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ETHNIC POLITICS AND THE CONSTITUTIONAL REVIEW PROCESS IN KENYA

Laurence Juma[†]

I. INTRODUCTION

When the Daniel Arap Moi regime in Kenya reluctantly acceded to the amendment of the Constitution to allow for multi-party politics in 1991,¹ many political observers and opposition groups believed that it was indeed possible to effect change of government and institute democratic governance through elections. The 1992 and 1997 elections proved them wrong. Moi is still in power, and neither the increased number of players in the political scene, nor the diminishing foreign aid allocations have shown the promise of ever tempering his dominance.² And yet his regime continues to stifle individual freedoms and rights,³ fan ethnic indifferences, attract blame for political murders,⁴ and worst of all, tolerate the plunder of national resources for the benefit of a few through corruption and

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1. Section 2A of the Constitution, inserted therein nine years earlier in June 1982, had turned Kenya into a *de jure* single party state. In December 1991, the Moi government sponsored its removal and, thus, paved way for political pluralism. For a discussion of the political developments after 1991, see DAVID W. THROUP & CHARLES HORNSBY, *MULTI-PARTY POLITICS IN KENYA: THE KENYATTA AND MOI STATES AND THE TRIUMPH OF THE SYSTEM IN THE 1992 ELECTION* (James Currey ed., 1998) [hereinafter *MULTI-PARTY POLITICS IN KENYA*].

2. *Moi Versus the Economy*, *AFRICA CONFIDENTIAL*, vol. 42, Sept., 2001, at 1.

3. Makau Mutua, *Justice Under Siege: The Rule of Law and Judicial Subservience in Kenya*, 23 *HUM. RTS. Q.* 96 (2001).

4. Gitau Warigi, *Kenya's Long Hit List of Political Assassinations*, *DAILY NATION*, Mar. 5, 2000, at 6 (Nairobi).

mismanagement.⁵ One of the factors to which the resilience of the regime can be attributed, is its ability to manipulate ethnic cleavages to its advantage, a tact that it undoubtedly learned from its predecessor.⁶ The next general election is slated for December 2002. Though Moi has announced that he will not seek re-election,⁷ the problems of ethnicity that his regime has imprinted on the nation's political as well as socio-economic life in his twenty-four year "mis"rule may, indeed, survive.

There is little doubt that the achievement of social, economic and political goals in Kenya envisages the development of norms sensitive to ethnic tolerance and cognition. In modern societies, the constitution is regarded as the kingpin of normative development. Constitutional engineering thus provides one avenue through which societal norms can be inscribed, transformed, or altered. Analysts of Kenya's political scene, though arguing from different standpoints, agree that the establishment of norms that address all the ethnic cleavages is desirable. Ndegwa, for example, observes that in the current stalemate, "democratic institutions such as alternative electoral rules and constitution" should be redesigned to incorporate issues of "rights and obligations."⁸ Conflicts, he argues, arise from the dichotomized allegiance to state and culture, what he calls "dual citizenship." According to him, federalism, consociationalism and electoral engineering merely address the peripheral transitory problems arising from "dual citizenship." Ajulu⁹ and Southhall¹⁰ are frustrated by Moi's maneuvering of the ethnic equation to gain political mileage and, thus, perpetuate his repressive leadership. They point toward the lack of norms regulating political behavior as the reason behind the use of government as "the driver of the accumulation process and the most important dispenser

5. Mburu Mwangi & Ken Opala, *Moi's Son Among Top Names in Scam*, DAILY NATION, June 18, 1999, at 1 (Nairobi); see also Njeri Rugene, *I Am Clean on Goldenberg Scandal, Insists Saitoti*, DAILY NATION, June 18, 1999 (Nairobi); *President Denies Foreign Account Claims, Threatens to Sue Publication*, DAILY NATION, Nov. 23, 1999, at 1 (Nairobi).

6. See David W. Throup, *The Construction and Deconstruction of the Kenyatta State*, THE POLITICAL ECONOMY OF KENYA 33-34 (Michael G. Schatzberg ed., 1987).

7. David Mugonyi & Maguta Kimemeia, *It's Official, Moi Will Retire*, DAILY NATION, Oct. 21, 2001, at 1 (Nairobi); see also Bob Odhiambo, *Moi Out, But Who In?* NEW AFRICA, Oct. 2001, at 13.

8. Stephen Ndegwa, *Citizenship and Ethnicity: An Examination of Two Transition Moments in Kenyan Politics*, 91(3) AM. POL. SCI. REV. 599-615 (1977).

9. Rok Ajulu, *Kenya's Democracy Experiment: The 1997 Elections*, 25 REV. AFRICAN POL. ECON. 275 (1997).

10. Roger Southall, *Reforming the State? Kleptocracy and the Political Transition in Kenya*, 26 REV. AFRICAN POL. ECON. 93 (1999).

of patronage and resources.”¹¹ The scholars agree that Kenya needs to remodel its Constitution to reorder the societal structures so that they can accommodate ethnic diversity. Ajulu, for example, asserts that Kenya’s Constitution is non-suited for this purpose. “In societies where political power is highly contested along ethnic cleavages, an electoral system which allows the winner on a minority vote to take all is simply a recipe for disaster,” he argues.¹²

The Kenyan situation represent a real dilemma for those interested in peace and stability in the continent. The fear that current contests between the heavy-handed authoritarian regime and the unrelenting forces of change may at one point lead to open conflagration is indeed well founded.¹³ The situation in neighboring nations of Somali¹⁴ and Sudan¹⁵ has done little to ameliorate these fears. The simmering tension amongst ethnic groups, and the unpredictability of government in its response to ethnic claims, has heightened the quest for the promulgation of a constitutional regime that will guarantee equal political participation for all ethnic groups.

In light of the impending constitutional review process,¹⁶ this article examines how the ethnic question can be addressed through constitutional engineering so as to eliminate the advantage that it has perennially afforded to the political leadership since the country’s inception. It will do so by analyzing political developments since independence and their impact upon the socio-economic conditions; isolating the landmarks of ethnic contestations in the trajectory of competing forces in Kenya’s political history; reviewing the political developments toward constitutional reform; and, finally, making a case for the establishment of strong legal institutions as a basis for democratic consolidation.

11. Ajulu, *supra* note 9.

12. *Id.*

13. Editorial, *Avert Rising Threat of Ethnic Conflict*, SUNDAY NATION, May 13, 2001, at 6 (Nairobi).

14. See generally Ismail I. Ahmed & Reginald Herbold Green, *The Heritage of War and State Collapse in Somalia and Somaliland: Local-level Effects, External Interventions and Reconstruction*, 20(1) THIRD WORLD Q. 113-27 (1999); see also Osei Boateng, *Somalia: Beware of B-52 Bombers*, NEW AFRICA, Jan. 2002.

15. See generally Laurence Juma, *Regional Initiatives for Peace: Lessons from IGAD and ECOWAS/ECOMOG*, 40(3) AFRICA Q. 85 (2000).

16. Mugambi Kiai, *Constitutional Review: New Potholes on the Road to Canaan*, THE LAW., vol. 35, July 2001, at 5 (Nairobi).

II. COLONIALISM AND THE GENESIS OF ETHNO NATIONALISM

A. *Pre-Colonial Societies*

The present day Kenya is home to well over forty-two different ethnic groups.¹⁷ This classification may be somewhat arbitrary considering that it amalgamates some groups that may be seen as separate. However, given the complexity of ethnic and sub-ethnic groupings in the African context, some arbitrariness may be excusable. The largest of the groups are the *Kikuyu* (21%), who occupy the central part of Kenya, followed by the *Luhya* (14%) and the *Luo* (13.5%) of western Kenya. There are also the *Kambas* (11%), *Kalenjins* (11%), *Merus* (5%), *Embus*, and other smaller groups.¹⁸ Before colonialism, each of these groups existed in different autonomous entities each identifying with distinct territory (homeland).¹⁹ The homelands had cultural and economic significance. The common characteristic amongst these groups was that life was simple and cultures and religion were built around food, shelter, and the quest for security. Ochieng has observed that:

[E]ach political system supported and was in turn supported by its own form of religion and ritual. These rituals were applied to the consecration of accepted custom and authority, and to all those situations where decisive change in custom and authority was found desirable or necessary. That is why African religions have . . . displayed . . . a complete rounded explanation of life.²⁰

None of the groups practiced a single mode of subsistence. Though one group may have been predominantly farmers, some members could also be fishers, herders, or the like. Similarly, none of the groups had a standard language. Instead, they had "clusters of dialects that shaded into

17. Recent census figures place Kenya's population at 28.7 million.

18. For a complete discussion of the Kenyan ethnic structure, see BETHWEL A. OGOT & WILLIAM R. OCHIENG, *DECOLONIZATION AND INDEPENDENCE IN KENYA 1904-93*, (James Currey ed., 1995).

19. One scholar has described Kenya's pre-colonial people as "like the American nation, made up of strangers, both adventurers and refugees." H.G. Mwakyembe, *The Parliament and the Electoral Process*, in *THE STATE AND THE WORKING PEOPLE IN TANZANIA* 32 (Issa G. Shivji ed., 1986) Council for the Development of Social and Economic Research in Africa (CODERSIA).

20. WILLIAM R. OCHIENG, *A HISTORY OF KENYA* 44 (1985).

each other."²¹ They also had no unified line of patriarchal descent traceable to one single origin.²²

Historians, lawyers, and political scientists alike are unable to agree on whether pre-colonial societies in Kenya had a unified system of government. Lonsdale argues that they did not, and thus categorizes them as "ethnic groups" rather than "political tribes."²³ Ojwang acknowledges that some ethnic groups had "a simple and relatively informal governmental system, localized and apparently not designed for a modern state."²⁴ According to Olumwullah, the postulation that "Kenyan societies were characterized by statelessness with only the Wanga Chieftdom having a semblance of centralized political authority" is misleading because it is informed by inaccurate understanding of how governmental power was exercised in pre-colonial societies.²⁵ Taking on the examples of the *Miji-Kenda* and the *Kalenjin* communities, he demonstrates that governmental powers in these communities were exercised both at the vertical and horizontal levels.²⁶ He argues that among the *Miji-Kenda*, political authority was exercised by *Kambi*, the highest level of leadership within the *Kaya* (fortified villages of forested hilltops). It also discharged judicial functions.²⁷ As for the *Kalenjin*, he makes the following observation:

Notwithstanding this fluid social and political situation, it would be wrong to describe the *Kalenjin* as a people lacking government or structural organization. For, in their own way, and through an in-built mechanism of recycling age-sets, these people maintained a highly sophisticated system of government which ensured automatic continuity.²⁸

Despite the fact that the ethnic groups existed as political units, the relationship between them was not necessarily in conflict. This by no means suggests that these groups were totally egalitarian or that their members enjoyed a homogenous culture with unambiguous identity.

21. John Lonsdale, *The Political Culture of Kenya*, Occasional Paper no. 7, in POLITICAL CULTURE, LOCAL GOVERNMENT AND LOCAL INSTITUTIONS 91 (Int'l. Development Studies, Univ. of Roskilde, Denmark, 1993).

22. *Id.*

23. *Id.* at 90.

24. J.B. OJWANG, CONSTITUTIONAL DEVELOPMENT IN KENYA: INSTITUTIONAL ADAPTATION AND SOCIAL CHANGE 21 (1990).

25. O.A.L.A. Olumwullah, *Government*, in THEMES IN KENYAN HISTORY 88-92 (William Ochieng ed., 1990).

26. *Id.*

27. *Id.* at 95.

28. *Id.*

Indeed, there are studies which indicate that the pre-colonial African societies were unstable, fluid, and much a factor of the vagaries of war, famine, and internal competition.²⁹ But this is only part of the wider picture. In Kenya, the relationship between groups was influenced by the interdependence in the realm of trade and material well being. For example, the *Mahiga* traders led caravans over the Abardare hills to trade various agricultural products for the *Masai* livestock.³⁰ Ndege has given an account about the elaborate trade patterns that existed before colonialism.³¹ According to him, trade amongst the ethnic groups in western Kenya, the *Luo*, *Luhya*, *Abagusii*, *Abakuria*, and even *Abasuba* was widespread.³² Iron implements from Yimbo were traded amongst the *Teso*, *Bukhayo*, *Ugenya*, and *Bunyore* up to Karachuonyo. Salt from Kaksingri was distributed to almost all groups in the region. Similarly, the *Kalenjins*, now occupying the Rift Valley, traded livestock for grains from the *Luo* and other Bantu groups living in their proximity.³³ Thus, so long as the *Kikuyu* remained in the slopes of Mount Kerinyaga, the *Masai* in the sprawling savannas of central lands, and the *Luo* at the shores of Lake Victoria, conflicts were at a minimum. One scholar has aptly described the relationship as that of "complimentarity" and "symbiotic interdependence."³⁴

B. *The Colonial Rule*

Through conquest,³⁵ deliberate annexation of territory and lopsided treaties,³⁶ the British coalesced the ethnic groups and the minority settler

29. See, e.g., Bruce J. Berman, *Ethnicity, Patronage and the African State: The Politics of Uncivil Nationalism*, 97 AFRICAN AFF. 305-11 (1998). According to the author, pre-colonial African societies experienced great upheaval as a result of war, famine, and disease that "destroyed old communities and identities, forced people to move and also created new communities out of survivors and refugees, often linked in unequal and dependent relations." *Id.*

30. CHRISTOPHER LEO, *LAND AND CLASS IN KENYA* 33 (1984).

31. See generally P. Ndege, *Trade Since the Early Times*, in THEMES IN KENYAN HISTORY 117 (William Ochieng ed., 1990).

32. *Id.* at 121.

33. *Id.*

34. Fredrik Barth, *Introduction*, in ETHNIC GROUPS AND BOUNDARIES 18-19 (Fredrik Barth ed., 1970).

35. OJWANG, *supra* note 24, at 24.

36. *Ole Njogo, et al. v. Attorney General of East Africa Protectorate*, 5 EAST AFRICA L. REP. 70 (1914). This case, often referred to as the "Masai case," explains the nature of the treaties made with the African groups. Here, the Colonial Administration, after discovering that part of the *Masai* territory was conducive to agriculture, induced the *Masai Laibon* (chief) to an agreement which provided *inter alia* that the agreement "shall be

population into a Nation State. The British direct rule was established on June 15, 1895, by the declaration of a protectorate status over the present day Kenya.³⁷ The protection status conferred on the British the power to exercise control over the indigenous groups and also acquire their land. The process of acquiring territory through conquests benefited a great deal from the British tactics of playing one African group against another and rewarding their supporters with loot, mainly cattle, taken from the conquered groups.³⁸ The African "allies" also earned political increment in British victories and sustained domination over internal opposition. According to Atieno-Odhiambo, the African allies were the "first generation of collaborators."³⁹ They accumulated wealth (land, wives, new kinship networks, clients, and chiefly power) and took advantage of the same to establish their patrimony.⁴⁰ For example, Nabongo Mumia of the Wanga tribe, consolidated his authority against traditional opponents while enjoying the British support.⁴¹ His kingdom provided "auxiliaries" to the British army and assisted expeditions against the *Luo* and the *Kalenjins*.⁴² Odera Ulalo, the great *Luo* chief of Gem, used British support

enduring so long as the *Masai* as a race shall exist and that European settlers shall not be allowed to take up land in the settlements." *Id.* The agreement was abrogated when, after seven years, the colonial administration forced the *Masai* to move from the settlement land. An action brought on the grounds that the treaty was a binding contract for which breach thereof should attract damages was dismissed by the colonial court.

37. Y.P. GHAI & J.P.W.B. MCAUSLAN, *PUBLIC LAW AND POLITICAL CHANGE IN KENYA* 3 (1970) [hereinafter GHAI & MCAUSLAN]. The direct rule was preceded by the interregnum of the Imperial British East Africa Company (IBEACO). The company was chartered in 1888 to administer the so-called 'British sphere of influence' following the Anglo-German Agreement of 1886. The significance of IBEACO's rule was that it created administrative sub-divisions that were later adopted by the colonial administration. In the words of John Ainsworth, the first colonial sub-provincial commissioner for Ukambani region, the districts were "based on old sub-division of the IBEACO which left us both an excellent foundation and framework of organization, and staff of very capable officers, Europeans and native, well acquainted with the needs and capacities of their respective districts." Olumwullah, *supra* note 25, at 99.

38. BRUCE BERMAN & JOHN LONSDALE, *UNHAPPY VALLEY: CONFLICT IN KENYA & AFRICA, BOOK 1: STATE AND CLASS* 55 (James Currey ed., 1992) [hereinafter UNHAPPY VALLEY].

39. E.S. Atieno-Odhiambo, *Democracy and the Ideology of Order in Kenya*, in *THE POLITICAL ECONOMY OF KENYA* 177-83 (Michael G. Schatzberg ed., 1987).

40. UNHAPPY VALLEY, *supra* note 38.

41. *Id.*; see also BRUCE BERMAN, *CONTROL AND CRISIS IN COLONIAL KENYA: THE DIALECTS OF DOMINATION* 211 (1990) [hereinafter CONTROL & CRISIS IN COLONIAL KENYA].

42. UNHAPPY VALLEY, *supra* note 38.

to invade Ugenya and the *Kalenjin* to increase his wealth in cattle.⁴³ In the 1890s, the *Masai* Olonana invaded the *Nandi* and other neighboring tribes and achieved great victories in the Morijo civil war against the *il aig-wanak*.⁴⁴ The involvement of Africans in the British military action was based on "mutually incompatible calculation of self interest."⁴⁵ As noted by Bruce, the contradictions that emerged were solved by cooperation of new allies and the "creation of new pivots of patronage at different levels of the social system."⁴⁶ From the very onset of British occupation, the deliberate manipulation of ethnic differences to acquire territory and secure political support became part and parcel of the process of state building.

Though the process of acquisition of territory had begun well before the declaration of the protectorate status, judicial authority can be traced back to the 1890 Foreign Jurisdiction Act which provided for the exercise of jurisdiction by Her Majesty the Queen:

[O]f any jurisdiction, whether obtained by treaty, capitulation, grant, usage, sufferance or any other lawful means, and whether obtained before or after the commencement of the Act, in a foreign country in as ample a manner as if she had acquired that jurisdiction by cessation or conquest.⁴⁷

The authority herein conferred was gradually expanded to expedite the complete subjugation of the natives and to open up the country for settler occupation. The process was accomplished through the establishment of administrative as well as legislative authority that was "subordinate to the imperial government."⁴⁸ Prior to 1897, the colonial officers in Kenya exercised authority similar to their counterparts in India.⁴⁹ However, the 1897 East African Order in Council brought in a structured form of administrative authority with the Office of Commissioner being at the helm. The commissioner had the responsibility of establishing administration, maintenance of law and order, and exercising legislative powers.⁵⁰ He was empowered to legislate on matters relating to internal communication, security, observance of treaty obligations, matters of local

43. *Id.*

44. *Id.* at 27.

