TITLE

Kenya's Constitutional Dilemma and the Curse of Imperial Presidency: Safeguarding the People's Voice Through Federal Governance Systems.

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DECLARATION

I, Martin Opondo Oloo, do declare that this is my original work and has not been submitted, nor is it currently being examined for a degree in any other University.

Signed.....

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This thesis is submitted for examination with my approval as university supervisor

Signed.....

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This thesis is dedicated to my children: Jeremy, a special person to us as a family, Bill and Daisy whom this work should inspire to greater heights!

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CHAPTER ONE: THE RATIONALE, BACKGROUND AND ASSUMPTIONS OF THE STUDY

1.0 Introduction and overview

Kenya's constitution making process is at a crossroads following the overwhelming rejection, at the November 2005 Referendum, of the draft constitution (also known as the Wako draft). At the heart of the rejection, lie a number of contested constitutional issues. These include the treatment of executive power and power sharing arrangements between the President and the Prime Minister. Equally contested are both the principle of devolution of power and the nature of federal structures.

The proponents of a strong presidency ignore, in particular, what has always been at the core of the demand for a new constitution i.e. the disenchantment with an imperial and powerful presidency in Kenya. Instead, they advance the argument that Kenya's political fragility, despite a history of forty years of independence, calls for a unitary state with a strong and centralized presidency. To them, any attempts to devolve power or indeed share executive power between the president and the prime minister are not an option. They assert that it is a political impossibility to construct more than two centres of power[1].

Advocates of the devolved system on the other hand, have suggested that the centralised Presidency amounts to a political "curse" that manifests through polarised ethnicity, inequality and skewed national resource allocation. To remedy this "curse" there is in their view, a need for an innovative and creative constitutional engineering. To them, such innovative constitutional engineering should draw on Kenya's strengths rather than dwell on its weaknesses. Recognition of ethnicity as an organising means should replace the attempts made to demonise ethnicity.

They also argue that there is need to recognise the divisibility of sovereignty i.e. that it is possible to use the various interests to arrive at a national polity. Countries such as India, Canada, Switzerland and the United States are examples often cited. This advocates strongly the belief that a comparative analysis should facilitate a home-grown constitutional architecture that will effectively serve Kenya for generations to come. It is their argument that federal structures foster a sense of nationhood, a necessary antidote for the heightened inequality that has over the years, been the hallmark of a skewed and ethnically based political and constitutional dispensation in Kenya.

The centralization of power by the first President Jomo Kenyatta and his successor, Daniel Arap Moi through numerous constitutional amendments, the covert ethnicization of Kenya's politics reflected in inequitable resource allocations, are at the very heart of the constitutional crisis in Kenya today. For the country to chart a new political and constitutional terrain there is need to revisit and embrace some fundamental constitutional principles. The principle of devolved power sharing through a federal governance structure holds the promise to safeguard the role of the people by redefining their responsibility in holding their governance structures to account. Devolved structures also hold the promise for enhanced democracy through active participation by the people. It offers a direct challenge to the ills associated with a centralized state i.e. a deficit of democratic space and the imperial presidency whose hallmark is a national level manifestation of political, economic and social inequalities.

[1] Statement associated with the former Minister for Justice and Constitutional Affairs, Mr. Kiraitu Murungi.

Kenya is a deeply divided society ethnically, politically and economically. The country has some of the largest income disparities in the world.[2] Social-political divisions have also widened over the years and appear to continually threaten the nation-state project[3] in several ways. With this threat in mind, we take the view that the new constitution should fundamentally provide a mechanism for people's participation in the governance of their affairs in an equitable and representative form.

While ethnicity has been publicly condemned, and not recognised by law, it has remained a strong basis for political organisation. The politics of Patronage has been the basis for allocation of public resources, albeit discreetly, and in the most opaque forms. This study makes the case for the constitutional architecture that embraces the positive aspects of ethnicity. Rather than see the potential threat of any of the regions seceding, or federalism generating tribal animosity as the basis of halting any gradual push towards the adoption of a federal structure, we suggest that a federal governance system is the most effective constitutional route to remedy the fractured social, political and economic basis of Kenya's Statehood.

1.2 Statement of the Problem, Theoretical framework and Justification of the Study

1.2.1 Statement of the Problem

The principles of constitutionalism and democracy run counter to the concept of Imperial Presidency. Imperial Presidency characterizes governance imbalances reflected through

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[2] In 2001, the bottom (poorest) 20 per cent of the population was getting 2.5 per cent of the total national income while the top 20 per cent received more than 50 per cent (Economic Intelligence Unit 2002; United Nations Development Programme 2002).

[3] The use of the term is within the political science context. The argument is that as a state with more than forty-two tribes, Kenya has many "nations" represented by each of the tribes. What both Kenyatta and Moi regimes attempted to do was to develop one nation without acknowledging the difficulty of so doing. In fact, elites from their own tribal groups captured both their presidencies. The net effect is that they presided less

excessive executive dominance, inequitable resource allocations, regional disparities, strong centralisation and atrophy of local and regional voices in institutions/governance structures.

