The Indomitable Yash Pal Ghai – Part 4: The Defender of Justice

Over the course of his career, Professor Yash Pal Ghai has had the opportunity to act as a visiting professor in a number of countries, teaching law across Australia, the United Kingdom, the United States, India, Singapore, South Africa, Canada, Fiji, and Italy. It was during one such visiting appointment in 2000, at the University of Wisconsin, Madison, that Ghai received one of the most important calls of his career.

When the phone rang, Ghai was sitting with Bill Whitford, his longtime friend, in Whitford's home in Madison. It was Amos Wako, Ghai's former student, then the Attorney General of Kenya. "Come home," Wako said to a stunned Ghai. His initial reaction was disbelief. "Are you really serious?" he asked Wako. "Yes," Wako explained, "Everyone wants you to come home, and President Moi wants you to write the new constitution."

Ghai's initial reaction was, unsurprisingly, one of hesitation. "The government had never shown any interest in me, and I still felt bitter about the way I had been treated." His hesitation was compounded by a feeling of detachment. Although he had been home sporadically in the intervening years, it was never for more than a few days at a time; he did not have a strong sense of what was happening politically. "I said no," Ghai says. "I didn't know what was happening, my experience had been bad and I didn't know how sincere they were." Indeed, Ghai had missed the years of political turmoil that preceded this moment. He had been away while the Kenyan executive gradually consolidated power and eroded democratic rights; he had missed the decades of struggle for constitutional reform.

Over the next few days, however, he consulted with old friends, including Pheroze Nowrojee and Willy Mutunga, who advised him to visit and survey the landscape before making a final decision. "Then one day my secretary rings from Hong Kong and says, 'This man who rang has called again and wants to see you. Can I give him your details in America?' The next day, Wako arrived in Wisconsin. He spent time with me and said things had changed and that I should give it a chance." Cottrell Ghai also recalls it clearly. "Wako actually went to Madison. It was most

extraordinary.”

As Ghai considered the offer, many of his contacts in Nairobi told him not to accept. The country was deeply divided, and the thinking around constitutional reform was concentrated in two opposing camps, one led by the Moi government and the other led by a coalition of religious leaders and civil society organisations, known as Ufungamano. Many in civil society did not trust that any real change could come through government-led efforts, and they believed that the focus should remain on deposing Moi from power. Mutunga was relatively alone among Ghai’s closest friends in his support. “He had written constitutions all over the place in the Commonwealth. He was honoured by the Queen for it. As a patriot, writing one for Kenya would be a great accolade. He had his doubts, but as a human rights activist we urged him to take up the task, notwithstanding the challenges.”

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After some initial thought, Ghai agreed to visit Kenya and survey the landscape without necessarily committing. First, however, he had to return to Hong Kong, which he did via Papua New Guinea, where he had some work. Ghai was relatively cut off for the duration of his short assignment, but by the time he returned to Hong Kong, Wako had (falsely) announced that he had accepted the position, a move that would eventually come back to haunt Wako.

When Ghai made his first visit to Kenya in December 2000, it was a momentous occasion. Wako and Raila Odinga, who was at the time representing the Langata constituency in parliament, personally met and welcomed Ghai home. He used this initial visit to meet with key players and get the lay of the land, eventually deciding to take the position but only on his own terms. When he returned to Hong Kong, though, the University was unwilling to allow Ghai to accept the

assignment. A few days after the refusal, Ghai received a call from the Chancellor. “He said he hadn’t been able to sleep,” Ghai remembers. “He had raised this with the Council and they said they felt a bit bad. After all, it was a chance for me to go back to my country. So they said, ‘Ok, but this is the last time you can go.’ We felt it wasn’t right for Jill to also leave so she stayed back.”

Whitford remembers Ghai’s hesitation. “He didn’t need that job. He just felt this tremendous loyalty to Kenya. He always travelled on a Kenyan passport even though he could’ve gotten a British passport. That was a real pain in the ass, but he did it. It was just important to him to play that role. It was about the chance to do something for his country.” Mutunga agrees, saying, “Kenya remained his constant North.” It had been more than three decades since Ghai had been a young student, standing on the steps of Lancaster House, watching the Kenyan delegates arrive to negotiate an independence constitution. This was a chance for him to contribute to the next phase of that mission – to lend the wisdom he had gained through years of service to other countries to his own homeland.

When Ghai returned to Nairobi, now ready to begin work in earnest, he was under no illusions. Moi was under pressure. He wanted someone who would get it done and get it done quickly. “I told Moi I wasn’t ready to accept. I would only take it if all the key groups in the country were involved in this process. I didn’t want to come and talk to a few politicians. I made it clear that it had to be a very participatory process. I said, ‘If you are willing on that basis, I will consider it.’ ” Ghai told Moi he required two to three months to merge the Ufungamano and government groups and create one united constitutional process. Ghai then embarked on what many consider to be one of his crowning achievements, the process of bringing the two sides together. So committed was he to achieving unity that he refused to take the oath as Chair of the Constitution of Kenya Review Commission (CKRC) unless there was one, unified process.

In addition to the divisions between the government and Ufungamano, Ghai quickly found that he would also have to address divisions within the Ufungamano group itself. According to Zein Abubakar, who represented the Safina Party at Ufungamano and who also became a commissioner of the Constitution of Kenya Review Commission, a “radical” wing of the Ufungamano process saw Ghai as someone who undermined the revolutionary path. Indeed, a radical minority group remained opposed throughout, branding those who participated as “sell outs.” At the same time, Abubakar explains, it was understandable; the

government had never kept its word in the past and the fear of betrayal was very real.

Ghai was aware of the divisions. “At that time,” he remembers, “civil society were very divided about my coming. They had already formed their own commission. They had already started going from town to town to talk about the constitution. I didn’t want to sabotage them.” Indeed, John Githongo, who was the head of Transparency International at the time, remembers being highly suspicious of Ghai. “I’ll be very honest. I was very concerned and completely opposed to him. I’ve never told him this, but we were very, very skeptical of a person brought by Amos Wako, even though the Ghai brothers had a sterling reputation as academics. Yash was bright and super-brained, but our attitude was that there’s no way he’s going to get our politics. He’s been away too long.” Abubakar agrees, explaining that Ghai – despite his international reputation – had no legitimate standing with local civil society and religious leaders.

His commitment to achieving unity greatly impressed skeptics in the Ufungamano group. Abubakar says, “One of the things we appreciated was his position that there can only be one process, which was principled. One of the things that bothered a number of leaders was that if you had two processes, apart from divisiveness, how would you implement the outcome of either one? The country was split 55-45 in our favour. It’s very difficult to have a constitutional order that is not supported by half the country. There was also potential for violence and reversal of some of the democratic gains that people had paid for and won by then. At a strategic level, we said that it is better to negotiate a unified process.”

