# THE CASE FOR COMPREHENSIVE SCENARIO BUILDING AS A MEANS FOR PRE-TESTING THE ARTICLES OF A PROPOSED CONSTITUTION TO ENSURE ITS VIABILITY POST PROMULGATION: A CASE STUDY OF KENYA



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## 1.0 INTRODUCTION

> *The people made the Constitution, and the people can unmake it. It is the creature of their will, and lives only by their will. But this supreme and irresistible power to make or to unmake resides only in the whole body of the people, not in any subdivision of them. The attempt of any of the parts to exercise it is usurpation and ought to be repelled by those to whom the people have delegated their power of repelling it.*[1]
> *(John Marshall, Chief Justice of the United States of America – 1801-1835)*

The proof of the pudding is indeed in the eating! This old adage has clearly been demonstrated in the case of Kenya that has grappled with a number of significant incongruities arising from the interpretation and implementation of its Constitution, 2010. This Constitution, which has since elicited both joy and frustration in equal measure, was promulgated on 27 August 2010 following an arduous constitution-making process lasting over two decades. This paper essentially seeks to highlight the delicate nature of modern constitution-making processes that in recent decades have been witnessed in Africa. In particular, the feasibility of the resulting constitutions will be examined with a particular focus on Kenya's Constitution against the backdrop of contiguous constitution-making processes on the African Continent.

Although many post-colonial countries on the continent have undergone a constitutional renaissance which has largely been expressed through elaborate constitution-making or amendment exercises, it is the case that a number of them have not experienced 'lift off' insofar as achieving the political, governance, and administrative regimes that were envisaged as the outcome. This is despite the fact that for most countries, the said constitution-making processes were in their nature people driven, people centred, and participatory[2]. Yet again, for most, the objective of the constitution-making and or amendment exercise was to remedy historical injustices of various natures including those pertaining to marginalisation of

[1] Stated in the Marshall-Cases: *Cohens v. Virginia* 1821, cited in the Documents Section of, 'American History from Revolution to Reconstruction and Beyond, available at *http://www.let.rug.nl/usa/documents/1801-1825/marshall-cases-cohens-v-virginia-1821.php* (accessed 14 June 2013)

[2] For instance, Eritrea adopted its current Constitution in 1997 having been drafted through a participatory process involving Eritrean citizens as was outlined through Proclamation No. 37/1993. Indeed before its adoption, public debate on the draft constitution had taken two years. Delays in its implementation significantly prevented the public from enjoying its otherwise progressive provisions. See Bereket H S, 'Constitution Making in Eritrea: A process-Driven Approach' in Miller E L (ed) *Framing the State in Times of Transition: Case Studies in Constitution Making* (2010), available at http://www.usip.org/sites/default/files/Framing%20the%20State/Chapter3_Framing.pd ( accessed 6 June 2013)

communities from land and the rights appurtenant to it[3], discrimination on the basis of gender[4], disability, ethnic origin, faith etc., and the systematic marginalisation of communities from the mainstream agenda of development[5]. This paper argues that key among the reasons for the failure to attain 'lift off' are: structural weaknesses built into the new constitution whether advertently or inadvertently; misplaced expectations from citizens; and covert motives from the ruling political class or whichever the hegemonic authority as the case may be.

Evidently, constitution-making can be a highly polarised affair thus reflecting Okoth-Ogendo's view of the constitution being akin to a power map, which in its making draws on past experiences and future aspirations. More specifically, he opines that constitution-making is eminently a political act where choices as to which concerns appear on the map are made, and could hardly be regarded as a simple reproduction of what basic principles have been found operational by particular societies[6]. Ultimately, where the body mandated with overseeing the constitution-making or amendment exercise does not take care to ensure that the power map is equitably apportioned, and that competing concerns are well balanced, there is a real danger of the emergent constitutional document being unworkable or highly ineffective at two levels. The first level refers to the impotency of the emergent constitution because of failing to engender a sense of ownership among influential or large sections of the population whose buy in is necessary for the constitution to work. The second level pertains to poor drafting of the clauses of the constitution that results in the constitution having inherent inconsistencies, contradictions, and plainly ineffectual clauses. Regardless of the factors accounting for the latter two levels, such a constitution is open to unending contestations both in and outside of courts by both citizens and the state, as they seek to have various clauses discussed, debated, interpreted, or enforced. Indeed the consequences of the latter contestations may have far-reaching consequences if not managed well within a stable framework that comprises a democratic culture characterised by tolerance and a robust judiciary. The latter factors are necessary in guaranteeing a working constitutional order that Tushnet defines as the legal regime by which political authority is expressed, or, *'... a reasonably stable set of institutions through which a nation's fundamental decisions are made over a sustained period, and the principles that guide those*

[3] The Constitution of Kenya, 2010 seeks to address among other things historical injustices and the emotive land question. Chapter Five of the Constitution addresses land and natural resources, establishes the National Land Commission and requires the enactment by Parliament of various land laws that will ensure equitable access to and use of land and mineral resources.

[4] The 1995 Constitution of Uganda for instance addressed various concerns of the Ugandan people including the right of the child, gender issues, the rights of the disabled and the environment. As a result of the explicit recognition of gender equality under the 1995 Constitution through Women's rights, Uganda today boasts of being among the Countries with the highest number of women in Parliament in the world. See Wapakhabulo J.F '*Uganda's Experience in Constitution-Making*' (2001). Available online at http://www.commonlii.org/ke/other/KECKRC/2001/33.html (accessed on 22 June 2013)

[5] The Constitution of Kenya, 2010 entrenches inclusivity in governance by requiring the consideration of marginalized communities and regional balance in state appointments. This requirement necessarily ensures that persons from marginalized communities have an equal and fair opportunity to participate in the governance of the state, a matter which has historically been the preserve of dominant ethnic groups. In addition, the Constitution requires the use of affirmative action measures to ensure the inclusion marginalised persons in electoral politics. In this regard, Article 100 states, *'100. Parliament shall enact legislation to promote the representation in Parliament of (a) women; (b) persons with disabilities; (c) youth; (d) ethnic and other minorities; and (e) marginalised communities.'*

[6] Okoth-Ogendo, H.W.O 'Constitutions without Constitutionalism: Reflections on an African Political Paradox' in Shivji, G. I. (ed) *State and Constitutionalism: An African Debate on Democracy* (1991) 3 - 25.

*decisions… .These institutions and principles provide the structure within which ordinary political contention occurs."*[7]

Based on the foregoing, the salient argument advanced in this paper is that constitution-making and amendment processes would, as a matter of course, benefit from thorough and systematic scenario-building exercises bringing together experts in both theory and practice before the promulgation stage. The purpose of such exercises would be to test each constitutional article along the logical path of its interpretation and implementation process in order to establish the strength and feasibility of the right conferred, the reasonableness of the obligation conferred, and the precise responsibility to be borne by respective parties. It is contended that the mandatory incorporation of such a step would strengthen the efficacy of the new constitution in achieving the desired national goals.

To demonstrate and illustrate the cogency of the foregoing arguments, this paper will investigate a number of issues in logical sequence. As a preliminary, the general context within which constitution-making and amendment exercises have been undertaken in the recent past in Africa will be reviewed. This context is necessary in establishing the premium placed on such constitutional reforms exercises that are usually considered the panacea for many of the ills suffered by citizens and the state. In this regard, it will be interesting to note any similarities and divergences arising across the Continent, and any factors that may account for the same. Having appreciated this, the specific context of Kenya's constitutional reforms process will be appraised briefly with a particular focus on the challenges that have been experienced with respect to its interpretation and implementation since promulgation. In this regard, key incidences where the Constitution of Kenya has been found wanting will be closely examined. A similar enquiry will be undertaken of Uganda and South Africa whose Constitutions provided a significant background for Kenya's constitution-making process. The purpose of this concise comparative study that will tease out relevant examples will be to establish the prevalence of this problem if at all and how the two countries have dealt with it. Ultimately, the case for comprehensive scenario-building as a means for ensuring the viability of a new constitution will be made based on the information gathered from an interrogation of the above issues. Appreciably, the thrust of the subject matter in this paper is relatively new and hence the dearth of literature around it although an attempt has been made to refer to relevant connected literature.

## 2.0 THE GENERAL CONTEXT OF RECENT CONSTITUTION-MAKING AND AMENDMENT EXERCISES IN POST-COLONIAL AFRICA

Once the drive for post-colonial African states to re-invent themselves anew begun in the 1980s, it was just a matter of time before individual countries on the Continent made the decision to overhaul their constitutions totally or amend sections of it radically. Oloka-Onyango explains this surge effect as having been caused by new winds blowing across the continent and bringing in their wake a renaissance of popular and elite interest in matters about governance, statecraft, and constitutionalism. He describes

[7] See Tushnet, M, *The New Constitutional Order* (2003) 1.

these developments as having heralded 'the *epoch of the rebirth of constitutionalism*'.[8] Among others, the constitution-making exercises of Ghana (1992), Uganda (1995), Eritrea (1997), South Africa (1996), and Kenya (2010) have had far-reaching consequences in altering the nature of the state and tilting the balance of power as hitherto known. Certainly, an important outcome of the post-independence constitutional reforms processes in Africa has been the expansion of political space for the public to engage with processes of national governance.

