Onyango & 11 others v Attorney General & 4 others (Miscellaneous Civil Application 677 of 2005) [2005] KEHC 3204 (KLR) (Civ) (15 November 2005) (Judgment)

Patrick Ouma Onyango & 12 others v Attorney General & 2 others [2005] eKLR

Neutral citation: [2005] KEHC 3204 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

MISCELLANEOUS CIVIL APPLICATION 677 OF 2005

JG NYAMU, RPV WENDOH & MJA EMUKULE, JJ

NOVEMBER 15, 2005

BETWEEN

PATRICK OUMA ONYANGO ..... 1ST APPLICANT

STEPHEN KAREMU MUKETHA ..... 2ND APPLICANT

MICHAEL GITAHI NGUNYI & 9 OTHERS & 9 OTHERS & 9 OTHERS & 9 OTHERS & 9 OTHERS & 9 OTHERS ..... 3RD APPLICANT

AND

ATTORNEY GENERAL ..... 1ST RESPONDENT

LUCY KAMBUNI AND NJOROGE REGERU ..... 2ND RESPONDENT

JEMIMAH KELI & 2 OTHERS & 2 OTHERS & 2 OTHERS & 2 OTHERS & 2 OTHERS & 2 OTHERS ..... 3RD RESPONDENT

Parliament does not have the power to make a new constitution under section 47 of the Constitution, it only had the amending power under that section

The originating summons sought among other declarations that; the National Assembly had no power to debate, alter or amend the draft Constitution of Kenya adopted by the National Constitutional Conference; and that the mandate to make a constitution lay solely with the people of Kenya. The court dismissed the originating summons and found that the touchstone of validity in respect of the amending power was the existing Constitution and the touchstone of validity in respect of the constituent power was the people. The court held that the exercise of the constituent power was a primary right of the people and thus it had no mandate to injunct the right or to declare that it should not be exercised. The court further held that section 47 of the Constitution did not deal with the making of a new constitution and that the power to make a new constitution was not vested in Parliament - it was the amending power that was vested in Parliament under that section.

Reported by Kakai Toili

Constitutional law *– constitution making - constituent power - power to make a new Constitution - incidence of such power and the mode of its exercise - the touchstone of validity of the constituent power - the necessary steps in the exercise of such power - national referendum - whether an injunction could issue to stop a referendum on a proposed new constitution on the ground that the proposed constitution had been arrived at through an unconstitutional process - political doctrine principle - whether the process of generating proposals to include in the proposed Constitution was a political process upon which the court could not adjudicate - whether the Constitution was the touchstone of validity of the constituent power and what were the necessary steps in the exercise of such power - whether sections of the Constitution of Kenya Review Act and the Constitution of Kenya Review (Amendment) Act were unconstitutional.*

Constitutional Law *– organs of Government - Parliament - powers of Parliament - whether Parliament was vested with the power to make a new constitution - whether Parliament could only amend the Constitution – Constitution of Kenya, section 47.*

Jurisdiction *- jurisdiction of the High Court – interpretative and declaratory jurisdiction over the Constitution - jurisdiction where an objection to jurisdiction was raised in a matter involving great public interest and a novelty in jurisprudence - whether it would be proper for the court to allow an objection to jurisdiction in such an instance.*

Constitutional Law *- public interest litigation - locus standi - where an objection to jurisdiction was raised in a matter involving great public interest and a novelty in jurisprudence - whether it was proper for the court to deal with the substance rather than the technicalities of the application.*

Brief facts

The applicants brought an originating summons asking the court to issue certain declarations, among them being that certain sections of the Constitution of Kenya Review (Amendment) Act (the Consensus Act) were null and void for contravening the Constitution; that the National Assembly had no power to debate, alter or amend the draft Constitution of Kenya adopted by the National Constitutional Conference (as the "Bomas Draft"); that the mandate to make a constitution lay solely with the people of Kenya; that it was a violation of the principle of democracy and the collective will of the people of Kenya to undertake the processes of civic education and a national referendum upon a "Parliament Constitution" that was not in line with the Bomas Draft; that any law, not being a law within the existing Constitution, giving the President or the National Assembly the power to make or promulgate a new Constitution would be *ultra vires* the Constitution and therefore null and void and that the constitutional rights of the applicants had been violated.

It was argued that for a valid new constitution to come into being section 47 of the existing Constitution had to be amended to provide for the making of a new constitution and further that the Electoral Commission of Kenya had no powers to conduct a national referendum on the proposed new constitution. Among the several objections raised by the respondents to the application were that the applicants had failed to comply with the procedure for the bringing of a representative suit and that they lacked *locus standi* to sue.

Issues

i. Whether the Constitution was the touchstone of validity of the constituent power and what were the necessary steps in the exercise of such power.
ii. Whether an injunction could be issued to stop a referendum on a proposed new constitution on the ground that the proposed constitution had been arrived at through an unconstitutional process.
iii. Whether the process of generating proposals to include in a proposed constitution was a political process upon which the court could not adjudicate.
iv. Whether Parliament was vested with the power to make a new constitution and whether Parliament could only amend the Constitution.
v. Whether it was proper for the court to allow an objection its jurisdiction where the objection was raised in a matter involving great public interest and a novelty in jurisprudence.

vi. Whether it was proper for the court to deal with the substance rather than the technicalities of an application where an objection to jurisdiction was raised in a matter involving great public interest and a novelty in jurisprudence.

Held

1. Whereas ordinarily the court would consider the objections raised by the respondents challenging the jurisdiction of the court, the court preferred to deal with the substance of the application rather than with technicalities as that was a new matter in Kenyan jurisprudence involving a matter of great public interest.
2. Except where Parliament had by an Act of Parliament conferred special jurisdiction in another court or tribunal, for instance the Industrial Court under the Trade Disputes Act (cap 234), it would be a serious abdication of duty and responsibility for the High Court to hold that it had no jurisdiction.
3. It was the duty of the court, (because the Constitution had not limited it specifically) to exercise its original jurisdiction in full. It had an interpretative and declaratory jurisdiction in respect of each of the provisions of the Constitution. It had a duty where moved to ascertain whether in any of the constitutional provisions there were enforceable rights and obligations and declare or refuse them.
4. The power to frame a constitution was a primary power whereas a power to amend a rigid constitution was a derivative power, since it was derived from the Constitution and was subject to the limitations imposed by the prescribed procedure under the Constitution. The amending power must be exercised in accordance with the existing Constitution. In other words, the touchstone of validity in respect of the amending power was the existing Constitution and the touchstone of validity in respect of the constituent power was the people. The existing Constitution could not be the touchstone of validity because it was a creature of the people's law-making power, that was the constituent power.
5. The exercise of constituent power could not be fettered and unless there were provisions in the existing Constitution which provided for the exercise of such power by following a particular procedure, nothing could restrict its exercise by the people. The right of the people to exercise that power was inherent in them but it was also expressed in section 1 and section 1A of the Constitution or implied in the sections.
6. The exercise of the constituent power was a primary right of the people and no group, Parliament, the Executive or the Judiciary had the right to take the right away. The court therefore had no mandate to injunct the right or to declare that it should not be exercised.
7. The process of generating and assembling the proposals for the enactment of a new constitution and of giving content and substance to them was a political process and the court was not equipped to adjudicate on that part of the process under the political doctrine principle since it was also not justiciable and the process having taken place it was moot.
8. The process leading up to the publication of the proposed new constitution was non-justiciable due to the political nature of the process and because of the succession of events which could not be reversed and in which the court could not effectively grant any enforceable remedies.
9. Parliament could not be faulted in both passing the Consensus Act and voting on the Constitution proposals pursuant to the Consensus Act. It was not convincing to the court that the alteration of the proposals at the stage of consultation or discussion could invalidate the proposals to be put to the vote by the people. Only the people could invalidate any such process by a "No" vote. A court of law had no authority to stop the adoption or rejection at a referendum of constitutional proposals on the basis that one or the other of the draft proposals were altered or mutilated since the court was not equipped to prefer any of the set of proposals and drafts this being substantially a political process.
10. The exercise of the power to injunct or to stop or to restrain people from exercising their constituent power would constitute usurpation of the people's power and a serious contradiction, in that judicial power was exercised on behalf of the people and it could not therefore be exercised against them.

11. Section 47 of the Constitution did not deal with the making of a new constitution or the process of making a new constitution. The power to make a new constitution was not therefore vested in Parliament - it was the amending power that was vested in Parliament under that section subject to the special procedures concerning the entrenched provisions and also subject to the doctrine of the basic structure. Parliament had no right to alter the basic structure of the Constitution and for example if it were to move to repeal Chapter 5 on fundamental rights and freedoms, or repeal the republican, and democratic stipulations in sections 1 and 1A of the Constitution the court would if moved declare such amendments unconstitutional.
12. The power to amend was the Constitution was derivative, being conferred by section 47 of the Constitution, whereas the Constitution making power was primary hence it was not provided for in the current Constitution and needed not be textualized. It followed therefore that what was not delegated to Parliament by the Constitution was reserved to the people that was the constitution making power was so reserved to the people and was inherent in them. That was in addition to the expression of constituent power in sections 1 and 1A of the Constitution. In the context of the Constitution of Kenya, the power to make a new constitution was with the people and not Parliament.
13. Parliament or the Executive could originate valid constitutional proposals but as originators, those organs of Government could not validly monopolise the process by disregarding the constituent power. Constitutional proposals could originate from any political interest in Kenya provided proper or adequate consultations with all the other political interests, and stakeholders take place.
14. Parliament in the event of a political stalemate provided the most representative political interests in Kenya since the majority of members of Parliament were directly elected by the people.
15. The Executive would have reason to originate constitutional proposals since it was the incumbent Government elected into office directly by the people with a mandate *inter-alia* to bring into being a new constitution. It therefore had the people's mandate to initiate proposals.
16. The Kenyan experience had all the three essential prerequisites in Constitution making; popular consultations, framing of the proposals and the proposed enactment by the people in a referendum.
17. The power to enact the constitutional proposals into law should rightly belong to the people, and be exercisable by them either directly at a referendum or by a constituent assembly so mandated by them**.** It followed that there was no constitution making in the current circumstances of Kenya until the people enact it in a referendum.
18. The President was duly elected by the people and in promulgating the new proposed Constitution he would be acting as an agent of the people after their having enacted the Constitution themselves at the referendum.
19. The Electoral Commission of Kenya was empowered by law to conduct the referendum.

Originating summons dismissed; parties to meet their respective costs.

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5. *Blackburn v Attorney General* [1971] 1 WLR 1037; [1971] 2 All ER 380
6. *In re ex parte President of the Republic of South Africa & others* 2000(2) SA 674
7. *McCawley v R* [1920] AC 691; (1920) 28 CLR 106
8. *Njoya & 6 others v Attorney General & another* (2008) 2 KLR (EP) 624; [2004] 1 KLR 232
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2. Constitution of Kenya Review Commision Act, 1997 sections 4(1); 6(1); 18; 20; 25(6); 27(1) (6); 28

3. Kenya Communications Act, 1998, (Act No 2 of 1998)

4. Constitution of Kenya (Protection of Fundamental Rights & Freedoms of the Individual) Practice & Procedure Rules 2001 (Constitution of Kenya Sub Leg) rules 9,11

5. Constitution of Kenya Review Act (cap 3A) sections 17, 24, 27(1)(c)(6)(7); 28; 28A

6. Constitution of Kenya Review (Amendment) Act, 2004 (Act No 9 of 2004) sections 4,5,26,27,28

7. Civil Procedure Act (cap 21) section 3A

8. Civil Procedure Rules (cap 21 Sub Leg) order 1 rule 12; order IV rule 3; order VIII; order XXXVI

9. National Assembly & Presidential Elections Act (cap 7) section 42A

10. Cyprus Constitution, 1960

11. Trade Disputes Act (cap 234) section 17

12. National Assembly (Powers & Privileges) Act (cap 6) sections 12, 29

13. Referendum Act, 1960 [Ghana]

International Instruments & Conventions

Universal Declaration of Human Rights (UDHR), 1948 Article 21.

JUDGMENT

A.Introduction

1. From the early 1990s the people of Kenya under the yoke of the monolistic 'KANU' Government agitated for a change in the manner of governance in Kenya and clamoured for enactment of a new Constitution. The Government reluctantly gave in to the demands by the people through opposition parties both in Parliament and outside Parliament civil society, religious organizations and other lobby groups. In 1991 changes were introduced into the Constitution including enactment of section 1A of the Constitution which provided that the Republic of Kenya shall be a multiparty Democratic State. For those who remember the history, this provision repealed section 2A of the Constitution which

then provided for a one party state. With this minimum amendment, election of 1992 were carried out and KANU won.

2. The clamour for opening the democratic space did not stop and agitation for further change continued leading to the Government's realization that it was inevitable to bring changes into the manner of governance. To achieve this, various initiatives were commenced by the mainstream churches through (NCCK), Supreme Muslim Council of Kenya (Supkem) Hindu Council of Kenya and the Kenya Episcopal Conference representing the Catholic Church and these were collectively called the Ufungamano Initiative.

B. Structured Process

3. Following the enactment of the Constitution of Kenya Review Act (the CKRC Act), and the fusion of the Ufungamano Initiative with the Commissioners under the "CKRC Act", the process of Constitutionmaking took a structured form.

4. The enactment of the "CKRC Act" was an acknowledgment both by the Kenya African National Union (KANU) Government of the day that Constitution-making in a country subject to the Constitution and therefore the rule of law had to be both a guided and structured according to law.

5. The enactment of the CKRC Act was itself a subject of intense and tedious negotiations between civil society, including, opposition parties, religious organizations, trade unions, and the Government of the day, or simply the monolithic KANU Government which held tight control of Government and its institutions.

6. So the CKRC Act was itself a subject of wide consultation in fact chaired by Rt Rev Philip Sulumeti a member Bishop of the Kenya Episcopal Conference the governing body of the Catholic Church in Kenya.

C. The Review Structures Established By the CKRC Act

7. The organs through which the review process was conducted were established by section 4 (1) of the CKRC Act, and were:-

   (a) the Constitution of Kenya Review Commission established under section 6 (1) of the CKRC Act.

   (b) the Constituency Constitutional Forum, established under Section 20 of the CKRC Act.

   (c) The National Constitutional Conference established under section 27 (1) of the CKRC Act.

   (d) The Referendum provided for under section 27 (6) of the CKRC Act then limited to matters not agreed upon at the National Constitutional Conference by the prescribed 2/3 majority,

   (e) The National Assembly.

   We will consider these organs in turn.

D. The Constitutional Review Commission

8. Was the primary organ for conducting the Constitution review process. Its functions included the facilitation of the establishment of the Constituency Constitutional Forums for the debate, discussion, collection and collation of the views of the members of the public on proposals to alter the _ Constitution.

9. The powers of the Commission as set out in section 18 of the CKRC Act, were extensive. The Commission visited every Constituency in Kenya, to receive the views of the people on the Constitution, it received memoranda, held public and private meetings throughout Kenya, collected and collated views and opinions of Kenyans resident in and outside Kenya, and had power to summon any public officer under penalty of severe fines or imprisonment for disobedience to such summons and regulated its own procedure.

10. The records of every meeting the Commission held in every Constituency were published through documentation centres, established by every County Council in every District for the preservation and dissemination to the public of the records of the deliberations and proceedings of the Commission, and through libraries provided by the National Library Services Board. In addition the Commission's records were published through the print and electronic media, including the national broadcaster, the Kenya Broadcasting Corporation and other stations, licensed under the Communications Commission of Kenya Act 1998.

Civic Education

11. Was a forum under which the Commission facilitated its work and promoted civic education in order to stimulate public discussion and awareness of Constitutional issues.

The Constituency Constitutional Forum

12. Was established under section 20 of the CKRC Act. It was the forum for debate, discussion, collection and collation of views of members of the public on proposals to alter the Constitution.

The National Constitutional Conference

13. The work of the Commission consisted of visiting all the Constituencies in Kenya, compiling reports of the Constituency Constitutional Forums, compile a report and draft bill for the National Constitutional Conference conducting and recording decisions of the conference on contentious issues, (that is to say, issues upon which there was no 2/3 agreement of the delegates in the National Constitutional Conference, under the then section 25 (6) of the CKRC Act), and on the basis of such resolutions of the National Constitutional Conference to draft a Bill for presentation to Parliament for enactment.

Composition of National Constitutional Conference

14. The Commission, was to convene the National Constitutional Conference thirty days after publication of its Report for purpose of discussion, debate amendment and adoption of the Commission's report and draft Bill.

15. The National Constitutional Conference, comprised-

    (1) the Commissioners of the Constitutional Review Commission, as exofficio members without the right to vote,

    (2) all the members of Parliament, (that is including the President who was delegate No 01).

    (3) three representative of each District, at least one of whom shall be a woman, and one of whom shall be a councilor, all elected by the respective County Council in accordance with rules prescribed by the Commission.

(4) One representative from each political party, then registered at the commencement of the CKRC Act and not being a member of Parliament.

(5) Such number of representatives of-

(a) religious organizations,

(b) professional bodies,

(c) women's organizations,

(d) trade unions and non governmental organizations registered at the commencement of the CKRC Act,

(e) interest groups the Commission determined to form part of the National Constitutional Conference. These interest groups who became part of the National Constitutional Conference included -

(i) Industry/business community,

(ii) Media,

(iii) Cultural Arts,

(iv) Students/Youth

(v) Youth

(vi) Informal Sector/Jua Kali (ie open air artisans).

(vii) Police

(viii) Prisons

(ix) Armed Forces

(x1) Goan Community

(xii) Hindu

(xiii) Judiciary."

(xiv) Accredited Lobby Groups.

Purpose of Introduction

16. The purpose of this long introduction was to show that the Kenya experience in Constitution making was an exhaustively wide consultation with all shades of opinion from the grass roots. It echoed the call of the protagonists of the Constitution and other legal reformists that the making of the new Constitution must be "people driven" and when former President Hon Daniel Arap Moi, quipped that "Wanjiku" was not sufficiently informed and advised on matters of Constitution - making the protagonists or reformists cried out louder that all the phases of Constitution making must have "Wanjiku" on or near the driving seat. In this Wanjiku, acquitted herself in both the membership of the Commission itself and entrenched her membership in the National Constitutional Conference. For those who do not know, "Wanjiku" is a popular girl name among the Agikuyu "sub-nation" of Kenya, and legend has it that she was one of the nine founding daughters of the house of Mumbi, the

progenitor of the Agikuyu. All said, the name "Wanjiku" in the understanding of Kenyans, represented the ordinary Kenyan.

17. It is noted that under section 28 of the CKRC Act the work of the National Constitutional Conference would end with the submitting to the Attorney General of the Commission's Report and the draft Bill with all matters resolved pursuant to the referendum on contentious issues, and the Attorney General would publish the Bill to alter the Constitution within seven days' and would take the Bill together with Commission's report to National Assembly, for enactment within seven days following the tabling thereof. This was not to be, and the reasons are set out below and are probably why Kenyans have ended with the kind of suit, the subject of this judgment.

18. Firstly, one group of delegates, members of the Government led by the Vice-President and Minister for Justice and Constitutional Affairs, and other delegates of similar mind walked out of the National Constitutional Conference, rendering the whole outcome of the National Constitutional Conference highly contentious.

19. Secondly, at about the end of National Constitutional Conference, a group of aggrieved Kenyans led by a PCEA fiery and fearless cleric Rev Dr Timothy Njoya sued the Commission, its leading lights, including one Koitamet Ole Kina the Vice Chairman of the National Constitutional Conference and the Attorney General.

20. Whereas the applicants in the Njoya Case deprecated the equal representation of every District in Kenya by three delegates each irrespective of their size and population there was also expressed in paragraphs (K) and (L) of the grounds an unfortunate intolerance to representation of delegates Nos 224 - 434 who happen to have been drawn from the so-called Political Districts.

