Furthering constitutions, birthing peace

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The Ghai in our Constitution

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Introduction

Professor Yash Pal Ghai did not just lead the process of writing the Constitution of Kenya; he is actually embedded in it. Our Constitution benefited not just from Ghai's long experience in negotiating peace but also his philosophy and approach to constitution-making. As a person who has taught and studied the new Constitution since its inauguration on 27 August 2010, I have often been astonished by its uniqueness. Many times I have pondered on the ingenuity of its authorship and I have become more and more convinced that most of this has its origins in Ghai; born of his own personal experiences, professional engagements and the resultant intellectual ideas.

Ghai was born and brought up in colonial Kenya. Growing up as an Asian exposed him to discrimination on the basis of race, and as part of a numerically disadvantaged population. Even upon independence in 1963, Kenyan Asians remained a racial other and minority. Pretending to act on behalf of the majority, the emergent black African elite simply took the place of the minority white race that ruled during the colonial epoch. The Asians remained subordinate.[1] Even in the greater East African region, then encompassing Kenya, Uganda and Tanzania, the experience of Asians was not just, a situation Ghai and his brother reflected on.[2] In August 1972, the world watched in awe when Uganda's President Idi Amin ordered all 'Indians' out of the country within 90 days**.** At a personal level, Ghai

[1] 'The problems of nation building – Race' in CJ Gertzel, Maure Goldschmidt, Don Rothchild (eds) *Government and politics in Kenya: A nation building text,* East African Publishing House, Nairobi, 1969, 21-32. These texts include Hansard debates on Asian dominance of small trading, population statistics, and reproduced news reports from the major dailies at the time of Nairobi City Council removal of 'non-African traders' from markets. Interestingly, Professor Ghai is thanked in the Preface for his comments on earlier drafts of the book.

[2] YP Ghai, DP Ghai, *Portrait of a minority: Asians in East Africa*, Oxford, Nairobi, 1971 (Swedish edition published by Prisma, Stockholm, 1971).

∞ I am thankful to my brilliant daughter (Lizzie Muthoni) for her invaluable assistance during the writing of this chapter and to my compatriot Humphrey Sipalla and mentor Jill Cottrell Ghai for making valuable comments on the original drafts of this contribution.

has narrated to me experiences of discrimination both at the University of East Africa Dar es Salaam (Dar) – where he taught and served as Dean of Law – and at the East African Community (EAC) where his nomination as Chief Legal Officer was resisted by Kenya, which preferred a black African instead. Inevitably, this background must have informed Ghai's expansive scholarship on management of diversity and inclusivity.

But it is not in Ghai to be a silent minority. He speaks truth to power, which in the 1970s caused a lot of tension between him and the emerging black African elite in the region. His book, *Public law and political change in Kenya,*[3] co-authored with the late Prof Patrick McAuslan, confirmed the suspicion that he would not be a 'partner in crime'. The book, which is the first account of the social, political and legal developments in East Africa since the colonial epoch, offered a critical approach to the subject and was not taken kindly by those then in authority. And for this Ghai suffered. His appointment as the first African Dean of the University of Nairobi's Faculty of Law was opposed by the top echelons of the Kenya African National Union (KANU) leadership. Unbeknownst to him, he had been declared persona non grata in his own country. Unwanted at home and welcomed a bit more in the neighbourhood, Ghai did not report to his post at the University of Nairobi, did not stay at Dar for longer than a year, but instead headed overseas.

Ghai eventually held positions at various universities in the US, Sweden, UK and Hong Kong and simultaneously helped many countries in transition to negotiate peace and rediscover their paths toward constitutional governance. While postings in the established universities were conducive for Ghai's already flourishing scholarship, the constitution-making engagements brought him close to societies in turmoil. Thus, Ghai's scholarship evolved practical and cogent ideas for the emancipation of societies in transition some of which are traceable in our Constitution.

This chapter is about the Ghai in our Constitution. It explores Ghai's contribution to all the stages of our constitution-making process. As I do this, I am conscious that many people were involved in Kenya's constitution-making process and in the development of the various draft constitutions. Nonetheless, I argue that Ghai's touch – his constitutional philosophy and approach, which I explain in detail below – remains the most influential.

[3] Yash Pal Ghai, JPWB McAuslan, *Public law and political change in Kenya: A study of the legal framework of government from colonial times to the present,* Oxford University Press, 1970, 2nd Edition, 2001.

The Ghai in the collection and collation process

Ghai's commitment to an all-inclusive, consultative and 'educated' views collection and collation process, as well as the protection of minority interests from the inherently majoritarian tendencies of democracy, enriched our constitution-making process greatly.

