

CMI REPORT

Kenya Constitutional Documents: A Comparative Analysis

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Abbreviations and Acronyms

CHRAJ	Commission on Human Rights and Administrative Justice
CJ	Chief Justice
CKRC	Constitution of Kenya Review Commission
CLB	Central Land Board
DC	District Commissioner
DDC	District Development Committee
DEC	District Executive Committee
DFRD	District Focus for Rural Development
EASCSO	East African Common Services Organisation
EBC	Electoral and Boundaries Commission
EC	Electoral Commission
ECK	Electoral Commission of Kenya
GPT	Graduated Personal Tax
ICESCR	International Committee on Economic Social and Cultural Rights
IPPG	Inter-Parties Parliamentary Group
JSC	Judicial Service Commission
KADU	Kenya African Democratic Union
KANU	Kenya African National Union
KHRC	Kenya Human Rights Commission
KPU	Kenya Peoples Union
LDP	Liberal Democratic Party
LSK	Law Society of Kenya
MoLG	Ministry of Local Government
MoU	Memorandum of Understanding
MPs	Member(s) of Parliament
MUF	Mwambao United Front
NARC	National Rainbow Coalition
NCKC	National Council of Churches of Kenya
NCEC	National Convention Executive Council
NFD	Northern Frontier Districts
NKP	New Kenya Party
NP	National Party
PA	Provincial Administration
PSC	Parliamentary Select Committee
PCRC	Peoples Constitution Review Commission
RAC	Revenue Allocation Committee

PART I: INTRODUCTION

1. Preamble

This study compares the three constitutional documents listed below that were the subject of debate in Kenya's constitutional reform process in 2005:

1. The Constitution of Kenya (the present constitution with amendments that has been in existence since 1969);
2. The Draft Constitution of Kenya, 2004 – the so-called Bomas Draft that was prepared by the Constitution of Kenya Review Commission (CKRC) and endorsed by the National Constitution Conference held at the Bomas of Kenya, hence the term 'Bomas Draft';
3. The Proposed New Constitution of Kenya – the draft that the Attorney-General and the Parliamentary Select Committee on Constitution Review prepared through adjustment of the Bomas Draft after the meetings at Naivasha (the Naivasha Accord) and Kilifi (the Kilifi Accord). The Proposed New Constitution of Kenya is informally referred to as the 'Wako Bill' with reference to its principal author, the Kenyan Attorney-General, Amos Wako.

It is beyond the scope of this report to conduct an exhaustive comparative analysis. Instead, we have selected salient issues that have been persistently contentious throughout the process. In some cases it is relevant to draw historical lines back to the independence constitution. These issues include:

- The Executive and its relationship to the Legislature;
- Devolution;
- The Judiciary;
- Electoral system;
- Bill of Rights;
- Land and property; and
- Minority rights.

In conclusion, we also project a number of scenarios as to the future of constitution-making in Kenya in view of the rejection by the people of the Wako Bill in the referendum held on 21 November 2005, and the subsequent dissolution of the Cabinet and the prorogation of Parliament, as well as the formation of a new Cabinet.

The report is divided into three parts. Part I depicts the quest for a new constitution during the last 15 years. The bulk of the report is contained in Part II, which provides comparative analyses of the three constitutional documents with respect to selected contentious issues. The final Part III draws up some future scenarios as to the likely trajectory of the constitution-making process.

2. The Process and Prelude to the Referendum

The current constitution of Kenya was enacted in 1969 after a series of fundamental amendments to the independence constitution that had come into force partly on 1 June 1963 and partly on 12 December 1963. The amendments undermined the democratic system of government that the independence constitution had contemplated and provided for. Indeed, the sections and clauses of the independence constitution that were subjected to amendment became once again the subject of reform in the Bomas Draft and the Wako Bill constitutions over 30 years later. The main changes included:

- Change from a federal to a unitary state system;
- Change from a bicameral to a unicameral legislative structure;
- Change from a parliamentary system of government with an executive prime minister as distinct from a head of state to a semi-presidential system with a powerful presidency;
- Change from effective safeguards for human rights and civil liberties to a weak Bill of Rights; and
- Change from a multiparty system of government to a *de jure* single-party system (effected in 1982).

The demand for constitutional change in the post-independence period began at the turn of the 1990s with the first call for a return to the multiparty system of government in line with the changes already taking place elsewhere in the world, especially in Eastern Europe and other African countries. The eventual introduction of the multiparty system of government in December 1991 was accompanied by the re-establishment of an electoral management body – the Electoral Commission of Kenya (ECK) – appointed by the president, and the requirement that a winning presidential candidate must receive at least 25 per cent of the votes cast in at least five of the eight administrative provinces of Kenya. With these three changes to the constitution, the country proceeded to the first post-independence multiparty elections including the first presidential election in December 1992. However, the party that had been in office since independence – the Kenya African National Union (KANU) – won the elections.

KANU's victory and the defeat of enthusiastic opposition political parties in the elections was quickly attributed to weaknesses in many other aspects of the constitution as well as various other laws that had favoured KANU. Opposition parties and civil society organizations began, therefore, as early as 1993 to demand 'comprehensive' constitutional reform as well as adjustment of other legislation to bring them all in tune with the newly introduced multiparty system of government, especially competitive multiparty elections. The leading civil society organizations in this process included the National Convention Council, especially its executive wing – the National Convention Executive Council (NCEC), the Convention Council for Constitutional Change (4-Cs), the Kenya Human Rights Commission (KHRC), and the Law Society of Kenya (LSK). However, the KANU government resisted the demand for constitutional reform until the 'mass action' that civil society initiated in the middle of 1997 when it appeared that the country would go to the next (second) multiparty elections without any further constitutional changes.

The mass action compelled the KANU government to accept some constitutional, administrative and legal reforms – minimum reforms through collaboration among all the parliamentary parties: the Inter-Parties Parliamentary Group (IPPG) that excluded the civil society organizations. The IPPG introduced a range of constitutional, legal and administrative reforms that helped to bring fairness to the 1997 elections. However, the IPPG initiative produced only a single amendment to

the constitution: the increase of the number of ECK commissioners to 21 and provision for parliamentary political parties' influence in the nomination of ECK members and for the President to appoint them. The rest of the IPPG changes concentrated on different laws (Acts of Parliament) that had a bearing on the electoral process:

- The Public Order Act;
- The Preservation of Public Security Act;
- The Chief's Authority Act;
- The Kenya Broadcasting Corporation Act;
- The Penal Code;
- The Local Government Act; and
- The Societies Act.

Thus, by the time the country went to the 1997 elections, only a single change had been made to the constitution out of the mammoth comprehensive constitutional reforms that the civil society and political parties expected. Moreover, the government offered to undertake constitutional reforms through parliament while civil society organization wanted a 'people-driven', or a 'Wanjiku' driven process.¹ At this point, civil society decided to proceed with the formulation of a new constitution without government involvement. The Peoples Constitution Review Commission (PCRC) was appointed at Ufungamano House with Ooko Ombaka as chair. The commission had already begun provincial visits to solicit views from the public when the KANU government decided to initiate an official review process: it pushed for the enactment of the Constitution of Kenya Review Act and appointed the Constitution of Kenya Review Commission (CKRC) with Prof. Yash Pal Ghai as its chairman. Prof. Ghai delayed his oath of office to negotiate a merger between the civil society PCRC and the new, formal CKRC.

The CKRC was not able to complete the review process before the December 2002 elections, largely because of frustration by the KANU government that had initiated the process. Indeed, the government attempted to discontinue the process. Opposition parties and civil society organizations undertook to continue the process after the elections. The National Rainbow Coalition Party (NARC) that was tipped to win the elections against KANU signed a Memorandum of Understanding (MoU) with civil society organizations whereby it undertook to continue with the constitutional review process if they won the elections and to enact a new constitution within 100 days of taking office. The understanding at the time had been that a bill would be prepared by the Attorney-General and tabled in Parliament, based on the Bomas recommendations. At that stage Parliament would have no authority to amend the bill.²

Although NARC won the December 2002 elections and formed a government, political circumstances changed. It appeared that the NARC coalition, or its dominant faction, was reluctant to secure a new constitution based on the findings of the CKRC process. The government was ready to accept the CKRC (Bomas) draft only if the Bomas conference:

- Maintained a unitary rather than a federal system of government;
- Retained the dual presidential powers as head of state and head of government rather than create a parliamentary system with an executive prime minister and curtailed presidential powers;
- Retained a unicameral rather than a bicameral legislature structure.

¹ Wanjiku, a typical Kikuyu name, denotes the ordinary Kenyan citizen representing the grassroots.

² As summed up by the Speaker (see *Hansard*, 9th Parliament, 4th Session, Vol. 1, No. 62, 20 July 2005, pp. 2553–2554.

However, the rest of the Bomas conference disagreed with the government's position. While government representatives at Bomas boycotted the rest of the process, the CKRC proceeded to formally submit the draft (Bomas) constitution to the Attorney-General as stipulated in the Review Act, and the CKRC Chairman, Prof. Ghai thereupon resigned having completed his assignment.

The government walkout from the Bomas conference introduced a conflict in the review process, that is, the problem of 'contentious issues', which delayed the enactment of a new constitution.

The NARC government has since attempted to ensure that its position on the contentious issues prevails. On 30 June 2004 the Parliamentary Select Committee (PSC) on Review of the Constitution of Kenya was reconstituted with a view to ironing out the differences over contentious issues. The committee comprised MPs aligned to either side of the dispute and convened under the chairmanship of Hon. William S. Ruto. The Attorney General advised the PSC on 25 August 2004 that neither section 47 of the Constitution nor the judgement by the Constitutional Court (the Njoya case) could repeal the existing Constitution in its entirety and give birth to a new one. He furthermore supported, for the avoidance of doubt, a constitutional amendment of section 47 to provide for a referendum and urged the committee to come up with a constitutional amendment bill to safeguard the review process from further legal challenges. None of these recommendations were ever acted upon. During a retreat at Naivasha on 4–7 November 2004 the PSC produced the so-called Naivasha Accord, which was a compromise on some of the contentious issues, but not all. Its report was tabled in Parliament on 9 December 2004.

On 5 May 2005 the Select Committee on Review of the Constitution of Kenya was again reconstituted under the chairmanship of Hon. Simeon Nyachae. However, the official opposition objected on the grounds that a select committee already existed and that there was no need for a new one with a different membership. Also, the Liberal Democratic Party (LDP) faction of NARC had reservations because some of its key members had been removed from the list submitted by the Business Committee for approval by the House (Parliament). In fact, the re-appointment of the PSC under Nyachae's chairmanship contravened Standing Order 154, which says that a PSC once established cannot be reconstituted unless there are vacancies.

The new Select Committee held a two-day retreat in Kilifi and reported to Parliament on 29 June 2005. When the report was debated in Parliament on 20–21 July 2005, the opposition and the LDP faction of NARC fiercely contested it. Among other things, the critics claimed that the committee had gone beyond its terms of reference and resurrected issues that had been agreed upon earlier. Others argued that the motion to adopt the Nyachae PSC report violated sections 30, 46 and 47 of the Constitution as well as Standing Orders 154 and 155. The Nyachae PSC report was never formally adopted. Nonetheless, the Attorney-General apparently went ahead to produce a new draft while taking into account the Naivasha and Kilifi reports. Thus, in view of the alleged contravention of the constitution and Standing Orders 154 and 155 the legality of the entire process was called into question. Nevertheless, the outcome was the Proposed New Constitution of Kenya (the Wako Bill), which was subjected to a yes-no referendum conducted by the ECK on 21 November 2005. The Wako Bill was defeated, with 57 per cent of the vote against and 43 per cent in favour.

PART II: THE COMPARISONS

3. The Executive and its Relationship to Parliament

The debacle over the new constitutional dispensation centres on a few salient contentious issues. Among them is the nature and scope of the Executive and the way in which it relates to Parliament as the principal representative organ of the state. How is Parliament equipped to check the Executive in the three constitutional documents compared?

3.1 Introduction

The issue is often seen to involve a choice between a fully-fledged parliamentary system of government and the retention and reinforcement of old-style presidentialism. In a parliamentary system the Legislature is relatively strong and wields considerable power and control over the Executive through a host of mechanisms. The ultimate control mechanism is the constitutional provision that Parliament by simple majority may pass a vote of no confidence against the Cabinet, normally led by an executive Prime Minister as Head of Government. In that eventuality, the Head of Government must resign but not necessarily the Head of State because those two functions are separate. This means that a power-sharing arrangement is in place between these two branches of government, in which Parliament has the upper hand.

By contrast, the predominant feature of a presidential system is the combined office of the President as Head of State and Head of Government vested in one and the same person, and the direct election of the President for a fixed term. Between elections, a President may normally be removed only by way of an elaborate impeachment procedure. The upshot is that in terms of the power relationship between Parliament and Executive, the latter has the upper hand.

However, the matter is not as dichotomous and clear-cut as the above two contrasting concepts would suggest. Between the arch-typical categories of presidential and parliamentary systems of government one finds a large number of variants or hybrids. Owing to historical circumstances and various external influences, many countries opted for mixed systems of government. It is justified, therefore, to see the two concepts as the extremes of a continuum. In this report we seek to examine the *degree* to which the Legislature is able to check or hold the Executive to account, which is the critical issue. To that end we intend to make a systematic comparison of key dimensions that bear on parliamentary-executive relations.

3.2 Head of State and Government

Since the separation or combination of the functions of Head of State and Government is pivotal to the system of government, we examine successively how the three constitutions define this relationship. We also include the related modes of presidential election in a comparative perspective.

In the current constitutional dispensation the President shall be elected through direct elections. He must be elected an MP and to be elected President he must in addition garner the highest number of the valid votes cast (a plurality) among the contesting candidates and receive a minimum of 25 per

cent of the valid votes cast in at least five of the eight provinces [Section 5 (2) (f)]. In other words, the presidential election is a first-past-the-post plurality contest. The President shall hold office for a term of five years, and may be re-elected only once [Section 9 (1) and (2)].

Section 4 provides that the President shall be the Head of State and Commander-in-Chief of the armed forces of the republic. This section does not state explicitly that the President shall also be the Head of Government. Reference to the President as Head of Government is only made implicitly in section 16 (2) in terms of which he shall appoint his ministers, and explicitly in section 52 (b). The President shall appoint his ministers (the Cabinet) from among the members of Parliament [Section 16 (2)]. The President may at any time prorogue or dissolve Parliament [Section 59 (1) and (2)]. The Cabinet shall be collectively responsible to Parliament [Section 17 (3)]. The executive authority of the Government of Kenya is vested in the President and may be exercised by him either directly or through his subordinate officers [Section 23 (1)].

Thus, the current constitution prescribes, in effect, a quasi-presidential system despite the provision that a vote of no confidence may be passed against the Cabinet [Section 59 (3)]. Moreover, the President is a member of the National Assembly. The presidential characteristics have been reinforced by successive constitutional amendments since 1969 to produce a very powerful presidency.

Since the democratic opening and the introduction of a multi-party system in the early 1990s, most opposition parties had criticised the extensive powers of the President and included in their election manifestoes the curtailment of presidential powers.

With regard to the Presidency, the Bomas Draft departed from the current constitution in a fundamental way. It stated in Article 150 (1) (a) that the President is the Head of State, the Commander-in-Chief of the Defence Forces, Chairperson of the National Security Council and the Defence Council. The President's function as Head of Government was removed. Instead, the Bomas Draft introduced the post of an executive Prime Minister and proposed a power-sharing formula between the President and the Prime Minister. Also, in terms of Article 151 (1) (d) of the Bomas Draft the President may dissolve Parliament only in the circumstances contemplated in Article 142 (i.e. during crises affecting national security).

Bomas Draft Article 151 (2) says that the President shall appoint and may in accordance with the Constitution, dismiss the Cabinet consisting of a Prime Minister who shall be the leader of the political party that enjoys majority support in Parliament subject to the approval of Parliament as provided for in Article 171. This latter article provides detailed procedures for selection of the Prime Minister, firmly under the control of Parliament.

The Bomas Draft proposed that the President be elected directly by 50 per cent of the valid votes cast and by at least 25 per cent in more than half of the provinces [Article 157 (4)]. Furthermore, Article 157 (5) prescribed that if no presidential candidate manages to garner a majority of the vote in the first round, there will be a run-off elections within three weeks between the two candidates who mustered the largest and second largest number of votes in the first round. Article 160 (1) (2) states, moreover, that the President may serve only two consecutive terms of five years each.

The Bomas Draft goes far in prescribing a typical parliamentary system of government, separating the functions of Head of State and Head of Government by introducing an executive Prime Minister position as Head of Government emerging from Parliament and being accountable to Parliament.

Article 143(1) and (2) of the Wako Bill states that the President shall be the Head of State, Head of Government, Commander-in-Chief of the Defence Forces and Chairperson of the National Security

Council. This provision defines a singularly presidential system of government. In essence, the Wako Bill represents continuity with respect to system of government. Relative to the current constitution, the Wako Bill actually strengthens the powers of the President because the existing provision for a vote of no confidence in the Cabinet is scrapped.

The Prime Minister post envisaged in the Wako Bill (Article 163), appointed by the President, is merely the leader of government business and he/she would not lead the Cabinet or have executive powers. In effect, the Prime Minister in this dispensation is merely an assistant to the President.

