Constitutionalism under a "Reformist" Regime in Kenya: One Step Forward, Two Steps Backwards?

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Introduction

The umbilical cord that connected the end of 2003 to the beginning of 2004 regarding constitutionalism in Kenya was the vexed question of making a new constitution. Though the National Constitutional Conference (NCC) continued its sittings during the first three months of 2004 at the Bomas of Kenya (what was referred to as "Bomas III" in subsequence to two earlier sittings), prospects for Kenyans enacting a new constitution arguably became dimmer on a backdrop of political squabbling and an elusive search for consensus on major issues. Thus, the main irony of Bomas III was that whereas it was supposed to move Kenyans closer to realising a new constitution, in actual sense, it pushed these hopes further into an indeterminable distant future.

The problem during this period hinged over various issues (of content), christened as "contentious", by one or the other political "camp" in the historic talks. The political nexus to the "politics of contention" could be discerned in a number of ways. The quarrelsome National Rainbow Coalition (NARC), for instance, had predicated its power sharing arrangement on non-legislated positions such as the post of a prime minister. To this extent, Bomas III became an alternative arena for NARC's internecine wars whose origins were the hurriedly packaged pre-election Memorandum of Understanding signed between the National Alliance Party of Kenya (NAK) and the Liberal Democratic Party of Kenya (LDP).

Whereas the principal players within the LDP were seen to be focused on using the review process to realise the pre-election power sharing pact, the NAK wing of NARC seemed to be set on securing their narrow gains by not allowing encroachment on the powers of the presidency. In effect, therefore, issues became contentious depending on political allegiances. To demonstrate this, NAK whose membership included the Democratic Party of Kenya (DP), had during submissions to the Constitution of Kenya Review Commission (CKRC) demanded devolution of power and the creation of a prime minister's position in a new constitutional dispensation. This perspective changed radically during the NCC.

Second, elite from the former ruling party, the Kenya African National Union (KANU), still reluctant to fully assume their place in the opposition and now wearing "reformist" garb, saw an opportunity to push for positions that would enhance their post reform political agenda. In the constitution review battlefield, therefore, lay the possibility of using the executive's excessive powers for purposes of perpetuation; it also presented the opportunity to rationalise the arrangement of executive power so as to even out post reform political contests.

In this context, the interests of the political elite seemed to have been clear enough. What was not clear was whether or not the interests of the majority of Kenyans were properly defined in this conundrum. Civil society organisations (CSOs) representing different interest groups, as well as representatives of groups such as women, youth and people with disabilities, laboured in this environment to defend their collective gains. However, the politicians seemed to have the upper hand, if not in terms of input, then in catching the eye of the Press and securing headlines.

Conceptual Issues

"Constitutional development" presents a huge arena for analysis. There are indeed many perspectives from which constitutional developments can be examined. As Kivutha Kibwana puts it (Onyango, 2001: 2):

Whenever a country makes a new constitution, one can analyse all the processes and activities which feed into and shape such constitution-making. Secondly, constitution making concerns the way in which the citizens relate to a new or existing constitution. Those activities accompanying the changing or amendment of a constitution similarly provide another aspect of constitutional development. The other key component concerns the implementation of the existing constitution by the executive, judiciary and also the legislature.

De Smith (1964: 106), has written that constitutionalism is evidenced in a country where

The government is genuinely accountable to an entity or organ distinct from itself, where elections are freely held on wide franchise at frequent intervals, where political groups are free to organise in opposition to the government in office and where there are effective legal guarantees of fundamental civil liberties enforced by an independent judiciary.

The above definitions are sound. Kibwana's definition expresses a wider perspective of constitutionalism, while De Smith points out the kind of activities whose presence or absence may signify adherence or non adherence to constitutionalism.

The fight for constitutionalism in Kenya has been waged on many fronts. The writing of a new constitution for the people of Kenya has clearly been one of the key facets of this struggle in the last one decade. The struggle for recognition of the centrality of human rights, the implementation of legal frameworks for the enhancement of human rights and the enactment of human rights friendly legislation have all been important elements of the fight for constitutionalism. From a one party system before the advent of the 1990s, Kenyans have struggled for inclusive electoral processes. In 1991, this struggle recorded a major milestone – restoration of the multiparty system of politics.

The many facets of constitutionalism underline the importance of setting out clearly the parameters on which analysis of constitutionalism in Kenya should be undertaken. This chapter examines constitutional developments in Kenya during 2004. It begins with an exhaustive examination of the final leg of the NCC, and analyses the circumstances, including a number of court cases that led to the stalemate in constitution making; it then explores the nexus between the process of constitution making, the content of the Bomas Draft Constitution and the possibility of a better human rights regime for Kenyans. To complete the review, other issues of relevance to constitutionalism and human rights during the review period are outlined and analysed.

Contextual Issues

In the introduction to *Constitutional Development in East Africa for Year 2001,* Prof J Oloka-Onyango notes the following:

The efforts by activists for gender equality, the recognition of minority issues, and the quest for increased attention to economic, social and cultural rights, are increasingly rooted in the idea that the constitution "shall provide". Consequently, the struggle over constitutionalism in the region is as much a struggle over ideas, as it is a struggle over resources, space and political accountability.

The above assertion might seem obvious at first glance. However, examination of some common assumptions underlying the constitution making process in Kenya especially among *wananchi* shows that indeed Kenyans have come to believe that the constitution is supposed to deliver them from their situations of want. For the last few years, the struggle for a new constitution has meant more than the rationalisation of political processes such as electoral contests, which in many cases, is a concern of elites positioning for political power. The process has found confluence with the aspirations of Kenyans caught up in varying situations of deprivation.

