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## **Antinomies in the struggle for the transformation of the Kenyan constitution (1990–2010)**

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How do social movements force fundamental constitutional changes in a polity? This article argues that it is the ‘disruptive power’ of movements that make them a force of change. By analysing waves of contemporary Kenyan struggles for constitutional and state reform, the article explains why it was only after 20 years of struggle, and in the aftermath of a major social conflict – the 2008 post-election violence – that constitutional reforms were successful. It further argues that it was the collective threats and fears posed by the post-election violence that forced an elite consensus necessary to deliver a new constitution in Kenya in 2010.

**Keywords:** Kenya; constitutional change; struggle; state reform; elite consensus/fragmentation; collective action/social movements; civil society

The post-colonial African state has been complex and mostly non-compliant to pressures for reforms. There are, nonetheless, a growing number of examples of ‘successful’ attempts at transforming the post-colonial African state through popular constitutional reforms. Kenya is one such recent case, where the dream for a new constitution was realised through the 4 August 2010 constitutional referendum (with 67.25% support) and its subsequent promulgation on 27 August 2010. But Kenya’s constitutional change contentions lasted two decades, involved a complex labyrinth of actors, issues and struggles, and were characterised by dual tendencies of unity and division. At different peaks in the course of this struggle, constitutional reform movements such as the Coalition for National Convention (CNC), Citizens Coalition for Constitutional Change (4Cs), the National Convention Executive Council (NCEC) and the Ufungamano Initiative emerged. These movements included representatives from various socioeconomic groups, facing distinct forms of state-perpetrated injustices, and bore testament to the deep-rooted anxieties experienced at different socioeconomic strata in society. These multi-interest coalitions, alliances and movements of different social, economic and political forces resulted in times of notable progress. But such unity and progress were momentary. Bitter and deep political, class, generational, ethnic and religious fragmentations usually contributed to their breakup and, in effect, led to many false dawns and missed opportunities for change.

This article addresses two key questions. First, what explains the emergence of successive waves, false dawns and missed opportunities in the struggles for

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constitutional change in Kenya? Second, how can we explain the realisation of a new constitution in 2010, in the aftermath of a major social conflict (the 2008 post-election violence)? The first section analyses the waves of contention for constitutional reform in Kenya. Findings reveal that an oppressive state was key in triggering the emergence of successive collective action movements. Furthermore, these waves were realms of multiple and simultaneous social struggles, alliances and competitions between different social forces involving, on the one hand, the reproduction of the dominant order, and, on the other, challenges to the status quo and attempts to create counter-hegemony. The second section analyses the nexus of political opportunities and leadership in the generation and sustenance of the reform struggles with a view to explaining how disparate socioeconomic and political groups in Kenya overcame prevalent ethnic, class, religious and generational cleavages to crystallise into a reform movement from the early 1990s.

### **Towards a conceptual explanation of the Kenyan constitutional change process**

The key proposition of the article is that it is the ‘disruptive power’<sup>1</sup> inherent in the successive waves of contention that made reforms possible. Evidence of this disruptive power over the last two decades is provided from interviews and existing literature. This research demonstrates that progress in reforming the Kenyan state is a consequence of pressures from below that forced elite fragmentations, as well as alignments of different social forces. Such alignments, especially between sections of the elite with popular struggles, were accompanied by mass conscientisation and civic education conducted by the intelligentsia, middle-class civil society organisations and religious institutions. These tilted the balance of power towards new claimants and, in turn, forced dominant political elites to make concessions to their fellow elite competitors in efforts towards self-preservation. This ultimately led to progressive state reforms as prior alignments and consciousness dictated that the concessions could not be limited to elites only. But such ‘forced elite cooperation’ was always short-lived. Internecine struggles and disagreements between different elite formations (i.e. ethnic, class, generational, political and religious) often took over and conspired to derail progress. Frustrations over arrested progress would always ignite the next wave or cycle of contention.<sup>2</sup> The article invokes evidence from four key moments in the last two decades to illustrate how new cycles of contention arose out of the remnants of their predecessors. These moments are: the mobilisations leading to and the aftermath of the 1991 repeal of Section 2A of the Constitution (i.e. the clause that made Kenya a *de jure* one-party state); the National Convention Executive Council of the mid-1990s; the Ufungamano Initiative of the late 1990s; and the post-2005 constitutional referendum developments.

### **Waves of contention in the struggles for constitutional changes in Kenya**

Kenya is a complex canvas of competing identities, classes, cultures, ethnicities and religious beliefs. New social movement theory’s insistence on subjective bonds from identity consciousness and cultural variables (i.e. status, ideology, generalised beliefs, values, ethnicity, gender and sexuality) as the ‘systems of reference’ (Melucci, Keane, and Mier 1989) that fuel shared feelings of grievance or outrage to prompt people to form collectives (Touraine 1981), discounts the possibility of unitary social struggles

emerging in such complex and conflict-laden societies as Kenya. Further literature suggests that, while a multiplicity of actors in collective struggles – as has been the case in Kenya – is a source of strength for movements, actor plurality comes laden with competing interests that challenge the viability of multi-constituency social struggles to remain united to achieve set goals (Mati 2009).

In view of the preceding, the critical questions from the struggles for Kenyan constitutional reform are: first, what explains the emergence of a common constitutional reform movement in Kenya's deeply divided society and, second, how was a dream of a new democratic constitution conceived, sustained and achieved in a society with so many cleavages? The discussion below addresses these questions in an attempt to show how a common struggle crystallised. Here, plurality is problematised because of its inherent dichotomy of strength and weakness. In this analysis I utilise a periodised approach to demonstrate how different groups congealed into a constitutional reform movement from the 1980s.