20. We hasten to add that it is that rather uninformed mentality which is often exhibited by members of the political class and pseudo-elite which increases polarization and arouses what those applicants called "deep rooted grievances and mutual distrust." The gods whatever you perceive them or him to be put us and the European powers in the Berlin Conference 1885, apportioned us, and the British in the seventy year old colonial state enforced the existence and maintenance of the results of that Partition, in the geographical expressions or entities, such as the ones we call mother Kenya today. So Kenya as that entity should not be seen in the prism of numbers, or a mere statistic. The whole philosophy which informed the negotiations between the KANU Government in the late 1990s, and opposition parties, civil society in their myriad forms, and the religious leaders, in Safari Park Hotel 1 II, III & IV negotiations and the Inter Party Parliamentary Group (IPPG.) Caucus and which eventfully led to the enactment of the CKRC Act was that the Constitution review process should not only be comprehensive but had to be inclusive of all shades of opinion, of all peoples of Kenya so that at end of the process, and even if the majority had their way, the minority would have had their say.

21. It was necessary to set out that background for the purpose of understanding the Originating Summons before us.

2. Originating Summons

(1) By an Amended Originating Summons dated 16.05.2005, which was said to be backed, supported and fostered by sections 1, 1A, 3, 8, 46,47,49,56,70,74,77 (9), 84 and 123 (8) of the Constitution of Kenya and rules 9 and 11 of the Constitution of Kenya, (Protection of Fundamental Rights and Freedoms of the Individual) Practice and Procedure Rules, 2001 and sections

17, 27, 28, 28A and 28 B (4) (5) of the Constitution of Kenya Review Act (the Principal Act) as amended by sections 4 and 5 of the Constitution of Kenya Review (Amendment) Act 2004, (the Consensus Act) section 3A of the Civil Procedure Act (chapter 21, Laws of Kenya) and all other enabling provisions of the law, the applicants have made a Constitutional reference to this Court sitting as a Constitutional Court in which are sought the orders namely:-

(2) Sections 4 and 5 of the Consensus Act be and are hereby declared null and void for contravening sections 1, 1A 3, 8, 46, 56, 70, 77 (9) and 123 (8) of the Constitution to the extent, inter alia, that they introduce unconstitutional amendments and/or unconstitutional sections to wit, sections 17 (e) & (f), 27 (1) (b), (2) and (3), 28 (1) and 28A (4), (5) and 28B (4) and (5) to the Principal Act.

(3) Sections 27 and 28 of the Principal Act amended by section 5 of the Consensus Act be and are hereby declared null and void for contravening section 1, 1A, 46, 47 and 56 of the Constitution.

(4) Section 28 A (4) and (5) of the Principal Act as amended by section 5 of the Consensus Act be and are hereby declared null and void for contravening sections 1, 1A, 8, 46, 47 and 56 of the Constitution.

(5) Section 17 (e) & (f) of the Principal Act as amended_by section 4 of the Consensus Act be and are hereby declared unconstitutional and therefore null and void as it violates the people's sovereignty and the values, principles and spirit of the Constitution.

(6) Section 28 (1) of the Principal Act as amended by section 5 of the Consensus Act be and is hereby nullified for contravening sections 1 and 1A of the Constitution and the principles, values and spirit enshrined therein.

(7) Section 28 B (4) & (5) of the Constitution of Kenya Review (Amendment) Act 2004 as amended by section 5 of the Consensus Act be and are hereby declared null and void for being discriminatory and in conflict with sections 70 and 84 of the Constitution and for denying the third applicant and an overwhelming majority of Kenyans who live below the poverty line (access to the court?)

(8) The powers conferred on the National Assembly by section 27 of the Principal Act as amended by section 5 of the Consensus Act be and are hereby declared unconstitutional, for being in conflict with sections 1, 1A, 46, 47 and 56 of the Constitution and are a subversion of democracy and the people's inviolate sovereign right to constitute their state.

and declarations that-

1. The National Assembly has no power to debate, alter or amend the draft Constitution of Kenya 2004 as adopted by the National Constitutional Conference on 15 March, 2004 (hereinafter "the Bomas Draft") in light of the decision in High Court Miscellaneous Civil Application No 82 of 2004 (OS) (hereinafter "the Njoya case") or otherwise and of sections 1, 1A, 46, 47, and 49 of the Constitution;

2. The mandate to make a Constitution and /or, identify, debate and resolve any perceived contentious issues in the Bomas Draft lies solely with the sovereign people of Kenya in a referendum or any other forum specifically constituted by Kenyans for that purpose and not the National Assembly and such an exercise by the National Assembly is contrary to the provisions and/or its spirit, principles and values as enshrined therein.

3. Constitution making is not a legislative process and therefore any law that purports to elevate members of Parliament and/or the National Assembly above Kenyans by ascribing a special role in constitutional review process to the former is ultra vires the Constitution and therefore null and void.

4. The powers and duties conferred on the President by section 28A of the Principal Act as amended by section 5 of the Consensus Act are in excess of the Constitution and in violation of sections 3, 8, 46 and 47 of the Constitution and the collective sovereign will of the people of Kenya since such sovereign cannot be subject to, contingent upon or dependent on the will, act or whims of the President.

5. The people of Kenya, having the inherent power to constitute and reconstitute their state and government and having given their views as to how they want this done, it is a violation of the principles of democracy and the collective sovereign will of the people of Kenya for the 2nd respondent to conduct civic education on the proposed new Constitution (hereinafter "the Parliament Constitution") that is not in line with the views given to it by Kenyans, its report and the Bomas Draft made with the views of Kenyans and instead to conduct a referendum on the Parliament/ National Assembly Constitution as envisaged in section 28 (1) of the Principal Act as amended by section 5 of the Consensus Act.

6. It is unconstitutional, an abuse of and infringements on the rights of the people of Kenya to subject their collective sovereign will to the National Assembly and the Presidency, the two being non-existent unless and until created, defined and limited by the people's collective sovereign will in a constitution.

7. The current Constitution not having any transitional provisions under which either the Presidency and/or the National Assembly can, as institution (s) make, participate in the making of a new constitution or promulgating a proposed new constitution to be the new constitution, any law, not being a law within the Constitution that gives the National assembly or the Presidency such power or right to so make, participate in the making or promulgate a proposed new constitution to be the constitution is ultra vires the constitution and therefore null and void.

8. Consensus Act violates the constitutional right of the 3rd applicant who cannot raise Kshs 5 Million in 2 weeks as stated in the said section as it severely limits and restricts his access to justice together with the 56% of Kenyans who live below the poverty line as it contravenes section 70 of the Constitution.

9. Sections 17, 27, 28, 28A and 28 B of the Principal Act as amended respectively by section 4 and 5 of the Consensus Act violate the constitutional rights of the applicants and other Kenyans (who gave their views and which views were reduced into the Bomas Draft by the 2nd respondent and the National Constitutional Conference) as safeguarded under sections 1, 1A and in the principles values and spirit enshrined in the Constitution.

22. The grounds advanced by the applicants before the Constitutional Court for this Summons are:-

(1) That the applicants being men and women from diverse cultural, social, economic and political backgrounds but being all conscientious people of integrity and sharing a common destiny as patriotic Kenyans, who cherish peace and are tax payers are greatly aggrieved by the enactment of the Consensus Act which has unconstitutionally enabled the National Assembly usurp and desecrate the people's sovereign right to make their own constitution and has empowered the respondents alongside the President to engage in unconstitutional adventurism that would cost the applicants and other Kenyans as tax payers very dearly and would in all probability compromise the socio-economic and political stability of the Republic of Kenya.

(2) That Kenya being a sovereign republic and a multiparty democracy, the power to make a Constitution and to decide how her citizens are to be governed lies with the citizens themselves and not the National Assembly or the President.

(3) That the National Assembly being a creature of the Constitution and members of the National Assembly having sworn to work within and protect the Constitution, the former cannot purport to make, debate, amend or work on another or new constitution.

(4) That the President being a holder of an office under the Constitution and having sworn to uphold and protect the same and his powers being defined and limited by the same Constitution, cannot go behind the Constitution to promulgate another document or Constitution in the place of or in violation of the current Constitution nor can the will of the people be subject to or be contingent upon the whims, will or discretion of the President by an Act of the National Assembly.

(5) That it is undesirable and against principles of democracy and sovereignty of the applicants and other Kenyans for a minute section of the citizenry namely, the National Assembly to purport to make a constitution for the majority of the Kenyan people.

(6) That a constitution being a covenant between and amongst a free citizenry on how to govern affairs in freedom, no other person or body can purport to impose a constitution contrary to their plain views.

(7) That the powers conferred on the National Assembly by section 27 as amended by section 5 of the Consensus Act are unconstitutional and in conflict with section 46, 47, 49 and 56 of the Constitution.

(8) That the National Assembly has no power to make a Constitution and/or to debate, alter or amend the Bomas Draft in light of the decision in the Njoya case and of section I, IA, 47 and 49 of the Constitution.

(9) That the mandate to make a constitution, identify, debate upon and resolve any perceived contentious issues in the Bomas Draft lies solely with the sovereign people of Kenya and not the National Assembly and such an exercise by the National Assembly is contrary to the provisions of the Constitution and/or its principles, spirit and values as enshrined therein.

(10) That the recommendations of the Parliament Select Committee on the Review of the Constitution, the so-called "Naivasha Accord" are so far reaching that they will completely alter and mutilate the structure and character of the current Constitution and its governance institutions, that it would be unconstitutional to make them the subject of legislative action without reference to the people of Kenya.

(11) That the powers and duties conferred on the President by section 28 A of the Principal Act as amended by section 5 of the Consensus Act are in excess and in violation of section 8, 46 and 47 of the Constitution and the collective sovereign will of the people cannot be subject to, contingent upon or dependent on the will, act or whims of the President.

(12) That it is a cardinal principle of constitutionalism that the people's collective sovereign will requires neither validation nor approval of any authority in the land.

(13) That sections 27 and 28 of the Principal Act as amended by section 5 of the Consensus Act violate the principles, spirit and values of the Constitution and are in any event in conflict with sections 46 and 47 of the Constitution.

(14) That the people of Kenya, having the power to constitute and reconstitute their state and government and having given their views as to how they want this done, it would be in violation of the principles of democracy and the collective sovereign will of the people of Kenya for the Constitution of Kenya Review Commission 2nd respondent to conduct civic education on the Parliament Constitution, which constitution is not in line with the views given to the 2nd respondent by Kenyans, its report and the Bomas Draft made pursuant to those views.

(15) That it is against the principles, values and spirit of the Constitution and therefore unconstitutional for the 3rd respondent to overlook the Bomas Draft made in accordance with the views of Kenyans and to conduct a referendum on the Parliament Constitution, which Constitution is a product of minority views of the National Assembly as envisaged or contemplated in section 28 of the Principal Act as amended by section 5 of the Consensus Act.

(16) That it is unconstitutional, an abuse of and infringement on the rights of the people of Kenya to subject their collective sovereign will to the National Assembly and the presidency, the two being non-existent unless and until created, defined and limited by the people's collective sovereign will in a Constitution.

(17) That since the usurpation of the review process from the people of Kenya by the National Assembly, immense public resources have been spent and continue being spent on the unconstitutional process and unless the respondents are prevented by an order of this Court, they are likely to escalate expenditure to astronomical figures and the applicants and the people of Kenya as tax payers shall suffer irreparable loss not only in monetary terms but also in so far as their governance and the national stability are concerned.

(18) That section 28 B(4) of the Principal Act as amended by section 5 of the Consensus Act violates the constitutional rights of the 3rd applicant and other 56% (overwhelming majority) of Kenyans who live below the poverty line and cannot raise Kshs 5 Million in 80 years let alone in 2 weeks as stated in the said section which contravenes sections 70 as it severely limits, challenges and restricts his and their access to justice.

(19) Sections 17, 27, 28, 28A and 28B of the Principal Act as amended respectively by sections 4 and 5 of the Consensus Act violate the constitutional rights of the applicants and other Kenyans (who gave their views and which views were reduced into the Bomas Draft by the 2nd respondent and the National Constitutional Conference) as safeguarded under sections 1, 1A and in the principles, values and spirit enshrined in the Constitution.

23. The Summons was initially supported by affidavits sworn on 16th May, 2005 by Patrick Ouma Onyango and Michael Gitahi Ngunyi, the first and third applicants herein and other grounds and reasons to be adduced at the hearing hereof.

24. On the first day of the hearing, the Summons was dealt a blow by the withdrawal therefrom by the 1st applicant Patrick Ouma Onyango with three (3) other applicants, and were no longer parties to the Summons. The Court declined to order the joinder to the Summons by Mtumishi Njeru Gathangu who with several other applicants, representing a group calling itself the Yellow Movement .sought to be joined as parties. The Court's main ground for declining to join them was that they were not likely to add anything new or of value to the application.

25. Following the withdrawal of the 1st applicant Patrick Ouma Onyango he ceased to have any interest in the motion, and his Affidavit in support sworn on 5-05-2005 was deemed to have been withdrawn as well. This vacuum was immediately filled by the Affidavit of Bishop Stephen Karemu Muketha sworn on 31-10-2005, and filed on 1-11-2005. So the Summons is supported by the Affidavit of the said Bishop Stephen Karemu Muketha, the 2nd applicant and the Affidavit of Michael Gitahi Ngunyi, the 3rd applicant.

26. On account of economy of public time, we do not propose to set out in extenso in this judgment all that was stated in the said Affidavits, but we wish to state that we have looked at everything said in those Affidavits and have carefully studied all the material that was filed and oral submission by the three counsel namely Miss Nyariki, Miss Jedidah Wakonyo Waruhiu, ably led by Mr Amena Amendi, learned counsel for the applicants during the Eight (8) days hearing of this matter.

27. The respondents were ably represented by Miss Muthoni Kimani, Deputy Solicitor - General, assisted by Mr Obwayo, Senior Principal State Counsel representing the Hon the Attorney General, Mrs Lucy Kambuni and Njoroge Regeru for Constitution of Kenya Review Commission of Kenya, the 2nd respondent and Miss Jemimah Keli for the 3rd respondent, the Electoral Commission of Kenya (ECK).

28. We realize that even with the modern day aids employed in the production of documents, we are not (even if we had all the opportunity to do so, and we were not presented with such opportunity in terms of time to be able to do so), reproduce in this judgment every word we heard said to us by each of the personae dramatis in the 9 days or so of the hearing of this matter, nor indeed every word we read in the nearly one metre deep pile of written submissions and authorities cited to us on this complex and least understood and to many confusing subject of Constitution - making in peace-time without the hinder-sight of either a violent revolution leading to a ceasefire or truce document, or interim Constitution such as the documents we have heard of far and near (Uganda- with the late Dr A Milton Obote's pigeon-hole constitution, the Interim Constitution of Tanzania upon the Union of Zanzibar and Tanganyika upon the overthrow of the Sultanate in Zanzibar many of the West African Countries

Ghana, Nigeria which have undergone bloody internal strifes including civil wars) and lately the post-apartheid Interim Constitution of South Africa and subsequent Constitution.

29. We heard this matter continuously morning and afternoon except on the last day, on 27th October 2005, 31st October, 2005, 1st, 2nd, 7th, 8th and 9th November, 2005.

30. In their closing remarks on the last day of the hearing of this matter, Mr Amena Amendi, in his admirable and quiet, demeanour but incisive mind, exhorted this Court to rise to the challenge of constitutional interpretation of Constitution making and give a way, a lead, in making a people friendly Constitution and deliver our people from the current mine - field of constitution making. He dared to say that this would be the most important decision by the Courts since the trial of Dedan Kimathi. There was uncertainty, point the way, inject confidence in our people and expand the frontiers of our people in the governance process, that constitution making is a hall-mark in the democratic process. If the rights of the citizen are compromised, participation in the elections would be compromised, a liberal interpretation of the constitution would push the frontiers of freedom to our people, so that if the applicants' prayers were granted, it would secure the sovereignty of our people.

31. To do otherwise would cause our young, emerging democracy to stagnate too early in its growth as ours was an evolutionary system, and we must go to the next stage in our democratic development. The prayer is not just for the 9 applicants but for the 30 odd million Kenyans.

32. Muthoni Kimani learned Deputy Solicitor General implored the court to rule in accordance with the law.

33. Ms Lucy Kambuni, learned counsel who ably held the fort on behalf of the 2nd respondent after the departure of equally learned, eloquent colleague, Njoroge Regeru on an international commercial arbitration in the Far East, reminded us that the constitution was like a living tree, it must be watered with a pragmatic and practical and realistic interpretation.

34. Miss Jemimah Keli, quiet but incisive Counsel for the 3rd respondent associated herself with the sentiments expressed by her two colleagues. Taking these exhortations and expectations of our masters, the 30 million odd Kenyans populating our hills, plains, mountains, and deserts outside there, and no doubt those outside and beyond our borders, in the Kenyan experience in Constitution-making, we applied our mind as to what issues were raised both by the applicants and the respondents on what ought to be the decision of our collective mind.

Objections Raised

35. The respondents raised the following objections to the applicants Originating Summons:

    1. That the suit being representative must fail because the applicants have not complied with order 1 and 8 of Civil Procedure Rules and order 1 rule 12 Civil Procedure Rules.

    2. That the affidavits in support of the application do not disclose the source of the information.

    3. That the applicants have not complied with legal notice 133/01 and order 4 rule 3(a) Civil Procedure Rules in that summons were not obtained and served upon the respondents.

    4. That the first respondent having withdrawn from the suit, the supporting affidavit sworn by him dated 16.5.05 is deemed to have been withdrawn

    5. That the applicants do not have and have not shown that they have the locus standi to sue in these proceedings.

    6. That the Originating Summons offends provisions of order 36 Civil Procedure Rules.

36. Whereas ordinarily, this Court would prefer to consider the objections raised, which challenge the jurisdiction of this Court to entertain the Originating Summons, yet right from the onset this Court indicated to the Counsel that it was unlikely that the Court would take on the technicalities.

37. This is because this is a new matter in Kenyan jurisprudence -

In the case Albert Ruturi vs The Minister For Finance a decision of a Constitutional Court held that

> as a general rule relating to this type of public interest litigation, we wish to state, that what gives locus standi is a minimal personal interest and such an interest gives a person a standing even though it is quite clear that he would not be more affected than any other member of the population."

38. The case here revolves around the interpretation of the Constitution under section 123 thereof, and whether the rights of the applicants along with those of other Kenyans have been violated. We indicated at the very start of the proceedings that the applicants had a right to be heard, and the court had the jurisdiction to hear them.

39. This Originating Summons dealt with matters that are larger than the constitution itself. This was a matter that was not anticipated and so no procedure is provided for anywhere in the Kenyan laws. The Court dealt with this application under its inherent jurisdiction. The applicants have derived their standing in the matter from the very nature of the subject matter. All Kenyans are interested in this case and are keenly awaiting its outcome. It is matter of great public interest and it would have been impossible to get consent of all Kenyans in order to file or regularize the Originating Summons, given the nature of the orders sought and the time within which this application was to be heard and a determination made. It would have been impossible for the Court to ask the applicants to comply with procedure if there was any. The Court preferred to go for the substance of the application rather than deal with technicalities.

40. So that even though the objections raised and arguments by the applicants were valid and substantive, the court was reluctant to consider them and instead delved directly into the Originating Summons.

Issues Raised

41. After arguments were presented by both Counsel for the applicants and the respondents, the court after deliberations and having found that we were of the same mind, considers the following to be the issues and questions upon which this Court should make our unanimous pronouncements. They are as follows:

    1. Whether applicants have locus standi;
    2. Interpretation of the Constitution as relates to the Principal and Consensus Acts;
    3. Whether the validity of the proposed new Constitution is dependent upon the existing Constitution or whether the existing Constitution is the touchstone of validity of the proposed new Constitution;
    4. Since the current Kenyan constitution does not provide for its death, how does another Constitution come into being?;
    5. Who should initiate constitution making?
    6. What is the constituent power of the people how is it exercised and can it be limited?

