

Constituting Folklore: A Dialogue on the 2010 Constitution in Kenya

by

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Abstract

This article marks the five years since the promulgation of the 2010 Constitution of Kenya by advancing the argument that the discourse of law and constitutional knowledge is a myth of a particular historical time in a particular place in the geography of social struggle and differentiation. It adopts the form of a dialogue containing questions and replies, objections and rejoinders within the limits of a private deliberation, using post-election violence and ethnic demographic narratives to focus on legal-cultural progress in Kenya. Hence, the paper concludes that the metaphysical infrastructure of a constitution and its legal and political representational practices largely proceed with the contingent assertion of cultural interpretations.

Keywords: constitution; Kenya; political culture; human rights; law; culture; post-election violence.

Introduction

Let it be impossible that anything should be done which is unknown to the nation—prove to it that you neither intend to deceive nor to surprise—you take away all the weapons of discontent. The public will repay with usury the confidence you repose in it (Bentham, 1839)

There is an old saying in my ancestral locality of Mt. Elgon that “Judges put on their trousers one leg at a time, just like everybody else.” If I understand this slightly sexist statement correctly, it refers to the ineradicable subjectivity brought to the legal system by the very fact of the judge’s humanity. From it, we can adduce examples of commonsense justice and its negative counterpart, irresponsible judicial meddling.

The post-election violence (PEV) of 2008 that mostly shaped the current 2010 Constitution was largely blamed on judicial meddling by the executive. As the country marks five years of its current Constitution, there is growing interest in the cultural interpretations of justice in relation to the Constitution. Back in Mt Elgon, justice is considered the principle virtue, the source of all the others in a locality that takes full pride in its status as the ‘cradle of humanity’.

In his numerous contributions to the Kenyan ‘struggle’, the great “son of Oyondi”, the late Martin Shikuku, a long term Member of Parliament for Butere constituency in the country’s then Western Province, suggested that “We must still deal with that problem” as a philosophical Common Ground for looking at the Kenyan Constitution. His metaphoric social reification was making a stunning reference to the fact that between 1963 and 2005, the Kenyan Constitution underwent very many amendments that it could no longer be classified as rigid. Most of the amendments were not intended to improve the quality of the Constitution, but to entrench an authoritarian and undemocratic administration. Other amendments were intended to solve political problems facing the government from time to time. Most of the amendments were carried out by a Parliament dominated by members of the ruling Kenya African National Union (KANU) party. Contrary to what Kenyan constitutional scholar Yash Pal Ghai had observed that the notion of a constitutional order is broader than merely the text of the constitution. “It represents a fundamental commitment to the principles and procedures of the constitution and therefore emphasises behaviour, practice, and internalisation of norms. A central feature being the depersonalisation of power” (Ghai 2009: 1). Since my interview with Shikuku in summer of 2009 at Cambridge University, and the Kenyan legal stage no less fraught with confrontation, his call remains strikingly relevant in Kenya’s everydayness expressivity.

On 28th of August 2015 as Kenya was marking five years of her current constitution, the Chief Justice Dr. Willy Mutunga in a speech echoing James Madison’s words observed that “the fight for a new constitution continues beyond its promulgation. The task of living the letter and spirit of the new Constitution is yet another phase of that struggle that all Kenyans and all institutions must play a key role in” (*Daily Nation*, 28 August 2015). Like Dr Mutunga, James Madison, the principal architect of the American Constitution and later its Bill of Rights, had no illusions about the efficacy of written limitations on government. “Experience assures us”, he wrote in the *Federalist Papers* in 1788, “not to place too much faith in ‘parchment barriers’” against infringement of the separation of powers.

In the premise of the German sociologist Jurgen Habermas’ ‘communicative action’, Madison’s ‘parchment barrier’ fears and Shikuku’s ‘we must deal with that problem’ purview are illustrative of critical praxis in addressing socially and politically constitutive natures. They both reinforce the notion that in order for the constitution to work, it must be taken dialogically serious both by the public at large as well as public officials. According to Habermas, communicative action is reflective in the sense that participants in an argument can learn from others by reflecting upon their premises and questioning suppositions that typically go without question.

The criteria of argumentative speech, which Habermas identifies as (1) the absence of coercive force, (2) the mutual search for understanding and (3) the compelling power of the better argument, form the key features from which intersubjective rationality can make community communication on a constitution possible. Communicative action is as such, action that results from such a deliberative process of interaction and common agreement of interpretations of situations (Habermas, 1984).

Constitutional Violence

Habermas' philosophy aside, Madison and Shikuku's metaphoric connection of the constitution between the dichotomies of the 'community' and the political 'establishment' silently exclude the possibility that disorder may be peaceful and the constitutional order violent. Historically, constitutions used to be largely about the allocation of public power and the structure of the state, rather than values and principles. It has been noted elsewhere that the ideas that we now associate with constitutionalism emerged in society, not the state, and to a great extent reflected changing economic and class structures (Ghai, 2014: 119).

Professor Paul Ekins in his 1992 book *a New World Order* demonstrated that one way in which constitutional violence works is by changing the *moral colour* of an Act from *wrong to right* or to some other intermediate meaning which is palatable to the status quo. For instance, shortly after the (s)election of Daniel Toroitich Arap Moi as President of Kenya in 1978, following the death of the first president Jomo Kenyatta, Moi pronounced fewer but far reaching changes to the Constitution that completely altered the constitutional architecture of Kenya and severely undermined the enforceability of the Bill of Rights. Some of the changes he made included the introduction of section 2A to the Constitution, which converted Kenya into a *de jure* one party state. It outlawed all forms of political opposition and gave KANU, the ruling party, the monopoly of power. No person could be elected into any political office unless she or he was a member of and was nominated by KANU. Cessation of KANU membership led to loss of political office. The amendment was motivated by leaked information that Mr. George Anyona and Mr. Oginga Odinga, both veterans of the Kenya independence 'struggle', had an intention of forming a new political party. Mr. Odinga was expelled from KANU while Mr. Anyona was detained.

From Moi's authoritarian presidency and 'Acts' we learn that orderly violence works by *making reality opaque*, so that *we do not see the violent act or fact*, or that when we see it, we do not see it as violent. Some instances include preventing consciousness formation (conscientisation), the penetration and conditioning of the mind from above, and segmentation (with those below getting a limited vision of reality); as well as preventing mobilisation and organisation of those below (i.e., fragmentation, splitting those below away from each other, marginalisation, setting those below apart from the rest).

Blocking community conscientisation and mobilisation was Moi's way of preventing the processes needed to transform the interests of communities in a structural conflict into consciously held values.

Political Culture

In Kenya, the association of violence with the constitutional order was not only a Kenyatta or Moi affair, as the executive, there are widespread and credible allegations that the legislature and the judiciary have also been abusing their powers and engaging in, or facilitating, corruption^[i] (*Daily Nation*, 10th December 2005). The problem reflects a general trend of socio-cultural as well as political experientialism.

