CATHOLIC UNINVERSITY OF EASTERN AFRICA

CUEA CLS 102

PRINCIPLES OF CONSTITUTIONAL LAW

LECTURE NOTES

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LESSON 4 Constitution Making

Lesson Content

1. The concept of the constituent power of the people
2. The making of the constitution
3. History of our constitution
4. The Road to the CoK 2010

1. The concept of the constituent power of the people

Read the case of Njoya vs AG

2. The Making of the constitution

- A theoretical perspective (These notes)
- Court Decisions (Read Njoya vs AG)(Madzimbamuto vs Ladner Burke, Uganda vs Commissioner of Prisons Ex Parte Matovu.
- The making of the Constitution of Kenya 2010 (These notes)
- Amending the constitution of Kenya 2010(Read Articles 255-257 CoK 2010 and Section 47 and 47 A of the 1969 Constitution)
- Making a Constitution for Kenya (These notes)

A theoretical perspective

Importance of the making of a constitution

Constitution making typically takes place during a constitutional moment, that moment when a country experiences an overwhelming need either to make a new constitution or to substantially review an existing one. Constitutional moments are rare occurrences indeed. Not every generation gets a chance to participate in the making of a constitution. The generation that gets this sacred opportunity has an obligation to rise above immediate concerns and prejudices and think of how the constitution they make today will impact on distant future generations

The making of a constitution marks the beginning of an epoch and the end of another. The constitution making process will accordingly reflect a commitment to, or the pressure towards, democratization, resulting from disillusionment with the previous dispensation.

Constitution making as a conflict resolution process

Many internal conflicts revolve around the structure of the state and the distribution of its powers and resources, and in that sense, at least at one level, they are disputes about the constitution. The making of a constitution is perceived as a key component of conflict resolution. The resolution of these disputes is often thought to have been successfully achieved when a new, consensual, constitution has been agreed and put in place. The psychological impact of a successful constitution making process is therefore significant and a country can leverage on it to signify a departure from the past and a focus on the future.

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Managing expectations

Because of the potential for conflict resolution, constitution making processes sometimes create unrealistic expectations. Although the adoption of a constitution is a watershed, it is unrealistic to assume that all problems have been resolved or that the constitution would take root automatically. A constitution needs to be nurtured and consideration must be given to the many measures to fully bring it into effect. Those spearheading the constitution making process must therefore be careful to manage the expectations of the citizens. Unmet expectations can create disillusionment and even outright discontent with the newly created constitutional order. This can have a negative effect on consolidating the gains made in the new dispensation and citizen apathy in the implementation process

An inherently divisive process

The constitution making process is often divisive because it is profoundly political. It is political not only in the sense that it is a dialogue about political power and deliberation about societal values and institutions. It is also political, in a cruder way, because it is about individuals and groups jockeying for power. An ever-present danger in the process of constitution making is the risk of the process being hijacked by narrow and short term political interests to the disadvantage of long term societal gains. Although constitutional negotiations are seen as the method of resolving differences, the fact is that the constitution making process can itself be deeply divisive, as a great deal is at stake. Infact, far from resolving conflicts the constitution making process can infact degenerate into an acrimonious process that opens past political wounds and generate incredible acrimony. Those tasked with the responsibility of shepherding the process must never be under any illusions about the conflict healing potential and must steadfastly focus on the ever present dangers inherent in the process.

Prepare for false starts. Prepare for disappointment

Historically, a large number of processes have failed to produce a new constitution. This does not necessarily mean that the entire process has failed. No matter how disappointing, every step in the process has a silver lining to an otherwise dark clowd. If nothing else every apparent failure is a powerful lesson on how not to go about the process. And the next step invariably starts from where the last process left off, never from the beginning.

Objectives of constitution making

Constitutions are invariably negotiated documents. It can have intended and unintended outcomes. To succeed, the constitution making process must reflect this realization. As indicated above, far from resolving conflicts, the process can infact engender conflict.. This typically happens if sections of the country feel excluded, or get the impression that vested interests have hijacked the process to their disadvantage. The process must therefore be inclusive and all must feel involved and valued. A good constitution making process should have as its objectives;

- The reconciliation of conflicting groups
- The strengthening of national unity

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- The empowering of the people; and preparing them for participation in public affairs and the exercise and protection of their rights
- The elaboration of national goals and values
- The promotion of knowledge and respect for principles of constitutionalism
- The enhancing of legitimacy of the constitution**.**

Process must be participatory

The above objectives cannot be achieved unless the process is participatory. There is now a consensus that certain norms, based on the principles of self-determination and political rights, should be incorporated in the design of the process, indeed some have argued that there is a human right to participate in making the constitution under which people will live and be governed. Arguably, this right cannot be delegated and is nonderogable. But direct participation is narrowly defined to mean the people have a final say in adopting or rejecting the final output of the process. There are many aspects of the process where direct participation is not feasible. But that the people have the ultimate say in whether or not to adopt the final document is now considered a given

Representative and Participatory Democracy

Public participation can take two forms

- Representative democracy-a few people are elected to act on behalf of the rest
- Participatory democracy- the people act directly

Neither appears to be close to the ideal but the latter is deemed to be the lesser of the two evils

Representative democracy

In representative democracy a few people are chosen to act on behalf of the rest. It is probably the most prevalent method of constitution making; A significant majority of constitutions were made using a process of representative democracy.

