national soul; the identification of the ideals and aspirations of a nation; the articulation of the values bonding its people and disciplining its government...[85]

[85] *S v Acheson* 1991 (2) SA 805 (NM HC) as cited in *Matatiele Municipality and Others v President of the Republic of South Africa and Others* 2006 (5) SA 47(CC) para 97.

It is for the reasons set out above that this thesis embarks upon an enquiry of determining the extent to which the new Constitution of Kenya is a reflection of "the national soul," an endeavour which has not been undertaken before.

1.7 RESEARCH METHOD AND DATA COLLECTION

1.7.1 Research Method

This thesis adopts a qualitative research method. Krauss observes that "many qualitative researchers believe that the best way to understand any phenomenon is to view it in its context."[86] To understand a specific phenomenon requires the researcher to be immersed in the subject of the research as in this study.[87] This kind of method is founded on a "realistivistic, constructive ontology that posits that there is no objective reality."[88] Its opposite is logical positivism or quantitative epistemological approach in which the researcher employs "experimental methods and quantitative measures to test hypothetical generalisations."[89] The main advantage of qualitative method over the quantitative one is the exhaustive nature of the investigation under enquiry as opposed to the limited scope of the quantitative method.[90]

A research method, like the one in this thesis, has certain paradigms. Guna and Lincoln define a "research paradigm" as "the basic belief system or worldview that guides the investigator, not only in choices of method but in ontological and epistemologically

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[86] Krauss, "Research Paradigms and Meaning-making: A Primer," 10:4 (2005) **The Qualitative Report** 758-770 p758. Available at **http://www.nova.edu/ssss/QR/QR10-4/krauss.pdf**.Accessed on 12 July 2010.

[87] Krauss *ibid* note 86 p759-760.

[88] Krauss *ibid* note 87 p760.

[89] Golafshani," Understanding Reliability and Validity in Qualitative Research," 8:4 (2003) **The Qualitative Report** 597-607 p597. Available at **http://www.nova.edu/ssss/QR/QR8-4/golafashani.pdf**. Accessed 12 July 2010.

[90] Golafshani, *ibid* note 89 pp600-604.

fundamental ways."[91] The paradigms applied in this thesis are interpretive, critical and comparative. An interpretive paradigm starts from the position that an individual's knowledge of reality "is a social construction by human actors."[92] In other words, this paradigm aims atmaking sense of the phenomenon or understanding of the environment by applying appropriate techniques to interpret or construe the phenomenon. In addition, the study adopts a hermeneutical approach by extensively examining and interpreting key legal and constitutional texts. This method helps in the understanding and deriving of meaning of texts.[93]

According to Neil, critical science or the critical approach, "explores the social world, critiques it and seeks to empower the individual to overcome problems in the social world."[94] This approach is quite appropriate to this study which proposes a dramatic shift in Kenya's governance trajectory by embracing robust constitutional and legal pragmatism. Equally relevant to this study is the comparative paradigm. This approach is about "comparison of social entities."[95] The idea is to determine the differences between the entities under enquiry and to discover the key characteristics of the entity which, without the comparison, would not be possible to discover.[96] This approach is quite illuminating in this thesis as Kenya's new clamour for popular participation is compared with that in South Africa where a system of deliberative or participatory democracy is now well entrenched.[97]

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[91] Guba and Lincoln, "Competing Paradigm in Qualitative Research," *in* Denzin and Lincoln(eds.) **The Sage Handbook of Qualitative Research**: Canada: Sage Publications 1994 pp105-117 p105.

[92] Walsham, "Doing Interpretive Research," 15 (2006) **European Journal of Information Systems** 320-330 p320. Available at **http://www.uio.no/.../WalshamDoing%20InterpretiveResearchEJIS2006.pd...** Accessed 12 February 2010.

[93] See generally, Forster, "Hermeneutics," **University of Chicago**. Available at **www.philosophy.uchicago.edu/faculty/files/forster/HERM.pdf.**Accessed 25 August 2012.

[94] Neill, "Analysis of Professional Literature Class 6: Qualitative Research 1, July 2006 p1. Available at **http://wilderdom.com**.Accessed on February 2010.

[95] Mills, "Comparative Research," Sage Publications 2008. Available at **http://ics.uda.u.rug.nl/.../comparative.** Accessed on 12 February 2010 p1.

[96] Mills, *ibid* note 95 p1.

[97] See for instance, the CCSA decision in the case of **Doctors for Life**, *op. cit.* note 1.

1.7.2 Data Collection

This study was principally carried out in three stages. Stage one was about a textual or hermeneutic analysis of legal materials on Kenya relevant to the topic. Stage two was an examination of scholarly literature on diverse aspects of the study especially on constitution-making and good governance. Thirdly, unstructured interviews were conducted mainly with representatives of civil society associations which in our view were at the heart of the struggle for reforms. Sampling was therefore purposive or by "hand-picking."[98]

The legal materials most relevant to the analysis of Kenya's constitutional and democratic landscape are:

(a) Kenya's constitutions: The 1963 Constitution (as variously amended) and the 2010 Constitution. Kenya's model of democracy at independence was based on the 1963 Constitution and the political direction of its Presidents. The 2010 Constitution will certainly play a pivotal role as the country attempts to improve its governance orientation.

(b) Acts of Parliament: The main Acts of Parliament examined under the 1963 constitutional dispensation are those which in various ways destroyed the constitutional underpinnings of that Constitution. The Constitution of Kenya Review Act 9 of 2008 is the cardinal legislation under scrutiny. The Act embraced a paradigm shift in the country's model of representative democracy to direct or active participatory model in constitution-making and the country's political governance. It is on this foundation that the 2010 Constitution is examined.

(c) Law reports: Law reports especially from Kenya and South Africa have invaluably illuminated the issues under investigation in this thesis. South Africa's jurisprudence

[98] Baxter *et al.*, **How to Research**, Berkshire: Open University Press 2010 p170.

is a major source of material because of the now entrenched participative democratic model, the key theme of this study.

(d) Constitution of the Republic of South Africa, 1996: This Constitution is germane to this thesis for two main reasons. First, the Constitution adopts a participative democratic model. Second, the jurisprudence developed under it has aggressively fostered this model. This forms the basis of a fair comparative perspective with the 2010 Constitution of the Republic of Kenya. It is no surprise then, that Kenya's Committee for the Implementation of the Constitution (CIC) visited South Africa in July 2011 to learn more about its constitutional experience. Among others, the CIC held meetings with the justices of the Constitutional Court of South Africa (CCSA), the Department of Justice and the Independent Electoral Commission.[99]

(e) Commission and Conference reports: Reports by several commissions were central to this thesis. They include the Report of the Constitution of Kenya Conference 1962, Report of the Integrity and Anti-corruption Committee of the Judiciary of Kenya (The Ringera Report) and the Commission of Inquiry into the 2007 Post-election Violence (CIPEV) or the Waki Report. In one way or another, these and other reports demonstrate cardinal aspects of Kenya's governance compass.

(f) International instruments: Key instruments in international law form a central source of literature and comparative perspectives with Kenya's political direction. These include the UDHR and the ICCPR. The Constitutive Act of the AU and the ACHPR are equally relevant to this study.

(g) Literary texts: Text books, journal articles, academic papers presented at various academic conferences especially on constitutional law and newspaper reports. It is worth noting that two leading and well established Kenyan newspapers, the *Daily Nation* and

[99] Commission for the Implementation of the Constitution (CIC): "Third Quarterly Report: July-September 2011," p3.Available at **http://www.cickenya.org**. Accessed 4 March 2012.

The Standard were quite helpful. Current governance and public affairs affecting Kenya could not have been possible without these two sources.

(h) Internet sources: The internet was a key source of information especially the most recent developments in matters of constitution-making and democratisation.

In addition to the above secondary sources of information, primary data was collected by way of face-to-face interviews. The selection of sample was subjective and was based on what we consider as their central role in the struggle for constitutional reforms. Of great contribution to the struggle were the NCCK, Catholic Church, KHRC and human rights lawyers. For ethical reasons, the names of interviewees representing these associations or in their individual capacities have been withheld. My experience gathered as a spectator, albeit a student of Kenyan law, politics and constitutional development from 1985 when I joined the University of Nairobi to study law, has shed significant light in this thesis.

In the analysis of data, a pragmatic and sociological view of phenomenon, the participation of the people, was applied with a view to making a contribution to Kenya's society. This is a dramatic shift from the traditional approach to law which does not view engaging in sociological escapades as an element of the province of law.

1.7.3 Research Ethics Requirements

The researcher has embraced and acknowledged the requirements laid down by the Research Committee of the North-West University, Mafikeng Campus. In particular:

- The researcher has adhered to the policy against plagiarism. Other peoples' ideas or opinions are clearly acknowledged.
- Participants' voluntary participation; informed consent and the right of withdrawal.

- Participants being fully informed about the purpose and uses of the research, confidentiality and their right to remain anonymous.
- Feedback to participants: A letter of appreciation and key findings of the research will be given to the participants.

1.8 LIMITATIONS AND SCOPE OF THE STUDY

1.8.1 Limitations of the study

In the course of this study, certain limiting factors were experienced namely:

(a) Court decisions: Kenya's judicial experience on good governance and a "thick" conception of the ideal of the rule of law as examined in this study have not developed significantly for the courts to guide researchers and scholars on this aspect. This includes the important concept of participatory democracy. Landmark decisions of the CCSA, which came in handy. However, foreign court judgments cannot, with due respect, be an effective substitute for a home-grown jurisprudence.

(b) Discourses on popular participation: For decades, Kenya's legal and political science discourses have principally focused on the struggle for multi-partism and the exigency to stem "one-man" rule by embracing constitutional reforms. These reforms include those touching on the independence of the judiciary. This approach, though necessary in view of presidential authoritarianism, clouded the need to go further than the trimming of presidential power.

(c) New Constitution: The 2010 Constitution is clearly one of Africa's youngest. This is a major limitation from the perspective of understanding how the courts would decode key aspects of the new supreme law of Kenya.

The cardinal leitmotif of this study is the need for Kenya's laws to fully and meaningfully embrace participatory democracy more importantly in constitutional law, law-making and law reforms. The motivating factor is that Kenyans have since independence suffered immensely under a representative political system as examined in this thesis.

1.8.2 Scope of the Study

The study consists of seven chapters. Chapter one lays the foundation of the study in the form of the background or context within which the study is located; problem statement; an explanation of the rationale and justification of the study; hypothesis; methodology and limitations of the study. Chapter two examines the meaning and elements of "good governance." As discussed in the chapter, there is no consensus among scholars and other stakeholders of good governance on the actual ambit of that concept. However, the chapter strives to explicate the main governance factors which are the rule of law, transparency and accountability, anti-corruption initiatives, participation and observance of human rights norms. Due to the over-arching relevance of the contemporary meaning of the "rule of law" to this study, a more detailed analysis of that concept is also presented. The aim of this chapter is to have a conceptual appreciation of the term "good governance" which, it is hoped, will be useful in assessing the nature of Kenya's political trajectory as adumbrated in subsequent chapters.

Chapter three examines the state of Kenya's political governance from 1963-2001. The chapter discusses the country's independence constitutional architecture which was underpinned by the respect for human rights and separation of powers. The importance of this epoch in the country's governance is that under the regimes of Presidents Kenyatta and then Moi, there were severe and deliberate mutilations of the 1963 Constitution. The aim was to

personify and centralise the power of the president. The amendments destroyed the basic structure and underpinnings of the Constitution. Most crucial was the violation of human rights especially by constricting the political space under Kenyatta which was legalised by Moi. It is this nature of governance which catapulted Kenyans to commence the protracted struggle for political reforms as examined in chapter four. The latter chapter discusses the various actors in the country's struggles for democratisation, in particular civil society movements, political activists, the *wananchi* or the ordinary people of Kenya and international dynamics which fuelled the struggle for reforms.

Chapter five lays down the foundation for the critique of the 2010 Constitution-making process. Key to this enquiry is the role of President Mwai Kibaki and his promise of a new Constitution within 100 days of his victory. This promise only came to pass after the 2007-post election violence. Chapter six examines the constitution-making process from the perspective of popular inclusion. It evaluates the extent to which the people of Kenya can, under contemporary jurisprudence of constitution-making, claim that they own their supreme law as acknowledged in the Preamble to the Constitution. The chapter also examines the extent to which the people are engaged in the management of public affairs, the other twin issue in the entire constitution-making project. Chapter seven summarises the findings of the study and provides the main arguments and recommendations with a view to reforming the relevant laws more particularly the Constitution.

1.9 SUMMARY

This chapter has established the aims of this thesis. These are the extent to which the people of Kenya were involved in the process of the making of the 2010 Constitution and the extent to which that Constitution embraces the ideal of popular participation in the management of

public affairs, a key aim of the entire constitution-making project. It is on these aims that the hypothesis of the study is founded. The chapter has also briefly captured the factors which propelled the constitutional review exercise. The central one is the mutilation of the 1963 Constitution by Presidents Kenyatta and Moi culminating into an all-powerful presidency. This was the genesis of the history of the country's dismal governance history.

The chapter also laid out the methodology through which the study was conducted. The purpose was to examine its key aspects and the general approach of the thesis which is a pragmatic and sociological interpretation of phenomenon. The next chapter deals with the conceptual framework of "good governance" which concept provides the building blocks upon which the entire edifice of this thesis is founded.

CHAPTER 2: GOOD GOVERNANCE: SOME CONCEPTUAL PERSPECTIVES

2.1 INTRODUCTION

This chapter is a critical examination of the concept of "good governance." The objective is to lay a theoretical perspective for an enquiry into the state of governance in the principal institutions of public governance in Kenya examined in the next chapter. The enquiry is imperative to this thesis because the genesis of the struggle for Kenya's constitutional reforms was and remains its disappointing record of public governance.

It is common cause that the Kenya political system has been a malfunctioning representative democratic trajectory. For decades, the system has been the nerve-centre of the country's unsatisfactory political governance. It is the state of governance of public affairs in Kenya, examined in chapter three, upon which the arduous journey to the making of the 2010 Constitution was predicated, the main thrust of this thesis. Most importantly, and as argued in chapters five and six of this thesis, Kenya's new constitutional architecture is predicated on central tenets of good governance in the management of public affairs. It is the near absence of the norm of good governance in Kenya's political environment which triggered the struggle for constitutional reforms and the vicious 2007-post election violence.

2.2 LOCATING THE ORIGINS OF GOOD GOVERNANCE

The concept of good governance is relatively new in public discourse. In Africa, Mazrui has argued that from the 1990s, the need for good governance became more urgent than ever before, principally due to the end of the Cold War, because before, most African states "were

living on handouts."[100] Mazrui makes a poignant observation that international donors and cooperating partners are now disillusioned by appeals for more aid. After the end of the Cold War, their resources were diverted to former communist Europe and to other emerging economies like Vietnam and India.[101]

Mazrui's observations are exhaustively interrogated by Muuka. Muuka links the quest for a different approach in the economic management of developing states especially in Africa, to two main factors, namely the end of the Cold War which culminated in the collapse of the Soviet Bloc and Communist rule in Eastern Europe and "donor fatigue."[102] The end of the Cold War meant that there was no more geo-political competition between the East and the West for the Third World countries. Therefore there was no need to support "nasty authoritarian regimes on the grounds that they are the only feasible alternative to local Communist and or Soviet, Cuba or Chinese influence."[103] What was coined as "donor fatigue," regarding Africa, was an argument derived from the tough treatment of African regimes by the International Monetary Fund and the World Bank by way of conditionalities commonly known as the Structural Adjustment Programmes (SAPs).[104]

The main problem was that SAPs was directly involved in the opening up of democratic space, a credible threat to authoritarian rule in Africa and Kenya in particular. Muuka argues that these institutions perhaps did not see much that Africa could show for the many dollars they had provided. [105] Linked to this view, was the competition for funding that Africa got

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[100] Mazrui, "The African State as a Political Refugee," in Ali A. Mazrui & James N. Karioki (eds), **A Tale of Two Africas: Nigeria and South Africa**: London: Adonis & Abbey Publishers Ltd 2006 pp 38-56 p.38.

[101] Mazrui, *ibid* note 100 p38.

[102] Muuka, "In Defense of World Bank and IMF Conditionality in Structural Adjustment Programs."2(1998) **Journal of Business in Developing Nations** Article 2.Available at **http://www.ewp.rpi.edu/jbdn/jbdnv202.htm** pp6-7.Accessed on 16 November 2010.

[103] Muuka, *ibid* note 102 p 7.

[104] Muuka, *ibid* note 103 p 13.

[105] Muuka, *ibid* note 104 p13.

from the former Communist states.[106] Donor agencies and governments also had to deal with the question of accountability. They had to show how the tax payers' money in the form of grants was applied. They began to demand better value for money given away in grants and donor support.These demands were prompted by the end of security concerns and strategic importance of countries in need of aid.[107] Having seen how "good governance" became an integral part of public discourse, it is now necessary to examine the meaning of this term.

2.3 THE ELEMENTS OF GOOD GOVERNANCE

A precise definition or meaning of the term "good governance," is difficult to formulate. As argued by Abdellatif, this is mainly because social science terms usually derive their conceptual explanation on the basis of the actors concerned, and these actors are guided by the nature, scope and interests of their work.[108] Abdellatif's statement sheds some light on why the term has a variety of meanings.The meaning depends on the user of the term and the context in which it is used or applied. Gathii, therefore, avers that "good governance proposals are a product of a heterogeneous coalition of forces."[109] This explains the difference in its definition in particular by the UNDP, the UNHCHR, the IMF and the World Bank.[110] It is after an examination of the various definitions given to "good governance" that one suitable to the aims of this study will be formulated.

The contemporary concept of good governance has not escaped general criticism and skeptical discourses. Nuesiri, for instance, observes that although in Sub-Saharan Africa the

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[106] Muuka, *ibid* note 105 p 13.

[107] Brown, "Foreign Aid and Democracy Promotion: Lessons from Africa," 17:2(2005) **The European Journal of Development Research** 179-198 p181.

[108] Abdellatif: "Good Governance and Its Relationship to Democracy and Economic Development." Global Forum III on Fighting Corruption and Safeguarding Integrity, Seoul 20-31 May 2003 p.3. Available at **http://www.pogar.org/publications/governance/aa/goodgov.pdf**.Accessed on 10 April 2010.

[109] Gathii, "Representations of Africa in Good Governance Discourse: Policing and Containing Dissidence to Neo-Liberalism," 18 (1999) **Third World Legal Studies** pp 65-108 p65. Available at **http://www.heinonline.org/HOL/Page?handle=hein.journals/twls19988&id=1&size=2&collection=journals&index=index=journals/twls=106** .Accessed on 28 July 2010.

[110] Abdellatif, *op. cit.*note 108 pp 5-6.

good governance project is being promoted by the North as a cure "or the 'silver bullet'" to the region's socio-economic ills, such expectations are "wishful thinking or at worst a covert attempt to reinforce its political and economic hegemony over the nation states of the Sub-Saharan Africa."[111] Instead of concentrating on good governance initiatives, Nuesiri calls for a global re-construction of political and economic factors as a pre-requisite to good governance efforts.[112] Gathii argues that good governance is more of a project which legitimises neo-liberalism, describing it as "the imposition by Western, industrialised nations and international agencies, of market governance--through the concepts of liberal democracy..."[113]

While the main reasons for the emphasis on good governance by donor countries and financial institutions on Sub-Saharan Africa and other regions may be viewed with suspicion, it is argued that it adds no value in declining to adopt fair and rational ideas. Ideas which have immediate benefits to the people, especially seen against the results that would be realised if the *status quo* in Sub-Saharan Africa and Kenya in particular were to be maintained. As discussed later in this chapter, most of the contemporary principles of good governance are derived from international instruments especially by the UN and its agencies and by the AU. This is the preferred approach in this thesis as opposed to ideological and doctrinal propositions argued by some scholars examined above. A brief examination of the constitutive elements of "good governance" from selected authors follows immediately below.

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[111] Nuesiri, "The Good Governance Project in Sub-Saharan Africa (SSA)-Silver Bullet or one More Initiative Re-enforcing the North's Political and Economic Hegemony over SSA?"-Paper presented at the annual meeting of the International Studies Association, Le Centre Sheraton Hotel, Montreal, Quebec, Canada, March 17 2004. Available **at http://www.allacademic.com/one/www/www/zeroindex.php?cmd** p1.Accessed on 12 July 2010.

[112] Nuesiri, *ibid* note 111 p1.

[113] Gathii, *op. cit.* note 109 p65.

The OECD notes that good governance depends on "an ability to exercise power, and to make good decisions over time, across a spectrum of economic, social, environmental and other areas."[114] Its view is that "good governance" is comprised of technical and managerial competence; organisational capacity; reliability, predictability and the rule of law; accountability; transparency and participation.[115] These ethoses of "good governance" are substantially similar to those of the UNDP which describes good governance as "among other things, participatory, transparent, accountable and efficient."[116]

The World Bank views good governance as including anti-corruption initiatives, an important aspect for purposes of this study. Blake argues that the good governance approach by the World Bank has not always been at the core of the Bank's policies until in 1999 when it crafted the Comprehensive Development Framework draft. This introduced a new approach to the structural, social and human spectrums of development to the Bank and its country-clients.[117] The World Bank placed emphasis on aid effectiveness which, according to Kauffman, is a different approach from two decades ago when major funding could be extended even to countries with outright cases of "extreme mis-governance."[118]

The definitions of good governance articulated above seem to focus on the specific mandates of the respective institutions and are therefore not materially relevant to this thesis. Lacking

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[114] Organisation for Economic Co-operation and Development, (OECD) "Promoting Good Governance."Available at **http://www.gdrc.org/u-gov/doc-oecd_ggov.html**p1.Accessed on 12 May 2010.

[115] OECD, *ibid* note 114 p1.

[116] UNDP, "UNDP and Good Governance Experiences," above note 136 p2. In this report, the UNDP adopts a broad and comprehensive approach to the diverse factors which, combined, constitute good governance. Whereas the other global institutions are 'specialist', the UNDP embraces the main facets of good governance including the enhancement of public and private sector management, institutional reforms, human rights and the power of the people through capacity building for the civil society. Its argument as stated in its report under reference is that good governance is a prerequisite to the achievement of sustainable development.

[117] Blake, "The World Bank's Draft Comprehensive Development Framework and the Micro-Paradigm of Law and Development," 3 (2000) Yale **Human Rights and Development Law Journal** 158-198 at 162. Available at **www.heinonline.org** Accessed on 4/4/2010.

[118] Kauffman, **Aid Effectiveness and Governance: The Good, the Bad and the Ugly**. Available at **http://siteresources.worldbank.org.**Accessed on 10 May, 2010.

in these definitions is the need to observe human rights as well as participatory processes in the course of public governance and finance management. These deficiencies seem to have been addressed by NEPAD in 2001.[119] The fundamental objective of NEPAD is to focus on the causes of widespread poverty in the continent and for a reversal of this reality by the adoption of a new political paradigm. The new paradigm acknowledges that "democracy and state legitimacy have been refined to include accountable government, a culture of human rights and popular participation as human elements."[120]

Human rights concerns as a key factor in good governance are aptly illustrated by the UNHCHR. In its 2007 publication, the UNHCHR explains the link between good governance and human rights by stating that human rights principles determine the substance of good governance initiatives and, on the other hand, the absence of good governance makes the protection and enjoyment of human rights unsustainable.[121] Most importantly, the UNHCR investigates the links between good governance in four key areas; namely democratic institutions, the rule of law, anti-corruption measures and the delivery of state services.[122]In relation to the strengthening of democratic institutions, the UNHCHR embraces strategies for public participation in public governance by the establishment of institutions and decision-making processes "that facilitate the participation of citizens and civil society in policy-making."[123]

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[119] The New Partnership for Africa's Development (NEPAD). Available at **www.nepad.org**.Accessed on 8 April 2010.

[120] NEPAD, *ibid* note 119 para 43.

[121] Office of the United Nations High Commissioner for Human Rights (UNHCHR): **Good Governance Practices for the Protection of Human Rights**, United Nations, New York and Geneva, 2007 p.1. Available at **http://www.ohchr.org/Documents/Publications/GoodGovernance.pdf.**

[122] UNHCHR, *ibid* note 121 p2.

[123] UNHCHR, *ibid* note 122 p9.

Under international law, Dugard has argued that there have been attempts to link denials of human rights and the right to self-determination to the recognition of sovereignty.[124] The argument has been that a government that denied basic rights "could not be truly organised and effective."[125] It is argued that the pursuit for inclusion of human rights as a good governance component is indeed a worthy cause. As argued by Terracino, corruption amounts to violation of human rights.[126] For this reason, it is argued, the human rights of many Kenyans have been trampled upon by corrupt regimes since independence.

At the heart of good governance discourses is the concept of democracy. However, democracy as a concept, its role in development and whether it is an element of good governance are shrouded in some controversy. While this study does not attempt to reconcile the opposing views, democracy, as a human rights construct suddenly becomes an element of good governance thus deserving some consideration.[127]The opposite of democracy is authoritarianism and or autocracy which generally loathe the enjoyment of fundamental rights and freedoms, thus running counter to the thematic underpinnings of this thesis. In the case of Kenya, particularly during President Moi's reign, the little of democracy left by Kenyatta was gradually consumed by progressive introduction of extreme authoritarianism through constitutional amendments as examined in the next chapter.

After considering the foregoing attempts to conceptualise the term "good governance," read against the key governance issues being investigated in this thesis, it becomes apparent that the key elements of good governance most relevant to, and which are at the heart of this

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124 Dugard, **International Law: A South African Perspective**, 3rd ed. Claremont: Juta & Co. Ltd. 2009 p. 88.
125 Dugard, *ibid* note124 p88.
126 Terracino, *op. cit.* note 75 p1.
127 For a thorough discussion of the merits of democracy and an examination of some of the arguments raised against authoritarianism as a prerequisite for development in poor countries, see for instance, Halpen *et al*, **The Democracy Advantage: How Democracies Promote Prosperity and Peace,** New York: Routledge 2005 p2.

thesis are the rule of law, anti-corruption initiatives, human rights, transparency and accountability and popular participation. It is argued that most of Kenya's post-independence political governance history is no more than an absence of these central elements of good governance. From these elements, the chapter has defined good governance as the existence, in a political administration or institution, of a framework of transparency and accountability, the rule of law, combating corruption, observance and respect for fundamental human rights and one that embraces effective participation of the people in its decision-making processes. It is now necessary to separately examine these elements. However, peoples' participation is the main thrust of this thesis; it is examined in chapter six which investigates popular participation and the making of the 2010 Constitution of Kenya.

2.3.1 The Rule of Law

A comprehensive investigation of the historical and philosophical evolution of the doctrine of the rule of law is beyond the scope of this thesis.[128] However, the hypothetical underpinnings of this study make a discussion of this concept indispensable. What is examined here are the critical aspects of this concept of "law" from its meaning in Ancient Greece to American legal realism and contemporary discourse driven by "substantive" or "thick" conceptualisation as opposed to a "thin" or "formalistic" definitions.[129]

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[128] For a seminal examination of philosophical development of the concept of the rule of law, see , Hayek, "Origins of the Rule of Law." Available at **http://lamar.colostate.edu/~grjan/hayekrulelaw.html**Accessed on 23 May 2010. Also see, Mbao, "Constitutionalism and the Rule of Law in the Third Millennium," Inaugural Lecture, North West University South Africa 2010 (Unpublished).

[129] Meyerson, "The Rule of Law and Separation of Powers,"4 (2004) **Macquaire Law Journal** p4. Available at **http://www.law.Mq.edu.au/html/MqLJ/volume4/vol4_introd.pdf** Accessed on 10 April 2010.

2.3.1.1 The Rule of Law in Early Greece and England

One of the foremost scholars to have investigated the concept of the rule of law was the political economist Hayek.[130] Hayek states that, the origin of the modern ideals of liberty is Greece, in particular Athens during the Middle Ages.[131] The medieval view was, in general, founded on a full enjoyment of liberties. As Pericles put it, "the freedom which we enjoy in our government extends also to our ordinary life (where), far from exercising a jealous surveillance over each other, we do not feel called upon to be angry with our neighbour for doing what he likes.[132] Basic liberties were also exercised by those in the military during the Sicilian expedition and were being reminded by their general that "they were fighting for a country in which they had unfettered discretion to live as they pleased."[133]

The main characteristic of freedom in Athens was contained in the word "Isonomia," which means "equality of laws to all manner of persons."[134] According to Hayek, the concept of insomnia was imported into England from Italy in the sixteenth century and later developed into "equality before the law," "government of laws," or "rule of law."[135] He further observed that Solon had given his people "equal laws for the noble and the base", thus contrasting this term with the "arbitrary rule of tyrants."[136] "Isonomia", Hayek continued, was said by Herodotus to be more important than "demokratia," and Plato "even uses the term 'isonomy' in deliberate contrast to democracy rather than in justification of it."[137] By enabling the poor to elect magistrates from classes above them and making them account to the electors, Solon

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[130] Stein, "Rule of Law: What Does it Mean?" 293:18 (2009) **Minnesota Journal of International Law** 293-303 p297. Available at **http://www.law.umn.edu/uploads/ktjSiAeuvdPV-_oeK2UDA/Stein-introduction-FinalOnline-PDF.** Accessed on 21 May 2010.
[131] Hayek, *op. cit.* note 128 p2.
[132] Hayek, *ibid* note 131 p2.
[133] Hayek, *ibid* note 132 p2.
[134] Hayek, *ibid* note 133 p2.
[135] Hayek,*ibid* note 134 p2.
[136] Hayek, *ibid* note 135 p2.
[137] Hyek, *ibid* note 136 p2.

is credited by Mbao for planting the "seed of our modern concepts of accountability and public probity in government."[138] Democracy is what it is today because Solon empowered the governed to control and be vigilant over those wielding public power.[139]

The ancient Greek philosophers, Plato and Aristotle, strongly believed in the need for a government limited by law. Mbao argues that Plato's philosophy of law is the genesis of many modern constitutions, including that of South Africa, namely, "that the government must obey the law and be given authority by a law for an action that it takes."[140] Cairns links much of the modern law to the direct or indirect influence of Plato, which "has even yet not been fully appreciated."[141] Aristotle opined that those exercising power should be peoples' servants, thus the well-known phrase "government by laws and not by men."[142] He is also said to have conceived the doctrine of separation of powers.[143] About 300 years after Aristotle, Cicero was of the view that unfettered discretion on judges amounted to arbitrariness and it was therefore necessary to limit judicial discretion.[144]

The fundamental lesson to be learnt from the Greek philosophers is that a government dominated by the majority is also as evil as one in an absolute monarchy. "It requires, for nearly the same reasons, institutions that must protect it against itself, and should hold the permanent rein of law against arbitrary revolution, the transient urges and passions of temporary majorities."[145] If those mandated to oversee the plight of the electors may go astray, the age-old question by the Roman poet, Juvenal, of "who will guard the guardians" becomes relevant to a contemporary political system notwithstanding that Juvenal was

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[138] Mbao, *op.cit.* note 128 p6.
[139] Mbao, *ibid* note 138 p7.
[140] Mbao, *ibid* note 139 p8.
[141] Huntington Cairns, "Plato's Theory of Law," 55 (1942) **Harvard Law Review** 359-388 pp. 360-61.
[142] Stein, *op. cit.* note 130 p 297.
[143] Stein, *ibid* note 142 p297.
[144] Stein, *ibid* note 143 p298.
[145] Mbao, *op.cit.* note 128 p10.

engaged in a social escapade.[146] According to DeBow, Juvenal's "is a notoriously difficult question."[147] However, the inability of obtaining a solid answer should not dilute the thirst for new efforts and ideas towards guarding the guardians to a certain extent as proposed in this thesis. The need to watch the guardians becomes more compelling when one considers the appalling nature of governance in some states like Kenya as examined in the next chapter.

Although the roots of the doctrine of the rule of law can be found in ancient Greece, Hayek argues that "individual liberty in modern times can hardly be traced back farther than the England of the seventeenth century."[148] It is for this reason that the modern USA experience of the concept of the rule of law has its origins in the seventeenth century England due to the colonial ties between the two. In the USA, there has also always been a strong determination to uphold the doctrine as seen in forceful discourses on the subject, even before the seminal decision of the Supreme Court in *Marbury v Madison.*[149]

Blackstone's *Commentaries on the Laws of England*, for instance, are said to have had considerable influence on the early American jurists. Justice Marshall is one of the jurists who heavily relied on the *Commentaries* to support his judicial approach.[150] Certainly, this approach is as important in the USA today as it was then. Locke's formidable philosophical postulation on government and law justify the observation by Hayek that the modern liberal rights jurisprudence is founded on the seventeenth century's English thinkers. It is for this reason that one would argue that the source of the modern rule of law orthodoxy is Locke

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146 See generally, Ancient History Sourcebook, **Juvenal: Satire VI: The Ways of Women.** Available at **http://www..fordham.edu/halsall//ancient/juvenal-satvi.html**. Accessed on 19 November 2010.

147 DeBow, "The Bench, the Bar, and Everyone Else: Some Questions About State Judicial Selection, 74 (2009) **Missouri Law Review** 777-781 p781.

148 Hayek, *op. cit.* note 128 p1.

149 *Marbury v Madison* 5 US (1 Cranch) 137 (1803); Probably the most influential discourse before *Marbury* was Paine's, **Common Sense**,1776. Available at **http://www.ushistory.org/paine/commonsense2.htm.**Accessed 10 May 2010.

150 Blackstone Institute, **Sir William Blackstone.** Available at **http://www.blackstoneinstitute.org/sirwilliamblackstone.htm** . p2. Accessed 27 May 2010.

because of his near exhaustive treatment of the key elements which constitute this term as intelligibly illustrated in his Second Treatise on Civil Government.[151]

Locke's discourse is characterized by the following fundamental propositions of jurisprudence: equality of men by nature;[152] the doctrine of unreasonableness, the rule against bias; for instance that no man should be a judge in his own case;[153] the legislature exercises power entrusted to it;[154] man is free from absolute and arbitrary power;[155] man is born with an entitlement to perfect freedom;[156] absolute monarchy is inconsistent with civil liberty;[157] in absolute monarchies there is a recourse to the judges;[158] the legislature should dispense justice in accordance with the laws and that it does not have the power to promulgate extemporary decrees;[159] the legislature cannot delegate as it exercises powers on trust;[160] tyranny is the exercise of power for one's private advantage and beyond what is right, and wherever the law ends tyranny begins.[161]

Locke's exposition of the rule of law several centuries ago is as alive today as it was then. Had Kenya embraced these cardinal components of the rule of law right after independence, it is submitted that most of the governance ills which have bedeviled the country for decades, including electoral violence, could have been significantly abated.

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[151] See generally, Locke, **Second Treatise of Civil Government**, Chapter II "Of the State and Nature," Available at **http://www.constitution.org/jl/2ndtr00.htm.** Accessed on 20 April 2010.

[152] Locke, *ibid* note 151 p1.
[153] Locke, *ibid* note 152 p3.
[154] Locke,*op. cit.* note 151 Chapter IV, "Of Slavery," p1.
[155] Locke, *ibid* note 154 p1.
[156] Locke, *op.cit*.note 151, Chapter VII, "Of Political or Civil Society," p3.
[157] Locke, *ibid* note 156 p4.
[158] Locke, *ibid* note 157 p5.
[159] Locke, *op.cit* note 151 Chapter XI, "Of the Extent of the Legislative Power," p 2.
[160] Locke, *op. cit*. note 151 Chapter XVIII, "Of Tyranny," p 1.
[161] Locke, *ibid* note 160 p1.

Dicey's characterisation of the rule of law is clearly the foundation of contemporary postulations of this doctrine. His discourse is what other jurists or commentators who after him seem to have developed, and continue to develop. Dicey termed these tests "three distinct though kindred conceptions."[162] They are: punishment should be predicated on breach of laws established in the ordinary courts of the land, thus protecting people from arbitrary exercise of power;[163] no man is above the law and all persons are subject to the jurisdiction of the ordinary tribunals;[164] and the infringement of the rights of the people is determined by cases brought before the courts.[165]

After Dicey's exposition of the ideal of a limited government, the concept came out more forcefully in England through the work of Jennings. Jennings has argued that "wide administrative or executive powers are likely to be abused, and therefore ought not to be conferred."[166] Jennings formalised the inclusion of Montesquieu's separation of powers doctrine into a wider concept of the rule of law. He observed that a liberal approach to the ideal of the rule of law "requires that the powers of the Crown and of its servants shall be derived from and limited by either legislation enacted by Parliament, or judicial decisions taken by independent courts."[167] In similar vein, commenting on the necessity of limiting of public power in the USA, Tocqueville saw "no sure barrier" against tyranny in America.[168] According to him, tyranny was unlimited power; irrespective of whomsoever such power is conferred, be it a people, a king, an aristocracy, a democracy, a monarchy or a republic as this "is itself a bad and dangerous thing."[169]

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[162] Dicey, **Introduction to the Law and the Study of the Constitution**, 10th ed. London: Macmillan 1968 p186.
[163] Dicey, *ibid* note 162 p186.
[164] Dicey, *ibid* note 163 p193.
[165] Dicey, *ibid* note 164 p195.
[166] Jennings, **The Law and the Constitution**: London: 5th ed. Hoddere Stoughton p307.
[167] Jennings, *ibid* note166 p47.
[168] Tocqueville, **Democracy in America**, London: David Campbell Publishers Ltd 1994 p262.
[169] Tocqueville, *ibid* note 168 p260.

The main thread connecting the foregoing celebrated discourses on public law is that conferring unlimited power on an individual is the hallway to tyranny and consequently bad governance. Kenya's political governance experience is enough testimony to the corrosive influence of untamed powers. What is discussed next is a school of thought whose main foundation is that law should be separated from political, sociological, ethical and other concerns.

2.3.1.2 **Legal Positivism**

To legal positivists, a sociological examination of law, as in this thesis, is not within the limits of jurisprudence as it has all the hallmarks of an ethical enterprise, and, therefore, "law and morality must be separated."[170] Austin, the foremost positivist, observed that although the purpose for the existence of a sovereign political government is the advancement of human happiness for which it must labour, that "belongs to the province of ethics, rather the province of jurisprudence."[171]

Hart describes law in terms of "primary" and "secondary" rules. In the former, "human beings are required to do or abstain from certain actions," while the latter introduces, extinguishes or modifies the former.[172] Recognising how matters of law are sometimes indeterminate, Dworkin attacks Hart's 'legal rules' concept, and observes that some problems lawyers deal with are not technical but they raise ethical issues.[173] The lawyer thus looks

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[170] Macleod-Cullinane, **Lon L. Fuller and the Enterprise of Law**, p1.Available at **http://www.libertarian.co.uk//lapubs/legan022.pdf.** Accessed on 22 May, 2010.
[171] Austin, **Lectures on Jurisprudence** 12th Impression, London: John Murray, Albermale Street 1913 p123.
[172] Hart, **The Concept of Law**, Oxford: Oxford University Press, 1994 p81.
[173] Dworkin, **Taking Rights Seriously,** London: Duckworths, 1977 p1.

'outside' the strictly so called, 'law', and finds "principles, policies and other sorts of standards for example that no one should benefit from his own fraud..."[174]

Dworkin continues to argue that principles should be treated in the same manner as legal rules, thus "in the United States, at least, the 'law' includes principles as well as rules."[175] He further contends that integrity in adjudication requires the judge, "so far as is possible, to treat our present system of public standards as expressing and respecting a coherent set of principles, and to that end, to interpret these standards to find implicit standards between and beneath the explicit ones."[176]

The development of the concept of the rule of law over centuries has not been deterred by legal positivism perhaps because of a general consensus that law is a "dynamic process of creation and discovery."[177] It is perhaps for this reason that Dworkin argues that the fundamental propositions of positivism "were in error, and must be abandoned."[178] Sachs, J., (as he then was) seems to be in support of Dworkin regarding the impression of certainty of the law as suggested by the positivists. He observes that becoming logical as a judge is difficult, and not a matter of connecting "the principles with the facts, and the solution will flow like water from a rock struck by Moses."[179]

Perhaps it was at the time of the Nuremberg Trials that the real test of positivism was experienced. Hart proposed a retrospective legislation to deal with the "criminals" who, during the Third Reich, were perfectly operating within the existing laws in Nazi Germany.[180]

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[174] Dworkin, "The Model of Rules," 35 (1967-68) **University of Chicago Law Review** 14-46 p22.
[175] Dworkin, *ibid* note 174 p29.
[176] Dworkin, **Law's Empire**, Cambridge MA: Harvard University Press 1988 p217.
[177] Macleod-Cullinane, *op. cit.* note 181 p1.
[178] Dworkin, *op.cit.* note 174 p46.
[179] Sachs, **The Strange Alchemy of Life and Law**, Oxford: Oxford University Press 2009 p140.
[180] For illuminating discussions on law and morality, see the Hart-Fuller debates in Hart, "Positivism and the

Such a proposition, as opposed to an outright call for an acquittal, could be a constructive realisation by the positivists of the need for laws to have some element of morality for them to justify their existence, which is undoubtedly not positivistic. This could have been what led to Hart's observation of Nazi Germany that "the stink of such societies [was] still in our nostrils."[181] On such admission of the inadequacy of positivism by its foremost positivist, it becomes difficult to see law outside of its sociological environment. This is perhaps what triggered a different philosophical approach as articulated throughout this thesis and as exemplified in the section below.

2.3.1.3 **Non-positivism: Legal Realism and Critical Legal Studies**

It is on the basis of the foregoing fundamental shortcomings in positivism orthodoxy and on the need for legal pragmatism to solve current and emerging problems in society that the term "rule of law" should not be viewed from a restrictive definition. In addition, a formalistic approach to "law" obliterates a socio-legal enquiry as expounded in this study. This study perceives law as a tool for the maximisiation of social interests. For this reason, law should be revamped for the public good, a view which is motivated by sociological and American realism jurisprudence and to a lesser degree, the Critical Legal Studies Movement. It is this approach which perhaps makes Tamanaha credit the rule of law for its "great contribution to human existence in its capacity to hold governments legally accountable."[182]

Legal Realism

Separation of Laws and Morals" (1958) 71:4 **Harvard Law Review** 593-629; Fuller, **"Positivism and Fidelity to Law: A Reply to Prof. Hart₁"** (1958) 71:4 630-672 and Justice Markandey Katju, "The Hart-Fuller Debates," (2001) **PL WebJour** 1 pp.1-3; Available **at http://www.ebc-india.com/lawyer/articles/496-1.htm**. Accessed on 27 May 2010;Larry May, **International Criminal Law and the Inner Morality of Law**, Vanderbilt University, Available at **http://www.osgoode.yorku.ca/nathanson/legalphilosophy/documents/LarryMay-InternationalCriminalLawandtheInnerMoralityofLaw.pdf.** Accessed on 18 May 2010.

[181] Hart, *ibid* note 180 p624.

[182] Tamanaha, "The Dark Side of the Relationship between the Rule of Law and Liberalism" **St. John's University School of Law Legal Studies Research Paper Series**, New York. January 2008. Available at **http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1087023** .Accessed on 28 May 2010.

Oliver Wendell Holmes, Jr., whose distinguished works do not identify him as a 'realist,' has been described by Trevino as America's most momentous legal mind.[183] Trevino argues that Holmes' sociological postulates were heavily influenced by great sociologists of the time, some of whom he did not view favourably.[184] During Holmes' time, law was essentially seen as a fixed and logical phenomenon but he boldly argued that law had to respond to the ever constant demands of the society.[185] Holmes' immortal words written in 1881 in *The Common Law* that "the life of the law has not been logic: it has been experience," and, law "cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics"[186] are quite inspiring to this thesis whose principal focus is to perceive law as an engine for the attainment of social benefits.

In his illustrious discourse, *The Path of the Law* penned in 1896, Holmes became more forceful in his explanation of the law as a phenomenon that was neither predictable nor deductible. He argued that what indeed the courts proclaimed was what he meant by law, thus "the prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."[187] It is argued that Holmes implicitly introduced pragmatism and Legal Realism as understood today by contending that law lost its purpose "if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past."[188] In reference to studies like this one, Holmes looked forward to a

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[183] Trevino, "The Influence of Sociology on American Jurisprudence: From Oliver Wendell Holmes to Critical Legal Studies," **Marquett University: Mid-American Review of Sociology**, 1994, 28:1-2 (1994) 23-46 p23. Available at **http://www.kuschoarworks.ku.edu/dspace/bitstream/1808/.../MARSV18N1-2A2.pdf**.Accessed on 25 November 2010.

[184] Trevino, *ibid* note 183 pp24-25.

[185] Trevino, *ibid* note 184 p24.

[186] Holmes, Jr., **The Common Law,** Boston: Little, Brown and Co. 1881 p1.

[187] Holmes, Jr. "The Path of the Law," 10 **Harvard Law Review** (1896-1897) 457-478 p461.Available at **http://heinonline.org/HOL/Page?handle=hein.journals/hlr10&id=479&collection=journals&index=journals/hlr.** Accessed on 15 December 2010.

[188] Holmes, *ibid* note 187 p469.

time, which indeed arrived much later, when the energy spent on legal research should aim at the "study of the ends sought to be attained and the reasons for desiring them."[189]

Trevino observes that Roscoe Pound was Holmes's 'intellectual heir' who more concisely examined the sociological dynamics of law in American jurisprudence.[190] Pound slammed the love for legal technicalities which were adorned by laymen and by the lawyers who, in addition to addressing the jury on the merits of a case were of the view that one, "ought to have a specious technicality for good measure."[191] A mechanical application of the law would not meet the ends of the law Thus Pound argued that the "sociological movement in jurisprudence is a movement for pragmatism as a philosophy of law."[192] To him, the most difficult problem in jurisprudence was a "mechanical operation of legal rules."[193] A mechanical or mathematical application of the law robs it of its full impact, justice, which Pound argues was "the end of law."[194] He was concerned about the slow pace at which the law was moving, to respond to changing times; thus in truth, law is "a government of the living by the dead."[195] In order that law is seen as relevant and to have life, it should proceed from "an intelligent account, of the social facts..."[196] Pound then crafted six points which were the cornerstone of sociological jurisprudence.[197]

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[189] Holmes, *ibid* note 188 p474.

[190] Trevino, *op.cit*.note 183 p29.

[191] Pound, "Mechanical Jurisprudence," 8 (1908) **Columbia Law Review** 605-623 p 607.Available at **http://hein.org/HOL/Page?handle=hein.journals/clr8&id=613&collection=journals&index=journals/clr**.Accessed on 9 December 2010.

[192] Pound, *ibid* note 191 p609.

[193] Pound, "The Causes of Popular Dissatisfaction with the Administration of Justice," 20 (1936-1937) **Journal of the American Judicature Society**178- 187 p180.Available at **http://hein.org/HOL/Page?handle=hein.journals/judica20&id=180&collection=journals&index=journals/judica**. Accessed on 9 December 2010.

[194] Pound, *ibid* note 193 p180.

[195] Pound, *ibid* note 194 p180.

[196] Pound, "The Scope and Purpose of Sociological Jurisprudence," 25 (1911-1912) **Harvard Law Review** 489-516 p 513.Available at **http://heinonline.org/HOL/Page?handle=hein.journals/hlr24&id=6197collection=journals&index=journals/hlr**.Accessed on 12 December 2010.

[197] See Pound, *ibid* note 196 pp513-515. The six points are (1) the study of the actual social effects of legal institutions and legal doctrines (2) the sociological study in connection with legal study in preparation for legislation (3) the means of making legal rules effective (4) the social effects the doctrines of the law have

In the 1920s, Pound's exposition of Sociological Jurisprudence came under attack from some scholars who argued that because judges were human beings, the nature and process of decision-making were "impressionistic, idiosyncratic, informal and intuitive."[198] The realists argued that politics had a role to play in decision-making as they questioned the theory of objectivity, impartiality and determinacy in the courts' discharge of their judicial responsibilities.[199] Their observations and views on jurisprudence got the support of a Federal District Judge Joseph Hutcheson. He confessed that in deciding cases, "his decisions were impressionistic and subjective" and called for law schools to put more attention in the science of the mind regarding the way decisions are made.[200]

Legal Realism is said to be an off-shoot of Sociological Jurisprudence, although in the early twentieth century, argues White, "the exponents of the two saw them as antagonistic."[201] Scholars on both ends battled over fundamental issues in jurisprudence, especially the link between law and morality and the never-ending question of decision-making by the courts.[202] Scholars link the beginning of the growth of Realism to the 'New Deal'.[203] The New Deal was President Franklin D. Roosevelt's promise to the American people, a commitment which he made upon being elected as the presidential nominee of the Democratic Party in 1932.[204] The era of the New Deal is associated with a reasonable degree of transformation of the

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produced in the past (5) the importance of reasonable and just solutions of individual causes and (6) to make effort in making the law achieve its purpose.

198 White, "From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America," 58(1972) **Virginia Law Review** 999-1028 p1013.

199 Bybee, "Legal Realism, Common Courtesy, and Hypocrisy," 1 (2005) **Law Culture and the Humanities** 75-102 p.76. Available at **http://www.surface.syr.edu/cgi/viewcontent.cg.?article=1051&context=lawpub**. Accessed on 10 December 2010.

200 White, *op.cit* note 198 p1016.

201 White, *ibid* note 200 p999.

202 White, *ibid* note 201 p999.

203 White, *ibid* note 202 p999.

204 Plante & Niemi, "The Search for the Meaning of the New Deal: Creating a Democratic Political Economy," p1 **Social Science Research Network**. Paper prepared for presentation at the American Political Science Association Annual Meeting, 4th September 2010. Available at **http://papers.ssrn.com/sol3/papers.cfm?abstract_idn=1660238** .Accessed on 20 December 2010.

American people including enlarged liberalism which included more labour rights, public accountability and institutional changes.[205] These reforms gave birth to other democratic rights, in particular civil rights for African-Americans, women, Hispanics and access to higher education for the minorities.[206]

In a modern-day concurrence with the realists, Sachs observes that legal decision-making is not a mechanical process where all that we are supposed to do is to feed the data into a machine.[207] That is why, perhaps, one of the foremost realists, Karl Llewellyn declined to define the term 'law.'[208] He failed to envy those who attempted to define 'law' because "there are so many things to be included, and the things to be included are so unbelievably different from each other."[209] Llewellyn compared law with life and observed that since both were equally broad; one would have to get to the bottom of life's experiences to acknowledge the nature of the legal issues under scrutiny.[210]

One of Llewellyn's most forceful arguments against formalistic jurisprudence was found in his classification of 'paper rules' and 'real rules, the former being what is doctrinally known as the rule of law, "what the books there say the law is."[211] What amounted to rights and 'real rules' was no more than what the courts would say and do, and, citing Holmes, "nothing more pretentious."[212] Mackey observes that the common theme under legal realism "is a belief in the potential for improvement of human society (and therefore the human condition)

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[205] Plante and Niemi, *ibid* note 204 p1.
[206] Plante and Niemi, *ibid* note 205 p2.
[207] Sachs, *op. cit.* note 179 p142.
[208] Llewellyn, "A Realistic Jurisprudence-The Next Step," 30 (1930) **Columbia Law Review** 431-465 p432. Available at **http://heinonline.org/HOL/Page?handle=hein.journals/clr30&id=501&collection=journals&index=journals/clr** .Accessed on 13 December 2010.
[209] Llewellyn, *ibid* note 208 p431.
[210] Llewellyn, *ibid* note 209 p431.
[211] Llewellyn, *ibid* note 210 p448.
[212] Llewellyn, *ibid* note 211 p448.

through purposeful change imposed via politics and law."[213] This statement is a key driving force in this thesis. To some scholars, legal realism did not fully interrogate political and ideological dynamics of "law." This led to a controversial school of thought which went beyond Legal Realism, the Critical Legal Studies Movement.

The Critical Legal Studies Movement

Launched in the USA by 'leftist' scholars in 1977, one of the key philosophical threads of the Critical Legal Studies Movement, like the legal realists, was that law is not positivistic.[214]The philosophy of the movement is that the rule of law is what the judges say it is, which means that a judge can apply it as a weapon to fight injustice.[215] Fish has described Roberto Unger as the prophet or messiah of the Critical Legal Studies Movement.[216] Unger argues that the rule of law ideal acts as a cushion from the "arbitrary tutelage of government," making the legal system "the balance wheel of social organization."[217]Currie and de Waal seem to be in agreement by observing that the rule of law "means more than the value-neutral principle of legality."[218]

Despite the above similarity between Legal Realism and the Critical Legal Studies Movement, Freeman argues that the philosophy and objectives of the critical studies movement "is much wider."[219] Though generally not monolithic, the Critical Legal Studies Movement contends that law is a political instrument applied to entrench and preserve power

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[213] Mackey, "The Triumph of Legal Realism," available at **www.law.edu/king/2004/2004_Mackey.pdf** p5. Accessed on 10 June 2010.

[214] Standen, "Critical Legal Studies as an Anti-positivist Phenomenon," 72 (1986) **Virginia Law Review** 983-998 p995.Available at **http://hein.org/HOL/Page?handle=hein.journals/valr72&id=993&collection=journals&index=journals/valr**. Accessed on 18 December 2010.

[215] See, for instance, Fish, "Dennis Martinez and the Uses of Theory," 1996 **Yale Law Journal** (1987) 1773 at p.1781.

[216] Fish, *ibid* note 215 p1781.

[217] Unger, **Law in Modern Society: Toward a Criticism of Social Theory**, London:Collier Macmillan Publishers 1976 p.54.

[218] Currie and de Waal, **The Bill of Rights Handbook** 5th ed. Cape Town: Shunami Printers 2005 p12.

[219] Freeman, **Lloyd's Introduction to Jurisprudence**, 6th ed. London; Sweet & Maxwell 1994 p.935.

at the expense of the underprivileged, women and the minority.[220] They attack the realists' view that law and politics should be distinguished, arguing that "one cannot devise law without resorting to non-scientific values."[221] According to the movement, a judge cannot be impartial and objectivity is unattainable.[222]

In explaining the ideological postulates of the Critical Legal Studies Movement, Unger argues that what the movement has done is to undermine "the central ideas of modern legal thought and put another conception of law in their place. This conception implies a view of society and informs a practice of politics."[223] Tushnet perceives the movement as more of a 'political location' than an intellectual enterprise.[224] The movement's disciples believe that 'law is politics.'[225] This then explains why there are sub-categories of the adherents of the movement, most notably the feminists or 'fem-crits', the critical race theorists, those of literal theory persuasion and political economists.[226]

It is argued that the absence of a forceful common intellectual location among the members of the movement has affected its growth which seems to have been overshadowed by the 'more legal,' Legal Realism. The growth of the movement could also have been affected by the general suspicion of its members as being too radical, revolutionary and leftist, such that

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220 Tushnet, "Critical Legal Studies: A Political History," 100 (1990-1991) **Yale Law Journal** 1515-1544 pp1516-1517. Available at **http://hein.org/HOL/Pge?handle=hein.journals/ylr100&id=1529&collection=journals&index=journals/ylr**.Accessed on 22 December 2010.

221 Standen, *op. cit.*note 214 p995.

222 Rindall, **Jurisprudence**, 2nd ed. London: Butterworths 1999 p259.

223 Unger, "The Critical Legal Studies Movement," 96(1982-1983) **Harvard Law Review** 563-675 p.563.Available at **http://hein.org/HOL/Page?handle=hein.journals/hlr96&id=579&collection=journals&index=journals/hlr**. Accessed on 17 October 2010.

224 Tushnet, *op.cit.*note 220 p1515.

225 Tushnet, *ibid* note 224 p1517.

226 Tushnet, *ibid* note 225 pp1517-1518.

there was fear in the 1990s that they would "go around stirring up trouble by attempting to indoctrinate students in the classroom..."[227]

It is submitted that the proposition that "law is politics," the jurisprudential centrepiece of the Critical Legal Studies Movement, does not seem to be unjustified. This view is, for instance, apparent in various court decisions in modern and old liberal democracies. In the USA, the Supreme Court has made decisions with cardinal political consequences some of which are not predicated on any known legal rules or principles. One of the most notable of such decisions is *Bush v. Gore.*[228] The central legal issue before the USA Supreme Court was whether former President Bush could obtain an order of *certiorari* to quash the order for a recount of votes in the State of Florida as ordered by that State's Supreme Court.[229] Like any other applicant seeking such relief, Bush was expected to prove that on the merits, he had a probability of success, and, most importantly, he stood to suffer irreparable harm if the re-count continued as ordered by the Court *a quo.*[230]

Between the applicant and Gore, it is quite plain to see that Gore, who was behind by a few votes and was catching up, would have suffered irreparable harm had the re-count been stopped.[231] The Supreme Court, divided 5-4 on ideological lines, ruled in favour of the applicant Republican candidate. Balkin argues that the case "has shaken the faith of many

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227 Tushnet, *ibid* note 226 p1519 footnote 18.

228 *Bush v Gore* 531 U.S. 98 (2000). For a good examination of this key decision of the US Supreme Court, see Balkin, "*Bush v Gore* and the Boundary Between Law and Politics," 110 (2000-2001) **Yale Law Journal** 1407-1458. Available at **http://hein.org/HOL/Page?handle=hein.journals/ylr110&id=1425&collection=journals&index=journals/ylr**.Accessed on 17 December 2010. Also see Bugliosi, "A President by Judicial Fiat: The Betrayal of America: How the Supreme Court Undermined the Constitution and Chose Our President" 2001 at **http://www.law.uga.edu/dwilkes_more/his_fiat.html** . Accessed on 23 December 2010.Bugliosi, argues, among other contentions, that the Court chose a President for the people and that its decision was an act of judicial usurpation. He adds that other landmark cases in which the Supreme Court has 'played to the gallery' include **Roe v Wade** 410 U.S. 113 (1973) and **Planned Parenthood of Southeastern PA v. Casey** 505 U.S. 833 (1992). In the latter case, the Court was afraid of losing its public support acquired in **Roe** and it could therefore not reverse it.

229 Balkin, *ibid* note 228 p1411.

230 Balkin, *ibid* note 229 p411.

231 Balkin, *ibid* note 230 p411.

legal academics in the Supreme Court and in the system of judicial review."[232] He further observes that *Bush* v. *Gore* was not based on any constitutional doctrine and was an excellent illustration of judicial misbehaviuor.[233] He adds that the partisanship of the five conservative judges "blinded them to their own biases. It seemed as if they had lost all sense of perspective."[234] The five judges went to great legal lengths to ensure the re-election of the Republican candidate; their reasoning was "so weak and *ad hoc* by professional standards..."[235]

Law as a political tool is also manifest in the post-September 11, 2001 USA and world politics with the coinage of the term "war on terror."[236] The USA nakedly 'defiled' the fundamental rights and liberties of terror suspects by empowering the President to take draconian measures which, some legal experts deemed, were within the law, although in real fact he was acting as a dictator.[237] The lesson learnt from the limits on the primary doctrine of the rule of law by Locke, Dicey and others isthat power should be constrained. It is worth noting that the USA domestic jurisdiction was extended beyond its borders, in total disregard of international law, when it invaded Iraq in 2003. This is a manifestation, "of high-handed unilateralism."[238]

It would appear that political considerations and not necessarily "law" in a positivistic sense can weigh heavily in decision-making by courts in developing countries. This is

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[232] Balkin, *ibid* note 231 p1407.
[233] Balkin, *ibid* note 232 p1408.
[234] Balkin, *ibid* note 233 p1408.
[235] Balkin, "Critical Legal Theory," **Social Science Research Network** January 2008 p.9. Available at **http://www.papers.ssrn.com/sol3/papers.cfm?abstract_id=1083846.**Accessed on 23 December 2010. Randazza observes that the 2000 US presidential election had lots of flaws and disputes. Explaining his dismay at the U.S. Supreme Court's decision in **Bush v. Gore** he calls it "a jurisprudential farce," see 82 (2004) **Washington University Law Quarterly** 143-243 p.146. Available at **http://www.lawreview.wustl.edu/.../p%20%20%20Table%20%20contents%2082-1.pdf**.Accessed on 23 December 2010.
[236] Balkin, *ibid* note 235 p9.
[237] Balkin, *ibid* note 236 p10.
[238] Mbao, *op. cit.*note 128 pp22.

demonstrated by the jurisprudence emerging from decisions of the Constitutional Court of South Africa, (CCSA).[239] In some cases, the Court has declined to go by the will of the state as it considers its public image in a quest for what Roux argues is its legitimacy.[240] For instance, in the case of *Minister of Health and Others v. Treatment Action Campaign and Others*[241] in which the HIV and AIDS drug Nevirapine was extended to all expectant mothers, Roux contends that "the CCSA relied on favourable public opinion to overcome significant opposition by the ANC political elite."[242] As examined in the next chapter, Kenya's judiciary has for most of its life pronounced judgments favourable to the executive in vertical human rights litigation. This is a candid pointer, perhaps, to a degree of validity of the Critical Legal Studies Movement's key contention, that law is politics.

It is argued that the foregoing debates and discourses on the rule of law fail to squarely address key contemporary issues in the conception of law. Most important, the procedure and substance of law are nowadays considered central aspects of law. It is this approach which I next examine.

2.3.1.4 Contemporary Perspectives on the Rule of Law

Some scholars are skeptical of the relevance of debates and discourses on the rule of law concept as it has taken all manner of shapes and forms. Shklar's view is that the phrase "has become meaningless, thanks to ideological abuse and general overuse. No intellectual effort

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239 For a discussion on the link between politics and judicial decision-making, generally see Sarkin, "The Political Role of the Constitutional Court of South Africa," 114 (1997) **South African Law Journal** 134-150.

240 See generally, Roux, " Principle and Pragmatism on the Constitutional Court of South Africa," paper presented at the International Law Roundtable on Writing and Reading Constitutions: Commemorating 60th Anniversary of the Constitution of Japan, Yokohama 23-24 November 2007.

241 *Minister of Health and Others v. Treatment Action Campaign and Others* 2002 (5) SA 721 (CC).

242 Roux, *ibid* note 240. Also see Roux, "Tactical Adjudication: How the Constitutional Court of South Africa Survived its First Decade," paper presented at Conference on Law, Nation-building and Transformation, University of Kwazulu-Natal, 2007.

need therefore be wasted on this bit of ruling-class charter."[243] On the contrary, it is argued that debates and discourses on the rule of law need to be enhanced; especiallyfor democracies still reeling under the weight of bad governance, such as Kenya which is the focus of this thesis, This could enable the values encompassed in this concept becoming well understood, and hopefully, embedded in the legal system. I now turn to the concept of the rule of law in two perspectives, namely formal and substantive (or 'thick') meaning of the rule of law.

Procedural Meaning of the "Rule of Law."

Lon Fuller introduced a procedural dimension to the concept of the rule of law, "the inner morality of law."[244] Fuller describes positivism's fundamental postulation as strict severance of law from morality and further states that his response constitutes a "real joinder of issue between the opposing camps."[245] He argues that although the supreme law-making power cannot be limited in legal power, it must accept "the limitation of rules before it can make a law at all."[246]

In terms of constitution-making for a country emerging from a serious crisis, (as in Kenya after the 2007 elections), Fuller suggests what he terms "planning the conditions that will make it possible to realise the ideal of fidelity to law," as the mere crafting of the document is not enough.[247] The success of the process is based on whether the document is found generally acceptable, necessary, right, good, and simple to understand in language and purpose.[248] As discussed in chapter five of this thesis, the aspect of procedure as described by

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[243] Shklar, "Political Theory and The Rule of Law," in **The Rule of Law in Ideology** 1 (Hutchinson & Monahan eds. 1987) cited by Stein, "Rule of Law: What Does it Mean"? 18 (2009) **Minnesota Journal of International Law**293-303 p.296.Available at **http://www.law.umn.edu/uploads/ktjSiAeuvdPV-_oeK2UDA/Stein-introduction-FinalOnline-PDF.** Accessed on 21 May 2010.

[244] See generally, Fuller, *op.cit*. note 180.

[245] Fuller, *ibid* note 244 p631.

[246] Fuller, *ibid* note 245 p640.

[247] Fuller, *ibid* note 246 p643.

[248] Fuller, *ibid* note 247 p642.

Fuller is central to constitution-making and in so far as Kenya's 2010 Constitution is concerned, its legitimacy is interrogated on this basis.

Fuller's theory of law becomes more formidable in *The Inner Morality of Law,* [249] discourse that has been described as standing "on its own as a major piece of modern jurisprudence."[250] In the "Inner Morality of Law," Fuller lays down eight procedural conditions or principles of legality which the law should embody. The rules should be (1) generality in scope; (2) made public; (3) applied prospectively; (4) clear in meaning; (5) duly enacted, that is, being in conformity with the existing authoritative rules; (6) possible to obey; (7) stable, which is remaining in force for a reasonable period of time and (8) enforced in a manner constant with the meaning.[251] If this approach is adopted, there would then be congruence between official action and the law.[252]

Since Fuller's influential liberal discourse was written, the concept of the rule of law has gradually changed in its structure. This could be due to the rule of law being the only legitimate paradigm that the scholars and others can re-conceptualise in their attempts to provide solutions to the myriad challenges which continue to face society. The modern approach is prominently captured by the work of Raz. Raz adopts a procedurally humanistic and fair conception of the doctrine of the rule of law.[253]

The doctrine of the rule of law, argues Raz, encompasses eight principles, namely:

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[249] Fuller, **The Morality of Law**, New Haven: Yale University Press 1969.

[250] Foreword to the symposium, "The Hart-Fuller Debates: Fifty Years Later," 83:4 (2008) **New York University Law Review** pp993- 999 at 995. Available at **http://www.law.nyu.edu/ecm_dlv2/.../law.law.../ecm_pro_059772.pdf**.Accessed on 10 June 2010.

[251] Altman, "Fissures in the Integrity of Law's Empire," *in* **Reading Dworkin Seriously** in Allan Hunt (ed.) Oxford: Berg Publishers Inc. 1992 pp. 157-186 p160. Also see Fuller, *op.cit* note 249 pp33-94.

[252] Fuller, *op. cit.* note 249 p70.

[253] Raz's "new" view of the notion of law came after he attacked Dworkin's onslaught on the positivists. He wrote about Dworkin's theory of principles and standards as integral to the theory of law that, "there is nothing in Professor Dworkin's arguments to show that there is reason to abandon the attempt to draw the limits of law," Raz, "Legal Principles and the Limits of Law," 81: (1971-72) **Yale Law Journal** 823-854 at p824.

- all laws should be prospective, open and clear;
- laws should be relatively stable;
- the making of particular laws should be guided by open, stable, clear and general rules;
- the independence of the judiciary must be guaranteed;
- the principles of natural justice must be observed;
- the courts should have review powers over the implementation of the other principles;
- the courts should be easily accessible and
- the discretion of the crime-preventing agencies should not be allowed to pervert the law.[254]

These requirements took the meaning of the "rule of law" to new heights especially by the inclusion of the requirement of independence of the judiciary and that of access to the courts of justice which are quite central to studies in good governance as in this thesis.

Substantive Meaning of "Rule of Law"

The views by Raz have been hailed as important because of the "formal constraints that societies should develop in order to approach legal problems in a way that minimises the abuse of the legal process and political power."[255] These rules are however considered inadequate by a number of liberal jurisprudence scholars. They have gone further than Raz by, including equality before the law, lack of violation of human rights[256] and transparent

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[254] Raz, "The Rule of Law and Its Virtue," in **The Authority of Law: Essays on Law and Morality,** Oxford: Clarendon Press 1979 pp214-218.

[255] Yu and Guernsey, "What is the Rule of Law"? Available at **http://www.uiowa.edu/ifdebook/faq/faq_docs/Rule_of_Law.htm** p.2

[256] Kleinfeld, "Competing Definitions of the Rule of Law," in Thomas Carothers (ed.), **Promoting the Rule of Law:** In Search of Knowledge p.32. The International Commission of Jurists adopts "an impartial, objective and authoritative legal approach to the protection and promotion of human rights through the rule of law," see **http://www.icj.org** . Accessed on 29 May 2010

governance[257] as additional elements of the rule of law. Raz however warns, unsuccessfully it seems, against confusing the rule of law with democracy and human rights because the rule of law is only "one of the virtues which a legal system may possess."[258]

These observation by Raz seem not to deter, and correctly so it is submitted, discourses in favour of a combination of formalistic and substantive elements of this term. For instance, Hoexter attacks the procedural approach to the concept of rule of law from the perspectives of "parsimony" and "conceptualism."[259] Her observations are quite apt, not only to South Africa but also to a country like Kenya which has had a difficult governance.. The rule of law is affected by parsimony because the three organs of State, the executive, the legislature and the judiciary become stingy in administrative justice, while conceptualism is reliance on "technical or mechanic reasoning instead of substantive principle, and to prefer formal reasons to moral, political, economic or other social considerations."[260]

To demonstrate the existence of parsimony, Hoexter observes that the CCSA has in some major decisions adopted a pre-apartheid era judicial approach of judicial review notwithstanding the constitutionalisation of judicial review, enforceable and robust Bill of Rights, developments which create a wrong impression that the rule of law is no longer necessary in democratic South Africa.[261]

Hoexter's concern lies in the Constitutional Court's determination of what constitutes "administrative" action and the Court's reluctance to classify an action as "administrative"

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[257] Yu and Guernsey *op.cit*.note 255 p2.
[258] Raz ,*op,cit*. note 254 p211.
[259] Hoexter, "The Principle of Legality in South African Administrative Law," 4 (2004) **Macquire Law Journal** pp165-185. Available at **http://www.law.mq.edu.au/html/MqLJ/Volume4/vol4_hoexter.pdf**Accessed on 12 June 2010.
[260] Hoexter, *ibid* note 259 p168.
[261] Hoexter, *ibid* note 260 pp183-185.

thus declining to deal with the matter under this head.[262] In such cases, the Court has failed to escape from the pre-constitutionalism era legal approach where, since the courts' main attention was to "prevent the application of fairness and reasonableness, the courts never seemed to deal with the crucial business of working out the substantive content of administrative justice."[263] Such an approach is only on "the narrow confines of legality…decisions should not only be legally authorised but also that they must, in addition, conform to certain minimum standards of justice…"[264] It is argued that the minimum standards of justice, and, consequently, the rule of law are undoubtedly those set out in a country's supreme law and in other laws regardless of whether they are substantive or formalistic.