45. *Id.* at 55.

46. *Id.*

47. GHAI & MCAUSLAN, *supra* note 37, at 15.

48. *Id.* at 35.

49. *Id.* This was done by virtue of the order issued by the Foreign office in 1896.

50. *Id.* at 37.

laws and customs, and for the “good government of the Protectorate.”⁵¹ In exercise of his powers, the authority of the commissioner was not subject to any person in the colony. He was accountable only to the Secretary of State in England to whom he was to make annual reports on operations in the colony.⁵²

As for judicial authority, the 1897 East African Order in Council made provision for a legal system whose function was coterminous with imperial interests and sympathetic to such an overbearing administrative authority. This legislation created a tripartite court system comprised of the native, Islamic and English courts—styled the colonial courts.⁵³ The entire court system was placed under the supervision of the Privy Council in Britain.⁵⁴ The system changed in 1902 when, by virtue of an Order in Council of that year, the High Court for the East Africa protectorate was established, with appeals going to her Majesty’s Court of Appeal for East Africa.⁵⁵ Apart from the judicial structure, the administrative mechanisms in the colony were fragmented and merely reacted to the whims of the settlers.

Coextensive with the exercise of state power was the institutionalization of racial segregation. By and large, the ideological underpinnings that informed the edifice of colonial administration were explicated by the perception of the African as a “happy, thriftless, excitable person, lacking in self-control, discipline, and foresight.”⁵⁶ This, no doubt, provided a moral justification for the systematic and deliberate divestiture of land from the ethnic groups and exacerbated exploitation. European occupation was perceived as something good for the African because he was inferior “not only in the sense of having a more rudimentary technology, but in some kind of vaguely conceived absolute sense, which was thought to have both intellectual and moral dimensions.”⁵⁷ Leo summarizes the spirit of European occupation as premised on “a self confident belief . . . that could justify almost anything.”⁵⁸

It is thus not surprising that in 1915 the colonial government passed the Crown Lands Ordinance that divested the ownership of all land from

51. *Id.* This was provided for in article 45 of the E.A. Order in Council.

52. *Id.* at 38.

53. GHAI & MCAUSLAN, *supra* note 37, at 130.

54. *Id.*

55. *Id.*

56. LORD LUGARD, *THE DUAL MANDATE IN BRITISH TROPICAL AFRICA* 69 (5th ed. Archon Books 1965).

57. LEO, *supra* note 30, at 34.

58. *Id.* at 35.

the Natives and invested it in the Crown.⁵⁹ In effect it abolished the rights of Africans to land in the colony and made them tenants at will of the Crown.⁶⁰ Generally speaking, the purpose of this legislation was two-fold. First, it ensured that all the fertile land, both suitable for agriculture and ranching, were made available for white settlers. The divestiture was so effective that by 1914 there were well over one thousand white farmers occupying about four million acres of land.⁶¹ Secondly, it created a situation where the natives would be landless and thus form a pool from which cheap labor could be drawn. A systematic movement of Africans from their ancestral land and subsequent settlement into designated areas, notoriously called the "native reserves" was undertaken.⁶² The natives were thus confined into designated tribal reserves with clearly marked boundaries. So as to "pacify" dissent and ease administration, the reserves remained as a "castellation of ethnically exclusive districts that incorporated deeply rooted isolated and mutually antagonistic tribes."⁶³ The *Kikuyu* had their own reserves just like the *Luo*, *Kamba* and others.

Not only were ethnic boundaries⁶⁴ in the reserves clearly demarcated and their inhabitants technically confined within their territories, but the general life of the African was strictly controlled. Each reserve was under a colonial appointed chief and headmen who ensured the maintenance of law and order.⁶⁵ They also collected taxes, especially the Hut tax,⁶⁶ for the

59. No. 12 of 1915, sections 5, 54 and 56, *quoted in* GHAI & MCAUSLAN, *supra* note 37, at 27. The Crown Lands Ordinance defined Crown lands to include land held by the different native tribes, and land reserved by the governor for the use of native tribes, but "such reservation, shall not confer on any tribe or members of any tribe any right to alienate the law so reserved or any part thereof." *Id.*

60. *Id.* at 28, 89. In the case of *Wainaina v. Murito* [(1923) 9(2) KLR 102], the Supreme Court affirmed this position. *Id.*

61. P. Anyang Nyongo, *The Possibilities and Historical Limitations of Import-Substitution Industrialization in Kenya*, in *INDUSTRIALIZATION IN KENYA: IN SEARCH OF A STRATEGY* 12 (Peter Coughlin & Gerrishon K. Ikiara eds., 1988). At independence, the so-called white highlands comprised of about three million hectare of land divided into 3,600 farms and ranches. LEO, *supra* note 30, at 4.

62. LEO, *supra* note 30, at 4.

63. HAUGARGERUD ANGELIQUE, *THE CULTURE OF POLITICS IN MODERN KENYA* 46 (Cambridge University Press 1995).

64. It is important to note that the boundaries were fixed at the whims of the settlers. They could be moved or altered at any time to allow for the expansion of white settlement. An example is often given of the 1913 edict that awarded the land between the *Ambani* and the *Chania* rivers near Nyeri to the white settlers despite the 1912 demarcation. LEO, *supra* note 30, at 38.

65. TABITHA KANOGO, *SQUATTERS AND THE ROOTS OF MAU MAU 1905-63* 13 (James Currey ed., 1987).

colonial authorities, and supervised the restrictions placed on commerce and agriculture. They also ensured the provision of labor for communal and public projects.⁶⁷ It is the heavy-handedness of these colonial chiefs and their headmen, and the general hardship of life within the reserves that drove most young people to seek work in the white farms or employment in the metropolitan areas.⁶⁸ The young men who moved to the white farms took residency there and became squatters.⁶⁹

The squatter phenomenon greatly influenced colonial policies and to a large extent defined the nature of the relationship between races during this time. As the number of squatters increased and their agricultural output became significant, the colonial government introduced legislation to keep them in check. The 1918 Resident Native Squatter Ordinance primarily set the obligations and restrictions on squatter activity. It gave the settlers tremendous power of supervision by introducing government controlled labor contracts. These contracts ensured that the African could reside in the white highlands in no other status other than that of a squatter, "liable to eviction at the expiration of the respective labor contracts."⁷⁰ The purpose of this legislation has been summarized as follows:

[T]o destroy the relationship of landlord and tenant between the European farmer and the African, and so to destroy any rights the African might have in the land by reason of tenancy. A relationship of employer and employee involving elements of involuntary servitude was substituted, and one of the prime objects . . . was to . . . prevent the development of the system of tenancy.⁷¹

A more vicious regime of squatter regulation came into place by the passing of the 1937 Resident Native Laborers Ordinance.⁷² This legislation devolved the powers for squatter management to the district councils primarily controlled by the settlers. The legislation was a pointer toward

66. The total amount of taxes collected from the Africans in 1931 amounted to £530,877 as compared to £42,596 collected from the white settlers. Yet the per capita income of the whites was about two hundred times higher than that of the Africans. CONTROL & CRISIS IN COLONIAL KENYA, *supra* note 41, at 163.

67. KANOGO, *supra* note 65.

68. *Id.*

69. "Squatting" is a phenomenon that refers to the "access to land on settler estates for cultivation and grazing in return for a stipulated period of labor service on the settler's farm at a minimum wage." CONTROL & CRISIS IN COLONIAL KENYA, *supra* note 41, at 62.

70. LEO, *supra* note 30, at 43.

71. GHAI & MCAUSLAN, *supra* note 37, at 83-84.

72. KANOGO, *supra* note 65, at 97.

the wider government policy of gradually making the squatter populations more dependent on wages rather than land. Though not officially backed by direct sanctions, government policy espoused by the colonial Labor Office during this period made squatter farming very difficult.⁷³ The wage labor economy resulted not only in the impoverishment of the unskilled labor force, but also created a minority of high wage earners amongst the Africans. This group was able to invest in land purchase, commodity production and trade. In the reserves, a class of "rich" African farmers emerged and was readily integrated into the capitalist economy. The evolution of class difference amongst the Africans was accelerated by deliberate government action. For example, under the Swynnerton Plan of 1954, the colonial government, hoping to introduce "modern" tenure in the African reserves, allowed the "able, energetic or rich Africans to acquire more land and bad or poor farmers less, creating a landed and a landless class."⁷⁴ According to the government, the creation of the two classes was "a normal step in the evolution of a country."⁷⁵ Further, the government eased restrictions on African cash cropping.⁷⁶

Inter-ethnic relationships could not be explained only in terms of the class differences. Obviously the existence of the squatter phenomenon in the white highlands, the impoverished peasant population in the reserves, and the "landed elite" exacerbated tensions amongst the Africans and sharpened the differences within communities. But it is the attitude of the colonial administrators that influenced economic policies, which, in turn, favored some ethnic communities more than others. The ethnic groups were treated differently depending on the attitude of the colonial administrators based upon what was considered to be their propensity. For example, the *Luo* were perceived as prudent civil servants,⁷⁷ the *Kamba* as generally "flexible and cooperative,"⁷⁸ while the *Kikuyu* as shrewd tradesmen. One colonial report stated:

73. *Id.* at 102. For example, the refusal of the government to allow the keeping of goats by squatters in Naivasha area is mentioned herein. *Id.*

74. R.J.M. SWYNNERTON, A PLAN TO INTENSIFY THE DEVELOPMENT OF AFRICAN AGRICULTURE IN KENYA (Govt. Printer, Nairobi 1954), *quoted in* Michael Chege, *The Political Economy of Agrarian Change in Central Kenya*, in THE POLITICAL ECONOMY OF KENYA 101 (Michael G. Schatzerberg ed., 1987).

75. *Id.*

76. *Id.*

77. Bethwel Ogot, *British Administration in the Central Nyanza District of Kenya*, 4 J. AFRICAN HIST. 128 (1963).

78. Bismark & Myrick, *Colonial Institutions and Kamba Reaction in Machakos District: Destocking Issue 1930-1938* (Syracuse University Press, New York, 1975).

[T]hough the African in Kenya has shown that he is anxious to participate in trade and industry . . . [h]is initial attempts in this direction have not been successful, mainly because of his lack of experience in business. I think that the *Kikuyu* are likely to realize the advantages more quickly than others.⁷⁹

One consequence of such stereotyping was the creation of ethnic hierarchy and the sharpening of consciousness toward ethnic identity.⁸⁰ Perhaps this explains why the *Kikuyu*, more than any other ethnic community, were more readily integrated into the emergent capitalist economy. And because of the proximity to the white highlands, a significant portion of their population committed to the European way of life and, thus, achieved the greatest social mobility. Other factors such as landlessness and population growth motivated their mass movement to the Nairobi cosmopolitan area to look for jobs. It is thus not surprising that the *Kikuyu* were the first to agitate against the colonial state.

To the colonialists, the ability to cope with dissent depended on "fragmented local containment of African political and economic sources and their representation in state institutions according to their ethnic categories."⁸¹ The policy worked in so far as it decentralized dissent. The ethnic groups were never able to ferment a national uprising against the very unpopular land policies. Each group was on its own. The Mau Mau revolt exemplifies this fact. Frank Furedi described the revolt as a "squatter movement which emerged out of lengthy agrarian struggle between *Kikuyu* squatters and the European settlers."⁸² Leaving each ethnic group to fend for itself created a deep sense of belonging and affection amongst its members, which de-colonization with all its plausible rhetoric of nationalism or democracy never erased.

The impact of colonialism in the ethno-political relations can be summarized as follows: First, the boundaries created by colonial administration defied the primordial geographical structure of the Kenyan as well as the other East African communities. Technically, the ethnic groups were unified (in a very informal sense) in the state system. Second, the colonial

79. V.A. Madison, *Schemes of Assistance to African Industrialists, Artisans and Businessmen*, Sept. 11, 1956, MCI/6/782, KNA quoted in DAVID HIMBARA, *KENYAN CAPITALISTS, THE STATE AND DEVELOPMENT* 36 (1994).

80. Lonsdale, *supra* note 21, at 93. No wonder, according to Henry Mworira, the first editor of the vernacular newspaper, *Mumenyereri* (Guardian), it was the *Kikuyu* who needed democracy and not any other of the Kenyan ethnic groups. *Id.* at 96.

81. John Lonsdale & Bruce Berman, *Coping With the Contradictions: The Development of Colonial State in Kenya*, 20 J. AFRICAN HIST. 505 (1979).

82. Frank Furedi, *The Social Composition of the Mau Mau Movements in the White Highlands*, 4 J. PEASANT STUD. 1 (1974).

policy incorporated ethnic flavor in its administrative system. Thirdly, it created a system of uneven development thus magnifying ethnic cleavages. Finally, it encapsulated Christian religious tendencies by allowing missionary activity to "pacify" the ethnic groups so as to ease political domination. The interplay of these factors raised ethnic consciousness to be part and parcel of Kenya's political life and has so persisted until today.

C. *The "Ethnic" Factor in the Independence Movements*

The initial phases of organized political mobilization were a function of ethnic or sub-ethnic contests against local problems and a reaction toward the unpopular British policy of indirect rule. The political agenda, with which they were later associated, reflected, not the clear-cut aspiration for an independent African state, but a localized opposition to singular aspects of colonial policy or law. This was because of the fragmentation of the African population. The colonial administration had stabilized ethnic boundaries through the system of reserves thus limiting the ability of Africans to forge a trans-ethnic political movement. Similarly, the exclusion of African farmers from the market economy, by denying them the opportunity to grow and market cash crops, further hampered such movement.⁸³ Instead, it perpetuated and strengthened local loyalties. Secondly, the settler-dominated political scene offered little room for the development of African politics. Abject poverty compounded by lack of education, racial segregation, and diminished communication capabilities, limited the functioning of African politicians as national figures. From the beginning, African political activity in Kenya was besieged by ethnic parochialism, a factor that not even independence and all its plausible rhetoric of "*Umoja na Nguvu*" (unity is strength) has been able to dislodge. Thirdly, there was a total lack of a shared discourse or conceptual language of rights and obligations between the African politicians.

Authors such as Frank Furedi,⁸⁴ Bruce Berman,⁸⁵ John Lonsdale,⁸⁶ and Tabitha Kanogo⁸⁷ acknowledge that political activity amongst the *Kikuyu* youths in and around the 1920s was a product of disaffection to the land alienation policies, and was initiated by those who had some form of missionary education. The Young *Kikuyu* Association (YKA) and the *Kikuyu* Central Association (KCA) formed in 1920 and 1924 respectively,

83. Chege, *supra* note 74, at 100.

84. FRANK FUREDI, *THE MAU MAU WAR IN PERSPECTIVE* 76 (James Currey ed., 1989).

85. CONTROL & CRISIS IN COLONIAL KENYA, *supra* note 41, at 230.

86. *Id.*

87. KANOGO, *supra* note 65, at 106.

championed the interests of *Kikuyu* culturalism that espoused anti-settler sentiments and opposed Christianity—especially its teaching against female circumcision. Because of the narrow focus, the Kenyan African Union (KAU) and KCA never made inroads into the mainstream of anti colonial politics of the time. They were dominated by the “petit-bourgeoisie,” had no plausible agenda to which popular support could be anchored, and were bereft of any “coherent social programme.”⁸⁸ The same fate also befell the North Kavirondo Central Association of the Abaluhya of Western Kenya; the Ukamba Members Association (UMA); and the Taita Hills Association (THA).⁸⁹

The onset of the Mau Mau revolt in 1950 considerably changed the political landscape.⁹⁰ The oathing ceremonies that the young *Kikuyu* fighters underwent reinforced their sense of ethnic identity. But that said, the revolt also revealed the difference between the elitist members of the *Kikuyu* community who perceived themselves as above ethnic politics and the lower rank and file whose motivation to fight off the European rested on his seared economic condition. The elitist group (also the political party leaders) detested Mau Mau methods.⁹¹ The declaration of the state of emergency on October 20, 1952, which resulted in large scale arrests and detention of many Mau Mau activists,⁹² and the subsequent reprisal by the colonial authorities may have limited the spread of the Mau Mau to other ethnic groups in Kenya.⁹³ However, its aftermath revealed that the colonial establishment and the settler ideology that it professed could no longer withstand the political challenge from majority Africans. As Furedi notes:

88. FUREDI, *supra* note 84, at 76.

89. North Kavirondo Central Association (NKCA) was formed in 1932 to protect the interests of the local *Abaluhya* communities who feared that the discovery of gold might trigger a gold rush. It lost its appeal when gold prospecting stopped. D.N. Sifuna, *Nationalism and Decolonization*, in THEMES IN KENYAN HISTORY 186, 189-96 (William R. Ochieng ed., 1990). Ukambani Members Association (UMA) was formed in 1938 to protest impending destocking decree. By this decree the colonial government intended to take all the cattle from *Ukambani* as a supply to the meat factory at Athi River. Taita Hills Association (THA) was formed to agitate for more land for the expanding Taita population.

90. See generally FUREDI, *supra* note 84, at 76.

91. *Id.* at 113. Furedi quotes a remark by one KAU leader who said, “Mau Mau was started by the ordinary people and when we leaders found out about it we were very surprised. I didn’t like people being forced to join an organization that they didn’t want to join.” *Id.*

92. *Id.* at 118.

93. *Id.* at 143.

Although the Mau Mau had been defeated militarily, the scale of the resistance had shown that a European settlor-dominated Kenya was not viable. It was clear that the existing form of state structure could not guarantee stability; on the contrary it itself contributed to the build up of tension and disaffection.⁹⁴

The 1957 elections, conducted under the Lyttelton constitutional arrangements, formed a watershed in Kenya's political history.⁹⁵ For the first time, African members of the legislative council were elected through popular vote. This reinvigorated claims by African politicians of more African involvement in the political life of the country. The claims were backed by boycotts and refusal to cooperate in the workings of a government that did not respect the majority opinion.⁹⁶ However, it was not until 1960 when Kenyan National African Union (KANU) (currently the ruling political party in Kenya) was formed that party politicking emerged as a strong force in the movement toward independence. The reason for this lies in the broad ethnic support that the party got from its inception. African Nationalism was propagated instead of *Kikuyu* or *Luo* nationalism, the narrow focus to which little appeal could be attached. African nationalism could only be propagated within a territorial frame. Geertz notes:

The first formative stage of nationalism consisted essentially of confronting the dense semblage of cultural, local, and linguistic categories of self identification and social loyalty that centuries of uninstructed history had produced with a simple abstract, deliberately constructed and almost painfully self conscious concept of political ethnicity—a proper “nationality” in the modern manner . . . The men who raised this challenge, the nationalist intellectuals were thus launching a revelation as much cultural, even epistemological as it was political.⁹⁷

Most importantly, KANU was supported by the *Luo*, a significant population living in the western part of the country. The other ethnic groups were suspicious of the *Luo* and *Kikuyu* domination and thus formed Kenya African Democratic Union (KADU) to function alongside KANU. The difference between the two parties reflected their ethnic composition. KADU's main fear was that KANU could use its demographic superiority to grab all the land left behind by the European

94. *Id.* at 161.