3.3 Removal of Head of State and Head of Government

Another mode of oversight of the Executive by the Legislature is the mechanisms provided for in the constitutional dispensations with regard to the removal of the Head of State and the Head of Government between elections.

The existing constitution contains no provision for the removal of the President by means of impeachment. However, Parliament may pass a vote of no confidence in the Cabinet by simple majority, in which case the President shall either resign or dissolve Parliament within three days. Failing this, Parliament shall stand dissolved on the fourth day following the passage of the no confidence motion [Section 59 (3)]. This section is the clearest parliamentary feature of the otherwise presidential system of government in Kenya. It should be noted, however, that although this formal provision exists it is seriously weakened by the practice of forming large Cabinets with a sizable proportion of parliamentarians being ministers and assistant ministers. The likelihood of a vote of no confidence in such circumstances is dramatically diminished. It is reasonable to deduce that it is a deliberate tactic on the part of the Executive to engage in such practices to forestall a vote of no confidence.

The President may also be removed on grounds of incapacity in terms of section 12 (2), i.e. being unable by reason of physical or mental infirmity to exercise the functions of the office of President, in which case the Chief Justice (CJ) shall appoint a tribunal of medical practitioners to inquire into the matter and report back to him and state an opinion as to whether the President is unable to discharge the functions of office. The CJ shall then convey the result to the Speaker of Parliament. If, within three months, the President is still unable to discharge his duties, he shall cease to hold office.

Article 170 (1) of the Bomas Draft provides for a Prime Minister as the leader of the Cabinet who presides over its meetings. The Prime Minister and his/her ministers exercise executive authority in terms of budget and policy; initiate legislation; implement acts; and co-ordinate ministries [Article 170 (2)]. The Prime Minister comes from the largest party or a smaller party within a coalition of parties. The Prime Minister selects (nominates) his/her ministers but the President formally appoints them. Approval by Parliament is needed [Article 175 (1)]. The Prime Minister shall keep the President informed about Cabinet business [177 (1)].

A motion of no confidence may be passed against the Cabinet, in which case the Prime Minister must resign [Article 143 (1)]. This provision is the epitome of a parliamentary system of government.

The Prime Minister cannot be removed by the President [Article 174 (2)] because the former is accountable to Parliament. If Parliament passes a vote of no confidence [Article 174 (1)] in the Prime Minister and his/her Cabinet, requiring a simple majority, the Cabinet must resign. Although the Cabinet is collectively accountable to Parliament [Article 176(2)] a vote of no confidence can

also be passed against individual ministers [Article 175 (2)] who are individually accountable to Parliament. Ministers may also be summoned by parliamentary committees to answer questions [Article 176 (4)].

Article 163 (1) of the Bomas Draft provides for an elaborate impeachment procedure whereby two-thirds of the MPs are required to vote in favour of an impeachment motion for violation of the constitution or gross misconduct by the President. Thereafter, the National Council (i.e. the upper house) is to be summoned by the Speaker to hear the charges and consider the motion. If the National Council is satisfied that there is *prima facie* evidence to support the charges, the next step is to appoint a special committee of 14 members, taking into account the proportional representation of parties in the House, to investigate the charges further. The special committee is chaired by the CJ and will report back to the National Council when the investigations are completed. If the charges are not substantiated there will be no further proceedings. But if the charges are substantiated, a vote of impeachment will be taken, requiring two-thirds majority to be passed.

The Wako Bill has no provision for a vote of no confidence in the President as Head of State and Government. The President as the combined Head of State and Head of Government can be removed only through an elaborate impeachment procedure [Article 155] in case of serious violation of the constitution or serious misconduct prejudicial to the interest of the republic. First, a majority vote of impeachment is required. Then a special committee of 13 MPs shall be formed to investigate the allegations. If the allegations are substantiated, 75 per cent of the MPs must vote in favour of the motion of impeachment for it to be passed. The strict 75 per cent requirement for a motion of impeachment makes it virtually impossible to depose the President.

3.4 Parliament

The three constitutions differ somewhat with respect to the election of Parliament and its functions, even though commonalities are legion.

In the current constitution, Parliament holds exclusive legislative power in terms of section 30. Currently, Parliament is uni-cameral and consists of 210 elected members, 12 nominated members representing special interests appointed by the President [Section 33 (1)], according to the parliamentary strength of the political parties while taking gender equality into account [Section 33 (3)], and two *ex officio* members without voting rights – the Attorney-General and the Speaker [Sections 36 and 37 (4)]. The term of office is five years and there is no limit as to how many terms an MP may serve [Section 59 (4)]. A parliamentary quorum is constituted when at least 30 members are present [Section 51].

Parliament may alter the constitution by a majority of not less than 65 per cent of the members [Section 47 (1) and (2)]. This is the controversial section that was subjected to a court ruling on 15 November 2005. The Yellow Movement who filed the case argued that Parliament could only alter the constitution in a piecemeal fashion but not discard it in its entirety and replace it with another. To do the latter, section 47 would have to be amended first. Hence, the submission of the Wako Bill to a referendum was illegal, so the argument ran. However, the court ruled that the people are sovereign and that no court could interfere in the exercise of that sovereignty. Therefore, the referendum could be held.

The Bomas Draft provides for a bicameral Legislature with an upper house – the Senate – and a lower house – the National Assembly [Article 120]. The functions of the legislature [Article 121] include the exclusive right of law-making at the national level [Article 121 (1)]; deliberation on policy [Article 121 (2) (b)]; budget and expenditure approval [Article 121 (d)]; amendment of the

constitution [Article 121 (c)]; oversight of the Executive [Article 121 (f) (i)]; popular representation [Article 121 (2)]; and confirmation of presidential appointments [Article 121 (h)].

The Senate is envisaged to consist of one member from each district elected indirectly by the District Council acting as an electoral college [Article 122 (1) (a)]; two women from each region elected indirectly by an electoral college consisting of all elected members of the District Councils within the region [Article 122 (1) (b)]; representatives of marginalised groups [Article 122 (1) (c)]; plus the Speaker as an *ex officio* member [Article 122 (1) (d)].

The National Assembly shall consist of one member from each constituency [Article 123 (1) (a)]; one woman elected from each district, each of which treated as a single-member constituency [Article 122 (1) (b)]; 14 members representing marginalized groups elected indirectly through an electoral college [Article 122 (1) (c) and (2)]; and the Speaker as an *ex officio* member [Article 122 (1) (d)].

The method of election varies. But generally the Senate is elected indirectly by means of electoral colleges, whereas the main rule with regard to the National Assembly is through a single-member plurality electoral system (the so-called first-past-the-post system), in other words as it is today. Although the Bomas Draft devotes much attention to the role of political parties in the system of government [Articles 111–119], it allows independent candidates to stand for election [Article 105]. The time of parliamentary elections is fixed to the Tuesday immediately preceding the 28 days before the expiration of the term of the House [Article 125 (1)]. The term of office is five years [Article 148 (1)].

The Wako Bill provides for a uni-cameral Legislature. It does not specify a precise number of members but refers to acts of parliament to be enacted in order to establish the number of members of various categories [Article 116 (4)]. In addition to regular elected members the Wako Bill also proposes that an unspecified number of special constituencies be created for women as prescribed by an act of Parliament [Article 16(b)]. Similarly, an unspecified number of MPs shall be nominated by the political parties in proportion to the votes received by the parties [Article 116 (c)]. The method of electing the nominated MPs is complex [116(2)].

The term of service for MPs is five years [Article 139 (1)]. The timing of the general parliamentary election is specified to be the Tuesday immediately preceding the 28 days before the expiration of the term of Parliament [Article 118 (1)], the same as in the Bomas Draft.

3.5 Other Means of Executive Restraint

The provision for a vote of no confidence is, of course, the ultimate mechanism of parliamentary control over the Executive. It is no doubt an effective means of control but it is generally applied sparingly because the consequences are dramatic. Still, its mere existence acts as a deterrent on excesses in the wielding of executive power. However, in normal parliamentary practice a number of other mechanisms of parliamentary restraint on the Executive are operative.

3.6 The Legislative Process

The main function of Parliament is to legislate. Through the legislative process, therefore, Parliament may restrain executive power.

The existing constitution vests legislative power in Parliament through enacted bills [Sections 30 and 46]. It is not specified who may table bills but it is understood on the basis of practice that

ministers and regular MPs alike may introduce bills. Once a bill has been passed the President shall assent to it. The President may, however, refuse to assent, in which case Parliament will have to reconsider the bill in light of the President's reservations [Section 46 (3) (4) and (5)]. After reconsidering the bill, Parliament may pass it anew and resubmit it for assent with or without amendments [Section 46 (5) (a)]. In the latter case, i.e. when the original bill is passed again, it requires support by 65 per cent of all MPs, after which the President must provide his assent within 14 days [Section 46 (5) (b)]. In other words, the President has no veto right, although the threshold of parliamentary passage of bills in defiance of the Executive is rather high.

The current constitution also provides that Parliament may not proceed upon bills – unless introduced by ministers – involving the imposition of taxes, charges on or withdrawal from the Consolidated Fund, or the remission of debt owed to Kenya [Section 48]. This provision has often been used or misused to curtail parliamentary control over the legislative process. Bills have been dismissed too easily on the grounds that they have money implications, however minor they might be. It is almost inconceivable that a bill would have no monetary implications whatsoever.

The Bomas Draft provides that any member or committee of Parliament may introduce bills in either House [Article 132 (2)]. A money bill, however, may only originate in the National Assembly and only be introduced by a minister [Articles 132 (3) and 133 (1)].

According to Article 134 of the Bomas Draft, once one House of Parliament has passed a bill, the Speaker of that House shall refer it to his counterpart of the other House for introduction, consideration and passage. If both Houses pass a bill in the same form, the bill shall be sent to the President for assent. But if one of the Houses rejects it the bill is defeated.

When the President receives a passed bill for assent he shall assent to it within 14 days or refer it back to Parliament for reconsideration with his reasons for not giving his assent [Article 135 (1)]. In the latter case Parliament may either amend the bill in light of the President's reservations or pass the bill a second time without amendment [Article 135 (2)]. If Parliament amends the bill it shall be submitted afresh to the President for assent [Article 135 (3)]. However, if Parliament passes the bill a second time without amendment by two-thirds majority the President shall assent to it within seven days [Article 135 (4)]. If the President fails to do so, the bill shall nevertheless be taken to have been assented to after seven days [Article 135 (5)]. The import of this procedure of assent is that the President has no veto power; he can only delay the legislative process.

According to the Wako Bill, any MP may introduce a bill in Parliament [Article 125 (2)]. But money bills may only be introduced by a minister [Article 126 (1)]. The President can refuse to assent to bills passed by Parliament only twice [Article 127]. In other words, the President holds no veto right. The quorum of Parliament shall be 30 per cent of all MPs [Article 130].

The Wako Bill suggests that Parliament shall conduct its business in an open manner and hold its sittings and those of the committees in public [Article 135 (1) (a)].

3.7 Parliamentary Autonomy, Public Appointments and the Committee System

A degree of parliamentary autonomy is provided by all three constitutions. Furthermore, as the meat of parliamentary work the committee system is critical, through which Parliament may exercise a measure of control of the Executive. The committee system is not only an important *ex post* method of control but equally much an *ex ante* opportunity of policy influence. Appointment to public offices by the President is also variously subjected to parliamentary control.

The current constitution states that Parliament may regulate its own procedure and adopt Standing Orders for the orderly conduct of deliberations [Section 56 (a)]. The sittings are regulated by the Standing Orders [Section 58(4)]. Parliament is at liberty to establish any committee deemed necessary and regulate its proceedings [Section 56 (b)]. The current constitution does not explicitly provide for the summoning of the President or ministers to the House or the committees to answer questions or to explain policy. However, a parliamentary practice has evolved whereby watchdog committees may ‘summon’ ministers – implying an adversarial relationship – to answer questions, whereas the departmental committees tend to ‘invite’ ministers in a non-adversarial fashion.

According to the Bomas Draft Parliament is at liberty to regulate its own procedure and establish any number of committees for any purpose as it deems fit [Article 142]. In the interest of transparency, the plenary and committees of Parliament are to be held in public [Article 144(1) (a)]. Although the intention underlying this provision is laudable and may serve as a restraint on executive excesses, it may in some instances be impracticable. It may be reasonable and justified to exempt deliberation on certain issues of national security or sensitive economic issues from public debate. Furthermore, if *in camera* deliberation is ruled out formally speaking, it is likely that decisions may be taken informally outside the ambit of Parliament and that the public insight is thus rendered a sham. However, there is a clause allowing for departure from this general principle in exceptional circumstances when the Speaker has determined that it is justified to exclude the public or the media from the proceedings [Article 144 (2)].

The Wako Bill also provides for Parliament to regulate its own procedure through Standing Orders [Article 133 (1) (a)] and to establish committees as deemed necessary. There is no specification of type or number of committee that may be established. Furthermore, Parliament or any of its committees may call any minister or any person holding public office or private individuals to submit memoranda or appear before it to give evidence [Article 134 (a)].

In terms of appointments to public office by the President, the current constitution provides that Parliament must approve such appointment if required by the constitution or other legislation [Article 121 (h)]. For example, the presidential appointment of members to the many constitutional commissions is subject to parliamentary approval [Article 290 (2) (b) and (c)].

3.8 Conclusion

Although the current constitution contains a vote of no confidence section, the existing regime is essentially presidential, especially in view of the practice of a bloated Cabinet that undermines the reality of this check on executive exercise of power. The Bomas Draft reinforces the parliamentary checks on the Executive and introduces a parliamentary system of government, principally by introducing the position of an executive Prime Minister and the separation of the Head of State from the Head of Government. The Wako Bill, on the other hand, reinforces the predominantly presidential nature of the present constitutional dispensation by removing the provision for a vote of no confidence in the Cabinet.

Notwithstanding the provision or non-provision of a vote of no confidence as the ultimate check on the Executive, all three constitutional proposals contain a mechanism of restraint that Parliament can apply, i.e. in the legislative process and the approval of presidential appointees.

4. Devolution

Among the very contentious issues, with antecedents in the *Majimbo* constitution of the immediate post-independence era, is devolution of functions and decision-making authority to lower levels of government and the number of tiers of devolved entities.³

4.1 Introduction

Kenya became independent in 1963 on the basis of a federal constitution that was popularly known as *Majimbo*. It devolved considerable powers and functions to eight regions. Each region was to have:

- A Regional Assembly comprised of members elected from established constituencies. The Assembly had powers to make laws relating to peace, order and good governance of the region;
- A President and a Deputy-President elected by two-thirds of the members of the assembly;
- The Finance and Establishments Committee of the Regional Assembly in which executive authority was vested;
- A civil secretary in charge of public officers serving in the establishment of the region;
- A regional police force under a commissioner of police.

The regions were established on 1 June 1963 with Oginga Odinga as the first minister in charge of regionalism. The national elections that led to independence elected the House of Representatives and the Senate, both at the national and regional levels. A few of the regions, especially those that had supported the *majimbo* form of government – Western, Coast and Rift Valley – initiated some activities. However, the KANU government was opposed to regionalism and sabotaged the regions by refusing to release funds for their operations. Consequently, the constitution was never fully operationalised, and in 1964 Kenya adopted a republican constitution that converted the polity into a unitary state. From that time onwards there was increasing centralization with the President amassing power.

Local governments were fairly strong on the eve of independence – for example, they were responsible for collection of Graduated Personal Tax (GPT) and other taxes and levies – that is, they raised revenue, decided how to use it and transferred some to the central government. They provided services such as health centres and clinics, road maintenance and schools. In 1967, their responsibility for tax collection including the GPT was removed. In 1969, the Local Authority Services Transfer Act was passed, which transferred services such as education and health, etc. to the central government. The regional authorities were left with minor operations such as markets and abattoirs. The central government through its Ministry of Local Government (MoLG) increased its control over the councils by deploying staff and approving their plans. The central government also had the authority to dissolve those councils that were perceived not to be performing as expected or with conflicts or other abuses. Not only did the central government dissolve local authorities, but also appointed commissions to manage them in the absence of elected councils.

As the local authorities were weakened, the central government increased its hold on communities through its field agencies led by the Provincial Administration (PA). A deconcentration strategy termed District Focus for Rural Development (DFRD) was introduced in 1983 and established the

³ *Majimbo* is the plural form of *jimbo* which in Kiswahili means administrative district or region.

District Commissioner (DC) as the chief executive authority of his/her district and the District Development Committee (DDC) as the organizations that approved all development plans of a district. One weakness of the DDCs was that they were dominated by civil servants rather than by local inhabitants of the districts, and thus hardly involved the latter in decision-making. The DDCs controlled local authorities by requiring that they approve development plans made by the authorities. The authorities were controlled further through DCs who served as *ex officio* members of county and municipal councils.

These developments were accompanied by others, such as the banning of opposition political parties, detention without trial of persons opposed to the then ruling KANU government and widespread corruption and mismanagement of national resources. The majority of Kenyans not only became poor as the economy deteriorated, but were voiceless and never participated in decision-making in matters affecting their lives. The consequence of these centralizing trends was that people became angry and frustrated, leading to a democratic struggle or movement that eventually led to the re-introduction of multi-partyism, to the rejection of the former KANU government and the election of the NARC coalition government in 2002. Whereas the constitutional review process started before the 2002 elections, the NARC party coalition promised to deliver a new constitution to Kenyans within 100 days of taking office. However, the process of constitution-making took much longer than expected and culminated in the Bomas Draft, which was rejected by the government. Subsequently, the Wako Bill was produced as the government's revamped version of the Bomas Draft.