A substantive or 'thick' conception of the rule of law goes beyond procedural or legalistic safeguards. It adopts a view based on social justice. For this reason, it poses the question of the fairness of a decision or rule.[265] This is the lesson to be learnt from some South African judges. In *Masethla v President of the Republic of South Africa and Another*,[266] the applicant to the CCSA was fired without a hearing, from his position as the head of the National Intelligence Agency by the President.. Finding for the applicant, Ngcobo J (as he then was) held in his dissenting judgment that "power must be exercised in a fair manner."[267] The Judge further added that the rule of law demands that the exercise of public power should not be arbitrary but should be both fair in procedure and substance.[268]

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[262] Hoexter, *ibid* note 261 pp171-181.
[263] Hoexter *ibid* note 262 p171.
[264] Mbao, *op. cit.* note 128 p17.
[265] See Ringer, "Development, Reform, and the Rule of Law: Some Prescriptions for a Common Understanding of the "Rule of Law" and its Place in Development Theory and Practice." 10 (2007) **Yale Human Rights and Development Law Journal** 178-208. Available at **http://www.heinonline.org**.Accessed on 20 February 2012. Also see Kruger, "The South African Constitutional Court and the Rule of Law: The Maethla Judgment, A Cause for Concern? 13(3) (2010) **Potchefstroom Electronic Law Journal** 468-508. Available at **http://www.ajol.info/index.php/pelj/article/view/63678/51507**
[266] *Masethla v President of the Republic of South Africa and Another* 2008(1) SA 566 (CC)
[267] *Masethla*, *ibid* note 266 paragraph 183.
[268] *Masethla*, *ibid* note 267 paragraph 184.

It is submitted that a contrary interpretation would do violence to the spirit and intent of the Bill of Rights set out in the Constitution of that country. As Kruger has argued, "the exercise of all public power is subject to constitutional constraints."[269] A substantive conception of the rule of law then focuses not only on procedural compliance but also with the key constitutional issue of substance.

Construing the rule of law as no more than enforcing the letter of the law is a boost to injustice especially during troubled times. Mathews has argued that in apartheid South Africa, some bold judges felt not constrained by statutory provisions under the doctrine of parliamentary sovereignty. On the contrary, such judges were mindful, despite a hostile political environment, to emphasis due process.[270] In *Minister of the Interior v Harris and Another*,[271] the Appellate Division rejected attempts to stifle access to the judicial courts with the creation by the apartheid regime of a High Court of Parliament by statute. Centrivres, C.J. boldly held that:-

> This Court is competent to enquire whether, regard being had to the provisions of sec. 35, an Act has been validly passed. To hold otherwise would mean that courts of law would be powerless to protect the rights of individuals which were specifically protected in the constitution of the country.[272]

It is argued that the proposition for law as a procedural phenomenon only has almost certainly lost ground. Indeed, international jurisprudence supports this shift in approach. The

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269 Kruger, *op. cit.* note 265 p486.
270 Mathews, Freedom, State Security and the Rule of Law: **Dilemmas of the Apartheid Society.** Cape Town: Juta 1986 pp.1-3.
271 *Minister of the Interior v Harris and Another* 1952 (4) SA 769 A.
272 *Harris*, *ibid* note 271 at 470 D.

general view, as espoused by Owada, the current President of the International Court of Justice, is that the rule of law should be end-focused. He adds that the rule of law has to embrace the substantive elements of justice and human rights, "regarded as universal values by the international community."[273]

Under international law, it seems settled that the rule of law embraces both procedural and substantive fairness of laws. In various pronouncements, the Secretary-General of the UN and the UN General Assembly have consistently held that the rule of law is a substantive doctrine. In a speech which looks like prescribing key principles of public law into the conception of the rule of law, the then Secretary-General, Kofi Annan, said as follows in 2004:

> For the United Nations, the rule of law refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measurers to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers,

[273] Owada, President, International Court of Justice, The Rule of Law in a Globalization Perspective,8:2 (2009) Washington **University Global Studies Law Review** 187-205 p 196. Available at **http://law.wustl.edu/WUGSLR/Issues/Volume8_2/owada.pdf**

participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.[274]

In 1994, the then Secretary-General of the UN, Butros Butros-Ghali prescribed a strong constitution, a strong electoral system and a strong civil society as integral elements of the rule of law.[275]In the same year, the UN General Assembly resolved that respect for human rights was also central to the rule of law and reminded member states of their obligations under the UDHR.[276] Since then, the UN General Assembly has consistently retained a broad and pragmatic conception of the rule of law.

In particular, the UN has placed great emphasis on *full* enjoyment of *all* human rights as resolved in Resolution 161 of its 66th Session held in November 2011.[277] The UN interpretation of the rule of law, specifically on a full enjoyment of human rights, is central to this thesis. This interpretation should apply to Kenya because of its judiciary's long history of a narrow view of the doctrine of the rule of law which has been a barrier to the enjoyment of human rights.

The above analysis of the concept of rule of law has examined the modern elements constituting the term. They are a limited government operating under laws consistent with Fuller and Raz's procedural requirements; equality before the law; independence of the judiciary in its various facets; respect for human rights; avoiding parsimony and

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[274] United Nations, "United Nations and the Rule of Law," p1. Available at **http://www.un.org/en/rule of law/**. Accessed on 6 May 2010.

[275] The Secretary-General, "**Strengthening the Rule of Law**: Report of the Secretary-General delivered to the General Assembly, UN Doc. A/49/519 as cited by Ringer *op cit* note 265 pp192-193

[276] United Nations, "**Strengthening the Rule of Law**," Resolution 49/1994.Available at **http://www.un.org/deps/dhl/resguide/r49.htm**Accessed on 8 May 2010.

[277] United Nations General Assembly, "**Globalization and Its Impact on the Full Enjoyment of All Human Rights**," Resolution A/Res/66/161, November 2011. Available at **http://www.un.org/deps/dhl/resguide/r66/shtml**

conceptualism. What is examined next in the quest to determine the essential elements of the term "good governance" are anti-corruption initiatives, a paramount requirement in Kenya's political trajectory as examined in the next chapter.

From the foregoing discussion, it is apparent that procedural aspects of law are quite pertinent to its validity. This has more weight in constitution-making in view of the living nature of that cardinal instrument. It is for this reason that the process leading to the making of Kenya's 2010 Constitution is examined in chapter five of this thesis. However, complete legitimacy of a law is not guaranteed by procedural compliance alone. The law has to be fair in substance. In achieving both procedural and substantive validity, the courts ought to be independent, a phenomenon quite central to the rule of law to which I now turn.

2.3.1.5 **Independence of the Judiciary**

A central feature of a substantive construction of the rule of law is the independence of the judiciary. The discussion on judicial independence has been at the centre of discourses on public law for decades. Like modern discourses on the broader concept of good governance, debates on the independence of the judiciary will not end any time soon. As Malila has argued, this is because of the key role played by the judiciary in the promotion and enforcement of human rights and observance of the rule of law as a whole.[278]

Debates of this nature will indeed be prolonged, and will undoubtedly occupy the minds of scholars and theorists for as long as there are direct or indirect forces opposed to this central

[278] See generally, Malila, "The Independence of the Judiciary through the Eyes of the African Commission on Human and Peoples' Rights," p1. Paper presented at the symposium on Strengthening the Independence, Impartiality and Accountability of the Judiciary in the context of Lesotho organised by the International Commission of Jurists in conjunction with the Judiciary of Lesotho 4-5 March 2010, Maseru, Lesotho. Available at **www.icj.org/...Malila-SC.** Accessed on 3 August 2011.

principle of social order and justice. Perhaps these two observations would counter remarks which suggest that debates on the independence of the judiciary have exhausted all that is there to be said on this principle.[279] From a Kenyan perspective, at least, debates on the independence of the judiciary will be relevant for a while in view of the judiciary's dismal failure to be the guardian of the rule of law and the protector of human rights. This happened at a time when the country had a justiciable Bill of Rights reinforced by international obligations which the country owed. This aspect of the study is examined in chapter three of this thesis.

As observed by the CCSA in the case of *Justice Alliance of South Africa v President of the Republic of South Africa and Others,*[280] "judicial independence in a democracy is recognised internationally."[281] The importance of this case to this thesis is that it demonstrates the emerging jurisprudence of the CCSA, which is a lesson for Kenya, that the "weaker" branch of a constitutional government can, even in a developing country, be fearless of, and make decisions which are unpalatable to the executive branch whenever the latter is in violation of the law. As held in that case, one of the main instruments adopted by the international community on the independence of the judiciary is the United Nations Basic Principles on the Independence of the Judiciary.[282] These principles seem to be motivated by the crucial role of judges in "decisions of life, freedoms, rights and property of citizens."[283]

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279 See Malila, *ibid* note 278p2.

280 *Justice Alliance of South Africa v President of the Republic of South Africa and Others* 2011 (SA) 388 (CC). Available at **http://www.saflii.org/29/cases/ZAA/2011/23.html. Accessed** on 5 July 2012

281 *Justice Alliance*, *ibid* note280 para 38.

282 The General Assembly of the United Nations Resolutions 40/32 of 29, November 1985 and 40/146 of 13 December 1985, "Basic Principles on the Independence of the Judiciary," adopted from the Seventh Congress on the Prevention of Crime and the Treatment of Offenders, Milan, 26 August to 6 September 1985 1985. Available at **http://www.2.ohchr/english/law/injudiciary.htm**

283 See preamble, Basic Principles on the Independence of the Judiciary, *ibid* note 282.

The starting point on judicial independence is that the state should guarantee this independence and have it enshrined in the country's Constitution or in other organic laws.[284] As if addressing the executive in Kenya due to its stranglehold of the judiciary especially in the epoch examined in the next chapter, the UN notes that "it is the duty of all governmental and other institutions to respect and observe the independence of the judiciary."[285] The UN adds other elements pertinent to judicial independence as integrity and impartiality of the judges; a fair process of conducting proceedings; adequate remuneration; guaranteed tenure until a mandatory retirement age; appropriate training and qualifications; adequate resources and a fair and expeditious process of discipline and removal.[286]

From an African perspective, the ideal of judicial independence has been around for some time. The African [Banjul] Charter on Human and Peoples' Rights (ACHPR) adopted in 1981 stipulates in Article 26 that State Parties shall guarantee judicial independence and "allow the establishment and improvement of appropriate national institutions entrusted with the protection and promotion of the rights and freedoms guaranteed by the present Charter."

Before 2003, the judicial arm of the ACHPR was the African Commission on Human and Peoples' Rights (the Commission) established under Article 31 of the ACHPR. Article 31 provided that members of the Commission had to be "persons of the highest reputation, morality, integrity and competence in matters of human and peoples' rights." In 2003, the Commission was replaced by the African Court of Justice. The judges of the Court, Article 13(1) of the repealed Protocol of the Court of Justice of the African Union provided that "the independence of the Judges shall be fully ensured in accordance with international law."[287]

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[284] Article 1 of the Basic Principles on the Independence of the Judiciary, *ibid* note 283.
[285] Article 1 of the Basic Principles on the Independence of the Judiciary, *ibid* note 284
[286] See Articles 5-17 of the Basic Principles on the Independence of the Judiciary *ibid* note 285.
[287] **Protocol of the Court of Justice of the African Union**, Available at www.africa-

As Malila has argued, the standards of independence and impartiality in the ordinary courts are what guided the Commission in the discharge of its mandate.[288] The spirit of independence of the judicial arm of the AU has been retained even after the 2006 merger of the African Court on Human Rights and The Court of Justice of the African Union by the Protocol on the Statute of the African Court of Justice and Human Rights.[289] Article 12 (1) of the Statute of the African Court of Justice and Human Rights provides that the independence of the judiciary "shall be fully ensured in accordance with international law." In addition, Article 12 (3) is categorical that in the exercise of the judicial functions, the Court shall not be subject "to the direction or control of any person or body."

Kenya has not ratified the ACHPR. However, it is argued that the UN principles on judicial independence essentially resemble those in the ACHPR. Further, in 1972, Kenya ratified the International Covenant on Civil and Political Rights (ICCPR).[290] Article 14 of the ICCPR provides for a "competent, independent and impartial tribunal established by law." The argument is that apart from domestic law on judicial independence, Kenya owes the African and international community an obligation of complying with the ideal of judicial independence. Had this pivotal ideal been historically observed, the International Criminal Court (ICC) would not have been called in by the AU, through Kofi Annan's mediation panelto try key suspects of the 2007-2008 post-election violence as further elucidated in chapter five of this thesis.

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union.org/...%20Protocols/...Accessed 25 September 2012.

[288] Malila *op. cit.* note 278 p2.

[289] See, **The African Court of Justice and Human Rights**, available at www.africancourtcoalition.org. Accessed on 4 April, 2013.

[290] See generally, OHCHR, "List of Kenya's Ratification of International Human Rights Treaties." Available at **http://www.ohchr.org/.../KSC_UPR_KEN-SO8_2010...**

Apart from an international perspective on the ideal of independence of the judiciary, the ideal has over decades attracted the attention of others because of its importance in a constitutional democracy. Hamilton, one of the foremost USA founders, observed that the independence of the judiciary was necessary so as to guard the Constitution and the rights of the individual.[291] He also proposed "permanence in office," the contemporary equivalent in most constitutions being security of tenure, and financial independence of judges. Hamilton observed that a financial independence was central to the whole ideal of independence of the judges because:

> a power over a man's subsistence amounts to a power over his will. And we can never hope to see realised in practice the complete separation of the judicial from legislative power in any system which leaves the former dependent for pecuniary resources on the occasional grants of the latter.[292]

The judiciary's financial independence from the executive would enhance the ability of judges to make decisions which, perhaps, would force the other two constitutional organs adhere to the rule of law. Equally important is the judge's personal financial independence as it would contribute to curbing corruption in the judiciary. A corrupt judiciary simply cannot discharge its prime responsibility of being the custodian of justice and the rule of law. It is argued that this is the reason behind the United Nations' Convention Against Corruption (UNCAC) resolved that States should "take measures to strengthen integrity and to prevent opportunities for corruption among members of the judiciary."[293]

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[291] Hamilton, **The Federalist No.78: The Judicial Department,** p3. Available at **www.constitution.org/federa78.htm.** Accessed on 6 February 2010

[292] Hamilton, **The Federalist No 79: The Judiciary Continued,** p1. Available at **www.constitution.org.federa79.htm**.Accessed on 6 February 2010.

[293] See Article 11 of the **United Nations Convention Against Corruption** A/RES/58/4, 31 October 2003. Available at **http://www.un-documents.net/a58r4.htm**. Accessed on 10 May 2010.

Judges view their independence as central to the architecture of the rule of law and human rights. Retired Justice O'Connor of the US Supreme Court contends that an independent and strong judiciary is necessary in "achieving and maintaining the rule of law."[294] O'Connor discusses three key principles which the judiciary should be committed to, namely independence, integrity, and competence.[295] An examination of Kenya's judiciary discloses a judicial system falling far too short from the principles articulated by O'Connor. Kenya's judiciary has for most of its existence been preoccupied with defending and giving judicial endorsement to the decisions of the executive without enquiring on the moral content of law.

It is argued that the unlocking key towards an independent judiciary is its institutional independence. This is achieved by separating the roles of the legislative and the judicial branches. The former as the law-maker and the latter's function is to declare and enforce the law as well as to ensure that the rule of law always constrains the rule of man.[296]Institutional independence should be complemented by a judge's "decisional" independence, a term which embraces the basic principles of fairness and impartiality.[297] In the discharge of their responsibilities, judges should also be men and women of integrity. Central to their integrity is their incorruptibility as they are "entrusted with the ultimate decisions over the life, freedoms, duties, rights and property of citizens."[298]

Impartiality and fairness as sub-rules of the ideal of the independence of the judiciary as a rule of law principle seem to demand that judges exercise great care in the execution of their duties, especially in disputes in which a judge's experience in life, philosophy or beliefs may tempt the judge not to take the rule of law route. Cardozo was quite awake to these factors,

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[294] O'Connor, "Vindicating the Rule of Law," (2003) **Chinese Journal of International Law** 1-10 p.1. Available at **http://chinesejil.oxfordjournals.org** p1 Accessed on 22 May 2010.
[295] O'Connor, *ibid* note 294 p1.
[296] O'Connor, *ibid* note 295 p2.
[297] O'Connor, *ibid* note 296 p3.
[298] O'Connor, *ibid* note 297 p5.

which, however inarticulate and subconscious, influence judges like other mortals.[299] The need for objectivity by a judge is perhaps more crucial when the intention of the statute is being sought, for which Fuller prescribes a "structural integrity."[300]

Central towards making a significant step towards good governance is anti-corruption initiatives. That is why, as discussed below, UNCAC recommended the strengthening of the judiciary so as to avert corrupt practices. Corruption has been one of the key barriers of good governance in Kenya as further examined in the next chapter of this thesis. It is therefore imperative to examine the conceptual underpinning of anti-corruption initiatives.

2.4 ANTI-CORRUPTION INITIATIVES

As Terracino has argued, a definition of and the particular acts which constitute the term 'corruption' are not universally agreed.[301] Indeed, Article 2 of UNCAC which defines the relevant terms of this instrument does not define the term "corruption." The definition of "corruption" as provided by the African Union Convention on Preventing and Combating Corruption (AUCPCC) is not helpful as it defines corruption as "the acts and practices including related offences proscribed in this Convention."[302] These foremost instruments in combating corruption are examined later in this part of the study. First, however, some general observations on the scourge of corruption are made so as to appreciate its past and contemporary dynamics.

As Gathii has argued, from the 1960s to the early 1970s, "corruption was a backburner issue in bilateral relations between developing and developed countries as well as in development

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[299] Cardozo, *op.cit.* note 44 p2.
[300] Fuller, *op.cit.* note 180 p670.
[301] Terracino, *op. cit.* note 75 p1.
[302] See the preamble to the African Union Convention on Preventing and Combating Corruption," adopted by the 2nd Ordinary Session of the Assembly of the African Union, Maputo 11 July, 2003.

policy."[303] However, the position changed with the good governance agenda propagated by the international financial institutions. This brought "corruption to the centre stage of development policy."[304] The new position was inconsistent with the argument existing at the time that corruption "acts like oil that greases and facilitates the engine of economic growth as it helps government officials to make the process of project approval more efficient."[305]

From contemporary scholarly accounts, Nathaniel Leff seems to have been one of the pioneer scholars who viewed corruption as an engine for efficiency and development.[306] Scholars sympathetic to a certain level of corruption supported the practice due to inefficiencies in developing countries' regulatory regimes. They opted for this crime as it would "help circumvent these regulations at a low cost because it would reduce uncertainty over enforcement."[307] Nye argues that corruption played a significant role in the Russian, British and American models of economic development. [308] Qizilbash calls for caution in demonizing corruption, "since there are arguments which suggest that corruption can promote human development."[309] He argues that there is a strong case for a 'consequentialist' approach so as to determine if an act is corrupt. He states that-

> One version of this approach suggests that some action is moral if it has the consequences which are at least as good as those of

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[303] Gathii, "Defining the Relationship between Human Rights and Corruption," 31:1(2009-2010) **University of Pennsylvania Journal of International Law** pp125-202 at p.126.Available at **http://heinonline.org/HOL/Page?handle=hein.journals/upjie131&id=1&size=2&collection=j...** Accessed on 1st August 2010.

[304] Gathii, *ibid* note 303 p126.

[305] Anoruo and Braha, "Corruption and Economic Growth: The African Experience," 7:1 (2005) **Journal of Sustainable Development in Africa** pp.43-55 at p.43. Available at **http://www.jsd-africa.com/Jsda/Spring2005/ArticlePDF/Arc_Corruption%20and%20Economic%20Growth.pdf** Accessed on 30 July 2010.

[306] Leff, "Economic Development Through Bureaucratic Corruption," 8 (1964) **American Behavioural Scientist**, pp.8-14, as cited in Gathii, *op.cit*. note 303 p134 fn 19. Also see Anoruo and Braha, *op.cit*. note 305 pp.1 and 52.

[307] Gathii, *op.cit*. note 303 p134.

[308] Nye, "Corruption and Political Development: A Cost Benefit Analysis," 61:2 (1967) **The American Political Science Review** pp417-427 p417. Available at **http://www.jstor.org/pss/1953254**.Accessed on 12 August 2010.

[309] Qizilbash, "Corruption and Human Development: A Conceptual Discussion," 29:3 (2001) **Oxford Development Studies** pp255-278 at p255.

> any other action. Consequentialist reasoning is sometimes invoked in situations where the state itself is oppressive or exploitative. In such instances, it is sometimes argued that corrupt activities might be morally right. Consider the case of the bureaucrat in Nazi Germany who uses his bribe income to fund the activities of the resistance. If the consequences of bribery are, on balance, better than those of any alternative, the consequentialist would say that bribery is morally right.[310]

Consequentialism, an ethical theory outside the scope of this thesis, "is the view that morality is all about producing the right kinds of overall consequences."[311] One of the main problems with this theory seems to be that its moral content and any claim to legitimacy is that "we rarely know all the consequences of our actions."[312] The general consensus now is that the overall consequences of corruption are undesirable for human development and certainly pose a real threat to the enjoyment of human rights. It is therefore necessary to examine contemporary perspectives on corruption.

As examined above, the UNCAC and AUCPCC do not define the term "corruption." This void seems to be filled by the UNDP. The UNDP defines corruption as "the misuse of public power, office or authority for private benefit—through bribery, extortion, influence peddling, nepotism, fraud, speed money or embezzlement."[313] The definition offered by the Southern

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[310] Qizilbash, *ibid* note 309 p268.

[311] Internet Encyclopedia of Philosophy, "Consequentialism."Available at **http://www.iep.utm.edu/conseque/** Accessed on 12 August 2010.

[312] Qizilbash, *op.cit*.note 309 p268.

[313] United Nations Development Programme,(UNDP) "The Impact of Corruption on Human Rights Based Approach to Development," **Oslo Governance Centre: The Democratic Governance Fellowship Programme** p4. Available at **http://www.undp.org/oslocentre/docs05/Thusitha_final.pdf**.Accessed on 3 May 2010.

African Development Community (SADC) Protocol against Corruption is more illuminating. It states that:-

> corruption... includes bribery or any other behavior in relation to persons entrusted with responsibilities in the public and private sectors which violates their duties as public officials, private employees, independent agents or other relationships of that kind and aimed at obtaining undue advantage of any kind for themselves or others.[314]

To the globally respected civil society organisation, Transparency International (TI) whose Kenya Chapter has been at the forefront of combating corruption in Kenya, corruption "is operationally defined as the abuse of entrusted power for private gain."[315] Scholars have attempted to classify corruption into various categories depending on its magnitude. "Petty corruption" is the corruption committed by junior officers, customs clerks, and traffic police, and generally involves relatively small amounts of assets."[316] 'Grand corruption' involves "businessmen and government officials of senior rank and the figures involved are significant.[317] 'Looting,' as consistently experienced in Kenya, is "large-scale economic delinquency."[318]

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[314] **Southern African Development Community (SADC), Protocol against Corruption.** Available at **http://www.sadc.int/index/save/page/122** .Accessed on 14 August 2010. Also see Terracino, *op. cit*. note 110 p.3.

[315] Transparency International, "Frequently Asked Questions about Corruption." Available at **http://www.transparency.org/news_room/faq/corruption_faq.**Accessed on 17 June 2010.

[316] Terracino, *op.cit*.note 75 p2.

[317] Ngunjiri, "Corruption and Entrepreneurship in Kenya," 2:1 (2010) **The Journal of Language, Technology & Entrepreneurship in Africa** pp.93-106 at p.98.Available at **http://ajol.info/index.php/jolte/article/viewFile/51993/40628** .Accessed on 29 July, 2010.

[318] Ngunjiri, *ibid* note 317 p98.

Looting slightly differs from petty and grand corruption. It "is prevalent in those Third World countries where institutions of governance are particularly weak."[319] Mbonu's insightful but admittedly in-exhaustive categorisation of corruption embraces looted funds and wealth kept secretly abroad; misappropriation of public funds or embezzlement or looting; money laundering; gratification in the form of rewards and favours for the performance of official duties and abuse of office.[320] In Kenya, it seems as if "the country is munched in the clammy claws of corruption."[321] The worst form of corruption is clearly the decades-old looting of public resources by the political elite as discussed in the next chapter.

2.4.1 The Impact of Corruption

The most unequivocal voice of the international community on the disastrous impact of corruption to societies came in 2003 with the adoption of the UNCAC.[322] The appalling results of corruption are probably what made the former UN Secretary-General Kofi Annan refer to corruption as "an insidious plague that has a wide range of corrosive effects on societies."[323] The Convention recognizes the effects of corruption on institutions, the values of democracy, the threat to development and stability of states resulting from their huge resources being lost to corruption.[324] The purposes of the Convention therefore are:-

a) To promote and strengthen measures to prevent and combat corruption more efficiently and effectively;

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[319] Ngunjiri, *ibid* note 318 p98.

[320] Mbonu, "Corruption and its Impact on the Full Enjoyment of Human Rights, in Particular Economic, Social and Cultural Rights" **United Nations Economic and Social Council** E/CN.4/Sub.2/2003/18. 14 May 2003 p.5.

[321] The Economist, "**Corruption in Kenya: How to Ruin a Country,**" p1, February 26 2009. Available at **www.economist.com/node/13176864**.Accessed on 17 September 2012.

[322] United Nations General Assembly, **United Nations Convention against Corruption** A/RES/58/4, 31 October 2003. Available at **http://www.un-documents.net/a58r4.htm** .Accessed on 10 May 2010.

[323] Annan, Foreword to UNCAC, *ibid* note 321 piii.

[324] See generally, the Preamble to UNCAC, *ibid* note 323 p3.

b) To promote, facilitate and support international cooperation and technical assistance in the prevention of and against corruption, including in asset recovery;

c) To promote integrity, accountability and proper management of public affairs and public property.[325]

The main consequence of corruption as articulated by UNCAC is that the rule of law, stability and security of societies, democracy, and consequently the enforcement and enjoyment of human rights are undermined.[326] To combat the scourge, UNCAC recommends that, all State Parties should cooperate among themselves and seek the participation of non-governmental bodies and society in their anti-corruption efforts.[327] In addition, each State Party should establish body or bodies which should be granted independence under the law so as to enable them to fight the scourge.[328]It is submitted that the recommended associational approach and independence of anti-corruption bodies would significantly contribute to combating the vice.

It is encouraging to note that the negative impact of the vice of corruption has been recognised in Kenya by the Ethics and Anti-Corruption Commission (EACC). The Commission came into existence upon the promulgation of the Ethics and Anti-Corruption Commission Act 22 of 2011 as required by Article 79 of the 2010 Constitution. The EACC's report on the 2011 national survey on corruption as follows:

> The Ethics and Anti-Corruption Commission recognises that corruption has far-reaching negative effects on the development of Kenya and the prosperity of her people. Corruption stifles

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325 UNCAC, *ibid* note 324, Art.1, "Statement of Purpose," p5.
326 UNCAC, *ibid* note 325 p3.
327 Article 5(4) UNCAC, *ibid* note 326.
328 Article 5(1) and the Preamble of UNCAC, *ibid* note 327.

> economic growth, increases the cost of doing business, scuttles employment opportunities and hence leads to increased poverty levels in the country.[329]

Kenya's anti-corruption initiatives are now anchored under the AUCPCC which the country adopted in 2003, and, most important, under Article 79 of the 2010 Constitution.[330] However, the EACC 2011 report paints a bad picture of corruption in Kenya and little or no progress is evident in the struggle for what the EACC report calls a "complex, dynamic and perverse phenomenon."[331] In Kenya, anti-corruption initiatives have borne little fruit largely because of the lack of political will. In the 2011 EACC report, only 9.7% of the respondents rated the government's handling of the anti-corruption battle as "very well," a drop from the 2010 report which had 14.9% to the same question.[332]

The drafters of the UNCAC seem to have the same concerns as those of the AUCPCC on the necessary measures to fight corruption. Co-operation between Member States is imperative in ensuring the effectiveness of the measures taken.[333] Independent institutions, in particular anti-corruption agencies, should be established and maintained.[334] Legislative measures should be adopted to facilitate access to information.[335] Most important, State Parties should promote participation of the people in general and civil society formations and the media in particular.[336]

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329 Ethics and Anti-Corruption Commission (EACC), "National Corruption Perception Survey, 2011, Nairobi, May 2012 piii. Available at **www.eacc.go.ke**.Accessed 20 September 2012.

330 For Kenya's adoption of AUCPCC, see African Union: Status List of Treaties, Conventions, Protocols, and Charters. Available at **www.africa-union.org/root/au/documents/treaties.htm**

331 EACC, *op.cit.* note 329 piii.

332 EACC, *ibid* note 331 p35.

333 Article 2(2) AUCPCC, *op cit.* note 330.

334 Article 5(3) AUCPCC, *ibid* note 333.

335 Article 9 AUCPCC, *ibid* note 334.

336 Articles 11 and 12 AUCPCC *ibid* note 335.

Initiatives by the International Council on Human Rights Policy (ICHRP) and Transparency International (TI), especially TI-Kenya, are an emphatic pointer to the contribution that can be made by civil society participation in strengthening the protection of human rights and institutions of governance in general.[337] In their view, combating corruption "is central to the struggle for human rights. Corruption has always greased the wheels of the exploitation and injustice which characterise our world."[338] They identify specific areas in which corruption has had a deleterious effect on the protection and enjoyment of human rights. In particular, the vulnerable and the disadvantaged, for instance, minorities, migrant workers and those infected with HIV and AIDS, are easy victims of corrupt officials because they cannot effectively defend themselves. Corruption, including in the legislative arm of government, may therefore magnify and "exacerbate the pre-existing human rights problems of such groups."[339]

The inalienable link between corruption and violation of the rule of law, human rights and good governance in general is exemplarily recognised by the AUCPCC. The Preamble to AUCPCC connects anti-corruption initiatives in the continent of Africa to key instruments of the AU including the AU Constitutive Act, the ACHPR "and other relevant human rights instruments." The Preamble reminds Member States of the AU Constitutive Act which "enjoins Member States to co-ordinate and intensify their cooperation, unity, cohesion and efforts to achieve a better life for the peoples of Africa."

The Preamble notes that corruption undermines accountability and transparency and promotes impunity. In the peculiar circumstances of Kenya, since independence, impunity,

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[337] International Council on Human Rights Policy and Transparency International, "Corruption and Human Rights(ICHRP&TI): Making the Connection.," 2009. Available at **http://www.ichrp.org/files/reports/40/131_web.pdf**.Accessed on 24 July 2010.

[338] ICHRP & TI, *ibid* note 337 p (v).

[339] ICHRP & TI, *ibid* note 338 p7.

certainly perpetuated through corruption, has been one of the main stumbling blocks for good governance. The main reason behind the ICC process for the 2007-2008 post-election violence was political corruption in that the relevant local institutions did not garner enough trust and confidence among Kenyans.[340] These include the Kenya Police Service and the judiciary. It is argued that it is for the same reason that the Parliament declined to establish a local tribunal to try the perpetrators of the violence despite enormous efforts by President Kibaki and Prime Minister Odinga for the establishment of an independent local machinery. This was in line with the recommendations of the Kofi Annan-led mediation team.[341]

Kenya is perhaps a formidable case study of the manner in which corruption can jeopardise the rule of law. This phenomenon is worsened by the involvement of the custodians of fundamental rights and freedoms, the judiciary, in the practice. Kenyan public officials are well cognisant of the dangers of corruption to society and the nation as a whole. At the 11th International Anti-corruption Conference in Seoul, Kenya's then Minister of Justice, Kiraitu Murungi, noted that-

> ...large-scale corruption should be designated a crime against humanity, as for many around the world it falls into the same category as torture, genocide and other crimes against humanity that rob us of our human dignity.[342]

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340 See generally, Commission of Inquiry for Post-Election Violence (CIPEV) Final Report Nairobi, 2008.

341 The Kofi-Annan mediation efforts are examined in detail in chapter five of this thesis as the new constitutional dispensation was anchored on their findings.

342 11th International Anti-Corruption Conference: The Seoul Findings, May 2003 p.1. Available at **http://iacconference.org/en/about/history/**.Accessed on 24 August 2010. In 2003, Kibaki's Government was under one year old and there were indications that the Moi-era type of corruption would cease. However, Murungi, a central figure in Kibaki's "Mt. Kenya Mafia" group, was later to show reluctance to tackle corruption and indeed has constantly been a beneficiary of Kibaki's distribution of "key ministries along the ethnic spectrum," see generally Michaela Wrong "It's our Turn to Eat," specifically p.72-75.

This high-pitched anti-corruption rhetoric later haunted the Minister and the administration of President Kibaki because serious allegations of corruption emerged. They included the multi-billion shilling scandal of Anglo-Leasing.[343]

A later Anti-Corruption Conference resolved that in addition to terrorism, drugs and human trafficking, corruption in the judiciary violated due process and facilitates violations of human rights.[344]Human rights scholars and advocates are in agreement that human rights violations are an inalienable consequence of corruption. Dorfman has observed that corruption by high officials of governments is a crime against humanity and the future.[345] Gathii links the two by noting that:

> Anti-corruption initiatives fall within the rubric of good governance....For example, the anti-corruption measures aimed at achieving transparency and accountability that give individuals the right to expose wrongdoing simultaneously promote the realisation of the right to freedom of expression.[346]

The foregoing impact of corruption has been recognised by the emerging jurisprudence of the CCSA. For instance, in the case of *Glenister v President of the Republic of South Africa,*[347]

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[343] For an examination of corruption under the reign of President Kibaki, including the Anglo-Leasing scandal, see chapter 5.2.2.1 *infra*.

[344] 13th International Anti-Corruption Conference, "Cutcome of the 13th International Anti-Corruption Conference," 30 October-2 November 2008 p.2.Available at **http://www.13iacc.org/en/IACC/Conference_Agenda** Accessed on 19 August 2010.

[345] Dorfman, "Whose Memory? Whose Justice? A Meditation on How and When and if to Reconcile, 8thLecture, **Nelson Mandela Foundation**, 31July, 2010. Available at **http://www.nelsonmandela.org/index.php/news/article/eigthnelson_mandela_annuallecture_adress/**. Accessed on 18 September 2010.

[346] Gathii,, *op.cit*.note 303 p150.

[347] *Glenister v President of the Republic of South Africa* 2011 (7) BCLR 651(CC). The UNDP observes that "corruption can directly affect rights at macro level and a micro, local level. For example, the Indonesian case studies reveal that poor people are expected to pay bribes to teachers to obtain reports, for school uniforms, and for scholarships affecting their right to education. In Sri Lanka, where healthcare is free, patients in line for heart surgery are reportedly required to pay a bribe to hospital staff to bring them up in line for surgery. In

the Court observed that among others, corruption affects the ability of the state to discharge its obligations under the Constitution also impairs democratic values and institutions.[348] It is argued that such judicial *dicta* by the Kenyan Courts combined with eradication of corruption in the judiciary would significantly contribute to combating the "insidious plague" in the country. What is next examined as part of the discourse on good governance is the need to observe human rights. This discussion is relevant to the thesis in view of Kenya's appalling human rights history.

2.5 HUMAN RIGHTS

2.5.1 An International Overview

The OHCHR defines human rights as rights "inherent to all human beings."[349] Every human being is entitled to these rights irrespective of one's nationality, ethnic origin or any other status.[350] The UDHR calls upon nations, organisations and individuals to strive to respect them and to take measures for their implementation.[351] These rights include, among others the right to equality, dignity, life, liberty, freedom from torture and to cruel or degrading treatment and the right to protection of the law.[352]

Most important, for the purposes of this study is the right of everyone to participate in the government of his country, either directly or indirectly.[353] Second, the will of the people,

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these cases, corruption directly impacts upon the poor people's rights to education and health care, UNDP *op.cit*. note 313 p11.

348 *Glenister*, *ibid* note 347 para 166.

349 OHCHR, "What are human Rights?" Available at **http://www.ohchr.org/en/issues/Pages/WhatareHumanRights.aspx**p1. Accesed on 3 December 2010.

350 OHCHR, *ibid* note 349 p1.

351 See the Preamble to the UDHR. Available at **www.un.org/en/documents/udhr/index.shtml**. Accessed on 2 February 2010.

352 See generally UDHR, *ibid* note 351.

353 UDHR, *ibid* note 352 Article 21(1).

exercised through periodic and genuine elections, "shall be the basis of the authority of the government."[354] It is therefore submitted that flawed electoral processes as those experienced in Kenya's 2007 plebiscite was a serious violation of human rights especially as enshrined in the foremost international instrument of human rights law, the UDHR. As Dugard has argued, the UDHR has had "immense" influence in the building of other international instruments, for instance the ICCPR and the ICESCR.[355]

As further argued in chapter four of this thesis, it is trite to note that Kenya has ratified the ICCPR, the UN's foremost instrument on popular participation.[356] Kenya's ratification of the ICCPR reinforced by the domestication of general rules of international law makes a formidable case for the country to adhere to diverse aspects of human rights as a good governance virtue.[357]

An inalienable nexus exists between good governance and human rights. The UNHCHR remarks that these concepts are mutually reinforcing as both are based on the principles of "participation, accountability, transparency and state responsibility...Although human rights empower people, they cannot be respected and protected in a sustainable manner without good governance."[358] The UNHCHR also observes that economic growth should also be aligned to fundamental human rights principles.[359]

A report by the OHCHR on various countries demonstrates that human rights principles determine the substance of efforts towards good governance, for instance, legislative

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[354] UDHR, *ibid* note 353 Article 21(3).
[355] Dugard, *op. cit.* note 124 p314.
[356] OHCHR Library, "List of Kenya's Ratification of International Human Rights Treaties." Available at **http://www.ohchr.org/.../KSC_UPR_KEN_S08_2010...**
[357] Article 2(5) of the Constitution of the Republic of Kenya 2010 irrevocably domesticates general principles of international law by stating that those principles "shall form part of the law of Kenya."
[358] UNHCHR, *op.cit.*note 349 p10.
[359] UNHCHR, *ibid* note 358 p10.

frameworks, policies, and budgetary allocations and, "without good governance, human rights cannot be respected and protected in a suitable manner."[360] Human rights values, as the driving force behind good governance reforms, create avenues for effective participation, especially in democratic institutions, the delivery of state services, the rule of law and anti-corruption initiatives.[361] It is perhaps for this reason that in 2009, the then Secretary General of the UN called upon nations to not only embrace democracy as traditionally known but to blend it with human rights and full participation in all areas of peoples' lives.[362]

The AU has adopted a similar approach. Through the AU Constitutive Act, member states have committed themselves to the promotion and protection of human and peoples' rights with a view to ensuring good governance.[363] In particular, the ACHPR generally replicates fundamental rights and guarantees set out in the ICCPR and the UDHR. From a participatory-democratic perspective, the ACHPR is more laudable. Article 13 provides that citizens have the right to participate in the affairs of their governments either directly or through their legally elected representatives.

For most of Kenya's political and constitutional history, the absence of necessary constitutional infrastructure has been a stumbling block in the realization of the spirit and purport of the AU Constitutive Act and other international instruments. This position has

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360 Office of the United Nations High Commissioner for Human Rights, "Good Governance Practices for the Protection of Human Rights," New-York and Geneva, 2007 p.1. Available at **http://www.ohchr.org/Documents/Publications/GoodGovernance.pdf.**Accessed on 10 July 2010. The study covered diverse governance areas especially strengthening democratic institutions by for instance institutionalizing public participation in South Africa. Another area critical to good governance include enhancing the rule of law, for instance legal and policy reform for the protection of the rights of migrant workers in the Republic of Korea. Also examined was improving service delivery by the State, for example equitable access to social services through a transparent process with reference to Ecuador. On combating corruption, India was examined from a perspective of transparency in public expenditure through participatory social auditing.

361 UNHCHR, *ibid* note 360 p2.

362 UN, "Guidance Note of the Secretary-General on Democracy," 15 September 2009 p2.Available at **http://www.un.org/.../UNSG%20Guidance%20Note%20on%20Democracy**... Accessed on 10 August 2010.

363 See, for instance, Article 3 (g) and (h) of the African Union Constitutive Act.

been worsened by a culture of impunity and general lack of political commitment to embrace the ideals of human rights. However, significant reforms on the enforcement and enjoyment of fundamental rights and freedoms have been achieved under the new Constitution the pertinent provisions of which are examined below.

2.5.2 A Synopsis of Human Rights and the Constitution of Kenya, 2010

Between1963-2001, Kenya experienced perhaps its worst human rights record. This was during the authoritarian rule of Presidents Kenyatta and Moi. It is argued herein that the drafters of the 2010 Constitution must have had the past awful political governance experience in mind in crafting the Bill of Rights in the 2010 Constitution. Demonstrating awareness to past violations of human rights by the state, the drafters of the Bill of Rights clearly intended to break from the past. The Bill of Rights provides that "the rights and freedoms in the Bill of Rights "belong to each individual and are not granted by the state." Further, the Bill of Rights applies to and binds all, including the state and its organs."[364]

Most important, and in so far as this study is concerned, the Constitution recognises the need for good political governance by providing in Article 19(1) that "the Bill of Rights is an integral part of Kenya's democratic state and it is the framework for social, economic and cultural policies."

Apart from the state, one other factor which for decades has fettered the enjoyment of human rights under the 1963 Constitution was the interpretation of fundamental rights provisions. Specifically, the English doctrine of *locus standi* which constrained many judges in public interest cases. Since independence from Britain, Kenyan courts have almost faithfully applied

[364] Article 20(1) of the Constitution of Kenya 2010.

a non-pragmatic interpretation of the law similar to that in England where judges' discretion in the interpretation of legislation is generally limited by the doctrine of parliamentary sovereignty.[365] One of the main principles in public litigation in England is the requirement of *locus standi*, a right to be heard by showing sufficient interest to sustain the litigant's standing to sue in a court of law.[366]

For instance, in the case of *Gouriet v H.M Attorney-General and Others*,[367] the House of Lords emphatically held that under English constitutional law, an individual could assert his or her rights but a public right could only be asserted by the Attorney-General.[368] As the Attorney-General cannot assert a private right, so should a private person not interfere with a public right. Lord Diplock saw the failure to distinguish these principles of public and private law as having led to "unaccustomed degree of rhetoric in this case."[369] This approach has been employed by some Kenyan judges faced with the question of whether to protect the rights of the public in an action instituted by a private individual.

The case of *Maathai v Kenya Times Media Trust*[370] is perhaps the most classic in illustrating the judiciary's general approach to principles of English law, some of which are outdated. The late Professor Maathai, the founder of the Green Belt Movement who in 2004 won the Nobel peace prize, approached the High Court in 1989 for an order interdicting the construction of a multi-storey complex at Nairobi's *Uhuru* (Kiswahili for independence) Park, a property with historical significance to Kenyans and a recreational area of repute as

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365 See generally, M'Inoti, "The Impact of English Legal Principles on Constitutional Litigation in Kenya," 1 (2003) **University of Nairobi Law Journal** pp195-208 p.196.Available at **http://www.uonlj.com/files/The%20Impact%20of%20English%20Legal%20Principles%20on%20Constitutional%20Litigation%20in%20Kenya.pdf**.Accessed on 10 August 2010.

366 *Law Society of Kenya v Commissioner of Lands and 2 Others* KLR (E and L) 1 p456 at pp456-457.

367 *Gouriet v Post Office Workers and Others* 1977 1[All ER] 70.

368 *Gouriet*, *ibid* note 367 pp 71-72.

369 *Gouriet*, *ibid* note 368 p95.

370 *Maathai v Kenya Times Media Trust Ltd* KLR E and L 1 at 164.Available at **www.kenyalawreports.or.ke**.Accessed on 10 September 2009.

well. The application was dismissed for want of disclosure of a cause of action and, because the applicant had no *locus standi* to approach the Court for relief. In dismissing the action without any reference to case law, perhaps because the doctrine of *locus standi* is a matter of legal notoriety in Kenya, the High Court, per Dugdale J., ruled that the only person who, under the law, could institute legal proceedings on behalf of the public was the Attorney General.

On the submission that people were not consulted before the commencement of the project , the court ruled, in quite uncharacteristic judicial *dicta*, that many buildings were put up in Nairobi without consulting people and further that the applicant's personal views were immaterial.[371] In the case of *Law Society of Kenya v Commissioner of Lands and 2 Others,*[372] the Law Society had approached the High Court challenging the unlawful allocation of public land which was held in trust by the Government, and, consequently, the members of the Law Society and the Kenyan public as a whole. The Court dismissed the application and held that the Law Society had not demonstrated to the Court that the preservation of the public land was a legal right of an individual. It noted that:-

> Equally, it has not been demonstrated to me, by the pleadings and argument, that the plaintiff's rights have been injured more than those of the 30 million-plus Kenyans. The plaintiff does not have individual right in the preservation of the subject matter, I find and I so hold.[373]

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[371] *Maathai, ibid* note 370 p170.
[372] *Law Society of Kenya v Commissioner of Lands and 2 Others* KLR (E and L) 1 p456.
[373] *Law Society of Kenya, ibid* note 372 p461.

Although not signifying a common pro-human rights approach to *locus standi*, some judges have in the course of time relaxed the application of *locus standi* in public litigation. This has been the case especially in environmental litigation where the Environmental Management and Coordination Act 1999 has, it is submitted, largely dealt a fatal blow to the traditional English law approach to the requirement of *locus standi*.[374]

Other Kenyan judges have simply applied their discretion in not applying *locus standi* as in *El-Busaidy v Commissioner of Lands and 2 Others*.[375] In this case, the applicant had in his own capacity applied for an injunction against the respondents for improper allocation of a private park in Mombasa. Citing *Gouriet* and other cases, the respondents' main contention was that the action and others of the same nature could only be instituted by the Attorney-General as the custodian of public interest. In allowing the application, the High Court held that Kenya's courts had to depart from the legalistic and non-pragmatic English law on *locus standi*. The Court, quite commendably, based its decision on the need to uphold constitutional guarantees and the right to have access to the courts. This case, together with that of *Albert Ruturi, J.K. Wanywela and Kenya Bankers Association v The Minister of Finance and 2 Others*[376] were a clear departure from the strict application of the English common law doctrine of *locus standi*. The decisions were cited with approval in *Priscilla Nyokabi Kanyua v Attorney General and Another*.[377]

The importance of the case of *Nyokabi Kanyua* is that it, for the first time in Kenya's jurisprudence tested the right of prisoners to vote in a constitutional referendum. The

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374 Kameri-Mbote, "Towards a Greater Access to Justice in Environmental Disputes in Kenya: Opportunities for Intervention" **International Environmental Law Research Centre:** IELRC Working Paper 2005-1 p4, available at http://www.ielrc.org/content/w0501.pdf, accessed on 12 July 2011.

375 *El-Busaidy v Commissioner of Lands and 2Others* KLR (E and L) 1 (2001) 479.

376 *Albert Ruturi, J.K. Wanywela and Kenya Bankers Association v The Minister of Finance and 2 Others (2002) 1KLR 61.*

377 *Priscilla Nyokabi Kanyua v Attorney General and Another* [2010] eKLR 1.

applicant had been instructed by a leading legal aid centre, *Kituo cha Sheria*, to institute proceedings on behalf of prisoners for them to be registered by the Interim Independent Electoral Commission as voters in the referendum on the 2010 Constitution. The main issue was whether she was a busy body, or had *locus standi* to represent all inmates in the country.

In acknowledging the difficulties caused by the traditional approach to *locus standi* in Kenya's jurisprudence, the High Court noted that:-

> the issue of *locus standi* has shackled public law litigants for a long time. The Courts usually held that if the issue was a public one, the litigant should show that the matter complained of had injured them over and above the general population.[378]

Approving *El-Busaidy* and *Albert Ruturi* as they granted the order for inmates to participate in the referendum, the judges in *Nyokabi Kanyua* held the shackles of *locus standi*" were broken, the law was liberalised and a purposeful approach took the driving seat in the area of Public Law."[379]

The foregoing recent developments in respect of *locus standi* in public law litigation are now firmly entrenched in the 2010 Constitution. The new approach is indeed encouraging to students of good governance and the rule of law. The new legal position becomes more heartening in view of constitutional provisions which bind the state to observe, respect, protect, promote and fulfill the rights and fundamental freedom in the Bill of Rights.

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[378] *Nyakabi Kanyua*, *ibid* note 377 p9.
[379] *Nyokabi Kanyua, ibid* note 378 p11.

The Constitution provides that in addition to a person directly affected by actual or threatened infringement of a right in the Bill of Rights as contained in Article 22 (1), court proceedings may be instituted by-:

a) A person acting on behalf of another person who cannot act in their own name;
b) A person acting as a member of, or in the interest of, a group or class of persons;
c) A person acting in the public interest; or
d) An association acting in the interest of one or more of its members.[380]

The Constitution has therefore ushered in a new era in the enjoyment of fundamental rights by embracing pragmatism as opposed to a restrictive approach to public law litigation. In view of the generally narrow application of the requirements of *locus standi* by the Kenyan courts in the past, this new development is a progressive step towards good governance. Strengthening this new development is the constitutional requirement that in the interpretation of the Bill of Rights, the courts should develop the law so as to make it compliant with fundamental rights and freedom.[381]

The courts should also adopt an interpretation that promotes and enforces fundamental rights and freedom.[382] In addition and as examined in section 2.5.2 above, it should be recalled that the Constitution provides that "the general rules of international law shall form part of the law of Kenya."[383] Therefore, it appears that the drafters of the

[380] Article 22(2) of the Constitution of the Republic of Kenya 2010.
[381] Article 20(3)(a) of the Constitution of the Republic of Kenya 2010.
[382] Article 20(3) (b) of the Constitution of the Republic of Kenya 2010.
[383] Article 2(5) of the Constitution of the Republic of Kenya 2010.

Constitution were committed to ensuring that the country adheres to the basic precepts of fundamental rights and freedoms, a key component of good governance.

2.6 TRANSPARENCY AND ACCOUNTABILITY

2.6.1 A Global Overview of Transparency and Accountability

The need for transparency and accountability in public and quasi-public institutions is posited on the principal-agent relationship whereby public administrators are the trustees and guardians of the administrative machinery.[384] It is for this reason that corruption is viewed as a breach or betrayal of public trust.

According to the UNDP, transparency and accountability are interactive and mutually reinforcing governance concepts, especially in anti-corruption initiatives.[385] The UNDP defines transparency as "the sharing of information and acting in an open manner."[386] As part of the integrity infrastructure, it means the "unfettered access by the public to timely and reliable information on decisions and performance in the public sector."[387] Accountability is the duty of public officials "to report on the usage of public resources and answerability for failing to meet stated performance objectives."[388]

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[384] Rosenbloom, **Public Administration: Understanding Management, Politics and Law in the Public Sector** 4th ed. New York: McGraw-Hill Inc. 1986 p. 529

[385] UNDP: **Programme on Governance in the Arab Region (POGAR): Transparency and Accountability**. Available at **http://www.pogar.org/governance/transparency-and acountability.aspx** p1.Accessed on 11 May 2010.

[386] UNDP, *ibid* note 385 p1.

[387] Armstrong, **Integrity, Transparency and Accountability in Public Administration: Record Trends, Regional and International Developments and Emerging Issues**, New York: United Nations Economic and Social Affairs, August 2005 p1.

[388] Armstrong, *ibid* note 387 p1.

The inseparable and inter-dependent nature of the two concepts is obtained from the UN's observation that "without accountability, transparency has no meaning, and it makes a mockery of sound public management. Accountability depends on transparency or having the necessary information."[389] UNECA views greater transparency as a good governance factor, this comprises of reliable, relevant, and timely information on the state's activities becoming available to the people, and having the right structures to make public officials accountable.[390]

In 1822, James Madison, one of the founding fathers of the USA, observed that:-

> a popular government without popular information, or the means of acquiring it, is but a prologue to a farce or a tragedy, or perhaps both...a people which mean to be their own governors must arm themselves with the power which knowledge gives.[391]

Schoenhard argues that accessibility of public information by the public is crucial even in times of insecurity, emergency and high alert provided that the right balance is maintained.[392] The information availed to the public should be enough and in a manner that is understandable.[393] Timely release of information to the public underscores contemporary

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389 Armstrong, *ibid* note 388 pp1-2.

390 Hope, "The UNECA and Good Governance in Africa," **United Nations Economic Commission for Africa**. Available at **http://www.uneca.org/dpmd/Hope_Harvard.doc** p.9.

391 Madison, 1822, as quoted in **James Madison Project**. Available at **http://www.jamesmadisonproject.org/**Accessed on 10 May 2010.

392 Schoenhard, "Disclosure of Government Information Online: A New Approach from an Existing Framework," (2001-2002) 15 **Harvard Journal of Law and Technology** 2 pp 497-538 p.498. Available at **http://www.heironline.org.** The author addresses the reaction of the US government towards the availability of Online government information which disappeared from the internet within hours of the September 11 attacks. He observes that the federal's Freedom of Information Act (FOIA) requires for the government to keep information accessible once it has become available on the internet.

393 Parigi *et al*, "Ushering in Transparency for Good Governance," **Center for Good Governance**, Hyderabad. India, November 2004 .Available at **http://www.cgg.gov.in:8080/Ushering_in-Transparency.doc.** Accessed on 9th June 2010.

thinking that the people have to actively participate in the nation's decision-making processes because the management of a state "is not limited to government alone."[394]

Meaningful civic engagement in key decision-making institutions of state enhances the level of trust and legitimacy of the decisions made and "improves the quality of overall governance."[395] People's involvement in the external and internal affairs of their state, as advocated for in this study, is therefore a transparency paradigm which, seen from a Kenyan perspective, would play a substantial contribution in deterring major corruptive practices which are deeply rooted in the institutions of state.

Transparency is a partnership and therefore realising meaningful governance results depends on officials making information available which should be accompanied by people and groups "with reasons and opportunities to put information to use."[396] The manner in which public bodies conduct their businesses ought to be easy to scrutinise.[397] Transparency may consume a lot of resources, but in its absence, good governance loses its meaning.[398] As observed by UNECA, the success of accountability as a governance concept depends on transparency.[399] Seen holistically, accountability is both vertical and horizontal. Vertical accountability comprises of a government that responds to enquiries by the citizenry and citizens who accept laws and policies of the government.[400] Horizontal accountability

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394 Parigi, *ibid* note 393 p1.
395 Parigi, *ibid* note 394 p1..
396 Johnson, "Good Governance: Rule of Law, Transparency, and Accountability," **United Nations Public Administration Network.**Available at **http://www.unpan1.un.org/introdocs/groups/publicdocuments/un/unpan010193.pdf**p.3.Accessed on 5 March 2010.
397 Johnson, *ibid* note 396 p3.
398 Johnson, *ibid* note 397 p3.
399 Hope, *op. cit.* note 390 p9.
400 Johnson, *op.cit.* note 396 p8.

consists of access to information, the right to be consulted and the power to check excesses and abuses.[401]

The UNCAC mandates State Parties to take appropriate measures to enhance transparency and promote the contribution of the people in decision-making and that subject to legitimate restrictions; the public has effective access to information.[402] The key international human rights instrument is the UDHR. The UDHR states that "everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas, through any media and regardless of frontiers."[403]

The case of *Marcel Claude Reyes and Others v Chile*[404] is a forceful authority on the international dynamics for the need for transparency and accountability. In this case, the petitioners had requested information from a public law entity, the Foreign Investment Committee. The request was about a foreign investment contract signed originally between the State and two foreign companies and a Chilean company (which would receive the investment), to develop a forestry-exploitation project. This caused considerable public debate because of its potential environmental impact. The information provided was not adequate which gave rise to a claim in the local courts after which the international action was instituted under the American Convention on Human Rights.[405] The Inter-American Court of Human Rights held that:

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401 Johnson, *ibid* note 400 p8.

402 UNCAC, *op.cit*.note 322 Article 13 (1) (a) (b).

403 UDHR, *op. cit*. note 351 Article 19.

404 *Marcel Claude Reyes and Others v Chile*. Inter-.American Court of Human Rights: Case No.12108, Report No. 60/03. Available at **http://www.corteidh.or.cr/docs/casos/articulous/seriec_151_ing**. Accessed on 14 August 2010.

405 See generally, *Marcel, ibid* note 404 in particular paras. 66. Also see Bertoni, "The I.A.Ct.HR & the ECHR: a Dialogue." Available at **http://www-ircm.u-strasbg.fr/.../Interventions_IV_Bertoni-Strasbourg_Final.pdf**. Accessed on 14 August 2010.p.20 fn 50.

> The protection granted by the American Convention, the right to freedom of thought and expression includes 'not only the right to and freedom to express one's own thoughts, but also the right and freedom to *seek, receive and impart* information and ideas of all kinds.' In the same way as the American Convention, other international human rights instruments, such as the Universal Declaration of Human Rights and the International Covenant on Civil and Political Right, establish a positive right to seek and receive information.[406]

In enhancing the legitimacy of the principles of good governance, the Court further held that disclosure and transparency should govern state actions so that people can exercise their democratic control of the state and that "access to State-held information of public interest can permit participation..."[407] This decision is a good precedent for Kenyan courts, and probably others, as they deal with cases on access to information held by the state. The most illuminating part of the judgment is its linking of the right to information to key international instruments, namely the UDHR and the ICCPR.

Participation of the people in the affairs of public governance would significantly contribute to good governance on the continent. It is argued that for most of Africa, the poor state of governance on the continent is beyond argument. However, there are concerted efforts towards addressing these problems especially transparency and accountability as examined below.

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406 *Marchel*, *ibid* note 405 para 76.
407 *Marchel*, *ibid* note 406 para 86.

2.6.2 An African Overview of Transparency and Accountability

Corrupt, non-accountable and opaque regimes with little or no respect for human rights, have in succession dominated the continent for decades. This was particularly so during the life of the OAU.[408] The state of affairs on the continent was recognized in 2000 by the General Assembly of the UN in the UN's Millennium Declaration which was the precursor to the UN Millennium Development Goals (MDGs). Declaration VII focuses on assisting Africans "in their struggle for lasting peace, poverty eradication and sustainable development, thereby bringing Africa into the mainstream of the world economy."[409]

The above observation by the UN might have significantly influenced a different approach by African leaders to issues of governance on the continent. This is what became known as the concept of "African Renaissance". The formal architect of this concept is perhaps Africa's foremost statesman, former South African President, Nelson Mandela. In his speech to the OAU's meeting of Heads of State and Government in Tunis, Tunisia, in June 1994, Mandela acknowledged, through the OAU the contribution made by the people of Africa, to the elimination of apartheid in South Africa.[410] Most importantly, he cried for a "new rebirth" on the continent to be evidenced in "quality governance."[411]

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[408] Akokpari, "The AU, NEPAD and the Promotion of Good Governance in Africa," (2004) **Nordic Journal of African Studies** (13) (3) pp 243-263 p.245. On this page, the author attacks the record of the OAU in fulfilling its commitment to good governance and says that "some governments remained unremittingly brutal in the suppression of basic freedoms." He names some of the leaders as Jerry Rawlings of Ghana, Daniel arap Moi of Kenya, Frederick Chiluba of Zambia, Macias Nguema of Equitorial Guinea, Kamuzu Banda of Malawi, Mobutu Sese Seko of Zaire, and others. Available at **http://www.njas.helsinki.fi/pdf-files/vol13num3/akokpari2.pdf**.Accessed on 9th June 2010.

[409] United Nations General Assembly Resolution A/Res/552,**United Nations Millennium Declaration** New York: 18 September 2000, Declaration No. VII. Available at **http://www.un.org/millenniumgoals/bkgd.shtml** Accessed on 3rd March 2010.

[410] Mandela, "Statement of the President of the Republic of South Africa at the OAU Meeting of Heads of State and Government," Tunis, 13-15th June 1994 p.1.Available at **http://anc.org.za/ancdocs/.../sp940613.html**.Accessed on 9th April 2010.

[411] Mandela, *ibid* note 410 p 2.

Mandela was awake to the reality that freedom from colonialism and imperialism alone was not enough to guarantee the African people happiness and prosperity, which after liberation, should be "the jewel of the crown."[412] After Mandela's speech, Thabo Mbeki became more articulate and forceful on the new vision for Africa. In particular, Mbeki attacked one-party state democracies and military states.[413] He argued that the African Renaissance should sought "genuine and stable democracies in Africa, whereby systems of governance flourish because they derive their authority and legitimacy from the will of the people."[414] It is imperative to note that both Mandela and Mbeki were speaking against a background of a country which had just arisen from the ravages of colonialism and apartheid with a new constitutional dispensation undoubtedly crafted to ensure good governance.

It is argued that sections 23 and 24 of the 1993 South African Interim Constitution forcefully introduced new dimensions of good governance not only to that country but to the continent of Africa as a whole. The sections made access to public information and administrative justice basic human rights. This was a new development in Africa's public governance trajectory. The new approach was retained when the country adopted the 'final' Constitution in1996.[415] The new African course to dealing with public business as suggested by Mandela and Mbeki is captured in the principles embedded in NEPAD.[416]

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[412] Mandela, *ibid* note 411 p2. Chris Landsberg and Dumisani Hlophe view the African renaissance as an emerging foreign policy culture and doctrine. Whether it is a doctrine yet is debatable especially in view of the luminaries of the "doctrine", former Presidents Thabo Mbeki and Olesegun Obasanjo are not playing active political roles in the continent. The authors however are, it seems, correct in saying that the renaissance is a "conceptual tool for the political, economic, social, cultural and educational analysis of the African continent." Available at **http://www.ceri-sciencespo.com/archieve/octo99/artl.pdf** .

[413] Mbeki, "Africa's Time has come, South Africa is Ready" Available at **http://www.dfa.gov.za/docs/speeches/1998/mbek0813.htm** .Accessed on 10 May 2010.

[414] See generally, Mbeki, *ibid* note 413. In his statement to the African Renaissance Conference in Johannesburg on 28th September 1998, Mbeki laid down the elements of the new African project as elimination of the disempowerment of the masses; participation of the people in governance; opposition to dictatorship; democratic elections; peaceful resolution of conflicts; effective engagement of the women and the youth; rebellion against corruption; sustainable development and democratic order in the continent. Available at **http://www.dfa.gov.za/docs/.../mbek0928.htm** .Accessed on 16th June 2010.

[415] Section 32(1) of the 1996 Constitution provides for the right of access to information held by the state, a vertical dimension to transparency, while s.32(2) for the right to information that is held by another person necessary for the enjoyment of any rights, a horizontal dimension of transparency. In terms of s.33, administrative action should be procedurally fair, thereby substantially constitutionalizing the common law on

Nwonwu avers that the NEPAD is a merger of Thabo Mbeki's Millennium Partnership for the African Recovery Programme (MAP) and the former Senegalese President Abdoulaye Wade's Omega Plan.[417] He further observes that NEPAD is the brain-child of South Africa's Thabo Mbeki; Nigeria's Olusegun Obasanjo; Algeria's Abdel Aziz Bouteflika; Egypt's Mubarak and Senegal's Wade, with the programme being "nurtured and marketed as Africa's organic political product designed to pull the continent out of its past development limbo."[418] Akokpari notes that it was the dismal performance of the OAU which led to its re-naming as the African Union (AU), which seeks to address the myriad of challenges facing Africa through NEPAD.[419]

NEPAD identifies the cardinal causes of Africa's impoverishment, despite being a richly endowed region, as colonialism, the Cold War, the international economic system in particular the Structural Adjustment Programmes (SAP), poor leadership, corruption and bad governance.[420] Its prescriptions for a new Africa, to keep it relevant to the globalisation process, are accountable government, democracy, a culture of human rights and popular participation.[421]

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judicial review. Both sections 32 and 33 demand national legislation to give effect to these rights, which is found in the Promotion of Access to Information Act No. 2 of 2000 and the Promotion of Administrative Justice Act No. 3 of 2000. The preamble of the Promotion of Access to Information Act states that the Act is intended to "foster a culture of transparency and accountability in public and private bodies and to "actively promote a society in which the people of South Africa have effective access to information to enable them to more fully exercise and protect all of their rights."

[416] The New Partnership for Africa's Development (NEPAD) Abuja, Nigeria, October 2001. Available at **http://www.nepad.org** . Accessed on 9th April 2010.

[417] Nwonwu, "NEPAD: A New Agenda or Another Rhetoric in Africa's Political Adventurism?" 2 (2006) **Africa Policy Journal** 1-31 p.2. Available at **http://www.hksafricapolicyjournal.com/.../nepad-new-agenda-or-another-rhetoric-africa's-political-adventurism**.Accessed on 13 April 2010.

[418] Nwonwu, *ibid* note 417 p 2.

[419] Akokpari, *op.cit* note 408 p 244.

[420] NEPAD, *op.cit*.note 416 p4.

[421] NEPAD, *ibid* note 420 p9.

The new concept of governance in Africa has both admirers and critics. NEPAD has its skeptics and optimists. UNECA observes that through NEPAD, African leaders have demonstrated the importance of democratic ideals and good governance which are a "*sine qua non* for development."[422] Nwonwu notes that NEPAD's critics see the institution as a political idea created from the top by a few of Africa's political leaders with little planning for its implementation and no consultation with the majority.[423]

Akokpari has also strongly attacked NEPAD. He observes that NEPAD "remains a suspicious and controversial project, especially that its formulation evaded debates and consultations in Africa It is also suspected that it was externally driven and a reincarnation of SAP."[424] He also questioned APRM's voluntary membership, which contributed towards keeping Africa's dictators out of the review process.[425] On the contrary, it is submitted that in view of the continent's general failure to combat bad governance, NEPAD and similar initiatives should be embraced, continuously strengthened and democratised internally. This is probably why Landsberg calls for African countries to show commitment to their obligations under NEPAD.[426]

Scholarly constructive or dismissive comments on efforts to enhance good governance are a central part of this new discourse in Africa. NEPAD may have been coined by only a few of African leaders. However, it is submitted that the governance predicament in the continent and Kenya in particular is compelling enough to, in general, welcome the new paradigm on

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[422] Hope, *op. cit.* note 390 p3.
[423] See Nwonwu, *op.cit* note 417 pp 3,5 and 28.
[424] Akokpari, *op. cit.* note 408 p259.
[425] Akokpari, *ibid* note 424 p 259. For a thorough analysis of the various scholarly views on NEPAD, see Landsberg, "The Birth and Evolution of NEPAD," *in* Akokpari et al (ed.), **The African Union and its Institutions.** Cape Town: CPT Book Printers 2008 pp.207-226.
[426] Landsberg, "NEPAD: What is it? What is Missing," Paper Written for Naled,i p9. Available at **www.sarpn.org/documents/.../P503_Landsberg.Pdf-SouthAfrica**. Accessed on 23 September 2012.

the continent but make recommendations on how it could become more useful to the people of Africa.

NEPAD's governance arm is the African Peer Review Mechanism (APRM). The APRM is a self-monitoring mechanism and "a key driver of African renaissance and rebirth and is a centre piece of the NEPAD process for the socio-economic development of Africa."[427] The first of its four themes is "Democracy and Good Political Governance." The theme incorporates fundamental elements of good governance.[428] Transparency and accountability are given prominence because of the voluntary process of a country's review and the call for "accountable, efficient and effective public office holders and civil servants" together with "fighting corruption in the political sphere."[429] Commenting on the good governance spirit by NEPAD as opposed to the Abuja Treaty which established the African Economic Community to be incorporated into the AU, Gutto notes that NEPAD "formally commits Africa and Africans to renewed commitment to good governance, rule of law and human rights in at least 7 paragraphs out of 207 paragraphs."[430]

A close examination of the APRM does not demonstrate unequivocal resolve by the AU to confront Africa's governance challenges. As the NEPAD's key governance organ, the APRM process is not a compulsory exercise for the member states of the AU.[431] Even for some of

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[427] African Peer Review Mechanism (APRM), available at **http://aprm.krazyboyz.co.za/** p1. Accessed on 9th April 2010.

[428] The main sub-themes are constitutional democracy, rule of law, human rights, separation of powers, fighting corruption, accountability, promotion and protection of the rights of vulnerable groups including displaced persons and refugees, promotion and protection of the rights of the child and young persons and the protection of the independence of the judiciary.

[429] APRM, *op.cit* note 427 p2.

[430] Gutto, "The Compliance to Regional and International Agreements and Standards by African Governments with Particular Reference to the Rule of Law and Human and Peoples' Rights," in Peter Anyang' Nyong'o et al (eds.), **New Partnership for Africa's Development NEPAD: A New Path?"** Nairobi: Heinrich Böll Foundation 2002 pp 94-104 p102.

[431] Landsberg, *op.cit.*note 426 p220.

the countries which have subscribed to its good governance review, controversies have arisen between them and the APRM panel.[432]

As observed by Fombad, the NEPAD process should, through the AU, be adopted by the AU Member States as an integral part of their governance and democratic agenda.[433] The continent's political leadership does not, consequently, appear deliberately committed or prepared for a voluntary-driven transparency and accountability processes. The voluntary nature of the NEPAD review process does not contribute towards enhancing good governance in the continent and Kenya in particular as elucidated below.

In 2004, Kenya was one of the first four countries to submit to the APRM process.[434] The outcome of the review was made in 2007. The duration of three years is indicative of the slow wheels of APRM's review machinery. It is argued that this review mechanism is therefore unsuitable in addressing urgent governance issues, for instance electoral malpractices of the country under review. The 2004 review declared the 2002 elections as free and fair although it noted the country's deep ethnic political culture.[435] It called for constitutional review for the realisation of separation of powers ideal.[436]

In July 2011, Kenya submitted itself to a second APRM review. The review was against a backdrop of the 2007-2008 post-election violence. This and other reforms, including the promulgation of a new Constitution as recommended by the Kofi Annan panel would

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[432] Landsberg, *ibid* p431 p220. The author singles out Nigeria and South Africa, two of the APRM's luminaries. Due to their important role in APRM, he observes that their review process "should be above board," but South Africa's review in 2007 was marred in controversy while Nigeria's had to be abandoned due to the planned general election.

[433] Fombad, "The African Union, Democracy and Good Governance." p34.Available at **http://www.se1.isn.ch/serviceengine/files/ISN/96254/ichaptersection.../32_01.pdf** .Accessed on 5 July 2010.

[434] NEPAD, "Findings of APRM Assessments in Kenya," January 2007. Available at **www.hss.de/fileadmin/namibia/downloads/nepad_briefs18.pdf**. Accessed on 4 April 2012.

[435] NEPAD *ibid* note 434 p1.

[436] NEPAD *ibid* note 435 p1.

certainly form a major part of the review report.[437] It is contended that irrespective of the weaknesses and challenges in the review process whose results were not yet released at the time of writing, it is nevertheless a good development to a country and a continent in which the public sector has been dominated by opaque regimes largely not accountable to the people.