When Ghai was appointed chair of the Constitution of Kenya Review Commission (CKRC), the country was divided badly, even madly. On the one hand, under the able hand of the late Dr Oki Ooko-Ombaka, was the civil society-led review process. On the other was the State-funded and supported CKRC, which Ghai was invited to chair. To the surprise of many Kenyans, Ghai deferred his appointment, opting to reconcile the warring factions first. He only took the oath of office once there was agreement to reconstitute the CKRC to include civil society representatives. This action alone showed Ghai's commitment to an all-inclusive review process, a principle that he continued to champion throughout. It also introduced trust and confidence in the constitution-making process, which would prove worthwhile subsequently.

Although the Constitution of Kenya Review Act[4] had already been enacted by the time of Ghai's appointment, and a consultative process first broadly mandated and later elaborated in it;[5] as chair, he gave the consultative and participatory requirements a life never before witnessed. The CKRC went throughout the country collecting the views of the ordinary Kenyan, then popularly known as 'Wanjiku'.[6] For the first time, Kenyans saw for themselves a State commission not only keen on listening to their views, but also one that did not distinguish on the basis of class, gender, age, tribe, locality or political affiliation. Ghai himself took the exercise very seriously. He was seen in various parts of the country engaging with different sectors of society including marginalised groups such as women, persons with disabilities and indigenous peoples among others. Furthermore, his humility, exemplified in his preference for a simpler car, endeared him to the masses who appreciated him as one their own.

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[4] Act No 13 of 1997. The Act was later amended in 2001 to facilitate the merger of the parallel processes that was negotiated by Ghai as prerequisite to his leadership of the review process.

[5] Sections 10(b), 11(a), 12A, 13A, CKRC Act (1997). The Act, as reviewed in 2000, replaced the rigid District Consultative Forums provided for in 12A and 13A of the 1997 Act with the more open Constituency Consultative Forums, which became the locus of both civic education and collation of view from the public directly, without necessary mediation of local leaders as was the case earlier.

[6] The term itself arose out of a derisive comment made by then President DT Moi, wondering what ordinary folk like 'Wanjiku' would know about constitution-making, thus suggesting that the people's views needed not be collated. All that was necessary, in the then President's view, was a drafting by experts.

As a student of law at the University of Nairobi, I was privileged to go round the country with the CKRC as a rapporteur. I witnessed first-hand the seriousness with which the CKRC – under Ghai's leadership – took consultation, participation and civic education. We had strict instructions to ensure all views were heard; to record with sufficient detail such views; to afford translators to those who needed them and to create an enabling environment for free expression while at the same time being sensitive to the various communities/groups and their values. The voices of the marginalised were especially to be afforded due attention and taken note of. The record of these public engagements were archived and are preserved to date.[7]

Ghai wanted Kenyans to take part in the constitution-making process, but from a point of education. So he put tremendous effort in civic education programmes and at every point ensured that Wanjiku had sufficient information to understand and engage in the process meaningfully. As a Kenyan who followed the constitution-writing process keenly, I lost count of the number of updates the CKRC issued as part of its public awareness efforts. Nearly every report or draft constitution was circulated in the full and simplified versions, and there were Swahili translations for most documents. The CKRC also held many civic education forums.[8]

Although Ghai promoted an all-inclusive constitution-writing process, including public consultation, participation and civic education, he was also conscious of the potential adverse effects of these processes on minority interests. He was aware that subjecting certain minority issues (such as gender equality and Kadhi courts) to uncontrolled public debate would likely lead to them being drowned out by the majority opinion. His position on this showed practically when Ghai vigorously pursued consensus at the Bomas Constitutional Conference, without which the Draft Constitution of Kenya 2004 (Bomas Draft) would have had to go to referendum.[9] Regrettably, even after achieving consensus at Bomas, the detractors of Ghai and the Bomas Draft succeeded in thwarting the entire review process through the *Reverend Njoya case*[10] under the pretence of an attractive theory, which held that changes to

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[7] *Report of the Constitution of Kenya Review Commission, Volume IV: Constituency Constitutional Forums*, consists of reports from all then existing constituencies. Each of these contains detailed information on dates or hearings, a listing of all views expressed and a list of all citizens who spoke. As noted above, the CCFs became the locus of both collation of views and civic education.

[8] As above.

[9] Jill Cottrell, Yash Pal Ghai, 'Constitution making and democratization in Kenya (2000–2005)' 14 *Democratization,* 1, 7.

