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TOPIC:

THE 2005 KENYA CONSTITUTIONAL REFERENDUM OF KENYA: IT'S NATURE AND PURPOSE, IT'S JURIDICAL BASIS AND ITS SOCIO-POLITICAL CONSEQUENCES

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DATED: 5TH FEBRUARY 2007

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DECLARATION

I, DAVID ANASI ONYANCHA, do hereby declare that this is my original and innovative work which has not been submitted nor intended to be submitted for a degree in any other university, in compliance with the regulations for an award of Masters degree in law (LLM).

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TABLE OF CONTENTS

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I dedicate this thesis to my wives Priscilla and Susan; my daughters Irene, Judith, Juliet, Ruth and Michelle; my sons Erick, Bernard, Daniel, Arnold and Derrick; my parents Mr and Mrs Anasi Onyancha.

ABBREVIATIONS

AG	Attorney General
CBO's	Community Based Organizations
CCF	Constituency Constitutional Forum
CKRC	Constitution of Kenya Review Commission
CKRCA	Constitution of Kenya Review Commission Act
CLARION	Centre for Legal Research International
CMI	Chr Michelsen Institute
CS	Civil Society
EAJHRD	East African Journal on Human Rights and Democracy
ECK	Electoral Commission of Kenya
GK	Government of Kenya
IPPG	Inter Parties Parliamentary Group
KANU	Kenya African National Union
KBC	Kenya Broadcasting Corporation
KG	Kenya Government
KNCHR	Kenya National Commission for Human Rights
LDP	Liberal Democratic Party
MPs	Members of Parliament
NARC	National Alliance Rainbow Coalition
NARC-K	National Rainbow Coalition-Kenya
NCC	National Constitutional Conference
NGO'S	Non-Governmental Organizations
ODM-K	Orange Democratic Movement-Kenya
PSC	Parliamentary Service Commission
PSC	Parliamentary Select Committee
RC	Referendum Commission
USA	United States of America

ACRONYMS

Banana side	The groups of people and political parties who sided with the Constitution.
Orange side	Those who opposed the Wako Draft Constitution.
People driven	used to connote legitimization by Kenyans as opposed to Parliament.
Super-majority	A majority greater than ordinary majority required to pass a Special legislation e.g. amendment or replacement of a Constitution.
Wanjiku	connotes a popular Kikuyu girl used symbolically to represent The typical ordinary Kenyan in contradistinction to political elites.

TABLE OF MAGAZINES AND NEWSPAPERS

- East African Journal of Human Rights and Democracy.
- The Daily Nation.
- The Saturday Standard.
- The Standard.
- The Sunday nation.

TABLE OF STATUTES

- Constitution of Kenya Review (Amendment) Act, No. 9 of 2004 (Consensus Act).
- Constitution of Kenya Review Act (Cap 3A) Laws of Kenya.
- Constitution of Kenya.
- Elections Offences Act, (Chapter 66) Laws of Kenya.
- National Assembly and Presidential Elections Act (Cap 7) Laws of Kenya
- The Interpretation and General Provisions Act, Chapter 2 Laws of Kenya.
- Wako Draft Constitution, 2005.

TABLE OF CASES

- Karanja vs Kabugi (1981) KLR 270.
- Njoya and 6 others vs. The Attorney General and 3 others [2004]1 KLR 161
- Onyango and 12 Others vs. The Attorney General and 2 Others H.C. Misc. Civil Application No.677 of 2005 (OS)
- Paul K. Ssemogerere vs. Attorney General of Uganda Constitutional Court of Uganda Petition No. 3 of 2000.

0.0 THE 2005 CONSTITUTIONAL REFERENDUM OF KENYA: HISTORICAL BACKGROUND

0.1 The Legal Framework

The November, 2005 Referendum was conducted against a backdrop of several constitutional, legal and administrative challenges among them its constitutionality. This thesis analyses the legal framework that informed the conduct of the referendum and critically examines the constitutional, legal and administrative rules that were used to conduct the historic referendum, which itself was a culmination of a lengthy and painstaking process that saw the drafting of proposed new constitution intended to replace the present Independence Constitution of 1963(as amended).

The agitation for constitutional reform which started as far back as 1989, soon after the 1988 queue-voting General Elections, was characterized by violent political incidents often triggered by the intolerance of the then undemocratic government of President Daniel Moi. Opposition groups which were being supported by civil society and religious and social movements, later felt that the mutilated independence Constitution[1] was no longer good enough for governing the people of Kenya. They thus began agitating for a completely new constitution that was expected to be drafted with care to capture all important principles for a modern democratic and just government.

When the KANU Government finally yielded to negotiations with the opposition movements for a new constitution, both sides rightly recognized that the final draft would only materialize through negotiations, compromises and consensus. It therefore, all at once became necessary to have a law passed that would set out the parameters of the intended process. The result was that Parliament in 1997 passed the Constitution of Kenya Review Act (Cap 3A) of the Laws of Kenya, (hereinafter referred to as CKR Act). It was itself a negotiated piece of legislation between the Government and the opposition movements in what became known as Inter-Parties Parliamentary Group (IPPG).

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[1] Mutilation of constitution gave basis for review demands.

The promulgators of the CKR Act however, rightly recognized that consensus might not always be reached. They therefore included contingent provisions in the legislation, in case of any conflict. That is how Section 27 (5) (iii) came to be included in the said Act. It provided that any question on a proposal for inclusion in the Constitution which was not resolved in the National Constitutional Conference as therein provided, would be submitted to the people of Kenya for determination through a **referendum**.

However, the Act as drafted did not appear to satisfy all the parties involved particularly those in the opposition who therefore pushed for further negotiations. This was particularly so as concerning the composition of the Commissions created to conduct the review process. To avoid a stalemate, the Government in 2000, yielded to and adopted the opposition demands for a comprehensive, people-driven, constitutional review which then called for the amendment of the 1998 CKR Act. The amendment of the Act was effected in the year 2000 with the amended Act entrusting the process to the following institutions to facilitate the review of the Constitution by the people of Kenya, namely:[2]

(a) The Constitution of Kenya Review Commission.
(b) The Constituency Constitutional Forum.
(c) The National Constitutional Conference (NCC).
(d) The Referendum and
(e) The National Assembly

The referendum envisaged under the original CKR Act of 1998, as already mentioned, was only intended to be used to resolve issues if a consensus during the NCC discussions should fail to be reached. However by the time the November 2005 referendum was conducted several events which affected the original nature and purpose of the process, had taken place

[2] Githu Muigai: "Overhaul or Amend? Future of Constitutional Reform in Kenya" in East African Journal of Human Rights & Democracy at P. 12.

First, the legality and the nature and purpose of the referendum provided under the CKR Act had been questioned in the High Court of Kenya through two cases - **Njoya**[3] and **Yellow Movement**[4] cases. In the separate cases each court had ruled that a referendum, being an exercise of the people's sovereign power, should be mandatory in any process of constitution-making or constitutional review. This called for the contingent referendum provided in Section 27 (5) (iii) of the CKR Act to be amended to become mandatory.

Secondly, and as result of the said court rulings, the CKR Act had been amended by Parliament through the Constitution of Kenya Review (Amendment) Act, (Act No. 9 of 2004) to make the referendum mandatory in the continuing review of the Constitution. This meant that no new constitution would be enacted in Kenya without it being first ratified by the people of Kenya through a referendum.

Thirdly, many constitutional and legal scholars as well as prominent parliamentarians had questioned the constitutionality of the whole constitutional review in so far as it now aimed at replacing the present Constitution instead of reviewing it. The relevant issue was whether an amendment of the constitution was required for the purpose of anchoring the review process and in particular, the referendum concept. Furthermore, an issue had been raised as to whether the CKR Act itself, even after being amended, had provided for a review simpliciter or whether it had also provided for a replacement of the Constitution.

0.2 Statement of the Problem

The ***Njoya*** and ***Yellow Movement*** cases had attempted to answer some of the issues raised above. The two courts' answer to the question as to whether the referendum concept first and foremost required to be anchored in the Constitution by amendment thereto was that no such amendment was necessary. This conclusion brought confusion among scholars who wanted to establish whether the CKR Act and its amending Acts were constitutional or not. What for example would happen if another court holds otherwise? Did the courts act under such pressure as to interpret the relevant principles of law for the convenience and circumstances then prevailing?

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[3] Njoya and 6 others v Attorney General and 3 others, (2004) 1 KLR, 161.
[4] Onyango and 12 others v. Attorney General and 2 others (Nairobi High Court Misc. Civil Application No. 677 of 2005 (OS).

The problem that arose after the Kenya Government agreed that the Constitution should be replaced instead of it being merely reviewed was whether there was adequate constitutional framework that would carry the whole process inclusive of the staging of the referendum. That the issue ended up in court which threw its spanner in the works, caused more confusion. It complicated the matter more when it held that the referendum process did not require to be expressly anchored in the constitution to acquire legality. In the end, the referendum of course took place, bringing with it unexpected social, political and other events whose trauma is still being felt a year down the line.

The purpose of this thesis is to interrogate the constitutional and legal basis of the November 2005 referendum, with a view to firmly establish whether its sanction came from the present constitution, or from the CKR Acts or from the judicial decisions in ***Njoya*** and ***Yellow Movement*** cases. In the process the legal and social nature of the referendum and the purpose for which it is applied across the globe, will also be examined. The thesis will finally focus on the probable effects of the said referendum upon the people of Kenya and explore whether they learnt any lessons from the phenomenon.

0.3 Research Questions

In tackling the above problems, the thesis addresses the following research questions:

1. What was the nature and purpose of the 2005 Kenya referendum and how can it be generally classified in terms of other referenda conducted in countries across the globe?
2. What was the juridical basis of the 2005 Kenya referendum? In what way did the ***Njoya*** and ***Yellow Movement*** cases contribute to the establishment of its juridical basis in Kenya?
3. Did the Kenya Government have any specific policy over the referendum?
4. What were the consequences of and lessons leant from the 2005 Kenyan referendum?
5. What possible recommendations can be made to Kenyans, if any, about the referendum?

0.4 Literature Review

The existing literature on referendum includes the general information about the subject of "referendum" from text books and other scholarly journals and periodicals. Relevant essays on the subject, and on the 2005 Kenyan referendum has been examined. Case Law particularly the ***Njoya*** and the ***Yellow movement*** cases, and their contribution towards constitutionalising and legalizing the referendum are of great significance. On the statutory framework, Section 27 (5) (iii) of the CKR Act, Cap 3A together with its several amending Acts provided the statutory basis for the referendum.

Wikipedia encyclopedia provides the distinction between 'referendum' and "plebiscite". The document describes the categories of the process and the purposes in respect of which referendum can be used. This classification offers invaluable information and lessons that informs the subsequent analysis of this thesis. It also raises the possible disadvantages that occur from the application of referendum and how Kenya can avoid such eventualities in the future. Finally, it textualises the 2005 Kenya Referendum in the larger African context in comparative terms taking into account the experiences in Uganda, Rwanda and Egypt.

Professor Mads Qvortrup in his article ***"Is the referendum a Constitutional Safeguard."*** raises the question as to whether the referendum is held as a result of growing willingness by the ruling elites to let the 'people' decide issues concerning their governance or whether the elite uses the referendum to strengthen their governing grip. He takes the view that the authorities may sometimes manipulate referenda to take advantage of the process to the detriment of the people. Similar views have been expressed by W. Masinde, in his article entitled ***"Kenya's fruitless referendum"*** in which he expresses the view that although Kenyans had a right to vote in a referendum for a new constitution they found themselves fighting not for the constitution but against each other.

C.W Gikonyo in his article entitled: ***"Referendum: we have never conducted one, but why not?"*** Highlights some of the functions of the referendum; particularly its checks

and balances on the exercise of power by the peoples' elected representatives. He also raises the question as to whether a referendum could be held in Kenya without an amendment to the current constitution.

Professor Githu Muigai in his article ***"Overhaul or Amend? A discourse of the future of Constitutional change in Kenya",***[5] expresses the view that the Njoya case ruling that amendment of the constitution could be achieved through CKR Act, without a corresponding amendment to the constitution is not contemplated and/or legally viable under the Kenyan constitutional framework. This postulation that the review process would be unconstitutional without a referendum, threw a major spanner in the works of constitution-making over the issue as to whether Parliament had the constitutional mandate to replace the constitution.

The fears that Parliament is a major constitutional roadblock to realizing a new constitution in Kenya have gained currency and attracted scholarly comment[6] since Parliament is an interested party with some deep rooted fears on the prospect of losing power to the people in the new constitutional dispensation[7]. In this context, Professor Okoth Ogendo's postulation that "if you can amend one then it follows you can amend all" appears to be the most viable option out of the current stalemate which even the referendum failed to resolve. On the other hand Professor Muigai asserts that the debate leading to the referendum became highly controversial leading to obscurantism of the real issues concerning the juridical basis of referendum. He also suggested that the referendum was more of a vote on political health of the ruling coalition than it was on the merit of the draft constitution.[8]

L. I. Odoyo, in his article ***"Amending the Constitution and/or enacting a Constitution – A critique of the Ringera Ruling in Njoya Case"*** argues quoting the Court of Appeal decision in **Karanja V. Kabugi** [1981] KLR, 270 at 289, to the effect that-

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[5] The East African Journal of Human Rights and Democracy p. 5.
[6] See Professor HWO Okoth Ogendo's comments on the hurdles facing the realization of a new Constitution particularly the role played by a biased Parliament –Daily Nation Thursday 9th Nov. 2006 at p 3.
[7] Ibid.
[8] Ibid., P. 12.

"the Constitution as this Court has often pointed out is to be construed by the application of the same rules that are applicable to the construction of the other law".

He points out that this decision has not been overturned and forms part of our law which cannot be overruled by the constitutional court since section 67(4) and Section 84 (7) envisage the right of appeal to the highest court in the land. He concludes that the 'purposeful' approach in the **Njoya** case was far-fetched and probably legally untenable on the basis that there is no provision in the Constitution for referendum to warrant such approach.

Constitution of Kenya Review Act, (Cap 3A) of the Laws of Kenya introduced into the Kenyan legal system, the concept of **referendum.** Through an amendment to the Act in 2004, the referendum was specifically made a mandatory requirement if Kenyans were to realize a new Constitution. This statutory amendment did not resolve the juridical issue as to whether it was necessary to entrench the concept of referendum in the constitution to safeguard the process from unnecessary litigation.

The Judiciary has also had opportunity to express their opinion on referendum through case law in ***Njoya and 6 Others vs. The Attorney General and 2 Others***[9]. The Constitutional Court asserted the view that referendum, although not textualised in the constitution, is implied from the words of Section 1, and 1A of the Constitution. The case further held that a referendum was mandatory constitutive step if Kenyans wanted to overhaul the Constitution as it reflects the people's constituent power which need not be necessarily textualised.