Challenges with representative democracy

The biggest challenge to representative democracy is that it involves a leap of faith in the representatives. The quality of the representation is never guaranteed. Democracies are known to entail exclusion. The proverbial tyranny of numbers is never too remote to pose a devastating threat to inclusivity which is a sine qua non of any successful process. Elected representative usually act on behalf of some organized segments of society with a disproportionate amount of material and ideological assets. The voice of the poor and minorities are often neglected. The best representation is a proportionate representation. There should be a representation of the majority and the minority. The majority should not dominate the agenda setting and use minority representation to legitimize an otherwise illegitimate process. Constitution making should be slow to adopt the mantra about the majority having their way as minorities have their say. Remember they are negotiated

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documents. The tyranny of numbers should be treated with utmost caution. A give and take approach delivers a far more promising outcome than a tyranny of numbers.

Representative democracy has other challenges. Elected representatives need autonomy and room for manoeuvre. Question is how much? It is generally agreed that the representatives are not proxies of the constituencies they represent but therein lies the danger of a small group of representatives being manipulated to pursue an agenda which is inherently anti-people.

Participatory democracy

Participatory democracy involves direct participation. Examples are referenda, plebiscite popular initiative. Participatory democracy Is now an important theme of constitution making. This has not always been the case. It is in fact a recent innovation. It is an expression of the rise of popular sovereignty. If sovereignty is indeed vested in and flows from the people it is natural that they should determine how it should be delegated and exercised. The emphasis on popular sovereignty is no doubt a natural response to the historically documented abuse of sovereign power by numerous governments. Participatory democracy is now the more popular brand of democracy. Switzerland stands out as the country that deliberately chooses participatory democracy above representative democracy.

Justification for participatory democracy

- Participatory democracy is seen as the ultimate expression popular sovereignty.
- It facilitates the development of a negotiated agenda for political change
- It promotes reconciliation between conflicting groups
- It helps to develop national consensus
- It acts as a means of civic education

Challenges with participatory democracy

Complex decisions require expert input. Popular choices may have adverse long term effects. Should a few expert technocrats dominate the most important collective decisions? Expert advice may be a smoke screen to pursue hidden agenda?

Participatory democracy can be very cumbersome and expensive. It may be undesirable even where possible. It requires a fairly sophisticated populace to work well. And it can easily be abused by charismatic caesaristic leaders who can generate cheering crowds by empty rhetoric. High levels of participation not necessarily indicative of better democracy

Other challenges with participatory democracy include the following

- It presents an opportunity for manipulation of the people by interest groups,
- It creates the risk of ethnicisation of opinion,
- There is a danger of spontaneity and populism,
- It diminishes the role of experts
- It makes consensus building harder
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Overcoming the perils of participatory democracy

The procedure must address questions of

- the preparedness of the people, both psychologically and intellectually, to engage in the process,
- the methods of soliciting views of the public and special and organised groups,
- the analysis, assessment, balancing and incorporation of these views

The engagement cannot be 'one off' but must be continuous, including fresh opportunities to comment on the draft and meaningful forms of participation afterwards.

The participation must be deliberative, not the mere aggregation of interests and demands. There is need for extensive involvement of civic society at grassroots level. In this way even if the formal process makes little provision for formal participation, the voice of the people will be heard.

Transparency and integrity are essential to win and sustain people's trust and confidence, and to guard against the dangers of manipulation; otherwise constitution making can easily become just another form of politics, driven by narrow and short term interests, and generating bitterness instead of goodwill.

Methods of making a constitution

It has been observed above that constitutions are typically made during constitutional moments. However there are fundamental differences in the methods of making constitutions. No one method is inherently superior to the others in all respects and the preferred approach is typically a combination of the many methods available. Below are examples of the different methods:

- Evolution like the UK Constitution
- Imposed e.g. the independence constitutions
- Promulgation Nigeria 1979 and 1989
- By parliament e.g. UK
- By a constituent assembly e.g. France, USA , SA
- The existing legislature reconstitution itself as a constituent assembly
- Constitutional commissions
- Constitutional conferences
- A Committee Of Experts
- Referendum on the whole document
- Referendum on contentious issues
- A Yes-Yes Or Yes-No referendum
- A combination of some or all the above

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The Constituent Assembly

The distinguishing characteristic of a constituent assembly is that it is established to make a constitution, or at least that this is its primary role. The constituent assembly is still the most common mode of making a constitution. (Ghai).But the fact is that between constituent assemblies there can be (and have been) enormous differences in the composition, functions and modes of operation. In some countries it has been in charge of the entire process. In some cases its draft has been subject to a referendum or ratification by another body.

Constitutional making processes

The process is as important as the outcome. The process can fundamentally affect the legitimacy and even the substance of the document. Whereas it is possible to embark on a constitution building process with no agreed parameters and goals, such an approach is likely to be an indicator that there are more or less hidden goals, not necessarily shared by all participants. This can irredeemably poison the atmosphere leading to tension, and delay as the process proceeds

Characteristics of a good process

- The general position is that the stakeholders must participate in the process
- The government must never control or even be seen to control the process
- The process must be transparent

Components of a good process

The process typically starts with an agreement on a broad set of principles and goals that will drive the process. This is followed by an agreement on institutions and procedures for making the constitution. The next important step is the preparation of the people for consultation. This is done by providing civic education on the process, country's constitutional history, and constitutional options available. Consultations should be meaningful. The range of stakeholders to be consulted must ensure maximum inclusivity. Some stakeholders may be worthy of more opportunities for consultation. There should also be consultations with experts on the constitution making process as constitution making is technical and non experts may lack the bird's eye view that experts acquire through training and experience. Consultations with experts will also ensure lessons from comparative experiences are brought to bear on the process. This can save the process substantial time and costs as mistakes committed elsewhere can be avoided.