[10] *Rev Dr Timothy M Njoya, Kepta Ombati, Joseph Wambugu Gaita, Peter Gitahi, Sophie O Ochieng, Muchemi Gitahi, Ndung'u Wainaina v The Hon Attorney General, the Constitution of Kenya Review Commission, Kiriro Wa Ngugi, Koitamet Ole Kina*, High Court of Kenya at Nairobi, 25 March 2004.

the basic structure of the Repealed Constitution could only be effected through a referendum. Ghai's fears would soon be justified as most minority rights issues (including gender equality, women's reproductive health rights, sexual minority rights and Kadhi courts) became the bone of contention, contributing to the failure of the *Proposed Draft Constitution of Kenya* at the November 2005 referendum. These issues remained contentious during the deliberations leading to the August 2010 referendum, with the result that serious restrictions were placed on the enjoyment of certain minority rights. The strange wording of Article 26(2) and (4) of the 2010 Constitution implying that life begins at conception and that abortion can only be permitted where a trained health professional certifies that the health of the mother is in danger; and the definition of a marriage as an institution of persons of opposite sex (under Article 45) will remain constitutional testimonies to the truth of Ghai's philosophy that minority rights suffer at the hands of the majorities.

The Ghai in the drafting and approach

Ghai did not stop at the views collection stage. His touch reflects in the drafting and approach of the 2010 Constitution brightly. We can credit the friendly and accessible drafting style, the extensive detail and 'intelligence' of the 2010 Constitution to Ghai's unique philosophy and technique.

On friendly and accessible drafting style

A continuous thread runs through all the various constitutional documents from the Draft Bill of the Constitution of Kenya Review Commission of 2002 (Ghai Draft) to the 2010 Constitution – an insistence on the accessibility of the language to Wanjiku. Through Ghai's advice, the CKRC contracted renowned plain English drafts-person, Prof Phil Knight, with instructions to help draft a simple and understandable constitution for everyone, not just for those in the legal profession. Even after the collapse of the Bomas constitutional deliberations, the new drivers, the Committee of Experts (CoE), still retained Knight's services, hence the stark similarity in the drafting of the constitutional documents since the arrival of Ghai.

To rate the accessibility of the 2010 Constitution, which retains Ghai's drafting philosophy, in comparison to the Repealed Constitution, I picked three words, which in plain English drafting parlance are referred to as archaic ('therein', 'hereinafter' and 'whereas') and then proceeded to count the number of times the words appear

in each document. The result was astounding. 'Therein' appears five times in the Repealed Constitution, 'hereinafter' appears four times and 'whereas' appears once. None of them is used in the Ghai-inspired 2010 Constitution at all – a sign that special care was taken to rid the new constitution of legalese.

Ghai's preferred drafting style is also sensitive to gender biases. Unlike the Repealed Constitution, which referred to natural persons through male-centric language such as 'him' and 'his'; the 2010 Constitution adopts gender neutrality. While the word 'him' appeared 76 times in the Repealed Constitution; it is completely absent from the 2010 Constitution. Similarly, while 'his' was used 227 times in the Repealed Constitution, it appears just once in the 2010 Constitution; and only when citing a provision of the Repealed Constitution. A summary of my findings are shown in the following table.

Table 1: Use of archaic and gender-biased words in constitutional texts

Archaic and gender-biased words	Number of uses in Repealed Constitution	Number of uses in the 2010 Constitution
Therein	5	0
Hereinafter	4	0
Whereas	1	0
Him	76	0
His	227	1

The Ghai in the details

Constitutional 'typologists' usually make a distinction between written and unwritten constitutions.[11] Under written constitutions, they further speak of brief and detailed constitutions. A detailed written constitution was Ghai's 'original' prescription for Kenya. As illustrated in Table 2, the very initial proposal made by the CKRC, the Ghai Draft, contained 20 chapters, seven schedules and 299 articles. After the constitutional conference, the Bomas Draft carried 20 chapters, seven schedules and a total of 307 articles. This approach was maintained, largely, despite the rigorous debates leading to the 2010 Constitution. Thus, the final text of the 2010 Constitution lost two chapters, through mergers, ending up with 18 – it shed one schedule, ending up with six; and severed several articles settling on the final

[11] M Kiwinda Mbondenyi, J Osogo Ambani, *The new constitutional law of Kenya: Principles, government and human rights,*LawAfrica, Claripress, 2012, 11-19.

264. The Bomas Draft chapters on land and property, and on environment and natural resources were merged. Additionally, the CoE, the ultimate 'mid-wife' of the 2010 Constitution, rescinded Ghai's idea of culture as a stand-alone chapter[12] and similarly thought superfluous the inclusion of a special chapter dedicated to national values, principles and goals. Hence the 18-chapter 2010 Constitution that resulted. This is still much more detailed compared to the Repealed Constitution, which at the time of its demise, had 11 chapters, a single schedule composed mainly of forms, and 127 articles.