Ghai’s style, based on an objective and open attitude, impressed key players. Abubakar remembers, “The first thing he did was to listen to various sections of society and the listening process allowed him to understand that this process was deeply dividing the nation. Based on those initial consultations and listening, he decided not to take the oath as Chair. That also helped build bridges with the religious sector and the other side, because he was seen as credible and as someone who is not showing any bias. He was willing to listen to everyone who had an opinion.” Githongo agrees, pointing to Ghai’s refusal to take the oath as one of the key factors in shifting the tide in his favour. “His credibility started very low with progressive forces. He was seen as Moi’s man, Wako’s man. I remember all of us sitting around, discussing. People said, ‘No, no. This is a hatchet man for Moi, a waste of time.’ But then he refused to take the oath.

Yash's credibility was first built on that – his unwillingness to take the oath until the two sides came together. It was a very slick move, very well executed. In fact, he doesn't talk about it or show it but he is a very politically wily operator. After that, all of a sudden, people took him seriously."

Ghai also made it clear that he was willing to walk away from the process if it did not live up to his standards. Unlike many others who had been competing for the position of Chair of what would be the review commission, Ghai had no personal ambition to win the position. Abubakar says, "He was willing to walk away and that was important in terms of people's willingness to sit and talk."

Finally, Ghai's connections to all sides greatly facilitated communication and eventual cohesion. "He opened back channels to government and to opposition leaders," Abubakar says. "I think the insistence then of both Ghai and Raila supporting Ghai is what reluctantly convinced Moi to agree to a common process. If it had been Ghai alone, it wouldn't have happened. It had to be Ghai and Raila. Ghai then said if there is no willingness to unite the country in a process and make sure the process is credible, he was willing to walk away."

After nearly five months of negotiations, Ghai achieved unity. The two sides came together, and now the real work began.

As Chair of the Constitution of Kenya Review Commission (CKRC), Ghai created and implemented a citizen-centred methodology based on his decades of experience. The CKRC set up local offices around the country, canvassing public views and educating Kenyan citizens about the process. The Commission also travelled extensively, in multiple rounds, to hold public hearings so that they could listen to what people wanted with regard to the key issues. It was important to Ghai to create a publicly-owned constitution, one that addressed people's longstanding grievances and that offered equal empowerment and protection to all. He personally travelled to public hearings, further demonstrating his deep commitment to and investment in the work. Githongo says, "I was very impressed, and I grew to have a great fondness for him. He was not only giving intellectually. He believed deeply in the work."

Yash Pal Ghai listening to views of a Kenyan at a CKRC event.

Indeed, the Ufungamano groups had already begun the process of canvassing public opinion, and Ghai was able to carry that initial momentum forward. “Many places were new to me,” Ghai remembers. “I had never been to so many places. In the beginning, it was not easy. My Swahili had deteriorated a lot, but I still enjoyed it and found it very interesting. I had never seen so many different Kenyans, different styles of dress and ways of life. I enjoyed getting people’s views, getting concrete feedback from the people.” Abubakar recalls Ghai’s personal touch on these journeys. “He has a willingness to learn from others, to talk to people, just ordinary people who flock around him. I had the occasion of him accompanying me to a number of public hearings. He has an ordinary touch with people. He has an ability to inspire people. He connects with young people, ordinary people, people from all different stations in life – from leaders all the way to people who don’t know where the next meal will come from. One time, we were driving to a hearing and he saw people walking on the side of the road. He said, ‘Stop the car and ask these people where they are going.’ They said they were going to the hearing. And then he asked for arrangements for them to be dropped there. And he’s in his element that way.”

The Commission was extremely successful, and by the end of the process, it had collected over 37,000 public submissions on a full range of issues. In its 2002 report to the country, the CKRC highlighted 13 main points from the people. Examples of these included a desire for a "decent life", fair access to land, a request to have more control over decisions which affect daily life, leaders who meet a higher standard of intelligence and integrity, respectful police, gender equality, freedom of expression for minorities and accountable government. There was a clearly expressed demand to "bring government closer to us." The CKRC was deeply moved by the public participation, commenting on how "humbling" it had been to see "people who, having so little, were most hospitable to the Commission teams, and [who were] prepared to raise their eyes from the daily struggle to participate with enthusiasm in the process of review." Githongo calls this public consultation process the second pillar of Ghai's credibility. "The process he defined and described helped people see that he was serious. He became a people's hero.

Read also: The Indomitable Yash Pal Ghai: Years of Exile

Ghai's commitment to his work generated massive amounts of attention. Abubakar says he respects Ghai for his ability to remain "down to earth." He says, "Prof. [Ghai] didn't take big security. The only time that he took it was when the government insisted and that was periodic." This was in sharp contrast to other commissioners, who insisted on 4-wheel drive cars and who even refused to share vehicles with Secretariat staff. Mutunga agrees, recalling, "They wanted him to drive a big car; he refused. Moi even announced that Yash was being too lax about security, and we all thought it meant he would be bumped off! One of the reasons why he became so popular was because of his humility."

At the end of public review, the CKRC moved on to drafting, producing a draft constitution in September 2002. Ghai then broke his team into thematic groups,

each responsible for refining and improving specific portions of the draft. He called in experts from around the world to assist and offer comparative knowledge. He also courted diplomats, many of whom were so impressed that they offered to help fund the process. "But I said, 'no,'" remembers Ghai. "I wanted it to be a *Kenyan* process." Three days before the debate on the draft was to begin, however, President Moi dissolved parliament. Since all MPs were part of the National Constitutional Conference, the body legally mandated to adopt the new Constitution, things could not proceed. In December 2002, Kenya held landmark elections. Moi, who had been in power for nearly a quarter of a century (24 years), finally stepped down, ceding power to the National Rainbow Coalition (NARC), headed by President Mwai Kibaki. One of NARC's key campaign promises was the promulgation of a new constitution within the first 100 days in office. Once in office, Kibaki stalled. "When people talked about presidential and parliamentary systems, Kibaki used to say that we are opposed to an imperial presidency; we want a parliamentary system. Once he realised that he could be president, that all changed. There was a lot of this opportunism. Even Raila to a certain extent – once Raila realised he wouldn't be president, he split away." Indeed, speculation was rife that the aging Kibaki's reluctance to move ahead with the Constitution was due, at least in part, to a provision that would prevent him from running for a second term.

In April 2003, four months after the elections, the process again got underway, this time at the Bomas of Kenya. Ghai remembers, "When we moved to Bomas, I told the people there that we are going to take over and we need six, seven months. This is going to be hundreds of people. I felt that people should have time to think about their own positions. The mood got better and better. People got to know each other. By the end, people who didn't know each other had become good friends." At the same time, however, there was increasing factionalisation amongst the delegates, each making decisions purely based on political self-interest. At one point, during a break in drafting, the government attempted to stop the process from continuing. "I don't think I have ever seen him so apoplectic," Githongo recalls with a smile. "Prof. started leading demos of delegates in the streets to demand entry into the Bomas, and that was against guys with guns and dogs," recalls Abubakar.