1.2.2 Theoretical Framework

A study of constitutional law lends itself to a multidisciplinary approach. Seidman observes that the making of independent Constitutions in most of Africa, including Kenya, was elite-type ceremonies involving the participation of nationalist leaders and representatives of the departing colonial power. He further observes that after the colonial era, most African constitution drafting is best analogized as:

> .....an elaborate buffet, with elaborate constitutional provisions from other existing constitutions spread across the glittering sideboard, from which the constitution maker filled her plate to her taste... sentences, paragraphs, whole sections and chapters float from one constitution to the next.[4]

The current Kenyan constitution is therefore far from a people's document. To make it worse, the numerous amendments since independence, without any reference to the people, makes the current constitution even more alien.

The original post-independence constitution in Kenya provided for a complex set of institutions. The most significant of such institutions was the semi-federalist (or Majimbo) system that took the form of seven regions, each with a Regional Assembly and a separate public service. The federalist element had a bi-cameral legislature at the national level. However, the subsequent regimes systematically moved to make amendments to the constitution that had the overall effect

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and less over one nation and had to resort to a centralisation of power to quell the potential of sub-national agitations/rebellions.

[4] Robert Seidman: perspectives on constitution making: independence constitution for Namibia and south Africa, 3 Lesotho L.J. 45 (1987).

of destroying some of the fundamental constitutional principles of separation of power, and the crucial central role of the people in the democratic process.

Trace of the growth of imperial Presidency goes back to the Kenyatta[5] and subsequent Moi[6] regimes which, through numerous constitutional amendments, dismantled the institutions that provided for checks and balances. These amendments were largely through a compromised parliament by the executive. In constitutional law, these amendments, that had no reference or any attempt to involve the people, flew in the face of democracy and made nonsense of the role of the people as the cornerstones of democratic values. In a sense, it continued the tradition that informed the final Kenyan constitution, negotiated by a few ostensibly on behalf of Kenyans, but in reality for their own elite interests. Small wonder then those subsequent amendments would not seek the people's views but elevated the presidency and the government beyond the scrutiny and accountability to the people. This development is inconsistent with the quest for a people driven, people based, and people owned constitution. In its present form, the now much discredited current constitution consecrates the domination of our polity by the politically effective few and the reduction of the rest to more or less passive consumers of the ministration of government"[7]. A great opportunity now presents itself for Kenyans to seize the moment to overhaul the current constitution. Indeed, Kenyans have a chance to apply constitutional law principles in a manner that develops a polity that would better reflect ideals of equality, civic virtue and a mobilized citizenry.[8]

The concept of the people is one that needs definition. To many, the concept implies those who inhabit the shoes of, among other entities, the electorate, prominent interest groups, identity-

[5] Jomo Kenyatta was the first President of Kenya.
[6] Daniel Arap Moi was the second President of Kenya.
[7] Richard Parker: the past of constitutional Theory – and its future, 42 Ohio ST. L.J 223 (1981).

based social movements, Parliament or "Bomas" (National Constitutional conference in Kenya), political parties or state institutions. This, in our view, is consistent with the provisions of the constitution review Act[9], and the ruling in the Njoya case[10] that proposed that this time around, the constitution-making project belongs to the people. There are those however, who would rather use the term people to mean the diverse ethnic groups. This takes us back to the definitional problems of the concept in the African Charter on people and human rights. There was, and has always been, great effort aimed at avoiding the definition of the term 'people' until fairly recently.

There is a growing body of scholarship on the concept of "popular constitutionalism". It all follows a trail blazed by Robert Cover,[11] Bruce Ackerman,[12] Sanford Levinson,[13] and Parker,[14] among others. Other recent works include a book by Larry Kramer,[15] and other articles and books by Jeremy Waldron,[16] Kramer,[17] William Eskridge, [18]Jack Balkin,[19] Keith Whittington[20], Stephen Griffin,[21] James Gray Pope,[22] and Mark Tushnet.[23]

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[8] Id at 258.
[9] Constitution of Kenya Review Act: Chapter 3A of the Laws of Kenya.
[10] Re: Constitution of Kenya, Njoya and others vs. the Attorney General of Kenya.
[11] Robert cover: The Supreme Court, 1982 Term-Foreword: Nomos and narrative, 97 Harv, L.Rev.4 (1983).
[12] Bruce Ackerman: We the People Foundation: Foundations (1991). Ackerman argues that the people act outside article v of the US constitution amendment process during isolated constitutional moments. Popular constitutionalists by contrast advance the constitutional models that bring the people into play during eras of "normal politics."
[13] Sanford Levinson: Constitutional Faith (1988).
[14] Richard D Parker: Here, the people rule (1994.)
[15] Larry D. Kramer: The people themselves: Popular constitutionalism and Judicial Review (2004).
[16] Jeremy Waldron: Law and disagreement (1999).
[17] Larry D. Kramer: Popular constitutionalism, circa 2004, 92 Cal. L.Rev, 959 (2004).
[18] William N. Eskridge, Jr.: Some effects of identity based Social movements on constitutional law in the twentieth century, 100 MICH. L. Rev 2062 (2002).
[19] Jack Balkin and Sanford Levinson: Understanding the constitutional revolution, 87 Va. L. Rev. 1045 (2001).
[20] Keith Whittington: Extra Judicial constitutional interpretation, Three objections and responses, 80 N.C. L. Rev. 773 (2002)
[21] Stephen Griffin, American Constitutionalism: From Theory to politics (1996), Stephen Griffin: What is constitutional Theory? The newer theory and the decline of the learned tradition, 62 S. Cal.L Rev. (1989)
[22] James Gray Pope, Labour's constitution of freedom, 106 Yale L.J.941 (1997), James Gray Pope, Republican moments: The role of direct popular power in the American Constitutional order, 139 U. PA. L. Rev 287 (1990).
[23] Mark Tushnet: Taking the constitution away from the courts (1999).