The current constitution (1969 as amended up to 1997) provides for a centralized state and has no chapter and provisions on devolution; it does not also provide for devolution of powers to local authorities. The Local Government Act of 1977 provides for a structure of local government but this legislation does not spring from the Constitution. Consequently, the comparison presented below makes references to the independence constitution (1963) while contrasting in greater detail Chapter 14 of both the Bomas Draft and Wako Bill.

4.2 Objectives and Principles

The Bomas decision to devolve powers to lower levels of government was justified in terms of four objectives:

1. Break up the concentration of power at the centre;
2. Recognize diversity;
3. Promote greater participation in public affairs; and
4. Make government more efficient, responsive and accountable.

A democratic system in which power was exercised locally was to replace the current PA that is the extended arm of the central government. The draft says: "give significant powers to devolved governments and provide strong legal protection".

Article 206 of the Bomas Draft cites eight main objectives of devolution:

1. Ensure democratic and accountable exercise of sovereign power;
2. Give powers of self-governance to people at all levels and enhance their participation in exercise of state power;
3. Foster national unity by recognizing diversity;
4. Protect and promote the interests of minorities and marginalized groups;

5. Ensure equitable sharing of national and local resources with special provisions for less developed areas;
6. Recognize the right of local communities to manage their own affairs and to form networks and associations to assist in their management and further their development;
7. Promote social and economic development and provision of services; and
8. Facilitate decentralization of state organization and functions from the capital city.

The draft [Article 207 (1)] lists the principles of devolution as:

- The district is the principal level of devolution;
- Regional governments are to co-ordinate the implementation of programmes and projects that extend across two or more districts of the region;
- The Senate is to provide an institution through which the devolved levels of government share and participate in the formulation and enactment of national legislation and protect the interests of the regional, district and locational governments;
- Parliament is responsible for enactment of the legislative framework applicable to devolved levels of government.

The Wako Bill [Article 198] provides objectives and principles, which are similar to those contained in the Bomas Draft.

The Wako Bill's main limitations are:

- (i) It omits to mention the concept of "devolved units";
- (ii) It fails to mention that communities are to participate in the exploitation and preservation of natural resources; and
- (iii) It has no provision for the protection and promotion of minority interests.

4.3 Levels of Devolution

Ghai observes that whereas many countries have two levels – the national and province/regions – a few have a third or a fourth level.⁴ More levels increase problems of co-ordination and sharing of resources and thus incur high transaction costs. On the other hand, several levels of devolution have the advantage of bringing the government closer to the people and taking care of diverse interests. Yet, by being small, devolved governments may not be able to effectively exercise powers conferred upon them nor challenge the national government. Larger devolved units are likely to have more resources and capacity to make and implement laws and policies, but their headquarters might be remote to many people and local governance is likely to be reduced. In other words, difficult trade-offs are involved.

The independence constitution [Section 91] provided for eight regions including the city of Nairobi and did not emphasize districts and locations.

The Bomas Draft [Article 215] provides four levels of government: national, provincial, district and locational. Existing provinces were reorganized into 13. It made the district the principal level of devolution. Both regions and districts were entrenched in the draft constitution. The location was to be an administrative unit.

⁴ Ghai, Yash Pal (2005). 'The Wako Draft Lost Course on Devolution'. *Sunday Nation*, 6 November 2005, p.21.

Wako Bill Article 199 provides for only two levels of government: the national and the district. The districts are not listed, meaning that they can easily be altered by legislation. Provinces are not mentioned and are presumably abolished.

Both the Bomas Draft and the Wako Bill treated the district as the principal level of devolution at the sub-national level. Bomas, however, provided in addition for the locational level to enhance governance at the local level and the regional level to ensure co-operation between districts as well as to enhance their capacity to undertake some regional activities. A total of 13 regions were recommended (see First Schedule).

The Wako Bill's main weakness is that it does not:

- (i) Explain how sub-national governance structures are constituted;
- (ii) Provide for an amalgamation of neighbouring districts into a regional government;
- (iii) Recognize the large size of many districts and the need to move governance closer to the people through lower level government;
- (iv) Specify the number of districts and list them in a schedule; and
- (v) Entrusts the process of district creation and dissolution ultimately to the President.

4.4 Composition of District Level Governments

The independence constitution [Sections 92–93] established a regional government composed of the Regional Assembly made up of elected members whose number as well as constituencies was to be established by a law made by the Assembly. The Regional Assembly was to be headed by a president and a vice-president elected by two-thirds of the members from among themselves and who were to preside over the sittings of the assembly, as well as a clerk. Executive authority of the region was exercised by the Finance and Establishments Committee [Section 105] of the Regional Assembly. This was to be done directly or indirectly through public officers serving on the establishment of the region or through designated committees.

The Bomas Draft [Articles 217–222] establishes a district government consisting of a District Council and a District Executive Committee (DEC). The district's legislative authority is vested in the District Council, which passes any laws that are reasonable and necessary for the exercise of its powers and performance of its functions, and maintains oversight over the DEC through the laws it enacts. The District Council is elected for a five-year term. Its members are to be elected from wards whose boundaries are prescribed by an Act of Parliament and recommended by the Electoral and Boundaries Commission (EBC). The District Councils are envisaged to include a number of special seats for women, marginalized groups and communities, older persons and those with disabilities as prescribed by an Act of Parliament.

The DEC exercises executive authority of the district. It comprises the District Governor and his/her deputy and such other members as are appointed by the District Governor with the approval of the District Council. The members shall range from ten to not more than a third of the members of the District Council. The functions of the DEC include:

1. The implementation of the laws of the District Council, the implementation of national and regional legislation, the co-ordination of the functions of the district administration and its departments, locations and communities;
2. The preparation and tabling of laws for enactment by the Council;
3. The formulation of policies and plans for the management and exploitation of the district's resources, its infrastructure and institutions. Similar provisions with minor modifications apply to the regional [Articles 211–214] and locational levels [Articles 223–225].

Elections of the District Governor and his/her deputy will be done by registered voters resident in the district, each holding office for a term of five years and eligible for one further term.

The Wako Bill [Articles 207–210] covers the same provisions. The only difference is that the provisions are confined to the district level. Instead of a District Council, the Wako Bill uses the term “District Assembly”. Another difference is that the District Assembly may recommend to Parliament the enactment of legislation concerning any matter outside the authority of that District Assembly and that is within the legislative competence of Parliament [Article 208 (4)]. Apart from the regular ward elections and special representatives, the Wako Bill adds five per cent members nominated by political parties.

Instead of a DEC, the Wako Bill provides for a District Council that exercises executive authority. Its composition is more or less the same as that provided by the Bomas Draft. However, instead of a District Governor as provided by the Bomas, the Wako Bill provides a district chairperson.

4.5 Powers and Functions of District Governments

The strength of lower level governments depends on their legislative and policy-making powers.⁵

In the independence constitution, the resident assembly was entrusted with legislative powers to make laws entitled “enactments” [Section 102 (5)].

The Bomas Draft proposed three exclusive lists of powers, one for each of the national, provincial and district governments. The locational governments were to serve as administrative units only, without authority to make laws.

The Wako Bill [Article 201] has two lists of functions: national and district. The district list is the same as that of Bomas and includes items that were under regions, and where there is a conflict, the national functions shall prevail.

The Bomas Draft [Article 209] sets out the powers and functions of the various levels of government in the Fourth Schedule. Every district will decentralize provision of services and other functions by devolving them to the locational level. Where powers and functions are re-assigned from one level to another, the funds necessary for exercise of the powers and performance of the functions will also be transferred. A function that is assigned to more than one level of government is a function of the concurrent jurisdiction of each of those levels of government.

Bomas Draft Article 220 and schedule list II show that the district will be responsible to the government with respect to:

- The implementation of development plans;
- The collection of local taxes;
- The provision of services, e.g. education (nursery, primary and secondary schools); medical and health services (health centres, dispensaries, clinics and primary health care); water supplies; road services; and markets and trading centres;
- The provision of other services such as district planning, agricultural services, land surveying, physical planning, trade development services, co-operative development, crop,

⁵ Ghai, Yash Pal (2005). ‘The Wako Draft Lost Course on Devolution’. *Sunday Nation*, 6 November 2005, p.21.

animal and fisheries husbandry extension, probation and welfare, community development, district information services and cultural affairs;

- The regulation, control, management, administration and licensing of any of the above services;
- The identification, administration and management of resources; and
- The provision of all development and welfare, security, and recreational services.

The provincial government will be responsible for:

- Enhancing the capacity of the district councils and promoting cooperation between them;
- Assisting districts to develop capacity to discharge their functions;
- Developing plans for exploitation of provincial resources and for development of its infrastructure; and
- Managing provincial institutions.

With regard to urban governments the Bomas Draft envisages the following:

- Nairobi has status of the capital territory and shall be managed in accordance with an Act of Parliament;
- A city or a municipality has status of a district; and
- Towns and urban centres have the status of a location.

Wako Bill Article 201 provides the following long list of detailed responsibilities of district governments:

- Formation of district policies;
- Setting of district standards;
- District planning, monitoring and evaluation;
- Production, management and delivery of district services;
- Development, operation and maintenance of district infrastructure and services;
- Facilitation and harmonization of operations;
- Capacity building;
- Agricultural services;
- Health services;
- Control of air, noise pollution, public nuisances and outdoor advertising;
- Cultural activities, public entertainments and public amenities;
- Transport services;
- Animal control and welfare;
- Trade development and regulation;
- Education services;
- Implementation of national government policies on natural resources and environmental conservation;
- Public works and services;
- Police, fire fighting and disaster management;
- Control of drugs and pornography; and
- Co-ordinate participation of communities in governance.

The functions are more detailed in the Bomas Draft than in the Wako Bill. The former entrusts development and welfare, security services as well as taxation powers to district governments. The Wako Bill appears to anticipate central government playing a role in delivery of these services and does not mention taxation powers.

4.6 Relationships Between Levels of Government

The Bomas Draft [Article 208] provides for co-operation between governments at different levels:

- Exercising its powers and performing its functions in a manner that does not encroach on the geographical, functional or institutional integrity of government at any other level;
- Assisting, supporting and consulting with other levels;
- Liaising with government at each level for purposes of exchange of information and co-ordination of policies, etc.;
- Co-operating in performance of functions, e.g. by setting up joint committees and authorities; and
- Where there is a dispute, make efforts to settle it based on procedures provided by Parliament.

Bomas Draft Article 210 provides a set of rules to be applied by the courts in cases of conflict arising from matters falling within the concurrent jurisdiction of the various levels of government. National legislation prevails over district legislation if it:

- (i) Applies uniformly throughout Kenya;
- (ii) Is aimed at preventing unreasonable action by a region or a district;
- (iii) Deals with matters that cannot be regulated effectively by legislation enacted by individual regions or districts; and
- (iv) Deals with matters that require uniformity across the nation.

Regional and district legislation will prevail over national legislation where the above conditions are not met. Similarly, regional legislation will prevail over district legislation where the above provisions are not met. When considering an apparent conflict between legislation at different levels of government, a court shall prefer any reasonable interpretation of the legislation that avoids a conflict to an alternative interpretation that results in conflict. The assumption behind these rules is that district law prevails unless there is good reason for national law to prevail.

Wako Bill Article 200 has the same provisions. An Act of Parliament shall provide procedures for the settlement of inter-governmental disputes by negotiation, mediation or arbitration. Otherwise there is no major difference between the Wako Bill and the Bomas Draft with regard to these provisions.

Wako Bill Article 202 holds that when there is a conflict between legislation in relation to matters falling within the concurrent jurisdiction of the two levels of government, national legislation shall prevail over district legislation. Thus, unlike the Bomas Draft, which provides a set of conditions where national legislation prevails over district legislation and vice versa, the Wako Bill enforces supremacy of the national level over the district level. This has been one of the contentious issues since it puts in question the principle upon which devolution is based.

Overall, districts would be far weaker under the Wako Bill provisions and would have no guaranteed powers at all. Everything would be subject to national law that could be easily changed, especially in the absence of a Senate.

4.7 Suspension of Regional or District Governments

Bomas Draft Article 210B states that a district or regional government can be suspended in an emergency arising out of internal conflict or war; and in case of gross inefficiency or corrupt practices or for failure to comply with a code of conduct prescribed by an Act of Parliament for

district or regional governments. For the suspension to be effected an independent commission of inquiry would investigate the allegations against it; the President would have to be satisfied that the allegations were justified; and the Senate would authorize the suspension. During periods of suspension, arrangements would be made for the performance of the functions of the regional or district governments and the suspension not extending beyond a period of 90 days during which fresh elections would be held for the election of the council.

Wako Bill Article 204 provides for the same conditions for suspension of a district government. The only difference is that a commission of inquiry will recommend the suspension to the President who will proceed to suspend it.

In respect of the suspension issue certain questions have been raised: How can a government elected by the people be suspended? How can the people's sovereignty be safeguarded? Can people take charge and remedy the situation?

At Bomas, there was a clause on recall of MPs. However, the MPs who were also delegates at the conference rejected the clause. Thus, whereas suspension of leaders who are not able to deliver is important, there is no provision for doing so, except through regular elections.

4.8 Management of Urban Districts and Urban Areas

Bomas Draft Article 210A provides that national legislation shall determine the governance and management of urban districts and urban areas. It points out that legislation shall establish criteria for:

- (i) Distinguishing between urban districts and areas and rural districts and areas;
- (ii) Transition from a rural district into an urban district;
- (iii) Classifying an area within a district as an urban area;
- (iv) Establish the principles of governance and management of urban districts and urban areas including special requirements of the national capital and major urban centres;
- (v) Provide for participation by the citizens of urban areas in governance functions of the district;
- (vi) Identification of different categories of urban areas; and
- (vii) Make other provisions for better governance of urban areas.

Wako Bill Article 203 has copied Bomas Draft clauses in their entirety and hence there is no difference between the two drafts.

4.9 The Legislature and other Institutions

The independence constitution [Section 9] provided for a regional assembly comprising elected and specially elected members. These were to be elected from constituencies specified by law made by the assembly. At the national level, there was a Senate established consisting of 41 senators elected from each of the then existing districts, including the Nairobi area.

The Bomas Draft gives powers to districts to make laws regarding residual items while the Wako Bill gives that power to the national government.

Bomas retained a second chamber, the Senate, aimed at providing a forum for negotiations between different levels of government. Its members were not to be elected directly by the people but rather chosen indirectly by district councils, except women representatives and ten representatives of

marginalized groups. On matters concerning districts, delegates from each region would vote as blocs (having one vote each) and decisions would be made by two-thirds majority vote.

Under the Wako Bill there was to be a system of elected government within the district: a District Assembly to serve as a local parliament with the power to make local laws and to supervise the local executive; and a District Council with a chair and a deputy chair and a number of members from the District Assembly. The bill did away with the second chamber, the Senate. Instead, the Wako Bill [Article 206] provided for a National Forum for District Governments comprising 16 members and its functions were purely advisory or consultative:

- (i) Consultation on and co-ordination of inter-district matters;
- (ii) Consultation with and provision of advice to the government on matters relating to the affairs of district governments;
- (iii) Nomination of the representatives of district governments to the commission on revenue collection; and
- (iv) Carrying out other functions prescribed by or under any law.

The forum's membership and procedure for conduct of business and other matters were to be provided by an Act of Parliament.

Both the Bomas Draft and the Wako Bill established a Revenue Allocation Committee (RAC). Under Bomas, both houses could modify the proposals of the committee. Under the Wako Bill, this could be done by only one house because of its unicameral nature.

The Bomas Draft does not provide for a national forum of district governments owing to the fact that district representation was to be ensured through the Senate.

Regarding the Wako Bill, a main concern was that the district governments were to have no voice at the national level. Similarly, it is not clear how effective representation of all districts was to be ensured in the above national forum.

4.10 Human and Other Resources

The independence constitution [Sections 116–117] provided for a civil secretary for each region who served as secretary and executive officer of the Finance and Establishments Committee, was in charge of the organization and administration of the public officers serving on the establishment of the region, and attended the regional assembly in an *ex officio* capacity.

Bomas Draft Article 223 provides that:

- The system of PA is to be abolished;
- District governments may employ their own staff; and
- The national government in consultation with devolved authorities may deploy its public officers in the provinces and districts to carry out its policies.

Both the Bomas Draft and the Wako Bill are unclear on staffing of the devolved units. One question in this regard is whether the scrapping of the PA would release staff to be redeployed in district governments. If so, no indication was given in either of the drafts as to how this could be done. What mechanism is there to ensure that the PA staff as well as other central government ministry and departmental personnel would not be recycled in the district governments? To where would chiefs and village headmen be redeployed as promised by the Wako Bill?

Bomas Draft Article 221 says that each district government is entitled to:

- (i) An equitable share of revenues raised nationally; and
- (ii) Equalization grants or other allocations of government revenue either conditionally or unconditionally.

The draft also envisages strengthened financial arrangements for the districts. They would levy taxes on more items, including on any item not reserved for the exclusive use of the national government.