95. GHAI & MCAUSLAN, *supra* note 37, at 72.

96. *Id.* at 73.

97. CLIFFORD GEERTZ, *AFTER REVOLUTION, INTERPRETATION OF CULTURES* (Basic Books 1973).

settlers. They thus advocated for “decentralization of power so that power is shared between many,” a regional system of government. KANU on the other hand supported the creation of a strong central government.

The contestation between the two parties is important to this discourse as it illustrates how resource competition engraved ethnic affirmations just before independence. The *Kikuyu* aspirations favored the centrality of land ownership and dismissed any historical claims. “Land is so important to the economy of Kenya that it must ultimately be under control of the central government,” one *Kikuyu* elite argued.⁹⁸ According to him, digging back in “history in order to find which tribes originally occupied this land or that, would only lead to unrest.”⁹⁹ What mattered more was the economy of the situation.¹⁰⁰ At that time, KADU leaders Daniel Arap Moi, Wafula Wabuge, and Ole Tipis refuted this position on the grounds of unfairness. They argued that independence should confer benefit to all. After independence, the political parties, despite their differences, formed a coalition government. But, the polarity of views, especially as regards issues of land and minority interests, remained unsolved.

III. THE DECLARATION OF INDEPENDENCE AND ITS AFTERMATH

Immediately after the collapse of colonial administration, two rather confounding processes of social mobilization emerged. The first was the claim to benefits of “*uhuru*” (independence) based on ethnic aggrandizement, while the second was the overwhelming and euphoric support for the establishment of African majority government, which was seen by many as a triumph of nationalism. The two processes were important because they influenced normative formulations at the very highest levels, especially at the drafting stages of Kenya’s independence constitution, and later defined the contradictory political approaches to legal reform in Kenya’s post independence era. Be that as it may, there has never been an open and clear acknowledgement of “ethnicity” or the differentiated ethnic claim to political power, despite the same being a major influence on political activity since independence. That is what makes the 1963 *Majimbo* Constitution a unique landmark in the trajectory of the legal reform process in Kenya. The assertion by leaders, such as Daniel Arap Moi, that their ethnic communities needed a political framework to

98. Margaret Wangui Gachihi, *The Role of Kikuyu Women in the Mau Mau* (1986) (unpublished M.A. thesis, University of Nairobi) (on file with author).

99. *Id.*

100. *Id.*

participate in government was remarkable and should have inspired a much more articulate constitutional arrangement than it did. However, the support that the majority of Kenyans gave to the KANU leadership and the thought that civic nationalism could only be achieved if ethnicity was eradicated, made nonsense of the minority claim. But today, Kenyans are all too aware of what the forty-one years of KANU rule has done to their country.

The *Majimbo* debate has recently surfaced again.¹⁰¹ This time around, the claim for *Majimboism* is touted as a warning to the *Kikuyu* opposition conglomerate that unless they succumb to the demands of KANU, the benefits of a unitary state may be unavailable to them even if they take over leadership. It is thus noteworthy to examine some of the salient features of the 1963 *Majimbo* Constitution because, after all, the proponents of the idea are keen to infer to its existence. The 1962 Lancaster Conference and the subsequent meetings in Nairobi that resulted in the adoption of the Constitution were bedeviled by claims for recognition of minority interests. It was thus not a surprise that the 1963 self-government constitution recognized some form of Federalism—*Majimbo*, to provide opportunity for minority groups to participate in governance. The Constitution provided for the division of the country into seven regions, each with a regional assembly vested with legislative as well as executive powers.¹⁰² Specifically, regional executive powers were to be exercised by a committee of the Assembly known as the Finance and Establishment Committee, but the Assembly was at liberty to delegate specific duties to other committees.¹⁰³

The relationship between the centre and the regions was not clearly spelled out. While the regions had powers to legislate on matters of agriculture, archives, auction sales, primary and secondary education, housing, medical, and others, the centre could also do the same.¹⁰⁴ Secondly, the centre had the powers to intervene in matters within the competence of the Regional Assembly. For example, under section 106(2) of the Constitution, the central government could “give directions to the

101. See, e.g., *Tread Carefully on Majimbo*, SUNDAY NATION, Nov. 18, 2001, at 11 (printed by DAILY NATION, Nairobi).

102. GHAI & MCAUSLAN, *supra* note 37, at 196. The Regional assembly was headed by a civil secretary appointed by the public service commission, and was in charge of the organization and the administration of civil service in the region. Kiraitu Murungi, *The Case of a Unitary State*, EAST AFRICAN STANDARD, Dec. 9, 2001, at 13 (Nairobi).

103. GHAI & MCAUSLAN, *supra* note 37, at 197.

104. The competence of the center was placed at the higher levels—higher education, marketing, and export of agricultural products, but in practical terms, the jurisdiction overlapped. *Id.* at 198.

regional assembly as appeared to it necessary or expedient” so as to ensure the compliance of the regional assembly.¹⁰⁵ This section provided that:

The executive authority of a Region shall be so exercised as . . . (a) not to impede or prejudice the exercise of the executive authority of the Government of Kenya; and (b) to ensure compliance with any provision made by or under any Act of Parliament applying to that Region.¹⁰⁶

According to Ghai and McAuslan, the regions had very little autonomy if any.¹⁰⁷ Their authority was precarious and could be impeded by the central government at any time. Secondly, the *Majimbo* provisions were rigid and complicated to the extent that they would have constrained economic planning and development.¹⁰⁸ This was so because the country did not have any “conventions for co-operation” between government and other institutions.¹⁰⁹ In the end, the authors observe that:

It is important to remember that the regional structure was a new one, and there had to be devolution of powers from the Centre before it could begin to function. Thus it lacked a tradition of government, no vested interests had yet been created, and the machinery for administration had to be established, often by transferring personnel from the central establishment to the regional. Under the circumstances, the odds against the success of the regional system were many and great.¹¹⁰

Despite its shortcomings, the *Majimbo* Constitution accommodated the interests of all communities, the vocal and articulate as well as those that Atieno-Odhiambo calls the “mute society.”¹¹¹ It also symbolized a discontinuance from the past, an impetus toward autochthony, and most importantly the attempt at harnessing the rich ethnic diversity toward national development. It indicated a move toward multi-ethnic coalitions that the country so much needed to deny any single ethnic community a chance to dominate others simply on account of their numerical superiority. When the strong KANU political elite overthrew the *Majimbo* Constitution very soon after its adoption, the process of democratic consolidation was obviated. It is for this reason that the independent Kenya never achieved a complete break from social institutions that

105. *Id.*

106. *Id.* at 200.

107. *Id.*

108. *Id.* at 218.

109. GHAI & MCAUSLAN, *supra* note 37, at 218.

110. *Id.* at 200-01.

111. Atieno-Odhiambo, *supra* note 39, at 179.

characterized its colonial past. As observed by Lonsdale, "colonialism was a social process that de-colonization continued."¹¹²

A. *The Rise of Kikuyu Nationalism*

When Kenya attained independence in 1963 and Jomo Kenyatta became President, he sought to accentuate *Kikuyu* hegemony. Studies have shown that Kenyatta consolidated his leadership by increasing members of his *Kikuyu* tribe both in the civil service and leading government parastatals. For example, in 1969, 1974, and even 1979, thirty percent of the cabinet members were *Kikuyu*.¹¹³ Likewise, the *Kikuyu* private sectors were aided by the government. Scholars point to the Gikuyu Embu Meru Association (GEMA) Holdings Limited which was established in 1973 as one such enterprise.¹¹⁴ The so-called policy of "Africanization" aided the entrenchment of *Kikuyu* capitalists into the economy, while excluding other ethnic groups.¹¹⁵ When it came to the allocation of land, especially within the white highlands formerly occupied by European settlers, the *Kikuyu* were given the utmost preference.¹¹⁶ The influx of the *Kikuyu* into Rift Valley, a predominantly *Kalenjin* area, attracted opposition from local politicians at the time,¹¹⁷ and has over the years been the subject of a great deal of contention between the two ethnic groups.

Political perception prevalent within the other ethnic groups was that of *Kikuyu* dominance. One *Luo* parliamentarian complained in Parliament that:

Today when we look at the top jobs in the government, we find that in most of the ministries, including certain cooperatives, practically all these have been taken over by people from central province (i.e., *Kikuyu*). If one tribe alone can take over about seventy-two percent of Kenya jobs, and they are less than two million people, how can you

112. John Lonsdale, *The Depression and the Second World War in the Transformation of Kenya*, in *AFRICA AND THE SECOND WORLD WAR* (David Killingray & Richard Rathbone eds., 1986).

113. Throup, *supra* note 6, at 41.

114. NICOLA SWAINSON, *THE DEVELOPMENT OF CO-OPERATIVE CAPITALISM IN KENYA 1918-1977* 57 (Berkeley Univ. of California Press 1975).

115. DAVID HIMBARA, *KENYAN CAPITALISTS, THE STATE AND DEVELOPMENT* 33 (Lynne Rienner Publishers 1994).

116. Nicholas Nyangira, *Ethnicity, Class and Politics in Kenya*, in *THE POLITICAL ECONOMY OF KENYA* 15, 27 (Michael G. Schatzberg ed., 1987).

117. *Id.* at 29. The late Marie John Seroney, a *Nandi* politician, attracted ire from KANU stalwarts in the late 1960s for spearheading the "Nandi Declaration" which called for stoppage of land allocation to the *Kikuyu*. *Id.*

expect twenty-five percent of the jobs to go to more than eight million people who belong to other tribes.¹¹⁸

In order to eliminate opposition to his regime by other ethnic groups, especially the *Luo*, Kenyatta outlawed opposition politics. When Oginga Odinga, a maverick *Luo* politician resigned his post of Vice President in the Kenyatta government and announced his intention to form the Kenya Peoples Union (KPU), the government hurriedly changed the constitution to require that MPs who seek to join the opposition party must first resign their parliamentary seat and face re-election.¹¹⁹ Other than law, the government resorted to political assassination to silence its critics. The unexplained deaths of Argwengs Kodhek, J.M. Kariuki, Tom Mboya and perhaps Ronald Ngala had all been accredited to the Kenyatta government.¹²⁰

Kenyans had fallen victim to *Kikuyu* sub-imperialism and just like its colonial predecessor, the Kenyatta regime sterilized political activity of other ethnic groups and silenced their voices. The exclusion of segments of society from political and economic participation was promoted by the strengthening of the central administration. Anyang Nyongo has described this as the process of disintegration of national coalition that brought independence.¹²¹ By the time of his death in 1978, his tribes, men and women, were virtually controlling all the sectors of the economy and running all political institutions.

B. The Moi Era and the Politics of Ethnic Mobilization

The significance of the Moi regime to this discourse is two-fold. First, events have occurred during this era that exemplify how ethnic mobilization, coupled with a promise of tangible economic and political benefit, may lead to inter-ethnic violence. It is during this regime that the simmering discontent of the marginalized tribes, especially in the Rift Valley and Coast province, have been aroused through political subterfuge to justify a full scale inter-ethnic conflict. Second, and most surprisingly, it is during this regime that political pluralism and the dreams for constitutional reform have become a reality. The two rather contradictory schemes of political action confirm just how fluid and susceptible the

118. G.F. Oduya, *National Assembly Debates* XIV, 6th Session, Feb. 27, 1968, quoted in VICTOR OLURUNSOLA, *THE POLITICS OF CULTURAL SUB-NATIONALISM IN AFRICA* 22 (1972).

119. MULTI-PARTY POLITICS IN KENYA, *supra* note 1, at 13.

120. Throup, *supra* note 6, at 50.

121. P. Anyang Nyongo, *Political Instability and Prospects of Democracy in Africa*, 13(1) *AFRICA DEV.* 72 (1988).

regime has been. Marked with a wavery approach to national issues and tethering support from ethnic lords, the regime has survived some of the most difficult times in Kenya's history—the attempted military coup in August 1982,¹²² the murder of John Robert Ouko,¹²³ and the withdrawal of support from international donors,¹²⁴ to mention but a few.

From the day Moi took leadership, his ability to maneuver the ethnic equation to his benefit has not been in doubt. When he came to power, he proclaimed that he would follow the footsteps of his predecessor, Kenyatta, so as to gain support from the *Kikuyu*. Having come to power amidst international economic changes that reduced real income levels of Kenyans, the Moi clique did not have an economic base upon which to anchor the ethnic political domination. Almost immediately he embarked on the systematic replacement of *Kikuyu* in high positions, by members of his *Kalenjin* tribe. Like his predecessor, Moi did not tolerate any form of dissent to his authoritarian rule. Arbitrary arrests and detention of lawyers,¹²⁵ academicians,¹²⁶ politicians and all other persons deemed to be in opposition was commonplace. The aura of authoritarianism created an atmosphere where *Kikuyu* hegemony could easily be replaced with *Kalenjin* autocracy. To the extent that the regime was forced to reckon with claims for political pluralism, the “*Kalenjin*” autocracy may have much more to deal with before they can assume complete control of Kenya's economic as well political institutions, like the *Kikuyu* did in the 1960s and 1970s.

C. *The Return of Multi-Party Politics*

At the beginning of the last decade, the regime came under very severe opposition from the local NGO community, religious groups, and professionals.¹²⁷ These groups agitated for the reintroduction of multi-party politics. The government insisted that Kenyans were not ready for multi-partyism because it was divisive and a plot to reinstate the *Kikuyu* hegemony since “all President Moi's critics were *Kikuyu*.”¹²⁸ Pressure

122. MULTI-PARTY POLITICS IN KENYA, *supra* note 1, at 31.

123. *Id.* at 58-60.

124. *Id.* at 84-86.

125. Stanley D. Ross, *The Rule of Law and Lawyers in Kenya*, 30 J. MOD. AFRICAN STUD. 421, 422 (1992); PAUL MWANGI, *THE BLACK LAW: CORRUPTION AND POLITICAL INTRIGUE WITHIN KENYA'S LEGAL FRATERNITY* 154 (2001).

126. Korwa Gombe Adar, *Human Rights and Academic Freedom in Kenya's Public Universities: The Case of the University Academic Staff Union*, 21 HUM. RTS. Q. 179 (1999).

127. MULTI-PARTY POLITICS IN KENYA, *supra* note 1, at 55-58.

128. *Id.* at 63.

mounted from internal as well as external forces. The international donor agencies exacerbated strain on the Moi regime to accommodate opposition groups.¹²⁹ At the same time the opposition politicians backed by a powerful civil society movement, the Law Society of Kenya (LSK) and church groups threatened mass action and complete disruption of public activity unless reform was undertaken. In July 1990, the government acted swiftly to detain Matiba, Rubia and Odinga who were seen as the leaders of the more militant wing of the pro-reform movement.¹³⁰ The detention was followed by the formation of what the KANU leaders termed a commission to investigate the party's electoral and disciplinary procedures.¹³¹ George Saitoti, the Vice President, headed the commission. Its members were Shariff Nassir, Biwot, Mwangale, Oloo Aringo, Kibaki, John Keen, trade unionists, women representatives, lawyers and church organizations.¹³² The commission went round the country collecting views of the public but was stunned at how the KANU government enjoyed very little support. Speakers to the commission's forum "questioned the continuation of the single party state" and "proposed a two term limit for the presidency."¹³³ As it became evident that the narrow one party political arena could not withstand the pressure, Moi hurriedly changed the Constitution to allow for multi-partyism in 1991.¹³⁴

It is the political developments after the amendment of the constitution that illustrates how ethnic equation became vulnerable to Moi's manipulative tactics. Though preceded by political euphoria in the form of street demonstrations and civil society agitation, the change took the political groups by surprise. The ethnic groups unfavored by the Moi regime hurriedly and disjointedly formed political parties.¹³⁵ The *Luo* and

129. In November 1991, western public donors withheld more than \$350 million in aid to Kenya (including \$28 million from the U.S.) pending economic and social reforms.

130. MULTI-PARTY POLITICS IN KENYA, *supra* note 1, at 63.

131. *Id.* at 68 quoting WKLY. REV., July 6, 1990, at 9-10.

132. *Id.*

133. *Id.*

134. *Id.* The announcement for the change was surprisingly made at the KANU delegates meeting in December 1990. Though called primarily to debate the report of the Saitoti Commission, many speakers at the conference opposed the move to pluralism, with some even declaring that legalizing opposition parties would be akin to introducing chaos in the country. "The choice," according to KANU's Organizing Secretary, "was between KANU and violence." WKLY. REV. Dec. 6, 1991, at 5. After all the debate, the president announced that section 2(a) of the constitution would be repealed and multi-party politics introduced; a move that was supported unanimously by the delegates (even those who had voiced opposition earlier).

135. For a discussion of how the parties were formed, see generally MULTI-PARTY POLITICS IN KENYA, *supra* note 1.

the *Luhya*, joined by a minority of *Kikuyu* “young turks,” formed the Forum for the Restoration of Democracy (FORD)—party which later split into FORD Kenya and FORD Asili, the later being predominantly *Kikuyu* and headed by Kenneth Matiba after his return from hospitalization in London, and the former remaining a *Luo* and *Luhya* party. Another party formed by the *Luos* was the National Democratic Party of Kenya (NDPK) of Stephen Omondi Oludhe.¹³⁶ The *Kalenjin* tribes in the Rift Valley, large sections of the Eastern, North Eastern and Coast provinces, were firmly in support of the ruling party KANU. The announcement that multi-partyism would be allowed aroused considerable excitement within *Kanu* itself. Moderates in the party, who had hitherto supported reforms, sensing that their party was relenting on its promise, opted out to join other parties or form new ones. For example, Mwai Kibaki, the then minister for health, resigned and formed the Democratic Party (DP).¹³⁷ The support of this party was drawn mainly from the *Kikuyu*, *Meru*, *Embu* (the old GEMA alliance) and some parts of Kambaland. The *Kissi* had their Kenya National Congress led by George Anyona.

It is important to note that prior to this development, the Moi regime had used all means possible to suppress people's freedoms. The entire civil society and opposition groups could only think “negatively” of what they opposed. They were thus never oriented toward the devolution of concrete political agenda, other than ethnic allegiance, in support of which they could rally. The opposition parties thus became by their composition, representative of the major Kenyan tribes. This development changed Kenya's political landscape by arousing ethnic consciousness to the contestation for political leadership. It also embodied a real challenge to the incumbent regime.

D. *Ethnic Cleansing: A Political Tactic?*

What the post-independence history of Kenya has shown is that when a repressive and autocratic incumbency in a multi-ethnic state is threatened by reforms, it falls back to its ethnic sympathizers for political support. This retreat often triggers ethnic friction and animosity and is perhaps responsible for the intractable conflicts currently plaguing the continent. Just before the constitutional amendment allowing for multi-partyism, Moi had in a number of occasions castigated the proponents of

136. This party was to become significant later, in 1998, after the fallout between the *Luo* and the *Luhya* ethnic groups in the FORD(K). The *Luo*, led by Raila Odinga moved out to join NDPK leaving Wamalwa Kijana and his *Luhya* followers in FORD(K).

