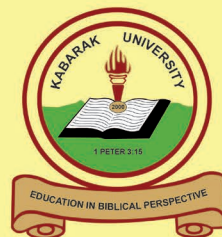


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# Some Passing Reflections on the Building Bridges Initiative

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## Abstract

This paper is a product of general reflections on the ongoing Building Bridges Initiative (BBI) process. The first part introduces the BBI process and explores its role in the ongoing constitutional reform debates. The second part examines some of the central weaknesses of the process in view of constitutional theory and highlights their deleterious effect on any gains that the process may seek to achieve. The third part examines some positive elements of the process and highlights the role of depoliticisation in the achievement of the BBI committee's objectives.

**Key words:** Constitutional Change, Constitutional Moment, Building Bridges Initiative

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## 1. Introduction

A Constitution can be defined as a set of laws and rules establishing the machinery of the government of a state and which defines and determines the relations between different institutions and areas of government - the executive, the judiciary and the legislature.<sup>1</sup> The history of Kenya's constitutional development can be traced to the pre-independence period where the colonial government made several attempts to draft a Constitution for the colony. These efforts eventually resulted in the Independence Constitution which not only established a bicameral parliament but also anchored fundamental freedoms, protected the independence of the judiciary, guaranteed political pluralism and anchored majimboism.<sup>2</sup>

However, the post-independence period saw an increased level of constitutional mutilation in which parliament, which was then dominated by members of the ruling party Kenya African National Union (KANU), amended the Constitution several times to allow the government to deal with dissent, entrench tyranny and perpetuate neo-patrimonial politics. Such massive changes eventually fuelled the call for a new Constitution. Although the KANU government was generally resistant to the development of a new Constitution, the National Rainbow Coalition (NARC) government was very receptive to constitutional reforms and pushed through several constitutional projects to try and jumpstart the process. These attempts resulted in the Bomas Draft and the Wako Draft of the Constitution (which was rejected in the 2005 referendum).<sup>3</sup> The two drafts later formed the bedrock of the 2010 Constitution which was passed through a referendum. Eight years after the 2010 constitution, a new constitutional amendment movement emerged. This is what has been called the Building Bridges Initiative (BBI).

## 2. The Building Bridges Initiative (BBI)

The history of Kenya's political landscape has been characterised by political violence, corruption, politics of exclusion, unequal resource distribution and

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<sup>1</sup> Media Development Association & Konrad Adenauer Foundation, *History of Constitution Making in Kenya* (Media Development Association, 2012) 1.

<sup>2</sup> Nelly Kamunde, 'Kenya's Constitutional History' REDD+ Law Project - Briefing Paper July 2014.

<sup>3</sup> The Bomas Constitutional Review Process suffered set back when the High Court declared that sections of the enabling process, The Constitutional Review Act, were unconstitutional and that Parliament did not have powers to review the Constitution. For details, see *Njoya and Others vs Attorney-General and Others* (2004) AHRLR 157 (KeHC 2004).

a winner takes all electoral process. The consequence has been a cut-throat competition which has more often than not, turned into ethnic competition and eventually violence. The competition and violence have been experienced since independence but were more pronounced in 2008 when violence broke out following disputed elections. Similar scenes were repeated in 2013 and 2017 although on a lesser scale. Following the disputed presidential elections, the leading contenders: Uhuru Kenyatta and Raila Odinga opted to reconcile through a handshake and put forth the Building Bridges Initiative (BBI) which was meant to develop legislative proposals (including constitutional amendments) that would help prevent the recurrence of violence. A committee of 14 individuals was then formed and gazetted to spearhead the process. The committee has been receiving views and memoranda from politicians, members of the public and pressure groups. It has, however, not presented its final report to the president and the former Prime Minister as required by their terms of reference. The BBI terms of reference required the committee to come up with recommendations on ending ethnic divisions and promoting inclusivity. The committee was also tasked to suggest mechanisms of avoiding polarising elections, enhancing national ethos, dealing with corruption, entrenching devolution and guaranteeing shared prosperity and human rights. The committee submitted its first report to the president on November 2019 and is currently working on the final report.

Despite its noble foundation, the BBI process has been subject to a lot of polemics, with critics citing various weaknesses, especially in view of the fact that achieving some of its core objectives require radical constitutional changes. The following section contextualizes some of the glaring weaknesses in the process.