Nowadays, the regular reports of Members of the County Assembly (MCAs) and Members of the National Assembly (MPs) bouts, fistfights^[ii], shout and disappointed citizens are a common phenomenon. A recent British Broadcasting Corporation (BBC) video report showed four Kenyan lawmakers assaulted and another two engaged in a fist-fight during a heated debate in parliament over a controversial Security bill that the government claimed it needed to fight al-Shabab, the militant Islamist group linked to the international terror network al-Qaeda that are threatening Kenya's security. "Opposition MPs shouted and ripped up copies of the bill, warning that Kenya was becoming a 'police state'. Parliamentary officials adjourned the debate twice, before the controversial changes were eventually pushed through"^[iii]. In more ways than not, these physical fights in the houses of parliament serves as canonic representations of contemporary Kenyan political culture, spelling out the difficulties and challenges that Kenya and many African countries continue to face in terms of sustaining democracy and maintaining the spirit of the Constitution.

How We Got Here

Indeed some of the main reasons why Kenyans agitated for a new constitutional framework included the culture of impunity and the weak institutions of governance that were unable to enforce the law. One area where this was felt most was in the administration of justice. As pointed out by Alex Thomson in his publication *An Introduction to African Politics*, (2000) the institutions that oversaw the administration of justice in Kenya had been weakened to an extent that, by and large, they were serving the interests of the Executive, other than the public. As such, there was a dialogical unanimity among stakeholders that Kenya needed a new Constitution to provide a framework for societal transformation. This led to the agitation for a Constitutional Review. This in turn eventually gave birth to the current Constitution in August 2010.

Thus, in my view, the main impetus of the current Constitution was strongly influenced by the post-election violence (PEV) following the discredited General Elections of December 2007 that pitted Mr. Mwai Kibaki of the Party of National Unity (PNU) as the incumbent president against Mr. Raila Odinga of the Orange Democratic Movement (ODM), who later became the Prime Minister in a grand coalition government arrangement secured through the National Accord and Reconciliation Act.

2008 Post Election Violence

“Kibaki Abaki”... “No Raila No Rail”... “Kibaki Asibaki”... Mapambano... mapambano...

Trouble began on 28 of December 2007 when the initial results started trickling in mainly from the ODM strongholds that had registered a strong lead in favour of Odinga, begun shrinking the following day to only 38,000 votes with almost 90% of the votes counted (180 out of 210 constituencies), with most of the remaining votes in Kibaki’s strongholds. Violence begun on 30 December when the Electoral Commission of Kenya (ECK) led by Samuel Kivuitu made an announcement that Mwai Kibaki had won with a popular vote of 4,584,721 (47%) against Raila Odinga’s 4,352,993 (44%) whilst Kalonzo Musyoka’s, who later became Kibaki’s vice president managed third position with 879,903 (9%) votes in his favour. According to the Electoral Commission, in parliamentary results, ODM secured 99 seats over 43 for PNU, but counting allied parties, this translated into only 103 parliamentarians for ODM compared to PNU’s 104 (ECK, 2008).

Amidst calls for a recount by the opposition and international observers, Mwai Kibaki’s “victory” was hurriedly sealed. Within minutes of the ECK announcement, he was sworn in for a second five-year term at a hastily organised ceremony at State House before a handful of guests (excluding diplomats) and the national broadcaster Kenya Broadcasting Corporation (KBC). This fostered a widespread perception that the count of the presidential election was modified in favour of Kibaki. In the ODM strongholds, supporters of Raila Odinga, who felt that their candidate had been cheated of victory, erupted in violence and protest demonstrations that soon degenerated into rape, looting, and indiscriminate killings. The PEV lasted for 59 days, from 28 December 2007 until 28 February 2008, it left 1,300 persons dead and a further 600,000 people displaced (Wanda, 2008: 30). Later, the chair of the Electoral Commission, Samuel Kivuitu, conceded that irregularities had occurred, further admitting that there were some problems in the vote counting, with some constituencies reporting a turnout rate way above 100%. Yet most inflammatory of all was Kivuitu’s damning admission shortly after the proclamation of Kibaki as president that he had been subject to undue pressure, and that he could not say with certainty whether Mwai Kibaki had actually won the poll.

As a result, international observers, including the European Union, declared the election ‘flawed’, blaming the ECK for its failure to establish ‘the credibility of the tallying process to the satisfaction of all parties and candidates’ (Reuters, 30 December 2008). A regional newspaper reported at that time that in the absence of a credible mechanism for resolving electoral disputes, ODM refused to take the matter to the courts, when it was suggested by the ECK, pointing out that they were controlled by Kibaki, who had nominated six judges, two to the Court of Appeal and four to the High Court, a few days to the election (Ndegwa, *The East African*, 30th December 2007).

According to African scholars Peter Kagwanja and Roger Southall, Kenya lost 100 billion Kenyan Shillings or \$1.5 billion as a result of the PEV of early 2008. They pointed out that President Mwai Kibaki’s National Rainbow Coalition (NARC) party came to power in 2003 on the platform of jump-starting the economy, creating 500,000 jobs a year, ending corruption, improving public services, and fast-tracking constitutional reforms to devolve power and decision making from the imperial presidencies of Jomo Kenyatta and Daniel Moi back to the grassroots. Kibaki’s first administration (2003 -2007) witnessed a stunning success in economic recovery as growth rose from 3.4% in 2003 to some 7% in 2007. National poverty levels fell from an estimated 56% in 1997 to 46% in 2006 and per capita incomes rose for the first time since the 1980s. NARC delivered on a promise of free primary education for all children (Kagwanja and Southall, 2009: 264).

However, Kagwanja and Southall explain that this economic record was not matched by an equally robust political stewardship. They argue that although Kibaki’s government erected the legal and institutional framework to combat corruption, its record of prosecuting and convicting high-level corruption before and after 2003 was dismal. In 2004 the government set up a judicial commission to investigate the Goldenberg scandal, a US\$800 million Moi-era rip-off involving government rebates for fake diamond exports, and released the findings of the commission in February 2006. But top leaders in both the government and in the opposition who were implicated were never arrested, let alone prosecuted. Meanwhile, the government generated mega-scandals of its own. In early 2005, some of its officers were allegedly involved in the Anglo leasing scandal, a series of security contracts with official payoffs. A raid of the *Standard* newspaper and its television station by the police in March 2006 reflected a return to Moi-era authoritarian undertows. Further, the NARC government not only failed to stamp out the Moi-era culture of impunity relating to mega-corruption but also extra-state violence (Kagwanja and Southall, 2009: 265). Worse, the Kibaki inner circle stymied the process of constitutional reform promised ahead of the 2002 election to reverse a curtailment of presidential powers proposed by a constitutional convention, thereby alienating the Kenyan public and civil society.