Popular constitutionalism theory holds that the people and their elected representatives should often play the critical role in the creation, interpretation, evolution, and enforcement of constitutional norms. This popular involvement takes various forms including the political process or direct action such as protests, boycotts and petitions. The people act through different ways and forms. At some other points, they act through accountable electoral institutions and in others, through political parties. Constitution making and interpretation is a product of political and constitutional culture.[24]

While the people's role in constitutional culture is desirable, we are aware that constitutional theorists have to come to terms with the fact that the people in their majority in Kenya, have little information, and are often susceptible to political manipulation by the elites. Their grasp of public life (law) issues is weak, and so is their ability to perform basic self-governance tasks, such as free participation in the electoral process, regular and periodical interrogation of its leaders, taking action against corruption and bribery, among others.[25]

The re-writing of the constitution offers an opportunity for Constitutional theory to focus on reconstituting the people as the core player, safeguarding their voices through a creation of governance structures that ensure participatory democracy at the local level.

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[24] Reva B.Siegel: Text in contest: Gender and the constitution from a social movement perspective, 150 U. PA. L. Rev 297. He defines political culture as a network of understandings and practices that structure our constitutional tradition, including those that shape law would not e recognised as law making according to the legal system's own formative criteria.

[25] This is consistent with the aims and objectives of the successive political regimes which have served to deliberately keep the people ignorant and have used political patronage to give token awards to the ethnic groups through often unelected unrecognised and often imposed illiterate torch bearers. Numerous examples include Kariuki Chotara, Mulu Mutisya, Kihika Kimani, etc.

1.2.3 Justification of the Study

The strong presidency emasculates the executive and marginalises the judiciary and the legislature. This is the very antithesis of the principles of constitutionalism, which seek to ensure that there are sufficient checks and balances between the three organs of the state: the judiciary, the executive and the Legislature within the concept of separation of powers. At the national level, one observes increased inequality in allocation of resources across the regions of Kenya, and a rise and duplication of institutions performing similar functions, which in turn trample over each other in the absence of clear constitutional provisions that separate and delineate each of their functions and space. Examples of this abound. Suffice it to mention the contentious issues of prosecutorial and investigative powers vested in the Attorney General's office and the Police departments respectively, vis-à-vis the Kenya Anti-corruption Commission.

Other examples include the creation of a plethora of local level funds, whose control and execution puts the Ministry of Local Government on a collision path with the respective local authorities. The implementation of the Constituency Development Fund (CDF) managed by Members of Parliament, which largely duplicates the role of central ministries including health and education, further compounds the problem. The odd result is that this alienates the ordinary citizens from holding constitutional institutions to account without mentioning the fact that this shifts accountability from constitutional institutions to institutions of the executive that largely operate outside the checks and balances enshrined in the constitution.

The rise in political literature on the state decline, political decomposition, or political recession in Africa explains some of the current challenges on constitutional development across the

world. The centralised state in Kenya exhibits attributes of a declining state i.e. the shrinkage in competence, credibility, and probity of the state. Given this reality, this study presents a case for the deflation of executive power and its reallocation to lower levels and the dispersion of social, economic, and political life away from the centre towards a more enclosed, self-reliant, and federal structure[26]

The arguments for or against federal or devolved structures in Kenya have been emotive. The arguments whether for or against, have lacked a researched basis on the pros and cons of the federal system. Indeed, no research has gone into answering the question as to how a federal system could cure the threat of negative ethnicity in Kenya. By addressing this, the study seeks to inform the ongoing constitutional debate and to advocate diffusion of power through a construction of more than two centres of power to deflate constitutionally, the over centralised Kenyan state.

The study also goes to some length to broach and interrogate the issue of the definition of who the Kenyan people are. It argues that the Kenyan law must rise to the challenge of defining who the Kenyan people are and avoid ambiguity. We argue that reference to the Kenyan people actually means the forty-two tribes (ethnic groups), which are the 'nations' of Kenya. The study argues that constitutional law in Kenya ought to make a positive contribution to this debate by explicitly recognising the Kenyan ethnic groups.

[26] This point is well made by Naomi Chazan, in the Anatomy of Ghanaian politics pp 331-353. We fully agree with it and find resonance with our argument.

1.3 Research Methodology, Objectives and Hypothesis

1.3.1 Research Methodology

This research benefits from the analysis of secondary data, including textbooks and Internet material on this subject, journals, court cases and newspaper reports. Given the nature of the topic, which oscillates between Law, social anthropology and Political Science, this research takes an eclectic approach. We adopt an interdisciplinary approach to bring in literature on comparative constitutional law theory, Political theory, social anthropology and a comparative history of constitution making.