### **3. Weaknesses of the BBI Initiative**

Absence of a strong constitutional moment: Successful constitutional processes are usually driven by constitutional moments. A constitutional moment occurs when a country undergoes a protracted social, economic, or political upheaval that disturbs an existing legal order, therefore, creating the need for a new Constitution.<sup>4</sup> Bruce Ackerman has identified components of a constitutional moment as: *signalling*, in which an institutional actor makes clear

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<sup>4</sup> See Bruce Ackerman cited in Daniel Taylor Young, 'How Do You Measure a Constitutional Moment? Using Algorithmic Topic Modelling to Evaluate Bruce Ackerman's Theory of Constitutional Change' 2013 (122) Yale Law Journal, 1991, 1999.

that major constitutional change is a possibility in the near future; *proposing*, in which the institutional actor pushing change begins to elaborate a program of constitutional reform, which gradually consumes more and more of the country's collective attention and the energy of political actors; *triggering*, an intervening event which provides preliminary support for the constitutional challenge and generates additional momentum for change; *ratifying* in which one or more of the institutional actors who have been resisting change gives up, clearing the way for a new constitutional regime; and *consolidating*, the various organs of government begin to integrate the new constitutional understanding into the previous regime, synthesising the two into a new constitutional order.<sup>5</sup>

Thus, although the political class has tried to locate BBI's constitutional moment within the 2017 elections, the same does not meet the test established by Ackerman nor has it elicited a lot of constitutional enthusiasm from the citizens as it would be expected. Although scholars like Ackerman would argue that disputes emerging from the 2017 election could be considered as ushering in a new constitutional moment, such a conclusion is problematic because the same resulted from a violation of the constitutional requirements on election rather than on the Constitution itself. In other words, if the electoral agency and the government had conducted the elections in line with the Constitution, the 2017 post-election disputes would not have emerged. Part of the reason is that previous constitutional processes were preceded by protracted disputes resulting from a history of marginalisation and oppression which the current Constitution sought to fix. Once it came into place, the impetus for more constitutional processes all but dissipated. The consequence is that the process has largely remained elitists and is quite removed from the governance discourses of the common citizens. This explains why meetings called by the committee have been poorly attended forcing politicians to seek political legitimacy through regional BBI rallies.

The politicisation of the process: It must be admitted from the outset that politics and law cannot be divorced from each other for three reasons. First, because law-making process is actually a political process that involves the making of political decisions. Second, because law, being a mechanism of organising society, (re)organises politics. Political forces, especially neo-patrimonial ones, are bound to take deep interest in law reform and making processes so as to ensure that the protection of their economic and political interests. Third, since political parties often have the long term interest of forming and retaining government, they often

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<sup>5</sup> Ibid.

take a keen interest in the law because it provides a legitimate means of achieving this goal. Each political party would, therefore, want to reorient the law-making process to suit its interests and aspirations.

Notwithstanding the above, the entry of politicians into the BBI process has politicised the process resulting in what Bannon calls the ‘capture of the constitutional process by politicians and other powerful forces in society.’<sup>6</sup> According to Bannon, ‘a well-designed process can fail if elites do not follow the rules, and incumbent politicians are particularly well situated to change procedures ex-post.’<sup>7</sup> The emergence of BBI rallies led by politicians has introduced an element of capture into the process, thus, relegating the BBI committee into minute-takers or sometimes, passive television viewers as politicians present, receive and even commission memoranda on the process. Such capture poses a risk to the process because the focus shifts from adhering to the original intentions of the review process to the short terms goals of the political class. To this end, the Orange Democratic Movement (ODM) and the *Kieleweke*<sup>8</sup> Wing of Jubilee have dominated the BBI process to the exclusion of other political players and have even used the constitutional process to push through political re-alignments.

One challenge that characterises political interference in constitutional reform processes is that it increases the number of ‘contentious issues’ because politicians often want to revisit all issues that they find intolerable in the existing legal and political dispensation. As has happened with the BBI process, the process, thus, shifts from guaranteeing the social-economic and political health of the nation to building consensus around the contentious issues. However, the fact that such contentious issues are seen along the prisms of certain political figures means that such a consensus is very difficult if not altogether impossible to build. This narrow conception of the constitutional reform process is particularly problematic because it temporalises the law into a means of resolving immediate individual problems rather than a strategic instrument for organising a society over a long period of time. This explains why some legal commentators have argued that such processes should be completely divorced from elections. One way of doing this would be to

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<sup>6</sup> Ibid.