Professors Kagwanja and Southhall later conclude their pessimism that if not careful, Kenya risks entering the ever-growing category of democracies at risk of failure across Africa, the limits and vulnerability of its 'electoral democracy' having been exposed in the face of stalled and failed constitutional experiments and weak institutions with its ever-present risk of election disputes degenerating into deadly conflicts in the context of elite fragmentation, surging ethnic nationalism, authoritarian undertows, corruption, widening social economic inequalities, historically embedded injustices, grinding poverty, and debt overhang.

The impact of PEV phenomenon, although common across Africa, cannot be underestimated; the Kenyan situation was extraordinarily powerful. The sociology of that violence exhibited several factors responsible for 'mob-justice' and election-related violence on the continent, among them structural weakness in election management, especially the election management bodies; the nature of the electoral system (that is, the winner-takes-it-all); abuse of incumbency (access to state resources, manipulation of electoral rules); identity politics; heavy-handedness of the security forces during elections; and deficiencies in election observation and reporting.

For me, the images of women and children burnt alive in a Church that they'd sought refuge in Kenya's western town of Eldoret, still reverberates with a shivery chill as to how low humanity can get. It reminds me of Sophistic and Isocratean traditions of classical rhetoric that regarded human society as a field of both competition and collective action. In both of these perspectives, rhetoric formed the connective tissue between discourse and power, and was fundamentally concerned, as the late Kenyan philosopher Henry Odera-Orika once posited, with the authority of naming practices to privilege certain meanings and aspects of reality.

The National Cohesion and Integration Act 2008

Connectively, it is possible to argue that each historical approach to legal thought rests on interpretative constructs which mediate the legal representation of social events. For instance, the crimes committed during the PEV of 1992 and again in 2008, were to some extent, a result of media propaganda, 'careless' speeches by politicians during public rallies as well as hate speech spread through the use of text messages aimed at antagonizing certain individuals belonging to particular ethnic groups. The Truth, Justice and Reconciliation Commission of Kenya (TJRC) formed as an integral accountability agenda item of the Kibaki and Raila coalition government through the National Accord, investigated and documented persons suspected of having committed crimes against humanity veiled under the disputed electoral outcome. Later through the Waki Commission, these were handed over in December 2010 to the International Criminal Court (ICC) at The Hague. The ICC's Prosecutor then requested that six individuals be summoned to appear before the Court in two separate cases.

Of the six, Henry Kiprono Kosgey the chairman of ODM, Muhammed Hussein Ali (Police chief), Francis Muthaura (PNU cabinet secretary), and more recently the current President Uhuru Kenyatta (then an active PNU member) have all had charges against them of murder, forcible transfer, rape, persecution, dropped. Amid revelations by a controversial Member of Parliament for Gatundu South, was that Moses Kuria was part of the PNU facet that helped “fix” the opposition, the Chief Prosecutor Fatou Bensouda on 11th September 2015 closed her case against the two Kenyans, whose cases still remain live at The Hague, the current deputy president William Ruto (then an active member of the ODM) and Joshua Arap Sang (then a Radio journalist and member of the ODM) for the crimes against humanity which include murder, forcible transfer and persecution—allegedly committed against PNU supporters (*Daily Nation*, 11th September 2015). Given Mr. Kuria’s recent confessions about “fixing” the evidence against the deputy president, it remains to be seen, what gravity if anything, his revelation will have on the case facing Ruto, yet to be determined.

These reasons, are in part why the National Cohesion and Integration Commission (NCIC) was set up and is supported by the current 2010 constitution to facilitate and promote equality of opportunity, good relations, harmony and peaceful coexistence between persons of different ethnic and racial backgrounds in Kenya and to advise the government thereof. Since its inception in 2009, a number of politicians and citizens have been arraigned in law Court for hearing and adjudication for charges on hate speech. The National Cohesion and Integration Act No. 12 of 2008 that set up the Commission, defines hate speech under section 13 as:

a person who (a) uses threatening, abusive or insulting words or behaviour, or displays any written material; (b) publishes or distributes written material; (c) presents or directs the performance the public performance of a play; (d) distributes, shows or plays, a recording of visual images; or (e) provides, produces or directs a programme, which is threatening, abusive or insulting or involves the use of threatening, abusive or insulting words or behavior commits an offence if such person intends thereby to stir up ethnic hatred, or having regard to all the circumstances, ethnic hatred is likely to be stirred up. (2) Any person who commits an offence under this section shall be liable to a fine not exceeding one million shillings or to imprisonment for a term not exceeding three years or to both. (3) In this section, “ethnic hatred” means hatred against a group of persons defined by reference to colour, race, nationality (including citizenship) or ethnic or national origins[iv].

In Kenya, which to a large extent defines itself in relation to its quasi-sacred document of 2010, the attempt to recreate social rights or to take account on new social facts has been extremely difficult, owing to a fabulously wealthy aristocratic class that is socially privileged and politically powerful. As such, the most obvious and perhaps most important manifestation of the 2010 Constitution had been the idea of formal equality or “equality before the law”. This holds that the law should treat each person as an individual, showing no regard to their social background, religion, race, colour, gender and so forth. Justice in such an environment could be literally termed “blind” as all factors other than those relevant to the case before the court, notably the evidence would be presented. Legal equality, according to this judicial logic, would then be the cornerstone of the rule of law. In this process, it was further anticipated that the ‘writtiness’ of the constitution, with its attendant interpretive culture, would facilitate the creation of a new political consensus based on social and cultural rights – leading to a constitutional *rewriting* of a national identity by re-forging a political purpose through the process of constitutional politics. Needless to say, five years on, there is still mistrust and a push and shove, especially in the houses of Parliament.

A section of MPs and Senators opposed to the government who have been compelled by the police to record statements after being accused of hate speech during political rallies, continue to accuse the Jubilee government of selective prosecution[v]. They point out the case of Mr. Moses Kuria who in spite of being charged with hate speech crimes after posting seriously hateful messages on his *Facebook* and *Twitter* pages with the intent of stirring up ethnic hatred between the Kikuyu, Luo and Somali communities, was given a certificate by the ruling The National Alliance (TNA) party to vie for a parliamentary position representing Gatundu South[vi]. In a small way, these perceptions of “selective persecution” or sentiments expressed thereof by a section of society (in this case the Opposition) help to raise more questions about the constitution’s ethicalness in the age of social contract. In John Rawls classical language of representativeness, we can ask: five years on, has the current constitution truly promoted free and equal citizenship, regardless of social or political status in Kenya?

To start us off, American scholars Henry Hart and Albert Sacks in *The Legal Process: Basic Problems in the Making and Application of Law* have argued that the proper way to understand law is to separate the substantive content of social arrangements from the procedures for settling disputes about arrangements. They contend that the process of resolving disputes is separate from and “more fundamental” than disagreement about the content of social arrangements, since they are at once the source of the substantive arrangements and the indispensable means of making them work effectively. With this *legal process* approach in mind, lessons from the Kenya rights arena are indeed complex.