The Wako Bill followed the Bomas Draft on the revenue question but modified the duty of the national government to promote equalization to the vague phrase “promote fair sharing of resources”. The Wako Bill assigned the RAC the task of proposing the distribution of resources between different levels of government. But no clue was given regarding the criteria to be applied in the allocation formulae.

4.11 Conclusion

Devolution of the type provided for by the Wako Bill has no real basis if there is no Senate. It is the mere delegation of tasks rather than genuine devolution of decision-making authority to lower levels of government. If the lower house passed legislation unacceptable to the districts, the Senate would be in a position to reject it. However, in the absence of a Senate, the districts would have no such safeguard.

Chapter 13 of both drafts establishes a Judiciary headed by the CJ and comprising the Supreme Court that sits in Nairobi, a Court of Appeal, a High Court, subordinate and *Kadhi* courts, organized and administered as prescribed by an Act of Parliament. Following the principle of separation of powers, neither draft devolves functions of the High Court and subordinate courts to the districts as the principal level of devolution. Such devolved courts would deal with legislation enacted by the region/district. The judicial system provided by both drafts is national or centralized and hence does not conform to the principle of devolution of powers inhered in this report.

Some commentators saw the four levels of devolution as unaffordable, but were comforted by the fact that only the national and districts were the principal levels and also that at present there are more levels: nation, province, district, division, location, sub-location and village. A problem, however, is that within the densely populated smallholder areas, locations and districts have been, over the past two decades, sub-divided time and again. Most of the districts are small in size and lack adequate economic and human resources for self-reliant development. Whereas districts in arid and semi-arid areas are relatively large in size and sparsely populated they lack adequate human resources and their natural resources remain unexploited. This is why Bomas recommended the regional level to co-ordinate. Some vexing questions remain: would the District Assemblies have the capability to legislate? Would the councils be able to raise adequate resources to supplement those provided by the national government?

Ghai remarked that Nigeria with 100 million people had only 31 regions while Kenya with a third of that population had, under the Wako Bill, 112 districts.⁶ This structure was, among other things, likely to complicate linkage between the national and sub-national levels.

⁶ Ghai, Yash Pal (2005). ‘The Wako Draft Lost Course on Devolution’. *Sunday Nation*, 6 November 2005, p.21.

5. The Judiciary

Owing to the key role of the Judiciary in restraining the exercise of power by the Executive and as the guardian of the rule of law, its structure and functioning became a contentious issue. The introduction by the Wako Bill of the concept of ‘religious’ courts added to the controversy.

5.1 Introduction

The Judiciary has long been considered an instrument of state power whose function is to control the constitutionality of the Executive and the Legislature. In the case of *Marbury vs Madison* the Supreme Court of the United States stated that the most important domain in the separation of state power is an independent judiciary as the guarantor of the rule of law.

In Kenya, which forms part of the Commonwealth and has a strong British tradition, the doctrine of separation of powers, though not expressly stated, underlies the design of the current constitution. Theoretically, the three arms of government are supposed to be significantly independent and are supposed to exhibit checks and balances *inter se*. In Kenya’s constitutional development, however, the Judiciary and Parliament were consistently emasculated and their powers to check the Executive significantly eroded. Of the three institutions the Judiciary’s role in checking the Executive was most compromised, in effect leaving this institution as a sub-department of the Attorney General’s office. The watering down of the powers of the Judiciary as the Executive became more powerful, coupled with weak infrastructure, inefficient and incompetent personnel and corrupt individuals resulted in the reform of the Judiciary being one of the pillars of any new constitutional arrangement.

5.2 Structure and Philosophy of the Judiciary

The current constitution contains no principles under which judicial power is to be exercised. It provides for the bare structures of the Judiciary and little else.

The current constitution has three levels of jurisdiction established under Sections 60 and 65 of the constitution. At the highest level is the Court of Appeal, at the second level is the High Court and at the lowest level are the subordinate courts. The subordinate courts include the Magistrates courts, the *Kadhi* courts and the court martials. The *Kadhi* courts, which have become an issue of contention in the process of designing the new constitution, are part of the independence negotiations between the incoming Kenyatta administration and the Sultan of Zanzibar. The latter wanted, as part of the bargain in which he was to cede jurisdiction over the ten mile coastal strip, to be assured that his subjects would be allowed to practice the Islamic faith and that their personal status issues would be dealt with in a separate judicial system. It was in this context that the *Kadhi* courts were constitutionalized under Section 66 of the current constitution. These courts deal with matters of personal status only and appeals from them lie to the High Court just like other subordinate courts.

The current constitution has no provision for a Supreme Court unlike the two other countries of the East African Community. The Court of Appeal therefore exercises the highest appellate jurisdiction and parties are entitled as a matter of right to an appeal but only on matters of law.

The High Court has both original and appellate jurisdiction in all matters, though constitutional applications and election petitions can only be originated in the High Court.

The Bomas Draft in Article 183 innovatively prescribes the norms and principles under which judicial power is to be exercised. It requires that judicial power be exercised for the benefit of the people of Kenya and that in the exercise of that power courts and tribunals must seek to meet the ends of justice, ensuring that technicalities do not compromise the delivery of justice. These principles are restated in the Wako Draft.

The structure of the courts under the Bomas Draft is similar to that of the Wako Bill in that it provides for four levels of courts as opposed to the current three [Article 184]. The levels are:

- 1) The Supreme Court;
- 2) The Court of Appeal;
- 3) The High Court; and
- 4) The subordinate courts.

The Supreme Court established under Article 186 of the Bomas Draft is the highest appellate court but exercises original jurisdiction in matters relating to the impeachment of the President and in presidential election petitions [Article 187]. Appeals on constitutional matters lie to the Supreme Court as a matter of right whilst all other matters are to be heard at the discretion of the Supreme Court once it determines that a matter is of general public importance. The Supreme Court is not bound by its previous decisions but all other courts are bound by its decisions. Article 187 (5) thus establishes the doctrine of *stare decisis*⁷ as a constitutional principle, unlike in the current constitution where it remains a matter of common law.

The jurisdiction of the Court of Appeal under Article 189 is similar to that of the current constitution and so is that of the High Court [Article 191], save on matters now reserved to the Supreme Court.

The subordinate courts are provided for in Articles 184, 197 and 198. They include the Magistrates' courts, *Kadhi's* courts and court martials, just like the provisions of the current constitution. The jurisdiction of the *Kadhi's* courts remains the administration of personal status issues just like in the current constitution.

The Bomas Draft, however, in Article 184 (c) adds traditional courts to the subordinate courts without allocating them specific jurisdiction. These courts, which were retained in the Wako Bill, were very contentious in the referendum debate as women's rights proponents felt that traditional courts would erode the gains made by women in the constitution since they would apply customary law, which usually subjugates women.

The Bomas Draft, unlike the current constitution, in Article 184 also establishes an Industrial Court and a court to specifically deal with matters relating to the environment. The Wako Bill in Article 178 contains extensive provisions on the principles of the exercise of judicial authority for the benefit of the people of Kenya similar to the provisions of the Bomas Draft.

The structure of the Judiciary as proposed in the Wako Bill is similar to that of the Bomas Draft in so far as the High Court, the Court of Appeal and the Supreme Court are concerned. The Wako Bill

⁷ Under the common law system, which Kenya follows due to its colonial relationship with the UK, lower courts are bound by the decisions of higher courts on questions of interpretation of the law. This doctrine is referred to as *stare decisis*.

in Article 181, however, elevates the CJ to be the head of the Judiciary and also introduces the office of a Deputy CJ. Unlike the Bomas Draft, which had placed the office of the Attorney-General and the Director of Prosecutions under the Judiciary, the Wako Bill in Articles 174 and 175 correctly places these offices under the Executive.

For some unexplained reason the Wako Bill omits the provisions relating to the setting up of the special environment courts that were provided for in the Bomas Draft. The Wako Bill in Article 195 also establishes the now controversial Christian, Hindu and other religious courts. It has been alleged that the drafters of the Wako Bill included these courts without anyone asking for them but it is on record that both the Ufungamano group and the Kenya Church, which is the umbrella body for the evangelical churches, asked for the inclusion of religious courts in a memorandum to the Public Service Commission. However, the courts were objected to by all faith communities for different reasons. The Muslims felt that the inclusion of religious courts diluted the *Kadhi's* courts and opened the possibility for their removal from the constitution in the future.

Article 195 of the Wako Bill provides that Christian courts, *Kadhi's* courts, Hindu courts and other religious courts shall have jurisdiction to determine questions of their religious laws relating to personal status, marriage, divorce and matters consequential to divorce, inheritance and succession in proceedings in which all the parties profess the respective faith, as may be prescribed by an Act of Parliament. This is similar to the current constitution's provisions on Kadhi courts' jurisdiction.

5.3 Appointment and Tenure of Judges

Under the current constitution the President, in accordance with Section 61 of the constitution appoints the CJ who is the president of the court and sits in both the High Court and the Court of Appeal. Similarly, puisne judges are appointed by the President in accordance with the advice of the Judicial Service Commission (JSC) [Section 61 (2)]. The JSC, which is provided for in Section 68, is comprised of the President's appointees and their role in the appointive process is undefined. This significantly erodes the independence of the Judiciary and has also been utilized to appoint 'politically correct' and sometimes incompetent individuals to the bench.

The qualifications for the appointment of judges are similar in the three documents under comparison and include practicing lawyers, law teachers and persons already serving in the Judiciary. There is no vetting process for the appointment of judges, hence the possibility that persons of questionable integrity may be appointed to these high offices.

The disciplinary process that may lead to the removal of a judge from the bench is controlled by the CJ under Section 62. The CJ has the sole authority of advising the President on the need to appoint a tribunal to investigate the conduct a judge. Once advised by the CJ the President must appoint the requisite tribunal and he is bound by law to accept the tribunal's recommendation.

It should also be noted that retention and promotion of judges is not regulated in the current constitution, thereby giving the President an open hand in this exercise, further weakening the independence of the Judiciary vis-à-vis the Executive.

The Executive also exercises fiscal control over the Judiciary. Under the current arrangement, the budget of the Judiciary is a vote under the relevant ministry. Traditionally this was exercised by the Attorney-General's office until the introduction of a Ministry of Justice in the NARC administration. Consequently, the terms of service of judges, their budget priorities and related matters are decided by the Executive, further diluting the independence of the Judiciary.

Under the Bomas Draft, unlike in the current constitution, the appointment of judges is determined by the JSC, which recommends persons for appointment but the President cannot appoint those recommended until they are approved by Parliament.

Unlike in the current constitution the JSC as proposed in the Bomas Draft is composed of independent persons who are not appointees of the Executive. These include representatives of the LSK and the Public Service Commission. The functions and services of the JSC are clearly spelt out and include prescribing the terms of service of judicial officers, disciplining subordinate court officers and generally advising the government on ways of improving service delivery by the Judiciary.

Under the Bomas Draft the qualifications of the judges of the Supreme Court and that of the CJ is higher than that of the other High Court judges. They are required to have at least 15 years of practice as judges or advocates. The judges of the Court of Appeal and the High Court only need 10 years experience to qualify. In terms of the current constitution all judges need the same qualifications: seven years of practice as advocates or service as a judge in the Commonwealth.

Under Article 195 of the Bomas Draft a judge shall retire from office on attaining the age of 70 years but may retire at 60. The Wako Bill differs from this position by stating that judges shall retire from office on attaining the age of 70 years.

The procedure for the removal of a judge under the Bomas Draft is more or less similar to that of the Wako Bill except for the fact that it does not include bankruptcy as one of the grounds for removal of a judge. Unlike in the current constitution an initiative for the removal of a judge can be taken by any person by way of a petition to the JSC, which will then advise the President in a mode similar to that of the current constitution. The composition of the investigative tribunals is different from that of the current constitution in that it includes non-lawyers, whereas the current constitution tribunals comprise solely of judges and advocates. With regard to process, the time frame for suspension of a judge pending hearing of the petition is established. The question of the judge's remuneration pending hearing of the petition is also provided for unlike in the current constitution, which leaves the issue at the discretion of the President. Just like in the current constitution the President is bound by the decision of the tribunal.

The qualifications for appointment of the judges and the jurisdiction of the Supreme Court, the Court of Appeal and the High Court are similar to those of the Bomas Draft. Similarly, appointments to the office of judge are to be determined by the JSC, which recommends to the President persons approved by Parliament. The JSC composition is similar to the Bomas Draft but it excludes the Chief Kadhi as a member. The Wako Bill requires, however, that in appointing persons to preside over religious courts, the JSC will consult the heads of the relevant faith community.

The chair of the JSC is the CJ, unlike in the Bomas Draft where the Commission elects the chair. The philosophy behind this fusion of authority is to avoid several centres of power within the Judiciary. Opinions have been voiced, however, that this concentration of power in the CJ could lead to abuse. The fiscal independence of the Judiciary is retained in the Wako Bill.

5.4 Transitional Matters

In the period leading to the Bomas conference, public trust in the Judiciary had been so eroded that a major concern for the public was the question of transition in the Judiciary. It had been recommended by certain parties that all existing judges should leave their offices and apply afresh for reinstatement. However, this proposal did not go down well with the existing judges who

strongly opposed it and indeed filed a case in court to stop deliberations by the Bomas constitutional conference with regard to the Judiciary.

Consequently the Bomas Draft in Article 13 of the transitional provisions provided that judges would submit themselves to inquiry before reappointment once the constitution came into force. For some unexplained reason, this provision was deleted from the Wako Bill.

5.5 Conclusion

There is no doubt that the Judiciary as proposed in both the Bomas Draft and the Wako Bill are significantly independent and capable of exercising checks on the Executive and Parliament. They are also structured in such a way that they are capable of empowering the citizens so that they can enforce their rights both against the government and other persons and institutions.

The controversy over the *Kadhi* courts will define the contentions on the Judiciary until the representatives of the various faiths are able to agree on a compromise that satisfies their declared interests.

There may be a need, however, to consider the inclusion of a constitutional court in the light of the fundamental reordering of the constitutional structure and the consequent need for interpretation of the constitution, especially in its formative years.

6. Electoral System

The method of electing representatives to office in a political system is not merely a technical question. The design and rules of the electoral system could have a determining effect on the outcome in terms of allocation of seats and the fair representation of constituencies in a given polity. Hence, some controversy has surrounded the electoral system in the constitutional debate in Kenya.

6.1 Introduction

The defects in the electoral system and the abuse of the same by the then incumbent KANU government in the late 1980s were among the factors that precipitated a mass demand for constitutional change, targeting primarily the need to reform the electoral process so that it could generate genuine representatives of the people. In the infamous ‘mlololongo’ (queue voting) elections of 1988, the nomination by the then single party of a sole candidate guaranteed him/her a direct parliamentary seat without facing a general election. These nomination processes were not supervised by any formal electoral body and were much abused, leading to widespread discontent as election results were altered in favour of losing candidates in many constituencies.

The general elections were themselves not supervised by an independent electoral body, and reports of massive vote rigging, blockage of candidates from contesting, vote buying, and other electoral malpractices were legion. It is no wonder then that the reform of the electoral system was one of the primary demands by Kenyans agitating for reform. The IPPG reforms in 1997 targeted the electoral process more than any other area of reform. It is therefore no wonder that the electoral systems set out in the Bomas Draft and in the Wako Bill are fundamentally different from that of the current constitution.

6.2 Presidential Elections

The current constitution [Section 5] requires that for a person to qualify as a presidential candidate in direct elections he/she must be a citizen of Kenya, have attained the age of 35 years, and be registered in some constituency as a voter in elections to the National Assembly. The section provides further that whenever Parliament is dissolved, an election of President shall be held at the ensuing general election. Each political party shall nominate one candidate for President in a manner prescribed by an Act of Parliament. The candidate must be supported by not less than 1,000 registered voters. When only one candidate is validly nominated, he shall be declared to be the elected president. If more than one candidate is nominated, a national election shall be held and the candidate who receives the greater number of valid votes cast and in addition receives a minimum of 25 per cent of the valid votes cast in at least five of the eight provinces shall be declared to have been elected President. Section 6 says that where the office of the President becomes vacant by death, resignation or other provisions of the constitution, an election shall be held within a period of 90 days from the date of occurrence of that vacancy in a manner prescribed in Section 5.

In the Bomas Draft Article 156 says that the presidential election shall be by direct adult suffrage through secret ballot and shall be conducted in accordance with provisions of this constitution or an Act of Parliament regulating such elections. The article specifies the date when the election is to be held and qualifications and procedure of the elections. On qualifications, Article 157 says that a person qualifies for nomination as a presidential candidate if he/she is qualified to stand for election

as a member of the National Assembly, is nominated by his/her political party or as an independent candidate by at least 1,000 voters from all the regions. The procedure is more or less as under the current constitution. It adds that after the counting of votes in the polling stations, the EBC shall declare the result. Candidates for President who receive more than 50 per cent of the valid votes cast and in addition 25 per cent of the valid votes cast in five out of the eight regions shall be declared President. If a candidate does not garner the required votes in the first round, a fresh run-off election shall be held within three weeks of the previous election for the two candidates who received the highest and second highest number of votes. The candidate who receives the highest number of votes shall then be declared President.

Wako Bill Article 147 has the same provisions as those of the Bomas Draft but adds that the candidate must be a citizen by birth and that the election is to be held at the same time as that of members of parliament.