7. Is there one set way of making a Constitution?

8. How have other jurisdictions gone about constitution making:?

9. At what stage is a Constitution deemed to have been made?

10. What is the effect of Bomas draft?

11. What is a Referendum and its implications in the constitution making process?

12. What is promulgation?

13. Does the Kenyan president have the power to promulgate the new Constitution?

14. hat is the political question?

15. Are the issues raised in the Originating Summons ripe for determination or are they moot hypothetical and premature;?

16. Consider the Njoya case in light of section 28J of the Consensus Act;

17. Can Parliament legislate against a court ruling using an Act of Parliament?

18. Finally whether the consensus Act is unconstitutional.

Submissions Applicant's

42. According to the submissions of Mr Amena Amendi, learned lead counsel for the applicants, there are many different ways, of Constitution -making and there are yet others to be invented. But the bottom line is at the very minimum the cardinal principle is, whichever way, or method is chosen, the peoples sovereignty and constituent power must be recognized, preserved, respected adhered to and implemented freely in the making of a new Constitution, that in Kenya there was no escape from the provisions of section 1, and 1A of the Constitution in constitution-making. According to said counsel the most ideal way of making a new and legitimate Constitution in peace-time can only be achieved if certain minimum or ideal parameters are found namely-

(1) there are spontaneous calls from the people for a new constitutional order;

(2) the calls reach a crescendo and become so overwhelming that a Government of the day cannot no longer ignore such calls, and begins to pay attention to the calls;

(3) the Government facilitates the election of a Constituent Assembly respecting as closely as possible the principle of one man one vote with the constituency with the least number of voters as the model and ensuring representation of minorities who would otherwise not be represented;

(4) The Constituent Assembly draws its own rules and regulations;

(5) The Constituent Assembly appoints a body such as the Constitution of Kenya Review Commission (CKRC) to collect views and opinions of Kenyans and prepare a working draft.

(6) The Constituent Assembly debates the views of the people and the working draft (confining the debate as closely as possible to only contentious issues as identified from views and opinions of the people and the CKRC (report) and comes up with a final draft;

(7) Subject the final draft to a referendum;

(8) If the Vote is "Yes" to the final draft in the referendum the Constituent Assembly declares that final draft the Constitution;

(9) In order to allow for a period of possible challenges in the results of the referendum (if the results are that it has been ratified) Parliament would have to amend the existing Constitution to make provisions for the transition so that the old Constitution continues in place while the referendum results are being challenged.

43. Mr Amena Amendi also postulated that it is not possible to provide for the challenge of the results of the referendum in the new Constitution in an ordinary Act of Parliament without first providing for the same in the old Constitution.

44. Counsel further postulated that there could be a variant to this ideal process so that where there is near unanimity in the Constituent Assembly, the Constituent Assembly may itself proclaim the new Constitution;

45. Mr Amendi also submitted that it was possible to commence and conclude the process outside any provisions of law, that there was no need to enact a law to guide the process, that the Constituent Assembly rules and regulations would be binding on the Constituent Assembly. He cited the example of India, although the Muslims in India refused to be bound by the conclusions of the Constituent Assembly.

46. Counsel argued further that the second legitimate and legal way of making a Constitution in Kenya would be for Parliament to amend the existing Constitution to expressly provide for making a new Constitution and abrogation of the existing one. The particular provision for the making of a new one would be the one to under- pin the CKRC Act, that CKRC Act would then provide for the election of the Constituent Assembly, which would operate above Parliament as it would, once elected make its own rules and regulations.

47. Mr Amendi further submitted that in the current situation, the CKRC Act is, plainly unconstitutional. It would have been the only law which provided for the election of members of the Constituent Assembly. The CKRC Act would not make rules for the Constituent Assembly, because since the Assembly was properly elected it would make its own rules and regulations or regulate its own procedures, well outside the control of Parliament.

48. Mr Amendi further argued that if, the Government (and we do not think, the Constituent Assembly) proceeded in the manner outlined by him, it would have put in place a Constituent Assembly before a Review Commission, because such a Commission becomes an organ of Government rather than an instrument of the people.

49. Counsel also submitted that a Government may sometimes be confused as to the real intention of the people and wonder whether they actually want a new Constitution or just a slight adjustment of the existing Constitution. In such a case, the government may appoint a temporary commission or committee or a working party to ascertain the real intention of the people before putting in place mechanisms for a Constituent Assembly.

50. In the ideal situation where there is a Constituent Assembly, the Assembly would operate parallel to Parliament or National Assembly, and any member of Parliament who wished to be elected as Constituent Assembly member would first have to resign from his Parliamentary seat and absolve himself of the oath to defend the existing Constitution and take a new one to faithfully exercise constituent power on behalf of the people. Counsel submitted that the act of converting Parliament

to a Constituent Assembly though it may on the face of it look legal if done through amendments of the Constitution, it still remains unconstitutional as it violates the peoples' constituent power.

51. Counsel submitted that this is what constitutes the concept of the rule of law as stated by Ringera J in the Njoya case.

> ... The constituent power is reposed in the people by virtue of their sovereignty and the hallmark thereof is the power to constitute or reconstitute the framework of government; or in other words, make a Constitution that being so, it follows ipso facto , that Parliament being one of the creatures of the Constitution it cannot make a new Constitution. Its power is limited to the alteration of the existing constitution only. Thirdly the application of the doctrine of purposive interpretation of the Constitution leads to the same result. The logic goes this way:- since
>
> (i) the Constitution embodies the peoples sovereignty;
>
> (ii) Constitutionalism betokens limited powers on the part of any organ of government;
>
> (iii) the principle of the supremacy of the Constitution precludes the notion of unlimited powers on the part of any one organ.
>
> It follows that the power vested in Parliament by sections 30 and 47 of the Constitution is a limited power to make ordinary laws and amend the Constitution, no more and no less."

52. Mr Amendi submitted that any organ created by the Constitution can therefore only exercise a limited mandate, limited by the Constitution itself for instance the office of the Attorney General, the 1st respondent, is a creation of the Constitution, it can only exercise such powers as are conferred to it by the Constitution. For the Attorney General, that power is defined in section 26 of the Constitution. Counsel submitted that it is an absurd argument to suggest that because the Attorney General is a member of Parliament he has additional powers as such member under section 30 of the Constitution. First the National Assembly has itself no power to make a Constitution, it cannot therefore donate a power which it does not have. Secondly the power of the National Assembly as was clearly reiterated in the Njoya case is limited to passing proposed ordinary legislation or bills for the amendment of the Constitution.

53 Mr Amendi also took issue with section 17 (A) and (F) of the Principal Act as amended by section 4 of the Consensus Act and suggested that if the court lifted the veil behind those provisions, it would find that those provisions were unconstitutional, including the facilitation of civic education on the proposed new Constitution. Counsel submitted in summary that the proposed New Constitution is unconstitutional because-

(a) it is based upon a product of an illegal and unconstitutional organ, the National Constitutional Conference - (the Bomas Conference).

(b) it is made by institutions and organs that have no constitutional power so to act, that is the 1st respondent (the Attorney General) and National Assembly,

(c) it is made in complete violation of the peoples constituent power under section 1 and 1A of the Constitution.

(d) Its making contravenes sections 26, 30, 46 and 47 of the Constitution.

(e) even if ratified by a majority (the proposed New Constitution) can never win universal acceptance and, can never be of universal application in Kenya as it cannot be binding upon those who vote against it or abstain, according to the principal of Ratification by Agency and Constitutional law.

(f) The third respondent, the Electoral Commission of Kenya is a body enjoined by law to act within the walls of the current constitution and not outside of it. It cannot conduct a referendum on an illegal document.

54. Mr Amena Amendi submitted that it would be illogical to find that the National Constitutional Conference was unconstitutionally constituted and yet find that its product is constitutional. Counsel submitted that the majority judgment in the Njoya case found that the National Constitutional Conference was established contrary to the provisions of the Constitution.

55. He relied upon the judgment of Lady Justice Kasango, at page 35, where she says-

> By prayer 14 the applicants seek a declaration that section 82 of the Constitution bars the respondent from constituting the NCC in a discriminatory manner." And at page 46, Lady Justice Kasango states - "the end result is that the prayer sought by the applicants, that is prayer 14 succeeds."

56. Counsel also suggested that Ringera, J also found the National Constitutional Conference was unlawfully constituted and violated the constitution. The result is that the very product of the National Constitutional Conference must be unconstitutional, and that the attempt by Parliament to validate the work and process of the National Constitutional Conference, the product of the Conference, and proceedings of the Conference via an ordinary Act of Parliament that is, the Consensus Act must fail. Counsel submitted that the result would have been different if section 4 of the Consensus Act had been enacted as an amendment to the Constitution.

57. We will pose here, and comment and answer the questions of whether or not the Njoya Case declared the National Constitutional Conference unconstitutional. A careful reading of the judgment of Mr Justice Ringera strongly suggests that the Njoya Case did not declare the National Constitutional Conference unconstitutional.

58. After reviewing the membership of the National Constitutional Conference, and finding that it was only one-thud of that membership (that is members of the National Assembly who were directly elected by universal adult suffrage, one person, one vote) and the majority composed of un elected membership, Justice Ringera concluded that-

> the NCC fails" the test of being a body with a peoples mandate to make a Constitution and the applicant's case that they have been denied the exercise of their constituent power by means of a Constituent assembly, is in my view unassailable. All I would want to add to that is that, as counsel for the applicants conceded, in a Constituent Assembly it is perfectly permissible to have some un elected membership."

59. The reasons for the un elected membership, the learned Judge tabulated are these-

> firstly in constitution making, it is necessary to have expertise in such matters as public affairs and administration, institutional design, constitutional law and practice, comparative government systems, and legal drafting. Secondly, a Constitution is for all, majorities and minorities alike, men and women and other social formulating. Accordingly there is need to have a representation of various interests. If one were to base membership of the constituent

assembly on elections only, the expertise and the special interest..... would be absent from the deliberative body."

60. After stating that the bottom or baseline in membership in the Constitutionmaking body is that majority must trace their roots to direct election by the people in whose name they are participating in constitution making Justice Ringera said-

> In reaching the conclusion I have, I must confess that I have even attempted to affirm the validity of the NCC as a Constituent Assembly considering the colossal amount of time and resources expended on the process so far the fact that all shades of political opinion and various social formations and interests had seats there.

61. I have in the end formed the conviction that constitution making is not an every day or every generations affairs.

62. It is an epoch-making event. If a new Constitution is to be made in peace time and in the context of an existing valid constitutional order/as is being done in Kenya) as opposed to in a revolutionary climate or as a cease fire document after civil strife, it must be made without compromise to major principles and it must be declared in a medium of legal purity. Sound Constitution making should never be sacrificial at the altar of expediency"."

63. After further discussion and finding that the second element in the exercise of a peoples constituent power, is the mechanism for the ratification of the Constitution made by the Constituent Assembly, whether called a referendum or a plebiscite, that facility is a fundamental right of the people in exercise of their constituent power."

64. The learned Judge went on to say at page 47 of his judgment-

> ..Indeed if the process of constitutional review is to be truly people driven, "Warjiku" the (mystical common person) must give her seal of approval, her very imprimatur to the proposed Constitution. If it is to have her abiding loyalty and reverence, it must be ratified by her in a referendum. Now looking at section 27 (5) and (6) of the Principal Act (unamended then), it is apparent that the right of a referendum is a contingent one depending on the absence of consensus at the NCC or the results of a vote thereat. The exercise of the constituent power requires nothing less than a compulsory referendum."

65. At the end of his consideration of the concept of constituent power Ringera, J found and held that the applicants had been denied the exercise of their constituent power to make a Constitution through a Constituent Assembly and to ratify it through a referendum, and granted the applicant's prayer for a referendum, (prayer 3), and participating in making it and ratifying the Constitution through a Constituent Assembly or National referendum (prayer 12).

66. There was no unanimity on the issue of discrimination alleged in prayer No 14 of the Njoya Case. Whereas Lady Justice Kasango, J granted it as stated above, Ringera J specifically dismissed prayers 7 and 14 of the summons (alleging discrimination in terms of section 1A, 70, 78, 79, 80 and 82 of the Constitution (prayer 7) and a declaration so in terms of Article 21 of the Universal Declaration of Human Rights (UDHR) 1948 as embodied and implied in section 82 of Constitution (prayer 14)

67. At the end of this well considered and epoch making judgment, Ringera J concluded, and we quote-

> "Final Orders"

In view of the conclusions I have reached above, and taking into account what has fallen from the lips of my brother Kubo J, and my sister Kasango Ag J it is obvious that the judgment of this Court is-

"1. That, Parliament has no jurisdiction or power under section 47 of the Constitution to abrogate the existing Constitution and enact a new one in its place. Parliament's power is limited to only alterations of the existing Constitution, the power to make a new Constitution/the constituent power) belongs to the people of Kenya as a whole, including the applicants. In the exercise of that power, the applicants together with other Kenyans, are in the circumstances of this case, entitled to have a referendum on any proposed New Constitution;

2. That the applicants have not established that they have been discriminated against by virtue of the - imposition of the National constitutional Conference (underlining ours) _

3. The applicants are not entitled to an injunction to stop the National Constitutional Conference; and

4. Every party will have to bear their own costs of the Originating Summons.

68. And the following declarations were granted in the Njoya case-

(a) Subsections (5) (6) and (7) and 27 of the Constitution of Kenya Review Act are unconstitutional to the extent they convert the applicant's right to have a referendum as one of the organs of reviewing the Kenyan Constitution into a hollow right and privilege dependent on the absolute discretion of the delegates of the National Constitutional Conference and are accordingly null and void. (These were the sections which provided for a referendum in the event of failure to reach a consensus by the conference).

(b) Section 28 (4) of the Constitution of Kenya Review Act is inconsistent with section 47 of the Constitution of Kenya and is therefore null and void. This was the provisions which stated that Parliament was to enact the Constitution within 7 days).

(c) the Constitution gives every person in Kenya an equal right to review the Constitution which right embodies the right to ratify the Constitution through a national referendum.

69. We observe that nowhere does the Court in the Njoya Case declare the National Constitutional Conference unconstitutional. To say that it was not a Constituent Assembly is not synonymous with saying that it was unconstitutional. For the National Constitutional Conference to be unconstitutional, there must be some provision in the Constitution abhorring its existence, or which is inconsistent with its being. The National Constitutional Conference was merely the last organ in the process of constitution-making. It did not have power to enact the proposed or any Constitution. Its mandate was limited to debating the draft Report and draft Bill prepared by the Constitution of Kenya Review Commission under the Constitution of Kenya Review Act.

70. Whereas we therefore agree with the finding of the court in the Njoya case, we reject the interpretation given thereto by Counsel for the applicants, and in this instance, that Njoya case declared the NCC as unconstitutional.

71. Reverting therefore to the submissions of Mr. Amendi, learned counsel for the applicants, he urged that a new and legitimate constitution in peace time can only be achieved if certain minimum parameters are met; namely-

(1) that the views of the people are heard and received and are recorded,

(2) those views are collated ,

(3) a body is established to discuss those proposals,

(4) that body, whether called, a congress, a Commission, a Convention, a Conference or commonly; or favoured terminology, a Constitution Assembly is established with a membership, specially and specifically elected with the mandate and purpose of writing a new Constitution.

(5) Depending upon the terms of such body, the document produced by the Constituent Assembly becomes the new Constitution of the country upon signification by its Chairperson that it is the document produced by the Assembly; such document then becomes the Constitution of the Country concerned.

(6) In other situations, the instrument setting up the Constituent Assembly may require that the final product of the Constitution making-body, be subjected to a people's plebiscite or referendum on the entire document or only upon some stated contentious issues

(7) Where the final product is subjected to a peoples plebiscite or referendum, the act of the people, voting for or against the whole document or those specific issues constitutes the enactment by the people of their Constitution.

(8) The new Constitution is brought into effect upon a date designated by the instrument under which the review was carried out,

(9) Unless there are challenges against the adoption of the new Constitution, or upon the end of such challenges, the new Constitution would come into force upon a date then designated by the authority adjudicating such disputes.

(10) The new Constitution would then be proclaimed by the designated authority under the instrument under which the review was carried out.

72. Towards the end of his submissions Mr Amendi conceded that there is no one way of making a Constitution. It can be initiated by a small group of people appointed by the government with reference to the interests of the Nation and that the Government can submit its proposals alongside other groups for consideration. It can also be initiated by Commission or like the American style which was by an unrepresentative body. However, he stressed that the most important consideration should be popular consultation. His suggestion is that the best way to go about it is as per his submission above and that the consensus Act has introduced a new method of constitution making which was not entrenched in the Constitution and the Act being an ordinary Act of Parliament, can not purport to introduce constitutional amendments to the Constitution.

73. With regard to section 42 A of the Constitution, under which the 3rd respondent purports to be mandated to conduct the Referendum, Counsel contended that a referendum Act should have been enacted which is contrary to his earlier submission that the Referendum should have been entrenched in the Constitution.

74. He adds that the Act does not provide how the Referendum will be conducted. Section 42 A provides for the conduct of National Assembly and Presidential Elections under chapter 7 laws of Kenya. His contention is that regulations made under the Consensus Act can not purport to amend an Act of Parliament that is chapter 7 on elections.

75. It is the applicants contention that section 28B(5) of the consensus Act is unconstitutional in so far as it impedes the 3rd applicants and 56% of the Kenyans population living below the poverty line, their right of access to justice. The section violates their fundamental rights under section 60(1) and 84 of the constitution because it is discriminatory in that it requires the applicant to raise Kshs 5 million within 7 days if he wishes to challenge the results of the Referendum. It was submitted that the amount was reached at arbitrarily and unreasonably and intends to lock out the majority of Kenyans from challenging the Referendum results. Counsel relied on the case of Ndyanabo v AG Court of Appeal Dar es Salaam 64/01. In that case, one of the holdings was that a person's right of access to justice was one of the most important in a democratic society and it can only be limited by legislation and even if it could be limited, such limitations could not be arbitrary or unreasonable or disproportionate and that poverty should not shut the doors of justice to applicants.

76. In later submissions Ms Wakonyo equates fundamental rights to the constituent power of the people which is inherent in the individual and cannot be limited and that there is also no need to have it textualised. Thise submission contradicts Ndyanabo's case which says the fundamental rights can be limited by statute but with provisos. Counsel further submitted that the section offends the doctrine of separation of powers in that costs of litigation are supposed to be determined by the court under the provisions of the Civil Procedure Act and Rules.

77. It is counsels contention that the said provision can not be used to keep off would be busy bodies because it is the Court which should determine who is a busy body after considering the Party's claim. The proposed provisions would never let the applicants case reach the doors of justice.

78. As to whether the prayer, was ripe for adjudication, Counsel submitted that the constitution making process is coming to a close and the threat of the applicant being denied access is real.

The Respondent's Submissions

79. Briefly, the following are the respondents submissions in response to the application.

80. Ms Muthoni submitting for both 1st and 2nd respondents agreed with the applicants that people are sovereign and that their constituent power is a primordial or primary power and can not be expressed or textualised in the Constitution. It is inherent in the people and is recognized by section 1 and 1A of the current Constitution. The constitution does not state how the power is to be exercised and counsel's contention is that there is no agreed way of exercising that power and counsel did this by looking at experiences in different countries. In her view, the validity of a new constitution is not dependent on the old constitution and counsel demonstrated this by considering the Njoya case on constituent power and the Consensus Act. Counsel urged that the unanimous decision in the above case was the peoples' right to a referendum. That Justice Ringera suggested 2 ways of constitution making, through a constituent assembly which would constitute peoples representatives or recognition of the Bomas Draft at a referendum. The draft was later altered by parliament and will be subject to a referendum. That the Judges never agreed that there has to be a constituent assembly or that constituent power had to be exercised through a constituent assembly. Ms Kimani urged that the product of Bomas is a constitutional proposal because people will decide at the referendum, whether or not it reflects their views and that the consensus Act is not therefore unconstitutional because it never sought to overturn

the judgment of the court. Counsel agreed that parliament has no power to make a constitution. According to Ms Kimani the Constitution will be made by the people at the referendum.