Perhaps the foremost assurance for the promotion of the good governance ideal of transparency is the right of access to information. It is therefore necessary to examine the Kenyan law on the exercise of this right due to its central place in good governance and elimination of corruption in particular.

2.6.3 Transparency and Access to Information: A Kenyan Perspective

In a democracy, the most effective way of achieving transparency, and thus combating corruption, is by making information held by the State and its organs accessible to the people.[438]This enhances meaningful public participation in decision-making processes. Notwithstanding the existence of various international instruments on transparency and accountability, successive Kenyan regimes have generally conducted public affairs in utmost secrecy. The reason is that domestically, there has not been a legal requirement for disclosure of information. The impact of this opaque way of conducting the people's business has been difficulties in unearthing of corruption and other governance vices. However, to a certain extent, the new Constitution provides for transparency and openness in public affairs as can be seen from the following provisions of the 2010 Constitution.

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[437] NEPAD Kenya: APRM. Available at **www.nepadkenya.org/aprm.html**.Accessed 28 September 2012. Also see generally, Ikiara, "The Role of Think Tanks in the APRM Process in Kenya: Challenges and Lessons Learned," paper presented at The African Conference on Think Tanks: Policies for a Better Future, Cairo Egypt, 8-9 November 2010. Available at **www.thinktanking.idsc.gov.eg/.../Ikiara/APRM%20process%20in%2**. Accessed on 5 May 2011.

[438] Currie & de Waal, *op.cit*. note 218 p691.

Article 35(1)(a) of the Constitution provides that "every person has the right of access to information held by the State." This position is boosted by Article 35(3) which states that the state shall publish and publicise any important information affecting the nation." These new provisions in Kenya's constitutional jurisprudence are commendable indeed. However, it is argued that they are ambiguous because the state is granted the discretion of "determining any important information affecting the nation." One may also argue that if the information affects a person's or a group of persons' right under the Bill of Rights, then the state has no obligation to publish and publicise the information as such parties' rights do not affect the nation. It should also be observed that there are types of information which cannot be made available to an individual. In such situations, interpretation of these provisions will create difficulties for the courts as they endeavour to determine whether the right to information should be limited "only to the extent that the limitation is reasonable and justifiable in an open and democratic society..."[439]

The above difficulties could be avoided by legislation which should be more specific on this right. However, the Constitution does not demand the enactment of such law. As a matter of comparative jurisprudence, it is worth noting that the drafters of the Constitution of South Africa found it necessary to fully entrench the right to information. Section 32 provides for the enactment of legislation for the exercise of the right of access to information. Further, this right applies both horizontally and vertically. That is why the legislature enacted the all-important Promotion of Access to Information, Act 2 of 2000. It is argued that the right in Kenya's Constitution will not be fully enjoyed and enforced in the absence of an enabling legislation which would operationalise the right as is the case in South Africa.

[439] See generally, the limitation of rights clause, Article 24 of the Constitution of the Republic of Kenya, 2010

When interpreting the unclear provisions in question, the Courts should be guided by the emerging South African jurisprudence on the right of access to information. In the case of *Minister for Provincial and Local Government of South Africa v Unrecognised Traditional Leaders of the Limpopo Province (Sekhukhuneland),*[440] the Supreme Court of Appeal dismissed the Minister's appeal against a High Court order that certain particulars of a 1996 commission's report should be made accessible to the respondents. The Supreme Court of Appeal held that the provisions of the Promotion of Access to Information Act 2 of 2000 could not be isolated from the general intent and purpose of the Bill of Rights and should be read purposively. Their aim is to "promote the values of openness, transparency and accountability which are foundational to the Constitution.[441]

To achieve maximum benefits of the right of access to information, it is paramount that those who disclose information be protected under the law. Such law was enacted by the Parliament of Kenya in 2006, namely the Witness Protection Act, 2006 (the Act). The Act vested substantial power and discretion in the Attorney-General. For instance, section 4(1) provided for the establishment and maintenance of a witness protection programme under the full control of the Attorney- General.

It is argued that given the general silence of Kenya's Attorneys-General in the face of gross violations of human rights by the state, the power given to the Attorney-General was uncalled for.[442] This, perhaps, is one of the reasons which triggered an amendment to the Act by the Witness Protection (Amendment) Act, 2010 as argued below. However, it is contended that the main reasons behind the amendment were the reforms proposed by the Kofi Annan

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[440] *Minister for Provincial and Local Government of South Africa v Unrecognised Traditional Leaders of the Limpopo Province (Sekhukhuneland)* (2005) 1 All SA 559 (SCA)

[441] **Minister for Provincial and Local Government of South Africa**, *ibid* note 440 para 16.

[442] The role played by successive attorneys-general in prompting violation of fundamental rights by the Kenyatta and Moi regimes is discussed in chapters four and five of the thesis.

Mediation Panel and comments made by the Commission of Inquiry into Post-Election Violence (CIPEV).[443]

A close scrutiny of the Witness Protection (Amendment) Act, 2010 (hereinafter "the Amendment Act") raises some concerns on the independence of the entire witness protection process. The heavy hand of the state would make one question the *bona fides* of the process especially in view of Kenya's history of domination by the State with little or no direct participation of the people. A few provisions from the Amendment Act, which in substance and length seems like the principal Act, will illustrate this observation.

Section 26 of the Amendment Act has deleted the word 'Attorney-General' in the Act and substituted therefore the word 'Director.' The main question, however, is the independence of the Director and other key organs created by the Amendment Act. Section 3E (1) of the Amendment Act provides that the Director shall be appointed by the Witness Protection Agency (the Agency) on the recommendation of the Witness Protection Advisory Board (the Board). The Agency is established under section 3A of the Amendment Act while the Board is established under section 3P of the Amendment Act.

Section 3P (2) of the Amendment Act provides for nine members of the Board. They are the Minister responsible for matters of witness protection as chairperson; the Director as secretary and *ex-officio* member; Ministers responsible for justice and finance; the Director-General of the National Security Intelligence Service; the Commissioners of Police and of Prisons; the Director of Public Prosecutions and the Chairperson of the Kenya National

[443] The reforms initiatives commencing after the 2007 post-election violence are investigated in chapter five of this thesis.

Commission on Human Rights (KNCHR). Apart from the chairperson of the KNCHR, it is evident that the state is fully in charge of the important task of witness protection.

It is highly unlikely that such a composition of the Board would attract the confidence of witnesses which would greatly jeopardise disclosure of important information. This view is amplified by the fact that under section 3S (5) of the Amendment Act, the decisions of the Board are decided by a majority of its members. In addition, under section 3Q of the Amendment Act, the Board has extensive powers over the agency, including among others, approving its budgetary estimates; establishment of committees and, most important, advising on the formulation of witness protection policies. It is argued that Kenya's legislature should enact legislation for the protection of whistle-blowers as is the case in South Africa under the Protected Disclosures Act 26 of 2000. This approach would probably increase the number of those who have important information to disclose as opposed to the present position where those who disclose information may fear for their lives as seen in the case of John Githongo formally of Transparency International, Kenya Chapter.[444]

2.7 SUMMARY

This chapter has examined the various meanings of good governance and its key elements. As shown in the chapter, scholars and international institutions like the OECD, the World Bank and the IMF disagree on a general definition of good governance even though the key elements are not in much dispute. The central elements are the rule of law and its various expressions, in particular the substantive or "thick" meaning which this thesis fully embraces and procedural dynamics of the ideal of the rule of law as adumbrated by Fuller. Other

[444] For a discussion on John Githongo and the existence of corruption under President Kibaki, see chapter 5.2.2.1 of this study.

elements include transparency and accountability, anti-corruption initiatives, participation of the people and human rights.

The aim was to lay a conceptual architecture of the key variables in this thesis on which the rest of the study is based. These elements were examined from an international, African and Kenyan perspective. In Africa, the weaknesses of NEPAD's APRM were examined. On Kenya, it was seen that the country's constitutional and legislative infrastructure have failed to provide for mechanisms for effectively dealing with transparency and accountability. In particular, the chapter has found that the Kenyan law on the protection of witnesses, a key component towards achieving transparency and accountability and combating corruption, has serious defects. As the 2011 report of EACC shows, the country is struggling to tackle the vice of corruption. Amending the law on witness protection so as to make it truly independent as examined in this chapter would be useful in anti-corruption initiatives. The next chapter examines the political governance trajectory of Kenya from independence in 1963 to 2001 when the ruling party KANU lost to a coalition of political parties under Mwai Kibaki.

CHAPTER 3: PUBLIC GOVERNANCE IN KENYA: 1963-2001

3.1 INTRODUCTION

The aim of this chapter is to trace and explicate the trajectory of Kenya's public governance from 1963 to 2001 within the discourse of good governance. Most importantly, this examination will evaluate the extent of popular democracy, the central theme in this thesis.

The period under investigation is crucial in definining the political governance of Kenya, for three key reasons. First, it was during this period that the country obtained independence from Britain under a liberal Constitution. Second, a presidential model of government was subsequently entrenched through major amendments to the Constitution. These amendments mutilated the intent and spirit of the independence constitutional project, especially popular democracy. Third, it was during this epoch that unprecedented violation of the rule of law and human rights took place and the seeds of circumventing political participation planted.

Central to an examination of Kenya's political governance trajectory for the period in question is the extent to which the executive was committed to an inclusive political process. In this regard, the governance compass of the first two presidents, Jomo Kenyatta and Daniel arap Moi is investigated. Key to this enquiry is how the legislature and the judiciary discharged their mandate in the reign of the two presidents. The impact of the country's political direction between1963-2001 was the bedrock of the struggle for political and constitutional reforms discussed in the next chapter. Before these issues are canvassed, an overview of Kenya's road to independence is necessary.

3.2 TOWARDS INDEPENDENCE

In 1895, the British occupied the present day Kenya, formerly known as the British East Africa Protectorate. The sole aim was to fortify a route to Uganda after which there was heightened increase in white settlers in the Protectorate.[445] As they wanted to be in charge of their political destiny, the settlers, led by Lord Delamare, put pressure on the colonial administration to establish a legislative authority, giving birth to the Legislative Council (Legco) in 1907.[446] The Legco did not have African or Indian representatives.[447] The Indians, who were later abandoned, were imported by the British to assist in building a railway from the Indian Ocean port of Mombasa to Uganda.[448]

Large tracts of land where Africans previously roamed freely were alienated to the white settlers.[449] The land question, combined with the exclusion of Africans from the political process, triggered the creation in the 1920s and 1930s of political associations to agitate for the rights of Africans. The main associations were the Kikuyu Central Association (KCA) and the Young Kavirondo Association (YKA).[450] Harry Thuku, the founder of the East African Association in 1921, peacefully protested against white rule. In particular, Thuku demanded the repeal of the Native Registration Ordinance.[451] This Ordinance compelled male Africans over the age of 16 years to wear a metal container known as *Kipande* on their necks for identification purposes. However, the colonial administration used it to control the movement of male Africans and for recruitment into colonial labour.[452]

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445 Ghai and McAuslan, *op. cit.* note 6 pp 4-7.
446 State House, "Kenya: 1900s Roots and Evolution," p1. Available at **http://www.statehousekenya.go.ke** , accessed on 12 October 2010.
447 Ghai and McAuslan, *op cit* note 6 p23.
448 State House, *op.cit.*note 446 p1.
449 State House, *ibid* note 448 pp1-2
450 See Generally, Ghai and McAuslan, *op cit* note 6 pp4-34.
451 *The Standard*, 6 February 2009. Available at **http://www.standardmedia.co.ke/archives**. Accessed on 24 May 2011.
452 Ministry of State for Immigration and Registration of Persons, Kenya **www.mirp.go.ke**. Accessed on 10 December 2011.

Jomo Kenyatta, a Kikuyu by tribe (properly pronounced *Gikuyu*), was born in Kiambu District in 1889.[453] In 1925, he became one of the leaders of the KCA. The organisation was principally formed to negotiate the burning issue of Kikuyu land, grabbed by the settlers.[454] In that capacity, Kenyatta was able to travel to England where he met and made contacts with other future African leaders like Ghana's Kwame Nkrumah.[455] One year after returning to Kenya in 1946, he became the leader of the political organisation known as the Kenya African Union (KAU).[456]

The land issue was so central to the Gikuyu that between1952 and 1960, the Gikuyu forcefully resisted white rule under the umbrella of the *Mau-Mau*.[457] The British declared a state of emergency in 1952. They wrongly concluded that Kenyatta was the leader of the Gikuyu and the unlawful *Mau Mau* organisation.[458] Associating Kenyatta with the *Mau Mau* was a mistake because he openly castigated the organisation and its violent cause as a means of propagating the Africans grievances. In 1952, Kenyatta said that KAU was not a union of violence compared to *Mau Mau*.[459] He was arrested in 1952 for managing and being a member of an unlawful *Mau Mau* society. To reiterate his abhorrence for violence, he said in court that his heart had no room for violence or the use of force.[460]

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[453] Nyangena, "Jomo Kenyatta: An Epitome of Indigenous Pan-Africanism, Nationalism and Intellectual Production in Kenya," 6:1&2 (2003) **African Journal of International Affairs** pp1-18 p. 12. Available at **http://www.ajol.onfo/index.php/ajia/article/view/57203/45591**. Accessed on 23 September 2010.

[454] Nyangena, *ibid* note 453 pp 2-3.

[455] Nyangena, *ibid* note 454 p.3.

[456] Nyangena, *ibid* note 455 p3.

[457] Prunier, "Kenya: Root of Crisis," **Open Democracy** 7 January 2008 p.2. Available at **http://www.opendemocracy.net/print/35512** .Accessed on 23 September 2010.

[458] Prunier, *ibid* note 457 p 2.

[459] Cornfield, Modern History Sourcebook, "Jomo Kenyatta: The Kenya African Union is Not the Mau Mau, 1952- Speech at the Kenya African Union Meeting at Nyeri, July 26, 1952," p.2. Available at **http://www.fordham.edu/halsall/mod/1952/kenyatta-kau1.html.**Accessed on 23 September 2010.

[460] Kenya National Archives, "Memory of the World Register: The Arrest and Mistrial of Jomo Kenyatta and Five other Nationalists p2. Available at **http://www.portal.unesco.org/ci/en/files/30015/Kenyatta/Kenya%2BKenyatta.doc**.Accessed on 23 September 2010.

In 1953, Kenyatta was sentenced to 7 years imprisonment on fabricated evidence. This came to light after a confession was made by the key witness in the Kenyatta trial.[461]Some sources argue that Kenyatta's trial is considered one of the most important milestones in colonial Africa because it triggered the "re-awakening of nationalism and freedom struggle across the continent."[462]

The British Army silenced the *Mau Mau* Movement in 1959.[463] However, the struggle against settler colonialism was not in vain. In 1961, Africans obtained some representation in the Legco.[464] Under the leadership of Mboya and Oginga Odinga, two nationalists from the Luo tribe, Kenyatta was elected *in absentia* as the leader of the Kenya African National Union (KANU).[465]

During Kenyatta's incarceration, Odinga and Mboya had merged KAU with Kenya Independent Movement (KIM) to form KANU.[466] A general election was held in 1961 which KANU won. However, top party leaders including Odinga and Mboya declined to be part of the government without Kenyatta and continued to struggle for his release.[467] He was released in August 1961. After KANU's victory in the 1963 election, Kenyatta became the first Prime Minister of independent Kenya under a Westminster-style Constitution, the product of lengthy deliberations at Lancaster House.[468]It was obvious that under the

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461 Kenya National Archives, *ibid* note 460 p4.
462 Kenya National Archives, *ibid* note 461 p8.
463 African History, "Jomo Kenyatta Part 3: From the Mau Mau Rebellion to the Presidency." Available at **http://www.africanhistory.about.com/od/biography/a/bio-kenyatta03.htmp**.1 Accessed on 26 September 2010.
464 Nyangena, *op. cit.* note 453 p7.
465 African History, *op. cit.* note 463 p1.
466 African History, *ibid* note 465 p1.
467 African History, *ibid* note 466 p1.
468 State House, Nairobi, "Profile of Mzee Jomo Kenyatta," p1. Available at **www.statehousekenya.org/presidents/kenyatta/profile.htm** .Accessed 10 July 2011. Also see, Kituo Cha Katiba, Constitutional Review Process In Kenya: Report of a Fact Finding Mission of the Kituo Cha Katiba on the Progress of the Constitutional Review Exercise in Kenya p9. Available at **http://www.kituochakatiba.org**. Also see Nyangena, *op.cit.* note 453 p.7

circumstances prevailing, there were no structures for the people to elect their representatives to the constitutional talks. The talks were based on serious and protracted bargaining.[469]

Republican status was acquired in 1964 with Kenyatta as the first President.[470] The main opposition party was the Kenya National Democratic Union (KADU). KADU was a conglomerate of small tribes which had come together, not on ideological congruence, but in order to stem the strong political wave coming from the big tribes in KANU, especially the Kikuyu under Kenyatta and the Luo under Odinga.[471] To guarantee the survival of the smaller tribes, KADU had preferred federalism as opposed to KANU's centralism.[472] Those in KADU, for instance, the Kalenjin, had generally collaborated with the colonial authorities as opposed to the bigger tribes in KANU.[473]

3.3 THE INDEPENDENCE CONSTITUTION: THE ENTRY OF LIBERAL DEMOCRACY

The notion of liberal democracy is a contested term in discourses on democracy. It is premised on the existence of the rule of law, individual freedoms, constitutional checks and balances, proper transparency and accountability along with periodic elections.[474] After many years of colonial rule, the intention and outcome of the Lancaster House constitutional talks was a constitution which contained key elements of a liberal democracy.

It is argued that the constitutional infrastructure, in particular the Bill of Rights, was premised on the observations made in 1991 by the British Colonial Secretary of State He said that the

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469 Ghai and McAuslan, *op. cit.* note 6 p177
470 Africa Watch: Kenya: **Taking Liberties Seriously**, London: Africa Watch 1991 p5.
471 New World Encyclopedia, "Daniel arap Moi" p.2. Available at **http://www.newworldencyclopedia.org/entry/Daniel_arap_Moi** p.2.Accessed on 25 September 2010.
472 New World Encyclopedia *ibid*.note 470 p2.
473 Africa Watch, *op. cit.* note 470 p5.
474 Leon, "The State of Liberal Democracy in Africa: Resurgence or Retreat?" **Centre for Global Liberty and Prosperity** (CATO Institute) 26th April 2010 p5.

greatest danger which faced the country was "fear: fear of discrimination, fear of intimidation, fear of exploitation. I have seen enough to be convinced that there is truth underlying these fears."[475] At the Lancaster House Conference, the Secretary of State stated that the responsibility of the British Government was to ensure that at the time of Kenya's independence, authority would be handed over "to a stable regime, free from oppression and from violence and free from racial discrimination."[476] The conference in London was attended by delegates from five main groups, among them KADU's Ngala and KANU's Kenyatta.[477]

The philosophical underpinning of the constitutional conference established the basic structure of the independence Constitution. The conference endeavoured to create a constitutional framework for a united Kenya. The framework was intended to foster respect for the sanctity of individual rights and liberties, including safeguarding the interests of the minorities.[478] In addition, the impartiality and independence of the judiciary were central to the constitutional project.[479]

The intention of the Bill of Rights was to guarantee the proper protection of individual rights and freedom which were enforceable by the judiciary.[480] On the executive, the National Government was responsible for essential activities. They included external affairs, defence, international trade, customs and major economic development. The National Government was also responsible for the Central Parliament.[481]The main purposes of the National Government were to increase national confidence and unity and to continue effective

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[475] Report of the Kenya Constitutional Conference, 1962: **Colonial Office, London** p7. Available at **http://marsgroupkenya.org/constitution/index.php** Accessed on 13 September 2011.
[476] Report of the Kenya Constitutional Conference, *ibid* note 475 p9.
[477] Report of the Kenya Constitutional Conference, 1962 *ibid* note 476 p8.
[478] Report of the Kenya Constitutional Conference, *ibid,* note 477 p16.
[479] Report of the Kenya Constitutional Conference, *ibid* note 478 p16.
[480] Report of the Kenya Constitutional Conference, *ibid* note 479 p16.
[481] Report of the Kenya Constitutional Conference, *ibid* note 480 p16.

governance.[482] The foregoing constitutional philosophy and design was entrenched in the 1963 Constitution, the key provisions of which are examined below.

3.3.1 Entrenchment of Fundamental Rights

Entrenchment of the Bill of Rights in the Constitution was driven by the fears of the minority communities against domination by the majority.[483] The European settlers were worried about compensation for any acquisition of land; the Asians were concerned about their investments while some minority tribes under Moi's KADU feared political emasculation by political parties in KANU which was controlled by the bigger tribes.[484]

Without any form of discrimination, but subject to the rights and freedoms of others, the Constitution guaranteed security of the person and the protection of the law to every individual.[485] Also guaranteed were various types of freedom. They included freedom of conscience and of expression; freedom of assembly and association. Privacy of people's homes and other properties was protected so was deprivation of property without compensation.[486] The right to life could be deprived in the execution of a sentence of a court in respect of a conviction for a criminal offence under the law of Kenya or if a person died as a result of the use of force reasonably justifiable in the circumstances of the case.[487]

The Constitution cushioned the people against unjustifiable and unreasonable deprivation of their liberties. It provided that any person arrested or detained had to be informed of the reasons for his or her arrest or detention as soon as was reasonably practicable; in a language

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[482] Report of the Kenya Constitutional Conference, *ibid* note 481 p19.
[483] Muigai, "Amending the Constitution: Lessons from History," **Report of the Constitution of Kenya Review Commission** Vol. 5 (2003) pp304-320 p305.
[484] Africa Watch, *op. cit.* note 470 p5.
[485] Section 21 of the Constitution of Kenya 1963.
[486] Sections 22-24 of the Constitution of Kenya 1963.
[487] Section 15 of the Constitution of Kenya 1963.

he or she could understand. If not released, such a person had to be brought before a court within twenty-four hours of his or her arrest or from the commencement of his detention.[488] Save as authorised by law, it was unlawful to subject any person to torture or to inhuman or degrading punishment or other treatment.[489] It would have been interesting to examine the observance of the provisions on the right against deprivation of liberty by the state and court decisions in the event of their violations. However, they were only in force for about one year but after Kenyatta became the President in 1964, detentions without trial became a tool to silence those who opposed his regime as will be discussed in chapter 3.4.1.1 below.

The Supreme Court was vested with the jurisdiction to determine allegations of violation of the Bill of Rights. The Court could make any orders it deemed appropriate including writs for the purpose of enforcing or securing the enforcement of these rights. The main impediment to the enforcement of fundamental rights was that the Constitution provided that the Chief Justice 'may make rules' with respect to the practice and procedure of the Supreme Court in relation to the powers vested in the Court.[490] This proviso gave the Chief Justice a reasonable degree of discretion in the enforcement of fundamental rights. The proviso became one of the main barriers to the justiciability of basic human rights and fundamental freedom as will be elucidated hereunder.

3.3.2 Parliamentary Democracy

In addition to addressing the human rights question, the Westminster-style Constitution had other key democratic promises. Ghai and McAuslan have observed that the drafters of the independence document were skeptical of power, and therefore included entrenched

[488] Section 21 of the Constitution of Kenya 1963.
[489] Section 18 of the Constitution of Kenya 1963.
[490] Section 28(6)of the Constitution of Kenya 1963.

provisions "to regulate the exercise of power and to prevent abuse and corruption."[491] Parliament was bi-cameral, consisting of two Houses, the Senate and the House of Representatives.[492] The Senate consisted of 41 Senators elected on the basis of universal adult suffrage. A Senator represented one of the 40 Districts and the Nairobi Area.[493] The country was divided into eight regions (*Majimbo* in Swahili), each region having an assembly consisting of Elected Members and Specially Elected Members.[494]

Ndegwa has argued that the inclusion of *Majimbo* in the Constitution was a major triumph for small communities as the devolution of power stood against "majoritarian tyranny and the apportionment of political power to ensure minority participation."[495] The House of Representatives consisted of members elected in single-member constituencies.[496] In terms of section 39(2), specially elected members of the House of Representatives were elected by members of the House. Parliament had the power to make law to bar a person convicted of an election offence from being qualified for nomination for election as a Member of Parliament.[497]

To safeguard the integrity of the electoral process, and consequently that of the peoples' representatives, there was a substantial amount of institutional independence of the Electoral Commission. The Chairperson of the Commission was the Speaker of the Senate while the Vice-Chairperson was the Speaker of the House of Representatives.[498] The Governor-General

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[491] Ghai and McAuslan, *op. cit.* note 6 pp 190-191.
[492] Section 34(2) of the Constitution of Kenya 1963
[493] Sections 36(1) of the Constitution of Kenya 1963
[494] Sections 91 and 92 of the Constitution of Kenya 1963.
[495] Ndegwa, "Citizenship and Ethnicity: An Examination of Two Transition Moments in Kenya Politics," 91:3 (1997) **American Political Science Review** pp. 599-616. Available at **http://find.galegroup.com/gtx/retrieve.do?contentSet=IAC-dOCUMENTS** pp 1-38 at p.15.Accessed on 10 June 2010.
[496] Section 38(1) of the Constitution of Kenya 1963.
[497] Section 41 (3) of the Constitution of Kenya 1963.
[498] Section 48(1)(a)(b)of the Constitution of Kenya 1963.

appointed two members, one on the advice of the Prime Minister.[499] Each of the other members of the Commission was appointed by the Governor-General acting in accordance with the advice of the President of each Regional Assembly.

3.3.3 Independence of the Judiciary

Independence of the judiciary was guaranteed by the appointment of a Chief Justice by the Governor-General acting on the advice of the Prime Minister.[500] The Prime Minister had to consult the Presidents of the Regional Assemblies and could not advise the Governor-General to appoint any person as Chief Justice unless the Presidents of not less than four Regional Assemblies concurred in his choice of candidate.[501] Judges were appointed by the Governor-General, acting in accordance with the advice of the Judicial Service Commission.[502]

A judge of the Supreme Court could only be removed if he or she was unable to perform the functions of his or her office or for misconduct. This removal was done after the recommendations of an independent tribunal which comprises among others, of persons who had held office as a judge of a Commonwealth country.[503] A Judicial Committee would then recommend to the Governor-General on the removal or otherwise of a judge.[504] The Judicial Service Commission, led by the Chief Justice, was not subject to the direction or control of any other person or authority.[505]

The foregoing constitutional architecture was a cardinal pointer to a clear intention by the founders of the Kenyan nation of their quest for a constitutional structure which limited the

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499 Section 48 (1) (c) (d) of the Constitution of Kenya 1963.
500 Section 172(1) of the Constitution of Kenya 1963.
501 Section 172(1) of the Constitution of Kenya 1963.
502 Section 172(1) of the Constitution of Kenya 1963.
503 Section 173(5) (a) and (b) of the Constitution of Kenya 1963.
504 Section 173(5)(c) of the Constitution of Kenya 1963.
505 Section 184(2) of the Constitution of Kenya 1963.

powers of the executive. They also clearly intended that the legislature and the judiciary were independent from executive influence, patronage and hegemony.

In 1964, Kenya became a Republic.[506] From that moment, a plethora of constitutional amendments were hastily enacted under a presidential system. With great vigour, this system entrenched personification and abuse of power by the presidency. The main casualties of this agenda were the other key institutions of political governance: the legislature and the judiciary. Consequently, the people of Kenya were denied basic civil and political rights, especially the right to form or join a political party of their choice. These aspects of the thesis are examined immediately below.

3.4 THE ERA OF ONE PARTY STATE AND THE RISE OF PRESIDENTIALISM

Ghai and McAuslan have argued that when Kenya became a Republic, a presidential system of government was preferred to a parliamentary one because there was a need for African states "to establish and maintain stability and order."[507]As observed by Linz, a conventional presidential system vests the president, as the chief executive, with full authority and powers because he is "also the symbolic head of state."[508] Two main strands of presidentialism are "the strong claim to democratic, even plebiscitarian, legitimacy; the second is his or her fixed term in office."[509] He further argues that presidential constitutions also reflect substantial suspicion of personification of power.[510] Perhaps this is due to "the winner-take-all"

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506 Constitution of Kenya Amendment Act 28 of 1964.
507 Ghai and McAuslan, *op. cit.* note 6 p220.
508 Linz, "The Perils of Presidentialism," **Journal of Democracy** 1:1 (1990) 51-69 p52 Available at **http://muse.jhu.edu/journals/journal_of_democracy/**.Accessed on 10 June 2010.
509 Linz, *ibid* note 508 p53.
510 Linz, *ibid* note 509 p54.

arrangement which makes politics a zero-sum game.[511] Harry Goulbourne contends that most authority under presidentialism is derived from sheer incumbency.[512]

Other scholars have argued that presidential power is difficult to control and presidents may indeed sabotage institutions intended to check their power.[513] The system tilts towards dictatorship and tyranny not because of its excessive power, but due to insufficient constitutional restraint which enhances presidential authority.[514] These observations seem to be apposite with reference to Kenya's experience regarding presidential democracy: The "big-man syndrome" or the "big-man leadership" was manifested in the centralisation and unrestrained presidential power for most of the country's history.[515]

As Okoth-Ogendo has observed, KANU's main focus at independence was "power transfer" from the colonial administration.[516] He specifically notes that KANU's Kenyatta, Oginga Odinga, Tom Mboya and Mwai Kibaki did not conceal their displeasure with the decentralisation of power. For this reason, they saw constitutional 'reforms' as necessary to reflect KANU's intentions at independence.[517] It is on this foundation that Kenyatta's presidency is now examined.

3.4.1 The First President, Jomo Kenyatta: 1963-1978

Early in his political life, Kenyatta was wide awake to the destructive nature of corruption and tribalism, two of Kenya's most crippling ills on governance since independence. In 1952, he observed that:

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[511] Linz, *ibid* note 510 p56.
[512] See generally, Goulbourne, "The State, Development and the Need for Participatory Democracy in Africa," in Peter Anyang Nyong'o (ed.), **Popular Struggles for Democracy in Africa**. London/New Jersey Publishers pp14-25.
[513] Rose-Ackerman *et al.*, Leveraging Presidential Power: Separation of Powers Without Checks and Balances in Argentina and the Philippines," **Yale Law School Faculty Scholarships**: Faculty Scholarship Series 2010. Available at **http://digitalcomms.law.edu/fss_papers/31**p1
[514] Goulbourne, *op.cit* note 512.
[515] On the "big-man" leadership, see Leon, *op. cit.* note 474 p12.
[516] Okoth-Ogendo, *op.cit.* note 60 p13.
[517] Okoth-Ogendo, *ibid* note 516 pp18-19.

> If we unite now, each and every one of us, and each tribe to another, we will cause the implementation in this country of that which the European calls democracy. True democracy has no colour distinction...We despise bribery and corruption, those two words that the European repeatedly refers to. Bribery and corruption is prevalent in this country.[518]

It is instructive to note that before becoming the country's leader, Kenyatta displayed admirable nationalistic and democratic ideals. In addition to his foreign exposure, perhaps, this political astuteness might also have been influenced by the counsel provided to Kenyatta at the constitutional talks in London. Kenyatta's counsel at the talks was the great USA civil rights advocate and future Associate Justice of the USA Supreme Court, Thurgood Marshall.[519]

However, once in office, Kenyatta's presidency manifested a different political direction than the rhetoric captured above. It is indeed ironic that when Marshall attended Kenyatta's funeral in 1978, he said that he was happy to find that the Schedule of Rights that he drew "was working very well."[520] To demonstrate that the Bill of Rights was not working very well under Kenyatta, the key aspects in which his presidency negated the independence constitutional structure are now discussed. Central among them are forceful and ruthless intolerance of dissent within and outside the ruling party, KANU.

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[518] Cornfield, *op. cit.* note 459 p1.

[519] See generally, Dudziak, "Working Toward Democracy: Thurgood Marshall and the Constitution of Kenya," 56 **Duke Law Journal** (2006-2007) pp721-780. Available at **http://heinonline.org/HOL/Page=hein.journals/duklr56&id=733collection=journals&index=journals/duklr.** Accessed on 27 September 2010.

[520] Dudziak, *ibid* note 519 p773.

3.4.1.1 **Entrenching One-party Politics and Combating Dissent**

The first independence elections in Kenya in May 1963 were mainly a contest between KANU and KADU.[521] Kenyatta's KANU won a majority of seats in the House of Representatives with 58 seats over Ronald Ngala's KADU which had 28 seats.[522] One of the main strategies used by Kenyatta to centralise power was to weaken political parties, thereby destroying the notion of competitive politics enshrined in the Constitution.[523] The tactics applied by KANU between 1963 and 1964 included frustrating KADU, promising its leaders appointments to the cabinet and intimidation. In November 1964, KADU dissolved itself to join KANU and its key leaders, Ronald Ngala, Daniel arap Moi and Masinde Muliro were appointed to the cabinet.[524]

After driving Kenya into a *de facto* one party democracy, Kenyatta had to contend with ideological differences which emerged within KANU, mainly between him and Odinga. As Kenyatta leaned West, Odinga seemed to lean to the East. This was indication that while the two political heavy weights had differences on issues like land ownership, the Cold War heightened these differences.[525] Odinga, Kenya's first Vice-President and also Vice-President of KANU together with Bildad Kagia among others lost their positions in KANU in the May 1966 party elections.

After losing his position in KANU, Odinga immediately formed the Kenya People's Union (KPU) which returned the country to a multi-party democracy.[526] To prevent Odinga from

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521 BBC News, "Kenyatta to become Kenya's First Premier," 27 May 1963 p1. Available at **http://news.bbc.org**

522 BBC News, *ibid* note 521 p1.

523 Odhiambo-Mbai, "The Rise and Fall of the Autocratic State in Kenya," in Walter Oyugi *et al.*, **The Politics of Transition in Kenya: From KANU to NARC** pp 51-95. Nairobi: Heinrich Boll Foundation: English Press Ltd 2003 p60.

524 Odhiambo-Mbai, *ibid* note 523 p61.

525 Nyong'o, "State and Society in Kenya: The Disintegration of the Nationalist Coalitions and the Rise of African Presidentialism," 88(1989) **African Affairs** pp229-251 p236.

526 Oloo and Mitulla, "The Legislature and Constitutionalism in Kenya," in Mute and Wanjala *op cit* note 66 pp35-57 p40.

recruiting KANU's MPs, thereby encroaching on KANU's majority in Parliament, Tom Mboya proposed a constitutional amendment.[527] The Constitution of Kenya (Amendment No.2 Act No.17) of 1966 prohibited an MP from losing his or her seat in Parliament if he or she resigned from the political party which sponsored him or her at election. Okoth-Ogendo has argued that the strategy, the 'turn-coat' rule, was borrowed from Malawi when the ruling party was faced with similar difficulties.[528] The strategy worked after 'the little general election,' called by Kenyatta in 1966 when he prorogued Parliament and Odinga's KPU lost to KANU.[529]

While at independence the Constitution prohibited deprivation of the liberty of the individual without due process as examined above, this safeguard seems to have prevented Kenyatta from dealing with his political opponents as he thought appropriate. It is for this reason, it is submitted, that the Constitution of Kenya Amendment Act 18 of 1966 was passed. The amendment gave the President unfettered powers to detain individuals without trial in the exercise of the emergency powers granted to him by the draconian Preservation of Public Security Act 18 of 1966. Key personalities detained by Kenyatta under these laws were Kenyatta's old friend, Oginga Odinga, and a number of MPs including the late firebrand legislators Jean-Marie Seroney, Martin Shikiku and George Anyona. Also detained was literary critic and scholar, Ngugi wa Thiong'o.[530] Anyona was detained without trial in 1975 after his remarks in Parliament on the mysterious disappearance and subsequent death of MP Josiah Mwangi Kariuki popularly known as "JM."[531] As observed by Conboy, the detention

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527 Oloo and Mitula, *ibid* note 526 p41.

528 Okoth-Ogendo, *op.cit*.note 60 p25. The author further observes that the Act went through and became law in 48 hours.

529 Okoth-Ogendo, *ibid* note 528 p26.

530 Conboy, "Detention Without Trial in Kenya," 8(1978) **Georgia Journal of International Law and Comparative Jurisprudence** 441-461 pp448-449. Available at **http://heinonline.org**.Accessed 2 October 2012.

531 Conboy, *ibid* note 530 p 449.

was an affront to the principle of parliamentary immunity, especially because the legislator was arrested in the Parliament building.[532]

In 1969 during the height of the Cold War, Kenyatta fell out with the two key politicians of Luo ethnicity. These were Tom Mboya and Oginga Odinga. It should be recalled that the two refused to form a government unless Kenyatta was released from prison. Their battle with Kenyatta was due to ideological differences: while Kenyatta leaned to the West, Mboya and Odinga faced the East.[533] In the course of time, it would appear that the differences went to new heights. In July 1969, Mboya was assassinated in Nairobi under mysterious circumstances. Kenyatta attacked the "communists" for the assassination of Mboya. He also charged at Odinga's new political party, the Kenya Peoples' Union (KPU) "as scapegoats, accusing them of being subversive and tribalist."[534]

After the assassination of Mboya in 1969, Kenyatta feared the political resurgence of Odinga by seeking the support of the Kikuyu through wide scale oath-taking. He sold to the Kikuyu the idea that the entire Kikuyu ethnic group was under siege.[535] The Kikuyu took the oath "in readiness to defend the House of *Mumbi*, the eponymous founder of the Kikuyu tribe."[536] Odhiambo observes that Kenya became an ethnic state, only catering to Kenyatta's Kikuyu elite to the exclusion of the other ethnic groups from power.[537]

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[532] Conboy, *ibid* note 531 p449.
[533] Kimani, "A Past of Power More than Tribe in Kenya's Turmoil," **Open Democracy**, p.4 January 2008. Available at **http://www..opendemocracy.net/print/35486** . Accessed on 10 September 2010.
[534] Africa Watch, *op. cit.* note 470 p6.
[535] Ajulu, "Politicised Ethnicity, Competitive Politics and Conflict in Kenya: A Historical Perspective," 61:2(2002) **African Studies** pp251-268p 261, available at **http://ejournals.ebsco.com**. Accessed on 23 July 2010.
[536] Ajulu *ibid* note 535 p 261.
[537] Odhiambo, "Ethnic Cleansing and Civil Society in Kenya," 22:1 (2004) **Journal of Contemporary African Studies** 29-42 p.31.Available at **http://ejournals.ebsco.com** . Accessed on 23 July 2010

The acrimony between Kenyatta and Odinga exploded in 1969. In October of that year, Kenyatta visited Kisumu, the capital city of the Luo-land, to open a hospital built by the Russian government. A bitter exchange of words between him and Odinga ensued. This led to a violent rebellion against Kenyatta, prompting his security men to fatally shoot eleven people.[538] In the aftermath of that incident, Kenyatta never returned to the Luo region of the country for the next decade.[539] After the Kisumu violence, Odinga's KPU was banned. Its leaders, Odinga and Achieng Oneko, were detained without trial.[540] These two former Kenyatta allies who waited for Kenyatta's release from prison to lead the nation did not take long to discover that Kenyatta could not entertain any form of political dissent. [541]

Unlike Odinga and Mboya who were non-Kikuyu, Kenyatta had a fierce critic from within his Kikuyu tribe. This was in one elected Member of Parliament, Josiah Mwangi Kariuki or "JM." Kariuki's national status started when he became Kenyatta's private secretary immediately after independence.[542] He then held various public positions including that of Assistant Minister. Kariuki showed open defiance to Kenyatta's policies especially corruption, the alarmingly widening gap between the rich and the poor and inequitable land allocation policy. This crusade irked the Kenyatta regime which banned him from addressing political rallies by, among others, setting up road-blocks to curtail his movement.[543] Out of this frustration, Kariuki could not serve in the Kenyatta Government any more and he resigned his Assistant Minister's position just before the 1974 elections.[544] Although he could

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538 Africa Watch, *op. cit.* note 470 p6.
539 Kimani, *op. cit* note 533 p4.
540 Africa Watch, *op. cit.* note 470 p6. Also see Conboy, *op. cit.* note 530 p448.
541 African History, *op. cit.* note 463 p1.
542 The Truth, Justice and Reconciliation Commission of Kenya: "TJRC's Thematic Hearings on Political Assassinations," p1. Nairobi, 5 March 2012. This version of JM's story was narrated to the TJRC by former MP, Mark Mwithaga who told the Commission that he was a good friend of the late JM since their school days. Available at **http://www.tjrckenya.org/indexphp?option=com_content&view=art...** Accessed 3 October 2012.
543 TJRC, *ibid* note 542 p1.
544 TJRC, *ibid* note 543 p1.

not attend political rallies or generally enjoy his freedom of movement, Kariuki was elected MP of Nyandarua constituency with a landslide victory in the 1974 election.[545]

As Kariuki's lawyer in the early 1970s, Duncan Mindo, observed in an interview with the *Daily Nation* in 2010 "Kariuki fearlessly attacked Kenyatta "for betraying the cause of the struggle for independence at a time when criticising the President was considered sacrilege."[546] One of Kariuki's most stinging attacks on the Kenyatta regime was that Kenya was a country of "10 million beggars and 10 millionaires."[547] Prior to Kariuki's murder, his lawyer hid him in a hotel as Kariuki feared for his life.[548] Kenyatta's government "clumsily interfered with the investigation into the killing, raising suspicion of its own involvement."[549] After Kariuki's death in March 1975, dissent against Kenyatta ensued and he did not make any public appearances for two weeks and when he did, perhaps to silence any form of opposition, "he was in full military gear."[550]

Silencing of dissent meant that Kenyatta was able to exercise his power without any manner of restraint and he truly became Kenya's 'big-man.' This new political strategy undoubtedly dented the positive spirit of political governance, human rights and the rule of law embodied in the Constitution. As discussed below, Kenyatta went further than annihilating political opposition. He personified power by mutilating the concept of separation of powers. He did this effectively by making Parliament and the courts mere appendages of the executive. In the

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545 TJRC, *ibid* note 544 p1.
546 *Daily Nation*, "Former Teacher Remembers Last Days with JM Kariuki," 6 March, 2010. Available at **http://www.nation.co.ke/News/Former%20teacher%remembers%201**. Accessed on 21 September 2010.
547 *Daily Nation, ibid* note 546 p2.
548 *Daily Nation, ibid* note 547 p2.
549 Africa Watch, *op. cit.* note 470 p7.
550 *Daily Nation op.cit.* note 546 p2.

process he entrenched authoritarian or 'imperial presidency' in Kenya, a common feature in many African countries.[551]

3.4.1.2 **Endemic Corruption and Ethnic Cleavage**

The political strategy and approach applied by Kenyatta to cling on to power inexorably led to Kenya's governance crisis. This remains a key facet of the political culture of modern-day Kenya. As Prunier has observed, the Kikuyu and their relatives, the Embu and the Meru, formed the Gikuyu Embu Meru Association (GEMA). GEMA sidelined bigger tribes especially the Luo as they "ran everything"[552] The Kikuyu elite elevated themselves over other tribes and claimed "martyr status for their sufferings under the *Mau Mau* emergency."[553]

To justify Kenyatta's reluctance to fight corruption, and to illustrate how he embraced tribalism and political cleavage, his philosophy was a Kikuyu anecdote, "my little bird keep hiding yourself and if you are found out, you are not mine."[554] The little 'birds' seem to have been a clique of Kikuyu leaders from Kenyatta's native Kiambu District. The clique managed the country's affairs up to the events following Kenyatta's death in 1978. This small group of leaders was called the *Kiambu Mafia*, who had greatly amassed large tracts of land in the early days of Kenyatta's presidency.[555] The allocation of land to Kenyatta, his family

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[551] See generally, Okoth-Ogendo, *op.cit.* note 59. Also see, Asare and Prepeh, "Amending the Constitution of Ghana: Is the Imperial Presidency Trespassing?" **African Journal of International and Comparative Law** 18:2 (2010) 192-216. Available at http://heinononline.org.Accessed on 14 June 2011.

[552] Prunier, *op. cit.* note 457 p2.

[553] Prunier, *ibid* note 552 p2.

[554] *Daily Nation*, "Kenya: Philosophy of 'The Hiding Little Bird' Has No Place in the Region We Want," 22 July 2010. p1. Available at **http://www.allafrica.com/stories/201007230274.html** . Accessed on 54 April 2010.

[555] African History *op. cit.* note 463 p1.

members and those close to him was based on the Government Lands Act. The Act, which had colonial roots, empowered the British Monarch to alienate land as he or she pleased.[556]

Kenyatta also assisted Kikuyu peasants descend into the Rift Valley where they seized land owned by former European settlers. Other communities, especially those of the Kalenjin tribe, regarded the land as rightfully theirs.[557] It is imperative to note that the invasion of land in the Rift Valley by 'outsiders' was central to the 2007 post-election violence.[558] In addition, job opportunities were ethnicised. The well-connected Kikuyu dominated the civil service, provincial administration, the police and the military.[559] Kenyatta's concept of *Harambee* (pulling together), became a political tool from which favoured politicians met with tremendous success by receiving Kenyatta's support. The outcome was that their opponents were sabotaged and "paid dearly at the ballot box."[560]

At independence, there was an urgent need to Africanise the Public Service because senior positions were held by former colonial administrators. Kenyatta got the power to be in control of the Public Service by the Constitutional (Amendment) Act No. 16 of 1966. The Act entrenched the President's control of the Public Service by providing that he had the power to appoint public servants. They also held their offices at his pleasure. The so-called

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[556] Ndung'u, "Tackling Land Related Corruption in Kenya," p4.Available at World Bank Site Resources, http://siteresources.worldbank.org/RPDLPROGRAM/.../ndung'u.pdf.Accessed on 18 February 2011.

[557] Wrong, **It's Our Turn to Eat: The Story of a Kenyan Whistle Blower**. London: Fourth Estate 2009 pp112-113.

[558] See generally, CIPEV report *op. cit.* note 339.

[559] Mwaura, "Political Succession and Related Conflicts in Kenya," A paper presented for the USAID Conference on Conflict Resolution in the Greater Horn of Africa held at the Methodist Guest House, Nairobi, 27-28 March 1997, available at **http://www.payson.tulane.edu/conflict/Cs20st/MwaurFIN2.doc** p13. Accessed on 8 July 2010.

[560] Cherotich, "Corruption and Democracy in Kenya," **Netherlands Institute for Multi-party Democracy**. Available at http://www.nimd.org/documents/C/corruption_and_democracy_inkenya.pdf p23.

'Kenyanisation' of the Public Service was used by Kenyatta to corruptly 'Kikuyunise' the Public Service.[561]

The positions were however given to those Kikuyus who were well connected to those in control of the machinery of State.[562] Some were qualified to hold those positions but most were not, thereby substituting meritocracy for nepotism.[563] By the time of his death, out of Kenya's eight Provincial Commissioners, four were Kikuyu while seven out of twenty cabinet ministers were also Kikuyu.[564] Of the seven Kikuyu cabinet ministers, five were from Kiambu, Kenyatta's home district.[565] Similar astonishing statistics were found in the number of Kikuyu permanent secretaries, the military and top positions at the University of Nairobi.[566]

3.4.1.3 **De-regionalisation and Dissipation of Separation of Powers**

KANU, through Mboya, Kenyatta and Odinga favoured a centralised political structure. However, the Constitution posed major barriers as the legislature was independent and power was cascaded to regional governments and assemblies. Constitutional amendments were therefore necessary for Kenyatta to exercise full control of the affairs of the nation. The Constitution of Kenya (Amendment) Act No. 38 of 1964 put de-regionalisation into effect, essentially ending regionalism or *Majimboism*. It converted regional 'Presidents' to 'Chairmen.' Power vested in the Regional Assemblies to alter regional or *jimbo* boundaries was transferred to Parliament. The Act also diminished the revenue independence of the

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561 Odhiambo-Mbai, Public Service Accountability and Governance in Kenya since Independence," 18:1 (2003) **African Journal of Political Science113**-145 p119.Available at **http://www.arcives.lib.msu.edu/DMC/African%20Journals/pdfs**... ajps008001006.Accessed on 20 August 2011.

562 Odhiambo-Mbai, *ibid* note 561 p119.

563 Odhiambo-Mbai, *ibid* note 562 p119.

564 Murunga, "The State, Its Reform and the Question of Legitimacy in Kenya," Identity, **Culture and Politics** 5:1&2 (2004)179-206 p 187.Available at http://www.codesria.org/IMG/pdf/murunga.pdf.Accessed on 12 September 2011.

565 Murunga, *ibid* note 564 p187.

566 Murunga, *ibid* note 565 p187.

regions by making them dependent on the national government. In addressing the Nyanza Regional Assembly, Mboya showed the contempt that KANU had for regionalism by saying that regional authorities were "not governments in themselves."[567]

The Constitution of Kenya (Amendment) Act 14 of 1965 renamed 'Regional Assemblies' as 'Provincial Councils.' With these changes also fell the assemblies' authority to pass legislation. That the executive was committed to emasculating the legislature is also evident from the Constitution of Kenya (Amendment) Act 16 of 1966. The Act provided that the Speaker of Parliament could declare a seat vacant if an MP defaulted in attending eight consecutive parliamentary sittings without permission of the Speaker. The President could however fetter the discretion of the Speaker as he or she could waive the Speaker's determination. The Act was not so much intended to protect the electorate but to enable the President have substantial control over parliamentary processes as at the time, a number of MPs were pro-Odinga and they missed parliamentary sessions at will.[568]

Further, the Constitutional Amendment Act 45 of 1968 enhanced the powers of the President by usurping the authority of the House of Representatives to appoint twelve specially elected Members of Parliament. The predominance of the President over Parliament was enhanced by Constitutional (Amendment) (No.2) Act 14 of 1975. It empowered the President to "rescue" MPs disqualified from being in office due to electoral offences. On this amendment, Kenyatta rescued his friend, Paul Ngei, who was a Cabinet Minister and a co-accused at the Kapenguria trial.[569] This constitutional amendment was Kenyatta's last major mutilation of the independence Constitution.

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[567] Okoth-Ogendo, *op. cit.* note 60 p20.
[568] Okoth-Ogendo, *ibid* note 567 p23.
[569] Muigai, *op. cit.* note 483 p312.

The independence Constitution provided for an independent judiciary as manifested in the security of tenure for judges. This position seems to have been engendered by the Lancaster House constitutional talks which declared independence of the judiciary of "fundamental importance."[570] KANU and Kenyatta's machinations to control the entire public sector could certainly not be realised when the judiciary was independent. The main strategy applied by Kenyatta for him to control the courts was the hiring of expatriate judges on contract, although judges' tenure and removal had constitutional protection.[571] The President and KANU used expatriate judges "as a special species hired by it to carry out its express or perceived wishes or face disciplinary action..."[572]

A former Chief Justice employed on contract, Alan Hancox, once urged lawyers and judges to show loyalty to the Government and the President.[573] Judges who displayed any form of sympathy to Kenyatta's opponents were not spared the sack. For instance, after Justices G. Farrel and Acting Chief Justice Dalton reduced the sentence imposed on KPU's Bildad Kagia in 1969, Kenyatta appointed Kitili Mwendwa as the Chief Justice on the day of Kagia ruling. A few days thereafter, Justice Farrel left the bench.[574]

Kenyatta became Prime Minister and later President of Kenya on a constitutional platform and philosophy of respect for human rights, in particular multi-partism, and the rule of law. However, by the time of his death in August 1978, Kenyatta had "dominated every facet of Kenya's political life for more than two decades."[575] He rewarded confidants and ruthlessly dealt with his opponents as he emasculated the legislature and the judiciary. This political

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[570] See generally Report of the Kenya Constitutional Conference *op cit* note 476.
[571] Mutua, *op. cit.* note 66 pp107-108.
[572] Mutua, *ibid* note 571 p108.
[573] Mutua, *ibid* note 572 pp 108-109.
[574] Mutua, *ibid* note 573 p109.
[575] Muriuki, "Central Kenya in the Nyayo Era," 26:3 (1979) **Africa Today** pp.39-42.Available at **http://www.jstor.org/pss/4185875** p2.Accessed on13 July 2010.

trajectory was perfected by his successor, Vice-President Daniel arap Moi in his *Nyayo* philosophy, following in the footsteps of Kenyatta.[576]

3.5 THE ERA OF DANIEL ARAP MOI: 1978-2001

A few years before his death, Kenyatta's health had shown increasing frailty.[577] An extremely wealthy and influential clique of mainly Kikuyus from Kenyatta's Kiambu district was determined to block Vice-President Moi from succeeding Kenyatta.[578] The group was unofficially known as "Change the Constitution Group" or the *Kiambu Mafia*.[579]The group's main worry was predicated on section 6 (2) (a) of the Constitution. That section provided that in the event of the Office of the President becoming vacant, the Vice-President would discharge the functions of the Office of the President for ninety days. This would have worked against their preferred successor, Dr. Njoroge Mungai.[580] This was a very long time to the group, especially freedom fighter and former Cabinet Minister Paul Ngei. He said that during this time, "a lot of things can happen...if you give me that period I can really teach you a lesson..." [581] It is submitted that the group's main thrust was to secure the post-Kenyatta era Kikuyu-domination of political power in the country. However, the Constitution stood in their way.

The scheme by the "Change the Constitution Group" failed for several reasons. First, it faced stiff opposition from many MPs, including Mwai Kibaki. Second, it encountered legal barriers as the Attorney-General Charles Njonjo forcefully opposed the group's machinations. In the process, Njonjo issued perhaps one of the most remembered political statements in Kenya. He argued that it was a criminal offence for any person to imagine,

[576] Mwaura, *op. cit.* note 559 p13. Accessed on 8 July 2010.
[577] Mwaura, *ibid* note 576 p4.
[578] Africa Watch, *op. cit.* note 470 p7.
[579] Mwaura, *op. cit.* note 559 p8.
[580] Mwaura, *ibid* note 579 p8.
[581] Mwaura, *ibid* note 580 p8.

devise or intend the death of the President.[582] Fourth, Kenyatta, who was not initially openly opposed to the group, finally convened a cabinet meeting at which the Cabinet castigated those calling for constitutional amendment.

In addition to the foregoing barriers faced by the Change the Constitution Group, Kenyatta called off a KANU party conference intended by the Change the Constitution Group, to nominate a president for the party.[583] It is therefore argued that Kenyatta intended Vice-President Moi to be his successor. This perhaps explains Moi's exceptional determination, though unsuccessfully, to hand over power to Kenyatta's son, Uhuru Kenyatta in 2002 as a manifestation of gratitude to his father.

Moi became Kenya's second President after the death of Kenyatta on 22 August 1978.[584] On October 6, 1978, he was unanimously elected as the president of the ruling party, KANU.[585] A seemingly harmless and humble man, Moi did not manifest the ability to step in the shoes of Kenyatta and some, quite wrongly, saw him as "a mere passing cloud."[586] Moi promised to continue pursuing Kenyatta's policies under the *Nyayo* philosophy.[587] Two of Moi's colleagues in the cabinet who had played a key role in fighting off attempts to block Moi from becoming the President, Mwai Kibaki and Charles Njonjo, were appointed Vice-President and Attorney-General respectively. At the same time, Moi was strengthening his position and was waiting for the right moment to scuttle them and other Kikuyu elites.[588] The

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582 Africa News Online, "Njonjo Among the Lat of the Breed," 18 May 2008. Available at **http://africanewsonline.org.**Accessed on 15 November 2010.
583 Mwaura, *op. cit.* note 559 pp7-8.
584 Mwaura, *ibid* note 583 p12.
585 Mwaura, *ibid* note 584 p13.
586 Musambayi, "After the Floods---The Rainbow: Contextualising NARC's Election Victory-Lessons Learnt and the Challenges Ahead," in Maina and Kopsieker (ed.), **Political Succession in East Africa: In Search for a Limited Leadership,**,Nairobi: Friedrich Ebert Stiftung, Kenya 2006 pp13-54 p16.
587 Mwaura, *op.cit.* note 559 p13.
588 Musambayi, *op. cit.* note 586 p16.

Moi-Njonjo-Kibaki triumvirate was later scattered by Moi in his unbridled determination for, and consolidation of, power.[589]

After Moi assumed power, there were some indications that he would confront past mistakes of political governance. He released 26 political detainees of all walks of life, some of whom had spent years in detention.[590] They included renowned social activist and writer, Ngugi wa Thiong'o, who was detained by Kenyatta regime for his literary work which had heavy political undertones.[591] Moi also promised to fight corruption, and the general feeling was that he would enlarge the democratic space.[592]However, this was short-lived.Once in office, he directed his efforts to fighting and neutralizing his political dissenters, real and imagined.[593] This approach did not seem to justify the conceptualisation of the *Nyayo* philosophy as peace love and unity.

The *Nyayo* philosophy was the cornerstone of Moi's presidency. In essence, Moi was making a case for pursuing Kenyatta's leadership technique. In a 1981 speech to the nation, Moi said:

> We live now in the era of *Nyayo*. I hear there are a few people who sometimes seem to wonder just where this *Nyayo* is leading. Well, the answer is simple: towards peace, love and unity. Peace, love and unity are not slogans or vague philosophies: they are practical foundations of countrywide development. Where there is peace, then there is stability and

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589 A few wealthy Kikuyu elite known as the Kikuyu *Mafia*showed open hostility against Moi when it appeared clearly that Kenyatta's health was in danger.This group "would have preferred one of their own to be eligible for the presidency,"see**http://en.wikipedia.org/wiki/Daniel_Arap_Moi.**Accessed on 14 July 2010. Also see generally, Mwaura *op.cit* note 559.

590 Adar, "The Internal and External Contexts of Human Rights Practice in Kenya: Daniel arap Moi's Operational Code," 4:1(2000) **African Sociological Review** pp74-96 p74.

591 See, generally, Thiongo: A Profile of a Literally and Social Activist," **http://www.ngugiwathiongo/bio/bio-home.htm**

592 Adar, *op. cit.* note 590 p74.

593 Adar, *ibid* note 592 p74.

> only in the arena of stability will you find investment, enterprise and progress. Where there is love, then there is trust and readiness to work with others to contribute to others in the cause of nationhood. Where there is unity, there is strength, rooted in understanding of our common purposes, common loyalties and mutual dependence.[594]

Moi's *modus operandi* failed to make a break from a past dominated by non-observance of the rule of law, the enforcement and enjoyment of human rights. It is imperative to note, for purposes of this thesis, that the *Nyayo* philosophy did not specifically address any particular component of good political governance, for instance transparency and accountability and respect for fundamental human rights and freedoms. It progressively occurred that the omission was a calculated move as Moi intended to silence all manner of political opposition and to personify power. Such a heavy political agenda could not be realised without consigning human rights issues to the back burner of his governance programme. This and other key aspects of his regime are examined below.

3.5.1 From a *De Facto* to a *De Jure* One-Party State

Although Kenyatta furiously fought any manner of opposition to his rule, Kenya's constitutional architecture of a multi-party state remained intact and this is what Moi inherited in August 1978. However, and in a systematic personification of power, Moi transformed the country into a *de jure* one party state. In addition, he ruthlessly dealt with his dissenters within the only political party, KANU. This approach was clearly inconsistent with his political philosophy when he was in the main opposition party, KADU. It is argued that

[594] State House, Kenya, "**1980s: The Emergence of the Nyayo Era**" p1. Available at **http://www.statehousekenya.go.ke/hist/1980.htm**. Accessed on 14th February 2012

Moi's objective was to act fast so as to consolidate power considering his unhappy experience with the "Change the Constitution Group." His strong dislike of multi-party politics was founded on the thinking that political pluralism was a foreign ideology which would divide the country along tribal lines.[595]

As he personified power, Moi's economic and political decisions led inexorably to intolerance and disillusionment among politicians and others who were dissatisfied with KANU's governance.[596] He reacted with a severity not comparable with that of Kenyatta: All tribal unions were banned; he closed the University of Nairobi whenever its students demonstrated against his government while opposing him in Parliament was tantamount to treason.[597] The Constitution of Kenya (Amendment) Act 7 of 1982 made KANU Kenya's only political party. By making Kenya a *de jure* one-party state, the new section 2A of the Constitution fundamentally transformed the course of the country's politics. No one could hold political office, from the President downwards, unless he or she was a member of KANU, a huge dent on the Bill of Rights.[598]

One of the intriguing aspects of the constitutional amendment was that it was preceded by a KANU Governing Council meeting which ordered the Attorney-General to table the Bill in Parliament. This was a direct affront to the independence and integrity of the office of Attorney-General and Parliament.[599] The Attorney-General pushed the Bill through

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595 Mutua, "Human Rights and State Despotism in Kenya: Institutional Problems," 41:4 (1994) **Africa Today** pp 50-57. Available at **http://find.galegroup.com/gtx/retrieve.do?contentSet=IAC-Documents** p3.Accessed on 15 July 2010.
596 Africa Watch, *op. cit.* note 470 p9.
597 Africa Watch, *ibid* note 596 p9.
598 Muigai, *op. cit.* note 483 p313.
599 Muigai, *ibid* note 598 p313.

Parliament without any debate in order to hurriedly pre-empt the formation of the Kenya African Socialist Alliance Party by Oginga Odinga and George Anyona.[600]

It is imperative to note that the process of converting the country into a *de jure* one-party state was characterised by what was akin to colonial-era-brutality. The main ingredients of the process were extreme and lengthy torture, arbitrary arrests and detentions without trial.[601] The current Chief Justice, Willy Mutunga, and other University of Nairobi lecturers were detained without trial for what Moi called "over-indulgence in politics."[602] The current Prime Minister Raila Odinga was also brutally tortured and detained without trial after the failed the 1982 coup attempt.[603]

3.5.2 Emasculation of Electoral Democracy

When Moi made Kenya a *de jure* one party state, he, in effect put in his control of the entire electoral democratic process. Except for KANU, there was no other party which could sponsor electoral candidates. While making Kenya a *de jure* one party state was intended to silence Moi's opponents, it did not seem to be so effective and he therefore had to work from within KANU. This position was made more forceful by section 41(1) of the Constitution which empowered Moi, the President, to appoint all members of the Electoral Commission. The Commission obviously became a KANU mouth-piece and a tool for repression of representative democracy. Moi re-constructed KANU to become the most forceful institution in the country. For instance, in 1986, he stated that the party was supreme over Parliament and the courts.[604]

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600 Africa Watch, *op. cit.* note 470 p10.
601 Adar and Munyae, "Human Rights Abuse in Kenya Under Daniel arap Moi, 1978-2001," **African Studies Quarterly** Available at **http://web.africa.ufl.edu/asq/v5/v5il/al.htm**. Accessed on 15 November 2010.
602 Adar and Munyae, *ibid* note 601 p2.
603 *The Standard*, 20 October 2010, "Raila Testifies in Trial against Former President Moi," available at http://www.standardmedia.co.ke, accessed on 20 October 2010.
604 Murunga, *op. cit.*note 564 p191.

KANU became the chief decision-making body feared by all. MPs could be kicked out of the only political party through which they could access and remain in Parliament.[605] The main party organ used by Moi to fight dissent was the KANU Disciplinary Committee which gave Moi's confidants immense powers to deal with those perceived as disloyal to its leader.

A key strategy which Moi used to retain his hold on power under a one-party state and to ensure the downfall of his political foes was KANU's 1988 "queue voting" method. Perhaps the world's first 'democratic' experience of its kind, voters would stand behind their preferred candidate and the counting was done by an administrative official.[606] In many cases, party loyalists were declared winners as the 'votes' in the shorter queues were unashamedly declared more than those in the longer queues. This happened after people "were threatened and cajoled into standing in the line of the government candidate."[607]

The 1989 election was a great fiasco. What happened in Kiharu constituency is worth examining. Throup and Hornsby note that one Dr. Julius G. Kiano, the first Doctor of Philosophy degree holder in Kenya, had garnered 92.46% of the 'votes' against his opponent, Kamau Mweru. Although Mweru got 7.53% of the votes, he was declared the winner.[608] The administrative officers involved in this electoral fiasco were only answerable to Moi who was also the final arbiter as the leader of the ruling political party. This combination of injustice robbed the people of their constitutional right to elect their representatives.[609]

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[605] Murunga, *ibid* note 604 p191.
[606] Africa Watch, *op.cit*.note 470 p21.
[607] Africa Watch, *ibid* note 606 p22.
[608] Throup and Hornsby, **Multi-Party Politics in Kenya: The Kenyatta and Moi States and the Triumph of the System in the 1992 Elections**. London: Villiers Publications 1998 p31.
[609] Adar and Munyae, *op. cit.* note 601 p2.

President Moi's strategy of emasculating Kenya's electoral democracy was strongly felt even after the resumption of political party pluralism in 1991. When the struggle for a return to multi-partism gained ground in 1990, Moi became paranoid and persistently prophesied that multiple political parties would breed ethnic violence.[610] This, undoubtedly, was political rhetoric aimed at pre-empting any accusations on his government about the 'ethnic' clashes, which ensued in the 1992 and 1997 elections.

During these elections, security forces and Moi's mainly Kalenjin supporters swore that they would evict from their midst those who opposed KANU.[611] The 1992 and 1997 elections clashes helped to maintain Moi's grip on power. This occurred as persons who were against KANU were intimidated and many opposition supporters were disenfranchised through displacements. The intention was to ensure that opposition presidential challengers did not achieve the constitutional minimum of 25 per cent of the votes in the provinces, especially in the politically volatile Rift Valley.[612]

The magnitude and complexity of the so called 'ethnic clashes' were quite different from the primordial quarrels between different communities. This is because the 'ethnic clashes' were aimed at maintaining the political *status quo*. As Klopp has argued, the 1992 and 1997 clashes were based on "political tribalism",[613] a phenomenon which she describes as exhibiting "divisive competition for state power by members of the political class who claim to speak for unified ethnic communities."[614] It is submitted that Klopp's definition of this

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[610] Odhiambo, *op. cit.*note 537 p32.
[611] Odhiambo, *ibid* note 610 p35.
[612] See generally, Brown, "Authoritarian Leaders and Multiparty Elections in Africa: How Foreign Donors Help to Keep Kenya's Daniel arap Moi in Power," 22:5 (2001) **Third World Quarterly** pp.725-739 Available at **http://ejournals.com/Article.asp?ContributionID=11276957**. Accessed on 20 May 2010.
[613] Klopp, "Can Moral Ethnicity Trump Political Tribalism? The Struggle for Land and Nation in Kenya," **African Studies** pp269-294 p269.Available at **http://www.columbia.edu/~/jk2002/02/publications/klopp/02_moralethnicity.pdf**.Accessed on 30 July 2010.
[614] Klopp, *ibid* note 613 p 269.

term is a correct reflection of Kenya's political trajectory since independence as examined below.

Kibaki's election petition against Moi's win in 1997 caused deaths and displacements of the Kikuyu in some parts of the Rift Valley. The Moi re-election challenge was interpreted as "an affront to the Kalenjin community."[615] Moi's political tribalism strategy also included a furious call for *majimboism* (provincial autonomy), which was "an extremely illiberal and violent form of ethnic nationalism."[616] Kagwanja observes that some 'moral-ethnic' and cultural associations, specifically the banned *Mungiki* (multitude) sect, saw their mainly Kikuyu religio-cultural agenda diverted so as to lend a hand in retention of power.[617] Formed in the 1980s as a Kikuyu religio-cultural group, the Mungiki gradually metamorphosed into an organised, intimidating underworld gang" [618] and as Kagwanja has argued, it was sometimes used by politicians for the realisation of their political objectives.

It however appears that the *Mungiki* mission went beyond the 'religio-cultural' as observed by Kagwanja. Appearing before the Truth, Justice and Reconciliation Commission in March 2012, one of the *Mungiki* founders and a former member of the group said that the group was infiltrated by politicians for political purposes. Politicians armed members of the group and incited them to violence for political gain.[619] Okungu has claimed that members of the group were used by Moi through promises for jobs in his crusade to ensure the election of his

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[615] Klopp, *ibid* note 614 p270.
[616] Klopp, *ibid* note 615 p270.
[617] See, Kagwanja, "Facing Mount Kenya or Facing Mecca? The Mungiki, Ethnic Violence and the Politics of the Moi Succession in Kenya, 1987-2002. **African Affairs** 102: 406 (2003) pp25-49. Abstract. Available at **http://ejournals.ebsco.com .**
[618] BBC News, 24 May, 2007, "Profile: Kenya's Secret Mungiki Sect," available at .news.bbc.co.uk. Accessed on 5 April 2013.
[619] Citizen TV, "Political Leaders Exploited Mungiki for Gain," p1.14 March 2012. Available at **http://thecitizen.co.tv .** Accessed on 12 April 2012.

preferred successor, Uhuru Kenyatta.[620] The extent of the group's militancy and its exceedingly inhumane tactics were noted by the ICC Pre-Trial Chamber II in its ruling on confirmation of some of the charges of crimes against humanity facing the prime suspects of the 2007-2008 post-election violence.[621]These observations will however be tested when the hearings are concluded.

After Kenya's transition to a *de jure* one party state and having a strong grip on the ruling party, Moi continued to shred the little left of the doctrine of separation of powers and respect for human rights by his predecessor, an overview of which I now turn to.

3.5.3 Erosion of Judicial Independence

Due to the overarching role played by the judiciary in ensuring good governance, the unprecedented manner in which Moi's 24-year reign meddled with and destroyed the constitutional architecture of this noble institution deserves some considerable attention. As observed by the former Chief Justice of India, Justice Y.K. Sabharwal, the judiciary has a key role to play "in the development and evolution of society in general and in ensuring good governance."[622] The learned judge reminds us that the judiciary is the guardian and custodian of the Constitution, a watchdog against violation of human rights and abuse of state power and defensive armour of the country, constitution and laws. "If this armour were to be stripped off its onerous functions it would mean, 'the door is wide open for nullification, anarchy and convulsion.'"[623]

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[620] Okungu, "Former President Daniel arap Moi's Long Association with Mungiki Sect in Kenya," *African News Online,* 30 June 2009.Available at **http://africanewsonline.blogspot.com/2009/06/former-president-daniel-mois-long.html** p1. Accessed on 16 November 2010.

[621] See, **Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali,** ICC Case No ICC-01/09/11. Available at **www.worldcourts.com/icc; http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Situations**.

[622] Chief Justice Sabharwal, "Role of the Judiciary in Good Governance." Undated paper, available at **http://www.highcourtd.govin/right_menu/articles/goodgovernance.pdf**p26.

[623] Sabharwal, *ibid* note 622 pp9-10.