Table 2: Detail of constitutional documents

	Repealed Constitution	Ghai Draft 2002	Bomas Draft 2004	Constitution 2010
No of chapters	11	20	20	18
No schedules	1	7	7	6
No of articles	127	299	307	264

Ghai's insistence on detail is not out of sheer verbosity. The Ghai in the details is born out of the belief in the emancipatory power of constitutional law. Upon reflection, I have come to the conclusion that Ghai's faith in this emancipatory power of the supreme law could have arisen while at Dar. During his time there, Ujamaa was the official State and university policy. Though distinguishable from socialism and even communism, Ujamaa was often related to these ideologies during the Cold War. I see the possibility that Ghai studied Marxist thought keenly, particularly the insight that law is a tool usually at the disposal of the bourgeoisie for the exploitation of the masses and stuck with the 'lesson' that law could be used as a powerful tool; this time to turn the tide in favour of the masses. This explains the detail in the Ghai constitution – which seizes every opportunity to bring every power, delegation and question under the ambit of the law, thereby denying the representatives of the people the much coveted and abused discretion. Thus, although Ghai believes in representative democracy, he ensures that the people give their representatives sufficient constitutional instruction, leaving very little to chance. For Ghai, just as the capitalist uses law to exploit the masses, Wanjiku can wield the same law to tame those same ardent abusers of power.

[12] Jill Cottrell-Ghai guided me that Ghai himself felt that the provisions of culture in the Bomas Draft were exaggerated. This might explain why the first CoE Harmonised Draft was brief on the subject and second draft (Revised Harmonised Draft) shortened provision on culture to roughly what it is now. The Parliamentary Select Committee in Naivasha deleted the whole chapter, and the CoE reinserted it but as part of Chapter 2.

The constitutional intelligence of Ghai

The genius of Ghai is also seen in his idea of transposing a certain ICT-like 'artificial intelligence' to constitutional law. Two examples are sufficient to illustrate this statement in some depth. First, and related to the preceding discussion, is the rigour and detail with which the 2010 Constitution takes charge of the regulation of the State. Second, is the fact that Ghai's constitution learns its surroundings and adapts appropriate solutions.

When the 2010 Constitution came into force on 27 August 2010, it took complete charge. It established sufficient regulatory cover over the subject of its focus in principle and spirit and in substance and procedure. Knowing that constitutions are not operated by angels, Ghai introduced the idea of prescribing detailed provisions to put the meaning of the Constitution beyond doubt. The Ghai Constitution enunciates national values to infuse constitutional spirituality in the human agents and a code of ethics to define their character and to guide their manners. Besides articulating an overarching Article 10 on national values and principles (which Ghai would rather have had as a stand-alone chapter), all chapters regulating State administration - the chapters on Land and Environment (Chapter Five), Representation of the People (Chapter Seven), the Executive (Chapter Nine), Devolved Government (Chapter Eleven), Public Finance (Chapter Twelve), Public Service (Chapter Thirteen), and National Security (Chapter Fourteen) – start by establishing the applicable values or principles. These values and principles are augmented by the articulation of a 'code of ethics', which remains one of the most striking aspects of the 2010 Constitution. Indeed, principles of leadership and integrity in the manner of Chapter Six of the 2010 Constitution are not regular features of constitutions. The Repealed Constitution did not articulate them. Comparatively, although Chapter 14 of the Constitution of the Republic of Uganda carries the title 'Leadership Code of Conduct', it serves little purpose beyond merely requiring Parliament to enact a code of conduct, and giving certain limited directions on the content of such enactment. Similarly, the constitutions of other countries in East Africa do not contain principles of leadership and integrity. Therefore, Chapter Six of the 2010 Constitution should be appreciated as revolutionary, at least regionally.[13] Underpinning Chapter Six is the principle that State power comes in the form of a trust, which trust is to be operated as a service. This principle is built upon the foundation of the foremost concept of sovereignty of the people.

[13] It is instructive that the Constitution of Papua New Guinea, where Ghai was involved, also provides for a

The net import of the concept of peoples' sovereignty is that although only a few persons can run day-to-day State affairs, such officials must have the people in contemplation constantly. State officials attain this ideal by consulting the people frequently, functioning in an open and transparent manner, and acting in the public interest always. Clearly, the intelligence of the 2010 Constitution has reorganised power in a manner that empowers the people and makes the State subservient to them.

The 2010 Constitution's intelligence has meddled even in areas where constitutions would normally be scanty, leaving discretion to the legislators. The typical example of this is seen in Article 261(1) of the 2010 Constitution as read together with the Fifth Schedule, which identifies 49 areas requiring parliamentary legislation complete with timelines for when Parliament should act. Having further provided for a handmaiden – the Commission for the Implementation of the Constitution (CIC) – the 2010 Constitution provides as follows:[14]

261. Consequential legislation

…

(5) If Parliament fails to enact any particular legislation within the specified time, any person may petition the High Court on the matter.