81. Counsel further submitted that the constitution-making process is a political process and hence the controversy before the court is political in nature and it would be prudent that the court does not intervene. The court should only look at the Constitutionality of the process. It is her contention that the adequacy and sufficiency of the process or contents of the draft can not be adjudicated upon by this court. That this court should not have adjudicated on the validity of Bomas as that is the mandate of the electorate. Counsel considered the American situation where courts do not interfere in political issues for purposes of maintaining political harmony between the 3 arms of Government and that they will not interfere in anticipated controversies but those that have already arisen.

82. It is counsels further submission that the court should not interfere with executive and legislative power in facilitating the referendum.

83. Counsel also submitted that some of the issues before court are moot or hypothetical. A moot question is said to be one that is controversial, uncertain or not clear. In respect of this case, Counsel argued that what will happen at the Referendum and thereafter is unknown. Counsel therefore urged that prayer 1 of the Originating Summons is moot because the National Assembly has already acted by debating and acting on the draft Constitution and made a resolution. Similarly prayers 2, 7 and 10 have already been dealt with, whereas prayers 3, 4 and 8 are hypothetical and speculative.

84. As regards the President's powers in promulgating the new Constitution Ms Kimani argued that promulgation is similar to the President giving assent to a bill and Promulgation is a date in a constitution when the constitution will come into effect and it is a function of the executive.

85. Promulgation is defined as follows, to declare or announce publicly, to put a law or decree into force or effect. Counsel said that there is no possibility of there being a vacuum in the country as anticipated by the applicants because the old constitution will still be in force till the new one takes effect when proclaimed. Counsel denied that there will be two constitutions in force at any one time as alleged by the applicants as there are transitional provisions in the proposed New Constitution, Articles 288, 289 and 290. Article 290 of the proposed new constitution provides that the old Constitution will stand repealed once the new one is put into effect. On the question posed by the applicants as to what will happen if the president does not promulgate the new Constitution Ms Kimani submitted that it is a hypothetical question. Such a question is said to be dangerous and the court can not adjudicate on such issue as it may cause embarrassment and is unenforceable. It is also speculative and can only be dealt with after the controversy arises. It was further submitted that promulgation does not in any way infringe on the constituent power of the people, but rather, facilitates it like other organs have done.

86. In response to the submissions made in respect of section 28 B (4) (5) of the consensus Act, Ms Kimani submitted that the applicant was not properly before Court. The Court has ignored these submissions on procedural defects of this application because the applicant has been heard anyway and as indicated earlier the Court would not delve in procedural technicalities. Counsel urged the Court to look at the intention of the legislature in setting the figure of Kshs 5 million in respects of costs before one can challenge the referendum. That the state considered the interests of the applicant vis a vis that of the majority of Kenyans. That in any event the applicant should prove that the right infringed is personal and that he has been shut out. He cannot agitate for others because this right can not be equated to constituent power.

87. Counsel went further to consider section 82 of the Constitution which provides protection against discrimination. It is argued that poverty is not one of the categories set out under that section. On this issue it was finally submitted that the claim is not ripe for adjudication because the right has not yet

been infringed. The Ndyanabo case which was relied on by the applicants was contrasted because in that case, the applicant was aggrieved unlike the applicant whose claim is anticipatory. The applicant's attention was drawn to the provisions of the Civil Procedure Act on pauper briefs if he cannot afford the costs.

88. The respondents do not dispute the Attorney General's mandate as provided under section 26 of the Constitution as the principal legal adviser of the Government. Ms Kimani contends that the Attorney Generals function in the Constitution making process is facilitative just like other organs have done. People will ratify what has been done at the referendum. She denies that the Kenyan people have been short changed as alleged by applicants.

89. In respect of section 28 J of the Consensus Act Ms Kimani agreed that Bomas was not perfect because of un-equitable representation of the people and parliament purported to recognize it but not perfect it and that in any case it does not matter where proposals are drawn from because the product of Bomas are mere proposals. It was further submitted that the applicants have not demonstrated that the Consensus Act or the above section is unconstitutional apart from hinging it on Bomas conference.

90. The respondents counsel tried to demonstrate that there is no one given way of constitution making and that the mode of Constitution making will depend on the special circumstances of each country and popularization of the Constitution. Mrs Kambuni considered the experiences of different countries. She ruled out the possibility of any Constitution achieving legal purity as envisaged by Justice Ringera in the Njoya case.

    1. The Indian experience; it is the constituent assembly that came up with the Constitution. It never went to a referendum

    2. The Pakistan experience; the Constitution was enacted by the constituent assembly with the assent of the Governor General

    3. The Uganda Experience; the process of Constitution making was initiated by the National Resistance Movement. It was ultimately enacted by a constituent assembly made up of both elected and appointed delegates.

    4. The Australian experience; people elected members of a commission to deliberate and agree on a constitution. It was put to the people at a referendum and sent to the United Kingdom for enactment.

    5. The Malayan Experience; the Constitution was enacted by commissions and put to the constituent assembly.

    6. The American experience; The constitution was written by delegates representing particular states who were not elected but composed remarkably by learned and talented groups of men: The people were not involved though it is referred to as the peoples Constitution.

    7. The Irish experience it was drafted in 1922 by the government and was approved at a referendum and the constitution was birthed.

    8. The South African experience: The various political parties, initiated it was debated in constituent assembly and the Constitutional Court confirmed it.

91. It was Mrs Kambuni's contention that even a government can come up with a Constitution and what matters is how people regard it and that in no jurisdiction has the government not been involved in the Constitution making process. In respect to parliament, counsel submitted it is the one that makes policies and best placed to originate a constitution as it would have consulted. Her argument is that

since there is no blueprint in constitution making the Court should accept the involvement by the people, collection of views, popularization of the draft through civic education and the referendum to have met the basic standards required of constitution making in Kenya.

92. In summary Mrs Kambuni urged the court to ignore the submission against the 2rd respondent as there is no prayer seeking to declare it unconstitutional. Ms Kelli on behalf of the 3rd respondent urged that the 3rd respondent is not a political body and is not involved in Constitution making. She said that the applicant's counsel intentionally failed to consider section 42A (e) of the Constitution which gives the 3rd respondent the mandate to perform "any other functions prescribed by law" and that parliament has prescribed the function ofthe Referendum under the Consensus Act section28. That the 3rd respondent has made regulations under legal notice 100 of 2005 pursuant to section 34 of the principal Act. Counsel's submission is that the 3rd respondent derives its mandate from cap 7 National and Presidential Elections Act and unless the consensus Act is declared unconstitutional, they will perform their function at the referendum.

93. We state on the outset as further explained below that these would be the summary of the order we shall ultimately arrive at-

Summary Of Findings

1. Prayer 1 -

   We are unable to grant the order sought because section 1 and 1A of the Constitution express Constituent power, and the touchstone of constituent power is not the existing Constitution. The validity of constituent power is assumed, and presupposed because it always rests with the people (sections 4, & 5) of the Consensus Act),

2. The order sought cannot be granted because sections 27 and 28 of the Consensus Act facilitate the exercise of Constituent power and the reasoning pertaining prayer No 1 applies

3. The order sought is disallowed for the same reasons concerning the touchstone of the validity of constituent power (section 4 of the Consensus Act.

4. The order sought concerning civic education is disallowed because civic education is part of the consultative process and cannot be a violation of the Constitution because it is pursuant to the exercise of constituent power.

5. Ratification by the people of Kenya by referendum.

   The peoples' act to enact a new constitution cannot be restrained as explained elsewhere- and in particular that right is assumed and presumed and presupposed to be with the people.

6. "Access to justice"

Sections 28 B (4 & 5) This prayer is refused on the ground that the prayer is premature on the doctrine of "ripeness" Challenge on Parliaments' Power (Section 27)

94. Principal Act and Section 5 of Consensus Act).

The order is refused on the following grounds-

1) Parliament debated on proposals and did not in law make a new Constitution and had no capacity to do so.

2) The claim is refused on the test of validity which we have set out in para 3 above.

Regarding the declarations:-

Challenge on role of Parliament

1) The declaration sought is refused because Parliament only dealt with Constitutional proposals, and did not purport to have powers to enact a new Constitution. The Njoya Case declared that Parliament had no power to enact and Parliament did not therefore contradict the judgment in the Njoya case. See also the validity test elsewhere in the course of this judgment.

2) Yet another challenge on role of Parliament

   Declaration cannot.be granted on the following grounds:-

   (i) because we regard the consultation as one structured process and Parliament as any other facilitator had the right to originate and debate constitutional proposals.

   (ii) The Bomas draft was not an enacted law, they were proposals..

3) Challenge to Parliament's Role

   We agree that Constitution -making is not a legislative process but we do not agree that Parliament elevated itself. At this stage Parliament just like any other interest group acted as a facilitator, and we find nothing unconstitutional in the exercise of that role.

4) Challenge to Process after Ratification/ Referendum

   We find no legal basis for the claim because adequate transition arrangements have been put in place and the President has authority both in the Consensus Act and also in the proposed new Constitution (if enacted by the people) to promulgate the new Constitution , without a gap being created.

5) Violation of Alleged Principles of Democracy and collective sovereignty will of the people Civic education is part of the consultative process and therefore part of the exercise of the Constituent power. The conduct of civic education cannot therefore reasonably affect or offend the will of the people or their sovereignty. There is nothing like the Parliament Constitution, under section 28 (1) of the Consensus Act because Parliament cannot enact a Constitution except where it is mandated as a Constituent Assembly. Bomas draft was part of the proposals in the constitutionmaking process. The people's constituent power will be exercised in a referendum. The National Assembly and the Presidency have not curtailed that right. Instead they are facilitative.

6) Promulgation

   This prayer is a repetition of the declaration sought in paragraph 4 and the same reasoning applies and is therefore also refused.

7) Security for Costs

   The declaration sought is for security for costs. It is refused because it is speculative and not ripe for determination.

8) Alleged Violation of Section 1 and 1A of the Constitution

   Fails on the validity test as expounded later in this judgment.

Definition of Constituent Power-Touchstone of Validity

95. The expression "Constituent Power" means the ability to frame or alter a (political) Constitution as (constituent assembly). The case of Njoya which has been cited in these proceedings has sufficiently described the power and for this reason, we need not revisit this. However, we must with respect indicate that we do not share the apparent contradiction in the Njoya judgment of Ringera J wherein in one place he says constituent power is constitutional and in another portion it is inherent and in yet another portion it is primordial. In our view, the constituent power need not be expressed as a constitutional right in order to be exercised because some constitutions, such as ours do not provide for their death. We do however share the view in Justice Ringera's great judgment that constituent power is inherent or primordial.

96. There cannot be any doubt that the Constitution vests legislative power in Parliament. However, ours being a rigid Constitution it is important to differentiate between legislative power and the constituent power. In the constitutions which require that a special procedure be followed and adhered to in amending the Constitution as is the case with the Kenya Constitution there must be a two thirds majority for parliament to secure this special constituent power vested in it by the Constitution because the Constitution is not an ordinary law and therefore any law made contrary to the provisions of a rigid Constitution is void. Similarly constitutional amendment made contrary to the special procedure provided under the Constitution would be void and the special procedure if specified must be strictly followed so as to give validity to a constitutional amendment.

97. In a flexible Constitution the constitution is an ordinary law and any law made contrary to its provisions repeals those provisions protanto see McCawley v R (1920) AC 691(PC) However ours is a rigid constitution and an ordinary law cannot violate or repeal the provisions of a Constitution.

98. However the exercise of legislative power and the distinction as outlined above is not applicable to the making of a new constitution by a constituent assembly or a referendum because constituent power is not subject to restraints by any external authority. In other words the constituent power to frame a Constitution is unfettered by any external restrictions and it is a plenary law making power. The power to frame a Constitution is a primary power whereas a power to amend a rigid Constitution is a derivative power, since it is derived from the Constitution and is subject to the limitations imposed by the prescribed procedure under the constitution.

99. The amending power must be exercised in accordance with the existing Constitution. In other words the touchstone of validity in respect of the amending power is the existing Constitution. On the other hand the touchstone of validity in respect of the constituent power is the people. Put differently there is no touchstone of validity in respect of constituent power because it is primary and assumed or presumed to exist and always vested in the people. Hans Kelsen in General Theory of Law and State and Wade & Phillips - Constitutional Law 4th Edition page 13 express the same view in their own words and we have touched on this in this judgment.

Illustrations

India

100. The Constituent Assembly of India had two capacities.

1. As a constituent Assembly it claimed and exercised plenary law making power of framing India's Constitution.

2. As the Dominion legislature under s 18, of India Independence Act it exercised restricted legislative power under the Act.

101. It took India three years to frame her Constitution using the process of a Constituent Assembly which was anchored on an Act of Parliament we mentioned earlier. We find no distinction between the two Acts of Parliament namely the Constitution of Kenya Review Act cap 3A and the Constitution of Kenya Review Amendment Act No 9 of 2004 upon which the Kenyan process is anchored and the Indian Act. The only difference is that in the case of Kenya the enactment of the Constitution is vested in a referendum instead of a Constituent Assembly. We shall revert to the Indian experience in this judgment. A new Constitution can be enacted by a Constituent Assembly which has been specially elected and mandated to do so or by a referendum. The exercise of Constituent power cannot be fettered as indicated above and unless there are provisions if any in the existing Constitution which provide for the exercise of such power by following a particular procedure, nothing can restrict its exercise by the people. The right of the people to exercise that power is inherent in them but it is also expressed in section 1 and section 1 A of the Constitution or implied in the sections.

102. The High Court in Njoya case declared certain provisions of the Constitution of Kenya Review Act cap 3A invalid for purporting to restrain the exercise of the constituent power by the people and purporting to confer that power on Parliament and for restricting that power on contentious issues only. On this point we do express our concurrence. In addition the Njoya case stated that the National Constitutional Conference established under cap 3A, was not constituted as Constituent Assembly because over two thirds of the delegates were not elected by the people. The court doubted the sanctity and infallibility of the process and clearly indicated that the only reason it did not declare the process invalid was because at the time of the ruling the conference had wound up and a court of law never acts in vain. In the light of that judgment the National Constitutional Conference draft remains and shall historically remain a Constitutional Proposal, although in our case we shall for reasons which appear herein see it as part of one long process.

103. Jennings The Law Of The Constitution 4th Edition at page 105 states that in most democratic countries, it is accepted that no fundamental change in the political system should be effected or made without a specific mandate from the people. The majority judgment by Justice Ringera, and Lady Justice Kasango's, were in our interpretation only unanimous on the need to have a referendum. However in the Ringera judgment the alternative of a Constituent Assembly is also mentioned and since the Bomas Conference was not a Constituent Assembly as per the findings of Ringera J both options of a Constituent Assembly and a referendum could still be availed. However as stated above the majority judgment was only unanimous on the need for a referendum. This is the view this Court shares and therefore in our circumstances the option of a Constituent Assembly is unnecessary. The applicants claim that referendum provisions are unconstitutional and that this Court should restrain or stop the referendum is not tenable.

104. Prof BO Nwabueze in his book Presidentialism In Commonwealth Africa 4th Edition at page 407 has identified the following methods of framing of Constitutional proposals that is by:

> Popular consultations, formalized discussions of the proposals in an assembly of the people (ie Constituent Assembly) and lastly final adoption by the constituent assembly or by the people (ie Constituent Assembly) and lastly final adoption by the Constituent Assembly, or by the people at a plebiscite (referendum).

105. From this it should be clear to all that the people have opted for a referendum.

Adoption of a New Constitution

106. Prof Nwabueze has also explained that on the African constitutional landscape where presidential regimes have sprung up since Independence with the exception of Botswana, have all adopted new Constitutions.

107. Historically, Governments, in various countries in Africa, have initiated Constitutional proposals such as in Ghana (1960) Tanganyika (1962) Kenya (1964) Uganda (1966) and 1967) Malawi (1966) Gambia 1970) and Siera Leone 1971 in these situations the countries mentioned did not adhere to any ideal steps in constitution making.

108. It is therefore clear that although the Governments must remain parties to the process, they have on the ground, and historically been the dominant parties in the framing of Constitutional proposals. That is not to say that the past practice was flawless or the ideal, since the ideal position does not exist and the position turns on the individual country's history and needs. However it is realistic to acknowledge Governments have a responsibility but they should not undermine the significance of the process of Constitution making which should be all embracing since it is not every generation that has the opportunity to frame a Constitution and as has happened in the past, it is one generation which exercises the power on behalf of many future generations because constitutions are intended to be permanent Charters. It would therefore in the opinion of the Court be undemocratic and usurpation of the people's power for a Government to force its proposals as the only proposal for framing a Constitution. The reason for this is that in a democracy, the mandate of the Government to govern is limited by the existing Constitution. It is therefore a limited mandate by the votes which put it into power. However where a government is elected on the basis of its promise to give birth or bring about a new Constitution, in our view it has a wider mandate to originate and facilitate constitutional proposals and it has a responsibility to put in place a machinery that would make it conducive to wide and extensive consultations to take place and this in turn means consultations with the people, Civil Society, Churches, political parties, minority groups and all interest groups who might have proposals of their own.

109. In the current situation we find that the government through Parliament did anchor a legal infrastructure for the constitutional proposals, debates and discussions to take place as described earlier. It is not in dispute that the Government did set up the legal machinery as set out in the two Acts described above with the assistance of Parliament which in turn is elected by the people. For this reason it would in our view be unjust to deny the process of framing the proposals legitimacy since it is the consultations and the people who legitimise the process. The test of legitimacy must be the popular will of the people.

USA

110. The US Constitution is now one of the oldest and it is important to note that before the constitution came into being several proposals from various stake holders representing the people and the States were submitted to the Philadelphia Convention in 1787 and several State conventions were also held.

111. It follows therefore that a historical analysis of the process does indicate that countries took different routes and in the case of the Presidential regimes of African governments did exercise unfettered freedom in making the proposals or influencing those made by government supported or inspired commissions. One reason for this unbroken feature in nearly all the Countries analysed was the factor of the one party democracies and its impact on governance, including one Party Parliaments. The disputed proposals in Kenya are certainly an improvement on the procedure followed at the advent of independence as most Parliaments consists of elected members representing various interests and

constituents. A majority decision reached by such representative parliament, although falling short of the ideal of a truly, representative and elected Constituent Assembly cannot justifiably at this time and age be said to lack some measure of mandate or legitimacy. It is therefore necessary to view the Government as an originator and facilitator. Like the illustration of the US experience above and we shall be reverting to it in this judgment the amalgam of the Bomas and other processes described above do, in our view constitute one unbroken political process that has culminated with the proposed new Constitution. We do not consider that it is the function of the Court to adjudicate on sufficiency or adequacy of the proposals as we consider the entire process from start to finish substantially a political process. It is clear from the historical analysis of the constitution making process in the other jurisdictions that no country has so far been able to claim perfection or purity.

112. However it is the peoples expression of their opinion in a referendum or a Constituent Assembly so empowered by the people which perfects the process and which also converts it into a legal process by enactment. Neither an existing Constitution, Parliament, Executive or the Judiciary has the power to stop the exercise of constituent power of the people to enact a new Constitution by way of a Constituent Assembly or by way of a referendum.

113. The reason for this is that Constituent power cannot be fettered by an existing Constitution in that in the hierarchy of power, the people come first and it is the people who gave rise to a Constitution. They are the supreme law givers. The Constitution though supreme is subordinate to the people.

114. At page 410 of Presidentialism the eminent Professor has stated quite rightly in the view of this Court that ideally consultations should occur at two stages, before and after the framing of the Proposals. In the view of the Court it is the first time in the constitutional history of this country that some consultations have taken place and we find that it would be unjust, unfair and prejudicial to good governance and against the public interest for a Court of law to be invited by a group of individuals no matter how eminent and well qualified to injunct this last phase of a long process, taking into account that the Acts of Parliament on which the process is anchored were debated and passed by a majority in a multiparty Parliament. We find and hold that the exercise of constituent power is a primary right of the people and no group, Parliament, the Executive or the Judiciary has the right to take the peoples right away. Indeed although Courts have the power to adjudicate on all disputes which are brought before them constituent power is one power they cannot fetter.