1.3.2 Purpose of the Study

The thrust of this study is to present a case for the deflation and reallocation of state power and the dispersion of social, economic, and political life away from the centralised state towards more devolved semi autonomous federal structures. The study notes the rise in political and legal literature that points to the decline of the state, political decomposition, and or political recession as well as recent political and constitutional challenges in Africa. While arguing that the imperial presidency has muzzled democratic space, the study suggests that in many respects, the Kenyan state is in a decline. This is manifested through shrinking competence (in its ability to deliver to the Kenyan people), credibility (it is out of touch and too removed from the majority of its people), and probity (has failed to keep its words and reneges on promises it makes).

1.3.3 Specific Objectives

The following specific objectives guide this study:

a) To justify federal constitutional governance structures for Kenya as a means of entrenching constitutionalism and democracy.

b) Through comparative constitutional law, draw from examples of how polarized societies have employed federal structures to address specific circumstances in support of the first objective.

c) Examine the causes of Kenya's constitutional crisis, analyse its genesis and history, with a focus on constitutional amendments aimed at centralizing power in the presidency.

1.3.3 Hypothesis

Our hypothesis is that for a legitimate and sustainable constitutional outcome, Kenya's new constitution should embrace the principles of popular participation and constitutionalism. The assumption here is that the elites and the masses transfer loyalty to institutions due to values derived: The higher the level of value returns, the higher the level of loyalty. Constitutional design is a function of identification of these core interests. In other words, without the apriori identification of interests, and clear manifestations of these issues, the result is an abstract design that does not respond to the core interests of the average Kenyan citizen.

1.3.4 Assumptions

The study makes several assumptions. First, that the critics of the Bomas draft and its provisions on devolved government serve self-interests that are not necessarily shared by the majority of the Kenyan People. That by altering the provisions of the Bomas draft on devolution, the Wako draft (put to the referendum) drifted away from popular will. The resounding rejection of the Wako

draft by the Kenyan people in the November referendum exemplifies this fact best. Secondly, that the threat of existing inequalities, the growing ethnic polarisation, especially as seen in the run up to the referendum and the increased ethnic polarisation, inspires reasonable Kenyans to demand a more equitable and sustainable democratic structure best achieved through the adoption of a federal governance structure in the new constitution.

1.4 Scope of the study

The first chapter lays out the problem statement, justification and literature review for the study. The second chapter dwells on the theory and political applications of federalism. It makes the case for the adoption of federal structures as a means of increasing and safeguarding people's voice in Kenya. Federalism is presented as a necessary constitutional device to manage the political, social and economic divide in Kenya. Relevant federal constitutional experiences are cited. The third chapter explores historical origins of the imperial presidency beginning with an assessment of the successive and deliberate constitutional amendments since the early sixties, and the entrenchment of the politics of ethnicity in Kenya over the years. Specifically, we explore the nature of constitutional law and its response to the pursuit of centralized democracy.

The fourth chapter goes into length to review the federal structures proposed in the Bomas draft, we suggest that Kenya's long-term stability, in our view, lies in an open acknowledgement and clear resolve to deal with the question of the deep ethnic divide and the associated constitutional problems.

The alienation of the majority of Kenyans from the effective participation in the governance of their national affairs to attributed to deliberate designs of the political elites, and the

misinterpretation or distortion of the role of executive power vis-à-vis people's power. The genesis and the execution of the Constitution review process through the creation of the Constitution of Kenya Review Commission (CKRC) is the culmination, in our view, of the citizens' call for a broader basis of accountability and self-governance.

The "people" concept in the Kenyan politics forms part of the second objective. We define the people, their roles and identity, while drawing a parallel between the constitution making process in the United States of America and Kenya. We recount the processes from the promulgation of the CKRC Act leading to the "Bomas" draft or the people's process, consensus building efforts, the enactment of the Consensus Act, and finally the draft constitution (also called the Wako Draft) that was put to the referendum.

1.5 Literature Review

1.5.1 Defining Democracy

The Greek words "demos" and "cratos" form the cradle of the term democracy. Demo means people and cratos means government. Democracy therefore means a government of the people, by the people and for the people[27] and a system of government under which the people exercise the governing power either directly or through representation, periodically elected by them.[28] A state may be termed democratic if it provides institutions for the expression and, in the last analysis, the supremacy of the popular will on basic questions such as social direction and

[27] This statement is now synonymous with the definition of democracy though initially associated with Abraham Lincolin.
[28] Op cit. Page 137.

policy. Other factors such as equality, fraternal feeling and the size of the state, are desirable and make for its successful working. Political liberty is the indispensable minimum of a democracy.

The essence of political liberty is the right to bind every person with the decisions of government and the right of all to contribute to the making and re-making of those decisions. The opportunity for political participation together with that of political equality and alternative government, are necessary ingredients for democracy. However, this should find anchor in tolerance and compromise among the members of the community; there must be a sense of give and take. This is necessary because democracy involves the conception of majority rule, and the acquiescence of the minority in the decision of the majority. Further, such a temper can only be in a society with "a necessary condition of free institutions that the boundaries of governments should coincide in the main, with those of nationalities."[29] The sense of belonging together creates a readiness on the part of the members of a state to subordinate their differences to the common good.

Democracy demands from the common person a certain level of ability and character "rational conduct and active participation in the government, the intelligent understanding of the public affairs, independent judgement, tolerance and unselfish devotion to the public interest".[30] Democracy equally requires a proper organisation and leadership. Such leadership ought to demonstrate a will to give a clear vision, gauging the needs of the people and formulation of the means for the realization of those needs, self-reliance, honesty, and a sense of responsibility. To the extent that leaders display these qualities, they can contribute to democracy.