Soon thereafter, Ghai was alerted that Kibaki was planning to take the CKRC to court and allege that the entire process was illegal. Upon hearing of the

impending court case, Ghai moved quickly to finalise a draft. At this point, however, Ghai remembers that "the only people left in the constitution-making body were from Raila's side. Others were told to boycott. Kibaki and the DP walked out ostentatiously at one point when they saw they wouldn't get the vote they wanted." Particularly contentious to the government were provisions for a parliamentary system and some aspects of devolution. He resolved to work hard to finish. "I had only ten or eleven days to finish and get an endorsement. We had to do so much so quickly, and that's why some parts are not so good." Kibaki succeeded in court, and the CKRC was prevented from passing its draft to the government. "That he was able to get the Bomas draft approved by the delegates before the reactionary forces disbanded the conference was a miracle," says Mutunga.

Ghai returned to Hong Kong soon after finalising the Bomas draft. "I read in the papers that the High Court had declared the whole process and the constitution unconstitutional. I felt terrible. I think I issued a couple of strong articles saying that, based on the documents that started the process, we were legal. By that time, Kibaki had gotten enough support and bribed enough people. They dissolved parliament all together, and then there was nothing more for me to do." Cottrell Ghai remembers the final push as particularly difficult. "They put huge pressure on the closing stages of the process. There was a sense of great satisfaction for having produced a document but he was disappointed."

The government's hijacking of the process became most clear at the end of the Bomas period, but Ghai faced enormous amounts of stress throughout the process. Cottrell Ghai remembers calling him every morning from Hong Kong, after reading the Kenyan papers online, to warn him about what he could expect that day.

Ghai had little say, for instance, regarding the team of commissioners he would lead, and it was clear that there were divisions. Some commissioners were little more than spies for the government side, sometimes purposely delaying progress, while others were more interested in using the opportunity for personal profit than for sincere constitutional reform. "After Yash had managed to unite the two sides, he found himself with a very difficult CKRC, riven with self-interest, corruption, people meeting with the president behind his back, people being paid off . . . which he had to mitigate on an ongoing basis," says Githongo. Mistrust was so deeply embedded that Abubakar insisted on the verbatim recording of all

meeting minutes. “It was the only protection against people who would change their views. Almost all our meetings were recorded verbatim with the exception of two to three of them, where it was so bad that people said to switch it off. Of course, that in itself was against what we had agreed.”

An early battle erupted over the Secretary of the Commission, who – according to both Abubakar and Ghai – was a severe alcoholic, incapable of discharging even the most basic of his duties. “The person was not fit for public office,” Abubakar remembers. When dismissal procedures started, however, Moi was against it, and he threatened to disband the entire CKRC. Ghai and others stood firm, making it clear that they were willing to walk away from the Commission if the Secretary was not dismissed. It worked. “It became so bad that when the other members realised that we were willing to disband, they backtracked and went to see Moi. They convinced him to give the Secretary a soft landing by appointing him to the Law Reform Commission,” Abubakar recalls.

Corruption and betrayal were significant issues, dogging Ghai throughout his time as head of the CKRC. Cottrell Ghai recalls this as a particular strain on Ghai. “Some of the commissioners were very nice, but others were lazy or corrupt. They were all a bit corrupt. That was all a big strain, constantly watching whether they were stealing. Yash would say, ‘I think I’m going to resign and then the next day, he would say, ‘It’s ok. I’ll carry on.’ The up and down was quite a strain.” Ghai agrees, attributing the onset of his diabetes to this period in his life.

Githongo also recalls Ghai’s stress and frustration. “Sometimes, he would rant and we would all sit and listen. And he would go on and on sometimes, talking about receipts and accounts, and then we would gently have to say, ‘Ok, let’s get back to the agenda.’ But he needed that outlet, that safe space to express himself.” Githongo explains that the kinds of problems he faced were new to him. “He is politically very savvy, but he had never functioned in a context where such avarice, corruption and greed were so blatant. It was even amongst people who were very respected legal scholars etc., and that seemed to really throw him. He was used to different types of problems.”

Abubakar remembers meetings in which members would try and build consensus around a certain issue. “Then you see a commissioner signal and leave the room. Then two or three people follow him. Then they would come back in and do a 180-degree turn on a position, or propose something that is inherently illegal. You

could see from his facial expressions that he was angry, but there were few times when he would lose his temper. On a few occasions, he would just walk out of meetings."

By the end, the process had taken a clear toll on Ghai. Recalls Githongo, "He has done some really difficult things. He has been in situations where guys would show up armed and he would have to negotiate with them to leave their AK-47s outside of the negotiation room. So he's used to that, but this one is much more soul destroying. It's avaricious, corrupt, deceitful and very money-oriented. That really threw him. He found himself interacting with some of the most respected law scholars, and he found himself completely stuck on issues like travel expenses. That took a toll. What was very clear to me is that Yash has not only put his whole mind and all his experience – which are both considerable – into this but he has put his whole heart into it. He would get very hurt by the betrayals, by the lies and by the realisation that he had been strung along."

Read also: The Indomitable Yash Pal Ghai: The Hong Kong Experience

Ghai resigned in 2004, soon after returning to Hong Kong. Cottrell Ghai remembers being in Italy on vacation. "The internet was not that good. We had to use a dial-up connection, and after a lot of hassle he emailed his letter of resignation to the president from there."

Despite all the challenges, Ghai does not regret accepting the job. "It meant a lot to me, especially because I had devoted a lot of my career to human rights." He says that the chance to return home after having been "thrown out" was also significant. "In the long run, I feel it gave Kenya a new start. I don't regret doing what I did. I met a lot of people, and I know so many more Kenyans than I would have otherwise known. It was really, really challenging, but I felt quite pleased in the end that I was able to bring some peace."

There are still, however, elements that haunt him. “Our document was strongly parliamentary, and we were somewhat innovative about the role of the governor general in that context. I think people liked it. We were trying very hard to build a non-ethnic political system and many of those provisions are still in. I think a parliamentary system is better and more participatory; you have to be more careful as prime minister. Also, we hadn’t quite finished what we had wanted to do with devolution. I regret these two things very much indeed. The people who are now saying to change these elements are the ones who had not wanted it back then.”