137. *Id.*

multi-party politics as “anarchists and “tribalists.”¹³⁸ Secondly, the regime had always been aware of minimal support from the majority ethnic groups, whose votes combined had the potential of dislodging it from power. Moi had no option but to fall back to his *Kalenjin* group for support. From a political standpoint, this was realistic approach given that in total, the *Kalenjin* tribes accounted for twenty-six constituencies, which under Kenya’s electoral system meant the same number of seats in parliament. But because the *Kalenjin* total support was doubtful, as Moi is from a minority Sub-tribe (Tugen), he made appeal to ethnic identity. Through his *Kalenjin* ministers and party leaders, a vigorous campaign was made to unify the *Kalenjins*. The *Kalenjin* groups were urged to support Moi and his party, KANU. A call for reclamation of land that had taken by aliens became the rallying cry against all non-*Kalenjin* residents in the Rift Valley province. The hatred that the land question was able to generate within a short period of time is indicative of poor policies on resource distribution pursued by the successive government since independence. The Moi regime and the *Kalenjin* die-hards were presenting to their folk an opportunity for correcting the “wrongs” that had been committed against them in exchange for their votes.

Attacks on non-*Kalenjin* residents in Rift Valley began in 1991 after declaration by *Kalenjin* politicians that people from other ethnic groups were not welcome there. The killings were done by chopping heads, limbs and genitals in a ritualistic fashion. The women were raped, their breasts cut and bellies opened up to determine if they were pregnant. The brutality with which these atrocities were conducted seems to suggest that a clear message of terror was being passed to the non-*Kalenjin* communities.¹³⁹ The victims were supposed anticipate the horrific consequences that would befall them if Moi was removed from power. Violence soon spread to the other parts of the country. *Kikuyu* and *Luo* ethnic groups were generally displaced, and their demographic composition greatly altered. According to one scholar, the ethnic cleansing “worked a political miracle for the regime” because they “helped unite fractious *Kalenjin* sub-groups while ‘opening up’ land that would be taken over by some *Kalenjin* and driving likely opposition voters out of Rift Valley constituencies.”¹⁴⁰ Government complicity was apparent, despite denial and inaction.

138. See generally MULTI-PARTY POLITICS IN KENYA, *supra* note 1.

139. This author personally witnessed the wanton destruction of his farm near Mateitei in the Nandi district. His farm worker was hacked to death with a machete, while the farm animals were herded into the shade and burnt to ashes.

140. Frank Homquist & Michael Ford, *Stalling Political Change: Moi's Way in Kenya*, in CURRENT HIST., Apr. 1995, at 177.

According to the Human Rights Watch Report published in 1993, the prediction of Moi, that multi-partyism would bring ethnic animosity, was fulfilled.¹⁴¹ However, the report also observed that:

[F]ar from being the spontaneous result of a return to political pluralism, there is clear evidence that the government was involved in provoking this ethnic violence for political purposes and has taken no adequate steps to prevent it from sprawling out of control.¹⁴²

One *Luo* member of parliament vehemently protested the government's inaction in parliament and put the blame squarely on his *Kalenjin* counterpart. He removed his shoes in parliament and banged them on the table saying:

You are killing my people . . . I don't want murderers to interrupt me on a point of order . . . my people are being killed by KANU . . . and the police and the provincial administration in Rift Valley just watch when my people are being killed . . . If the *Kalenjin* continue behaving this way we will go beyond Kericho.¹⁴³

Thus, when the elections were held on December 1992, Moi won with a majority of seats.¹⁴⁴ The outcome of the 1992 elections affirmed the primacy of ethnicity in Kenya's politics. As observed by one writer:

The events of 1992-94 clearly demonstrated the primacy of individuals and of ethnicity over policy ideology and class, though the ethnic identification revealed was more a rational reflection of economic self-interest than some 'traditional' pattern of political orientation. The previous 30 years of neo-patrimonial ethnic and regional clientage have created an enduring culture of sectional competition for power and for the goods that fundamental principle remained—that the competition

141. See generally *Divide and Rule: State-Sponsored Ethnic Violence in Kenya*, HUM. RTS. WATCH, Nov. 1993, at 1, 3.

142. *Id.* at 1.

143. WKLY. REV., Mar. 27, 1992. This Newspaper also reported that another *Luo* cabinet minister, defying the joint accountability rule, asked his fellow cabinet minister (a *Kalenjin*) to "withdraw his army from the battlefield" before he could talk in parliament about peace. *Id.*

144. The total number of political parties that participated in the elections was ten. KANU won the presidential seat with a total of 1,962,866 votes; followed by FORD(A) of Kenneth Matiba 1,404,266; DP of Mwai Kibaki 1,050,617; and FORD(K) of Jaramogi Oginga Odinga 944,197. MULTI-PARTY POLITICS IN KENYA *supra* note 1, at 435. As far as parliamentary seats were concerned, KANU had 100, FORD(K) 31, FORD(A) 31, DP 23, KNC 1, KSC 1, and PICK 1. *Id.* at 443.

for power would be fought between ethnic coalitions built around powerful individuals.”¹⁴⁵

After the 1992 elections, many observers thought that the violence would end. But this was not to be so. The ethnic violence erupted again in 1994. Human Rights Watch documented the displacement of approximately 4,000 *Kikuyus* from Trans-Mara in Narok district; 2,000 *Luo* residents in Kilifi district, and serious skirmishes in the Burn-Forest area in Rift Valley.¹⁴⁶ The same violence occurred again just before the 1997 general elections and continues today in a sporadic fashion.¹⁴⁷

It seems that the ghost of ethnic violence is yet to be exorcised. A parliamentary committee appointed in September 1992 (Kiliku Commission) to investigate the conflict, found that political motivation from KANU politicians was the cause. In June 1998, Moi appointed a judicial commission of inquiry to investigate the “truth” about the ethnic violence.¹⁴⁸ In Moi’s own words, “In my search for peace, I want a judicial commission of inquiry into what happened in 1992 and 1998 in Rift Valley and other parts of the country.”¹⁴⁹ After a series of hearings in which the commission heard evidence from victims and political leaders, a report was prepared and submitted to the government. The report has not been made public despite demands from various sections of society.¹⁵⁰

The fact that ethnicity is a tool for political machinations often provides it with the opprobrious label linking it to war and upheaval. The Moi era has illustrated that until ethnic sentiments are deliberately invoked and materially supported by a cognitive political constituency, ethnic pluralism is not a threat to democracy.

145. MULTI-PARTY POLITICS IN KENYA, *supra* note 1, at 591.

146. *Multi-Partyism Betrayed in Kenya: Continuing Rural Violence and Restriction of Freedom of Speech and Assembly*, HUM. RTS. WATCH 4-8 (July 1994).

147. See, e.g., David Mugonyi, *NCKK Report Blames Politicians for Feuds*, DAILY NATION, June 27, 2001, at 4 (Nairobi); see also *KANU Dismishes Clashes Report*, DAILY NATION, June 28, 2001, at 6 (Nairobi).

148. Gichuru Njihia, *Judges to Probe Ethnic Clashes*, DAILY NATION, July 1, 1998, at 2 (Nairobi).

149. *Id.* Justice Akilano Akiwumi of the Court of Appeals was appointed to head the commission. Other commissioners included Justices Elkana Bosire and Sarah Ondeyo. Caleb Atemi, *Akiwumi Heads Clashes Probe*, DAILY NATION, July 2, 1998, at 1 (Nairobi).

150. Francis Thoya, *Lawyers Demand Akiwumi Report*, DAILY NATION, Feb. 21, 2000, at 11 (Nairobi); see also Dennis Onyango, *Akiwumi Report and the Scars of Violence*, SUNDAY NATION, Mar. 18, 2001 (printed by DAILY NATION, Nairobi).

IV. COPING WITH ETHNIC DIVERSITY

A. *De-Mystifying Ethnicity*

It has become nearly impossible to discuss devolution of political power in African countries without considering their ethnic configuration. The talk on whether this "tribe" may lose power to that "tribe" or that this "tribe" may retain power because it has the support of those "tribes" has become so commonplace that no presidential election in Africa can now be said to be devoid of ethnic considerations.¹⁵¹ Lack of ideological commitments has, in whole, given way to concerted appeal for ethnic support. Thus, African multi-party elections have been reduced to mere census for ethnicities in the country. Ethnic identities in African party politics are, according to one analyst, "prior, indigenous, and totalizing, while nation-states are recent, imposed and superficial."¹⁵² Thus when something goes wrong, be it as a result of the improper management of the election process itself, or the abrogation of rights of one community by government, ethnic alliances are quickly formed to provide a rallying ideology for violence. If response from the government is slanted in favor of one ethnic group, a major national catastrophe is likely to occur. The Rwandan genocide, Sudan civil war, Somalia, and even the intractable civil war in Angola, offer very lucid examples of the vulnerability of a state to the manipulation of the ethnic psyche.¹⁵³ Even in cases where outright violence seems unlikely because of strong government, the preponderance of ethnically motivated political action on the part of power wielders may accentuate hatred amongst groups and thus propagate a fertile ground for future violence.

There is no consensus amongst scientists as to why ethnicity, and not anything else, is a preferred rallying ground for political action. Factors that include search for emotional security, circumstances of people's lives and rational grounds of utility in the search for access to resources, have all

151. Deborah Kaspin, *Tribes, Regions and Regionalism in Democratic Malawi*, in *ETHNICITY AND GROUP RIGHTS* 464 (Ian Shapiro & Will Kaymlicka eds., 1997). Political competition between the *Xhosa* and the *Zulus* nearly derailed South Africa's first democratic elections. The 1994 multi-party elections in Malawi exposed tribal divisions in the country with President Bakili Muluzi, a *Yao* from South claiming *Yao* constituency; Hastings Banda, a *Chewa* from the centre, claiming a *Chewa* constituency; and Chakufwa Chihana, a *Timbuga* from the north claiming a *Timbuga* constituency. *Id.* at 466.

152. *Id.* at 464.

153. Laurence Juma, *Human Rights Approaches to Peace in Sierra Leone: The Analysis of the Peace Process and Human Rights Enforcement in a Civil War Situation*, 10 *DENV. J. INT'L L. & POL'Y* (2002) (forthcoming).

been mentioned.¹⁵⁴ David Brown has observed that ethnicity is preferable because it benefits from the three factors.¹⁵⁵ He argues that ethnicity replicates “in the public and adult world, the functions performed in private and childhood environment by family.”¹⁵⁶ The ethnic group is seen by its members as:

[A] [p]seudo-kinship group which promises to provide the all-embracing emotional security offered by the family to the child; which offers practical support, in the form of nepotism, such as the family gives to its members when they interact with others; and which, precisely because it is based in ubiquitous family and kinship ties, is widely and easily available for utilization in politics.¹⁵⁷

Ethnicity in Kenya, just like in many African countries, has defied the popularly held view of the last century, that ethnic identities must and will fade away to be replaced by a less threatening civic nationalism.¹⁵⁸ The view, espoused by the independence fathers, accommodated their pursuit of power and blinded the unsuspecting public of the kleptocracy, indigenous spoliation, and the subterfuge with which ethnic affirmations became part and parcel of their rule. The results have been far-reaching. Political competition has become dependant solely on an ethnic power game that pits the larger tribes against one another, and subsumes the smaller ones in an intractable search for lucrative alliance. Economic well-being and sharing of the national “cake” has been slanted to benefit those ethnic groups that favor the ruling elite and so are the appointments to big jobs in the civil service and government-sponsored parastatals.

What then is the best strategy of coping with ethnic diversity in Kenya? To begin with, Kenyans must accept that ethnicity is not in itself a bad thing. The fact of being a *Kikuyu*, *Luo*, *Maasai* or *Luhya*, to name a few, does not in itself indicate difference in political opinion. Sociological factors intervene to influence one’s worldview. I have observed elsewhere that all societies take great pride in aspects of their culture such as food and dressing.¹⁵⁹ Further some scholars confirm that ethnic diversity in

154. David Brown, *Ethnic Revival: Perspectives on State and Society*, 11(4) THIRD WORLD Q. 1, 6 (1989).

155. *Id.*

156. *Id.*

157. *Id.* at 6-7.

158. Interestingly, this view supports the Marxist socialist theories, which equates ethnic conflict to immature class conflicts and anticipates the dissolution of ethnic identities in class identities.

159. Juma, *supra* note 153.

itself may not impede democratization.¹⁶⁰ There should thus be a greater willingness to accept "cultural pluralism" as a positive phenomenon.¹⁶¹ The trend in Kenya that exhibits a tendency to play down the importance of ethnicity and to devise institutions that would minimize its impact has failed.¹⁶² While ethnicity remains a forbidden topic in many arenas, and ethnic loyalties are erroneously perceived as fissiparous, national integration does not seem to gain ascendancy either. Thus, if truth be told, many African countries, Kenya included, appear to be incapable of finding ethnic *modus vivendi*, and a modicum of stability in unitary systems that ignore ethnic divisions.

I propose therefore, that an appropriate conceptual base for designing mechanisms of addressing the problems posed by ethnicity is that of "positive ethnicity." It is based on the notion that societal integration is best achieved through accommodation rather than by imposition. We can cope with ethnic diversity if we concentrate on its positive dimensions and work toward a policy of cultural pluralism rather than on suppression of diverse ethnic identities. Two factors underlie the evolution of such strategy. The first is that ethnicity in Kenya has proved to be disruptive of political structures only when these have sought to suppress the competing claims of ethnic groups for a share in political power and economic advantage, as well as for cultural expression. Second, that ethnicity needs to be acknowledged rather than ignored, through arrangements that induce inclusionary politics and creates structural incentives for inter-communal cooperation.¹⁶³

Positive ethnicity thus presupposes that the processes of ethnic interaction within a state are conceptualized as a shared culture of heritage, and a strategy for the achievement of economic, social, and political objectives. The two processes, which reflect both substantive and instrumental

160. H. Glickman, *Ethnic Conflict and Democratization in Africa*, quoted in Zeric Kay Smith, *The Impact of Political Liberalization in Ethnic Conflict in Africa: An Empirical Test of Common Assumptions*, 38 J. MOD. AFRICAN STUD. 21, 22 (2000).

161. European Institutions such as Organization for Security and Cooperation in Europe and the Council for Europe have, for example, developed guidelines for multi-ethnic countries on how to protect rights of the minority ethnic groups through legislation and autonomous local government. See generally MARINA OTTAWAY, *DEMOCRATIZATION AND ETHNIC NATIONALISM: AFRICAN AND EASTERN EUROPEAN EXPERIENCES* (Kathleen Lynch ed., Washington, D.C., Overseas Development Council 1994).

162. The *Kampala Declaration of 1991* explicitly rejected ethnicity, stating that political parties based on ethnic identities were not legitimate. The *African Charter on Human and Peoples Rights* (The Banjul Charter) avoided mention of ethnic groups and instead used "peoples" as constituent members of society.

163. See generally DONALD HORIWITZ, *ETHNIC GROUPS IN CONFLICTS* (Univ. of California Press 1985).

approaches, are not to be confounded. As people generate new responses to changed circumstances and bestow new meanings and weights on different aspects of their ethnic identity, these redefinitions guide further social and political behavior. The generative process and its inherent dynamism must be perceived as an asset, rather than a liability if the process is to have meaning.¹⁶⁴ The role of the state becomes crucial to this endeavor. As already illustrated in this article, imperialism gave rise to the exploitative authoritarian state that was obsessed with its civilizing role and was even seen by some as the protector. Nationalism has brought into being "soft" (democratic) or "hard" (dictatorial) regimes that have sought to "modernize" people in different ways. I argue that the state can now assume a different role. It can become a "negotiating table" or a "mediator," its ideological concerns notwithstanding. In the words of one scholar, the state may be conceived of:

[A]s an arena where social relationships can be renegotiated. The state in this image is delimited—the image has obviously something to do with the frequently observed marginality of organized politics . . . It is seen as a kind of market place.¹⁶⁵

The state can only act if it is so mandated by its constitutive instrument, the constitution. Which brings me to the point this article seeks to make: the problem of ethnicity in Kenya can and should be addressed by constitutional reform. This nevertheless implies that the pragmatic approach to constitutionalism now envisages the widening of the concept to include processes that ensure harmony in a multi-ethnic environment.

B. *Constitutionalism*

In Kenya, the quest for constitutional change has been aimed at redefining the extent of executive power and widening the parameters for the exercise of individual rights and freedoms. Indeed, this is what constitutionalism is all about—the establishment of a government that is "subject to restraint in the interest of the ordinary members of the community,"¹⁶⁶

164. This reasoning is not new. In analyzing the Indian situation with regard to the language, religion and political diversity, Paul Brass noted: "Objective differences between peoples are not only insufficient as basis of national formation but they are themselves highly variable. Especially in traditional societies in the early stages of social mobilization, it is misleading to think of gross differences in the religious and linguistic composition populations as givens or as immutably fixed." PAUL BRASS, *LANGUAGE RELIGION AND POLITICS IN NORTH INDIA* 12 (Vikas 1975).

165. Ashis Nandy, *The State of the State*, 269 SEMINAR 56-57 (1982).

166. OJWANG, *supra* note 24, at 2.

and the institution of an elaborate scheme of human rights guarantees and protection. Professor S.A. de Smith defines it as:

The principle that the exercise of political power shall be bounded by rules which determine the validity of legislative and executive action by prescribing the procedure according to which it must be performed or by delimiting its permissible content . . . constitutionalism becomes a living reality to the extent that these rules curb the arbitrariness of discretion and are in fact observed by the wielders of political power, and to the extent that within the forbidden zones upon which authority may not trespass there is significant room for the enjoyment of individual liberty.¹⁶⁷

Constitutionalism emerged in Europe during the bourgeoisie revolutions in the 17th and 18th centuries.¹⁶⁸ Its roots lie in the need of capitalism for "predictability, calculability and security of property rights and transactions."¹⁶⁹ Though the origin of the term had little to do with democracy, political freedoms or social justice, the concept has broadened over the years to become a key factor in the analysis of constitutional and democratic performance of governments.

The twin principles of separation of powers and the independence of the judiciary are an outgrowth of constitutionalism. As conceived by Montesque, the principle of separation of powers evolves out of the realization that "every man invested with power is liable to abuse it, and to carry his authority as far as it will go."¹⁷⁰ It becomes necessary that a system of checks and balances is created to keep the government in check.¹⁷¹ This is done through the creation of the three arms of government, the executive, the legislature and the judiciary.¹⁷² Ideally, the three

167. S.A. de Smith, *Constitutionalism in the Commonwealth Today*, 4 MALAYA L. REV. 205-17 (1962) quoted in Welshman Ncube, *Constitutionalism and Human Rights; Challenges of Democracy*, in THE INSTITUTIONALIZATION OF HUMAN RIGHTS IN SOUTHERN AFRICA 2 (Pearson Nherere & Marina Engelbronner-Kolff eds., Nordic Human Rights Publications 1993).