[29] Ibid Page 139.
[30] Ibid page 139

1.5.2 Democracy and its critics

Critics however, point to democracy's defects. They argue that most democratic ideals are difficult to achieve. They say that democracy, so called, thrives on people's ignorance. The measure of democracy is through quantity, not quality with votes counted and not weighed. A large number of citizens still regard government as something quite apart from the main business of their lives, in which they have no vital role. Sir Henry Maine went so far as to say that democracy can never represent the rule of many because, as a rule, the people merely accept the opinions of their leaders. The principle and practice of representation are also faulty. According to Cole, no man can represent another; at the very best one can only represent a function. Others like Voltaire, question some of the principles of democracy such as political equality, and majority rule. Voltaire argues that equality is a myth and that it is impossible for men to be equal as it is impossible for two professors of theology not to be jealous of each other.

To Fareed Zakaria, democracy as defined has its dark sides. Across the globe, democratically elected governments, often the ones that have even been re-elected or reaffirmed through referenda, are routinely ignoring constitutional limits on their power and depriving their citizens of their basic rights. This disturbing phenomenon is what Fareed refers to as the "illiberal democracy".

Fareed argues further, for people in the west, democracy means liberal democracy, a political system marked not only by the free and fair elections, but also by the rule of law, separation of powers, and the protection of basic liberties of speech, assembly, religion and property. This assumption needs questioning in the African context. The lesson drawn from some of the world's

known dictators is illustrative. People like Adolf Hitler, Mobutu Seseko, Robert Mugabe and Kenya's Daniel Arap Moi ascended and retained power through free and fair elections. Fareed argues that in the event of free and fair elections in the Arab world today, it would usher in regimes that are more intolerant, reactionary and anti-western. Recent events vindicate Fareed with the recent electoral victory of Hamas movement in the Palestinian elections.

1.5.3 Democracy: A way of life?

To Samuel P Huntington, elections, open free and fair, are the essence of democracy, the inescapable sine qua non. Governments produced by elections may be inefficient, corrupt, short sighted, irresponsible, dominated by special interests, and incapable of adopting policies demanded by the public good. Such qualities make these governments undesirable but not necessarily, undemocratic. Democracy is one public virtue, not the only one, and the relation of democracy to other public virtues and issues should aid the understanding, to distinguish democracy from other characteristic of political systems[31].

For Fareed, the issue is constitutional liberalism. This is not about the procedures for selecting government, but rather, government's goals. It refers to the tradition, deep in western history, which seeks to protect an individual's autonomy and dignity against coercion, whatever the source, the state, church or society. Constitutional liberalism emphasises checks and balances on the power of government, equality under law, impartial courts and tribunals, and the separation of church from the state. Constitutional liberalism argues that human beings have certain inalienable rights; natural rights and that government must accept a basic law, limiting its own powers to secure them.

Fareed concludes by suggesting that democracy, as we have lived it, has always been what Aristotle called a "mixed regime". It has an elected government, but also constitutional laws and rights, an independent judiciary, strong political parties, churches, business, private associations, and professional elites. Political democracy is essentially people having power, but the system is a complex one with many parts, not all of them subject to elections. The purpose of many of these undemocratic institutions and groups is to temper public passions, educate citizens, guide democracy, and thereby secure liberty.

Proponents of democracy have argued however, that despite its defects, democracy is still the best form of government. It postulates a measure of personal freedom and equal consideration for all classes. To John Stuart Mills, democracy is superior to other forms of government because the rights and interests of every person are secure from being disregarded only when the person interested is himself able and is habitually disposed to stand up for them. In addition, the general prosperity attains greater height and is diffused in proportion to the amount and variety of personal energies enlisted in promoting it. History shows that democratic governments perform better the functions of government. However, if democracy has failed to subdue the clash of capital and labour, and to establish peace between nations, and to abolish corruption, it is because no form of government can be expected to accomplish a revolution in human nature. No realistic thinker regards democracy as the ideal form of government; it is at best, the least objectionable form of government that is practicable.

The last century has witnessed the rise of democracy a practice that was once associated with a handful of nations, is now the standard form of government for humankind. To Fareed Zakaria,

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[31] Samuel P. Huntington: The third wave of democracy, Democratization in the late twentieth century, page 20

monarchies are antique, fascism and communism utterly discredited. For the majority of the world, democracy is the sole surviving source of political legitimacy. To him, democracy has grown from a form of government to a way of life.