In spite of the significant problems faced by Ghai and the CKRC, the Constitution of Kenya – finally promulgated in 2010 – is based largely on Ghai’s Bomas draft. For this reason, Ghai continues to be known as the “guru” and the “father” of the Constitution. One of his proudest achievements, and indeed one reason why the Constitution receives such widespread, international praise, is the Bill of Rights. “I am very proud of it,” Ghai says. “I think it’s a good document. It’s very people-oriented. There are a lot of methods through which they can take action, which they must be allowed to do. And I am particularly pleased about the Bill of Rights. If we are failing, it’s our fault. Our politicians have absolutely failed us, and now it’s up to us to solve it.”

Katiba Institute co-founder Waikwa Wanyoike agrees, describing the Bill of Rights as a personal reflection of Ghai’s thinking on human rights. Says Wanyoike, “He has a very strong connection to it. Even in terms of newer constitutions, I don’t think that we have any constitution that surpasses the Kenyan constitution, especially in terms of rights.” Wanyoike also credits Ghai for what he calls the uniquely “transformative” aspects of the Constitution. “What you get is an overthrow of the political order and the installation of a completely new political order which clearly spells out values and principles. That element of transformation is even more defining than any single chapter of the Constitution, and that was because of the design that he and the CKRC put in place, which was very, very participatory. It’s now very hard for the political class to try and trash what has been done.”

Mutunga agrees, especially with regard to the Bill of Rights. “Our Bill of Rights is the most modern in the world. It has borrowed from the progressive development of human rights from the world over . . . I am proud of it, too. In my writings I have called the jurisprudence envisioned by the Constitution ‘indigenous, rich,

robust, progressive, decolonised, and de-imperialised.' I see the constitution as rejecting and mediating the status quo that is unacceptable and unsustainable in its various provisions. If implemented, I have always argued, it could put the country in a social-democratic trajectory and act as a basis of further progressive social reform . . . if we have the political leadership committed to its implementation. It seems, however, that Kenyans as parents have given this 'baby' to a political leadership that cannot be trusted to grow and breathe life into it."

Githongo also laments the nature of Kenya's leaders, who he believes are incapable of implementing the Constitution with any sincerity. "On paper, our Bill of Rights is extremely progressive, but life is breathed into the Bill of Rights by leaders agreeing to be accountable and surprising their people by saying, 'I can't do this because it is wrong.' Our guys make every effort to show that the Bill of Rights doesn't apply to them. If you are poor, then you can die anytime; the Bill of Rights doesn't apply to them. It hasn't come to life for the majority of Kenyans."

On the other hand, Githongo believes that Ghai's work on the Constitution ensured that – despite everything – it continues to offer hope. He says, "We still have a hugely corrupt and dangerous elite that will do anything to continue looting and raping this country, but Yash wrote this Constitution so they can't mess with certain things."

Death by Ink: How Uganda's Constitution Has Broken the Country

Uganda does not have a constitution; it has a career-distributing patronage device disguised as one. This device serves the important function of immunising the presidency from serious challenges from what was historically a very cantankerous and militant middle class. Instead, this class has been tranquilised

by all the jobs, careers and postings created by the 1995 document.

The just-concluded proceedings in Uganda's Supreme Court – in which a petition against the 2018 passing of a law that removed the constitutional requirement for a presidential candidate to be below 75 years was heard and dismissed – is the latest proof that the constitution was never going to deliver constitutionalism, nor was it designed for that purpose.

The petition was in itself an appeal against the same ruling made by the Constitutional Court the previous year. That first petition was itself borne out of the very unconstitutional manner in which the Ugandan Parliament had passed the amendment. First –and not for the first time – there were obvious material inducements offered to the parliamentarians before their decision. Second – and more critically – the supposed sanctity of Parliament was violated through an invasion by Uganda's Special Forces Command, who proceeded to violently carry out the core group of MPs opposed to the amendment who were attempting to impede its progress through filibuster. Third, legal minds had already also weighed to counsel that, given the country's singular experiences with unrestrained presidents, an amendment of such importance should perhaps first be put to a public referendum before it is tampered with such a historically-birthed rule.

This also came three years after the same court heard a petition against the Ugandan Electoral Commission's declaration of President Yoweri Museveni as the lawful winner of the 2016 election.

Naked bias

The retired Supreme Court judge, George Kanyeihamba, has described the age-limit ruling as "an exhibition of naked bias, cowardly disregard for rights and an orgy of contemptuous indifference to democratic principles".

But this game has been going on for a very long time. I recall one incident over fifteen years ago, in which the government side got around the obstacle of a parliamentary rule of procedure that required a period of weeks before a motion they wished to have discussed could be debated. They simply mobilised their numbers to first vote to suspend that procedural rule, then tabled, debated and passed their motion, and then voted to reinstate the troublesome rule.

And of course, Uganda's MPs had already famously voted to remove presidential term-limits from the constitution in 2006, in time for President Museveni to stand for a previously not permissible third term in 2006. This time round, on top of removing age limits, they voted to reinstate the two-term limit that had been removed in 2005. At the same sitting, the court found this reversal to be "unconstitutional".

We are going to have to look again at "democracy", and think about the quest for representation that underlies it, instead. It is clearly possible to hold a presidential election, and not get the candidate everybody voted for, but still have the entire process dubbed "legal" and constitutionally above board. What is presented as democracy can actually fail to be actually representative of anyone.

This entire fraud – which effectively began with the 1996 presidential election – has been continually buttressed by the "constitutional" rejection of all complaints by the courts. Basically, of the three arms of governance, the Executive does as it pleases, and neither the Judiciary nor the Legislature can stop it, nor can they help shield each other from the its rampaging effects.

This situation is rooted in two things. First was the merging of the powers of the executive Prime Minister with those of the ceremonial president, and the abolition of the Prime Minister post by the self-appointed president, Milton Obote, in 1966. Thus, a highly centralised presidency was born, and lives on to this day. It was in keeping with this spirit that the members of the then Parliament were menacingly obliged to vote in favour of the 1966 document before being allowed to read it.

Over-centralised presidency

As long as you have an over-centralised presidency, then you basically will still have the 1966 constitution and the 1967 one in which federation was also abolished. The 1995 constitution is, therefore, basically the 1967 document with donor-designed and funded upgrades in which some "civil society" scaffolding was arranged around the Executive.

> *Uganda's pre-eminent problem remains political exclusion, or the monopolisation of power for the purpose of enabling the material enrichment of a few. This is literally what colonialism was. Such exclusion necessitates political repression, which leads to the subversion of justice and the undermining of the judicial system as a whole, which, in turn, begets human*

rights violations across the board.

A key adjustment, whereby a president's electoral destiny was determined separately from the rest of his party, only cements this further. (In the earlier pretence to democracy that was the 1980 elections, it was the leader of the party that won the most seats in Parliament who became president. He also had to have won a parliamentary seat.) This presidency has always been able to reach through the scaffolding, and over-ride any other aspect of the constitution at will.