115. For the above reasons we find that this Court has no mandate to injunct the right or to declare that it should not be exercised. The Court would have to sit on the Moon or on the Planet Mars to be able to hold otherwise.

116. In addition the process of generating and assembling the proposals and of giving content and substance to them is a political process and our finding on this is that the Court is not equipped to adjudicate on this part of the process under the political doctrine principle since it is also not justiciable and the process having taken place it is moot. What we think is important is the existence of popular consultations which are capable of commanding the confidence, loyalty and obedience of the people because the acceptance and legitimacy of the ultimate product that is a new Constitution will depend on the degree or the extent of the consultations.

Discussion of the Proposals

117. In view of the debate in Parliament and the subsequent voting on the proposals and the approval of the proposals and the authority given to the Attorney General to frame the proposals into the proposed new Constitution it is important to touch on the importance of this aspect of the process in the constitution making process and an illustration of the constitution making for Ghana during

Nkrumah's regime in 1960 reveals a striking similarity between the Ghanian process and Kenya's current process. The process in Parliament, the claimed consensus building and what the Attorney General and his team have drafted would be well described by the following passage appearing at page 417 of Presidentialism:

> "It is arguable that given an existing elected parliament, it is unanimously wasteful and disruptive to go through the motion of electing a constituent assembly. This point is conclusively answered by the fact, admitted by the Ghana government, in the statement quoted above, that the existing parliament has no mandate to enact a new Constitution radically or substantially different from that under which it took office. It is entitled like anyone else, to originate proposals but its proposals are no more representative or binding than any others. However, if there had been popular consultation on, and approval of the proposals this could have been taken as conferring a mandate on the existing parliament to conduct formal discussions which would carry behind them the representative authority of such a body. In conducting discussions with the mandate of prior popular consultation and approval parliament is in fact cast in a different role and capacity that of a constituent assembly, and it seems perhaps more in accord with that role that it should formally assume that during any proceedings on the proposals".

118. Turning to the Kenya situation the parliamentary proceedings and the subsequent majority vote are on all fours with the above quotation and we find that Parliament cannot be faulted in both passing the Consensus Act and voting on the Constitution proposals pursuant to the Consensus Act.

119. In the case of Ghana the questions voted on at the referendum were;-

1. Do you accept the draft republican Constitution for Ghana as set out in the white paper issued by the Government on 7th March 1960?

2. Do you accept Kwame Nkurumah or Joseph Boatiye Panguah as the first President under the New Constitution?

120. In the Kenya situation it is not denied that the current Government was elected by the electorate on the promise to bring into existence a new Constitution and since this country has an existing Constitution the Government in Kenya has much wider mandate as both an originator and a facilitator.

Alteration of The Proposals, Validity of:

121. It is not convincing to the Court that alteration of the proposals at the stage of consultation or discussion can invalidate the proposals to be put to the vote by the people. Only the people can invalidate any such process by a No vote. A Court of law has no authority to stop the adoption or rejection at a referendum of a constitutional proposals on the basis that one on the other of the draft proposals were altered or mutilated since the Court is not equipped to prefer any of the set of proposals and drafts this being substantially a political process. We reject the applicants invitation to do so because under the political question doctrine and justiciability this is not a function for the Court.

Exercise of Judicial Power

122. The other reason why this Court cannot injunct, stop or restrain any of the processes leading to the referendum vote is that the exercise of the power to injunct or to stop or to restrain people from exercising their constituent power would constitute usurpation of the peoples power and a serious contradiction, in that judicial power is exercised on behalf of the people and it cannot therefore be exercised against them. When exercising constituent power the people are by the same act allocating

power to the Legislature, Executive and the Judiciary and also limiting the power in a completely new dispensation. Democratic governance would be impossible to attain, nor requirements of a modern government achieved nor would the peoples right to a new Constitution be realized if they are to remain pegged or tied to an existing Constitution. It would be impossible for them to exercise the right to renew redefine or reconstitute governments of their choice.

Anchor of the Proposals Comparative Constitution Making in Other Jurisdictions

123. It has been contended that the Constitution making process should have been based on the provisions of the existing Constitution instead of being anchored on an Act of parliament. A common thread in the Constitution making in African countries is that the process has been invariably been anchored on an Act of parliament.

124. Ghana (1960) Tanganyika (1962) and Uganda (1967). The constitution making process was in each country anchored on an Act of parliament. Although the process in Tanganyika (1962) and Uganda (1967) are not good examples of what one would call proper constitution making this Court has carefully considered the Ghanian constitution making with the current Constitution making in the country and the processes followed have striking similarities in terms of consultation and substance including their being anchored on the Referendum Act and the Consensus Act respectively.

125. In the case of Ghana Professor Nwabueze in his book Presidentialism Commonwealth Africa has at page 418 given the process in Ghana the following verdict.

> " In this connection it should be pointed out that the existing National Assembly in Ghana had already resolved itself once into a constituent assembly before the plebiscite, on the draft Constitution and it was in that capacity that it debated the proposals on the first occasion and by resolution recommended to the people and later ordered the holding of the plebiscite, the procedure cannot seriously be objected to."

126. In the case of Kenya there has been extensive collection of views, debates and discussions based on the Constitution of Kenya Review Act cap 3A. A further process of consultation and consensus building was tried under the Consensus Act and finally Parliament did consider the Draft Proposals and voted to have the proposals sent to the people in a referendum. Prior to the referendum the Consensus Act s 24 provided that civic education on the proposals be undertaken by the Constitution of Kenya Review Commission and that the referendum be conducted by the Electoral Commission which is an independent body under the existing Constitution. History will tell but in Commonwealth Africa and perhaps even in the other emerging states no single nation has endeavored for a longer period to have a new constitutional order than Kenya.

127. All major stakeholders claim to do what they did on behalf of the people. They further contend that the differences or contention in the process represent the popular support of the people of Kenya. It is not the business of the Courts to pass a verdict on what the people want. It is the business of the people to speak out in a referendum and their right to do so cannot be muzzled by the Court, any group of people, the including Parliament. It is a primary right which cannot be taken away or exercised on their behalf.

128. The touchstone of validity must be the people. They have the sole right of determining the completeness and acceptability of the proposals. We find and hold that the existing Constitution cannot be the touchstone of validity because it is a creature of the peoples law making power, that is the constituent power.

Section 47 of the Existing Constitution

129. It has been argued that for a valid new Constitution to come into being section 47 of the existing constitution should be amended to provide for the making of a new Constitution.

130. This Court does not regard this as good constitutional law or good constitutional justice. First we agree with the holding in the Njoya case that section 47 does not deal with the making of a new Constitution or the process of making a new Constitution. The power to make a new Constitution was not therefore vested in Parliament - it is the amending power that is vested in Parliament under s 47 subject to the special procedures concerning the entrenched provisions and also subject to the doctrine of the basic structure. We must also add that Parliament has no right to alter the basic structure of the Constitution and for example if it were to move to repeal chapter 5 on Fundamental Rights and Freedoms, or repeal the Republican, and democratic stipulations in s 1 and 1A of the Constitution this Court would if moved declare such amendments unconstitutional. Parliament has the power to amend because those powers derive from the provisions of section 47 of the Constitution. The power to amend is derivative whereas the constitution making power is primary hence it is not provided for in the current Constitution and need not been textualized. Even where a Constitution provides that although this would be good constitutional practice and good order such a provision is superfluous. It follows therefore that what was not delegated to Parliament by the constitution was reserved to the people i.e. the constitution making power was so reserved to the people and is inherent in them. This is in addition to the expression of constituent power in sections 1 and 1A of the Constitution.

131. In this regard the American doctrine of enumerated powers is shared with us except for the federal aspect of state powers. The doctrine has been summarized as follows:

> " The powers not delegated to the United States by this Constitution, nor prohibited by it to the states are reserved to the states respectively or to the people"

132. In the context of our constitution the power to make a new Constitution is with the people and not Parliament.

133. One might pose the question here, why must objections raised concerning s 47 and other related technical objections fail? The reason is that the Constitution is the grund-norm" in the Kelsenian theory of law - see Constitutions cf The World By MVPylee introduction page X

> " The 'grund-norm' (the constitution) is not created by legal procedure or by a law creating organ. It is not as a positive legal norm valid, because it is created in a certain way by a legal act, but it is valid because it is presupposed to be valid; and it is presupposed to be valid because without this presupposition no human act could be interpreted to be legal specially as a norm creating act. In other words the validity of the Constitution generally lies in the social fact of its being accepted by the community and for the reasons that its "norms" have become efficacious. It validity is meta-legal:- see (Hans Kelsen-General Theory of Law and State,"

134. The preoccupation with the people as outlined above in many jurisdictions reflects a wide acceptance and recognition of the constituent power of the people to make new Constitutions and in certain cases being consulted as regards an attempt at changing the intended provisions or in changing the basic structure.

135. For example see JM Kelly 2nd Edition - The Irish Constitution page 685 Article 46 (1) and (2) and 3 read:-

1. Any provision of the Constitution may be amended, whether by way of variations, addition or repeal in the manner provided by this Article.

2. Every proposal for an amendment of this Constitution shall be initiated in Dail Eitreann as a Bill and shall upon having been passed by both Houses of the Oireachtas be submitted by Referendum to the decision of the people in accordance with the law for the time being in force relating to the Referendum.

3. A bill containing a proposal for the amendment of the Constitution shall be signed by the President forthwith upon his being satisfied that the provisions of this Article have been complied with in respect thereof and that such proposal has been duly approved by the people in accordance with the provisions of section 1 of Article 47 of this constitution and shall be duly promulgated by the President as a law.

136. In Roche v Ireland (unreported). High Court (Carrol J) on 17 June 1983 a Plaintiff attempted to stop the Eighth amendment of the Constitution Bill 1982 being put to referendum on the ground that as the wording of the proposed amendment was unclear, he could not rationally decide how to vote and was thus deprived of his constitutional right to vote guaranteed by Article 47(3). Carol J pointing out obiter that he was not deprived of his constitutional right to vote since if uncertain of the amendments meaning he could simply vote against it and dismissed his action saying that "the wording of the amendment could not be the subject of scrutiny by the Courts at this stage; and that the courts had no jurisdiction to interfere with the legislative process.

137. It is clear to this Court that it is for the people to look at the proposals and it is not the function of the Court to fill in any perceived gaps in the process. We reject the invitation to interfere with what is evidently being put to the people in a referendum. It was the role of the politicians and other organized groups such as the churches, NGOs and other interest groups to give content and substance to the Constitutional proposals and to build up satisfactory consensus and that phase has apparently come to an end.

Parliaments Role as Originator of Constitutional Proposals.

138. Quite apart from the pattern established above in Commonwealth African Constitutional landscape the Irish example quoted above illustrates that Parliament can or may originate constitutional proposals. In the Irish experience there was expression of the existence of constituent power in the Constitution but it is not the only player in the generation of proposals and a process of consultation with the people and other organized stakeholders such as the Churches, political parties civil society, professional bodies and all interested groups and minorities must be put in place to give legitimacy to the process.

139. The process commenced by the Constitution of Kenya Review Act was faulted by the Court in the Njoya case on the two fronts namely pursuant to s 27(1)(c) of subsections (6) and (7) of the Act the peoples right to a referendum was restricted to those issues where consensus had not been achieved. The Court held that the right ought not to have been so restricted. s 47 did not exclude constituent power.

140. The Court having held that Parliament had no power under the existing Constitution to abrogate the existing Constitution the final process as declared in s 28 could not be finalized. The practical effect was that Parliament could not make a new constitution based on the National Constitutional Conference Draft and Report because NCC was not a Constituent Assembly and Parliament did not have the power to enact a new Constitution as contemplated in the principal Act (cap 3A). For the

above reasons that process ended up with a flawed product; because none of the Constitutional Review organs established, had the enacting power.

141. This Court therefore views the Consensus Act as a new linkage by Parliament as an originator and facilitator which took into account the holdings in the Njoya case. This parliamentary initiative as stated above appears to have borrowed heavily from the work of the Commission and the work of National Constitutional Conference "The Bomas Draft" and Report.

142. We have elsewhere described the entire process and the organs and functions of the Constitution Review Constitution Process.

Public Interest

143. In a few days time the people of Kenya shall for the first time in the country's independence history vote in a referendum. It is common ground that the people of Kenya have agitated for a new Constitution for a long time and it would not, among other grounds be in the public interest to interfere with the process on this ground as well.

144. A constitutional finding which disregards or ignores the large public interest clearly inherent, in a constitutional making process would be shortsighted and constitutionally unsound. In this regard we wish to quote from the Constitutional Lav.' cf India by HM Seervai 3"' Edition at page 2660 where Chandrachud J stated:

> " it is the common man's sense of justice which sustains democracies and there is a fear that the 39th amendment by its impugned part may outrage the sense of justice."

Enactment of a Constitution

145. While still on this topic it is important to observe that a comparative study of the constitutional structures of the Commonwealth countries does emphasize in a very special way that countries have not adopted a particular set of rules or a manual in constitution making. Instead nearly every country that has tried to homegrow a new constitution on its soil and each country has walked a lonely but unique path depending on its past history.

146. This is as it should be in view of the colonial history of former dominions so that when our illustrious judge and brother Hon Justice, Ringera (Rtd) inclines to view that:

> " if a new Constitution is to be made in peace time and in the context of an existing valid Constitutional order (as is being done in Kenya) as opposed to in a revolutionary climate or as a cease fire document after civil strife it must be made without compromise to major principles and it must be delivered in a medium of legal purity. Sound Constitution making should never be sacrificed at the altar of expediency,"

147. we must with great respect to the judge part ways although we share his vision if only the entire constitution making were to be regulated by a procedure set out in the Constitution before the enactment of the Constitutional Review Acts because in our experience from the structures we have been able to examine, that purity is on the ground unrealistic and utopian because even in situations where the existing Constitutions do not provide for their demise or death the constituent power is still intact and vested in the people and for the power to be triggered of, harnessed and exercised such a process is substantially political and in such a process twists, turns and breaks are inherent in the system. To compound the problem many of the nations emerging from colonialism inherited Constitutions that were handed down to them at independence by the colonialists.

148. The concept of constituent power did not exist in the colonialists mind but only in the dictionary because the concept of a constituent power is a liberating concept and its acceptance and practice would have made strange bed fellows with the concept of colonialism. Thus it has taken Kenya 42 years for a Court of law to declare that the people do have a constituent power.

149. The great break however came from the Irish Free State in 1937 when she gave birth to a homegrown constitution.

150. KC Wheare - the Constitutional Structure of the Commonwealth at page 89 on autochthony writes:-

> " For some members of the Commonwealth not enough to be able to say that they enjoy a system of government which is in no way subordinate to the government of the UK. They wish to be able to say that their Constitution has force of law and if necessary, of supreme law within their territory through its own native authority and not because it was enacted or authorized by the Parliament of the UK that is to speak, homegrown, sprung from their own soil, and not imported from the UK. They assert not the principle of autonomy only, they assert also the principle of something stronger, of self sufficiency, of constitutional autarky or a principle of autochthony, of being constitutionally rooted in their own native soil"

151. In Constitution making there cannot be any prescription that binds the nations together. In real life and practice of Constitution making there are certain basic standards which have universal or common application namely consultation with the people framing of the proposals, and the enactment by the people, directly through a referendum or by enactment through an elected and representative Constituent Assembly.

Examples:

(1) The Irish Experience:

Irish Free State Constitution of 1922 was superseded in 1937 by the Constitution of Eire and KC Wheare states in his book, that in enacting of the Constitution, great care was taken that it should not only be but also be seen to be 'homegrown" in legal theory and practice.

At page 94 he observes

> " In the first place, the draft Constitution presented by the Valeras government was presented to be Dail (Parliament) but it was not enacted by it. The Dail was invited to discuss the draft, to amend it, to approve it, but to go no further. Thereafter it was submitted to the people in a referendum, and their approval constituted the enactment of the document.
>
> It was thus impossible to argue that the Constitution obtained force of law through the authority of the Dail which in turn had got its authority from the Statute of Westminister and the Irish Free State Constitution Act 1922 - both Acts of the Parliament of the UK. On the contrary the constitution was an act of the people as declared in its preamble."

On our part the learned counsel for the second respondent made two important points which have the effect of demolishing the notion of purity and also of the effect of the ratification of the Constitution by the people at the proposed referendum and the subsequent promulgation:

(2) On the Irish as well as on the British view of the legal basis of the Constitution of the Irish Free State, the enactment of the Constitution of the Irish Free State, the enactment of the Constitution of 1937, caused a break in Irish constitutional history.

(3) There was a gap or break in legal continuity. Whether the Dail owed its authority to the Irish people or to the Parliament of the UK, it did not enact or purport to enact the Constitution of 1937. It showed to other Commonwealth countries a method of making a break with the past, and of conducting what in law was a revolution not an amendment or revision of the Constitution of 1922.

152. Obviously Ireland like Kenya carried out the above steps within an infrastructure of an existing Constitution.

153. In our view Constituent power is not only a juridical constitutional concept, it is a primary law making power that is not dependent on it being expressed or entrenched in the existing Constitution. It creates the Constitutional arrangement. It is the giver of the supreme law - the Constitution.

154. We therefore find that although we accept that the sections 1and 1A of the existing Constitution do make reference to the existence of constituent power or implies it, its existence or validity is not the Constitution, it is the people.

The Indian Experience

155. The Indian Independence Act 1947 empowered a Constituent Assembly to enact the Constitution. The CA had powers to enact other laws as well. Whenever it produced constitutional measures it regarded them as coming into force upon their signature not by the Governor - General, to whom they were not presented but by the President of the CA. His signature was not regarded as assent but as authentication as certifying that the measure which he signed was that which in fact the Assembly passed.

156. The assent of the Governor-General was never obtained. But this did not invalidate the Indian Constitution.

Wheare at page 98 poses the question:

> " Did the Indian Independence Act of 1947 make the assent of the Governor -General an essential part of the process of enacting all legislation, constitutional or non constitutional? If it did then all constitutional measures, including the constitution itself, passed by the CA, were not in fact enacted and did not obtain force of law under the authority of the Indian Independence Act. They derived their force of law if they had it, from elsewhere -from the people, from the C.A. itself as a sovereign body or from both"

157. Concerning the composition of the CA of India HR Khanna in the Making of India's Constitution page 247 observes:

> " The Constituent Assembly met for the first time on December 9, 1946 and continued its' deliberations till November 26,1949. Most of the members were politicians. It represented the very cream of those in the public life of the country. And in drafting the Constitution, the members of the CA. were assisted by a band of Civil Servants and jurists who combined within themselves great ability and a high sense of devotion and dedication. The Congress members of the CA. constituted 69% of the total membership. After partition of the

country which resulted in diminution of the strength of Muslim members the Congress membership constituted 82% of the total membership."

158. Members of the CA. were elected by the Provincial Legislature which in turn elected members of CA.

The South African Experience

159. Hassen Ibrahim in his book the Soul of a Nation, Constitution - making in South Africa at page 177 observes that when the people of South Africa voted on the 27-4-1994 General Elections, they voted to provide their newly elected leaders with two separate and distinct mandates: one to govern a new democratic society and two to draft the final Constitution. The election produced 490 political leaders at national level: 400 in the National Assembly and 90 in the Senate. In terms of s 68 (1) of the Interim Constitution, a joint sitting of these bodies made up the Constitutional Assembly (CA) The CA created awareness and engaged the public.

160. And at page 235 Ibrahim states this of the signing ceremony - while the signing of the Constitution into law was primarily an executive act, it was thought the Constitutional Assembly administration was best placed to deal with the planning of it. Conceptually, the event had to be dignified and solemn as opposed to celebratory for the President was to sign into law a Constitution, not just any ordinary law, a Constitution that was democratically arrived at in the most effective public participation process in the country and in pursuance to a mandate given by the electorate when they voted in April, 1994.