After the consultative process, it is time to analyze the opinions Analysis of opinions is really a technical job. Once the analysis is over, a draft document is prepares and submitted for public discussion and more consultations. The consultations should yield a reviewed version of the draft which is then submitted to the people to approve or disapprove in a referendum. If the document is approved, the constitution is then formally promulgated as the constitution of the country. It is the promulgation that brings the constitution into force. The constitution must have transitional provisions to ensure a smooth transition from the old dispensation to the new. Finally the constitution must have provisions to guide its implementation.

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Phases of Constitution Making

From the preceding section, it is apparent that almost without exception the process is executed in various phases. It is important to remember that the process is country specific. Accordingly, the phases are country and time specific. It is also important to remember that public participation is a thread that must run through all the four phases. The participation of the people at all stages of the process will determine its legitimacy if not its quality

A model Constitution Making Process (Paul R William July 21, 2006)

- The preparatory phase;
- The constitutional drafting phase;
- The public consultation phase; and
- The final review and adoption phase.

The First Phase: The preparatory phase;

- Initial negotiations concerning procedure, an outline of the process, and the establishment of realistic timetables;
- Agreement on a set of basic principles that will guide the constitutional process;
- Initial public education and consultation, national dialogue of the constitutional changes or potential revisions;
- The possible adoption of an interim or transitional constitutional document;
- And, the establishment of a constitutional commission.

The Second Phase: The constitutional drafting phase;

- The establishment of an elected constitutional commission or assembly that will oversee the drafting of the final document;
- Extensive consultation with legal experts and advisors, the international community, a broad array of stakeholders, all political parties concerned, and the public at large;
- The preparation of an initial draft of the constitution, via transparent drafting committees, and regular input from the public, and select international advisors, as well as domestic and international legal advisors.

The public consultation phase;

- A nation-wide public and civil education, media campaigning, reception of public comments and suggestions;
- The use of traditional and innovative modes of bargaining and public dialogue, before or during the initial drafting of the new constitution; website
- Structured participation by all groups-especially women, minorities, all political and opposition parties, and civil society;

Third phase: The public consultation phase

- A nation-wide public and civil education, media campaigning, reception of public comments and suggestions;
- The use of traditional and innovative modes of bargaining and public dialogue, before or during the initial drafting of the new constitution; website

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- Structured participation by all groups-especially women, minorities, all political and opposition parties, and civil society;

Fourth phase: The final review and adoption phase.

- A period for modifying the draft constitutional text to include public and expert comments and suggestions;
- A review by the constitutional commission, parliament or the courts, as well as the public, for necessary revisions, amendments, or greater public input;
- The broad approval and adoption of the final text via the constitutional commission, elected representatives, or a national referendum process;
- A post-adoption process of public education, national ratification, and conference of legitimacy on the final product

Five Rules of Constitution Making

- Rule 1: Limit the appearance of incumbent/occupier dominance
- Rule 2: Provide multiple opportunities for participation Public participation may generate useful ideas. Creates a model for future democratic behaviour
- Rule 3: Choose procedural rules that foster compromise
- Rule 4: Focus on the future
- Rule 5: Adopt clear rules of procedure in advance

Lessons for the drafter

- There are different approaches to constitution making processes
- Constitution making processes are country specific
- The proceeds usually take place in phases
- The phases must be as participatory as possible
- The government need to play only a facilitative role
- Representative democracy is not ideal representation in constitution making
- Referenda do not guarantee the best outcomes

3. History of our constitution

Five main phases

- 1877-1895
- 1895-1920
- 1920-1963
- 1963 to 2010
- 2010 to Present day

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1877-1895

Landmarks

1877-BEAA formed by William MacKinnon

1886-Berlin Conference

1886-Anglo-German Agreement

1888- Royal Charter of incorporation given to BEAA. Birth of IBEA

1890-Brussels Conference

1890 THE Anglo-German Agreement

1895 –Declaration of the protectorate end of IBEA

Jurisdiction under English Law

Jurisdiction partly based on the concessions the BEAA (later IBEA) obtained from the sultan of Zanzibar and agreements with local leaders and later, from a Royal Charter. Concessions gave wide administrative and judicial powers to the IBEA.The Royal Charter reserved far-reaching rights to the British Govt but Britain was of the view that she was not the constitutional sovereign. At an international law level the Company was no more than a convenient device for the exercise of sovereign power and Britain was for all intents and purposes the recognised sovereign .This is confirmed by the General Act of 1886 (Berlin) and 1890(Brussels)

The juridical sources of jurisdiction were:

- Prerogative Power
- The Foreign Jurisdictions Act 1843 and subsequent amendments
- Royal Charter
- Concessions from the Sultan and agreements with local leaders
- The Foreign Jurisdiction Act 1890
- Zanzibar Order-in-Council 1884
- The African Order-in-Council 1887