Ihonvbere describes the above wave of constitutional reforms as predicated on adopting a different type of constitutionalism particular to Africa, a continent he describes as rife with debates regarding issues such as human rights, gender, minority groups, the rule of law, and the relevance of the military to society. These debates centre on the obstacles that have militated against the full realisation of the mentioned rights, and how they can be overcome. The debates essentially encompass the struggle for the reform of constitutions, this time with the long marginalized masses at the centre. Today those masses are articulating their aspirations, and demanding that the various rights are incorporated into the new constitution. For Ihonvbere, these struggles embody the agitation for a new constitutionalism, "*a process for developing, presenting, adopting and utilizing a political compact that defines not only power relations between political communities and constituencies, but also defines the rights, duties, and obligations of citizens in any society."*[9] This type of new constitutionalism is today an integral aspect of constitutional reforms in African political processes.[10]

In setting out the context for most of the recent constitutional review processes in Africa, it is important to appreciate the fact that the majority of countries had been governed by post-independence constitutions and governance systems that were largely reflective of the norms, mores, and continuing interests of the exiting colonial powers. The impact of the residual governance and administrative methods of colonial authorities on the emergent independent states has been discussed at length by Okoth-Ogendo in his

[8] Oloka-Onyango does wonder in the same breath in what direction these winds are taking Africa. Perhaps to a new political nirvana, or back to regression, dictatorship or autocracy? He wonders whether the efforts to address the gnawing questions of marginalisation, discrimination, or exclusion are genuinely motivated, or whether they are simply another ruse in the desire for the reconfiguration of state structures to ensure political hegemony, amongst a leadership principally concerned with self-preservation. Will the experiments in constitutional engineering, built hopefully on sustainable foundations, outlast their political and legal architects? See Oloka-Onyango's comments in the Introduction to Oloka-Onyango, J *Constitutionalism in Africa: Creating opportunities, Facing Challenges* ed (2001) 1.

[9] See Preface of, Ihonvbere, J.O. *Towards a New Constitutionalism in Africa*, First published by the Centre for Democracy & Development (2000).

[10] In this regard the Centre for Democracy and Development remarks, *'At every level on the continent, the idea has taken root that the Leviathans of Africa must no longer function as "virtual democracies" but must be refashioned to reflect the realities of their multifaceted societies. This has been reflected in the constitutional Conferences in Benin, Mali, Togo, Niger, the Democratic Republic of the Congo, and Cameroon in the early 1990s, in the successful constitutional arrangement of South Africa, and in the process-based constitutional commissions in Uganda and Eritrea… .Today, the struggle for constitutional reform in Kenya, Tanzania, Zimbabwe and Nigeria typifies the second liberation/independence struggle in the continent. The struggle has been led predominantly by civil society in Africa, since the political parties have proved either incapable or unwilling to push for constitutions that will promote just and equitable societies, being instead distracted by a chance to exercise power'*. See Centre for Democracy and Development, *The Zimbabwe Constitutional Referendum: Report of the Centre for Democracy & Development Observer mission from 12-13 February* (2000) P 33-34.

seminal work *'Constitutions without Constitutionalism'*[11]. Although the subject of his analysis predates the recent constitutional review processes in Africa during the last two decades, it is contended that his views, expressed in the early 1990s, nevertheless remain pertinent. This assertion is strengthened by Akibá's observation regarding the recent democratic re-awakening in Africa that has been characterised by a wave of constitutional reviews. Akibá notes that despite these constitutional reviews being enthusiastically received, with some believing Africa is in the throes of political renaissance, "*reversals in the momentum of political reform have also occurred in a few countries, suggesting uncertainties and contradictions in the future of democratic consolidation.*"[12] To begin with, Okoth-Ogendo surmises that since Ghana's independence in 1957, political developments in Africa have repeatedly demonstrated that not only have constitutions 'failed' to check the exercise of power, but have also failed to become the basic law on which all other law is based according to established constitutional tradition. [13] He notes Ghai's sentiments that, *"...whilst numerous regimes through history have found the rule of law or legality invaluable, both as a principle of organisation and as a legitimising ideology, few African governments have valued them other than as rhetoric."*[14]

As for the independence constitutions that subsequently emerged, Ebrahim *et al* observe that these have been regarded with deep ambivalence, having been *"handed down by exiting colonial powers as a holy grail legitimising the supremacy of the state over society*". Ebrahim *et al* consider that for too long, these constitutions have only been identified with legislation rather than as devices meant to limit government power. They state that where the Westminster model was used, constitutions have mainly been perceived as a set of rules and administrative measures to authenticate the post-colonial state, the rationale being what is legal is essentially legitimate.[15]

Okoth-Ogendo argues that constitutional systems in Anglophone Africa have largely been deficient, particularly in the 1960s. He notes the propensity for them either to have been dumped in military dustbins or to have significantly been amended such as to make them otiose.[16] Furthermore, Akibá

[11] Okoth-Ogendo, H.W.O 'Constitutions without Constitutionalism: Reflections on an African Political Paradox' in Shivji, G. I. ed *State and Constitutionalism: An African Debate on Democracy* (1991) 3 - 25.

[12] Akibá, O *Constitutionalism and Society in Africa* eds (2004) 3.

[13] Okoth-Ogendo, H.W.O 'Constitutions without Constitutionalism: Reflections on an African Political Paradox' in Shivji, G. I. *State and Constitutionalism: An African Debate on Democracy* ed (1991) 3 – 25.

[14] See Ghai, Y, P 'The Rule of Law, Legitimacy and Governance' 14 *International Journal of the Sociology of Law*, (1986) 179-208. Quoted by Okoth-Ogendo in Okoth-Ogendo, H.W.O 'Constitutions without Constitutionalism: Reflections on an African Political Paradox' in Shivji, G. I. *State and Constitutionalism: An African Debate on Democracy* ed (1991) 3 – 25.

[15] They note that such constitutions have indeed endorsed one-party states, as well as racial segregation, while being perceived as legitimate legal documents, governing the affairs of the state. This has usually been to the population's detriment. See Ebrahim H, *et al* '*Promoting a Culture of Constitutionalism and Democracy in Commonwealth Africa'*, Recommendations to Commonwealth Heads of Government, by the Commonwealth Human Rights Initiative's Consultation on Participatory Constitution-making, 16-17 August 1999, Holiday Inn, Burgerspark, Pretoria). Available online at, http://www.humanrightsinitiative.org/publications/const/constitutionalism_booklet_1999.pdf#search='funding%20constitution making%20uganda [accessed 13 June 2013].

[16] Okoth-Ogendo notes the debatable sentiments of some scholars at the time that this state of affairs was attributable to the inherent inability of Africans, to operate constitutional systems. These scholars, trained in Westminster custom, view the constitution as a body of rules defining and limiting government power, as well as regulating major activities in the political sphere of the state. See Okoth-Ogendo, H.W.O 'Constitutions without Constitutionalism: Reflections on an African Political Paradox' in Shivji, G. I. *State and Constitutionalism: An African Debate on Democracy* ed (1991) 3 - 25.

recognises that all African governments gaining independence in the 1960s had constitutions including safeguards to human rights and incorporating the doctrine of separation of powers. However, the abrogation, rewriting, and even nullification of these constitutions took place no sooner after independence. Single party structures were instituted in some cases, based on the widely believed notion that it was impossible for the Western constitutional model to embed perfectly in Africa.[17]

With respect to francophone Africa, Reyntjens notes that despite the pace and intensity of reforms differing considerably, virtually all countries in francophone Africa were touched by the wave of political reforms that swept across the Continent in 1990. According to Reyntjens, the wave was triggered by a combination of factors including events that occurred in Eastern Europe in 1989, effectively signalling the end of the Cold War, as well as France's radical change of heart towards its African partners otherwise known as 'Paristroïka'. Undeniably, the policy of inclusion of political reforms by the World Bank and International Monetary Fund as a pre-requisite for engagement with states was also a key factor. Reyntjens appears to have been circumspect at the time about the long term success and viability of democratic reforms induced in this nature with countries such as Benin, Gabon, Chad, and Ivory Coast having since undertaken pluralist electoral processes following their adoption of multi-partyism.[18]

From the foregoing, it is clear that the independence constitutions of many African countries were problematic because of the discrepancy between what they were designed to achieve and what the expectations of both the elite post-independence ruling class and the citizens were. It would appear that this discrepancy continues to exist because Okoth-Ogendo's early writings on the subject matter have remained relevant through the years and been restated by later day writers. Evidently, constitutional review was identified as a means for reinventing post-colonial societies based on their peculiar interests, traditions, and future aspirations quite early on. Overall, it is inarguable for invariably most countries in Africa, that the historical circumstances through which the nation and state were created are responsible for the subsequent push for constitutional reforms in these countries. For the most part, there have been strong feelings of disenchantment from sections of the population who have felt left out and marginalised by the state, whilst poor governance and outright dictatorial political regimes have driven citizens to the edge through oppression, repression, and impoverishment. These factors, which are well known and have been discussed widely and written about, therefore had the effect of pushing citizens and the political opposition towards mounting active campaigns for constitutional reforms with a view to remedying the stated malfeasance.

[17] Akibá, O *Constitutionalism and Society in Africa* eds (2004) 3. Akibá's remarks are illustrated by Nyerere, the former President of Tanzania's sentiments that: 'In 1965 Tanzania adopted its own form of democracy - we rejected the Western model and said it was not appropriate for our circumstances despite the fact that all our constitutional development had until then been based on it. We looked at different democratic systems around the world, and studied the work of different thinkers… Then we worked out a system of one-party Government which seemed to us to include the essential elements of democracy at the same time as it provided for unity and strength in Government, and took account of our poverty, our size, our traditions, and our aspirations. The resultant constitution is not perfect; but its suits us better than any system operating elsewhere, and we believe that it safeguards the people's sovereignty at the same time as it enables the effective and strong Government so essential at this stage of our development.' See Nyerere, Julius *Freedom and Socialism: A Selection from Writings & Speeches, 1965-1967*', Dar es Salaam: Oxford University Press (1968) P 19

[18] Reyntjens, F 'The Winds of Change: Political and Constitutional Evolution in Francophone Africa' (1990-1991) 35 1-2 *Journal of African Law* 44-55. Available online at http://www.africabib.org/rec.php?RID=11990473X&DB=p (accessed 16 August 2013)

Burnham makes some interesting observations about the wave of present day constitution-making exercises that are relevant to the arguments being advanced in this paper. She states that they are largely a shared international effort where ideas about the best method for capturing complex notions such as those pertaining to individual freedoms and governance in a language that ensures they are practically and legally enforceable, are liberally exchanged and adopted from one country to the other. Burnham asserts that, *'As these concepts criss-cross national lines, what emerges is a roving constitutional project, in which each new constitution, while reflecting indigenous realities, echoes the terms of other recent national charters:'*[19]. More particularly Burnham notes the key role to be played by the body charged with interpreting the constitution in such circumstances. In her view, the role of such a body is critical given that the constitution is a living document that not only comprises the text that embodies various concepts, ideals and principles, but is rather expected to capture the hopes and aspirations of citizens dynamically. In the case of South Africa, this body is the Constitutional Court that was created under the terms of the 1996 Constitution following a comprehensive constitution-making exercise. Burnham avers that the procedures and practice of this Court may be influential in determining the direction taken by other countries seized of the same exercise.