1.5.4 Participatory constitution making

Many states and nations are undertaking reviews of their Constitutions partly as a response to changing configurations of power, the quest for effective forms of participation and accountability, the recognition of the old and new forms of identity, and the new perceptions of the state purposes[32]. Democracy must engage the people; it must recognise and safeguard the normative democratic values of dialogue, tolerance, pluralism, probity and fairness. In general, the American constitution serves to ensure peaceful, long-term operation of democracy in the face of the persistent social differences, and plurality among religious, ethnic, cultural, among others. James Madison saw differences and diversity as strengths rather than weaknesses if channelled through constitutional structures that would promote deliberation and lead groups to check, rather than exploit other groups.[33]

On the fear of secession, Sunstein argues that there is a case for entrenching institutional arrangements and substantive rights. His thesis is that in a newly formed nation, people might want to do this as part of a pre-commitment strategy. Some rights will be entrenched because they are pre- or extra-political. Individuals ought to exercise them regardless of what the

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[32] Yash Pal Ghai in a forward to Willy Mutunga: Constitution Making from the Middle.
[33] Cass Sunstein: Constitutionalism and secession, 58 University of Chicago Law Review. 633.

majority thinks. In applying this, the constitution becomes a self-conscious check on self-government, "attempting to minimise a private sphere from public power" [34]

Walter Murphy suggests that democracy's central values lie in the participation of the people in self-governance and most crucially, on popular elections of representatives who govern in institutions. Constitutionalism, in his view, tends to seek out "institutional restraints on substantive matters to prevent lapses into authoritarianism or even totalitarian systems cloaked with populist trappings" [35]. In discussing constitutional democracy, Murphy argues that the two theories are in tension with each other. Constitutionalism can prevent a majority from effectively depriving minorities of participation rights, while democracy can prevent the paralysis that may be associated with rigid constitutionalism. Both constitutionalism and democracy, he avers, rest on the respect for human worth and dignity.

The South African constitution making experience is referred to as 'democratic constitution-making' or new constitutionalism.[36] To this extent, the 'new constitutionalism' borrows from democracy, to ensure that the populace is involved in the process of constitution making.

Key to the idea of constitutionalism is the extent to which a majority and diversity of the population are included. The Kenyan politico-economic culture is exclusivist and as a result, has allowed a situation where a few ethnic groups dominate the means of production and consequently, state power, while denying the majority of Kenyans access.[37] Constitutionalism

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[34] This is in simple constitutionalization but not to immunize a constitutional provision from amendment.
[35] Constitutions, constitutionalism and democracy in Constitutions and Democracy: Transitions in the contemporary world, Douglas Greenberg et al eds. 1993
[36] Vivien, Hart: Democratic Constitution making, US Institute of Peace, Special Report no.107, 2003.
[37] Musambayi Katumanga on Political economy of constitutional amendments in Kenya 1895 to 1997. SAREAT- working papers 005/98.

will only emerge if the constitution seeks to protect citizens from arbitrary exercise of powers and facilitate enjoyment of life within the parameters of freedom from want.

1.5.5 Ethnicity, political elites and constitutionalism

For better or for worse, ethnicity can and does colour interactions between economic, and political realms, between the rulers and the ruled, between the wealthy and the poor.[38] Nicholas Nyangira[39]argues that both class and ethnicity are crucial in gaining a balanced perspective on the politics of Kenya. Understanding ethnicity requires historical perspectives traced over time, the interplay between organisational initiatives in the colonial era, the rise of ethnic nationalism, and the shifting alliances between Kenya's ethnic groups. David Throup[40] identifies the high politics and the interplay of elite competition for power in Kenya. He captures the desire to protect the nature of political factions and alliances, whether ethnic or not, while probing the contradictions between the desire to promote a trans-ethnic Kenyan nationalism on the one hand, and on the other, the necessity for any Kenyan president to construct a politically united ethnic base as a foundation for hegemonic political coalition[41].

Ng'ethe and Katumanga[42] argue that the political elites will back constitutional changes that facilitate transition if they perceive them to be not only in their interest, but also feasible. They argue, "No constitution will be expected to evolve values of mutual respect among citizens if it is woven around the ideology of exclusivism i.e. a constitution that entrenches the existing

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[38] Michael G Schatzberg, Political Economy of Kenya PRAEGER, 1987.
[39] Ethnicity, class, and politics in Kenya in the Schatzberg book.
[40] The construction and destruction of the Kenyatta state.
[41] The formation of the NARC government and the very argument of the expansion of the current government into one of national unity attest to this argument.
[42] In Transition and politics of constitution Making: a comparative study of Uganda, South Africa, and Kenya

inequalities and concentration of powers in one arm of the government"[43]. For where this happens, it allows a few political groups to dominate the means of production and consequently state power, while denying the majority of the population access to the same. Constitutionalism, they suggest, will only emerge where the constitution seeks to protect citizens from arbitrariness in the exercise of power. They conclude that reforms, which do not strive to reconfigure the state with a view to reorganizing society by changing economic, political and legal structures, will not facilitate constitutional stability.

The experiment with a centralized state has over the past decades of Africa's experience with self-government, proved a failure.[44] A centralized democracy is a superficial reform that represents little change in the fundamental distribution of power in the life chances of its citizens. Lasting democracy rarely emerges from the politics of the centre because the centre is too distant from the bulk of the people and its occupants are too prone to subornation by the intense amounts of wealth at the centre as opposed to the grassroots.

The term consociational democracy describes political systems in which conflicts are resolved through negotiations and groups with different points of view settle their differences in the spirit of tolerance and compromise rather than by application of the principles of majority rule.[45] This is consistent with what Justice Kennedy in the case of US Term Limit v. Thornton[46], described as the constitution having split the atom of sovereignty 'creating a nation in which people saw themselves as citizens of both their states and of a larger nation of which the state was a part. Examples, of the constitutional federal forms include Canada, Australia, India, Germany,

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[43] Ibid, page 38
[44] This is the thrust of the book edited by S.Wunsch and Dele Olowu entitled "the failure of the centralised African state, institutions and self- governance in Africa
[45] Bertand Badie and Pierre Birmbam: The Sociology of the State page 130.
[46] 514, U.S. 779 (1995)

Switzerland, South Africa, Ethiopia and Venezuela, among others, to protect and accommodate minority interests.