The ***Yellow movement*** case whose proper citation is ***Onyango and 12 Others vs. The Attorney General and 2 Others***[10] concurred with the decision in the ***Njoya*** case on the right of the people to express their views in a referendum notwithstanding the fact that it is not expressly provided for in the Constitution more so during Constitution-making. The court stated: thus at page 56 of its ruling:–

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[9] Njoya and 6 others v. Attorney General and 3 others [2004] 1 KLR, 261.
[10] Onyango and 12 others v. Attorney General and 2 others (Nairobi High Court Misc. Civil Application No. 677 of 2005) (OS).

"the exercise of constituent power cannot be fettered as indicated above and unless there is provision, if any, in the existing Constitution which provides for the exercise of such power by following a particular procedure, nothing can restrict its exercise by the people"

0.5 OUTLINE OF THE CHAPTERS

This section briefly analyses the arrangement of chapters that form the main body of this thesis which includes:

INTRODUCTION

This chapter introduces the political events that led to demands for a constitutional review in Kenya. It indicates that the promulgation of the Constitution of Kenya Review Act, Chapter 3A (CKR Act) was a negotiated piece of legislation between the Government on the one hand and the nascent political opposition supported by civil society religious and other social movements, on the other hand. The CKR Act, introduced the ***"Referendum"*** as one of the institutions that would facilitate the review of the constitution. This section will also describe the statement of the problem which is to interrogate the question as to whether the 2005 referendum had a juridical basis or not. The chapter also introduces the literature review, showing the materials upon which this thesis is premised. Finally, it shows the assumptions and the research questions that informed this thesis.

CHAPTER ONE

This chapter will deal with the global meaning, nature, classification and the functions of referenda as applied in various countries around the world.

CHAPTER TWO

This chapter will attempt to establish the juridical basis of the 2005 Kenya's referendum. It will attempt to establish whether the referendum was anchored in the Kenya constitution or in the CKR Acts. The chapter will also examine the legal and jurisprudential contributions brought into Kenya's legal system by the ***Njoya*** and ***Yellow Movement*** cases.

CHAPTER THREE

This chapter specifically examines the November 2005 Kenya's referendum in terms of its nature, classification and the purpose for which it was included in the CKR Act. Examination is also made as to whether the said referendum was applied for its original purpose and how its application differed or closely compared with referendum use in other chosen countries where the process is applied.

CHAPTER FOUR

This chapter has briefly examined the aftermath of the November 2005 Kenya referendum. The scope includes the legal, political, social and even economic effects of the referendum. It has also attempted to answer the question as to whether the people of Kenya learnt any lessons from the said process.

CHAPTER FIVE

This chapter will make concluding remarks of the 2005 referendum and make recommendations concerning its legal and constitutional basis in the future.

CHAPTER ONE

THE UNIVERSAL CHARACTER OF REFERENDUM

1.0 The Meaning of Referendum

Referendum process is currently applied in many countries of the World. Although mainly used in constitutional review and ratification, some states use it for opinion gathering and decision making in matters that are not constitutional. In most states, the concept of referendum as an institution is enshrined in the state's constitution in broad terms and then carried in detail in a statute authorized by the constitutional provision.

"Referendum" is defined as **"the process of referring a state legislative act, a state constitutional amendment, or an important public issue to the people for final approval by popular vote".** The word also often refers to the vote so taken (plural: '*referendums*' or *referenda*')[11] It is a direct vote in which an entire electorate is asked to either accept or reject a particular proposal. Sometimes the term ***referendum*** is used interchangeably with the term ***plebiscite*** but it is herein argued that a ***plebiscite*** is usually preferred in circumstances in which a decision is being made on fundamental issues of sovereignty, such as determining national borders.[12] Plebiscite is also often the term used to describe a direct vote held by a dictator or an undemocratic regime in circumstances in which a free and fair vote is impossible. But the term referendum is usually preferred to describe routine votes held in liberal democracies. The major difference would however, appear to be that in a plebiscite, the voters expression is not perceived as democratic; while in a referendum the voters, express free and democratic opinion.[13] The Kenyan referendum of 2005 was described as **"a process through which citizens consciously accept or reject changes from one instrument of governance to another through voting."**[14]

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[11] BLACK'S LAW Dictionary 7th Edition.

[12] & [13] Wikipedia, the free Encyclopedia "Referendum" p 2 http://en wikipedia org/wiki/Referedum.

[14] Constitution of Kenya Review Commission: "Source Book for Civic Education - Referendum 2005", p.4.

1.1 Nature and Categories of Referenda

There are several categories of referenda, often determined mainly by their origin or purpose for which they are initiated. First, a referendum may be either ***mandatory*** or ***facultative***. It is mandatory where the law directs the authorities to hold a referendum on specific matters. These include such matters as reconstituting government, amending the constitution, impeaching the head of state or ratifying international treaties, which are matters of great importance and are often binding.

The referendum is **facultative**, that is to say, if it can be initiated at the will of a public authority such as a President, Prime Minister or Parliament or where it is called at the will of the citizens, usually through a petition. Such referendum will be binding or non-binding depending on the existing legislation or the purpose of initiation. The process of initiating a referendum by petition in countries where referendum is often used, is known as the ***popular*** or ***citizen's*** initiative.[15]

By nature of their effects, referendums may be categorised as either ***binding*** or ***non-binding***. A non-binding referendum is merely consultative or advisory. It is left to the government or the legislature to interpret the results and either honour or ignore them. The practice in liberal democracies however, is to respond positively to the results of a referendum in view of the fact that it bears an expression of the people. In the United Kingdom referendums are neither mandatory nor binding but by convention, important issues or constitutional changes will be put to a referendum and the results will be honoured.

1.2 Procedures of Referenda

In most referendums it is sufficient for a referendum ***measure*** or ***proposal*** to be approved by a simple majority of the voters who turn up to vote. However a referendum may also require the support of a ***super-majority***, such as three quarters or two-thirds of the votes

[15] See footnote.

cast. An example of such is **Lithuania** and **France**. In some countries there are requirements that there be a certain minimum turn-out of the electorate in order for the result to be considered valid or legitimate. This latter case of which ***Italy*** is an example, is intended to ensure that the result is representative of the will of the majority of the electorate and is analogous to the quorum required in, for example, a Parliamentary Committee stage in a constitutional amendment in countries whose constitutions have Parliamentary supremacy such as Kenya. The simple majority vote which was required in Kenya's referendum was in contrast with, for example, the ***Lithuania*** state-run referendums, which require ***super-majority*** support, of ¾ of the total voters who turn out to vote. An alternative procedure is for a referendum to insist on certain minimum absolute Number of 'Yes' votes before a measure can be deemed to have been carried, or of absolute number of 'No' votes if it is to be deemed vetoed.

1.3 Functions and Purposes of Referendum

The basic use of the referendum is for establishing, as much as that can be achieved, the opinion of the people over a proposal or issue placed before them by the Government. It is a tool for ascertaining the views of the electorate on an important constitutional, political, economic or social issue(s). The government or the legislature or any such authority, will then know and decide which course to take.

From a different angle, a referendum is used to resolve a conflict or controversy or even help make a choice. For example the Kenya Government having in late 2005 finally obtained a draft Constitution from the Attorney-General after the latter had fine-tuned and polished it, placed it before the people of Kenya to decide whether it should be the future Constitution or not. The people in the referendum rejected it. Here the referendum in addition to establishing the stand taken by the majority of the Kenyan people, as well became a conflict-resolution mechanism. Referendum, thus, can be used as **"a mechanism for deadlock-breaking and dispute-resolution"**[16]

[16] "Constitution of Kenya Review Commission: Manual for Educators for Civic Education- Referendum. 2005" p. 15.

It is the writer's view that referenda are now being more and more regarded as the more legitimate process of Constitution-making or resolving important national issues. It carries wider participation and therefore achieves wider acceptance of the decision obtained in it. This use of the process is well captured by the Constitution of Kenya Review Commission-

> **".... indeed, the referendum is envisaged in CAP 3A as a dispute and conflict resolution mechanism. This is amplified in the Constitution of Kenya (Amendment) Act 2004, which acknowledges a referendum as a sovereign right of Kenyans in changing their Constitution...."**[17]

Referendum is also regarded as a Constitutional safeguard. The people use it to have their say and way in the manner they are governed by those representatives they have elected or by the government as a whole. The people's views expressed in the referendum is mandatorily honoured or at the minimum, cannot be ignored by the government or by governing institutions.[18]

This reduces the effect of representative governance often delegated to the elected representatives in parliaments and local authorities while increasing direct participation of the people who are called upon to make a decision in such referendums. As aptly put in Wikipedia, **"some adopt a strict definition of democracy in which elected parliaments are merely a necessary expedient needed to make governance possible in the large, modern nation-state; direct democracy is nonetheless preferable and so a referendum must always take preference over a decision of Parliament"**[19]. Referendums are in addition used as a checks-and-balances mechanism on the likely excesses of unrestricted party-government.[20]

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[17] Ibid., p. 15.
[18] Mads Qvortrup: "A.V. Dicey: The referendum as the people's veto" (in History of political thought, vol. xx. No1. Spring 1999 P. 1-16.
[19] Wikipedia, the free encyclopedia "Referendum", p. 2 at ; http://en.wikipedia.org/wiki/Referendum.
[20] Professor Mads Qvortrup,"is the Referendum a Constitutional safeguard?" p. 2.

1.4 Disadvantages and Misuse of Referendum

While the referendum can be considered as a democracy–enriching process as shown above, it can as well be used to delimit, instead of widening, the people's choices. The philosopher Michael Oakeshot summed up the above view thus –

> ***"....the referendum is not a method by which 'mass man' imposes his choices upon his rulers; it is a method of generating a government with unlimited authority to make choices on his behalf."***[21]

Those who criticize referendums accordingly advance several misuses of the process. They argue that referendums are often controlled by the governments which usually calls for them only when the government believes the result will be in favour of its policy.[22]

It is also argued that the governing elites use the referendum to strengthen their grip on power, thus limiting democracy. This may lead to a situation where the executive will undermine the authority and/or the control of the legislature, especially in pushing the legislature to pass laws without proper or informed views of the members of Parliament. In this respect, Hitler of Germany and Mussolini of Italy, used referendums to clothe oppressive policies in a veneer of legitimacy. They that way found it easy to push through their Parliaments immoral laws that supported government policy during the two World Wars[23].

It is further argued that voters in a referendum may be driven by transient whims rather than careful deliberation. They may be too insufficiently informed on the proposal which may itself be too complicated or technical to decide on for their own welfare. They may be swayed by strong personalities or ethnicity or adverse influence of propaganda or expensive advertisements for goodies, or promises for greater benefits, jobs or other gifts as exemplified during the 2005, Kenyan referendum[24]. Expressing their views in an interview on this issue soon after the Referendum, the Chairman of the Electoral Commission of Kenya, Mr Kivuitu asserted to an interviewer of CHR MICHELSEN

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[21] Michael Oakeshott,"Rationalism in politics and other Essays" (Indianapolis: Liberty Fund, 1991), p. 380.
[22] David Butler & Austin Ranney, Summming up ' in "Referendums ;a comparative study of practice and theory' (Washington D.C America Enterprise institute, 1978), p. 221.
[23] Wikipedia, the free encyclopedia, "Referendum" p. 5. (Ibid).
[24] B.A. Andreassen & Arne Tostensen, "Of Oranges and bananas; the 2005 Kenyan referendum on the Constitution"-(executive Summary, P. v-vi.

INSTITUTE (CMI) that from their knowledge and information, only up to 20% of the Kenyan electorate was well aware of what the referendum really was about. They also gave the said ground as the reason why referendum public debate had easily drifted away from constitutional issues and constitution-making to the political and ethnopolitical rivalry, even at the elite level.

A referendum may as well lead to the *"tyranny of the majority and erosion of the rights of individuals and minorities"*[25]. While the authorities may choose to manipulate it by offering the electorate only two concocted options loaded with a multiplicity of smaller options, thus giving the voters very limited choices with a view to pressurise them to choose the lesser of two evils.[26]

1.5 Comparative study of Referendum

A comparative analysis of referendums as applied in countries around the world, will help to properly contextualize the Kenya's referendum, in terms of its nature and classification and functions.[27]

Australia

No amendment of the constitution is possible in Australia without approval by the people in a referendum.[28] A bill for review or amendment is first passed through both houses of Parliament or one house, as the law may require, before it is submitted to a referendum. Like in the 2005 Kenya referendum, only a majority of the voters who turn out to vote carry the day either way. However, separate state majorities are required independently of the federal majority in order to carry the day. Unlike in Kenya however, the referendum for constitutional amendment, in Australia, is specifically provided for in the constitution. For that reason referendums in Australia are only related to constitutional amendment.

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[25] Wikipedia, the free encyclopedia, "Referendum", p. 4.
[26] Ibid p. 5.
[27] Wikipedia, the free encyclopedia, "Referendum" - available at http://en.wikipedia.org/wiki/Referendum- (See Referendums in Australia), p. 5-6.
[28] Ibid

For other important socio-political, economic, and cultural issues, plebiscites are used.[29] Constitutional referenda in Australia are mandatory and binding.

Republic of Ireland

In the Republic of Ireland, constitutional amendments are also not only mandatory but they have been binding as well since 1937. Like the Kenya's 2005 referendum, the Bill for amendment or review is first passed by Parliament before it is placed in a referendum. For ordinary issues which are not constitutional, Ireland has an ordinary referendum law[30].

Italy

Italy has two kinds of binding referenda. Both are however, encapsulated in the constitution. A legislative referendum can be called to abrogate or amend an ordinary statute and requires a majority of all registered electors to vote.[31] A constitutional referendum is called to amend the constitution or introduce a constitutional law and is valid no matter how many electors go to the polling station. These referendums are, unlike in Kenya today, contained in the constitution.

Sweden

The constitution of Sweden provides for both binding and non-binding or consultative referendums.[32] The interesting feature in Sweden's two of the several non-binding referendums is that the 1957 and 1980 were *multiple choice* referenda.

Switzerland

There are two types of referenda in Switzerland which are either binding or facultative. Referendum is obligatory on any constitutional amendment and any treaty or law

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[29] Ibid.
[30] Ibid
[31] Ibid
[32] Wikipedia, the free encyclopedia, "Referendum"-available at-http://en.wikipedia.org/wiki/Referendum.

requiring the state to join a multinational community or organization for collective security. The majority of referendums in Switzerland are however non-constitutional and are merely facultative and often initiated by political parties or interested groups. Referendums have become a regular feature of the political and social life of the people of Switzerland.[33] This has made Parliament sensitive to opinions expressed in the referendums. In so far as referenda are an expression of the people from time to time, the process has democratised governance in Switzerland as much as it has slowed the politics there. Another interesting feature of referendums in Switzerland is that they have been held simultaneously with the General-Elections to enable a given party to have a clear policy mandate to enable it tackle the issue if it wins the election.[34] It is no wonder therefore that referendums have been most frequently used in Switzerland where their application started in 1848.