Jurisdiction under International Law

Article 1V General Act of the Brussels conference

'The powers exercising sovereignty or protection in Africa may, however, delegate to chartered companies all or a portion of the engagements which they assume by virtue of Article 111.They remain nonetheless directly responsible for the engagements which they contract by the present General Act and they guarantee the execution thereof'

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1895 to 1919

Landmarks

1895-Kenya Becomes a British Protectorate

1897-East Africa Order In Council

1902-East Africa Order In Council

1902- The Crown Lands Ordinance

1903 -Native Tax Ordinance

1905 –The Legislative Council and the Executive Council

1915-The Crown Lands Ordinance

The declaration of a protectorate in 1895 only had legal implications from the point of view of English Constitutional Law. The territory became known as the East Africa Protectorate. From an international perspective and from a practical point of view the declaration was a mere formalization of an existing reality and an acknowledgement of international obligations conferred by the General Acts of 1886 and 1890. By an agreement with the sultan of Zanzibar Britain assumed far-reaching administrative and judicial powers over the ten mile coastal strip and the hinterland. This marked the beginning of direct British administration in the protectorate

The jurisdiction to administer was initially thought to flow from the exercise of Royal Prerogative but when doubts arose the Foreign Jurisdictions Act was passed in 1843 to deal with the doubts. Pursuant thereto the Queen could by subsidiary legislation known as Orders-In -Council make laws pertaining to colonial administration. The foreign Jurisdictions Act 1843 was repealed and amending legislation was consolidated into the Foreign Jurisdictions Act 1890. It was the Foreign jurisdictions Act 1890 and orders in council made there under that formed the legal framework for the administration of the territory. The legal framework gave wide ranging legislative judicial and administrative powers to the consuls and, later, colonial officers. Notable Orders-in-Council included the Zanzibar Order-in Council 1884, the African Order In Council 1889, the East Africa Order in Council 1897. The status of the inhabitants of East Africa were changed from those of aliens to those of protected persons but in English law they are still not subjects of the British Govt. Curiously the relationships between the inhabitants and the protecting power is not governed by international law but by the law of the protector.

Ole Njogo and ors vs AG of the EAP (1914) 5 EALR 70

1904 first agreement with the Laibon provides for certain rights to the Masais.1911 second agreement with the Laibon reviews some of the rights under the 1904 agreement. Plaintiff who was affected by the 1911 agreement sues for a breach of the 1904 agreement claiming it was a civil contract, and damages for tort for wrongful confiscation of cattle. Preliminary objections were raised on the grounds that the two agreements were not contracts but treaties and the confiscation not a tort but an Act State.

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The court held that

- The Masais were not subjects of the British Government
- The agreements were treaties not contracts
- The tortious acts complained of were acts of state not torts
- The courts had no jurisdiction over the matters before it
- The Masais had no remedy in international law since a tribe was not a recognised state. They had no right of diplomatic protection
- Their remedy lay in invoking the goodwill of the colonial aggressors

See also Denning LJ in Nyali Ltd vs AG 1956 KB 1

Although the jurisdiction of the crown in the protectorate is in law limited jurisdiction, the limits may in fact be extended indefinitely so as to embrace almost the whole field of Government…The courts themselves will not mark out the limits. They will not examine the treaty or grant under which the crown acquired jurisdiction: nor will they inquire into the usage or sufferance or other lawful means by which the crown may have extended its jurisdiction. The courts rely on the representatives of the crown to know the limits of its jurisdiction and to keep within it. Once jurisdiction is exercised by the crown the courts will not permit it to be challenged

Summary on Jurisdiction

Between 1887 and 1895 in the eyes of the British they had no legal or political obligations in their spheres of influence administered by the IBEA. Sovereignty vested in the Sultan of Zanzibar but the company acquired administrative legislative and judicial rights under the concessions given by the sultan

But the company also had a royal charter which gave the British government extraordinary power over its activities and which in effect was the legal source of the company's authority. The company was for all intents and purposes an agent of the British Government

In the eyes of international law sovereign power vested in the sultan subject to any concessions given to the British Govt or its agent-the IBEA. This was the purport and import of the General Acts of 1886 and 1890

Once a protectorate was declared jurisdiction was now exercised directly.The international law basis of jurisdiction were the General Acts of 1886 and 1890

The constitutional basis for jurisdiction was a combination of royal prerogatives , the Foreign Jurisdictions Acts of 1843 and 1890 and the Orders-in-Council made there under e.g. the African Order-in-Council and the Zanzibar Order-in-Council. The East Africa Order-in-Council 1897 1899and 1902.Pursuant to these orders in council various ordinances such as the Crown Lands Ordinance, were enacted

Jurisdiction over Land and natives

On the Authority of *Ole Njogo vs AG of EAP* the indigenous communities in the protectorate were not British subjects but foreigners. Under International Law the indigenous

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communities were not states and therefore had neither rights nor obligations under international law.