The social indicators in the country for the last decade have continued to portend minimal optimism for the majority while a minority have continued to reap maximum benefits. At present, up to 56 per cent of Kenyans are said to live below the poverty line and, even if the figure does not tell the actual tale, the suffering of the majority is apparent. An ever shrinking job market, rising rates of crime and general insecurity as well as increasing incidents of family conflicts, are among the indicators that contextualise this situation.

From this perspective, perhaps one gain of the struggle for accountable governance is the firm establishment in the minds of the citizenry about the nexus between constitutionalism and governance generally with obtaining material conditions. In line with Prof. Oloka's thinking, there is a sense in which Kenyans believe that a new

constitution, apart from removing structures of oppression such as an "imperial" presidency and providing a better human rights framework, will also solve their immediate "bread and butter" problems.
The end of 2004 marked two years since the coming to power of what was initially thought to be a reformist government; a government upon which Kenyans banked hopes of salvation from many of the ills mentioned above. Even though the parameters of reform may not have been clear to all, the constitution review process, with its promise of leading to fundamental renewal, featured very prominently on the reform menu. The assumption was that with the former regime out of the picture, the review process would be smoothened.

However, political happenings generally and especially the events that led to the stalemate in the review process indicate that the political class has once again succeeded in trashing one of the key premises agreed upon by popular consensus during the initial stages of constitution making: that the participation of the common (wo)man – *Wanjiku* – in constitution making was paramount. In this sense, Kenyans have gone back many steps, which is not surprising since the fight for an inclusive process of constitution making generally tends to go against the wishes of the political elite who could, therefore, be expected to scuttle it at any moment.
Finally, just before the 2002 election, there was an underlying assumption that the country would undergo a significant transition after years of human rights' abuse and economic plunder. Kenyans believed that a new constitution would create mechanisms to anchor reform actions on more solid ground. Indeed, some of the actions that the regime has taken so far were clearly provided for in the Bomas Draft Constitution. For instance, on the question of land reform, the Draft Constitution had provided for mechanisms such as the National Land Commission to anchor land reforms, while on dealing with corruption, provision had been made for various institutions including an Ethics and Integrity Commission. Critics have wondered, therefore, whether the NARC regime favours a piecemeal approach to change as witnessed by laws enacted and institutions put in place so far.

Bomas III: Creating an Impasse

The last phase of the NCC convened on the 12th of January 2004. On the 15th of March 2004 delegates adopted the Draft Constitution of Kenya, 2004. The document, however, was robbed of some legitimacy by the events preceding its adoption. With politicians, mostly the opposing camps in NARC, fighting a bare knuckled battle to secure their interests, the interests of the majority of Kenyans took a back seat in the process. On 16th March, 2004 a number of MPs and ministers engineered a walkout

from Bomas of Kenya when matters got a little too heavy. The important events leading to the controversial "government" walkout are presented below:

Events leading to the 16th March walkout from the NCC by ministers and MPs

Date [2004]	**Event**	**Comment**
12th January	Bomas III resumes	The stage was set for the final leg of the constitution review process. According to the initial Constitution of Kenya Review Act, if consensus was to be arrived at Bomas, that product would immediately be proclaimed as the new constitution for Kenya. Bomas III was, therefore, going to be a major battlefield.
13th January	**Bomas delegates vow to fight off experts –** *Njeri Rugene and David Mugonyi [DN, 1]* Delegates vow to fight for their right to complete the constitution review.They vow to safeguard the National Constitutional Conference and condemn those out to hijack the process.	This was in reaction to a position taken by several politicians that the delegates could not manage the remaining stages of the review. Specifically, one politician had remarked that the delegates had reached their intellectual limit. The quest for experts is reminiscent of president Moi's position that a new constitution for Kenya could only be midwifed by constitutional experts.

14th January	**Breakthrough as Bomas backs Prime Minister's slot –** *Odhiambo Orlale [DN, 1]* Delegates agree to retain the president as head of government in a new power structure. In the new arrangement, the president will share executive power with a prime minister. Further, the president will chair cabinet meetings, which shall be attended by ministers and the prime minister.	The issue of executive power was probably the most significant point of divergence at Bomas. The Bomas draft suggested an arrangement where power was shared between the president and the prime minister. However, a section of politicians saw this arrangement as creating a "ceremonial" presidency. The issue of executive arrangement was to haunt Bomas throughout its sittings.
15th January	**Bomas trims president's powers to close House –** *Odhiambo Orlale [DN, 1]* Delegates resolve as follows: (i) The new constitution will bar the president from dissolving parliament and also set a ceiling on the number of cabinet ministers he can appoint at a go; and (ii) Limit the number of cabinet ministers and their deputies that the president will be allowed to appoint	Cutting down the powers of the president, which had increased over many years of constitutional amendments, was clearly one of the key premises in reviewing the Constitution of Kenya. However, after securing power, sections of the political leadership who had termed Moi's presidency as "imperial" presidency, was no longer interested in acknowledging this fact. A minister had even commented that constitutional review was about removing former president Moi from power

	from a list of nominations drawn up by the prime minister. Members of the technical committee on the executive set the number of ministers and their deputies at 15.	