(6) The High Court in determining a petition under clause (5) may—

(a) make a declaratory order on the matter; and

(b) transmit an order directing Parliament and the Attorney-General to take steps to ensure that the required legislation is enacted, within the period specified in the order, and to report the progress to the Chief Justice.

(7) If Parliament fails to enact legislation in accordance with an order under clause (6) (b), the Chief Justice shall advise the President to dissolve Parliament and the President shall dissolve Parliament.

(8) If Parliament has been dissolved under clause (7), the new Parliament shall enact the required legislation within the periods specified in the Fifth Schedule beginning with the date of commencement of the term of the new Parliament.

Code of Conduct (Article 302).

[14] The CIC was provided for in the Bomas Draft, 2004, under Article 299. Provisions on consequential legislation in the Bomas Draft, Article 308, are carried verbatim to the 2010 enacted version cited here.

(9) If the new Parliament fails to enact legislation in accordance with clause (8), the provisions of clauses (1) to (8) shall apply afresh.

By enabling Kenyans to enforce the constitutional implementation programme over ten years since the 2010 Constitution was promulgated, these fairly 'innocent' provisions have proven to be intelligent. The impasse in the quest for gender parity is illustrative of this genius of Ghai and the 'artificial intelligence' of the 2010 Constitution. Article 100 of the 2010 Constitution requires Parliament to enact legislation promoting the representation of marginalised groups in Parliament including women. Due to various factors, including a culture of disregard for the rule of law and patriarchy, Parliament dilly-dallied in enacting the relevant legislation precipitating a situation whereby the stipulated five-year period lapsed before the relevant legislation was enacted. Citizens petitioned the then Chief Justice, Hon David Maraga, who in 2020 advised the President to dissolve Parliament, under the terms of Article 261 (6,b) cited above. As I write, a constitutional crisis persists in what could be interpreted as a partial triumph for the constitutionalists. It is a story of a new and intelligent Constitution in total charge, on one hand; and an old and unintelligent political culture on the other. Regardless of who wins this particular battle, Ghai's constitutional intelligence has changed the terms of the war. For good.

Regarding adaptability, Ghai's constitutional intelligence, like artificial intelligence, learns from its environment and adjusts matters for the future good. In this sense, the 2010 Constitution ought to be seen as a transitional document. It is a manifesto meant to re-engineer a society with a troubled past. Written into the constitutional document is a re-ordering of power that centres the people. The 2010 Constitution envisions a State that for the first time must serve its people. It has turned tables. It has recognised people's sovereignty. It has established a framework for equal citizenship. It has affirmed human rights and introduced mechanisms for holding leaders accountable. Its very design and architecture confirms this position. The 2010 Constitution begins with the concept of sovereignty of the people. It articulates provisions on citizenship early at Chapter Three. And the Bill of Rights follows at Chapter Four. The 2010 Constitution places principles of leadership and integrity at Chapter Six, way ahead of the Legislature and Executive chapters which appear at chapters Eight and Nine respectively. This Ghai Draft-like set up, alone, represents a major revolution aimed at elevating the status of the sovereign people. Even literally.

Additionally, the 2010 Constitution is full of remedial provisions that have obviously taken lessons from past misdeeds. For example, the robust and flexible

provisions on standing,[15] which were inspired by the Constitution of South Africa and public interest litigation jurisprudence in India, which permit a person to lodge litigation on behalf of others or even the public interest are a reaction to the situation under the Repealed Constitution where the courts would deny public-spirited persons like the late Nobel Peace laureate Prof Wangari Maathai access to defend such critical matters as the environment.[16] Courts would also delay in determining election petitions unduly and there is a history of some petitions being determined close to the succeeding general elections – at the near close of the contested candidate's term in office. Ghai's remedy in the Bomas Draft was an ambitious provision requiring the Supreme Court to determine presidential election petitions within seven days of filling[17] and, with regard to parliamentary elections and nominations, the High Court would have had to determine such matters 'within six months of the date of lodging the petition'.[18] The 2010 Constitution maintains this position with minimum changes such as to increases the time for determining presidential petitions to 14 days.

Similarly, at the height of the 2007/8 post-election violence, then President-elect, Mwai Kibaki, was sworn in at dusk at State House Nairobi, out of sight of Wanjiku. The concept of constitutional intelligence suggested itself to the CoE; hence, Article 141(1) of the 2010 Constitution is explicit that the President shall be sworn in at a public place. Again, for a long time, the Bill of Rights could not be enforced because the then Chief Justice(s) had not made rules as the Repealed Constitution required. In fact, the Chief Justice Cecil Miller himself once ruled that the litigant before him could not enjoy his rights because *he* (the Chief Justice) had not made the rules operationalising the Bill of Rights.[19] In the spirit of constitutional intelligence, the 2010 Constitution provides that the absence of such rules does not limit the right of any person to commence court proceedings to enforce their rights.[20] Evidently, Ghai's constitution learns from the users, identifies bugs and updates its software accordingly.