168. See generally Yash Ghai, *The Rule of Law in Africa: Reflections on the Limits of Constitutionalism* (1990) (paper presented at the Chr. Michelsen Institute, Norway, as part of the commemoration of the 175th anniversary of the Norwegian Constitution.).

169. *Id.* at 2.

170. OJWANG, *supra* note 24, at 21.

171. *Id.*

172. The U.S. Constitution of 1876 is probably the best illustration of this principle. In practice, the exercise of legislative functions could be widespread among the three arms of government. John Locke has observed: "And because it may be too great a temptation to human frailty, apt to grasp at power, for the same persons who have the power of making laws to have also in their hands the power to execute them, whereby they may exempt

arms of government are supposed to check each other and to be independent. According to Montesque:

When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty, if the judicial power be not separated from the legislative and executive. Were it combined with legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge might behave with violence and oppression. There would be an end to everything, were the same man, or the same body, be it of nobles or the people, to exercise those three powers, that of implementing the public resolutions and that of adjudicating the causes of individuals.¹⁷³

Indeed, the scheme proposed by Montesque envisioned a neater division—namely, that no member of one organ could participate in the organs; there could be no interference in the function of one organ by the others and, there was a clear dichotomy of functions exercised by the different organs. In practice, however, there is tremendous fusion between the three entities.

As far as individual rights and freedoms are concerned, the independence of the judicial arm of government is very crucial. The rights and freedoms that limit the exercise of legislative and executive power will be of practical value only if they can be enforced judicially. Obviously, the notion of an independent judiciary presupposes that the vulnerability of judicial officers to the executive is minimized, and that the regime of human rights and other norms are clearly articulated. The duty of the judiciary is to interpret the law, or simply stated, to establish conclusively what the law is in every case. The judges are expected to do so without bias or improper pressure. Government officials and the overall state bureaucracy are expected to obtain guidance from judicial pronouncements just as much as ordinary citizens. Implicit in the function of the judiciary is the authority to conduct judicial review. Since Justice John Marshall's edict in *Marbury v. Madison* that "it is the duty of the judicial department to say what the law is," the U.S. Supreme Court has in several

themselves from obedience to the laws they make, and suit the law, both in its making and execution, to their private advantage, and thereby come to have a distinct interest from the rest of the community contrary to the end of society and government; therefore, in well ordered commonwealth, where the good of the whole is considered as it ought, the legislative power is put in the hands of diverse persons who, duly assembled, have by themselves, or jointly with others, a power to make laws." See JOHN LOCKE, SECOND TREATISE OF GOVERNMENT, CHAPTER XII PARA. 143 quoted in OJWANG, *supra* note 24, at 5.

173. OJWANG, *supra* note 24, at 6.

of its decisions established fundamental constitutional principles without altering or overriding the basic provisions of the constitution.¹⁷⁴ The *Brown v. Board of Education*,¹⁷⁵ and *Roe v. Wade*¹⁷⁶ decisions can be cited in this regard.

The independence of the judiciary also infers that every person, institution and the government are bound to act in accordance with the "law." In this regard the exercise of judicial function provides a link between the aspirations of society and the positive law. In countries where the judiciary has lost its independence, the realization of rights and freedoms has become difficult. In Kenya for example, despite a guarantee of rights by the Bill of Rights contained in Chapter Five of the Constitution, violations still occur.¹⁷⁷

Constitutionalism is not all about restraint on government and the protection of individual rights and freedoms. But, it is also about setting general principles that reflect the fundamental aspirations and ideals of society.¹⁷⁸ Nwabueze has espoused this view as follows:

A constitution operating as law and imposing judicially enforceable restraints upon government should not abandon its other function as a source of legitimacy for those governmental powers and relations that are, by their very nature, non-justifiable. Nor should it renounce its role in the affirmation of fundamental objectives and ideals or directive principles of government which serve to inform and inspire governmental actions along desirable lines.¹⁷⁹

174. *Brown v. Board of Education*, 349 U.S. 294 (1955).

175. *Marbury v. Madison*, 5 U.S. 137 (1803). This decision overruled an earlier opinion in *Plessy v. Ferguson*, 163 U.S. 537 (1896). The Supreme Court's interpretation of the 14th Amendment to outlaw segregation in schools is perhaps what makes this case one of the most celebrated in U.S. constitutional jurisprudence.

176. *Roe v. Wade*, 410 U.S. 113 (1973). The court held that there was a constitutional right to abortion. It affirmed that the right to privacy was "broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Id.* at 153. The U.S. Constitution does not explicitly guarantee rights to privacy—the same is borne out of the Court's interpretation of the 1st, 4th, 9th, and 14th Amendments to the Constitution.

177. *See generally* Mutua, *supra* note 3.

178. Professor Issa G. Shivji has observed that out of the two pillars, "limited government" and "individual rights," flows several other notions such as "accountability of government through periodic elections" and others. Issa G. Shivji, *State and Constitutionalism in Africa: A New Democratic Perspective*, in *STATE AND CONSTITUTIONALISM: AN AFRICAN DEBATE* 28 (I.G. Shivji ed., 1991).

179. B.O. NWABUEZE, *JUDICIALISM IN COMMONWEALTH AFRICA: THE ROLE OF THE COURTS IN GOVERNMENT* 22-23 (Hurst & Co. 1977).

It is a process of setting national goals, and erecting structures to ensure their attainment. Constitutionalism is thus an ordering process. In the words of Carl Friedrich, constitutionalism should address itself to "the will to live together in a political community."¹⁸⁰ Such will is concerned with "the internal mechanism for the stable maintenance of community" as well as the "institutional regulatory and normative structures of national integrity and survival."¹⁸¹ Friedrich argues that the strength of a state rests on power allocation based on these normative structures.¹⁸²

In multi-ethnic societies, constitutionalism implies a more profound task of creating harmony and forging national unity. It has even been suggested that constitutionalism imports a very pluralistic look at the political society, legitimizes organized dissent, and restricts the power of the majority as against the minority. Constitutions should erect features that will insulate societies from the innate problems of ethnicity.¹⁸³

Propagating a culture of constitutionalism, by far remains the greatest challenge to most African states. As shown in this article, the adoption of independence constitutions replete with articles protecting individual rights and freedoms and delineating functions of the three organs of government, has not prevented what some analysts have called the "bastardization"¹⁸⁴ of the same. In Kenya, the complete lack of respect for the constitutional guarantees has been exacerbated by total lack of education by the populace on what the constitution portends. Hopefully, this will change if the proposed program of civic education by the recently proposed Constitutional Reform Commission is implemented.

V. THE CONSTITUTIONAL REVIEW PROCESS

After suffering a resounding defeat by KANU in the 1992 general elections, the opposition groups became wary of facing the 1997 election without reforming the Constitution. The folly of not having insisted on the leveling of political playing field before multi-party elections starkly reverberated upon the faces of the opposition chiefs, and more so as the second multi-party elections drew near. Thus, the call for minimum constitutional reform before election became a rallying epithet for all

180. CARL J. FRIEDRICH, *THE PHILOSOPHY OF LAW IN HISTORICAL PERSPECTIVE* 220 (Chicago Univ. Press 1963).

181. *Id.*; see also C. HOWARD, *THE CONSTITUTION POWER AND POLITICS* 13-23 (1980).

182. FRIEDRICH, *supra* note 180.

183. Judusola Akande, *Constitutionalism and Pluralism, Essays in Honour of Judge Taslim Olawale Elias*, 2 AFRICAN COMP. PUB. L. 659.

184. See, e.g., Mutahi Ngunyi, *Making Laws is Bad*, DAILY NATION, June 28, 1998, at 9 (Nairobi).

opposition groups and the National Council of Churches in Kenya (NCCCK).¹⁸⁵ The agenda was also picked up by the Catholic Church and the international donor community.¹⁸⁶

The government, on its part, acknowledged that reform was indeed necessary, but insisted that the opposition groups and churches were going about it the wrong way.¹⁸⁷ However, no serious effort was made to bring this promise to fruition. Now, with the NGO community and opposition groups threatening mass action, strikes and boycott of the impending elections, the government, like a lethargic fly caught in a spider's web, found it self entangled in a self-induced rhetoric trap. It had to deliver on its promise. In a quick spin of action, the government announced its intention to negotiate with opposition parties' only (excluding NGOs and other civil society groups), minimum reforms before elections. The opposition parties, being wary of the NGO's prominence in the pro-reform movement, accepted this gesture and convened, together with KANU at Nairobi City Hall to negotiate reforms.¹⁸⁸ The group became known as the Inter-Party Parliamentary Group (IPPG).¹⁸⁹ The IPPG round of talks were largely successful. Several issues were discussed and agreed upon such as the immediate removal of licensing requirement for political meetings, the diminution of the chief's powers under the Chiefs Authority Act, and the candid promise for the repeal of the Public Order Act. Most importantly, however, was the agreement that constitutional reform process would begin immediately after the elections, and that it would involve all the stakeholders.

As a gesture of goodwill, the government presented to Parliament the Constitution of Kenya Review Act on November 6, 1997, and the same was readily passed.¹⁹⁰ The unpublished Bill mandated the Attorney

185. Sylvia Mudasia, *NCCK Reignites Reform Debate*, DAILY NATION, Jan. 10, 1997, at 1 (Nairobi); see also Jacinta Sekoh & Tom Chitechi, *Postpone Poll, Says Gitari*, DAILY NATION, Jan. 13, 1997, at 1 (Nairobi).

186. Onesmus Kilonzo, *Catholic Group Warns of Chaos*, SUNDAY NATION, Apr. 20, 1997, at 3 (printed by DAILY NATION, Nairobi).

187. See, e.g., Jacinta Sekoh, *KANU Reacts to NCCK Demands*, DAILY NATION, Jan. 11, 1997, at 1 (Nairobi).

188. *Take Law Reform Effort Seriously*, DAILY NATION, Jan. 16, 1998, at 9 (Nairobi). In fact, it was the president himself, who in a New Year's address to the nation in 1995, mentioned that among the tasks that the government was to undertake was the reform of the constitution. The president further stated that the government would seek help of international experts in collating the views of Kenyans toward the comprehensive review of the constitution—this was not done.

189. *Id.*

190. Eric Shimoli, *Attorney General Starts Law Review Process*, DAILY NATION, Jan. 15, 1998, at 1 (Nairobi).

General to constitute the commission that would be responsible for the review of the constitution.¹⁹¹ The commission was to have 45 members nominated by the “registered political parties, religious groups, institutional organizations, professional associations,” association of disabled persons, “trade unions, the business community, farmers, women and youth organizations, and NGOs.”¹⁹² Upon being served by notice, these groups had only fifteen (15) days within which to submit the list of their nominees to the Attorney General, who thereafter was required to compile the list of 45 people and submit it to the President. From the said list, the President would then select 29 commissioners. The President also has the sole discretion of appointing the commission’s chairman. The Bill gave the commission two years within which to complete its work.¹⁹³

In January 1998, a month after the general elections in which KANU won the presidential seat, the Attorney General issued a notice to all stakeholders to nominate their representatives to the constitutional review commission.¹⁹⁴ The announcement sparked considerable opposition from the stakeholders. The churches voiced skepticism over the government’s intention and instead advocated for the end to ethnic clashes in part of Rift Valley before any reform could be undertaken. The opposition parties, mainly the Democratic Party (DP), Safina and the National Convention Executive Council called for a constitutional conference instead.¹⁹⁵ The NCEC made a number of uncoordinated claims. Some of its members called for the election of commissioners, others for the repeal of the review

191. Specifically, the commission was given power to:

Examine and recommend the composition and functions of the organs of state—mainly the Executive, Legislature, and Judiciary aiming to maximize their mutual checks and balances and secure their independence; Examine and recommend improvements to the existing constitutional commissions, institutions and offices and the establishment of additional ones to facilitate constitutional governance and the respect for human rights as an indispensable and integral part of the enabling environment for economic, social, political and cultural development; Examine and make recommendations on the judiciary generally and in particular the establishment and jurisdiction of the courts, aiming at measures necessary to ensure the competence, efficiency and independence of the judiciary; Examine and review the place of local government in the constitutional organization; Examine and review the place of property rights and land, including private, government and trust land, in the constitutional framework and law and to recommend improvements that will secure fullest enjoyment of land and other property rights. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. *More Say No to Law Review Team*, DAILY NATION, Feb. 22, 1998, at 10 (Nairobi).

Act,¹⁹⁶ while others joined forces with opposition parties to demand for a constitutional conference or convention.¹⁹⁷ The NCKC was perhaps the most sober voice in the opposition furor that followed the Attorney General's announcement. It recommended that the unpublished Act be returned back to parliament to amend sections of it that were problematic.¹⁹⁸ It suggested that Section Five, which gave the President powers to appoint the Chairman of the Commission, should be removed; that the tenure of the Chairman should be secured; that non-parliamentary bodies be allowed to nominate a fixed number of commissioners; that a consultative council comprised of 150 members mainly drawn the church and parliament be constituted to oversee the process and finally debate the report prepared by the Commission and draft the new constitution.

A series of meetings organized by the various groups on the constitutional review seemed to indicate that there were indeed serious issues that the government should address before the process could begin. The two-day conference organized "by the Kenya Episcopal Conference, Kenya Women's Political Caucus, the Supreme Council of Kenya Muslims, the Muslim Consultative Forum and the NGO Council," in March 1998, proposed amendments of the Review Commission Act, and presented the same to the Attorney General.¹⁹⁹ In April, the Social Democratic Party (SDP) added its voice to the claim for amendment of the Kenya Review Commission Act.²⁰⁰ The government succumbed to these demands, but insisted that it was the prerogative of parliament to streamline the review process.²⁰¹ Consequently, the Attorney General announced the formation of a credentials committee made up of parliamentarians from all political parties, to prepare for a meeting of "all persons or groups who had indicated in writing to the Mr. Wako (Attorney General) an interest to take part in the meeting, were free to do so."²⁰² This was a beginning to a

196. Jacinta Sekoh-Ochieng, *Repeal Act, Says NCEC*, DAILY NATION, Mar. 2, 1998, at 2 (Nairobi).

197. *Id.*

198. *NCKC Querries Reforms Body*, DAILY NATION, Feb. 27, 1998, at 3 (Nairobi).

199. Eric Shimoli, *Fresh Proposal for Law Review Act*, DAILY NATION, Mar. 8, 1998, at 1 (Nairobi). The proposals for amendment included the requirement that 30% of all commissioners be women, at least two of the commissioners be people with disabilities, the commissioners enjoy security of tenure, the appointment of the chairman be done by the commission and not the president, and that the commission be adequately financed.

200. *SDP Wants Review Act Altered*, DAILY NATION, Apr. 6, 1998, at 2 (Nairobi).

201. Kwendo Opanga, *Cost of Constitution Review*, DAILY NATION, Mar. 4, 1998, at 14 (Nairobi).

202. Maguta Kimemia, *Team Speaks on Law Review*, DAILY NATION, May 6, 1998, at 5 (Nairobi).

long, drawn out process of negotiation between the government, civil society, and political parties. Several meetings, beginning with the Bomas of Kenya in May 1998, to the Safari Park in June 1998, were held to discuss the process, but all of them failing to consolidate the differing opinions amongst interested parties.

A. *The Bomas and Safari Park Meetings*

The Bomas of Kenya meetings were a product of inter-party political party arrangements under the auspices of the so-called credentials committee chaired by the then solicitor general Aaron Ringera. The first meeting was held on May 11, 1998.²⁰³ It was attended by over 400 persons.²⁰⁴ It was marked by disagreement on how the commission was to be constituted. In the afternoon, representatives of the NCEC walked out of the meeting accusing the IPPC and government of complacency.²⁰⁵ According to Professor Kivutha Kibwana, the NCEC boss, the meeting was a mere “charade” not intended to discuss practicality of the review process.²⁰⁶ He blamed the government of “treating Kenyans to a circus.”²⁰⁷ The meeting urged the government to increase the number of members of the committee planning future talks, to include civil society groups. In the whole, the meeting ended without resolving the issues at stake. In the days that followed, four opposition members of the IPPC walked out of its sessions claiming that their participation would be contingent upon the enlargement of the committee to include civil society.²⁰⁸ However, the government still announced that another round of talks would be held at Bomas on June 8-9, 1998.²⁰⁹ This was not to be. The opposition parties withdrew their members from the committee and the church organizations announced that they would not participate on the planned Bomas talks unless their demands were met.²¹⁰

On June 1, 1998, in a speech to the nation marking the “Madaraka day” celebration, the President acceded to the demands of opposition

203. Emman Omari & Jacinta Sekoh-Ochieng, *Talks on Law Review Today*, DAILY NATION, May 11, 1998, at 1 (Nairobi).

204. *Id.*

205. *Law Review Forum Seeks Key Changes*, DAILY NATION, May 12, 1998, at 1 (Nairobi).

206. *Id.*

207. *Id.*

208. Kipkoech Tanui, *MPs Quit Reform Talks*, DAILY NATION, May 14, 1998, at 1 (Nairobi).

209. *Id.*; see also Eric Shimoli, *Bomas Talks Hit by Boycott Fear*, DAILY NATION, May 30, 1998, at 2 (Nairobi).

210. *Catholics Keep Up Pressure on Reform*, DAILY NATION, June 1, 1998, at 1 (Nairobi).

groups to expand the committee.²¹¹ Subsequently, the Attorney General convened another round of talks at Safari Park on June 22, 1998.²¹² The deliberations went on for two days after which the attendees agreed to form a smaller committee to draft the resolutions already passed.²¹³ Parties also agreed to an adjournment of the meeting to Monday, June 29, 1998. Among the issues that got support across the party divide was the increment of commissioners from the 29 to a number differently suggested. KANU suggested 65, NCEC 51, while FORD(K) suggested 51.²¹⁴ Several issues remained very contentious. These included the appointment of the chairman to the commission, the role of parliament in the whole process, the methods of collating views from the wider public and whether or not a referendum or some form of constitutional convention would be necessary to ratify the new constitution.²¹⁵

At a further session on June 29, 1998, at Safari Park Hotel, all the parties to the talks agreed to a three-tier structure for the review of the constitution.²¹⁶ The Constitutional Review Commission comprised of commissioners appointed by all stakeholders, the National Consultative Forum (NCF) to be composed of 224 members to vet the proposals put forth by the commission, and the District Consultative Forum (DCF) whose functions would be confined to the districts during district meetings.²¹⁷ A draft committee of 12, with powers to elect its chairman, was constituted to redraft the constitution Review Act and present it to the final forum on August 10, 1998. The events that followed were overshadowed by the nationwide bankers strike that virtually paralyzed the economic life of the country,²¹⁸ and the terrorist bomb attacks on the U.S. Embassy in Nairobi on August 7, 1998.²¹⁹

The role that KANU played after the Safari Park meetings aroused the skeptic's fear that the ruling party was not genuinely interested in

211. Eric Shimoli & Mburu Mwangi, *Moi Gives in on Constitution*, DAILY NATION, June 2, 1998, at 1 (Nairobi).

212. *Round Two of the Law Reform Talks on Tomorrow*, DAILY NATION, June 21, 1998, at 1 (Nairobi).