16th January	**Now Churches plot a constitution takeover – *Njeri Rugene [DN, 1]*** The Ufungamano Initiative releases its own draft constitution and says it wishes the draft to be presented to Kenyans. It remains unclear on what legal basis this can be done.	Once seen as champions of a participatory review process, the Ufungamano Initiative did not find it ironic that they could come up with a "boardroom" constitution and try to force it onto the people. The action of this group was seen as an attempt to derail the review process. Politician Raila Odinga and CKRC chairman Yash Pal Ghai are the only notable stakeholders who criticised Ufungamano's move. The reaction was in line with the contours of political polarisation in Bomas.
24th January	**MPs plot to break up Bomas ends up in failure –** Benard Namunane *[DN 1]* An attempt to rally MPs behind a secret plot to scuttle the Constitution review process fails. The MPs had sought to join forces to block a recall clause empowering voters to call back	This was a clear message that MPs would not countenance any provisions in the constitution that would empower citizens to demand accountability from them. In this case they acted in typical fashion by rejecting the recall clause. In a similar move, they also voted against the clause requiring the president to appoint cabinet ministers from without parliament

	"lazy" and inefficient MPs.	

28th January	**MPs put Muite on the spot over bid to scuttle Bomas –** *Njeri Rugene [DN 1]* The Parliamentary Select Committee on Constitution Review attributes their lackadaisical performance at the National Constitutional Conference on the chairman, MP Paul Muite, whom they accuse of being partisan and belonging to a "powerful clique" set on scuttling the process of reviewing the constitution.	The "neutrality" of the Parliamentary Select Committee on Constitution Review under the chairmanship of Hon. Muite was questioned a number of times due to his close affinity with one of the factions of the ruling coalition. This state of affairs led to suspicion and further intrigue. Muite did not contest his position when the Select Committee was being reconstituted.
28th January	**Njoya moves to halt Bomas –** *Wathome Thuku, Odhiambo Orlale, David Mugonyi, Tony Kago and Cyrus Kinyngu [DN 4]* Reverend Timothy Njoya and eight others appeal to the high	This was probably the boldest move to halt the NCC. In its aftermath, there followed a number of court actions either meant to stop the Bomas process or to secure it from such legal attacks. The court ruling in the "Njoya" case virtually brought the review process to a halt.

	court to amend* sections of the Constitution Review Act that are inconsistent with the constitution	

1st February	**MPs support new move to curb Bomas** – *Muriithi Muriuki [DN 4]* MPs support the Parliamentary Committee on Constitutional review's suggestion that parliament be allowed to change the draft constitution that eventually comes out of Bomas. The move was seen as an attempt by the MPs to regain ground they had lost at the NCC where they were booed and even man-handled by delegates resentful of their partisan politics.	The political elite sought to take advantage of every opportunity to take the constitution review process away from the people.
4th February	**Case against review fails to take off** – *Odhiambo Orlale, Thomas Kagoh and Julius Bosire [DN 6]* A case filed to suspend the Bomas review of the constitution fails to take off after one of	

	the applicants applies to be struck off.	
5th February	**Group opposes MPs plans over final draft** – *Patrick Mayoyo, Odhiambo Orlale, David Mugonyi, Cyrus Kinyungu, Muriithi Muriuki and Tony Kagoh* The National Convention Executive Council (NCEC) opposes plan by MPs to alter the Bomas draft constitution. The group says MPs have vested interests in the outcome of the review and, therefore, cannot be trusted to be impartial arbiters in their "own case'.	
6th February	**Ghai rejects calls for changes in review Act** – *Tony Kago, Odhiambo Orlale and Wilson Kimani* The chair of CKRC Prof Yash Pal Ghai dismisses calls for changes to the Constitution of Kenya Review Act saying the Act is not flawed and, therefore, should not be altered.	

8th February	**Mutava resigns from Bomas review talks –** *[Sunday N 1]* The National Council of Churches of Kenya General Secretary, Mutava Musyimi, who was also the chairperson of the Ufungamano Initiative, "resigns" from the National Constitutional Conference and is replaced by another member of the clergy.	It was instructive that this action came after the Ufungamano Initiative released their own draft constitution. Rev. Musyimi would subsequently be seen as a key ally of those intent on scuttling the review process.
9th February	**Bomas III illegal, says Githae –** *George Munene and David Mugonyi [DN 6]* Assistant Minister for Justice and Constitutional Affairs, Robinson Githae, dismisses the NCC as illegal and says the National Assembly be reconvened to discuss the conference to give it legal backing.	Hon. Githae's statement represents what the political elite and especially the NAK have stood for since assuming power– a parliament driven as opposed to a pro-people constitution review process.
10th February	**Now Ghai seeks to meet Speaker over stand off** – *Tony Kago [DN 3]* The chair of the CKRC seeks to meet the speaker of parliament Francis ole Kaparo to discuss the proposal made by the parliamentary Select Committee on	

	constitutional review to give parliament powers to change the draft constitution by amending section 47 of the constitution. The speaker had chaired a meeting in which this position was taken by 147 MPs.	

11th February	**Fresh bid to hijack Bomas fails** – *David Mugonyi and Benard Namunane* MPs from the LDP and Kanu rebuff a plan to "snatch" power from NCC delegates. They dismiss claims by the Speaker that MPs had agreed to set up an expanded Parliamentary Select Committee on the constitution to resolve the impasse. They further fault the Speaker for claiming that a majority of MPs supported amending section 47 of the constitution and the Constitution of Kenya Review Act to empower parliament to have a final say on the draft constitution.	

17th February	**300 want to join review suit** – *[DN 4]* More than 300 constitutional review delegates apply to be enjoined in a case filed by a pressure group to stop the Bomas conference.	
21st February	**Parties strike deal over prime minister** – *David Mugonyi and Muriithi Muriuki [DN 1]* "Tense" talks between the National Alliance Party of Kenya (NAK), Liberal Democratic Party (LDP) and the Coalition of National Unity (CNU) organised by the Consensus Building Committee agrees on a presidential system of governance modelled on the Tanzanian model that allows the president to retain executive powers and reducing the prime minister to a "chief minister".	