### ***Contentions in the lead-up to the repeal of Section 2A***

Contemporary struggles aimed at transforming the Kenyan state started in earnest in the early 1990s but were foregrounded by social, political and economic developments of the 1980s. A mapping of pro-reform forces and their crystallisation into the struggle for constitutional reform reveals that diverse issues and actors were key in generating discontent leading to the emergence of fragmented movements that occasionally united in their push for state reforms. These struggles have been the subject of many scholarly works. For the purposes of this paper, I find Press's (2004) conclusions on the emergence of a framework for democratisation in Kenya between 1987 and 2002 particularly instructive. Press (2004, 51) revisits the classic sociological dilemma by asking whether Kenyan struggles were a 'result of structural circumstances or agency'. However, Press (2004) over-emphasises individual agency while downplaying, among other factors, rational choice and political opportunity structures offered by formal organisations and international donor support. As will become clear in the current analysis, the Kenyan reform struggles were a product of both agency and structure in Kenyan domestic and international fronts. These struggles emerged because, to borrow from Giddens (2006, 78), Kenyans 'unlike objects in nature, [are] self-aware beings and confer sense and purpose on what they do'. But their emergence also capitalised on existing or created domestic and global political opportunities. An analysis of the socioeconomic and political developments from the 1980s provides evidence for this position.

The 1980s, seen as the *terminus a quo* for contemporary Kenyan struggles for constitutional reform, were marked by co-evolutionary intra-elite antagonism and militancy between the ruling elite and dissident groups (mainly sections of students/intelligentsia, lawyers, religious leaders and politicians). The period also witnessed falling levels of foreign aid and commodity prices that reduced financial resources utilised by the dominant power elite to keep themselves in power. In an effort to retain their dominance, President Daniel arap Moi and the Kenya African National Union (KANU) – the only political party at the time – intensified corruption and oppression of political competitors while at the same time flirting with 'mass line populism' (Currie and Ray 1984, 570).

The first wave of the heightening militancy was largely shaped by the events leading to and immediately after the 1982 failed coup. Commentators attribute the abortive coup of 1 August 1982, led by non-commissioned officers of the Kenyan Air Force, with tacit support from a section of students and intelligentsia, as an expression of dissatisfaction with the Moi/KANU regime (see, for example, Mutunga 1999; Currie and Ray 1984, 1986; Mbingu 1991; Mwaura 1997). Specifically, the triggers for the 1982 coup attempt included increasing human rights abuses, a generally 'worsening economic crisis, and [deepening] regional-ethnic tensions, open struggles over land allocation, and deteriorating relations between the Government and the University of Nairobi' (Currie and Ray 1986, 47). In the aftermath of the failed coup, the Moi government became overly brutal in its crackdown on political dissent (wa Thiong'o 1983; Mwaura 1997; Mbingu 1991). There also emerged a cocktail of underground movements led by the intelligentsia opposed to state repression. The state's ruthless crackdown on the subversive intelligentsia forced them to form alliances with sections of professional societies and the clergy to resist increasing authoritarianism.

As far as professional societies are concerned, the Law Society of Kenya (LSK) stands out. From the 1980s, the LSK – an organisation hitherto known for its conservatism – took an increasingly critical and liberal stance against the government's repressive activities. Most importantly, the LSK resisted the government's attempt to co-opt it, as had befallen organisations such as the premier Women's organisation – *Maendeleo ya Wanawake Organisation* (MYWO) and the Central Organisation of Trade Unions (COTU) (Nzomo 2003). Teaming up with a section of the clergy and the intelligentsia, the LSK became an important actor that diffused the change agenda to the masses through its campaign against further erosion of the political space, especially after the introduction of the infamous *Mlolongo* (queue) voting system by the increasingly intolerant Moi/KANU regime in 1988.<sup>3</sup> These developments were precipitated by widespread human rights abuses targeting lawyers representing those agitating for political pluralism. These lawyers, some of whom had made a name representing the dissident intelligentsia and soldiers prosecuted for their role in the aborted 1982 coup, faced the same fate as their clients – harassment, abduction, imprisonment, assassination, loss of livelihood and/or exile (Mati 2012; Mutiga 2010; Friedrich Ebert Stiftung 2003).<sup>4</sup> Under these circumstances, for these lawyers the struggle was a matter of individual survival. The motivations for the legal fraternity to join these struggles and spearhead mass mobilisations and conscientisation therefore aligns with Tarrow's (1998, 56) assertion that bereft of a middle class as a buffer between the state and society, people become 'self seekers practicing narrow individualism . . . the result [is] a jealous egalitarianism, sporadic and uncoordinated mobilisation' that may ultimately lead to a revolution.

The tide started turning against the Moi/KANU regime in the late 1980s when some prominent politicians joined the pro-reform clergy, the intelligentsia and the LSK in calling for the repeal of Section 2A of the Constitution to allow for political pluralism. Around the same time, consensus started emerging among pro-reform activists that Kenya's 'political transition from authoritarian illiberal state to a more open society . . . was centred on the constitution' (Mutua 2008, 99). In 1990, this consensus crystallised into the Forum for the Restoration of Democracy (FORD) as a multi-interest coalition of pro-reform activists from the LSK, politicians and religious leaders.

Despite the coalition, the late 1980s were also significant for divergences on the best way to transform the state. Mutua (2008, 99, 100) offers some insights on these cleavages:

Two schools of thought emerged... The first, whose adherents advocated for the legalization of opposition, argued for minimum legal and constitutional reforms to level the playing field. Its main objective was the capture of state power. The second school, prevalent within the emergent civil society organisations, called for a constitutional overhaul of the state and a basic reformulation of the purposes of political society.