For the purposes of this paper, it will be important to note the extent to which bodies charged with interpreting emergent constitutions after their promulgation, have been effective in steering the country along the path intended during constitution-making. In other words, could the failure for full implementation of the promulgated constitution be attributable to the fact that the terms and clauses of the constitution as stated are completely unworkable, or that the body charged with interpreting the new constitution is simply ineffective? The answer to this question and others may be gleaned from the following investigation of Kenya's situation and subsequent reference to others on the Continent.

## 3.0 KENYA'S POST-PROMULGATION CHALLENGES IN THE INTERPRETATION AND IMPLEMENTATION OF THE CONSTITUTION, 2010

Kenya's journey towards constitutional reforms conforms to the general realities canvassed in the preceding section. Briefly, the popular clamour for constitutional reforms in Kenya was occasioned by the radical amendments that had been made to its Independence Constitution with the deleterious effect of altering the balance of power between the Executive, Legislature, and Judiciary. As a result, there was a severe constriction of individual rights and freedoms as well as the acute marginalisation of various categories of Kenyans. In addition, bad governance was exhibited generally by successive political authoritarian regimes starting with the founding President, Jomo Kenyatta and his successor Daniel Moi[20]

[19] Burnham M A, 'Constitution-Making In South Africa: *Forging a New Legal System, The Former Pariah State Reveals the Virtues of an Activist Supreme Court.*' Available at http://new.bostonreview.net/BR22.6/Burnham.html (accessed on 29 July 2013)

[20] The Kenya Human Rights Commission (KHRC) states that if Kenyatta's tenure was characterised by the willy-nilly making and un-making of laws, including the strong-arm use of the apparatus of government, Moi's tenure definitely surpassed. For one, Moi had at his disposal the constitutional and other devices created during Kenyatta's tenure. In principle, disturbing constitutional amendments passed during the Moi era followed the same patterns, and were undertaken for similar reasons, as those passed by the Kenyatta regime. The KHRC further comments that in fact: '... Moi's vow to follow Kenyatta's nyayo

thus becoming endemic. For instance, detentions without trial[21] and markedly repressive laws[22] were utilised abundantly to oppress perceived dissenters. Like Kenyatta, some constitutional amendments were clearly undertaken in Moi's personal interest.[23] Furthermore, the independence of the judiciary was

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[footsteps] was indeed too real: he followed Kenyatta's footsteps to their logical conclusion, destroying the last vestiges of civil liberties and concentrating power in his hands in a manner that would have made both Kenyatta and the colonial authorities envious. His constitutional amendments were more extreme and far-reaching than ever before, particularly since he lacked Kenyatta's stature and personal aura. The only way to have total control was by manipulating the law, and resorting to extra-legal strong arm measures through KANU and the security forces. After the 1979 elections, Moi set out to create his own style of rule that was different from Kenyatta's. Realising that many doubts existed about his ability to govern...'. See Kenya Human Rights Commission, 'Independence without Freedom: Legitimization of Repressive Laws and Practices in Kenya' in Kibwana, Kivutha ed *Constitutional Law and Politics in Africa: A Case Study of Kenya* (1998)113 - 162. [Report released in 1994, and written by Maina Kiai, the then Executive Director of the Kenya Human Rights Commission] P 132

[21] These made a comeback in 1982. Among those who bore the brunt, included several University dons some of who were arrested between May and July. These include Maina Kinyatti - Department of History, and Katama Mkangi - Department of Sociology. Others were detained without trial in accordance with the Preservation of Public Security Act, such as Alamin Mazrui - Department of Linguistics, Kamoji Wachira – Department of Geography, Edward Oyugi - Department of Education Psychology, Willy Mutunga – Faculty of Law and Mukaru Ng'ang'a – Institute of African Studies. The Universities were highly targeted by the government and free thought severely constrained. The Academic Staff Union was banned in 1980, while the Nairobi University Students Organisation was also banned for its condemnation of rigging of general elections, its calls for socio-economic reforms, and calls for the re-hiring of Ngugi Wa Thiongo, the maverick academic sacked during the Kenyatta era. See Kenya Human Rights Commission, 'Independence without Freedom: Legitimization of Repressive Laws and Practices in Kenya' in Kibwana, Kivutha ed *Constitutional Law and Politics in Africa: A Case Study of Kenya* (1998)113 - 162 above.

[22] To stoke things up, on Moi's order, detention laws that had been suspended in 1978 were reinstated, and used together with colonial era laws that had been inherited *in toto*, such as to give the President power to suspend individual rights guaranteed by the Constitution. These laws, often used in tandem at the time, included: the Chiefs Authority Act [Chapter 128 of the Laws of Kenya], the Public Order Act [Chapter 56 of the Laws of Kenya], Preservation of Public Security Act [Chapter 57 of the Laws of Kenya], The Societies Act [Chapter 108 of the Laws of Kenya], and Sections of the Penal Code [Chapter 63 of the Laws of Kenya] regarding prohibition of publications and sedition. See *Korwa, G A &. Munyae, I M Human Rights Abuse in Kenya under Daniel Arap Moi (1978-2001)5 (1) African Studies Quarterly 1*. Available online at, http://web.africa.ufl.edu/asq/v5/v5i1a1.htm (accessed 19 June 2013)

Through the use of legislation that had become more draconian with time, the independence of the media was effectively suppressed. Certainly, no media were prepared to speak ill of the government based on the general treatment of dissenting Kenyans. Where they dared, they were surely clamped down harshly. For instance the publication by the National Council of Churches of Kenya of its magazine, Beyond, that portrayed the Mlolongo elections as a fraud, was banned in accordance with section 52 of the Penal Code. Furthermore, possession of past, current, or impending publications was criminalised. The magazines' editor Bedan Mbugua, was arrested in accordance with the Books and Newspapers Act and charged for failure of fulfilling certain administrative requirements as regards the magazine. Even though his appeal against conviction was overturned by the High Court, he had already served the duration of the sentence. The same fate befell Peter Kareithi's publication, the Financial Review, which had published instances of government corruption. It was banned in 1988 under the same provisions of the Penal Code, save that Kareithi exiled himself abroad. See Kenya Human Rights Commission, 'Independence without Freedom: Legitimization of Repressive Laws and Practices in Kenya' in Kibwana, Kivutha ed *Constitutional Law and Politics in Africa: A Case Study of Kenya* (1998)113 – 162.

The revocation of the parliamentary privilege, giving parliamentary representatives the right to obtain information from the Office of the President effectively resulted in the surrender by Parliamentarians, and by extension their constituents, of their constitutional rights to have access to the Office of the President. Put otherwise, parliamentary supremacy had now been subordinated by the presidency and the ruling party KANU. The upshot of these amendments was to make KANU the clearinghouse for all elected offices, and to increase Moi's powers for dealing with any political or judicial dissent without further reference to any constitutional or legal provisions or principles. See *Korwa, G A &. Munyae, I M Human Rights Abuse in Kenya under Daniel Arap Moi (1978-2001)5 (1) African Studies Quarterly 1*.

[23] For instance in May 1979, a constitutional amendment was passed to the effect that if civil servants wanted to be elected as MPs, they were required to resign from office six months before the nomination date. This amendment sought to circumvent the earlier position during Kenyatta's reign, whereby civil servants were absolutely forbidden from engaging in politics. Interestingly, this 1979 amendment was motivated more by the desire to enable Charles Njonjo, the then Attorney General [AG], who was a close friend and confidant of the newly elected President Moi, to contest the by-elections of the Kikuyu

further compromised with alarming consequences for the protection of human rights,[24] given the inflexible environment existing for judges to make decisions that countered[25] the government.

Given the above background, the struggle for increased democratization in Kenya that had started back in 1991 begun showing some signs of life in the year 2000 with the enactment of legislation to review the Constitution. This was followed by the appointment of the Constitution of Kenya Review Commission (CKRC) led by Professor Yash Pal Ghai. The CKRC's primary directive was to ensure the comprehensive review of the Constitution at the time '*by the people of Kenya'*. In carrying out its mandate, the Commission was required to ensure that the review process accommodates the diversity of the Kenyan people, including their, *"...socio-economic status, race, ethnicity, gender, religious faith, age, occupation, learning, persons with disabilities and the disadvantaged.*"[26]

Having set up its internal working procedures, the Ghai Commission employed certain unprecedented methods to prepare Kenyans to participate in the review process. To this end, the Commission spared no effort towards establishing an elaborate national infrastructure to facilitate the stimulation, discussion, and

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Constituency. The sitting MP, Amos Ng'ang'a, had 'conveniently' resigned. Njonjo subsequently won the by-election, and was appointed the Minister for Constitutional Affairs. See *Korwa, G A &. Munyae, I M Human Rights Abuse in Kenya under Daniel Arap Moi (1978-2001)5 (1) African Studies Quarterly 1*.