1st March	**House will have the final word on constitution, says Muite –** *[DN 40]* The chairman of the Parliamentary Select Committee on the constitution insists that the august House would have the final say on the constitution, saying parliament would not abdicate its duty to delegates. Hon. Muite further accuses delegates of being partisan and having the mistaken belief that they were members of a constituent assembly with more powers than MPs to write a new constitution.	
9th March	**New constitution delayed as MPs take over draft –** *David Mugonyi [DN 1]* A cabinet meeting chaired by the president approves two Bills – the Constitution of Kenya (Amendment) Bill and the Constitution of Kenya Review (Amendment) Bill, setting out a new programme of constitution review to take up to 7 months. The gist of the	

	amendments is to give power to parliament to make changes to the Bomas draft.	

10th March	**Now rebel MPs vow to block reform Bills** – *Njeri Rugene and Tony Kago [DN 1]* Hostility, anger and suspicion meet the cabinet's decision to wrest constitution making powers from Bomas delegates as 78 MPs from across the political divide vow to shoot down the proposed reform Bills in parliament.	
11th March	**MPs storm out as debate on power sharing kicks off** – *Muriithi Muriuki [DN 2]* Health minister, Charity Ngilu, Assistant minister in the Office of the President, Danson Mungatana, MPs Muchiri Gachara and P. G. Mureithi, storm out of Bomas among jeers and boos, throwing the meeting	

	temporarily into confusion.	
12th March	**Kadhi's courts are retained in the draft constitution** – *[DN 4]* Delegates vote overwhelmingly to retain the Kadhi's courts in the constitution as subordinate to the high court of Kenya.	The issue of whether or not Kadhi's courts should be provided for in the constitution became one of the "contentious" issues in the process. The decision to retain them as provided in the present Constitution led to court action by a section of Christian churches' leadership.

15th March	**Its make or break for Bomas in vote today** – *[DN 1]* After a weekend of intense lobbying delegates geared for a pivotal vote on the compromise ironed out by the Bishop Sulumeti Consensus Committee. Delegates reveal that senior politicians were offering cash for a vote for the Sulumeti report.	The Bishop Sulumeti Consensus Committee was created to deal with contentious issues especially executive power and devolution arrangements. Its report was rejected by delegates leading to a walk out by a number MPs and Ministers.
16th March	**VP leads Bomas walkout: But Raila stays after consensus is voted down** – *[DN 1]* VP Moody Awori leads ministers and delegates including some MPs to walk from the NCC to	

	protest against the rejection of the report of the Bishop Sulumeti Consensus Committee. The conference had decided to revert to executive provisions in the Zero draft, which significantly reduced the president's powers.	

Emerging Issues and Lessons from Bomas III

Kenya's constitution making initiative has been one of the most protracted on the continent. Observers attribute this fact to the "impracticality" of making a constitution in peace time. They aver that a constitution is better made during times of strife, with the constitution becoming a "ceasefire" document. Wade and Bradley state:

In the modern world, the making of a constitution normally follows some fundamental political event – the conferment of independence on a colony; a successful revolution; the creation of a new state by the union of states which were formally independent of each other; a major reconstruction of a country's institutions following a world war.

The two scholars could not envisage a situation where a constitution could be written for an existing state in peacetime. Another scholar has written thus in an attempt to state the conditions that will normally impel the writing of constitutions world over (Brazier, 1991: 1):

Constitutions have, of course, been granted or adopted for many different reasons. New constitutions have marked stages in a progression towards self government (as in most British colonies before independence); they have established a system of government in a newly independent state (as with the United States of America in 1787), or in a reconstituted state (such as Malaysia in 1963 or Tanzania in 1964); they have marked a major change in the system of government (as in Spain in 1978); they have been adopted in order to rebuild the machinery of government following defeat in war (as with the Federal Republic of Germany in 1949); and they have declared a new beginning after a revolution, or after the collapse of a regime (as in France in 1791 and in 1958).

None of these factors have operated in Kenya. The Kenya constitution making experience must, therefore, be both unique and uncommon. The secretary of the CKRC has described the process thus:

The ongoing review of the constitution of Kenya is a historic process and the culmination of a tedious struggle by the people of Kenya to redefine their political organisation and aspiration and to reengineer themselves to all spheres of public life. The argument by pundits that writing a new constitution is not tenable in peacetime, therefore, holds sufficient water. This school of thought prescribes that a major consensus over constitutional issues is most unlikely because the peaceful conditions hitherto prevailing in Kenya do not offer a chance for level-headed or sober discussions and agreements. The accuracy of this observation is neither here nor there in the current review. One thing is clear though: the constitution- making process in Kenya has to a large extent been captured by the political elite for the advancement of narrow interests. The following are the key issues that have emerged from the process:

Content vs Process

Bomas III delegates fought over both the content and process of constitution making. The intersection came at the point where disagreements over issues of content led to attempts to discredit the process. As recorded, an assistant minister of government opined that the process was illegal, the irony of the assertion not withstanding, given the extent to which the process had progressed. This assertion, among others, was seen as an attempt to discredit the process by a section of politicians who did not like the direction discussions were taking.

Members of Parliament versus Other delegates

Members of parliament formed the biggest block of delegates at the NCC. A lot of the time, their views seemed to conflict with those of other delegates. The legislators tended to take common positions on matters of their self-interest. This happened, for example, when they voted against the "recall" clause as well as the requirement for the president to appoint cabinet ministers from non-MPs. This was one of the reasons for the rift between the MPs and other delegates; on many occasions MPs found themselves being heckled by other delegates when presenting their views.