The main difference between the Bomas Draft and the Wako Bill, on the one hand, and the current constitution, on the other, is that the former allow for independent candidates to stand while the latter does not. The drafts also state the circumstances in which candidates do not qualify as presidential candidates. Both drafts require a candidate to be nominated by at least 1,000 signatures from all the eight provinces. They also describe the run-off elections. Whereas the Bomas Draft and the current constitution require presidential candidates to muster 25 per cent of the valid votes cast in five of the eight regions, the Wako Bill requires them to obtain at least 25 per cent of the valid votes cast in half of the districts in the country.

It is important to note that, unlike the current constitution and the Wako Bill in which the elections for the presidency and parliament take place at the same time, they take place at different times under the Bomas Draft. Consequently, even though both the Bomas Draft and the Wako Bill do not allow a party to seek both elective seats at the same time, it is possible under the Bomas Draft to seek elections for both offices in the event a candidate is unsuccessful in the first of either the presidential or the parliamentary elections. Under the current constitution one must stand for a parliamentary seat to qualify to stand for presidential elections.

6.3 Elections to Parliament

The current constitution [Section 30] provides that the legislative power of the country shall vest in Parliament comprising the President and the National Assembly. The Assembly shall consist of elected and nominated members. The country shall be divided into constituencies and the voters of each constituency shall at a general election elect one member to the Assembly. The candidate garnering a plurality of the valid votes cast wins the seat. This electoral system is called a first-past-the-post plurality system in single-member constituencies. Persons nominated shall be those that would have qualified for election to the National Assembly. Sections 34 and 35 provide for qualifications and disqualifications for election. Qualifications include being a Kenyan citizen, being registered in some constituency as a voter in elections to the Assembly, being able to speak and read English and Swahili, being nominated by a political party and having reached the age of 21 years. Disqualifications are provided for in cases of imprisonment and being holder of specified public offices. Sections 37 and 38 provide that the Speaker and Deputy Speaker shall be elected by the Assembly from among its members or those qualified to be elected as its members. In addition, the Assembly shall have 12 members nominated by their political parties according to their proportion in the Assembly and on the basis of the principle of gender equality to represent various interests.

Bomas Draft Article 122 provides for election of members to the Senate and the National Assembly. The Senate shall comprise of one member elected from each district by the district council acting as an electoral college, two women elected from each region by its electoral college formed by district councils and representatives of marginal groups elected by their electoral colleges. Article 123 says that the Assembly shall consist of one member elected from each constituency, one woman elected from each district and 14 members elected by electoral colleges of marginalized groups. Article 124 stipulates the qualifications and disqualifications of members including being a citizen by birth, a registered voter, be 18 years of age, nominated by a political party and that an independent candidate shall be supported by 500 registered voters in his/her constituency. They must also qualify on other criteria provided in the constitution that include the leadership and integrity provisions in the constitution, a feature that is absent from the current constitution. Article 125 provides that election of members to either house of Parliament shall be held 28 days before the expiration of the term of that House. When a member's seat becomes vacant, the Speaker shall notify the EBC within 21 days and a by-election shall be held within 90 days of the seat falling vacant. For the Senate, the Speaker shall within 21 days notify the district council or regional legislative assembly to nominate a replacement within another 21 days. Article 126 provides that the seat of a member of parliament becomes vacant in circumstances that include the member's resignation, expiration of the life of parliament and when an elected independent member joins a political party.

Wako Bill Articles 116–119 make provisions that are almost identical to those made by the Bomas Draft. There are, however, important differences. The elections as prescribed by the Bomas Draft are based on a devolution model comprising a bicameral legislature as opposed to the Wako Bill and the current constitution whose elections are confined only to one house of parliament. Similarly, the Bomas Draft provides for elections of marginal groups while the Wako draft and the current constitution are silent about this. Both the Bomas Draft and the Wako Bill provide for independent candidates while the current constitution does not.

The Bomas Draft and Wako Bill also provide for the participation in the election by independent candidates who may not be willing to take part in the political party system. Article 105 of the Bomas Draft and 106 of the Wako Bill, however, require that anyone offering themselves as an independent candidate must not be a member of any political party in the six months preceding an election, ostensibly to ensure that people do not use this as a fallback position if they lose party nominations.

6.4 Elections to Devolved Governments

Bomas Draft Article 212 provides for the election of delegates to regional assemblies. These are not members of district councils but are elected from each district. An electoral college comprising all members of the district councils within a region will elect a regional premier and his/her deputy. The mayor and deputy mayor of Nairobi shall each be elected in a manner prescribed by an act of parliament. District councillors will be elected from wards established on the basis of recommendations of the EBC and will include a number of seats for marginalized groups and women. The district governor and his/her deputy will be elected in an election in which they contest as a team. Article 224 on locational councils provides for the election of representatives by registered voters who meet requirements for residence in the location and the provisions of an act of parliament. A location administrator will be elected as prescribed by an act of parliament.

Wako Bill Article 209 provides for election of members to a district assembly in a manner similar to that prescribed by Bomas. The difference is that it meets the need for ensuring women

representation but not that of other marginal groups. It also indicates that there shall be five per cent of the elected members in the district assembly nominated by political parties.

The current constitution does not provide for election of local councils and leaves it to an Act of Parliament.

6.5 Voters and Voting Procedures

The current constitution [Section 43] provides for qualifications and disqualifications of a voter in elections to the national assembly and the Presidency. Qualifications include Kenyan citizenship, minimum 18 years of age, and residency in Kenya.

6.6 Management of Elections

Under the current constitution, elections are managed and supervised by the ECK. Members of the ECK are constitutionally appointed by the President, although under the 1997 IPPG reforms different political parties nominate members to fill proportionately allocated slots in the Commission. To secure their independence, members of the Commission have security of tenure and can only be removed from office on the recommendation of a tribunal exclusively set up for that purpose [Section 41].

The mandate of the Commission is to carry out the registration of voters and conduct presidential, parliamentary and civic elections. The Commission is tasked to ensure that all elections are free and fair. In this respect the ECK determines the date for elections, maintains a voter register, oversees the actual polling and the vote counting process and also announces and certifies the results of the elections.

Other than the conduct of elections, the ECK is, under Section 42, also charged with the responsibility of determining the number, boundaries and names of constituencies. Unlike the Bomas Draft and the Wako Bill, the current constitution makes provision for a minimum and maximum number of constituencies. The process of reviewing constituency boundaries is to be carried out every eight and not more than 10 years [Section 42(4) of current constitution]. In the Bomas Draft and Wako Bill this process is envisaged to take place every 10 years. In determining the number and boundaries of constituencies the ECK is mandated to consider population size, geographical features, community interests and the means of communications of the areas in question.

Other details of the electoral process, including the specific powers of the ECK, are provided for under the *Presidential and Parliamentary Elections Act*.

Despite the prescription that the ECK is independent, complaints have emanated from the Commission that it is hampered by several limitations in carrying out its mandate independently and effectively. These include the lack of fiscal independence and the lack of sufficient powers to enforce its code of conduct and to penalize the breach of electoral rules. There is no doubt that the absence of fiscal autonomy leaves the ECK vulnerable to undue pressure from the Executive upon which it depends for the allocation of resources. Not only does the Executive determine the terms of service of the Commission but also the resource allocation for its various activities. Consequently, the Executive may compromise the ECK's independence and activities by starving it of resources for 'undesirable' programmes.

As regards the ECK's power to enforce discipline in the electoral process, it is clear that it has failed in many instances to use the extensive powers it has, and it is not clear that increasing these powers is the solution to this aspect of its problems.

The management of elections under the Bomas Draft and the Wako Bill is to be carried out by a renamed Electoral and Boundaries Commission (EBC). The EBC would deal with the presidential, parliamentary and devolved government elections since the existing local authorities would be abolished. Article 108 of the Bomas Draft establishes the Commission and grants it an extensive mandate, including the settlement of minor electoral disputes, the supervision of political parties and the management of the political parties' fund.

Like the current constitution, the Bomas Draft defines the principles of the electoral system and requires the EBC to abide by it in discharging its functions. These include free and fair elections and representation by both genders. It also requires the inclusion of minorities and marginalized groups in the electoral system.

With regard to the delimitation of electoral boundaries, the EBC is mandated to determine and review the boundaries of constituencies and other electoral units, in this case the locational, district and regional boundaries [Articles 109 and 110]. In determining the boundaries of the electoral units, the Commission is required to consider the same criteria as those provided for in the current constitution.

The President appoints members of the EBC but unlike the current constitution, the Bomas Draft requires parliamentary approval, like for all other constitutional commissions.

The management of the electoral process in the Wako Bill is similar to that of the Bomas Draft, save that in the former the electoral units are limited to the constituency and the district levels. The Wako Bill also foresees the possibility of the EBC being allocated other powers by Parliament [Article 109 (1)] and leaves that option open.

Both Bomas Draft Article 108 and Wako Bill Article 109 entrust the conduct of elections to the EBC whose functions include continuous registration of voters, delimitation of constituencies, efficient supervision and conduct of elections and referenda, supervision of political parties, promotion of voter education, facilitation of the observation, monitoring and evaluation of elections and establishment, review and variation of administrative boundaries of regions, districts and locations.

The current constitution [Section 42A] entrusts the conduct of elections to the ECK. Its functions include the registration of voters and the maintenance and revision of the voter register, directing and supervision of elections, promoting free and fair elections and voter education.

6.7 Oversight of Political Parties

Despite the affirmation that Kenya is a multiparty democracy [Section 1A], the current constitution is silent about the formation, management and supervision of political parties. This is despite their pivotal role in the electoral process. In a country where political parties exert overwhelming influence in specific regions, the nomination of candidates is a critical part of the democratic process. The failure to democratize and oversee this part of the electoral process necessarily compromises the outcome of the eventual national elections, however free and fair they may be. This is all the more important to forestall a flawed nomination process that might occur in parties, which are dominant in a specific region.

In the Wako Bill and the Bomas Draft, political parties are to be supervised by the EBC and the drafts provide minimum standards that political parties must embrace to be recognized as legal entities. These include the requirement that a political party must have a national character and must hold regular elections, the latter being supervised by the EBC.

The Bomas Draft, however, specifically provides for the setting up of a political parties fund and lays down the criteria for participating in the fund and also sets out its purposes. The structure of the management of the fund is also provided for. The Bomas Draft furthermore contains very specific provisions relating to the supervision of the political parties including their accounting and auditing requirements and matters of party discipline.

The Wako Bill, by contrast, leaves it to Parliament [Article 113] to enact legislation to deal with all matters pertaining to the political parties.

6.8 Conclusion

It is clear from the above discussion that the two drafts produce an electoral system that is more consistent with a multi-party democracy than that of the current constitution. However, there is no doubt that the Bomas Draft provisions when read together with other chapters in the draft are more empowering on the elector. It is clear, moreover, that much of the detail that the Bomas Draft sets out, especially in relation to the management of elections and political parties, belong to the statute books rather than the constitution. Generally, this 'overload' of detailed provisions in the constitutional drafts is a flaw that applies to many chapters.

7. Bill of Rights

In view of the massive violations of human rights that were perpetrated under the Kenyatta and Moi administrations, the inclusion of an effective Bill of Rights in the constitution has been a mobilising point. Also, the evolution and expansion of the international human rights regime since the mid-1960s have raised the issue of better protection in the realm of economic, social and cultural rights.

7.1 Introduction

The Bill of Rights is the foundation of any democratic constitutional order and the respect, observance, protection and promotion of individual freedoms and rights are central to the building of accountability and the empowerment of the citizenry in any system. Whereas most of the contents of the constitution relate to the structure of government and the process of governance, the Bill of Rights, especially one that includes the ‘second generation’ of rights becomes a pillar upon which the citizenry is able to assess government performance at the political and socio-economic level. Critically, it also defines the limits of the exercise of state power over the citizen. Left without definite checks the tendency for the state is to curtail the exercise of freedom and to carve an increasingly larger niche for itself in the life and times of the individual.

Whereas Kenya has been a signatory of several international conventions that require the protection and promotion of the rights and freedoms of the individual, and despite the existence, at least in title of a Bill of Rights, the level of protection and promotion of such rights has been wanting in the municipal arena. Indeed, the clamour for constitutional change which started in earnest in the 1980s can be understood in light of the rampant abuse of individual rights and freedoms especially in the late 1970s and the 1980s. At that time the state clamped down on perceived critics of the government and Kenya operated under a virtual state of emergency. Many Kenyans were arrested, tortured and charged with multifarious offences of operating against the security of the state. Several high profile politicians, academics and activists were detained without trial, courtesy of the much maligned but constitutionally protected *Preservation of Public Security Act*.

All these abuses of basic individual freedoms occurred despite the existence of an extensive Bill of Rights in the constitution. As will be evident, the state was able to constitutionally justify this oppression on the basis of the multitude of exemptions that are contained in the current constitution.

7.2 Rights Protected Under the Constitutions

Chapter V of the current constitution protects the traditional individual freedoms and political-civil rights and was one of the tenets by which the departing colonial government negotiated as a means of affording protection to its remaining settlers upon independence. It is in this context that the very extensive protection of the right to private property (however acquired) can be understood. It was important for the departing government that the titles that had been acquired through the colonization process be constitutionally guaranteed.

Other rights and freedoms guaranteed in the current constitution include the right to life [Section 71], personal liberty [Section 72], freedom of expression [Section 79] and the freedom of association [Section 80]. It is important to note that with regard to the right to life, Section 71 of the current constitution only addresses the question of the death penalty and does not deal with the question of abortion, which was one of the more contentious issues in both the Bomas process and

eventually the Wako Bill. Unlike the Bomas Draft and the Wako Bill, the current constitution in Section 74 also allows the application of corporal punishment. Furthermore, Section 78 on the freedom of conscience also provides for the right to change religion. The absence of a similar provision in the Bomas Draft and the Wako Bill became an issue of contention, especially amongst evangelical Christians.

The current constitution has no provisions relating to economic, social and cultural rights (so-called second generation rights) apart from the protection of the right to property referred to above.

Despite the extensive guarantees of rights and freedoms, it is important to note that the language of these rights is couched in extremely limiting language to the extent that the Bill of Rights has been referred to as the 'Bill of Exceptions'. On the one hand, the state is permitted to limit the enjoyment of these rights for the protection of the freedoms of others and the public interest. The constitution also allows Parliament to enact laws to restrict the enjoyment of these rights and freedoms in the interest of the maintenance of 'public order, morality, and public health'. The parameters of the 'public interest' and the other limitations are not set.

The Bomas Draft restates and expands the ten (10) freedoms and rights guaranteed under the current constitution, and adds another thirty-two (32) not provided for in the current constitution. The new rights include extensive individual rights and freedoms, including the right not to obey unlawful instructions, freedom of trade and occupation [Article 57], the rights of refugees and displaced persons [Article 56] and the right to human dignity.

Numerous political and civil rights have also been added. These include a liberal right to assemble including the right to strike and to demonstrate [Article 53], the right to access information, and the freedom of the media.

The Bomas Draft also provides for the protection and promotion of minorities and marginalized groups by requiring the state to implement affirmative action to promote their interests. The state and society are required to take into account the special needs of sections of society, which are often marginalized, i.e. children, the youth, older persons and women.

The Bomas Draft also introduces economic, social and cultural rights. The primary of these rights are:

- **Social security:** Article 60 provides for every person's right to social security and the state's duty to provide appropriate social security to persons who are unable to support themselves or their dependants;
- **Health:** Article 61 states that every person has the right to health, which includes the right to health care services and reproductive health care. It also provide for the right to emergency medical treatment;
- **Education:** Article 62 provides that every person has the right to education and obliges the state to institute a free pre-primary and primary school education programme to realize the right of every child in this regard. It also obliges the state to pay particular attention to children with special needs [Article 62(2)]. The same article imposes the duty of the state to make secondary and tertiary education progressively available and accessible. It is notable that the right to pre-primary and primary education is not qualified by reference to 'progressive availability', which applies to secondary and tertiary education. This arguably supports an interpretation that the obligation to implement this right is immediate;
- **Housing:** Article 63 provides that every person has the right to accessible and adequate housing;

- **Food:** Article 64 states that every person has the right to be free from hunger and to have adequate food of acceptable quality;
- **Water:** Article 65 provides that every person has the right to water in adequate quantities and of satisfactory quality.
- **Sanitation:** Article 66 provides that every person has the right to a reasonable standard of sanitation.

The Wako Bill includes all the rights and freedoms provided under the Bomas Draft but excludes the provision protecting the rights of minorities and marginalized groups and the right not to obey unlawful instructions. There are significant differences, however, in respect of limitations of several of the rights and also the enforcement of the economic, social and cultural rights in comparison to the liberal provisions of the Bomas Draft.

7.3 Limitations and Enforcement

Traditionally, the Bill of Rights contained limitations ostensibly designed to ensure that the enjoyment of the rights and freedoms by individuals would not prejudice the rights and freedoms of others, the security of the state, and public order, etc. In a similar vein, the exceptions contained in the current constitution are extensive, allowing Parliament to enact laws that negated the rights granted. It is in this context that laws such as the *Chiefs Authority Act*, the *Public Order Act*, the *Preservation of Public Security Act* and the *Vagrancy Act* were enacted and used by the state to reverse the gains granted under the constitution. In terms of these laws the state was not required to do any more than to allege the existence of a threat to public order, etc. in order to suspend the constitutional guarantees.