For pro-democracy civil society, the reforms debate was not simply about political pluralism, but a search for the 'most appropriate political system that would create the political conditions within which Kenyans can meaningfully achieve their social, cultural, economic and other related societal goals' (Mutua 1991, 25 cited in Mutua 2008, 100). Such change, this group argued, was only possible through the overhaul of the constitution because the then constitution was, by its very nature, tyrannical. On the other hand, political opposition parties and their leaders argued that the constitution was not that bad and what was needed was election of well-trained technocrats (read themselves) to fix and transform Kenya.<sup>5</sup> As Mutua (2008, 100) argues, 'although the two schools formed the opposition to the Moi/KANU regime... their visions of reform sharply diverged beyond a certain point because of these fundamental differences'. These divisions explain the manifestations of potentials but also limitations inherent in the emergent struggles.

Despite the fragmentations, sensitisation carried out by pro-change middle-class groups tilted the power balance after large sections of lumpen urban struggles joined FORD in its challenge to the Moi/KANU dictatorship. From then on, the pro-change activists utilising mass protests and strikes led by FORD brought pressure to bear on the Moi/KANU regime to ultimately repeal Section 2A on 3 December 1991.<sup>6</sup> This was the first time unity among the pro-democracy activists and their organisations had produced disruptive power capable of forcing concessions from the Moi/KANU regime. Nonetheless, disagreements on the substance and depth of reforms forestalled the possibility of more radical state transformations through constitutional reforms. Together with ethnicity and ideological differences, these cleavages explain the rapidity with which FORD dissipated soon after the repeal of Section 2A as a multiplicity of ethnically organised opposition political parties geared towards defeating the Moi/KANU regime emerged.

### ***1991–1997: crystallisation of the constitutional change movement***

In the 1992 general election, Moi/KANU defeated a fragmented political opposition. The opposition's defeat was a blessing for the group that advocated for a total constitutional overhaul, giving them leverage over those who sought mere changes to the rules of the game. They then moved to agitate for more fundamental constitutional reforms to benefit not just the political elites but Kenyans in general (Harbeson 1999). This served as a significant landmark, incubating new demands including socioeconomic rights, addressing inequalities in access to land, insecurity, jobs and education. This shift was possible because of the support middle-class non-governmental organisations (NGOs) received from urban poor movements.

Even before the December 1992 elections, a significant attempt to bridge fissures within the movement was made through two National Council of Churches of Kenya-organised symposia in May and July. These symposia brought together different pro-change civil society, religious organisations and opposition political parties (Mutunga 1999; Mutua 2008; Nasong'o 2007). While these symposia did not deliver unity, they were significant because they led to the formation of the Coalition for National Convention. The CNC is credited as the first ever coalition of forces seeking a national dialogue on the way forward for Kenya after the repeal of Section 2A. The actors behind the CNC were drawn from different socioeconomic strata and remained instrumental throughout the struggles for constitutional reforms.

However, the CNC stagnated because of a lack of decisive leadership and the deep-rooted divisions between the two pro-reform groupings – civil society and the political parties (Mutunga 1999). The CNC's perceived radical demands for a total overhaul of the constitution also failed to attract the support of religious organisations which, together with political parties, and fearing that a new order advocated by the CNC 'would inhibit the winning political parties from inheriting the machinery of . . . power reflected by the presidential authoritarianism' (Mutunga 1999, 35), were interested only in reforms to ensure free elections. Consequently, instead of joining the CNC, mainstream religious groups, in particular the Catholic Church and the National Council of Churches of Kenya, and opposition political parties formed the National Ecumenical Election Programme (NECEP) to prepare for elections.

Though short-lived, the CNC sowed seeds for the post-election phase as its agenda was bequeathed to various successors, some of whom had earlier opposed an idea of a total overhaul of the constitution. One such successor was the Catholic Church's Kenya Episcopal Conference, which in March 1994 issued a Pastoral Letter calling for a new constitution to reflect the new multiparty reality. It is, however, the Kenya Human Rights Commission's (KHRC) *Model Constitution* project that kept the CNC's constitutional reform ship on course because the repertoire of action it utilised – publication of the *Proposed Model Constitution* – captured public interest and imagination. The *Model Constitution* project brought together human rights NGOs interested in the search for a new constitution and sought to bring other actors on board. This broadening happened through the Constitutional Caucus of 9 December 1994 at Ufungamano House.

The *Proposed Model Constitution* received the support of influential religious leaders attending the December 1994 Constitutional Caucus. According to Mutunga (1999, 59), an intervention by Bishop John Njue – then Deputy Chair of the Episcopal Conference of Catholic Bishops – enlightened the gathered middle-class Kenyans on the framing needed for 'the essence and spirit of the new constitution if it were to be relevant to the survival of the nation'. For Mutunga (1999, 59, 60), Njue registered a sense of moral outrage and spoke for many absent Kenyans when he said:

As we sit here . . . there are people suffering . . . in the various parts of the country . . . living in sub-human conditions . . . without shelter . . . deprived of their rightfully acquired lands and have had their property destroyed . . . people . . . in daily search for employment which they never find . . . people . . . who do not know where they will get their next meal. Our city and towns are teeming with street children. It is not a secret

any longer that corruption is the order of the day... Do you need to be told that insecurity is rampant? Am I the only one who wonders why some elected leaders cannot meet their constituents... simply because they are in the opposition? [For] how long must Kenyans continue to pay debts they never even participated in borrowing?

Bishop Njue framed constitution-making as a 'God-given right' of all Kenyans. His interventions received widespread support from the gathered representatives of sections of middle-class civil society, religious institutions, media, labour, students and political parties. Bishop Njue's intervention is an empirical manifestation of the role of leadership in incubating social movements through effective framing.

The Caucus, together with the *Proposed Model Constitution*, also received an unexpected response from the state. As if on cue, on New Year's Eve of 1995, President Moi made a surprise announcement that Kenya needed a new constitution. Moi further indicated that the government would invite foreign experts to collect views from Kenyans, draft a constitution and hand the draft over to parliament for debate and ratification (Mutua 2008). In his announcement, Moi's message was clear: the constitution review had to be under his control and he would determine its outcome. This incensed activists who felt that the president was insensitive to demands for popular participation, a demand already framed as inviolable.