<sup>7</sup> Alicia Bannon, ‘Designing a Constitution-Drafting Process: Lessons from Kenya’ 2007 (116) Yale Law Journal, 1824, 1849.

<sup>8</sup> Following the handshake between the Opposition Leader and the President, the ruling Political party, Jubilee split into two camps namely *Tanga tanga* (aligned to the Deputy President) and *Kieleweke* (aligned to the President). The differences between the two camps are fluid and therefore difficult to contextualize in the context of this paper. The names however emerged from political pronouncements that have characterised the divisions.

enact the legal reforms now but suspend the implementation process for 10 or so years. This would minimise the political (mis)calculations that have bedevilled the current process.

Ethnicisation of the process: Just like the rest of Africa, Kenya's political landscape is highly ethnicised. This is because political parties are usually formed by regional kingpins who often try to use them to ascend to national political offices. The consequence is that politics, ethnicity and political parties are triplets in Kenya. Since the law is generally seen as a servant of politics<sup>9</sup>, a highly ethnicised political process seeps through into the legal reform domain. Accordingly, ethnic communities that associate with major political parties (and political players) have aligned themselves with the BBI process while those who see the process as antagonistic to their political bigwigs have at best provided lukewarm support and at worst opposed it. Thus, 'because ethnicity will likely be a significant undercurrent in constitutional negotiations in societies with salient ethnic divisions, a review process must be consciously designed to mitigate ethnic tensions and to avoid possibilities for capture along ethnic lines.'<sup>10</sup> However, the BBI process has failed in this process and instead fuelled ethnic tensions as communities see themselves as either winners or losers of the process. The introduction of the BBI question into the ongoing revenue allocation debate has only worsened the ethnic dimension of the discussions, thus, compromising the legitimacy of the process.

Failure to build consensus: Consensus building as an important step in constitutional development and reform processes. Robert Maxon has pointed out that those spearheading the constitutional process must isolate the contentious issues and build consensus around them for an all-inclusive process.<sup>11</sup> One of the most contested issues in the current BBI discourse has been the structure of the executive. One wing of the debate has been focusing on the retention of the strong presidency with a non-executive prime minister while the other has sought a powerful executive prime minister. Needless to say, the BBI steering committee has failed to build consensus on this matter and has left the entire debate to the politicians. This has resulted in a situation in which specific political personalities have been associated with given positions, thus, raising suspicion about the process and limiting its legitimacy.

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<sup>9</sup> Makau Mutua, 'Purge in Senate illustrates why the Law is a Servant of Politics' (Saturday, July 04, 2020) available at <<https://www.nation.co.ke/kenya/blogs-opinion/opinion/purge-in-senate-illustrates-why-the-law-is-a-servant-of-politics-310210>> accessed on 16th September 2020.

<sup>10</sup> Bannon note 7 at 1853.

<sup>11</sup> Maxon, Robert, 'Constitution-Making in Contemporary Kenya: Lessons from the Twentieth Century' (2009) 1(1) Kenya Studies Review, 11.

Limited role of parliament: Although opinions are contested with regards to the involvement of parliament in the process,<sup>12</sup> there is at least a tacit agreement that the goodwill of parliamentarians is necessary for the success of the process. This is because, if not involved from the beginning, they may sabotage the entire process or use parliament to introduce legislative reforms that run contrary to the anticipated legal reforms.<sup>13</sup> Involvement at a very late stage also poses the risk that parliamentarians may introduce new contentious issues which may derail the process. It is, thus, encouraged that parliamentarians should be engaged either through parliamentary committee, caucuses or memoranda to ensure that their views are submitted for public participation by the committee. This not only introduces an element of transparency in the process but also enhances accountability and legitimacy of the process. It also ensures that contentious issues are identified and resolved early enough to ensure compliance with necessary timelines and milestones. However, the BBI process in Kenya has failed to enhance the participation of parliamentarians thus rendering the process exclusive to the whims of the two key principals, President Uhuru Kenya and the former Prime Minister, Raila Odinga.

