

KENYAN WOMEN AT DUSK:

Where is FIDA?



Also Inside:

- Main Party behind Wanguru Sacking Agenda
- Raila's Return and what it means to the Ruling Coalition
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editor's digest

The main gender identities in a family/society setting need not necessarily be positively hostile towards each other as none of them can subsist alone but the current sound of FIDA's silence is rather surprising because gender-based violence against women is so clearly an increasing problem in the country Kenya now taking the form of normalcy-as being part of a Kenyan woman's life, but, the farther we penetrate into the primitive history of thought, the farther we find ourselves from a conception of progress and development which all along it resembles. To ask for action from the government is rather rhetoric but from FIDA-Kenya, I cannot help asking for something more, for some central notion which shall account not only for the elimination of gender based violence but also for its permanence. It may be doubted whether this quest can be successful.

As time progresses, so do we; or rather we strive to. I therefore welcome you to the Ninth issue of Kenyan Legal magazine; this is it-It's Real Kenya, Real Issues. Be my guest.

REGARDS,

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Is Kenya Constitutional Yet?

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The past and present experiences on devolution and other transitions suggested by the Constitution of Kenya 2010 always raise a big question whether Kenya has yet gotten her best Constitution. While to say no may initiate the framing of another treason clause in the history of Kenya, the truth is that the existing suggestion of amendments to lessen parliamentary seats and number of counties is not informed by vagueness.

Amongst the salient choices of constitutional makers in any constitution making body is **transition**. *Democratic nations cannot have their constitutions written for them, nor can they have them written in hurry. "Transitional" or "interim" charter of constitutions guaranteeing open, continuing and inclusive process one solution to urgent needs for a framework of governance in divided, novel, or war-torn countries creating room for change to permanence*¹. This was the choice that led to the formation of the CKRC and precipitated to the Ringera Judgment in **Timothy Njoya V Attorney General and Another (2003)** opening room for public participation and referendum.

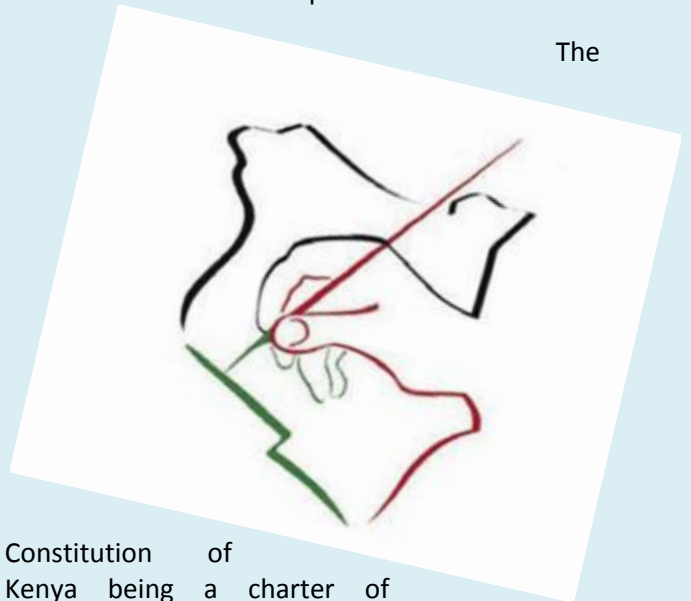
A **transitional** is intended to govern a transitional period until a permanent constitution is adopted². The South African constitution is an apotheosis. The decision in **Azania Peoples ' Organization V the President of the Republic of south Africa** indicated that transition *needs*

¹ H. Kerskey's Special Report 107 of (2003) Democratic Constitution Making page 1

² The Transitional Constitution of South Africa which governed the country through a transformative period between 1982 and 1993.

reconciliation, restoration, and transformation but not revenge, revolution or compensation. The purpose of this is to ensure a transition within the rule of law. Although the Kenya Constitution was passed in August 27th 2010 not all of it became operative on that day. Consequently, chapter 18 Transitional and Consequential Provisions, its sixth schedule and the fifth schedule, provide for a transitional period.

The



Constitution of Kenya being a charter of transformation³, it may arguably be for the time during transition regarded as a Provisional Constitution. This owes to its suspending certain chapters and of itself, retaining certain sections of the Constitution of Kenya of 1963 while keeping in operation certain provisions of itself. This constitution is provisional since its implementation is tied to the enactment of consequential legislations by the parliament (some of which require at most a five year time

³ The Supreme Court Advisory Opinion No 2 of 2013 on whether the passing the Division of Revenue Act of 2013 was constitutionally procedural.



allowance since the promulgation of the constitution⁴) and the passing of certain specific phases of transition, failure of which the Constitution will be as unimplemented as not-promulgated.

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The making of a constitution extends beyond its being promulgated or enacted⁵. At paragraph 156 on page 32 of **the Supreme Court advisory Opinion regarding whether the passing of the Division of Revenue Act 2013 was against the Constitution** indicates the following

“The supreme court must also be aware that the making of a constitution requires compromises; which compromises may occasion contradictions. The compromise has social and political demands marking constitutional moments which instigate vagueness in the phrasing and drafting of a constitution. Its making does not end when it is promulgated, it continues through the process of interpretation ...”

This is because the limits of mental capacity and creativity should not prevail over the citizens’ aspirations. Even at times of Transitional

⁴ The Fifth Schedule to the Constitution as read together with Article 261(1) of the Constitution indicate that some of the Legislations that may take the longest to be passed to implement the Constitution are Legislation with respect to culture regarding article 11(3), Legislation with respect to family regarding Article 45, Legislation with respect to Community land regarding article 63, Legislation with respect to Agreements Relating to Natural Resources regarding article 71, Legislation with respect to Regulation of Land Use and Property regarding article 66, Legislation with respect to Promotion of Representation of Marginalized Groups regarding article 100 and any other General Legislation required under this Constitution.

⁵ The concurring opinion of the CJ Willy Mutunga in the Supreme Court Advisory Opinion No 2 of 2013 on the Constitutionality of the Enactment of the Division of Revenue Act of 2013.

Constitutions, a structure of Constitutional principles and rule of law that governs the nation exists. However, the making of constitutions which extends to its implementation through interpretation may even bear aspects that if checked against the existing or departed legal order amount to illegality⁶. This calls for the application of special rules of the legal process leading to the determination and existence of a grunt-norm.

This is indicative and conclusive that the aspirations of the people are not yet fully stated. I whichever case they could not be restricted to the artistic work of the drafter but it is carried in the aspirations of the people who may change it through amendments.

⁶ B. Michelle, C. Jill, G. Yash and R. Anthony. (2011), Constitution-Making and Reform: Options For the Process. Interpeace Publisher