Title to land was conferred initially by agreement with the natives but later by legislation such as the Crown Lands Ordinances (CLO)of 1902 and 1915.The 1915 CLO and the 1920 Kenya Colony Order-in-Council the natives became tenants at will of the crown *Wainaina vs Murito* 1923 (9) 2 KLR 102

The two Crown Lands Ordinances made some exceptions with regard to ownership of land in the ten mile coastal strip. With respect to the ten mile coastal strip, the Land Titles Ordinance provided for an adjudication of ownership of Land belonging to the Sultans subjects as of 1914.After 1914 radical title vested in the crown not the sultan

Jurisdiction over foreigners

Law Officers' opinion 1886

Under the IBEA era and under the protectorate the British government had no civil or criminal jurisdiction over foreigners who were not British subjects save with the consent of the foreigner or of his government

This position was given legislative imprimatur in the 1884 Zanzibar Order in Council and the 1889 African Order in Council

Judicial decisions in R v Montopoulo (1895) 19 ILR (Bomb.) 741 and Imperatrix vs Juma and Urzee (1898) 22 ILR (Bomb.) 54

Jurisdiction under the colonial state

1920 Kenya Colony Order in Council-Kenya becomes a British colony.

All vestiges of sovereignty lost but paradoxically the inhabitants now had better rights than they had under English law. Kenya became part of the British Empire

Development of legislative and executive power

- 1897-1920 The 1897 and 1902 EA O-in-C
- 1920-Kenya Colony Order In Council
- 1923 –The Devonshire White Paper
- 1944-The Legislative Council
- 1952-Emergency Powers
- **1954-The Littleton Constitution**
- 1957-TheLegislative Council
- **1958-The Lennox Boyd Constitution**
- 1960-the 1st Lancaster Hose Conference
- **1960-the Macleod Constitution**

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1960 to 1964

The constitutional framework 1960-1963

At this time Kenya was governed by the 1960 Constitution-The Lennox-Boyd Constitution

Two Lancaster conferences, 1960 and 1962

The objectives of the Lancaster conference was two-fold

- To establish a Westminster parliamentary system
- To incorporate special provisions for the protection of minorities

The first objective was largely uncontroversial. Great controversy attended the second

In 1962 there was a coalition government between KANU and KADU headed by the Governor. The membership of the council of ministers was evenly divided between the two. The two leaders Ronald Ngala and Jomo Kenyatta were ranked at par. Because of the deep division between the two it was not possible to have a chief minister though KANU was by far the predominant party.On 1st June 1963 Kenya was granted internal self government

Highlights of the self-government constitution

The independence constitution is famed for its remarkable distrust for power. No effort was spared to circumscribe the powers of the incoming government through a series of constitutional provisions designed especially to protect minorities from the feared tyranny of the majority

- A Westminster parliamentary system of government
- An extensive system of regionalism
- Substantial constitutional safeguards to protect minority interests

The executive

There was a prime minister to be appointed by the Governor from the members of the House of Representatives likely to command the support of the majority. The Governor was to act on the advice of the cabinet. The colonial office retained important powers. Acting under his instructions he retained significant legislative and judicial competence in respect of Defence, External affairs, internal security.

The Legislature

The legislative council was renamed the Central Legislature and was bicameral. It consisted of the House of Representatives as the Lower House and the Senate as the Upper House

Regionalism

The country was divided into seven regions each with its own executive and legislative powers. In the performance of certain functions, the center could only Act with the consent of the Regions

Universal suffrage

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The grant of internal self-government was preceded by a general election based for the first time on universal suffrage

Independence

On 12th December 1963 Kenya became an independent state .The legislative instruments that granted independence were

- The Kenya independence Act 1963
- The Kenya Independence Order-in-Council to which the independence constitution as a Schedule

It is noteworthy that the protectorate over the ten mile coastal strip was included in the territory which was granted independence following a tripartite agreement between the Sultan, the British Government and the Kenya Government. The quid pro quo was a commitment and an undertaking of the Kenyan Government to protect the Muslim minority through constitutional safeguards that ultimately took the form of the provisions for the Kadhi Courts.

Highlights of the Kenya Independence Act

The British parliament renounced British Rights of Government and Legislation in Kenya. It repealed all limitations on the competence of Kenya's legislature e.g.

- The ability of the imperial legislature to legislate for Kenya
- Limitations of the colonial legislature to pass laws with extraterritorial effect
- The crowns veto powers
- The need for the executive to perform its functions in accordance with royal instructions

The Act provided that with effect from the 12th Dec. 1963 the British Govt would cease to have responsibility for the government of Kenya. It also provided that the acts of the UK parliament would cease to apply to Kenya .The first schedule to the act specifically disapplied the Colonial Laws Validity Act 1865 to legislation passed in Kenya. It removed the repugnancy clause that voided certain statutes passed by the Kenyan legislature. It also placed certain limitations on the Kenyan legislature to amend certain constitutional provisions. It gave the Kenyan legislature full powers to make laws with extra territorial effect. It removed the repugnancy clause that voided certain statutes passed by the Kenyan legislature. It also placed certain limitations on the Kenyan legislature to amend certain constitutional provisions. It gave the Kenyan legislature full powers to make laws with extra territorial effect

Highlights of the Kenya Independence Order-in-Council

The Order-in-Council was made pursuant to the provisions of the Kenya Independence Act 1963. It is subsidiary legislation and was better suited to handle the detail that inevitably went into the new constitutional framework. The object of the Order-in-Council was to bypass parliamentary procedures and possible complications in approving the negotiated constitutional document. It was easier to handle the compromise through the instrumentation

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of delegated legislation. The constitution was annexed to the Order-in-Council as a schedule to the order. Most of the external and internal limitations on sovereignty were however removed by the parent statute. It made the necessary transitional provisions including the validation of colonial legislation

The Independence Constitution

It was attached as a schedule to the independence order in council. It I was long, detailed, and complex. The parliamentary conventions applicable in England were imported and codified. It was based on two contradictory principles,

- 'Parliamentary system' which is traditionally unitary highly centralized and powerful
- 'Minority protection' which inherently tends towards decentralization

The parliamentary system designed in Kenya was designed to protect minorities. The essentials of the parliamentary system were retained in relation to the central government .The governor appointed the prime minister who was the person most likely to command the support of the majority of the members of the House of Representatives. Executive power was vested in the queen, delegated to the Governor but exercised on the advice of the cabinet

The cabinet was collectively responsible to both houses and could be removed by a vote of no confidence. The prime minister could ask the Governor to dissolve the lower house. Through express provisions the relationship between the Governor and the cabinet was defined in a detailed and precise manner.