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[15] Article 31(2), Bomas Draft; Article 22(1), 2010 Constitution.

[16] *Maathai v Kenya Times Media Trust Ltd* [1989] eKLR.

[17] Article 159(3), Bomas Draft.

[18] Article 127(2), Bomas Draft.

[19] See, *Kamau Kuria v Attorney General* (1989) 15 Nairobi Law Monthly 33. Also, *Maina Mbacha v Attorney General* (1989) 17 Nairobi Law Monthly 38. Former Chief Justice, Dr Willy Mutunga observed as follows about this practice: "This practice was endemic under the reign of CJ Cecil Miller (1986-1989) and championed vigorously by Justice Norbury Dugdale." See, Willy Mutunga The 2010 Constitution of Kenya and its interpretation: Reflections from the Supreme Court's decision, *SPECJU 6*, Vol 1, 2015, 3.

[20] Article 22(4), 2010 Constitution.

The Ghai in the content

So far, we have established that Ghai's conception of the constitution is an intelligent document that learns its social, political and legal surroundings and responds with significant detail for the good of the masses and to the chagrin of the powerful. Any substantive chapter of the 2010 Constitution could illustrate this point satisfactorily. But, for now, let me focus only on the Bill of Rights as the case study to save on space and time. How I wish we had room to also explore Ghai's aspirational ideas on national values or his radical prognosis of the land question or even the innovatory scheme of devolution.

The Ghai in the Bill of Rights

Consistent with other parts of the 2010 Constitution, constitutional intelligence in the Bill of Rights manifests in the comprehensive coverage of rights, accurate learning of the social, cultural and political environment, which in our case includes the history of marginalisation and human rights violations of profound proportions, and remedial measures meant to check excesses of power.

Very much a replica of the Ghai Draft,[21] our Bill of Rights provides a comprehensive catalogue of human rights that includes the right(s) to: life, equality and freedom from discrimination, human dignity, freedom and security of the person, freedom from slavery, servitude and forced labour, privacy, freedom of conscience, religion, belief and opinion, freedom of expression, freedom of the media, access to information, freedom of association, assembly, demonstration, picketing and petition, political rights, freedom of movement and residence, protection of the right to property, labour relations, environment, economic and social rights, language and culture, family, consumer rights, fair administrative action, and access to justice. In addition, the Bill of Rights has elaborate protection of arrested persons, the right to a fair hearing and the rights of persons detained, held in custody or imprisoned. It also has express and specific protection of children, persons with disabilities, youth, minorities and marginalised groups and older members of society.

Ghai's approach of detail particularly manifests in the broad list of grounds upon which discrimination is prohibited. The grounds include – but are not limited to – race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth. Except

[21] See Chapter Five of the Ghai Draft.

for the inclusion of the ground of 'dress', which arose in the course of negotiating the Bomas Draft, the rest are as the Ghai Draft had proposed. The new menu is broad when compared to the Repealed Constitution, which only listed race, tribe, place of origin or residence or other local connection, political opinions, colour, creed or sex as the protected grounds.

True to constitutional intelligence, the Bill of Rights responds to our history of marginalisation not just by recognising the rights of minorities and other vulnerable groups but also by going beyond procedural equality to re-engineer a more inclusive society. As an overarching principle, the Bill of Rights obliges the State to take legislative and other measures including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination. Similarly, it requires the State to take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender. Substantive equality is a salient feature of the 2010 Constitution especially through the provision for: -

a) Affirmative action programmes designed to ensure that minorities and marginalised groups participate and are represented in governance and other spheres of life.

b) An electoral system that complies with the principle that not more than two-thirds of the members of elective public bodies shall be of the same gender as well as fair representation of persons with disabilities.

c) Party lists comprising an appropriate number of qualified candidates and which alternates between male and female candidates in the priority in which they are listed; and except in the case of county assembly seats, each party list ought to reflect the regional and ethnic diversity of the people of Kenya.

d) Respect, by every political party, of the right of all persons to participate in the political process, including minorities and marginalised groups.

e) Respect and promotion of human rights and fundamental freedoms and gender equality and equity by every political party.

f) The membership of forty-seven women and twelve members representatives of special interests (including the youth, persons with disabilities and workers) in the National Assembly.

g) The nomination of 16 women members to Senate and two further members, being one man and one woman, representing the youth, in

addition to the nomination of two members, being one man and one woman, representing persons with disabilities.