The influence of conflicts within Narc on Bomas

The internecine wars involving the ruling coalition constituted a significant reason for the stalemate over the constitution review exercise. The pre-election power sharing arrangements codified in the Memorandum of Understanding signed by NAK and LDP were of utmost concern to the politicians even as they discussed the draft constitution. Furthermore, towards the end of Bomas III, the ruling coalition was caught up in its own wrangles over a new party constitution.

Introduction of constitutional drafts other than the Bomas draft
When the Ufungamano Initiative presented its draft constitution to the public on the 15th of January, this was seen as yet another attempt to derail the Bomas process. This was more so because the chairman of the Ufungamano Initiative, Rev. Mutava Musyimi, resigned as an NCC delegate on the February 7th 2004. The irony of this situation was not lost on many: The Ufungamano Initiative, the citadel of people led constitution review, was now advocating a "boardroom" process. The Ufungamano draft constitution could not measure up with the CKRC draft constitution on the legitimacy test.

Change of positions on fundamental issues
Throughout the NCC's sittings at Bomas of Kenya, stakeholders from political parties continually shifted their positions on specific issues. These shifts depended on whether or not the issue at hand had the potential to advance particular group interests. Specifically, the issue of executive power and devolution of power presented areas of concern. Quite clearly, constitution making during the immediate years preceding the 2002 election had come to be associated with dismantling the Moi regime and system. Understood in this sense, the pro-reform rhetoric by former opposition political parties had a narrow aim: replacing the then political elite. With the advantage of hindsight, it can further be argued that the aim was to kick out the principals but maintain the superstructure that allowed bad-governance to fester in the country.

Post Bomas III: The Court Arena
The most significant legal challenge to the NCC was instituted by the Rev. Timothy Njoya, the national spokesman of the National Constitutional Assembly (NCA), and eight other applicants. This court case, which caused a stir around the country due to its implications for the review process, was also of major significance to the country's jurisprudence. The applicants, in their originating summons, sought a total of 19 orders from the three judge bench of Justices Aaron Ringera, Benjamin Kubo and Mary Kasango.
The applicants questioned the constitutionality of the Constitution of Kenya Review Act, Cap 3A, Laws of Kenya, in a number of respects. The judges considered the following issues for interpretation:
• The proper approach to constitutional interpretation;
• The constitutional status of the concept of the constituent power of the people and its implications for the constitutional review process;
• The constitutional right to equal protection of the law and non discrimination;
• The scope of the power of parliament under section 47 of the Constitution of Kenya and whether Section 28 (3) and (4) of the Act are inconsistent therewith; and

The appropriateness of an injunction to stop the review process in the circumstances of the case.
The judges acknowledged that the issues presented for interpretation especially with regard to the constituent power of the people and the question of whether parliament could in exercise of its amendment power (Constitution Section 47) repeal a constitution and enact a new one in its place were novel and without precedent. This issue indeed presented a rare opportunity for juridical interpretation and development. First, was the question of proper approach to constitutional interpretation, an issue that is central to any jurisprudence. The question before the judges was whether or not the constitution ought to be interpreted like any other ordinary legislation. To this Ringera J., observed as follows:
The Constitution is not an Act of Parliament and is not to be interpreted as one. It is the supreme law of the land; it is a living instrument with a soul and consciousness; it embodies certain fundamental values and principles and must be construed broadly, liberally and purposely or teleologically to give effect to those values and principles. …
This critical assertion by Ringera J, was a fundamental departure from an earlier precedent where the court had held:
We do not deny that in certain contexts a liberal interpretation may be called for, but in one cardinal respect, we are satisfied that a Constitution is to be construed in the same way as any other legislative enactment, and that is, where the words used are precise and unambiguous, they are to be construed in their ordinary and natural sense.
In an interesting dissenting opinion, Kubo J, argued that the two schools of thought were not mutually exclusive. He observed that where the words were clear and unambiguous, the constitution could imply and apply as it read. But where the wording of the constitution is too sketchy, nay, skeleton as to warrant some flesh, the court should always give it. Second, on the question of the constituent power of the people, the prevailing *ratio decidendi* was that such power is in deed vested in the people even if the constitution does not expressly provide so. The sound reasoning here, which is a clear bedrock for future constitutional interpretations, was that institutions of state including parliament are creatures of the constitution and, therefore, cannot themselves be greater than the constitution. The power to make a new constitution consequently must reside in an organ that is greater than these institutions and the constitution itself. That prior "organ" is the people whose desires are expressed through their collective "constituent power". According to Ringera J, it is superfluous for the constitution to state expressly that the power to rewrite the supreme law resides in the people. Whenever a people decide to say this in the express provisions of the constitution, they are simply exercising extreme caution. With or without express provisions in this regard, it is to be implied that the constituent power is with the people, especially at a point of writing a new constitution. The meaning of the

people's constituent power is understood in the following sense as defined by Nwabueze (Nwabueze, 1974: 392):

It is power to constitute a frame of Government for a community, and a Constitution is the means by which this is done. It is a primordial power, the ultimate mark of a people's sovereignty. Sovereignty has three elements: the power to constitute a frame of Government, the power to choose those to run the Government, and the powers involved in governing. It is by means of the first, the constituent power, that the last are conferred.

Nwabueze goes on to explain that the constitution confers power of government and also defines the extent of those powers and their limits. Since the constitution is a direct result of the people's constituent powers, the relationship between the constitution and the power of government is the "relation of an original and a dependant or derivative power, between a superior and subordinate authority" (*Ibid*).