Minority rights protection

It was the minority rights protection provisions that generated the greatest heat and KANU reluctantly and grudgingly accepted the same only to cross the bridge to independence. It was however clear that KANU had every intention to circumvent undermine or even remove the provisions once it was in the driving seat. The British were careful to create major roadblocks to any constitutional amendments that could remove the entrenched provisions. That the amendments proceeded with ease and speed is testimony to the limitations of the written and codified law as an instrument of erecting constitutional safeguards

Background to minority protection

There were four main categories of minority interests. The Europeans who wanted to protect their land, their jobs and to secure their future

- The Somalis who wanted to secede
- The coastal who wanted to secede
- The pastoral communities who feared Luo-Kikuyu domination

Dealing with minority protection

Provide safeguards outside the constitutional framework. This could be achieved by

- Secession
- Involvement of outside powers in a system of international guarantees

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Provide safeguards within the constitution

The Africans preferred the safeguards within the constitution,

The non Africans who included the Somalis, the Arabs and the Europeans preferred safeguards outside the constitution

Specific minority rights questions

The Somali question

The Somalis occupied what was then known as Northern Frontier District NFD. In the run up to independence the Somalis boycotted the discussions on the constitutional framework insisting that nothing short of secession would protect their interests. They considered themselves different on grounds of race culture and religion. The presence of the republic of Somalia just across the border complicated the matter as they considered themselves victims of the reckless determination of boundaries by the process of the partition of Africa. They demanded that they secede and join the Republic of Somalia. A commission of inquiry by the colonial regime was appointed to consider their case. For good measure the British Promised that any decision on their case would await the finding of the commission.

The commission found that in the areas predominantly inhabited by the Somalis there was unanimity of opinion on the issues of secession. In other area there were mixed feelings .In others there were clear intentions to join the Republic of Kenya. The British pres called for a referendum to determine the question. The British decided to leave the matter to discussions between the Kenya Government and the Republic of Somalia. A tripartite meeting convened in Rome resulted in a deadlock. The British responded by creating a North Eastern Province to cater for the needs of the Somalis so that their interests could be catered for by the regional structures in the constitution. That is how much of what is now Eastern Province was curved out of the NFD. The Somalis were unhappy and responded with terrorist activity-the 'shifta wars'. The colonial government responded by making provision for emergency powers which would enable the independence government to suspend constitutional rights for the NEP and rule by decree. In 1965 these powers were extended to cover much of Eastern province by a constitutional amendment. In 1968 an MOU was signed between Kenya and Somalia to end hostilities. In 1969 the government gave a notice to end the use of emergency powers in the area. This did not happen until 1991

THE ARAB QUESTION

They invoked the 1995 agreement and demanded to join the sultanate of Zanzibar. The British acknowledged that the sultans sovereignty though more nominal than real was 'emotionally.. a factor that cannot be lightly dismissed Another commission of inquiry was appointed to investigate the issue. It considered four options

- Independence of the strip
- Independence after addition to part of the hinterland
- Federation or other association with Zanzibar
- Monaco type of status for Mombasa

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The commission rejected all these options and recommended that the 1995 agreement be abrogated and any subsequent terms be left to the future Kenya Government to negotiate with the sultan

After much discussion it was resolved that the 1995 agreement be abrogated, the strip be integrated with the hinterland and the rights of the Muslim minority be entrenched in the constitution by

- The institution of Kadhi Courts
- The retention of the liwalis and the mudirs
- 'Sheria' law was however rejected save in so far as it applied to personal law
- The boundaries commission created the Coast province in which the Arabs remained a significant minority

THE MAASAI QUESTION

They reminded the British of the 1904 and 1911 agreements and asked the British either guarantee their interests or to stay on in Maasailand! Their demands were not met and it was recommended that the regional structure would cater for their interests/

THE EUROPEAN QUESTION

Their main worry was the jobs of the European civil servants, the land they had grabbed and citizenship

Their demands were met by

- Including in the Independence Order-in-Council a provision for compulsory retirement subject to compensation
- Creating a Central Land Board to ensure compensation for compulsorily acquired land
- Enacting the British Nationality Act which gave them favorable options on citizenship

Safeguards in the constitution

The constitutional document 'showed a remarkable distrust for power'- G and A p 190.The basis of the new constitutional scheme was a system of regionalism. The boundaries commission had great difficulty in drawing boundaries that certified tribal interests but finally they settled for seven provinces

Other safeguards

These included;

- An independent judiciary
- An independent public service commission
- An independent police service commission
- Security of tenure for certain categories of public servants
- A bill of rights

An independent Judiciary

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Members were appointed by the judicial service commission. The members of the judicial service commission were appointed mainly from the judiciary and by the judiciary. The judges were given security of tenure