The judiciary's cardinal role in good governance, especially the enjoyment of fundamental human rights, cannot be realised when the courts are under the mighty hand of the executive as experienced in Kenya under the 1963 Constitution. Notwithstanding the 'fundamental importance' of independence of the judiciary expressed at the constitutional talks in London in 1962, the judiciary has to abhor all forms of corruption including interference by the executive. In South Africa, for instance, the courts have made pronouncements, albeit *obiter dicta*, expounding on the threat of corruption to constitutional order and realisation of human rights. In the case of *South African Association of Personal Injury Lawyers v Heath and Others*,[624] Chaskalson, P (as he then was) opined that:

> Corruption and maladministration are inconsistent with the rule of law and the fundamental values of our Constitution. They undermine the constitutional commitment to human dignity, the achievement of equality and the advancement of human rights and freedoms. They are the antithesis of the open, accountable democratic government required by the Constitution. If allowed to go unchecked and unpunished. they will pose a serious threat to our democratic State.[625]

In *S v Shaik and Others*,[626] the Supreme Court of Appeal remarked that:

> The seriousness of the offence of corruption cannot be overemphasised. It offends against the rule of law and principles of good governance. It lowers the moral tone of a

[624] *South African Association of Personal Injury Lawyers v Heath and Others* 2001 (7) BCLR 77.
[625] *South African Association of Personal Injury Lawyers*, *ibid* note 623 para 4.
[626] *S v Shaik and Others* 2006 (1) SCA 134 (1).

> nation and negatively affects development and the promotion of human rights....Corruption threatens our constitutional order...[627]

It is therefore apparent that a judiciary committed to the rule of law and human rights can significantly contribute to good governance, the main threat of which is corruption. However, Kenya's judiciary has for long not generally embraced these values mainly because of executive pressure which was worsened by the timidity and the executive-mindedness of the courts, is made clear by the examples below.

If Kenyatta meddled with the judiciary, Moi's government "literally moved into the courts and ruled them."[628] The executive's stranglehold of the judiciary could not be fettered by the entrenchment of the security of tenure of judges contained in Constitution of Kenya Amendment Act 2 of 1990. Justices Edward Torgbor and Alexander Couldrey had their contracts terminated after ruling that the election petition instituted against Moi by Kenneth Matiba was properly before the Court.[629] In 1992, Justice Tom Mbaluto was delivering a ruling on an application that the Attorney-General had caused the Parliament to unprocedurally amend the National Assembly and Presidential Elections Act Cap 7. In the course of the ruling, Phillip Mbithi, the Head of the Civil Service and Secretary to the Cabinet made some telephone calls to the judge so that he could change his decision.[630]

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627 *Shaik*, *ibid* note 626 para 223.
628 *The Black Bar*, "The Role of the Judiciary."Available at **http://www.marsgroupkenya.org/pdfs/Black_Bar_Chapter_8.pdf** p 105.Accessed on 16 November 2010.
629 Mutua, *op. cit*. note 66 p111.
630 Mutua, *ibid* note 629 p111.

One of the most compelling illustrations of the executive's determination to emasculate the judiciary can be seen in the manner in which Justice Derek Schofield was treated by Chief Justice Cecil Miller, a judicial officer truly loyal to Moi.[631] In April 1987, Schofield had before him a *habeas corpus* application commenced by the wife of one Stephen Mbaraka Karanja who had been picked up by police officers. The importance of *habeas corpus* application in Kenya, especially during the reigns of President Kenyatta and Moi was that it was probably the only way of holding the State to account regarding the whereabouts of the people who were held by the State, most under *incommunicado* circumstances.[632] The usefulness of this originally common law writ is embodied in section 389 (2) of the Criminal Procedure Act which contains the procedure to be applied in such applications.

In the *Karanja* case, the State informed the High Court that Karanja had been shot dead by the Criminal Investigation Department officers as he attempted to escape from their custody.[633] The judge ordered the exhumation of the body and an independent post-mortem to identifythe body and determine the cause of death. The body could not be found after two days of exhumations. However, two days before the exhumations had commenced, the police had exhumed the body and returned it to the grave.[634]

The Judge saw the failure to produce the body as contempt of his order and directed the Director of the Criminal Investigations Department to appear in Court. Before the Director could show why he could not be committed for contempt, Chief Justice Miller, who had asked the Judge to lay off the case, summoned Mrs. Karanja's lawyer to his chambers where

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631 *The Black Bar, op. cit.* note 628 p107.

632 See for instance, the case of *Re Application by Muthoni Muriithi on Behalf of Mwangi Stephen Muriithi* High Court at Nairobi Miscellaneous Criminal Application No 88 of 1982 (Unreported).

633 *The Black Bar, op. cit.* note 628 p108. Also see Mutua, *op.cit.* note 66 pp109-110.

634 Perhaps what made it impossible for the body to be produced was the state in which it was. According to reports, Karanja had been burnt to ashes, see Africa Press International at http://africapress.wordpress.com/2008/06/03. Accessed on 13 September 2011.

the file was placed before him.[635] Despite protests from the lawyer, he refused to give him a hearing and ordered that the file be placed before another judge after the vacation.[636] The file was later placed before Justice Akilano Akiwumi who ruled that customarily, the order of *habeas corpus* did not apply to a dead body.[637] In a reaction which was uncharacteristic of judges and others in government facing similar situations, Justice Schofield resigned in protest.[638]

Under President Moi's rule, many Kenyan judges went to great lengths to protect the executive, by what Lord Atkin called in *Liversidge v Anderson*[639] "a strained construction put on words with the effect of giving uncontrolled power..."[640] A court mindful of the human rights of an individual would apply a purposive or generous interpretation of the rights' provisions in its role as the guardian of fundamental rights of the individual. In the landmark Canadian case of *R v Big M Drug Mart Ltd,*[641] the Supreme Court of Canada held that ascertaining of the meaning in the Charter of Rights and Freedoms required an analysis of the larger objects and character of the Charter, as opposed to a legalistic interpretation, so as to fulfill "the purpose of the guarantee and securing for individuals the full benefit of the Charter's protection."[642] In *S v Makwanyane,*[643] where the CCSA boldly outlawed the death penalty, the Court held that much as due regard to the language used in the Bill of Rights was necessary; the underlying values of the Constitution would be obtained by a generous and purposive interpretation.[644]

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635 *The Black Bar, op. cit.* note 628 p108.
636 *The Black Bar, ibid* note 635 p109.
637 *The Black Bar, ibid* note 636 p109.
638 Mutua, *op. cit.* note 66 p110.
639 *Liversidge v Anderson* [1942] AC 206.
640 *Liversidge, ibid* note 639 pp 244-245.
641 *R v Big M Drug Mart Ltd* [1985] 1 SCR 295. Available at **http://www.canlii.org/en/ca/scc/doc/1985/1985canlii69/1985canlii69.pdf**
642 *Big M Drug Mart, ibid* note 641 p 59 at para 117.
643 *S v Makwanyane* 1995 (3) SA 391 (CC).
644 *Makwanyane, ibid* note 643 para 9.

In direct contrast to that pragmatic and admirable approach, interpretation of the Bill of Rights in Kenya's 1963 Constitution was for so long one of the main strategies employed to impede the enforcement of fundamental rights. There is no doubt that statutory interpretation is one of the most controversial subjects in jurisprudence. It is for this reason, perhaps, that Cover demonstrates the complexities in the exercise of legal interpretation by noting that interpretation works "in a field of life and death... somebody loses his freedom, his property, his children, even his life."[645] In order to restrain the powers of the interpreter, Fiss suggests that disciplining rules should be established which should be viewed by an interpretive community as authoritative.[646] The sheer degree of discretion enjoyed by judges in statutory interpretation supports Posner's observation of elasticity of interpretation.[647]

The latitude of discretion enjoyed by the courts in statutory or constitutional interpretation notwithstanding, it should be observed that the Kenyan Courts had, under the Constitution, express grant of power to invalidate statutes inconsistent with the supreme law. However, the judiciary remained bound to the English doctrine of Sovereignty of Parliament.[648] Such a view was contrary to the provisions and spirit of section 60(1) of the Constitution. The section, without any reservations, vested the High Court with unlimited original jurisdiction in civil and criminal matters. It is respectfully submitted that Public Law would never be the messiah of rights and freedom if the courts felt toothless when faced with tired legal doctrines and draconian legislation or were unduly influenced to arrive at a pre-determined outcome.

Under the 1963 Constitution, pragmatism and judicial activism, to the great detriment of the enjoyment of human rights, were hardly considered by the Kenyan Courts. The Courts

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645 Cover, "Violence and the Word," 95 (1986) **Yale Law Journal** 1601-1630 p1601. Available at **http://hwinonline.org.**Accessed on 10 October 2010.

646 See generally, Fiss, "Objectivity and Interpretation," 34 (1981-1982) **Stanford Law Review** 739-764. Available at **http://heinonline.org.**Accessed on 12 October 2009.

647 Posner, **The Problems of Jurisprudence**, London: Harvard University Press 1990 p271.

648 M'Inoti, *op. cit.* note 365 p196.

interpreted the Constitution and legislation with one eye on the interests of the Executive. However, as cogently observed by Roux, the interest of the community is promoted when judges in new democracies "temper principle with pragmatism."[649] Under a pragmatic interpretation of the law, a judge is not unduly constrained by the letter of the law, rather in the interests of justice, judges should engage in "social science research."[650] The Kenyan experience is that in the course of singing the tune of the Executive, Kenyan judges have, in general, not eschewed what Lord Wilberforce termed in the case of *Minister of Home Affairs (Bermuda) v Fisher*[651] as "the austerity of tabulated legalism." [652] This restrictive approach in constitutional interpretation was specifically criticised by the CCSA in the leading case of *S v Mhlungu and Others*. [653] Mahomed, J noted that:

> A constitution is an organic instrument. Although it is enacted in the form of a statute, it is *sui generis*. It must broadly, liberally and purposively be interpreted so as to avoid "the austerity of tabulated legalism" and so as to enable it to continue to play a creative and dynamic role in the expression and the achievement of the ideals and aspirations of the nation in the articulation of the values bonding its people and in disciplining its Government.[654]

A few cases will remind us of the ringing words of the dissenting judgment of Lord Atkin in *Livsersidge* that he viewed:-

> with apprehension the attitude of judges who on a mere question of construction when face to face with claims

[649] Roux, *op. cit.* note 240 p16.
[650] Posner, *op. cit.* note 647 p309.
[651] *Minister of Home Affairs (Bermuda) v Fisher* 1980 AC 319.
[652] *Fisher*, *ibid* note 651 at 328H.
[653] *S v Mhlungu and Others* 1995 (3) SA (CC) 867.
[654] *Mhlungu*, *ibid* note 653 paragraph 8.

involving the liberty of the subject show themselves more executive minded than the executive.[655]

The approach by the Kenyan judiciary in constitutional interpretation was in general, no more than pronouncements of loyalty of the judiciary to the executive. The judiciary's attitude to claims of violation of fundamental rights and freedoms was not significantly different from that of judges operating under more hostile political environment, for instance, in South Africa. During the apartheid era in that country, judges were operating in what Dugard terms as a "national crisis".[656] The difference however was that the Kenyan judges deliberately failed to employ what is undoubtedly the most important tool in combating violations of individual rights and freedoms, the Constitution and more specifically, the Bill of Rights.

In the cases of *Kamau Kuria v Attorney-General*[657] and *Maina Mbacha v Attorney-General*,[658] the High Court of Kenya shockingly abdicated its constitutional role as the guardian and custodian of fundamental rights. Section 84(1) of the 1963 Constitution provided that any person who alleged that his or her fundamental rights contained in sections 70-83 of the Constitution had been or were likely to be contravened could approach the High Court for redress. Section 84(2) gave the High Court original jurisdiction to determine the dispute brought under section 84(1) and give directions as it deemed appropriate. The right to approach the High Court in section 84(1) was subject to section 84(6). Section 84(6)

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[655] *Liversidge*, *op. cit.* note 639 pp244-245.

[656] See generally, Dugard, "The Judiciary in a State of National Crisis With Special Reference to the South African Experience," 44:2(1987) **Washington and Lee Law Review** pp477-501. Available at **www.scholarly.law.wlu.edu/cgi/viewcontent.cgi?article=2793...**

[657] *Kamau Kuria v Attorney-General* (1989) 15 **Nairobi Law Monthly** 33, as reported in Kuria and Vazquez, "Judges and Human Rights: The Kenyan Experience," 35 (1991) **Journal of African Law** 142-173 p142. Available **at http://heinonline.org** . Accessed on 3 May 2011.

[658] *Maina Mbacha v Attorney-General* (1989) 17 **Nairobi Law Monthly** 38, as reported in Kuria and Vazquez, *ibid* note 657 p142.

empowered the Chief Justice to make rules with respect to the practice and procedure in the High Court in relation to the enforcement of fundamental rights.

In *Kamau Kuria,* the applicant sought a return of his passport whose summary confiscation was allegedly an infringement of his freedom of movement. Chief Justice Cecil Miller failed to get to the merits of the matter because, as he reasoned, the enforcement of fundamental rights in section 84(1) was 'subject' or on condition that there were rules made by the Chief Justice. It was Miller, as the Chief Justice, who was empowered by section 84(6) of the Constitution to determine how the High Court would proceed in such cases. Section 84(1) was therefore declared inoperative as there were no rules. According to the Chief Justice, Kuria had no remedy in the circumstances of the case. [659]

In *Maina Mbacha,* the applicants had released a press statement complaining of the rigging of KANU elections in Kiharu constituency in 1989. They were arrested and charged with breaching the peace. They sought High Court orders to restrain the magistrate from proceeding with their criminal trials as their behaviour amounted to no more than harmless expression of their political opinions. Justice Dugdale decided the case on similar judicial thinking as the *Kamau Kuria* case which had become a precedent. The judge however ignored the fact that the application was also based on section 60 of the Constitution which gave the High Court original jurisdiction in both civil and criminal matters.

To Kamau Kuria, the applicant's attorney in *Maina Mbacha*, what was most alarming was that Justice Dugdale had a pre-typed ruling, upholding the Attorney-General's points of law that the Court had no jurisdiction because no rules existed under section 84(6) of the

[659] *Kamau Kuria, op. cit.* note 657 p50.

Constitution.[660] No one knows how the judge, in advance, knew of the preliminary objections by the State. Instead of applying an interpretation which could have promoted human rights, the Court adopted an approach whose impact was to fetter its constitutional jurisdiction. One would have imagined that the primary role of the Courts was to be a defender of human and fundamental rights, a pragmatic view enunciated a long time ago in the memorable decision of the USA Supreme Court case of *Marbury v Madison.*[661]

That the judiciary was not a protector of fundamental rights can also be seen from the arrest and subsequent imprisonment of the late lawyer Ng'ang'a Thiong'o in 1986. His experience as captured in the *Daily Nation* newspaper deserves some attention. He recalls as follows:

> I ended up being taken before Chief Magistrate H.H. Buch who declined to take my plea as I was his student at the School of Law. A court was hurriedly convened under Mr. Joseph Mango and it was packed with the very people who had been torturing me...I told the magistrate that I had undergone a harrowing experience in police custody where upon he said he would first enter a plea of guilty and then hear the details. The then deputy public prosecutor, Bernard Chunga, rose and read a six-page statement on my alleged activities to overthrow the government. Without asking any question, the magistrate wrote that the facts were true and correct. He then wrote mitigation on my behalf and sentenced me to fifteen months imprisonment.[662]

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[660] Personal communication by way of interview with the plaintiff's lawyer in the case, 9 May 2012 Nairobi.
[661] *Marbury v Madison, op.cit* note 149.
[662] *Daily Nation*, "The Dark Legacy," Available at **http://nation.co.ke.**Accessed on 21 September 2009.

The conduct of the trial magistrate at the above-mentioned trial is a clear demonstration of the authority and control that the executive had on the judiciary. It should also be mentioned that the prosecutor at the trial, and most of the other similar trials, Mr. Bernard Chunga, was later promoted by Moi to the highest judicial office in Kenya as Chief Justice, leap-frogging many senior and deserving judges.[663]

In the erosion of the independence of the judiciary in Kenya, it is trite to note the role played by successive Attorneys-General in the entire scheme. In England and the British Commonwealth in general, the office of the Attorney-General occupies a central place in the executive arm of the government. The position under the English constitutional theory is that the Attorney-General is the chief law officer of the Crown and "plays a central role in the executive component of the state machinery."[664] That being the case, any claims for his or her independence would be unsustainable because, unlike judges who generally have constitutional independence under the doctrine of separation of powers, the Attorney-General is the executive's legal mind. Under section 26(2) of Kenya's 1963 Constitution, the Attorney-General was the principal legal adviser to the Government of Kenya. He or she also had the power to commence or terminate criminal proceedings at will as well as private prosecutions.

Despite enjoying wide powers, any Attorney-General, in his or her twin-function of law enforcement and chief government legal officer, is expected to act in the public interest at all

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[663] See *Daily Nation* of the 19th September 1999, "Moi's Choice of Chunga as CJ Confounds both Friend and Foe," available at **http://allafrica.com/stories/199909190023.htm** . Accessed on 15 July 2010. The story casted in doubt Chunga's commitment to respect for human rights, judging by his ignorance of human rights cries of persons accused of plots to dismantle Moi's regime and his (Chunga) venomous zeal to obtain a conviction.

[664] Goredema, "The Attorney-General in Zimbabwe and South Africa: Whose Weapon? Whose Shield? 8 (1997) **Stellenbosch Law Review**pp 45-64 p 47.Available at **http://heinonline.org/HOL/Index?index=journals/stelblr&collection=journals** .Accessed on 5 November 2010.

times.[665] In Kenya, however, all forms of flagrant violations of human rights under the country's presidential system took, and have taken place, under the umbrella of a constitutionally powerful Attorney General. This started with Charles Njonjo who ably sang the tune of both Kenyatta, and later Moi, until he fell out of favour with the latter.[666]

Njonjo was influential in the appointment of the Chief Justices. As claimed by the *Black Bar,* Njonjo was behind three constitutional amendments to increase the judges' retirement age so as to retain Justice Wicks as the Chief Justice until he reached 74 years of age.[667] The reign of Attorney-General Amos Wako occurred during the height of Moi's dictatorship and his office was used to trample upon basic human rights, among other ills. In Parliament in 1991, he, with little surprise due to the circumstances then prevailing, said that "a characteristic of the rule of law is that no man, save for the president, is above the law."[668] The statement was clearly inconsistent with the noble ideal of the rule of law as emphatically stated by Sir Edward Coke to King James that the King was subject to the law and to God.[669] His commitment to the rule of law made him decline an appointment to head Britain's foreign mission to Ireland in 1624.[670]

Attorney-General Wako was also the architect of the 'Wako Draft Constitution.' This effort, as further examined in chapter five of this thesis, was a mischievous Kibaki constitutional "reform" project which was astoundingly rejected by the people in the 2005 referendum.

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[665] Musila, "The Office of the Attorney-General in East Africa: Protecting Public Interest through Independent Prosecution and Quality Legal Advice." **South African Institute for Advanced Constitutional, Public, Human Rights and International Law** (SAIFAC) pp.1-2.Available at **http://www/saifac.org.za/docs/res_papers/RPS%20NO.%2013.pdf**.Accessed on 22 July 2010.

[666] See generally, Adar and Munyae, *op.cit*. note 600.

[667] *The Black Bar, op.cit*.note 628 p105.

[668] Attorney-General Amos Wako in his address to Parliament in 1991 as cited in Mutua, *op.cit*.note 101 p100

[669] For a discussion of historical perspectives of the Rule of Law and human rights in England including Coke's philosophy, see, Sir John Baker, "Human Rights and the Rule of Law in Renaissance England," 2:2004 **NorthWestern University Journal of International Human Rights** (pdf version) 1-20. Available at **http://www.law.northwestern.edu.journals/jihr**. Accessed on 12 May 2010. Also see, Chapter two of this study, "Rule of Law."

[670] See generally, "The History of Parliament: British Political, Social and Local History. " Available at **www.historyofparliamentonline.org** . Accessed on 5 May 2013.

Wako's attempt in October 2010 to boast to parliamentarians of his long service to the country was contemptuously rejected by MPs who instead of commending him accused him of sins of commission and omission, especially during Moi's autocratic rule.[671] It would then be right to observe that Kenya's Attorneys-General have failed the public interest benchmark test, "in a society that strives to entrench constitutionalism, the rule of law and a culture of human rights..."[672]

It is imperative to note that the executive control of the courts bred an exceedingly corrupt judiciary, perhaps due to a general loss of judicial integrity and a political environment supportive of impunity. Corruption in Kenya's judiciary is a phenomenon which has for long received local and international condemnation. For instance, the ICJ has taken note of the various reports which have heavily indicted the judiciary on corruption.[673] Kenya's own Justice Kwach Report disclosed corruption in the form of inducing court officials to lose or misplace files, delay trials, judgments and rulings and actual payment of money to judges and magistrates to impact rulings.[674] A panel of Commonwealth judges was "shocked and dismayed by the widespread allegations of bribery of judges."[675] The most damning report was by former Court of Appeal Judge, Mr. Justice Ringera (The Ringera Report).[676] The Report found that the prevalence of corruption "was fifty six (56) per cent in the Court of

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[671] *The Standard*, "Wako Put in a Spot Over 'Dark Days' as two Picked for JSC," 21 October 2010.Available at **http://www.standardmedia.co.ke/InsidePage.php?id=2000020814&cid=4&** .Accessed on 5 November 2010.

[672] Musila, *op. cit*. note 665 p3.

[673] See generally, International Commission of Jurists, "Kenya: Judicial Independence, Corruption and Reforms," 2005. Available at **www.icj.org/.../kenya-judicialindpCorruption&reform-April2005rep**. Accessed 2 May 2010.

[674] Report of the Committee on the Administration of Justice (Justice Kwach Report), 1998 p10 as quoted in ICJ, *ibid* note 673 p15. In an amazing turn of events, Justice Richard Kwach opted to resign instead of facing a tribunal after being named in the Ringera Report as one of the 105 corrupt judicial officers, see **http://www.allafrica.com/stories 19 October 2003**. Accessed on 5 May 2011.

[675] Report of the Advisory Panel of Eminent Commonwealth Judicial Experts, Nairobi, "The Kenya Judiciary in the New Constitution," Kenya 2002 as quoted in ICJ, *op.cit.* note 673 p15.

[676] Report of the Integrity and Anti-Corruption Committee of the Judiciary of Kenya, (The Ringera Report), September 2003. Available at **http://www.marsgroupkenya.org/Reports/Government/Ringera.Report.pdf**.Accessed on 10 April 2010.

Appeal, fifty (50%) per cent in the High Court and thirty two (32) per cent of the magistrates."[677]

As discussed above, President Moi perfected Kenyatta's project of destroying the key institutions of good governance entrenched in the Constitution. This mainly happened by way of constitutional amendments and by the mere exercise of presidential power. The result was that endemic economic corruption and ethnicisation were the obvious results as there was no effective institutional framework, including the judiciary, to avert the vices.

3.5.4 Economic Corruption and Political Tribalism

Moi entrenched the institutionalisation of corruption, leading to the near collapse of the economy.[678] The unprecedented looting, devouring and plundering of public resources reached its zenith between1990 and 1993, as evidenced by the "Goldenberg scandal." As Carraza has argued, these forms of corruption, (and the Goldenberg scandal is one such scandal as explained below) cause major dents on the economy.[679] He correctly, it is submitted, added that as the scandals amount to serious violations of human rights, truth and justice commissions should encounter them in addition to their traditional jurisdiction of civil and political rights.[680] In addition, and as argued by Ndulo and Duthie, judicial reform in post-conflict states, is necessary to tackle, among others, economic corruption as it hinders development and the promotion of the rule of law.[681] This observation undoubtedly applies to Kenya and other post-conflict states.

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677 The Ringera Report *ibid* note 676 pp30-31.

678 Njeru and Njoka, "Political Ideology in Kenya," in Wanyande *et al*, **Governance and Transition Politics in Kenya**, Nairobi: University of Nairobi Press 2007 pp.22-53 p45.

679 Carraza, "Plunder and Pain: Should Transitional Justice Engage with Corruption and Economic Crimes? 2:3. (2008) **International Journal of Transitional Justice**. Abstract. Available at Accessed **2 October 2012**

680 Carraza, *ibid* note 679. Abstract.

681 See generally, Ndulo and Duthie, "The Role of Judicial Reform in Development and Transitional Justice," *in* Greiff and Guthie (eds.), **Transitional Justice and Development: Making Connections**, New York: Social Science Research Council 2009 pp250-281.

The Goldenberg scandal was an export compensation scheme designed to 'boost' the country's foreign currency reserves which were fast drying up.[682] Under an export compensation scheme based on the Export Compensation Act, Cap 482, 1987, the Moi government, desperate for foreign currency, paid Goldenberg International and the Exchange Bank of Kenya about USA $ 600 million (about 10% of Kenya's Gross Domestic Product) for gold "exported" from Kenya. The country has never had significant gold or diamond deposits.[683] To prove that indeed the "exports" took place, the company used "powerful connections with the State elite."[684] An inter-ministerial committee appointed by the president's office recommended to the Ministry of Finance under the late George Saitoti, that Goldenberg International be granted the monopoly to export gold and diamond jewelry.[685]

In February 2003, two months after assuming the presidency, Kibaki appointed a Judicial Commission of Inquiry to investigate the scandal.[686] The Report of the Judicial Commission of Inquiry into the Goldenberg Affair (The Goldenberg Report) defines the "Goldenberg Affair" as "a series of business deals or alleged business deals revolving round various economic schemes. The transactions were allegedly either illegal or irregular and were regarded as fraudulent."[687] The intense involvement of the presidency in the scandal is, among other reasons, clearly illustrated by the fact that the Minister of Finance at the time was the Vice-President, of whom the Goldenberg Report states:

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[682] Warutere, "The Goldenberg Conspiracy: The Game of Paper Gold, Money and Power." **Institute of Security Studies**, September 2005. Available at **http://www.iss.co.za/pubs/papers/117/Paper117.htm** .p2. Accessed on 16 November 2010.
[683] Warutere, *ibid* note 682 p1.
[684] Warutere, *ibid* note 683 p2.
[685] Warutere, *ibid* note 684 p2.
[686] Warutere, *ibid* note 685 p2.
[687] Report of the Judicial Commission of Inquiry into the Goldenberg Affair (Goldenberg Report), 2005 para 46. Available at**www.tikenya.org/documents/Goldenberg%20Report.pdf** .Accessed on 22 July 2010.

> It cannot be said that he did not know that Kenya did not have diamonds as a mineral resource. He had held the post of Minister for Finance for long. Neither, he nor the then Permanent Secretary in that Ministry, Mr. Charles Mbindyo, raised the issue.[688]

Moi and KANU obstructed and compromised the due process to avert any attempt to bring to justice those behind the scandal.[689] The Goldenberg Report blamed the absence of professionalism and lack of independence by the Kenyan Police Force as the causes behind the failure to apprehend and prosecute the Goldenberg suspects.[690]

In addition, and most importantly from a legal perspective, was the role of the Attorney-General in blocking any attempts to institute private prosecutions against the Goldenberg suspects. One of the court applications for the institution of private prosecution proceedings was made by the current Prime Minister, Raila Odinga. Like others before it, was terminated on the Attorney-General's exercise of constitutional power of *nolle prosequi*.[691]

President Moi accelerated the alienation of public land commenced by Kenyatta. In doing so, Ndung'u has argued that Moi was exercising "his perceived powers" which allowed him to allocate land to his cronies.[692] He further notes that most of the land was granted to Moi's supporters especially at the time of elections. As available land diminished, Moi turned to land reserved for public purposes, for instance roads, road reserves, parks and forests.[693] After acquiring the title deeds for the land, the grabbers would sell them to state corporations

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688 Goldenberg Report, *ibid* note 687 para 80.
689 Warutere, *op.cit.*note 682 p1.
690 Goldenberg Report, *op. cit.* note 687 para 756.
691 Goldenberg Report, *ibid* note 690 para 767.
692 Ndungu, *op. cit.* note 556 p4.
693 Ndungu, *ibid* note 692 p4.

at exorbitant prices, the favourite "cash cow" being the national pension scheme, the National Social Security Fund, which between 1990 and 1995 spent about US$ 400 million in acquisition of corruptly obtained public land.[694]

For Moi to entrench his hold on power, and perhaps in the application of the *Nyayo* philosophy, he reinforced economic corruption with the political ethnicisation of the country.[695] Members of Moi's Kalenjin tribe took the KANU government as their own such that they viewed anti-government protests in Kalenjin land as a challenge to local power which they were entitled to silence.[696] In a robust execution of his *Nyayo* ideal, Moi surrounded himself mainly with people from his tribe, the Kalenjins, which enabled him to "purge political forces, which were either too powerful or outside his own control."[697] This ethnic trajectory seems to have been a continuation from the Kenyatta reign. As Ruteere has argued, under *Nyayo,* Moi "perfected the repressive system he had inherited."[698]

President Moi dished out public resources and jobs to people from his tribe therefore,top government positions moved from the hands of the Kikuyus to those of the Kalenjins. As Ake has argued, this strategy enabled Moi to develop a political constituency which he did not have when he assumed power.[699] Barkan, however views Moi's approach as aimed at re-dressing the imbalance established by Kenyatta by pursuing re-distributive policies which favoured the Kalenjin tribes and other minority tribes in the Rift Valley. [700]

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[694] Ndungu, *ibid* note 693 p5.
[695] Klopp, *op.cit.*note 613 p276.
[696] Klopp, *ibid* note 695 p276.
[697] Ajulu, *op. cit.*note 535 p263.
[698] Ruteere, "Dilemmas of Crime, Human Rights and the Politics of Mungiki Violence in Kenya." **Kenya Human Rights Institute** 2008.Available at **http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1462685** p13.
[699] Ake, **The Feasibility of Democracy in Africa.** Dakar: Council for Development of Social Science Research 2000 p41.
[700] Barkan, "Kenya after Moi," **Foreign Affairs** (2004).Available at **http://www.foreignaffairs.com/articles/59535/joel-d-barkan/kenya-after-moi** .Accessed on 26 July 2010.

It is however argued that a close scrutiny of Moi's leadership does not manifest clear policies aimed at improving the lives of the inhabitants of the Rift Valley, especially the Kalenjin. On the contrary, Moi, like Kenyatta, surrounded himself with a few elite from his home province. These elitegained access to the resources of the state and privileges of power. These are the few who consolidated the Kalenjin community's support for Moi as their son. It is argued that benefiting a few people does not amount to re-distributive policies or justice as argued by Barkan. The principal aim was to harness Moi's stay in power, especially after the re-introduction of multi-party politics. As Hagg and Kagwanja have observed, multi-party politics in Africa has seen political parties coalescing around their political base which is the tribe or tribes.[701]

Where governmental policies have largely sidelined a particular ethnic group or community for long, then a degree of restorative justice is fair and acceptable after a regime change or legal reform. This is the case in South Africa, where the blacks have experienced a painful past from the apartheid policies.[702]Clearly, such was not Moi's objective. Moi's political strategy could not also be termed as the "ethnicisation" or promoting the key anthropological components of the Kalenjin as such a scheme was not in existence.[703] Instead, Moi practiced political tribalism, what Klopp calls "politicising ethnicity by the political class for their own political gain."[704] It was political tribalism which led to "ethnic" wars preceding multi-party elections during the Moi era.[705] It is argued that this trajectory, embroiled in a broader view of corruption, did not "restore" or "redistribute" any lost rights or benefits to any ethnic

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[701] Hagg and Kagwanja, "Identity and Peace: Re-Configuring Conflict Resolution in Africa," 7(2007) **African Journal of Conflict Resolution** 9-36 p18. Available at **www.ajol.info/index/ajcr/article/view/39409/59584**. Accessed on 20 February 2012.

[702] Hagg and Kagwanja, *ibid* note 701 p25.

[703] For an examination of "ethnicity," see Baumann, "Defining Ethnicity," The SAA Archaeological Record, September 2004 pp 12-14. Available at **www.gbl.indiana.edu/.../Baumann%202004%20-20Defining%ethnicity%20Ethnicit** . Baumann observes that there are six main features of an ethnic group, namely, a common proper name; a myth of common ancestry; shared historical memories; elements of common culture; a link with a homeland and a sense of solidarity.

[704] Klopp, *op. cit.* note 613 p270.

[705] Klopp, *ibid* note 704 p270.

group. Moi's political tribalism dynamics were purely designed to only entrench the interests of a few of his tribesmen who would then whip up the support of specific tribal groupings, the majority of whom had no access to state coffers or resources.[706]

It is clear that the political trajectories of Kenyatta and Moi were inconsistent with the letter and spirit of the independence constitutional talks, the architecture of the 1963 Constitution. It is the mutilation of that Constitution which entrenched the kind of political governance under the two presidents. Indeed, the Constitution was clear on the protection and the enjoyment of fundamental rights and embraced an institutional framework for the attainment of this purpose.

However, the aggregate impact of the raft of constitutional amendments buttressed by the draconian reigns of Kenyatta and Moi was a global erosion of these virtues on an unprecedented scale. Read against the substance of the original document, it is necessary to briefly examine the legitimacy and validity of the Kenyatta and Moi amendments, and, consequently, their impact on the constitutional project of 1963.

3.6 THE LEGITIMACY OF THE CONSTITUTIONAL AMENDMENTS

Barnett has argued that it is wrong to simply assume the legitimacy of a constitution.[707] It is important to confront the question of the legitimacy of a constitution, he continues, because legitimacy comes between the "justice of laws and their validity."[708] Unless a constitution obtains its legitimacy by enjoying unanimous support of the people, which seems unrealistic

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[706] See generally, Norwegian Agency for Development Co-operation: **Political Economy Analysis of Kenya, Report 19/2009 Discussion.** Available at www.norad.no/en/tools-and-publications/.../134241?_...true...

[707] Barnett, "Constitutional Legitimacy," 103 (2003) **Columbia Law Review** 111-148 p111. Available at **http://heinonline.org/HOL/Page?handle=hein.journals/clr103&id=155&collection=journals&index=journals/clr**

[708] Barnett, *ibid* note 707 p114.

to achieve, its legitimacy is determined not by the consent of the majority but by the existence of "adequate procedures to ensure the justice of valid laws."[709]

Applying the above test, it would be right to argue that the constitutional amendments which in one way or another negated the enjoyment of fundamental rights in Kenya, were, from a "thick" meaning of "legitimacy," illegitimate. The same argument applies to those amendments that drove the country to a presidential, one-man authoritarian rule. The amendments, and Kenya's style of presidentialism, took the country back to what Diamond would call a "democratic recession"[710] or, according to Okoth-Ogendo, a constitution without constitutionalism.[711]

Fallon explores the concept of constitutional legitimacy from a broader and more inclusive approach. To him, constitutional legitimacy, a term which he says is little considered in constitutional debates, consists of three, sometimes connected, concepts. These are legal, sociological and moral.[712] Legal legitimacy is about legal norms: whatever is lawful is at the same time legitimate.[713] This does not mean that whatever is illegitimate should not be obeyed or followed. The reason is that the law or a decision of a judge may possess authoritative legitimacy, although substantive legitimacy may be lacking.[714]

Sociological legitimacy enquires whether the constitution or official decisions are regarded by the affected public as appropriate and justified in order for them to render their

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[709] Barnett, *ibid* note 708 p113.
[710] Diamond, "The Democratic Rollback," **Foreign Affairs**, March/April 2008 p1.Available at http://www.foreignaffairs.com/articles/63218/...diamond/the-democratic-rollback.Accessed on 18 September 2011.
[711] On constitutions without constitutionalism, see generally Okoth-Ogendo, *op.cit.*note 60. Also see Maseko, *op.cit.* note 60.
[712] Fallon, Jr., "Legitimacy and the Constitution," 118:6 (2003) **Harvard Law Review** pp 1787-1853 p1787.
[713] Fallon, *ibid* note 712 p1794.
[714] Fallon, *ibid* note 713 p1794.

conscientious support.[715] Moral legitimacy is about "moral justifiability or respect-worthiness."[716] Officials are morally justified in their actions if the Constitution "rises to the level of minimal legitimacy."[717] This is because achieving ideal moral legitimacy is impossible. In governance terms, the minimal moral acceptability criterion is present if institutions do not persist in serious violations of fundamental human rights and other injustices.[718] It is argued that Kenya's constitutional amendments examined above did not meet the threshold of legitimacy and indeed amounted to abuse of powers vested by the representatives by the people.

Some constitutional amendments may be unconstitutional, either in substance or due to procedural irregularities. What is considered here is not procedural unconstitutionality of an amendment, as that is a textual matter, but rather its substantive unconstitutionality. The American liberal theorist, John Rawls, argued that there are "substantive limits" on legislative power to alter the constitution.[719] The limitation on change would include amendments which take away central constitutional rights, values and freedoms. Other limitations include well-established traditions or practices and a long-held view of constitutional principles and how a constitution should be amended. [720] Under the Vienna Convention on the Law of Treaties, 1969, States are bound by the obligations contained in cardinal peremptory norms of international law, for instance, *jus cogens* and obligations *erga omnes.*[721]These obligations

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[715] Fallon, *ibid* note 714 p1795. See generally, Wells, "Sociological Legitimacy in Supreme Court," 64 (2007) **Washington & Lee Law Review** 1011-1070, available at **http://www.heinonline.org** . Accessed on 6 May 2011

[716] Fallon, *ibid* note 715 p1796.

[717] Fallon, *ibid* note 716 p1800.

[718] Keohane, "Governance and Legitimacy," SFB 700: **Governance in Areas of Statehood**, SFB Governance Lecture Series-Keynote Speech held at the Opening Conference of the Research Centre, Berlin February 2007. Available at http://www.sfb-governance.de/publikationes/sfbgov_ls/ls1.../sfbgov_ls_en.pdf. Accessed on 30 May 2011.

[719] Kelbley, "Are There Limits to Constitutional Change? Rawals on Comprehensive Doctrines, Unconstitutional Amendments, and the Basis of Equality", 72 (2004) **Fordham Law Review** 1487-1536 p.1504

[720] Kelbley, *ibid* note719 p1504.

[721] Article 53 of the Convention provides that no treaty should be in conflict with or derogate from a peremptory norm of general international law. Also see generally, Schnably, "Emerging International Law Constraints on Constitutional Structure and Revision: A Preliminary Appraisal," 62 (2008) **University of Miami Law Review**

are owed to the international community as a whole, and any manner of derogation from these "higher norms," as Dugard observes, is impermissible.[722]

The courts in a number of jurisdictions have declared illegitimate constitutional amendments that violate overarching postulates of constitutionalism. These principles of constitutioalism include the principle that the government is bound by the rule of law and the prohibition of arbitrary exercise of power.[723] In *BVerGE*,[724] the West German Constitutional Court held that it could strike out an amendment if it was in contravention of the constitutional limitation of state power irrespective of the amendment's procedural validity.[725]

The Supreme Court of India held in *His Holiness Kesavanada Bharati Sripadagalvaru v State of Kerala*[726] that it had the power to declare unconstitutional constitutional amendments which tampered with the basic structure of the Constitution of India. Since independence, this Court has prevented Parliament from distorting, altering or damaging "the basic features of the Constitution under the pretext of amending it."[727] South Africa's jurisprudence is not certain on this matter. However, in the case of *Certification of the Constitution of the Republic of South Africa 1996,*[728] the CCSA declined to certify the country's 1996

417-489. Available at **http://heinonline.org/HOL/Page?collection=journals&handle=hein.journals/umialr62&id=425&collection=journals&index=journals/imialr,** accessed on 1 June 2011. Also see Samar, "Can a Constitutional Amendment be Unconstitutional?" 33 (2008) **Oklahoma City University Law Review** 668-748, available at **http://heinonline.org/HOL/Page?collection=journals&handle=hein.journals/okcu33&id=676&type=image** .Accessed on 1 June 2011.

722 Dugard , *op. cit*. note 124 p43.

723 Gatmayan, "Can Constitutionalism Constrain Constitutional Change,?" 3 (2010) **Northwestern Interdisciplinary Law Review** pp22-37 pp27-30.Available at **http://heinonline.org/HOL/Page?handle=hein.journals/nwilr3&id=26&collection=journals=index=journals/nwilr** .Accessed on 27 May 2011. On constitutionalism, also see generally Mbao, *op. cit*. note 128 and Fombad, *op. cit.* note 433 on challenges to constitutionalism.

724 1 *BeverGE* 1(*Southwest* case) (1970) as cited in Gatmayan, *ibid* note 723.

725 *BeverGE* 1 case, *ibid* note 723 as cited in Gatmayan, *ibid* note 723 pp28-29.

726 *His Holiness Kesavanada v Sripadagalvaru v State of Kerala* (1973) 4 SCC 0255 SC. Available at LawNet India CD **http://www.youthforequality.com/supreme-court-cases/13A.pdf** .Accessed on 26 May 2011.

727 Nayak, "The Basic Structure of the Indian Constitution," **Civil Service of India** 2009.Available at **http://www.humanrightsinitiative.org/.../the_basic_structure_of_the_indian_constitution.pdf**. Accessed on 20 May 2011.

728 *Certification of the Constitution of the Republic of South Africa,1996* 1996(4) SA 744 (CC)

Constitution. As explained by Sachs, in nine respects, the Constitution fell below the thirty-four constitutional principles enshrined in the Interim Constitution of 1993.[729]

The question of whether the CCSA can declare illegitimate a constitutional amendment for violation of key constitutional doctrines remains in serious doubt except for the *dicta* of Mahomed DP in *Premier of Kwazulu-Natal and Others v President of the Republic of South Africa and Others.*[730] The Deputy President (as he then was) acknowledged the basic structure doctrine as espoused by the Supreme Court of India. However, in the case before the Court, the amendments were not so basic as to amount to an abrogation of the Constitution.[731] It therefore remains in doubt whether the CCSA would make a different pronouncement of the law if a constitutional amendment were a basic affront to the structure of the Constitution.

In Kenya, the basic structure of its1963 Constitution as manifested in the 1962 constitutional talks was clearly anchored on the protection of fundamental human rights, separation of powers, multi-partism, electoral democracy and universal adult suffrage. Most of the amendments undoubtedly abrogated the rights enshrined in the original document. Applying the basic structure doctrine and Fallon's three-pronged approach to the determination of legitimacy of a constitution, it is submitted that the amendments could not have been legitimate. This argument is strengthened by Kenya's commitment to central principles of international law, in particular the UDHR, and the ICCPR, which most of the amendments abrogated.

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[729] Sachs, "South Africa's Unconstitutional Constitution: The Transition from Power to Lawful Power," 41 (1996-1997) **Saint Louis University Law Journal** 1249-1257 p 1257. Available at **http://heinonline.org/HOL/Page?handle=hein.journals/stlulj41&id=1&size=2&collection=journals&index=journals/stlulj** .Accessed on 2 June 2011.

[730] *Premier of Kwazulu-Natal & Others v President of the Republic of South Africa and Others* 1996 (1) SA 796 (CC).

[731] *Premier of Kwazulu-Natal ibid,* note 730 para 47-49.

The cardinal feature was the creation of 'the big-man syndrome' in the form of an ultra-powerful executive presidency. President Kenyatta and his successor, Daniel arap Moi, took full advantage of the constitutional mandate whose aggregate impact became the bedrock of Kenya's destruction. It took almost five decades of pain and loss of valuable lives for the country to undo the damage caused by the mutilations to the independence Constitution. Centralisation and personification of power in the presidency, and the resultant destruction of the basic structure of the independence Constitution eventually created a fertile ground for a fearless popular struggle to return the country to a multi-party democracy.

The struggle centred on changing constitutional provisions which were the bedrock of bad governance. Gradually, the battle became that of making a new constitution. Due to the overarching position of a country's constitution in political governance, it is submitted that this new approach was the only conceivable guarantee for the realisation of a reasonable degree of good governance. It is for this reason that the remaining chapters of this thesis examine the pertinent aspects of post-independence constitution-making in Kenya. To start with, chapter four examines the peoples' struggle for constitutional reforms at the height of President Moi's reign in 1985 until he left office in 2001.

3.7 SUMMARY

This chapter has examined Kenya's political governance form 1963 to 2001. It has been shown that the 1963 Constitution was underpinned by a political system which generally respected and protected the rule of law, human rights and separation of powers. However, under Presidents Kenyatta and Moi, these cardinal ideals of political governance were whittled down by a plethora of constitutional amendments the impact of which was

destruction of the basic structure of the Constitution. Literally, the presidency became the sole custodian of peoples' rights. Further, this institution was used to enrich the political elite, especially those who came from the president's community or tribe, thereby entrenching ethnic politics in the country.

In many cases, the courts, whose independence had been muzzled by the executive, were helpless when faced with litigation contesting executive hegemony and authoritarianism. Political opposition officially came to an end with the insertion of section 2A which made KANU a *de jure* one-party state. It was this authoritarianism which fuelled the people's struggle for a new political dispensation. Specifically, there was the urgency, boosted by global democratic initiatives, to overhaul key provisions of the Constitution which were the linchpin of bad governance. It is the struggle for these reforms which is the subject of the next chapter.

CHAPTER 4: THE STRUGGLE FOR KENYA'S NEW CONSTITUTIONAL ORDER: 1985-2001

4.1 INTRODUCTION

This chapter investigates the struggle by the people of Kenya for the restoration of the spirit encapsulated in the 1963 Constitution. Having gone through destructive major constitutional amendments and having experienced the full force of executive power, this chapter shows how the battle for reforms was planned and executed. At the heart of the struggle were civil society movements; therefore a synopsis is first made of the "civil society construct." The role played by human rights activists and key politicians in the struggle for reforms are also examined. The chapter also examines international factors which significantly propelled and gave legitimacy to the local initiatives.

4.2 THE RETURN TO MULTI-PARTY DEMOCRACY

In the late 1980s and early 1990s, two key but unrelated developments accelerated Kenya's return to multi-partism: domestic and international pressure. Before donors put pressure on Moi to liberalise the economy and to enlarge political space, pressure from within had commenced much earlier. However, the donors' aid conditionalities on the Moi regime substantially reinforced domestic pressure for multi-party democracy.

In early 1990, there was formidable pressure for the country's return to multi-party democracy in what became known as the "multi-party debate."[732] Under the political

[732] Oloo and Oyugi, "Democracy and Good Governance in Kenya: Prospects and Obstacles," December 1991, **Development Policy Management Forum** (DPMF) Publications p3. Available at **http://www.dpmf.org/images/democracy-adams.htm** .Accessed on 4 June 2011.

temperatures then prevailing, the "debate" took place in a very hostile environment as those in favour of multi-partism were criminalised by the Moi Government.[733] However, the media carried the views of those in favour of one party, and among the few who were courageous enough to openly vouch for multi-partism. Most notable were church leaders, such as Timothy Njoya, Anglican Bishop Henry Okulu and former cabinet ministers under Moi, Kenneth Matiba and Charles Rubia.[734] Matiba and Rubia boldly argued that it was wrong to oppose a return to multi-partism on the ground that it would lead to tribalism. The two called for a referendum, repeal of the one-party system in section 2A of the Constitution and dissolution of Parliament.[735]

The opponents of Moi's political scheme received support from, at the time, a politically indifferent but powerful voice, the Catholic Church.[736] The Church's bishops argued that KANU had become the government and was superior over the legislature.[737] They also attacked political murders, detentions and the general conduct of security forces.[738] Those debating in favour of multi-partism seem to have been re-energised after the mysterious death of the then popular Foreign Affairs Minister, Robert Ouko in 1990. They were undeterred by a furious countrywide crackdown by security agents which came into existence after the death of Ouko. Ouko's death heightened opposition to the government both internally and externally.[739]

Cabinet Ministers Professor Sam Ongeri and William ole Ntimama, both of whom are key players in the current Kibaki-Odinga coalition government respectively, accused multi-party

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[733] Mwaura , *op.cit.*note 559 p19.
[734] Africa Watch, *op. cit.* note 470 pp 37-48.
[735] See generally, Mwaura, *op.cit*. note 559.
[736] Africa Watch, *op. cit.* note 470 p56.
[737] Africa Watch, *ibid* note 736 p 56.
[738] Africa Watch, *ibid* note 737 p56.
[739] Mwaura, *op.cit*. note 559 p19.

advocates as day dreamers. They argued that the multi-party crusade would destroy the country, with Ongeri pointing out that there would be no tolerance. This came to pass by way of many deaths and severe torture, to those urging for multi-party democracy.[740]

In June 1990, Moi, in his characteristic hardline approach to dissenters, accused Rubia and Matiba of plans to cause havoc in the country.[741] In particular, he accused them of planning for mayhem at a proposed unlicenced public rally on 7 July 1990, dubbed *Saba Saba* (in Kiswahili meaning 'seven-seven.') [742] On 6 July 1990, the two were detained without trial, together with ex-detainee Raila Odinga and lawyers John Khaminwa and Mohamed Ibrahim.[743] Mohamed Ibrahim had earlier opposed the inhumane treatment and discriminatory screening of Somalis.[744]

The detentions ignited a passion for freedom perhaps not seen in independent Kenya. On 7 July 1990, thousands assembled at the *Kamukunji* grounds in Nairobi where they were expecting Matiba "to appear from heaven like an angel."[745] The meeting was violently dispersed by the security forces and Nairobi turned into a battle ground between the security forces and the thousands who dispersed into various suburbs of the city.[746] More than twenty lives were lost and hundreds arrested as riots spread into the other major opposition strongholds like Kiambu, Nakuru and Kisumu. The Moi state "was under siege."[747]

Although politicians like Matiba, Odinga and Rubia played an important role in the struggle for Kenya's resumption of plural democracy, it is submitted that the struggle was not driven

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[740] Africa Watch, *ibid* note 739 p46.
[741] Africa Watch, *ibid* note 740 p58.
[742] Africa Watch, *ibid* note 741.
[743] Mwaura, *op. cit.* note 559 p19.
[744] Africa Watch, *op. cit.* note 470 p4.
[745] Africa Watch, *ibid* note 744 p61.
[746] Africa Watch, *ibid* note 745 pp 62-63.
[747] Mwaura, *op.cit.* note 559 p19.

by politicians. The real participants and actors were the citizens themselves in various civil society movements. These movements or groups created for themselves a special place in Kenya's history of the struggle for democratisation. Before the principal civil society movements are examined, an overview of the civil society construct is necessary due to its over-arching place in the discourse on popular participation and democratisation initiatives.

4.2.1 The Role of Civil Society Movements

4.2.1.1 The Civil Society "Construct"

Perhaps as part of the global democratic re-awakening driven by civil society movements after the end of the Cold War particularly from the late 1980s, civil society movements in Kenya were at the forefront in the struggle for the country's democratisation. Before this aspect is examined, it is necessary to inquire into the conceptual underpinnings of "civil society."

Schmitter avers that the "civil society" construct is as difficult to define as "democracy."[748] Labuschagne has argued that the controversies surrounding civil society are so diverse that obtaining an all-inclusive definition is an ambitious task.[749] A comparison of the western or conventional notion of civil society with the African experience illustrates the complexities involved in attempting to define civil society. Orvis observes that the African notion and experience of civil society is not similar to the western concept which is not as wide.[750] By

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[748] Schmitter, "Civil Society: East and West," in Larry Diamond (ed.) **Consolidating the Third Wave Democracies**, Baltimore: The John Hopkins University Press 1997 pp 239-262 p 239.

[749] The terms "classical" and "contemporary" in the context of civil society discourses refer, respectively, to the Eighteenth and the Nineteenth centuries thinking on the term, the former comprised of great philosophers of the time whose ideas still influence modern thinking. For the usage of these terms, see for instance, Pieter Labuschagne, "Revisiting Civil Society in Africa," **African Studies Association of Australasia and the Pacific 2003 Conferences Proceedings: Africa on a Global Stage.** Available at **http://www.afsaap.org.au/Conferences/2003/Labuschagne.pdf** .Accessed on 14 January 2011. p2.

[750] Orvis, "Civil Society in Africa or Africa Civil Society?" 36:1 (2001) **Journal of Asian and African Studies** pp17-38 p2.

arguing that the western phenomenon of civil society is narrow in comparison to the African experience, Orvis is referring to the 'conventional notion' of civil society, heavily criticised by Kasfir as inadequate.[751]

The conventionist's argument as canvassed by Schmitter is as follows:

> a set or system of self-organised intermediary groups that: 1) are relatively independent of both public authorities and private units of production, that is, of firms and families; 2) are capable of deliberating about and taking collective actions in defense or promotion of their interests or passions; 3) do not seek to replace either state agents or private (re)producers or to accept responsibility for governing the polity as a whole; and 4) agree to act within pre-established rules of a 'civil' nature, that is, conveying mutual respect.[752]

Diamond defines civil society as "the realm of organised social life that is open, voluntary, self-generating, at least partially self-supporting, autonomous from the state, and bound by a legal order or set of shared rules."[753] He argues that religious worship or spiritual groups, among other associations, are not part of civil society because they do not concern themselves with civic life and the public realm.[754]

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[751] See generally, Kasfir, "The Conventional Notion of Civil Society: A Critique," 36:2 (1998) **Commonwealth and Comparative Politics** pp1-20. Available at **http://www.informaworld.com/7916869.pdf** .Accessed on 20 December 2010.

[752] Schmitter, *op. cit.* note 748 p240.

[753] Diamond, "Civil Society and the Development of Democracy," Advanced Study in the Social Sciences of the Juan March Institute in Madrid on 7, 12, 13 and 14 November 1996 p.6. Available at **http://www.march.es/ceas/ing/es/punlicaciones/working/.../1997_101.pdf** p.6. Accessed on 20 January 2010.

[754] Diamond, *ibid* note 753 p6.

It is argued that observations by Schmitter and Diamond fail to acknowledge and capture the crucial role of the church in Kenya toward democratisation. This view compounds the difficulties with the conventional understanding of the concept of civil society. Contrary to Schmitter's argument that the state and civil society are separate, Markovitz contends that the state and civil society in Africa, or anywhere else, cannot be divorced from each other, instead the two are intertwined.[755]

The link between the two becomes clearer when the state officials seek the advice of the members of the civil society movement, when members of the civil society join government institutions and when the civil society structures are created and supported by the state.[756] Tripp terms the conventional notion of civil society as "Western liberal theory."[757] She fiercely attacks this theory because of its exclusion and marginalisation of women by treating civil society as the "exclusive domain of men."[758]

Orji has argued that it is inappropriate for the conventional theorist to view the civil society movement merely from a "political conception" perspective as it limits groupings that are part of Africa's associational life.[759] Orji further contends that from an African perspective, the concept of civil society has a sociological underpinning as it embraces a broader spectrum of associations than in the west, for instance NGOs, labour unions, students' unions, cultural associations, religious and communal bodies.[760] This larger approach to civil society seems similar to that adopted by the African Union which defines civil society organisations as

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[755] Markovitz, "Uncivil Civil Society and the State in Africa," 36 (2) (1998) **Commonwealth and Comparative Politics** 21-53 p22.Available at **http://www.informaworld.com/791686968.pdf** .Accessed on 19 December 2010.

[756] Markovitz, *ibid* note 755 p24.

[757] Tripp, "Expanding 'Civil Society': Women and Political Space in Contemporary Uganda," 36 (2) (1998) **Commonwealth and Comparative Politics** p84. Available at **http://www.informaworld.com/791686970.pdf** . Accessed on 20 December 2010.

[758] Tripp, *ibid* note 757 p85.

[759] Orji, "Civil Society, Democracy and Good Governance in Africa," 4:1 (2009) **CEU Political Science Journal** pp 76-101 p79.

[760] Orji, *ibid* note 759 p82.

including "faith-based groups, trade unions, NGOs, village associations, producer groups, professional associations, universities, and the like, big or small."[761] It is the broader and more embracing sociological adumbration of the concept of civil society which this study adopts in its examination of these movements in Kenya's struggle for democratisation.

4.2.1.2 **Civil Society Movements and Multi-Partism**

In Kenya, civil society movements played a significant role in mobilising the people to resist authoritarian rule, violation of human rights and a constitutional architecture which was a fertile ground for violation of the rule of law. However, these movements, together with political parties failed to exert substantial pressure on Moi's government to embrace the requisite constitutional reforms.

It is argued that flaws in the civil society movements notwithstanding, the movements helped to inculcate a strong culture of human rights-awareness among Kenyans. This goes beyond the people's right to form political parties which key civil society movements knew was not a panacea for democracy. As discussed below, their struggle did not bring to an end KANU's dominance of the political terrain. However, it is submitted that the key lesson is that future leaders would face enormous rebellion if they curtailed the enjoyment of human rights and freedoms.

[761] African Union, "African Union-Civil Society Dialogue." Available at **http://www.africa-union.org/ECOSOC/DIALOGUE%20-en.pdf** p1.Accessed on 10 January 2010.

Before Moi's unbridled personification of political power, the Law Society of Kenya (LSK) was a little-known professional organisation.[762] When Moi's authoritarianism reached its pinnacle in the early 1990s, the LSK declared that its functions were both legal and political. Consequently, it fiercely resisted and confronted the Government on key issues.[763] Specifically, the LSK confronted Moi for the cessation of the secret ballot in favour of the queue voting system, and removal of security of tenure of constitutional offices of the Auditor-General, the Attorney-General and judges.[764]

Together with the Kisumu Anglican Bishop Henry Okullu, the LSK chairperson, Paul Muite, became the leader of the National Council of the Churches of Kenya (NCCK), the Church of the Province of Kenya (CPK) whose name later changed to the Anglican Church of Kenya (ACK) and the LSK committee known as the Justice and Peace Convention (JPC). The main aim of the JPC was to see to the establishment of a democratic Kenya.[765] Not much was achieved from the JPC as the government's cavalier tactics succeeded in discouraging people from attending its meetings.[766]

The Kenyan media, especially the print media, have in general played a significant role in the struggle for the country's democratic transition. As Wanyande has observed, not all media organisations were useful in the democratisation process as some, especially the KANU-owned newspaper *Kenya Times*, had the aim of "disempowering civil society or to further

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762 Ndegwa, "Civil Society and Political Change in Africa: The Case of Non-governmental Organisations in Kenya," 35:1994 **International Journal of Comparative Sociology** 19-36. Available at **http://findgalegroup.com/gtx/retrieve.do**... Accessed on 10 February 2010 p2.

763 Ndegwa, *ibid* note 762 p2.

764 Ndegwa, *ibid* note 763 p2.

765 Matanga, "Civil Society and Politics in Africa: The Case of Kenya," paper presented at the 4th Conference of ISTR, Trinity College, Dublin, Ireland, 5-8 July 2000. Available at **www.istr.org/conferences/dublin/workingpapers/matanga.PDF**.Accessed on 14 January 2010 p15.

766 Matanga, *ibid* note 765 p15.

empower the state at the expense of civil society."[767] He singles out the *Daily Nation* newspaper of Nation Media Group as having contributed significantly to the democratic process through its editorial comments on reforms and bold reporting.[768]

Other newspapers in this category were the *People*, *Society*, *Finance*, *Law Monthly* and *Beyond*.[769] As noted by a senior manager of *Nation Television,* the media was a formidable force in Kenya's struggle for multi-partism due to its independence and consistency in unearthing the ills of the Moi regime. He adds that in particular, the Nation Media Group continued to fight for social justice after Kibaki succeeded Moi as president by, exposing corruption and its serialisation of the book, "It's Our Turn to Eat."[770]

The academics were also key players in the struggle for political change. They formulated ideological change and were sympathetic to the cause of the majority and championed the need for change.[771] They included Kamau Kuria, current Chief Justice Willy Mutunga, the late Maina Kinyati and others who were detained and tortured by the government's security agents.[772] Through the University Academic Staff Union (UASU), and together with the Students' Organisation of Nairobi University (SONU), the academia provided credible opposition to the Moi regime.[773] Acting as a think-tank, the academia provided advice on the

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[767] Wanyande, "The Media as Civil Society and its Role in Democratic Transition in Kenya," 10:3 (1997) **African Media Review** pp1-20 p6, Available at **http://www.amarc.org/documents/manuals/mediaingovernance.pdf** . Accessed on 10 May 2011.

[768] Wanyande, *ibid* note 767 p14.

[769] Wanyande, *ibid* note 768 p10.

[770] Communication by way of personal interview with a senior manager, Nation Television, Nairobi, 17 May 2012.

[771] Olunga, "The Role of Academia in Democratisation in Kenya," *in* Wanyande and Okebe, *op.cit*. note 74 pp31-39 p34

[772] See generally, Chege, "The Politics of Education in Kenyan Universities," 52:3(2009) **African Studies Review** pp55-71. Available at **www.bupedu.com/lms/admin/uploaded_article/eA.1035.pdf** .Accessed on 12 February 2012.

[773] Nasong'o, "Negotiating New Rules of the Game: Social Movements, Civil Society and the Kenyan Transition," *in* Murunga and Nasong'o (eds.) **The Struggle for Democracy in Kenya,** Codesria: Dakar 2007 pp19-57 p32.

issues of transition by presenting papers at workshops and seminars on political transition.[774] Moi's reaction was to ban UASU. At the same time, Moi also banned the *Matatu* (commuter taxi) Vehicle Owners Association which made it difficult for public service vehicle owners to organise any form of protests.[775]

Perhaps the most influential mass movement was the Forum for the Restoration of Democracy (FORD). The founders of this movement especially Oginga Odinga and Kenneth Matiba, successfully mobilised Kenyans in Nairobi and many parts of the country to show agitation against dictatorial rule principally through demonstrations.[776] The movement was seen as "the second liberation."[777]

As Moi became more paranoid about the civil society movement, he co-opted the hitherto independent movements into KANU. These included the national women's organisation, *Maendeleo ya Wanawake Organisation* (MYWO) and the central workers' body, the Central Organisation of Trade Unions (COTU) into the ruling party, KANU.[778] For those organisations which Moi could not co-opt into KANU, most were banned. All ethnic-based organisations including the Kikuyu outfit GEMA whose key leaders opposed Moi's ascendancy to the presidency through the Change the Constitution Group, were outlawed.[779]

Football clubs bearing tribal names like the "Luo Union" and "Abaluhyia Football Club" were not spared as well.[780]Statutory corporations were forced to stop links with these football clubs and were made to form their own. By so doing, these major football clubs could not be

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774 Nasong'o, *ibid* note 773 p33.
775 Nasong'o, *ibid* note 774 p33.
776 Friedrich Ebert Foundation (FES) and Centre for Governance and Development (CGD), "Institutionalizing Political Parties in Kenya," Nairobi: Friedrich Ebert Stiftung, 2010 p15.
777 FES and CGD *ibid* note 776 p15.
778 Nasong'o, *op.cit.* note 773 p32.
779 Matanga *op. cit.* note 765 pp24-25.
780 Nasong'o *op. cit.* note 773 p 32.

the springboard for opposing Moi.[781] Associations with ethnic names were banned because they were potential sources of political "unrest" by opposing Moi's authoritarianism.[782]

As Moi strove to control or annihilate the nascent civil society groups, the only category of associations that he had a hard time silencing was the churches. It is argued that the genesis of the vocal nature of the church can be traced to President Kenyatta's remarks made in 1976 to the Kenyan Bishops at their Plenary Assembly. Kenyatta observed that the church "is the conscience of society and today a society needs a conscience. Do not be afraid to speak."[783]

In candid remarks he made in 1990 on the role of the church in the political environment then prevailing, the ACK's Reverend Njoroge Kariuki observed that the church had a duty to "destroy the cause of oppression. The church will have to enter the political arena to do this."[784] In justifying the new position of the church, he stated that:

> The absence of other organisations of a political nature (e.g. other political parties), that can confront the excesses of the State means that the Church is the only nationwide body which, because of its institutional strength and its sense of obligation for public morals and social justice, can speak and act in implicitly political ways. The social evils of our time (e.g. corruption, tribal patronage in employment, interference of the State with basic human freedoms, electoral rigging, detention without trial, torture, gagging of the press etc.) are so great that

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781 Musambayi *op. cit.* note 586 p17.
782 Nasong'o, *op. cit.* note 773 p33.
783 Mejia (ed), **The Conscience of Society: The Social Teaching of the Catholic Bishops of Kenya: 1960-1995**,Nairobi: Paulines Publications Africa (1995) p3.
784 *Law* No.24 September 1990 p29 as quoted in Sabar-Friedman, "Church and State in Kenya, 1986-1992: The Churches' Involvement in the 'Game of Change,'" 96 (1997) **African Affairs** 25-52 p30 available at **http://findgalegroup.comp**

> Christians with any compassion cannot be indifferent to, or complacent about the effects of such evils upon human lives in Kenya.[785]

Friedman has observed that the legitimacy of the Church's involvement in political debates and struggle for liberalisation was underpinned by its "institutional strength and from a moral imperative framed on the juridical, social and theological language of good versus evil and of Christian obligation, social justice, and compassion."[786] Most importantly, according to senior official of the reforms-minded NCCK, the crusade of the church for social justice is scriptural. Citing Proverbs 14:34, he notes that "justice exalteth a nation, but sin maketh nations miserable."[787]

It is perhaps on this foundation that Bishops Kipsang Muge, David Gitari, Manasses Kuria and Henry Okullu of the ACK, Reverend Timothy Njoya of the Presbyterian Church of East Africa (PCEA), Catholic Bishops Mwana a'Nzeki, Peter Kairu, Peter Njenga and to a certain extent, the Catholic Church's Cardinal Otunga, were vocal voices against tyranny, as was the NCCK. For instance, in 1987, Catholic Bishop Mwana a'Nzeki issued a statement condemning the queue voting system which "rocked the very foundations of the establishment."[788] In addition to individual statements like that of Mwana a'Nzeki, the Catholic Church issued a forceful pastoral letter, authored by its bishops.[789] To Archbishop Kuria of the CPK, the church would "never abdicate its role in shaping the political destiny of

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[785] *Law, ibid* note 784 p29, as quoted in Sabar-Friedman, *ibid* note 784 p30.
[786] Sabar-Friedman, *ibid* note 785 p30.
[787] Personal communication by way of interview with a senior official of the NCCK, Nairobi, 11 May 2012.
[788] Waihenya and Fr Teresia, **A Voice Unstilled: Archbishop Ndingi Mwana a'Nzeki** Nairobi: Longhorn Publishers 2009 p87.
[789] See generally, Mejia *op. cit.* note 783.

Kenya. He contended that it was the obligation of the churchmen to show the politician a sense of direction."[790]

In 1986, the late ACK Bishop Muge said that the church had to protest the erosion of rights and liberties which were God-given rights. At the same time, 1,200 pastors urged Christians to boycott the unconstitutional queue-voting system.[791] In early 1990, Bishop Okullu said after the fall of communism that "a similar fate awaited all other dictators the world over."[792] Reverend Njoya had on New Year's Day, 1990, called on KANU and Moi to return the country to multi-partism. KANU's reaction was lethal:

> They screamed for his blood. KANU Secretary-General Joseph Kamotho termed the cleric's call treasonable, while the Agriculture Minister Elijah Mwangale suggested that the clergyman be detained without trial. President Moi pronounced that a return to multi-party politics in Kenya was an evil dream by a few clergymen on the payroll of foreigners.[793]

Still in 1990, the Anglican clergy and their Catholic colleagues called for KANU's overhaul and the initiation of a debate on the "Kenya We Want."[794] It should however be observed that the church, like other civil society groups, is not a homogeneous entity. This perhaps explains why some churches, not mainstream though, were against the crusade for reforms. For instance, the African Independent Churches, like the African Inland Church and the Legio Maria Church "were in the game of suppressing any calls for change."[795]Undoubtedly,

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[790] Musalia, **Archbishop Manasses Kuria: A Biography,** Nairobi: Cana Publishing 2001 p96.
[791] Sabar-Friedman, *op. cit.* note 784 p33.
[792] Patel, "MultiParty Politics in Kenya," **Revista Ciencia Politica** 21:1(2001) pp154-173 p156.Available at **http://www7.uc.cl/icp/revista/pdf/rev211/ar8.pdf**.Accessed on 18 February 2012.
[793] Patel, *ibid* note 792 p156.
[794] Sabar-Friedman, *op.cit.* note 784 p35.
[795] Sabar-Friedman, *ibid* note 794 p26.

domestic pressure for the return of the country to a multi-party democracy was insurmountable. However it is necessary to examine the role played by and the boost received from, the fall of communism in the late 1980s.

4.3 INTERNATIONAL PRESSURE: POLITICAL AND ECONOMIC

The formidable role played by the people towards the resumption of multi-party politics received a significant boost from the end of the Cold War when communism in Eastern Europe fell.[796] The Kenyan struggle was inspired by a progressive international shift towards a more liberal and open economic environment. This commenced with international development policy and reforms proposed by John Williamson, the sometimes much maligned "Washington Consensus." [797] As Hyslop has argued, the fall of the East European and Soviet Union states de-legitimised authoritarianism throughout Africa. In this regard, political reforms, by embracing political pluralism and democracy were seen as the only viable ideological options.[798] It is worth noting that the fall of the Soviet Union led to the emergence of new democratic states, for instance, Georgia, Latvia and Estonia, the effect of which had an influence in global democratisation.[799]

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[796] Africa Watch, *op.cit*.note 470 p37.

[797] Williamson proposed ten reforms namely fiscal discipline; re-ordering public expenditure priorities; tax reform; liberalizing interest rates; a competitive exchange rate; trade liberalization; liberalization of inward foreign direct investment; privatization; deregulation and property rights. See generally, John Williamson, "A Short History of the Washington Consensus," Paper Commissioned by Fundaciön CIDOB for a conference "From the Washington Consensus towards a new Global Governance," Barcelona, September 2004. Available at **http://www.iie.com/publications/papers/williamson0904-2.pdf** .Accessed on 14 November 2010. Commenting on the November 2010 G-20 summit in South Korea, Chang argues that the prescription in the 'Washington Consensus' should be dropped and he justified his contention by demonstrating that South Korea's miraculous economic performance is based on policies most of which are inconsistent with the Consensus. See Ha-Joo-Chang, "It's Time to Reject the Washington Consensus."Available in the "*The Guardian*" at **http://www.guardian.co.uk/commentisfree/2010nov/09/time-to-reject-washington-seoul-g20**.Accessed on 15 November 2010.

[798] Hyslop, "Introduction," *in* Hyslop (ed.), **African Democracy in the Era of Globalization.** Johannesburg: Witwatersrand University Press 1999 pp1-12 p2.

[799] See, "The Cold War Museum: The Fall of the Soviet Union," available at **www.coldwar.org**. Accessed on 6 April 2013.