The current constitution places the responsibility of enforcement of human rights on the High Court by virtue of Section 67 which states that when a question as to the interpretation of the constitution arises in the proceedings of a subordinate court and the court is of the opinion that the question involves a substantial question of law, the court may refer this question to the High Court. The court is mandatorily required, however, to refer such questions to the High Court if the parties so request. It is on the basis of this provision that numerous criminal and civil cases, especially in the last few years, have been referred to the High Court for constitutional interpretation.

Persons are also allowed to seek the enforcement of their rights and freedoms under Section 84 of the current constitution through the High Court. Under this Section, only the person whose rights have been infringed can commence proceedings for protection unless the person whose rights are breached is in detention. This compares unfavourably with Article 31 of the Bomas Draft which allows a person to file proceedings on behalf of others including for the protection of the public interest.

Unlike the Bomas Draft and the Wako Bill the principles of interpretation are not provided in the current constitution. As a consequence, the courts have historically been very restrictive in their interpretation of the Bill of Rights, applying technical rules and *locus standi* requirements to deny claimants their basic rights. For instance, until the late 1990s courts consistently refused to entertain applications for enforcement of fundamental rights under Section 84 since the CJ had not made the requisite practice and procedure rules.

The Bomas Draft in Article 33 requires that any limitation of a right be applied strictly and only to such an extent as is acceptable in open and democratic societies. Furthermore, no limitation can be construed in a manner that derogates from the right granted. The specific limitations provided in the constitution are:

Right to Life: Article 34 of the Bomas Draft provides that every person has a right to life except as may be prescribed in an act of parliament, thus implicitly allowing the enactment of legislation on death sentence. Furthermore, life is defined as starting at conception and abortion is outlawed except if the life of the mother is at risk.

Equality: Bomas Draft Article 33(5) limits the provisions on equality to persons who profess the Islamic faith.

Protection of the right to property: Bomas Draft Article 58 states that every person has a right to acquire and own property in any part of Kenya, either individually or in association with others. This protection is limited, however, to legally acquired property unlike the current constitution, which makes no distinction between any properties however acquired, probably in light of the circumstances of the independence negotiations.

Freedom of expression: Article 49 of the Bomas Draft protects the freedom of expression but limits it in cases of propaganda for war, incitement to violence or advocacy of hatred.

The Bill of Rights under the Bomas Draft has two primary enforcement mechanisms. Under Article 31, any citizen can complain of violation to the Commission on Human Rights and Administrative Justice (CHRAJ). The Commission can in its own right initiate investigations and carry out the mandate granted to it under Article 31. Under this Article and Article 32 a citizen can also on his/her own behalf or on behalf of other aggrieved parties file proceedings in the High Court for the enforcement of rights granted under this Chapter. The High Court is granted diverse powers to enforce the Bill of Rights, including issuing declaratory orders and ordering compensation. Furthermore, unlike the current constitution the Bomas Draft requires that in dealing with claims for the enforcement of rights and freedoms the courts should not be unduly restricted by technical rules.

As concerns enforcement of economic, social and cultural rights in the Bomas Draft, Article 30(3) requires the state to take legislative and policy measures to facilitate the progressive realization of these rights. However, Parliament and the CHRAJ are given the mandate of establishing standards, which the state must meet in this regard. This provision was deleted in the Wako Bill.

The Wako Bill in Article 31 restates the principles that need to inform any limitations to the Bill of Rights. The few specific limitations found in the Bomas Draft are also found in the Wako Bill, except with regard to abortion. The Wako Bill gives Parliament the responsibility of enacting appropriate legislation on acceptable exceptions. Article 50 of the Wako Bill relating to the freedom of the media adds new provisions that require the media to protect the rights of others and the independence of the judiciary.

With regard to enforcement the provisions of Wako Bill are similar to those contained in the Bomas Draft. Save in the case of economic, social and cultural rights the state is given extensive latitude under Article 31(3) in deciding which of the rights it can afford to promote. No parameters are established for determining whether the state has achieved constitutional minimums in promoting these rights.

7.4 Conclusion

There is no doubt that the Bill of Rights proposed in these two draft constitutions is a significant improvement in relation to the current situation. If a new constitution were to be passed with very liberal provisions particularly, as provided in the Bomas Draft, it would be interesting to see how

the courts would interpret the various provisions in a system where the state has traditionally defined the limits of the exercise of people's freedoms.

Kenya has adequate jurisprudence as far as civil and political rights are concerned even though the courts have historically been wary of interpreting the Bill of Rights in a people-empowering fashion. However, the liberal provisions of the two drafts allow the courts to evolve empowering jurisprudence once they follow the interpretive principles established by the drafts. It is important, therefore, that the eventual new constitution of Kenya contains the rights and freedoms enshrined in these two drafts and the principles set out therein.

There is no local jurisprudence, however, on economic, social and cultural rights. This means that courts will face challenges when interpreting the provisions concerning these rights. In this regard, they may choose to use the decisions of domestic courts that have been engaged in adjudicating economic and social rights cases such as those of South Africa, or gain inspiration from the jurisprudence of the International Committee on Economic, Social and Cultural Rights (ICESCR) has developed through General Comments, and the examination of state reports. The ICESCR is the treaty body charged with overseeing the implementation of the International Covenant on Economic, Social and Cultural Rights, to which Kenya has acceded, and to issue authoritative interpretations of the articles of the Covenant.

The novelty in both the Bomas Draft and Wako Bill is that they set out the principles to be followed by the courts in adjudicating on economic, social and cultural rights, especially when the state raises the resource constraints argument. Article 30(5) (a) of the Wako Bill and Article 29 (5) (a) of the Bomas Draft, states that it is the responsibility of the state to show that the resources are not available. Therefore, all that a litigant needs to do is prove that a violation has occurred, without bearing the burden of proving that resources are indeed available to satisfy the rights claimed.

In essence, the provision establishes a rebuttable presumption that the state will always have the necessary resources to realize the economic, social and cultural rights. This presumptive position is crucial in this type of litigation because it is mostly the poor and disadvantaged people in society who institute actions against the state and often they are deprived of access to government information. They also usually lack the expertise necessary to evaluate the government's policies, budgetary resources and capacities.

The Wako Bill provisions that restrict the implementation of economic, social and cultural rights on the basis of availability of resources are a negation of the citizens' power to hold the government accountable to the promotion of these rights.

8. Land and Property

In an agrarian society such as Kenya land is the principal means of production. The constitutional and legal rules that govern land ownership and access are, therefore, of paramount importance. As a consequence, land has been a contentious constitutional issue since well before independence.

8.1 Introduction

Land is the primary natural resource in Kenya. Indeed, agriculture is the means of livelihood for about 80 per cent of the entire population and the mainstay of the economy. Land is, in fact, the only natural resource whose ownership, utilization and other related features are specifically stipulated in all the constitutional documents in the post-independence period. The independence constitution was the first to address the question of land. The land problem at the time originated in the preceding colonial period and involved the fairness of the privileges and restrictions that the colonial state had imposed whereby European settlers had exclusive right to ownership of land in the favourable Kenya Highlands with vast acreage of individual holding of 99-year leases. Africans were relegated to designated, poorer reserves and the arid and semi-arid Northern Frontier Districts (NFD), and state ownership was enforced on the rest of the land under forest or game reserves. The primary land-related problem at independence was the dismantling of the colonial land privileges and restrictions, and the establishment of a fair regime, especially from the standpoint of the demands for African land resettlement. The independence constitution, therefore, made special provisions that set a precedent for constitutions that followed. Specifically, the present constitution makes provisions about land, but only as far as Trust Land is concerned, presumably because some of the problems that the independence constitution attempted to redress through the chapter about land had been of a transitional nature, which had been overcome by the time the present (1969) constitution was promulgated. The Bomas Draft and the Wako Bill return to the provisions about land because the intervening period had witnessed what was widely seen to be rampant abuses in the management of land resources – land grabbing – that had to be stemmed through the constitution.

This section makes a comparative assessment of constitutional documents along three dimensions: categories of land and other property; land ownership and power to allocate; and the establishment of a regulatory regime.

8.2 Categories of Land and other Natural Resources

The independence constitution designated five categories of land:

- Settlement Schemes that were under the control of the Central Land Board (CLB) [Section 197];
- Land vested in the Governor-General;
- Land vested in regions;
- Trust Land that included land that was registered in the name of county councils, as well as land in areas previously referred to as Special Areas, Special Reserves, Temporary Special Reserves, Special Leasehold Areas, and Special Settlement Areas [Section 208];
- Un-extracted minerals including mineral oils;
- ‘The water of every body of water’.

The present constitution makes provisions for only one category of land – Trust Land (Chapter IX) – and includes the type of land as the Trust Land defined in the independence constitution [current constitution Section 114 (1)]. The chapter also provides for any body of water and for mineral oils. These are exclusively under the control of the central government.

The Bomas Draft [Article 78 (2)] as well as the Wako Bill [Article 79 (2)] cater for three categories of land:

- Public land which includes what had been Trust Land as well as minerals, water systems including the sea, seabed, and beaches, roads, government forests including game reserves, national parks, animal sanctuaries, water catchments areas and other ‘specially protected areas’, land used by a public institution, and any land whose legal owner cannot be easily established [Bomas Draft Article 79; Wako Bill Article 80];
- Community land is land “held by communities identified on the basis of ethnicity, culture, or community of interest” [Bomas Draft Article 80 (1); Wako Bill Article 81 (1)]. It includes all public land that is held in trust by devolved (district) governments, land registered under group representatives, land that lawfully belongs to specific communities, ancestral land traditionally used by hunter-gatherer communities;
- Private land, that is, held by any person on freehold tenure and leasehold tenure [Bomas Draft Article 81 (a, b); Wako Bill Article 82]. The independence constitution as well as the present constitution both failed to make provisions for private land; an omission that the Bomas Draft and the Wako Bill have redressed.

8.3 Land Control and Allocation

The independence constitution vested ownership of land and the power to make land allocations in a wider range of institutions than all the subsequent constitutional documents: the current constitution, the Bomas Draft and the Wako Bill.

(a) A Land Control Agency

The independence constitution created the CLB with the responsibility to liaise with the Central Settlement Committee in matters that concerned land resettlement: to select the land in the ‘Scheduled Areas’ for the purpose of African resettlement, to assess the fair price of the land, to purchase the land from the owners at the time, and to reallocate it to new African settlers [Sections 198–201]. The CLB had power to “convey to such persons as may ... be nominated in that behalf by the President of the Regional Assembly of the Region in which the land is situated, such estates, rights or interests in or over the land as may be necessary to give effect to a settlement scheme relating to the land” [Section 198 (1) (d)]. The constitution also granted the CLB autonomy in the performance of its duties; that is, the CLB would “not be subject to the direction or control of any other person or authority” [Section 198 (6)]. However, the CLB was not constitutionally responsible for regulation.

The independence constitution created the CLB due to the exercise of ‘Africanization’ of the White Highlands that was underway during the transition period. The exercise was virtually completed by the time the present constitution was set out in 1969. The present constitution does not, therefore, provide for a central agency responsible for land allocation. However, the Bomas Draft and the Wako Bill created a central agency – the National Land Commission – responsible only for regulating land matters as shown in the next subsection [Bomas Draft Article 85; Wako Bill Article 85].

(b) Central Government

The independence constitution conferred some powers over land ownership and allocation to the central government, notably the Governor-General. The Governor-General had:

- (a) Powers to “make grants or disposition of any estates, interests, or rights in or over land that are for the time being vested in the Governor-General on behalf of Her Majesty in right of the Government of Kenya” [Section 207], land within the Nairobi area and land in the regions which land had previously been placed under the control of the Governor;
- (b) Power over all un-extracted minerals including mineral oils to the Governor-General, subject to rights already granted to other persons [Section 213 (1), (2) and (4)]; and
- (c) Power over ‘the water of every body of water’ previously under the Crown or the Governor to the Governor-General – to the state – subject to the rights to use such water [Section 214].

In addition, the central government could, through the Prime Minister, secure the transfer of “estate, interest or rights” vested in regions – i.e. trust land under county councils – to the Governor-General for use by the central government, a corporate body, the now defunct East African Common Services Organization (EACSO), or prospecting of minerals [Section 209 (1)].

The current constitution confers upon the central government: (a) Control over “any body of water” as well as “any mineral oils” [Section 115 (1) i, ii]; and (b) The power to convert Trust Land to other owners that include the Government of Kenya itself, any ‘body corporate’, any registered company, and for extraction of minerals or mineral oils [Section 118 (2)]. The constitution also empowered the President to revert such land back to the county council concerned as Trust Land. The Bomas Draft and the Wako Bill also confer upon the central government some powers over the ownership and allocation of specific categories of public land, namely minerals, water systems including the sea, seabed, and beaches, roads, government forests including game reserves, national parks, animal sanctuaries, water catchment areas and other ‘specially protected areas’, land used by a public institution, and any land whose legal owner cannot be easily established [Bomas Draft Article 79 (3); Wako Bill Article 80]. While the present constitution confers responsibility for the control of central government land in the President, the Bomas Draft and the Wako Bill confer that power on the National Land Commission.

(c) Devolved Units

The independence constitution had two levels of devolution – regions and county councils. The constitution bestowed some power to each of the two units of devolution: power in the control and allocation of a certain category of land. Trust Land came under the custodianship, including reallocation and change of status, of the county councils: “All Trust Land shall vest in the county council...”, but based on regional assembly laws [Section 208 (2, 4, 6)]. However, Trust Land could be transferred to the Government of Kenya for other national use through an appropriate law passed by Parliament and placed under the responsibility of the Governor-General after consultations with the regional assembly and an appropriate compensation paid, or could be converted for settlement at the request of the regional assembly. The constitution also granted regions “all estates, interests or rights in or over land” that had previously been under the control of the Governor except Trust Land that belonged to county councils and land located in the regions but which had been under the control of the Governor as well as land within the Nairobi area. The Governor was placed under the custody of the regions [Section 204]. Accordingly, the regions could make land grants or disposition of any estates, interests, or rights in or over land” [Section 206].

The present constitution is based on a unitary state system whereby political power is centralized and regions that existed under the independence constitution were abolished. Local government authorities that are conventionally regarded to be a secondary-level form of devolution are not directly provided for in the present constitution, but exist in practice through the *Local Government*

Act. Nevertheless, the constitution presupposes the existence of local government authorities, including county councils through its stipulation of the functions of the ECK, notably “directing and supervising the presidential, national assembly and local government elections” [Section 42A (b)]. Most importantly, the current constitution vests the power to control all Trust Land in county councils; that is, “All Trust Land shall vest in the county council within whose area of jurisdiction it is situated” [Section 115 (1)] with the exception of any body of water and of mineral oils. This characteristic of the current constitution is shared with the independence constitution.

The Bomas Draft re-established regions, but unlike the independence constitution the principal unit of devolution in the Bomas Draft was the district. The draft conferred authority over the control and allocation of one category of public land onto the district government; that is, land that “shall vest in and be held by the district government in trust for the people resident in the relevant districts...” [Bomas Draft Article 79 (2)]. The Wako Bill eliminated regions, but retained districts as the unit of devolution and applied the same provisions about the power of district governments over one category of public land [Wako Bill Article 80 (2)].

8.4 Regulation of Land Ownership and Land Use

(a) Establishment of a Regulatory Body

The independence constitution did not create a single institution to regulate acquisition and utilization of land, whether public or private land. The mandate of the CLB was restricted to creation of land resettlement schemes in the scheduled areas – specific sections of the former White Highlands. Provision for the actual utilization of land was left to acts of parliament. Similarly, the current constitution does not make provisions for the utilization of land and has left this task to an “act of parliament”. However, the Bomas Draft and the Wako Bill made some provisions to regulate ownership and utilization of land. The two documents create the National Land Commission to “manage public land on behalf of the national and devolved governments” in such matters as land registration, formulation of land policy, investigation of land disputes and alleged injustices, research, land tax assessment, land-use planning, and review of sectoral land-use laws [Bomas Draft Article 85; Wako Bill Article 85].

Unlike the independence constitution as well as the present constitution that did not draw the state into regulation of land use, the Bomas Draft and the Wako Bill specifically compel the state to regulate land use. Such regulation has to be conducted on the basis of two factors: public interest (such as health, morality and land use planning) or encourage “creation, development and management”, and ensure the “establishment of a housing development fund to enable the people of Kenya to gain access to more and better housing” [Bomas Draft Article 84; Wako Bill Article 84].

(b) Enacting Legislation

The independence constitution and the current constitution provide for the enactment of an act of parliament to regulate land matters without guidance as to the content of the envisaged Act. The Bomas Draft and the Wako Bill also provide for parliament to enact legislation but both go further to specify the functions that the envisaged legislation should prescribe [Bomas Draft Article 86; Wako Bill Article 86]. The purpose of the legislation would be to consolidate existing land laws, revise existing sectoral laws, regulate conversion of land between categories, safeguard matrimonial property at the end of a marriage, safeguard community land, safeguard public land for the “unfettered access to all”, review and ascertain the legality of all land allocations, settle the landless, establish a land fund to facilitate equitable access to land, establish a ‘land bank’ for public use whenever needed, and most importantly “prescribe minimum and maximum land holding acreage in arable areas” [Bomas Draft Article 86; Wako Bill Article 86]. In short, the Bomas Draft and Wako Bill sought to address through legislation certain matters that were fundamental and could not be

left to the discretion of an act of parliament, notably equity, safeguards from misappropriation of public land as well as land due to the *bona fide* dependants, including spouses of deceased persons, maximum landholding, and resettlement of the landless people. These matters were ignored by the independence constitution as well as the current constitution.