h) The enactment of legislation to promote the representation in Parliament of women; persons with disabilities; youth; ethnic and other minorities; and marginalised communities.

i) The appointment of at least four women to the Parliamentary Service Commission.

j) The representation of both genders in the Judicial Service Commission.

k) The promotion of gender equality in judicial service.

l) A devolved system of government aimed at protecting and promoting the interests and rights of minorities and marginalised communities.

m) County governments reflecting the principle that no more than two-thirds of the members of representative bodies in each county government shall be of the same gender.

n) Special seats necessary to ensure that no more than two-thirds of the membership of the respective county assembly is of the same gender.

o) The inclusion in county assemblies of a number of members of marginalised groups, persons with disabilities and the youth as prescribed by an Act of Parliament.

p) No inclusion of more than two-thirds of the members of any county assembly or county executive committee from the same gender.

q) The requirement for the enactment of legislation to prescribe mechanisms to protect minorities within counties.

r) The principle that the composition of the commissions and offices, taken as a whole, shall reflect the regional and ethnic diversity of the people of Kenya.

These and similar provisions have put Kenya in line with international human rights standards such as the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) which, for instance, implores states to take temporary special measures (affirmative action) to accelerate the achievement of equality in practice between men and women, and actions to modify social and cultural patterns that perpetuate discrimination with the view to achieving the elimination of prejudices and customary and all other practices which are based on

the idea of the inferiority or superiority of either of the sexes or the stereotyped roles for men and women.

There is more to the details. The Bill of Rights defies the divisive tendencies of the concept of generations of human rights. In addition to the usual civil and political rights, it also carries social and economic rights like the right to the highest attainable standard of health; the right to accessible and adequate housing, and to reasonable standards of sanitation; the right to be free from hunger, and to have adequate food of acceptable quality; the right to clean and safe water in adequate quantities; the right to benefit from social security; and the right to education. The Bill of Rights also protects environmental rights in addition to other special and specific rights of children, youth, women, and the elderly, amongst others. Provision is also made for consumer rights setting the Bill of Rights apart from many others. All the generations grace the Bill of Rights collectively upholding the wisdom that human rights are interrelated, interdependent, interconnected and equal in status. This is a rare feat in municipal law, and Kenya has joined South Africa and very few others in the region in securing overall human rights cover for its people.

To restrain the State and empower Wanjiku, the Bill of Rights retains strict and pro-people provisions on emergencies and limitation of human rights just like the Ghai Draft had proposed.[22] Careful regulation of emergencies is important because such occasions can provide opportunity for wanton violations of human rights. If the Ghai and Bomas Drafts are anything to go by, the Ghai philosophy is to define and delineate instances when emergencies can be declared clearly, to make the declaration of such measures exceptional, to be invoked only where regular operations of authority are impossible, to require emergencies to last for only the duration of the national threat, to provide institutional checks to the power to declare emergencies, and to secure important rights from derogation.

Following this script, the Bill of Rights establishes sufficient safeguards for the regulation of emergencies.[23] A state of emergency may be declared only when the State is threatened by war, invasion, general insurrection, disorder, natural disaster or other public emergency and the declaration is necessary to meet the circumstances for which the emergency is declared. Such declaration only applies prospectively for no longer than 14 days. The National Assembly may extend this period but only on attaining special majorities. As an additional measure, the Supreme Court

[22] See Articles 31 and 71 of the Ghai Draft.

[23] See Article 58 of the 2010 Constitution.

has jurisdiction to decide on the validity of a declaration of a state of emergency, any extension of a declaration of a state of emergency and any legislation enacted, or other action taken, in consequence of a declaration of a state of emergency. A further safeguard is that a declaration of a state of emergency, or legislation enacted or other action taken in consequence of any declaration may not permit or authorise the indemnification of the State, or of any person, in respect of any unlawful act or omission. Although the declaration of a state of emergency may justify the limitation of human rights, this is only to the extent that the limitation is strictly required by the emergency and the legislation under which the limitation is hinged is consistent with the Republic's obligations under international law. Even then, limitation of rights can only take effect after publication in the Gazette.

The rights enshrined in the 2010 Constitution may be derogated from with the exception of the right to freedom from torture and cruel, inhuman or degrading treatment or punishment; the right to freedom from slavery or servitude; the right to a fair trial; and the right to an order of *habeas corpus.*[24] This exclusion of certain rights from derogation, aside from being a unique landmark in Kenya's constitutional history, is also controversial. Generally speaking, the idea of derogation from human rights during emergencies is not inconsistent with international human rights law. Under the framework of the International Covenant on Civil and Political Rights (ICCPR),[25] derogations are allowed but States are also required to inform the UN Secretary-General of the provisions from which they have derogated and the reasons for their derogation immediately. A similar communication must be made when the derogation ends.[26] By the ICCPR standards, the rights saved from exclusion under our Bill of Rights are few and in-exhaustive. The right to life;[27] the right not to be subjected to retroactive penal laws and the right to freedom of conscience and religion are not exempted from derogation as required by the ICCPR.[28] Further, the derogation provisions of the Bill of Rights are inconsistent with the African Charter, which does not allow state parties to derogate from their treaty obligations

[24] Article 25, Constitution of Kenya 2010.