The current Constitution of Kenya as a descriptive collection of statements about the Kenyan human condition sets about in a normative fashion the assertion about the moral worth of each human life. Human beings, it says, are 'equal' in the simple sense that they are all 'human'. They are 'born' or 'created' 'equal' in the eyes of 'God'. In its Preamble it states that Kenya shall have 'a Government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law'. Article 10 in specific, then proceeds to detail out a treatment of the national values and principles of governance that includes sharing and devolution of power, the rule of law, democracy, participation of the people, human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination, protection of the marginalized, good governance, integrity, transparency, accountability and sustainable development are all listed. But what do these forms of equality imply in practice? In what ways have Kenyans been equal or unequal for that matter?

Revisiting the productive tension in Martin Shikuku's "we must deal with that problem" and James Madison's "parchment barriers" hypotheses, the concept of equality at a philosophical level and the meaning of equality in practice in Kenya exhibit far and wide divergences especially in matters pertaining poverty and justice. Indeed it is possible to argue that the 'original intent' of the current Kenyan Constitution was for it to act as a philosophy of liberty, whose core was a freedom from arbitrariness, broader than that defined by the enumeration of 'bargained' social rights. One could go as far as suggesting that the current Constitution as an infrastructure has served to structure political debate rather than provide societal answers to, at times, difficult situations. For instance, action brought about by the current Constitution, has directly confronted and reinforced the national context of native, ethnic, linguistic and intra - county conflicts to an extent yet to be recognized by communities let alone envisaged by the Constitution itself. Part of the problem, by extension, lies in earlier political configuration.

Since independence from Britain in 1963, law in Kenya has never been autonomous. Increasingly, it can be seen as merely instrumental in the achievement of some wider private purpose, which the state, acting as the embodiment representative of those interests, sets. Paradoxically, it can be seen as just simply another aspect of political activity. Writers and artists in the region have best captured this problem in their fictional works. The late Ugandan poet Okot P' Bitek, himself a law graduate from Aberystwyth University in Wales, wrote a collection of essays for a book titled "*Artist, the Ruler*" where he famously argued that legal systems must be understood in the context of the cultural narratives that give them meaning. The stories he told in *Song of Lawino* and *Song of Ocol* were not nostalgic returns to the pre-colonial past, but rather active interventions into the way in which justice was administered in his country Uganda.

For Okot, the African poet is not simply an entertainer or cultural educator, but a fully acknowledged law-maker. Through their poetry, songs, and dance, poets create and disseminate principles that form the foundation of a people's system of thought and action: "The artist creates the central ideas around which other leaders, law makers, chiefs, judges, heads of clans, family heads, construct and sustain social institutions" (Bitek in Leman, 2009: 109). Thus, he continues, there are two types of rulers: those who "provide and sustain the fundamental ideas" of society and those who fashion these ideas into formal laws, who "put these ideas into practice in ruling or misruling society." The key implication of this schema is that Okot, as an artist committed to traditional African culture and identity, saw himself as a poet/law-maker whose visions for his society were expressed through his poetry. His were not merely words of entertainment or education, but expressions of "central ideas" meant to provide an ethico-legal foundation for his society in the fragmentary post- and neo-colonial environment (Bitek in Leman, 2009: 110).

In Kenya, writers such as Charles Mangua, David Maillu, Meja Mwangi, the late Grace Ogot and the godfather of the written word himself Ngugi wa Thiongo were intellectual voices of the 1960s to the 1990s who told brutal stories of Kenya's struggle under colonial rule thereby helping Kenya to forge a new humanistic, postcolonial identity. A slice into the works of such writers and artists are in my view, much more acute in their examination and representation of the social reality lived by the majority of Kenyans in the postcolonial era than are predictions by economists, development experts, sociologists, policy planners, or the state itself. This is because these writers highlighted the "lived experiences" of "mwananchi wa kawaida"— the ordinary citizens under a dreadfully restrictive Constitution.

The prolific and insightful Ngugi wa Thiongo, for instance, captures well the Marxist aesthetic position in practice in his novel *Petals of Blood* (1977). The book is a fictional account of Marx's history of class struggles: workers' organization through unions; the transformation of society through an inevitable revolution that sweeps away capitalism and all the oppressive tools it has used to enslave, divide, disunite, suppress and exploit the proletariat; and the eventual triumph of communism. Through the events that revolve round Ilmorog, the conflict in economic relations is used as the basis for portraying a revolutionary consciousness and the transformation of society. According to Thiong'o, *Petals of Blood* was about the peasants and workers who built Kenya (and by extension Africa), and who, through their blood and sweat, have written a history of grandeur and dignity and fearless resistance to foreign economic, political and cultural domination. Throughout the novel, Thiong'o presents characters whose conduct is firmly rooted in concrete material history and changing social conditions; his mission, it seems, was aimed at showing how imperialist capitalism had ruined Africans; his focus was unwavering on how change in material production and class relations operated in Kenya. Thiong'o observed that in a class society such as Kenya, where a dominant economic class of *Waheshimiwa* or the *Wana Benzis* (the bourgeoisie) has a determinate political and economic influence in all spheres of society, changes in law are unlikely to reflect the interests of the underprivileged (Thiong'o 1981: 98).

Agreeably, a leading Africa historian, the late Basil Davidson later concluded that the kind of development that was initiated in Africa continued to be a carbon copy of the colonial state it inherited, and hence its true definition as a “post-colonial state.” Professor Davidson went on further and labeled the post-colonial state a “curse of the Nation-state” and worst still a “Blackman’s Burden” (Davidson, 1992), and rightly so.

Marxist and liberal scholars of today would agree with Thiong’o and Bitek that the dominant ideology of the liberal economic order is constitutionalism or the rule of law. At first, the rule of law hid the reality of power politics and the domination over the workers, but because of the very power of this ideology, overt behaviour inconsistent with its norms raised questions about the exercise of power. In this way, constitutionalism acted to restrain government action and to secure to a significant extent the liberties and freedoms of citizens.

In further illustration of Thiong’o’s point, today in Kenya, English law still forms the core of the received law. For instance in the 1986 case of Virginia Edith Wambui Otieno vs Joash Ochieng Ougo and Omolo Siranga, the Nairobi High Court (Civil case number 4973, 1986) took the position that subject to certain qualifications which provided for the application of traditional law, the English common law and English scholarship of equity constituted the residual law that applies at all times unless excluded; that is to say, the common law is the general law. Furthermore, the governing body of law in Kenya expressed through the Judicature Act of 1967, in spite of its revision in 2012 to accommodate the current Constitution of 2010 implicitly states its priorities as: “a) constitution; b) subject there to, all other written laws...c) subject thereto and so far as those written laws do not extend or apply, the substance of the common law, the doctrine of equity and the statutes of general application in force in England on the 12th of August, 1897, and the procedure and practice observed in the courts of justice in England at that date^[vii]...”