[24] Parliament's enactment of Act No.14 in 1986, and Act No.4 in 1988 saw the Judiciary's independence seriously breached, with serious implications for cases on human rights violations. The 1986 and 1988 constitutional amendments removed the security of tenure for the offices of the Attorney General, judges of the High Court and Court of Appeal, as well as of the Controller and Auditor General. None of these changes were resisted by Parliament that was firmly under the control of the Executive, which had definitely eclipsed the other two arms of government. Furthermore, Section 61(1) of the then Constitution empowered the President, upon the recommendation of the Judicial Service Commission whose members were presidential appointees anyway, to appoint the Chief Justice and Puisne Judges respectively. Bringing the Judiciary under the control of the President thus enabled the unchallengeable manipulation of the Judiciary and the Legislature. This dispelled any ideas about the existence of separation of powers, or checks and balances, within the Kenya government. . See *Korwa, G A &. Munyae, I M Human Rights Abuse in Kenya under Daniel Arap Moi (1978-2001)5 (1) African Studies Quarterly 1*.

In commenting about the compromised status of the Judiciary, Adar and Munyae state, the British Judges who were serving in Kenya as part of the British Overseas Development Aid, were more susceptible to manipulation, because extension or renewal of their contracts of secondment was dependent on the discretion of the Kenya Government. They cite Eugene Cotran, a former British expatriate Judge, who declared openly that undue pressure was applied to expatriate Judges to rule in favour of the State where the President had a direct interest in a case. This situation, led to the resignation of Justices Derek Schofield and Patrick O'Connor, both expatriate Judges, because of what was in their view a judicial system that was "*blatantly contravened by those who are supposed to be its supreme guardians*". Regardless of the murmurs of discontent, if anything, judicial interference blossomed in the late 1990s particularly with regard to political cases. Justices Bena Luta and William Mbuya accused the Government at a workshop held at Mbagathi (Nairobi) in 1995 of interfering with cases that were in court. See *Korwa, G A &. Munyae, I M Human Rights Abuse in Kenya under Daniel Arap Moi (1978-2001)5 (1) African Studies Quarterly 1*.

[25] Certainly, magistrates and judges looked the other way, even in clear cases of the harassment of the so-called political heretics or 'intellectual terrorists' at the Universities because of the very intimate connection between their appointments and the goodwill of the Executive. Thus, magistrates and judges were not in a position to raise issues or questions as regards the treatment of suspected political dissidents. In order to counter these intellectual terrorists, intellectual home-guards were introduced to monitor any suspect ideologies being circulated by the intellectual subversives. Justice Sachdeva is on record as having justified the willingness of courts to become tools of political repression. In his view, it was impossible for courts to operate as though in a political vacuum oblivious of the fact the University and the State had been infiltrated by dissident elements, and thereby ignore them. This position was not shared by all judicial officers, a fact that was not lost on Moi, who was earnestly preparing to celebrate 10 years of his presidency. See Munene, Macharia, The Manipulation of the Constitution of Kenya, 1963-1996: A Reflective Essay'. Paper forming the corpus of Specialist research/papers to the Constitution Review Commission of Kenya (2001)

[26] The Kenya Constitution Review Commission, *The Final report of the Constitution of Kenya Review Commission* (2005) 9.

collection of Kenyans' views[27]. Considering Kenya's history where the culture of consulting citizens directly had not yet taken root, the process designed by the Ghai Commission to obtain feedback from Kenyans with respect to the Constitution they wanted was inarguably unprecedented. This is because of the open and participatory nature with which the process was conducted. Clearly, the Ghai Commission set out to reach Kenyans where they were and in their diversity. However, for various reasons that will not be explored in this paper, Kenya's constitution-making process was intermittently interrupted thus resulting in the process being overseen by two other individuals in the course of time. Nonetheless, the quest to ensure that the constitutional reforms process was participatory and people-centred remained a key feature of the subsequent Abida Ali Aroni led Commission (2004), and the Nzamba Kitonga led Committee of Experts (2009) that finally completed the work begun by the Ghai Commission thus paving way for the National Referendum on 4 August 2010, was.

Whilst Kenya's Constitution 2010 has been hailed as a progressive document by many, the contradictions and inconsistencies inherent in it have also been flagged, and particularly their potential to reverse some of the fundamental gains for Kenyans as variously constituted. Some have even argued that the Constitution, 2010 is a document quite ahead of its time and not in tandem with some of the beliefs, traditions, and political proclivities of the same people who participated in making it. Indeed, since its promulgation, the detection of a number of significant anomalies affecting its implementation has caused great concern. It is contended in this paper that the majority of these anomalies could have been avoided at the constitution-making stage. The anomalies stated are illustrated below through the review of three specific cases among others that were avidly debated amongst the Kenyan public, regionally, and internationally.

The first and most glaring anomaly concerns the interpretation of Chapter Six of the Constitution of Kenya, 2010 that makes prescriptions about Leadership and Integrity. Essentially, Chapter Six describes, among other things, the responsibilities of leadership and states:

> **73.** (1) Authority assigned to a State officer—(*a*) is a public trust to be exercised in a manner that (i) is consistent with the purposes and objects of this Constitution; (ii) demonstrates respect for the people; (iii) brings honour to the nation and dignity to the office; and (iv) promotes public confidence in the integrity of the office;… .(2) The guiding principles of leadership and integrity include (*a*) selection on the basis of personal integrity, competence and suitability, or election in free and fair elections;[28]

[27] Truly immense time and resources were expended on this aspect due to the importance of making sure that the process was as participatory and as people led as possible. This included, among other things, the establishment of documentation centres in every district containing materials relevant for informing and educating the public on reform related issues. Some of these materials included records of conferences, workshop reports, and proceedings of the Commission. District coordination machineries were also set up in all administrative districts, as well as Constituency Constitutional Forums established in the 210 electoral Constituencies in Kenya at the time. Constitutional review related information was also disseminated through the print and electronic media with messages and information deriving from both the Commission as well as other participating organisations. See generally the Report of the Ghai Commission, '*Report of the Constitution of Kenya Review Commission'*, Volume Two, The Draft Bill to Amend the Constitution. Available online at, http://www.mlgi.org.za/resources/local-government-database/by-country/kenya/constitution/Ghai%20Draft.pdf (accessed on 15 June 2013)

[28] The Constitution of Kenya is available online at http://www.kenyalaw.org/klr/index.php?id=741 (accessed 14 June 2013)

Several cases arose in respect of the interpretation and implementation of Chapter Six. This paper will however examine only one among those that attracted the most attention. In particular, this concerns the acrimonious debate that took place in the run up to the 4 March 2013 General Elections as to whether the duo of the President of the Republic of Kenya, His Excellency Uhuru Kenyatta, and his Deputy, Honourable William Ruto were eligible to contest for these positions. This question arose because of the serious charges faced by the duo of crimes against humanity[29] before the International Criminal Court[30] at the Hague, Netherlands. This debate split the country right in the middle with a section of the population adamant that the duo were not eligible to vie for the stated political positions in light of the clear provisions of Chapter Six, while others argued otherwise.

The key arguments advanced as to why the duo was eligible despite the charges they faced were the equally compelling constitutional provisions on the right to fair hearing. In this regard, Article 50 of the Constitution of Kenya was cited and states: '*(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body. (2) Every accused person has the right to a fair trial, which includes the right— (a) to be presumed innocent until the contrary is proved; (e) to have the trial begin and conclude without unreasonable delay;… .'* The provisions of Article 50, coupled with the fact that the two had not been convicted and sentenced by the ICC or any other court of law for the offences they were accused of, and even if so had not exhausted any available appellate processes[31], persuaded the Court to rule in their favour. In giving its ruling in respect of this case, i.e., *International Centre for Policy and Conflict & 5 Others v Attorney General & 4 Others*[32], the High Court stated among other things that in the absence of the duo having been convicted of an offence by a court of law prior to

[29] Mr Kenyatta is charged with the crimes against humanity of: murder, deportation or forcible transfer, rape, persecution and other inhumane acts, while Mr Ruto is accused of being criminally responsible as an indirect co-perpetrator for the crimes against humanity of: murder , deportation or forcible transfer of population and persecution. Further information available on the website of the International Criminal Court online at, http://www.icc-cpi.int/EN_Menus/ICC/Situations%20and%20Cases/Situations/Situation%20ICC%200109/Pages/situation%20index.aspx

(accessed 16 June 2013)

[30] The International Criminal Court (ICC) was established in 1998 by the Rome Statute as the first permanent and treaty-based, institution to help end impunity and punish the perpetrators of the most serious crimes of concern to the international community. The ICC is an independent international institution with its seat at the Hague in the Netherlands. See further information about the workings of the ICC on the its website online at, http://www.icc-cpi.int/en_menus/icc/about%20the%20court/Pages/about%20the%20court.aspx (accessed 16 June 2013)

[31] The qualifications and disqualifications applicable for election as member of Parliament are spelt out in Article 99 of the Constitution of Kenya and of relevance in this case is Sub-Article 2(h) and Sub-Article 3 that state: '99. (2) A person is disqualified from being elected a member of Parliament if the person (*g*) is subject to a sentence of imprisonment of at least six months, as at the date of registration as a candidate, or at the date of election; or (*h*) is found, in accordance with any law, to have misused or abused a State office or public office or in any way to have contravened Chapter Six. … . (3) A person is not disqualified under clause (2) unless all possibility of appeal or review of the relevant sentence or decision has been exhausted.'