Our point of departure therefore is the extent to which this literature relates to the Kenyan political and constitutional context. At the heart of the contentious issues, is the argument that the Bomas process was illegitimate the delegates were handpicked and did not represent the Kenyan people. However, they give no definition of what the Kenyan people means even as they make the case. Indeed the arguments in the Njoya case went deeper to elaborate this point. The case said that this time around, it was the responsibility of the Kenyan people to decide on the form and content of their constitution. To them, the best form of the Kenyan people's representation is through the constituent assembly and eventually the subjection of that outcome to a referendum expressly.

1.5.6 Constitution making: The path (not) taken?

On the issue of constituting a constituent assembly, it is our view that the Constituent Assembly is not necessarily the best form of entrenching the interests of the Kenyan people. If anything, we do not see how different the constituting of the Constituent assembly is likely to be from the selection of the Bomas delegates. More telling however, is the fact that the very proponents of the centrality of the people in the constitution making process are averse to a devolved form of government, which diffuses power arrangements between the national and sub-national level. They prefer a centralised or unitary constitutional structure that vests governmental powers in a centralised government with only delegated authority to lower structures.

This study draws on the concept of the people as contained in the African Charter on Human and Peoples' rights. More fundamentally, the study observes that constitutionalism and democracy in Kenya face several crises: the threat of national fragmentation, state delegitimation and decline coupled with an acute economic decline. To survive, constitutionalism and democracy have to pose fundamental questions about the nature of social diversity and the terms of political and social cohabitation in Kenya. The new thinking must begin with the recognition of the problematic character of nationhood itself. Constitutionalism will have to reconstitute not just the state, and state society relations, but nationhood through its attention to the rights of nationalities in a plural and diverse environment.

The study makes the case for participatory democracy and argues that the Kenyan people (nations, or ethnic groups) should be the basis for democratic organisation. Constitutional law in should reflect this reality in Kenya. The existing literature makes the arguments for and against democracy, makes assumptions on how democracy ought to be enhanced. We observe however, that the reality of the American constitution presents judicial review as having taken the place of the people in amending and deciding what the constitution is. Small wonder it is often said that the American constitution is what the Supreme Court decides. We argue here that the people of Kenya constitute the nation state and any constitutional arrangement that does not recognise this, fails to measure up to the peoples' expectation.

CHAPTER TWO: THE PEOPLE, CONSTITUTIONALISM AND FEDERALISM

2.0 Introduction

This chapter wrestles with a number of questions beginning with who or what the term "people" means. The question asked is what is constitutionalism? What is the justification for federal structures as a means of ensuring and sustaining people's voices in the constitution making? We cite the experience of other jurisdictions in using the constitution to deal with the entrenchment and safeguard of the role of people in a participatory democracy. It is our view that the constitutional mainstreaming of popular participation by Kenyan citizens in self-governance is critical if participatory democracy is to be achieved in Kenya.

While reviewing Kenya's National Constitutional Conference (Bomas), we argue that this was Kenya's first and only attempt at an inclusive and representative process in constitution making. Lessons from the constitution making process in the US at the Philadelphia convention are used. We observe that at the end of the process the Americans, through negotiations, got a constitution that might not have been the most agreeable document, but one that the majority accepted as representing the interests of the people. The Bomas process, like the United States convention, made very good attempts at recognising federalism as a political and constitutional vehicle for safeguarding the voices of the people. The draft recommends federalism as a mechanism of entrenching participatory democracy and constitutionalism in Kenya.

A historical perspective is taken on the colonial experience in Kenya and Africa in general. Colonialism and post-colonial history points to the creation of state–society relations that are primarily administrative and extractive. The independence constitution, like those of many other

African states sanctioned parliamentarism as the dominant articulating mechanism in the regulation of state-society relations. Suffice it to note that experience points to the fact that this is a wrongly premised assumption, since this democratic practice had no experiential basis in colonial and pre-colonial society. The colonialists had not used parliamentarism but had invoked executive fiats as a way of dominating and ruling over Kenyans. When at independence the colonial masters acceded to a Westminster model for an independent Kenya, observers see this as the very antithesis of colonial rule. Liberal individualism and its assumption of social homogenisation of the equivalence of individuals and social conditions, as provided in the constitution, could not easily accommodate or reflect cultural and social diversity. Liberal constitutionalism therefore fails to accommodate the effects of the colonial and nationalist activation in Kenya that expresses itself through the assertion of ethnic, cultural, and religious distinctiveness, in the questioning of the terms of participation in the state and its spatial arrangements, and the associated demand for sectional sovereignty or autonomy[47].

Kenya is among the many countries that have in the recent past taken on the task of establishing a new constitutional order. This process recognises the need for a democratic, legitimate and popularly accepted constitution making/review. The reason for this is simple. The constitution sets new norms for governance as it creates and empowers new democratic institutions, protects the rights of citizens to property, and promotes the rule of law, and due process. The constitution is therefore a binding political and legal instrument, whose crafting and provisions ought to reflect the voices of the people.