The American Experience

161. The American Constitution had its forerunner the Articles of Confederation and Perpetual Union. And the following is a useful quotation from Walter Bems "Taking the Constitution Seriously" at page 66.

> "Congress had called the convention for the sole purpose of revising the Articles of Confederation and reporting to the Congress and several state legislatures such alterations and provisions therein as shall when agreed to in Congress, and confirmed by the states, render the federal Constitution adequate to the exigencies of government and to the preservation of the Union"

162. Bem noted that everyone acknowledged that the Constitution that came out of the Convention was much more than a revision of the Articles of Confederation; it was wholly new in principle as well as provisions. It recognized the sovereignty not of each individual state but rather of the people of the US.:

On state delegation at the Convention Bem notes at page 93 - 94.

> "Some were unknown and remained so, but as strangers to each other. The more distinguished among them especially had worked together in Congress or army and, even when that was not the case knew each other by reputation. They were a remarkably learned and talented group of men 'Richard Henry Lee who did his best to prevent the ratification of the Constitution, acknowledged that "America probably never will see an assembly of men of like number, more respectable"

163. It is quite evident to us and to all that even the process that has produced perhaps the most honoured, venerated, respected and perhaps one of the oldest constitutions of the World is far from being perfect or pure. Indeed, the question which was similar to the question being asked by some Kenyans today and also in this constitutional case was asked in America by Patrick Henry - one of the heroes of the

American Revolution and we find it relevant to our country's current situation or circumstances. Patrick Henry posed!

> " What right had they to say"
>
> We the people, "Who authorized them to speak the language of We the people instead of" We the states?"

The Australian Experience

164. In an article cited to us by the Learned Counsel for the respondents "Hon Sir Niniain Stephen - Our Demotic Constitution" published in (1994) 68 Australian Law Journal has written:

> " The Australians directly elected members of a convention to deliberate and if agreed adopt a Constitution for Australia. The elected members deliberated and adopted a Constitution which was put to the people for approval in a referendum. Thereafter the Constitution was transmitted for enactment by the Parliament of the United Kingdom."

165. The applicants have attacked Parliaments role in legislating the two Acts ie the Principal Act cap 3A and the Consensus Act No 9 of 2004 upon which the Constitution review process is based. It is claimed inter-alia that Parliament exceeded its powers. On this we do not agree. We find that there is nothing wrong in Parliament originating constitutional proposals provided consultative talks take place with the people on the proposals and the final product put to the people in a referendum.

166. We take great consolation and also find solid support for this view in the view expressed by Herman Schwartz-Building Blocks for a Constitution at page 13:

> " First should the Constitution be written by an ordinary legislative body or by a special Constituent Assembly? If the decision is to go with the former, incumbent legislators can write a Constitution that keeps themselves in office. A special Constituent Assembly representing as many elements in society as possible is preferable, even though it is more cumbersome and expensive."

167. Again in the applicants own authority cited to us" The Place of Parliament in the Legislative Process" by LA Sheradon at page 279 a beacon of light appears in the form of these words:

> " There is always a danger of constitutional theory lagging far behind constitutional practice. In this field of law far more than any other in it is common to hear such expressions as "In theory that is correct. But what actually happens ... and what actually happens often seems to be regarded as an upstart with not quite the correct educational background ... we feel that at all costs the theory of the Constitution must be upheld, forgetting that its constant modification over the last seven hundred years has alone saved from decay and that indeed, this adaptability is one of its greatest assets.

168. It is more than ever necessary today to show that Parliamentary democracy is a flexible instrument and to judge its institutions not by theories of the Constitution which were applicable to other circumstances but by the way in which they meet the needs of the day; by a functional not a priori approach."

169. To conclude on this important topic it is fitting to set out two quotations in the Presidentialism In Commonwealth Africa - BO Nwabueze appearing at pages 393 and 394 respectively.

At page 393

> " But the proposals would also need to be put through an organized and formalized process of discussion in an assembly of the people; a constituent assembly, which of necessity again must consist of individuals selected by the people for the purpose. There the proposals would be discussed in detail, and amendments could be made. The final adoption of the proposals as the Constitution and supreme law for the government of the community may follow either of two procedures namely by the Constituent Assembly (with or without prior reference to the people at large) or directly by the people by means of a plebiscite. A Constitution adopted in the way outlined is truly an original Act, an emanation of the people from whom it derives its superior authority and its quality as a supreme, overriding law."

At page 394

> " The argument smarks of excessive formalism. If the state is a creation of the people by means of a Constitution and derives its power of Law-making from them, it may be wondered why the people who constitute and grant this power cannot act directly, in a referendum or otherwise, to give the Constitution the character and force of law. After all the Constitution being the starting point of a country's legal order its "lawness" should not depend on its enactment through the lawmaking mechanism of the state, but rather on its recognition as such by people who are to be governed by it. It is today generally accepted that the American Constitution obtains its entire force and efficacy, not from the fact that it was ratified by a pre-existent political community or communities -for it was not - but from the fact that it was established by the people to be governed by it. There can be no doubt that today a referendum or plebiscite is a legally accepted way of adopting a Constitution though, adherence to formalism still sometimes require that after adoption by the people the Constitution should be formally promulgated by a pre-existing state authority, invariably the Head of State. It is pertinent to emphasize however that a referendum or plebiscite lacks a genuine constituent and legitimizing effect unless it is preceded, at the drafting stage or after, by serious discussion of the constitutional proposals on as wide a platform as possible. This is exemplified by the process followed in America when the Constitution was drafted by a convention after thorough discussion followed by even more mature and long deliberations in the ratifying convention in the various states. An equally genuine process is adoption by a Constituent Assembly and ratification in a plebiste as in the case of the Swiss Constitution of 1848."

170. It follows that popularization of a Constitution is an essential step so as to achieve understanding and acceptance by the people who alone can give it legitimacy. For this to be attained we find that a referendum does in a way give the people a sense of ownership, identification, attachment and involvement to the document.

171. The overwhelming public interest in the process cannot therefore be ignored and must in the circumstances be upheld. We find that the Kenyan experience does have all the three essential prerequites in Constitution making, popular consultations, framing of the proposals and the proposed enactment by the people in a referendum.

172. Courts interference with what is a political and legislative process - whether this is the province of the court: The exercise of discretion if any:

> The answer the Court gives to this question is that whatever the technicalities or the legal theory, sound constitutional law must be founded on the bedrock of commonsense and the Courts must now and in the future appreciate the limitations on formulation of policy, legislative process and practical politics because the Courts are ill equipped to handle such matters. In all the jurisdictions cited in this judgment constitutional initiatives and proposals have either been initiated by Parliament or government. What is constitutionally objectionable is for Parliament or the Government to monopolise the process and fail to involve other stakeholders including the people of Kenya. Indeed, the initiative under the Constitution of Kenya Review Act (Cap 3A) was similarly initiated or originated and no court has so far faulted it on the basis of it having been so initiated or originated. Any interested group or groups in the country can originate proposals.

173. The Court fully agrees with the observations of Lord Denning M R in the celebrated case of Blackburn v Attorney General (1971) I WLR 1037, in which an applicant invited the Court to issue a declaration against the Attorney General to the effect that on entry into the Common Market, signature of the Treaty of Rome by Her Majesty's Government would be in breach of the law because the government would then be surrendering in part the sovereignty of the Crown in Parliament for ever. Lord Denning held thus in striking down the suit:

> " We have all been brought up to believe that in legal theory, one Parliament cannot bind another and that no act is irreversible. But legal theory does not always march alongside political reality ... Take the Acts which have granted independence to the Dominions and territories overseas. Can any one imagine that Parliament could, or could reverse those laws and take away their independence? Most clearly not. Freedom once given cannot be taken away. Legal theory must give way to practical politics."

174. It is also important to recall the holding of Salmon LJ:

> " Whilst I recognize the undoubted sincerity of Mr Blackburn's views I deprecate litigation the purpose of which is to influence political decisions. Such decisions have nothing to do with the Courts. These Courts are concerned only with the effect of such decisions if and when they have been implemented by legislation. Nor have the courts any power to interfere with the treatymaking power of the sovereign. As to Parliament, in the present state of the law it can enact, amend and repeal any legislation it pleases. The sole power of the Courts is to decide and enforce what is the law and not what it should be now or in the future"

175. Turning to our situation, s 47 of the Constitution gives Parliament power to alter the Constitution. This power is only subject to compliance with the special procedure set out in the section eg votes of 65% required in the second and third readings of the altering or amending bill.

176. This court has in the Njoya case held that abrogating or the making of a new Constitution is not included in the definition of the word "alter", in s 47. S 47 does not therefore regulate the making of a new Constitution.

177. It follows therefore that the two Acts passed by Parliament with a view of facilitating the comprehensive review of the Constitution namely, The Constitution of Kenya Review Act (cap 3 A) and the Consensus Act (Act 9 of 2004) can only offend or violate S47 if they purport to amend the existing

Constitution which is not what they have done. They are only facilitative Acts for the purpose of the making of a new Constitution by the people. This is quite clear from the title of cap 3A:

> "An Act of Parliament to facilitate the comprehensive review of the Constitution by the people of Kenya and for connected purposes."

178. They are clearly not amending any provision of the Constitution nor do they violate s 47. They are not Constitutional Amending Acts at all. If they were they would have to comply with the entrenched provisions of s 47 fully otherwise they would be void. In our Constitution the amending power is derivative ie it derives from the Constitution. However the constituent power of the people to make a new Constitution is primary and is not derived from the Constitution. Its touchstone of validity is not the Constitution but the people. You cannot attack it or challenge it on the ground of unconstitutionality unless the procedure to make a new Constitution is specifically set out in the Constitution. In any event, the exercise or facilitation of constituent power must be assumed or presumed, pre-supposed to be valid as explained above. The validity of the Acts cannot be questioned and they are valid as facilitating the exercise of Constituent power.

179. On this ground alone it should be clear why the orders and declarations sought must fail. They are based on the mistaken view that constituent power must be textualised.

180. Meaning of important words with special reference to sections 1 and 1A of the Constitution

181. It is important to highlight the meaning of the following words as they appear in Blacks Law Dictionary 8th Edition:-

1) Plebiscite:

   - A binding or non binding referendum on a proposed law, constitutional amendment or significant public issue

   - A direct vote of a country's electorate to decide a question of public importance such as union with another country or a proposed change to the Constitution.

2) Referendum:

   - 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

   - A vote taken by this method

3) Constituent Assembly:

   Able to frame or amend a Constitution

4) Sovereign:

   The political body consists of the collective number of citizens and qualified electors who possess the powers of sovereignty and exercise them through their chosen representatives.

5) Democracy:

   Government by the people either directly or through representatives

6) Republic:

   A system of government in which the people hold sovereign power and elect representatives who exercise that power. It contrasts on the one hand with a pure democracy in which the

people or community as an organized whole wield the sovereign power of government and on the other the rule of one person eg King

182. It is therefore important to bear in mind the meaning of the words or terms used above.

183. With the above definition of a Republic in view it is clear that the Constituent power of the people is expressed in s 1 and 1A of the Constitution which read:

(1) "Kenya is a sovereign Republic"

(1A) The Republic of Kenya shall be a multiparty democratic state.

184. It also follows that the right to a referendum is also equally covered in the above provisions because it is a decision or a vote exercisable by the people themselves. Consequently any facilitative Act which recognizes constituent power see s 26 of the Consensus Act and Constitution of Kenya Review (Amendment) Act (No 9 of2004) ss 26 - 28 recognise the right to a referendum which is exercisable by a sovereign people in a Sovereign Republic which is also democratic.

185. All the same the right cannot be restricted or curtailed even when expressed or textualised in a constitution.

186. In addition in passing the facilitating Act Parliament invoked s 30 and s 46 of the Constitution respectively which read:

> " The legislative power of the Republic shall vest in the Parliament of Kenya, which shall consist of the President and the National Assembly"

187. It is clear that the legislative power of Parliament under s 30 is not limited and can only be limited by the Constitution.

> " S 46
>
> 1. Subject to this Constitution, the legislative power of Parliament shall be exercisable by Bills passed by the National Assembly
>
> 2. When a Bill has been passed by the National Assembly, it shall be presented to the President for his assent."

188. Would the courts be entitled to restrain the implementation of the Constitutional making process which has been anchored under the two Acts passed in accordance with s 30 of constituent power and s 46 of the Constitution? Even where the exercise has not been textualised its validity is assumed, presumed or presupposed to be there. The answer to the above question must be clear "No" firstly because they do not violate the existing Constitution. Secondly the courts would violate the cherished principle of separation of powers. Thirdly the courts cannot injunct, stop, hinder or interfere with the Constituent power and also the Constitution does express the power in s 1 and s 1A of the Constitution. Fourthly the Constitution making process is substantially a political process, the Acts having been debated in Parliament and passed. Finally the validity of the exercise of constituent power is assumed, presumed or presupposed as indicated above. Invoking the principle in Black Burn v The Attorney General (ibid) legal theory must give way to practical politics and the Courts must send out clear signals that they will not and are not meant to provide avenues of articulating failed political proposals. The avenue for this is Parliament and the people of Kenya. Courts shall continue to resist being tempted to enter into the arena of politics. Political action is out there and it is largely

unjusticiable. The Courts shall confine themselves to areas where they can effectively enforce their orders because courts of law never act in vain.

The Process

189. This Court views the above described process as one. The proposed new Constitution is the final product of the process and it is being taken to the people of Kenya to enact it as the new Constitution or reject it. No other organ known to the law can make the Constitution on their behalf. It is quite clear to the Court that although the Constitution making process as described above has been anchored on two ordinary Acts of Parliament, the two Acts were made in accordance with the legislative powers vested in Parliament by virtue of s 30 and 46 of the Constitution and although Parliament did not declare itself expressly as a Constituent Assembly as in Ghana, in practice it played a leadership and managerial role by virtue of anchoring the Constitutional making process in the two Acts. The two Acts do not violate any provisions of the Constitution because they did not amend or purport to amend it. The two Acts were made in recognition of constituent power of the people of Kenya to make a new Constitution and this is expressed in s 26 of the Consensus Act. This Court has not come across any state or jurisdiction except Irish Republic and South

190. Africa which has an existing Constitution and which has not anchored Constitution making in an Act of Parliament. The two Acts Kenya has used to launch her new Constitution making process, are in our view valid and are not unconstitutional. Parts of cap 3A were declared void in the Njoya case for purporting to take away the peoples Constituent power to make a new Constitution and for vesting the right to enact the Constitution in Parliament which right should have been expressed as lying with the people. This explains why the Bomas initiative failed as a legal process. It was premised on the mistaken view that Parliament could enact a new Constitution. The Act also purported to take away from the people the right to make that Constitution through a referendum. The Act purported to confine the right to a referendum only to some proposals coming out of the Bomas process and in particular the contentious issues.

191. Following the finding and the declarations of the majority ruling in the Njoya case there was no way the Bomas proposals whether by way of a Draft bill and its report could translate into a new Constitution, the Court having held that the National Constitution Conference was not a Constituent Assembly because only one third of its delegates (read Members of Parliament were elected) and two thirds were not elected by the people and the subsequent inability of Parliament to make or enact the final draft Constitution. It is from this standpoint that Parliament took the second initiative through the Constitution of Kenya Review (Amendment) Act 2004 to repeal the offending provisions of cap 3A in order to relaunch the process. This second Act has substantially taken into account the findings and the declarations made in the Njoya case because a machinery for the holding of a referendum was set up and the Act also provided for further consultations with all the political interests including all the stakeholders - a Constitution making process being largely political consultative and a consensus building process.

192. The question this Court needs to answer is whether Parliament or the Executive arm of the Government can originate valid constitutional proposals. The answer to this question must be yes, for the following reasons:-

    1) Constitutional proposals can originate from any political interest in the country provided proper or adequate consultations with all the other political interests, and stakeholders take place. However Parliament or the Executive arm of Government as originator cannot validly monopolise the process by disregarding the constituent power

2) Parliament in the event of a political stalemate perhaps provides the most representative political interests in the country since the majority of members of Parliament are directly elected by the people,

3) As regards the additional Executive arm of the Government they would have reason to originate constitutional proposals since it is not disputed that the current Government was elected into office directly by the people with a mandate inter-alia to bring into being a new Constitution. It therefore had the peoples mandate to initiate proposals.

193. The above explains why Prof Nwabueze in the book referred to earlier has come up with clear findings that in Commonwealth Africa the origination of Constitution proposals or amendments have been invariably the Government. At the risk of repeating ourselves the main steps in the process are:-

1. framing of proposals for a Constitution (Final part done by the Attorney General and his team of experts)

2. popular consultations (see the review structure established under the CKRC Act)

3. formalised proposals in an assembly of the people (ie Constituent Assembly) (Only mentioned in the Ringera Judgment - but it is only one of the options with number 4)

4. final adoption by the Constituent Assembly or by the people at a plebiscite/referendum (expected to take place shortly).

194. It is clear from the above that steps 1, 2 and 4 have substantially been complied with except for lack of a Constituent Assembly (as per Njoya findings) but it must be appreciated that Parliament did debate the formalized proposals which in the view of the court substantially satisfy this requirement as well, although Parliament was strictly speaking not a Constituent Assembly - but this requirement is not necessary where there is a referendum. The current Court challenge appears targeted at requirement (4) that is the final adoption by the people at a plebiscite or a referendum. This is clearly an alternative to a Constituent Assembly. In our view the Kenyan process as anchored in the two Acts does satisfy the basic requirements.

195. Wade & Philips - Constitutional Law 4th Edition at page 13 has this to say about the sources of a Constitution:

> " It is true that there is no special source giving expression to the rules of the Constitution in the form of a code which is unattainable save by the act of a special constituent assembly or a specific reference to a popular vote."

196. It is therefore clear that whatever the process chosen by any particular country and there is no rule of thumb on this provided the above minimum requirements are substantially complied with it is the people who make the Constitution. The Government or Parliament (unless acting as a Constituent Assembly) can only originate proposals. The framing of constitutional proposals can be entrusted to a small group see Presidentialism at page 407. In our case the Attorney General and some foreign and local experts performed this role before the publication of the proposed new Constitution.

Enactment of a Constitution and the Touchstone of Validity

197. The arguments and grounds relied on by the applicants are premised on the seriously mistaken view that the peoples power to make a Constitution can be restrained or prevented by the existing Constitution. Constitutions are permanent charters. Some do not provide for their demise, and therefore the touchstone of the validity of new constitutional proposals cannot be the existing

Constitution. Where they provide for their demise, as we said earlier those provisions should be invoked for the sake of good order and the rule of law.

198. Nwabueze makes the point at page 421 in these illuminating and enlightened words:

> " The power to enact the constitutional proposals into law should rightly belong to the people, and be exercisable by them either directly at a referendum or by a constituent assembly so mandated by them"

199. It follows therefore that there is no Constitution making in the current circumstances of Kenya until the people enact it in a referendum.

Initiatives or Proposals for a New Constitution are not Unconstitutional

200. It has bee suggested by the applicants that the involvement of the current constitutional organs including Parliament, Executive, the President, the Attorney General etc in the new constitution making process is a betrayal of the existing Constitution and could constitute treason or subversion. This Court does not share such a horrendous view. On the contrary it is mistaken attachment to the inability of peoples constitution making power and the lack of appreciation that it is a power that cannot be controlled by outside forces that brings confusion and uncertainty whereas a proper appreciation of the peoples Constitution making power and giving it the pride of place could instead lead to an evolution or orderly change and a new dispensation. Thus writers have used the observation of Dicey that "the twelve unamendable Constitutions (of France) have each lasted on average for less than ten years and have frequently perished by violence" see Dicey, Law of the Constitution 10th Ed p 129.