Kenyan legal scholar Jackton B. Ojwang, currently serving as a Judge in the Supreme Court of Kenya, has observed that Britain as a colonizing power deliberately refused to introduce a system of legal training in Kenya during its 70 year rule of the colony. The official reason for this policy, Ojwang points out, was “that it was more important to train engineers, doctors and agriculturalists than lawyers...” But it is the second reason which Professor Ojwang advances that seems to reflect the true position of the British: “Africans wished to read law as a preparation for a career in politics; it would be self-destructive for a colonial government actively to encourage the production of politicians” (Ojwang, 1986: 61). As such, right across East Africa, the British instituted *Legal Practitioners Rules* of 1910^[viii] made it deliberately difficult for people to become lawyers by prescribing weighty qualifications to be attained in order to practice law. For instance, one had to be a member of the Bar of England, Scotland or Ireland or be a solicitor of the Supreme Court of England or Ireland or a Writer to the Signet or Solicitor in the Supreme Court of Scotland.

According to Bruce Ackerman, the “constitutional moment”^[ix] arrived in 1963, where one was only required to have a law degree followed by a guided pupillage, and the rest as the saying would go, ‘see you in Court’. But one problem, that of the old dichotomy between *adversarial* (retributive) and *restorative* (redistributive) *justice* still remained. Kenya, like most countries that still belong to the Commonwealth (a club of former British colonies) chose to continue with the British adversarial system of law. This system relies on the skill of barristers representing the parties and a judge in a trial to determine the truth of the case. The system derives from Roman law and the Napoleonic code under which a judge or a group of judges could directly investigate a case and determine it one way or the other. On the other hand, the adversarial system is a two-sided structure that pits the prosecution against the defense. Justice is said to be done when the most effective adversary is able to convince the judge(s) or jury that his or her perspective on the case is the correct one. Some writers have traced the adversarial process to the medieval mode of trial by combat in which some litigants, notably women, were allowed a champion to represent them. This system has been criticized for its reliance on the skill of advocates to ‘twist’ the truth to their clients’ advantage and may not result in substantive justice. Retributive justice is a theory of justice that considers that proportionate sentence is a morally acceptable response to crime, regardless of whether the punishment causes any tangible benefits. But this has also been criticised for its reliance on the principle of an ‘eye for eye’ doctrine (Nabudere, 2013).

Furthermore, as Robert Home, a land management specialist based at Anglia Ruskin University has pointed out; “the main authors of Kenya’s colonial laws were a small cadre of predominantly Oxbridge-educated law officers, for whom the colonies offered the chance of early advancement to such positions as attorney-general and chief justice”. According to Professor Home, law-making in Kenya was informed by various official commissions and reports of expert consultants, drawn from the same cadre of lawyers and other professionals. Home further quoted an under-secretary at the Colonial Office in London expressing himself “a little distressed over Kenya’s increasing inability to move in any direction without the assistance of an outside expert”(Robert Home, 2012: 178). What Robert Home’s legal geography reveals, in a historical way, is the perceived vulnerability of Kenya’s legal institutions by the British. Indeed proving in a way that each approach to legal thought rests on interpretative constructs which mediate the legal representation of social events.

The Kenya of today, as I have argued elsewhere, in spite of its independence is still very much dependent on Western political constructs, socio-legal ideas, and judicial and epistemological philosophies. This is because of its engineered political metaphysical past, where people never dialogued their differences as a basis for federating. They were simply conscripted into geopolitical constructs that they neither chose nor bargained for. Therefore, colonialism as such, designed and inspired many of the problems that the country continue to face today; these include those now being rotated as universal rights and the deliberate portrayal of communities as victims of traditional culture and in need of rescue through legislation.

Indeed the words ‘dignity’, ‘respect’ and ‘value’ feature prominently in the current Constitution, is ignorant to the fact that the deliberate identification of *Wanainchi* (citizens) as subordinate victims, devoid of any form of agency to resist or challenge oppression, has roots in historical, economic, social, cultural and political structures designed and defended by Eurocentric philosophies that the Constitution itself consciously advances (Wanda 2013: 3-4, emphasis added).

One significant problem that continues to characterize Kenya today is a lack of commitment on the part of the state and its agents to use the Constitution as the basis of governance, protection of the weak and vulnerable as well as a framework for rectifying past violations and injustices. Prior to the 2010 Constitution, the constitution-making process often resulted into constitutions without constitutionalism and therefore, they were bound to fail due to a number of factors including but not limited to the narrow-approach that the political elite who participated in the process took; the lack of public participation; the lack of comprehensive dialogue and consensus on the contentious issues such as ethnicity, language, gender, accountability, social justice, *difference*; and via misconception that the post-colonial constitutions were one-fit-all constitutions for the whole of Africa in total disregard of the diverse values and principles of the people and communities’ on matters of democracy, leadership, dispute resolution mechanisms, among others.

It is of no surprise, therefore, that the struggle for a comprehensive constitutional reform in Kenya began with the mass protests and activities by civil society groups and the community at large which characterized the demand for the repeal of section 2A of the Constitution by parliament on December 4, 1991. Section 2A that had been introduced in 1982 amendment created a *de jure* one state with political power monopolized by the ruling party, KANU. Parliament amended the Constitution in 1992 to facilitate the holding of the General Elections in that year. The amendments included the requirement that the President was required to receive majority of the total votes cast and a minimum of 25% of the valid votes cast in 5 provinces, that a President shall not hold office for more than two terms and vesting the powers to conduct elections, including presidential elections, on the Electoral Commission of Kenya. The members of the Electoral Commission were appointed soon thereafter. Previously, the Provincial Administration had played a key role in organizing and managing elections leading to allegations of electoral malpractices and manipulation.

In an effort to address some of the recurring problems that I have mentioned earlier, that have haunted Kenya for decades, the 2010 Constitution aimed to transfer power from the presidency to create a new two-tiered parliamentary structure, make significant changes to the judiciary, and implement a new Bill of Rights. But as Alex Palmer has warned in the *Harvard International Review*, significant problems remain. Kenya has yet to deal properly with the involvement of high-ranking government officials in the 2007-2008 post-election violence.

Hence, “Corruption within the government is among the worst in Africa, and regional instability threatens to throw the country into turmoil again. If Kenya is to emerge from the shock of the 2007-2008 violence stronger, freer, and better prepared to act as a continental leader, it must chart a course that addresses these challenges and fundamentally changes the way the Kenyan government operates” (Palmer, 2011: 1).