213. Gichuru Njihia, *Little Progress in Reform Talks*, DAILY NATION, June 24, 1998, at 5 (Nairobi).

214. *Id.*

215. *Id.*

216. Emman Omari, *Reform Forum Makes Headway*, DAILY NATION, June 30, 1998, at 3 (Nairobi).

217. *Id.*

218. *Banks Dismiss 12,000 Workers*, DAILY NATION, Aug. 6, 1998, at 1 (Nairobi).

219. *Carnage!—Scores Die as Bomb Blast Rocks City*, DAILY NATION, Aug. 7, 1998, at 1 (Nairobi).

instituting reforms. First came the presidential announcement in July that KANU rejected the three-tier arrangement agreed upon at Safari Park.²²⁰ Propelled by the support from the international community following the terrorist bomb attacks, the government adopted an increasingly hard stance against the involvement of the civil society in the process. It was however too late. Second, KANU agitated for a district based commission which would take care of the interests of the “marginalized and historically disadvantaged tribes.”²²¹ This obviated the plans for a nationally based approach to the review process. However when the third Safari Park meeting convened on August 24, 1998, with President Moi in attendance, the three-tier review structure was retained. A commission of 25 was agreed instead of 29, as well as the financial autonomy of the commission.²²² A fourth meeting was set for October 5, 1998, to endorse the new Act. At that meeting the final format for the Act was agreed and the Attorney General was given the go ahead to translate the agreement into a Bill to be debated and passed by parliament. In substance, it was agreed that 13 commissioners would be nominated by the parliamentary political parties and two would be women; the Muslim Consultative Council, Kenya Episcopal Conference and NCKK would each nominate one person; the women’s organizations would nominate five persons, and the civil society four.²²³ The Bill was presented to parliament on December 2, 1998, and passed on the same day.²²⁴

B. KANU Scuttles the Review Process

After the enactment of the Constitution of Kenya Review Commission (Amendment) Act, the Kenya Women’s Political Caucus became the first to forward its list of nominees to the Attorney General in January 1999.²²⁵ It had nominated five persons representing Central, Nyanza, North Eastern and Western provinces.²²⁶ But all was not well, as ethnicity

220. *Societies Blow to Reform Talks*, DAILY NATION, Aug. 1, 1998, at 1 (Nairobi).

221. *Doubts Over Reform Talks*, DAILY NATION, Aug. 23, 1998, at 3 (Nairobi) quoting Kiraitu Murungi, a DP member of parliament from Imenti South constituency.

222. Emman Omari & Mburu Mwangi, *Breakthrough in Talks*, DAILY NATION, Aug. 25, 1998, at 1 (Nairobi).

223. Emman Omari, *Review Deal Struck*, DAILY NATION, Oct. 6, 1998, at 1 (Nairobi).

224. *Parliament Passes Constitutional Bill*, DAILY NATION, Dec. 3, 1998, at 1 (Nairobi); see also Emman Omari et al., *Constitutional Review Bill Sails Through*, DAILY NATION, Dec. 9, 1998, at 3 (Nairobi); Mburu Mwangi, *Constitutional Review Act Now Law*, DAILY NATION, Dec. 26, 1998, at 2 (Nairobi).

225. *Women Choose Review Team*, DAILY NATION, Jan. 9, 1999, at 1 (Nairobi).

226. *Id.* Those nominated were Dr. Wanjiku Kibira (Central), Nancy Baraza (Western), Phoebe Asiyo (Nyanza), Abida Ali (North Eastern), and Salome Muigai (Central).

and regionalism seemed to have taken the better of most of the women. A group of women, including the leadership of Maendeleo ya Wanawake, Lilian Mwaura of the National Council of Women, Jael mbogo, Orié Rogo Manduli and others, voiced complaint that the nomination process was flawed.²²⁷ Indeed the matter ended up in the high court after the parties failed to reach an agreement.²²⁸ The court affirmed the nomination. The NGO community on the other hand, expressed dissatisfaction once again, with the process of constitutional review set up by the Act.²²⁹ Spearheaded by NCEC, they advocated for the boycott of the process terming it as "sham" since the commission to be created would be subject to manipulation. The NCEC threatened to se up a parallel process calling it "a peoples constitutional review forum."²³⁰

The real test for the survival of the process came with the political parties attempts to distribute the 13 seats in the commission. According to the Act, the parties had until February 8, 1999, to nominate their representatives. The meeting set for January 25, 1999, ended up in open disagreement after KANU insisted on having seven nominees, instead of the five agreed upon at the fourth Safari Park meeting.²³¹ The other smaller parties, Safina and SDP, disputed the DP and NDP claim that they should have three and two seats respectively. Other meetings on January 27, 1999,²³² and February 3, 1999, failed to resolve the stalemate.²³³ It appeared, no doubt, that the review process would stagnate once more. On the eve of the deadline, all the parties handed in their list of nominees without consulting each other.²³⁴ KANU handed in a list of seven, DP three, NDP two, Kenya Women Political Caucus four, NCKK two, Civil Society four, SDP one, FORD(K) one, Safina one, KSC one, FORD(A) one, Shirikisho one, and FORD(P) one.²³⁵ KANU had completely ignored

227. Gitau Warigi, *Women Nominees: All the Noise is Self-Serving*, DAILY NATION, Jan. 24, 1999, at 5 (Nairobi).

228. Lilian Nduta, *Women's Caucus Team Held Up By Court Order*, DAILY NATION, Jan. 27 1999, at 2 (Nairobi).

229. Oliver Musembi, *NCEC Plans People's Constitutional Forum*, DAILY NATION, Jan. 9 1999, at 1 (Nairobi); see also *NCEC Spells Out its Stand*, DAILY NATION, Jan. 10, 1999, at 1 (Nairobi).

230. Musembi, *supra* note 229, at 1.

231. Njonjo Kihuria & Jeff Otieno, *New Deadlock in Constitutional Reform Talks*, DAILY NATION, Jan. 26, 1999, at 1 (Nairobi).

232. Kipkoech Tanui, *Reforms: MP's Yet to Agree on Seats*, DAILY NATION, Jan. 28, 1999, at 2 (Nairobi).

233. Kipkoech Tanui, *Parties Still Divided*, DAILY NATION, Feb. 4, 1999, at 6 (Nairobi).

234. Emman Omari & Chege wa Gachamba, *Wako Faces Dilemma Over List of Reform Nominees*, DAILY NATION, Feb. 9, 1999, at 1 (Nairobi).

235. *Id.*

the commitments it made at Safari Park and scuttled the reform process by nominating more than they were entitled to. Even a further attempt to resolve the stalemate on February 18, 1999, was deliberately run down by KANU after it sent 21 delegates instead of two.²³⁶ The same fate befell the March 25, 1999 effort.²³⁷ Clearly, the Attorney General had the mandate to disallow nominations from culpable quarters and steer the process from the lull and mistrust that befell it. Unfortunately, the government's chief legal adviser lacked the flamboyance, wit and tact to do this. As the parties traded accusations, the office of the Attorney General went to slumber.²³⁸

With the process degenerating into a period of uncertainty, and political groups posturing all manner of threats to the government and the ruling party KANU, all hope for restoring calm seemed to have evaporated. The law society on its part asked for the extension of deadlines to the nominations to the review commission.²³⁹ In a letter to the Attorney General, the LSK chairman Nzamba Kitonga reminded the office of its responsibility under the Act. It denied the claim of the church and the NCEC, that the Act should be returned to parliament for further deliberation because "[t]his will merely shift the same controversies to the House and those with greater numbers will carry the day at the expense of other legitimately interested parties."²⁴⁰ On the same streak, the LSK objected to further postponement of the process arguing that Kenyans should not be subjected to "injustices, and kleptocracy inherent under the current Constitution."²⁴¹ In a seminar on constitutional review organized by CLARION, an NGO based in Nairobi, leaders of the various organizations representing the civil society failed to agree on which way

236. Emman Omari & Njeri Rugene, *KANU Derails Constitutional Review Talks*, DAILY NATION, Feb. 19, 1999, at 1 (Nairobi).

237. Njeri Rugene, *Parties Snub Key IPPC Reconciliation Meeting*, DAILY NATION, Mar. 26, 1999, at 2 (Nairobi). This time it was the opposition parties led by DP and SDP that refused to attend. *Id.*

238. Sometime in March 1999, a group of stakeholders, mainly the nominating authorities under the Act, sought to bring suit against the Attorney General for his inaction. Emman Omari, *Law Review: Bodies Intend to Sue AG*, DAILY NATION, Mar. 28, 1999, at 5 (Nairobi). The lawyers for these groups wrote to the AG giving him notice of their intention to sue under section 14 of the Government Proceedings Act. *Id.* According to these groups, it was due to the AG's "acts of omission and commission" that the process of constitutional review was paralyzed and the "whole nation thrown into confusion and anxiety." *Id.* This cause of action was not pursued. *Id.*

239. Eric Shimoli, *LSK Wants New Deadlines for Review Committee*, DAILY NATION, Feb. 27, 1999, at 3 (Nairobi).

240. *Id.*

241. *Id.*

the reform process should proceed.²⁴² The NCEC stressed that the current review Act was inherently flawed and thus should not be the basis of the reform process. Others, including Dr. Karuti Kanyinga of the Institute of Development Studies, University of Nairobi, argued that the problems of Kenya were not due to bad constitution but the fact that leaders were not responsive to the constitution.²⁴³ The Muslim representative Mr. Abdulrajham implored Kenyans not to "kill" the review initiatives enunciated by the Act because it was a step forward in the reform process.²⁴⁴ Similar disagreements also emerged amongst lawyers. In the LSK monthly luncheon of April 29, 1999, a group of lawyers led by Lee Muthoga supported the review Act and asserted that the claim that it was "unworkable" and cowardice.²⁴⁵ The problem, as far as they were concerned, was lack of goodwill on all concerned parties.

Several calls for the start of the process were made by American Ambassador Prudence Bushnell,²⁴⁶ the Catholic Church,²⁴⁷ and the Protestant churches.²⁴⁸ It was the announcement by President Moi that the review process should be sent back to parliament that spurred activity from both sides of the debate.²⁴⁹ KANU leaders taking the queue from their president, asked the Attorney General to declare the process under the Act had failed, and thereafter refer the matter to parliament for action. At a news conference in parliament buildings on May 26, 1999, the KANU national organizing secretary Kalonzo Musyoka, affirmed his parties view that the Act was "too flawed to facilitate meaningful reforms."²⁵⁰

The proposal that the matter be taken to parliament was opposed by opposition parties, the civil society and churches. They saw in KANU a sinister motive to divest from the process, the involvement of non-

242. *NGOs Differ on Stalled Constitutional Review Process*, DAILY NATION, Mar. 19, 1999, at 1 (Nairobi).

243. *Id.*

244. *Id.*

245. *Lawyers Divided Over Kenya Review Commission Act*, DAILY NATION, Apr. 30, 1999, at 1 (Nairobi).

246. Peter Njenga & John Oywa, *Bushnell Urges Government to End Political Uncertainty*, DAILY NATION, Mar. 29, 1999, at 3 (Nairobi).

247. *Ndingi Wants Constitutional Review Restated*, DAILY NATION, Apr. 5, 1999, at 1 (Nairobi).

248. Chege wa Gachamba, *Review Hitch 'Deliberate,' Churches Allege*, DAILY NATION, May 7, 1999, at 3 (Nairobi).

249. Kipkoech Tanui & Frank Wainainah, *Send Law Review to Parliament—Moi*, DAILY NATION, May 23, 1999, at 1 (Nairobi).

250. Samuel Siringi, *Review Showdown Looms*, DAILY NATION, May 27, 1999, at 5 (Nairobi).

parliamentary entities and then manipulate the reform to suit its agenda. While a considerable section of such non-parliamentary entities may have agreed that the Act was indeed flawed, their involvement in streamlining the review process was conceived as necessary and mandatory since they had sufficient stake as Kenyans, in the outcome of the whole process. In a joint statement of NCEC, Law Society of Kenya, Presbyterian Church, Human Rights Commission, NDP, DP, FORD(K), Safina, and SDP, the leaders said:

We totally reject parliament as the only forum for constitution making. We do not recognize it as representative of all voices in Kenya. We do this appreciating that there is a stated national consensus that the constitution properly belongs to all people of Kenya. We unequivocally restate that the constitutional review process is irreversible and must be people driven.²⁵¹

KANU stuck to its guns. In a number of statements at public gatherings, the President asked parliament to take up its role and save the process from collapse.²⁵²

The NCEC, with the support from DP called for a nationwide demonstration on June 10, 1999, to oppose the government's position on law reform.²⁵³ The call was also supported by mainstream churches. On that day, the police violently dispersed the demonstrators, severely injuring a church leader, members of parliament, a senior member of NCEC, and scores of others.²⁵⁴ As the violence was going on in the streets of Nairobi, the proceedings in parliament were equally belligerent. Incidentally, the budget speech was set to be read on the same day. One member of parliament raised a point of order asking for adjournment of the day's business because the constitutional review process was not yet properly underway. In his view it was a tragedy to discuss the budget in the circumstances because it precipitated "bad governance."²⁵⁵ In apparent reference to what was going on in the streets, he said, "we are going to see

251. *Leaders Dismiss Moi's Prescription for Constitutional Review*, DAILY NATION, May 24, 1999, at 1 (Nairobi).

252. Muthui Mwai, *Parliament Right Forum for Reforms, Insists Moi*, DAILY NATION, May 28, 1999, at 1 (Nairobi); see also *Tussle over Parliament's Role in Review Exercise Heightens*, DAILY NATION, June 2, 1999, at 1 (Nairobi).

253. *See Support Grows for Tomorrows Reforms Demo*, DAILY NATION, June 9, 1999, at 1 (Nairobi).

254. *Dozens Hurt as Police Violently Disperse Pro-Reform Marchers*, DAILY NATION, June 11, 1999, at 1 (Nairobi).

255. Emman Omari & Njeri Rugene, *Orengo Tackles Moi on Constitutional Reforms*, DAILY NATION, June 11, 1999, at 1 (Nairobi).

many scenes like we have seen today where women have been beaten in the streets by the same policemen, who are supposed to protect them.”²⁵⁶

Despite the brutal reprisal from the police, the pro-reform groups arranged for another demonstration on July 10, 1999.²⁵⁷ With threat of another demonstration and a national poll showing that the majority of Kenyans supported a people driven reform process,²⁵⁸ Moi retracted his earlier stand, claiming that he had been “misinterpreted.”²⁵⁹ The NCEC toughened its stand on planned demonstrations amidst reports that there were secret talks between KANU and opposition MP's funded by some foreign donors.²⁶⁰ At the same time the NCKK announced that it would hold prayers for the reform process and urged its members to start a three-month fasting period to force the government to heed to their call.²⁶¹ In July, the Catholic Church confirmed that secret talks were indeed in progress between the political parties with a view to end the impasse.²⁶² Seeing no end to the problem and skeptical that KANU may indeed use such negotiation as a delaying tactic, a strong undercurrent emerged within the ranks of protestant churches calling for a parallel review process.

C. *The 'Faiths' Led Initiative (The Ufungamano Group)*

It was the DP leader, Mwai Kibaki, who in February 1999, made the first call for a parallel review process, different from the government's initiative under the Review Act.²⁶³ In August 1999, the Anglican Church joined in the call and asked interested parties to organize for a fifth Safari Park to begin the process.²⁶⁴ According to a signed statement, the Church observed that such a step is necessary because the government and

256. *Id.*

257. Samuel Siringi, *Constitution: Protest Demo Planned for July 10*, DAILY NATION, June 15, 1999, at 5 (Nairobi).

258. *Poll Shows Moi at Odds With Kenyans Over Reform Process*, DAILY NATION, June 14, 1999, at 1 (Nairobi); see also Emman Omari, *KANU Furious With Nation Poll on Constitutional Reform Impasse*, DAILY NATION, June 15, 1999 (Nairobi).

259. Eric Shimoli, *My Word Was Not Final, Says Moi*, DAILY NATION, June 18, 1999, at 1 (Nairobi).

260. *MP's in Fresh Bid to Break Reforms Deadlock*, DAILY NATION, June 27, 1999, at 1 (Nairobi).

261. Chege wa Gachamba, *NCKK to Fast, Pray for Law Reforms*, DAILY NATION, July 1, 1999, at 3 (Nairobi).

262. Eric Shimoli, *Stakeholders in Secret Constitutional Talks*, DAILY NATION, July 14, 1999, at 4 (Nairobi).

263. Muthuma Mwai, *'Reject Constitutional Review Lobby' Hots Up*, DAILY NATION, Feb. 22, 1999, at 5 (Nairobi).

264. *Anglican Church Calls for a Parallel Reform Process*, DAILY NATION, Aug. 5, 1999, at 1 (Nairobi).

political parties have failed to resolve the stalemate. It called on churches to spearhead change by instituting a parallel constitutional process. The Catholic Church affirmed its position that they would favor a people-driven process and launched a series of educational materials for the reform process.²⁶⁵ Further, a group of twenty-three Bishops announced that they would organize countrywide prayers in support of a people-driven process in October 1999.²⁶⁶ The acrimony between the Catholic Church and the government was not made any better when the government issued an order expelling one of their priests from Kenya,²⁶⁷ and about 700 Catholic parishes asked Moi to resign because he was "too old and tired to change."²⁶⁸ Apart from the church, the Law Society of Kenya (LSK) indicated their intention of instituting a reform process, removed from the government initiative. It announced that as a beginning to such a process, a seminar of all stakeholders would soon be called to discuss amongst other things, a framework for reviving a "people-driven" constitutional review process.²⁶⁹

The indications were rife that unless the government did something, the mantle was going to be stolen from their hands, and its credibility injured beyond repair. Considerable debate went on within the KANU top notch, seeking ways to redeem their image and capture leadership of the reform process. Indeed, a lackluster attempt to salvage the process through Parliament failed after procedural bottlenecks debarred the attempt to introduce the debate under standing order number 20.²⁷⁰ In the meantime, religious groups comprising of NCKK, SUPKEM, Hindu council, MCC and others, met in Ufungamano to strategize on their move

265. Emman Omari & Vincent Mwangi, *Catholics Start Review Process*, DAILY NATION, Sept. 27, 1999, at 3 (Nairobi).

266. *Bishops to Lead Prayers*, DAILY NATION, Oct. 17, 1999, at 2 (Nairobi).