201. Although what is being advocated by the applicants is that the nation remains static, Kenya's existing Constitution is not unamendable and this is clear from s47. Amendments are expressly permissible subject to the special procedure outlined in s47. In the case of the U S Constitution Article 5 is unamendable because it states that "no state, without its consent shall be deprived of its equal suffrage in the senate."

202. The Constitution of the US has been existence for more than 200 years and there has not been a revolution. Australia and Canada have similar unalterable provisions but there has not been a revolution there. With respect what is being advocated that Kenya fails to enact a new Constitution because the old does not provide for its demise and that the initiatives in making a new one are invalid lacks logic and sounds retrogressive and utopian.

203. Again, Presidentialism has touched on this at page 397 - thus the case for new constitutions in developing countries emerging from colonialism has been convincingly stated:-

> " It may even be conceded that the need for a Constitution that is able to evolve with changing social and political conditions is perhaps greatest in developing country launched into independent statehood under a Constitution made for it by its former imperial masters."

204. The author has described the Cyprus Constitution Of 1960 where Justice Vassiliades remarked upon what he calls "the sin of ignoring human nature in the making of the Constitution.

> " Time moves on continuously he says!" Man is by nature a creature of evolution and changes as time moves on. The Constitution was basically made fixed and immovable ... As time moves on, while the Constitution remained fixed the inevitable crack came - perhaps a good deal sooner than some people may have thought with grave and far reaching consequences

- see Attorney General of the Republic v Mustafa Ibrahim & others 1964 1 Cyprus L Rep 195, 208"

205. The evolutionary nature of progressive constitutions cannot be ignored and this Court shares the view expressed by a Parliamentary Secretary in Nkrumah's government in Ghana and cited in Presidentialism at page 397 as follows:-

> " The Constitution of any country develops by evolution.
>
> No Constitution is static."

206. We hold, find and declare that in the hierarchy of authority the people rank first because it is the people who give birth to Constitutions. The peoples Constituent power cannot be stopped inhibited or muzzled by any of the organs of modern government including any existing Constitution especially where the Constitution making is being done under an existing Constitution which is fixed and does not provide for its death. The American Constitution although the product of a civil war was drafted by a convention and ratified by the requisite number of states ie (9 states) various proposals and plans were considered by the convention as explained. Above and by the ratifying conventions.

207. It follows therefore no constitutional proposals can claim purity or infallibility or legitimacy as has been claimed by the applicants because it is in the nature of Constitution making to receive proposals from at least the major stakeholders or political interests in the country. The politicians in Kenya had ample time to give the proposals form substance and content and it is not the function of the court to approve or disapprove any of the proposals except where they violate the existing Constitution or derogate from the exercise of Constituent power or interfere with it. Indeed should the current Constitution making process fail a new process of Constitution would have to start de novo. The Constitution writing itself has yet to happen because the peoples referendum declared by this Court has not taken place. It is the people who will bequeath to themselves a new Constitution and all other organs including the Courts must bow to that right. The words which appear in the preamble of the American Constitution and which have been adopted in most modern Constitutions are not idle words. Instead they shall continue to remind the people of their right and heritage in Constitution making. Every word underlines and underpins the hierarchy, the making of the Constitution and the enactment by the people. For this reason permit us to reproduce them here because they demolish the main points raised by the applicants in this matter:

> " We the people of the United States, in order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America."

Standing or locus standi

208. In Hans Muller Murenburg v Supt Presidency Jak Calcutta 1955 1 SCR 1234, 1295 (55) A - SC 367 the Supreme Court of India held and we quote:

> " The Court will not hear an objection as to the constitutionality of a law by a person whose rights are not affected by it."

209. In AK Gopolan v State 1960 SCR, 88, 120 [150] A SC 27 the Supreme Court of India held that a statute cannot be declared unconstitutional merely because in the opinion of the court it violates one

or more of the principles of liberty, or the spirit of the Constitution, unless such principles and that spirit are found in terms of the Constitution.

210. Chief Justice Gwyer amplified on the same point in the following terms at page 120-121:

> "Where the fundamental law has not limited, either in terms or by necessary implication the general powers conferred upon the Legislature we cannot declare a limitation under the notion of having discovered something. In the spirit of the Constitution which is not even mentioned in the instrument ... But it is only on express constitutional provisions limiting legislative power and controlling the temporary will of a majority by a permanent and paramount law settled by the deliberate wisdom of the nation that one can find a safe and solid ground for the authority of the courts of justice to declare void any legislative enactment. Any assumption of authority beyond this would be to place in the hands of the Judiciary powers too great and too indefinite either for its own security or for the protection of private rights."

211. Again Chief Justice Latham in the Australian Communist Party v Commonwealth (1950-51) 83 CLRI 148-9 observed:

> "I am aware that it is sometimes said that legal questions before the High Court should be determined upon socio logical ground that is - political economic or social. I can understand Courts being directed (as in Russia and Germany in recent years) to determine questions in accordance with the interests of a particular political party. There the Court is provided with at least a political standard. But such a proposition, as for example the recent Banking case (1948) 76 CLR, should have been determined upon political grounds and that the court was wrong in adopting an attitude of detachment from all political considerations appears to me merely to ask the court to vote again upon an issue which Parliament had already voted or could be asked to vote and to determine whether the nationalization of banks would be good thing or bad thing for the community. In my opinion, the Court has no concern whatsoever with any such questions. In the present case the decision of the court should be the same whether the members of the court believe in communism or do not believe in communism"

212. We find no inconsistency between the provisions of the Acts and the existing Constitution, the Acts having been passed pursuant s 30 and s 46 of the Constitution. The policy or provisions in the Acts constituting and facilitating the exercise of Constituent power by the people cannot be challenged in our view. In addition the court would have no mandate to restrain the exercise of Constituent power. Again turning to some of the key provisions in the Constitution making process section 26, of the Constitution of Kenya Review (Amendment Act) No 9 of 2004 (baptized the Consensus Act)", it is quite evident that this particular section specifically recognizes and acknowledges constituent power and is in our view the clearest reflection of Parliament's acknowledgement of the primary nature of the power. It will be recalled that the new provisions in the Consensus Act were enacted by Parliament as amendments to cap 3A following the challenge posed to the Bomas process (ie NCC) by the majority decision in the Njoya case on the referendum (ibid). S26 is as a result of the holding and the declaration in Njoya's case concerning the constituent power.

213. It would be a serious contradiction and serious abdication of responsibility for this court like in the Njoya case to declare and to uphold the existence of constituent power (not covered by s 47) -or outside s 47 and in the same breath accept an invitation by the applicants to stop the direct exercise of that same right by the people by way of a referendum. If the Ringera judgment upheld two methods for the exercise of the constituent power through a Constituent Assembly and a referendum this Court

now walks the extra mile of declaring and holding that popular consultations framing of constitutional proposals followed by a referendum is sufficient. In addition this Court would like to declare in no uncertain terms that the exercise of the constituent power cannot be stopped, injuncted or interfered with except under any of the grounds set out in the Act and the regulations facilitating it. Constituent power is primary (not derivative). It is not subject to any external power and we hold and declare that the power can be exercised either by a duly elected and representative Constituent Assembly or directly through a referendum as proposed. For this reason the Kenyan process cannot be legally faulted.

Jurisdiction

214. It has been argued by the respondent in the written grounds of opposition that this court has no jurisdiction to entertain this matter (although the point was not pursued during their submissions) and that we should determine this matter as a preliminary point. Indeed an application has been filed raising this. However the Court declined the invitation to do so for reasons to which appear hereinafter.

215. We do not share the meaning attributed to s 60 of the Constitution by the respondents. The High Court has unlimited jurisdiction in criminal and civil matters but where else in the Constitution is the jurisdiction of the High Court limited by the Constitution? Except where Parliament has by an Act of Parliament conferred special jurisdiction in another Court or tribunal eg the Industrial Court under the Trade Disputes Act it would serious abdication of duty and responsibility for the High Court to hold that it has no jurisdiction. What is not specifically excluded is not prohibited. Even where its jurisdiction has been limited by statute its jurisdiction can still revert to it and again using the example of the Industrial Court, if the Industrial Court exceeds its jurisdiction or has no jurisdiction and rules on a matter outside its jurisdiction the High Court notwithstanding provisions of s17 of the Trade Disputes Act, which purports to oust the jurisdiction would still be entitled to intervene.

216. Turning to the matter at hand this Court has repeatedly emphasized that it respects the doctrine of separation of powers and would not interfere with the decisions of Parliament or its standing orders. The Court is also acutely aware of the provisions of s12 and s29 of the National Assembly powers (of and Privileges Act) (cap 6) and that no suits can be filed against organs of Parliament or its officers. However even these provisions cannot override this court's jurisdiction in enforcing constitutional rights especially fundamental rights and freedoms under s 84 of the Constitution.

217. Do the sections oust completely the jurisdiction of the High Court in constitutional matters? The answer is "No". Take the following examples:

    1. Supposing an organ of Parliament purports to exercise powers of arrest. Is the High Court upon whom judicial powers vests under the Constitution supposed to intervene on behalf of the aggrieved? Yes, the High Court has a constitutional duty to stop any such exercise of judicial powers by Parliament.

    2. Supposing Parliament decided tomorrow to pass a Constitutional Amendment Act repealing chapter 5 on the Fundamental rights and freedoms - this Court would if moved declare that Parliament does not have the power to scrap fundamental rights under the Constitution. The Court would do this under the doctrine of basic structure. That is, Parliament's power to amend does not include the power to scrap such a basic structure of the Constitution.

Interpretative and Declaratory Jurisdiction

218. I therefore hold that it is the duty of this Court (because the Constitution has not limited it specifically) to exercise its original jurisdiction in full. It has an interpretative and declaratory jurisdiction in respect

of each of the provisions of the Constitution. It has a duty where moved to ascertain whether in any of the constitutional provisions there are enforceable rights and obligations and declare or refuse them.

Where there is a controversy or dispute this Court has judicial power to adjudicate.

219. In the case of Pharmaceutial Manufacturer Association of South Africa ; In re: ex-parte Application of The President of The Republic of South Africa, 2000(2) SA 674 Chaskalson P held:

> " that every exercise of public power was subject to the power of the courts to ensure constitutional compatibility..."

220. We find that we have the jurisdiction both under the Constitution and the fact that we exercise judicial powers on behalf of the people to adjudicate on issues touching on the exercise of such powers.

221. We find that this Court should not restrict itself or limit its jurisdiction because in many matters parties look to the Court as the final frontiers in the defence of justice, liberty and equality. Thus the political question doctrine does in the view of this Court come in handy where larger constitutional questions touching on Parliament and the Executive are at issue. It is for this Court to define the extent of its jurisdiction when such jurisdiction has not been limited by the Constitution or any other law. We do have jurisdiction to adjudicate on the issue of constituent power although it is larger than the Constitution.

Political Question Doctrine

222. As indicated above it is for this Court to define the limits of its jurisdiction and we do accept as good constitutional law on this point the American constitutional law view of the doctrine as expressed in American Constitutional Law 2nd Edition - Lawrence H Tribe at page 97:

> " One conventional view of the doctrine grounds it in the assumption that there are certain constitutional questions which are inherently non-justiciable. These "political questions" it is said concern matters as to which department of government other than the courts or perhaps the electorate as a whole, must have the final say.
>
> With respect to these matters, the Judiciary does not define constitutional limits. Professor Louis Henkin however has forcefully criticized the idea that there are parts of the Constitution to which the Judiciary must be blind. The political question cases, he argues, do not support such a proposition. In these cases, the Supreme Court concluded or could have concluded that a particular legislative or executive action fell within a constitutional grant of authority and without the scope of any constitutional limitation, and thus the action at issue, because constitutionality proper was open only to political challenge. Alternatively Henkin urges, the Court ruled or could have ruled that a particular constitutional restriction was unenforceable because it did not confer standing to sue upon the parties who sought to invoke it or because it required for its enforcement remedies which were judicially unmanageable or equitably unwise.
>
> Professor Henkin is clearly right that one should not accept lightly the proposition that there are provisions of the Constitution which the courts may not independently, interpret, since it is plainly inconsistent with Marbury v Madson's basic assumption that the Constitution is judicially declarable law."

223. The application of the political question doctrine does in the view of this court dictate that this court cannot undo an Act of Parliament because it contains and reflects the decision of Parliament which

has in turn the power to legislate, unless the Act of Parliament violates the Constitution, this Court has no constitutional jurisdiction to invalidate it or any of its provisions.

224. The argument that certain objectives were not attained in managing the process is a matter this Court would be unable to judicially enforce at this stage since the collection of views, the framing of proposals has already taken place and the question whether or not the objectives were met is largely a political question.

225. In other words the process leading up to the publication of the proposed new Constitution is in our judgment non-unjustiable firstly due to the political nature of the process and secondly because of the succession of events which cannot be reversed and in which the Court cannot effectively grant any enforceable remedies. Thus for example whether the proposed new Constitution is valid or not is a separate question because it is speculative and at this stage there is no justiciable controversy before us. What is at stake is a proposal to the people of Kenya.

226. We find that the issue whether the principles of s 5 have been met does not present a real and substantial controversy neither do the applicants have standing because their stake as claimants does not reveal any personal legal injury to them as applicants. It is for the people to determine whether the objectives are reflected in the proposed new Proposal and the applicants have no standing to purport to have this determined on their behalf. What they are claiming cannot immediately be adjudicated upon by a Court of law. Their remedy is to vote in the referendum. For this reason we endorse fully the Doctrine of Justiciability - again as outlined at pages 68 - 69 of American Constitutional Law (ibid) s follows:-

> " In order for a claim to be justiciable as an article III matter, it must "present a real and substantial controversy which unequivocally calls for adjudication of the rights asserted." In part, the extent to which there is a "real and substantial controversy is determined under the doctrine of standing" by an examination of the sufficiency of the stake of the person making the claim, to ensure the litigant has suffered an actual injury which is fairly traceable to challenged action and likely to be redressed by the judicial relief requested. The substantiality of the controversy is also in part a feature of the controversy itself - an aspect of "the appropriateness of the issues for judicial decision ... and the actual hardship of denying litigants the relief sought. Examination of the contours of the controversy is regarded as necessary to ensure that Courts do not overstep their constitutional authority by issuing advisory opinions. The ban on advisory opinion is further articulated and reinforced by judicial consideration of two supplementary doctrines: that of "ripeness" which requires that the factual claims underlying the litigation be concretely presented and not based on speculative future contingencies and of "mootness" which reflects the complementary concern of ensuring that the passage of time or succession of events has not destroyed the previously live nature of the controversy. Finally related to the nature of the controversy is the "political question" doctrine, barring decision of certain disputes best suited to resolution by other governmental actors"

227. The claims caught by the above principles are briefly:-

(i) The adequacy, completeness of the constitutional proposals presented to the people in the new proposed Constitution. - we find this to be a political question. It was for the politicians to play their role and they have already done so. The Courts have no role here. It is the people now to decide on the adequacy, sufficiency, contentions and completeness of the proposals.

We are persuaded to apply the test set out in the American Jurisprudence second Edition pg 168 - 170 on the doctrine of political question.

> " Thus the Supreme Court of the US has indicated that in determining if a question is a political question the appropriateness under our system of government of attributing finality to the action of the political department and also the lack of satisfactory criteria for judicial determination are dominant considerations. Elsewhere too the Court has indicated that there will be a political question where the need for finality in the political determination is dominant."

(ii) What has already been done by Parliament or the Attorney General is already moot and beyond challenge now

(iii) The issue of the security and costs is not ripe. This Court cannot anticipate a constitutional issue in advance of the necessity of deciding it. The controversy on security for costs is premature or "unripe" as the Americans would put it.

s 28 B (4) - Access To Justice

228. The applicants have sought a declaration that s 28 B (4) of the Consensus Act violates the third applicants right of access to justice in that he is handicapped and cannot afford Kshs 5 million being the specified security for costs to be deposited within 7 days of the filing of an application challenging the results of the referendum. It is claimed that over 56% of Kenyans will be denied access to justice in that they live below the poverty line.

229. The court poses the following question. Have the applicants and especially the 3rd applicant established legally established rights and interests?. The answer at this point in time is that they have not. The referendum is an event in the near future and therefore no legal right or interest has arisen capable of being protected by the court. The right or interest must be in existence now for it to be infringed or threatened with infringement under s 70 of the Constitution. The court holds the view that there shall still be life in Kenya after the referendum and courts of law shall still have their doors open to litigants.

230. We accept as good law the principle stated in the case of Antigua And Barbuda of Spencer v Attorney General & others 1999 3 LRC I in these words:

> " "In respect of whether a litigant had locus standi to bring an action in public law cases, the courts had adopted the approach of first determining the nature of the alleged violation of the constitution and proceeding to determine whether the applicant had a relevant interest only if it was considered that there was a sustainable allegation of the said violation."

231. S 28 B (4) is obviously intended to apply in future and for this reason it is not our wish to deny a future Constitutional Court determining the merits if moved by any aggrieved applicants with legally enforceable rights and interests. We consider that it would not be right for this Court to give an advisory opinion on the issue. The sole power of the Court is to decide and enforce what is the law and not what it should be - now or in the future as was so well put by Lord Justice Denning in the case of Blackburn v Attorney General (1971) All ER 380. In this case Lord Justice Stamp explained the situation such as this Court is currently placed, in these clear words:

> " It is not part of this Courts function or duty to make declarations in general terms, ... more particularly where the circumstances in which the court is asked to intervene are purely hypothetical."

232. The applicants and the 3rd applicant have not established an enforceable right today to complain of its contravention. The declaration sought cannot be granted by this court and the same is refused.

Promulgation of the Proposed New Constitution

233. It has been argued that s 28 of the Consensus Act which provides for the promulgation of the proposed new Constitution by the President is ultra vires the Constitution. It has further been argued that the power to promulgate should have been contained in the existing Constitution. It has also been contended that before the promulgation of the new Constitution there shall be two parallel Constitutions in place at the same time. As a result a declaration has been sought in the following terms:

> " The current Constitution not having any transitional provisions under which either the Presidency and/or the National Assembly can, as an institution(s) make, participate in the making of a new Constitution or promulgating a proposed new Constitution to be the new Constitution, any law, not being a law within the Constitution that gives the National Assembly or the Presidency such power or right to so make, participate in the making or promulgate a proposed new Constitution to be the Constitution is ultra vires the Constitution and therefore review null and void."

234. The first point to note concerning this contention is that we shall not be the first nation to promulgate a new Constitution. The Irish Constitution was promulgated and does also provide for promulgation of important amendments as well. The provision was however in the Constitution.

235. As held above the constituent power to frame a new Constitution is not subject to an existing Constitution. A provision providing for promulgation need not be stipulated for in an existing Constitution. However in a country that respects the rule of law it must be noted that supremacy of law is a cherished principle. In addition, Constitution making can only be regulated by written law, and it is therefore absolutely necessary to manage the exercise of constituent power by law, hence Acts of Parliament to manage the process were for example passed in India as the (G A Act) and the Referendum Act of Ghana in 1960. The provision to promulgate is contained in the Consensus Act, which Act is in our view on all fours with the Referendum Act of Ghana.

236. It is important to stress that in a situation where the proposed new constitution is being framed with the existing constitution in force Parliament is not limited in its exercise of legislative power and the Consensus Act is a product of the exercise of Parliament's legislative power as argued elsewhere in the judgment. It is also significant to note that the President was duly elected by the people and in promulgating the new proposed Constitution he will be acting as an agent of the people after their having enacted the Constitution themselves at the referendum. He will not be doing the promulgation because he is above the people but on the contrary because he is their servant. It is the people who shall have conferred the President with the power to promulgate a new Constitution because the proposed new Constitution does have a promulgation provision.

237. It is utter rubbish to suggest that there shall be two parallel Constitutions at any time when the new one is enacted by the people.

238. In law it is the people who shall enact the new Constitution at the referendum, if majority votes are attained. The process of bringing the new proposed Constitution shall be as under:

1) The referendum - the actual enactment takes place by people (directly) if simple majority vote attained

2) Article 289 of the proposed new Constitution provides that the new proposed Constitution shall come into force upon its promulgation by the President

3) The effective date has been defined in the proposed new Constitution as the date the new Constitution comes into force

4) The repeal of the existing Constitution shall be as per Article 290 of the proposed new Constitution which reads:

> " The Constitution in force immediately before the effective date shall stand repealed on the effective date."