[32] High Court at Nairobi Petition No 552 of 2012 [Coram – M Msagha, L Kimaru, H A Omondi, P Nyamweya, GK Kimondo JJ] - The specific issues for determination in this case were among others, '1. Whether the 3rd and 4th Respondents were qualified to offer their candidature for the office of President and Deputy President respectively. 2. Whether the High Court had jurisdiction to determine matters relating to the qualification or disqualification of a person who had been duly nominated to contest the position of President of the Republic of Kenya. 3. Whether the nomination of 3rd and 4th Respondent to contest the offices of president and vice president respectively was in violation of the Constitution on account of the International Criminal Court charges under the Rome Statute. 4. Whether the ICC and the Kenyan courts could simultaneously adjudicate over the same matter…'.

the elections[33], and moreover there being no law that had been enacted to enable the enforcement of the provisions of Chapter Six[34], that there existed no bar to the candidature of the two. The upshot of the former element of the ruling was to raise the threshold required to invoke the provisions of Chapter Six to that required in proving a criminal offence, i.e. guilty beyond reasonable doubt. This development thus negated the very essence of Chapter Six on leadership and integrity given that it is not based on the strict evidentiary requirements of criminal trials.[35]

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[33] The Judges stated at Point No.8: 'It had neither been alleged, nor had any evidence been placed before the High Court that the 3rd and 4th Respondents have been subjected to any trial by any local court or the ICC that had led to imprisonment for more than 6 months. The confirmation of charges at the ICC might have formed the basis for commencement of the trial against the 3rd and 4th Respondents. The end result however, could not be presumed, neither was there sufficient evidence that at the end of it all, a conviction might have be arrived at.' See *International Centre for Policy and Conflict & 5 Others v Attorney General & 4 Others*, High Court at Nairobi Petition No 552 of 2012

[34] The Judges stated at Point 6, 'An inquiry into the integrity of a candidate for State office whether appointed or elected, was an essential requirement for the enforcement of Chapter Six of the Constitution. The nature and procedures of such inquiry was for Parliament to decide by way of legislation enacted pursuant to Article 80 of the Constitution. The relevant legislation in this respect includes the Leadership and Integrity Act 2012, the Ethics and Anti-Corruption Commission Act 2011, the IEBC Act 2011, the Public Officer Ethics Act 2003 and the Political Parties Act 2011. These Acts provide mechanisms under which inquiry may be made concerning the integrity of the person who aspires to public office.' See *International Centre for Policy and Conflict & 5 Others v Attorney General & 4 Others*, High Court at Nairobi Petition No 552 of 2012

[35] Another prominent case that brought challenges in the interpretation of Chapter Six concerned the eligibility of one Mumo Matemu, the nominee of the Selection Panel constituted to shortlist members for the position of chairperson and the members of the Ethics and Anti-Corruption Commission (EACC). The Selection Panel comprised of representatives from, among others the Office of the President, the Office of the Prime Minister (then); the Ministry of Justice, the Kenya National Commission on Human Rights, etc. It advertised vacancies for these positions and shortlisted potential candidates. In accordance with the statutory deadlines under Section 6 of the Ethics and Anti-Corruption Commission, the shortlisted candidates were interviewed. After receiving the list of persons for approval, the National Assembly through its Departmental Committee on Justice and Legal Affairs invited members of the public to submit any representation on the suitability or otherwise of the nominees, including Mr. Matemu. After being interviewed by the Justice and Legal Affairs Committee, the Committee made a recommendation rejecting the nomination of the nominees stating that "they lacked the passion, initiative and the drive to lead the fight against corruption." However, the report made no recommendations relating to the unfitness or unsuitability of the nominees. Following a prolonged debate, the National Assembly rejected the Justice and Legal Affairs Committee's report and approved the nomination of all the nominees. The President then gazetted the appointment of the nominees vide Gazette Notice Number 6602 & 6603 – Kenya Gazette Vol. CXIV-No. 40). Mr. Matemu was confirmed as the Chairperson of the Ethics and Anti-Corruption Commission, and Prof. Jane Kerubo Onsongo and Ms. Irene Cheptoo Keino as members of the Commission. See entry titled, 'Court of Appeal Overrules the Decision Setting Aside the Appointment of Mumo Matemu as Chairperson of Ethics and Anti-Corruption Commission', available online at http://www.kenyalaw.org/Forum/?p=3311#sthash.fKrLeyUw.dpuf (accessed 16 June 2013).

Whilst the Selection Panel's decision had been endorsed by Parliament and the Executive, the formal swearing in of Mr Matemu as chair of the EACC was put on hold pending the decision of the High Court on the matter following the filing of a case by the Trusted Society of Human Rights Alliance. Briefly, the facts of the case were that the petitioner had made allegations against Mr Matemu to the effect that he did not meet the threshold required for the appointment of state and constitutional office holders given questions that arisen about his integrity whilst holding several senior positions at the Agricultural Finance Corporation (AFC). In particular, the Petitioners alleged that Mr Matemu had sworn an affidavit based on false information about what the Rift Valley Agricultural Contractors Limited owed AFC. In addition, that whilst occupying the position of legal officer, Mr Matemu had irregularly approved certain loans that were not properly secured and whose proceeds had been paid out under unclear and fraudulent circumstances. The petitioner further stated that in their view, Parliament and the Executive had absconded their constitutional duty in failing to prevent the selection of Mr Matemu under the circumstances. In response to these allegations, Mr Matemu averred that some of the allegations made were under investigation by the Criminal Investigations Department that had yet to complete its investigations. This argument was

The second major anomaly that arose in the interpretation and implementation of the Constitution of Kenya post promulgation concerns the implementation of the much fought for affirmative action provisions in both appointive and elective positions. Indeed this case was thoroughly debated by the public in Kenya throughout the various media outlets and thus the profile of the issues therein was enhanced maximally. Briefly, whilst the method for achieving the 47 seats reserved for women in the National Assembly as provided for by Article 97(1) (b) of the Constitution was clear, the method of

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countered by the petitioner who asserted that the criminal investigations file was still active with there being a recommendation that Mr Matemu be interviewed. See the facts of the case as set out in *Trusted Society of Human Rights Alliance v Attorney General & 2 others* [2012] eKLR High Court of Kenya at Nairobi (Nairobi Law Courts) September 20,[ Coram Joel Ngugi, Mumbi Ngugi & J V Odunga JJJ]. In its ruling as to the eligibility of Mr Matemu as chair of the EACC, the High Court in the case of *Trusted Society of Human Rights Alliance v Attorney General & 2 others* upheld the petitioner's prayer that sought to have Mr Matemu declared ineligible. Essentially, at Paragraph 102 of the Judgment, the Court stated: 'Kenyans were very clear in their intentions when they entrenched Chapter Six and Article 73 in the Constitution. They were singular*[ly]* aware the Constitution has other values such as the presumption of innocence until proven guilty. Yet, Kenyans were singular*[ly]* desirous of cleaning up our politics and governance structures by insisting on high standards of personal integrity among those seeking to govern us or hold public office… .to our mind, therefore, a person is said to lack integrity when there are serious unresolved questions about his honesty, financial probity, scrupulousness, fairness, reputation, soundness of his moral judgment or his commitment to the national values enumerated in the Constitution... ...In our view, for purposes of the integrity test in our Constitution, there is no requirement that the behaviour, attribute or conduct in question has to rise to the threshold of criminality. It therefore follows that the fact that a person [who] has not been convicted of a criminal offence is not dispositive of the inquiry whether they lack integrity or not.' The upshot of this decision was to bar the appointment of Mr Matemu as chair of EACC. However, this was overturned in a subsequent ruling by the Court of Appeal in the case of *Mumo Matemu v. Trusted Society of Human Rights Alliance & 5 Others. (*See Court of Appeal at Nairobi, Civil Appeal No. 290 of 2012 [Coram P. Kihara Kariuki, W. Ouko, P. O. Kiage, S. Gatembu Kairu & A. K. Murgor, JJ A] July 26, 2013). In its ruling, the Court, among other things, found that the particulars of the alleged impropriety by Mr Matemu had not been particularized to the extent required in constitutional petitions and more particularly that the High Court's decision risked offending the principle of separation of powers. With respect to the latter point, the Court of Appeal was in agreement that heightened scrutiny of the legality of appointments in the case of the EACC was necessary given that it was the constitutionally mandated vehicle for enforcing Chapter Six. However, the Court was of the considered view that this in itself did not give the Judiciary a license to conduct itself like a vetting body or to substitute the Legislature's decision with its own choice. Thus the Court of Appeal quashed the decision of the High Court which was based on its conclusion that among other things there had been procedural impropriety on the part of the respective appointing authorities in the Legislature and Executive.

In addition to demonstrating the significant variance there is in interpreting the provisions of the Constitution when compared to the decision of the High Court in the same matter, the decision of the Court of Appeal of Kenya, stands in sharp contrast with that of the Indian Supreme Court that had been seized of a similar inquiry into the integrity of the nominee for appointment as Central Vigilance Commissioner (CVC), Mr PJ Thomas. The appointment of Mr Thomas had been contested on the grounds that he had been accused of corruption in a criminal case in the early 1990s when he was a senior bureaucrat in Kerala. In declaring Mr Thomas ineligible to be the CVC, the Supreme Court stated: 'When institutional integrity is in question, the touchstone should be "public interest" which has got to be taken into consideration by the HPC [High Powered Committee] and in such cases the HPC may not insist upon proof… *We should not be understood to mean that the personal integrity is not relevant. It certainly has a corelationship with institutional integrity*. The point to be noted is that in the present case the entire emphasis has been placed by the CVC, the DoPT [Department of Personnel and Training] and the HPC only on the bio-data of the empanelled candidates. None of these authorities have looked at the matter from the larger perspective of institutional integrity including institutional competence and functioning of CVC. See Writ Petition (C) No. 348 of 2010 *Centre for Pil & Anr. Petitioner(S) Versus Union of India & Anr. Respondent(S)* With Writ Petition (C) No. 355 of 2010, Supreme Court of India, Civil Original Jurisdiction. Available online at, http://supremecourtofindia.nic.in/ (accessed 26 July 2013)

achieving the surplus required to ensure that not more than two-thirds of either sex dominated the National Assembly and Senate in line with Article 27(8), was far from clear.

To be precise, there arose confusion as to the proper reading of the various relevant constitutional Articles regarding the electoral process insofar as satisfying the requirements of the mandatory affirmative action measures spelt out in the Constitution. Article 81(b) that prescribes the nature of Kenya's electoral process states, '*the electoral system shall comply with the following principles: (b) not more than two-thirds of the members of elective public bodies shall be of the same gender*.' This provision is in tandem with the requirements of Article 27(8) that states, *'...the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender*.' However, Articles 97[36] and 98[37] of the Constitution, which make provision for the composition of the National Assembly and Senate respectively, have a fixed allocation of seats for the various members comprising these bodies. Thus, there arose a dilemma from the inconsistencies between the strict constitutional provisions making prescriptions about the electoral process as regards the composition of the National Assembly and Senate, with those that make particular reference to the affirmative action measures required by Article 27(8). Notably, this contradiction did not arise with respect to the county assemblies whose composition as prescribed under Article 177[38] includes a mechanism for ensuring that the surplus required to effect the not more than two-thirds constitutional gender principle requirement is achieved within the county assemblies after the general elections.