Before the military infringement on parliament, there was a long list of extra-constructional shenanigans being carried out by the Executive against the other constitutional branches:

- In November 2005, soldiers invaded the High Court premises in an attempt to prevent rebel suspects being granted bail.
- In an epic showdown during October 2011, the Executive flatly refused to subject the details of oil contracts to proper parliamentary scrutiny.
- Various well-connected individuals who become key suspects in serious crimes regularly have their files delayed or missing when required by court, leading to delays or abandonment of the cases.
- A local government minster and well-known bush war veteran once invaded a district local council meeting, and forced it to abandon a tabled motion regarding the handing back of land under its control to the original owner (the Kingdom of Buganda).
- As a factotum of the presidency, the former Inspector General of Police, General Kale Kayihura, built up a prodigious record of violations against all constitutional provisions regarding policing. Bail terms, bond terms, detention lengths, media rights, stipulations against torture and the like were all repeatedly trampled by his operatives. This culminated in the 2011 mobilising of a mob to assemble outside a magistrate's court where a civil case against the IGP had been lodged. Court officials hid, and the case was never heard.
- Ruling party MPs hold their caucus meetings regularly at State House, the official residence of the President.

In short, whatever aspect of this constitution that has not been violated is simply whatever aspect has not yet come into conflict with the intentions of this

unrestrained Executive.

Monopolisation of power

Uganda's pre-eminent problem remains political exclusion, or the monopolisation of power for the purpose of enabling the material enrichment of a few. This is literally what colonialism was. Such exclusion necessitates political repression, which leads to the subversion of justice and the undermining of the judicial system as a whole, which, in turn, begets human rights violations across the board. Ultimately, constitutional order itself has to then be violated so as to enable the regime to hold on to this exclusionary power by entrenching itself above its provisions. An unrestrained Executive becomes the whole state.

This is Uganda today. Once again.

The historical challenge has been to find the means by which Ugandans do not find themselves under the rule of yet another unrestrained Executive. This, in fact, was the aspiration behind the crafting of the new constitution between 1993 and 1995. As the *Daily Monitor* writer, Ivan Okuda, has pointed out, political documents of such magnitude do not come about in the abstract, but rather are shaped by the political history they seek to now legislate for. It is for this reason that the preamble to the 1995 constitution sternly proclaims:

"….Recalling our history which has been characterised by political and constitutional instability; Recognising our struggles against the forces of tyranny, oppression and exploitation;…"

The authors naturally felt they had every right to see the moment as significant: it represented an opportunity to turn the corner on all the spectacular political failures of the past.

But it was doomed from the start. Stillborn.

To understand that, let us remember the process briefly. It began with a Commission of Inquiry headed by Justice Benjamin Odoki, which gathered views countrywide through a template known by all and accepted by the authorities. The resultant Odoki Report represented then the most up-to-date information on Ugandans' political views. Its findings were then presented to the country, and in 1993, an elected Constituent Assembly was convened to design the new

constitution.

In 1995, Uganda received the design of its new constitution. The critical point here is that while this new constitution contained many things, new and old, it conspicuously lacked the two key findings of the Odoki Commission: multipartyism and federation.

The failure to base the constitution on Odoki's primary findings – and not even reflect them – was like an unwell person going to hospital with an ailment, then being treated for everything else except that ailment, and then also being discharged with new illnesses picked up from the ward.

What had started out as a well-meaning exercise was revealed as a project benefitting a confluence of elite interests: a section of the local middle class, the regime, and the Western Empire deeply entrenched in Uganda's economic affairs.

> *"As it stands, legislative processes, right from 1966 to 2019, have stood in favour of those who controlled the means of coercion and state power and the courts have found nice English to cover up politicians' mess," observes the journalist Ivan Okuda.*

This latest Supreme Court ruling simply confirms that the constitution does not have anything to do with the presidency, which functions fully according to its own necessities. This is not in itself new. The office of the colonial governor was basically what we call a president today: their "Excellency" title is the same, as is their official residence. In this period of extreme neoliberalism, they even answer directly to the same Western powers. Like the colony before it, the neo-colony can only be effectively governed for its owners by such over-centralised means.

"As it stands, legislative processes, right from 1966 to 2019, have stood in favour of those who controlled the means of coercion and state power and the courts have found nice English to cover up politicians' mess," observes the journalist Ivan Okuda.

In the sense that it is not fooling anyone any more, it has reached the end of its useful life. This realisation is a final step in a long process. We began with the ritual dismissals of all four petitions brought against the twenty years of five sham elections, then the dismissals of petitions against the removal of constitutionally-

provided-for term limits; and now this.

The Empire strikes back

The constitution has performed three functions: it serves as a fig leaf protecting Western donor pretensions to “democracy and good governance”, while covering up the dictatorial machine the West needs. The Empire gets guaranteed access to the resource wealth that brought them to Africa in the first place; other donors acquire a blank slate upon which they can practise their social engineering; and it diverts a significant part of the political elite from their historical role as fomenters of anti-dictatorial agitation. This last factor has been achieved through stage-managed elections, and also the creation of a very wide variety of jobs for the political elite to aspire to. Add up all the boards, commissions, inquiries and the like enumerated or made possible by the constitution “document”, and one ends up with a very long list of actual and potential vacancies that can be filled only by a certain type of educated citizen.

There have now been elite individuals bouncing around from one appointment to another as minister, judge, ambassador, director of some authority, or chair of some commission for the last two decades or more. These functions are an act of sedation, whereby the only thing they see worth agitating for anymore is how high up the command chain there is an awareness of their CV.

This started life as the colonial-era strategy that derailed the original independence movement, which was done because the movement was rooted not just among ordinary people, but also organised around economic demands expressed through various unions, trader associations, and peasant societies. Such demands went to the very core of the raison d’être of the colonial project: money.

> *The strategy had the following key features: suppressing the radicals, isolating the masses, and undermining native institutions. In this way, a noisy and energetic type of middle-class politician was placed centre stage in the unfolding process of decolonisation. These types of politicians became the “owners” of post-independence politics, which they went on to ruin through continuing the culture of any one faction in power always seeking to exclude all others.*

Governor Andrew Cohen, appointed in 1952, was given the task of addressing the crisis caused by the violent anti-colonial "disturbances" that erupted under the rule of his predecessor, Governor John Hall. Cohen laid out his strategy out very clearly. He advised his bosses that not all African nationalism should be seen as a bad thing. He pointed out that much as there was a lot of agitating and strong language, not every strand of nationalism was fundamentally opposed to Western rule and Western lifestyles. Some, he said, were simply in disagreement over the pace of change, but shared values and goals "that were not fundamentally different from our (the British) own".