In economic terms, the 1980s and early 1990s were what the IMF called "exceptionally difficult period for low-income developing countries, particularly in Africa."[800]Many African countries encountered severe droughts, high prices of petroleum and poor terms of trade for raw materials. As a consequence, there were unprecedented balance of payments deficits and heavy external debts. The situation worsened by a drastic reduction of donor funds forced Kenya and others to turn to the IMF and the World Bank for economic bailouts.

In addition to these challenges, the IMF and the World Bank noted that there were "years of economic mismanagement." [801] It is submitted that the coincidence of this "discovery" with the end of the Cold War raises doubts on the *bona fides* of their claim. It therefore seems that the ideological underpinning of economic and political pressure for reforms were inseparable. However, economic support by these institutions, for instance low-interest loans, was based on a country's compliance with their prescriptions.[802]

Politically, the fall of the "bipolar system" manifested by the end of West-East conflict weakened the bargaining power of regimes. The strategic importance of countries like Kenya as an ally of the West was not an issue any more.[803] Democratisation was not only endorsed by bilateral and multi-lateral donors, but also by the World Bank which recognised that economic reforms were not adequate for the achievement of sustainable growth.[804]

The new global political shift reduced Moi's political fortunes from an international perspective. For instance, his visit to the USA in 1987 must have been a shocking experience

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[800] International Monetary Fund, "The IMF's Enhanced Structural Adjustment Facility (ESAF): Is it Working?" p1. Available at **http://www.imf.org/external/pubs/ft/easf/exr/index.htm** .Accessed on 10 November 2011.

[801] IMF, *ibid* note 800 p1.

[802] Hyslop, *op. cit.*note 798 p3.

[803] Muriuki, **Donor Conditionalities and Democratisation in Kenya**, Unpublished, 2000: A Thesis Submitted in Fulfilment of the Requirements for the Degree of Master of Arts of Rhodes University p7. Available at **www.ru.ac.za/2457/.** Accessed 2 January 2011.

[804] Muriuki, *ibid* note 803 p8.

to him. In a dramatic paradigm shift, the administration of President Ronald Reagan expressed "grave awareness" of human rights abuses in Kenya which included claims of torture supported by the victims' affidavits.[805] This was a new approach by the USA which hitherto was, in practical terms, a secondary or non-existent policy.[806] However, it should be observed that the USA Congress had passed legislation which promoted democratisation and human rights in the world.[807]

The USA policy could not however withstand the pressures of the Cold War. While in the USA, the salient message passed to Moi was that he had to address the torture of political prisoners and other human rights concerns. There was also an insurmountable attack on the government for violation of human rights from the West. Most of the pressure came from Norway which had given refuge to some influential reform activists. This forced Moi to cancel a planned state visit to Norway and Sweden in late 1987.[808]

It is submitted that the human rights and democratisation message from the USA to Moi was not as forceful as that of its ambassador to Kenya, Smith Hempstone, who called himself "The Rogue Ambassador."[809] Hempstone was probably the most aggressive and influential personality in the struggle for resumption of multi-party politics. Between 1989 and 1991, the ambassador ignored diplomatic etiquette and stated that under the Foreign Assistance Act, the USA would only assist countries that "nourished democratic institutions, defended human

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[805] Schmitz, "When Networks Blind: Human Rights and Politics in Kenya," Cornell University Workshop on Transitional Contention," Working Paper No. 2001-6 p8. Available at **www.nai.vv.se/ecas-4/panels/61.../Michael-Wahman-Full-paper.pdf** .Accessed on 12 February 2012.

[806] Adar, "The Wisconian Conception of Democracy and Human Rights: A Retrospective and a Prospective," 2: 1998 **African Studies Quarterly** p1. Available at **http://www.africa.ufl.edu/asq/v2/v2i2a3.htm**Accessed on 10 February 2012.

[807] Adar, *ibid* note 806 p2.

[808] Schmitz *op cit* note 805 p8.

[809] *The Washington Post*, "Smith Hempstone: U.S. Ambassador to Kenya," 20 November 2006 p1. Available at **http://www.washingtonpost.com/wp-dyn/content/article/2006/11/19**... Accessed on 23 February 2012

rights and practised multi-party politics."[810] An article in the *Washington Post* following Hempstone's death in November 2006, captures the ambassador's role in Kenya's struggle for democratisation. It noted that:

> Mr. Hempstone was credited with helping usher multi-party elections into an African country that, although a US ally during the Cold War, had little tolerance for political dissent. Moi was Kenya's second president since independence in 1960 (*sic*), and his Kenya African National Union was by constitutional decree the only legal party...In Nairobi, Mr. Hempstone advocated the end of KANU dominance. He gave refuge within the US Embassy to noteable human rights lawyer sought by the police and spirited the man, Gibson Kamau Kuria, to safety in London. He also denounced economic corruption, which he said prompted greater furore in Kenya than any other human rights matter.[811]

Probably, the most admirable aspect of Hempstone's crusade was that he was not fully implementing the USA's diplomatic policy. Describing Hempstone as "a man of real courage," the Secretary of State at the time, Lawrence Eagleburger, said that the ambassador kept his job in Nairobi notwithstanding public brawls because "to have pulled him out or to have disciplined him would almost certainly have created political problems at home." [812]

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[810] Adar *op. cit.* note 806 p2.
[811] *The Washington Post*, *ibid* note 809 p2.
[812] *The Washington Post* , *op.cit.* note 809 p2.

More pressure on the Moi regime was exerted by the donors. In 1991, Western donors suspended aid to Kenya amounting to US $ 350 million and the suspension could only be lifted if corruption was curbed and the political system liberalised. Within weeks, Moi amended the constitution to legalise the formation of opposition.[813] Pressure by donors bore fruit because of popular campaigns against section 2A of the Constitution which made Kenya a *de jure* one-party state.[814]The repeal in 1991 of section 2A of the Constitution opened the door for the country's return to multi-party politics. In particular, the former mass movement, FORD, was registered as a political party.[815] As Nasong'o has argued, the main problem with FORD was that it failed to have "an all-inclusive national political agenda."[816] This deficiency of strategy was worsened by serious leadership wrangles in the party which saw it split into several FORD-parties which reflected their leaders' ethnic cocoons.[817] That being the case, Moi's victory in the 1992 election became more real.

4.4 POST-MULTI-PARTISM PRESSURE FOR REFORMS

Kenya's return to multi-partism under Moi did not translate into good governance. The 1992 and 1997 multi-party elections led to deaths and displacements of the Kikuyu in some parts of the Rift Valley. On the whole, those who were opposed to KANU faced the wrath of politically insulated militias released to cause mayhem in these elections which, as Kagwanja has observed were "a dangerous minefield of vigilante violence."[818] The clashes escalated after Kibaki lodged a petition against Moi's victory. This democratic right was dubbed "an

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[813] Brown, *op.cit*.note 612 p526.

[814] See generally, Independent Review Commission (IREC), "An analysis of the Constitutional and Legal Framework for the Conduct of Elections in Kenya, 2008" available at **http://www.communication.go.ke/krieger_knowledge_IREC/A**. Accessed on 12 May 2011

[815] Matanga, *op. cit*. note 765 p16.

[816] Nasong'o, *op. cit.* note 773 p39.

[817] Nasong'o, *ibid* note 816 p39.

[818] Kagwanja, "Politics of Marionettes: Extra-legal Violence and the 1997 Elections in Kenya," *in* Rutten *et al*, Out for the Count: The 1997 General Elections and Prospects for Democracy in Kenya: Nairobi: Fountain Publishers 2001 pp73-100 p73.

affront to the Kalenjin community."[819] Moi's political tribalism strategy also included a furious call for '*majimboism*' (provincial autonomy), which was "an extremely illiberal and violent form of ethnic nationalism."[820]

The failure to arrest the perpetrators of the 1997 violence perpetuated a culture of impunity.[821] Although foreign donors pressured Moi to embrace multi-partism, they were not concerned about institutional reforms. They were only pushing for the re-introduction of a multi-party political system.[822] In addition, the donors dismally failed to criticise Moi's illegitimate strategies to retain power in the 1992 and 1997 multi-party elections. Indeed, they went to the extent of endorsing "unfair elections (including suppressing evidence of their illegitimacy) and subverting domestic efforts to secure far-reaching reforms."[823] Their reluctance to call for strong and independent institutions must have been a silent endorsement of the *status quo*. This must have helped Moi in harnessing his autocratic hold on key public institutions and his governance style in general.

As politicians and the donors failed to see the need for comprehensive reforms, key civil society actors had long ago seen that need. The NCCK had in 1991 said that substantial reforms, preferably a new Constitution were exigent.[824] Before the 1992 election, the NCCK had indeed organized two symposia to debate a new constitution.[825] However, political parties might have been excited by a return to political pluralism. They were busy campaigning to dislodge Moi in the 1992 elections.

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819 Klopp, *op.cit.* note 613 p270.
820 Klopp, *ibid* note 819 p270.
821 See generally, CIPEV report *op cit.* note 339.
822 Brown, *op. cit.*note 612 p734.
823 Brown, *ibid* note 822 p726.
824 Nasong'o, *op.cit.* note 773 p39.
825 Nasong'o, *ibid* note 824 p40.

After Moi emerged victorious in 1992, calls for constitutional change consisted mainly of altercations between the opposition and KANU. KANU's reaction to calls for constitutional change was that the country had to go the '*majimbo*' way.[826] It should be recalled that this was the position adopted by KADU which Moi and other leaders of minority communities managed to have it included in the Constitution during the constitutional talks in London, in 1963. On the other hand, Kenyatta and other representatives of bigger communities called for the centralisation of power. The events of 1994 must have been important as they made Moi make some reformist statements. In March, the Bishops of the Roman Catholic Church and the Anglican Church of the Province of Kenya called for comprehensive and inclusive constitutional reforms.[827]

Working in conjunction with the Kenya Human Rights Commission (KHRC), the churches, together with 15 civil society organisations mandated Kamau Kuria, a constitutional lawyer to draft a model constitution for purposes of mobilising the support of Kenyans for the project.[828] It is important to note that the KHRC has been at the heart of Kenya's reform agenda.[829] As argued by perhaps the best known human rights lawyer at the time, one of the key crusaders of reforms, the "model" Constitution was intended to "demystify constitution-making and to demonstrate that it was possible to create a new Constitution."[830] Consultations on the model led to the formation of the Citizens' Coalition for Constitutional Change (CCCC) which was dubbed the "4Cs."[831]

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826 Oloo and Oyugi, *op.cit.* note 729 p6.
827 Oloo and Oyugi, *ibid* note 826 p6.
828 Nasong'o, *op. cit.* note 773 p40.
829 Communication by way of personal interview with a Senior Programme Officer, Research and Advocacy, Kenya Human Rights Commission, Nairobi, 9 May 2012.
830 Communication by way of personal interview with a prominent human rights lawyer during the Moi regime, Nairobi, 8th May 2012.
831 Personal interview, *ibid* note 830.

The demands for political reforms were repeated in November 1994 by the LSK, KHRC and the Kenya Chapter of the ICJ who unveiled a Model Constitution of Kenya. This development made the Attorney-General, Amos Wako, promise in the National Assembly that there would be constitutional review before the 1997 election.[832] The government's reluctance to commence reform talks led to more pressure being exerted in late 1995 by the opposition parties led by Mwai Kibaki, Martin Shikuku and Kenneth Matiba. These politicians were boosted by churches and civic bodies represented by the CCCC.[833]

The reform groups converted the CCCC into the National Convention Preparatory Committee (NCPC) in March 1996.[834] The NCPC demanded the repeal of draconian laws, for instance, the Chief's Authority Act, Cap 128; the Public Order Act, Cap 56 and the Preservation of Public Security Act, Cap 57. These colonial statutes were principally intended to curtail fundamental human rights and freedoms, in particular the freedom of movement, assembly and association. Also central to the reform agenda were the electoral laws which gave the President an upper hand in the entire electoral process.[835]

The NCPC also agitated for major amendments to the Non-Governmental Organisations Coordination Act, Cap 19. The main contention with the Act was, and still remains, the heavy hand of the government in regulating NGOs in Kenya.[836] The National Convention Assembly (NCA) was established at the delegates' conference in April 1997. It decided that the NCPC

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[832] Oloo and Oyugi, *op. cit* note 729 p6.
[833] Oloo and Oyugi, *ibid* note 832 p8.
[834] Nasong'o, *op. cit*. note 773 p41.
[835] Nasong'o, *ibid* note 834 pp40-41.
[836] See generally, Jillo, "NGO Law in Kenya, 11:4 (2009) **The International Journal of Not-for-Profit Law.** Available at **http://www.icnl.org/research/journal/vol11iss4/art_2.htm**.Accessed on 11 February 2011.

and the other delegates would serve as the National Convention Executive Council (NCEC), formally the Coalition for a National Convention.[837]

The NCEC was effective in mobilising civil disobedience dubbed "No Reforms No Elections." [838] In March and May of 1997, the NCEC mobilised the people for mass action to protest Moi's refusal to institute genuine reform talks. In both rallies, the police opened fire on the crowd and some people lost their lives.[839] The result of the July pressure from the people made the Moi government promise some reforms before the 1997 election. The reaction of Moi's government and KANU was not an outright nod to the crusade for reforms; rather it is what a former member of the editorial board of the *Nairobi Law Monthly*, a leading publication on the promotion of human rights and democratisation, calls "a step by step strategy."[840] To execute this strategy, KANU made proposals to the government for the repeal of some draconian laws like the Public Order Act. President Moi also announced the relaxation of rules for holding of public meetings.[841] These were Moi's tactics for buying time from local and international pressure-groups and the people for fundamental constitutional reforms.

Moi succeeded in substantially slowing down the reform movement by dividing the people and their parliamentary representatives. He disregarded the firebrand NCEC and argued that the only persons mandated to steer the reforms were the MPs..[842] The strategy by Moi seems to have been the end of a genuinely people-driven reform agenda because the MPs had political party issues to quickly address before the 1997 election. The new strategy gave birth

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[837] Nasong'o, *op. cit.* note 770 p41. Also see, Mutunga, **Constitution-Making from the Middle: Civil Society and Transition Politics in Kenya, 1992-1997**. Nairobi and Harare: Sareat and Mwengo 1999 pp-28-31.
[838] Nasong'o, *ibid* note 837 p41.
[839] Nasong'o, *ibid* note 838 p42-43.
[840] Communication by way of personal interview with a former member of the editorial board of the *Nairobi Law Monthly* who is also a legal practitioner, Nairobi 9 May 2012.
[841] Nasong'o *op. cit.* note 773 p43.
[842] Oloo and Oyugi *op. cit.* note 729 p10.

to the Inter-Party Parliamentary Group (IPPG) which most opposition politicians embraced, thus substantially rendering the NCEC irrelevant.[843]

In July 1997 some minimum constitutional and legal reforms were eventually agreed on by the IPPG. These included, for the first time, the appointment of some of the members of the Electoral Commission by the opposition parties and the nominating some members of the National Assembly. Other changes included the repeal of sedition laws; provision of equal coverage of all political parties by the national television; abolition of detention without trial and enabling the winning presidential candidate to form a government of national unity or a coalition government.[844] Equally important, the IPPG initiative led to the enactment of the Constitution of Kenya Review Act (CKRA) 1997 to drive the nation towards a comprehensive new constitutional dispensation.[845]

The advocates of constitutional change, in particular the Roman Catholic Church, the NCCK and the NCEC, correctly claimed that the IPPG "reforms" and, consequently, the CKRA did nothing to loosen Moi's grip on power.[846] Kamau Kuria, a co-convener of the NCEC lamented that the MPs, through the IPPG, had hijacked the people's right to reform the Constitution.[847] From the perspective of credible constitution-making process, the Catholic Church was emphatic that:

> The entire process of drawing up a new constitution must involve all Kenyans, from listening, collating of opinions,

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[843] Oloo and Oyugi, *ibid* note 842 p10.
[844] Oloo and Oyugi, *ibid* note 843 p10.
[845] Law Society of Kenya: Final Report of the Standing Committee on Constitutional Review, August 2006 p11. Available at **http://www.mirror.undp.org/kenya/constitutionalreview.pdf.** Accessed on 14 September 2011.
[846] Nasong'o, *op. cit.* note 773 pp 44-45.
[847] Oloo and Oyugi *op. cit.* note 846 p11.

submitting views, writing, to the final enactment of that document...the people, not the government, decide."[848]

Complaints about the hijacking of the process by politicians came to a halt when Moi dissolved the National Assembly and called the 1997 election. Moi emerged victorious against a divided opposition although, as in 1992, he had only garnered about one-third of the votes cast.[849]

After Moi's victory, constitutional review efforts continued under two parallel groups. One was the more reformist religious organisations and the civil society groups called the *Ufungamano* Initiative. This initiative established its review team, the Peoples' Commission of Kenya (PCK).[850] The other groups were the statutory CKRA commissioners whose chairperson, Yash Ghai, negotiated a merger between the two groups.

The merger became possible after the amendment of the CKRA by the Constitution of Kenya Review (Amendment) Act 2001. This Act brought on board twelve commissioners of the *Ufungamano* initiative.[851] Differing views on a new Constitution were collated and a draft Constitution was unveiled in 2002. The draft was later amended because of serious disagreements before the final draft could be presented to the National Assembly for debate. Notwithstanding the amendments, the battle for a new Constitution was far from over as the *Bomas* draft never became law.[852]When President Moi relinquished power to the opposition in 2002, there were no meaningful constitutional changes to Kenya's constitutional infrastructure.

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[848] Mejia, *op. cit.* note 783 p208.
[849] Nasong'o, *op. cit.* note 773 p45.
[850] Kindiki, *op. cit.* note 65 p154.
[851] Kindiki, *ibid* note 850 p154.
[852] Kindiki, *ibid* note 851 p154.

Due to the over-arching need for constitutional reforms and the massive support and enthusiasm the reforms initiative received from the people, it is necessary to examine the obtrusive factors which stopped meaningful constitutional reforms during the Moi era. It is submitted that this examination will buttress the argument in this thesis that the people of Kenya should augment the traditional institutions of governance which represent them by playing a direct role in public affairs and in any constitutional and legal re-configuration.

4.5 BARRIERS TO CONSTITUTIONAL REVIEW INITIATIVES

A combination of factors coalesced against genuine constitutional reforms in the epoch under review. It is submitted that the envisaged reforms would have significantly addressed entrenched governance concerns, in particular infringement of human rights and the rule of law, had the three key barriers to reform been mitigated. These are presidential authoritarianism; limitations in civil society associations and divisions in opposition politics. It is argued that given Kenya's complex political landscape, these key domestic challenges to democratisation and constitutional reforms are pertinent to this thesis. The reason is that they enhance the argument in favour of meaningful participation of the people in Kenya's constitutional development and political governance in general.

4.5.1 The Fall of Nationalism

Although the leading lights in the struggle for Kenya's first Constitution might have represented different ideological positions. Notwithstanding that they had territorial (or tribal) interests to guard; their political synergy was a clear demonstration of nationalism. Perhaps this view would explain why Odinga and Mboya, KANU leaders from the Luo ethnic group,

decided that the victorious KANU could not form the government as long as Kenyatta, a Kikuyu, was not a free man.

After Kenyatta's release from imprisonment and the formation of Kenya's first government after independence, leading nationalists saw the need for uniting the country under one president. As Nyong'o has argued, this approach can be explained from an understanding of Africa's sociological environment in which the presidency, especially a few decades ago, was monarchical and the people adored it.[853] The foregoing theory perhaps explains why Odinga, Mboya and Moi readily "transferred" power to Kenyatta.[854]

The main disappointment was that after the "transfer of power," to Kenyatta, Moi exploited it in a style which, most likely, none of the other nationalist had imagined. That could explain why rebellion within KANU was so apparent. Except for Moi who followed Kenyatta's *Nyayo* before and after succeeding him, the battles between Kenyatta and the other leading nationalists were ferocious and bloody. His disintegration of nationalist coalition politics led to abuse of trust, personification of power and authoritarianism. Its impact was that the president became such an institution in policy formulation that politicians and the people stood in awe of his powers. Ideology no longer mattered as the president strategised on power retention and by being so manipulative, countered any opposition from his former coalition partners mainly Odinga and Mboya.[855]

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[853] Nyong'o, "State and Society in Kenya: The Disintegration of the Nationalist Coalitions and the Rise of Presidential Authoritarianism" 88(1989) **African Affairs** 229-251 p231.
[854] Nyong', *ibid* note 853 p 231.
[855] See generally, chapter 3.4.1.1 of this study. Also see Nyong'o *ibid* note 854 p231-232.

It would seem that the Kenyatta approach was effectively applied by Moi, the self- confessed "Professor of Politics."[856]It is observed that in order for him to cultivate a degree of legitimacy especially among the Kikuyu, Moi sought and got the support of Cabinet colleagues, Njonjo and Kibaki. The support was necessary because when Moi was the Vice-President, he did not have a national constituency which, in any event, would have been interpreted as competing against Kenyatta. His constitutionally vital job was no more than symbolic.[857]

When Moi took over power after Kenyatta's death, he seemed to have been keen on consolidating power as opposed to designing a plan to enhance his nationalistic agenda as demonstrated in his day at KADU. As examined in chapter three of this thesis, after assuming office, Moi sought and obtained the support of Njonjo and Kibaki, but that move, it is argued, was to reward the two senior Kikuyu politicians for their opposition to "Change the Constitution Group," whose sole aim was for a member of the Kiambu *Mafia* to succeed Kenyatta.[858]

Kibaki and Njonjo were retained in the Cabinet by Moi who also appointed Kibaki as the Vice-President. After about a decade of consolidating his position in KANU, and as head of state, Moi ditched Njonjo in 1987 and later Kibaki. Njonjo had been found "guilty" of a plot to overthrow the Government by a judicial commission of enquiry but Moi "forgave" him.[859] It therefore becomes apparent that Moi's credentials as a nationalist at independence gradually waned as he consolidated and personified his power.

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[856] See generally, Patel, *op. cit.* note 792.
[857] Omolo, "Political Ethnicity in the Democratisation Process in Kenya," 61:2 (2002) **African Studies** pp209-221 p214.Available at **http://heinonline.org**.Accessed on 10 June 2011.
[858] See Mwaura, *op. cit.* note 559 p11.
[859] Mwaura, *ibid* note 858 pp 16-19.

Moi's preferred successor, Uhuru Kenyatta, lost to Kibaki in the December 2001 elections. However, Kibaki would not have had an outright victory had Raila Odinga and a few others not formed a coalition to defeat the Moi-Kenyatta project. As it would be further argued in the next chapter, Kibaki abandoned Odinga and was in no hurry to dismantle the constitutional architecture which was the lynchpin of presidential authoritarianism. Like Moi and Kenyatta before him, Kibaki surrendered a nationalistic agenda and betrayed those who made his victory possible in favour of narrow parochial interests. The damage caused by his political maneuvering came to light after he controversially emerged victorious in the 2007 election. This will become clearer in the next chapter.

A powerful presidency, abuse of the power vested in that office and the abandonment of true nationalism by incumbents became key impediments to meaningful reforms. As it will be discussed below, those who joined forces so as to fight for reforms, especially the civil society movements and opposition political parties and many other formations encountered key challenges which inhibited meaningful progress in the struggle for democratic space.

4.5.2 The Ethnic Phenomenon in Multi-Party Democracy

An exhaustive discussion of sociological and political theories on ethnicity and its influence on politics in Kenya is beyond the scope of this thesis. However, due to the important place of the phenomenon of ethnicity in Kenya's political discourse, it becomes imperative to make some comments on this conception. Irrespective of the ethnic factor, the contribution of political parties in democratisation should be recognised. This includes political mobilisation; recruitment into the party; political education; representative function; political development and policy formulation and national governance for the victorious party.[860] As argued by

[860] FES and CGD *op. cit.* note 777 pp8-18.

Mutua, modern democracy is what it is today because of the existence of electoral competition by political parties.[861]

Primordialists argue that ethnicity is an uninterrupted historical factor bequeathed by one generation to the other. They further observe that ethnicity is predicated on "instinctive behaviour and to pre-modern societies." [862] Because of the common features among members of the same ethnic community, group solidarity is of great emphasis. From a Kenyan perspective, the Kenyan politician has used the primordial view of ethnicity as an opportunity "for economic and political power while pretending to be acting on behalf of and for the benefit of their respective ethnic communities."[863] Perhaps the politician has taken the cue from the colonial administration which, for its own survival, managed to divide communities with those rebelling being subjected to severe human rights abuses while the rest gained some access to economic opportunities.[864]However, the fissures created by ethnicity have largely contributed to the general failure of Kenya's political parties to achieve the foregoing functions.

After the resumption of multi-partism, the FORD party split into Matiba's FORD-Asili and Odinga's FORD-Kenya. The party collapsed under the heavy weight of ethnic factions in their leaders' struggle for power. FORD-Asili, and Kibaki's Democratic Party (DP), were mainly Kikuyu-backed parties because their leaders were Kikuyu. On the other hand, FORD-Kenya was a Luo and Luhya party. FORD-Asili later split and added another FORD outfit, FORD-People.[865] Perhaps Kenya's largest and most influential post-independence mass movement, FORD went into the 1992 election, the first multi-party elections during the Moi

[861] Mutua, "Political Parties in Transitions," *in* Maina and Kopsieker *op. cit.* note 586 pp109-120 p113.
[862] Omolo, *op. cit.*note 857 p210.
[863] Jonyo, "The Centrality of Ethnicity in Kenya's Political Transition," *in* Oyugi et al op cit note--pp155-179 p158.
[864] Omolo, *op. cit.* note 857 p213.
[865] FES and CGD *op. cit.* note 777 p15.

era, a divided house which significantly contributed to Moi's victory. Most of Moi's votes came from his home-turf and voter rich province, the Rift Valley.[866] Matiba's strong showing in Luhya land was attributed to Martin Shikuku, a Luhya, and Matiba's "running-mate." [867] As observed by a leading human rights lawyer and reforms crusader, these divisions happened because politicians were concerned with capturing power instead of the structure of power.[868]

The outcome of the 1997 election repeated the ethnic voting pattern of the 1992 election. The only difference in the latter election was that Matiba had boycotted the election from which Kibaki largely benefitted by reaping the Kikuyu votes. Second, the Luo vote went to Raila Odinga's National Development Party (NDP). This was because his father, the doyen of Kenya's opposition politics, Oginga Odinga, had died.[869] Raila Odinga had joined the NDP after disagreements with Kijana Wamalwa, a Luhya, over the leadership of FORD-K in 1995.

It is worth noting that in the run-up to the 2001 election, Raila Odinga's NDP merged with Moi's KANU. However, the relationship was short lived as Moi chose, as his preferred successor, the little-known Uhuru Kenyatta. . This resulted in Raila Odinga joining hands with Mwai Kibaki.[870]In the 2001 election, the Luo vote went to Raila Odinga's Orange Democratic Movement (ODM) while Kibaki's Party of National Unity (PNU) got the Kikuyu vote. Raila Odinga, Kibaki and a few others had formed the National Rainbow Coalition

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866 Omolo, *op. cit.* note 857 p 218.
867 Omolo, *ibid* note 866 p218.
868 Communication by way of personal interview with a leading human rights legal practitioner during the Moi era, Nairobi, 6 May 2012.
869 Omolo, *op cit.*note 857 p219.
870 Kanyinga, "Limitations of Political Liberalisation: Parties and Electoral Politics in Kenya, 1992-2002," in Oyugi *et al.*, **The Politics of Transition in Kenya, Nairobi: Heinrich Boll Foundation 2003** pp96-126 p96.

(NARC). The NARC party halved after Kibaki reneged on the Memorandum of Understanding (MoU) entered into with Odinga in the run-up to the 2001 election.[871]

In addition to ethnic cleavages, political parties also suffer from lack of a common inter-party democracy. In particular, there is little engagement with the members of these parties and their inner structures, especially those governing grassroots elections, which are in disarray. In the 2007 party nominations in readiness for the national elections, most parties had a lot of difficulties in various parts of the country and some members never got an opportunity to vote.[872] It is also beyond doubt that the majorities of the members of these parties were not, and perhaps are not, glued together by ideology or policy. The common thread in all parties was that their members were disciples of the main personality or personalities in the party. It is argued that it is for this reason that the end of political harmony between the elites in the party significantly slowed down the democratisation enterprise. These challenges, together with problems in the civil society movements as discussed below, complicated the road to a new legal configuration for the country.

4.5.3 Limitations within Civil Society Movements

It would appear that a number of challenges encountered by the political society and which significantly hampered the country's democratisation initiatives were replicated in civil society movements. These movements failed to internalise democracy, quite ironical considering that they were resisting the country's undemocratic culture.[873]According to a Kenyan scholar teaching in a South African University, civil society movements lacked internal structures which would survive the exit of their leaders, most of whom were quite

[871] See generally chapter five of this study.
[872] FES and CGD *op. cit.* note 777 pp21-22.
[873] Wanyande, "Civil Society and Transition Politics in Kenya: Historical and Contemporary Perspectives in Kenya," in Wanyande and Okebe *op. cit.* note 74 pp8-19 p17.

charismatic.[874] In addition, this vital sector in Kenya's struggle for a new legal order suffered from ethnic divisions, a reflection of Kenya's associational life. As Wanyande has argued, civil society movements have been unable "to transcend ethnic and regional capture." [875] The bishops of the Catholic Church, for instance, had opposing views on the Wako draft constitution. Those from central Kenya, Kibaki's stronghold, supported the draft as bishops from Nyanza, Odinga's home province and most other parts of the country, opposed the Kibaki-Wako project in the referendum.[876]

In addition, civil society movements failed to marshal any meaningful grassroots support. Most of the rural areas where the majority live, were in the hands of the political society, for instance the Rift Valley which was largely the monopoly of KANU.[877] This would perhaps support Murunga's observation that civil society movements were competing for popularity with the political parties, a position worsened by the movement's lack of independent popular base.[878]

Some critics of civil society movements also view them as agents for those fighting the ruling class for their political recognition. To an extent, this argument is valid, thus questioning the degree of commitment of their leaders in maintaining the reform crusade. For instance, after the NARC victory in the 2001 elections, top leaders of civil society movements which were at the forefront of the reform struggle joined the Kibaki government and others became MPs. Except for John Githongo, formerly of Transparency International (Kenya), the other ex-rights activists did not quit their positions, nor were they active any more, even after

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[874] Personal communication by way of **interview with a Kenyan scholar teaching in a South African University**, Gaborone, 26 September 2012.
[875] Wanyande, *op. cit.* note 873 p17.
[876] Wanyande, *ibid* note 875 p1.
[877] Murunga, "Civil Society and the Democratic Experience in Kenya: A Review Essay of Constitution-Making from the Middle: Civil Society and Transition Politics in Kenya," 4:1 (2000) **African Sociological Review** pp 97-118 p106.
[878] Murunga, *ibid* note 877 p106.

becoming fully aware that President Kibaki was not committed to reforms. This view seems to explain the bourgeois component of these movements. It is for this reason, perhaps, that Mutunga observes that sectors of civil society were used as "springboards to active political careers."[879] This observation also supports the view that even after the return to multi-partism, the civil society movements generally suffered from lack of enthusiasm and as much passion as during the one-party rule. As Ngunyi has observed, these movements suffered from a "paradigm paralysis."[880]

The dependency on foreign donors further weakens the democratic initiatives of the civil society movements.. That must have created serious apprehensions of patriotism, especially during the tough times of SAPs in which the movements were "compromising to foreign interests." [881] Their lack of financial autonomy undoubtedly underlined or accentuated negative perceptions of their independence by the masses.

Financial support for civil society groups by particularly large and financially stronger civil society groups would also be seen to affect the impartiality of the recipient organisation as well as its officials. In June 2011, for instance, the nomination of the current Chief Justice, Willy Mutunga, was opposed by the Catholic Church and other churches allegedly because of his professional links with the Ford Foundation. The organisation supports the rights of gays and lesbians, sexual orientations prohibited by the new Constitution. To the churches, Mutunga's nomination "did not meet the bar on morality." [882]

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[879] Mutunga, *op.cit.* note 837 p115.
[880] Ngunyi, "Civil Society in the Post-Amendment Context," **Royal Norwegian Embassy,** Nairobi, June, 2008 p8. Available at **http://www.norway.or.ke/NR/rdonlyres/.../97913/FinalReport-civilsociety.pdf**
[881] Murunga, *op. cit.* note 877 p107.
[882] International Criminal Court, "For all to See and Hear Part I," available at **http://www.icckenya.org/2011/06for-all-to-see-and-hear-part-i/**.Accessed on 12 March 2012.

The challenges faced by civil society groups, compounded by those encountered by political society, have to be weighed against the democratic in-roads achieved from the momentum of the two sectors. At a minimum, Moi restored multi-partism and probably most important, a new chapter of fundamental rights and freedoms-conscious people was ushered into the country. However, the impediments examined above invigorate the need for enhanced direct participation of the people in public affairs and Kenya's constitutional progression in particular, is the main thrust of this study.

4.6 SUMMARY

The chapter has examined the struggle for democracy in Kenya during the reign of President Moi. It has been shown that Moi gave in to domestic and international pressure and returned the country to multi-partism by repealing section 2A of the Constitution. However, the chapter has shown that this concession did not change his political trajectory. Political space remained constricted such that opposition parties could not freely seek for votes especially in Moi's stronghold, the Rift Valley. To demonstrate that multi-partism could not work, "ethnic" clashes engulfed the period leading to the 1992 and 1997 elections both of which Moi won.

The "mother churches," especially the ACK, the Catholic Church and the protestant churches' umbrella body, the NCCK, were at the forefront of the struggle for reforms. Non-religious civil society movements, like the KHRC, the LSK and CCCC, crafted a draft constitution so as to demystify the constitution-making process. However, when Moi left the political scene, not much had been accomplished because of substantial challenges facing the reform struggle including ethnic divisions of the otherwise united front and weaknesses in the civil society movement. The hope of Kenyans was that Moi's successor, Mwai Kibaki, would

steer the country to an all-inclusive constitutional reform process with the main aim of addressing the governance ills of Kenya's indirect participatory democracy. This aspect of the thesis, the state of governance under Mwai Kibaki and most important, his constitutional reforms promise, are discussed in the next chapter.

CHAPTER 5: THE 2010 CONSTITUTION-MAKING: FROM PROMISE TO ANARCHY

5.1 INTRODUCTION

Kenya's return to multi-party democracy did not herald the "arrival" of good governance. Multi-partism failed to entrench the ethos and norms of good governance. When President Moi left office, the state of governance was quite pathetic. Presidential candidates were well aware of this and they promised Kenyans a new paradigm in governance. This among others included a new constitution which they failed to get under Moi. Because of the hunger which Kenyans had for a new constitution, a campaing based on this promise provided the best chance for any presidential candidate to defeat the incumbent. It was on this basis that Kibaki was elected in December 2002.

The chapter examines the nature of governance after years of mismanagement by the Moi regime. The intention is to analyse the extent to which his successor, Mwai Kibaki, has tackled the main challenges of governance whose promise to cure propelled him to victory in 2002. In this connection, the manner in which President Kibaki managed the urgent and burning issue of constitutional reforms is central to this thesis. The chapter therefore examines the rough road to the new Constitution. This includes the 2005 failed attempt by Kibaki to introduce a constitution.

This chapter argues that the true origin of the new Constitution is the 2007-8 post-election violence. The violence erupted after Kibaki was controversially declared the winner, defeating his closest opponent, Raila Odinga. The chapter examines this critical event in the

history of the country and the efforts made to restore peace in the country. The nexus between the violence and the new Constitution is also discussed. The chapter then investigates the legislative activities which put into place the legal machinery for the new Constitution. Finally, crucial judicial decisions delivered by various courts in the determination of pertinent question revolving around the constitutional review process are critically analysed. However, before the constitution-making process is discussed, it is pertinent to examine the political trajectory of Mwai Kibaki in who, as President, the burden of steering the constitution-making process vested.

5.2 A SYNOPSIS OF PRESIDENT KIBAKI'S PRESIDENCY

5.2.1 Kibaki's "Democratisation" Initiatives

Kibaki entered the race for the 2002 presidential elections amidst some uncertainty as to whether Moi would transfer power to the opposition, considering that he was "a master at rewriting the rules."[883] By appointing Kenyatta's son and side-stepping senior politicians in KANU like Raila Odinga, Moi might have, unsuccessfully, intended to split the Kikuyu vote between Uhuru Kenyatta and Kibaki as it happened in 1992 and 1997 elections when a split of the Kikuyu vote propelled Moi to victory.[884]

The main force behind Kibaki's landslide win against KANU in 2002 was the formation of a coalition party, National Rainbow Coalition (NARC). The party was a conglomerate of small parties that formed the National Alliance Party of Kenya (NAK) under Kibaki and the Liberal Democratic Party (LDP) led by Raila Odinga.[885] Raila Odinga and a host of other politicians quit KANU in late 2002 to form the Rainbow Alliance after Moi unilaterally chose Uhuru

[883] Brown, *op. cit.* note 612 p329.
[884] Brown, *ibid* note 883 p334.
[885] Brown, *ibid* note 884 p332.

Kenyatta to contest for the presidency on a KANU ticket and hastily joined "the lesser-known LDP."[886] The coalition was based on a Memorandum of Understanding (MoU), the glue which was holding the NARC coalition together.[887] The main link between the parties in the "super alliance" was that NAK and LDP would acquire 50:50 stakes in NARC.[888]

An examination of Kibaki's presidency from December 2002 when he took office to the present should be approached from a backdrop of certain critical factors which engendered hope in his administration in contrast to the regimes of Kenyatta and Moi. Under Moi's *Nyayo* ideal, any optimism of a better-governed Kenya was clearly misplaced. Whereas the assumption of power by Kenyatta and Moi was not predicated on the contemporary appreciation and internalisation of the term "good governance," it is submitted that Kibaki's undoubtedly was.

First, Kibaki, former Cabinet Minister under the Kenyatta and Moi regimes and former Vice-President under Moi, quit the Moi administration and the ruling party, KANU, in 1992. In that year, Kibaki formed the Democratic Party (DP), and in the process formally announced his distaste for Moi's autocracy and his preparedness to join the laborious crusade for the country's democratisation and consolidation of the ideals of good governance.[889] Second, Kibaki joined other democratic forces, in particular the civil society, around the time of the end of the Cold War which ushered in Africa's "third wave of democratisation."[890]

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[886] Whitaker and Giersch, *op. cit.* note 79 p5.

[887] See for instance, Whitaker and Giersch, *ibid* note 886 p5; Brown, *op. cit.* note 612 p332.

[888] Commonwealth Secretariat: Kenya General Election 27 December 2007-**The Report of the Commonwealth Observer Group** p4, available at **http://www.thecommonwealth.org/shared_asp_files/GFSR.asp?NodeID**. Accessed on 22 May 2011.

[889] For an in-depth examination of Kibaki's political trajectory, see generally, Murunga and Nasong'o, *op.cit.* note 78.

[890] See Huntington, The **Third Wave: Democratization in Late Twentieth Century**, Norman: University of Oklahoma Press 1991 as cited in Shola Omotola, "Democratization, Good Governance and Development in Africa: The Nigerian Experience," 9:4 (2007) **Journal of Sustainable Development in Africa** pp.247-274 p.247.Available at**http://www.jsd-africa.com/Jsda/V9n4_Winter2007/PDF/DemocraGovt.pdf**. Accessed on 24 July 2010.

The third factor is that Kibaki became President on the strength of a vigorous coalition party, NARC. The party had openly promised and campaigned on a platform of a dynamic shift from the cavalier approach in which national affairs were run by the previous regime to improved governance.[891] Fourth, and perhaps most important, Kibaki had promised to have the powers of the president trimmed through legal and constitutional reforms as part of a wider constitutional project.[892] If doubts existed about his promise to share and limit presidential power, then he was, as an opposition figure, well aware of the need for good governance as the litmus test for his rule which undoubtedly aimed at stemming the powers of the presidency. It is for the above reasons, it is argued, that the thousands of Kenyans who turned up for Kibaki's inauguration ceremony had the faith that he would not take long to undo the damage done by past regimes. This drove them to continuously ululate with joy in Kiswahili that "*yote yawezekana bila* Moi (all is possible without Moi)."[893]

The foregoing synopsis of Kibaki's potential ability to pursue the path of good governance, combined with his academic brilliance and wide experience in government, created a euphoric atmosphere and a justified enthusiasm in Kenyans.[894]They surely were convinced that the nature of the country's governance had turned the corner. Indeed, Kibaki's 2002 inauguration speech contained all the traits of a leader committed to good governance.[895]

Reckoning that the country had a long list of problems emanating fromyears of misrule, Kibaki promised that he would be the peoples' chief servant; his leadership would be

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[891] See generally, Murunga and Nasong'o, *op. cit.* note 78 pp1-2.
[892] Murung'a and Nasong'o, *ibid* note 891 pp1-2.
[893] Musambayi, *op. cit.* note 586 p13.
[894] Murunga and Nasong'o, *op. cit.* note 78 pp1-2.
[895] See generally, Kiambi, *op.cit.* note 76. Also see Mwai Kibaki, "President Kibaki's Speech to the Nation on his Inauguration as Kenya's third President," **State House** 30/12/2002." Available at http://www.statehousekenya.go.ke/speeches/kibaki/2002301201.htm

accountable, responsive, transparent and innovative; the authority of Parliament and the independence of the judiciary would be restored and that corruption would cease to be a way of life in Kenya.[896] As pointed out in chapter two of this thesis, these promises are the main ingredients of the notion of good governance.

Kibaki's inaugural speech and the MoU were the litmus tests of his pledge to democratise the country on the basis of good governance. The MoU promised that the coalition partners would embark on constitutional review within 100 days, establish new institutions of governance as the existing ones were strengthened and, quite crucial, trim the powers of the presidency.[897] The powers of the presidency were to be tamed by creating the position of Prime Minister which was to be occupied by Raila Odinga.[898] It is on the foundations of Kibaki's vow to entrench the tenets of good governance and to move the process for the enactment of a new Constitution, that the central features of his first term as President are examined. Kibaki's further disconcerting governance dynamics under the new constitutional dispensation are examined in the next chapter. This will enhance the popular participation theme, the central thesis in this study.

5.2.2 Kibaki and Good Governance: Crucial Disillusionments

It is argued that an inquiry into President Kibaki's commitment to good governance clearly demonstrates that his pre-election promises and inaugural speech were not ideological postulations but, in general, mere political rhetoric. Indeed, and as discussed here, some decisions taken by Kibaki have been inconsistent with the basic tenets of democracy. This, perhaps, is a pointer to the fact that Kibaki had learnt from Kenyatta and Moi how to derive

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[896] Kiambi, *ibid* note 895 p4.
[897] Murunga and Nasong'o, "Prospects for Democracy in Kenya," in Murunga and Nasong'o *op.cit.*note 78 pp.1-16 p9.
[898] Brown, *op. cit.*note 612 p332. Also see Whitaker and Giersch *op. cit.* note 79 p5.

maximum benefit from incumbency. These include political and economic corruption, meddling with the judiciary, and failure to avert corrupt practices in the National Assembly. Most important was his lackluster attitude towards the commencement of genuine constitutional reforms. This approach nearly threw the country into an abyss after his disputed 2007 election victory. These shortcomings will be elaborated on in the sections that follow.

5.2.2.1 **Promoting Tribalism and Corruption**

After becoming the President in 2002, Kibaki surrounded himself with close associates from the larger Kikuyu tribe, comprising the Gikuyu, Embu and Meru (GEMA) ethnic groups.[899] It is clear then that Kibaki reverted to the worst excesses of Kenyatta, a fellow Kikuyu. These old Kibaki friends are also well-known businessmen, colloquially called the '*Mount Kenya Mafia.*'[900] He trashed the coalition agreement and made crucial government appointments without consulting the coalition partners led by Raila Odinga but rather on the advice from his old cronies in this *Mafia*.[901]

Kibaki also assigned his cronies the most meaningful positions in the public service and government agencies and therefore "*Kikuyunising*" the civil service.[902] In 2005, for instance, the head of the Civil Service, Security Minister, Finance Minister, Justice Minister, Chief Justice, the head of the Criminal Investigations Department and the Kenya Anti-Corruption Commission's chief executive were all Kikuyus.[903] Even under the new constitutional

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899 Murunga and Nasong'o, *op. cit.* note 78 pp7-8.
900 See generally, Whitaker and Giersch *op. cit.* note 79 and Murunga and Nasong'o *ibid* note 899.
901 Brown *op. cit.* note 612 pp333-334.
902 Ngunyi *op. cit.* note 880 p6.
903 Murunga and Nasong'o, *op. cit.* note 78 p11. Also see generally, Horowitz, "Power-Sharing in Kenya," **University of California, San Diego:** Paper Prepared for Presentation at the Workshop on Political Inclusion

dispensation, most of the key positions in government are still in the hands of the Kikuyu or the larger GEMA tribe, including the Attorney-General and the Ministers of Energy and Finance.

President Kibaki's inability to steer the country as anticipated has also been demonstrated in his ineptitude or lack of political will to fight perhaps the worst governance crisis Kenya has ever faced, namely, corruption. As noted by Justice (Retired) Ringera at a time when he was the Director and Chief Executive of the Kenya Anti-Corruption Commission Agency (KACA), "the regime change in Kenya in the General Elections of December 2002 was driven largely by citizens' wrath on corruption."[904] But by entrenching political tribalism, Kibaki created an enabling environment for graft to thrive, and thus it became near impossible for him to combat the most damning crisis of Kenya's governance. For instance, July 2006 saw the allocation of more funds for the construction of roads in the regions represented in parliament by Kibaki's "inner circle than was allocated to areas whose leaders were in opposition."[905]

As a new strategy in fighting graft, Kibaki had in February 2006 appointed the respected John Githongo, a Kikuyu and formerly of Transparency International, Kenya Chapter, as the Permanent Secretary for Ethics and Governance.[906] Unfortunately, Githongo could not handle the heat and the forces behind high-level graft in Kibaki's government and had to flee the country.[907] Githongo feared for his life after declining attempts to be silenced by close Kibaki

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in Africa, American University April 24-29 2009, available at http://www.american.edu/sis/.../Paper 2-Kenya-Power-Sharing-Horowitz.pdf, accessed on 4 October 2011.

[904] Ringera, "Corruption in the Judiciary," **The Kenya Anti-Corruption Commission**. Paper presented at the World Bank, Washington D.C. on 25th April 2007 p.9. Available at **http://www.kacc.gov.ke/archieves/Speeches/Justice_Ringera_Presentation200407.pdf** .Accessed on 10 June 2010.

[905] Wrong,*op.cit*.note 557 p53.

[906] Murunga and Nasong'o *op. cit*. note 78 p4.

[907] See generally, Wrong, *op. cit*. note 557.

confidants over the $34 million corruption scandal involving the Anglo Leasing and Finance Company Limited. The compay had not participated in a transparent tendering process.[908] However, one of Kibaki's closest confidants, Kitaitu Murungi, was re-appointed to the Cabinet in 2006 in what was said to have been a 2007 elections strategy by Kibaki.[909]

In 2006, some Kenyan MPs visited Githongo in London. While there, Githongo told them of the involvement of government ministers in collusion "worth hundreds of millions of dollars with companies that either did not exist or massively inflated their prices."[910] During the same year, there were reluctant resignations on corruption charges of three Cabinet Ministers, Chris Murungaru, Kiraitu Murungi and David Mwiraria who were closely associated with Kibaki.[911]

However, more pressure on the government to combat corruption with more resolve was exerted by civil society formations, the media and others which seem not to have been well-received by the regime. One night in late February 2006, the *Standard* newspaper and its associate television station, Kenya Television Network (KTN), were "on security grounds" raided *Mafia*-style by state-sponsored criminals and lots of equipment destroyed and others taken away.[912] John Michuki, the Minister in-charge of security at the time, responded to criticisms leveled at the Government for the raid by arrogantly saying that "if you rattle a snake, you should be ready to be bitten."[913]

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[908] Wrong, *ibid* note 907 p70.
[909] Mars Group, "Saitoti and Kiraitu Back in Cabinet Reshuffle," report adopted from the *Daily Nation*, 16 November 2006. Available at www.marsgroupkenya.org . Accesssed 6 October 2012.
[910] BBC News Africa, "Graft Evidence Stuns Kenyan MPs" 11 February, 2006. Available at **http://news.bbc.co.uk/2/hi/africa/4704656.stm** .Accessed on 12 May 2010.
[911] Whitaker and Giersch, *op. cit.* note 79 p14.
[912] BBC News, "Kenya Admits Armed Raid on Paper," Whitaker and Giersch *ibid* note 782 p14.
[913] International Commission of Jurists, Kenya "Statement on Government's Explanation of Raid on KTN and *Standard Newspapers*," 3 March 2006, p1.Available at http://www.icj-kenya.org, accessed on 26 February 2011.

Expressing its shock at the Government's unacceptable explanation and reaction to the raid, the International Commission of Jurists (ICJ), Kenya Chapter, in a statement reminded the Minister that the "state security" ground for the raid was similar to the behaviour of the colonial administration and previous independence governments.[914]

The 2009 re-appointment of Mr. Justice Ringera by President Kibaki for a five-year term as the director of the anti-corruption agency, KACA, demonstrates the President's disregard for the law and lack of passion to combat corruption in the country. The general consensus in the country was that Ringera had failed to steer the anti-corruption battle and did not deserve another term.[915]Coming from the GEMA community, and considering the all-important role of fighting graft, Ringera's re-appointment must have been viewed as a form of political patronage by Kibaki. This must have been a huge dent to the institutional and operational autonomy of the KACC. Worse still, and as an unequivocal illustration of Kibaki's support for authoritarianism, Ringera's re-appointment was in total violation of the clear and simple mandatory procedure contained in the Anti-Corruption and Economic Crimes Act, 2003.

Section 8(3) of this Act states that "the director and the assistant directors shall be persons recommended by the Advisory Board and approved by the National Assembly for appointment to their respective positions." It is after the approval by Parliament that, under s.8 (4), the President was supposed to re-appoint Ringera. Pressure was exerted on the

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[914] ICJ, *ibid* note 913 p1.

[915] *Daily Nation*, "Ringera: Uproar over Kibaki's 'Illegal' Move," 1 September 2009. Available at **http://www.nation.co.ke/News/-/1056/651704/-/umqjwm/-/index.htm**.Accessed on 1 August 2010. The newspaper report mentions some of the civil society groups which opposed Ringera's re-appointment as the Law Society of Kenya and Transparency International. The KACC Advisory Board also complained of its non-involvement by the President.

President by Parliament and the civil society groups for him to rescind the appointment which he declined to do. However, Ringera eventually resigned on his own volition.[916]

5.2.2.2 Independence of the Judiciary

Apart from the lack of a serious political will by the Kibaki presidency to combat corruption and tribalism, Kibaki seems to have had considerable control in the way the judiciary under the old Constitution was managed. This must have interfered with the independence of the judiciary as examined below.

The case of *Kariuki and 2 Others v Minister for Gender, Sports, Culture and Social Services and 2 Others*[917] was decided within two years of "reformist" Kibaki's reign. In that case, the High Court had issued a restraining order for the Minister not to inaugurate a Stakeholders Transition Committee to replace the officials of the Kenya Football Federation. The Minister nevertheless proceeded to inaugurate the officials. The law of contempt, generally inherited from England at Kenya's independence, is that personal service of the court order is mandatory for one to be held to be in contempt, in addition to a penal notice indicating the consequences in case of failure to comply with the order.[918] In this case, the contemnor's attorney had been served with the order together with the endorsement on penal consequences.

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[916] See *The Guardian*, "Head of Kenya's Anti-Corruption Commission Aaron Ringera Resigns." Available at **http://www.guardian.co.uk/world/2009/sep/30/kenya**.Accessed on 1 August 2010. This report says that Kibaki makes "public sector appointments with little reference to the candidates suitability, and that although Ringera had been re-appointed, he had Ring failed to secure a single conviction for a high-level government official on corruption charges.

[917] *Kariuki and 2 Others v Minister for Gender, Sports, Culture & Social Services & 2 Others* [2004]1KLR 588.Available at **http://kenyalaw.org/**. Accessed on 23 May 2011.

[918] *Kariuki*, *ibid* note 917 pp 594-595.

It was not possible for the order to be personally served on the Minister because his bodyguards physically restrained the process server to effect service, a contention which the Court accepted.[919] In an express admission of the executive's disregard of the law, and the Court's apparent helpless position, the Court lamented about the "increasing trend of Government Ministers to behave as if they are in competition with the courts as to who has more "*muscle,*" when their decisions were questioned in court!"[920] The Court held that service was higher than knowledge, and, since service was frustrated by the Minister's bodyguards, it firmly held "in accord with the existing law that there was no service."[921]

Another illustration of interference with the judiciary took place in 2006. In that year, a swearing-in ceremony of lawyers as judges at State House was embarrassingly aborted. Subsequent comments by the then Chief Justice, Evans Gicheru, clearly manifest Kibaki's desire to control the judiciary. On 6 December 2006, Chief Justice Gicheru left his chambers for State House in the company of three lawyers, in full legal regalia that were to be sworn-in as judges.

The four could not get past the State House gate as the ceremony had been cancelled without notice to them.[922] It was in 2009, after retiring from the judiciary, that Gicheru angrily revealed why the 2006 function could not take place. He accused a Cabinet Minister for the aborted ceremony and interference with the independence of the judiciary. He argued that, "a judiciary which is directed by the Executive on what to do is not fit to be called a judiciary."[923]

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[919] *Kariuki* , *ibid* note 918 p595.
[920] *Kariuki*, *ibid* note 919 p592.
[921] *Kariuki*, *ibid* note 920 p595.
[922] Allafrica.com, "Kenya: Judges Swearing Put off Abruptly", available at http:// allafrica.com/stories/2006, accessed on 23 September 2010.
[923] *Daily Nation*, 30 March 2009, "Why Judges Swearing-in was Cancelled," available at http://www.nation.co.ke/News/-/1056/549016/-/u37odo/-/index.html, accessed on 10 November, 2010. Also

The 2008 Commission of Inquiry on Post-Election Violence (CIPEV) report and that of the UN Special Rapporteur on Extra-Judicial, Summary or Arbitrary Execution, Philip Alston, aptly demonstrate that Kibaki was not committed to combating corruption in the judiciary. The CIPEV Report pointed out that the judiciary had for long been accused of inability to enforce democratic governance in Kenya, consequently losing the faith of the people, which made the Orange Democratic Movement (ODM) decline to refer the dispute over the 2007 presidential election results to the courts.[924]

In the view of CIPEV Commissioners, the above-mentioned and other mounting challenges facing the judiciary could only be substantially addressed by a comprehensive constitutional review.[925] The Alston Report, which came under heavy criticism by the Kibaki administration for its alleged non-involvement in the investigations, was more succinct. It stated that the judiciary in Kenya:

> ... has been an obstacle in the path to a smooth-functioning criminal justice system, the appointments are crony opaque, there are extra-ordinary levels of corruption and payments are made to judges and magistrates for files to be 'lost' or cases to be decided in a certain way.[926]

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see the Kenya Section of the International Commission of Jurists, "Cancellation of the Swearing-in Ceremony for High Court Judges," 26 December 2006. Available at http://www.icj-kenya.org/index2.php?option=com_content&do_pdf=1, accessed on 10 November 2010.

924 CIPEV, *op.cit*.note 57 pp 460-461.

925 CIPEV, *ibid* note 924 p461.

926 UN's Human Rights Council, "Report of the Special Rapporteur on Extra-judicial, Summary or Arbitrary Executions: Mr. Philip Alston's Mission to Kenya," (The Alston's Report) A/HRC/11/2/Add.6 26 May 2009 p.21. Available at **http://www.nation.co.ke/blob/view/-/603988/data/80344/-/bdlk&iz/-/report.pdf.** Accessed on 10 July 2010. On the government's criticism of the report, see Daily Nation, "Death Squads: Kenya Plots to Oust Alston," 7 June, 2009. Available at **www.nation.co.ke** . Accessed on 10 April 2013.

It seems that not much has changed under the new constitutional dispensation. One JSC commissioner refers to the judiciary as "corrupt" and "discredited."[927] However, it is hoped that the judiciary mainly under the revitalised JSC will address corruption and other ills. This would help in the restoration of people's confidence in the judiciary which is a cardinal institution in the struggle for a new democratic culture and the observance of the rule of law.[928]

5.2.2.3 **Corruption in the Legislature**

The theory underpinning the doctrine of separation of powers "is to prevent the excessive concentration of power in one person or a single body."[929] As explained by Madison, a law-making body "must in all cases be a salutary check on the government."[930] He cautioned that certain consequences occurred if such an institution was not credible, for instance, if those in charge of this institution "forget their obligations to their constituents, and prove unfaithful to their important trust."[931]

The National Assembly is probably the most forceful institution in Kenya which can be used to promote good governance.[932] Kibaki's presidency has however failed to ensure that the National Assembly effectively plays this role. In Kenya, the constitutional power of the National Assembly, as a watchdog of the executive, mainly arises from four responsibilities

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927 See generally, JSC's Commissioner, Abdullahi, "Restoring Public Confidence in Kenya's Discredited, Corrupt, Inefficient and Overburdened Judiciary: The Judicial Service Commission's Agenda for Reform," **Paper Presented at the Judges Colloquium,** Mombasa, 14-19 August 2011. Available at www.kenyalaw.org . Accessed on 10 October 2012.

928 Abdullahi, *ibid* note 927 p1.

929 Currie and de Waal *op. cit.* note 218 p18.

930 Madison, "The Federalist No. 62: The Senate." Available at **http://www.constitution.org/fed/federa62.htm p 2.**Accessed on 4 November 2010.

931 Madison, *ibid* note 930 p2.

932 Transparency International, Kenya, "A Report on Integrity: A Study of the Kenyan Parliament," March 30, 2010. Available at **http://www.tikenya.org/documents/parliamentary_integrity_Study_2010.doc**p.5.Accessed on 6 August 2010.

which it has to discharge: law-making power, oversight authority over the executive, power of the purse and approval of certain appointments to public offices.[933] These important governance tasks cannot be effectively discharged by a legislature whose members are easily manipulated, essentially through corruption. Kenyan MPs are known to be corrupt, from the time of seeking votes when they start to dent the democratic process by bribing voters to their activities in the National Assembly.[934]

In the National Assembly, MPs receive bribes to vote in a particular way, turning the legislature into an "auction house where the highest bidder won crucial battles, even if not in the interests of Kenyans."[935] Bribes have been attributed to a Chairperson of a Parliamentary Committee and other MPs in debates for the adoption of key committee reports.[936] Perhaps that is why the US $122 million supplementary budget "oversight" by the Minister for Finance could only be unearthed by Mars Group, a civil society organisation, but not by Parliament or any of its committees.[937]

In June 2010, Prime Minister Odinga alleged that in Parliament, MPs raise questions on governments tendering processes "in cash-for-question" deals.[938] Despite such unethical practices, and not being mindful of the abject poverty facing most Kenyans, the MPs resolved in July 2010 to increase their already excessive pay to £29, 000 per year, with the Prime Minister to earn "over a third more than his British counterpart and earn almost 10% more

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933 Transparency International, *ibid* note 932 pp5-6.
934 Transparency International, *ibid* note 933 p6.
935 *The Standard*, 29 December 2009, "MPs Corrupt at Expense of Kenya," as quoted in Transparency International *ibid* note 934 p7.
936 Transparency International, *op. cit.* note 932 p7.
937 See generally, Mars Group: Mars Group Kenya Submissions to the Budget Committee on the Expenditure and Revenue Estimates of the Government of Kenya for the Financial Year Ending June 2012. Available at **www.marsgroup.org** . 27 June 2012. Accessed on 30 June 2012.
938 *The Standard,* "Raila's Speech on Checks Leaves MPs Grumbling." 23 June 2010. Available at **http://www.standardmedia.co.ke/InsidePage.php.?id=2000012298&cid=4&story=Raila's...** p.1. Accessed on 24 June 2010.

than the USA President."[939] In April 2012, under the watchful eye of the new Constitution, there were allegations of MPs receiving bribes so as to pass the Finance Bill. The Bill was passed after MPs doubled their gratuity and becoming eligible to life-long pensions and other benefits. Most of the benefits were backdated to 2006.[940]

The predominance of the executive over parliament and other organs of state further dilute the oversight role of parliament. This is an "African problem," where more than half of its legislatures are under presidential influence including the official and personal power of the president.[941] In Kenya, presidential influence on the legislature has produced a culture of impunity "whereby the executive has the ability to undermine and subvert the efficacy of many laws that parliament has been passing."[942]

Any hope for a new paradigm for parliamentary business seems to be fading fast even under the Kibaki regime which was elected on a reforms platform, mainly promising to combat corruption and political tribalism. In June 2011, *Parliamentary Centre* named Kenya's Parliament as one of the "most dishonest institutions of legislation in Africa."[943] Out of seven countries that were assessed, only Kenya's Parliament failed to achieve a pass mark of 5, scoring 4.7 out of 10 points. Uganda got 7; Tanzania 6.7; Zambia 7; Benin 7.8; Ghana 6.8 and Senegal 7.2.[944] Kenya's Parliament has shown no interest in enforcing a code of conduct

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939 BBC News, 1 July 2010, "Kenya MPs Vote to Join World's Best Paid Lawmakers." Available at **http://www.bbc.co.uk/news/0476388**.Accessed on 6 July 2010.

940 *The Standard*, "MPs in Secret Pay Deal," 21 April 2012. Available at **http://www.standardmedia.co.ke**.Accessed on 21 April 2012.

941 All Africa Parliamentary Group Report (AAPG), "Strengthening Parliaments in Africa: Improving Support," March 2008. Available at **http://siteresources.worldbank.org/PSGL/Resources/StrengtheningParliamentsinAfrica.pdf** p27.

942 AAPG, *ibid* note 941 p 27.

943 Parliamentary Centre: Status Report: African Parliamentary Index. Available at **http://www.parlcentafrica.org/index** . Also see *Daily Nation*, 9 October 2011. Available at **http://www.nation.co.ke.** Accessed in June 2011

944 Parliamentary Centre, *ibid* note 943 p 27.

and in combating corruption. This is evidenced by MPs embezzlement of Constituency Development Fund (CDF), money laundering and drug trafficking.[945]

5.3 KIBAKI AND THE WAKO-v-THE BOMAS DRAFT CONSTITUTIONS

As an opposition leader, Kibaki was involved in the struggle for constitution-making process from its early stages. The key players however were not politicians but the various civil society formations involved in the struggle for multi-partism as examined in chapter four of this study. However, the natural expectation was that President Kibaki would maintain the same passion for an overhaul of the Constitution and democratisation in general. What transpired was that Kibaki had his own agenda. This manifested itself in the "Wako" Draft while most of those involved in the making of a constitution favoured the "Bomas" Draft.

Cottrell and Ghai observe that after the 2002 opposition victory, the general understanding among all parties was that the constitutional review process had to be democratic, participatory and transparent.[946] After taking office, the LDP and NAK arms of the NARC coalition strongly disagreed on whether the country should adopt a constitution with an executive president or a parliamentary system, with the latter granting some executive powers to a prime minister.[947]

The 2004 Bomas Draft was prepared by the National Constitutional Conference (NCC), through what Cottrell and Ghai consider a people-driven and all-inclusive process.[948]

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945 *Daily Nation, op. cit*. note 943.
946 Cottrell and Ghai, "Constitution Making and Democratization in Kenya (2000-2005),"14:1 (2007) **Democratization** pp.1-25 p.1. Available at **http://ejscontent.ebsco.com/ContentServer.aspx**.Accessed on 30 June 2010.
947 Whitaker and Giersch, *op. cit*. note 79 p6.
948 Cottrell and Ghai, *op. cit.* note 946 pp7-12.

However, the argument in this thesis is that the Bomas Draft did not meet the threshold of a people-driven constitution. The Draft was not received well by Kibaki's NAK Party, whose delegates walked out of the conference, demanding Parliament to amend it.[949] The absence of those who opposed the Draft left "the delegates to vote for a system that the government incumbents could not stomach."[950]

Before the Drafts are examined, it is necessary to examine perhaps the most important case in the history of Kenya's constitution-building, *Njoya and 6 Others v Attorney-General and 3 Others*[951] due to its impact on the constitutional review process. In the *Njoya* case, the High Court was approached to determine the constitutional validity of the legislative process initiated by the CKRA 1997. The applicants' argument was that the review commissioners were not appointed by the people as their constituent assembly. Due to the strong nexus between a constituent assembly and popular participation in constitution-building, these aspects are examined in detail in the next chapter. Second, the Court was called upon to interpret section 47 of the Constitution which vested power to amend the Constitution in Parliament. Nowhere was Parliament empowered to abrogate, repeal or replace the Constitution.

Shattering the entire Bomas process, the Court held that the National Assembly had "no power under the provisions of section 47 of the Constitution to abrogate the Constitution and or enact a new one in its place."[952] In arriving at this finding, the Court applied a textual or

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[949] Whitaker and Giersch *op. cit.* note 79 p6.
[950] Cottrell and Ghai, *op cit* note 946 p12.
[951] *Njoya & 6 Others v Attorney-General & 6 Others* (2008) 2 KLR 658 (EP) .Available at **http://kenyalaw.org**. Accessed on 23 May 2011.
[952] *Njoya*, *ibid* note 951 p694.

plain meaning of the word "alter" in section 47(1) which the Court found did not include the replacement or abrogation of the Constitution by the National Assembly.[953]

The *Njoya* judgment meant the end of the road for the Bomas constitutional review initiatives as Parliament could not replace the Constitution. After this decision, the constitution-making process was hijacked by politicians with the result that the Constitution of Kenya (Amendment) Bill 2004 was tabled in Parliament to amend the CKRA to empower Parliament to amend the Draft Constitution by a 65 per cent majority.[954] The Bill was passed by Parliament but the President declined to assent to it, arguing that under the Constitution, it was only Bills intending to amend the Constitution which required 65 per cent majority.[955] The Bill became the Constitution of Kenya Review (Amendment) Act 2004 when the simple majority provision was inserted, causing an outcry in the anti-Kibaki group of the coalition.[956]

5.3.1 The "Wako" Draft and Kibaki's 100-days' Pledge

At a 2005 meeting of Members of Parliament held at Kilifi in the Coast Province, solutions were suggested on the contentious issues in the Bomas Draft. The meeting was a continuation of a 2004 meeting held for the same purpose. KANU and Odinga's LDP did not participate in the 2005 meeting, insisting on the original Bomas Draft.[957] The Attorney General, Amos Wako, crafted a Constitution from the Kilifi meeting, the Proposed Constitution of Kenya 2005, what section 2 of the Review Act says is "commonly called the Wako Draft." Cottrell and Ghai have argued that although Kibaki had earlier defended the Bomas Draft while in the

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953 *Njoya, ibid* note 952 p694.
954 Section 2 of the Constitution of Kenya (Amendment) Bill 2006 and Cottrell and Ghai *op. cit.* note 946 p16.
955 See section 47 (2) of the Constitution of the Republic of Kenya 1963.
956 Cottrell and Ghai, *op. cit.* note 946 p16.
957 Whitaker and Giersch, *op. cit.* note 79 p16.

opposition, as President, he and his Justice Minister who was previously a human rights activist, lost enthusiasm and indeed opposed the Draft.[958]

Kibaki's loss of enthusiasm in the review process, especially the Bomas Draft, seems to be explicable on his desire to retain, as President, authoritarian executive powers. The agony of the pro-democracy forces in the review process over Kibaki's tactics to avert devolution of power is easy to discern upon an examination of the provisions for the appointment, and responsibilities of the Prime Minister in both the Bomas and Wako Drafts. The Bomas Draft mandated the President with the power to appoint, as Prime Minister, a member of the National Assembly who was the leader of the largest political party or coalition of parties represented in the National Assembly.[959] It also vested executive authority on the Prime Minister, by making him or her Head of Government with the duties, among others, of coordinating the work of the ministries, preparation of legislation and presiding at Cabinet meetings.[960]

The Wako Draft had the hallmarks of presidential authoritarianism regarding the sharing of executive power. The draft mandated the President to propose to Parliament an MP for appointment as Prime Minister. In default of approval by Parliament of the President's two successive choices, the President could appoint a Member of Parliament as Prime Minister.[961] According to one of Kibaki's confidants and Cabinet Minister, the late John Michuki, devolution of presidential power was no longer necessary because Kibaki, unlike his predecessor Moi, "was a good President."[962]

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[958] Cottrell and Ghai *op.cit.*note 946 p2.

[959] Section 173(1) of "The Draft Constitution of Kenya," (Bomas Draft) **National Constitutional Conference** 2004.Available at **http://www.scrib.com/doc/438024/Bomas-Draft-2004**. Accessed on 23 May 2010.

[960] Section172 (1) and (2) of the Bomas Draft *ibid* note 959.

[961] See section 164 (1)-(6) of the Wako Draft. Available at **http://raila2007.files.wordpress.com/2007/10/wako_kilifi_constitution.pdf**.Accessed on 23 May 2010.

[962] Minister John Michuki as reported in *The Standard* newspaper of 18 September, 2003 as quoted in Murunga

The Wako Draft placed the Prime Minister under the President's hegemony as he or she was accountable to the President. The Prime Minister was under the President's general direction and performed or caused to perform, other duties given to him or her by the President.[963] These provisions had no smack of the supreme law preferred by Kibaki in the Moi era. Kibaki's political machinations, perhaps, confirm Ndegwa's argument that Kenya's constitutional reform debate has revealed major distinctions between politicians and the civil society movements. While politicians pursued a satisfying agenda, "the latter pursued a maximizing agenda."[964] It should however be observed that with the exception of the KHRC, the "maximizing agenda" of civil society movements came to an end with Kibaki's election as President under NARC.[965] As it turned out later and as argued below, it was a costly mistake to shelve democratisation initiatives simply because Moi had left the political arena.

Kibaki's meddling with the constitutional review process, bolstered by complaints from anti-Kibaki elements of the NARC coalition that he had reneged on the MoU, steepened the road towards a smooth sailing of the Wako Draft in the 2005 referendum.[966] In the circumstances, it was no surprise therefore that the Draft was shot down in the referendum. This happened although Kibaki dished out the state's resources to see the Draft receive the support of Kenyans. "Gifts" included, for instance, issuing of land titles, creating more districts, elevating colleges into universities and doubling salaries of the provincial administration,

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and Nasong'o, *op.cit.*note 78 p11.

963 Section 163 (1) (2) of the Wako Draft Constitution.

964 Ndegwa, "The Incomplete Transition: The Constitutional and Electoral Context in Kenya." 45:2 (1998) **Africa Today** pp193-212, available at http://find.galegroup.com/gtx/retrieve.do?contentset=IA-Documents p.7.