United Kingdom

Owing to the doctrine of ***Parliamentary Sovereignty*** a binding referendum cannot be held in the United Kingdom (UK). Referendums are therefore rare, the known ones being on the vote to enter the European Union in 1975 and 2004. But there have been several referendums in Wales, Northern Ireland and Scotland.

Other Nations outside Africa

In ***France*** constitutional amendments require a super majority in Parliament or of the people. ***Puerto Rico's***, referendum in 2005, was conducted to square the issue as whether Parliament should change to become bicameral. In ***Spain***, referendum was conducted and the people by an overwhelming majority, decided to change from the dictatorship of General Franco to a democracy in 1976 and to join NATO in 1986. In ***United States*** there is no Federal Constitutional provision for a referendum, but several States have provisions and have used them to modify or amend State Constitutions. In ***Romania*** mandatory and binding referendums are provided in the constitution inter-alia to *impeach*

[33] Wikipedia, the free encyclopedia, "Referendum" – available at http://en.wikipedia.org/wiki/Referendum.
[34] Ibid.

the president if he disobeyed the constitution and for approving constitutional amendments or adoption.

Referendum in Uganda

Close to home in Uganda the Referendum (Political System) Act, 2000 was enacted under the authority of the 1995 Uganda Constitution. The referendum under the Act which was intended to give the people of Uganda an opportunity to choose the political system they wanted, took place on 29th June, 2000 and the people purported to choose the system they wanted. However, the referendum was successfully challenged in the Constitutional Court of Uganda at Kampala on the basis that the Referendum (Political System) Act 2000 was void ab initio for being inconsistent with the provisions of the Constitution which authorized it.[35] Interestingly, the main ground for nullifying the Referendum (Political System) Act 2000, was that it failed to give the people adequate opportunity and time to conduct political canvassing provided for under the Constitution, before the referendum could take place. In other words, the Uganda Parliament during the passage of the said Act, failed to provide an adequate period of time to discuss the issues of the referendum before going to vote. The result was that the electorate was denied fair opportunity to make a choice as to the political system they really wanted.

1.6 Conclusion

The above chapter reviews the universal meaning and nature of referenda, categories, and procedures. It also analyses the functions and purposes of referenda and highlights the advantages and disadvantages of referenda. It finally looks at the various aspects perspectives and dimensions of referenda in different countries. The understanding obtained therefrom is necessary in helping us to appreciate the juridical character of the 2005 Kenya referendum which is the next section.

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[35] Paul K. Ssemogerere & another v. Attorney General- Constitutional Court of Uganda, petition No. 3 of 2000.

CHAPTER TWO

JURIDICAL BASIS OF THE 2005 KENYA REFERENDUM

2.0 Introduction

The legal system of Kenya before 1998, did not in any way reflect the concept of referendum. It had never been doubted however, that Kenya is an independent Republic which has sovereignty over its territory, over its resources and over its people. Every five years generally, since independence in 1963, the people of Kenya exercised their sovereign power in General Elections during which they chose leaders to represent them in governing the state in the manner the people wished. But the exercise of the sovereign power had never been exercised through a referendum. This thesis examines the question as to whether there was a constitutional or statutory basis upon which the people exercised their sovereignty through the 2005 Kenya referendum.

2.1 Constitutional basis of referendum in Kenya

In a paper presented at a workshop on the interpretation of the Constitution of Kenya Review Commission's mandate on 15th September 2001, Dr. PLO Lumumba stated:

> **"while acknowledgement of the citizens supremacy is useful way of expressing the people's residual powers, it must be observed that in practical terms it is difficult to place mechanisms through which the people can ensure that their delegates do not usurp their power. The only effective tool is the referendum, hence the need to find a place for it in Kenya's new Constitutional regime."**[36]

Dr. Lumumba, a constitutional scholar, was through the above statement, admitting that the present Kenya Constitution has no recognition or provision for a ***referendum.*** Similarly in the late 1980s and 1990's, whenever a call was made for a referendum, the ruling leaders, including President Moi and the then Attorney General, firmly asserted

[36] PLO Lumumba, "Constituting the State Territory, Citizenry and National Philosophy in a Constitution". P. 8.

then that our Constitution did not provide for one. In fact the Attorney-General, Justice Mathew Muli, could then claim that a referendum could not be held even if petitioned for by the people, **"simply because our Constitution was silent on the issue".**[37]

In ***CMI Working Paper***, (Chr. Michelsen Institute) Bard Anders Andreassen and Arne Tostensen, soon after the November referendum declared,

> "This was the first referendum ever held in Kenya. Therefore, there was no previous legislation to apply....."[38]

Careful perusal of the Kenya Constitution indeed confirms that section I and IA, otherwise reputed to enshrine the principles of constituent power of the people, do not expressly provide for the referendum, the latter being claimed as one of the means of exercising the said people's constituent power. Further more section 47 of the Constitution provides the manner in which Parliament can amend, modify or reenact any section of the Constitution. The section does not provide for the referendum as a necessary requirement for such amendment even where the amendment may be a basic amendment. Instead Section 47(2) provides a special procedure requiring 65% of the membership of the National Assembly to support an amending bill. There was therefore no express constitutional provision upon which the 2005 referendum was anchored. Such lacuna posed a serious challenge to the Review facilitators and other stakeholders, including the Electoral Commission of Kenya whose obligation was to promulgate the rules and conduct the actual referendum.

And yet the High Court in ***Njoya*** and the ***Yellow Movement*** cases making separate findings, practically made findings to the effect that a referendum, as an exercise of the constituent power of the people, need not be textualised in the Constitution and/or that it can be read in Section I and IA of the Kenya Constitution. Whether or not a major principle of governance, such as referendum (or even others, such as separation of powers or supremacy of Parliament) was an issue to be lightly and casually treated by the two courts as it was, is a matter left to posterity to answer. What is however not doubtful

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[37] Charles W. Gikonyo, "Referendum", Daily Nation, Wednesday, October 2003.
[38] "Of Oranges and Bananas: The 2005 Kenya Referendum on the Constitution" CMI Working Paper, P. 3.

is that we may not have heard the last of the two courts' rulings concerning referendum in Kenya.

2.1.1 Referendum provisions in the Wako Draft Constitution

If the Wako Draft Constitution had been ratified by the 2005 referendum it would have become the Kenya's New Constitution on the date of assent by the President. Sections 281, 282 and 283 thereof, provided the manner the constitution would be liable to amendment. Under Section 281 (1), the following issues would be amended only if the amendment would be passed by two-thirds majority of Parliament besides a simple majority of the citizens voting in a referendum; that is to say, the Supremacy of the Constitution; the territory of Kenya; the sovereignty of the people; the principles and values of the Republic; the Bill of Rights; the term of office of the President; the independence of the Judiciary and constitutional commissions; the functions of Parliament; devolution; or the provisions of Chapter 19 in relation to amendments.

A similar referendum would also be mandatory under Section 283 (9) of the said Draft Constitution, if an amendment proposed from outside Parliament by the people through a popular initiative, supported by the signatures of at least one million registered voters, is rejected by Parliament.

It is submitted that the Draft Constitution avoided the pitfalls of the current Constitution, in that it expressly textualised the referendum institution under the above mentioned provisions. The drafters also went further and provided under Section 1 (1) and (2) of the Draft the sovereign power of the people of Kenya as follows:-

> **i. All sovereign authority belongs to the people of Kenya and may be exercised only in accordance with this Constitution.**
> **ii. The people may exercise their sovereign authority either directly or through their democratically elected representatives.**
> **iii. ...."**

The writer takes the position that those who drafted the Wako Draft Constitution, by expressly including the provision of Section 1 (2) and Sections 281 (1), 282 (5) and 283 (9) in the draft, intended to avoid the possible constitutional difficulties faced by those facilitating and implementing the 2005 referendum. They did so by clearly reposing the sovereignty of the people in section 1 (1) of the Draft Constitution before declaring under Section (2) thereof that the said sovereignty would be exercised either directly in a referendum or indirectly through democratically elected representatives. By expressly textualising the people's sovereign power and how it should be exercised, the Draft Constitution not only frowns at the ***Njoya's*** and ***Yellow Movement's*** Cases too-broad principles, but actually, it is suggested, rejects them.

2.2 Statutory Provisions for Referendum

The statutory provisions for referendum are contained in the CKR Act, Cap 3A of the Laws of Kenya and its amending Acts, the most important and relevant one in relation to the referendum, being, the Constitution of Kenya Review (Amendment) Act, Act No.9 of 2004.

2.2.1 The CKR Act, (Cap 3A) of the Laws of Kenya

This was a creature of negotiations between the Kenya Government then led by the then Ruling Party KANU, on the one hand, and the opposition movements which included the civil society, religious groups and other social movements, on the other hand. The Act has set out the institutions authorized to review the Constitution, one of which was the "referendum". Section 27 (5) (iii) of the CKR Act provided-

> **"if on taking a further vote under paragraph (ii) any question on a proposal for inclusion in the Constitution is not determined, the National Constitutional Conference may, by a resolution supported by at least two-thirds of the voting members present, determine that the question be submitted to the people for determination through a referendum".**

This provision for the first time since independence, introduced a referendum concept into the Kenyan legal system. It will be noticed however, that the process would only be

made applicable if there was lack of consensus on constitutional proposal(s) intended to be included in the Draft Constitution.[39] Further, the provision was limited in time and in application in that the referendum would apply only once if so required and would thereby most likely, self-exhaust. This is because the whole process of constitution-making is a one-time process and a repeat of the same if found necessary, would require a re-enactment of the Act. Put differently the CKR Act and institutions for constitution-making constituted under it, including the referendum, stood to be repealed under section 33 of the Act after the end of the exercise of the referendum on the 21st November 2005.

2.2.2 The Constitution of Kenya (Amendment) Act, Act No. 9 of 2004

This amendment Act was passed and assented to by the President on 29th December 2004. It's intention was to incorporate in the original Act the principles enunciated both by the ***Njoya*** *and* ***Yellow Movement*** cases. These included the principle that political power reposes with the people and it is superior to any other power and that it can only be donated to other institutions such as the Constitution, Parliament etc. The introductory note to the amending Act speaks for itself – **"An Act of parliament to amend the Constitution of Kenya Review Act to provide for participation of the people of Kenya in the making of a new Constitution through the National Assembly and a referendum and to provide for certain other matters".** The provisions of this amending Act replaced the whole of chapter 7 of the principal Act. It contains quite interesting provisions such as its section 26 which states:

> ***"Recognizing that the people of Kenya collectively have the sovereign right and power to replace the Constitution with a new constitution sections 27, 28 and 284 are enacted to facilitate the exercise of that right and power."***

This provision is clearly a rendition of some untested pronouncement of the ***Njoya*** and ***Yellow Movement*** cases. What would happen if a future court disagrees with and reverses the two court's rulings concerning the "constituent power" of the people and the interpretation of section I and 1A of the Constitution as concerns the sovereign power? Section 27 (1) of the amending Act however provides for a mandatory referendum to be

[39] This became an issue in **Njoya** Case (supra), to be discussed fully later in this thesis.

organized by the Electoral Commission of Kenya to take place within ninety days. The clear purpose of the envisaged referendum is to give Kenya's electorate an opportunity to replace the present Constitution with the proposed new Constitution or to reject the latter.

2.2.3 Constitutionality of the CKR Act and Act No. 9 of 2004

This writer wishes to examine the issue of the validity of the CKR Act and its amending Acts from two angles-

Firstly, whether the Acts were technically valid and, secondly, whether they had a legal validity.

An Act of Parliament is technically valid if all the relevant parliamentary procedures for passing a parliamentary bill were adhered to during its passage. That is to say that the Acts must have been introduced in Parliament in form of a bill which was properly published read, discussed and passed as per the Constitution of Kenya and the rules of Parliament before finally sending it to the President for assenting to it.

The second aspect is whether the Acts were in substance invalid or void for any other reason. They would be void for example if they were found inconsistent to the constitution. Furthermore, the writer's view is that even where the Acts are not expressly inconsistent with the Constitution, they might nevertheless, be so unconnected and so outside the purview of the Constitution that it would legally be untenable to link them to it.

This thesis takes the view that the CKR Act as amended by the CKR (Amending Act) Act No. 9 of 2004 are technically valid statutes. There is no iota of evidence that they were not properly introduced, published, discussed and assented to by the President as required by law. Indeed, it is asserted that these procedures are presumed to have been adhered to unless evidence to the contrary is established. There is no such contrary evidence.

As relates to the second aspect, perusal of the Acts in the face of the Constitution shows no express or specific inconsistency with the Constitution. None also has so far been pointed out by any quarters. Those who support the validity of the Acts accordingly argue that any act carried out under them, including the referendum, was valid and legally effective. If such an approach were to be accepted, even only for the purpose of arguments, it is suggested that the referendum had a statutory basis in the CKR acts.

As mentioned earlier, however, there is the proposition that CKR Acts had totally no link with the Constitution, which did not authorize them therefore. From that point of view the CKR Acts were legislations whose purpose was merely to set up institutions which would either review the Constitution or as it later turned out, overhaul it. It is the writer's view, therefore, that a Constitution cannot be amended or reviewed by the provisions of a simple statute of parliament unless a relevant valid constitutional amendment, to authorize the promulgation of such statute, was put in place. Those in this class of thought point to Section 47 of the Constitution and argue that the current constitutional review only intended to amend the Constitution but not to replace it, whether through a referendum or otherwise. That those who wanted to achieve a replacement of the constitution through the process of a referendum, which is not itself provided for in the constitution, could only do so by amending the Constitution, to provide for the process. Professor Githu Muigai in a paper he wrote recently, put the question as follows: -

> **"Did parliament have the constitutional mandate to replace the current Constitution with an entirely new one, with or without a referendum, as anticipated by the Review Act?"**[40]

The position taken by this thesis is that replacement of a constitution even through a referendum, is such a fundamental constitutional issue that it cannot be legally achievable without an amendment of the Constitution to authorize it. This issue had later to arise in ***Njoya*** and ***Yellow Movement*** cases. The issue will accordingly be again visited under an interrogation of the two cases. For the sake of the argument in hand however, it will be observed that if the correct position is that an amendment of the Constitution was

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[40] Githu Muigai, "Overhaul or Amend? A Discourse on the future of Constitutional Change in Kenya", The East African Journal on Human Rights and Democracy, p. 12.

required to accommodate the CKR Act, even as amended by Act 9 of 2004, then lack of such amendments would render the Acts and therefore the referendum process conducted under them, null and void, *ab initio*. Thus, the 2005 Kenya Referendum would under this approach be said to have had no statutory basis, as much as it did not have any constitutional basis as earlier suggested. The writer takes the position that Parliament should have put in place an amendment of the Constitution of the relevant sections to include a replacement of the Constitution through a referendum. The latter would then be provided for by an Act of Parliament.