He therefore advocated identifying the key voices in this tendency, and working with them to deliver a more manageable ("responsible") independence movement.

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Such elites were to remain pre-eminent in this way in the two decades after independence. Up until the emergence of the peasants (Joseph Kony and Alice Lakwena before him in the late 1980s), virtually every coup, attempted coup, exile movement and armed rebellion was planned, resourced, led and organised by individuals from this elite class. And even then, Lakwena and Kony only came to leadership as a result of the slow-motion collapse of the initial anti-Museveni armed rebellion in northern Uganda led by former Obote-era Prime Minister Eric Otema Allimadi, who had thrown in the towel and accepted a government amnesty.

Salary-based political process

Prof Amii Otunnu describes our political culture as one of "using fear if not violence to access State resources for upward socio-economic mobility and in some cases for the sheer physical survival of social groups."

Consider just one law: The Local Government Act, which is an outgrowth of the constitution. A quick analysis tells us that as is the practice, each new district usually produces three members of parliament: two directly elected from

constituencies created therein, and one as the district woman MP. In addition, the district must convene an elected council, as well as a technical administrative structure headed by a Chief Administrative Officer. By these means, at least eighty new jobs will be immediately created, all to be supported by the public purse. As result of this, Uganda's districts have increased in number from 33 in the 1990s to 127 today.

And as a result of that, Uganda's Parliament now has 426 members, who in total consume 11.4 billion Uganda shillings ($3,041,349) monthly as pay and allowances for MPs. Their mandatory extra perks cost extra.

In general terms, the same demographic group that provided logistical support to armed rebellion now uses the same skill-set to feud over parliamentary seats, local government seats, and tenders.

The establishment of the 1995 constitution can, therefore, also be understood as an act of mass demobilisation of these historically troublesome elites from their historical activity through their mass co-option into a salary-based political process. Through its members in the main going along with the hollowing out of the meaning of the Constituent Assembly process by dodging Odoki's findings, the Assembly became essentially an exercise in which the middle class wrote the job descriptions for their future jobs, and laid the foundations for their now two decades of well-paid public careers.

Cohen's strategy has thus had a very far-reaching impact on Uganda politics. Basically, what we saw under him was the creation of space in which only a non-threatening, modernising form of "acceptable" politics was enabled to thrive. The 1995 constitution now essentially performs the same function.

With a middle class finally rendered docile, it is natural that the current dictatorship should go on to have the longest run of any dictatorship in the country's history.

Maybe it is a good thing, in terms of what is called "peace-building". But what is "peace" if there is no justice?

The 1995 constitution was a document that – despite the aspirations cited in its preamble – did not really *see* our history. It simply did not take cognisance of Uganda's governance failings, and attendant dramas of the past, to create real

representation.

Back to square one. Uganda is going to have to try again.

A Lost Opportunity: Can the National Land Commission Reclaim Its Original Mandate and Regain the Public's Trust?

On 19th February 2019, the term of office of officials of the National Land Commission ended. A new set of Commissioners will have to be appointed. This seems like a good moment to reflect on the commission's record and to remind ourselves of how much hope we citizens had invested in this constitutionally mandated independent commission.

Let us begin by reminding ourselves of the origins of the commission and the mischiefs we had hoped it would address. Institutional change in the land arena was a key aim of the new Constitution when it was inaugurated in 2010. The hope was that a new architecture of land governance would solve Kenya's long-standing land problems, including massive and worsening inequalities in access to land, the concentration of land in a despotic executive, widespread land grabbing, the irregular and illegal use of land as a patronage resource, and continuing conflicts over who is and who is not entitled to occupy land.

The National Land Commission was envisaged as an independent constitutional commission that would stand apart from existing institutions associated with facilitating a multitude of wrongs, including corruption. The path to the creation of the National Land Commission was by no means easy. Although there was powerful advocacy for it at the start of the constitutional review process, it also encountered its opponents. It was hoped that creating a strong land commission undergirded by constitutional guarantees of its independence would mark the

beginning of a new land order for Kenya. It would put into effect Chapter Five of the Constitution that emphasises the importance of land being "held, used and managed in a manner that is equitable, efficient, productive and sustainable". And it would be guided by the principles of land policy inscribed in the new Constitution and by its national values, including those of participation, consultation and transparency, all of which had entered the Constitution after concerted debate and struggle.

In spite of these aspirations, what we have witnessed in the short life of the National Land Commission is concerted resistance to the changes it might have brought about. The national government has fought hard to retain its control over key land functions, including land registration. There has been a powerful centralising effort by a state determined not to lose control of management of and access to land, including regional and central land registries.

The Ministry of Lands, Housing and Urban Development has been the prime actor in this struggle for control. An incumbent institution with vast experience, it has worked hard to keep the new National Land Commission in check. The short life of the Commission has been riddled with infighting and uncertainty. Those who wished to maintain the status quo sought to make the commission an appendage of the executive. The land commission quickly assumed a subordinate role to the land ministry. It struggled to take on new and distinct responsibilities. It absorbed administrative officials from the ministry. Located in the Ministry of Lands, Housing and Urban Development's headquarters at Ardhi House, it was essentially a tenant at the will the ministry.

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The Supreme Court's Advisory Opinion

In 2014, with much of the business of county land administration at a standstill, the Supreme Court was asked to provide an Advisory Opinion on what should be the relationship between the two bodies in light of the Constitution and the

relevant land laws. Advisory Opinions are a judicial mechanism that enable the Supreme Court to provide "authoritative and impartial interpretation of the Constitution" (s. 3 Supreme Court Act 2011). Resorting to the court for its guidance was a clear indication that two bodies with responsibilities on land had reached a stalemate. The country's highest court was being asked to rule on a key question: what are the responsibilities and duties of the institutions envisaged by Kenya's new legal framework for land governance?

The Supreme Court is charged by legislation with being a guardian of the Constitution and its values. Section 3 of the Supreme Court Act 2011 provides that the objectives of the court "enable important constitutional and other legal matters, especially matters on transition to the new Constitution be determined with due regard to the circumstances, history and cultures of the people". The Supreme Court's ruling in this matter is extremely detailed (it runs to sixty-two pages). It is perhaps one of the best considerations of Kenya's land history and of the connections between land reform and constitutional transformations currently in existence. But the Advisory Opinion fails to provide, as the amicus curiae submission of the Katiba Institute urged, detailed guidance on the meaning of land administration and management. Despite its keen sense of the history of land in Kenya and its stated commitment to constitutional transformation, including the role of the land commission in this, the court did not provide the direct and forthright judicial support the commission needed at this critical stage of the commission's infancy.

Particularly in relation to titling responsibilities, the court failed to grasp how the case presented a unique jurisprudential opportunity. The court might have developed in its judgment reasoning that had the effect of "locking in" a public law perspective on land issues. What was being asked of it was an interpretation of public functions, essentially administrative law. It should have provided robust and detailed guidance on the powers and responsibilities of institutions and individuals in the land arena.