Nonetheless, Moi's 1995 New Year's announcement was a welcome political opportunity to mobilise for greater interest and participation of Kenyan citizens in a constitution reform project whose dawn seemed in sight. More importantly, the announcement also offered an opportunity for the nascent movement to utilise what Keck and Sikkink (1998), call 'accountability politics', especially because President Moi, despite his promises to the nation, spent the next two years tarnishing the very idea of a need for comprehensive constitutional review. This marked the beginning of significant escalations of militancy in the next phase of the struggle.

By the beginning of 1997, activists behind the *Proposed Model Constitution*, who had by now reconstituted as the Citizens Coalition for Constitutional Change, started strategising on how to force Moi/KANU to agree to comprehensive reforms before the next general election slated for later that year. In April 1997, the 4Cs convened what came to be known as the National Convention Assembly (NCA) at Limuru. The NCA brought together over 500 individuals from NGOs, social movements, religious institutions and opposition political parties. A significant outcome of the Limuru Assembly was the birth of the National Convention Executive Council as the NCA's executive implementation organ (Mutua 2008; Mutunga 1999). Immediately after its formation, the NCEC took the Moi/KANU regime head-on through mass political sensitisations, mobilisation and actions.

Because of these mass mobilisations, ordinary citizens joined the NCEC's clarion call of 'No Reforms No Elections'. As a result, between May and October 1997 there were widespread mass protests and violence involving NCEC-supporting citizens and its leadership battling police and state-hired 'thugs, thieves, muggers, cutthroats and murderers calling themselves *Jeshi la Mzee*<sup>7</sup> (The Army of the Old/Big Man)' (Mutunga 1999, 164) in urban streets. There was also widespread looting, which the state blamed the NCEC for. Talk of a civil war was rife (Mutunga 1999).<sup>8</sup>

The Moi/KANU regime was forced to concede, especially to opposition political parties and religious organisations, as the NCEC's intensified mass actions made the possibility of a boycott of the 1997 general election look real. In efforts to



out-manoeuvre the NCEC, Moi/KANU invited religious leaders and opposition political parties, but not the NCEC, for dialogue through what came to be known as the Inter-Parliamentary Political Parties Group (IPPG). The IPPG agreed on minimum electoral reforms with promises of comprehensive reforms after the election. This promise was captured in the 1997 Constitution of Kenya Review Act. The IPPG deal forestalled the derailing of the 1997 general election. More importantly, it stole the reform wind from the sails of the NCEC. The subsequent election enjoyed the participation of all popular political parties except the Kenneth Matiba-led *Saba Saba Asili*.

Concessions made through the IPPG talks highlight, yet again, the effectiveness of disruptive power. These pressures had forced a fragmented political elite into bargains that reflected some advances in meeting popular demands. The concessions, as shown in the next phase of these struggles, also helped preserve the political elites' dominant position. The closing of ranks of political elites through the IPPG, though read by some as betrayal, begs the question: why did opposition political parties and religious institutions, which had all along been part of the NCEC, go back to parliament to negotiate minimum reforms under the IPPG?

The behaviour of politicians is explained by the fact that while existing political opportunities had allowed different actors to cohere under the NCEC and managed to force concessions from the Moi/KANU regime, their union was short-lived because, once again, both politicians and the clergy had little faith in the NCEC's push for radical constitutional reforms before elections. According to activists and politicians close to the IPPG developments, the majority of opposition politicians were already feeling irrelevant because of the 'bonfire for reforms...stoked in the populace by NCEC...Political parties who claimed to represent the masses had to find a way to tap into this political capital or risk marginalization' by heeding the NCEC's call to boycott elections (Mutua 2008, 108). Kiraitu Murungi (2000 cited in Mutua 2008, 107, 108), one of the leading lights of the IPPG deal, argues that MPs were driven into KANU's arms because, firstly, the NCEC had deliberately taken positions to create a crisis. Secondly, MPs engaging KANU through the IPPG faced ridicule from NCEC leaders and its followers. In the IPPG, such MPs saw an opportunity for ensuring that the 'NCEC was no longer the solo voice of all pro-democracy voices in Kenya' (Murungi 2000, 80). This demonstrates that in joining the NCEC, opposition politicians' agenda was co-option aimed at reproducing their domination over other social forces. When the NCEC proved difficult to co-opt, they jumped ship.

Donors also played a role in these developments. The 1997 mass protests were so violent and successful that some representatives of Western donor countries sought to force solutions on the political impasse created by a 'possibility of an election boycott and its potential effects on both the stability of Kenya and the interest of their countries' (Ng'ethe and Katumanga 2003, 332). They pressured some NCEC members (mainly politicians and religious leaders) to dialogue with a regime that had made it clear that it did not recognise the NCEC's demands as legitimate. In the end, pressure from donors and a nod from the clergy and politicians ensured that the NCEC was sidelined in the IPPG talks, and with it the steam for more progressive reforms began to evaporate (Mutua 2008; Ng'ethe and Katumanga 2003). The IPPG therefore came as a relief and was seen as a more 'rational and less threatening alternative to the NCEC's radical agenda' that pacified the anxieties of foreign

interests, clergy and opposition political parties in the short term (Mutua 2008, 109). Moreover, the IPPG gave Moi/KANU a much-needed breather to preserve their dominance. The IPPG also points to how entrenched interests of the so-called donor countries have subverted progressive transformations (Brown 2001).

### *1998–2005: the Ufungamano Initiative*

The IPPG deal and the deflation of the NCEC give credence to Mutua's (2008, 75) apt summary of the key outcomes for a majority of Kenyan struggles:

Since the British founded Kenya . . . it has been the graveyard for radical, progressive, leftist, or transformative politics. Virtually every revolutionary political, economic, or social cause has been either rejected or crushed. Only gradualist or accommodationist political projects have achieved any measure of success.