2.3 Referendum Regulations

The CKR Act as amended, provided under Section 34 (1) r (2) (d) as follows:

1) "The Commission shall make Regulations generally for the better carrying out of its functions under this Act.

2) Without prejudice to the generality of sub-section (1), regulations under this Section may-

   (d) Prescribe the procedure for the holding of a referendum under Section 27.

   "provided that regulations under this paragraph shall be made in consultation with the Electoral Commission of Kenya"

When the original Act was later amended by Act No.9 of 2004,a subsection (3) was added to the above Section 34 and it reads as follows:-

3) "The Electoral Commission, in consultation with the Commission and the Parliamentary Select Committee on Constitutional Review, may make regulations prescribing the procedure for the holding of a referendum under Section 28."

It may here be noted that the amendments brought on the CKR Act by Act No. 9 of 2004 repealed and replaced the entire part IV of the CKR Act. In doing so Section 27 of the original Act which had provided for the contingent referendum, was replaced by the new

Section 28 of the Act which provided for a mandatory referendum within ninety days **"to give the people of Kenya the opportunity to ratify the proposed new constitution"**

It will be observed therefore, that the Electoral Commission of Kenya was under the CKR Acts not only mandated to conduct the referendum but was also authorized expressly to make regulations in the manner the referendum should be conducted. It may also be worth noting that the Electoral Commission of Kenya was mandated by the CKR Act as amended, to conduct the referendum, subject to the operation of the National Assembly and Presidential Elections Act and the Election Offences Act. The amended Section provides-

> **"Section 28 (5) The national Assembly and Presidential elections Act shall apply, with necessary modifications, with respect to the conduct of the referendum, subject to the regulations under Section 34(3).**
>
> **(6) The Elections offence Act shall apply with respect to the referendum as though it were an election within the meaning of that Act".**

Following upon the above provisions, the Electoral Commission of Kenya (ECK) promulgated regulations under which the Referendum of November 21st 2005 was to be conducted. Since the ECK had also been authorized by Section 28 of the CKR Act (as amended) to apply the National Assembly and Presidential Elections Act and the Election Offences Act, there is reason to think that the ECK did operationalise the two Acts. But the regulations under CKR Act were promulgated in consultation with the Constitution of Kenya Review Commission and the Parliamentary Select Committee (PSC) on the Constitution, before gazettement.

The regulations addressed the following issues

- The criteria for eligibility to vote in the referendum.
- Voting time during the referendum.
- The threshold for the vote.
- The referendum question.
- Format and language of ballot papers.
- Assisted voters.

- Dispute arising from the referendum.
- Announcement of the results.
- Observers.
- The personnel recruitment.
- Documentation and archiving.

Within the above legal provisions which were made available to the ECK to enable it make necessary regulations, it is difficult to appreciate the comment made by the ECK's Chairman, to the effect that the framework regulations which ECK gazzetted, were illegal. He said-

> **"We decided a law covering everything. We had to make some framework of our own, which I believe was illegal but it worked. Fortunately, nobody went to court to challenge our regulations. Those who went to court only challenged the idea to have a referendum. God loves this country."** [41]

The writer suggests that this comment made by the Chairman of ECK at the time appears to have been made in ignorance of the earlier examined provisions of the law made available to ECK to authorize it to make regulations. On the other hand, it is the position of this thesis that the regulations promulgated by the ECK were validly made under the above Acts and were legally used to conduct the referendum. In other words, the referendum had a stable and sufficient juridical basis in so far as regulations promulgated under the relevant Acts were concerned.

Having examined the role, if any, played by the Constitution, the Acts of Parliament and the subsidiary legislation to legitimize the 2005 Referendum, this thesis, in the next sub-section, examines the role played by the Kenyan Courts.

[41] Sunday Nation, August 13th 2006 p. 4.

2.4 Case Law

2.4.1 Njoya Case

The original Constitution of Kenya Review Act has in section 4(1) stipulated a **"referendum"** as one of the several institutions for conducting the review of the Constitution. In Section 27 (5) (iii) of the original Act the referendum would be conducted specifically in default of a consensus being reached on any constitutional issue. At the end of the National Constitutional Conference (NCC) (otherwise called "Bomas",) it appeared that no contentious matters remained unresolved. It is recalled how the majority of the NCC participants danced with joy at the Plenary Hall of the Bomas of Kenya where Constitutional negotiations had taken place. Unfortunately not all participants were happy with the final document which however came out after several personalities representing the Government, including several Cabinet Ministers, walked out of the final plenary session.

One of those not satisfied with the final Constitutional Draft was Dr. Timothy Njoya. The latter in company of several others, alleged, among other issues, that the CKR Act had been drawn in such a way that it denied the people of Kenya their right to exercise their constituent power in a referendum to review or replace the Constitution. This case raised several important constitutional issues and was later to be popularly referred to as ***Njoya*** case.[42]

Amongst their prayers, the applicants sought a declaration that subsection (5), (6) and (7) of Section 27 of the original CKR Act be struck out for being unconstitutional to the extent that the said provisions had converted the applicant's right to have a referendum into a hollow right and privilege, dependent on the absolute discretion of the National Constitutional Conference. They also sought the amendments of section 47 of the Constitution to accommodate legislation that would be required to facilitate proper constitutional review. The Constitutional Court which heard the application consisted of three Judges and was presided over by Ringera, J. There was finally a divided opinion on the issue of constitutional interpretive approach, the majority decision being written by

[42] Njoya and 6 others v. Attorney General and 3 others [2004] IKLR, 261.

Ringera, J. while the minority dissenting opinion was written by Kubo, J. The Court's ruling was *inter alia,* to the effect that the said subsections (5), (6) and (7) of the CKR Act which provided for a contingent referendum, were inconsistent with the Constitution and therefore null and void. The court thus ruled that the contingent referendum provided for by the CKR Act was inconsistent with the Constitution for not being mandatory. That the referendum envisaged required to be conducted whether or not there was a consensus in respect of all issues. The Court's ruling effectively, therefore, was that the proposed new Constitution must be put before the electorate of Kenya to approve it or reject it through a referendum.

In coming to this conclusion the court made various interesting observations touching on the referendum process. It said:-

a) that a Constitution is supreme because it is made by they in whom the sovereign power is reposed, the people themselves, and that the constituent power of the people has a juridical status which is also demonstrated in the constitution.

b) that one of the known ways of exercising the constituent power of the people is through a referendum, assumed to be practical and effective medium of exercising such power. This raises the issue as to whether the exercise of the constituent power of the people cannot effectively and validly be delegated to a Constituent Assembly or Parliament?

c) that the present Constitution was made supreme by the higher power i.e. the constituent power of the people, and that the Constitution is therefore answerable only to the people themselves, not vice versa.

d) that the constituent power of the people need not be expressly recognized and textualised in the constitution, although such recognition would be a wise act merely showing excessive caution.

e) that the supremacy of the Constitution does not arise from the fact that the Constitution says so as the supreme instrument of governance but because it was made by a higher power, a power higher than the Constitution itself or its structures, the people themselves.

This writer, in so far as the referendum was concerned, understands the *Njoya* ruling to state that Parliament and those who had by consensus proposed the passing of the CKR Act, had violated the Constitution by failing to make the exercise of the constituent power of the people in a referendum, mandatory. However, the writer believes that Parliament had a right as well as power to pass a legislation providing for a contingent referendum if that was the Inter-Party Parliamentary Groups consensus and if that was what the situation required.

2.4.1.1 The juridical basis for referendum in Njoya case

The ***Njoya*** ruling questioned the validity of the referendum provided under section 27 (5) (iii) of the CKR Act on the basis that the contingent referendum provided, thereunder, amounted to no substantive or proper referendum. For that reason the court made a finding that the above statutory provision, *inter alia,* violated the Constitution for being inconsistent to it. The court's further view was that since a referendum was one of the processes through which the constituent power of the people is to be exercised, and since such constituent power cannot be limited, fettered or muzzled, then the act by Parliament and other stake-holders of negotiating and concurring on a **contingent referendum** in the CKR Act, was in violation of and was inconsistent to the Constitution. The court did not point to any provision in the Constitution which the referendum provision aforementioned violated, except to argue that a new Constitution cannot be validly made unless it be ratified through an unfettered referendum. The court's ruling created a predicament among the stakeholders and facilitators of the constitutional review. It actually sent them to the drawing board. Their response was the bringing of an amendment to the CKR Act through the Constitution of Kenya Review (Amendment) Act, Act No.9 of 2004.

This amending Act, *inter-alia,* repealed the whole Part IV of the CKR Act and replaced Section 27 which had provided for a contingent referendum with Section 28(1) which made the referendum mandatory for the ratification or otherwise, of the proposed Constitution. The new section stated-

> **"28(1). Within ninety days after the Attorney General publishes the proposed new constitution under Section 27 (3), the Electoral Commission shall hold a referendum to give the people of Kenya the opportunity to ratify the proposed new constitution."**

The other subsections of this section provided for the referendum question, the necessary majority required to pass or reject the proposal, the people who were entitled to vote and other possible law to be applied to the referendum. Other relevant issues relating to the same, including the results and the final effect of the referendum were also provided for.

We take the position that, subject to the question of validity of the CKR Act in its original form and as later amended, the ***Njoya*** ruling provided the jurisprudence upon which the 2005 referendum was to be understood and based. The Court explained clearly that a referendum is a forum through which the constituent power of the people is exercised and demonstrated. This meaning of the referendum may possibly have only vaguely existed in the minds of the stake-holders of the constitutional review, especially in 1998 when the CKR Act was promulgated. Further, in so far as the ***Njoya*** ruling led the stake-holders and facilitators of the Constitutional review to amend the CKR Act, to make the referendum mandatory, the case can without hesitation be considered to have contributed to the expansion of the juridical basis of the 2005 Kenya referendum. That arises from the fact that Parliament will not have brought the amendment except in response to the court ruling which outlawed the contingent referendum provided by the CKR Act, 1998.

It should however be noted that the writer does not accede to the view of that court that the CKR Act denied the people their right to exercise their constituent power or right. It has to be understood that when the Act was promulgated in 1998, all stake-holders believed that the review was a matter to be achieved by negotiations which would ultimately, end up in consensus. Indeed, it can be taken as wisdom on their part to have

provided for the contingent referendum intended then, not to ratify the review, but to merely resolve any contentious issues arising. Furthermore it is the position of this thesis that the legislation did not in any way expressly or by implication deny the people a referendum. All it did not do, was to make the referendum a mandatory part of the process because the referendum was originally not for the ratification of the intended review but for the resolving of disputes on lack of consensus.

The above conclusion raises the relevant question i.e. whether the said subsections (5), (6) and (7) of section 27 of the CKR Act, were really inconsistent with the Constitution. Was there any provision in the Constitution which abhorred the subsections or were the subsections offensive to any section of the Constitution, expressly or by implication? With great respect, CKR Act can be said to have provided a referendum for a specific purpose as dictated by the circumstances that existed in 1998. But failure by the Act to use referendum for more purposes, inclusive of using it for ushering in a new Constitution, did not make these legal provisions for a limited referendum, illegal or inconsistent to the current Constitution. Indeed originally, ***"the referendum was envisaged in Cap 3A as a dispute and conflict resolution mechanism"***[43].

One more aspect of the inclusion of the referendum in the CKR Acts should be considered. Accepting the fact that the current Constitution has no provision for referendum, can it be taken that the CKR Acts introduced the concept in the Constitution? If that was the purpose of Parliament then, Parliament purported to use an ordinary Act to amend the Constitution! It is the writer's view that such a course is legally impossible in the face of the provisions of Section 3 of the Constitution which states thus-

> **"This Constitution is the Constitution of the Republic of Kenya and shall have the force of law throughout Kenya and, subject to Section 47, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void."**

[43] Constitution of Kenya Review Commission-Manual for Educators for Civic Education-"Referendum, 2005", p.15.

Perusal of Section 47 mentioned in the Section 3 above quoted confirms that no amendment of any Section of the Constitution is valid or viable unless it is done in accordance with the terms and conditions provided thereunder. It is argued by the writer that Parliament's intention in promulgating the CKR Acts containing the referendum and other related mechanisms, for review quietly was to amend Section 47 of the Constitution, a purpose not sanctioned by the Constitution. It was accordingly not only mischievious for Parliament to purport to introduce a referendum into the Constitution through a simple statute but it was legally untenable.

2.4.2 The Yellow Movement case[44]

Following the ruling in ***Njoya*** case the stake-holders who included the Government and Parliament as already pointed out, brought an amendment to the CKR Act to bring it in line with the ruling.[45] In particular the referendum was no longer to remain as a mere dispute resolution mechanism in relation to unresolved constitutional issues. Instead a referendum was under the amended Act's Section 28 (S.5 of the Amending Act), made mandatory (not merely for dispute resolution) for the ratification of a new proposed Constitution. This in turn attracted another High Court constitutional case, ***The Yellow Movement*** case.

The main issues raised in this latter case which touched on the subject of referendum, can be summarized into:-

a) What a referendum is and its implications in the Constitution making process.

b) What a constituent power of the people is and how a referendum is one of the ways of exercising that power or right.

c) Whether the CKR Act and its amending Acts in so far as they provided for a referendum, required to be anchored in the Constitution, for the purpose of validity.

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[44] Onyango and 12 others v. Attorney General and 2 others Nairobi High Court Misc. Civil Application No. 677 of 2005 (OS).

[45] The Constitution of Kenya Review (Amendment) Act No. 9 of 2004.

d) Whether any amendment of the Constitution was required to accommodate the CKR Acts.

Although the definition of a referendum is given in Chapter Two of this thesis, it will briefly be repeated here for the purpose of linking it to the concept of *"constituent power of the people"* which the said court discussed at length. The court in this case defined referendum as a process of referring a state legislative act, a state constitutional amendment or an important public issue, to the people for final approval by popular vote". However, Taft W. H. in his book ***"Popular Government",*** defines a referendum ***"as a reference of an issue to a decision by popular election."***[46] It was the view of the court in this case, that Section 1 and 1A of Kenya Constitution which declares the ***"sovereign"*** and ***"democratic multiparty"*** nature of the Republic of Kenya, also entailed the people's constituent power which can be exercised through a constituent assembly or a referendum. The court had accordingly concluded, that a referendum process is also impliedly covered in the Sections 1 and 1A of the Constitution. The court consequently further concluded that the CKR Act, and the CKR (Amendment) Act, Act No.9 of 2004, were lawful legislation passed within the purview of the accommodative Sections 1 and 1 A of the Constitution, to facilitate the replacement of the constitution through a referendum. The court concluded that constitution-making is a political process as opposed to it being a legal process. This meant that the exercise of constituent power in referendum was basically a political act not liable to interference by the court of law.