On the above matter, various persons and institutions held differing opinions as to the consequences and solution of the dilemma arising from the contradictions referred to above. From popular anecdotal discussions that arose some were of the view that should there emerge a Parliament, following the March 2013 General Elections, that does not conform to the requirements of the not more than two-thirds

[36] Article 97 provides that: '(1)The National Assembly consists of—(*a*) two hundred and ninety members, each elected by the registered voters of single member constituencies; (*b*) forty-seven women, each elected by the registered voters of the counties, each county constituting a single member constituency; (*c*) twelve members nominated by parliamentary political parties according to their proportion of members of the National Assembly in accordance with Article 90, to represent special interests including the youth, persons with disabilities and workers; and (*d*) the Speaker, who is an *ex officio* member. (2) Nothing in this Article shall be construed as excluding any person from contesting an election under clause (1) (*a*).'

[37] Article 98 provides that: '(1) The Senate consists of—(*a*) forty-seven members each elected by the registered voters of the counties, each county constituting a single member constituency; (*b*) sixteen women members who shall be nominated by political parties according to their proportion of members of the Senate elected under clause (*a*) in accordance with Article 90;(*c*) two members, being one man and one woman, representing the youth;(*d*) two members, being one man and one woman, representing persons with disabilities; and(*e*) the Speaker, who shall be an *ex officio* member.(2) The members referred to in clause (1) (*c*) and (*d*) shall be elected in accordance with Article 90.(3) Nothing in this Article shall be construed as excluding any person from contesting an election under clause (1) (*a*).'

[38] Article 177 provides that: '(1) A county assembly consists of— (*a*) members elected by the registered voters of the wards, each ward constituting a single member constituency, on the same day as a general election of Members of Parliament, being the second Tuesday in August, in every fifth year; (*b*) the number of special seat members necessary to ensure that no more than two-thirds of the membership of the assembly are of the same gender; (*c*) the number of members of marginalized groups, including persons with disabilities and the youth, prescribed by an Act of Parliament; and (*d*) the Speaker, who is an *ex officio* member.(2) The members contemplated in clause (1) (*b*) and (*c*) shall, in each case, be nominated by political parties in proportion to the seats received in that election in that county by each political party under paragraph (*a*) in accordance with Article 90.(3) The filling of special seats under clause (1) (*b*) shall be determined after declaration of elected members from each ward.(4) A county assembly is elected for a term of five years.'

constitutional gender principle expressed in Article 27(8), such Parliament would not be properly constituted and hence would be unconstitutional. However, others argued that such an occurrence would not necessarily lead to the declaration of Parliament as unconstitutional by the Courts. Regardless of one's stance however, many were agreed that this inherent inconsistency required final determination before the impending elections to avoid any unwanted consequences arising from the uncertainties after the elections. Ultimately, the two proposed solutions that emerged as popular, and which were equally strongly contended by their protagonists, were first, that the Constitution be amended to include the mechanism of achieving the surplus required to ensure that the not more than two-thirds affirmative action principle was adhered to. Secondly, that the achievement of the affirmative action principle in the impending elections was unrealistic and ought to be staggered over the longer term in a progressive fashion.

With respect to the option of staggering the implementation of the affirmative action principle, commentators at the time argued that there already existed guidance as to how the courts would view the matter based on the previously decided case of *Federation of Women Lawyers Kenya (FIDA-K) & 5 Others v Attorney General & Another*[39]. Essentially, the complainants' claim arose from what they considered an anomaly in the appointments made by the Judicial Service Commission with respect to Judges of Kenya's newly established Supreme Court. They argued that the not more than two-thirds requirement for either sex as regards elective and appointive positions, which is anchored in Article 27 of the Constitution 2010, had not been adhered to in the appointment of persons to the Supreme Court. They contended that the number of females appointed was less than that expected. The upshot of the High Court's ruling in this matter was that Article 27 ought to be construed as intended for progressive implementation. The Judges opined that given that not just any person can be appointed a Supreme Court Judge, the Constitution could not, in their view, have been intended to achieve the impossible if such persons do not exist. Instead, the crux of the matter according to the Judges lay in whether the government could be considered to be taking legislative and such other measures to make sure that there was a sufficient pool of talent in future from which could be drawn qualified judges worthy of appointment to the Supreme Court.

Ultimately, following much effort by the Legislature and civil society organisations to resolve the dilemma that threatened to throw the first general elections under the Constitution, 2010 into disarray, the Attorney General sought an advisory opinion with respect to the immediate implementation of the not more than two-thirds gender principle in these elections. In its majority opinion of four to one Judges, delivered on 11 December 2012, the Supreme Court acknowledged the fact that women have for decades been disenfranchised because of discriminative practices, laws, policies and regulations. It also acknowledged that this disenfranchisement has had a major negative impact on their social standing as a whole. This notwithstanding, the Court was of the opinion that the not more than two-thirds gender principle as provided for by the Constitution could not be enforced immediately and was to be applied

[39] See *Federation of Women Lawyers Kenya (FIDA-K) & 5 others v Attorney General & another* [2011] eKLR Petition No. 102 of 2011 [Coram J.W. Mwera, M. Warsame, P.M Mwilu JJ] Available online at, http://kenyalaw.org/Downloads_FreeCases/83092.pdf (accessed 17 June 2013).

progressively. Furthermore, the Court stated, *'Legislative measures for giving effect to the one-third-to-two-thirds gender principle under article 81(b) of the Constitution and in relation to the National Assembly and Senate, should be taken by 27 August, 2015.'* Unsurprisingly, this decision evoked much angst within the women's movement and in other civil society organisations supportive of the cause of women, although it was appreciated that the timeline built into the Court's decision within which measures for the implementation of the affirmative action provisions should have been put in place was a albeit a step forward.

The third prolific case that demonstrates the post promulgation crisis in the interpretation and implementation of the Constitution pertains to the conduct of Kenya's Supreme Court during the landmark petition filed by the loser of the presidential elections in the 4 March General Elections Honourable Raila Odinga. According to Odinga, in a petition filed before the Supreme Court on 16 March 2013, the Independent Electoral and Boundaries Commission (IEBC) had erred in declaring Honourable Uhuru Kenyatta and his running mate Honourable William Ruto as the President and Deputy President elect respectively on 9 March 2013. Odinga took the view that the electoral process had been so mired with fundamental flaws that it was not possible to ascertain the veracity of the presidential results so released. During the pre-trial conference stage of this case i.e., *Raila Odinga & 2 Others versus Independent Electoral and Boundaries Commission, Isaack Hassan, Uhuru Kenyatta and William Ruto*[40], Honourable Odinga sought leave to be allowed to submit a 900-page affidavit containing information he argued was fundamental in supporting his case. However, his application was made outside of the timelines prescribed by the Supreme Court's procedures for this purpose. On this the respondents were unyielding and insisted on the laid down procedures being following to the hilt given that their case risked being imperilled by the introduction of copious amounts of information too late in the day. They further averred that the petitioner had filed the affidavit without leave of the court and hence should not be allowed to benefit from this irregularity.

In response to the above, Odinga chose to rely on the provisions of Article 159(2)(d) of the Constitution that describes judicial authority and which states among other things, *'...(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles ... (d) justice shall be administered without undue regard to procedural technicalities;...'* In refusing Odinga's late application, the Supreme Court relied on the provisions of Article 140 of the same Constitution, which deals with questions as to the validity of a presidential election. In particular, Article 140(2) requires that petitions filed under this clause be disposed of within 14 days after the petition is filed. For this reason, the Supreme Court was of the view that because of time constraints, it could not allow the enormous 900-page affidavit to be filed out of time because it would be unfair to the respondents to expect them to grapple with such a voluminous document at short notice.[41] Justice Tunoi, the Supreme Court Judge who read the ruling on this application on behalf of his colleagues, indicated that parties to a petition are duty

[40] Supreme Court of Kenya at Nairobi, Petition No 5 of 2013 as Consolidated with Petition No. 3 of 2013 and Petition No 4 of 2013. (Coram: W.M Mutunga, Chief Justice and President of the Supreme Court; P.K Tunoi, M.K Ibrahim; J.B Ojwang; S.C Wanjala, N.S Ndungu, SCJJ.) Available online at http://kenyalaw.org/CaseSearch/pdf_export.php (accessed 23 June 2013)

[41] See Paragraph 214-216 of the Judgment available online at http://kenyalaw.org/CaseSearch/pdf_export.php (accessed 23 June 2013)

bound to ensure compliance with the timelines set by court procedures and to refrain from wasting the time of the court and that of other parties to the petitions. The Court further stated that Article 159(2) (d) of the Constitution concerning 'undue regard to technicalities' did not mean that it obviated the need for procedural propriety or that technicalities imposed by the Constitution or other written law could be ignored at will.[42]

The decision of the Supreme Court on this application received mixed reactions. Many were in support for the reasons that had been proffered, but others equally disagreed with it on the basis that it had set a bad precedent by returning the reformed Judiciary to the old practice in the courts where procedure was upheld in many cases to the detriment of substantive justice. Furthermore, those against the decision opined that the Supreme Court had not given cogent reasons for giving one constitutional Article more prominence than the other. Indeed, it was the petitioner's view that with the refusal, his case had been substantially weakened *ab initio.* Notably, the Supreme Court's decision flies in the face of the Judiciary Transformation Framework 2012-2016 that restates the provisions of Article 159(2)(d) of the Constitution in stating that, *'It, therefore, demands that justice must be done to all irrespective of status and that all state organs must assure access to justice for all persons. These twin constitutional demands require that justice be delivered expeditiously and without undue regard to technicalities.'*[43] Adding his voice to the fray, the Chairman of the Law Society of Kenya, Mr Eric Mutua was quoted in the dailies expressing his concern about the full import of the decision. He stated:

> 'the decision by the highest court in the land to reject the affidavit on the grounds that it was time-barred will undermine reforms in the Judiciary… the Supreme Court should have considered the affidavit on its own merits instead of rejecting it on technicalities. …'The Chief Justice and President of the Supreme Court, Justice Willy Mutunga has time and again reminded lawyers that the era of reliance on procedural technicalities is gone…I see some lawyers taking advantage of this decision to return us to the era of litigating by advancing arguments of a technical nature…'[44]

Mr Mutua further challenged the Supreme Court to clarify its decision that would most likely see courts reverting to making decisions based on procedural technicalities rather than on the substantive issues

[42] See Paragraph 218 of the Judgment available at http://kenyalaw.org/CaseSearch/pdf_export.php (accessed on 23 June 2013)

[43] The Judicial Transformation Framework is the blueprint upon which the Kenyan Judiciary seeks to reinvent itself. This Framework is premised on four key pillars. These pillars are: (a) People focused delivery of service; (b) Transformative leadership, organization culture and professional, motivated staff; (c) Adequate financial resources and physical infrastructure; and (d) Harnessing Technology as an Enabler for Justice. Through the Framework, the Kenyan Judiciary seeks to reset the relationship between the Judiciary and other arms of government whilst maintaining its independence, reorient its organizational culture to customize it with the exigencies of its social realities, and its institutional design and leadership style ,and to emerge and operate as a service entity which serves the people.' available at, http://www.judiciary.go.ke/portal/assets/downloads/reports/Judiciary%27s%20Tranformation%20Framework-fv.pdf (accessed 21 July 2013

[44]Mutua E 'Supreme Court Turned Back the Wheels of Justice in Rejecting Affidavit on Technicalities' *Business Daily* 2 April 2013 8. Available online at, http://www.businessdailyafrica.com/-/539546/1737650/-/item/1/-/12c0yhsz/-/index.html (accessed 21 July 2013).

based on the principle of *stare decisis*. His parting shot to advocates was to exercise restraint at the 'bar' when citing this decision from the Supreme Court.

The above are but three instances that demonstrate the challenges that have been experienced in the interpretation and implementation of sections of Kenya's Constitution, 2010 and are by no means exhaustive. Notably, in all cases the conflict arising ended up in court, which is clearly the site for resolving such contestations. Burnham's earlier assertion about the premium that should be placed on the body charged with interpreting the constitution post promulgation is borne out by the various instances where the courts in Kenya have been called upon to interpret or decide on clauses that have created undue confusion in their interpretation and implementation.

## 4.0 A COMPARATIVE ANALYSIS OF POST-PROMULGATION CHALLENGES IN INTERPRETATION AND IMPLEMENTATION OF SELECT CONSTITUTIONS IN AFRICA

The post promulgation challenges in interpreting and implementing Kenya's Constitution, 2010 are by no means unique. In this section, a sample of the challenges faced by other countries on the Continent will be reviewed briefly for comparative purposes.

For starters, following the promulgation of Uganda's Constitution in 1995, there arose challenges in the implementation of the radical clauses[45] empowering of women. In Manisuli's view, the challenges in implementation arose more out of the lack of political will to ensure that women fully enjoy the rights granted to them by the Constitution. For instance, Manisuli decries the fact that ten years after the promulgation of the Constitution, customary laws and practices that constrict the emancipation of women continued to be in existence despite the provisions of Article 33(6) of the Constitution that proscribes laws, customs or traditions that offend the dignity, welfare or interests of women. In her view, this could be attributed to, *'the lack of political will to confront issues of inequality and discrimination in a holistic and comprehensive manner.*[46]

[45] The Constitution of Uganda of 1995 contains several provisions on the principle of non- discrimination and equal rights of women and men. According to Article 21, '(1) All persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law; (2) … a person shall not be discriminated against on the ground of sex, race, colour, ethnic origin, tribe, birth, creed or religion, or social or economic standing, political opinion or disability; (3) … (to)"discriminate" means to give different treatment to different persons attributable only or mainly to their respective descriptions by sex, race, colour, ethnic origin, tribe, birth, creed or religion, or social or economic standing, political opinion or disability.' Furthermore, at (Article 31), the Constitution puts the marriage age at 18 years and recognizes both men and women as equal partners in a marriage. Article 33, puts an obligation on the state to put measures in place aimed at assisting women to realize their full potential and advancement. In addition, the Constitution takes cognizance of women's special role in the society including their maternal role. Constitution available online at, http://www.uganda.at/Geschichte/verfassung_der_republik_Uganda_2008.pdf (accessed 21 July 2013).

[46] See Manisuli S 'Women's Rights to Equality and Non-discrimination: Discriminatory Family Legislation in Uganda and the Role of Uganda's Constitutional Court' (2007) 21:3 *International Journal of Law, Policy and the Family*, 341-372. Available online at http://lawfam.oxfordjournals.org/content/21/3/341.abstract (accessed 21 July 2013)

In the case of South Africa, the inclusion of sexual orientation in its 1996 Constitution as a ground upon which one may not be discriminated provides an example of how a clause in the constitution may not be analogous with the aspirations of the majority and thus raise operational difficulties in its enforcement. Article 9[47] of the South African Constitution makes unconstitutional the discrimination of persons based on sexual orientation. At the time, this clause represented the first time that a constitution had clearly spelt out the protection of persons in same sex relationships in the world. However, the inclusion of sexual orientation in this anti-discrimination clause sharply divided the society in South Africa given that it did not receive wide support from the majority, who do not support same sex relationships. The sentiments of the public were gleaned through a national survey carried out in 1995 prior to the promulgation of the constitution by the University of the Witwatersrand, during which the support for equal rights being given to persons in same sex relationships was found to be 38 per cent[48]. In speaking about the incongruence of the fact that a proposition, which was not widely supported by citizens in South Africa, had nonetheless been included in the Constitution, Massoud opines that laws are not necessarily reflective of social attitude. His opinion is supported by Duarte's statement that, *'Not only are there legal injustices to be done away with, but mindsets and cultures have to be done away with too. It's one thing for you to have your rights and equality in the law, it's quite another to have them each day in the street, at work, in the bar, in public places.'*[49] Duarte's opinion clearly shows the daily conflict that is likely to exist for persons in same sex relationships wishing to avail themselves of the benefits of the right conferred by Section 9 of the Constitution.

Ultimately, the protection of the rights of persons in same sex relationships was restated in the case of *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others*[50]. In this case, the Constitutional Court was called upon to confirm an order that had been made by the Witwatersrand High Court to the effect that the legal offence of sodomy, its inclusion in the schedules of some Acts of Parliament, and in a section of the Sexual Offences Act whereby sexual relationships between men were prohibited in certain circumstances, was unconstitutional and hence invalid. The Constitutional Court not only confirmed this order but also refined the definition of equality to mean that

[47] See Article 9 '(1)Equality- Everyone is equal before the law and has the right to equal protection And benefit of the law. 2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken. (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.' South African Constitution available online at, http://www.info.gov.za/documents/constitution/1996/a108-96.pdf (accessed 21 July 2013)

[48] See Ilyayambwa M 'Homosexual Rights and the Law: A South African Constitutional Metamorphosis' (2012) 2:4 *International Journal of Humanities and Social Science* 50-58 available at

http://www.ijhssnet.com/journals/Vol_2_No_4_Special_Issue_February_2012/6.pdf (accessed on 23 July 2013)

[49] See Ilyayambwa M 'Homosexual Rights and the Law: A South African Constitutional Metamorphosis' (2012) 2:4 *International Journal of Humanities and Social Science* 50-58 available at

http://www.ijhssnet.com/journals/Vol_2_No_4_Special_Issue_February_2012/6.pdf (accessed on 23 July 2013)

[50] *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* (CCT10/99) [1999] available at http://www.saflii.org/za/cases/ZACC/1999/17.html (accessed 23 July 2013).

it should be defined against the background of historical disadvantage, in which case the rights of persons in same sex relationships ought to be protected for having been repressed during the apartheid regime.

Since the above ruling, the Constitutional Court has made further pronouncements regarding the rights of persons in same sex relationships that are in permanent life partnerships to include their right to enjoy the same rights as married persons with respect to immigration, custody and adoption of children, and employment benefits. Louw however notes that despite the progressive legislation so far on the rights of persons in same sex relationships, there still remains more to be done particularly with regard to granting them the right to same sex marriage or a civil union/domestic partnership model.[51]

On another matter, the case of *Soobramoney v Minister of Health (Kwazulu-Natal)*[52] illustrates the gap between the aspirations of people as captured in constitutional provisions and the implementation of the same by the executive. In this case, the Constitutional Court was seized of a question regarding the right to health guaranteed by South Africa's Constitution 1996. More particularly, in addition to Article 27 making a raft of various pronouncements on the right to health, it specifically provided at sub-Article (3) that, *'no one can be denied emergency medical treatment.'* It was therefore the contention of Mr Soobramoney, a patient with chronic renal illness, that the decision to deny him regular lifesaving kidney dialysis at a government health clinic based on a government-instituted system of priorities, had infringed his right to health and was therefore unconstitutional. The Court's ruling that the constitutional right of citizens to equal access to healthcare must be balanced with government imperatives to prioritize allocation of the enjoyment of this right based on other relevant considerations[53], essentially introduced a restriction to the enjoyment of this right that had not been envisaged during the constitution-making stage.

Essentially, the above cases from Uganda and South Africa are just but a sample of the quagmire that states can find themselves in following the promulgation of a new constitution. Clearly, some clauses in the constitution may just not be practical as drafted and thus require to be interpreted by the courts in order to clarify the contradictory constitutional provision therein.