The IPPG deal exposed the deep-seated cleavages among the pro-reform actors. Secular civil society activists felt betrayed by the closing of ranks of political elites that effectively arrested the tide of reforms (Mutua 2008; Mutunga 1999).<sup>9</sup> Politicians, whether in government or in opposition, now were even more distrusted (Mutunga 1999).<sup>10</sup> The effects of this deepening distrust were many. First, it gave rise to new contenders in these struggles. Second, it shifted donor support from the NCEC to the IPPG and the resultant 1997 Constitution of Kenya Review Act because of the apparent support of political elites and religious organisations. But this had a very short shelf life.

When it came to the implementation of the 1997 Review Act, it immediately became clear that the supposed elite cooperation had been a mirage. Disagreements arose, first, because secular civil society and religious groups felt that the Review Act did not effectively recognise all interest groups in the country as bona fide stakeholders of the review process. Secondly, non-parliamentary political parties felt that the process envisaged under the Review Act was captive of narrow interests of political elites to the exclusion of the Kenyan people (4Cs 2006). Lastly, parliamentary political parties nominated more representatives to the Constitution of Kenya Review Commission than the Review Act had allocated them. In the midst of the acrimony between different interests, protests by 54 different civil society organisations, social movements, opposition political parties and religious groups against a government-controlled process crystallised into a new movement – the Ufungamano Initiative – on 15 December 1999.

The crystallisation of the Ufungamano Initiative sheds light on how diverse social actors unite in the face of collective threat. This is because the Ufungamano Initiative arose from a confluence of interests and frustrations of the betrayed. The specific trigger for the emergence of the Ufungamano Initiative was a new alliance between the Moi/KANU regime and Raila Odinga's National Development Party (NDP) (the third largest political party in parliament at the time). This alliance was the wakeup call to those opposed to Moi/KANU on the need to work together to stem the combined Moi/KANU and Odinga/NDP attempt to amend the 1997 Review Act to deny Kenyans a chance to directly participate in the review process. These attempts by Moi/KANU with Odinga/NDP's support created a sense of outrage that acted as a shared 'system of reference' necessary to ignite collective

organising to confront shared threats. The Ufungamano Initiative's emergence as a movement of those resisting Moi/KANU's manipulation further corroborates the co-evolutionary perspective between movements and their antagonists.

The Ufungamano Initiative emerged with great promise and had widespread mass support because it succeeded in forging unity amongst diverse ethnic, religious, generational and class groups where several of its predecessors had failed. The Ufungamano Initiative placed the citizens at the centre of the constitution review process. It framed the constitution as a sacred covenant between people and their rulers and the making of the same as a sovereign and inalienable right of every Kenyan that could not be left, or delegated, to politicians. When it became apparent that the combined force of the Moi/KANU and Odinga/NDP push for a process led and controlled by the political elite was unrelenting, the Ufungamano Initiative resorted to a new strategy – formation of the People's Commission of Kenya (PCK) – to facilitate Kenyans in writing their own constitution. The PCK's direct competition with the regime-sanctioned Commission proved to be the movement's most potent strategy. Specifically, the launch of the PCK as a parallel process at a time when KANU/NDP's fidelity to the 1997 Review Act was in question forced the greatest credibility and legitimacy challenge to the regime-led process.

The crisis of legitimacy posed by the Ufungamano Initiative forced KANU/NDP to seek ways to save face by appointing an 'independent' personality – Professor Yash Pal Ghai, a renowned Kenyan constitutional expert – to lead the regime-run process. Ghai's influence in the process was immense because he demanded, as a condition of his acceptance, a free hand in seeking a merger between the regime-led process and the Ufungamano Initiative.<sup>11</sup> Ghai's demands paid off as he managed, though not without many hurdles, to negotiate a successful merger. According to Ghai, he pushed for a merger because he knew the Ufungamano Initiative had significant numbers of citizens on its side. As such, the ultimate success of the review process needed the Ufungamano Initiative's support. The merged processes placed direct citizen involvement at the centre of the review process. The success of the Ufungamano Initiative in attracting a merger proposal illustrates the potency of a movement with moral authority and mass support base in challenging power elites.<sup>12</sup> Such power is further exhibited in the 2002 general election as groups affiliated to the Ufungamano Initiative joined with KANU rebels led by Raila Odinga, after falling out of favour with Moi, to form the National Alliance Rainbow Coalition (NARC) that defeated KANU, riding on promises of reform.

Despite its promise and successes, the Ufungamano Initiative was beset with multiple contradictions. For instance, the movement fashioned itself as an effort to rewrite the Kenyan people's relationship with their political leaders in a democratically participatory way. But its internal structures remained susceptible to elite manipulation and dominance. Specifically, the Ufungamano Initiative's structure rested on constituent/member organisations' mobilisation abilities, and thus favoured the constituencies that were more effective in mobilising grassroots support and resources. These had greater leverage in the decision-making and in directing the trajectory of the movement, most prominently the merger decision.<sup>13</sup> This sometimes challenged the Ufungamano Initiative's standing as a true mass movement.

As such, while the Ufungamano Initiative managed to put the Kenyan citizen in the driver's seat in a merged unitary constitutional review process, in the 2005 Constitutional Referendum the dream of a new constitution fell victim to political

shenanigans. Mistrust born out of vested ethnic, political and religious elite interests conspired to deny Kenyans a new constitution (Cottrell and Ghai 2007). This suggests that strategic interactions between a social movement and the state (reflected by the merger) are not always transformative. Rather they can – as the Ufungamano Initiative’s merger with the state process shows – amount to elite bargains that subordinate popular will (Mati 2012). This was made possible by ethnicisation of the struggle as well as hero-worship of some of the leaders by the masses.