The writer, however, only partly agrees with the court ruling above. While it may indeed be true to say that the exercise of the constituent power in constitution-making is political, yet there is a lot in it that is legal. For example, legislating is a legal process. The process has to start with drafting the bill by the Minister or the Attorney-General, publish it, have it discussed by Parliament and its relevant Committees, and finally after the bill is passed, have it assented by the President. It cannot be denied that the Draft

[46] This definition is quoted by Charles Wahome Gikonyo in his paper," Referendum – We've never conducted one, but why not?". Daily Nation, Wednesday October 8, 2003.

Constitution had to go through most of the above stages. It particular, the part to be played by the Attorney-General, Parliament and its committees and the President, are such that make constitution-making partly a legal process.

With the above in mind this thesis understands the Yellow Movement ruling to have included the following findings:-

(a) That the constituent power of the people is assumed, presumed, presupposed, is primary and need not be textualised in the Constitution.

(b) That a referendum *inter alia,* is an expression of the constituent power of the people and cannot be curtailed, injuncted, stopped, or interfered with, in anyway, even where it is not expressed or textualised in the Constitution.

(c) That a referendum as such expression of the people's constituent power, need not be fully expressed within the substance of the sovereign and democratic multiparty character of the Republic of Kenya as provided in Sections 1 and 1A of the Constitution.

(d) That therefore there was no constitutional requirement to amend the Constitution (Sections 47, 1 and 1A of the Constitution,) to accommodate expressly, *inter alia,* a mandatory referendum in Kenya.

2.4.2.1 The Juridical basis of referendum in *Yellow Movement* Case

This court considered the CKR Acts as legislation merely intended to facilitate the reviewing or replacing of the Constitution of Kenya. The **"referendum"** provided under the said Acts was therefore merely an expression of the people's constituent and sovereign power claimed by Njoya ruling to be reposed in sections 1 and 1A of the Kenya Constitution. Looked at this way, and taking the referendum as a mere vehicle through which the sovereign power of the people is to be expressed, the court was of the view that no one, not even the court of law, has power to interfere, stop, injunct or in any other way fetter the said constituent power of the people.

It is accordingly, suggested by this writer that the ***Yellow Movement*** court, saw no need for enshrining the process of referendum in the Constitution. Not even a statute carrying the provision of referendum needs to be sanctioned by the Constitution. All this by virtue of the fact that the people's constituent power is the most supreme, so that it alone, legitimately gives birth to constitutions. Accordingly, asserted the ruling, Kenya did not need a constitutional or statutory basis to conduct a referendum. The juridical basis of a referendum, if the above view is correct, is not the Constitution nor the CKR Acts, but the constituent power of people. In which case every statutory or regulatory legislation, should only be applied to provide procedural requirements or facilitation.

The writer, however, finds the above proposition quite unusual. The Constitution being the supreme law of the land, provides the broad principles under which all institutions of governance including all other laws are to be based. Any legislation not in tandem with it is invalid to the extent it is inconsistent with it. In that context, it can be argued that any principle of law, such as the referendum, which was not drafted into the Constitution, was not intended to be therein. It is further suggested that such omission is assumed to have been intended. To assume otherwise would lead to invoking a principle where it does not and was not intended to exist, in the writer's view, a legally dangerous approach.

In conclusion, it is the writer's view that Kenya needed a constitutional amendment not only to introduce a referendum concept into our legal system but also to sanction statutory legislation under which to conduct the referendum. This thesis, with great respect, views the ***Yellow Movement*** ruling, as not good law.

2.4.3 Juridical significance of *Njoya* and *Yellow Movement* cases

There is no doubt that the two courts highlighted and greatly underscored the relevance of a referendum in constitution-making in Kenya. This is so despite the controversial reasoning adopted by either court in coming to the conclusions each did. Each court, nevertheless, elucidated the definition, the specific functions and purposes of a referendum as an expression of the people's constituent power, in constitution-making.

The two courts views as to the character of the people's constituent power as exercised in a referendum, is not only interesting but also one likely to raise dissent and/or controversy in scholarly and judicial circles. But whether in positive or negative ways, the two court cases have greatly contributed to the jurisprudential knowledge and information of referendum as a people's right and power to participate in decision-making in various aspects of governance. In conclusion, the two courts' rulings heightened the future role of the referendum in both constitution–making and in the wider and direct political participation in public governance in Kenya.

On the other hand they brewed possible future controversy on the following possible issues, particularly during this period when Kenya is struggling to construct a suitable new constitution.

i. Whether Section 47 needed to be amended to open up for Constitution replacement instead of constitutional review that was originally intended.
ii. Whether the CKR Acts, in so far as they purported to legally sanction replacement of the Constitution, contained a juridical capacity to do so.

iii. Whether CKR Acts were enacted for the purpose of constitutional replacement or merely for constitutional review (amendments) only.

iv. Whether a referendum as a process for achieving basic amendment or replacement of constitutions should not be textualised in the Constitution as a basic juridical principle.

2.5 Conclusion

Several conclusions commend themselves out of this section of the juridical basis of the referendum. These include the following:-

a) That constitutional review in Kenya appears to have started as an unplanned event, grudgingly accepted by the Government. It included the application of a referendum in the process only where a consensus would become elusive.

b) That referendum process was not therefore originally a major or even important factor in the constitutional review, as originally envisaged.

c) That the ***Njoya*** ruling totally changed the nature and approach to the review by making the referendum mandatory. After the year 2000 the intended *review* of the constitution changed to become the *replacement* of the constitution, while the original *contingent* referendum for *dispute resolution* became the *mandatory* referendum for the *replacement* of the constitution.

d) That the CKR Acts were not sanctioned by the present constitution. To argue, as **Njoya** ruling did, that sections 1 and 1A of the Constitution are juridically wide enough, and that they were originally meant, to house a referendum, is to say the least, far-fetched, even in applying the most liberal and purposeful approach of the present Constitution.

e) That the constitutional basis of the 2005 referendum would be said to lie in the ***Njoya*** and ***Yellow Movement*** rulings, a basis, which to say the least, is clearly shaky and unsatisfactory.

f) That uncertainty about the legal validity of the CKR Acts arises in two ways:-

    i. That they were originally promulgated for review and not replacement of the Constitution.

    ii. That they were not authorized by and not anchored in any provision of the current Constitution.

With the above conclusions in mind, we will now turn to examine the character and functions of the 2005 Kenya referendum.

CHAPTER THREE

THE 2005 KENYA REFERENDUM

3.0 Introduction

The 21st November, 2005 referendum was a process in which the entire Kenyan electorate was asked to participate. In it every Kenyan eligible to vote in a general election and who held a voting card, had a right to vote, either approving or rejecting the proposed draft Constitution as a suitable document to replace the current 1963 independence Constitution.[47] This section will first briefly interrogate the issue as to whether the Kenya Government had in place a clear policy concerning the referendum. Thereafter the nature, functions and purpose of the referendum will be critically examined.

3.1 Government policy on referendum

Referendum process is a new democracy-building process in Kenya. It was in our view included in the CKR Act in 1998 not because it was at the time considered as important as it later turned to be, but merely to be used to resolve any constitutional conflicts that might arise during the review process. Parliament had later to amend the CKR Act to make the referendum mandatory in the process of Constitution ratification as ruled in ***Njoya*** case ruling.

It is not very surprising therefore to note that the government had not laid much importance over the process nor had it formed any strong policy decisions or guidelines as to how it should be handled, conducted or controlled. This position can be simply understood and appreciated on the ground that there was no basis upon which the government would spend much time and resources on an issue which at that appeared unimportant.

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[47] Constitutional Review Commission: Source Book for Civic Education: Referendum 2005 P. 4: "2.1 what is a referendum."

It is accordingly submitted that the Government had no clear referendum policy at the beginning. However, eventually the government realized that like any other important institution, referendum required a policy and administrative framework within which it could operate. The situation was so uncertain that the Chairman of the Electoral Commission of Kenya complained of lack of regulatory framework for the process.[48]

The consensus that is emerging is that there lacks a government policy framework especially now when the general political view is that no new Constitution may be realized by the people of Kenya without the same being ratified by them in a referendum.

In 2005 the importance of the referendum became apparent to the political elite. It was all at once realized that referendum was the mechanism through which the people of Kenya would choose the kind of Constitution that would replace the present Constitution. This was clearly vital since there already existed more than one political groupings each of which supported different versions of draft constitutions, which held a different approach on the division of executive power between the Presidency, on the one hand and the Premiership, on the other hand.

It is accordingly submitted that gradually the referendum became a contentious subject which each political group found necessary to influence, to control or even to manipulate. The Government declared it a Government project which required to be financed, guided, facilitated and controlled by the Government like any other Government projects. The Government was then generally understood to the saying that a Government project, like the construction of a major road, should be conducted by Government personnel as well as be carried out with Government equipment and Government finance. No other parties like the opposition, the donor nation, multinational corporations and similar others, should have a right to contribute or even criticize the manner of implementation of a Government project. This was understood further to mean, that the Government had freedom to use any Government resource to make the project "succeed", where "succeed" meant that the referendum should be won by the Government side. It meant

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[48] Supra footnote 41.

that the Government had to use every possible means to persuade the electorate to ratify the Wako Draft Constitution. The opposition on the other hand saw the referendum as a democratic process just like the General Elections, which should indeed be financed by Parliament but must be conducted freely, fairly and independently. These two opposing stances inevitably led to serious political conflict which only the people of Kenya finally resolved through voting in the referendum.

3.2 Nature and classification of the 2005 Referendum

The referendum was initially provided for under Section 27 (5) (iii) of the above mentioned Act. The Section Provides:-

> "All questions before the National Constitutional Conference shall be determined by consensus, but in the absence of a consensus, decisions shall be determined by a simple majority of the members present and voting:
> Provided that-
>
> (i) ...
>
> (ii) ...
>
> (iii) If on taking a further vote under (ii), any question on a proposal for inclusion in the constitution is not determined, the National Constitutional Conference may, by resolution supported by at least two-thirds of the voting members present, determine that the question be submitted to the people for determination through a referendum."

A perusal of the provision above confirms that the referendum was intended to be conducted only when there could be no consensus on any constitutional issue(s) at the National Constitutional Conference. At that stage, the Kenya referendum was in terms of nature, ***conditional*** or ***contingent***. This remained the position for several years after 1998. In the meantime some scholars and stake-holders in the review process felt that that provision for referendum was not adequate. They believed that a referendum is a democracy-building process which gives the people a chance to express their opinion on

the review process and should not therefore be restricted in its application to certain situations only. This group of citizens which was being led by Rev. Dr. Timothy Njoya filed a High Court case demanding that the court declares that a referendum should be mandatory in the review process. The case's finding in relation to the process of referendum however, was that a referendum by its nature, gave the electorate an opportunity to ratify or reject a draft constitution and its provision must accordingly, be mandatory.

To bring the whole situation into conformity with the said High Court ruling and after serious consultation with the stake-holders, Parliament amended the CKR Act to make the referendum in the process of constitutional review, mandatory.[49]

In passing this amendment, Parliament itself acknowledged the referendum as a sovereign right of Kenyans in the process of changing or replacing of their constitution.[50] After the said amendment therefore, the Kenyan 2005 referendum can be classified as a ***mandatory*** referendum. It also now satisfied the requirement of Section 26 of the Act which recognized "that the people of Kenya collectively have the sovereign right and power to replace the Constitution with a new Constitution, through a referendum"[51]

In terming the Kenya 2005 referendum mandatory is meant that those given authority to complete the constitutional review process had no choice but to make the referendum part and parcel of the review process. In this particular case, the referendum became the final major act of the constitutional-review process. Had the people of Kenya approved the Proposed New Constitution, only the President's assent would be required to bring about the replacement of the current Constitution. On the other hand, rejection of the Bill, which is what occurred, meant that there could be no replacement of the Constitution because the Draft Constitution was denied ratification by the people of Kenya.

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[49] Constitution of Kenya Review (Amendment) Act, Act No. 9 of 2004.
[50] Constitution of Kenya Review Commission: manual for Educators for Civic Education- "the Referendum", P. 15.
[51] Ibid.

Since the Kenyan referendum result was by its nature binding upon all the stakeholders, the referendum could be termed ***binding.*** In other words, its results were not merely ***consultative*** or ***advisory*** upon the stake-holders. The result could not accordingly be ignored by the Government, the majority of whose senior leaders campaigned for the approval of the draft proposal. Indeed many Government officials, including **"President Mwai Kibaki, had campaigned for a 'Yes' (Banana symbol) vote on the Constitution"**[52] The Banana camp however, conceded defeat at an early stage and pledged to work with the opposing camp towards reconciliation and healing of wounds inflicted during the heated campaign, that had left the country politically polarised.[53]

In the 2005 Kenya referendum the ***proposal*** or ***measure***, was to be approved or rejected in the form it was presented to the people. It was also to be approved or rejected by a simple majority of all the voters who cast valid votes. The proposed new constitution was finally voted down by a 57% majority of Kenya's voters who turned out to vote.[54]

3.3 The Purpose and Functions of the 2005 Kenya Referendum

The ***Manual for Educators for Civic Education,*** published by the Constitution of Kenya Review Commission, shows that the constitutional review process was an experience in conflict resolution using various mechanisms.[55]

The referendum was therefore first and foremost, a mechanism for deadlock breaking and dispute-resolution. Indeed the views presented by the people during the review process were many, and differences which required resolution were bound to arise. This purpose of a referendum, was the basis of Section 27 (5) (iii) of the original CKR Act, which encapsulated a referendum. The CKR Source Book for Civic Education puts it this way-

> **"this is why in modern times, a referendum has been used as a last resort after all other efforts to arrive at a consensus over an issue fail."**[56]

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[52] Wikipedia, the free encyclopedia, "Kenyan constitutional referendum, 2005" P. 1 - "http://en. Wikipedia. org/wiki/Kenyan Constitutional referendum% 2c 2005."

[53] Bard Anders Andreassen & Arne Tostensen, "Of Oranges and Bananas: The 2005 Kenya referendum on the Constitution" CMI WORKING PAPER NO. 2006:13.

[54] Wikipedia, the free encyclopedia, "Kenyan Constitutional referendum 2005", P. 1 – Ibid.

[55] Constitution of Kenya Review Commission – Manual for Educators for Civic Education, "referendum" 2005- P.15.

[56] Ibid., P.4.