Independent Public Service Commission

The members of the PSC were themselves appointed by the JSC. Each region had to be adequately represented in the central establishment. Regional service commissions were appointed to deal with regional appointments. In the appointment of senior civil servants the commission had to consult the prime minister (or the regional president as the case may be)certain categories of civil servants such as the AG the C and AG

A Police Service Commission

The Commission was created to deal with appointment and dismissal of police officers. The members of the Police Service Commission were the Chairman PSC, a judge appointed by the CJ and the IG who was himself appointed by the police service commission

Independent Electoral Commission

It consisted of the speakers of the two houses, a nominee of the prime minister and each regional president. The last safeguard was the inclusion of the bill of rights in the constitution and elaborate provisions on citizenship alluded to above

Regionalism

The aforementioned safeguards were intended to prevent abuse of power. The provisions on regionalism were calculated to facilitate the sharing of power Seven regions created. Each region had its own Regional Assembly specially elected members. The qualifications for voters were carefully drafted to ensure foreigners' don't vote in the regions. The boundaries of the regions could not be altered unilaterally by the central legislature. The executive powers in the region were vested in a committee of the Regional Assembly. The executive powers in the region were vested in a committee of the Regional Assembly. Even the administration was conducted by committees of the assembly. The CEO of the region was the civil secretary appointed by the PSC after consultation with the regional president. There was an extensive of allocation of competence between the central and regional legislature. However schedule 11 upset the otherwise neat arrangement on executive and legislative competencies by retaining substantial residual powers to the center and even having overlapping provisions. The poor delineation of executive and legislative competencies was responsible for a lot of misunderstanding and eventual collapse of the system. Provisions on finance enabled the central authority to deny the legislature much needed financial stability

1963 to 2008

Please read Kamunde-Aquino Nelly Kenya's Constitutional History REDD Law Project Briefing Paper July 2014

The Road to the constitution of Kenya 2010

The agitation for a new constitution must be traced to the clamor for more political space personified by the late doyen of opposition politics, Jaramogi Oginga Odinga. The response of the Moi government was to contract the political space even further. First was the

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infamous 1982 amendment that made Kenya a dejure one party state, the 1986 amendment that removed the security of tenure for the Attorney General and Controller of Auditor General and the 1988 amendment that removed the security of tenure for the office of the Public Service Commission, High Court judges and Court of Appeal judges.

The clamor however increased in intensity and slowly but surely the Moi government started conceding ground. It is against this background that we must see the 1990 amendment that restored the security of tenure to members of the Public Service Commission, High Court judges and Court of Appeal judges and the ultimate concession being the repeal of section 2A in 1991.

These token concessions however only served to embolden the opposition. By 1997, the clamor for reform reached a crescendo with the clarion call 'no reforms no elections' taking the centre stage before the 1997 general elections. Moi however pulled a fast one on the opposition by brokering the infamous '1997 Inter Parliamentary Group (IPPG) amendments. The highlight of the amendments was the introduction of Section 1A which made Kenya a multi-party state. It also amended Sections 7, 33, 41, 42A, 82 and 84 of the Constitution. The President was henceforth at liberty to form his government from members of other political parties. Political parties were given the responsibility of appointing the nominated members of parliament; the number of electoral commissioners was increased and political parties given the responsibility of nominating members thereof. Voter education and ensuring free and fair elections was included as additional roles of the electoral commission, and lastly persons were allowed to appeal to the Court of Appeal on constitutional matters.

Subsequent to the discredited general elections of 1997, the opposition regrouped under the Ufungamano Initiative to press for constitutional change. Moi responded by the enactment of the Constitution of Kenya Review Act 1998 to create a framework for a comprehensive review of the constitution. The members of the commission were sworn in in December 2000. Yash Pal Ghai was appointed to chair the commission but he declined to take up his appointment until a deal was brokered with the Ufungamano initiative by which the two initiatives merged to form an expanded Constitution of Kenya Review Commission in May 2001

The enlarged CKRC (29 members in total including the Secretary and the Attorney General) embarked on civic education, It travelled around the country, held hearings and received written submissions from Kenyans on the new Constitution. In September 2002 it produced a draft Constitution .The Act provided for a National Constitutional Conference (NCC) to be convened to discuss, and adopt the new Constitution. It was scheduled for October 28 2002; during the previous week delegates met and heard comments from experts on the draft. On the afternoon of Friday October 25 President Moi dissolved Parliament. Since all MPs were members of the NCC, the dissolution of parliament stalled the process. After the December election, the NCC eventually assembled in April 2003, at the Bomas of Kenya (hence its name of "Bomas").

National Constitutional Conference) had adopted a draft Constitution which became known as the Bomas draft. The draft was however challenged in court on the basis that the composition of the NCC was not representative and that the process denied Kenyans their non derogable power to approve the constitution in a referendum.

After the court decision, the NAK wing of the Kibaki government, which was largely unsupportive of the Bomas draft the government persuaded Parliament to amend the Constitution of Kenya Review Act so that the draft could be changed.