239. Blacks Law Dictionary 8th Edition defines promulgation as "To promulgate means to make a law publicly known after its enactment."

Oath of Office by the President

240. Paragraph 8 in the sixth schedule made pursuant to article 288 of the proposed new Constitution stipulates that on the effective date, the President (among others) shall take and subscribe the appropriate oath or affirmation under the new Constitution.

241. It is clear to us that the coming into force of the new Constitution shall be on the effective date and the oath of office by all other Constitution job-holders shall be on the same date. The promulgation shall be on the effective date and the automatic repeal shall be on the effective date as well.

242. The objection that there shall be two parallel Constitutions at any given time lacks substance and we decline to grant any declaration sought or any other order sought or at all.

243. In the case of Eire (Irish Republic) there was a Constitution break which is a more serious affair than promulgation. Similarly there was a break in India and this did not invalidate the constitutional process or invalidate the constitution in force at any given time.

Allegiance

244. The President, the institutions and all the people who have facilitated the exercise of the Constituent power of the people and which must in a democracy be managed and facilitated by law are not committing any offence known to law because the constituent power is primary and it is not derived from the existing Constitution and therefore the touchstone of the validity of the acts of facilitators are the people who in turn occupy a higher hierarchy as the givers of the supreme law and the question of subverting the existing Constitution does not therefore arise at all. The allegiance to the new Constitution shall be on the effective date.

245. The right of the people to make a new Constitution is specifically recognized in s 26 of the Consensus Act whose full description is "The Constitution of Kenya Review (Amendment) Act No 9 of 2004 and reads as under:-

> " Recognising that the people of Kenya collectively have the right and power to replace the Constitution, sections 27, 28 and 28A are enacted to facilitate the exercise of that right and power."

246. To describe the actions of facilitating the exercise constituent power of the people as subversion is a serious misdirection. The exercise of constituent power by its nature (involves all the people) and by sheer necessity certain institutions, organs and persons must be involved in the facilitation.

These include the Review Commission, Constituency Constitutional Forums. (CCF) National Constitutional Conference NCC), Parliament, Presidency and Attorney General. Suggesting that these institutions and persons were subverting the Constitution is misguided law and a revelation of lack of understanding of what constitution making power and its management and facilitation entails. It is also important to provide a structured process as has already been done under the two Acts. There cannot in a modern civilized system of government be a vacuum and the exercise of the power must be anchored on some written law and a country can never have a better choice than an Act passed by an elected and representative Parliament. This is the common thread in all Constitutions which have been made in peace time.

247. As indicated elsewhere there are four known ideals in the exercise of constituent power and countries have come up with their special structures or processes which cannot necessarily be said to be unacceptable provided they have met the basic requirements which appear to be three namely participation by the people in the process, framing of Constitution of proposals and the enactment by a specially elected Constituent Assembly or ratification/enactment in a referendum. The four ideals are:

    i. The framing of constitutional proposals (which can be entrusted by law to a small group of individuals such as has happened in Kenya. The Attorney General was empowered by law and he in turn formed a group of both local and international experts in constitutional law.

    ii. Popular Consultations

248. There is no known formulae provided there are effective consultations.

249. As described early in this judgment the structured process as described above does in our view constitute effective consultations. But as stated above this is for the people.

250. The entire process since the commencement of agitation has taken up fifteen years. The structured process is from 1997 - 2005 and in terms of cost it is estimated to have cost billions of shillings. While it is clear to us that the Courts should not be judges of the sufficiency or adequacy of the consultation (being a political process) our research has not disclosed any other nation on earth which has expended so much time energy and resources and consulted so widely and created so many organs of consultation. In this regard however, we must state that if the final proposal is inadequate in the eyes of some, the blame must fall squarely on the shoulders of the politicians who had the time and opportunity to give the country more options in terms of proposals since the generation of proposals was not necessarily a legal process, for example Parliament could have debated and provided more than one proposal, or issues in the ballot paper to be put to the people in the referendum.

251. The other serious indictment in our view is against those giving legal services to the government and interested parties for having failed to appreciate the role of the people in Constitution making process until the Njoya decision jolted them into a thinking mood. It must be placed on record that the nation received inadequate and poor legal advice on this important issue which has led to confusion, delay, divisions and frustration.

252. The irony of it all is that it was being done in the name of the people.

iii. Discussion of Proposals in a Constituent Assembly.

253. In the case before us no specially elected and mandated Constituent Assembly was established - instead a Review Commission and a National Constitutional Conference were established and in Njoya case Justice Ringera, in his judgment found that NCC was not a Constituent Assembly. However a

Constituent Assembly is only one alternative to a referendum where consultations have taken place and Kenya chose a referendum following the consultations described above.

(iv) The Enactment of the Constitution

254. This can be done by a Constituent Assembly specially elected and mandated or - through a referendum.

255. It is absolutely necessary in a democracy and a country that practices constitutionalism and the rule of law to facilitate and manage the review process by law - we see no other alternative whatsoever. Such a process being a primary process any claims for entrenchment of the facilitation in an existing Constitution is both obstructive and misguided. Primary power cannot be exercised or limited as contended by the applicants. Its authority or validity is assumed, presumed or presupposed.

256. Validity of Past Work of Commission and Conference

Section 28 J of the Consensus Act states:

> " To ensure there is no doubt as to their validity, the following are declared to have been authorised and to have been done in accordance with the Act:-
>
> (a) the work of the Commission
>
> (b) the work of the National Constitutional Conference in discussing, debating, amending and adopting the draft Bill"

257. The applicants have challenged this provision on the ground that it contradicts the findings in the Njoya case. Except for the reasons stated herein we would have found great merit in the applicants challenge for the following reasons

i. Judgments of Court on the constitution form part of the constitutional law of Kenya

ii. Parliament cannot legislate against such judgments by passing an ordinary Act of Parliament and a Constitutional Amendment Act to reverse such a judgment would be required;

> " In this connection page 57 of the Judgment of Justice Ringera states: "viewed in that light the composition of the NCC was quite flawed and no amount of antecedent history of skewed representation in Parliament or elsewhere could wholly justify it"

258. At page 45 the learned judge held:-

> " so the NCC fails the test of being a body with the peoples mandate to make a Constitution and the applicants case that they have been denied the exercise of their constituent power by means of a constituent assembly is in my view, unassailable"

259. However in conclusion Justice Ringera and Lady Justice Kasango did not grant any final orders on this.

260. We therefore find nothing unconstitutional in the provisions of s 28 J. We have elsewhere held that, we view the entire constitutional proposals over the entire period from 1997 to-date as one and further concur with the majority judgment that the National Constitutional Conference was neither elected and mandated for the purpose nor sufficiently representative to constitute a Constituent Assembly capable of enacting a new Constitution. We further find that its end product that is the Draft Bill and Report could not be enacted by Parliament in any event because Parliament did not have the powers to enact a new Constitution either. The product of Bomas will remain an important historical document but it certainly does not have the legal status it was intended to have. The big mistake was the

unforgivable failure by those offering legal services to the Government in 1997 and thereafter including the CKRC not to have thought of or contemplated the role of the people in Constitution making. Regrettably important review organs were set up but they all missed one important link namely the role of the people hence the unfortunate fate which befell the Bomas process.

Claim against the Electoral Commission

261. It has been claimed that the Electoral Commission of Kenya has no powers to conduct the referendum.

262. Ordinarily the commission has the powers set out in s 42 of the constitution namely to divide Kenya into such number of constituencies by making an order, to review the number, the boundaries and the names of the constituencies. It may alter the number, the boundaries or the names of constituencies to the extent it considers desirable. However under s 42 A (e) of the Constitution the ECK shall have such other functions as may be prescribed by law. Such prescribed law is the Consensus Act and in particular s 28 which empowers the ECK to hold a referendum. The section also applies the National Assembly and Presidential Elections Act to the conduct of the referendum with necessary modifications. The Commission (CKRC) is empowered to facilitate and co-ordinate civic education on the referendum. In addition the section adopts the Election Offences Act.

263. We find that the claims against the ECK have no basis in law and they are accordingly disallowed.

Validity of the Application

264. The respondents have raised very strong objections concerning the competency of the Originating Summons, the major one being that the applicants have not succeeded in bringing this case under s 70 and s 84 of the Constitution. The other one is that the affidavits sworn in support of the application are defective. It is also contended that the applicant lacks standing ie they have no locus standi. Finally that the suit is a representative action and that the applicants have not complied with the provisions of o 1 rule 8 of the Civil Procedure Rules in that they purport to represent and to act for the people of Kenya ie 30 million and they are only 7 or so applicants.

265. We think that all the above points are arguable objections but we consider that notwithstanding the apparent merits of the technical objections what is before us is a matter which is larger than the Constitution itself, it is unique, unparalleled and without precedent in that what the applicants have brought out is the definition of constituent power its exercise and whether its validity turns on the provisions of the existing Constitution. Although s 1 and s 1A as indicated above do express the constituent power or imply it in a sovereign, republic and democratic state such as Kenya, the constitution itself makes no provision on how to access the court in respect of this very serious issues which are also matters of great public interest touching on the future of this great nation. Concerning any declarations on constituent power, we have ourselves held that the Constituent power is primary and it does not derive its existence or validity from the existing Constitution. This is a unique application which sought unique orders and declarations and no procedure could have been contemplated or prescribed.

266. We further find that no prejudice will be occasioned to the respondents because the determination on all the critical points will largely turn on law.

267. In addition the public interest element in the orders and declaration being sought is so great and compelling that by determining this matter on technicalities no matter how sound this Court would be abdicating its duty to the people of Kenya on whose behalf it exercises Judicial power. For the above reasons this Court has in the circumstances decided to adjudicate the points raised on merit. However on the issue of locus standi the court reserves the right to consider it where the issue of locus

standi is relevant and critical in respect of any of the issues for determination. As regards the issue of standing generally we have for the same reasons as indicated above taken a liberal and broad view and we informed counsel for the respondents from the outset that we took the view that notwithstanding the strength and weight of the technical points raised by them we preferred adjudicating on all issues raised, due to their importance and the considerable public interest element involved. They all agree to this and we do salute them.

Rule of Law and its Role in the Process

The Principal Act and the Consensus Act

268. In a country that prides itself as an adherent to the rule of law, we find that Parliament cannot be faulted in hinging the Constitution Review Process on the two Acts as amended. The purpose or intention in passing the two Acts was and still is to facilitate the exercising of the constituent powers of the people. This is clearly expressed in the preamble to the Act and very explicitly in S 26 of the Consensus Act. In a democracy that is founded on the rule of law there is no alternative apart from passing facilitative legislation. The purpose was to enable the people themselves to enact a new Constitution, an exercise whose source is the primary power of the people to give birth by enactment directly and free from any external force including the existing Constitution. The facilitation of the exercise can only be done under the framework of supportive legislation. One fundamental principle in the practice and observance of the rule of law is that people have the right to organize their affairs on the basis of enacted legislation. Thus, in Pepper v Hart [1993] AC 593 at page 606 the House of Lords observed thus, concerning the role of the courts and Parliament:

> " Acceptance of the rule of law requires that its sources are predictable, identifiable and publicly accessible"

269. The two facilitative Acts serve this purpose. The constitutional structures examined above except the South African and the Irish experience hinged the constitutional proposals on Acts of Parliament. In the case of South Africa the Proposals stemmed from an Interim Constitution which was specifically negotiated on the basis that it would form the framework of a future new Constitution.

270. For the above reasons we find that the touchstone of validity of the ongoing constitutional proposals, the process and the final product being the proposed new Constitution is not the existing Constitution but the people. The peoples plenary law making power cannot be subjected to any external force because it is primary and not derivative. Amendments to a Constitution are derivative hence the need to comply with the existing Constitution (read s 47) but constituent power to make a new Constitution is primary and nothing can restrain the people.

271. This is a great moment for our country. Our country is at cross roads in the Constitution making process. Our people can enact or reject and continue within the framework of the existing Constitution. Permit us to conclude this judgment with two quotations from Walter Berns "taking the constitution seriously", and one of them from the 'Federalist:"

> " The real wonder is that so many difficulties should have been surmounted by the convention and surmounted with a unanimity almost unprecedented as it must have been unexpected. It is impossible for any man of candor to reflect on this circumstance without partaking of the astonishment. It is impossible for the man of pious reflection most to perceive in a finger of that Almighty hand which has been so frequently and signally extended to our relief in the critical stages of the revolution. Federalist 37.

272. It has been frequently remarked that it seems to have been reserved to the people of this country, by their conduct and example, to decide the important question, whether societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions on accident and force. Taking the Constitution seriously.

273. For this country we think the choice is reflection and choice in the exercise of their constituent power.

Conclusion

274.

1. For the reasons given above and especially our finding that new Constitutional proposals, measures, legislation, including the exercise of Constituent power the touchstone of validity is not the existing Constitution all the orders and declarations sought are refused

2. The orders and declarations sought on security for costs are refused on the principle of unripeness and for being premature for now.

3. The orders and declarations sought against the Electoral Commission of Kenya ECK have been disallowed on the ground that the existing Constitution and the law sufficiently empowers the ECK to undertake the intended mandate or function.

4. The orders and declarations sought against Parliament, Attorney-General and other facilitating institutions are spent and moot and the fact that the Attorney General did his work as one of the experts in the framing of the proposed new Constitution. Prayers concerning the alleged unconstitutionality of the process from 1997 to-date have been wholly disallowed on the principle of the doctrine of the political question and non justiciability ie courts have no powers in respect of the process this being substantially political and that Courts have and must recognise the limits of their powers and the effectiveness of the orders they make.

5. The orders and declarations sought in respect of the enactment and the promulgation have been declined on the ground that the legal infrastructure set up for the transition gives no room for any gap or break in the anticipated transition in that the coming into force of the proposed new Constitution would be as promulgated after the disposal of any possible challenges to the referendum results. Under the relevant provisions it is the proposed new Constitution which shall automatically repeal the existing Constitution on the effective date.

   Even if there was a break or gap we find, hold and declare that it would not make any difference in the exercise of the Constituent power as happened in the case of Irish Republic and India.

6. The Njoya case speaks for itself. The Judgments of Justice Ringera and Lady Justice Kasango in our view were unanimous on the need to have a referendum and on this point we do share their view. In the judgment of Justice Ringera in one portion he appears to indicate that both a Constituent Assembly and a Referendum were required, however on this he was in the minority since it is conceded even by the applicants in their final written submissions that Lady Justice Kasango did not address the issue of a Constituent Assembly at all.

7. Justice Ringera's judgment faulted the Review process under the framework of the Principal Act on the ground that there was no elected and representative Constituent Assembly mandated to enact the proposed draft proposals (Bomas) because neither the National Constituently Conference itself nor Parliament could exercise constituent power. On this we concur with Justice Ringera. However following the enactment of the Consensus Act a new linkage in the process was established under the framework of the Act which under s 26

recognised for the first time the constituent power of the people and the entire Act in our view is and was intended to facilitate the exercise of the constituent power. Thus whereas the Principal Act only provided for a restricted referendum ie on contentious issues only, the Consensus Act gave an unrestricted referendum. This Court unlike the Njoya case is faced with a larger issue ie to declare whether and how constituent power is exercised and to determine on the validity of the exercise. We have answered this by finding that the entire process - from the formalized part of the process from 1997 to the anticipated date of the referendum as one process and substantially political except the final act by the people in the referendum which has the potential and the ability of enacting a new Constitution. It is one process culminating with the new proposed Constitution as the final product. The final product consists of constitutional proposals framed by the Attorney General with his team of experts. We find no solid basis for the faulting the framing aspect of the constitution making which as indicated above can rightfully be delegated to a small group and is one of the three other important steps in Constitution making. We find no merit in the applicants contention that a Constituent Assembly is necessary because the enactment of a new Constitution can be done by either a Constituent Assembly elected for the purpose and mandated to enact or through a referendum as is now proposed in Kenya. We further find and declare that what will give purity to the process is the enactment of the proposals as a Constitution by the people in the referendum. It is the enactment by the people which gives purity and validity. Yes, they are the touchstone of validity - the people. The applicants in their final written submissions did concede that constituent power cannot be restrained. We exercise judicial power on behalf of the people, and we cannot restrain them in making their choice.

We find and declare that the basic steps in constitution making are:-

1. Popular consultations

2. framing of the proposals

3. Referendum/or a Constituent Assembly specially elected and mandated. We find that the challenged process has satisfied all the three essential steps.

8. We find and declare that the process is not flawed. In our view the real judges of the process are the people of Kenya in view of their past involvement with the process as outlined in the introduction to this judgment. We find that the referendum does in a way, for a split second give the people Executive, Legislative and Judicial powers to determine whether they were sufficiently involved and consulted and whether the final product has the content and the substance, whether the final product was properly framed and whether it is a document they would want to enact. Upon enactment in the referendum they shall have put their final seal of approval. This must be correct because upon approval at the referendum the people at the Referendum shall have put in place a new structure of Government under the new dispensation which shall in turn on behalf of the people exercise thereafter Executive, Legislative and Judicial powers.

9. In a very special way what gave locus and standing in respect of the entire application is the great public interest element and the great constitutional and public law issues raised. Controversies and disputes can give standing to applications especially where there is no other person to articulate public interest issues. In this case the Attorney General is a respondent and the Public interest factor looms large and it could not have been articulated if the applicants had not taken up the matter.

10. What gave the Court jurisdiction is the great controversy concerning validity of new constitution making process. Whenever there is a judicially declarable controversy the High Court has inherent jurisdiction and power to define and declare the frontiers of its jurisdiction provided jurisdiction has not been denied by the Constitution or any written law. Granted that there are areas the Court would have to shy away from, for example on grounds of the political doctrine, and non justifiability. However it is for the Court to delineate, define and make a finding on these outer limits of its jurisdiction and no other arm of government has the powers to do so.

11. We would like to observe that in a process such as constitution making the generation which by a twist of fate or history finds itself entrusted with the task of constitution making has the greatest task which any civilized society or community can entrust to one generation to accomplish on behalf of future generations. It is a rare and historic responsibility. It is also true that each generation has its fair share of great men and women who see the bigger picture and unending frontiers for democracy and the rule of law. No generation or country is ever short of heroes. Each country's experience has produced such great men and women. Their names have been chronicled in history books and what they said and did gives hope and inspiration to the young of each generation. The US experience was certainly not pure - by today's standards but the achievement of their few great men has defied time.

275. This Court has viewed the entire process as one. Let history identify such great men of our country in each phase from the first political agitation for change, Safari Park, Bomas and Naivasha etc.

276. However no single generation has the luxury of endless time to consult to resolve all contentions, to constitute and reconstitute organs of review or remain in a prolonged state of indecision - in such a moment of indecision that Invisible hand of fate can justifiably pass on the marathon stick to the next generation.

277. The upshot is that the Originating Summons is dismissed. On the issue of costs however we decline to order that they follow the event for the following reasons:-

1. The issues raised have no precedent in this country's constitutional history. Issues on what is constituent power and how it is exercised have never arisen before - including the touchstone of its validity.

2. The issues raised are of great public interest

3. Considerable anxiety confusion and division was created by those who had the responsibility of giving the Government legal services especially from 1997 and thereafter, including organs such as CKRC with nearly a one third composition of lawyers who regrettably failed to advise in good time or at all concerning the peoples involvement ie the exercise constituent power.

278. For the above reasons we order that the parties meet their respective costs.

279. We would like to put on record our great appreciation of industry, considerable legal research, and skillful presentation by advocate for all the parties. We are greatly indebted to them.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 15TH DAY OF NOVEMBER, 2005.

J.G. NYAMU

JUDGE

R. WENDOH

JUDGE

M. J. ANYARA EMUKULE

JUDGE