Instead, the court relied rather too much on a view of the case as predominantly based on land law, and specifically private law. This is evidenced by its reading of the function of registration of title. Its reasoning here was that the legislature cannot have envisaged a fragmentation of the role of land title issuance between the ministry and the commission because that would be bad for land markets and lead to uncertainty. This emphasis by the court on the need to avoid

fragmentation in a key area of land dealings shows a private law interpretive inclination. The court prioritised a private law view of land as a tradeable asset. It failed to see that the task of breathing life into terms such as "land management" and "land administration" is essentially an elaboration of public law. Such a stance might have led the court to reason differently. Its own account of constitutional and land history in the judgment should have led it to that point. Aware of the mischief, which a new dispensation in land was developed to address, the court should instead have provided jurisprudential backing for a strongly protected constitutional commission rooted in administrative law.

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The Advisory Opinion falls short of issuing specific detail of how to resolve the problems between the land ministry and the land commission that had come to characterise the years since the new land laws were enacted. The judgment leaves this for the two bodies to work out. Given the strains of the past few years, and the impasse at which they found themselves on the eve of the Advisory Opinion, it is hard to see how this order could be an effective one. The judgment provides everything needed for a historically informed jurisprudence. The court knows why there is a need to guarantee the independence of the National Land Commission, but it does not build a sturdy and enduring architecture with detailed and carefully elaborated roles specifically set out.

The outcome of the judgment is that the role of the land commission is truncated. The roles it remains with are: the conduct of research on land issues and on natural resources; initiating inquiries into historical land grievances and recommending redress; and promoting traditional methods of resolving land conflict. The mandate of the commission is succinctly summed up by the court as "a brains-trust mandate in relation to land grievances, with functions that are in nature consultative, advisory, and safeguard-oriented". Thinker, but not doer, the resultant land commission is a far cry from that envisaged by the Constitution and the National Land Policy.

Successes and challenges

Despite the numerous challenges that it has been faced with, the commission has had some successes. Staff at the commission have demonstrated an ability to make progress in spite of the difficult context. For instance, through its Research Directorate, the commission has partnered with civil society organisations, academics and practitioners. The commission has also undertaken the process of review of grants and dispositions on public land.

The *Shule Yangu* initiative represents an important success. The issuance of title deeds to public schools has guaranteed the protection of land owned by schools. The commission has worked hard to recover public land allocated to various state agencies, including the Water Ministry, the National Youth Service, the Kenya Prisons Department, Kenya Ports Authority and the Kenya Maritime Authority, which was subsequently grabbed by private developers. (See, for example, the Makupa Causeway and Kitale Museum cases.)

Although our focus in this article has not been on rehashing graft narratives, it is important to acknowledge how much harm has been done to the commission's independence and non-partisanship by recent scandals. Allegations of impropriety and of corruption have become commonplace. The commission's credibility has been called into question since the loss of data on compensation payments for land which it was holding on an internal computer. It has been embroiled in land compensation scandals. Serious doubts have been cast over the integrity of some commissioners.

The commission has not only lost the public's trust, it has also lost its status as an independent guardian of the Constitution in the land arena and has become associated instead with the sorts of land wrongs for which the land ministry is infamous. Most recently, by allowing the regularisation of title to the land on which Weston Hotel sits, the commission caused much upset. Why, asked Kenyans, did it not give the same opportunity to the many properties that were demolished after it was established that they were sitting on public or riparian land? Differential treatment of this sort casts doubt on the commission's independence in discharging its mandate.

The coming years

In discharging their responsibilities, the new land commissioners must have at

the front of their minds the public and administrative law framework that should govern their work. Unlike other independent commissions, the land commission has a unique and symbiotic relationship with the executive in the form of the Ministry of Lands. Negotiating this relationship has not been easy but a renewed National Land Commission will reconnect with constitutional history and with the long-standing demands of Kenyans for an accountable and independent institution in charge of land.

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The public law model we have suggested emphasises administrative duties, restraint of public officials and accountability. These are the constitutional values with which the land commission was inaugurated. Since then, a private land law model has been allowed to predominate, including in the landmark Supreme Court ruling on the relationship between the land ministry and the land commission and in the analyses of most commentators on land matters. A public law model retrieves Kenyans' hopes for a different and better way to manage and administer land as the commission enters its next phase.

Why we cannot change the Constitution without violating it

Despite the talk on the necessity and content of constitutional amendments, there has been little or no discussion on the process to effect legal changes to Kenya's Constitution. It is a Catch-22 situation. On the one hand, Parliament cannot

amend the Constitution without violating it. On the other hand, there is no way the Constitution can be amended without Parliament.

There are only two ways to amend the Constitution of Kenya 2010, both of which are detailed in Chapter Sixteen. The first, by parliamentary initiative, is provided in Article 256. This entails a constitutional amendment in the form of a bill that can be introduced in either house of Parliament. The bill must be subject to public participation and must pass by at least two-thirds majority of Parliament, which means at least 234 votes in the National Assembly and 45 in the Senate at both the second and third readings of the bill.

The second method to amend the Constitution is through popular initiative provided in Article 257, which vests the power to initiate a constitutional amendment in the people. A popular initiative may be initiated by a citizen, a movement or a political party through collecting the signatures of at least one million registered voters. Once the popular initiative is submitted to the Independent Electoral and Boundaries Commission (IEBC), it must be in the form of a draft bill.

Thereafter, the IEBC, after confirming that the popular initiative complies with the requirements of Article 257, must within 3 months of its receipt submit the draft bill to all 47 County Assemblies for consideration. At least 24 County Assemblies must approve the popular amendment bill (within 3 months), and thereafter the bill shall be submitted to Parliament where it must pass by a simple majority in each house before being submitted to the President for assent and signature. Given the recent resignations of some IEBC commissioners, this option presents the further complication of the IEBC lacking the quorum needed to act. Furthermore, the replacement of IEBC commissioners also requires the approval of the National Assembly, according to Article 250(2)(b).

> *The Constitution of Kenya, while less than a decade old, is the result of decades of struggle by ordinary Kenyans to assert the right to control their destiny and to wrest control from politicians and political dynasties.*

Parliament is the common denominator in both constitutional amendment processes. This makes sense as it is a reflection of the important role that Parliament plays as the institutional manifestation of the “sovereign power” of the people from which the Constitution derives its authority.