In the past, one of the most significant problems with the previous Constitution had been the subordination of the Judiciary. This not only undermined its development, but also exposed it to political patronage, taking the form of opaque political appointments; nepotism, favoritism and tribalism in appointments and promotions; and subservience by some judicial officers. The Judiciary, for instance, failed to enforce the Bill of Rights on the grounds that the Chief Justice had not developed Regulations as envisaged under Section 84(6) of the repealed Constitution; failed to secure the right of the accused persons to be provided with reasons for detention; and incorrectly stated that the operations of the ruling party could only be handled by the party itself.

Upon assumption of office in June 2011, the Chief Justice Dr. Willy Mutunga aptly captured the misery of the state of the Judiciary as:

We found an institution so frail in its structures; so thin on resources; so low on its confidence; so deficient in integrity; so weak in its public support that to have expected it to deliver justice was to be wildly optimistic. We found a Judiciary that was designed to fail. The institutional structure was such that the Office of the Chief Justice operated as a judicial monarch supported by the Registrar of the High Court. Power and authority were highly centralized. Accountability mechanisms were weak and reporting requirements absent^[x].

A year later, during a presentation in Washington, USA, the Chief Justice said:

There is resistance. The old order is too terrified not just of the radical nature of the Constitution but also the assertive independence of the Judiciary. Many people, particularly the political and economic elite, having been socialized in and benefited from a retrogressive culture have neither the skill nor appetite for this new environment. They were used to a CJ and a Judiciary they would call and do deals and bargains with. Not anymore. They were used to a Judiciary that would deliberately be starved of resources as a blackmail strategy. Not anymore. They were used to a Judiciary that was very unpopular with the public, not anymore. This has caused considerable frustration not just to these elite but also the lawyers who had established corrupt networks with judges and magistrates^[xi].

Dr. Mutunga's experience provides insights of the renewed hope for the realization of the rule of law and human rights based on the new constitutional dispensation, although there is still a long way to go. Mutunga's quest for the essence of law serving society uses Martin Shikuku's "we must deal with that problem" as Common Ground in guarding the boundaries between the realm of facts and the realm of values. He asserts that the only passport between the two is a (logically disreputable) leap of faith in serving the community through a legal reformist practice.

Elsewhere, Professor Ben Sihanya of Nairobi University has pointed out that there are at least four reasons why the 2010 Constitution has enjoyed tremendous support in Kenya and beyond. First, the 2010 Constitution introduces far reaching changes to Kenya's system of governance by creating a decentralized (or devolved) system of government characterized by two levels of government, the national and county governments. Second, Sihanya observes that the Constitution sought to fundamentally restructure the core institutions of governance. In this regard, the Executive, Parliament and the judiciary are to be fundamentally restructured and reformed. For instance, the executive was restructured by reinforced checks and balances from other institutions. Third, the 2010 Constitution protects and promotes the rights of citizens in a more elaborate manner. The Constitution in this regard introduced an extensive, elaborate and liberal Bill of Rights that seeks to protect and promote social, economic and political rights of Kenyans. The protection of socio-economic rights (also known as second generation rights) like the right to accessible and adequate housing, the right to clean and safe water, social security, emergency medical treatment, to be free from hunger, and to have adequate food, among others, is an important addition by the 2010 Constitution. The fourth reason Sihanya (a former Dean of Law at Nairobi University), gives is that the 2010 Constitution introduced national values and principles of governance and further devoted a chapter on leadership and integrity. And he points out that in the past, public service was weighed down by problems like rent seeking, corruption, poor governance, mismanagement of resources, tribalism, criminal conduct and impunity, among others (Sihanya, 2012: 4).

Progressive Bill of Rights

One of the distinguishing features of the Constitution is the prescription of a broad range of rights and freedoms in the Bill of Rights Chapter, entrenched in the Constitution. The Bill of Rights includes all the three generations of rights – civil and political rights; economic, social and cultural rights; and group or collective rights. The scope of the rights and freedoms is not limited to the prescription in the Constitution; by virtue of Article 2(5&6) and 19(3) (b), it includes other rights and freedoms recognized in law as long as they are consistent with the Constitution. The Constitution requires the State, all State Organs and other persons to observe, respect, protect, promote and fulfill the rights and freedoms in the Bill of Rights.

In order to ensure full enforcement of the Bill of Rights, the Constitution has significantly whittled away the requirement of *locus standi* for instituting court proceedings in case of a violation or threat of violation the rights or freedoms^[xiii]. Furthermore, the Kenya National Human Rights and Equality Commission have been established to ensure implementation of the Bill of Rights^[xiii].

The 2010 Constitution in many ways makes a radical departure from earlier constitutions. As Professor Yash Pal Ghai points out, it was written to serve the people, and as such it puts serious restrictions on the authority of the government by prescribing how it must exercise the powers of the state. “The ruling class is well aware of the challenge posed by the constitution to their plunder of state resources. It is therefore no surprise that the ruling class has embarked upon its sabotage” (Ghai, 2014: 119).

Writing earlier in 2010, Ghai noted that a great deal of effort had gone into crafting the current Constitution so that its values and structures impose themselves on the state and society, with much attention given to enforcement and remedies. The internal logic and dynamics of the Constitution, he added, have to compete with larger social forces, the most powerful of which, he suggested, may have little commitment to its values. Professor Ghai argued further that a constitution’s fortune is shaped largely by: personalities and elites, political parties and other organisations, social structures, economic changes, traditions of constitutionalism – and by the rules and institutions of the constitution itself. On the Kenyan situation he further elaborated:

It is important to note that this constitution was imposed on politicians and bureaucrats by the people (a revolutionary constitution but no revolution), unlike the previous ones that were imposed by politicians on the people. Those familiar with Kenya’s past regimes will immediately recognise how it seeks to revolutionise state and society. A major obstacle to its implementation is that the state is the primary source of power and wealth in society. Corruption is the principal vehicle for accumulation. Since a major preoccupation of the constitution is the safeguarding of public resources from plunder, the only way in which the ruling class could achieve its objectives is by systematic violation of the constitution, benefiting from impunities that the political and legal systems have bestowed upon them. The question is whether those who are committed to the reform of the state will be able to impose the discipline of the constitution on the ruling class (Ghai 2010: 313–31).

Deducing from such, one can argue that the state in Africa has never been neutral, although it works hard at portraying itself as a neutral intermediate between Self and Others. The dichotomization of 'crime' and 'civil wrong' has its origin in the monopolisation of violence and power, including the right to punish wrongdoers by the state. This is a continuation of the power of the feudal sovereign over the feudal state and the power of the sovereign to impose sanctions. However, what we are also witnessing today in Africa is the state's weakened capacity to maintain law and order and many a times, we actually see the state itself embroiled in the commitment of crime, especially in 'failed' and 'failing' states such as Somalia and the Central African Republic among others in the eastern Africa region. What communities in Africa seem to be asking the state is; how can we prevent you from having all of the threatening aspects of the Other? How can the state maintain its image as the protector of pre-existing human rights when it also creates, defines, and regulates the same rights? In all of these questions of neutrality, the state's action becomes undoubtedly problematic.