The Ufungamano Initiative therefore constitutes a reminder of the limitations of social movements, as indeed of religious, political and civil society leadership in Kenya. These groups and their leadership can only be custodians of people’s confidence and trust as long as they are true and sympathetic to popular will. The moment actors within the Ufungamano Initiative started fighting among themselves, and turned ethnic as they jostled for political power, they lost that confidence. Instead, they became the nerve centres of social contentions and conflicts that deferred the dream of a new constitution in 2005.

### ***Post-2005 developments and the realisation of a new constitution***

A new phase of contention emerged in the period following the 2005 referendum. This was characterised by a vortex of ethnic rivalries that ultimately led to the 2008 post-election violence. The analysis from this phase helps us understand why the aftermath of the 2008 post-election violence provided conditions necessary to deliver a new constitution in 2010. Specifically, the pent-up anger from the NARC regime’s failure to deliver a new constitution (as its election manifesto promised), and to redress long-standing legal and institutional reforms, land reforms, unemployment, poverty, inequity and regional development imbalances found expression in the ethnic demagoguery that characterised the 2007 electioneering. The close election and accusations of rigging led to the 2008 post-election ethnic bloodbath that only stopped after a forced political marriage between Raila Odinga’s Orange Democratic Movement (ODM) and Mwai Kibaki’s Party of National Unity.

This violence threatened collective economic interests of local power elites and their global allies, forcing the international community’s intervention to end the crisis. This intervention came in the form of mediation by the group of Eminent African Persons led by Kofi Annan (the former United Nations Secretary General). The mediation team imposed upon the Kenyan political elites a raft of conditions necessary for the preservation of the Kenyan state. One of these was the Agenda 4 of February 2008 *Kenyan National Dialogue and Reconciliation* pact. The total overhaul of the constitution was a key agreement of this pact. Yet again, we see pressure from widespread citizen’s insurrection as the disruptive power that forced elite agreements to deliver a new constitution.

Both the 2010 and 2005 referenda had similarities in their scripts, especially in the political behaviour of actors at the heart of the push for constitutional reforms. In 2010, as in 2005, some sections of the clergy, civil and political societies supported the proposed constitution while others, driven by self-interest, vigorously campaigned against it. But by 2010, a majority of ordinary citizens seemed weary of divisions fuelled by self-interests, and aware that these might be a ploy to yet again deny them a new constitution. There were also stark contrasts in the political

environment between 2005 and 2010: the 2005 referendum had come after an extraordinarily peaceful and unifying political transition from KANU to NARC, while the 2010 referendum came in the midst of an environment charged with deep ethnic tensions and the grisly images of the 2008 post-election violence.

The fact that it became possible to realise a new constitution after the 2008 wave of violence is instructive. First, it suggests that the confluence of means and ends within the different elite formations were a *sine qua non* for transforming power relations. Second, the same elite cleavages that fuelled ethnic tensions were critical in delivering a new constitution. This is because the collective threat to elites from this violence, especially through loss of property, triggered elite bargains and concessions to Kenyans in general. Third, the international community played a critical role, in particular by forcing a government of national unity and imposition of constitutional reforms as key components that delivered a truce. Fourth, changes were possible because of sustained pressures. It therefore follows that vigilance and threats of invocation of disruptive power will be instrumental in informing strategies for ensuring the new constitution is fully implemented. Lastly, the Kenyan struggles for constitutional reform also confirm Gramsci's (1971) conception of civil society as a sphere of contestation. The current paralysis in the Kenyan state and civil society is a statement that there is as yet no clear winner in the battles for the control of society.

Having looked at the key moments, the paper turns to address the following critical sub-questions: what factors enabled the crystallisation of the pro-democracy struggle into a constitutional change movement? What opportunity structures were utilised? What framing was useful in eliciting mass support? In the following section, the paper analyses the broad political opportunities and constraints that allowed diverse and often contentious groups to coalesce into a unitary constitutional reform movement. In short this took an active leadership role, mass conscientisation and mobilisation to recognise and utilise existing or created political opportunities.

### **Political opportunities and leadership role in generation and sustenance of reform struggles**

Political opportunity theorists argue that social movements are created to tap political resources and opportunities available in modern democratic societies (see, for example, Tilly 1978, 1984). Such opportunities can be analysed in terms of conflicts of interest, just like other forms of political struggles. Taking the cue from this, analysis of Kenyan struggles for constitutional reform reveals that at least five factors related to domestic and global socioeconomic and political conditions from the late 1980s provided specific opportunities and resources that pushed the participation of the various socioeconomic formations into these contentions.

First, the pro-change movements were made possible by emergent economic and geopolitical realities occasioned by the end of the Cold War. This was accompanied by the 'ascendancy of a new ideological dispensation among Western donor countries that increasingly linked aid disbursement to good governance and economic and political liberalisation' (Nzomo 2003, 189). These changes brought to an end the political support that many repressive regimes, including Kenya, had previously enjoyed. In Kenya, the Moi/KANU regime's intransigence to calls for

democracy, and the ruthlessness with which it cracked down on pro-democracy protesters in 1990, saw some donors resort to tying aid explicitly to political reforms. Most donors also directly funded nascent human rights civil society organisations challenging the state. This gave such pro-reform groups resources and support to effectively challenge state excesses.

Second, developments in the global political economy, together with the effects of nearly a decade of neoliberal austerity measures implemented through Structural Adjustment Programmes (SAPs) on the Kenyan economy, offered a further push for contention. These twin pushes for political and economic liberalisation presented contradictory opportunities (Mkandawire 1999). SAPs required the country's economy to be embedded in highly competitive international markets, while simultaneously inducing growth and development in a volatile global political economy. As part of fiscal austerity measures imposed on Kenya, donors cut funding to the state, while at the same time pushing it to reduce the wage bill, cut expenditure on basic services, and introduce user fees and privatisation of public enterprises and services.