In addition, with both methods, the parliamentary initiative (Article 256) and the popular initiative (Article 257), the provisions of the amendment **must be subject to a referendum** if they relate to 10 areas, including: the supremacy of the Constitution (255(1) (a); the sovereignty of the people 255(1)(c); the national values and principles of governance 255(1)(d); the Bill of Rights 255(1)(e); the independence of the Judiciary and the independent offices to which Chapter Fifteen applies 255(1)(g); the principle and structure of devolution 255(1)(i); and the provisions of Chapter Sixteen 255(1)(j). However, a referendum can only be conducted after the proposed constitutional amendment passes in Parliament.

Again, this is a constitutional affirmation of the source of power, which "belongs to the people of Kenya". The Constitution of Kenya, while less than a decade old, is the result of decades of struggle by ordinary Kenyans to assert the right to control their destiny and to wrest control from politicians and political dynasties. So, the only way the people of Kenya have accepted that the Constitution can be amended is through Parliament. Parliament is a creation of the Constitution which defines its composition and role.

One of the most significant changes in national governance after 2010 was the creation of a bicameral legislature, with Article 93 establishing Parliament which consists of two houses – the National Assembly and the Senate. Articles 97 and 98 define the National Assembly and Senate as elective bodies. As elective bodies, the principles of the electoral system provided in Article 81, as well as the composition requirements of elective bodies in Article 27(8) of the Bill of Rights also apply to Parliament.

Therefore, in evaluating whether Parliament has the capacity to enact any amendments to the Constitution, as provided in Chapter Sixteen, we must first determine two things: one, that Parliament is constitutionally compliant, and two, that it is acting in exercise of authority granted to it by the Constitution. Without meeting the first requirement, we cannot proceed to the second. A constitutionally compliant Parliament cannot legally act outside its authority as prescribed in the Constitution. And an unconstitutional Parliament, one composed in violation of the Constitution, cannot legally perform any acts as it fails the test of legality established by the Constitution.

The current Parliament, the second after the promulgation of the Constitution of Kenya in 2010, has a membership of 416 persons (excluding both Speakers).

Based on data from the IEBC after the August 8th 2017 election, the second post-Constitution parliament is 77% male and 23% female. Parliament complies fully with the numerical provisions provided for its membership: there are 349 members of the National Assembly (excluding the Speaker), as required in Article 97, and 67 members of the Senate (excluding the Speaker), as required by Article 98. However, neither Parliament as a body nor either house individually complies with Articles 81(b) and 27(8).

> *Parliament's failure to comply with the gender composition requirement of its membership renders it unconstitutional, just as its failure to comply with its numerical composition (fewer or more than 416 MPs) would render it unconstitutional.*

Article 81 in Chapter Seven on Representation of the People lays out general principles for the electoral system, which include universal suffrage, free and fair elections and that "not more than two-thirds of the members of elective public bodies shall be of the same gender" 81(b). Article 27(8) provides that "not more than two-thirds of the members of elective and appointive bodies shall be of the same gender". These are mandatory provisions of the Constitution and fix the constitutionality of Parliament as a body. They thus determine whether Parliament is legally capacitated to act at all.

Parliament's failure to comply with the gender composition requirement of its membership renders it unconstitutional, just as its failure to comply with its numerical composition (fewer or more than 416 MPs) would render it unconstitutional. The actions of an unconstitutional Parliament lack legal authority. An illegal Parliament cannot perform its constitutional functions; it cannot, for instance, enact laws, it cannot approve appointments to Cabinet or to the IEBC, nor can it amend the Constitution. An illegal Parliament is outlawed in Article 3, which states: "Any attempt to establish a government otherwise than in compliance with this Constitution is unlawful."

It is, therefore, an irrefutable fact that the second post-Constitution Parliament is unconstitutional and illegal. Indeed, this is also the official position of the Office of the Attorney General, the government's principal legal adviser. In 2012, concerns about a potentially unconstitutional Parliament and the constitutional crisis this would precipitate, led the then Attorney General, Prof. Githu Muigai, to

seek definitive interpretation of the provisions of Article 81(b) and 27(8) as they relate to Parliament. The Supreme Court of Kenya settled the question in its majority opinion, holding that while the first post-promulgation Parliament would be exempt from compliance with Articles 27(8) and 81(b) in its composition, that same Parliament would be required to enact legislation to implement the gender principle in Article 81(b) by August 27, 2015.

The Supreme Court of Kenya settled the question in its majority opinion, holding that while the first post-promulgation Parliament would be exempt from compliance with Articles 27(8) and 81(b) in its composition, that same Parliament would be required to enact legislation to implement the gender principle in Article 81(b) by August 27, 2015.

The effect of the Supreme Court's 2012 judgment was two-fold: first, it provided temporary legal cover to an otherwise unconstitutional Parliament, and second, it established that without judicial interpretation and decree, a Parliament that fails to comply with Articles 81(b) and 27(8) is indeed illegal. By its decision, the Supreme Court affirmed the position of the Office of the Attorney General that a Parliament that failed to comply with provisions of the Constitution in its composition would create a constitutional crisis.

The Supreme Court's temporary reprieve required the 11th Parliament to enact a law before the next general elections scheduled for August 2017, thereby ensuring there would be no constitutional crisis as the 12th Parliament, and all subsequent parliaments, would be composed in compliance with the Constitution. However, despite the Supreme Court and subsequent High Court judgements ordering Parliament to enact legislation to ensure compliance with Articles 27(8) and 81(b), Parliament has refused to abide by the provisions of the Constitution and the law.

The foundation on which the 2012 Supreme Court judgement rests is a determination that as an illegally composed body, Parliament, without the exemption granted by the Supreme Court, would be unconstitutional and legally incapable of enacting any of its constitutional functions. The current Parliament has no such protection and therefore exists entirely outside of the constitutional order.

How then can a body that has deliberately set itself apart and outside the Constitution make amendments to the Constitution? Legally it cannot. Its position on the relative merits or demerits of the various constitutional amendments proposed is, therefore, irrelevant because the means to accomplish any amendments is legally unavailable to Parliament at this juncture due to the illegality of the national legislature.

> *By promoting national dialogue on constitutional amendments, the political leadership – with the complicity of the Chief Justice and religious, business and civil society leaders – are attempting to lure the public into a conspiracy to commit further illegalities.*

Kenya's leadership class is fully aware of Parliament's illegality and the constitutional crisis. In addition to the official position of the Office of the Attorney General, the jurisprudence from various courts and a petition seeking to dissolve Parliament pursuant to Article 261(7) has been pending before Chief Justice Maraga since September 27, 2017. By promoting national dialogue on constitutional amendments, the political leadership – with the complicity of the Chief Justice and religious, business and civil society leaders – are attempting to lure the public into a conspiracy to commit further illegalities.

The only way to legally amend the Constitution is through a constitutionally compliant Parliament. The legal impediment to constitutional amendments is Parliament's unconstitutionality; curing that illegality is the first step to legally amending the Constitution.

Winter is here!