A Parliamentary Select Committee on Constitutional Review (PSC) met at Naivasha in November 2004 and agreed on a reviewed draft. But these proposals were rejected by a

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reconstituted PSC meeting at Kilifi in 2005, which produced a whole new draft. The Kilifi draft was itself rejected by parliament and the executive then instructed the Attorney General to review the drafts. The changed draft was popularly known as the "Wako draft" . It differed materially from the Bomas draft. Against better judgement the NAK wing pressed on with the Wako draft and submitted it to a referendum.
The referendum was held in November 2005. Only about 52% of registered voters voted. The draft was rejected by 58.35% to 41.65%. The reasons for the rejection included substantive arguments about the content and a general dissatisfaction with the process but there were strong undercurrents of ethnically driven political alignments. It turned out to be more of a referendum on the Kibaki government than on the constitution. The president responded to the emphatic rejection of the draft by dissolving his cabinet and subsequently droping the LDP aligned members of his government then led by Raila Odinga. The consequences were catastrophic. A botched 2007 general election led to post election violence which forced a coalition government. This necessitated a major amendment to the constitution to create the position of a prime minister who shared power with the president. Agenda item 4 of the National Accord and Reconciliation Agreement provided for major reforms the most important of which was a comprehensive constitutional reform. That process was anchored in the Constitution of Kenya Review (Amendment Act 2008) the highlights of which were as follows:

Objects and purpose of constitutional review process
Section three of the Act provided for the objects of the review process as follows: The object and purpose of the review of the Constitution is to secure provisions therein¯
(a) Guaranteeing peace, national unity and integrity of the Republic of Kenya in order to safeguard the well-being of the people of Kenya;
(b) establishing a free and democratic system of Government that guarantees good governance, constitutionalism, the rule of law, human rights, gender equity, gender equality and affirmative action;
(c) Recognizing and demarcating divisions of responsibility among the various state organs including the executive, the legislature and the judiciary so as to create checks and balances between them and to ensure accountability of the Government and its officers to the people of Kenya;
(d) Promoting the peoples' participation in the governance of the country through democratic, free and fair elections and the devolution and exercise of power;
(e) Respecting ethnic and regional diversity and communal rights including the right of communities to organise and participate in cultural activities and the expression of their identities;
(f) Ensuring the provision of basic needs of all Kenyans through the establishment of an equitable frame-work for economic growth and equitable access to national resources;
(g) Promoting and facilitating regional and international co-operation to ensure economic development, peace and stability and to support democracy and human rights;
(h) Strengthening national integration and unity;
(i) Creating conditions conducive to a free exchange of ideas;
(j) Ensuring the full participation of people in the management of public affairs; and
(k) Committing Kenyans to peaceful resolution of national issues through dialogue and consensus
Organs of review
Section 4 created the Organs of Review as follows
The organs through which the review of the Constitution shall be completed are¯

- the Committee of Experts;

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- "Reference Group" representing various religious and other civil society groups to be consulted by the CoE.
- the Parliamentary Select Committee;
- the National Assembly; and
- the referendum

Guiding principles

Section 5 provided for the guiding principles as follows
5. In the exercise of the powers or the performance of the functions conferred by this Act, the organs specified in section 4 shall
(a) Ensure that the national interest prevails over regional or Sectoral interests;
(b) Be accountable to the people of Kenya;
(c) ensure that the review process accommodates the diversity of the people of Kenya including socio-economic status, race, ethnicity, gender, religious faith, age, occupation, learning, persons with disabilities and the disadvantaged;
(d) Ensure that the review process –
(i) Provides the people of Kenya with an opportunity to actively, freely and meaningfully participate in generating and debating proposals to review and replace the Constitution;
(ii) Is guided by the principle of stewardship and responsible management;
(iii) Is, subject to this Act, conducted in an open manner; and
(iv) Is guided by respect for the principles of human rights, equality, affirmative action, gender equity, and democracy;
(e) Ensure that the outcome of the review process faithfully reflects the wishes of the people of Kenya.

Steps
The process of review proceeded as follows
- Amend the constitution to entrench the review process (See Njoya vs AG on section 47 OC
- But see also Patrick Ouma Onyango the yellow movement case)
- Create a statutory framework (The CKRC Act 2008)
- Establish the committee of experts
- Create a time frame

Procedure
Study all existing drafts
- Prepare a report on contentious and non-contentious issues section 27
- Invite representations from the public
- Prepare a Report and a Harmonized Draft

Publish Harmonized Draft for 30 days
- Ensure the draft is made available to the public
- Invite public Debate

Review the draft
- Within 21 days send Revised Draft to the PSC to build consensus on contentious issues
- PSC to reach consensus
- COE to prepare revised draft and send it to PSC within 21 days
- Within 7 days PSC to table report in the NA

NA could approve the draft without amendments and send it to AG

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Propose amendments and send it back to COE for redrafting
2/3rds majority needed for amendments
AG to publish draft without alteration
Civic education within 30 days
EC to hold referendum within 60 days
Result of referendum to be published within two days
Petition to challenge within 14 days
Hearing within 14 days
Promulgation within 14 days
Dissolution of COE

The CoE first sought public views on what were the contentious issues and how to resolve them, and identified the following areas as contentious:

- The system/form of Government (i.e., the Executive and
- the Legislature),
- Devolution of Powers, and
- Bringing the Constitution into Effect (Transitional Clauses)

And the identified other "issues of concern" including:

- Kadhi Courts
- Land
- Electoral systems
- Affirmative Action

Drafts

- First draft by COE on November 2009.
- Harmonised Draft"
- The "Revised Harmonised Draft"
- A further revised draft by PSC
- The Proposed Constitution(May 2009)

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