The second function of the 2005 Kenyan referendum was spelt out by the Constitution of Kenya (Amendment) Act, 2004, Section 26 of the Act states inter-alia, that the purpose of the process was to fulfill the requirement,

> **"that the people of Kenya collectively have a sovereign right and power to replace the constitution with a new constitution".**

The referendum was here to be used as a means of replacing the current Constitution for a new Constitution that would be greatly improved and modernised in its approach to constitutional doctrines. The referendum had changed its character from a dispute-resolution mechanism to Constitution-legitimating mechanism. The question that is difficult to answer at the moment is whether the referendum is the best mechanism for legitimizing a new constitution given the fact that ethnicity is still very strong in Kenyan politics. Be that what it may, majority of Kenyans appear to want a new constitutional dispensation.

Thirdly, the referendum was used as a barometer to firmly ascertain or establish the correct opinion of the citizens of Kenya over various Constitutional issues. It took from 1998 through to the end of 2005, to construct the Draft New Constitution with the process going through twists and turns. If the construct was manipulated by a few leaders to protect their selfish interest, then the people also, had a right to have their say on it. It was therefore only through the referendum that those entrusted with the responsibility to build or influence the building of the Constitution, would know what the people stood for or against in the proposed document. The people's rejection of the proposed Constitution, will have cautioned the ruling elites as to where the people stood on issues contained therein.

Fourth, the people of Kenya did at the end of casting their votes, indeed, appreciate the fact that they had been given a chance to exercise their sovereign constituent right and power to say what they wanted to say about how they should be governed. Put differently, the Constitution which was in the making, being the core instrument of governance, required the people's direct input. Despite the fact that the twelve million Kenya citizens were earlier represented in the constitution-making process by about 600

representatives, such representation was not considered to be effective or even fair and just. That, in the writer's view, is why the people's direct say in the referendum was an exercise "in the regulation of their own affairs".[57] They had the last and presumably, the final say, about the Draft Constitution before debate is on Constitution-making is once again reopened in the near future.

Fifth, the people of Kenya were supposed to settle one way or the other, the disputes that arose during negotiations concerning the New Draft Constitution. "Settle" here might mean that the people would say "yes" or "no" to an issue. For example if the people wanted greater devolution, as this thesis suggests they did, they would in the referendum, probably vote "yes" if greater devolution was properly encapsulated in the draft document, or "no" if it was not. In that way they would show clearly and finally the way they wanted that issue to be treated, even in the future. Unfortunately in this respect the simple, single-choice referendum of 2005, in which the people by a single "yes" or "no" were to approve or reject the whole document as it stood, had no capacity to resolve the several contentious issues in the draft proposal.

The sixth, function of the 2005 Kenya referendum was that it certainly operated as a constitutional safeguard to the Kenya's citizenry against the manipulation of constitutional issues, by the governing elites. One of the major constitutional review issues at the top of Kenya people's mind from 1998, was the devolution of the executive power. Soon after receiving independence from the British, under what was perceived to be a cautiously but otherwise carefully drafted and balanced federal Constitution, President Kenyatta, within the first year of independence and using the Parliament which he dominated, replaced the Constitution with one that introduced a unitary State with an elected President as Head of State. Meanwhile a practice of frequent constitutional amendments which led to a deliberate distortion of the Constitutional issue of division of power between the executive, the legislature and the judiciary, had set in. It soon resulted in a dictatorial presidency which became the hallmark of Kenyan authoritarianism in the 1970's and 1980's. The re-introduction of the multiparty democracy in 1991 opened up

[57] A referendum allowed the citizens of Kenya to participate widely in the constitution-making apart from giving them the right to choose the right Constitution.

for agitation for more political freedom, with the constitutional issue abovementioned being the rallying point. The writer sees the Referendum as an exercise of people's political power to choose and have the kind of Constitution that would protect them from the kind of authoritarianism experienced in Kenya since independence.

It is all at once clear therefore that any constitutional review whether in terms of amendments or replacement of the constitution, which ignored the reduction of the executive powers, particularly, presidential powers, would be unacceptable. Through the referendum, the people of Kenya prevented a perceived rogue parliament and an impudent executive from imposing upon the people, what otherwise was an improved Constitution but one which was contrary to long term wishes and struggle of the people of Kenya.

It is instructive to note that the 2005 Kenya referendum was an important constitutional milestone in Kenya in that the Government's determination to manipulate the process was frustrated by a vigilant electorate exercising its direct power through a referendum. It demonstrates clearly that even in developing countries of Africa direct participation of the people in exercising their sovereign right and power to have their say and thus influence to put in place a democratic government, is feasible.[58] This leads us to the next issue which is how the 2005 Referendum was implemented.

3.4 Whether the 2005 Referendum was used for the purpose originally intended

Under the original CKR Act of 1998, the referendum was to be a mechanism for dispute resolution. This is to say that if there was a dispute on any constitutional review issue, the same would be resolved by the Kenyan electorate through a referendum. This indeed formed the substance of section 27 (5) (iii) of the CKR Act. However, by the amendment brought by the Constitution of Kenya (Amendment) Act, Act No. 9 of 2004 the purpose of the incoming mandatory referendum was for the ratification of the draft new Constitution.

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[58] See professor Mads Qvortrup on "Dicey A.V: the referendum as the people's vote" in History of Political Thought, Vol. Xx, No. 1, Spring 1999, P. 1 – 16.

This thesis takes the position that the Kenya Government, the Kenyan Parliament and all the other stake-holders, including the political parties, failed to use the referendum process for the resolving of contentious constitutional issues that arose during the Review as envisaged under section 27 (5) (iii) of the CKR Act. It is argued that the various contentious constitutional issues should have been put to the people for resolution through the referendum first and foremost. It is only after such resolution that the resolved matters would be made part of the Draft Constitution. It is however, further observed that the Government and Parliament, instead imposed upon the people the Wako Draft Constitution which carried several unresolved issues and new amendments which had not been authorized by the people either directly or through their elected representatives.

While the Kilifi Parliamentary Select Committee Report had basically recommended that the Bomas Draft be revised in accordance with the Naivasha Report, it had nevertheless gone further to reduce the powers of the Prime Minister in favour of the President and had omitted the express limitation on the size of the Cabinet to 25. Furthermore, despite the fact that Parliament debated and acrimoniously passed the inflated Kilifi Report, the Attorney-General whose duty thereafter was to construct a Draft Bill from the now accepted Kilifi Report, tilted the Draft Bill in favour strong Presidential powers. He also introduced into the draft new issue like the Christian and traditional courts not agreed upon before. That is the "Proposed New Constitution," otherwise called the "Wako Draft", which was put before the electorate to be ratified or rejected.

It is observed that the purpose or use of the referendum as spelt out in section 28 (i) of the Constitution of Kenya (Amendment) Act was, **"to give the people of Kenya the opportunity to ratify the proposed new constitution."** Put another way, the purpose for the 2005 referendum had been altered to make it a tool for replacing the current constitution. It is noted however, that, the amendment failed to specifically include the original dispute resolution purpose. This may be difficult to appreciate since at the time when the amendment was put in place to alter the referendum purpose, the contentious issues which required resolution still glaringly remained unresolved.

It is therefore posited that those who drafted the amendment to the CKR Act, failed to retain the referendum's dispute- resolution purpose as they ushered in the new purpose of using it for ratification of the draft constitution. The unanswered question is whether or not the course taken, was deliberate to give the Government or Parliament an advantage over the other stakeholders. It is easy to argue that the referendum was used for the purpose intended in the amended Act although it is not clear whether the original purpose of dispute resolution was thereby abandoned or not. It might be argued that the electorate, in the process of choosing to vote 'yes' or 'no' also decided one way or the other, the constitutional issues contained in the Wako Draft Constitution. Such an argument, however, would hold little weight since the referendum result, whichever way it went, did not address the specific contentious issues. This position can be easily explained by the fact that the contentious issues during the 21st November, 2005 referendum, remained unresolved and may have to be discussed in future relevant fora to obtain resolution. As aptly put by Bard Anders Andreassen and Arne Tostensen –

> **"The referendum result implies that the constitutional issue has not been resolved. Rather than interpreting the result as expressing a popular wish to retain the existing constitution, we see this result as a quest for a constitution different from the proposed constitution…**[59]

The second manner in which the referendum was used was that it virtually became a war front between the Government and the Opposition. While it is observed that the parliamentary treatment of the constitutional draft did not resolve the "contentious" issues on the system of government and devolution of power which became a source of political struggle, the position taken by this thesis is that the core source of disagreement lay elsewhere. The rivalry was prehistoric to the Memorandum of understanding (MoU) between the Liberal Democratic Party (LDP) (Raila Odinga) and National Alliance of Kenya (NAK) (Kibaki). The MoU is reputed to have stated that the position of an executive prime minister was to be introduced by Kibaki who would be the President, within 100 days to be given to Raila Odinga. It is also reputed that President Kibaki reneged on this understanding, thus providing the basic cause for taking different sides by

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[59] Executive Summary, item 4, CMI Working Paper No. 2006:13 "of Oranges and Bananas – The 2005 Kenya Referendum on the Constitution" CMI WORKING PAPER NO. 2000: 13 – Supra.

the two, who were backed by their respective supporters. The Kibaki side became the "Banana" side while the Raila side became the "Orange" side.

The referendum accordingly became a forum for bitter political exchanges between the two political groupings, each trying to outdo the other. Such attacks ultimately became personal among and between leaders. The result was that political differences deepened to a point from where they would be difficult to heal. It also became a forum for satisfying personal political ends of the political leaders who as well used the referendum for laying foundations for the 2007 General Elections, contrary to the original purpose of the referendum which was to give the Kenya electorate an opportunity to review or replace the Constitution.

The third manner, in which the referendum was used for a different purpose, was that the opposition parties in parliament made it a contest in political popularity between it and the government. The Orange group which later became the Orange Democratic Movement (ODM) consisting of the opposition party KANU and the Liberal Democratic Party (LDP), attempted to prove to the electorate, that the Narc government had failed to fulfill its mandate and therefore had no business continuing to govern after 2007 elections. The referendum result thus became a vote of no confidence against the Narc Government. As put by Bard Anders Andreassen and Arne Tostensen –

> **"President Kibaki and his close associates had invested much political capital in the 'yes' vote. However, in the first referendum in Kenya's history on an issue of greater political significance, the people defied the powers that be and voiced a resounding, No. In a parliamentary system such a defeat would no doubt have caused the government to resign...."**[60]

The writer's position is that the opposition groups totally misunderstood and accordingly misapplied the referendum, whose purpose was to enable the people say the kind of new Constitution they wanted to have. What confused issues was the fact that the government did not itself allow the people to say exactly what they wanted to say in relation to the

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[60] *Ibid*, Executive Summary, p.6.

contentious issues.[61] This arose from the fact that the people's views as collected, collated and published in the Bomas draft, were not as faithfully recorded and adhered to in the referendum draft as they ought to have been. In conclusion, both the proponents and the opponents of the referendum proposal, went out of their way to use it for the purposes it was not intended to serve or achieve.

3.5 Conclusion

This chapter has highlighted the nature, functions, purposes and the accomplishments of the referendum. It suggested that if the mechanism is properly utilized, it can achieve the purpose of conflict resolution and constitutional amendment and/or legitimation. On the other hand it also shows that the process can be vulnerable to manipulation and misuse by the political elites. But where the public is alive to this eventuality, it can successfully thwart such efforts as happened in Kenya during the referendum. The political, economic and social after-effects form the next chapter.

[61] This thesis takes the position that the Government should, in the referendum proposal, have given the the electorate structured choices on the crucial contentious issues.

CHAPTER FOUR

THE CONSEQUENCES OF THE 2005 KENYA REFERENDUM

4.0 Introduction

Apart from the General Elections which occur every five years, no other political event has had greater impact upon the lives of Kenyan people as the 2005 referendum. In summary, the referendum affected the people in their political life and thinking. The process was intended and expected to resolve the contentious constitutional issues which arose as a result of the parliamentary treatment of the Bomas draft, especially as it related to the system of the government and the degree of devolution in it. Instead the process became impeded in struggles between ethnic leaders seeking the governance model likely to best serve their own interest, during the 2007 elections. As a result many recorded events occurred that affected the people one way or the other. This chapter examines and chronicles several of such events. It also attempts to analyse the way such events may have influenced or served as lessons to Kenyans.

4.1 The events preceding the referendum

First, the November 2005, referendum was the first one to take place in Kenya's 43 years independent history. The facilitators of the process included the CKRC and its organs, the Kenya Government, the Kenya Parliament, and the Electoral Commission of Kenya (ECK). The electorate did not therefore know what to expect of this new and unfamiliar phenomenon. Accordingly Kenyans had to receive civic education about the referendum and its purpose, the people's right to participate in voting in it on the date set for voting, and generally, what the proposed Constitution contained and how every vote would affect the constitutional and civic situation in the country. The people were informed that voting 'Yes' meant Kenya would have a new Constitution while voting 'No' would deny them a Constitution, in the meantime. The referendum event can accordingly be said to have cultivated large scale civic education, the kind never seen before in the country.

Second, the Kenya Government declared the referendum a Government project. This appeared to conflict with the civic education teachings then being conducted by the Constitution of Kenya Review Commission. The Commission was informing the people that a referendum was a forum through which Kenyan citizens were to freely express their views as they vote either way. And yet the Government was here, at the same time, claiming the referendum to be a Government project, thus implying that the people should side with the Government. The Government was effectively denying its position as a mere facilitator. The referendum had all at once turned into a tool at the disposal and control of the ruling elite and not a process giving the people of Kenya opportunity to consciously express their opinion over a constitution under which they were likely to be governed for many years to come.[62] At the same time the popular assertion that the referendum was a method of allowing "*Wanjiku*" (the majority ordinary Kenyans as opposed to the few ruling elite),to have a greater say in constitution making, was all at once put into great doubt and jeopardy.

Third, and related to the Government's declaring the referendum a government project, the Government claimed entitlement to utilize public resources to make its "pet project" a success. Ministers of the Government crisscrossed the country, not only using public state resources but also dishing out 'goodies' which included funds. Water was transported to and wells dug in dry areas of North Eastern Province. Food was distributed to people living in needy areas of Ukambani as impassable roads were graded and murramed in Gusii land. As aptly put by Bard Anders Andreassen and Arne Tostensen-

"....the use of state resources to influence the voters choice in the run-up period, is tantamount to a form of indirect vote-buying. This involved the President's announcement of new districts, promised about development projects and food distribution, and alleged handouts of money to groups of visitors from districts and outside the capital gathering at State House to rally in favour of the proposed constitution".[63]

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[62] Constitution of Kenya Review Commission, "Source Book for Civic Education- Referendum 2005", p. 4.
[63] CMI WORKING PAPER, "Of Oranges and Bananas: The 2005 Kenya Referendum on the Constitution", Executive Summary- www.cmi.no/publication.