965 Nzomo, "Civil Society in the Kenyan Political Transition," in Oyugi *et. al. op. cit.* note 865 pp180-211 p202-203.

966 Whitaker and Giersch, *op. cit.* note 79 p8.

especially chiefs.[967] Those behind the "Orange," the symbol representing the opponents of the Draft, celebrated victory but promised to push for meaningful constitutional changes.[968]

Kibaki might have seen the defeat of the Wako Draft as a challenge to his authority. He dropped Odinga and a group of Ministers associated with him from his Cabinet, thereby failing to unite the country. The lethal impact was that this killed the MoU, the vehicle which propelled him to the presidency.[969] Kenyans went into elections in 2007, two years after the referendum, without a new Constitution. This must have been a long and painful wait, taking into account Kibaki's promise in his inaugural speech of a new Constitution within 100 days.

Depriving Kenyans of key reforms significantly contributed to the 2007 presidential election fiasco which was a battle between President Kibaki and Odinga, the key personalities behind the 2002 MoU. Kibaki's failure to initiate genuine constitutional reforms was also the genesis of the ensuing 2007 post-election mayhem which erupted after Kibaki was controversially declared the winner. Because of the central role played by the violence in the constitution-making process, it is necessary to now examine this episode.

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967 Whitaker and Giersch *ibid* note 961 p9.

968 Kibaki's desire for the retention of an authoritarian presidency is said to have included "issuing land titles to displaced squatters (despite a High Court injunction), handing over Amboseli National Park to a local council, creating additional districts, elevating a technical school to university status, doubling salaries of local chiefs, and distributing relief food in areas at risk of famine." See Whitaker and Giersch, *ibid* note 962 p9.

969 CIPEV, *op.cit*.note 57 p30.

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5.4 THE 2007 GENERAL ELECTION AND ITS AFTERMA

OVERVIEW

5.4.1 Context and Background

The December 2007 election was Kenya's ninth since independence.[970] The p parliamentary elections were contests mainly between Kibaki's Party of (PNU) and Odinga's Orange Democratic Movement (ODM). ODM had split Musyoka's Orange Democratic Movement of Kenya (ODM-K). ODM-K em symbol "Orange" which was victorious against Kibaki's "Banana" symbol in t constitutional referendum in 2005.[971]

PNU, an alliance of twenty parties, had been formed four months before the g and they fielded Kibaki as their presidential candidate. However, the various PNU coalition could field their own parliamentary and civic candidates.[972]PN promises were among others, free secondary education, creation of mor opportunities, a corrupt-free Cabinet and infrastructural development.[973]

Considering Kenya's governance ills since independence, ODM's promises exciting to a majority of the electorate. They included a new Constitution with combating corruption, eradication of poverty, devolution of state power to t improved security and equitable distribution of resources.[974]The highly tribal cc the election is depicted in the 2008 report of the Independent Review Comm

[970] Commonwealth Secretariat: **Report of the Kenya 2007 General Elections**., 2008 Available **www.thecommonwealth.org.** Accessed on 12 August 2010 p5
[971] Commonwealth Secretariat, *ibid* note 970 p5.
[972] Commonwealth Secretariat, *ibid* note 971 p5.
[973] Commonwealth Secretariat, *ibid* note 972 p5.
[974] Commonwealth Secretariat, *ibid* note 973 p5.

had promised to do.[979] Undoubtedly, this increased perceptions of partiality against the opposition as Kibaki was exploiting the powers of his incumbency to his advantage.

The desirability of having and maintaining the integrity and independence of Electoral Management Bodies (EMBs), like the ECK, has been emphasized by the judiciary in certain jurisdictions. In South Africa, for instance, the Independent Electoral Commission is under section 181 (1) of the Constitution one of the independent state institutions established to strengthen democracy in that country. Section 181 (1) (f) provides that in the exercise of its functions, the Commission should be impartial and act without fear, favour or prejudice. The importance of this body in post-apartheid South Africa was recognised by the CCSA in the case *of New National Party of South Africa v Government of the Republic of South Africa and Others*,[980] as a "product of new constitutionalism. The organs of state should assist in order to ensure its independence, impartiality, dignity and effectiveness."[981]

EMBs are seen as central institutional pillars of democracy and their transparency is necessary to avoid "mutual suspicion and mistrust among political actors."[982] It is on this basis, it is submitted, that Kibaki should not only have consulted the opposition in the appointment of the Commissioners but he was also enjoined to facilitate the realisation of ECK's impartiality, effectiveness and integrity, its central constitutional attributes. It is submitted that this grave failure was the central cause behind the ECK's incompetence in its handling of the 2007 elections. As it turned out, the presidential results which were announced by the ECK were rigged because the process was perverted, starting from the

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[979] Department for International Development (DFID) United Kingdom, "**Elections in Kenya in 2007,**" p2, available at **http://www.dfid.gov.uk/Documents/publications1/elections/elections-ke-2007pdf**. Accessed on 13 July 2011

[980] *New National Party of South Africa v Government of the Republic of South Africa and Others*(1999) SA 191

[981] *New National Party*, *ibid* note 980 para 78 per Yacoob, J.

[982] Omotola, "Explaining Electoral Violence in Africa's "new" Democracies 10:3 (2010) **African Journal on Conflict Resolution** 51-73 p66, available at http://www.ajol.info/index.php/ajcr/artticle/viewFile/63320/51203. Accessed on 22 August 2010.

polling stations. For this reason, the results were "so inaccurate as to render any reasonably accurate, reliable and convincing conclusion impossible."[983]

The pathologies of fraud are documented by the KHRC and the Kriegler reports. They included the high turnout figures in the strongholds of the main political parties, vote buying and or bribery, ballot-stuffing, political parties declaring certain areas "no go zones" and therefore excluding the "opposition,"inordinate delays in the tallying of the votes, and poor or no communication between the ECK and political parties.[984] It was therefore incomprehensible to explain the circumstances under which the ECK declared Kibaki the winner of the presidential elections on 30 December 2007. This is compounded by later admission of the Chairperson at the time, Samuel Kivutu that he did not know if Kibaki had won the election.[985] The 2007 elections therefore clearly failed to satisfy the minimum threshold of "free and fair elections."

Writing for the UNDP, Lopez-Pointor argues that "free and fair" elections can only be said to be so if there is "freedom from coercion and fairness as the correlate of impartiality."[986] He further observes that the process involves three stages: Before polling day, on polling day and after polling day. Before polling day, there should be freedom of movement, speech, assembly and association, and freedom from fear in relation to the election.[987] Fairness on polling day includes accessing the polling station by all political parties' supporters and their representatives, appropriate counting procedures and non-intimidation of voters. After polling

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[983] Kriegler, *op. cit*. note 975 p10.

[984] See generally, Kenya Human Rights Commission (KHRC), "Violating the Vote: A Report of the 2007 General Elections," Nairobi: Acme Press (K) Ltd 2008. Also see Kriegler *ibid* note 963 pp10-11

[985] *The Telegraph*, "**Kenya's Poll Chief Does not know if Kibaki Won**," 3rd January 2008 p1. Available at http://www.telegraph.co.uk, Accessed on 7 April 2011.

[986] Lopez-Pointor, "Electoral Management Bodies as Institutions of Governance," UNDP: Bureau for Development Policy, 2000 p103. Available at http://www.pagor.org/.../other/undp/elections/electoralmgmtbodies-e.pdf, accessed on 23 August 2011.

[987] Lopez-Pointor, *ibid* note 986 p103.

day, there should be expeditious release of results and acceptance of results by the parties involved.[988] It would then appear that Kenya's 2007 election dismally failed to satisfy the requirements for free and fair elections. In the absence of key factors engendering free and fair elections, violence was almost inevitable

5.4.2 The Post-2007 Election Violence and Reconciliation Initiatives

In addition to the over-arching governance ills in existence since Kenya's independence, it is argued that the 2007 presidential election illuminated two major dynamics which indeed set the political stakes quite high. First, President Kibaki had trashed the MoU with Odinga which, undoubtedly, was not received well by Odinga and his supporters who saw Kibaki as "retreating into an ethnic enclave."[989] Second, the 2005 defeat of Kibaki's Wako Draft Constitution in the referendum was succeeded by high political temperatures arising from the two bitterly opposed sides of the referendum, thus fatally contaminating the political atmosphere before the election campaign had even started.

For example, in the Rift Valley, the centre of the post-2007 election violence, people were heavily incited by politicians in the referendum campaigns.[990] According to CIPEV, the Kalenjin were told that the Kibaki Government had unfairly removed their people from government positions. The Kikuyu were seen as "foreigners," and the return of *majimbo* or regionalism as proposed by those against the Wako Draft would enable the Kalenjin to recover their ancestral lands taken by the "foreigners."[991] It is submitted that such promises

[988] Lopez-Pointor *ibid* note 987 p104.
[989] CIPEV, *op.cit.* note 57 p30.
[990] CIPEV, *ibid* note 989 p41.
[991] CIPEV, *ibid* note 990 p41.

confirm Omotola's argument that in Africa, capturing power amounts to capturing everything else.[992]

Further, and a forceful reason for their conviction that they could win the 2007 election, Odinga's ODM had admirably done its geo-political maths. It had in its bag two key voting blocs in the Western part of the country represented by Odinga and his running-mate, Musalia Mudavadi, and most of the Rift Valley represented by William Ruto.[993] This was significantly boosted by representatives of a few other lower key regions in ODM's think tank, the "Pentagon."[994] In the "Pentagon," Najib Balala represented the Coast while Joseph Nyaga and Charity Ngilu represented the Eastern regions with the latter also representing women's interests.[995]

When the ECK declared Kibaki the winner, "an unprecedented wave of violence erupted in several parts of the country."[996] A civil war was looming as Odinga's ODM refused to accept the election outcome. The country's existence as one nation was under siege as ethno-regional blocs emerged.[997] In the course of the violence, 350,000 people were displaced; properties destroyed and about 1,200 valuable lives were lost.[998] On 28 February 2008, an African Union Panel of Eminent Persons consisting of former Secretary-General of the United Nations, Kofi Annan, former Tanzanian President Benjamin Mkapa and Mrs. Graca Machel-Mandela, brought the warring parties, PNU and the ODM, together.[999] The parties

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992 Omotola *op. cit.* note 982 p64.
993 Oucho, "Undercurrents of Post-Election Violence in Kenya". Available at **www.2Warwick.ac.uk** p10. Accessed on 12 April 2012.
994 Oucho, *ibid* note 993 p 10.
995 Oucho, *ibid* note 994 p10.
996 The Kenya National Dialogue and Reconciliation Monitoring Project (KNDR), **Project Context and Summary of Findings,** January 2009 para 1.
997 KNDR, *ibid* note 996 paras 1-2.
998 DFID, *op. cit.* note 979 p2.
999 See generally, the KNDR, *op. cit.* note 996.

signed the Agreement on the Principles of Partnership and Reconciliation in the form of the Kenya National Dialogue and Reconciliation (KNDR).[1000]

The KNDR was the foundation of the National Accord and Reconciliation Act, 2008. The Act led to the entrenchment of the position of Prime Minister in the Constitution and the extent to which the Prime Minister would share executive power with the President. The KNDR also addressed the central issues which urgently needed attention and or reform. Key among them was an end to violence, the humanitarian crisis caused by the displacement of people from their "foreign" homes and, most important, the much delayed constitutional changes, captured in Agenda Item 4. For purposes of this thesis, agenda Item 4 is the most central item of the Annan peace initiative because it captured constitutional reforms as key to reconciliation efforts.

Central to Agenda Item 4 was also the need and urgency to investigate the root causes of the violence which is necessary to examine here. To get to the bottom of the matter, a Committee of Inquiry on Post-Election Violence (CIPEV) (the Waki Commission) chaired by Justice Phillip Waki of the Kenya Court of Appeal, was appointed in May 2008.[1001]After visiting various parts of the country, witnessing the magnitude of the violence and hearing from the victims of the violence among others, the commissioners recommended fundamental constitutional and institutional reforms. This included reforming the criminal justice system, the police and the judiciary so as to address impunity, the bedrock of Kenya's history of discoloured governance.[1002]

[1000] KNDR, *ibid* note 999 para 3.
[1001] CIPEV, *op. cit.* note 57 p1.
[1002] CIPEV, *ibid* note 1001 p480.

CIPEV also presented to Kofi Annan an envelope containing the names of people bearing the heaviest responsibility for the violence. As CIPEV had little faith in the judiciary, it gave a time frame for legal entrenchment and the commencement, of a special tribunal, to try the suspects. In default, CIPEV recommended that the International Criminal Court (ICC) should take over the matter.[1003] Despite the presence of, and, the support of President Kibaki and Prime Minister Odinga in Parliament, the Bill to establish a local tribunal to deal with the suspects was defeated in February 2009.[1004] The MPs had no faith in the country's judiciary and those who had perpetrated the violence had to be tried by the ICC at The Hague.[1005]

In July 2009, Annan handed over the envelope to the ICC Prosecutor, Moreno Ocampo.[1006]After further investigations, Moreno Ocampo named six suspects in December 2010. In what appears to be a balancing act, two key leaders, each from Kibaki and Odinga's camps were named. Those perceived as Kibaki advisors were Deputy Prime Minister Uhuru Kenyatta, former Head of the Civil Service and Secretary to the Cabinet, Francis Muthaura and former Commissioner of Police Hussein Ali. Odinga's ODM had Ministers William Ruto and Henry Kosgey and Joshua Sang, a radio presenter who it seemed was the only "light weight." [1007]

The "Ocampo-Six," as they were called by the Kenyan-media, are now the "Ocampo Four" after charges were not confirmed against two of the six. Pre-Trial Chamber II of the ICC

[1003] CIPEV *ibid* note 1002 p472.

[1004] See generally, Jalloh, "Situation in the Republic of Kenya," 105 (2011) **American Journal of International Law** 540-547. Available at **www.heinonline.org** .Accessed on 5 March 2012. Also see BBC News, "Kenyan MPs Reject Violence Court," 12 February 2009, available at **http://www.bbc.co.uk**p1, accessed on 30 August 2011.

[1005] BBC News, *ibid* note 1004 p1.

[1006] International Criminal Court: ICC Situations and Case-01/09 "Prosecutor Receives Sealed Envelope from Kofi Annan on Post Election Violence in Kenya," available at http://www.icc-cpi.int/menus/icc/situations and cases ...Accessed on 12 July 1011.

[1007] All Africa News, "Kenya: ICC names six suspects," 15 December 2010. Available at http://www.africanews.com .

confirmed charges against the four in January 2012.[1008] They are Uhuru Kenyatta, William Ruto, Francis Muthaura and Joshua Sang.[1009] Kenyatta and Muthaura are Kibaki's confidants while Ruto and Sang campaigned for Odinga's ODM. Hearing of their cases will commence at The Hague from 11 April 2013.[1010]

The CIPEV and ICC initiatives were central aspects of Agenda Item 4. It is argued that the most crucial aspect of this Agenda was that it became the linchpin of constitutional and institutional reforms in Kenya. It is therefore imperative to examine the legislative initiatives established through this Agenda item.

5.4.3 Post-Violence Legislative Initiatives

Two pieces of legislation became what this thesis considers as the bedrock of constitutional reforms. They were the Constitution of Kenya Review Act 9, of 2008 ('the Review Act') and the Constitution of Kenya (Amendment) Act 2008, ('the Amendment Act'). Due to the salient place of the Review Act in this study, especially in connection with the ideal of popular participation as examined in the next chapter, only some pertinent comments on the Act are examined here.

Section 2 of the Amendment Act inserted section 47A to the Constitution. The new section provided for the replacement of the Constitution. The Act then effectively dealt with the main question in the *Njoya* case. In that case, the High Court decided that the National Assembly

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[1008] The International Criminal Court, "The Kenya Monitor," p1.Available at **http://www.icckenya.org/** Accessed on 9 February 2012.

[1009] See generally, ICC Case No. -01/09-02/11 *The Prosecutor v Uhuru Muigai Kenyatta and Francis Kirimi Muthaura*; ICC Case No. ICC-01/09-01/11 *The Prosecutor v William Samoei Ruto and Joshua arap Sang.* Alse see, The International Criminal Court *ibid* note 1008 p1.

[1010] See generally, ICC, "The Kenyan Situation," Available at www.icc-cpi.int. Accessed 6 September 2012.

could not replace the Constitution. It also held that MPs could not make a Constitution for Kenyans without their participation through a referendum.[1011]

The import of section 2 of the Review Act was that it recognised and gave legitimacy to the reconciliation efforts. It defined the "National Dialogue and Reconciliation Committee" as the "Committee established under the auspices of the Panel of Eminent African Personalities to resolve the crisis arising from the December, 2007 elections." Among other objects and purposes, the Review Act provided that it was enacted to provide for the establishment of organs which would facilitate the constitutional review process and to provide mechanisms for consultation with the stakeholders.[1012]

The Review Act established a Committee of Experts (CoE), a body corporate comprising of nine members nominated by the National Assembly and appointed by the President.[1013] The central mandate of the CoE was to identify the non-contentious issues in the "Bomas" and "Wako" Drafts. This was to be done by soliciting and receiving from the public, written memoranda and presentations on the contentious issues, making recommendations to the Parliamentary Select Committee (PSC) on resolution of the contentious issues and the preparation of a Harmonised Draft Constitution (HDC) for presentation to the National Assembly.[1014]

The HDC was presented to the PSC on 24 February 2010.[1015] In January 2010, the PSC held its retreat in the tourist resort town of Naivasha. It came up with certain fundamental changes to the HDC. In particular, the PSC curiously expunged provisions relating to the right to

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[1011] *Njoya*, *op.cit.* note 951 p694.
[1012] Section 3 (a)(b) of the Constitution of Kenya Review Act 9, 2008
[1013] Section 8 of the Constitution of Kenya Review Act 9, 2008
[1014] Section 23 of the Constitution of Kenya Review Act 9, 2008.
[1015] See The Official Website of Committee of Experts, available at **www.coe.kenya.go.ke**. Accessed on 25 February 2011.

information, rights of children and the marginalised, the right to fair administrative action, the establishment of the office of the Public Protector (the Ombudsperson), the Ethics and Anti-Corruption Commission, provisions against floor-crossing and proposed an executive presidential system without a Prime Minister.[1016] According to a senior human rights expert at the KHRC and a member of the reference group formed under section 31(1) of the Review Act to liaise with the CoE on key issues of the review, the reference group opposed the proposals by the PSC because the parliamentary committee intended to "break the spirit of *Wanjiku*, the common person."[1017]

After examining the draft as revised by the PSC in February 2010, the CoE rejected most of the suggested changes. While addressing the PSC at the ceremony for handing over of the draft to the PSC pursuant to section 33(1) of the Review Act, the Chairperson of the CoE, Nzamba Kitonga, said that the CoE had captured their inputs without sacrificing the wishes of Kenyans.[1018]In April 2010, the draft sailed through the National Assembly but after acrimonious debate which prompted the intervention of both principals, Kibaki and Odinga. Kibaki's addressed Parliament in his capacity as MP, the first sitting President to do so in the country's history.[1019]

In May 2010, acting in accordance with section 33(10) of the Review Act, the Attorney-General published the Draft Constitution. Thereafter, the CoE commenced civic education on

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[1016] See generally, Kenya National Assembly," Report of the Parliamentary Select Committee on the Review of the Constitution on the Reviewed Harmonised Draft Constitution," 29 January 2010, available at **http://www.gendergovernancekenya.org/28-report-of-psc-on-the-review.** Accessed on 12 July 2011.

[1017] Personal communication by way of interview, Nairobi: 9th May 2012. Also see Committee of Experts on Constitutional Review, "Progress on the Constitutional Review Process as at October 2009." Available at **www.idphs.org.za/resources/local/.../kenya/CoE_ProgressReport.pdf**. Accessed on 10 March 2012. Also see, generally, Committee of Experts on Constitutional Review: Final Report of the Committee of Experts on Constitutional Review, October 2010.

[1018] Allafrica.com, "Final Version of Draft Law Set for Debate," 24 February 2010. Available at **http://allafrica.com/stories**. Accessed on 12 June 2011.

[1019] Africa News, "Kenya: Parliament Passes Draft Constitution," 3rd April 2010, accessed on 12 January 2010, available at http://www.africanews.com

the draft. Heated debates for and against the Draft commenced in July. As observed by a senior official of the NCCK, the main opponents of the draft, the "NO" camp, were mainly the churches which were against the otherwise controlled abortion provisions in the Draft. Heightening this concern was the draft's adoption of international law ratified by Kenya as part of domestic law which the official observed could be used to permit, for instance, same sex marriages. The official adds that the churches were also opposed to the inclusion of the Islamic Kadhis' Courts.

Their main contention was that the entrenchment of such courts was discriminatory and against other religions. [1020] In addition, and speaking on the position of the Catholic Church, a principal administrator and priest at the Nairobi Arch-Diocese observes that the church was uncomfortable with the manner in which the CoE handled the contentious issues one of which was the Kadhis' Courts. To him, the issue and other contentious matters should have been decided by the people themselves.[1021] He also adds that the constitution-making process "was hurried so as to beat the set deadlines."[1022] It is for the foregoing reasons, perhaps, that a human rights lawyer during the Moi regime and a reforms advocate, observes that the CoE should in fact have been elected by the people.[1023]

Former President Moi was also a "No" crusader, because as argued by some news sources, of the manner in which the draft decentralised power and denied the President more executive authority.[1024] In response to the arguments raised by those opposing the draft, especially the

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[1020] Communication by way of Personal interview, Nairobi 11 May 2012.
[1021] Communication by way of Personal interview, Nairobi 10 May 2012.
[1022] Personal interview, *ibid* note 1021.
[1023] Communication by way of Personal interview, Nairobi 9 May 2012.
[1024] Africa Press International," Draft: Moi Opposes the Chapter on Executive because He enjoyed the Powers, available at http://africanpress.wordpress.com, accessed on 15 January 2011.

churches, Kibaki and Odinga promised them that they would be amended after the review process was over.[1025]

On 4 August 2010, a peaceful referendum on the Draft was conducted by the Interim Independent Electoral Commission (IIEC) under section 33 of the Review Act. The Draft or the "Proposed" Constitution, received 67% approval in the referendum.[1026] Unlike in the past when efforts to adopt a constitution collapsed, the process was successful because, as argued by a practicing lawyer and former editor of a pro-reforms law publication, the key politicians, Kibaki and Odinga, "were not pulling in opposite directions."[1027]

Before and after the referendum, and even after the promulgation of the Constitution on 27 August 2010, the courts were approached to determine key legal issues pertaining to the constitutional review process. Due to the sheer weight of the issues raised and the overarching argument of popular participation in this thesis, it is necessary to examine the leading cases on the road to a new constitution. Because of the difficulties in tracing the order in which the cases were instituted in various courts, the emphasis is on the nature of their jurisprudential value in relation to the constitutional review process.

5.5 THE COURTS AND THE CONSTITUTIONAL REVIEW PROCESS

A principal omission of the Review Act was that it did not provide for a constitutional disputes resolution mechanism. It is argued that this was a major omission considering that Odinga and the ODM had rejected the Kenyan judiciary as the arbiter of presidential election disputes. It is undoubtedly for this reason that Parliament enacted the Constitution of Kenya

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[1025] Communication by way of personal interview with a senior official of the NCCK, Nairobi, 6 May 2012.
[1026] Office of Public Communications, Kenya: Promulgation of the New Constitution, 27 August 2010. Available at **http://www.communication.go.ke/media.asp?id=1203**.Accessed on 3 May 2011.
[1027] Communication by way of personal interview, Nairobi, 9 May 2012.

(Amendment) Act 10, 2008. This Act provided for the establishment of the Interim Independent Constitutional Dispute Resolution Court (IICDRC). The Court was different from the High Court which was created under 60 of the Constitution. By virtue of the Amendment Act, a new section 60A establishing the IICDRC was inserted into the Constitution. Section 60A (1) provided that:

> Notwithstanding section 60, there shall be an Interim Independent Constitutional Dispute Resolution Court which shall have exclusive original jurisdiction to hear and determine all and only matters arising from the constitutional review process.

Before the IICDRC had been operationalised, there was a legal void on how disputes pertaining to the constitutional review process could be determined. However, the law was laid down by the High Court in the case of *Bishop Joseph Kimani and 2 Others v The Attorney-General and 2 Others.*[1028] In that case, the applicants approached the High Court for alleged contravention of their fundamental rights and freedoms enshrined in sections 70, 72, 75 and 78 of the Constitution. Their main contention was that the CoE was in no position to determine for Kenyans what amounted to matters contentious or not contentious based on the Wako and Bomas Draft Constitutions. Their main contention was that constitution-making process was an exercise for all Kenyans to be engaged in.

The Court dismissed the respondents' objections for want of jurisdiction as the IICDRC was the right forum. The High Court ruled that as the IICDRC had not been operationalised, it had

[1028] *Bishop Joseph Kimani and 2 Others v The Attorney-General and 2 Others* High Court at Mombasa Petition No 669 of 2009. Available at **http://www.kenyalaw.org** .Accessed on 5 March 2012.

to determine the dispute in the exercise of its original and inherent jurisdiction vested in the Court by section 60 of the Constitution. In particular, it opined that:

> In the absence of a duly constituted court, the Interim Constitutional Dispute Resolution Court, does it mean that section 60A of the Constitution is a dead letter? No. To the contrary it is an unborn child, unfortunately, whose gestation period is uncertain and unknown. In view of the situation now, it is likely to be still-born upon the expiry of the operation of section 60A of the Constitution, *i.e.*24 months.[1029]

The Court also noted that section 60A could not be applied to bar the applicants from accessing justice as that was their legitimate expectation.[1030] Most important, the Court held that the section was not intended to take away their rights contained in the Constitution. It added that such interpretation would have been inconsistent with the intention of the "founding fathers" of the nation who were assisted by, among others, the late USA Judge, Thurgood Marshall.[1031] Further, the Court observed that:

> To exclude the petitioners from access to justice due to the bareness of section 60A would be a mockery of the lost and destroyed lives, the internally displaced and many traumatised Kenyans after the December 2007 Elections which led to deaths, destruction, and civil strife that took the country to the brink of chaos, anarchy and total collapse.[1032]

[1029] *Bishop Kimani*, *ibid* note 1028 p13.
[1030] *Bishop Kimani*, *ibid* note 1029 p13.
[1031] *Bishop Kimani*, *ibid* note 1030 p13.
[1032] *Bishop Kimani*, *ibid* note 1031 p13.

Before the 24 months mentioned by the Court could lapse, the IICDRC judges were appointed and sworn in in the presence of President Kibaki.[1033] The Court was composed of nine judges, six of whom were Kenyans and three expatriate judges.[1034] One of the expatriate judges was Justice Unity Dow of Botswana, the applicant in the ground-breaking Botswana human rights case of *Attorney-General v Dow*.[1035] It is submitted that the intention of constituting such a bench was to enhance public confidence and moral legitimacy in the constitutional review process and in the troubled judiciary. Because of the central role of the IICDRC in the review process, some of its key decisions are examined below.

5.5.1 The IICDRC: Some Key Decisions

After the inauguration of the IICDRC bench, the High Court's jurisdiction was exhausted and it could therefore not deal with the *Bishop Kimani* or any other constitutional review cases. This was held by the High Court in the case of *Mary Ariviza v Interim Independent Electoral Commission and Another*.[1036]In that case, the applicants had sought, among others, an order setting aside the results of the referendum. The Court held that it concurred with the judgment in the *Bishop Kimani* case on the right of access to the Court and its jurisdiction to entertain the application, notwithstanding section 60A. However, the Court held that circumstances had changed. Since the decision in the *Bishop Kimani* case, the IICDRC had become functional. The Court's jurisdiction had accordingly been terminated.[1037] It is now appropriate to examine some of the key decisions of the IICDRC touching on the review process.

[1033] State House, "President Kibaki Reassures Kenyans on Constitution," pp1-2. Available at **http://www.statehousekenya.org.ke**.Accessed on 20 February 2012.

[1034] State House, *ibid* note 1033 p1.

[1035] *Attorney-General v Dow* 1992 BLR 119 (CA).

[1036] *Mary Ariviza v Interim Independent Electoral Commission of Kenya and Another* High Court Miscellaneous Civil Application 273 of 2010 [2010] Eklr 1. Available at **http://www.kenyalaw.org.ke**

[1037] *Mary Ariviza*, *ibid* note 1036 p10 paragraph 22.

Within the short life of the IICDRC, some key decisions with a major bearing on the constitutional review process were delivered, three of which are examined here. They are *Bishop Joseph Kimani and 2 Others v The Attorney General and 2 Others* (IICDRC);[1038] *Mary Ariviza and Another v The Attorney-General and 3 Others* (IICDRC) [1039] and *Andrew Omtata Okoiti and 5 Others v The Attorney-General and 2 Others* (IICDRC).[1040]

The driving force behind the case of *Bishop Kimani* seems to be the orders made by the High Court in the case of *Jesse Kamau and 25 Others v Attorney General and Another.*[1041] The key issue in the case was the legitimacy of the Kadhis' (Islamic Courts) which have been in existence long before independence. The applicants, all Christians, approached the High Court to make orders that section 66 of the old Constitution, which entrenched Kadhis' Courts, was inconsistent with sections 70, 78, 79, 80 and 82 of the same Constitution.

The applicants' contention was that their rights to equal protection of the law were infringed by section 66 as a particular religion was given constitutional recognition.[1042] Most important, they contended that section 66 was a hidden agenda to introduce, advance, propagate and promote Islam in Kenya and Africa as a whole under what they termed the "Abuja Declaration."[1043] The Court examined a number of constitutions especially those of the USA and South Africa and noted those constitutions, almost

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1038 *Bishop Njenga Kimani and 2 Others v The Attorney General and 2 Others* (IICDRC) Constitutional Petition 4 of 2010 [2010] eKLR 1. Available at **http://www.kenyalaw.org.** Accessed on 14 March 2012.

1039 *Mary Ariviza and Another v The Attorney-General and 3 Others* (IICDRC) Constitutional Petition 7 of 2010 [2010] eKLR 1. Available at **http://www.kenyalaw.org**. Accessed on 14 March 2012.

1040 *Andrew Omtata Okoiti and 5 Others v The Attorney-General and 2Others* (IICDRC) Constitutional Petition 3 of 2010 [2010] eKLR 1. Available at **http://www.kenyalaw.org.**Accessed on 14 March 2010.

1041 *Jesse Kamau and 25 Others v Attorney General and Another*[2010] eKLR 1.

1042 For a historical background of the Kadhis' Courts, see *Jesse Kamau*, *ibid* note 1041 pp 29-30.

1043 *Jesse Kamau*, *ibid* note 1042 pp3-6.

without exception, prohibit direct or indirect discrimination of an individual on the basis of religion among other grounds.[1044]

In making the declarations sought, the Court recommended alterations to the Constitution so as to remove the conflict. It observed that section 66 had "the effect of furthering one faith as against others."[1045] By so finding, it is argued, the Court seems to have been misguided as in constitutional interpretation, all provisions are equal, and "there are no internal logical contradictions, except that a provision of an amendment inconsistent with a previous provision supersedes that provision." [1046] Indeed, the IICDRC in the case of *Bishop Kimani* seemed to agree with the High Court in the case of *Bishop Kimani* that the decision of *Jesse Kamau* failed to meet established principles of constitutional interpretation.[1047]

The petitioners in the case of *Bishop Kimani* were concerned about the retention of the Kadhis' Courts in the proposed Draft Constitution. Their main prayer was for the referendum to be postponed to allow for more dialogue on the undefined "contentious issues" through the CoE and other review organs; the Review Act be amended to provide for the revision of the proposed Constitution and to subject the Kadhis' Courts to audit by the people of Kenya and a declaratory order that the inclusion of the Kadhis' Courts in the proposed Constitution was contemptuous in view of the High Court's decision in the case of *Jesse Kamau.* They specifically pleaded with the Court to expunge those provisions in

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[1044] *Jesse Kamau, ibid* note 1043 pp57-58.
[1045] *Jesse Kamau, ibid* note 1044 p87.
[1046] Principles of Constitutional Construction. Available at **http://www.constitution.org .**
[1047] *Bishop Kimani* (IICDRC), *op. cit.* note 1038 p27. Also see *Bishop Kimani* (High Court), *op. cit.* note 1028.

the proposed Constitution which, as in the old Constitution, established the Kadhis' courts.[1048]

The IICDRC dismissed the petition on the ground that the orders sought did not exist in law. In particular, the Court noted that the CoE had consulted widely and had exercised its discretion appropriately in the execution of its statutory mandate especially in determining the contentious issues. The Court noted that it was not bound by the decision of the High Court in the case of *Jesse Kamau.* Most importantly, the Court held that no one provision of a constitution is superior to another. It observed that:

> ...the Constitution as a supreme law is a wholesome document; it is a living document and operates through all the provisions, not one. To hold otherwise would be to say of the living person: Can the eye say to the nose: you protrude on the face and make it uneven and must be expunged! Or the right hand: "we are right-handed and do not need you." This would be illogical and unreasonable and in this we have the comfort of the scripture because it is written in 1st Corinthians 12:12-26 (New International Version).[1049]

In the case of *Mary Ariviza*, the petitioner prayers to the IICDRC were for a scrutiny and recount of all the ballot papers due to many alleged irregularities; independent audit of the referendum results; declaration that the referendum results were null and void and the relevant Gazette Notice No 1019 of 23 August 2010 that published the final results of the

[1048] *Bishop Kimani,* (IICDRC) *ibid* note 1047 pp1-3.
[1049] *Bishop Kimani*, *ibid* note 1048 p13.

referendum be struck out.[1050] The petitioner's difficulties, which were insurmountable and therefore caused the dismissal of the petition, were mainly her failure to comply with the Review Act. In the first place, she had filed the petition more than14 days of the publication of the referendum results. Also, she had not deposited the requisite deposit of two million shillings as security for costs. Indeed, no such money had been deposited with the Court by the time it completed writing the ruling.[1051]

The petitioners in the case of *Mary Ariviza* made one last attempt in the courts. After the dismissal of their petition by the IICDRC, they approached the East African Court of Justice (EACJ) in Arusha, Tanzania in the case of *Mary Ariviza and Another v The Attorney General and 3 Others.*[1052] The claimants repeated the averments they had made before the IICDRC on the irregularities of the referendum. They pleaded with the EACJ to hold that the due process was not followed in the referendum, and that the irregularities complained of violated The Treaty for the Establishment of the East African Community ("the Treaty") to which Kenya is a party.[1053] They also attacked the IICDRC as a Court lacking in impartiality and independence. Of greater importance to the petitioners was an order that the promulgation of the new Constitution on 27 August 2010 was in contravention of the Treaty, was illegal, null and void.[1054]

The EACJ held that it lacked jurisdiction to inquire into claims against the IICRDC as that would amount to sitting on appeal over the IICDRC's decisions. Further, the Court found that it lacked jurisdiction because the substance of the reference was not a regulation,

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1050 *Mary Ariviza*, (IICDRC) *op. cit* note 1039 p2.
1051 *Mary Ariviza*, *ibid* note 1050 p7.
1052 *Mary Ariviza and Another v The Attorney General and 3 Others*(EACJ) Reference No.7 of 2010
1053 *Mary Ariviza* (EACJ), *ibid* note 1052 p8.
1054 *Mary Ariviza* (EACJ), *ibid* note 1053 p14.

directive or action of a Partner State or the Community which could be interrogated by the Court under Article 30(1) of the Treaty.[1055]

The case of *Andrew Omtata* was described by the IICDRC as "fairly profound litigation."[1056] It is argued that the constitutional issues involved were indeed profound given Kenya's rough terrain of constitution-making. The importance of the issues was reinforced by the fact that the petitioners attacked some of the key organs mandated to drive the constitution-making process. These were the Attorney-General; the CoE and the Interim Independent Electoral Commission (IIEC).

The cardinal issues in the case of *Andrew Omtata* were the Attorney-General's alteration of the draft Constitution; the role of the people in constitution-making and the composition and manner in which the CoE proceeded to determine "contentious issues" in the Wako and Bomas Draft Constitutions. In addition, the Court had to determine the *locus standi* of the petitioners. The respondents' argument was that the petitioners had no *locus standi* to get orders which would have enormous impact on 40 million Kenyans who had not approached the Court and for whom the petitioners were not acting. [1057] Further, one of the petitioners was residing in the diaspora, a University Professor in the USA and was therefore not qualified to participate in the referendum as he was not a registered voter.[1058]

Also crucial was the question whether the IICDRC had the jurisdiction to grant the orders sought. The point was raised by the respondents who contended that the role of the Court

[1055] *Mary Ariviza,* (EACJ) *ibid* note 1054 pp24-25.
[1056] *Andrew Omtata, op. cit.* note 1040 p1.
[1057] *Andrew Omtata, ibid* note 1056 p4.
[1058] *Andrew Omtata, ibid* note 1057 p19.

was to ensure that the constitutional review process was within the law. They reasoned that a contrary interpretation of section 60A would have amounted to the Court interfering with the principal doctrine of separation of powers. They averred that the Court could not usurp the role of Parliament which had vested various review functions to specific institutions.[1059] Their other main argument was that the Court's hands were tied as the various aspects of the review process had become *functus officio.* They also averred that each of the review organs had timeously discharged its responsibilities and that the petitioners had delayed in approaching the Court. All that was pending in the road-map to a new constitution, they added, was the voting in the referendum.[1060]

The Court dismissed the claims against the alleged improprieties of the review bodies. It held that the Attorney-General only corrected editorial errors which did not impact fundamentally on the Draft. On the CoE, the Court held that each of the experts had satisfied the minimum requirements for his or her appointment as provided for in section 10(1) of the Review Act. This included proven experience and knowledge in comparative and constitutional law, human rights, governance, ethics and accountability and women and gender issues among others.

The Court also held that the CoE consulted widely on the contentious issues for the stipulated duration in which the petitioners did not raise any concerns to the CoE. There was no evidence that the CoE made wrong considerations in its determination of what amounted to "contentious" issues. The Court also noted that the petitioners had not complained to Parliament or other relevant authority.[1061]

[1059] *Andrew Omtata, ibid* note 1058 p4.
[1060] *Andrew Omtata, ibid* note 1059 p4.
[1061] *Andrew Omtata, ibid* note 1060 p10.

On the question of delay encompassed in the doctrine of laches, the Court noted that the petitioners' delay was not inordinate as they had approached the Court within six months of its establishment. The Court distinguished the case of *Lt. Col. Peter Ngari Kagume and Others v the Attorney-General.*[1062] In that case, the High Court held that the application was an abuse of the Court process because the applicant had approached the Court for relief under section 84 of the old Constitution, 24 years after the alleged violation of his rights under the Bill of Rights had taken place.[1063]

It is submitted that it was fruitless for the IICDRC to distinguish the *Kagume* case on any basis. This was an outright bad precedent on fundamental rights law. Section 84 of the Constitution did not provide for definite times within which claims for alleged violations of fundamental rights could be made. It was therefore a denial of justice for the applicant to be denied access to justice on a constrained interpretation of the provision.[1064]

In the course of determining the various issues before it, the IICDRC made what this thesis views as progressive pronouncements of the law from the uncomfortable perspective of Kenya's human rights jurisprudence. It is argued that although the IICDRC was an *ad hoc* and transitional judicial institution under the broader subject of transitional justice, this decision has an important place in Kenya's constitutional jurisprudence.[1065]

1062 *Andrew Omtata, ibid* note 1061 p7.

1063 *Lt. Col. Peter Ngari Kagume and Others v the Attorney-General* Constitutional Application No. 128 of 2006 as cited in *Andrew Omtata, ibid* note 1062 p7.

1064 In the case of *Gitari Cyrus Muraguri v Attorney General* [2011] eKLR 1, the High Court declined to apply *Kagume* case although the applicant was tortured by security agents 20 years before the lodging of the claim in *Muraguri* case. It is worth noting that in April 2012, the judge in *Kagume* case, Nyamu., J who had since then been elevated to the Court of Appeal, was found unfit by the Judges and Magistrates Vetting Board to continue holding the office of a judge in the on-going judicial reforms under the new constitutional dispensation (*The Standard*, 26 April 2012, "Scandals and Past Rulings end Careers of Four Senior Judges," **http://www.standardmedia.co.ke**. For the timelessness of actions on violations of human rights, also see, *Rumba Kinuthia and 6 Others v Attorney General,* High Court Misc. Application 1408 of 2004 as cited in the case of *Muraguri* p12.

1065 For a thorough discussion of transitional justice, see Teitel, "Transitional Justice Genealogy," 16 (2003): **Harvard Human Rights Journal** 69-94 p69, available at http://heinonline.org/HOL/Page?handle=hein.journals/hhrj16&id=75, accessed on 23 August 2011.

On the question of what the Court termed "the weighty issue" of its jurisdiction because of the long road of the review process as the only process pending was the referendum, the Court held that it had to stamp its authority "in pronouncing and declaring rights in whatever circumstances."[1066] The Court further noted that it was "established as the bastion for the defense of the rights and freedoms of the individual and against oppression and unjust laws and acts."[1067] It also added that it was vested with jurisdiction as the petitioners had approached the Court alleging breach of fundamental rights.[1068]

On the petitioners' lack of *locus standi* as they had prayed for orders which could affect the rest of Kenyans, the Court held that in matters of constitutional review, the Court could not close its doors to any person acting in good faith.[1069] The importance of this opinion was that the Court was confirming emerging Kenyan jurisprudence of a relaxed interpretation of the doctrine of *locus standi* by the Kenyan Courts.[1070] However, it is argued that it is too early to say whether this commendable interpretation is part of what Ellet calls "emerging judicial power in transitional democracies."[1071]

It is submitted that it was on the basis of the new approach to *locus standi* that the Court made a rare order in Kenya's judicial history. In holding that qualified citizens in the diaspora had a right to vote as enshrined in the UDHR and the ICCPR as noted by the

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1066 *Andrew Omtata, op. cit.* note 1040 p5.

1067 *Andrew Omtata, ibid* note 1066 p5. The IICDRC's interpretation was based, among other decisions, on the reasoning in the Ugandan human rights case of *Ssemogerere and Another v Attorney General* (3) [2004] 2 EA in which the Constitutional Court emphatically stated the supremacy of the Bill of Rights over any legislation.

1068 *Andrew Omtata, ibid* note 1067 p5.

1069 *Andrew Omtata, ibid* note 1068 p4.

1070 *Andrew Omtata, ibid* note 1069 p4.

1071 See generally, Ellet, "Emerging Judicial Power in Transitional Democracies: Malawi Tanzania and Uganda," a dissertation presented to the Department of Political Science in partial fulfillment for the degree of Doctor of Philosophy in the field of International Affairs and Public Policy, Northeastern University Boston, Massachusetts, April 2008. Available at **www.iris.lib.neu.edu/pub_int_aff_diss/3/-** .Accessed on 10 March 2010.

Court, it made "appropriate modifications to section 43 of the Constitution."[1072] Section 43 set out the requirements to be met for a person to be registered as a voter in elections to the National Assembly and in elections of the President. In arriving at this finding, the Court noted the economic contribution to the nation by persons in the diaspora as elucidated by the CCSA in the case of *Willem Stephanus Richter v Minister of Home Affairs and Others.*[1073] The CCSA also noted the "civic-mindedness" of these South Africans which the democratic system benefits.[1074] As noted by a former leader of the Association of Kenyans in Botswana, but now working in South Africa, Kenyans in the diaspora have a crucial role to play in their country's democratisation initiatives because most of them are highly trained and have international exposure.[1075]

The boldness of the IICDRC in making orders for "modifications" to the Constitution so as to enforce the fundamental right of the citizens not residing in the country to participate in a referendum is indeed commendable. It seems to confirm to the democratic importance of one's vote, in what Sachs J termed "a badge of dignity and personhood. Quite literally, it says that everybody counts."[1076] However, as this right was pronounced on 2 August 2010, it was too late for it to be exercised under Kenya's 2010 referendum.

The main paradox of the decision was that the Court's approach to section 43 clearly contradicted its reasoning in not granting orders which, it is submitted, would have undone what the review organs had done under the Review Act. In its view:

> ...the doctrine of parliamentary sovereignty and separation of powers does not allow this Court to undo that which parliament

1072 *Andrew Omtata, op. cit.* note 1040 p20.
1073 *Willem Stephanus Richter v Minister of Home Affairs* 2009(3) SA 615 (CC)
1074 *Richter, ibid* note 1073 para 69.
1075 Personal communication by way of e-mail correspondence with a former leader of Association of Kenyans in Botswana, now working in South Africa,12 October 2012.
1076 *August and Another v Electoral Commission and Others* 1999(3) SA 1 (CC) para 17.

> has done. This doctrine is about the relationship between those who create the Acts (Parliament) and those who must apply them (courts). When Dicey published **The Law of the Constitution (1885)**, he identified parliamentary sovereignty as meaning that, Parliament has, under the English Constitution, the right to make or unmake any law whatever; and further that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament. What this means is that as long as an Act has passed through Parliament and received Presidential Assent (Royal in the case of the UK), judges will not argue whether or not a statute should or should not exist but will merely try to apply the statute.[1077]

It is argued that the Court erred in holding that its hands were tied by the Review Act due to the doctrines of parliamentary sovereignty and separation of powers. As already submitted, the IICDRC had suggested amendments to the Constitution and "read in" to enforce the right of those in the diaspora to vote.[1078] It is observed that the said interpretation was the right view of the law as the two doctrines have to be understood within the celebrated doctrines of constitutional supremacy and the rule of law.[1079] If the Court could make alterations to the supreme law of the land, it is submitted that it could, at a minimum, have declared its power to overturn the Review Act had it found it necessary.

[1077] *Andrew Omtata op. cit.* note 1040 p22.

[1078] For a further appreciation of the powers of the courts in emerging democracies to alter or "read in" provisions, see for instance,*National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC). In that case, the CCSA "read in" the words "or partner, in a permanent same-sex life partnership" into the offending legislation so as to give effect to fundamental rights provisions in the Bill of Rights.

[1079] See generally, chapter 2 of this study.

Connected with the Court's view of the doctrines mentioned above was the "political question" doctrine.[1080] It observed that "the political question doctrine becomes more relevant where larger constitutional questions touching on parliament and the executive are at issue."[1081] The "larger" constitutional question, it is argued, was the postponement of the referendum which took place two days after the judgment of the Court. It is submitted that postponement of the referendum was not weighty enough to deny the petitioners the right to a full examination of the issues canvassed by the applicants. In any event, there was a precedent. The High Court had in the case of *Njoya* stopped Parliament from making a constitution for Kenyans as the people, where the constituent power rests, had not been given the right to a referendum by the review laws then prevailing.

Although the IICDRC held that the petition lacked merit except forthose in the diaspora, it is argued that the wrong interpretation and application of the doctrines of separation of powers and sovereignty of parliament obscured and swayed the pendulum of justice against the petitioners. In this and other cases examined above, it is submitted that opportunity was lost for the IICDRC to exercise its jurisdiction under section 60A of the old Constitution and critically examine the legitimacy of the entire constitution-making process. As the sole arbiter of the review process, and vested with unlimited jurisdiction in this regard, the IICDRC was the only hope for a serious judicial enquiry into Kenya's constitutional review process, and the Review Act in particular, from the perspective of popular participation as discussed in the next chapter.

[1080] For a discussion of the "political question" doctrine, see Roux, "*Baker v Carr* in South Africa, or How Political Questions Become Legal Questions," paper presented to Conference on *Law, Language and Politics in South Africa: The Impact of the Constitution,* 1 July 2006. Available at **www.saifac.org.za/docs/2006/...**

[1081] *Andrew Omtata, op. cit.* note 1040 p25.

5.6 SUMMARY

This chapter has investigated the political direction of Mwai Kibaki's presidency in the context of good governance and constitution-making. As examined in the chapter, Kibaki's candidature as President was found suitable because of his many years in opposition politics after leaving the Moi administration. Boosted mainly by Odinga with whom he entered into a MoU, Kibaki promised a new Constitution within 100 days of assuming office. The aim was to address the key feature in the Constitution: Presidential power to restore order in the management of public affairs. It has been shown that Kibaki reneged on this promise and instead resisted efforts to minimise the powers vested in the presidency, by for instance, giving Odinga a raw deal in the NARC coalition government.

Most crucial to this thesis, the chapter has demonstrated that Kibaki fought reform initiatives as captured in the Bomas Draft Constitution with his own instrument, the Wako Draft Constitution. His draft was rejected in the 2005 referendum as Odinga and others resigned from the Kibaki administration and joined forces in opposition of the draft. As the chapter has argued, the trashing of the MoU by Kibaki was the genesis of the post-2007 election violence, which, in turn, triggered hurried efforts for constitutional reforms with the able guidance of the Kofi Annan panel under the auspices of the KNDR. The next chapter has also examined the key court cases which in one way or the other were approached to determine the legitimacy of the constitution-making process. It has been argued that these courts, specifically the IICDRC failed to fully address its mind in the resolution of the matters before it mainly from the perspective of popular participation. The next chapter interrogates in depth the 2010 constitution-making process and the central theme of this thesis, popular participation under the new constitutional dispensation.

CHAPTER 6: THE 2010 CONSTITUTION: POPULAR PARTICIPATION AND LEGITIMACY AT CROSS-ROADS

6.1 INTRODUCTION

The main aim of this chapter is to examine the central tenets of Kenya's 2010 constitution-making process. In addition, the chapter examines the key aspects of constitutional implementation to determine the extent of compliance with the constitution review principles contained in the Review Act.

The intention is to evaluate the constitution-making process from well-established principles of constitutional review as adumbrated in scholarly discourses and key international institutions and, most importantly, in the Review Act. On this basis, the legitimacy or otherwise of the Review Act, and, consequently, the entire review process, will be assessed. In this examination, relevant court decisions on the review process will be analysed and critically examined. The general purpose of the chapter is to lookinto the question of participation of Kenyans, in whom the constituent power lies. Linked to this enquiry is the extent of their involvement in operationalization of the Constitution. Before embarking on this investigation, a conceptual perspective on "popular participation" is necessary.

6.2 THE ORIGIN OF THE CONCEPT OF POPULAR PARTICIPATION

The aim of this part of the study is to examine the philosophical foundation of the concept of popular participation before embarking on the position of the concept from a Kenyan

perspective. This, it is hoped, will properly locate the Kenyan experience on stable jurisprudential basis especially from an African and international perspective.

The origin of the concept of popular or political participation is said to be the ancient Greek philosophers. Ancient Greek philosophers generally perceived the state as being separate from civil society.[1082] Socrates sought "an appropriate balance between the needs of an individual and those of the state so as to produce a *societas civilis* as opposed to a diabolical one."[1083] To Plato, civil society comprised of different individuals, endowed with different skills for the good of the society, "but requires the civilising force of a strong state to counteract the centrifugal force of diversity."[1084] Aristotle is credited with coining the term "civil society," by identifying the nature of "the socio-political order as *koin nia politika*."[1085] Aristotle called for the kind of democratic order where individuals would participate in public policy-making, thus encouraging societal governance.[1086] It is clear therefore that the deliberate exclusion of the people of Kenya through presidential authoritarianism as examined in chapter three of this study was inconsistent with the philosophy laid down a long time ago by Greek philosophers.

The sixteenth and the seventeenth centuries' enlightenment philosophers' postulation of civil society was from the perspective of social transformation from the period preceding the existence of the state, the social contract theory.[1087] Hobbes theorised that the natural order moved from a war-like perspective as the passions and desires of a human being conflicted

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1082 Sentianto, "Somewhere in Between: Conceptualizing Civil Society," 10:1 (2007) **International Journal of Not-for-Profit Law** 109-118 p.110. Available at **http://www.icnl.org/knowledge/ijnl/vol10iss1/art_3.htm** .Accessed on 19 December 2010.

1083 Setianto, *ibid* note 1082 p 110.

1084 Zoeram *et al*, "The Epistemology of the Concept of Civil Society in the West and Iran Interpretations," 6 (4) (2010) **Canada Social Science** 42-55 p44.Available at **http://www.cscanada.net/index.php/css/article/view/1403/1563** .Accessed on 20 December 2010.

1085 Setianto, *ibid.* note 1084 p110. Also see Zoeram, *ibid* note 1084 p44 which discusses Cohen and Arato, **Civil Society and Political Theory**. Cambridge: MIT Press 1992.

1086 Setianto, *ibid* note 1085 p110.

1087 Zoeram, *op.cit*. note 1084 p 45.

with those of another human being therefore creating war and conflict between them as they fought for gain, safety, and reputation.[1088] He therefore argued that in this state of nature, the life of man was "...solitary, poor, nasty, brutish and short."[1089]

Hobbes' philosophy was diametrically opposed to that of Locke. Locke saw the state of nature as peaceable in which people worked, gained property and formed social relationships.[1090] Although Locke saw men as peaceful and sociable, he explained that they had their own interests to which they were partial, therefore necessitating "an impartial authority to mediate disputes."[1091] John Locke's formidable argument was that the government and society were different entities, the idea being to limit the tyranny of the state on society.[1092]

Locke's key discourse was that an absolute ruler would not meet the criterion for mediating disputes as his "unrestricted power would be partial to his or her own interests."[1093] To Locke, the government was an enlargement of the right of people to form associations.[1094] He viewed civil society "as a means of protecting the individual's property rights."[1095] To avoid conflicts among people as they struggled for property and other rights, Jean-Jacques

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1088 Hobbes, **The Leviathan,** "Of the Natural Condition of Mankind as Concerning their Felicity and Misery," p2. Obtained from Oregon State University at **http://oregonstate.edu/instruct/phl302/texts/hobbes/leviathan-c.html**

1089 Hobbes, *ibid* note 1088 pp2-3.

1090 Zoeram, *op.cit.* note 1084 p46.

1091 De Wiel, "A Conceptual History of Civil Society: From Greek Beginnings to the End of Marx," 6 (1997) **Past Imperfect** pp3-42 p15. Available at **http://www.ejournals.library.ualberta.ca/index.php/pi/article/viewFile/1422/963 .Accessed** on 14 January 2011.

1092 See Generally, Locke, *op. cit* note 151 and Zoeram, *op. cit.* note 1084 p45.

1093 DeWiel, *op.cit*.note 1091 p 15.

1094 Setianto, *op.cit* note 1085 p111.

1095 Labuschagne, "Revisiting Civil Society in Africa,"**African Studies Association of Australasia and the Pacific 2003 Conferences Proceedings: Africa on a Global Stage** p3. Available at **http://www.afsaap.org.au/Conferences/2003/Labuschagne.pdf**. Accessed on 14 January 2011.

Rousseau invoked the theory of social compact where a supreme power under a new social order would maintain peace and protect individual liberties.[1096]

Ochoa links the origins of the theory of participatory democracy to Jean-Jacques Rousseau.[1097] Rousseau's seminal discourse on "Social Contract," examines key issues of democracy which are as relevant today as they were over two hundred years ago.[1098] For instance, he teaches us that he who makes the laws should not execute them;[1099] the right of the strongest is not strong enough "unless he transforms strength into right, and obedience into duty,"[1100] and that "the depositories of the executive power are not the people's masters, but its officers."[1101] By voting, Rousseau opines, "each man is stating his opinion on that point; and the general will is found by counting votes."[1102] He argues that the right to vote gives him the right to comment on public matters, "however feeble the influence my voice can have on public affairs."[1103]

Cunningham however asserts that the term "participatory democracy" was coined by the USA students' clamour for their involvement in the governance of universities and opposition of professors' anti-participatory views.[1104] The students' views, set out in the "Port Huron Statement," were more than a protest against university authorities in the USA, but rather, a powerful discourse on democratic and human rights concerns most of which continue to plague humanity today. The students' crusade was, for instance, against any form of exploitation of minority groups, an equitable allocation of resources, a "truly" public sector,

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1096 Setianto, *op. cit.* note 1085 p112; Zoeram, *op. cit.* note 1084 p46.
1097 Ochoa, "Participatory Democracy and Law Formation," (2008) **Indiana Journal of Global Legal Studies**15 pp.5-18 at p.7. Also see "The Rule of Law," chapter 2.3.1 of this thesis.
1098 Rosseau, (1762) **Social Contract**. Available at **http://www.constituion.org/jjr/socon_01.htm** .Accessed on 26 June 2010.
1099 Rosseau, *ibid* note 1098 Book III p6.
1100 Rosseau, *ibid* note 1099 Book I p2.
1101 Rosseau, *ibid* note 1100 Book III p20
1102 Rosseau, *ibid* note 1101 Book IV, p3.
1103 Rousseau, *ibid* note 1102 Book I p1.
1104 Cunningham, **Theories of Democracy: A Critical Introduction**. London: Routledge 2002 p123

making the public sector "public" and commencement of anti-poverty programmes.[1105] On popular participation, the students said:

> As a social system we seek the establishment of a democracy of individual participation, governed by two central aims: that the individual share in those social decisions determining the quality and direction of his life; that society be organised to encourage independence in men and provide the media for their common participation.[1106]

The involvement of the people is a good governance ideal that is inseparable from the concept of democracy. While there is no doubt that popular participation is a prerequisite for any credible democratic system, there is no universal consensus on the methodological postulations that this significant human rights ideal should manifest. Arguments about rights are political discussions, such that what "one group may regard as a step forward for rights, another (using the same framework) may regard as a violation, or even an abuse, of rights."[1107] In South Africa, for instance, public participation bears two constitutional and legal facets, namely an individual's right to elect political representatives and the duty on the legislature to involve the public in law formation.[1108] Out of the myriad views and concepts of democracy, what is central to this study is the established representative model of participation and the developing or emerging popular or direct participation. I now turn to these concepts.

[1105] Office of Sen. Hayden, **The Port Huron Statement of Students for a Democratic Society**, 1962.Available at **http://docs.google.com/Doc** pp.28-37. Accessed on 13 April 2010.

[1106] Port Huron Statement, *ibid* note1105 p4.

[1107] Evans and Evans, "Evaluating the Human Rights Performance of Legislatures," 6 (2006) **Human Rights Law Review** 545-569 p.550.Available at **http://heinonline.org/HOL/Page?collection=journals&handle=hein.journals/hrlr6&id=556&type=image**. Accessed on 1 December 2010.

[1108] See sections 19, 59, 72 and 118 of the Constitution of the Republic of South Africa, 1996

6.2.1 Representative Democracy

6.2.1.1 The Majoritarian Principle

The most intrinsic method of participation of the people in the political process is when the political system is essentially a representative democracy.[1109] On representative democracy, the great American founder, James Madison, observed that the authority of the representatives emanates from the people through frequent elections, a process which should remind them (representatives) of "their dependence on the people."[1110] For decades, this model has dismally failed to trigger and drive credible public governance especially in Africa and Kenya in particular. Before the principal barriers to this model are examined, it is necessary to deliberate on some interlocking concepts in jurisprudence. They are the sovereignty of the law-making body (parliament) as an institution of people's representatives; the majoritarian doctrine; and judicial self-restraint.

The principle of parliamentary sovereignty is one of the cornerstones of English constitutional law. The principle became firmly entrenched in the English legal system after attempts by Chief Justice Coke in *Dr Bonham's*[1111] case were frustrated by the King. In that case, the Chief Justice asserted the authority of the courts over legislation, what later emerged as judicial review or the courts "testing" right. He said that "in many cases, the common law will control Acts of Parliament and sometimes adjudge them to be utterly void..."[1112] The

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[1109] Buccus, "Civil Society and Participatory Policy Making in South Africa: Gaps and Opportunities," p3. Paper Presented at the Democracy Development Programme workshop, 7-8 September 2009, Durban. Available at **http://www.ddp.org.za**. Accessed on 6 May 2011.

[1110] Madison, **The Federalist No. 57**, "The Alleged Tendency of the New Plan to Elevate the Few at the Expense of the Many Considered in Connection with Representation."Available at **http://www.constitution.org/fed/federa57.htm** p.2.Accessed 24 June 2010.

[1111] *Dr Bonham's* case (1601) 8 Co. REP 114a.

[1112] *Dr Bonham's* case *ibid* note 1111 at 118a.

King demanded the withdrawal of the statement but Coke was eventually dismissed after explanation of his theory was rejected by the King.[1113]

The law now seems settled that English courts cannot question the legitimacy of the legislature. In modern times though, this doctrine has been diluted by the sovereignty of European Union law, an aspect beyond the scope of this study. In *Madzimbamuto v Lardner-Burke,*[1114] Lord Reid ruled that the courts would not invalidate anything done by Parliament, even if Parliament acted beyond its power.[1115]

Pound observed that "the legislature thought of itself as sovereign and conceived that, no matter what terms of fundamental law under which it sat, the courts had but to ascertain and give effect to its will."[1116] Dicey was more emphatic as the legislature "can do everything but make a woman a man, and a man a woman."[1117] This judicial view has for decades been generally applied by the Kenyan courts with a vengeance. The approach significantly contributed to exclusion of Kenyans from governance and was the linchpin for violation of fundamental rights and freedoms.

Although Coke's crusade against an unfettered parliament was unsuccessful, Dugard has argued that Coke's dictum in *Dr. Bonham's* case was accepted and applied in the USA.[1118] It is submitted that there is not a better exposition of Dugard's view than the ground-breaking USA Supreme Court case of *Marbury v Madison,*[1119] best remembered by the immortal

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[1113] Jennings, **The Law and the Constitution**, 5th ed, London: Hodere Stoughton 1979 p324.
[1114] *Madzimbamuto v Lardner-Burke* [1969] 1 AC 645.
[1115] *Madzimbamuto, ibid* note 1114 p723.
[1116] Pound, **The Spirit of the Common Law**, Boston: Marshall Jones Company 1921 at p63.
[1117] Dicey, Introduction to the Law of the Constitution, 10th ed, New York: Macmillan Press, 1968 p43.
[1118] Dugard, Human Rights and the South African Legal Order, New Jersey: Prince Town University Press 1978 p16.
[1119] *Marbury v Madison* 5 US 137: 1803.

words of Chief Justice Marshall that "it is emphatically the province and duty of the judicial department (the judicial branch) to say what the law is."[1120]

This decision has for long raised cardinal questions about the actual ambit of the power of the courts when dealing with "the will of the majority" as expressed by their representatives in the legislative branch. The argument seems to centre on the dangers posed by having two centres of power in law-making. Commenting on the matter, Dworkin has observed that judges are unelected officials and so not responsible to the electorate, therefore, "adjudication should be as unoriginal as possible."[1121] What Dworkin appears to be advocating for is judicial restraint, a concept which Engelken argues defined the jurisprudence of Chief Justice Rehnquist of the USA Supreme Court.[1122]

It should however be observed that Rehnquist agreed with the view of a "living constitution," a term which he said is not easy to define especially at the USA Senate Judiciary Committee confirmation hearing.[1123] In this regard, he argued that the constitution should be "relevant and useful in solving the problems of modern society."[1124] His central argument was that judges are unelected unlike members of the other branches of government, therefore they should not be "free-wheeling" which is "quite unacceptable in a democratic society."[1125]

Rehnquist further observed that judicial arguments which support views contrary to those of the elected branches of government and which "the voters have not and would not have

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[1120] *Madison, ibid* note 1119 at 177-178.
[1121] Dworkin, "Hard Cases" **Harvard Law Review** 88:6 (1974-75) pp1057-1109 p1061
[1122] See generally, Engelken,"Majoritarian Democracy in a Federalist System: The Late Chief Justice Rehnquist and the First Amendment," 30:2 (2007). Available at **www.law.harvard.edu/students/orgs/.../vol30_No2-Engelkenonline...**
[1123] Rehenquist, "The Notion of a Living Constitution," 29: (2005-2006) **Harvard Journal of Law and Public Policy** 401-415 p401. Available at **http://www.heinonline.org**. Accessed 5 August 2011.
[1124] Rehenquist, *ibid* note 1123 p407.
[1125] Rehenquist, *ibid* note 1124 p407.

embodied in the Constitution...is genuinely corrosive of the fundamental values of our democratic society."[1126] It is submitted that the majoritarian doctrine, parliamentary sovereignty and judicial restraint do not foster a sociological perspective of law and justice. On the contrary, they have in some jurisdictions been applied to restrict the enjoyment of fundamental rights and freedoms.

6.2.1.2: *Representative Democracy as a Boon*

Madison observed that the representatives exercised delegated authority, with the hope that their "wisdom may best discern the true interest of their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations."[1127] As argued in this study, the wisdom of the people's representatives in Kenya has generally failed "to discern the true interests of their country" as argued by Madison, and therefore the submission for a genuine shift in the country's democratic direction.

As Buccus has argued, corruption, domination by the elites and financial support of wealthy groups are barriers to representative democracy being a vehicle which would address the interests of the poor, therefore reproducing social, economic, and political inequities.[1128] Effective and direct popular participation would contribute significantly to democratisation as opposed to the tired and widely practiced representative democracy which Midge calls "procedural democracy," the latter characterized by regular elections and representative bodies with "no place for the popular will."[1129] Hirst notes the following as regards representative political participation:

[1126] Rehenquist, *ibid* note 1125 p415.

[1127] Madison, **The Federalist No. 10**, "The Utility of the Union as a Safeguard Against Domestic Faction and Insurrection. Available at **http://www.constitution.org/fed/federa10.htm**p.4. Accessed on 26 June 2010.

[1128] Buccus, *op. cit.* note1109 p3.

[1129] Quant, "In Defense of Participatory Democracy," available at **http://www.nicanet.org/wp-content/.../158-/participatorydemocracy-b.pdf** .Accessed on 10 June 2010.

In some countries like Kenya, Uganda, Madagascar, Zambia and Zimbabwe, more than 70% of the voters felt neglected by their representatives who paid them occasional visits only.[1134] Representative democracy becomes more of a mockery when elections are not credible, with the result that they do not manifest the will of the voters. In many countries, elections have not been "free and fair," starting with electoral malpractices of candidates to making campaign promises so as to be elected.[1135]

In Kenya and Zambia, a staggering 90% of the voters had come to accept, as a norm, "gifts" offered to them by the politicians with the aim of influencing their decision at the polling booth.[1136] In addition, Africa's electoral democracy is dented by the executive's grip on MPs. As argued by Simutanyi, the executive is in control of the purse, and, further, it "is not only expected that Members of Parliament will vote according to the instructions of their parties, but also that those who do not, may risk severe sanctions."[1137]

The above observations on the representative democracy model generally reflect Kenya's experience with democracy as discussed in chapter three of this thesis. Personification of power under Kenya's presidential system through constitutional amendments and flawed regular elections dealt a devastating denial of basic rights of the people under an indirect participatory democracy system. The lesson to be learnt is that "the test of democracy is not the fact that a government is elected by the votes of the people."[1138] Kenyan experience has further established that the Western model of representative democracy has failed to

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[1134] Afro-barometer, *ibid* note 1133 p16.
[1135] Afrobarometer, *ibid* note 1134 p14.
[1136] Afrobarometer *ibid* note 1135 p14.
[1137] Simutanyi, "Parties in Parliament: The Relationship between Members of Parliament and their Parties in Zambia," "**EISA Occasional Paper Number 36**, September 2005 p2. Available at **http://www.eisa.org.za/PDF/OP36.pdf,** accessed on 8 May 2011.
On page 17, Simuthanyi notes that in Zambia, presidential appointments, in particular ministerial appointments and inducements are the main ways used by the executive and the ruling party to lure and influence MPs to sing a different tune which might be inconsistent with the will of their representatives.
[1138] Ober, **Democracy**. Stratford: Open University Press 1987 .2.

effectively promote constitutional liberalism, an ideal "predicated on the protection of individual liberties and the rule of law."[1139] The governance deficits of representative democracy are perhaps what persuade Quant to refer to the system as "procedural democracy," which is characterised by regular elections and representative bodies with "no place for the popular will."[1140] It is now necessary to explore the "deeper" sense of democracy, direct participatory or deliberative democracy.

6.3 DIRECT PARTICIPATORY DEMOCRACY

Having examined the key fundamentals of representative democracy, it is trite to investigate the central aspects of the "modern" concept of popular participation. What are considered below are aspects relevant to this study. They are international perspectives on popular participation; the benefits of popular engagement using civil society formations as an example and the South African jurisprudence as an illustration of the contemporary role of popular participation in democratisation and entrenchment of the rule of law. In a study of this nature, it is considered appropriate to have a synopsis beyond that of Kenya thus an international view on popular participation.

A deeper approach to participation is "deliberative democracy." This approach replaces the "voting-centric" democratic theory with "talk- centric" democratic theory.[1141]Under the "talk-centric" model, the people debate about governance issues which reinforce participatory democracy and enrich civic engagement.[1142] Birch has observed that political participation is involvement or playing a part in the process of government, for instance the choosing of political leaders at national or local elections, voting in referenda, taking part in political

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[1139] Ober, *ibid* note 1138 p27.
[1140] Quant, *op. cit.* note 1129.
[1141] See generally, Chambers, "Deliberative Democracy Theory." Available at **http://www.chinesedemocratization.com/.../...Accessed** on 10 July 2010.
[1142] Buccus, *op.cit.* note 1109 note 997 p4.

demonstrations, active membership of pressure groups, industrial strikes with political objectives, and various forms of civil disobedience.[1143]

An advantage of popular participation is that it "is likely to increase the propensity for citizens to comply voluntarily with government rules and orders."[1144]As argued by Tocqueville, participation acts as a check on the potential of the sovereign to abuse his power which if unlimited, "is in itself a bad and dangerous thing."[1145] He also noted that conferring of absolute command on any power whether called a democracy or whatever else amounts to "a germ of tyranny."[1146]

Kasfir has observed that popular participation vests a regime with constitutional legitimacy and argues that it was popular participation which drove the unprecedented movement for democratisation in Eastern Europe and in Africa.[1147] In emphasising the profound role of participation, Kasfir notes that although "the principles of direct political involvement and indirect representation seem contradictory on their face; in practice it seems plausible to blend certain aspects of each and thus provide a wider political coalition in support of a new constitution."[1148]

One of the central benefits derived from popular participation in public affairs is that it enhances transparency and accountability of political institutions in addition to constraining the discretion of the peoples' representatives. On transparency, Schoenhard has observed that accessibility of public information by the public is crucial even in times of insecurity,

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[1143] Birch, **The Concepts and Theories of Modern Democracy**, 3rd ed., London: Routledge 2007 p145.
[1144] Birch, *ibid* note 1143 p 146.
[1145] Tocqueville, *op. cit*. note 168 p260.
[1146] Tocqueville, *ibid* note 1145 p260.
[1147] Kasfir, "Popular Sovereignty and Popular Participation: Mixed Constitutional Democracy in the Third World," 13 (1992) **Third World Quarterly** 4 pp587-605 at p587. Available at **http://content.ebscohost.com/pdf10/pdf/1992/TWQ01Dec/9609120059.pdf**.Accessed on 26 June 2010.
[1148] Kasfir, *ibid* note 1147 p 588.

emergency and high alert provided that the right balance is maintained.[1149] The information availed to the public should be enough and in a manner that is understandable.[1150] Timely release of information to the public underscores contemporary thinking that the people have to actively participate in the nation's decision-making processes because the management of a state "is not limited to government alone."[1151]

6.4 INTERNATIONAL PERSPECTIVES ON POPULAR PARTICIPATION

In modern times, the importance of popular participation is derived from key international instruments. Central among these instruments is the UDHR, the ICCPR and the AU Constitutive Act and most recently, the 2007 African Charter on Democracy, Elections and Governance. Participation of the people in the political process is, in terms of Article 21(1) of the UDHR, either direct or indirect, the latter involving the election of representatives to represent a particular electorate. The right enshrined in the above provision is also captured in the ICCPR.[1152] Article 25 of the ICCPR provides that the right to vote at genuine, periodic elections and "to take part in the conduct of public affairs, directly or through freely chosen representatives should be enjoyed without unreasonable restrictions."[1153] For its part, the AU

[1149] Schoenhard, "Disclosure of Government Information Online: A New Approach from an Existing Framework," (2001-2002) 15 **Harvard Journal of Law and Technology** 2 pp 497-538 p.498. Available at http://www.heinonline.org. The author addresses the reaction of the US government towards the availability of Online government information which disappeared from the internet within hours of the September 11 attacks. He observes that the federal's Freedom of Information Act (FOIA) requires for the government to keep information accessible once it has become available on the internet.