What emerges with sharp clarity from Ghai's observations is that it is only by constant and systemic violations of the constitution and the law that Kenya's political class has been able to accumulate and establish its control over society—and its opponents. Most elements of the framework of constitutionalism, as he has pointed out, have been unacceptable to those who gained access to state power, for they interfered with their primary objective of accumulation (Ghai, 2010). Constitutionalism had been rejected, and constitutionally sanctioned power had been exercised or abused in the name of ethnicity and for personal aggrandizement. The incumbent Jubilee Alliance regime has not been indifferent.

Jubilee Government and Its Administration of Justice: From Father to Son

On 9 March 2013, contrary to USA's top official for Africa Johnnie Carson's 'choices have consequences' warning, Uhuru Kenyatta of The National Alliance (TNA) a member of the Jubilee Coalition, was elected as Kenya's president having secured a 50.07% against his main rival Raila Odinga of Orange Democratic Movement (ODM), a member of the Coalition for Reforms and Democracy's (CORD) 43.03% with a total turnout of 86% (Karen Allen, BBC News, March 2013). Until 5 November 2015 when Uhuru Kenyatta's case was suspended at the ICC, he was accused alongside his deputy William Ruto of orchestrating the post-election violence against the opposing camp in early 2008 (*Guardian*, November 2014). In the 2007 general elections, Kenyatta and Ruto had lined up in opposing political camps - Kenyatta supported President Mwai Kibaki, while Ruto supported opposition leader Raila Odinga. After the then-ICC Chief Prosecutor Luis Moreno Ocampo named them primary suspects on 15 December 2010, both Kenyatta and Ruto used this disadvantage as a political opportunity structure, and marshaled the court summons to their electoral advantage. Their election campaign was largely fought on the basis that the ICC's intervention was an imperialist strategy aimed at attacking Kenya's political sovereignty. Their major slogan during their campaign was that the election was a 'referendum against ICC'.

Since taking power, the socio-political and legal ecosystems of the Jubilee government have attracted significant criticism. It has been accused of curtailing rights under the auspices of fighting terrorism; extrajudicial killings have become widespread; corruption endemic; and outright disregard of the rule of law a common phenomenon. In the midst of an ongoing teachers strike, in its fifth week paralysed learning in Kenya, Wandia Njoya, a cultural scholar at Daystar University writing recently in the *Pambazuka News Journal*, has captured well the general frustrations:

We are in a sad, sad, period of Kenya's history. Our hearts have been broken after losing loved ones in terror attacks. The dollar is having a field day against the Kenyan shilling, and corruption has gone through the roof. And with each episode, we look for leadership in the form of not just a government response, but also a national response that would comfort, guide, unite and inspire us to keep the faith. Instead, what we witness is a largely disjointed and incoherent response, as if government departments are reading from different scripts, and as if the Kenyan people do not deserve better. The person who should ideally bring some coherence and unity in such times is the president. However, some episodes find Kenyatta II on some trip abroad whose relevance to national interests is not convincing, especially when selfies of him pop up on the internet, or when the convergence with the Formula 1 calendar seems too much of a coincidence. Other times he's just quiet. When the public eventually gets to see him, he's doing some down to earth thing like hugging a child, embracing his wife after a marathon, buying a soda at a kiosk or driving a tractor. At which we Kenyans ooh and ahh, and then we forget that what we needed was leadership, not sentimentality.

On a rare occasion, some incompetent person in his circles gives the president some speech to read, which is aimed at showing us that Kenyatta II is still running the country, but which ends up proving anything else but. One such event was in November 2014, a few days after the terror attack on a bus travelling from Garissa that claimed about 30 lives. When the president returned to the country shortly afterwards, he made a speech in which he passed his responsibility for security on to ordinary Kenyans (Njoya Wandia ,2015).

Contrary to Chapter Six's 'Leadership and Integrity' section of the current Constitution, that obligates public officers to make objective and impartial decisions with unqualified integrity and honesty in the offices they hold, John Githongo, the CEO of Inuka Kenya Trust, and a former Permanent Secretary in former President Kibaki's government, has pointed out that the current Kenyatta regime has allowed the most permissive environment for corruption in Kenya's history.

Pointing at the annual audit of government accounts' report by Edward Ouko, the auditor general, Githongo has argued that it is an embarrassing testimony of the Jubilee government's scorecard that only 1.2% of the country's 2013-14 \$10bn budgets was correctly accounted for. About \$600m, according to Githongo could not be accounted for at all (Githongo, Guardian, 6 August 2015).

Although the president, in his part, on 28 March 2015 ordered the country's Ethics and Anti-Corruption Commission to investigate 170 officials including five of his own ministers for fraud. Barely a month later, on 23 April 2015, he suspended the chairman of the anti-corruption agency and his deputy on April 23 on allegations of misconduct. The two officials resigned before testifying at a tribunal (Bloomberg, 27 May 2015). In spite of constitutional attempts at redressing the problem of corruption through several legislations such as the Public Officer Ethics Act of 2003; Anti-Corruption and Economic Crimes Act of 2003; the Public Procurement and Disposal Act of 2005; and the Leadership and Integrity Act of 2012 among other laws, corruption in Kenya remains a deep-rooted problem. Kenya is as such ranked in the bottom quarter of the 177 nations on Transparency International's 2014 Corruption Perception Index.

Various explanations have been offered for the existence of corruption in governments in the developing world. For example, British author Michela Wrong who wrote the book *It's our Turn to Eat* (2009), an account based on John Githongo's corruption exposures of the Kibaki regime, suggests that corruption is prevalent in Kenya because particular people believe that it is their "turn to eat" once they assume the reins of government. Her explanations, in my view, are symptomatic of a much deeper problem, namely institutional failure. Dysfunctional or failed institutions often facilitate the abuse of power in government. Using this purview, it is possible to argue that this is perhaps the reason why the conservative ideas of Uhuru Kenyatta's father Jomo Kenyatta and his political mentor Daniel Moi have shown themselves to be strategically useful to the incumbent Jubilee administration.

Under Jomo Kenyatta and Daniel Arap Moi's imperial presidencies (1964-2002), according to Otiende Omollo, Kenya experienced democracy deficits mainly occasioned by constitutional amendments that concentrated state power in the core executive and weakened other state institutions. The upshot was democratic regression which facilitated autocracy, patrimonialism, state capture, corruption, violations of human rights, deference of state institutions to the Executive, disregard of the rule of law and, above all, the creation of a 'criminal state.' And the legal profession and the judiciary were not spared. Their members were always harassed for making decisions that were deemed unfavorable to the Executive or agitating for democratic changes. For instance, judicial officers who made decisions deemed unfavorable to the Executive were transferred to other stations and ultimately in 1988 their security of tenure was removed. Similarly, lawyers who defended individuals accused of political detainees were always harassed and even detained (Omollo, 2012).