(c) Land Ownership Rights

The independence constitution was silent about land rights; that is, about who would or would not be allowed to own land in Kenya. No distinction was made between owners of land in terms of citizenship or gender. The present constitution also remained silent on the subject. However, large tracts of land in the hands of non-citizens as well as the widespread disinheritance of land for women over the decades since independence prompted the drafters of the Bomas constitution to make express provisions about land rights. The Bomas Draft explicitly affirms spousal land rights: “A surviving spouse shall not be deprived of a reasonable provision out of the estate of a deceased spouse whether or not the spouse died having made a will” [Bomas Draft Article 82]. However, the Wako Bill markedly omitted this safeguard for spousal land rights from its text.

In the case of non-citizens, both the Bomas Draft and Wako Bill limit land rights to leasehold tenure, not exceeding 99 years [Bomas Draft Article 83; Wako Bill Article 83].

8.5 Conclusion

The centrality of land as a principal source of livelihood in Kenya means that the control and allocation of land has been a contentious issue since before independence. It is no wonder, therefore, that land has remained a key issue in the constitutional debate to date. For the European settler community and the Asian and Arab populations it was of paramount importance to get constitutional guarantees against confiscation of their land and other property by the new indigenous government. As a result, the independence constitution contained such safeguards and the devolved layers of government had a role to play in the allocation of land. The independence constitution also set up a CLB to manage the creation of resettlement schemes for landless Africans and squatters. Other matters were prescribed in ordinary legislation.

While the concerns of non-citizen communities were instrumental in enshrining land and property rights in the independence constitution, these safeguards were weakened in the current (1969) constitution. This notwithstanding, land remained on the mind of every Kenyan. The phenomenon of ‘land grabbing’ by corrupt means coupled with increasing shortage of land as the population grew served to put it firmly back on the constitutional agenda. Both the Bomas Draft and the Wako Bill proposed to create a National Land Commission to which was delegated the regulation, control and allocation of land. Subsidiary legislation was also envisaged to further specify policies.

Land also impinges on gender equality. The current constitution is silent in that regard, whereas the Bomas Draft affirms the land rights of spouses. The Wako Bill, on the other hand, omitted this provision from its text.

9. Minority Rights

In a democratic dispensation there is an inherent danger that majority rule may marginalise minorities. The importance of constitutional protection for minorities is reinforced in a polity such as Kenya where ethnic and other cleavages inform political life and struggles.

9.1 Introduction

This section compares and contrasts the treatment of minority interests in the three constitutional documents under review. The comparison is based upon two criteria:

- What minority interests do the constitutional documents recognize or envisage, if at all?
- What guarantees do the constitution documents provide for the protection of minority interests?

While the independence constitution is not at the centre of our comparison, this study inevitably has to refer to it for two reasons. First, the current constitution is an adjustment of the independence constitution and keeps salient some of the critical minority-related issues that that first constitution raised. Second, the Bomas Draft and the Wako Bill are both attempts to re-enact the independence constitution, especially with regard to the protection of minority rights with a view to remedying the omissions that were made during the abrogation of that constitution and the enactment of the current. Indeed, a brief return to the independence constitution will afford this analysis the parameters for comparison.

9.2 Recognition of Minority Rights and Interests

The independence constitution was very sensitive to minority rights and interests, even though it did not expressly mention the term ‘minority’ or ‘marginalized.’ Indeed, the constitution was negotiated under intense minority suspicion and apprehension of discrimination and marginalization under the post-colonial government that the ethno-numerical Kikuyu-Luo dominated Kenya African National Union (KANU) was expected to form. Five communities and groups claimed minority status at the time:

- The hitherto hegemonic European community, which had formed the New Kenya Party (NKP) and the National Party (NP). This community sought constitutional protection through guarantees of citizenship and security of property ownership, especially land that they already held in the former Kenya Highlands;
- Asians seeking constitutional protection in respect of citizenship guarantees and equal treatment generally;
- Muslims of Arab descent at the Kenyan coast formed the Mwambao United Front (MUF) that claimed constitutional protection of the unique, Islamic culture and, tacitly, the land rights of the local royal families;
- Non-Kikuyu/Luo ethnic groups that coalesced around the Kenya African Democratic Union (KADU) sought constitutional protection of their land and other regional resources through a federal system of government;
- The Somali of the North Eastern Province claimed to be rightfully a part of the neighbouring Republic of Somalia and sought constitutional redress through exclusion from the emerging Kenyan state to join the Republic of Somalia.

The Lancaster House constitutional conference produced the independence draft constitution in 1962 and responded to the different minority interests in different chapters and clauses. Broadly, minority interests under that first constitution were safeguarded through:

- (a) The introduction of the federal system of government;
- (b) Wide acceptance of citizenship claims; and
- (c) The establishment of safeguards for civil liberties and individual freedoms.

These three constitutional instruments for protection of minority rights were ignored in the readjusted 1969 (the current) constitution, but the Bomas Draft and the Wako Bill have revisited them in different ways in an attempt to restore safeguards for minority rights and interests generally.

The current constitution does not recognize minority rights or interests and assumes that Kenya is a homogeneous society in all important respects. The non-recognition of minority interests in the current constitution is demonstrated through the elimination of important safeguards that had been contained in the independence constitution and the disabling of these safeguards by means of successive constitutional amendments between 1963 and 1968 to create the current version. The current constitution does not apply the term ‘minority’ or ‘marginalized’ anywhere within its text.

By contrast, the Bomas Draft and the Wako Bill recognize minority rights and interests and overtly employ the term ‘minorities and marginalized’ persons. The Bomas Draft and the Wako Bill contain novel Chapters Three on “National Values, Principles and Goals” in which they make five specific provisions that are relevant to minorities and marginalized people:

- Recognition of the diversity of the people and protection of their respective cultures [Bomas Draft Article 12 (2) (b); Wako Bill Article 13 (1) (b)];
- Access to justice based on impartiality of the judiciary [Bomas Draft Article 12 (2) (f); Wako Bill Article 13 (1) (f)];
- Protection and promotion of human rights [Bomas Draft Article 12 (2) (h); Wako Bill Article 13 (1) (h)];
- Ensure “full participation of women, persons of disabilities, marginalized communities ... in the political, social and economic life of the country” [Bomas Draft Article 12 (2) (i); Wako Bill Article 13 (1) (i)];
- “Eliminate disparities in development between the various parts of the country and sectors of society” [Bomas Draft Article 12 (2) (o); Wako Bill Article 13 (1) (o)].

The rise of the democratization movement in Kenya, particularly the search for a new constitution in the early 1990s, revived the concern for old minorities such as ethnic groups, faith communities, and racial groups that had been driven underground under the Kenyatta and Moi regimes. Indeed, the Bomas Draft and the Wako Bill specify in the Bill of Rights the meaning of the specific categories of minority and marginalized persons within the context of the Bill of Rights. The categories are: (i) Women; (ii) Physically and mentally disabled persons; (iii) Older members of the society; (iv) Youth; (v) Children (the Bomas Draft and the Wako Bill state, in Article 34 (2) and Article 35 (1), respectively, that: “the life of a person begins at conception”); (vi) Economically marginalized groups; (vii) Persons in custody; (viii) Refugees and asylum seekers; and (ix) Arrested persons.

9.3 Constitutional Provision for Minority Rights and Interests

The independence constitution made a wide range of provisions for the protection of minority rights and interests. Indeed, this was the primary concern of the drafters of the constitution. Five main

provisions were made in the independence constitution to safeguard minority rights and the interests of marginalized persons. The provisions were subsequently expunged from or weakened in the current (1969) constitution through radical amendments between 1964 and 1968 but restored in the Bomas Draft and the Wako Bill nearly three decades later. The rest of this analysis will focus on these provisions.

The independence constitution created a *majimbo* state structure. The constitution divided Kenya into eight regions that included the capital city, Nairobi. Each region had a semi-autonomous governmental structure and authority: a regional assembly, a regional president, a regional civil service, a regional treasury and a specified regional revenue base, and the power to formulate regional policies and make region-specific legislation in a wide range of fields. The rationale of *majimbo* was to confer on ethno-regional minority communities the power to safeguard their local resources, especially land, and to safeguard other special interests like culture and religion without interference from the central government, regardless of the ethno-cultural group wielding political control at that level of government. The *majimbo* constitutional formula appeased the Mwambao residents and the Somali in the North Eastern Province with regard to culture, and appeased the Europeans as well as ethnic Kalenjin and Masai groups, all of whom were apprehensive that other ethnic groups would rush for land in the Rift Valley once most of the white settlers departed upon *uhuru* (independence). The two indigenous Rift Valley communities as well as the European settlers who wished to remain in Kenya – in the White Highlands – believed land in their province was out of bounds to any other group.

However, the 1964 constitution abolished the federal (*majimbo*) structure of government including other associated constitutional provisions and introduced the unitary state system. It thereby deprived minority ethnic and racial groups of the safeguards they enjoyed previously under the regional governments. The rights and interests of these minority groups now fell under the discretion of the central government, which in addition to the powers hitherto in the hands of regional governments, had put in place a uni-cameral legislature instead of the previous two-tier chamber through which the Upper House had the responsibility to check discriminatory legislation. A powerful presidency was instituted as the head of a republic; a presidency that at once wielded the power and authority of head of state and head of government.

The demand for federalism in Kenya re-emerged alongside the demand for a multiparty system of government. The population in many ethno-regional zones believed that they had been marginalized in the distribution of national resources under the centralized KANU regime. At the same time, the population in ethno-regional zones that had presumably gained disproportionately from the skewed distribution of the national resources also demanded federalism when the control of the central government (the presidency) seemed bound to shift to a different ethno-regional zone with the advent of multiparty electoral system. The Bomas Draft, therefore, accommodated the widespread demand for a federal state system in which designated zones would be able to manage local resources and issues within semi-autonomous regional governments. Chapter Fourteen on Devolved Government shows that one of the aims of devolution was “to protect and promote the interests and rights of minorities and marginalized groups at all levels” [Article 206 (1) (e)] as well as “to ensure equitable sharing of local and national resources throughout Kenya, with special provisions for less developed areas” [Article 206 (1) (g)].

The Bomas Draft therefore declares that: “The sovereign authority of the people is exercised at the national, regional, district, and locational level” [Article 6 (1)]. However, unlike the independence constitution that provided for the region to be the unit of devolution, the Bomas Draft provided for the district to be “the principal level of devolution” [Article 207 (1)] whereas the role of the regional government is to “co-ordinate the implementation, within the districts forming the region, of programmes and projects that extend across two or more districts of the region” [Article 207 (2)].

Overall, the Bomas Draft provided for 14 regions (including Nairobi Metropolitan) and 74 districts, including the four boroughs in Nairobi [First Schedule]. Minority rights and interests could, therefore, be protected within the walls of these semi-autonomous lower levels of government.

The opponents of the Bomas Draft were especially against devolution of powers, whatever its significance, for the protection of minority rights and interests. Whereas the Wako Bill retained the principles of devolution, it altered fundamentally the chapter on devolution to the point of subordination of the presumably devolved units of government to the authority of the central government. Essentially therefore, the Wako Bill reverted to the unitary system of government that is contained in the current (1969) constitution. The Bill declared that: “the district is the unit of devolution” [Article 199]. The envisaged institutional infrastructure is similar to what obtains in a federal system of government: a district assembly with legislative powers and a district council with executive powers. The main difference from a federal system of government, however, is that the existence of the district government as proposed by the Wako Bill depends on the discretion of the central government: “A district government may be suspended” [Article 204 (1)]. The capacity, therefore, of such a structure to protect minority rights and interests is weak.

9.4 Protection of Fundamental Rights and Freedoms

The Bill of Rights was deliberately included in the independence constitution upon the insistence of the European community as a safeguard against possible confiscation of their land in the Kenya Highlands and other property elsewhere; loss of positions in the public service; and loss of citizenship. Other minorities also expected to gain from the Bill of Rights. The Bill guaranteed the individual “the right, whatever his race, tribe, place of origin or residence or other local connection, political opinions, colour, creed or sex.” However, the Bill of Rights did not make specific reference to minorities or marginalized groups.

The Bill of Rights in the independence constitution was also emphatic about the protection of property rights of the European community: “no property of any description shall be compulsorily taken possession of, and no interests in or right over property of any description shall be compulsorily acquired” except in special exceptional cases of a compelling public interest. Moreover, any such confiscation had to be followed with “the prompt payment of full compensation.”

The amendments of the independence constitution that led to the current (1969) edition left the Bill of Rights unchanged. The current constitution therefore provides for the “Protection of the Fundamental Rights and Freedoms of the Individual” [Chapter V]. The provisions of the Bill of Rights in the current constitution that indirectly provide for the protection of minority rights and interests include: the right to life, liberty, security, and protection of the law; freedom of conscience, expression, assembly and association, movement; and protection from infringement upon privacy, from deprivation of property without compensation, from inhuman treatment, and from slavery and forced labour. Most importantly, the rights, freedoms, and protection are granted to every individual “whatever his race, tribe, place of origin or residence or other local connexion, political opinions, colour, creed or sex...” [Section 70]. In short, Chapter V of the current constitution contains provisions that could constitute safeguards against the common forms of violation of minority rights and interests and the marginalization of social groups, though only indirectly. The general coverage of the Bill of Rights in the current constitution fails to provide for the protection of particular rights and interests of minorities and marginalized groups and the failure of the Bill to specify the minorities and marginalized groups in Kenyan society, all created a wide opportunity for the transgression of the rights and interests of these groups.

The Bomas Draft attempted to overcome the inadequacy of the Bill of Rights as contained in the current constitution. The draft provided for safeguards for the interests of minority and marginalized groups within the Bill of Rights; safeguards that are far more comprehensive and detailed than the provision in both the current and independence constitutions. The Bomas Draft devoted a full section to “Minorities and marginalized groups” [Article 43], which states in part that: “minorities and marginalized groups are entitled to enjoy all the rights and freedoms set out in the Bill of Rights, on a basis of equality, taking into account their special circumstances and needs” [Article 43 (1)]. Furthermore, the Bill of Rights makes general provisions that have important implications for the protection of the rights and interests of minorities and marginalized groups. Specifically, the draft states that: “Every person shall enjoy the rights and freedoms in the Bill of Rights to the greatest extent” [Article 29 (2)]. In allocating resources the state has an obligation to give priority to ensuring widest possible enjoyment [Article 29 (5) (b)]. The state shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.” [Article 36 (1)].

The Bill of Rights in the Bomas Draft proceeds to specify the manner in which the state will seek to secure minority rights, namely; (a) Through a system of affirmative action and; (b) Through assistance to secure representation in all “spheres of national life”, access opportunities like education, water and health, employment, preserve cultural values, and “live a life free from discrimination, exploitation or abuse” [Article 43 (3)].

While the Bomas Draft made specific provisions for minorities and marginalized groups, the Wako Bill excluded this provision from its version of the Bill of Rights. The Wako Bill thereby reverted to the same position as that of the current (1969) constitution whereby no mention is made of minorities or marginalized groups.

The Bomas Draft proceeds to make provisions for the protection of marginalized groups besides the minorities. The Wako Bill also makes similar provisions for marginalized groups although it does not expressly mention the term ‘marginalized groups.’ Thus the Wako Bill replicated the Bomas Draft with regard to provisions for the protection of marginalized groups as shown below:

- Women: their equality with men, equal rights to inherit property, dignity, and welfare and advancement [Bomas Draft Article 37; Wako Bill Article 38];
- Physically and mentally challenged (persons with disabilities): their human dignity, education, access to public places, rights to inherit, etc [Bomas Draft Article 42; Wako Bill Article 43];
- Older members of the society: their participation in societal affairs, dignity, care, personal development, etc. [Bomas Draft Article 38; Wako Bill Article 39];
- Youth: their welfare through affirmative action, education, employment, participation in governance, freedom from undesired cultural influence, discrimination, and exploitation [Bomas Draft Article 39; Wako Bill Article 40];
- Children (including the unborn child): their nurture, protection, and free education, equality of all children in law, and freedom from corporal punishment, from armed conflicts, exploitation, discrimination, etc. [Bomas Draft Article 40; Wako Bill Article 41];
- Persons held in custody: their human dignity, freedom from exploitation or abuse, decent living, privacy, franchise, and communication with external relations [Bomas Draft Article 75; Wako Bill Article 74];
- Refugees and asylum seekers: their right not to be returned to another country if they have well-founded fear of persecution [Bomas Draft Article 56; Wako Bill Article 56];

- Arrested persons: their knowledge of reason for arrest, freedom to remain silent, access to a legal counsel, produced in court within 48 hours, eligibility for release on bail, fair trial [Bomas Draft Article 73; Wako Bill Article 72].