Lastly, the process of appointing the BBI committee members was largely opaque: Yash Pal Ghai has particularly argued that members of the constitutional review steering committee must be appointed in a transparent manner to help build trust in the process.<sup>14</sup> This can be done by identifying the various interest groups and appointing categories of people who are either specialised on matters affecting these groups or are direct representatives of these groups. The process must also be open and participatory to elicit enthusiasm and public participation. The committee is made up of individuals who were appointed by the president and prime minister. There is generally no information as to their unique qualifications beyond their academic credentials and professional history which in itself may not explain why they were appointed. At the same time, the committee members do not seem to represent identifiable interest groups in the country nor do they possess extra capacities in constitutional making processes. This opaqueness in the process has eroded their legitimacy. This reality is further complicated by the fact that some of them are sitting members of parliament who possess strong political ideologies and orientations which would be antagonistic to any consensus building.

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<sup>12</sup> Ibid.

<sup>13</sup> Ibid.

<sup>14</sup> Yash Pal Ghai, *The Role of Constituent Assemblies in Constitution Making*. See also Yash Ghai, 'A Journey Around Constitutions: Reflections on Contemporary Constitutions' 2005 (122) 4 South African Law Journal.



#### 4. Some Light Within the Tunnel

The role of value systems in societal growth cannot be emphasised. As Lord Patrick Devlin famously argued, the collapse of a society is usually preceded by a collapse in its value system.<sup>15</sup> He particularly observes that:

If men and women try to create a society in which there is no fundamental agreement about good and evil they will fail; if, having based it on common agreement, the agreement goes, the society will disintegrate. For society is not something that is kept together physically; It is held by the invisible bonds of common thought. If the bonds were too far relaxed the members would drift apart.<sup>16</sup>

Devlin's argument is centred on the idea that since law is primarily concerned with reproducing cohesion in society, building national ethos falls within the province of law. Indeed, the BBI steering committee seems to be alert to this reality. Specifically, the process seems to be anchored on certain positive national values which when realised, may help propel the Kenyan society to greater levels of integration and progress. Although scholars like Devlin see ethos as falling within the province of criminal law, Yash Pal Ghai has argued that the constitutional development and amendment process should help nurture and build national values. He opines that:

The process may do more than set up a framework for government; it may be a process of elaborating national goals and values and broadening the agenda for change....The constitution-making exercise itself can be an important catalyst for this wider process, especially if the constitution-making is designed to involve nation-wide debates and discussions and to discover the concerns of all the people, not just those of the elites or urban populations.<sup>17</sup>

The BBI process, thus, achieves this benchmark by focusing on the redevelopment of national ethos. Indeed, one of the committee's terms of reference requires it to build national ethos as a way of fostering national unity. National unity and cohesion are not only the national values encapsulated under article 10 of the Constitution but are also springboards towards national integration, sustainable development and peace. To this end, BBI as a process seems to be oriented towards the resolution of historical national injustices and reconciliation

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<sup>15</sup> Patrick Devlin, 'Morals and the Criminal Law' available at <[http://www.klindeman.com/uploads/3/8/2/2/38221431/devlin\\_-\\_morals\\_and\\_the\\_criminal\\_law.pdf](http://www.klindeman.com/uploads/3/8/2/2/38221431/devlin_-_morals_and_the_criminal_law.pdf)> accessed on 16th September 2020.

<sup>16</sup> Ibid Par 11.

<sup>17</sup> Yash Pal Ghai note 14 at 3.

which have been hailed as some of the push factors that usher in constitutional moments and spearhead the reform process.<sup>18</sup> Identifying the need for national ethics as a product of the constitutional reform process, the committee, in its draft report observed that:

This report is a historic opportunity for us to begin willingly defining, developing and subscribing to an enduring collective vision that would lead to a united Kenya equal to all its major challenges. It would appreciate and honour excellence in leadership, in the civic practices of citizenship, and in our care and consideration of one another. Such an ethos would be deeply respectful of differences in culture, heritage, beliefs and religions. Its character would guide and constrict the planning and actions of the State to the benefit of the people of Kenya. The journey to developing such a national ethos begins by accepting the desperate need for it.<sup>19</sup>

As highlighted earlier, participation is a contested issue in the constitutional development process. Scholars do not agree on the value and state of participation with both Bannon and Yash Pal Ghai presenting different views on the depth of participation that is needed for such a process. Whereas Ghai advocates for condition-less full participation, Bannon observes that it may be impossible to map out all interest groups for the sake of participation. Thus, in his view, too much participation may lengthen the process, increase the number of contentious issues and make it generally cumbersome, slow and contested. He argues that the price of participation may sometimes outweigh its strengths. Notwithstanding these views, the BBI steering committee attempted to improve the legitimacy of the process by visiting all regions of the country and receiving memoranda from as many groups as possible within the given timelines. As at the outbreak of COVID 19 (when public rallies were suspended), the committee had embedded itself into the BBI regional rallies and would send its officials to receive memoranda to minimise the politicisation of the process. In this regard, the committee seems to have done well with regards to the participation index.