If the people's participation had not been properly conceptualised at the beginning of Kenya's constitution making, this reasoning did just that: it properly established the link between the people's sovereignty and the quest for a new constitution and constitutionalism. Two issues in Kenya's context make this conclusion necessary. First, is the fact that since the constitution of Kenya was a product of negotiation between British settlers and a few Kenyan political leaders, it did not have the people's constituent power as its basis of legitimacy. Second, is the fact that the "partial legitimacy" that that constitution had has been eroded through years of arbitrary amendments most of which were in conflict with the aspirations of the people or never took their welfare into consideration and, therefore, rubbished any notion of their constituent power.

In line with the above understanding of the notion of constituent power, the issue of whether or not parliament has the power to write the new constitution on behalf of Kenyans and particularly the interpretation of the word "alter" (Constitution Section 47) seems to have been settled. Parliament being an organ created consequent to the people's constituent power through which they constitute the frame of government, this body cannot pretend to make a constitution for the people. This is in line with the fact that at the NCC, members of parliament were but one of the "stakeholders" recognised by the review Act. Secondly, even the most skewed interpretation of the word "alter" cannot be interpreted to give the August house powers to unilaterally decide what Kenyans want in a constitution.

The uproar that followed the *Njoya ruling* took a line that was purely partisan, thus camouflaging the real import of the ruling. Those, especially politicians, who reacted to the ruling took a typical party line. The feud over the ruling almost became an annex to the fight for supremacy by the political elite which had been experienced during the NCC and especially Bomas III. Whatever the interpretation, however, it is an inescapable fact that the ruling threw the constitution making process into complete disarray. A lawyer and regular newspaper commentator, Kibe Mungai,

opined that the ruling had "in one fell swoop exposed the glaring legal contradictions of the review process…."

The writer concluded that the review legal framework had been flawed from the beginning. For instance, in the initial Constitution of Kenya Review Act, 1997, which was enacted under the aegis of the Inter-Parties Parliamentary Group (IPPG) reforms package, sovereignty was assumed to repose in Parliament and not in the citizenry. This was, therefore, one of the initial contradictions in constitution making. As the writer noted:

Stated differently, under the 1997 Act, Wanjiku was deemed a part of but not the Sovereign. Sovereignty was presumed to repose in Parliament if not entirely but ultimately (*Ibid*).

The subsequent amendments to the 1997 Act seemed to have maintained this unconstitutional position and way of thinking. The final Constitution of Kenya Review Act carried forward this notion and failed to provide for a referendum or constituent assembly through which the people would promulgate a new constitution. This became one of the legal challenges made through the *Rev. Timothy Njoya & 7 Others vs. A. G., and Another,* case. Apart from the Njoya Case, other cases that were instituted in regard to the review and which are also of great constitutional import include the case of *Njuguna Michael Kungu and Others vs. Attorney General and Another.* In this case, Njuguna Michael Kungu, Gacuru wa Karenge and Nichassius Mugo Njoka, challenged the legal validity of the procedure used by 320 of the 629 delegates to the NCC in a controversial sitting on 13th March 2004 to adopt the draft constitution before all amendments made as of that day had been incorporated.

The overall effect of the various legal challenges to the NCC was to change the focus of constitution making at that point in time from concentration on the content of the draft constitution as debated at the NCC to debate on the process. The next arena, therefore, became parliament, which was expected to come up with appropriate legislation to facilitate the completion of the process.

From Content to Process: Dealing with the Njoya ruling

Before the end of the NCC and the adoption of the draft constitution, 2004, the minister for justice and constitutional affairs, Kiraitu Murungi, had published two Bills in February 2004 that sought to address the process of constitution making. The Constitution of Kenya (Amendment) Bill, 2004, sought to amend Section 47 of the Constitution to empower Kenyans to replace the current constitution through a referendum. The Constitution of Kenya Review (Amendment) Bill, 2004, sought to empower parliament to consider, audit and change the Draft Constitution passed by the NCC.

The *Njoya ruling* as well as the other cases brought to the courts had laid bare the contradictions that the process envisaged by the Review Act had in regard to principles of constitution making. The publishing of the two Bills was taken to be an

attempt to introduce a mandatory referendum in case the NAK faction of the ruling NARC lost at the NCC. That the court ruling in the *Njoya case* was in line with this position became a politically sensitive issue.

On the 28th June 2004, president Kibaki directed Hon. Kiraitu Murungi to withdraw the two Bills amid tension sparked by activists of the Bomas Katiba Watch lobby. The lobby group had planned mass protests in the city if the deadline given by president Kibaki – 30 June – for the realisation of a new constitution failed to materialise. With the lobby group getting support from KANU and the LDP wing of the ruling coalition, the nation geared itself for the real possibility of reverting to the mass action synonymous with pre-2002 constitution-making in Kenya. The two bills were withdrawn forthwith – the president explaining that his commitment to realising a new constitution by June 30 was done in "good faith".

On the 28th of June 2004, Hon. Kiraitu Murungi again published the Constitution of Kenya Review [Amendment] Bill 2004 after a "consensus building" process undertaken under the aegis of the Consensus Building Group [CBG]. In defiance of the *Njoya ruling,* the CBG proceeded on the assumption that parliament has a special mandate in the review process.