These were activities and a conduct reminiscent of general elections during the former President Moi era and highly unexpected in Narc era. Narc had swept into power with promises to establish a clean Government which would not involve itself in dubious conduct. To appear to be vote-buying through the dishing out of various "goodies" including money, new districts or projects, was a conduct that surprised many Kenyans.

Fourth consequence was the nature of the campaign that preceded the referendum. It was characterized by aggressive and inciting behaviour by politicians of both divides, who used hostile, abusive and provocative language against their colleagues in the opposite camp. They possibly succeeded in provoking ethnic hatred and tribal and divisional groupings never seen before in the 43 years of Kenya's independence. Their "hate speeches" became so explosive that the Kenya National Commission for Human Rights (KNCHR), with a view to tone the situation down, set up a verbatim account of the leaders hate speeches which it published in the local press to expose and discourage the leaders who might continue misbehaving in this manner.[64]

These speeches were released in the press with an appeal to all leaders to tone down for the sake of future unity and welfare in the country.[65] The situation is thought to have negatively impacted on the civic education programmes in some areas of the country. It even influenced some civic education teachers who in turn attempted to influence voters one way or the other. In other areas civic education is said to have been largely neglected because civil society personnel were divided along ethnic lines and hence had compromised their credibility and impartiality. In some cases not-so-prominent politicians gained prominence by participating in the 'hate speeches'. The speeches are perceived to have provoked physical violence as eight people were shot dead by police in rallies in Kisumu and Mombasa after the public rallies escalated into violence due to aggressive, inciting and hostile language and utterances.[66]

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[64] Daily Nation, November 10, 2005.
[65] *Ibid*, item No. 6.
[66] CMI Working Paper No. 13-Executive Summary-Item 6 "of Oranges and Bananas: The 2005 Kenya Referendum on the Constitution." – www.cmi.no/publication

4.2 The aftermath of the 2005 Referendum

4.2.1 Introductory Note

The 2005 Referendum was a big event. Apart from being a novel process which had not before taken place in Kenya, it as well triggered or directly caused other secondary events that affected the people of Kenya, one way or the other. This thesis recaptures several of those events. Sometimes the writer explains how the events affected the people generally. Some of the events were indeed dramatic. Others were traumatic. The factor that groups the incidents together is that they were all triggered or directly caused by the 2005 referendum from the preparation period until it took place on 21st November 2005. The aftermath of the Referendum should accordingly be regarded as the effects or consequences of the Referendum.

4.2.2 The actual consequences of the 2005 Referendum

First, the referendum split President Kibaki's cabinet, appearing to cause confusion on the principle of "collective responsibility". This was inevitable since about a quarter of the Cabinet Ministers, led by Raila Odinga and Kalonzo Musyoka, held the view that the powers of the Presidency in the proposed Constitution, needed drastic reduction. The bulk of the Cabinet, led by President Kibaki himself, held the opposite view that the Presidency should retain not only its present executive powers but should be strengthened. For that reason cracks showed in the Cabinet, particularly as the campaign was openly based upon the difference in approach to the draft Constitution on the said constitutional issue.

There is evidence that differences in President Kibaki's cabinet, may have started much earlier during the formation of the cabinet in January 2003 when President Kibaki failed to appoint Raila Odinga as Prime Minister as well as divide the cabinet seats as earlier agreed upon among the leaders forming NARC. As put in an article carried in Wikipedia, the free encyclopedia writing about the 2005 Referendum:-

"The dismissal of the cabinet follows a seven month period in which its members never actually met formally, instead preferring to play political games with one another through the media. Kibaki has pledged to appoint a new cabinet within two weeks, until then he will be managing the nation's affairs single-handedly."[67]

It is argued that at the time of formation of this first and even second cabinet, the President had power under the Constitution, Sections 16,17 and 18, to appoint Raila Odinga a Prime Minister while awaiting the promulgation of a Neo Constitution in 100 days as reputedly agreed. He, however, did not do so, which was perceived as reneging on the Mou pact. It is not surprising, therefore, that such split occurred both in the cabinet and in NARC.

The rejection of the proposed New Constitution on 21st November 2005, led to the President's sacking of his whole cabinet. He was recorded as saying,

> **"Following the result of the referendum, it has become necessary for me, as the President of the Republic, to organize my government to make it more cohesive and better able to serve the people of Kenya".**

This was seen as an admission that the cabinet was not cohesive and that it had stopped operating collectively and cohesively. It therefore indeed made sense to have it re-organized. The act of dissolving it would give him opportunity, to deal with the political crisis in his hands. The President, after two weeks of his above statement, created a new cabinet. He dropped the ministers who had opposed the new Draft Constitution and shuffled several others, leaving out one of his close ministers perceived to have been a top advisor in respect to the referendum. The writer argues that the dissolving of the cabinet made political sense and was within the President's constitutional power. But whether he utilized the opportunity to the highest advantage politically, remains controversial.

A third consequence of the referendum was the immediate postponement of the sittings and proceedings of the Kenyan Parliament. Immediately after the referendum, the Kenya

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[67] Wikipedia, the free encyclopedia, " Kenya Constitutional Referendum" –available at htt://en.wikipedia-org/wiki/Kenyan constitutional referendum% 2c 2005.

Parliament was supposed to continue sitting in December, 2005, to conduct its usual business. The President, possibly fearing a political backlash in terms of a vote of no-confidence, prorogued Parliament in the same month and did not recall it until early in March, 2006.

A fourth consequence was a perceived slowing down of the fight against corruption. This is thought to have arisen in various ways. First, from the moment the date of the referendum was announced, the ministers, senior government officials, the provincial administration and even the investigative arms of the government, were all diverted towards the conduct and management of the process. With all government machinery focused on the referendum with the aim to win it, corruption investigations slowed down and in some instances stopped altogether. The dishing out by the Government of specific goods and services for the purpose of rallying support in favour of the proposed constitution [68] reflected badly on the Government, and also possibly demonstrated lack of political good will to effectively deal with corruption. The Government's pre-referendum posture might possibly have been perceived as slowing down the war against corruption in Kenya. It may have watered down various economic and ethical codes recently put in place to fight corruption by the same leadership. The codes include The Anti-corruption and Economic Crimes Act No. 3 of 2003 and the Public Officers Ethics Act: Act No. 4 of 2003.

Fifth, the referendum campaign clearly left the country, ethnically and politically divided. It created wide rifts and deep wounds between and among the people's of Kenya thus threatening national unity. It also reflected the Kenya's political leadership as not sufficiently developed to debunk from ethnicity and regionalism. Even political parties appeared as probably based on ethnicity. They appeared as having not acquired or accomplished the efficacious unity and cohesion found in western democracies. Bard Anders Andreassen and Arne Tostensen described the situation thus:

> **"The referendum campaign reconfirmed that Kenya politics is characterized by ethno-political cleavages and political loyalty based on ethnicity. The referendum also validates that the constitution-making process became**

[68] This thesis asserts that this conduct by the President himself and his Ministers directly amounted to improper ethical conduct within the provisions of Public Officers Ethics Act No. 4 of 2003.

entrenched in political contestation over power and positions among political elites that are situated along ethnic lines...."[69]

Sixth, the government after it losing the referendum, appeared to adopt an undemocratic conduct when it started clamping down on people's fundamental rights and freedoms. It banned public meetings called countrywide by the opposition Orange group, for the purpose of thanking the people for rejecting the proposed new Constitution and that way give the people a chance to demonstrate their victory and solidarity. This clamping down on freedoms was in the opinion of the writer, not in conformity with Chapter V of the Constitution and was thus an interference with the freedom of association, freedom of expression, and freedom of assembly. The government's conduct also appeared to go contrary to the spirit and guarantees secured by the same governing leaders under Inter-Parties Parliamentary Group consensus reforms of 1997 ironically secured by the present Government leaders who were then in opposition.

Seventh, the referendum promoted and greatly sharpened the important role of the print and electronic media, to the extent never before seen and experienced in Kenya since the coming of its political independence. It is argued that the media covered the two sides of the campaign in a generally balanced manner. On most occasions the media informed on events as they happened or as soon thereafter as was practicable. It also informed the people adequately and effectively. The role it played was much superior to that played by the CKRC in civic education. It was observed, however, that the media had the capacity to cause harm if used to disseminate hate and other causes of disunity. In this respect, the state-owned Kenya Broadcasting Corporation (KBC) and the Royal Media Group, printed and broadcasted openly in favour of the Banana side and against the Orange side. The two were deliberately and unrelentingly, biased. It was observed further that the Government leaders, who in yester years suffered under the repressive KANU regime's misuse of Government controlled press, were the ones now encouraging Kenya Broadcasting Corporation to report with bias in favour of the Government side.

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[69] CMI Working Paper, "Oranges and Banana: The 2005 Kenya Referendum on the Constitution," Executive Summary – www.cmi.no/publication.

Eighth, the referendum awakened the realization in the people of Kenya of their political power conjunctively contained in their voting card and their right to exercise it. In the face of a determined Government and a determined Parliament, both of which used every machinery at their disposal to influence the electorate to return a "yes" verdict, the rejection of the Draft Constitution, was indeed a show of determination. The referendum demonstrated the people's democratic right to take a firm stand on what they actually wanted included in the new constitution. The people indeed, returned an unflattering verdict despite all manner of persuasion by the Government. It is the writer's view that if in the said exercise of their political power the people were well informed, then they indeed demonstrated a great hope in Kenya's future democratic space.

Ninth, the referendum tended to reflect the present crop of politicians in Parliament as ethnic-based, and probably not too trusted in relation with the electorate. It also suggested that Parliament has not recently reflected itself as an institution of tenants whose major duty and purpose is that of safeguarding the people's rights and interests. And yet no important step can be taken without parliamentarian's involvement, even only for putting in place the necessary legal framework on issues concerning the people. Such issues would include constitution-making in respect of which the referendum was introduced. The process interestingly, in addition, established the startling realization that poor leaders in the past regimes, were liable and even viable for rehabilitation today. Put differently, the autocrats of yesterday tended to have become reformers of the present, while the yesterday reformers and democrats who had succeeded to remove the KANU regime on a reformist agenda, had turned to be the conformists of today, fighting to preserve or even increase, the controversial massive autocratic and despotic powers of the executive.

The referendum also resulted in a realization that the effective democratic future political leadership does not lie in ethnicity or sizes of ethnic groups, but on well-thought and planned coalitions. For example, voting in the metropolitan Nairobi where all tribes big and small live, demonstrated as being more cohesive than it was thought before. Since its inhabitants were dominated by the Kikuyu, the largest ethnic group in Kenya who generally were for "Banana", it was logical to expect that Nairobi would vote for

"Banana". However, the majority Nairobians, apparently voted "Orange", demonstrating that Kenyans were more united generally than the politicians thought.

The referendum further confirmed another widely held view: that constitution-making during peace time, is a Herculean task that requires extremely careful handling. It is argued that the referendum process itself could be a risky tool to use during peace time. It is also thought that referendums work well during a crisis when important decisions need to be all at once made and implemented at once. The writer therefore, suggests that it was probably that it probably was a big mistake for the leaders to choose the method of a referendum in the construction of a constitution when a constituent assembly could have been adopted for the purpose.

The referendum also demonstrated that half the Kenyan electorate does not turn up to vote, even during the general elections. This by any standards is a large fraction of the electorate that misses to express their preference and negatively impacts the practice of democracy. It was a warning therefore that methods of encouraging the citizenry to turn up to vote to choose a government they would want, should be found.[70]

The referendum conduct and management put the effectiveness of the Electoral Commission of Kenya to a test and did not find it wanting. The ECK, despite the many odds facing it which included time constraints tried its best and indeed made the referendum a success. Polling stations were effectively managed by largely competent personnel which made the voting smooth. The counting of votes even in remote areas was effective, fast and fair. Returns to the headquarters at Nairobi were almost instant. The above realizations lead to a clear call that if the ECK will in future handle referendum it must be strengthened and be made completely independent in terms of personnel, finance and its operations. That is the only way it can fairly and effectively handle future referendums as well as regular and other elections which are its core function.

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[70] Tables A, B, C and D in the schedule demonstrate that the voter turn-out may influence the final result in a referendum.

The referendum in addition, represented another step toward the deepening and fomenting of democracy in Kenya. It opened up for discussions and all manner of speeches in many places i.e in Parliament, in offices, in public meetings, in the media, in churches and mosques. Such speeches and discussions concerned all manner of issues, which related to politics and the referendum itself. There were speeches and discussions touching on law, inheritance, land, culture, education, administration, environment, public resources, elections, women and youth affairs, as sell as human rights and many other issues. The referendum indeed opened up people's eyes to the magnitude of political power they hold and can wield in deciding how they should be governed.

The referendum is further seen as having roughly set up the agenda for the 2007 General Elections. It as well revealed the possible groupings which, with minor adjustments, might be the main contenders in the coming General Election. Among the agenda, for example, the proposed new constitution is likely to be a major issue. The larger contenders in the two main sides will likely be those who supported or opposed the proposed new constitution. Indeed, one of the major distortions of the 2005 referendum was the fact that either side of the divide made the referendum a popularity contest forum of the Kibaki Government. The loss of the referendum question accordingly, probably spelt out the degree of dissatisfaction of the electorate with the NARC Government. Hence the conclusion that the two sides of the referendum probably without intending to do so, made it a forum for discussing some of the main issues likely to feature in the 2007 General Elections. Put differently, the referendum result may have led to a reconfiguration of Kenya's political landscape.[71] Indeed, the two opposing groups have since formed themselves into to two strong political parties identified as Narc-Kenya and ODM-Kenya, a serious indication that the 2007 election will be dominated by the two political groupings and probably influenced by ethnicity cultivated during the referendum.

The referendum on the other hand, consumed a whole five billion Kenya Shillings. This is by any standard a large amount of money which would otherwise have been used for

[71] It is instructive to note that Kenyans abandoned ethnicity in the 2002 General Elections, but the voting pattern in the referendum appears to have rekindled tribal affiliations.

development in other sectors of this country's infrastructure i.e. improving our roads which are in poor state or improving primary schools facilities or even increasing the supply of medicines in our poorly supplied hospitals. Many people think the money went down the drain while others say that the money went into the pockets of Kenyans, from where it is bound to influence improvement of the economy generally. It is suggested, however, that the money spent failed to achieve the purpose for which it was voted by Parliament, – the ushering in of a new constitution for the Kenyans.