The result of SAPs, Bates (1999, 93) notes, was an orchestra of 'disequilibria in the markets, clientelistic politics, fiscal crisis and growing political disaffection'. In Kenya, SAPs led to a socioeconomic crisis characterised by collapse of the state's ability to deliver essential public goods and an increase in inequality and massive unemployment. This destroyed basic social solidarity and led to a decline in life expectancy and a rise in infant mortality rates (Ikamari 2004). Physical infrastructural developments were frozen while existing ones decayed into a sorry state of disrepair. Moreover, falling international commodity prices forced many primary producer cooperatives to close shop (Kanyinga, Mitullah, and Njagi 2007; Ombongi and Kanyinga 2001). Multiple ghettos sprang up in urban centres. These conditions triggered widespread Polanyi type 'double movement' protests against political and economic elites.

Third, reduced state budget support resulted in a dwindling of resources for buying patronage and crushing dissent (Mkandawire 1999). This led to political elite fragmentation in a political environment charged with high intolerance to dissent. Taken together, these developments offered opportunities for the nascent civil society and opposition groupings to emerge and push for democratic reforms (Nzomo 2003). Pressures from activists in nascent movements coupled with the state's reduced ability to quell mounting unrest forced the Moi/KANU regime to finally repeal Section 2A of the Kenyan constitution on 3 December 1991. The repeal of Section 2A opened up space for new forms of protest action, and to calls for a total overhaul of the Kenyan constitution.

Fourth, the suspension of aid to the state was accompanied by donors' embrace of NGOs. NGOs effectively became key in donor politics of resource allocation from the late 1980s (Maina 1998; van Rooy 1998). This resulted in huge investments in germinating a civil society empowered to play a major role in poverty alleviation, governance, social change, and even 'mobilization in favour of SAPs' (Mkandawire 1999, 129). These developments also led to a condition Maina (1998, 166) describes as civil society's 'donor aid addiction, fostering financial and, more perniciously, intellectual dependency'. This dependency raises questions about the transformative potential of contemporary Kenyan civil society, given its dependency on funding from donors who stand to lose if the structures of Kenyan society are reformed.<sup>14</sup>

Evidence suggests that donor funds have served a subversive role against radical transformations. The donor agenda has not always been ‘consonant with local interests’ (Murunga and Nasong’o 2007, xx–xxi). Instead, donors have covertly:

continuously undermined the underclasses from organising on their own. This is why very many movements are quickly attracted and co-opted by the donor dangled funds... Donors do not want to fund any work that in effect ‘radicalises’ communities... the question of resources will always be hindrance to radical transformations in society. Our struggles have to find ways of sustaining themselves if we expect to transform our society. They have to get more grounded in the grievances of the people.<sup>15</sup>

The contradictions and dictates inherent in external funding imposed limitations on the reform struggles. A movement trying to radically redefine the relationship between the masses and their governors, as well as their relationship with external capital, cannot achieve its objective while entangled in the intricate funding web that determines what use money can be put to.

Fifth, the pro-change struggles were prompted not by external forces only, but also by runaway elite corruption and clientelistic politics that made things worse for both middle-class professionals and the urban poor. The poor, especially in urban slums, were dispossessed through a culture of grabbing of public land that was initiated and perfected by economic and political elites in collusion with state bureaucracy. In an effort to quench their insatiable appetite for public land, economic and political elites used state security agencies and hired thugs to evict people and demolish shacks in the slums. Such evictions and demolitions became common. Katumanga (2005, 510) concludes that ‘for most urban lumpen elements, direct resistance was a function of the fact that they had no fall-back position and everything to lose’ (see also Wamucii and Idwasi 2011; Katumanga 2005; Katumanga and Cliffe 2005; Manundu 1997; Exodus-Kutoka Network 2005).

State corruption, which climaxed in the late 1980s, did not spare middle-class professionals such as lawyers (Mati 2012). As the judiciary increasingly became an instrument of control by the executive, justice was commodified while lawyers pursuing any social justice cases were increasingly harassed. Many lost their livelihoods in the process. Economic necessity therefore became a factor for the outpouring of protest by people to wrest themselves away from an avaricious state and the conditions it had created. This explains the strong participation of the urban middle and working classes in these reform struggles.

Last, but not least, a central factor in the emergence and operation of protest movements was the role of leadership. Without looking at leadership as both agency and structure, it is difficult to understand how individual and collective grievances were channelled into collective action. It required leadership as agency on the part of activists to recognise, utilise and push the frontiers of existing opportunities for mobilisation and strategic co-optation of different struggles, in order to diffuse the idea of the need for comprehensive constitutional reforms from the exclusive domain of the middle class and elites to wider Kenyan society. It furthermore took courage and organisation for this to happen. This suggests that individual agency was an important variable in translating grievances into social movement organisations to confront collective and individual oppression. This corroborates McCarthy and

Zald's (1977) argument that social movements emerge when individuals with grievances are able to mobilise sufficient resources (i.e. leadership, money, knowledge, political influence, access to media, labour, solidarity, legitimacy, and internal and external support from powerful elite) to take action. Furthermore, it is leadership by movement entrepreneurs, combining both agency and structure, which explains why discontented and/or deprived individuals are able to organise while others are not. This is because, as Tilly (1977) and McAdam (1982) observe, leaders catalyse and transform collective discontent into social movements. Such 'entrepreneurs' were critical in bringing the disparate pro-reform groups including civil society, religious organisations and opposition political parties together in these struggles.