This Bill was passed by parliament, but refused assent by the president. The reasons for this refusal were not clear. As expected, the president's action drew criticism because it was seen to take a partisan position on the issue. The president sent the Bill back to parliament with his recommendations as is required by the law and in November 2004 the amended version was passed by parliament. According to a notice published in the local dailies by the minister for justice and constitutional affairs, on the 24th of December, 2004, the Constitution of Kenya Review (Amendment) Bill, 2004, had by then been assented to by the president. The minister in the notice sought to present the new "road map" for the final phase of constitutional review. In responding to the *Njoya ruling,* the Bill provides for a mandatory referendum through which the people of Kenya will enact their constitution.

However, the new law failed the test of key principles of constitution making in a number of ways. It goes against the *Njoya ruling* in as far as it empowers the national assembly to make changes to the Bomas Draft Constitution. Further, by requiring that whoever seeks to contest the outcome of a referendum must deposit with the court five million shillings (5,000,000) in security for costs, a host of public spirited persons are denied the possibility of enforcing their rights simply because they may not raise this amount of money. This bit of law directly goes against the spirit of section 84 (1) of the constitution which provides as follows:

… If a person alleges that any of the provisions of sections 70 to 83 (inclusive) has been, is being or is likely to be contravened in relation to him … , then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the High Court for redress.

In fact, the final Act allegedly assented to by the president actually pegs a mandatory cost of five million shillings (5,000,000) to any litigation regarding the constitution review process. Quite to the contrary, Parliament is mandated by section 84 (5)(b)(i) of the constitution to:
… Make provision for the *rendering of financial assistance to any indigent citizen of Kenya* where his right under this Chapter – Chapter V – has been infringed or with a view to enabling him engage the services of an advocate to prosecute his claim. Clearly, in dealing with the legal obstacles to constitution making, Kenya's law makers have chosen to act against the constitution. This is quite an irony in the present context: ignoring constitutional provisions while making a new constitution raises the question as to whether the new constitution will in fact be obeyed at all since a precedent of non compliance will have been established. However, it confirms the fact that when it comes to constitution making, the political elite will go to great lengths to controvert the people's recognised constituent powers.

Other Developments of Constitutional Importance

During the period under review, other matters touching on constitutionalism which arose included the failure to respect civil rights, the pronouncement of court rulings that had a bearing on human rights, and the introduction of legislation sensitive to constitutionalism and human rights.

Protecting civil liberties

During the period under review, the state and its agents continued to treat the civil and political rights of the citizenry as luxuries. Thus, the 10th of January 2004 saw a crackdown on the alternative press, the so-called "gutter press", by officers of the Criminal Investigations Department purportedly for commenting on the personal lives of influential personalities. In scenes reminiscent of the crackdowns of the early 1990s, CID officers carried away copies of *The Independent*, *The Ego* and *The People Daily* newspapers.
Available evidence shows that during the reporting period freedoms such as those of freedom of assembly and association are yet to be accorded their rightful place in Kenya's constitutional practice. During the period under review, councillor Lekina Ole Santeyo was, for example, arrested for demonstrating against the grabbing of a stadium in Kajiado, prompting fellow councillors, on Jan 31st 2004, to storm the police station to demand his release.
In a case that brought into sharp relief power asymmetry in politics, the public was stunned when on the 6th of April 2004, a member of parliament, Hon. Joseph Kamotho, alleged that the minister in charge of Internal Security, Hon. Chris Murungaru, had sponsored thugs to disrupt his political rally; the two belong to the rival NARC camps. Further, the state on the 3rd of July 2004 violently broke up a rally called by members of the Bomas Katiba Watch lobby group to press for the

enactment of the draft constitution adopted during the NCC. In Kisumu, several protesters were shot dead by police on the same day.
The right to life was also under attack during the reporting period. An incidence on the 28th of September 2004 where prisoners were tragically killed in Meru G.K. prison is a case in point. Later inquiries into this fatal incident revealed the terrible conditions in which prisoners are incarcerated in that prison and in prisons generally. It was established that the prison, designed to hold 500 prisoners, was at the time accommodating 243 prisoners, 8 condemned prisoners, 740 "ordinary" remandees, 166 robbery remandees, one mental patient and two civil debtors – making a total of 1,414 inmates – a staggering 282.8% of its capacity.

The Rule of Law: An Unbinding Doctrine?
A democratic society is governed by laws, which are obeyed by all. Court orders are sacrosanct and are supposed to be observed to the letter. 2004 witnessed unprecedented incidences of defiance of court orders especially by cabinet ministers. Some instances of that defiance are produced below:
• On the 12th of March, 2004, Mr. Justice Isaac Lenaola issued an order cancelling the nomination of Shakeel A. Shabir as a councilor in Kisumu City Council. Hon. Karisa Maitha declined to heed this order;
• On 20th April, 2004, the Minister for Tourism and Information, Hon. Raphael Tuju, declined to terminate the activities of a committee constituted by him to investigate the conduct of a local radio station, KISS FM, despite a court order to that effect;
• On 30th August, 2004, Hon. Ali Makwere chose to ignore court summons to appear before a city magistrate to answer to claims of neglect of official duties; and
• On 28th November, 2004, cabinet ministers Kalonzo Musyoka and Raila Odinga counseled former President Daniel Moi to defy a court order requiring that he attends the Goldernberg proceedings in person.