[1150] Parigi, *et al*, "Ushering in Transparency for Good Governance," **Center for Good Governance**, Hyderabad, India, November 2004 .Available at **http://www.cgg.gov.in:8080/Ushering_in-Transparency.doc**. Accessed on 9th June 2010.

[1151] Parigi, *ibid* note1150 p1.

[1152] International Covenant on Civil and Political Rights, G.A. res. 22OOA (XXI), 21 U.N. GAOR SUPP. (No.16) at 52, U. N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976. Available at **http://www1.umn.edu/humanrts/instree/b3ccpr.htm**. Accessed on 12 June 2010.

[1153] ICCPR, *ibid* note 1152.

through the AU Constitutive Act states one of the objectives of the AU as "to promote democratic principles and institutions, popular participation and good governance."[1154]

Perhaps the foremost instrument in Africa which embraces popular participation from a broader governance perspective is the ACHPR. Article 13 states that:

> "1. Every citizen has the right to participate freely in the government of his country either directly or through freely chosen representatives in accordance with the provisions of the law.
>
> 2. Every citizen shall have the right of equal access to the public service of his country.
>
> 3. Every individual shall have the right of access to public property and services in strict equality of all persons before the law."

The political right of citizens to participate in the affairs of their government directly or through their representatives as embodied in the ACHPR has with consistency been expounded and protected by the jurisprudence of the African Commission of Human and Peoples' Rights. In *Dawda K Jawara v The Gambia,*[1155] the complainant was the former Head of State of the Gambia. He complained to the Commission about the July 1994 military coup which ousted him from power. Among other complaints, he alleged that the military grossly violated human rights by terrorizing the people, unlawful detentions and restriction of freedom of movement. The Commission found that the people's right to self-determination

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[1154] African Union, **The Constitutive Act**. Available at **http://www.africa-union.org/root/au/aboutau/constitutive_act_en.htm**. Accessed on 29 June 2010.

[1155] *Dawda K Jawara v The Gambia,* African Commission on Human and Peoples' Rights Communication 147/95 and 149/96 :13th Annual Activity Report of the African Commission on Human and Peoples' Rights1999-2000, available at http://www.achpr.org/english/activity_reports/activity13_en.pdf . Accessed on 12 February 2011.

had been violated by the July 1994 military coup which was a clear violation of the ACHPR.[1156]

In *Amnesty International v Zambia*,[1157] Amnesty International had approached the Commission on behalf of William Steven Banda and John Lyson Chinula, two Zambian politicians. The two had been inhumanly deported to Malawi on allegations that they were a threat to Zambia's peace and security. One of the disturbing aspects of their predicament was that the High Court in Malawi had issued orders that they were not citizens of Malawi, but the Government of Malawi had failed to order their return to Zambia. The Commission held the conduct of the Government of Zambia was unlawful, contrary to the principles of natural justice and a denial of their right to participate in the political processes of Zambia which was inconsistent with the Charter.[1158]

A similar decision was made by the Commission in *John K. Modise v Botswana*.[1159] In this complaint, the complainant, an opposition politician, claimed Botswana citizenship by ancestry. His father was a citizen of Botswana working in South Africa and married to a South African when the complainant was born of that marriage. He never took South African nationality. After going through various forms of harassment such as "deportation" to Bophuthatswana, South Africa, he was deported back to Botswana. After that, he was granted Botswana citizenship by registration.

[1156] *Jawara*, *ibid* note 1155 p 107.

[1157] *Amnesty International v Zambia*, African Commission on Human and Peoples' Rights, Communication No 212/98 (1999), University of Minnesota Human Rights Library. Available at **http://www1.umn.edu/humanrts/africa/concases/212-98.htm**l. Accessed on 12 February 2011.

[1158] *Amnesty International*, *ibid* note 1157 p8.

[1159] *John K. Modise v Botswana*,14th Annual Activity Report of the African Commission on Human and Peoples' Rights 2000-2001, available at http://www.achpr.org/english/activity_reports/activity/14_en.pdf. Accessed on 12 February 2011.

The Commission found that such registration denied him the right to fully participate in political affairs of Botswana and also constituted "a denial of his right of equal access to the public service of his country granted under Article 14 of the Charter."[1160] In Ivory Coast's 2000 Constitution's heavy restriction on some citizens to perform political functions, the Commission re-stated that "the right to participate in government or in the political process of one's country, including the right to vote and the stand for election, is a fundamental civil liberty and human right and should be enjoyed by citizens without discrimination."[1161]

The model of democracy in the AU Constitutive Act also forms one of the elements of the theme of human rights, democracy and good governance of the UN's Millennium Development Goals (MDGs).[1162] In 2000, 186 members of the UN resolved to address poverty and governance issues by among others "to work collectively for more inclusive political processes, allowing genuine participation by all citizens in all our countries."[1163]Writing for the UN Department of Economic and Social Affairs regarding the road to the achievement of MDGs, Osmani argues that "effective participation by all stakeholders, especially at local level of government, has come to be viewed as a necessary condition for promoting good governance."[1164]

Osmani further notes that people's participation in governance processes combats deficiencies in governance in addition to its intrinsic benefit because people would be

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[1160] *Modise, ibid* note 1159 para 96.

[1161] *Mouvement Ivoirien des Droits Humans v Cote d'Ivoire*, 25th Activity Report of the African Commission of human and Peoples' Rights 2008 para 77. Available at http://www.achpr.org/.../acticvity_reports/25%20Activity%20Report.pdf

[1162] United Nations General Assembly, **United Nations Millennium Declaration A/RES/55/2.**Available at http://www.un.org/milleniumgoals/ accessed on 12 February 2011.

[1163] UN Millennium Development Goals *ibid* note 1157 p7.

[1164] Osmani, "Participatory Governance: An Overview and Evidence," United **Nations Department of Economic and Social Affairs**, New York, 2008 p1, available at http://www.unpan1.un.org/intradoc/groups/public/.../un/unpan028359.pdf, accessed on 12 May 2011.

exercising one of their basic freedoms.[1165] Although elections are a positive democratic exercise, he observes that one of the main problem is the long time lag between one election and the next, which can be ameliorated by the representatives being required to explain to the people in meetings what it is, for instance, they have done with the resources entrusted to them.[1166]People's participation also enhances empowerment and social capital which are mutually reinforcing.[1167]

From an African perspective, the strongest indication that the AU is committed to the virtue of popular participation enshrined in the AU Constitutive Act is the entering into force of the African Charter on Democracy, Elections and Governance ("the Charter"). Article 2(10) provides that one of the objectives of the Charter is the promotion and the establishment of conditions which would foster citizen participation in the management of public affairs. This approach is a departure from the traditional notion of popular participation being the holding of regular elections, recognition that, it is argued, effective participation can only be achieved when the people are directly involved in the affairs of their State. In particular, Articles 29(3) and 31(2) of the Charter require State Parties to create suitable conditions for effective participation of women and social groups with special needs in democracy and developmental processes. Notwithstanding the noble objectives of the Charter, one of the main problems in the enjoyment of democratic ideals it espouses seems to be the few State Parties that have ratified the Charter. By March 2012, only fifteen (17) of the State Parties had ratified the treaty. For purposes of this thesis, it is discouraging to note that Kenya is yet to ratify the Charter.[1168]

[1165] Osmani, *ibid* note 1164 p1.
[1166] Osmani, *ibid* note 1165 p6.
[1167] Osmani, *ibid* note 1166 p7.
[1168] See AU list of Countries which have ratified the Charter. Available at **www.africa-union.org.** Accessed 23 March 2013.

South Africa has one of the best models of participatory democracy in emerging democracies which should be adopted; it is argued, by countries reeling under the heavy weight of representative democracy like Kenya. The foundation of this model, a fundamental departure from a pure representative and discriminatory system of the past, is undoubtedly the 1996 Constitution. Among other founding statements, the Preamble states that the adoption of the Constitution by the people of South Africa was to "heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights." By constitutionalising social justice, it is argued that the founders of the Constitution shifted the country's democratic posture from the "thin" positivistic approach and, in the interests of social justice, adopted a pragmatic and sociological view of law. Most important, the new legal underpinning focuses on the citizenry owning the process thus enhancing its legitimacy.

Ebrahim has argued that:

> A constitution is more than merely a set of rules regulating society and their government. It is more than a social contract or even the *grund norm*. It is also different from a piece of legislation. It is in fact the expression of the will of a nation. It is a reflection of its history, fears, concerns, aspirations, vision, and indeed, a reflection of the soul of that nation. A constitution is obliged to find the favour of the majority of the citizenry; but, in doing so, has to take into account the fears and concerns of minorities...The citizenry must claim ownership of it.[1169]

[1169] Ebrahim, "Constitution-Making in South Africa: A Case Study," House of Commons, 9 July 1999 p3.

It is submitted that the above observations on a country's constitution are the legal architecture of the 1996 South African Constitution. The audacious task of drafting the final Constitution was vested in the Constitutional Assembly. However, the Constitutional Assembly found it exigent to make the process as inclusive as possible so that the people of South African could own not only the process but the substance of the exercise.[1170] Among other reasons, it is the participatory nature of the new constitutional dispensation which has persuaded Wing to suggest that the South African Constitution should be a role model for the USA.[1171] Further, the Constitution had to receive the approval of the custodian of people's rights, the judiciary, so as to test its compliance with the 34 constitutional principles enshrined in the 1993 interim Constitution.[1172]

In addition to a people-centred and people-owned constitution-making approach, South Africa seems to be the genesis of the African social-jurisprudential concept of *Ubuntu.* Mokgoro, J., (as she then was) opines that the concept is difficult to define but among other aims, it "...describes group solidarity where such group solidarity is central to the survival of communities...the individual's whole existence is relative to that of the group..."[1173] As Bennett has observed, this African concept has become a key driver of South Africa's jurisprudence of participatory democracy under the constitutional revolution in that country.[1174]

[1170] Ebrahim, *ibid* note 1169 p4.

[1171] Wing, The South African Constitution as a Model for the United States, 24 (2008) **Harvard Blackletter Law Journal** 73-80 p74. Available at **www.law.harvard.edu/students/orgs/blj/vol24/Wing.pdf**. Accessed on 16 February 2012.

[1172] Schedule 4 of the 1993 Interim Constitution of the Republic of South Africa.

[1173] Mokgoro, "*Ubuntu* and the Law in South Africa," p2. Paper presented at the **First Colloquium Constitution held at Potchefstroom** on 31 October 1997 p3. Available at **http://www.ajol.info/index**.Accessed 12 June 2011.

[1174] See generally Bennett, Ubuntu: An African Equity 14:4 (2011) **Potschefstroom Electronic Law Journal** 30-61. Available at **http://www.ajol.info/index.php/pelj/article/view/68745/56815.** Accessed 10 November 2011.

Apart from its constitutional significance, Bennett notes that *Ubuntu* has also been embraced by the courts in other branches of law, for instance, criminal law, administrative law, contract and private law.[1175] This jurisprudence becomes quite persuasive to examine as a model for other democracies like Kenya, which is struggling to emerge from decades of bad governance principally perpetuated by politics and law of popular exclusion.

The democratic virtue of public involvement in the law-making process, an integral part of political liberalism, seems to be a well-entrenched constitutional doctrine in post-apartheid jurisprudence of South Africa. In the landmark decision of *Doctors for Life,*[1176] the CCSA declared invalid and unconstitutional The Choice on Termination of Pregnancy Amendment Act, Act 38 of 2004 and The Traditional Health Practitioners Act, Act 35 of 2004. The Court held that the statutes were inconsistent with sections 72(1) (a) and 118(1) (a) of the 1996 Constitution of South Africa which, respectively, obligate the National Council of Provinces and provincial legislatures to facilitate public involvement in their legislative and other business.[1177]

The above approach to deliberative democracy was re-affirmed in the case of *Stephen Segopotso Tongoane and Others v. Minister of Agriculture and Land Affairs.*[1178] This case is of great significance, mainly to black South Africans, due to vast injustices occasioned to them by the apartheid land tenure laws and systems. In an effort to address these injustices as mandated by section 25(6) of the Constitution, the National Assembly passed the Communal Land Rights Act, Act 11 of 2004. The main difficulty with this law was the manner in which it was enacted. The procedure applied in the making of the Act failed to meet the

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[1175] Bennett, *ibid* note 1174 pp32-51.
[1176] *Doctors for Life*, *op. cit.*. note 1.
[1177] *Doctors for Life*, *ibid* note 1176 para 212.
[1178] *Stephen Segopotso Tongoane and Others v Minister of Agriculture and Land Affairs* [2010] ZACC10.

constitutional threshold contained in section 59(1)(a), among other challenges, which requires the National Assembly "to facilitate public involvement in the legislative and other processes of the National Assembly and its Committees."

The foregoing overview of popular participation has examined the conceptual foundations of the concept of popular participation and the benefits to be derived from an all-inclusive governance model especially in constitution-making. As examined in chapter three of this thesis, Kenya's political governance has, for decades, essentially been that of popular exclusion. This reality was occasioned by the personification of power by Presidents Jomo Kenyatta and his successor, Daniel arap Moi, largely through a plethora of constitutional amendments. These amendments significantly destroyed the basic structure of the independence Constitution. For this reason, the Westminster model of representative democracy failed to yield good governance because both the legislature and the judiciary fully participated in the destruction of the basic foundations of good governance set out in the Constitution. For this reason, the people of Kenyan could not enjoy the fruits of democracy including their right to form and join political parties of their choice.

Since the legislature and the judiciary were held hostage by the executive, the people had to struggle for meaningful participation in the country's political governance. This was done through a lot of sacrifice. It is submitted that under circumstances then prevailing, the people's approach was a justified expression in which the governance benefits of political participation could be realised. As argued in chapter four of this study, the struggle against personification of public power was the genesis of true popular participation in Kenya's democracy and constitution-making.

It is for the above reason, it is argued, that the 2010 Constitution is a philosophical departure from the wholly representative democratic model by embracing the ideal of popular participation as embraced by the international instruments examined above. Although the central aspects of popular participation especially on the 2010 constitution-making are analysed and critiqued in this thesis, it is important to note here some of the provisions of the Constitution which embrace the new democratic shift. These include Article 35 which provides for access to information held by the State; the rights of persons with disabilities under Article 54; the right of the youth to among others participate in the political, social, economic and other aspects of life under Article 55 and Article 56 which provides for the right of minorities and marginalised groups to participate and be represented in governance and other spheres of life.

Of importance are Articles 97 and 98 which provide for the representation of women, the youth, persons with disabilities and the marginalised communities both in the National Assembly and in the Senate. In addition, the concept of devolved government in Articles 174-200 is also a central pointer to the new democratic shift of empowering the people at grassroots level through the county governments. Despite this democratic reorientation under the new constitutional dispensation, it is however submitted that the most meaningful manner of participation of the people is in the making of their constitution and it is for this reason that I now turn to the key aspects of the participation of Kenyans in the making of the 2010 Constitution.

6.5 SOVEREIGNTY AND THE PARTICIPATION OF KENYANS UNDER THE 2010 CONSTITUTION

The main thrust of this part of the study is that the legitimacy of Kenya's 2010 Constitution cannot be divorced from the Review Act. It is therefore desirable to appraise the extent to which the Constitution is concordant with the Review Act as regards peoples' participation in governance. Section 4(j) of the Review Act provided that one of the objects and purposes of the constitutional review exercise was to ensure "the full participation of people in the management of public affairs." The question which then follows is the extent to which the Constitution-making mechanisms fully engaged the people in Constitution-making. Also to be investigated is the extent to which the Constitution permits the people of Kenya, due to past governance misdeeds, to "fully" participate in the management of public affairs. These issues are the central tenets of this thesis.

Article 1 of the Constitution vests sovereignty in the people of Kenya. This is a major departure from the independence Constitution. Section1 of that Constitution only recognised Kenya as a sovereign Republic. There was no indication on who this sovereignty was vested. Declarations of sovereignty of the people, at both national and county level, are embodied in the new Constitution.[1179] In particular, "all sovereign power belongs to the people of Kenya."[1180] Further, "the people may exercise their sovereign power directly or through their democratically elected representatives."[1181] Article 10 (2) (a) entrenches participation of the people as one of the national values and principles of governance. The philosophy underpinning the new Constitution seems to embrace the jurisprudence of Locke and

[1179] Article 1(4) stipulates that the sovereignty of the people is at national and county level.
[1180] Article 1(1).
[1181] Article 1(2).

Rousseau that governments derive their just power from the consent of the governed.[1182] On the basis of the new Constitution, it is now imperative to critically discuss the question of the sovereign will of the people of Kenya in constitution-making and governance in general under the new constitutional project.

6.5.1 The Kenyan Polity and Constitution-Making

6.5.1.1 Constitutions and Constitution-making: A Conceptual Overview

The making of the supreme law is perhaps the most important process in a country's legal and political history. This is because, to the citizens, a constitution "has a symbolic value."[1183] It can be the foundation of security and identity of citizens although their views may differ.[1184] Those who are politically "in" on the basis of majoritarian and power perspectives are subjected to the criticisms of those who are politically "out" "while simultaneously communicating to all their common national membership."[1185] A modern constitution is not so much seen as a political "power map", as Okoth-Ogendo would have called it, rather it is the take-off point towards constitutionalism and the rule of law.[1186]

To achieve the legitimacy of a modern constitution, Ghai has argued that the process of constitution-making should be an inclusive one in a manner which "strengthens national unity and a sense of common, national identity."[1187] The place of a constitution in a contemporary political system is not only found in legal and political discourses. The UN has provided

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1182 See generally, Chapter Two of this study. Also see Doernberg, "We the People": John Locke, Collective Constitutional Rights, and Standing to Challenge Government Action," 73:52(1985) **California Law Review** 52-118. Available at http://www. heinonline.org.

1183 Tribe and Landry, "Reflections on Constitution-making," 8: (1993) **American University Journal of International Law and Policy** 627-646 p630.

1184 Tribe and Landry, *ibid* note 1183 p631.

1185 Tribe and Landry, *ibid* note 1184 p631.

1186 Ihonvbere, *op. cit.* note 67 pp5-7.

1187 Ghai, "The Role of Constituent Assemblies in Constitution Making," International Institute for Democracy and Electoral Assistance," Paper Commissioned by the International Institute for Democracy and Electoral Assistance (IDEA) (undated) p3. Available at **www.constitutionnet.org.../the-role_of_constituent_assemblies_-_fin**. Accessed on 10 July 2011.

assistance to countries emerging from political turbulence to establish constitutions as they are central to democratic transitions.[1188] In this regard, the UN puts emphasis on a credible document, both in process and substance, because of the role of the document in resumption of peace and in averting similar strife as in the past.[1189]

It is for the above reason that there seems to be near complete consensus in scholarly discourses in constitutional law and others stakeholders on democracy and good governance, like the UN, that the process of constitution-making has to be as inclusive as possible. Even when a nation is emerging from a political crisis, for instance Kenya's 2007 post-election violence, Tribe and Landry argue that:

> The temptation to hammer out a constitutional accord as quickly as possible–to seize the historical moment–must be balanced against sombre reality that speed is not the only *desideratum* if the constitution is to be than simply one stop among many in a series of radical transformation.[1190]

As argued below, it appears as if Kenya's new constitution-making exercise fell prey to this temptation of hammering out an accord as quickly as possible.

In constitution-making, the outcome or the end product is not necessarily what counts in determining the acceptability of the new law. Undoubtedly, substance is crucial, because the constitutional enterprise should address the issues of concentration of power and tyranny by

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[1188] See generally, United Nations, "Guidance Note of the Secretary-General: United Nations Assistance to Constitution-making Processes," New York, April 2009. Available at **www.agoa-parl.org/node/3484**

[1189] UN, *ibid* note 1188 p3.

[1190] Tribe and Landry, *op.cit.* note 1183 p628.

entrenching the principles of liberty, equality and democracy.[1191] However, process and substance are both cardinal ingredients of the constitution-making enterprise. It is also risky to ignore that the whole project of constitution-making can, at the process stage, be manipulated and therefore systems should be put in place to mitigate this.[1192] On process, the UNDP is categorical that "constitution-making has to be a wide societal process *in the full sense of the word,*" (emphasis mine).[1193]

As Regassa has argued, if the right design including an inclusive process to make the supreme law is adopted, it facilitates the fostering of legitimacy and better enforcement and engenders fidelity to the constitution. The constitution is "not only a "basic law," or a higher law but our law."[1194] Certainly, the desirability for public engagement in constitution-making is predicated on the constitution being a supreme law which is an embodiment of the sovereignty of the people and determines their country's system of governance.[1195] For these reasons, Colon-Rios argues that the constituent assembly should be elected in a way that promotes the participation of all the stakeholders; popular participation should occur in all stages of the process and it should take place in a context of strong popular support for constitutional change.[1196]

In South Africa, for instance, the painstaking constitution-making process which ushered in the 1996 Constitution had the National Assembly and the Senate as its Constitutional

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1191 Tribe and Landry, *ibid* note 1190 p639.

1192 Tribe and Landry, *ibid* note 1191 pp632 and 637.

1193 UNDP: Centre for Constitutional Dialogue: Support to Participatory Constitution Building in Nepal p1. Available at **www.ccd.org.np/new/publications/Participatory-Constitution-English.pdf**

1194 Regassa, "The Making and Legitimacy of the Ethiopian Constitution: Towards Bridging the Gap between Constitutional Design and Constitutional Practice," 23:1 (2010) **Afrika Focus** 85-118 p88.

1195 See generally, Mbao "The Politics of Constitution-making in Zambia: Where Does the Constituent Power Lie? in **Fombad and Murray (eds.) Fostering Constitutionalism in Africa.** Pretoria: Pretoria University Press 2010 pp 87-117.

1196 See, Colon-Rios, "Notes on Democracy and Constitution-Making," 9:1(2011) **New Zealand Journal of Public and International Law** pp1-17 pp9-16. Available at http://papers.ssrn.com/sol13/papers.Accessed on 1 April 2012.

Assembly.[1197] The two bodies were democratically elected peoples' representatives and had to approve the Constitution by a two-thirds majority.[1198] In the process, the Constitutional Assembly endeavoured to engage the people in constitution-making and to avoid the charge that had been leveled at the interim Constitution—that it was an 'elite pact.'"[1199]

It is necessary to examine the extent to which the Constitutional Assembly in South Africa went so as to ensure effective and meaningful participation of the people of South Africa in the 1996 constitution-making process. It is observed that the South African approach is helpful in determining the legitimacy of the Kenya constitution-making process and therefore, it is submitted, the legitimacy of the 2010 Constitution of Kenya. The starting point was a widespread civic education intended to communicate to the people the message of the constitution-making process; their fundamental rights; their right to participate; holding meetings on specific subjects like the Bill of Rights and the judiciary.[1200] After the publication of the draft constitution, the people were again invited to make comments on the draft. The education campaign for the entire constitution-making process reached 73% of the South African adults which contributed to a "strong sense of ownership, thus rendering the participation process a success."[1201]

As Ihonvbere notes, one of the central features of constitutionalism is whether the process of constitution-making is popular and democratic, because the process of "constitution-making

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[1197] Currie and de Waal, *op .cit.* note 218 p6.
[1198] Currie and de Waal, *ibid* note 1197 p6 foot note 21.
[1199] Currie and de Waal, *ibid* note 1198 p6 foot note 21.
[1200] Democracy Reporting International, "Lessons Learned from Constitution-making: Processes with Broad-Based Public Participation" November 2011 p6. Available at **http://www.democracy-reporting.org** . Accessed on 1 May 2013.
[1201] Democracy Reporting International, *ibid* note 1200 p6.

is a process of construing a political consensus around constitutionalism. It is a process by which the rulers derive legitimacy."[1202]

Engaging the people in constitution-making enables the people to see the instrument as one which addresses "pressing social-economic, cultural and economic questions as well as an embodiment of consensus around constitutionalism."[1203] In addition, a participatory constitution-making process is an assurance that those who participated in the compact would continue to claim ownership of the instrument, respect individual and collective rights along with the entire democratic process.[1204]

Citing Uganda as an example, Kirkby has argued that for popular participation in constitution-making to be effective, there should be a link between the people and their representatives in the local government institutions.[1205] These representatives would act as the people's "gatekeepers" for purposes of disseminating information on the proposed law and also be part of a constituent assembly.[1206] This approach might be helpful in constitution-making process.

However, the main problem with Kirkby's approach is that in countries with serious governance impediments, like Kenya, such representatives cannot garner the trust of the people and could even distort information for their own political interests. The success of the model would also depend on the legitimacy of the central government institutions which, it is submitted, is cascaded to the regional authorities. In countries emerging from political

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1202 Ihonvbere, *op.cit.*note 67 p6.
1203 Ihonvbere, *ibid* note 1202 p12.
1204 Ihovbere, *ibid* note 1203 p13.
1205 Kirkby, Linking Popular Participation to Democratic Representation in Eastern and Southern Africa Constitution-making," paper presented at the **International Association of Constitutional Law Conference**, Athens, Greece, July 2007 p31.
1206 Kirkby, *ibid* note 1205 p31.

upheaval or where a culture of impunity is well entrenched, as in Kenya, there would be no legitimacy button to pass from the main government to the regional authorities.

The UN provides for a constitution-making road map which, if genuinely applied, would most likely produce a legitimate constitution. To summarise, the components are:

- Determining the need for a constitution-making process, for instance, in a peace agreement. (To confirm this view of the UN, Kibaki and Odinga signed a peace accord in February 2008 in the presence of Africa's Eminent Persons for resumption of peace and legal reforms);[1207]
- negotiations on how the constitution-making process should be conducted;
- establishing of a representative body;
- establishing of a Secretariat, (5) civic education campaigns;
- consultation of the public by the drafting body;
- debate by the drafting body or assembly;
- adoption procedures, for instance Kenya's referendum for the new Constitution and
- civic education after the adoption of the constitution and an effective implementation plan.[1208]

It is therefore apparent that if the only meaningful manner of popular participation is in a referendum, the constitution-making process lacks legitimacy.

The desirability for the constitution-making process to be all inclusive is greater in countries that have emerged from active conflicts than those which reform their constitutions in times

[1207] See generally Agenda Item No. 4 of the KNDR, *op.cit.* note 996.
[1208] UN: Guidance Note of the Secretary-General: United Nations Assistance to Constitution-making April 2009 p5. Available at **www.agora-parl.org/node/3484**. Accessed on 12 March 2011.

of peace.[1209] Without doubt, an all-inclusive process would boost reconciliation efforts in addition to the greater question of legitimacy of the new constitutional compact. In Kenya, it is submitted that the actual event that prompted an accelerated constitution-making process was the 2007 post- election crises. It is appropriate therefore to regard the new Constitution as a post-conflict supreme law.

In such circumstances as those prevailing in Kenya, Banks has argued that participation of the people in the drafting and implementation of the Constitution is imperative. The reason is that participation of the people forms a normative foundation of the constitution and gives it "a legitimate governance system."[1210] Kenya's 2010 Constitution emanates from the turbulence which arose after the 2007 general elections, and was indeed the central agenda in the KNDR talks led by Annan. As the Constitution is a product of the crisis, it is imperative to interrogate the involvement of the people of Kenya from a constitution-making perspective and, consequently, the legitimacy of the new Constitution.

6.5.2 Kenyans and the Making of the 2010 Constitution

In determining the degree of participation of Kenyans in the making of the 2010 Constitution, section 29 of the Review Act must be examined. This section provided that in the discharge of its functions, the CoE was guided by various sources of information all which, it is argued, were failed attempts at forming a constitution for the people of Kenya. These were studies and views collated by the NCC; the various draft constitutions formed by the NCC and the Commission; the Proposed New Constitution, 2005 (The Wako Draft Constitution) and documents and political agreements on critical constitutional questions.

[1209] See generally Ghai *op. cit.* note 1187.

[1210] Banks, "Expanding Participation in Constitution-making: Challenges and Opportunities," 49:4 (2008) **William and Mary Law Review** 1043-1069 p1046. Available at http://scholarship.law.wm.edu/wmlr.Accessed on 12 October 2011.

As discussed in chapter 4.4 of this thesis, the return to multi-partism under Moi was followed by sustained pressure for genuine and meaningful constitutional reforms. The result of this pressure was that the political wing of reforms, the IPPG, merged with that driven by the civil society especially by the NCEC. As argued in that part of the study, the draft constitution prepared by the NCC came too late and the 2002 elections were held under the old Constitution. However, the key issue to observe is that the 2002 draft Constitution emanating from the NCC cannot be said to have manifested the will of the people of Kenya due to the composition of the commissioners. None of the commissioners under the banner of the *Ufungamano* Initiative was appointed by the people. This dimension in the jurisprudence of Kenyan's constitution-making further came to light in the *Njoya* and *Onyango* cases.

In *Njoya,* the High Court, *per* Ringera and Kasango AgJJ., ruled that the people's right to constitution-making including a referendum, which was not encapsulated in the Bomas Draft, was primordial. Further, the Court held that it was wrong for the number of the people's representatives (MPs) in the National Constitutional Conference (NCC) at Bomas which was the constitution-writing body, to be less than the number of the delegates representing other interests. Ringera, Ag.J observed that:

> ...the entire membership consisted of 629 delegates. Out of those only 210 elected members of Parliament could claim to have been directly elected by the people. Although they were not directly elected for the specific purpose of making a new Constitution, it is a notorious fact of which the court may take judicial notice, that one of the issues in the general elections of 2002 was the delivery of a new Constitution. To that extent, the

> elected members could claim to have had the direct mandate of the people to participate in the making of a new Constitution. The other categories of membership were all unelected directly by the people....Thus on the whole; only one-third of the membership of the National Constitutional Conference was directly elected by the people...it would be to turn logic on its head to describe a body largely composed of unelected membership as a representative one.[1211]

In *Onyango and 12 Others v Attorney General and 2 Others*,[1212] the applicants unsuccessfully urged the High Court to stop the 2005 referendum because Parliament had, without the participation of the people, converted the Bomas Draft into the Wako Draft. In holding that Parliament had the authority to make the proposals, the Court ruled that:

> It is not convincing to the Court that alteration of the proposal at the stage of consultation or discussion can invalidate the proposals to be put to the vote by the people. Only the people can invalidate any such process by a 'No' vote. A Court of law has no authority to stop the adoption or rejection at a referendum of constitutional proposals on the basis that one or the other of the draft proposals were altered or mutilated since the Court is not equipped to prefer any of the set of proposals and drafts, this being substantially a political process.[1213]

[1211] *Njoya, op. cit.* note 951 p681.
[1212] *Onyango and 12 Others v Attorney General and 2 Others* 3 KLR (2008) EP.
[1213] *Onyango, ibid* note 1212 p86.

Onyango is a crucial decision in the jurisprudence of Kenya's constitution-making because of the strong remarks the judges made about the landmark decision of *Njoya* and their own views on constitution-making in general. *Onyango* held that *Njoya* did not declare the constitution-making body, the NCC unconstitutional.[1214] Although that is so, the credibility of the Bomas Draft, the work of the NCC, is cast into serious doubt on diverse grounds. First, the people's representatives at the NCC were a minority. This finding in *Njoya* was succinctly reiterated in *Onyango* as follows:

> The product of Bomas will remain an important historical document but it certainly does not have the legal status it was intended to have. The big mistake was the unforgivable failure by those offering legal services to the Government in 1997 and thereafter including the CKRC not to have thought of, or contemplated the role of the people in constitution-making. Regrettably, important review organs were set up but they all missed one important link, namely the role of the people hence the unfortunate fate which befell the Bomas process.[1215]

Second, and as the High Court noted in *Onyango,* one group of delegates led by the then Vice-President walked out of the NCC at Bomas.[1216] Third, allegations of unequal, discriminatory and politically motivated regional representation at the NCC were found to be genuine by Kasango, AJ., in *Njoya.*[1217] Fourth, the process became acrimonious and the NCC seriously split. This prompted the applicants in *Njoya* to allege that some of the recommendations in the Bomas Draft did not, quite disturbingly, reflect the submissions

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[1214] *Onyango, ibid* note 1213 p110.
[1215] *Onyango, ibid* note 1214 p169.
[1216] *Onyango, ibid* note 1215 p94.
[1217] *Njoya, op. cit.* note 951 pp717-721.

made to the constitutional review commissioners. Further, they argued that it was not right for the Draft to deny them the right to participate in a referendum.[1218]

It is therefore apparent that the NCC (*Bomas*) was fundamentally flawed especially on the question of its mandate from the people to produce a Draft Constitution for Kenya. As observed by a leading constitutional lawyer in Kenya, the starting point in constitution-making is the election of members of a constituent assembly followed by a referendum.[1219] This thesis therefore argues that the 2004 Bomas Draft Constitution was illegitimate. On the basis of this argument, the 2002 Draft Constitution prepared by the NCC was equally illegitimate due to its composition. Similarly, it is submitted that President Kibaki's Wako Draft Constitution, which was heavily defeated in the 2005 referendum, was equally illegitimate. The reason is that its bedrock was the illegitimate 2004 Bomas Draft. The invalidity of the Wako Draft was exacerbated by Kibaki-friendly MPs making certain alterations to the Bomas Draft (to create the Wako Draft) with the intention of retaining an all-powerful presidency.[1220]

6.5.3 The Missing Spirit of the Review Act in the 2010 Constitution

As examined in chapter 5.4.3 of this thesis, the Review Act, a product of the KNDR talks, was the bedrock of Kenya's 2010 Constitution. It is therefore crucial to examine the Constitution from the perspective of the Review Act.

The Review Act stated the purpose of the Act as to, among others, provide for the establishment of the organs charged with the responsibility of facilitating the review

[1218] *Njoya, ibid* note 1217 p703.
[1219] Communication by way of personal interview, Nairobi 9 May, 2012.
[1220] See generally, chapter four of this thesis.

process;[1221] establish mechanisms for conducting consultations with the stakeholders[1222] and provide a mechanism for consensus-building on contentious issues in the review process.[1223] As examined below, the aim of the constitutional review exercise was contained in section 4 of the Review Act. Undoubtedly then, the legitimacy of the 2010 Constitution is predicated on its compliance with the principles embedded in the Review Act. It is therefore necessary to examine section 4 of the Review Act in depth. The section provided that the constitutional review exercise was intended to secure provisions in the law for:

a) guaranteeing peace, national unity and integrity of the Republic of Kenya in order to safeguard the well-being of the people of Kenya;

b) establishing a free and democratic system of Government that guarantees good governance, constitutionalism, the rule of law, human rights, gender equity, gender equality and affirmative action;

c) recognising and demarcating divisions of responsibility among the various state organs including the executive, the legislature and the judiciary so as to create checks and balances between them and to ensure accountability of the Government and its officers to the people of Kenya;

d) promoting the peoples' participation in the governance of the country through democratic, free and fair elections and the devolution and exercise of power;

e) respecting the ethnic and regional diversity and communal rights including the right of communities to organise and

[1221] Section 3(b) of the Constitution of Kenya Review Act 9 of 2008.
[1222] Section 3(c) of the Constitution of Kenya Review Act 9 2008.
[1223] Section 3(d) of the Constitution of Kenya Review Act 9 of 2008.

participate in cultural activities and the expression of their identities;

f) ensuring provision of basic needs to all Kenyans through the establishment of an equitable framework for economic growth and equitable access to national resources;

g) promoting and facilitating regional and international co-operation to ensure economic development, peace and stability and to support democracy and human rights;

h) strengthening national and international unity;

i) creating conditions conducive to a free exchange of ideas;

j) ensuring the full participation of people in the management of public affairs; and

k) Committing Kenyans to peaceful resolution of national issues through dialogue and reconciliation.

The constitutional review organs established under section 4 had to:

a) ensure that the national interest prevails over regional or sectorial interests;

b) be accountable to the people of Kenya;

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

d) ensure that the review process—

i. provides the people of Kenya with an opportunity to actively, freely and meaningfully participate in the generating and debating proposals to the review to replace the Constitution;

ii. is guided by the principle of stewardship and responsible management;

iii. is, subject to this Act, conducted in an open manner; and

iv. is guided by respect for the principles of human rights, equality, affirmative action;

e) ensure that the outcome of the review process faithfully reflects the wishes of the people of Kenya.[1224]

The above sections of the Review Act established the philosophical architecture of the constitution-making process. It is worth noting the strong intention of a comprehensive, robust and all-inclusive process as contained in section 4 (i) and (j) and section 6 (d) (i) and (e) which were designed to entrench the voice of the people in public governance.

Having established such a strong foundation for the review process especially in the participation of the people in constitution-making and governance, one would have thought that the rest of the Act would have provisions entrenching this philosophy. However, the Act took short cuts and therefore denied the people the crucial right of fully participating in the formulation of their constitution. In particular, it is necessary to examine section 23 which set out the functions of the CoE. Because of the need to establish the nature and magnitude of popular participation in the making of the new Constitution and in view of the sound

[1224] Section 6 of the Constitution of Kenya Review Act 9, 2008

philosophy of the review process as contained in sections 4 and 6 of the Review Act, it is necessary to examine section 23 at length. The functions of the CoE were to:

a. identify the issues already agreed upon in the existing draft constitutions;
b. identify the issues which are contentious or not agreed upon in the existing draft constitutions;
c. solicit and receive from the public written memorandum and presentations on the contentious issues;
d. undertake thematic consultations with caucuses, interest groups and other experts;
e. carry out or cause to be carried out such studies, researches and evaluations concerning the Constitution and other constitutions and constitutional systems;
f. articulate the respective merits and demerits of proposed options for resolving the contentious issues;
g. make recommendations to the Parliamentary Select Committee on the resolution of the contentious issues in the context of the greater good of the people of Kenya;
h. prepare a harmonised draft constitution for presentation to the National Assembly;
i. facilitate civic education in order to stimulate public discussion and awareness of constitutional issues;
j. liaise with the Electoral Commission of Kenya to hold a referendum on the Draft Constitution; and

k. do such other things as are incidental or conducive to the attainment of the objects and principles of the review process.

As seen above, section 23 (a) and (b) did not provide that the constitutional review exercise had to start afresh regarding Kenyans full involved in the process. On the contrary, and for purposes of this thesis, a fundamental flaw in the review process, the Act provided the existing Draft Constitutions as the basis or the architecture of the review exercise. Given the complexity of constitution-making, the CoE's job was simplified because all that it was supposed to do was to determine the contentious issues in the Draft Constitutions. The fundamental flaw of section 23 is that it categorically adopted what this study considers illegitimate draft constitutions except in those matters which the CoE considered contentious having regard to the draft constitutions. The "existing draft constitutions" mentioned in section 23(b) as read with section 29 are the 2002 and 2004 draft constitutions emanating from the deliberations of the NCC and the Proposed Constitution of Kenya, 2005 (The Wako Draft).

As held in the cases of *Njoya* and *Onyango*, the 2004 Bomas draft constitution was fundamentally flawed because at the conference, the direct representatives of the people were outnumbered by unelected delegates. In addition, there were serious internal disputes and splits within the NCC such that the Bomas Draft could not be said to have been a genuine reflection of the views of the "delegates." As argued above, the 2002 Draft Constitution prepared by the NCC could not have been legitimate due to the composition of its membership. Clearly, as well, the Wako Draft, a Kibaki-engineered project, undoubtedly fails the test of constitutional legitimacy.

The approach by the Review Act also operated against the process-rule in constitution-making, a view which, quite paradoxically, is contained in section 4 of that Act. It is therefore submitted that any claim that the 2010 constitution-making passed the process-test fails, with respect, to fully appreciate the defects in this overarching legislation and constitution-making events preceding its enactment. For instance, in attacking Zambia's constitution-making process, Ndulo and Beyan argued in 2011 that Zambia's constitution-making should, as in Kenya, South Africa, Namibia and Uganda, be guided by best practice in constitution-building.[1225] It is argued that the view by these scholars seems, with due respect, not to appreciate the historical underpinnings of the 2010 constitution-making process which is the only way, it is submitted, of determining whether it satisfied best practice in constitution-making.

In addition to providing for full participation of the people, the review process was intended to reform the constitutional and legal architecture of the country so as to involve the people in the management of public affairs. This was a major departure from the country's political trajectory since independence and, perhaps, an acknowledgment of the consequences of such a system as examined in chapter three of this study. It is therefore necessary to examine this object of the Review Act viewed against some key provisions of the Constitution.

6.6 FULL PARTICIPATION OF THE PEOPLE IN THE MANAGEMENT OF PUBLIC AFFAIRS

The ideal of full participation of the people was one of the cornerstones of the Review Act. The twin pillars of full participation were, first, the involvement of the people in constitution-

[1225] UK Zambians, "Diaspora Zambian Constitutional Lawyers Castigate Constitution-Making Process." Available at **http://www.ukzambians.co.uk/home/2011/12/25**. Accessed on 10 April 2012.

making. As already examined, that did not happen. It seems there was a great rush to produce a constitution, thus reference was made to three fundamentally flawed draft constitutions.

The other pillar of the review process was that under the new constitutional project, Kenyans would significantly contribute and be fully engaged in the management of their affairs.[1226] Perhaps the envisaged model of democracy was motivated by the governance predicaments of the past under a pure representative democracy. It is for this reason argued that the new Constitution was intended to embrace direct democracy, or at least vest in the people more space for them to significantly participate in the conduct of public affairs. This model would reflect similar views of the people in advanced democracies where the citizenry generally prefer to be fully engaged in public governance processes.[1227]

The reasons for the above view are that even in such democracies; citizens generally distrust their governments and also see an obligation for them "to keep a watch on their government."[1228] The extent to which sovereignty of the people of Kenya as stipulated in Article 1 of the Constitution and the extent to which the model of democracy and governance envisaged in the Review Act are manifested in the Constitution are now examined with specific reference to law-making and selected provisions on executive decision-making.

6.6.1 Popular Participation and Law-making

Under the 2010 Constitution, participation of the people of Kenya in law-making is probably one of the main and laudable democratic gains; a key departure from the old Constitution. The starting point is to see the extent to which law-making process embraces peoples'

[1226] Article 4(j).
[1227] Bowler *et al.*, "Enraged or Engaged," 60(2007) **Political Research Quarterly** 351-362 p351. Available at http://www.sagepublications.com.
[1228] Bowler, *ibid* note 1227 p351.

participation in the legislature, a democratic ideal whose origin, as discussed above, are renown ancient Greek philosophers. The second matter for discussion in this section of the study, and this is central to this study, is to examine whether the Constitution provides for effective mechanisms and processes for the participation of Kenyans in law-making at the national level.

Article 97 (1) (b) of the 2010 Constitution provides that membership of The National Assembly shall include forty-seven women each elected by voters in every county. This is without doubt a major democratic and human rights benefit for the country. This is in view of the failure by the old Constitution to make any provision for women representation in the legislature, a phenomenon found in all institutions of state. In addition, Article 97 (1) (c) provides that the National Assembly membership shall include twelve persons nominated by political parties according to their proportion of members of the National Assembly. These members would represent special interests including the youth, persons with disabilities and workers.

The above approach is replicated by the provisions pertaining to membership of the Senate. Sixteen of its members shall be women nominated by political parties according to their proportion of members of the Senate provided in Article 98 (1) (b)) and two members, one being a woman and the other a man, representing the youth in terms of Article 98 (1) (c). Further, Article 98 (1) (d) provides for two members, one being a woman and the other a man, to represent persons with disabilities. It is also worth noting that under Article 119 of the Constitution, any person may petition Parliament, consisting of the National Assembly and the Senate, to consider any matter within its authority including enacting, amending or repealing any legislation.

While Parliament under Kenya's independence Constitution was a pure representative model, the new Constitution embraces certain key changes in the law-making process. Most importantly, Parliament is required to facilitate public participation and involvement in the legislative and other business of Parliament and its committees.[1229] This indeed is a major reform in Kenya's law-making process. However, the real benefits of this provision would be derived only if Parliament fully adheres to this ideal, which Ngcobo J.,(as he then was) in South Africa's seminal case of *Doctors for Life* observed was at "the heart of our constitutional democracy."[1230] In Kenya, it is argued that popular participation in the law-making process was an ideal of the constitutional democracy envisaged in the Review Act which seemed to embrace the philosophy explained above by Ngcobo J. It is submitted that meaningful and effective involvement of the people in law-making is perhaps the most crucial aspect of the general notion of popular participation in the management of public affairs.

As a matter of comparative jurisprudence, this emerging concept, as a central component of the ethos of participatory democracy, is perhaps nowhere as established as in South Africa. As Seedat has argued, in that country, the democratic political order should not be about representative democracy only, but should also incorporate elements of participatory democracy, or she calls "a bedrock principle."[1231]

The main difficulty in ensuring public participation is that Kenya's 2010 Constitution does not stipulate that Parliament should enact legislation for the operationalisation of this ideal. It

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[1229] Article 118(1)(b).
[1230] *Doctors for Life, op. cit.* note 1 para 1.
[1231] Seedat, "The Ethos of Law-Making: Lessons from the Constitutional Court of South Africa," **Institute for Democracy in South Africa**. Available at **www.idasa.org/media/.../PublicParticipationDoc-ConCourt+Lessons.pd...** p1. Accessed on 12 October 2011.

is submitted that for such an important reform, which is certainly predicated on past experiences with a compromised legislature, the Constitution should have demanded the enactment of an enabling statute which would drive the realisation of the ideal of popular participation in legislation-making.

One would have fathomed that the mandatory word "shall" conveys a strong message to Parliament for involvement of the people in its business. However, from a Kenyan political trajectory, that is not forceful enough. Perhaps that is what motivated the drafters of the Constitution to stipulate in Article 261 that Parliament shall enact certain legislation as part of the reform process.

Legislation which Parliament should enact within specified time-frames is contained in the Fifth Schedule of the Constitution. It includes citizenship; promotion of representation in Parliament of marginalised groups; freedom of the media; just administrative action and quite important, the right granted to a person by Article 119 to petition Parliament for it to consider any matter within its authority. Parliament is therefore not under an obligation to enact legislation for the people's involvement in law-making and other business. It is submitted that this position does not fully embody the intent and spirit the Review Act and the declaration of sovereignty in the Constitution. Legislation would, hopefully, eliminate doubts, mistrust and suspicion on how the crucial notion of involvement of the people in law-making should be achieved. The gravity of this omission is demonstrated in the next section of this chapter which examines a continuum of political conduct which violates constitutionalism and the rule of law even under the new constitutional dispensation.

6.6.2 Popular Participation and Executive Decision-making

6.6.2.1 Commissions and Independent Offices

One of the central features of the new Constitution is the establishment of key commissions and independent offices of the Auditor-General and the Controller of Budget.[1232] These institutions are corporate bodies capable of suing and being sued.[1233] The three objects of the commissions and independent offices are to "protect the sovereignty of the people;"[1234] "secure the observance by all State organs of democratic values and principles"[1235] and "promote constitutionalism."[1236] In order to shield them from interference, the most probable being political as in the past, the commissions "are independent and not subject to direction or control by any person or authority."[1237] The commissions include the National Police Service Commission (NPC); the Public Service Commission (PSC); the Judicial Service Commission (JSC); the Commission on Revenue Allocation (CRA); the Independent Electoral and Boundaries Commission (IEBC); the National Land Commission (NLC); and the National Security Council (NSC).[1238]

It is expected that the above commissions will significantly contribute to the management of national affairs in their respective capacities under the new constitutional dispensation. It is therefore necessary that their membership should not be determined exclusively by the political class without people's involvement. The membership of the JSC is a good example and is used here as a benchmark as the composition of the other commissions is examined. Membership of the JSC includes one woman and one man elected by the members of the

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1232 These Commissions and Independent Offices are established in various Articles but the general provision is Article 248.
1233 Article 253(a)(b).
1234 Article 249(1)(a).
1235 Article 249(1)(b).
1236 Article 249(1)(c).
1237 Article 249(2)(b).
1238 Article 248(2).

association of judges and magistrates and two advocates (one being a man and the other being a woman) elected by the members of the statutory body responsible for the professional regulation of advocates.[1239] The composition of the JSC seems to represent the ideal of peoples' empowerment in decision-making under the new legal order. However, this admirable departure from the past is not reflected in other key commissions and councils as examined below.

The PSC has the crucial role of establishing and abolishing offices in the public service and to appoint persons to hold or act in those offices.[1240] Members of the PSC are appointed by the President with the approval of the National Assembly.[1241] The people, who as in the case of the JSC should be considered key stakeholders in the functions of the PSC, have not been granted an opportunity to appoint any of the members of the PSC. This responsibility solely rests on the people's representatives. This could have been what prompted some MPs to call for the 'new' PSC to be reformed. They argued that the two principals to the coalition Government, President Kibaki and Prime Minister Raila Odinga, were horse-trading and therefore practicing ethnicity in key public service appointments under the new Constitution.[1242]

It should also be observed that the President exercises unfettered authority in matters of defence and security of the nation which could be misused as before. Article 240 of the Constitution does not promote the ideal of participation of the citizenry in the management of public affairs as the composition of the NSC is clearly under the control of the President. For instance, President Kibaki has been accused of appointing persons from his tribe to lead top

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1239 Article 171(2) (d) and (f).
1240 Article 234(2)(a)(b).
1241 Article 233(2).
1242 *The Standard*, 11 November 2011, "Kibaki, Raila Accused of Ethnic Profiling in Top Jobs." Available at http//www.standardmedia.co.ke.Accessed 11 November 2011.

security organs of the country under the National Security Council (NSC). This is perhaps what prompted Omar Hassan, a Commissioner in the Kenya National Commission of Human Rights (KNCHR), to reveal in 2011 that the new Chief of Defence Forces, the Commander of Administration Police, the Director General of the National Intelligence Service, the Director of Criminal Investigations Department are all, like Kibaki, Kikuyus, while the Commissioner of Police is from the Meru tribe, a member of the three GEMA tribes.[1243]

That the new Constitution does not substantially embrace the notion of a people fully engaged in the management of public affairs as envisaged in the Review Act is also demonstrated in the composition of the all-important CRA. For decades, the "our turn to eat" culture in Kenya has mainly been perpetrated by its Presidents through financial allocations to Ministries by the Ministry of Finance.[1244] It is argued that in an attempt to mitigate such anomalies, the new Constitution provides that the CRA should ensure a balanced and equitable distribution in sharing of revenue between the national and county governments and among the county governments as well as promote fiscal responsibility.[1245]

However, what one deciphers in the composition of the CRA is heavy political presence, a trajectory which, it is argued, is clearly inconsistent with the spirit of the Review Act. In terms of Article 215(2), the Commission chairperson is nominated by the President and approved by the National Assembly; two members are nominated by the political parties represented in the National Assembly according to their proportion of members in the National Assembly; five persons are nominated by the parties represented in the Senate

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1243 Hassan, "Every Kenyan Must Take a Stand against Kibaki's Tribalism," as reported in *The Standard,* 22 November 2011.

1244 See, for instance, Wrong, *op. cit.* note 557 p53.

1245 Articles 216(1)-(3).

according to their proportion of members in the Senate and the Principal Secretary in the Ministry responsible for Finance.

The composition of the above key governance commissions cannot be said to manifest the sovereignty of the people or their participation in the management of public affairs. In addition, the Constitution does not provide for the engagement of the people in the formulation and implementation of policy among other requirements which would amount to the empowerment of the citizenry. Entrusting the key aspects of the executive management of the state to politicians especially in view of their miserable governance record, is a continuation of the representative model of democracy as in the 1963 Constitution. It is submitted that this approach is an affront to the letter and spirit of the Review Act. Specifically it takes away the sovereignty of the people as encapsulated in the 2010 Constitution. This is worsened by the reality that Kenya's political parties, to which most politicians owe their loyalty, are in general tribal affiliations with little ideological foundations.[1246]

6.6.2.2 Devolved Government and Popular Participation

Article 174(d) of the Constitution provides one of the objects of devolution of government as "to *recognise* the right of communities to manage their own affairs and to further their development." This is a major reform in the country's governance structure. The need for communities in the various counties to manage their own affairs is based on past experiences of governance characterised by a powerful presidency; highly centralised machinery of the

[1246] See generally, Ajulu, *op. cit.*note 535 and Throup and Hornsby, *op. cit.* note 608.

state; political ethnicisation and "our turn to eat" phenomenon.[1247] For the purposes of this thesis, it is submitted that the people would only be empowered if they were involved in the decision-making process of their respective counties. This is how they would usefully contribute to the promotion of their welfare at the local level, what Brynard calls "the Achilles heel of public management in local government."[1248]

Participation of the citizenry in decision-making of their county is equivocally spelt out in the Constitution. In addition, none of the functions of county executive committees laid out in Article 183 include soliciting the views of or engaging the county residents in decision-making. Such ambiguity could be used to exploit deeply-rooted parochial interests. It is argued that the ideal of popular governance in the counties should be as elaborate and unequivocal as that in urban areas and cities. Article 184(1)(c) states that national legislation should be enacted to among others "provide for participation by residents in the governance of urban areas and cities." It is submitted that this new paradigm should be replicated in all counties in which most Kenyans live.

One important aspect of the management of counties deserves mention. The Constitution does not make it mandatory for county executive committees or any other organ to involve the people in decisions pertaining to alteration of their county boundaries. Article 188 provides that boundaries of a county may only be altered by a resolution of a commission established by Parliament for that purpose and passed by the National Assembly and the Senate with at least two-thirds majority. It is argued that it is against the architecture of the new Constitution for the people to be excluded in an exercise which affects what they would

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1247 Ghai, "Devolution: Restructuring the Kenyan State," Lecture for the African Research and Resource Forum," Nairobi, 23 November 2007 p2. Available at **http://www.arrforum.org/index.php?option=com_content&view=arti..**. Accessed on 16 March 2012.

1248 Brynard, "Public Participation in Local Government and Administration: Bridging the Gap," **University of South Africa Press** 2009 p1, Available at http://www.unisa.ac.za. Accessed on 12 October 2011.

consider their "home" as established by the First Schedule to the Constitution. For comparative purposes, it is necessary to briefly examine the position in South Africa as a leading country in participatory democracy.

In the case of *Matatiele Municipality and Others v President of the Republic of South Africa (2),*[1249] the Constitution of the Republic of South Africa Twelfth Amendment Act 2005 was declared unconstitutional by the CCSA. The Act re-demarcated Matatiele municipality from the Province of KwaZulu-Natal into the Eastern Cape without the involvement of the people in the province in the alteration of the boundaries. This was contrary to sections 72 and 118 of the 1996 Constitution. The CCSA ruled that the failure to involve the people in alteration of the boundaries of their province was:

> ...contrary to the conception of our democracy, which contemplates an additional and more direct role for the people of the province in the functioning of their provincial legislatures than simply through the electoral process.[1250]

The Court was emphatic that the new model of democracy was not purely founded on the traditional representative system but it had to be boosted by direct participation of the people. It is worth noting that while Kenya's 2010 Constitution provides in Article 196 and the Fifth Schedule that legislation should be enacted for participation of the people in law-making in county assemblies, the same is not replicated in decision-making. While the people may meaningfully participate in the enacting of laws, people's involvement in the implementation and indeed the operationalisation of those laws should be engendered in the new

[1249] *Matatiele Municipality and Others v President of the Republic of South Africa* 2007 (6) SA 477(CC)
[1250] *Matatiele, ibid* note 1249 para 63.

dispensation. It is submitted that when that takes place, the concept of "citizen" bears more significance as the people become "participants as agents of democratic governance."[1251]

Without doubt, the history of Kenya's political governance must have informed the spirits behind the Review Act and the new Constitution. The need for a robust participatory democracy in Kenya with the intent of remedying the exclusion of the people as submitted above becomes clearer upon an examination of key events on the country's current political developments. The argument is that even under the new Constitution, the same threats which have for decades undermined good governance still abound. This further strengthens the argument in this thesis that the people should indeed be the bulwarks of the Constitution and be fully involved in public governance processes.

6.7 THE 2010 CONSTITUTION AND THE CONTINUUM OF UNCONSTITUTIONALISM

6.7.1 Impunity and Corruption: General Observations

Due to the deeply entrenched governance challenges faced by Kenyans since independence, the new Constitution may not usher in constitutionalism. Skeptics of the new legal order, such as, Ghai, argue that there exist in the country's political system vested interests which may sabotage reforms because the state "still remains the primary means to accumulate wealth and power, and those who are in control of it will fight to maintain their control, regardless of the rules of the constitution."[1252] Some months before the appointment of Mutunga to the office of Chief Justice under the new Constitution, he observed that there was pessimism that actual reforms would take place. He stated that:

[1251] Williams, "Community Participation: Lessons from Post-apartheid South Africa," 27:3(2006) **Policy Studies** 197-217 p203. Available at http://www.oreconsulting.co.za/.../Publication2006-Community_Partici... Accessed on 12 October 2010.

[1252] Ghai, *op. cit.* note 1187 p2.

> ...the forces of anti-reform that we have faced, both internal and external have not gone away. They remain powerful. We see bureaucrats and ministers rushing the process...we see the recycling of names of the usual suspects for senior appointments.[1253]

The fears expressed above are not without merit. About three weeks after the promulgation of the Constitution, the executive arm of the Government commenced the process of reforming the provincial administration, a responsibility of the Commission for Implementation of the Constitution (CIC) appointed by Parliament under the Sixth Schedule pursuant to Article 262 of the Constitution.[1254] The Government's move was opposed by the Chairman of the Parliamentary Accounts Committee, who "asked the government to stop usurping the role of the yet-to-be formed CIC."[1255] In addition, there is a scramble for dominant elective political positions of Governor and Senator and as *The Standard* observed, this should make voters "very worried...if the current leadership is allowed to have its way, then the 'New Dawn' could quickly turn into the 'False Dawn'."[1256]

On tribalism, the former Head of the Civil Service, Francis Muthaura, admitted in November 2010 when he appeared before a Parliamentary Defence and Foreign Affairs Committee that diplomatic appointments were made on tribal considerations. Therefore, "certain communities were dominant and 'overrepresented.'"[1257] Mutua has argued that the

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[1253] Mutunga, "Will the New Constitution Really Change Politics and Society in Kenya," *Daily Nation,* 28 August 2010 at **http://www.nation.co.ke.** Accessed on 28 August 2010.

[1254] *The Standard*, 24 September 2010, "State Binds PSs to Reform Provincial Administration." Available at **http://www.standardmedia.co.ke/InsidePage.php?id=2000019004&cid.** Accessed on 24 August 2010.

[1255] *The Standard, ibid* note 1254.

[1256] *The Standard*, 6 September 2010, "Scramble for Senators May Scuttle 'New' Dawn.'" Available at **http://www.standardmedia.co.ke/InsidePage.php?id=2000017736&cid...** Accessed on 6 September 2010.

[1257] *The Standard*, 16 November 2010, "Wetangula's Ministry Hit by Claims of Tribalism." Available at

referendum vote for the new Constitution did not reflect the convictions of the voters on the issues it embraced, but the votes were guided by tribal persuasions.[1258] He further notes that the voters followed their tribal kingpins, the Luo with Raila Odinga, the Kikuyu heeded Mwai Kibaki while the Luhya went with Deputy Prime Minister Musalia Mudavadi. The Kalenjin 'No' vote was obtained due to the opposition to the draft by their kingpins, William Ruto and former President Moi.[1259] Mutua fails to see, excluding tribalism, how the Kalenjin could vote in unison and as a block against the draft. Only Muslims, he continues, voted for the Constitution because of the retention of the Kadhis Courts. As a whole, he adds that the referendum vote was like past elections, including the one in 2007. In Kenya, "the tribe still rules the ballot box."[1260]

Michael Ranneberger, the former USA Ambassador to Kenya said in November 2010 that two of Kenya's main challenges are "the culture of impunity and negative ethnicity."[1261] Ranneberger was at the forefront in opposing the re-opening of Charterhouse Bank Limited which was placed under statutory management by the Central Bank of Kenya in 2006.[1262] A USA secret report which was submitted to the Kenya Anti-Corruption Commission by Ranneberger, alleged money laundering activities by the Bank amounting to US $500 million and loss to the exchequer of US $ 250 million by assisting people to evade the payment of

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http://www.standardmedia.co.ke/InsidePage.php?id=2000022532&cid. Accessed on 16 November 2010.

1258 Mutua, "Why the Tribe Could Kill the Constitution," *Daily Nation*, 4 September 2010. Available at **http://www.nation.co.ke/oped/Opinion/Whythetribecouldkilltheconstituion/-/440808/1003802/-/item/1/-/e3v2yl/-/index.htm** p 1. Accessed on 6 September 2010.

1259 Mutua, *ibid* note 1258 p2.

1260 Mutua, *ibid* note 1259 p2.

1261 *Daily Nation*, "Graft: US wants Kenya's Attorney-General and Chief Justice Out," 30 November 2010. Available at **http://www.nation.co.ke/-/1056/1062398/-/11/hahmpz/-/index.html p.1**. Accessed on 30 November 2010.

1262 See Central Bank of Kenya, "Press Release: Placing Charterhouse Bank under Statutory Management," 23 June 20006. Available at **http://www2.centralbank.go.ke/downloads/mediareleases /charterhouse.pdf**. Accessed on 2 December 2010.

tax.[1263] The Charterhouse Bank saga becomes more disturbing from the perspective of constitutionalism because in December 2010, the National Assembly cleared the Bank of any wrong-doing.[1264] It is however claimed that the National Assembly acted irregularly as it violated its own standing orders.[1265] The Central Bank has declined to re-open the Bank, but the saga "has triggered new questions about the integrity of the National Assembly and its ability to play the vital oversight role envisioned by the new Constitution."[1266]

In 2006, the Central Bank of Kenya appointed Price Waterhouse Coopers to investigate the Charterhouse Bank. The firm found it difficult to compile its final report due to un-co-operative Bank executives. This was worsened by the destruction of important documents by a suspicious fire. However, their preliminary findings disclosed major financial irregularities at the Bank.[1267] To demonstrate that not much has changed under the new legal order, Ranneberger observes that "there are influential personalities in and outside the government seeking to block reforms in the financial sector to ensure they preserve entrenched interests in the new constitutional dispensation.[1268]

A key manifestation of the argument that the National Assembly is a threat to constitutionalism is the MPs' refusal to pay taxes they owe since the promulgation of the 2010 Constitution in August 2010.[1269] In July 2011, Kenyan MPs, unsurprisingly, threatened to strip the retirement perks of President Kibaki, Vice-President Kalonzo Musyoka, Prime

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[1263] *The Standard*, "Powerful Leaders Fighting Financial Sector Changes," 2 December 2010. Available at **http://www.standardmedia.co.ke/InsidePage.2000023786&cid=4&ttl.**p.1. Accessed on 2 December 2010.

[1264] Kenya broadcasting Corporation (KBC) News, "Parliament Clears Charterhouse Bank," 9 December 2010. Available at **http://www.kbk.co.ke/news**. Accessed on 5 June 2011.

[1265] *The Nairobi Law Monthly*, "Mercenaries in the House" p1. 3 February 2011. Available at **http://nairobilawmonthly.com/index/content.asp?contendID=214**. Accessed on 5 June 2011.

[1266] *The Nairobi Law Monthly, ibid* note 1265 p1.

[1267] *AllAfrica.com*, "Summary of Report on Charterhouse Bank," 1st October 2010. Available at http://allafrica.com/stories/201010020143.htm p.1. Accessed on 2 December 2010.

[1268] *The Standard, op. cit.* note 1263 p1.

[1269] *Daily Nation*, 7 July 2011, "MPs Threaten Kibaki and Raila over Taxes." Available at **http://www.nation.co.ke**. Accessed on 7 July 2011.

Minister Odinga and their spouses if they did not prevail upon the Kenya Revenue Authority to shelve its decision to demand tax arrears from them, an obligation imposed on the revenue body by the new Constitution.[1270]

Threats to constitutionalism are reinforced by the fact that the President, the symbol of national unity in terms of the Constitution, may have indirect control of the National Assembly. This would particularly be achieved through the machinery of the President's political party, especially on discipline and policy orientation. As Simutanyi has observed, although African parliaments have recently begun to emerge from decades of marginalisation by the executive, the worrying reality is that the executive still retains great influence on the MPs because it is in control of the purse. In addition, it "is not only expected that Members of Parliament will vote according to the instructions of their parties, but also of those who may not risk severe sanctions."[1271]

The disclosure by the Permanent Secretary of Finance, Joseph Kinyua to a Parliamentary Committee in December 2010 of the grand scale of corruption in Kenya is enough, one would hope, to convince even the most skeptical critics of direct participatory democracy that more reforms are necessary in order for the people to be more engaged in safe-guarding and managing of national affairs. As the average Kenyan struggles to survive on under US $1 per day, the Permanent Secretary disclosed that the country loses Shillings 270 billion(US $360 Million) to corruption every year which can "cater for the budgets of the Ministries of

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[1270] Article 210(3) provides that State officials may not be excluded from payment of tax by reason of the office held by the officer or the nature of the work of the State officer.

[1271] Simutanyi, "Parties in Parliament: The Relationship between Members of Parliament and their Parties in Zambia," "**EISA Occasional Paper Number 36**, September 2005 p2. On page 17, Simutanyi notes that in Zambia, (as in Kenya) presidential appointments, in particular ministerial appointments and inducements are the main ways used by the executive and the ruling party to lure and influence MPs to sing a different tune which might be inconsistent with the will of their representatives. Available at **http://www.eisa.org.za/PDF/OP36.pdf**. Accessed on 8 May 2011.

Education (sh. 139 billion), Roads (sh.67 billion), Medical Services (sh.32 billion) Public Health (sh.16 billion) and Energy (19 billion)." [1272]

In June 2011, more confirmation of grand corruption in the government came from Uhuru Kenyatta and Sam Ongeri, former Ministers of Finance and Education respectively. The two told the country that Ks 4.2 billion (US $56 million), meant for the Kenya Education Sector Support Programme had been stolen in the past four years.[1273] The admission was that half of the amount reported was missing. The donors, including the World Bank, demanded that the Government should refund to them all the money that was stolen.[1274]

On impunity, generally driven by the African style of presidentialism, a member of the Kenyan National Assembly, Ababu Namwamba, has observed that the new Constitution may have altered the legal architecture of the state, but "the national surface is still populated by powerful lords of impunity determined to travel any length to torpedo Kenya's flight in the new dispensation."[1275]

Namwamba made the comments following the Judicial Service Commission's nomination of Keriako Tobiko as the Director of Public Prosecutions. The vetting, subsequent confirmation hearing and eventual confirmation of Tobiko under the new Constitution was the most acrimonious of the judicial nominees' hearings in Parliament. The exercise had deep tribal undertones and serious exchanges. The JSC had indeed failed to garner unanimous agreement on Tobiko although it forwarded his name to Parliament for confirmation. Namwamba argues

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[1272] *The Standard*, "Sh. 270 Billion: That's what we Lose to Graft Yearly," 3 December 2010. Available at **http://www.standardmedia.co.ke/InsidePage.php?id=2000023860&cid=4&ttl**. Accessed on 3 December 2010.

[1273] *The Standard*, "Heat over Missing Billions for Schools," 15 June 2011. Available at **http://www.standardmedia.co.ke**.Accessed on 15 June 2011.

[1274] *The Standard, ibid* note 1273 p1.

[1275] Ababu-Namwamba, "The Tobiko Tragedy Proves Impunity makes Vetting a Futile Exercise." Available at **http://www.nation.go.ke** p 1. Accessed on 20 June 2011

that the confirmation process, successful though acrimonious, was hijacked by powerful forces within the ruling coalition, with the intention of protecting their diverse interests.[1276]

In addition, the general reluctance of political leaders to abandon impunity and embrace constitutionalism even under the new legal environment is demonstrated by the motion passed by Parliament in December 2010 that Kenya shouldwithdraw from the Rome Treaty which establishes the ICC. This came about after the ICC prosecutor named key politicians, William Ruto, a Kalenjin and Uhuru Kenyatta a Kikuyu, as some of the masterminds of the 2007 post-election violence. It should be recalled that the ICC process came into existence after the MPs shot down the government's attempt to establish a local tribunal to try the post-election violence suspects. Perhaps the MPs were not expecting such high profile 'community' leaders' names to be dragged through the ICC process.[1277] Although the government has not withdrawn Kenya from the Rome Treaty, the MPs attempts raise genuine concerns of their commitment to the rule of law given that the motion was passed after the promulgation of the 2010 Constitution. The MPs passed the motion in the face of Article 2(6) of the Constitution which provides that any treaty or convention ratified by Kenya shall form part of the law of Kenya.

It is submitted that there is little to be gained from the motion as the "Ocampo Four" are now awaiting trial at the ICC after their charges were confirmed.[1278] The hope is that the Government will, at the right time, surrender the suspects and cooperate with the ICC. In default, it is argued that the High Courts may not shy away from issuing orders against the Government as it did in the case of *The Kenya Section of the International Commission of*

[1276] Ababau-Namwamba, *ibid* note 1275 p1.