In conclusion, it can be said that the referendum denied Kenyans a new constitution. Kenya's constitutional review took a lot of effort and consumed a lot of time and money. The struggle probably started as far back as 1988, soon after the queue-voting General Elections. The said elections were notoriously undemocratic compared to other General Elections since independence. The struggle to change the undemocratic political systems authored and presided over by KANU, under the one Party rule, was bitter and sometimes violent. And yet when the people of Kenya finally got opportunity to adopt a new and better constitution through Bomas, manipulation of the referendum by the political elite, denied the people a fair chance to make a good choice. Wanyama Masinde in an article appears to suggest that politics and ethnicity were the reason for rejecting the Wako Draft Constitution when he postulates:-

> **"All agree that the draft constitution is better than the current one and the option of not voting "yes' is to remain stuck with the much maligned one, but no one is talking about that eventuality; the reality is that the draft is either good for the banana camp or bad for the Orange one...."**[72]

4.3 Lessons Kenyans could learn from the 2005 Referendum

The first lesson that the people of Kenya may have realised from the referendum is that in the right to vote demonstrated by their voting card, they hold a political weapon and power. They probably learnt that their political strength is greater than that of the leaders they elect, and that such power is exercised directly during an election and during a referendum like the one of 2005.

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[72] Wanyama Masinde, "Kenya's Fruitless Referendum", http://www.opendemocracy.net/xml/xhtml/articles /3050.html.

The Kenyan people may further have leant that although the Government and the ruling elite, adopted the referendum as a government project, the people had a residual power to successfully disagree with them.

Thirdly, the people of Kenya demonstrated that they will not blindly follow their elected leaders. The people may have realized that their leaders who had during the 2002 elections promised good governance before being voted in on a drastic reform agenda, had changed their views. Their leaders probably had decided to enjoy the power they had eventually acquired. S. Kichamu Akivaya aptly put the issue as follows:-

> **"Narc promised to reverse the political and economic morass the country had got into. But since ascending to power, the Narc leadership, embroiled in intrigue, scheming and power games, lost sight of why they won the general election. Kenyans still desperately want a new constitution, and their verdict on the proposed constitution was equally and perhaps more so, a verdict on Narc's performance...."**[73]

A fourth lesson that the people of Kenya may have leant from the referendum is that Kenya's leaders, particularly the elected ones do not regard the ordinary Kenya citizens highly. This impression arises from the fact that Kenyans who wanted to review the Constitution, declared through the National Constitutional Conference (NCC), how that was to be done as they came up with the Bomas draft. The people presumed that any changes made by parliamentarians and experts like the Attorney-General, would be limited to editing and correcting grammatical errors only. However, major changes were made without the people's authority. For example, the Kilifi Parliamentary Committee removed the limitation to the future size of the Cabinet to 25 Ministers, while the executive power was tilted in favour of the President at the expense of the Prime Minister. Furthermore, the Attorney-General introduced religious courts that had not featured in Bomas or Kilifi drafts. The increments may have reflected badly with the people who clearly reacted negatively to the introductions.

A further lesson probably learnt from the referendum is the danger posed by ethnicity in Kenya. The effects of the whipping of the tribal, hateful and barbaric sentiments which had sowed seeds of discord, may not have subsided. Political leaders projected the

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[73] Saturday Standard, November 26, 2005 "The Referendum Special Report".

constitutional review debate as something about control and retention of power. Of course, power control in Kenya should not be allowed to ensue from ethnicity into which political leaders are dragging the people of Kenya. To what extent Kenyans' eyes were opened by the referendum, or how willingly or otherwise, they will in future follow their leaders blindly, will probably be tested, once again, during the 2007 elections. But it is suggested that Kenyans should have sufficient courage to say "No" when they realize that they are being misled. The referendum may have exposed Kenyans as people who easily get misled, but it also brought out the people's strengths. It portrayed a people who if unprovoked, are peace- loving, with abundant magnanimity for reconciliation and unity.

A fifth important lesson from the referendum is that the people of Kenya may not afford to forget the past experiences. They should remember the reason why people struggled to put the review process in place, a struggle which led to some people losing lives, limbs, basic rights and freedoms. They wanted to achieve a better constitution. And yet they need to respect the present one as they improve our country so that they can be proud of it tomorrow as they continually work for a better future. In that continuous process, the people should firmly teach their leaders to be accountable for the promises the leaders make. That will be the only way Kenya's democracy will flourish.

4.4 Conclusion

The referendum it is argued, did not demonstrate that the people of Kenya in rejecting the draft Constitution, believed that the current Constitution was good and required no overhaul. If it were so, a decade's effort and struggle to review the Constitution, would come to naught. On the contrary, all the people demonstrated is that their leaders, both in Parliament and Government, had failed to review the constitution in the manner the people had wanted. The referendum result simply gave Kenya leaders a short time to rethink the whole process and thereafter go back to account to the people. That is to say, the leaders need to and must embrace the people's expressed views by going back to them in a rejuvenated process in which contentious issues should not be made too narrow to the detriment of the comprehensive public discourse, nor be stretched too far beyond possibilities of rational focused debate. There is no doubt that the review process requires

sanity not by the judiciary but by Parliament which should make sure that the will of the people, as expressed through the referendum, remains the bedrock of the process. The referendum result put the destiny of the people of Kenya in the hands of the MPs in so far as the expected new constitution is concerned. It is suggested that the leaders should be persuaded, in whatever method that can be understood by them to make them set up a legal framework to restart the constitutional review.

The consensus emerging is that no new constitution will be properly realized or easily attained in Kenya without the same being ratified by the people in a referendum. That is why the next chapter makes recommendations intended to improve the constitutional, legal and administrative framework for the referendum in Kenya.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1 Conclusions

This thesis posits that the Kenya referendum process of the November 2005 was an entirely novel process that was applied in Kenya for the first time. Its inclusion in the CKR Act of 1998 may be said to have been without much planning. That would explain why the referendum was not at the beginning regarded as that important. The thesis suggests also that the reason for making the referendum contingent would be the failure by National Constitutional Conference to obtain a consensus on a constitutional issue. The same reason may explain the lack of or absence of various relevant frameworks, including the legal and the administrative frameworks for the referendum.

The 2005 Kenyan referendum, however, is an experience that demonstrated and brought to the fore various issues and dilemmas that are juridically, socially and politically significant. Accordingly the following conclusions are suggested:-

(a) That it is not easy to achieve Constitutional review or replacement using a referendum in which people, on the one hand, exercise their free political power, while on the other hand, their elected representatives also attempt to control and manipulate the process.

(b) That 2005 referendum process was a completely unfamiliar process in Kenya and that there was a controversy concerning its constitutional basis.

(c) That referendum is an effective democratic process that gives people an opportunity to directly exercise their political power instead of doing so through their elected representatives. In addition, the referendum was

demonstrated to be a people's constitutional safeguard in so far as it gave the electorate an opportunity to vote the way the people wanted.

(d) That a referendum is a process that would work well and effectively where the electorate is cohesive and informed and that its results can easily be distorted by ethnicity. This raises the question as to whether referendum process is suited to an ethnic-based and elite-controlled electorate, which Kenya's is.

(e) That the government or the parliament of a country should not control referendum process, since governments are presumed to be always acting in self-preservation and/or self-sustenance. They have cause, therefore, to easily manipulate the referendum for such purpose.

(f) That referendum is a political tool whose time has come in Kenya. It cannot, therefore, be wished away and the only way to deal with it is to comprehensively entrench it in our legal system, taking care to insulate it from political misuse and manipulation.

5.2 Recommendations

5.2.1 Introductory Note

This thesis has attempted to show that the Kenya 2005 Referendum was conducted in legal circumstances that were not clear or certain. There was no clear constitutional framework sanctioning the Constitution of Kenya Review Acts (CKR Acts) which were the only legislation authorizing the referendum. On the other hand, the said CKR Acts were themselves drawn in a hurry, which may explain their poor draftsmanship and lack of proper juridical foundation. Furthermore, the ***Njoya*** ruling tended to confuse the situation by stating that the Referendum required no constitutional or statutory sanction in order to be conducted. The recommendations made hereunder are intended to remove the stated uncertainty so that future referenda will have a firm juridical foundation.

5.2.2 Constitutional Framework

Lack of a clear and specific constitutional provision for referendum has raised considerable debate as to whether or not the 2005 referendum had proper constitutional basis. This uncertainty led the High Court of Kenya in ***Njoya*** case to consequently rule, that a referendum being an exercise of the constituent power of the people need not be textualized in the Constitution. The court also believed that the constituent power of the people expressed in a referendum, relates to and is sourced in the sovereign power of the people purportedly expressed in section 1 and 1A of the Constitution. The Court concluded that the constituent power of the people expressed in a referendum is the same power that gives birth to the Constitution. The court meanwhile recognized the wisdom of textualising the referendum in the Constitution, which the Court termed a mere act showing excessive caution so that failure to textualise referendum was not fatal to the 2005 referendum.

This thesis takes the view that there is a serious need for a constitutional framework for the future conduct of referendum in Kenya. This would give the process a sound juridical basis that will in future withstand any legal challenges.

It is, accordingly, recommended that Sections 1 and/or 1A and/or 47 of the current Constitution be amended to explicitly sanction the referendum concept or process in Kenya's legal system. Sections 281, 282 and 283 of the Wako Draft Constitution, herein discussed under 2.1.1, are recommended as a good reference point.

5.2.3 Statutory Framework

With a constitutional provision in place, as already suggested above, referendum legislation should be put in place. A referendum Act should be a comprehensive piece of legislation with a capacity to accommodate different types of referendums, whether they concern constitutional, political, social, economic, environmental, cultural or any issue of importance. It is further suggested that a frequent use and application of the referendum

process to resolve important issues through people's opinion should be applicable. This is the practice in Switzerland where people's participation in important decision making has become a popular political practice. [74]

The purpose of referendum legislation like any other legislation, should be to define boundaries, clarify issues about, as well as remove ambiguities from and minimize conflict concerning, referendum and its functions. Furthermore, the recommended referendum Act should carry adequate provisions for the promulgation of regulations or rules under it. That constitutes the next recommendation.

5.2.4 Referendum Regulations

Regulations should be made under the proposed Referendum Act to control the nitty-gritty of the actual organization of the referendum process. It is recommended therefore that such rules should be promulgated to regulate the issues contained in the appendix. [75]

It is further recommended that a referendum legislation should provide for the following issues as well-

(i) The Act should provide whether a referendum on a given issue should be mandatory or conditional. For example it is now accepted in most countries of the world where referendums are used that constitutional referendums are usually mandatory while those seeking people's opinion on other less important issues generally, are optional.

(ii) Whether a referendum should be merely consultative or advisory to the authority conducting it.

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[74] Dean Lacy, "A Problem with Referendums," http://www.157.umiich.edu/cps/pewpa/archive/archive98/19980023.pdg

[75] See First Appendix.

(iii) Whether a given referendum should require a *simple-majority* or *super–majority* to pass it. Those concerning amendment or ratification of the constitution usually require super-majority support.

(iv) Whether the referendum question or proposal should consist of a single or multiple questions. Such structure may make a difference in the final result

It is further recommended that an autonomous or semi-autonomous commission, probably named the Referendum Commission (RC), should be created to handle or deal with all referendums that may be conducted. It may, by law be directed to act in close links and co-operation with the Electoral Commission of Kenya. Its purpose would be to plan, structure and generally independently administer the referendum process without being influenced by stake-holders or political institutions including the government.

It follows that the funds to sustain the referendum and its institutions should be assured. Direct sourcing from the Consolidated Fund sanctioned by Parliament, would be preferable and is hereby recommended.

The suggested referendum commission would need to be chaired by a properly qualified professional with qualification equivalent to that of a High Court judge. The body should be corporate with powers to sue and be sued and it should have its own seal of office and have perpetual succession. The commission should be endowed with powers to promulgate the various relevant rules and regulations aforementioned. It should also be the one to receive, control and utilize funds related to referendums. It would operate in close links with the Electoral Commission.

5.2.5 Recommendation on Policy

It has been mentioned elsewhere in this thesis that in the process of constitution-making or constitutional review in Kenya, the process of referendum is now mandatory. The amending Act to the CKR Act, known as act No 9 of 2004 which was responding to the High Court ruling in the ***Njoya*** case in that respect, accomplished the task. Besides and in

addition, the political climate now prevailing in Kenya is such that no task of the magnitude of constitution-making would be easily accepted unless the electorate approves or ratifies it through a referendum. It can therefore be boldly suggested that the process of referendum will not be easily wished away from Kenya's future political development. With that view in mind, this thesis makes the following general recommendations on policy:-

(i) The Government should without delay, clearly assert and demonstrate its political will in support of future referenda process in Kenya.

(ii) The government should provide immediate funding for research on the subject of referendum. This will include a full study of the referendum process in various countries where the process has been fully developed and tested for various purposes. The resulting report should be properly discussed by the Government which should then come up with a comprehensive Sessional Paper indicating Government policy over referendum. Thereafter the Sessional Paper should be placed before Parliament for debate before it becomes the basis for legislation.

(iii) The government should be careful to confirm that the referendum process is a democracy-establishing and democracy-consolidating process which should never be manipulated or politicilised by the stakeholders or facilitators. The referendum also being a tool for ascertaining or establishing the views or opinion of the electorate, it should be above party politics or ethno-divisions. In this respect it may have been unconstitutional for the President during the 2005 referendum, to direct his Cabinet Ministers or Government senior officers, including Assistant Ministers and Permanent Secretaries, to necessarily side with the Government in the 2005 referendum.

(iv) The Government should declare the referendum a non-partisan national issue in respect of which every citizen including civil servants and Ministers should have freedom to choose sides free of sanction.

(v) It should be a mandatory Government policy to provide adequate civic education over every future referendum proposal.

(vi) It should be Government policy to enable every eligible Kenyan citizen to participate in every future referendum process. To that end every Kenyan attaining age 18, should immediately be facilitated to have the national Identity Card but and a voting card, to facilitate participation in voting in referendums.

(vii) Some scholars, with whom the writer agrees, believe that a voter should not neglect to exercise his right to vote. The writer accordingly proposes that voting should by law be made mandatory. The writer's argument is that there is always a choice given to every voter to choose one side of the proposal and that failure to vote impacts negatively on democracy. It is also argued that a high turn-out during voting, whether in a referendum or a General Election, legitimizes the results because the greater majority will have participated. It is accordingly recommended that a referendum legislation should include a provision for mandatory voting.

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APPENDIX

- The criteria for eligibility to vote
- Method of civic Education
- The possible issues or subjects that can be decided through referendum.
- Voting time during referendum.
- The threshold for the vote.
- The referendum question or proposal.
- The structure or format of referendum or referendum proposal i.e. whether it will be a Yes –No proposal or whether it should be a multi-purpose question
- Language (s) of the ballot paper
- Assisted voters regulations
- Dispute resolution mechanism applicable
- Method of result announcement
- Observer status
- Personnel recruitment, training and remuneration
- Documentation and archiving
- The 2005 referendum almost faced a crisis because the Electoral Commission of Kenya believed that the relevant legislation had failed to authorize the promulgation of regulations to administer the said referendum.