9.5 Award of Citizenship

The independence constitution provided in Chapter 1 for a wide range of circumstances under which one could become a citizen upon independence. Citizenship could be realized either automatically as was the case for the native population, or through the fulfilment of prescribed requirements; a procedure that related mostly to immigrant communities – Asian, European, and Arab. The provisions for citizenship within the independence constitution aimed mostly to protect the interests of the minority immigrant European, Asian, and Arab communities faced with the fear of expulsion from Kenya after *uhuru*. The constitution repeatedly provided eligibility to citizenship to categories of the population that included “a citizen of the United Kingdom, and Colonies or a British protected person ... (and) a citizen of the Republic of Ireland...” or one whose any one parent was already a Kenyan citizen or was eligible to become a citizen on 11 December 1963, the eve of independence. The constitution also extended eligibility for citizenship to any other person who wished to apply to become a citizen of Kenya. In short, the independence constitution made provisions for a member of any category of minorities to become a Kenyan citizen, notably the three leading minority immigrant communities in Kenya – the Europeans, Asians, and Arabs. The children of such minorities were also made eligible through the general provision that “Every person born in Kenya after 11 December 1963 shall become a citizen of Kenya at the date of his birth... [unless] neither of his parents is a citizen of Kenya...” (Section 3). Furthermore, the constitution accepted dual citizenship by granting eligibility for Kenyan citizenship to individuals already citizens of other countries with historical links with Britain – the former colonial power. Significantly, however, the constitution prohibited dual citizenship.

The alterations that were made to the independence constitution to bring about the current constitution did not touch upon the provisions on citizenship. Furthermore, a few of the original provisions regarding conditions for eligibility for citizenship by application were constitutionally due to expire – and did expire – within two years, in December 1965 after they had served their purpose. Thus, the independence constitution as well as the current one attempted to protect minority rights and interests through the award of citizenship without which some immigrant communities in Kenya could have lost claim to Kenyan citizenship and all the rights and privileges that accompany citizenship status.

The Bomas Draft preserved the citizenship of everyone already granted such status: “Every person who was a citizen immediately before the effective date retains the same citizenship status as from that date” [Bomas Draft Article 14]. It also retained the different means by which an individual can acquire citizenship – by birth, marriage, and naturalization. The most outstanding innovation of the Bomas Draft is the provision for dual citizenship that also allows application from individuals (read minority immigrant communities) who could not previously become Kenyan citizens because they were already citizens of other countries [Bomas Draft Article 20].

The Wako draft retained the same provisions for citizenship, save restriction of eligibility for dual citizenship to individuals who are Kenyan citizens by birth [Wako Bill Article 21].

9.6 Administration of Justice

The independence constitution sought to protect the rights of individuals through the structure and operations of the Judiciary. The establishment of a hierarchy of law courts, from the district

Magistrates Courts at the bottom to the Supreme Court at the top was intended to facilitate appeals. But more explicitly, the constitution created *Kadhi's* Courts to cater for the minority Muslim population that had created the Mwambao crisis at the Kenyan coast and the Somali crisis in the North Eastern Province. *Kadhi's* Courts had jurisdiction over matters of inheritance and marriage in which the parties concerned all subscribe to the Islamic faith. The current (1969) constitution retained the provisions for *Kadhi's* Courts “within the jurisdiction of the former protectorate or within such part of the former protectorate as may be so prescribed: provided that no part of the former protectorate shall be outside the jurisdiction of some *Kadhi's* court” [Section 66 (4)]. The current constitution also restricts the jurisdiction of the *Kadhi's* courts “to the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion” [Section 66 (5)]. Unlike the independence constitution, however, the current constitution reduced the hierarchy of law courts through the exclusion of the Supreme Court, thus allowing appeals to end at the Court of Appeal.

The Bomas Draft reintroduced the Supreme Court above the Court of Appeal and thereby increased once again the hierarchy for appeals [Bomas Draft Article 186]. The Wako Bill also retained the Supreme Court above the Court of Appeal [Wako Bill Article 184]. The Bomas Draft retained *Kadhi's* Courts as provided for in the current constitution [Bomas Draft Article 198]. However, the draft eliminated any reference to the protectorate, as does the current constitution. The Wako Bill went a step further than the current constitution and the Bomas Draft by introducing Christian and Hindu religious courts in addition to the *Kadhi's* courts [Wako Bill Article 195]. The issue-based jurisdiction of these courts remained as contained in the current constitution as well as in the Bomas Draft. In short, all the constitutional documents provide for the protection of the interests of the minority Muslim population through the establishment of special *Kadhi's* Courts. The Wako Draft introduced the Christian and Hindu Courts only in order to appease some sections of the non-Muslim population who believed the draft constitution was discriminatory in providing for special courts to the believers of a single religion – the Muslims.

9.7 Affirmative Action

The independence constitution as well as the current one did not make provision for affirmative action with regard to any category of minorities and marginalized persons. But the Bomas Draft and the Wako Bill make provision for affirmative action with regard to women and persons with disability. The two drafts provide in their respective Chapters on National Principles and Values that the state will “implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender” [Bomas Draft Article 12 (2) (j); Wako Bill Article 13 (1) (j)]. The two documents declare with regard to persons with disability that the state shall ensure that increasingly “at least five per cent of the members of elective and appointive bodies shall be persons with disabilities” [Bomas Draft Article 12 (2) (k); Wako Bill Article 13 (1) (k)].

9.8 Conclusion

It is evident from the above analysis that the strong protection afforded minorities in the independence constitution, largely owing to pressure by the European community in Kenya at the time, re-emerged in the Bomas Draft and the Wako Bill some 30 years later. In the meantime the protective sections had been removed, ostensibly because they had been made superfluous. The re-introduction of the issue of protection for minorities and marginalized groups had partially a different rationale in the recent constitutional debate. Safeguarding the rights of ethnic minorities was still a concern, but ‘new’ groups of marginalized persons had since emerged, e.g. women, the elderly, youth, the disabled, etc. The notion of affirmative action is also an entirely new concept.

PART III: THE FUTURE

10. Future Scenarios

The above comparative analysis has depicted a political situation of contestation over the various proposals for a new constitutional dispensation in Kenya. The culmination of the process thus far by the referendum verdict does not mean that the issue has been laid to rest. Although there is consensus across the political spectrum that Kenya needs a new constitution, the contestation over the precise nature and content of the new document will continue for some time to come.

10.1 Introduction

Even before the rejection of the Wako Bill through the referendum on 21 November 2005, debate had started on the options available to Kenya if the government-sponsored constitution were rejected. There was a feeling that the government was bound to lose on the political front because of its failure, not only to deliver a constitution within 100 days of assuming office but also to live up to many of its other promises. This had led to widespread disaffection. The proposed new constitution (widely referred to as the Wako Bill), which was the subject of the referendum, was widely considered to be the brainchild of a coterie of hardliners of the dominant wing of the ruling coalition, which had refused to accept compromise, and therefore produced an anti-Wanjiku document.

The options suggested both before and after the referendum are informed by several realities. One is the recognition that despite the overwhelming NO vote to the Wako Bill in the referendum, Kenyans are still committed to a new constitution and the government is still obligated to put in motion a process that delivers a new constitutional dispensation for the nation. The argument that by rejecting the Wako Bill Kenyans were accepting to be governed by the old constitution is not sustainable, however eloquently presented. The other reality is that with the upcoming general election in two years, the debate over a new constitution could easily be upstaged by the political campaigns for change of government. In that situation, the politics of the day would define the constitution-making process and could easily generate a product that would seek to resolve immediate political questions rather than the long-term constitutional needs of the nation.

A further reality that informs the thinking about the available options is the recognition that to gain legality and legitimacy any process to produce a new constitution would have to involve the people of Kenya. In the two landmark cases relating to the constitution-making process, the courts have indicated that it is only the people that can collectively, legally and legitimately make a new constitution, either by electing a Constituent Assembly whose sole object is to produce a constitution, or by subjecting whatever document will emanate from whatever forum, to the people through a referendum. Any of these processes would necessarily have to contend with the question of time and cost. But fortunately, all the material that the process would need as reference documents is easily available and there would be little (if any) need for further information gathering.

10.2 Options for Constitution-making

With the above realities in mind the main options under consideration with regard to the constitution-making process include those below. The number of options could, of course, be multiplied. But we have chosen to focus on four that we consider to be most likely.

Option One: Constituent Assembly

A Constituent Assembly remains one of the more popular options for resuscitating the constitutional review process. The role of such an Assembly would solely be to consider and synchronize all the data collected so far in the course of the review process. The existing documents would need to be considered in light of the views emanating from the just concluded referendum, which marked the first time that opinions of Kenyans on a specific constitutional document had been expressed from a wide and diverse variety of sources. On the basis of all the already collected sources, the Constituent Assembly would be required to craft a document largely acceptable by the majority of the people.

Even though the precise character and composition of a Constituent Assembly have not been agreed upon, there is significant consensus that such a forum would need to include a certain number of elected representatives whether on the basis of districts or constituencies. It would also be necessary to incorporate representatives of special interest groups, including minorities who may not be procured through an elective process. Obviously, a Constituent Assembly would have access to professional experts on technical issues.

A Constituent Assembly would also require a specific time frame within which to conclude its work both to save resources and to produce a document whose operationalisation would not be complicated by the forthcoming general elections in 2007.

The Constituent Assembly option has several advantages. In the first place, it would to some degree insulate the constitution-making process from the political bickering of the day. It is acknowledged, of course, that constitution-making is an inherently political activity because the resultant constitutional dispensation determines the future rules of the political game. The intention would be to prevent the deliberations of the Constituent Assembly becoming part and parcel of the electoral campaign in the run-up to the 2007 elections. It might indeed be possible to bar any member of the Constituent Assembly from vying in the ensuing election so as to forestall excessive short-term politicisation of the reform process. Secondly, a Constituent Assembly would obviate the need for a divisive referendum. The just concluded process revealed the dangers of subjecting a negotiated document to an either/or decision in a country where literacy levels are low and the electorate correspondingly susceptible to misinformation both for and against.

A Constituent Assembly option also has several disadvantages. Firstly, it would mean an expensive process yet again and questions can be raised as to whether a poor economy like Kenya can afford another constitutional exercise of this nature. To ensure the representativeness of the Constituent Assembly election of delegates would have to be held. An election process not only costs the government dearly, it also diverts the nation's attention into a political process at the expense of other urgent priorities. The cost of an election campaign and the Constituent Assembly would probably extend beyond the direct costs incurred. Deferred investment decisions pending the constitutional outcome might slow down economic activity and reduce much needed economic growth that could benefit the poor.

Secondly, a Constituent Assembly would have to contend with time constraints. Ideally, the process of making a new constitution should be completed before the next general election to enable those elections to be organized under a new set of rules. With the general election barely two years away,

the pressure on the Constituent Assembly would be significant and possibly compromise the production of a well considered and properly negotiated document that would be seen to be legitimate in the eyes of the overwhelming majority of the electorate.

Constituting a Constituent Assembly would probably prove contentious since it would have to be based on existing constituency and/or district boundaries, which have been drawn with political considerations in mind. They may not be considered adequately representative and thus raise questions about the legitimacy of the final product. This matter of representativeness and legitimacy becomes even more important in the absence of a referendum to ratify the Constituent Assembly's product.

Option Two: Experts

The proposal to enlist constitutional experts to write the constitution of Kenya is as old as the reform debate itself. At one time it was the preferred option of the Moi government. In the aftermath of the referendum proposals have been made to call in international constitutional experts who have no partisan interest in the current political set-up to draft a working constitution informed by the numerous documents that exist. A variation of this proposal is the inclusion of domestic non-political experts. In either event, the terms of reference of these experts would be to coalesce and align the diverse views that have emanated from the debate with a view of producing an acceptable document. Such a document would still require endorsement by the people through a referendum.

Another variant of the experts' proposal suggests that the role of the panel of experts be restricted to negotiating an acceptable process without necessarily considering the content of the document. The recent proposal of the National Council of Churches of Kenya (NCCCK) goes along these lines.

Whereas the idea of a disinterested panel appears reasonably straightforward, legitimizing it would require broad consensus on its composition and the desire to include diverse interests and views. It may also produce an unnecessarily large group.

Furthermore, any product of the experts would still require a referendum procedure with all the divisiveness and contention that such constitutional documents tend to generate.

Option Three: Parliament

Of the options so far discussed, the least popular remains the review of the constitution by Parliament. Even though the current constitution under Section 47 reserves to Parliament the power to amend the constitution, it is now widely accepted that as a matter of law Parliament does not have the power to overhaul the constitution in the fundamental manner anticipated by the proposed review process. That view has been endorsed by the court rulings in the Njoya and Yellow Movement cases.

Parliament's capacity to review the constitution is also compromised by the general mistrust that Kenyans have in the capacity of the political class to direct and oversee a comprehensive people-empowering reform process. The insistence that any review process would eventually need to be driven by the 'people' as opposed to 'Parliament' originates in this mistrust.

Notwithstanding the above, there is no doubt that Parliament must play at the very least a facilitative role in the review process. With the imminent death of the Constitution of Kenya Review Act and the dissolution of the CKRC any new process will need a new legislative framework, which can only be generated by Parliament.

Furthermore, it is important to reiterate that constitution-making is also a political process and that the support of the political class is important, especially if their role is clearly understood to involve

facilitation rather than direct ownership. It would be politically risky, therefore, to alienate the political class and jeopardize the process and outcome.

In the circumstances, significant political leaders need to be incorporated in the thinking about any process intended to jumpstart the review process. It is also important that they do not perceive civil society and the faith communities to be in political competition with them. Finally, the political class should also, in the interest of national unity, desist from attempts at gaining short-term political mileage in shepherding the reform process.

Option Four: Bottom-Up Review by the People

A top-down approach has generally been used in the making of all Kenya's constitutions. The only instance where local people were involved through consultations was when the CKRC toured the country to hear views and collect information about the new constitution it was to prepare. The CKRC also brought together various stakeholder representatives as well as members of parliament into a constitution-making assembly at the Bomas conference. However, the conference was taken over by the political elite and the resultant Bomas Draft, although reflecting the desires of the majority Kenyans, was still very much an elite product that was not owned by the people.

A lesson about a bottom-up process of constitution-making can be learnt from Ghana. Jerry Rawlings explains such a bottom-up process that was used in the making of the country's constitution. His views are quoted in detail below:⁸

Although we were belaboured with external pressures to quickly concoct a new constitution, form political parties and hold new elections, we said "No"...We wanted to begin at the grassroots in order to evolve a system in which our people felt a genuine ownership of governance. To do so, we had to take...risk of initially calling on the people themselves, without any guidelines, to form community and workplace committees to rekindle the spirit of communal participation....We then provided structural guidelines for these localized groups to focus on practical projects and to provide a two-way feedback between the people and the Provisional National Defence Council (PNDC) (which he chaired as President from 1982-1992). As more and more people gained practical insight into the limitations and possibilities of governance, we...took another step towards the formulation of a new local government system. We created the District Assemblies, which would become real agents of decentralization, taking responsibility for planning, budgeting, implementing and monitoring local development within the districts. In 1988 the first district elections were held and the District Assemblies came into being...The creation of the District Assemblies Fund, which transfers a portion of central government revenues to the districts according to a complex formula...has enabled the assemblies to undertake... development... programmes according to their own priorities.... It was only after the district assemblies were up and running that we began another series of countrywide public fora to discuss the shape of a new constitution and the form of national government, which we should have. The results of these discussions were collated by the National Commission for Democracy and formed the basis for a draft constitution which was submitted first to a very broad based Consultative Assembly and secondly to a national referendum.

Rawlings concludes by noting that they started at the grassroots knowing that although the process would take time, the end product would not be an imposition by an elite, but a product of national consensus. He further says that whereas involving constitutional experts, or a constituent assembly

⁸ *Daily Nation*, 6 January 2006. *Africa will progress, the devil is in the type of leaders it gets.*

dominated by the elite would have been appreciated by some parties, they would then have imposed a structure upon the people however seemingly democratic it would have been. He says (*Daily Nation*, 6 January 2006, page 13):

... there would be no sense of ownership, no real participation and therefore no real progress...That, to me, would have been stillborn. It is my belief that any reforms aimed at encouraging genuine democracy must be designed with the people and not merely for them...we should not forget that reforms have to be sustained, otherwise there will be a gradual erosion of popular interest, and power and influence will once again begin to accumulate in the hands of a few.

These remarks show that Kenyans need to rethink their process of constitution making and shift it from being elite- to people-driven.

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SUMMARY

This study compares the three constitutional documents listed below that were the subject of debate in Kenya's constitutional reform process in 2005:

1. The Constitution of Kenya (the present constitution with amendments that has been in existence since 1969);
2. The Draft Constitution of Kenya, 2004 – the so-called Bomas Draft that was prepared by the Constitution of Kenya Review Commission (CKRC) and endorsed by the National Constitution Conference held at the Bomas of Kenya, hence the term 'Bomas Draft';
3. The Proposed New Constitution of Kenya – the draft that the Attorney-General and the Parliamentary Select Committee on Constitution Review prepared through adjustment of the Bomas Draft after the meetings at Naivasha (the Naivasha Accord) and Kilifi (the Kilifi Accord). The Proposed New Constitution of Kenya is informally referred to as the 'Wako Bill' with reference to its principal author, the Kenyan Attorney-General, Amos Wako.

In conclusion, we also project a number of scenarios as to the future of constitution-making in Kenya in view of the rejection by the people of the Wako Bill in the referendum held on 21 November 2005, and the subsequent dissolution of the Cabinet and the prorogation of Parliament, as well as the formation of a new Cabinet.

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