Although it is unclear whether the copies of the initial draft have been distributed to all corners of the country, the fact that the committee came up with an initial draft to guide public debate on the process is a factor that is hailed by scholars like Ghai. Such a draft is not only important for citizens to isolate contentious issues but is also useful in guiding national discussions towards consensus building. Such a step also goes a long way in enhancing public participation as envisioned

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<sup>18</sup> Ibid see also Young note 4.

<sup>19</sup> Building Bridges Initiative Preliminary report, p 30 available at <<https://d2s5ggbxczybtf.cloudfront.net/bbireport.pdf>> accessed on 16th September 2020.

in article 10 of the Constitution. Such a process has particularly been hailed by constitutional scholars because it enables all sections of society to examine the extent to which their views and interests have been captured in the report and to propose additional ways of fulfilling the same interests in view of other proposals of other sections of the society. It is also a crucial component of civic education which is necessary for informed citizenship.

Lastly, there seems to be a push for a referendum which would offer an additional opportunity for public participation and self-determination by citizens. This would especially be fruitful because the citizens would make the ultimate choice over the ways in which they are governed. Since the rigid Kenyan Constitution only allows for the amendments of some articles subject to a referendum, the referendum proposal in the BBI process will help in widening the scope of possible amendments. A parliamentary process may be quicker, but the same would face constitutional obstacles since some sections may never be amended through this process, regardless of the extent to which their amendments are recommended by the people through the BBI process. Such a process would meet the test in *Njoya and Others v Attorney-General and Others*<sup>20</sup> where the Court of Appeal observed that:

Since (i) the Constitution embodies the peoples' sovereignty; (ii) constitutionalism betokens limited powers on the part of any organ of government; and (iii) the principle of the supremacy of the Constitution precludes the notion of unlimited powers on the part of any organ...[73] 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.<sup>21</sup>

It is clear from the above extract that the constitutional development, amendment and review processes must be people-driven. The question is, therefore, the extent to which the sovereign authority- the people, are involved in the process. The BBI process, much as it seeks outcomes that are good for the nation and the people, seems to be less people-centred compared to earlier constitutional processes. However, it hoped that a referendum will cure this process by taking the process back to the people and ensuring that their voices guide the outcome. The BBI committee, to address this process, must take seriously the standards set in

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<sup>20</sup> *Njoya and Others v Attorney-General and Others* (2004) AHRLR 157 (KeHC 2004).

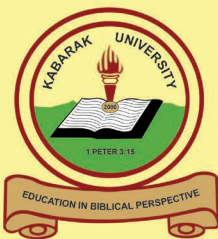
<sup>21</sup> *Ibid* Par 73.

*Njoya* as well as the different approaches advocated for by Bannon, Yash Pal Ghai (and this paper).

Further to the above, the steering committee must undertake the difficult task of depoliticising the process. Although law and politics are almost joined at the hip, exposing the process to political players at the early stage risks obscuring its intentions. Political players should only engage with the process towards the end, when very limited damage can be done to the process. This will minimise both the ethnicisation and politicisation of the process, a reality that is counterproductive to both the national values under article 10 of the Constitution as well as to the terms of reference and aspiration of the BBI steering committee.

## 5. Conclusion

Law must always adjust to changing social-economic and cultural realities as well as to the changing moralities in society. A failure to respond to social changes would imply that the law would be lagging behind the society and would therefore fail to adequately perform its regulatory and dispute resolution functions. Such an event would easily lead to the collapse of any society. The Constitution, being the grand norm, must be alert to such realities and must, therefore, provide a mechanism for its amendment. Whether through popular initiatives such as BBI or through parliamentary processes, the Constitution must be subject to changes. However, the process of constitutional change itself must adhere to the constitutional principles and must seek to realise the overall principles and aspirations of constitutional law. It is against this background that this writer explores the pros and cons of the ongoing constitutional amendments processes in Kenya. It is hoped that a well-midwifed process will act as a springboard for Kenya's shared prosperity as envisioned in its terms of reference.



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