Judicial Enforcement of Human Rights
In the *Rev. Dr. Timothy Njoya and 6 Others v. The Attorney General and 4 Others* case, the high court made it clear that in enforcing the Bill of Rights, the judges would not limit themselves to the letter of the law. The ruling elevated judicial enforcement of fundamental human rights to a new level. This judgment was a fundamental departure from an earlier precedent where the court had held:
We do not deny that in certain contexts a liberal interpretation may be called for, but in one cardinal respect, we are satisfied that a Constitution is to be construed in the same way as any other legislative enactment, and that is, where the words used are precise and unambiguous, they are to be construed in their ordinary and natural sense.
This important precedent was corroborated by a tribunal established by president Kibaki to inquire into the conduct of *puisne* judges alleged to be corrupt. Responding

to a submission that the tribunal should interpret the constitution just like any other act of parliament, the bench observed as follows:

Rules of interpretation in case of a Constitution which is not an Act of Parliament may, therefore, be different from those in case of an Act of Parliament. We are, therefore, strongly inclined to go with the decision of the constitutional court in the case of *Crispus Karanja Njogu v. Attorney General.* We will interpret the Constitution in a liberal and broad manner within the precincts of common sense and the object of that particular section.

In another development of equal importance, the high court while determining public interest litigation, declined to be held back by the procedural trappings of *locus standi* preferring instead to delve into the merits of the case. Though in lamentation, the court observed:

The Applicant as is required by Order 53 Rule 3 gave Notice to the Registrar but did not attach a Verifying Affidavit or statement to the Notice. I would have dismissed the Application at that point… invoking powers granted by the proviso thereto, I however excused failure to do so on grounds that the matter was urgent and of great public importance…

In another critical instance, the high court of the Republic of Kenya, in *Samuel Muciri W'njuguna v. R,* Nairobi H.C. Misc. Criminal Application No. 710 of 2002, granted the applicant an anticipatory bail even where the express provisions of the constitution were silent. In arriving at the innovative conclusion, the tribunal observed:

When the statute is silent, this court cannot become a toothless watchdog of the constitution which we have sworn to defend. Furthermore, the constitution having itself granted wide discretion to the High Court presumably to fill the gaps which the statutes left…

There are numerous other decisions of significant value made during the period under review but which this chapter cannot carry. Such decisions include George *Ngothe Juma and Two Others v. The Attorney General* (Nairobi High Court Misc. application No. 34 of 2001) where the court explored the rights of accused persons and observed that they must be afforded ample time in court including being availed all information in prosecution hands a *priori.*

These cases and many others represent the fact that the judiciary has, in 2004, been vigilant when interpreting the provisions of the constitution pertaining to fundamental human rights and has seized every opportunity that has availed itself to develop human rights and democratic jurisprudence. Critics, however, argue that the events of 2003 and 2004 where the president was able to change almost 3/5 of the entire judiciary reflect very badly on the independence of the judiciary in Kenya.

Developments in Legislation

One of the most significant Bills to be published during 2004 was the *Constitution of Kenya (Amendment) (No. 2) Bill,* 2004, proposed by Hon. Charles Keter, member of

parliament for Belgut Constituency. This Bill is a culmination of previous efforts to strengthen the national assembly. Several actors, including civil society organisations, have continuously called for the empowerment of the legislature to enable it function more effectively. This Bill had several implications in terms of empowering the legislature and is seen as apt for the following reasons.

First, it is agreed in constitutional theory that only an autonomous and sovereign national assembly can act as a genuine check to the executive in a government operating under the principle of separation of powers. The chances of the executive abusing its powers increase with a more disempowered legislature.

Second, the history of Kenya is rife with evidence that a weak legislature is, at best, amenable to executive manipulation and, at worst, becomes an uncritical and consistent rubberstamp of executive agenda. Kenyan heads of state have, in the past, used their immense powers under the constitution to prorogue and dissolve parliament on a whim sometimes to the detriment of important national imperatives.

Finally, a multi-party democracy should ideally be predicated upon effective representation of a people in an assembly of sorts (in our case the National Assembly) that not only is a sovereign entity but also one that is recognised by the existing laws and legitimate structures as being exactly that. Legal recognition of independence is, therefore, normally evidence of the sanctity that is very much needed if Kenya's national assembly is to be said, at all, to be a politically legitimate host of the peoples' representatives.

The aforementioned Bill is therefore appropriate because of three main aspects. One, having the national assembly in charge of its own calendar – whether or not and when to adjourn or summon; where to meet and when – is a major step forward and a key boost to the doctrine of separation of powers. Such a provision will certainly enable the House to discuss national issues in its own timeframe without outside interference. The amendment is also likely to enable parliament address an emergency, say, during dissolution.

Two, clause 59(1) of the Bill, which fixes the exact date when parliament shall stand prorogued as the 30th of November every year, clause 59(2), which states the exact date when parliament shall stand dissolved as the 30th of November every fifth year and clause 59(3) which mandates the speaker of the national assembly to convene the first session of the new parliament on the first Tuesday of February year after dissolution, will be accompanied by certainty in the electoral and political process. By dint of these stipulations, instances akin to those when heads of state have used their powers to dissolve parliament as a secret political/electoral weapon will be a thing of the past; hence levelling the political battlefield. Certainty in the dates of dissolution of parliament will also extinguish any extra-legal temptation to attain or cling to political power; let alone prepare stakeholders adequately for impending elections. Three, clause 59A of Keter's Bill which seeks to provide a framework for a vote of no confidence in the government of the day without affecting the life of parliament

clearly unties the august House from currently prevailing manacles of dependence. Only such a provision can enable proper check of the executive. Tying the life or session of the Legislature to that of the president has, in the past, been a major hindrance to the autonomy of parliament. This is why calls have been made for separating presidential elections from parliamentary elections. De-linking the life of parliament from that of the president will be an excellent starting point for cogent parliamentary sovereignty in this country.

Conclusion

The year 2004 saw mixed fortunes for Kenyans in the fight for constitutionalism. The constitution review process recorded minimal gains while the conduct of the state in respecting and implementing human rights provisions under the law did not measure up to required standards.