267. *Catholic Priest Ordered Out of Kenya as Church Raises Concern Over Clash Victims*, DAILY NATION, Oct. 30, 1999, at 1 (Nairobi). But the story of Father John Kaiser, an American-born Catholic missionary who had worked in Kenya for over 35 years, did not end here. Gitau Warigi, *Why Government Picked on Catholic Priest*, DAILY NATION, Nov. 7, 1999, at 12 (Nairobi). Though the government later rescinded their order after immense pressure by the opposition groups, the NGO community and the U.S. government, his personal relationship with some senior KANU operatives did not fare any better. *Id.*

268. *700 Catholic Parishes Asking Moi to Step Down*, DAILY NATION, Nov. 1, 1999, at 1 (Nairobi).

269. David Mugonyi, *Law Society Embarks on Constitutional Review*, DAILY NATION, Sept. 28, 1999, at 4 (Nairobi).

270. Jacinta Sekoh-Ochieng & Emman Omari, *Kanu's Constitutional Review Plan to Lock Out Key Players*, DAILY NATION, Oct. 20, 1999, at 1 (Nairobi).

to resist the KANU intention of returning the reform process to Parliament.²⁷¹

On December 3, 1999, the religious groups announced that they had resolved to start a constitutional review process of their own.²⁷² As a prelude to this process, they invited all stakeholders to a meeting on December 15, 1999, to agree on the modalities of implementing this initiative. In the meantime, about 52 opposition members of Parliament issued a threat to hold a parallel Jamhuri day celebration at Kamkunji grounds to press the government to accept their demands for a people-driven constitutional reform.²⁷³ Moi quickly called for an all-political party meeting to discuss the way forward. Obviously, his intention was to dissuade them from their planned meeting by promising to begin the process of reform.²⁷⁴ The meeting was not successful. On December 15, just as the motion for constitutional review was being discussed in Parliament, the religious groups and NGO groups formed a committee at Ufungamano to spearhead the talks on reform.²⁷⁵

The Commission elected Dr. Oki Ooko Ombaka as its chairman and Abida Ali as vice chairperson.²⁷⁶ Two major problems dogged the Ufungamano team. The first was indeed the question of legitimacy. For the process to be legitimate it was incumbent upon the commissioners to collate views of all Kenyan's, wherever they were. This meant that the Ufungamano group, would have to visit KANU strongholds such as Rift Valley and Coast province. Of course, KANU politicians instructed their constituents to expel Ufungamano commissioners from their regions.²⁷⁷ In November 2000, NDP youths were reported to have ambushed Ufungamano commissioners in Kisumu. In the chaos and melee that ensued, a

271. Eric Shimoli, *Religious Groups Unite to Thwart Government Plans*, DAILY NATION, Oct. 22, 1999, at 5 (Nairobi).

272. Njeri Rugene, *Faiths to Start a New Reform Bid*, DAILY NATION, Dec. 4, 1999, at 1 (Nairobi).

273. December 12th is a national holiday to commemorate the day when Kenya became a republic. The high mark of the celebration is the presidential address at the Nyayo national stadium in Nairobi.

274. Gitau Warigi, *Moi Talks Doomed to Failure*, DAILY NATION, Dec. 12, 1999, at 8 (Nairobi).

275. Jacinta Sekoh-Ochieng, *As Religions Forms Own Team*, DAILY NATION, Dec. 16, 1999, at 3 (Nairobi).

276. *Ombaka to Chair Ufungamano Team*, DAILY NATION, May 15, 2000, at 3 (Nairobi).

277. *Block Ufungamano Rallies, Says Minister*, DAILY NATION, Oct. 2, 2000, at 3 (Nairobi).

Land Rover belonging to the NCKK was burnt to ashes and a number of people were hurt.²⁷⁸ NDP denied complicity.

Other problems of the group had to do with paucity of resources. Understandably, the groups that backed the initiative controlled vast resources and the fear within KANU was that they could put these into use to marshal support for their initiative. However, there was no set mechanism of how the group would be financed. Further, internal squabbling and jostling for leadership positions prevented the Ufungamano group from making an impact. Soon after the establishment of the commission, the NCEC announced that the initiative was indecisive, lacked openness, and a referee to guide its activity.²⁷⁹ Though dismissed by the commission's chairman, the views expressed by the NCEC spelt much more widely the edifice of the reform initiative. The reform initiative was saved from internal collapse by the unification with the parliamentary commission. Ufungamano initiative announced in June 2001, that it would officially wind up its activities when the merger with the parliamentary group, was finally sanctioned by law.²⁸⁰

D. Enter Raila Odinga of NDP

Raila Odinga, the son of the late octogenarian politician Jaramogi Oginga Odinga resigned from the party founded by his father, FORD (K), on New Year's Eve of 1996.²⁸¹ He immediately joined the National development party of Kenya (NDP) and took over its leadership from the little known, Stephen Omondi Oludhe.²⁸² From then on, Raila became the backbone of opposition politics in Kenya with his *Luo* supporters coming out in large numbers to support his calls for demonstrations in Nairobi and other key centers. However, toward the end of 1999, Raila and the NDP supporters started to soften their approach to opposition politics. It is not a surprise that as opposition parties and the churches jostled for control of the reform process, KANU and NDP entered into secret merger talks. The leader of NDP, Raila Odinga surprised the opposition MP's when he announced that he would soon table in parliament a motion to jump start the review process.²⁸³ However, the motion was contentious because it

278. *Chaos at Reform Meeting*, DAILY NATION, Nov. 27, 2000, at 1 (Nairobi).

279. Owino Opondo, *Ufungamano Split Over Review Format*, DAILY NATION, 2000, at 3 (Nairobi).

280. *Religious Law Reform to Wind Up*, DAILY NATION, June 9, 2001, at 1 (Nairobi).

281. Ochieng Sino, *Raila Defects, Resigns as MP*, DAILY NATION, Jan. 1997, at 1 (Nairobi).

282. *Id.*

283. *Round of Criticism Against NDP Leader*, DAILY NATION, Oct. 24, 1999, at 1 (Nairobi).

sought to confer power on the Attorney General to reconvene a meeting of stakeholders to debate the Act and recommend amendments.²⁸⁴ Amidst intense lobbying by KANU MP's, a behind the curtains meeting in Mombasa was organized and a resolution struck for the formation of a parliamentary select committee to handle the reform process.²⁸⁵

Though thoroughly opposed by the NGOs, DP and SDP members of Parliament, the idea gained momentum because it seemed more pragmatic than the suggestions for another conference of stakeholders. While the term "people-driven" appeared rather amorphous and inchoate at the very least, the camouflaged intention of the so-called stakeholders appeared to have been aimed at lessening or totally eradicating KANU's influence in the process. However, the manner in which the opposition groups and the general NGO community went about advocating their displeasure against the ruling party, and posturing themselves to take control of the review process, was characterized by impudent parochialism. The call by the NCEC for a military take over²⁸⁶ and the establishment of a parallel government for example,²⁸⁷ exhibited just how the edifice of NGO arrogance and the shortsightedness inherent to their scheme could steer the reform process into abject turmoil. Further, by converting other sections of society to support their agenda, the NGO program of action precipitated utter mayhem in Nairobi and other major towns in Kenya. The devastating four-day riots by the University of Nairobi students in January 2000, began by instigation of opposition figures and some NGO personalities. The riots depicted a growing division among student ranks on the two parallel frontiers of the constitutional review debate.²⁸⁸ But KANU and their supporters were not idle spectators in many of these instances. They, unlike their NGO counter parts, enjoyed police protection and thus their complacency and/or inaction in certain cases, allowed for even greater havoc.

284. *Id.*

285. Njeri Rugene, *50 MPs Plot New Law Reform Deal*, DAILY NATION, Nov. 28, 1999, at 1 (Nairobi).

286. Chege wa Gachamba, *Military Proposed for Kenya's Reform Government*, DAILY NATION, Nov. 5, 1999, at 1 (Nairobi); see also *Treason Accusations as NCEC is Condemned*, DAILY NATION, Nov. 6, 1999 (Nairobi); Jacinta Sekoh-Ochieng, *NCEC: We Didn't Call for a Military Government*, DAILY NATION, Nov. 7, 1999 (Nairobi); Mugambi Kiai & Willy Mutunga, *Constitution-Making and the Military: What is So Insane About NCEC's Idea?*, DAILY NATION, Nov. 14, 1999 (Nairobi).

287. Oliver Musembi, *Group Demands Parallel Government*, DAILY NATION, Apr. 16, 2000, at 3 (Nairobi).

288. Samuel Siringi & Wahome Thuku, *Mayhem as Reform Rivals Clash*, DAILY NATION, Jan. 16, 2000, at 3 (Nairobi).

The only persons other than KANU operatives who came out in support of the Raila motion were university professors, HWO Okoth Ogendo, and Jackton B. Ojwang.²⁸⁹ The former is an internationally recognized and respected professor of property law. The latter, though not conspicuous in local political debates, is probably the most well-qualified constitutional law academic in Kenya today.²⁹⁰ The professors castigated the NGO approach to the process of reform, and advocated for the establishment of a commission to review the constitution. They also expressed strong dissatisfaction with politicians, especially KANU MP's, for being selfish and merely attendant to their own interests.

The motion paving way for parliamentary involvement in the reform process was tabled by the NDP leader Raila Odinga on December 15, 1999, and eventually passed.²⁹¹ It constituted a parliamentary select committee of 21 members and called on the Attorney General to restart the review process by convening a meeting of stakeholders within seven days.²⁹² Parliament nominated Raila Odinga as the chairman of the committee.²⁹³ In effect, the Parliament had given its authority for the re-examination of the Constitution of the Kenya Review Act passed by Parliament. Most importantly, the parliamentary committee had legal standing and could summon any person to give information before it.²⁹⁴

With the parliamentary committee in place, the reform process was set to begin in earnest. Its chairman, Raila Odinga, announced that the collection of views from the public would be preceded by a meeting

289. Nzamba Kitonga, *Querries Over Dons Law Reform Agenda*, DAILY NATION, Dec. 19, 1999, at 10 (Nairobi).

290. He is currently the Dean of the Law Faculty at the University of Nairobi.

291. Njeri Rugene, *MPs to Oversee Review as NDP Move Triumphs*, DAILY NATION, Dec. 16, 1999, at 1 (Nairobi).

292. *Id.*

293. Emman Omari, *Fury as Raila Heads House Team*, DAILY NATION, Dec. 17, 1999, at 3 (Nairobi). Other members of the committee were, from KANU: Musalia Mudavadi (KANU), Julius Sunkuli, Joseph Kamotho, Kalonzo Musyoka, Mohamed Affey, Jembe Mwakalu, Joseph Kiangoi, Fred Gumo, Seif Kajembe, Shaban Isaac, Paul Sang, Justin Muturi, Zephaniah Nyangwara, Ziporah Kittony. *Id.* From FORD(K) was John Munyasia; from NDP, Otieno Kajwang, Safina's Adan Keynan; KSC, George Anyona, and Shirikisho's Rashid Shakombo. *Id.* The DP and SDP members reclined their positions. *Id.*

294. Parliamentary committees are given such powers by section 23 of the National Assembly (Powers and Privileges) Act, Chapter of the Laws of Kenya. Disobedience to summons issued by the committee is punishable by imprisonment, or a fine of 2000 Kenyan shillings (Kshs.), or both.

between the committee and experts from all parts of the world.²⁹⁵ Many individuals and groups appeared before it and gave their views on reform. Most mainstream NGOs declined the invitation. For example, the Federation of International Women Lawyers (FIDA) refused the invitation saying that the committee was set up “illegally and unilaterally.”²⁹⁶ Lawyers, prominent retired politicians,²⁹⁷ academicians from all walks of life—local and foreign leaders of indigenous churches,²⁹⁸ ordinary citizens and members of parliament appeared before the commission. This occurred despite the spirited efforts by some sections of the opposition to derail its function.²⁹⁹ The committee wound up its public hearings on March 14, 2000.

The report prepared by the Raila committee revised some of the provisions of the Constitution Review Act. It removed the three-tier process and instead affirmed the Attorney General’s key role in the process.³⁰⁰ It also gave Parliament the power to appoint the constitutional review commission that would collate views from the public and draft the constitution. The chairman of the commission was to be appointed by the President from a list presented to him by Parliament. Like its predecessor,

295. Njeri Rugene, *Now Raila Calls an Array of Foreign Lawyers*, DAILY NATION, Dec. 22, 1999, at 3, 8-9 (Nairobi); see also Gitau Warigi, *Do We Need Foreign Experts*, DAILY NATION, Jan. 16, 2000 (Nairobi).

296. *FIDA Rejects Review Invitation*, DAILY NATION, Jan. 19, 2000, at 3 (Nairobi). FIDA’s view was rather surprising given that the lawyer’s organization, more than anybody else, should have acknowledged the legitimacy of parliament as the law-making organ of government.

297. *Elders Present Reform Views*, DAILY NATION, Feb. 2, 2000, at 10 (Nairobi).

298. *Pro-Committee Clerics Give Views*, DAILY NATION, Feb. 3, 2000, at 44 (Nairobi).

299. The activities of DP members were particularly noteworthy in this regard. First, came the boycott of all DP members from the committee. One DP member of parliament, Chege Mbituri, attended 24 sessions of the committee before resigning. Emman Omari, *Mbituri Leaves Reform Panel*, DAILY NATION, Feb. 13, 2000 (Nairobi). Second, came the allegation that NDP members of parliament had been bribed to forge unity between them and KANU. The allegation led to a physical fight between one NDP Member of Parliament and his colleague from DP. Eric Shimoli, *MP’s Fight Over Reforms*, DAILY NATION, Jan. 21, 2000 (Nairobi); see also Emman omari, *Speaker Steps in Over Feuding MPs*, DAILY NATION, Jan. 26, 2000 (Nairobi); *Top Editors Summoned Over Bribery Story*, DAILY NATION, Jan. 25, 2000 (Nairobi). Finally, in an effort to debilitate NDP, it facilitated the resignation of the latter key officers, namely, the secretary general, the national organizing secretary and the deputy national treasury. The trio announced their resignation at a press conference in March 2000. Owino Opondo, *Senior NDP Officials Resign*, DAILY NATION, Mar. 19, 2000 (Nairobi).

300. Emman Omari, *Raila Team Give a Key Role to Moi*, DAILY NATION, Apr. 7, 2000, at 1-2 (Nairobi).

the new commission would have two years to accomplish its task.³⁰¹ Many, including the Ufungamano group, the LSK, the mainstream media and opposition parties, castigated the report. A political commentator for the *Sunday Nation* newspaper made a prediction bordering on apocalypse.³⁰² He wrote:

There is no need to beat about the bush. And this is not the time to engage in idle arguments. A very very crucial point must be made openly, clearly, candidly. The point is this. The parliamentary Select committee on constitutional reform has made a grave mistake . . . The overall picture tells the whole sad story. It is that the committee has decided to hand the entire constitutional reform plate to President Moi to do with it whatever he pleases. . . Our future, our children's future, this country's future are all in peril if Kenya heads the way this select committee wants.³⁰³

And yet this was not to be so. The report ushered in a fresh bid to jumpstart the stalled process. It created a solid and legally justifiable framework within which the diverse opinions on the future of the nation could be articulated without endangering the rule of law. No matter the machinations of KANU, and quite contrary to the predictions above, by bringing in Raila and proceeding on the manner in which it did, the future of the reform process was set to slip from the hands of Moi and his party. It's Raila who probably read the signs of time correctly when he informed his critics to "read the report properly and discuss its merits or demerits rather than speak out of hearsay or misreading of media reports on it."³⁰⁴ The widespread suspicion for the Raila committee report by the NGO's and section of the opposition was not shared by a majority of Kenyans. Indeed, many criticized the call by DP chairman Mwai Kibaki and the NCEC for "mass action"³⁰⁵ and the establishment of a parallel government.³⁰⁶ The *Daily Nation* newspaper editorial of April 3, 2000, headed "Mass Action won't help our country," was a clear summation of the broader view that empathized with a legal approach to the whole issue of constitutional review. Similarly, the NCK rejected both the mass action

301. *Id.*

302. Gitau Warrigi, *Raila's Group Made a Horrible Mistake*, DAILY NATION, Apr. 9, 2000, at 6 (Nairobi).

303. *Id.*

304. Njeri Rugene & David Mugonyi, *Critics Mised, Raila Declares*, DAILY NATION, Apr. 9, 2000, at 1-2 (Nairobi).

305. Kipkoech Tanui, *Kibaki Now in the Firing Line*, DAILY NATION, Apr. 13, 2000, at 1 (Nairobi).

306. Musembi, *supra* note 287.

approach and the establishment of parallel government.³⁰⁷ Waking from his slumber, the Attorney General issued a warning to the NCEC and their sympathizers that they risked arrest for undermining the constitution and its bodies.³⁰⁸

The report of the Raila committee was passed by Parliament on April 26, 2000.³⁰⁹ Out of this report, the Attorney General drafted the Constitution of Kenya Review (Amendment) Bill of 2000. The Bill came before the House on June 6, 2000, it resumed immediately after a three-week recess. The same was readily passed with minor amendments.³¹⁰ The Act now gave Parliament authority to set up the Constitution Review Commission comprised of 23 members. In October 2000, the government advertised the positions and gave aspirants until November 2, 2000, to send in their applications.³¹¹ At the same time, the House also set up a committee to interview and short list the applicants for final approval by the President.³¹² The committee came up with 23 nominees. The list included, HWO Okoth-Ogendo, a respected legal scholar, Yash Ghai, a leading constitutional law expert and professor of law at Hong Kong University, a number of practicing lawyers, career politicians, retired civil servants and clerics.³¹³ The list also included the names of two persons slated for the position of the secretary. The president was obliged to choose 15 commissioners and a secretary from the list.

E. *The Ghai Commission*

On November 10, 2000, the final list of commissioners was released. The President had appointed Professor Yash Ghai, chairman to the commission and Arthur Okoth-Owiro its secretary.³¹⁴ Other commissioners were: Keriako Tobiko (practicing lawyer), Pastor Zablon Ayonga,

307. Ngumbao Kithi, *NCKK Rejects Mass Action*, DAILY NATION, Apr. 22, 2000, at 1, 5 (Nairobi). On April 22, the Ufungamano group also disassociated itself from the calls for mass action and establishment of parallel government. See *Ufungamano Rejects Mass Action*, DAILY NATION, Apr. 23, 2000, at 3 (Nairobi).

308. Owino Opondo, *Attorney Generals Warning to NCEC*, DAILY NATION, Apr. 18, 2000, at 2 (Nairobi).

309. Njeri Rugene, *Parliament Passes Raila Report*, DAILY NATION, Apr. 27, 2000, at 1, 16 (Nairobi).

310. *Review Commission Bill Passes First Reading*, DAILY NATION, June 7, 2000, at 7 (Nairobi).