Dr. Otiende Omollo, who chairs Kenya's Office of the Ombudsman commonly referred to as the Commission of Administrative Justice, in a paper presented to a SADC Law Association conference, argued that the role and authority of the Judiciary declined and in some cases usurped by other entities mainly the ruling party, the Kenya National African Union. The subordination of the Judiciary, Omollo observed, not only undermined its development, but also exposed it to political patronage taking the form of opaque political appointments; nepotism, favoritism and ethnic favoritism in appointments and promotions; and subservience by some judicial officers. The Judiciary, for instance, according to Omollo, failed to enforce the Bill of Rights on the grounds that the Chief Justice had not developed Regulations as envisaged under Section 84(6) of the repealed Constitution; failed to secure the right of the accused persons to be provided with reasons for detention; and incorrectly stated that the operations of the ruling party could only be handled by the party itself.

Today, according to preliminary evidence collected in a recent report by the Kenya National Commission of Human rights, the government is accused of gross human rights violations in its ongoing war on terrorism. Over 100 people have disappeared, several killed and scores of others tortured in various parts of the country mainly in Nairobi, Wajir, Mandera, Garissa, Lamu, Tana-River, Kwale, Kilifi and Mombasa counties. The counterterrorism operations, the report noted, are being conducted by a combined contingent of Kenya Defense Forces (KDF), National Intelligence Service (NIS), Kenya Wildlife Services (KWS), County Commissioners, Deputy/Assistant County Commissioners, Chiefs and various units of the National Police Service including the AntiTerrorism Police Unit (ATPU), Kenya Police Reservists (KPRs), Rapid Deployment Unit (RDU) of the Administration Police, Border Patrol Unit (BPU) and the General Service Unit (GSU). The report documents over one hundred and twenty (120) cases of egregious human rights violations that include twenty five (25) extrajudicial killings and eighty one (81) enforced disappearances. As detailed in the report, these violations are widespread, systematic and well-coordinated and include but are not limited to arbitrary arrests, extortion, illegal detention, torture, killings and disappearances. The commission expressed its concerns that the ongoing crackdown was disproportionately targeting certain groups of people particularly ethnic Somalis and certain members of the Muslim faith, contrary to the 2010 Constitution as well as other international norms (KNHCR, 2015).

Conclusion

In the vortex of constitutional values and mandates, once a constitutional regime is established, its sternest test lies in the way it is applied and interpreted. For all practical purposes, the law is what the authoritative interpreters say it is and therefore the caliber of interpreters and the canons of interpretation they employ are of cardinal importance. It is often noted in practices of representative democracy in which Kenya is striving towards, that it is the citizen who delegates her sovereignty to a popularly elected representative, who in turn delegate her authority to a bureaucrat.

This, as the Kenyan situation demonstrates, does not always ensure that governmental power is only used for its intended purposes, namely the protection of the rights of citizens and the pursuit of the public good (Migal Akech, 2011: 345). While the Kenyan state is strong in its subjugation of society, it has been deliberately weak in its capacity to direct social change as stipulated in the vibrant 2010 Constitution. Most politicians in Kenya, from the county and national assemblies to the Upper House of Senators in Nairobi, have little desire for social progress, concentrating on their predatory practices, protected by political fragmentation and the ethnification of society.

The contractual relation between the community and the state, are characteristics of a weak constitutional reality of the past captured well in the philosophical wisdom of Martin Shikuku's "We must deal with that problem". Upon careful scrutiny, The 2010 Constitution appears well aware of Shikuku's Common Ground proposal, and as if in response, through a rigorous legal discourse aims at promoting a positive people-centred representation. As such, the study of the Kenyan constitutional experience provides insights of the renewed hope for the realization of the rule of law and human rights based on the new constitutional dispensation. Although the incumbent Jubilee administration's push for a conservative KANU ideational heritage risks pulling back an autocratic blanket over the community, which ought to be resisted. The Kenyan constitutional reform struggle cycles demonstrate that change happened due to pressures from collective action. A reading of the different cycles must also be understood within the competing class and ethnic cleavages that have dictated that by and large, change initiatives have been intra-class competitions for control and support of the masses. That said, after the 1992 General Elections, it is the community itself through civil society and religious groups that emerged as important drivers of the reform process. Soon after the said elections, Kenya Human Rights Commission and Law Society of Kenya revived the agenda for a National Constitutional Convention to spearhead comprehensive reform of the constitution in February 1993. This road eventually led to the current 2010 Constitution.

Notes

¹ *MPs in 'Most Corrupt' League*, Daily Nation, 10, December, 2005;

² See *Standard Newspaper*, 11th March 2015 available at <http://www.standardmedia.co.ke/article/2000154445/eacc-summons-nakuru-mcas-after-fist-fights> (accessed 7th April 2015).

³ BBC News, 18th December 2014, (See <http://www.bbc.com/news/world-africa-30530423>., accessed 7th August 2015).

⁴ http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/NationalCohesionandIntegrationAct_No12of2008.pdf

⁵ *CORD Senators, MPs Grilled Over Hate Speech Allegations* (2014) <http://www.youtube.com/watch?v=eAT0XOXUnPk&feature=youtube_gdata_player> accessed 23rd September 2015.

⁶ The People, 'Gatundu South TNA Aspirant Moses Kuria Charged with Hate Speech' <http://www.mediamaxnetwork.co.ke/thepeople/86821/gatundu-south-tna-aspirant-moses-kuria-charged-hate-speech>> accessed 23rd September 2015.

⁷ Judicature Act 1967, see Chapter 8 of the Constitution, Laws of Kenya. Available at www.kenyalaw.org, accessed 2nd May 2015

⁸ See *Kenya Law Society Report*, available at www.lsk.or.ke (accessed 2nd August 2015) No. 8 of 1901, published in (1897 -1905) E.A. Prot. L.R. 121-125.

⁹ I think it was Professor Bruce Ackerman, the American Legal Scholar who used the term first, for general purposes see his work *Reconstructing American Law* 19(1984); *see also* Bruce Ackerman, *We the People: Transformations* 385,409 (1991).

¹⁰ W. Mutunga, 'Progress Report on the Transformation of the Judiciary: The First Hundred and Twenty Days,' 19th October 2011.

¹¹ Speech by the Chief Justice, Dr. Willy Mutunga, at the Centre for Strategic and International studies, 7 September 2012, Washington DC.

¹² See Article 22 of the Constitution of the Republic of Kenya.

¹³ In accordance with Article 59(4) of the Constitution, the Kenya National Human Rights and Equality Commission has been restructured into three separate Commissions, that is, the Kenya National Commission on Human Rights, the Commission on Administrative Justice and the National Gender and Equality Commission.

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