## 5.0 THE CASE FOR COMPREHENSIVE SCENARIO-BUILDING TO TEST THE ARTICLES OF A PROPOSED CONSTITUTION BEFORE PROMULGATION

[51] Louw R. 'Advancing human rights through constitutional protection for gays and lesbians in South Africa' (2005)48:3-4 *Journal of Homesexuality* 141-62. Available online at http://www.ncbi.nlm.nih.gov/pubmed/15814504 (accessed 4 August 2013)

[52] See *Soobramoney v Minister of Health (Kwazulu-Natal)* (CCT32/97) [1997] ZACC 17; 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (27 November 1997) http://www.saflii.org/za/cases/ZACC/1997/17.html (accessed 21 June 2013)

[53] The Court was of the opinion that the minister of health could justifiably institute a programme of prioritization where renal patients whose chances of cure were better could receive kidney dialysis before those whose chances were poorer, and for whom the benefit would be minimal. In the case of Mr Soobramoney, his health condition had further been compromised by heart disease and other limitations thus making him ineligible for a kidney transplant. For this reason, the Constitutional Court was of the view that the government was justified in denying him treatment in favour of patients whose chances of recovery were higher. However, in allowing the minister of health the discretion in making decisions about the allocation of resources, the Court ruled that the exercise of this discretion required that a standardized priority system be put in place. The Court also reaffirmed the enjoyment of the right to health as progressive and not immediate. See *Soobramoney v Minister of Health (Kwazulu-Natal)* (CCT32/97) [1997] ZACC 17; 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (27 November 1997). Available online at http://www.saflii.org/za/cases/ZACC/1997/17.html (accessed 21 June 2013)

Based on the information that has already been examined so far in this paper, it is evident that as much attention should be paid to discovering the feasibility of the clauses included in a constitution as to the compulsion to include a clause capturing a certain right or aspiration. The failure to do this before the promulgation of the constitution is likely to result in significant challenges after its promulgation, which may have the effect of reducing the esteem with which citizens view the new constitutional document. Ultimately, where these contestations are not addressed through the arena of courts, it may become necessary for the same to be resolved politically through initiating further revisions to the new constitutional document in the manner prescribed by the constitution for undertaking such revisions. Naturally, post-promulgation amendments coming soon after the promulgation of the constitution are likely to cause anxiety and pose a great threat to the viability of the constitution in the long run. This is based especially on the history of post-independence African states undertaking myriad amendments to the constitution after independence. The effect of these amendments was mostly to annihilate the substance of the constitution altogether thus making it unrecognisable.

In the end, the constitutional document hailed as progressive by many has since become the source of bitter acrimony in Kenya with various parties striving to establish their rights or positions on varying matters. For instance, the debate about the importance placed on devolution by Kenya's Constitution 2010 has created clear fault lines among the Kenyan public. In this regard, one group, led by the Chair of the Governors Council, Honourable Isaac Rutto, argues that the financial commitment in support of devolution that was established in the Constitution was not well cemented and is inadequate.[54] This position is supported by large sections of the public who understand the devolved units of government to be quite important to their wellbeing given their proximity compared to the national government.[55] On the other hand, the National Government, led by the President, Uhuru Kenyatta, and his Deputy, William Ruto have been reluctant to have the financial commitment embedded in the Constitution increased significantly beyond what was provided through having a referendum. They have argued that since the Jubilee Government of its own volition, had doubled the financial commitment and was even prepared to increase it further, there is no point of putting the Country, which has just emerged from a general election, through the throes of a referendum so soon.[56] This position is also immensely supported by sections of the public against tampering with the Constitution, 2010 when hardly five years have elapsed since its promulgation. The proponents of taking the matter to a referendum have of course opposed this benevolent approach. They instead prefer that the matter be settled finally to avoid the adequate funding of the 47 devolved governments being based on the political whims of successive political regimes that may be intent on killing the much highly regarded devolution. The raging debate on this and other issues

[54] Miruka K 'Deputy President William Ruto and Isaac Ruto Clash Again' *Standard Digital News* 27 August 2013.

Available online at http://www.standardmedia.co.ke/mobile/?articleID=20s00091999&story_title=deputy-president-william-ruto-and-isaac-ruto-clash-again&pageNo=1 (accessed 15 August 2013)

[55] Ngige F 'Bipartisan fight to protect devolution turns into fierce political battle' *Standard Digital News* 20 August 2013. Available online at, http://www.standardmedia.co.ke/?articleID=2000091487&story_title=Politics:%20Bipartisan%20fight%20to%20protect%20devolution%20turns%20into%20fierce%20political%20battle (accessed 15 August 2013)

[56] Ayodo H 'Devolution Debate Rages As 20th Annual Conference Closes' *Law Society of Kenya website*. Available online at http://www.lsk.or.ke/index.php/component/content/article/1-latest-news/289-lsk-annual-conference-closes (accessed 28 August 2013)

that have emerged since the promulgation of Kenya's Constitution 2010 has threatened to tear the nation apart, which was certainly not an intended consequence of the constitution-making exercise that was undertaken with such vigour and enthusiasm by Kenyans.

In concluding the arguments in this paper, it is contended that the case for comprehensive scenario-building prior to the promulgation of the constitution in order to ensure its viability has been made. The various scenarios that have been examined in Kenya, Uganda, and South Africa, clearly point out the consequences that the structural deficiencies and inherent contradictions that may be apparent in a newly promulgated constitution, can have on the state or sections of the population. As had earlier been suggested, these structural weaknesses and contradictions may be inadvertent or deliberate and it would be well worth carrying out further studies to ascertain the position, because the answer may lead to much more fruitful constitution-making exercises on the Continent in the future.

The mandatory inclusion of comprehensive scenario-building as a step prior to the promulgation of a new constitution would involve experts in both theory and practice taking each article of the proposed constitution through a series of definitive tests to determine whether in fact each specific article meets the test of feasibility. In the case of Kenya, had this been undertaken, it would for example have revealed the weaknesses in Chapter Six that concerns leadership and integrity. Questions would have been raised about whether each provision in Chapter Six is consonant with the provisions of the rest of the Constitution. Such enquiry would then have revealed that the provisions of Chapter Six are not entirely enforceable when read together with Article 50 that establishes the right to presumption of innocence. Issues regarding the threshold to be applied when considering the eligibility of persons under the provisions of Chapter Six in relation to the threshold required in criminal trials would also have been thoroughly discussed.

The provisions under the Constitution of Kenya regarding the death of the president elect before assuming office can be used to illustrate what comprehensive scenario-building would involve and can achieve. Article 139[57] of the Constitution, which pertains to the death of the president elect before assuming office, essentially indicates that should the president elect die before assumption of office, the deputy president elect shall be sworn in as acting president. This would be the case, pending a fresh election to the office of the president that shall be undertaken 60 days later. The Article further provides that should both the president and deputy president elect die before assuming office, the Speaker of the National Assembly shall act as president until a fresh presidential election 60 days later. In a comprehensive scenario-building exercise in this respect of this constitutional Article prior to the promulgation of the constitution, the next logical step would be to postulate various scenarios to their logical conclusion. For instance, it would be very important to enquire whether if for any reason the speaker were unable to take up the position of president in an acting capacity, whether this would result in any untoward consequences. To investigate

[57] See Article 139 of the Constitution of Kenya that states: '139. (1) If a President-elect dies after being declared elected as President, but before assuming office (a) the Deputy President-elect shall be sworn in as acting President on the date on which the President-elect would otherwise have been sworn-in; and (b) a fresh election to the office of President shall be held within sixty days after the death of the President-elect. (2) If the Deputy President-elect dies before assuming office, the office of the Deputy President shall be declared vacant on the assumption of office by the person declared elected as the President. (3) If both the persons declared elected as the President and the Deputy President die before assuming office (a) the Speaker of the National Assembly shall act as President from the date on which the President-elect would otherwise have been sworn-in; and (b) a fresh presidential election shall be conducted within sixty days after the second death.'

this, one can look at the provisions of Article 106[58] that pertains to the manner of appointment of speakers and their deputies. Notably, the Constitution does not envisage the deputy speaker standing in on behalf of the speaker with respect to the role of the speaker occupying the office of the president in the interim, where both the president elect and their deputy die before assuming office. Also noteworthy is the fact that the office of the speaker becomes vacant upon the first meeting of a new House of Parliament following a general election. Furthermore, Article 132(1) of the Constitution indicates that the opening of each newly elected Parliament shall be addressed by the President. This presupposes that the office of the speaker can only become vacant on the occasion of the President addressing the newly elected Parliament, which also constitutes the first meeting of the newly elected Parliament. One scenario that may arise therefore is to consider the possibility of the president elect, his or her deputy, and the speaker in office all dying at the same time for whatever reason. Another scenario could be that of the president and his/her deputy dying, and simultaneously the speaker in office being incapacitated by reason of physical or mental infirmity to play their role of standing in for the president. In these two scenarios, the Constitution does not provide a way out! Upon being confronted with this reality during the scenario-building exercise, it would be incumbent upon the makers of the constitution to make suitable arrangements that would ensure that no such lacuna is left.

Based on the above, it is strongly recommended that countries currently undergoing constitutional reforms processes do incorporate comprehensive scenario-building by experts in theory and practice as an integral step in their process to avoid the untidy outcome of a constitution that is fraught with challenges of interpretation and implementation that may eventually cause instability in the state. Clearly, countries that have also undertaken constitutional reforms ought also to conduct a similar enquiry with the view to effecting the necessary changes where it is absolutely necessary.



[58] See Article 106 of the Constitution of Kenya that states: '106. (1) There shall be (a) a Speaker for each House of Parliament, who shall be elected by that House in accordance with the Standing Orders, from among persons who are qualified to be elected as members of Parliament but are not such members; and (b) a Deputy Speaker for each House of Parliament, who shall be elected by that House in accordance with the Standing Orders, from among the members of that House. (2) The office of Speaker or Deputy Speaker shall become vacant (a) when a new House of Parliament first meets after an election;…'

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