### **Conclusion**

The Kenyan constitutional reform struggle cycles demonstrate that change happened due to pressures from collective action. A reading of the different cycles must also be understood within the competing class and ethnic cleavages that have dictated that, by and large, change initiatives have been intra-class competitions for control and support of the masses. These projects have, nonetheless, resonated well with the public. It is this broad appeal that enabled these movements to mobilise for support. This corroborates Downey and Rohlinger's (2008, 12) observation that the breadth of appeal is a strategic dimension that helps movement actors to mobilise and cultivate a base of support (material and human) because:

[While] core activists are an essential component to any movement group [and make] the highest levels of commitment and . . . greatest sacrifices for the movement . . . movements also depend on members who have lower levels of involvement in and identification with a cause, including those who only intermittently participate and those who are members on paper alone . . . It is also important for collective actors to appeal to supportive outsiders who are conceptualized as bystanders, conscience constituents . . . third parties . . . and the audiences . . . collectively comprise public opinion.

But these struggles, as highlighted in this paper, have not been without challenges. Internal inconsistencies have resulted in constant failures and declines of the specific cycles. For instance, the failure of the leadership to 'interpret social process correctly, [and] evolving right institutional design and programmatic responses for mobilisation' has been observed by Katumanga (1999, 1) as a great contributor to NCEC's decline. A similar fate befell the Ufungamano Initiative.

To conclude, Kenya's political economy and the attendant social struggles for state reform have had three key interesting features. First, economic, social and political strain and an environment of increasing state brutality were key drivers of contention. This is synonymous with McAdam, McCarthy, and Zald's (1996) emphasis on social dysfunctions and socioeconomic and political strains as generators of conflict and collective action. In such contexts, elementary forms of amorphous, unpredictable and non-institutional collective behaviour spontaneously evolve among individuals who feel insignificant or socially detached (Buechler 2000).

Second has been the centrality of ethnicity in these contentions. The salience of ethnicity is a hangover from the tribal struggles against the colonial state in Kenya and undermines the potential for collective action to be representative of popular



national, social and political interests. In effect, these struggles have been iterations of intra-elite conflicts with a cunning ability to construct and impose an idea of 'national consensus' while mostly pursuing the interests of certain dominant social groups, albeit with some benefits to the underclasses (Mutunga 1999; Nzomo 2003; Mutua 2008; Maina 1998).

Third, the analysis of successive interregnums of struggles for Kenyan state reforms isolates elite consensus and fragmentation as a constant feature. This seesaw of elite consensus and fragmentations lends credence to conclusions advanced by Mutua (2008, 117, 118) that 'the African state has shown a surprising ability to be impenetrable by the citizenry, a fact that makes its reform a daunting task'. Indeed, the language of reforms has been framed to indicate the need for fundamental changes in the architecture of the state and its relationship with the citizens. But this has not been fully achieved, partly due to this duality of elite consensus and fragmentation in these struggles. As such, while classic political process model sees elite fragmentation as an opportunity for the advance of social movements (see, for example, Tarrow 1998), and without doubt elite fragmentation offered a vanguard to the Kenyan struggles, fragmentation resulting from competing interests in capturing, managing and utilising the post-colonial state has often been the bane of progress.

Lastly, the explanation for the success of the Kenyan constitutional reforms in 2010 hinges on a mix of internal pressures from below and external (international community) pressures. The pressures from below forced the elite consensus that delivered a new constitution. But they were not sufficient to force local political elites to make constitutional reform concessions. Rather, it also required further pressure from the international community to push elites to acquiesce to the disruptive power of the masses, a move designed to preserve the interests of both the local elites and the international community. The struggles for constitutional change in Kenya demonstrate a movement's power to effect change, but they also indicate the need to explore multiple explanatory variables as well as co-evolutionary processes between movements and their antagonists.

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### **Notes**

1. According to Piven (2006, 20), disruptive power works because 'all societies organize social life through networks of specialized and interdependent activities... Networks of cooperation and interdependence inevitably give rise to contention... the leverage inherent in interdependencies is potentially widespread... This leverage can in principle

- be activated by all parties to social relations, and it can also be activated from below, by the withdrawal of contributions to social cooperation by people at the lower end of hierarchical social relations’.
2. I borrow Koopmans’ (2004, 22) conception of cycles or waves of contention to refer to a ‘strong increase and subsequent decrease in the level of contention’.
  3. The Mlolongo voting system operated such that electorates queued behind their preferred candidates and did not cast any ballots. The system was open to voter manipulation and intimidation. Voters would be warned not to queue behind any politicians who spoke ill of the Moi political establishment.
  4. Interviews with G. Imanyara, Midlands, South Africa, 28 October 2009; W. Kihoro, Nairobi, 23 September 2009; G.K. Kuria, Nairobi, 23 September 2009; K. Kibwana, Nairobi, 21 October 2009.
  5. Interview with A. Zein, Nairobi, 7 October 2009.
  6. Interview with L. Apiyo, Nairobi, 16 September 2009.
  7. Such private militia were not limited to KANU only. Some opposition politicians also funded the establishment of their own militia. The Baghdad Boys in Kisumu largely associated with Ford Kenya’s Jaramogi Odinga and later his son Raila Odinga, Jeshi la Embakasi associated with David Mwenje (Democratic Party Member of Parliament for Embakasi) and Mungiki, associated with Kikuyu political elites in Rift Valley and Central provinces are other examples (interview with A. Oganda, Kisumu, 26 March 2010).
  8. Interviews with D. Gitari, Kirinyaga, 21 September 2009; K. Kibwana, Nairobi, 21 October 2009.
  9. Interviews with K. Kibwana, Nairobi, 21 October, 2009; T. Njoya, Ngong, 29 September 2009.
  10. Interview with D. Lamba, Nairobi, 23 October 2009.
  11. Interview with Y.P. Ghai, Nairobi, 23 October 2009.
  12. Interview with P. Lumumba, Nairobi, 1 October 2009.
  13. Interview with Wandati, Kibera, 17 September 2009.
  14. Interviews with M. Odhiambo, Nairobi, 1 April 2009; K. Kibwana, Nairobi, 21 October 2009; O. Omtatah, Nairobi, 31 March 2010.
  15. Interview with M. Odhiambo, Nairobi, 1 April 2009.

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