[1277] *Daily Nation*, "Parliament Pulls Kenya from ICC Treaty." Available at **http://www.nation.co.ke/News/politics/ParliamentpullsKenyafrom ICCtreaty/-/1064/1077336/-/v0uyxsz/-/index.html.** Accessed on 24 December 2010.

[1278] See generally, ICC Kenya Monitor. Available at http://www.icckenya.org/. Accessed on 12 May 2012.

Jurists v Attorney-General and Another, (The *Bashir* case).[1279] The High Court ordered the arrest of President Omar al-Bashir of the Sudan should he step foot in Kenya as there was an arrest warrant against him by the ICC. The basis of the decision was Article 2(5) of the Constitution which provides that international treaties and conventions ratified by Kenya are part of the laws of Kenya. The Rome statute, which establishes the ICC was ratified by Kenya in March 2005.[1280]

6.7.2 Presidential Power

It is argued that even under the new Constitution, winning the presidency will remain Kenya's most coveted political prize. This is derived from the retention of an executive presidency under the new constitutional dispensation. The immense powers enjoyed by the President may continue to enhance the clamour for this position. In general, the only check in the exercise of this power is the National Assembly (not Parliament which consists of both Houses). It is submitted that this constitutional approach to limiting presidential power is merely procedural and fails to tame the presidency which might circumvent the process.

The main reason for this view is that the President, like members of the National Assembly, is nominated by a political party, or is an independent candidate.[1281] Therefore, the President, through the might of his or her political party or coalition of political parties, may manipulate the National Assembly thus making it, as in the past, a mere rubber stamp of the executive which is a common phenomenon in several African countries.[1282]

[1279] *The Kenya Section of the International Commission of Jurists v Attorney-General and Another* [2011] Eklr. Available at **http://kenyalaw.org**. Accessed on 19 January 2012.

[1280] The OHCHR, "List of Kenya's Ratification of Human Rights Treaties." Available at **www.lib/.../KSC_UPR_KEN-** S08_210. Accessed 4 July 2011.

[1281] Article 137(1) (c).

[1282] Simutanyi, *op. cit.* note 1271 pp2-3.

The benefits which accompany executive power have made Kenyan communities clamour to elevate their favourite son or daughter to become President. This phenomenon has for decades been used by presidents to perpetuate corruption and impunity. As an indication of the expectation of the "our turn to eat" culture, the Kamba tribe and their MPs are rooting for the current Vice-President, Kalonzo Musyoka to battle for the presidency in the 2012 elections so that they may have one of their 'own son' in State House.[1283]

To enhance his chances of clinching the 2012 plebiscite and perhaps ignited by what is widely considered his stolen victory in the 2007 election, Odinga has since 2011 been crisscrossing the country in an effort to gain lost ground in the Kalenjin community which happened after he fell out with their favourite son, William Ruto.[1284] In June 2011, Ruto visited the Presidents of Tanzania and Uganda to proclaim his interest in the presidency.[1285] For Ruto and Kenyatta, they have made it clear that their names will be on the presidential ballot paper irrespective of the pending ICC trials.[1286] The exertion of these energies in the clamour for power makes one view any reforms embedded in the new Constitution with what Posner and Young would call "cautious optimism."[1287]

The power of the President to appoint the Attorney-General and the Director of Public Prosecutions on the approval of the National Assembly requires some attention. To some degree then, especially if a strong political party backing in the National Assembly is present,

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1283 *Daily Nation*, "Battle Lines Drawn for 2012 Polls." 4th August 2010. Available at **http://www.nation.co.ke/Referendum/Battlelinesdrawnfor2010polls/-/926046/970442/-/lglm0b/-/index.html.** Accessed on 4th August 2010.

1284 *The Standard*, 18 June 2011, "What is Raila's Plan.?" Available at **http://www.standardmedia.co.ke**

1285 *The Standard*, 20 June 2011, "Why Ruto is Courting Museveni and Kikwete." Available at http://www.standardmedia.co.ke. Accessed on 20 June 2011. At p1, the report stated that Ruto presented himself to Presidents Jakaya Kikwete of Tanzania and Yoweri Museveni of Uganda in order "to portray himself as a credible presidential material."

1286 *The Standard*, *ibid* note 1285 p1.

1287 For the need to have hope in some African countries' constitutions,(especially that of Nigeria) to restrict presidential power, see Daniel Posner and Daniel Young, "The Institutionalization of Political Power in Africa," 18:3(2007) **Journal of Democracy** 126-140 especially pp136-138 which suggest "cautious optimism" in these democracies. Available at **http://www.journalofdemocracy.org/articles/.../PosnerandYoung-18-3-pdf.** Accessed on 18 July 2011.

the President has substantial control of the country's legal machinery. Specifically, it would appear that the Attorney-General, whose qualifications for appointment are like those of the Chief Justice, is directly under the control of the President. Article 156, and indeed the entire Constitution, fails to shield the Attorney-General from executive or other interference. It is argued that his position is disturbing, and difficult to understand, considering that the Director of Public Prosecutions "shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions..."[1288]

From a good governance perspective, the position of the Attorney-General in the 2010 Constitution is, amazingly, clearly worse than that which prevailed in the 1963 Constitution. That Constitution vested the Attorney-General with some degree of independence. In the exercise of his or her powers, the Attorney-General was "not subject to the direction or control of any other person or authority."[1289] In addition, it is worth noting that as the Constitution of Kenya Amendment Act No.2 of 1990 restored the security of tenure of the judges, that of the Attorney-General was also restored. As in the case of removal of judges, an independent tribunal had to be constituted to investigate any allegations against the Attorney-General.

Considering that the Attorney-General should promote, protect and uphold the rule of law and defend the public interest as contained in Article 156(6) of the Constitution, this expectation may become a false hope without the Attorney-General's constitutional protection from executive or other interference.[1290]It is also disturbing that the Attorney-

[1288] Article 157(10).
[1289] Section 26(8) of the 1963 Constitution.
[1290] Mabvuto "The Independence of Prosecuting Authorities: The Malawi Experience," in Fombad and Murray *op. cit.* note 1195 pp61-85.

General does not enjoy security of tenure under the new Constitution. These omissions are of major constitutional significance.For instance, the Attorney-General, it is argued, is expected to institute civil proceedings for the massive loss of public resources perpetuated by past corrupt regimes. The omissions in the Constitution raise perceptions of an executive-compliant Attorney-General. This does not also augur well in a country with an experience of Attorneys-General who have all along not raised their voices during severe abuses of human rights and freedoms by the executive as witnessed during the reigns of Attorneys-General Charles Njonjo and Amos Wako.[1291]

6.7.3 Infidelity to the Constitution through its Dubious Implementation

It is submitted that the most imperative process towards the realisation of the intent and spirit of the 2010 Constitution is an effective implementation of the Constitution. In this regard, the Commission for the Implementation of the Constitution (CIC) is established as a transitional commission in terms of Article 262 and section 5(1) of the Sixth Schedule of the Constitution and the Commission for the Implementation of the Constitution Act 9 of 2010. The functions of the CIC are contained in section 5(6) (a)-(d) of the Sixth Schedule.

Key among its functions, the CIC has to "monitor, facilitate and oversee the development of legislation and administrative procedures required to implement the Constitution."[1292] In discharging its functions and in working with other constitutional commissions, the CIC has "to ensure that the letter and spirit of this Constitution is respected."[1293] The CIC, and indeed the parties involved in the implementation process including Parliament, have achieved

[1291] See generally, chapters three and four of this study.
[1292] Sixth Schedule clause 5(6) (a) of the Constitution of the Republic of Kenya 2010.
[1293] Sixth Schedule clause 5(6) (d) of the Constitution of the Republic of Kenya 2010.

certain milestones by enacting 19 Acts as required by the new Constitution while 23 Bills are undergoing review.[1294]

However, in the discharge of its constitutional obligations, the CIC has come across major obstacles from both the executive and the legislative arms of the Government. The CIC Chairperson, Charles Nyachae, who is said to have "carved an image as a stickler for constitutionalism and due process, now finds himself at the wrong end of the stick for his persistent criticism of Parliament, the State Law Office, the Cabinet and the Justice Ministry."[1295] His commitment to ensuring a lawful implementation of the Constitution has seen him ruffle the feathers of the President, the Prime Minister, the Attorney General and Parliament. The remarks of one MP confirm that impunity is still rife as he warned Nyachae that "he is not the headmaster of Kenya."[1296]

Threats to key office holders by MPs cannot be taken lightly in view of the exit of the former head of Kenya Anti-Corruption Commission (KACC), PLO Lumumba in August 2011. Lumumba and the entire top management of the KACC, were kicked out of office when MPs amended the Anti-Corruption and Ethics Bill, intended to replace the Anti-Corruption and Economic Crimes Act 2003 which established KACC. The amendment of the Bill, which was still before the Parliament, barred holders of top management of the KACC from joining the Ethics and Anti-Corruption Commission (EACC), the successor of KACC. The amendment seems to have been hastened by Lumumba's exchange of words with MP and Assistant Minister Cecily Mbarire over Lumumba's allegations that her husband had attempted to bribe

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[1294] CIC, *op. cit.*note 99 pp15-17.
[1295] *The Standard*, 23 October 2011, "Is Nyachae Next Target after PLO Lumumba?"Available at **http://www.standardmedia.co.ke**. Accessed on 23 October 2011.
[1296] *The Standard*, *ibid* note 1295 p1.

him (Lumumba) over corruption investigations involving companies owned by the couple, allegations which seem not have been taken well by MPs.[1297]

In its Third Quarterly Report for 2011, the CIC contains what this thesis considers as fundamental governance sins which bedevil the tender constitutional architecture of Kenya. Since the promulgation of the Constitution, nothing, it is submitted, demonstrates the general reluctance of the executive and the legislature to embrace constitutionalism, than the claims made against these institutions by the CIC Report.

The CIC Report enumerates examples of "blatant violation of the Constitution."[1298] Examples include: the unconstitutional enactment of the Contingencies Fund and County Emergency Funds Act, 2011 and the National Government Loans Guarantee Act 2011 as the CIC was not involved;[1299] general failure by Ministries to submit to CIC reports to show their internalisation of the Constitution which is against the CIC Act;[1300] reluctance by the Executive and Parliament to implement devolution which "could kill the Constitution;"[1301] introduction of amendments of Bills approved by the CIC, for instance the important Commission on Revenue Allocation Bill 2011, thus Parliament circumventing CIC scrutiny of the Bills which is worsened by the Executive's ignorance of CIC advisories in this regard.[1302]

Other key violations of the Constitution included the disregard of participation of the people in law-making;[1303] the appointment of only two female Supreme Court Judges by the JSC and

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1297 All Africa.com, 29 August 2011. Available at **http://allafrica.com.** Accessed on 23 October 2011.
1298 CIC, *op.cit.* note 99 p4.
1299 CIC, *ibid* note 1298 p15.
1300 CIC, *ibid* note 1299 p49.
1301 CIC, *ibid* note 1300 p51.
1302 CIC, *ibid* note 1301 pp32-33, 51-52.
1303 CIC, *ibid* note 1302 p52.

therefore failing the mandatory constitutional threshold of gender balance (two-thirds maximum number of appointees for same gender);[1304] total disregard by Parliament and the Executive of the High Court order to stop the passage into law of the Government Loans Guarantee and the Contingencies Fund and County Emergency Bills as they were unconstitutional[1305] and manifestation of competing "individual and collective interest of the political class."[1306] Also crucial to examine is the disregard by Parliament of the participation of the people on changes to the Political Parties Act 2011. In June 2012, MPs, without public participation, passed crucial amendments to the Act so as to permit floor-crossing without losing their seats in Parliament. Calls by the chairperson of the CIC, and some MPs that the Bill was unconstitutional, went unheeded.[1307]

One of the examples given by the CIC to demonstrate the existence of deeply vested political interests which clearly go counter to the rule of law and constitutionalism was the Cabinet's proposed Constitutional Amendment Bill 2011 to move the election date from August to December effective from 2012 election without participation of "stakeholders."[1308] The unconstitutional move, however, did not take place because the High Court, in the case of *John Harun Mwau and Others v Attorney-General and Others*,[1309] ruled that according to sections 6 and 10 of the Sixth Schedule of the Constitution, the first elections under the new constitutional dispensation should be held within sixty days after 14 January 2013 which is the end of the current Parliament, alternatively upon dissolution of the National Coalition Government.[1310]

1304 CIC, *ibid* note 1303 p47.
1305 CIC, *ibid* note 1304 p32.
1306 CIC, *ibid* note 1305 p53
1307 *Daily Nation*, "Kenyan MPs Can Now Defect at Will, " available at **http://www.nation.co.ke** p1. Accessed on 22 June 2012.
1308 CIC, *op. cit.*.note 99 p53.
1309 *John Harun Mwau and Others v Attorney-General and Others*, High Court Constitutional Petition No. 65 of 2011 (unreported).
1310 *Mwau, ibid* note 1309 pp62-63.

On hasty constitutional amendments, the CIC notes that much as it might occasionally be necessary to amend the Constitution, "such amendments need careful consideration and proper justification based on broad consultations."[1311] It is submitted that the approach by the CIC to constitutional amendments would guarantee that mutilation of the spirit and intent of the new Constitution as was the case with the old Constitution is stemmed. A contrary approach would be the bedrock of a second round of mutilating the basic structure of the country's constitutions.

Among the myriad threats to the realisation of constitutionalism detailed by the CIC, one of the most provoking in view of the aims of this study is the default by the legislature to engage the people in law-making. In addition, and quite surprising for the purpose of this thesis, there has been ineffective engagement of the people in law-making by the CIC as examined below. Due to the overarching constitutional role played by the CIC in overseeing the implementation of the Constitution, it is necessary to investigate the CIC's interpretation and application of the constitutional provision of "participation of the people" in law-making.

6.7.4 CIC's Trajectory of "Stakeholders-Approach" to Law-making

As Sachs J., aptly observed in the case of *Doctors for Life*, the involvement of the people in law-making is a manifestation of respect for the people "as concerned citizens and legislators must have the benefit of all inputs that will enable them to produce the best possible laws."[1312] The CIC has made several observations on the unconstitutional conduct of the executive and parliament in the transformation process. One of such accusations which indeed affects the legitimacy and validity of laws passed under the new Constitution is that in

[1311] CIC, *op. cit.*note 99 p4.
[1312] *Doctors for Life*, *op. cit.* note 1 para 235.

many cases, the people were not engaged in law-making or in its amendment. It is argued that such laws are clearly illegitimate and are an affront to the notion of the new constitutionalism, a position buttressed by tested South Africa's jurisprudence. It is therefore necessary to inquire into the legitimacy of CIC's approach to popular participation in law-making.

The approach of the CIC to achieve the constitutional threshold of participation of the people of Kenya in law-making raises a degree of consternation. It is also submitted that the approach sets a dangerous precedent for future law-making. Further, the CIC approach violates a pragmatic meaning of popular sovereignty in law-making, the living spirit of the Constitution and the Review Act.

In its Report expounded above, the CIC's main approach is "interaction with stakeholders." It is argued that the implication of this flawed approach is that public participation, what the Constitution demands, is being violated. The Report fails to indicate the parts of the country visited and the engagement with the people at grassroots level, in towns, villages and markets to obtain their views on various proposed laws. A few statements of the Report will authenticate, it is argued, the view that the CIC is more inclined to a stakeholder approach in contrast with the constitutionally envisaged and broader participation of the people.

On the Kenya Citizenship and Immigration Bill 2011 and the Kenya Citizens and Foreign Nationals Management Service Bill 2011, the CIC notes that involvement with key stakeholders resulted in "consensus on most of the provisions of the Bills was achieved in a shorter period of time."[1313] The same approach was replicated in the Ratification of Treaties

[1313] CIC, *op. cit.* note 99 pp23-24.

Bill 2011. The CIC held consultations with stakeholders on the Bill after which the Bill "was forwarded to the office of the AG for final technical editing before transmission to the Cabinet for its deliberations."[1314] As for the Labour Relations Bill 2011, the CIC organised a "stakeholders' forum" which was "followed by a technical drafting session..."[1315] Regarding public participation, the CIC Report notes that it "is critical to facilitate active participation by the different actors to ensure that the Bills submitted to CIC meet the threshold of consultation required under the Constitution."[1316]

This study observes that while consultation with the stakeholders or different actors in proposed laws, for instance the relevant professional bodies is commendable and a clear departure from the past, it should not be a substitute for active and effective engagement of Kenyans in law-making. The CIC should put into practice what they learnt in 2011 from South Africa regarding the implementation of a constitution. In that country, the process of law-making fully engages the people and the Courts do not hesitate to nullify laws made in a different manner. That is why legislation should be enacted to determine how the people should be involved in the making of laws at a national level. The stakeholder approach, mistaken, it is submitted, by the CIC as people's participation, should be part of the larger constitutional scheme and intent of engaging the people in law-making.

As pointed out earlier, the CCSA in the case of *Doctors for Life* firmly ruled on the need for effective and serious engagement of the people in law-making. Such involvement includes public education; access to information on the proposed laws and facilitation of learning and understanding of the bills.[1317] To cement the importance of this ideal, the Court added that

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1314 CIC, *ibid* note 1313 pp2.
1315 CIC, *ibid* note 1314 p35.
1316 CIC, *ibid* note 1315 p54.
1317 *Doctors for Life, op. cit.* note 1 para 131.

conditions should be created "that are conducive to the effective exercise of the right to participation in the law-making process."[1318]

The fundamental challenges to constitutionalism under Kenya's new legal order are what Ghai and Galli call the "post-enactment stage" of constitution-building.[1319] These scholars argue that this stage is quite critical for the stabilisation and consolidation of a constitution which may be jeopardised and negated by several factors. These include the recognition by certain forces in society whether they were for or against the new law that their personal interests would best be served by the old law; the international community (as in Kenya) leaving the scene; deliberate or benign inactivity and fatigue and complacency overtaking activism after the promulgation of the new law.[1320]

Notwithstanding these challenges, there are no excuses, it is argued, for the CIC not to adhere to the letter and spirit of the Constitution. The irony is that while the CIC attacks Parliament and the executive for violating the Constitution, it is, as seen above, equally guilty of breaching the supreme law and the cardinal ideal of participatory democracy. The law-making model adopted by the CIC, combined with executive and parliamentary interferences and irregularities in the law-making process further enhance what this thesis considers an illegitimate 2010 Constitution as examined later in this chapter.

[1318] *Doctors for Life*, *ibid* note 1317 para 132.

[1319] Ghai and Galli, "Constitution Building Processes and Democratization, "**International Institute for Democracy and Electoral Assistance**, Stockholm, 2006 p11. Available at http://www.federalism.ch/files/.../YGhai_ConstbuildingProc%26Democr.pd... Accessed on 12 June 2011.

[1320] Ghai and Galli, *ibid* note1319 p11.

6.8 CONTROVERSIAL INTERPRETATION OF THE CONSTITUTION

The judiciary has acknowledged the place of the new legal order under the 2010 Constitution. In the case of *Hon. Lady Justice Jeanne W. Gacheche and 6 Others v The Judges and Magistrates' Vetting Board and 4 Others*,[1321] the High Court hailed the new Constitution as:

> a radical departure from the old constitutional dispensation in many ways, not the least of which is the recognition of the sovereignty of the people of Kenya and the identification, preservation and development of human rights, both at the individual level and the communal level.[1322]

Specifically, the Court alluded to the need to reform the judiciary due to the many incidents of corruption reported against the judges.[1323] Notwithstanding the noble observations on the spirit underlying the new constitutional project, the Court arrived at a result which, it is argued, runs counter not only to the spirit and intent of the Constitution but also clear and unequivocal provisions of the Constitution. In the case before the Court, the applicants, some judges of the High Court and of the Court of Appeal, had been found by the Judges and Magistrates' Vetting Board as unsuitable to hold their judicial offices. Section 23(1) of the Sixth Schedule of the Constitution provides for the enactment of legislation to establish a body which would determine the appropriateness of current judges and magistrates to hold office under the new dispensation.

[1321] *Hon. Lady Justice Jeanne W. Gacheche and Others v The Judges and Magistrates Vetting Board and Others* (2012) eKLR 1. Available at **http://www.kenyalaw.org**. Accessed 1 November 2012.
[1322] *Gacheche, ibid* note 1321 p1.
[1323] *Gacheche, ibid* note 1322 p1. Also see chapter 3.5.3 of this study.

On the strength of this provision, Parliament enacted The Vetting of Judges and Magistrates Act, 2011.The key provision under the Court's examination, and which this thesis considers incapable of a different interpretation especially in view of the spirit of the review process, is section 23 (2) of the Sixth Schedule of the Constitution which states that:

> A removal or a process leading to the removal of a judge from office by virtue of the operation of legislation contemplated under section (1) shall not be subject to the question in, or review by, any court.

It is imperative to note that the Vetting Board, the JSC and the Attorney-General submitted that the above provision ousted the jurisdiction of the High Court or any other court to question a decision of the Vetting Board. Deciding the matter in favour of the applicants, the High Court held that it had the power to exercise its supervisory jurisdiction over the Vetting Board under Article 165(6) of the Constitution.[1324] It is argued that the Court, even after alluding to the "widespread public concern over the performance of the judiciary,"[1325] went ahead and interfered with the findings of an independent institution, the membership of which includes former Justice Albie Sachs of South Africa, established to oversee reforms in the already discredited judiciary.

It is argued that the above trend of interpretation by the High Court of such key provisions of the Constitution is certainly disturbing and will stem the taking place of what the High Court in the case of *The Centre for Human Rights and Democracy and 2 Others v The Judges and Magistrates Vetting Board and 2 Others* [1326] called "a vast revolution...in the judicial

[1324] *Gacheche, ibid* note 1323 p15.
[1325] *Gacheche, ibid* note 1324 p1.
[1326] *The Centre for Human Rights and Democracy and 2 Others v The Judges and Magistrates Vetting Board* (2012) eKLR 1. Available at **http://www.kenyalaw.org** . Accessed on 1 November 2012.

arena."[1327] In that case, the Court, (Kimondo, J dissenting), issued conservatory orders against the Vetting Board pending the formation of a full bench by the CJ to determine the matter in view of its constitutional significance. As submitted above and as held by Kimondo, J, public interest in the vetting process and indeed the entire judicial reforms, outweighed any private right or interest.[1328] The real problem though was that the majority opinion failed to grasp the constitutional spirit behind the vetting process which would have made the Court dismiss the application outright. It is argued that such decisions from the High Court go counter to the ethos of constitutionalism which the new dispensation is keen to entrench. Having examined some of the key challenges to constitutionalism under the new dispensation, it is now appropriate to examine one of the central issues under investigation in this thesis, the legitimacy of the 2010 Constitution.

6.9 EXAMINING THE LEGITIMACY OF THE 2010 CONSTITUTION

As regards the Review Act, the people and the CoE could not operate *ultra vires* the limited functions of the CoE, namely to "harmonise" the draft constitutions by collating views from Kenyans on controversial issues. Such a limited scope of the CoE, compounded by the apparently sizeable constitutional and legal defects in the draft constitutions especially the Bomas and Wako Drafts as seen in *Njoya* and *Onyango* pokes huge holes into the legitimacy of the new Constitution. The Review Act approach is also a mockery, it is submitted, to the pain and suffering the people of Kenya were subjected to in the clamour for a new Constitution and good governance in general. The noble ideal of popular participation in designing the nature of governance and its key institutions had been considerably undermined.

[1327] *The Centre for Human Rights, ibid* note 1326 p1.
[1328] *The Centre for Human Rights, ibid* note 1328 p8.

The wishes and views of Kenyans could not be reflected in a Constitution whose authors' ability to involve Kenyans was amazingly curtailed by the same law which authorised them to collate their views. This is surprising because the legitimacy of the state is found in the free will of the people and in the role which they play in creating the laws which govern them.[1329] The power to ratify or approve the Constitution in a referendum does not give legitimacy to the new law. As Elkins and Ginsburg have argued, a referendum, the "final step" of having popular *imprimatur* is necessary but its relevance is limited.[1330] For the citizens to regard themselves as "the founders" of the constitution, it is also required that they must be deeply involved in the design of a constitution, by among others electing representatives to a constituent assembly.[1331]

Apart from the involvement of the people in the referendum, their obvious near total exclusion in constitution-making then substantially renders hollow the contention in the Preamble to the Constitution that the people fully participated in the making of the Constitution. The Preamble states that:

> We, the people of Kenya...exercising our sovereign and inalienable right to determine the form of governance of our country *and having participated fully in the making of this Constitution,* adopt enact and give this Constitution to ourselves and to our future generation (emphasis mine).

The constitution-making exercise was a clear violation of the UN and UNDP guidelines, jurisprudence and doctrines embedded in scholarly discourses on constitution-making

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1329 Kirkby, *op. cit.*note 1205 p2.

1330 Elkins and Ginsburg, "The Citizens as Founders: Public Participation in Constitutional Approval," 81:2 (2008) **Temple Law Review** pp361-382 p364. Available **at www.templelawtenintenclients.com/wp-content/uploads/.../Ginsburg.pdf**. Accessed on 12 November 2011.

1331 Elkins and Ginsburg, *ibid* note 1330 p364.

examined in this chapter. As Arato would probably observe, Kenya's constitution-making process lacked significant traits of a democratic and sovereign constitution-making.[1332] As the political process in constitution-making failed to embrace genuine participation, it was expected that the courts would stand against any attempt to deny the people their "inalienable right." However, that did not happen as the IICDRC adopted a narrow view of the constitution-making process.

It is further submitted that apart from the non-inclusiveness in the review process towards a new Constitution, it has been shown that in major areas of governance of national affairs, the new law fails to fully embrace the ideal of popular participation of the citizenry in the management of public affairs as envisaged and stipulated in the Review Act.

Also crucial is the manner in which the Constitution has vested immeasurable power in the presidency. In a few cases, the only key barrier to absolute hegemony of the institution of the presidency is the National Assembly which seems not to have changed its *modus operandi* under the new Constitution. The unconstitutional manner in which the Constitution is being implemented, including the CIC's stakeholder-approach also contributes to genuine perceptions of illegitimacy of the new dispensation.

As Fallon perhaps would observe, because of non-involvement of Kenyans in the review process except in the referendum, they may then ask themselves "what type of document the Constitution is and what it means."[1333] The Constitution "in action" must genuinely be the

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[1332] Arato, "Forms of Constitution-making and Theories of Democracy," 17 (1995-96) **Cardozo Law Review** 191-231 p203. Available at **http://www.heinonlineorg.** Accessed on 13 March 2011.

[1333] Fallon, *op. cit*. note 712 p1810. Also see generally, Barnett, *op. cit*.note 707.

document they know as their Constitution. Its opposite would be moral illegitimacy of the Constitution, which is "an empty exercise and at worst a misleading one."[1334]

6.10 SUMMARY

This chapter has examined the theoretical basis of the concept of popular participation in constitution-making in the peculiar context of Kenya. The importance of constitution-making to a people is such that the process should encompass substantive and procedural ingredients in order for the review exercise to be valid. Scholarly discourses and leading international bodies like the UN and the UNDP prefer this model so that the citizenry may own the document and the institutions created under it. This is the only way of vesting the supreme law with legitimacy.

The 2010 Constitution of Kenya was examined from the perspective of popular participation. Popular participation was the theoretical underpinning of the Constitution as provided for in the Review Act, 2008. It has also been seen that the Constitution embraces this approach in its various provisions. Perhaps this was informed by the popular participation model in the South African Constitution and discourses on popular participation which consider the new model as the new constitutionalism.

The chapter has questioned the legitimacy of the 2010 Constitution. The Review Act, the architecture of the review exercise, provided for the harmonisation of the existing draft constitutions as the key functions of the CoE so as to resolve the contentious issues in the drafts. The chapter has submitted that these Draft Constitutions, the foundation of the Harmonised or Proposed Draft Constitution, were not legitimate Draft Constitutions.

[1334] Fallon, *ibid* note 1333 p1810.

In particular, the case of *Njoya* scuttled the NCC as about two-thirds of its "delegates" were not elected by the people. In addition, Parliament was called upon to enact a constitution without a referendum exercise. Further, there were serious divisions among the "delegates" such that the outcome, the Bomas Draft Constitution, was only endorsed by a section of the delegates as other delegates had stormed out of the conference. It was also clearly shown that the 2002 attempts to review the Constitution were illegitimate due to the membership of the review body. The Wako Draft was the more illegitimate of the three draft constitutions. The Draft was a Kibaki-Wako project generally designed to retain presidential authoritarianism in Kenya. It is no wonder then that the project suffered heavy defeat in the 2005 constitutional referendum.

The IICDRC was established to deal with questions relating to the review process. Unfortunately, the Court did not address the key issue of the legitimacy of draft constitutions. This matter was not canvassed before the IICDRC as the petitioners dealt with what this study, with due respect, regards as issues of less constitutional importance in Kenya's constitutional review process.

The legitimacy of the Constitution was also examined from the generally representative democratic model in the Constitution. It cannot be argued that the representative model was the paradigm shift envisaged in the Review Act. The presidency and the National Assembly have been vested with substantial power with little or no reference to participation of the people. This explains why there are serious efforts by some senior politicians to fight for the presidency in the 2013 general election.

Also discussed were the fundamental constitutional violations by those in power, including, most unfortunately, the CIC. The executive and the legislature have also breached major processes laid down in the Constitution. This demonstrates, as examined in the chapter, that the deeply entrenched culture of impunity which is the central threat to constitutionalism, can only be tackled by a robust and full process of involving the people in decision-making. It is argued that the ethos of the notion of good governance, in particular the rule of law, remains, under serious threat even under the new constitutional project. For this reason, the people of Kenya should effectively participate in law-making processes, including any envisaged constitutional reforms. Kenyans should truly be the bulwarks of their constitution and the governance institutions created under it, the main thrust of this thesis.

CHAPTER 7: CONCLUSION AND SUMMARY

7.1 INTRODUCTION

The aim of this chapter is to revisit the objectives of the study and to determine whether they have been achieved. The study examined central aspects of Kenya's political governance from 1963 and the country's post-independence constitution-making initiatives which culminated in the 2010 Constitution.

The chapter summarises the literature examined in the study and relates this to the central objectives intended to be attained. The objectives of the thesis were to:

1. Examine the independence (1963) Constitution of Kenya against the spirit and intent of the independence constitutional talks.
2. Enquire into the amendments effected on the 1963 Constitution and their impact on democracy, good governance, human rights and the rule of law.
3. Examine the efforts made towards the country's democratisation including multi-partism and constitution-making initiatives.
4. Investigates the philosophical underpinnings of the Constitution of Kenya Review Act 9 of 2008 upon which the Constitution of Kenya 2010 is anchored.
5. Assess the degree to which the Constitution of Kenya 2010 resonates with, and is in concordance with the spirit and intent of the Constitution of Kenya Review Act 9 of 2008.
6. Evaluate the legitimacy of the 2010 Constitution.
7. Recommend specific constitutional reforms.

The approach in which these key objectives are examined is discussed in chapter one. In addition, chapter one contains the research question: To what extent does the 2010 Constitution of Kenya and the constitution-making process embrace the ideal of popular participation in the Kenyan constitutional project? In answer to this question, the study's hypothesises that the 2010 Constitution of Kenya project does not significantly embrace the ideal of popular participation. To fully capture the state of Kenya's political governance, which was the driving force of the country's constitutional reform initiatives, the concept of "good governance," which it is argued is the barometer of a country's political direction, is discussed in chapter two.

In view of the shortcomings in the country's constitution-making process, and taking into account what the study argued was an insignificant extent of the engagement with the people of Kenya in public decision-making, legal reforms are recommended. In addition, this chapter suggests areas for further research so as to enhance the gains made under the 2010 Constitution and for further democratisation of the country.

7.2 REVISITING THE LITERATURE REVIEW AND OBJECTIVES OF THE STUDY

The occupation of Kenya by Britain in 1895 was followed by alienation of most of the country's fertile land by the colonial settlers in addition to political exclusion of the majority of Kenyans from the political process.[1335] As discussed in the study, the land question therefore became the main force behind the creation of political associations which agitated for the rights of Kenya's Africans. The most important of these associations included the

[1335] Ghai and McAuslan, *op. cit.* note 6 p3.

KCA which later became KAU and the YKA.[1336] The Kikuyu-founded organisation, the *Mau Mau,* resisted colonial domination by violent means.[1337] Although Kenyatta opposed *Mau Mau's* violent strategy in opposing colonial rule, the colonial administration associated him with the organisation. For this reason he was sentenced to imprisonment on evidence which later emerged to have been fabricated.

The struggle for liberation bore some fruits. In 1961, Africans obtained some representation in the Legislative Council. To boost this gain, Kenyatta was released from prison in 1961 around which time constitutional talks had commenced. Kenyatta's KANU, which was spearheaded by Odinga and Mboya before Kenyatta's release from jail, won the 1963 election and he became the country's first Prime Minister. When Kenya became a republic in 1964, Kenyatta became the country's first President under a Westminster-style Constitution.[1338]

The 1963 Constitution was predicated on an absolute representative democratic model but with checks to restrict the hegemony of the executive. The Constitution provided for elaborate regional (*majimbo*) government structures with substantially significant legislative and administrative powers. Most important for the new nation, the study found that the Constitution provided for a justiciable Bill of Rights, a multi-party political system, an independent judiciary and a national legislature that was shielded from executive dominance in tandem with the doctrine of separation of powers.[1339]

[1336] Mwaruvie, *op. cit.* note 14 p4; Also see generally, Ghai and McAuslan, *ibid* note 1335 pp4-34.
[1337] See generally, African History, *op. cit.* note 16.
[1338] State House, Nairobi, *op. cit.* note 468 p1.
[1339] See, for instance, sections 21-24 of the 1963 Constitution.

As shown in the study, the virtues of liberal democracy were generally agreed upon at the constitutional talks in London in 1962.[1340] These virtues formed the philosophical underpinnings and architecture of the independence Constitution. The thesis has argued that the rise of presidential authoritarianism in Kenya marked the genesis of the country's governance nightmare, an approach which was inconsistent with the philosophy underpinning the 1963 Constitution. The regional system of *majimbo* gave regions significant autonomy in the management of their affairs. This came to an end after the enactment of The Constitution of Kenya (Amendment) Act No.38 of 1964. Among others, the amendment took away the revenue independence of the regions. In addition, The Constitution of Kenya (Amendment) Act 14 of 1965 diminished the regions authority's law-making powers.

The judiciary was not spared as well. Under the watchful eye of Attorney-General Charles Njonjo, the judiciary came under severe pressure from the executive. Although judges had security of tenure under the Constitution, some were appointed on contract terms, a potential threat to their independence. It is for this reason, the study argued, that a former Chief Justice Alan Hancox urged lawyers and judges to show loyalty to the Government and the executive.[1341]

In addition to the foregoing strategy, Kenyatta silenced the views of those opposed to his regime. His approach commenced with the merger of his political party, KANU and Moi's KADU, thus converting the country into a *de facto* one-party state.[1342] This was followed by extreme oppression of Oginga Odinga, and others who played a key role in Kenyatta assuming the presidency, when Oginga Odinga expressed an intention of forming a political

[1340] See generally, The Report of the Kenya Constitutional Conference, *op. cit.* note 475.
[1341] Mutua, *op. cit.* note 66 pp108-109.
[1342] Odhiambo-Mbai, *op. cit.* note 523 p61.

party, the KPU.[1343] As shown in the study, the heavy hand of the executive was seen even by Parliament in the mysterious disappearance and subsequent death of maverick MP, JM Kariuki in 1975. Kariuki's controversial death was not the first of such kind as Tom Mboya, a key KANU politician, had mysteriously been shot dead in Nairobi in 1969.[1344]

In addition to what the study found to have been a systematic destruction of the basic structure of the Constitution, the study demonstrated that the destruction of the country's democratic ideals enshrined in the Constitution was the genesis of a culture of grand corruption in the country usually driven by a few of Kenyatta's confidants from the GEMA ethnic group.[1345]

Vice-President Moi took over following the death of Kenyatta in 1978. The study has demonstrated that with a view to vesting legitimacy to his rule which was seen as "weak," Moi told the nation and the world that he would follow in the footsteps (*Nyayo*) of Kenyatta. What emerged was forceful centralisation of power and negative ethnicity which appears to have been more than just applying the *Nyayo* "philosophy."

As the study found, the first casualty of this approach was, as under the Kenyatta regime, the Constitution. From a *de facto* one-party State, Moi, formerly of the opposition party, KADU, navigated through Parliament one of the country's most infamous constitutional amendments, Amendment Act No.7 of 1982 which made Kenya a *de jure* one-party state. KANU became the only legitimate political party. Any attempts to express opinions on the need for an alternative political vehicle were met with violent violations of human rights, such as detentions without trial and a general crackdown on "dissidents." Opposition voices within

[1343] Oloo and Mitula, *op. cit.* note 526 p41.
[1344] See chapter 3.4.1.1 of this study.
[1345] Prunier, *op.cit.* note 457 p2.

KANU were ruthlessly punished especially through the infamous queue-voting which produced winners from queues with fewer supporters than those of the winner.[1346]

The victims of Moi's atrocities could not fruitfully turn to the courts, the custodians of a justiciable Bill of Rights. Under an executive-minded High Court, the litigants could not go through preliminary stages of litigation because the Chief Justice had not made rules for the enforcement of fundamental rights required under the 1963 Constitution. As demonstrated in the study, in the cases of *Maina Mbacha*[1347] and *Kamau Kuria,*[1348] the Chief Justice, Cecil Miller, could not entertain hearing the merits of the human rights cases as he had not promulgated the requisite rules. The general pressure on the courts was exacerbated by the removal of security of tenure of judges and of the Attorney-General.

The study showed that under Moi's 24 years' rule under a Constitution which had whittled down basic rights and freedoms through many amendments, the country experienced unprecedented levels of looting of public resources, including grabbing of land. Statutory corporations, for instance, the National Social Security Fund, suffered immensely by, being forced by well-connected "land-owners" to buy land initially owned by the state at exorbitant prices.[1349] Perhaps the most shocking example of corruption under Moi was the fraudulent Goldenberg Foreign Exchange Compensation Scheme in which the Central Bank of Kenya lost billions of shillings.[1350] As argued in the study, Moi also dethroned the many Kikuyus who occupied top positions in Government and replaced them with people from his tribe, the *Kalenjins.*[1351]

[1346] Throup and Hornsby, *op.cit.* note 608 p31.
[1347] *Maina Mbacha, op. cit* note 658.
[1348] *Kamau Kuria, op. cit.* note 657.
[1349] Njeru and Njoka, *op.cit.* note 678 p45.
[1350] See, generally, Warutere, *op.cit.* note 682.
[1351] Klopp, *op.cit.* note 613 p270.

The most disturbing aspect of the political trajectories of Kenyatta and Moi especially destruction of the key pillars of the Constitution, was that both were generally contrary to the key elements of good governance. As examined in chapter two of the study, the central elements are the rule of law;[1352] human rights;[1353] anti-corruption initiatives;[1354] transparency and accountability;[1355] together with participation of the people in public affairs of their government,[1356] for instance, through multi-party politics. Regarding the rule of law, the concept, as postulated by Fuller, embraces procedural and substantive aspects of the term especially adherence to the basic rules of natural justice and accessibility to the courts.[1357]

Further, the political system in Kenya was an affront to the concept of a limited government as formidably characterised by Locke especially the rule against arbitrariness and the existence of absolute power. As the Kenyan situation clearly shows, it was the near absence of these principles, specifically the deliberate exclusion of the people in the democratic processes, which was at the core of the peoples' agitation and struggle for democratisation, the third objective of this study.

The study has argued that direct participation, the central focus of the thesis, enables the peoples' views to be taken on board in the democratic processes of a country. It has been shown that in South Africa, the system has enabled the people to meaningfully participate in the public affairs of their country, especially in the important process of law-making. The

[1352] For a history of the Rule of Law, see chapter 2.3.1.1 of this study specifically Hayek, *op. cit.* note 131
[1353] UNHCR *op. cit.* note 349 p1.
[1354] Gathii, *op. cit.* note 303 p126.
[1355] UNDP, *op. cit.* note 385 p1; Hope, *op. cit.* note 390 p9.
[1356] Birch, *op.cit.* note 1143 p145.
[1357] See, generally, Fuller, *op.cit.* note 180.

CCSA has jealously guarded this right by declaring legislation and process of law-making unconstitutional as seen in the seminal case of *Doctors for Life*.[1358]

The main handicap for the involvement of Kenyans in the affairs of their government was section 2A of the Constitution which had made the country a *de jure* one-party state. The pressure for a return to multi-partism was driven by key civil society movements and politicians. In particular, the NCCK and mainstream churches, the ACK, the Catholic Church and the PCEA and their bishops, as individuals, played a key role in the struggle based on their biblical calling to fight against social injustice, strengthened by the Bible's Proverbs 14:34 that "righteousness shall exalt a nation." Also central in agitating for reforms were the KHRC; the CCCC and the LSK.[1359] Politicians opposed to the system also helped mobilise the people in opposing the system, especially in the forceful 1990 *Saba Saba* demonstrations. As the thesis has shown, Moi's reaction to the crusade for multi-partism was brutal and merciless. Hundreds were killed by security forces. Key politicians like Matiba and Rubia were detained without trial.[1360]

In addition, the study showed that the important event of the collapse of Communism in the 1980s triggered an international wave of democratisation. The collapse of the divide between the East and the West brought to an end the Cold War, credited for the new global political order in which democracy was its central component. Further, the thesis has shown that it was this wave, especially through Western donors, combined with domestic factors that compelled Moi to return the country to a multi-party democracy in 1992.

[1358] *Doctors for Life*, *op. cit.* note 1.
[1359] Africa Watch, *op.cit.* note 470 pp37-48
[1360] Mwaura, *op.cit.* note 559 p19.

The thesis has argued that the return to multi-partism on its own did not bring in a democratic polity. What the country needed were genuine constitutional reforms. As the study has further shown, Moi's political direction was not moved by the country's return to a multi-party democracy. The 1992 elections, which were the first multi-party elections under Moi, were preceded by "ethnic" violence as his regime was determined to prove that the system would bring death and mayhem to the country. The security forces simply watched as pro-Moi politicians, who were opposed to the new system, preached violence before and during the elections.[1361]

President Moi was determined to stay in power at all costs and he therefore opposed any serious initiative for constitutional reforms. After more pressure was exerted on him to embrace reforms, Moi's strategy, which worked magnificently, was to convince MPs to be in-charge of the process as opposed to the civil society movements. The study has shown that this led to the birth of the IPPG and the minimal constitutional reforms in particular the enactment of The Constitution of Kenya Review Act 1997.[1362]

As in the 1992 multi-party elections, Moi emerged victorious in the 1997 elections although he had garnered about one-third of the votes. The defeat of the opposition was exacerbated by an opposition divided on tribal lines and civil society movements which had lost their initial colour and appeal, mainly due to internal weaknesses.[1363] As the thesis has further demonstrated, when Moi left office in 2001, the authoritarian constitutional structure he inherited from Kenyatta was generally intact and this is what Mwai Kibaki, who defeated

[1361] Klopp, *op. cit.* note 613 p270.
[1362] Law Society of Kenya, *op. cit.* note 845 p11.
[1363] FES and CGD, *op. cit.* note 777 p15.

KANU's and Moi's preferred successor, Uhuru Kenyatta, took over the presidency in 2002.[1364]

The study examined Kibakis' political trajectory in order to gauge his commitment to the principles of good governance, constitutionalism and the rule of law. The hope was that as a former opposition leader, his presidency would be a drastic departure from that of his predecessors. As found in the study, Kibaki's victory might not have been possible without the MoU with Odinga and other key politicians who ditched Moi's KANU after he picked Kenyatta as KANU's presidential candidate. The study has shown that as an opposition leader and during his inaugural speech, Kibaki had committed himself to a new political trajectory for the country, anchored on good governance, including combating corruption.[1365]

It was hoped that most of the promises were to be realised in a new Constitution which he promised to deliver within 100-days in office. However, this thesis has found that contrary to those lofty dreams, what followed were clear manifestations of a leader who had a concealed desire to oppose what he seemed to represent. For instance, Kibaki locked-out Odinga and his group from running the NARC Government as agreed in a MoU which propelled Kibaki to the presidency.[1366] He has made no efforts in combating corruption and political tribalism with the necessary vigour.

Like Kenyatta, Kibaki has continued with the *Kikuyunization* of senior positions in Government, including appointing members of the Mt. Kenya *mafia* to lead weighty Government Ministries, for instance, Finance and Energy.[1367] The respected former leader of

[1364] See generally, Murunga and Nasong'o *op. cit.* note 78.
[1365] Kiambi, *op. cit.* note 76 p4.
[1366] Commonwealth Secretariat, *op.cit.* note 883 p4.
[1367] See generally, Whitaker and Giersch, *op.cit.*note 79 and Murunga and Nasong'o, *op.cit.*note 78.

the Kenya Chapter of Transparency International, John Githongo, who had been appointed by Kibaki as the Permanent Secretary in-charge of Ethics, had to flee the country to save his life after obtaining damning evidence incriminating top personalities involved in the multi-billion Anglo-Leasing scandal.[1368]

The thesis has clearly demonstrated that Kibaki's failure to embrace genuine constitutional reforms came to full public glare when he made fundamental alterations to the Bomas Draft Constitution to create his own constitutional project, the Wako Draft Constitution (Wako Draft). The Wako Draft was crafted after the High Court in the case of *Njoya*[1369] had ruled that Parliament could not replace the 1963 Constitution, and further that constitution-making had to engage the people in a referendum. The judgment therefore scattered both the Bomas Draft and the entire constitutional review process. The thesis has underscored the key distinguishing features between the Bomas and the Wako Drafts. For instance, while the Bomas Draft provided for an executive Prime Minister appointed by the President from the leader of the largest political party or coalition of parties represented in Parliament, the Wako Draft placed the Prime Minister under the authority of the President.[1370]

This study argued that such machinations were inconsistent with the Kibaki known to Kenyans during his days as the leader of the opposition. His Draft was defeated in the 2005 constitutional referendum by an Odinga led "no" vote with the symbol of an Orange in the referendum.[1371] Since then, the battle lines between Kibaki and Odinga have been drawn, culminating in the violent and bloody aftermath of the 2007 general elections which

[1368] Wrong, *op.cit.* note 557 p53
[1369] *Njoya*, *op. cit.* note 951.
[1370] Section 164 (1)-(6) of the Wako Draft Constitution.
[1371] See Whitaker and Giersch, *op.cit.* note 79 p9.

controversially declared Kibaki the winner.[1372] As the thesis has shown, the 2007 elections were conducted under the umbrella of the government-controlled ECK. At independence, the ECK was independent of executive control but in the course of time, the ECK had become a mere appendage of the executive.

As further discussed in the study, it is no wonder then that even under the confusing, highly flawed elections, the ECK declared Kibaki the winner. After this announcement, violence erupted in the country because Odinga's ODM refused to accept the outcome. About 1,300 people were killed, properties destroyed and over 350,000 people ejected from their homes. This painful outcome was the foundation of serious initiatives for constitutional reforms, the main focus of the fourth objective of this study.

Kibaki embraced constitutional reforms in 2008 under the former UN Secretary-General, Kofi Annan who led AU's efforts to restore peace in the country under the KNDR initiative. As examined in the study, the KNDR was the bedrock of the 2010 constitution-making process. The heart of the KNDR initiative was "agenda item four" which called for political reforms, the most important being constitutional reforms.[1373] Further, there had to be full investigations into the causes of the violence. CIPEV led by the Court of Appeal Judge, Phillip Waki, was appointed to investigate the violence and handed its report to the AU panel. After its investigations, several recommendations were made, the principal ones being constitutional reforms and the prosecution of those behind the violence. It handed an envelope containing the names of six suspects who, to the CIPEV, bore the heaviest responsibility in the violence.[1374]

[1372] See generally, Commonwealth Secretariat, *op.cit* note 970.
[1373] KNDR, *op.cit.* note 996 para 3.
[1374] CIPEV *op. cit.* note 57 p472.

The study found that as the CIPEV had no faith in the country's judiciary, it recommended the appointment of a local tribunal to try the six suspects and in default, the envelope had to be handed to the ICC by Annan. Efforts to establish a local tribunal failed, and trials for four of the six are set down for 2013 at the ICC after confirmation of charges and dismissal of their appeals over the jurisdiction of the ICC. Charges against two of the six suspects were dismissed. It is worth observing that at the closing stages of this study, two of the four ICC suspects, Uhuru Kenyatta and William Ruto, had joined hands and won the 2013 presidential elections as President and Deputy President respectively under the Jubilee coalition of political parties. The two narrowly defeated their closest rival and former Kibaki-ally, Odinga.[1375] Circumstances surrounding their victory, including the reasons for the Supreme Court's dismissal of the election petition are matters worthy of further research in view of the criticisms leveled against the Independent Electoral and Boundaries Commission and the Supreme Court.[1376]

The road-map for the constitution-making process, initiated by the KNDR, was underpinned by the Constitution of Kenya Review Act 9 of 2008 (The Review Act) and the Constitution of Kenya (Amendment) Act, 2008 (the Amendment Act). As the study has found, the Amendment Act was intended to deal with the key finding in the case of *Njoya*, that Parliament's only power was to alter the Constitution and not to replace it. That Act therefore introduced section 47A into the Constitution which empowered Parliament to replace the Constitution.

[1375] See, The Guardian, "Uhuru Kenyatta Wins Kenyan Election by the Slimmest of Margins," 8 March, 2013, available at **www.guardian.co.uk**. Accessed on 3 May 2013.

[1376] Perhaps the strongest attacks on the electoral process and the decision of the Supreme Court is by Maina Kiai and Joel Barkan who have argued that Kenyatta's actual tally did not exceed 50% as required by the Constitution, see *The Daily Nation,* 24 April, 2013, "Supreme Court was Loser in Kenyan Election," available at **www.nation.co.ke** , accessed on 24 April 2013. The Court's full judgment was not available as this study came to an end but for the dismissal of the petitions only, see the case of *Raila Odinga and 2 Others v Independent Electoral and Boundaries Commission and 3 Others* Eklr 2013, available at **http://kenyalaw.org** , accessed on 3 May 2013.

As the study further demonstrated, the Review Act was the legislation intended to drive the constitutional review process. Specifically, it introduced the key organs of the review, namely the CoE, the PSC, the Attorney-General, the referendum and Parliament. As further discussed in the thesis, the CoE's main responsibility was to come up with a Harmonized Draft Constitution from the Draft Constitutions. In this process, the CoE had to collate the views of Kenyans on the contentious issues in the two drafts, so as to "harmonise" them.

One central issue in the review process remained unresolved: the manner in which disputes arising from the process could be settled. As discussed in the study, the judiciary had lost its credibility, and such an important process could not, as with the 2007 elections dispute, be left to the Kenyan Courts. It is for this reason, the thesis argued, that the Constitution of Kenya (Amendment) Act 10, of 2008 was enacted. The Act established the IICDRC. Before the Court could be established, the High Court had, in the case of *Bishop Kimani,*[1377] held that in the absence of the IICDRC, which under the circumstances prevailing had not been promulgated speedily, it had original jurisdiction to entertain constitutional review disputes as it could not deny a litigant in such a weighty matter access to justice on technical grounds.

A number of key decisions made by the IICDRC after its operationalisation were examined in the study. The main complaint by the petitioners in those cases, for instance *Bishop Kimani*[1378] and *Mary Ariviza*,[1379] was how the CoE went about settling the contentious issues in the draft constitutions. As the this study strongly argued, and indeed found, the IICDRC failed to deal with the cardinal question of a fully people-entrenched constitution-making process, what the thesis submits is the philosophical foundation of the constitutional review

[1377] *Bishop Kimani* (High court) *op. cit.* note 1028.
[1378] *Bishop Kimani* (IICDRC), *op. cit.* note 1038.
[1379] *Mary Ariviza* (IICDRC), *op. cit.* note 1039.

process. Instead, the Court dealt with issues that this study, with respect, considers insignificant in constitution-making.

The issues included the extent to which the CoE consulted Kenyans on the contentious issues key among them being the retention of the Islamic Kadhis Courts in the supreme law as other religions or faiths failed to get such recognition. Much as such issues are clearly important, the study has shown that the IICDRC lost an opportunity, despite being vested with statutory jurisdiction, to investigate the validity of the draft constitutions, or any similar documents, from the perspective of participation of the people in the making of the draft constitutions, and, consequently, determine the legitimacy of the 2010 constitution-making process. The study argued that the legitimacy of the 2010 Constitution is inseparable from the philosophy underpinning the Review Act, issues which fall under objectives four and five of the study.

Section 4 of the Review Act was at the heart of this study as it set out the purpose and the procedure for the country's constitution-making. In particular, the constitution-making process was intended to entrench constitutionalism, the rule of law, good governance respect for human rights and, most important for this study, participation of Kenyans in the affairs of the state. All these, it seems, was an implied reminder of the blatant violations of these ideals by the executive especially during the reigns of Kenyatta and Moi. In addition, the constitution-making process had to ensure effective participation of the people in the exercise in order to ensure that "the outcome of the review process faithfully reflects the wishes of the people of Kenya."[1380]

[1380] Section 4 (e) of the Review Act.

Meaningful participation of the people in constitution-making vests a constitution with legitimacy and ownership of the supreme law. It is for this reason that discourses on constitution-making, for instance by Tribe and Landry,[1381] and as recommended by the UN,[1382] call for a robust and fully people-involved process in order to make the process legitimate. As the study argued, the Review Act restrained the powers of the CoE, the body in charge of collating the views of the people, by providing in sections 23 and 29 that the CoE could only obtain the peoples' views only in matters which were contentious having regard to the previous draft constitutions. The draft constitutions were the 2002 Draft Constitution produced by the NCC; the 2004 Draft Constitution of Kenya commonly called the Bomas Draft and the 2005 Proposed Constitution of Kenya commonly known and the Wako Draft.[1383]

The main obstacle, from a constitution-making perspective, was that those draft constitutions could notbe said to have been made by the people of Kenya because most of the members of the constitution-making panels or teams were not elected by the people of Kenya as succinctly observed in the cases of *Njoya* and *Onyango*. Equally disturbing was the taking away of the right of Kenyans to fully participate in the making of their constitution by limiting the powers of the CoE's to contentious matters in the illegitimate, the study argued, draft constitutions. It is for these reasons that the study argued that the claim in the Preamble to the 2010 Constitution that the people of Kenya fully participated in the making of the Constitution is a hollow assertion as it lacks legitimacy, the focus of objective number six of this study.

[1381] Tribe and Landry, *op.cit.* note 1183 p628.
[1382] UN, *op. cit.* note 1188 p3.
[1383] See sections 23 and 29 of the Review Act.

In addition to the process of constitution-making, the study also examined the other aspect of the study which emanates from the Review Act 2008 and the 2010 Constitution: embracing the ideal of participation of the citizenry in the management of public affairs. As found in the study, the people of Kenya have largely been excluded from the management of public affairs through a pure electoral democratic system. It was shown that from a Kenyan perspective, the realisation of a culture of transparency and accountability may not be attained even under the 2010 Constitution due to the weakness in the Constitution regarding these ideals. The key Article on transparency is Article 35(3) of the Constitution. This provision is ambiguous as it grants the state what the thesis considers unacceptable administrative discretion in that it is the state which has to determine "important information affecting the nation," in order for the information to be made available.

As a matter of comparative jurisprudence, and with a view to demonstrate the weaknesses of the Kenyan law on transparency and accountability, the study examined the legal position in South Africa. It was shown that in that country, the right to information, which clearly is the gateway to transparency and accountability, is accorded serious attention and the state is not given the kind of discretion as that found in Kenya. Further, there is in South Africa the constitutionally founded legislation, the Promotion of Access to Information Act 2 of 2000, so as to facilitate the realisation and enjoyment of this right, thus making the notion of "government in the sunshine,"[1384] real.

A pure representative system has failed to yield the intended results as the people's representatives have, for long, perpetrated a plethora of governance ills, including endemic

[1384] In USA's political governance, the term "government in the sunshine" means an open and transparent government, see generally, The White House, "Spotlighting Open Government Progress During Sunshine Week." Available at http://www.whitehouse.gov. Accessed 25 October 2012.

corruption and generally acted against the interests of the people. As discussed in the study, it was the reason why the Review Act embraced the ideal of the involvement of the people in the management of public affairs as one of the cornerstones of the constitutional review exercise. As argued further, the intention behind the ideal of popular participation in the management of public affairs is predicated on the need for the people to be the bulwarks of their constitution, as opposed to leaving this enormous responsibility to their generally discredited representatives.

As discussed in the study, one of the key reforms in the 2010 Constitution is in the law-making process. Unlike under the 1963 Constitution, Parliament now has the responsibility of facilitating participation of the people in law-making, and in the work of its committees.[1385] Notwithstanding this noble ideal, it has been shown that this democratic shift may not yield the intended results because the MPs have, since the promulgation of the Constitution been circumventing the process by not fully engaging the people in law-making. The position is worsened by the stakeholder approach adopted by the CIC as it collates views on new Bills.[1386]

As further argued, the two institutions have not adhered to the spirit and intent of the Review Act 2008 which is a fully participative democratic system. As further submitted, meaningful realisation of the right of the people to participate in law-making by Parliament cannot be achieved without enacting legislation which spells out how this right should be exercised. The approach by the National Assembly and shockingly the CIC, undoubtedly contributes to doing violence to the cardinal ideal of popular participation in law-making process, the important role of which was firmly established in the case of *Doctors for Life.*

[1385] Article 118 of the Constitution of Kenya 2010.
[1386] See generally, CIC Report, *op.cit.* note 99.

The study has demonstrated that major challenges to the rule of law under the watchful eyes of the new Constitution still abound, therefore strengthening the case for an effective people-driven democratic trajectory. The thesis has shown that since the promulgation of the 2010 Constitution, what has been most disturbing is that many of the old challenges to the realisation of constitutionalism and the rule of law remain unabated. The executive openly continues to make key appointments on tribal basis as in the past. Members of the National Assembly are violating the Constitution regarding payment of taxes. Grand corruption continues unabated as, for instance, in the disappearance of the donors' 4.2 Billion Shillings earmarked for the Education Ministry.[1387]

As further shown in the study, the most incontrovertible evidence of violation of the rule of law from a constitutional law perspective is the irregular and unconstitutional implementation of the Constitution. Those in charge of steering the country into a new dawn, especially the legislators and the executive, are busy violating the new law in the face of the guiding principles of leadership and integrity contained in Articles 73-80 of the Constitution. As further argued, the executive has shown contempt for international law and the Courts as demonstrated in its open defiance against the High Court and the ICC in the arrest of President Omar al-Bashir of the Sudan. It is for the foregoing reasons that fundamental reforms are recommended in the study.

The study also showed that the people have been locked out in the determination of membership of key constitutional commissions. As the study has found, the JSC should be the benchmark for the appointment and composition of members of these institutions due to

[1387] See, for instance, *The Standard*, *op. cit.* note 1251 and Mutunga, *op.cit* note 1253.

its participatory trajectory.[1388] However, this approach is not replicated in the composition of most constitutional commissions. For instance, membership to the crucial PSC is the responsibility of the President with the only possible check being the approval of National Assembly.[1389] A similar approach applies to the new and important CRA, the constitutional body for allocation of national revenue to counties.[1390] Membership of the NSC, empowered to deal with matters of national security, is the sole prerogative of the President and this has attracted allegations of tribalism as all members of the NSC appointed by President Kibaki are from his Kikuyu tribe.[1391]

7.3 RECOMMENDATIONS

The 2010 Constitution was predicated on a people-owned constitutional review process and on the need for the people of Kenya to be genuinely engaged in the management of public affairs as unequivocally captured in the Review Act 2008. The intention, it has been argued, was to have a participatory political trajectory, a fundamental departure from the pure representative democratic model which was the bedrock of the independence Constitution. On the basis of this philosophy, this thesis makes the following recommendations:

7.3.1 Re-starting the Constitution-making Process

This is the main recommendation of this thesis, and, indeed, is a weighty one. The people of Kenya did not fully participate in the making of the 2010 Constitution. They do not own that Constitution. This finding is underpinned by the illegitimacy of the three draft constitutions: the 2002 Constitution by the NCC; the 2004 Bomas Draft Constitution and the 2005 Wako Draft Constitution. Consequently, the Harmonized Draft which was finally endorsed by the

[1388] For the composition of the membership of the JSC, see Article 171 (2) of the Constitution of Kenya 2010.
[1389] Article 233 (2) of the Constitution of Kenya 2010.
[1390] Article 215 (2) of the Constitution of Kenya 2010.
[1391] See, Hassan, *op. cit.* note 1243.

people in a referendum lacks legitimacy. As the study has argued, a referendum is merely one of the processes in constitution-making and on its one cannot vest the final product with legitimacy.

As a fully participative constitution-making exercise and the politics involved could drag the process for a long time as found in this study, it is recommended that some constitutional amendments be effected immediately so as to embrace the ideal of participative democracy as intended in the Review Act 2008. These include:

7.3.2 Law-Making

Participation of the people in legislative business is central to participatory democracy which is the backbone of this study. It is therefore essential for the process of law-making not to be considered immaterial or irrelevant by those in charge of the process. For this reason, it is recommended that the Constitution should stipulate that the National Assembly should enact legislation for involving the people in its law-making business. The existing position is merely that the people should participate in law-making. Most, if not all the legislation passed under the 2010 Constitution have not, as the study has found involved the people in any meaningful manner and are accordingly unconstitutional. Enabling legislation would most likely eliminate confusion on the modalities of popular participation in law-making and how the views of the people should be taken on board at the law-making stages in the National Assembly.

The adoption of the suggested approach would be in tandem with the position at the county assemblies which, under Article 196 and the Fifth Schedule, must enact legislation for involvement of the people in law-making. It is dumb-founding that in the counties, legislation

has to be enacted to facilitate popular involvement in law-making, but a similar provision does not exist where matters of law-making and others really matter, in Parliament. Legislation would also address the *lacunae* of "stakeholder consultation and consensus" adopted by the CIC. It has been seen that for the short period the new Constitution has been in force, Parliament has made amendments to key legislation without the participation of the people or the involvement of the CIC.

7.3.3 Management of Public Affairs

In so far as management of public affairs is concerned, the thesis has found that apart from involving the people in law-making (with reforms as recommended above) by Parliament, the people are not in any other significant way engaged in decision-making at national level. Except in the composition of the JSC which is not dominated by political appointees, the membership of other main commissions demonstrates a representative democratic system. The President, and in some cases the President and Parliament, have full authority in the appointment of members of influential commissions especially the PSC, the NSC and the CRA. It is submitted that involvement of relevant professional and religious associations in the appointment of members of these commissions would greatly boost good governance as opposed to pure political appointments. Further, these bodies should be obligated to embrace the values and ethos of popular participation in their government practices.

As found in the study, the Constitution provides that legislation shall be enacted to regulate how the people in the counties will be engaged in law-making. However, law-making consists of the first step in decision-making. Popular governance is incomplete without engaging the people in implementation of law and policy. As the study has argued, with the exception of urban areas and cities, the only claim which the people in the county have in the

affairs of the county is law-making which shall be regulated by legislation. They have no legislative or constitutional right to be engaged or involved in other decision-making processes of the counties, including the key issue, as held in the South African case of *Matatiele*, of the demarcation or alteration of their boundaries.

7.3.4 Appointment and Removal of the Attorney-General

As discussed in the study, the Constitution does not insulate the Attorney-General with security of tenure. For a Constitution which is founded on the need for good governance, rule of law and constitutionalism, there is no justification whatsoever to alter the position prevailing under the old Constitution which gave the Attorney-General security of tenure. The study argued that it is not possible for the Attorney-General to commence civil proceedings in the courts, especiallyagainst politically well-connected individuals, and to generally deal with impunity through the civil courts, without his or her tenure receiving constitutional protection. In this regard, it is recommended that a tribunal, composed on terms perhaps similar to those for the removal of a judge or the Director of Public Prosecutions, should deal with the issue of the removal of the Attorney-General from office.

7.3.5 Transparency and Probity in Governance

As this thesis demonstrated, the Bill of Rights provides for access to information as one of the rights, a key departure from the old Constitution. As the study further showed, access to information is at the core of good governance, constitutionalism and the rule of law. Article 35(1) of the Constitution declares the right of every person to have information held by the state. The study has shown that in terms of Article 35(3), the state should publish and publicise any important information affecting the nation. The Constitution does not require

the enactment of legislation for the implementation of this important right which, the study argued, is the gateway to good governance and effective popular democracy.

As it now stands, the right to information is difficult to exercise. Its ambiguity, for instance the term "important information," makes reforms necessary, lest the much desired engagement with the people in decision-making will remain empty rhetoric. Key ingredients necessary for an effective exercise of this right should include time-lines, delays in providing the information, grounds for refusal and appeals.

It is recommended that a constitutional approach, as in South Africa, be adopted if the battle against violation of the rule of law, corruption and bad governance as a whole is to be meaningfully executed or prosecuted. The thesis has shown that in South Africa, section 32 of the 1996 Constitution provides for the enactment of legislation to regulate the enjoyment of the constitutional right. This is the genesis of the Promotion of Access to Information Act 20 of 2000 which, undoubtedly, is central to popular governance. In Kenya, enabling legislation is therefore called for the fulfillment of this constitutional right.

Further, the study observed that witness protection is at the core of a meaningful enjoyment of the right of access to information. As the study further found, the Witness Protection Act, 2006 and the Witness Protection (Amendment) Act, 2010 are under the tight control and direction of the executive. The Witness Protection Agency merely augments executive control of the whole witness protection process and reforms in this important agency of good governance are obligatory. Of special urgency is the enactment of an effective law to provide for the protection of privileged disclosures.

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Fundamentals Level – Skills Module

BAC

ACCA F4 Mock 1

Corporate and Business Law (Botswana)

~~Tuesday 7 June 2011~~

Friday, 17 May 2013

Paper F4 (BWA)

Time allowed
Reading and planning: 15 minutes
Writing: 3 hours

ALL TEN questions are compulsory and MUST be attempted.

Do NOT open this paper until instructed by the supervisor.

During reading and planning time only the question paper may be annotated. You must NOT write in your answer booklet until instructed by the supervisor.

This question paper must not be removed from the examination hall.

The Association of Chartered Certified Accountants

The Botswana Institute of Accountants

ALL TEN questions are compulsory and MUST be attempted

1 In relation to the Botswana Legal System, discuss the rules used by the Botswana courts in the interpretation of statutes.

(10 marks)

2 In relation to the law of contract:

(a) discuss specific performance as a remedy for breach of contract and cite instances in which the court would refrain from granting an order for specific performance; (6 marks)

(b) describe various methods for the enforcement of an order for specific performance. (4 marks)

(10 marks)

3 In relation to the law of partnership, discuss the various ways in which a partnership may be terminated.

(10 marks)

4 In relation to the law of companies:

(a) explain the doctrine of *ultra vires*; (5 marks)

(b) explain how the doctrine of *ultra vires* has been reformed in the Companies Act 2003. (5 marks)

(10 marks)

5 In relation to the law of companies, explain and distinguish between ordinary shares and preference shares.

(10 marks)

6 In relation to the law of employment, discuss the main duties of an employer.

(10 marks)

7 In relation to company law, explain the rules relating to the appointment, duties and powers of a company ~~secretary.~~ auditor

(10 marks)

8 Lebogang owns a shoe retail store in Gaborone. She regularly receives consignments of shoes from Takutaku Wholesalers. In the last six months of 2010, Lebogang had been in negotiations with Takutaku about the price of the shoes supplied to her. Takutaku wished to increase prices by 10% to account for increased costs of materials. Lebogang had been negotiating for only a 5% increment.

In February 2011, Takutaku sent a letter to Lebogang stating as follows:

'We have considered your position. We are prepared to offer you the usual shoe consignment at a compromise increment of 7·5% unless we hear otherwise.'

In March 2011, Takutaku sent a consignment of shoes to Lebogang. The unit price on each pair of shoes supplied had been increased by 7·5%. Lebogang did not reply to Takutaku.

In September 2011, Takutaku sent Lebogang a letter of demand claiming payment for the March 2011 consignment. Lebogang then responded as follows:

'You will be well aware that negotiations between us were inconclusive. Whilst your company advocated a 10% increment, I had maintained that a 5% increase was the maximum that I was prepared to accept. I am not liable to you on the new price.'

Takutaku disagrees with the position that Lebogang has taken and wishes to sue Lebogang for the amount due on the consignment of shoes delivered in March 2011.

Required:

Advise Takutaku.

(10 marks)

9 Kagiso is chairman of the board of directors of Kwacha Supermarket, a limited liability company running a chain of stores in Botswana. Kagiso holds 60% of the shares in Kwacha Supermarket.

Kwacha Supermarket entered into a contract with Tlhapi (Pty) Limited for the supply of frozen fish. At the time of conclusion of the contract, Kagiso was managing director of Tlhapi (Pty) Limited. Kwacha Supermarket paid for the supply of the frozen fish. The other directors of Kwacha Supermarket later discovered Kagiso's involvement in the transaction, and now wish to rescind the contract with Tlhapi (Pty) Limited.

Required:

Advise Tlhapi (Pty) Limited if the contract is enforceable against Kwacha Supermarket, discussing the provisions of the Companies Act, 2003 dealing with directors' interests in a transaction to which the company is a party.

(10 marks)

10 Thapelo is a computer technician. He has worked for several years at a leading IT firm and now wishes to go into business for himself, offering IT solutions to businesses.

Initially, Thapelo intended to go into the business as a single entrepreneur. However, he anticipates that his brother Kago will join him in the business when he completes his schooling in a year's time. As Kago will have no money to buy into the business, Thapelo is interested in a corporate form that will allow Kago to borrow money from the business entity for the purpose of acquiring an interest in it. Thapelo also wishes that the business entity should be one capable of continuing in existence in the event that either he or Kago leave it.

Thapelo is also concerned that he shall not be able to meet the rigorous statutory management and accounting requirements facing a business entity subsequent to incorporation. Since he will eventually be in business with his sibling, Thapelo would prefer an informal arrangement that will allow him and Kago to spend more time working and building the business and less time in management meetings. Thapelo comes to you for advice on the best corporate form for his enterprise.

Required:

(a) **Advise Thapelo regarding the distinguishing characteristics of the corporate form most suited to his proposed business undertaking.** (6 marks)

(b) **Explain the advantages and disadvantages of the proposed corporate form in comparison to other incorporated entities.** (4 marks)

(10 marks)

End of Question Paper