[25] Kenya acceded to the ICCPRon 1 May 1972.

[26] F Viljoen *International human rights law in Africa* (2007) 251. Article 4(3), Constitution of Kenya 2010.

[27] Judge Emukule in *Republic v John Kimita Mwaniki* [2011] eKLR, was stunned that: 'Strangely also, life is not one of those fundamental rights which may not be limited under section 25 of the Constitution'.

[28] Under Article 4(2) of the ICCPR the right to life; the prohibition on torture, slavery, forced labour, application of retroactive penal laws and the right to freedom of conscience and religion may under no circumstances be derogated from.

during emergency situations.[29] These shortfalls aside, the reservation of certain rights from derogation, however few, should be lauded first and then built on.

Also praiseworthy is the pro-rights system of limitation of rights established under Article 24 of the 2010 Constitution. I say this because the Repealed Constitution was often criticised for overemphasising the limitations of human rights more than the entitlements themselves. Human rights would be limited in two major ways: by way of internal limitations assigned to particular rights; and through a general limitation clause which stated that human rights could be limited for the sake of greater interests of public health, security and morality. These provisions were often deployed to defeat the realisation of human rights. Faithful to constitutional intelligence, Article 24 learns and corrects that anomaly. With the exception of three human rights – the right to property, the right to freedom of the media and the right to freedom of expression – the new Bill of Rights does not use internal limitations or 'claw back clauses'.

This leaves the limitation of all human rights to be operated by one general clause akin to Article 36 of the Constitution of South Africa – Article 24 – of which six important things can be said.[30] First, it acknowledges limitation of rights only by way of law.[31] This is positive because it illegalises limitations by executive or military decrees or other extra-juridical devices. Second, and relatedly, Article 24 outlaws limitations by inference or implication. Legislation limiting the Bill of Rights must expressly state the intention to limit a particular right or fundamental freedom as well as the nature and extent of the limitation in question. Third, a limitation has to be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account: the nature of the right or fundamental freedom; the purpose of the limitation; the nature and extent of the limitation; the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.[32] Fourth, at the very least, no limitation should go so far as to derogate from the core or essential content of the right in question.[33] Fifth, the burden of demonstrating, before courts, tribunals

[29] Communication 74/92, *Commission nationale des droits de l'Homme et des Libertés v Chad,* para 21.

[30] Article 24, Constitution of Kenya 2010.

[31] Article 24(1), Constitution of Kenya 2010.

[32] Article 24(1), Constitution of Kenya 2010.

[33] Article 24(2)(c), Constitution of Kenya 2010.

and other authorities, that a limitation meets the above requirements is vested with the State or person(s) justifying the limitation[34] and not the individual(s) or group(s) entitled to a particular right. Finally, perhaps in appreciation of the fact that certain globally acclaimed human rights may not always be palatable to all sections of society, Article 24 concedes that the provisions on equality shall be qualified to the extent strictly necessary for the application of Muslim law before the Kadhis' courts, to persons who profess the Muslim religion, in matters relating to personal status, marriage, divorce and inheritance.[35] This qualification may be justified because, as cultural relativists argue, global human rights standards which greatly influenced the new Bill of Rights often fail to take into consideration that each region has its own unique realities or priorities. Consequently, 'regional specificities often are the casualties in processes of universal consensus-seeking'.[36] Such concessions should be understood as an effort toward practical cultural equilibrium.

Conclusion

As our foremost constitutional law scholar, Ghai has played his part fully. He brought his immense experience to bear during our constitutional moment. Ghai lent his intellect and credibility to the creation of a good and legitimate Constitution. He ensured we had an all-inclusive, consultative and educated constitution-making process protective of the minorities. He inspired the drafting of a friendly and accessible document and gave it sufficient detail and intelligence not merely for the ordinary regulation of the State, but most importantly for the ample cover of Wanjiku and to tame the leviathan for her. For these we shall forever be grateful. But the powerful are fighting back. Hard. Yet we shall not fear because the intelligent Constitution knew about them and gave us enough avenues to resist them this time. All we will need is eternal vigilance!

[34] Article 24(3), Constitution of Kenya 2010.

[35] Article 24(5), Constitution of Kenya 2010.

[36] Viljoen, *International human rights law in Africa,* 2nd Edition, 2012, 392.