311. Emman Omari, *House Review Begins*, DAILY NATION, Oct. 7, 2000, at 24 (Nairobi).

312. *Id.*

313. Gitau Warigi, *Review Team List Finally Released*, DAILY NATION, Nov. 5, 2000, at 8-9 (Nairobi).

314. Mburu Mwangi, *Ghai to Head the Review Team*, DAILY NATION, Nov. 11, 2000, at 1-2 (Nairobi).

Mutakha Kangu (practicing lawyer), Githu Muigai (lawyer), Bishop Bernard Njoroge, Paul Musili (lawyer), Domisiano Ratanya (retired civil servant), Ahmed Idha Salim (former Kenya's Ambassador in Stockholm), Mohammed Abdaulla Swazuri (former lecturer), and HWO Okoth-Ogendo (professor of law).³¹⁵ The establishment of a commission and the appointment of Prof. Yash Pal Ghai as its head heralded the beginning of a serious approach toward constitutional reform. Undisputedly, Prof. Ghai's appointment revamped the credibility of the whole process and allayed fears that the KANU-NDP alliance may simply install their surrogates at the helm of such an important review body. The divisions and tensions that the process had gathered in its five-year history, and the very existence of a parallel team—the Ufungamano group, signaled to the commission a very bumpy approach toward the achievement of its goal. But this was just one of the challenges that the Ghai commission has had to deal with in its short history. Corruption, insubordination, and lack of political goodwill signaled an even greater challenge for the review team.

1. Toward a Unified Review Process

Indeed Ghai's immediate concern after his appointment was to marry the two reform initiatives before any progress could be made on the actual review process. According to him, it was in the interest of all, that the review process be conducted in peace, even if the negotiations were to take time.³¹⁶ To show his commitment to this cause, he declined to be sworn until the two groups came together.³¹⁷ The gesture for reconciliation by Professor Ghai to the Ufungamano team was at first flatly rejected.³¹⁸ However, after intense lobbying and mutual consultations amongst members of the two groups, the Ufungamano team agreed to set up a small committee to negotiate with Professor Ghai.³¹⁹ The committee met

315. *Id.*

316. Emman Omari, *Fresh Unity Bid in Reform Talks*, DAILY NATION, Nov. 29, 2000, at 1-2 (Nairobi).

317. Chege wa Gachamba, *Reform Top Organ Meet*, DAILY NATION, Dec. 1, 2000, at 3 (Nairobi); see also Stephen Mburu, *Parallel Reforms Useless, Says Ghai*, DAILY NATION, Dec. 3, 2000, at 4 (Nairobi). Professor Ghai and his team were sworn on January 26, 2001, after the merger process was already in top gear. Chege wa Gachamba, *Prof. Ghai Sworn in as Reform Chairman*, DAILY NATION, Jan. 27, 2001, at 1 (Nairobi).

318. Chege wa Gachamba & Hannah Gakuo, *Reform Merger Snub*, DAILY NATION, Nov. 30, 2000, at 1 (Nairobi).

319. *Unity Hopes Grow*, DAILY NATION, Dec. 15, 2000, at 1 (Nairobi); see also Jacinta Senkoh-Ochieng & Benson Abele, *SUPKEM Supports Ghai Bid*, DAILY NATION, Jan. 10, 2001, at 3 (Nairobi).

on December 19, 2000, to draft proposals for merger.³²⁰ Amongst the proposals was the claim for equal number of representatives on the commission. The Ufungamano then wrote a letter to Raila Odinga requesting an early meeting, saying that time was of the essence.³²¹ After a series of meetings, both sides announced that they had reached some form of settlement that would incorporate the Ufungamano faction into the reform process. This however, would necessitate the amendment of the Review Act. Both teams appointed persons to draft amendments, which were presented to the Attorney General on February 21, 2001.³²²

After the publication of the two amendment Bills, the Constitution of Kenya (Amendment) Bill and the Constitution of Kenya Review (Amendment) Bill, the Ufungamano team nominated its commissioners to the commission. These were: Dr. Ooko Ombaka, Abida Ali Aroni, Dr. Wanjiku Kabira, Nancy Baraza, Amina S. Kassim, Salome Muigai, Dr. Charles Maranga, Riunga Raiji, Ibrahim Lithome Asmani, Isaac Lenaola, Abubakar Zein, Al Haj Baricha.³²³ These commissioners joined their counterparts earlier appointed by the Raila team. In total, the commissioners were twenty-seven, with 12 from Ufungamano and the rest were parliamentary nominees. In April 2001, the commission announced the formation of various committees, namely, the information communication and publicity to be headed by Kavetsa Adagala, Finance administration by Alice Yano, Civic education by Paul Wambua Musili, research and drafting by HWO Okoth Ogenjo.³²⁴

2. Insubordination

Having surmounted the problem of a divided reform initiative, the Ghai commission was now left to deal with its internal problems. Obviously, the fact that the commissioners had come from somewhat different ideological backgrounds, there was bound to be some difference in opinion on many levels. Indeed as it has turned out, there continues to

320. Chege wa Gachamba, *Review Team Meets to Draft Terms*, DAILY NATION, Dec. 20, 2000, at 3 (Nairobi).

321. Chege wa Gachamba, *Faiths Led Team Calls for Talks*, DAILY NATION, Jan. 11, 2001, at 3 (Nairobi).

322. Emman Omari, *What Ghai's New Bill Says*, DAILY NATION, Feb. 22, 2001, at 5 (Nairobi); see also Chege wa Gachamba, *Parties Agree on Review Framework*, DAILY NATION, Mar. 14, 2001, at 1 (Nairobi); *Yes to Merger*, DAILY NATION, Mar. 22, 2001, at 1 (Nairobi).

323. Chege wa Gachamba, *Ufungamano Picks Commissioners*, DAILY NATION, Apr. 7, 2001, at 1 (Nairobi).

324. Emman Omari & Muriithi Muriuki, *House Team Backs Ghai*, DAILY NATION, Apr. 20, 2001, at 1 (Nairobi).

be internal divisions and wrangling among the members of the commission that has greatly undermined its credibility. First came the revelation that some of its members had visited state house without knowledge and authority of its chairman.³²⁵ It was alleged that ten commissioners, seen by many as allied to KANU, visited state house for some unnamed purpose. The hue and cry from the commissioners left behind resulted in a very heated exchange in the commissions meeting called to resolve the matter. According to the chairman, this was an attempt to sabotage the process. "I find it hard to understand why some national leaders try to subvert this process. I can only conclude that there is a narrow and personal agenda and that the national agenda is not uppermost in their minds."³²⁶ The ten commissioners who visited state house explained that their purpose of doing so was to seek assurance from the President that the commission would not be dissolved prematurely.³²⁷ But this was not to be the end of such a secret visit to state house by any of the commissioners. On April 15, the local dailies reported that Alice Yano, in company of some 11 Kalenjin lawyers visited the President at his home in Kabarak.³²⁸ The purpose of the meeting was not disclosed.

Then came the accusations against the commission's secretary Okoth-Owiro, by the chairman, for financial impropriety, poor performance, and conduct.³²⁹ As Professor Ghai pushed for removal of Owiro, the secretary made counter-allegations of a similar nature against his chairman. Nobody, except the secretary and the chairman, will ever know the truthfulness or otherwise of the allegations and counter allegations raised by both sides, as the planned disciplinary hearing never took place and the High Court suit filed by the beleaguered secretary was settled before it came to full hearing.³³⁰ Owiro went on leave paving way for the commission to advertise his job. In a one-page statement the next day Owiro tended his

325. Macharia Gaitho, *Visit to Moi Splits Ghai Reform Team*, DAILY NATION, Apr. 13, 2001, at 2 (Nairobi).

326. *Ghai: I Feel Let Down*, DAILY NATION, Apr. 14, 2001, at 1 (Nairobi).

327. Emman Omari, *Why Law Reform Team Visited Moi*, DAILY NATION, April 16, 2001, at 5 (Nairobi). Two of the commissioners, Keriako Tobiko and Musili Wambua, denied that they had any regrets nor apologies for their visit. They also denied that they required consent from anybody to visit state house. *Furor Over Statehouse Visit*, SUNDAY NATION, April 15, 2001, at 3 (printed by DAILY NATION, Nairobi).

328. Emman Omari, *KANU Out to Cut Ghai Powers*, DAILY NATION, Apr. 19, 2001, at 3 (Nairobi).

329. *Review Team Secretary Gets Reprieve*, DAILY NATION, Aug. 9, 2001, at 3 (Nairobi).

330. David Mugonyi & Pamela Chepkemei, *Owiro Finally Off the Hook*, DAILY NATION, Aug. 24, 2001, at 3 (Nairobi).

resignation saying that the differences between him and the chairman were irreconcilable. He stated:

Given the rancor and acrimony that characterized the relationship between myself and Prof Ghai, it is obvious to me that the two of us cannot work together. For this reason, and in the interest of the nation and the review process, I have decided to step aside as commission secretary. . . .³³¹

Patrick Lumumba, a founding member of Movement for Dialogue and Non-Violence (MODAN),³³² and a law lecturer at the University of Nairobi's Faculty of Law, was hired as the new secretary to the commission.³³³ Lumumba, a regular to local political discourse, who in a letter to the Nation newspaper in March 1998³³⁴ called on the NCEC to give the Parliament a chance to create the framework for review, a prediction that by all merits had come true, was seen by many as a befitting replacement to the embattled Okoth Owiro. The commission's image has undeniably improved and the secretariat is dutifully performing its functions.

3. Paucity of Resources

According to the 2001/2002 Supplementary Estimates, the Commission should have at its disposal Kenyan shillings (Kshs.) 300 million. This amount was to be placed at the Commission's disposal once Parliament passed the two Bills.³³⁵ The two were passed in parliament on May 8, 2001, and assented by President on May 17, 2001. With the expanded mandate that included civic education, the Commission will no doubt need more money. The Commission Chairman has appealed to donors to fund the 2.6 billion deficit in the constitutional review process.³³⁶

331. *Owiro Quits Law Team Over Clashes With Ghai*, DAILY NATION, Aug. 25, 2001, at 1 (Nairobi).

332. MODAN had come to the limelight when in April 2000, they wrote a letter to the president, all political parties and prominent NGOs to agitate for change through peaceful means. *Groups Plea on Review Talks*, DAILY NATION, Apr. 30, 2000, at 3 (Nairobi).

333. David Ngunyi, *City Lawyer Named Reform Team Secretary*, DAILY NATION, Oct. 5, 2001, at 1 (Nairobi).

334. P.L.O. Lumumba, *Logical Steps to Law Reforms*, DAILY NATION, Mar. 11, 1998, at 12 (Nairobi).

335. Emman Omari, *Make or Break for Ghai Group*, DAILY NATION, Apr. 17, 2001, at 5 (Nairobi).

336. Chege wa Gachamba, *Commission Pleads for Sh 2.6 b from Donors*, DAILY NATION, July 14, 2001, at 3 (Nairobi).

4. Corruption

Charges of corruption within the Ghai commission have been most disheartening.³³⁷ In June 2001, Professor Ghai admitted that there was an attempt to procure 25 expensive vehicles without his knowledge.³³⁸ There were also reports that mobile telephones had similarly been ordered, and that some commissioners were claiming up to three times the attendance allowance for one time.³³⁹ Later the same month, a commissioner admitted that he had billed the commission Kshs. 500,000 for legal services he allegedly rendered.³⁴⁰ But he said the fee note was a “dummy” merely meant to assist the commission to bring down fees that were being sought by another law firm. The LSK demanded that those implicated in the scandals should resign immediately. According to the LSK chairman, the commission had been “morally and politically compromised beyond repair.”³⁴¹ The matters were resolved within the commission and nothing was made public.

5. Prospects

The hope that the Commission will live to accomplish its work is strengthened as days go by. But the fear that President Moi and his KANU friends may indeed scuttle the process still lies firmly in the subconscious of opposition leaders.³⁴² Indeed, there has been suggestion that the commission should be entrenched in the constitution.³⁴³ The commissioners do not share the pessimism. While presenting what they called “strategic plan for the review” in July 2002, the commissioners expressed optimism that they would be able to accomplish their work by October 2002.³⁴⁴ True to their promise, the public hearings began on July 17, 2001,

337. *Probe Graft Claims in Law Review Team*, DAILY NATION, June 8, 2001, at 1 (Nairobi).

338. Chege wa Gachamba, *Ghai Speaks Out On Sh 121 Million Deal*, DAILY NATION, June 2001, at 1 (Nairobi). The issue of mobile telephones later surfaced when the commission was threatened with legal action for the recovery of monies owed to the suppliers. See, *Ghai Team Faces New Court Threat*, SUNDAY NATION, June 10, 2001, at 3 (printed by DAILY NATION, Nairobi).

339. *Id.*

340. Ken Opala & Macharia Gaitho, *Why Reform Lawyer Asked for Sh 500,000*, DAILY NATION, June 9, 2001, at 1 (Nairobi).

341. *Pressure Mounts on Ghai Team*, DAILY NATION, June 11, 2001, at 1 (Nairobi).

342. See, e.g., Paul Muite, *Opposition Plight in Impending Elections*, SUNDAY NATION, Jan. 6, 2002, at 13 (printed by DAILY NATION, Nairobi).

343. Njeri Rugene, *Why Hardliners Want to Derail Review Plans*, DAILY NATION, Apr. 15, 2001, at 6 (Nairobi).

344. Njeri Rugene, *Constitution Ready By June, Says Ghai*, DAILY NATION, July 17, 2001, at 24 (Nairobi).

and are continuing.³⁴⁵ So far the future looks bright and it will be up to the commission chairman to steer his boat out of unnecessary controversy and to keep his house clean.

The task before the Commission is not an easy one. Over the years and particularly after 1995, the constitutional reform agenda has attracted a myriad of views from a cross-section of society. Adding to the suggestions, reports, memoranda, etc. that it will collate during the hearing process, reducing these into an acceptable constitution, may indeed pose a challenge. As I see it, the commission may have to involve of experts at various levels of the process. Secondly, the commission must begin thinking of ways to extend the temporal aspects of its terms of reference. Indeed, questions have been raised as to whether the commission will have sufficient time to canvass people's views on these issues and come up with a document that reflects a consensus of majority of Kenyans.³⁴⁶ It is inconceivable that the commission may be able to finish its task before September 2002. I thus agree with the views of Julius Ihonvbere,³⁴⁷ that making a constitution that enjoys legitimacy and has value not only requires the establishment of an "independent and well financed" constitutional commission, but also that the Commission so established has ample time to do its work.³⁴⁸ It may thus be prudent to accomplish 'minimum reforms' to enable the country go through the transitional election slated for December 2002. Thereafter, comprehensive review may then be finalized.

The issues that the reform process may have to deal with are wide-ranging. However, so that the constitutional framework provides for mechanisms and processes that may eventually minimize the problems of ethnicity, the following areas may at a minimum, be subject to clear constitutional guarantee. The new constitution should:

- (1) Provide for structural techniques that would change institutional format in which ethnic conflicts occur. The proposal here is that Kenyans should consider reducing state centric powers by establishing semi-federal arrangements that would accord autonomy to

345. Chege wa Gachamba & Silas Nthiga, *Review Team's Hearings Begin*, DAILY NATION, July 18, 2001, at 3 (Nairobi).

346. Njeri Rugene, *Querries Over Review Deadline*, DAILY NATION, July 22, 2001, at 6 (Nairobi); see also *Law Society Cautions Ghai Team*, SUNDAY NATION, July 29, 2001, at 3 (printed by DAILY NATION, Nairobi).

347. Julius O. Ihonvbere, *How to Make an Undemocratic Constitution: The Nigerian Example*, 21(2) THIRD WORLD Q. 343-66 (2000).

348. *Id.*

the various provinces in line with the current administrative zones. The *Majimbo* debate must be put to rest.

- (2) Limit presidential powers while expanding the role of Parliament and other legislative organs. Strengthen Parliament by giving it powers to regulate appointments to public offices, and government expenditure, and so forth. In this way, the loss of an election will not diminish a political party's influence in political decision-making.
- (3) Expand the Bill of rights so that group rights are protected just as much as individual rights are.
- (4) Expand the areas of political participation. Strengthen democratic procedures at the Local government level as well in provincial councils (if created).
- (5) Strengthen the judiciary so that it is capable of resolving conflicts and punishing deviants.

It should not be expected that the constitution will be a straightjacket for all events for all times. According to Justice William Rehnquist, the framers of the U.S. Constitution set out general principles and "left to succeeding generations the task of applying that language to the unceasingly changing environment."³⁴⁹ However, the process of constitutional review should spur legislative response to other sectoral concerns. Specific themes such as land, management of elections, civic education, environment and the like, could very well be addressed by comprehensive statutes rather than the constitution. Moreover, by strengthening the judiciary and especially its judicial review functions, many contentious issues that have hitherto been an anathema to the exercise of political freedoms may be resolved.

VI. CONCLUSION

No matter how one views the current political situation, the inevitable conclusion seems to be that the "big men" of Kenyan politics are indeed here to stay. The Kenyatta oligarchy gave way to the Kalenjin autocracy. Both these hegemonies benefited from the ethnic cleavages that were invented by the colonialists and nurtured so well after independence. Tormented by the forces of change generated after the cold war, the Kalenjin autocracy seems to be giving up some of its hold on state centric

349. William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 694.

power, while depicting empathy with a more decentralized dispensation. For now, the nature of the political establishment may be unwieldy, but its influence on the normative processes is profound. Thus, the current constitutional review process may romanticize its so-called independence, but the outcome of its work may be the ultimate judge of this. The hope that has so far been invested in is enormous. According to professor Kivutha Kibwana, the process should redesign the entire political, socio economic and cultural system of the country "so that the basic values, institutions and rules thus derived have the ability to promote the welfare of all."³⁵⁰ This scheme is not compatible with the narrow interests of the "big men" of Kenyan politics, and there is bound to be conflicts as the process unfolds.

The fact that ethnicity is at the center of current political developments, and that it may influence future political outcomes, is not in doubt. The test is whether Kenyans can live with it. As suggested in this article, there is need to rethink the notion of ethnicity and explore how to put it to positive use instead of moaning about its negative aspects. "Positive ethnicity" offers a favorable basis upon which to launch such an exploration, which is by no means an easy task. If our goal is to attain "democracy without tears" then relentless we must become in our quest for plausible and preferable structures of development that will respect our cultures, religion and race. The extent to which the broad formulations and aspirations enunciated by positive ethnicity will find expression in the Kenyan constitution only time will tell. However, one thing remains clear, unless the ethnic issue is resolved through constitutional change, the only option left for Kenyans to eliminate political decadence will be through popular uprising like the Filipinos, Zambians, and Haitians.

350. Kivutha Kibwana, *All Must Have a Say in Constitutional Making*, DAILY NATION, Sept., 13, 1999, at 1-2 (Nairobi).