[47] Examples of the Somalis who live in the North east of Kenya's demands for autonomy, the pre-independence advocates for the "majimbo" constitution attest to this. Further, it is this very notion that lies at the heart of the demand for federal governance as opposed to unitary governance in the Constitution Review process in Kenya

Kenya is not alone in seeking to overhaul its constitution. Many African countries have been framing new constitutions or reforming existing ones. Most of these reforms have had their main thrust in capturing the interests and wishes of diverse groups in the society. They have also sought to have the constitution making process open, democratic and transparent. The recent examples are from the Republic of South Africa, Republic of Uganda, Republic of Mozambique, Republic of Ghana, and the Republic of Zambia.

We now proceed to examine a number of these issues in detail beginning with what a constitution is and the meaning of constitutionalism.

2.1 Constitutions and constitutionalism

Walter Murphy in his discussion of constitutionalism and democracy looks at what the constitution is and where it derives its authority. What are its functions? What does it include? How does the constitution validly change over time? He begins by observing that constitutions pattern the political system. It is the supreme law, the "Grundnorm" as Kelsen observed. To him, constitutions fall within a spectrum of what he calls constitutional authority. He cites these as sham, cosmetic reality, and a charter for governments, as a guardian of fundamental rights, constitutions as a covenant, symbol and aspiration.

The Constitution, which is a charter for government, sketches the fundamental methods of governmental operations. Where the text is constitutive and embodies democratic theory, it is a guardian of fundamental rights, and such rights as the right to political participation. As a covenant, constitutions represent a people's agreement to transform into a nation. It functions as

a marriage covenant for a generation consummated through the pledging partner's pro-active consent to remain a nation for better or for worse richer or poorer, in peace and war.

Okoth Ogendo argues that there is no single definition of what a constitution is. Throughout history, he observes, different societies have pronounced varying factual or philosophical conditions as equivalent to constitutions. This range from a single constitutive act, a fundamental norm or value, a set of basic aspirations or expectations, to a social and economic programme. The critical point however is to have a common agreement on what will be called the constitution. This should not only have a universal character, but recognised as the primary point of reference in the society. Therefore every society has a constitution[48]

The term constitutionalism by deduction means at least two things, fidelity to life under the norm or value, and acceptance of that norm or value in ordinary political discourse. Okoth-Ogendo would argue further that a system of constitutional government would therefore mean that the society has a 'power map' reflective of its constitution. A constitutional government would however be more than just the distribution and exercise of power in accordance with the constitution. It pre-supposes the existence of certain thresholds: sufficient civic consciousness and maturity capable of tolerating diversity where homogeneity is not possible or desirable, a great deal of political hygiene i.e. an ability to manage competing interests and struggles for power on a level playing field, and lastly, a level of economic development capable of absorbing the costs associated with constitutionalism.

Prof Jackton Ojwang defines constitutionalism as the conduct of government within a system of checks and of accountability. He would argue, as would Carl J. Friedrich, that constitutionalism

is a principle, which begins from the profound values of humanity and of human society, and these revolve around self and the individual. The quest for the rights of individuals is yet another description of constitutionalism. What this means is that a governmental system that guarantees and safeguards such rights practices constitutionalism[49].

To Richard Kay, the purpose of a constitution is to lay out fixed rules that can affect human conduct and thereby keep government in order. Constitutionalism, he argues, implements the rule of law: it brings about predictability and security in the relations of individuals to the government by defining in advance, the power that puts limits of that government[50].

Kenya's and Africa's experience in general, puts to test a number of these assumptions. What emerges confirms the fact that the existence of constitutions does not necessarily confer with it constitutionalism.

2.2 Constitutions: Africa and Kenya's experience

Africa's experience since 1957 demonstrates a catalogue of constitutional failures in regulating the exercise of political power. Few African governments have valued them other than the rhetoric. Okoth-Ogendo raises both the dilemma and the paradox in the African constitutional experience. On the paradox, he observes the simultaneous existence of what appears as a clear commitment by African political elites to the idea of constitutions and an equally emphatic rejection of the classical or liberal democratic notions of constitutionalism.

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[48] In his article titled the constitution of Kenya: its tripartite character discussed at a seminar for orientation of members of parliament in 1993.
[49] JB Ojwang in an article "Constitutionalism- in classical Terms and in African Nationhood 1989 in Lesotho National University.
[50] In Constitutionalism, the philosophical foundations.

Okoth-Ogendo observes that the African political elites use the constitution to decentralize power by: the extension of appointive authority of the Chief Executive Officers to all public service offices, subjection of political recruitment at all levels to strict party sponsorship, expansion of the coercive powers of the state by allowing extensive derogation from the Bill of Rights wherever these were justiciable, and lastly, to ensure that the constitutional order conformed to the inherited legal order. All these meant the reconstitution of the colonial power map. This development is the very antithesis our discourse in this thesis. The kind of decentralisation and or devolution that we are advocating for has to engender fundamental structural changes to ensure the safeguarding of the people's voices in the new constitution.

In Kenya, the character of the reconstituted state begins to form around three factors, the rise of the imperial presidency, shrinking political arena, and the military factor. The imperial presidency fuses executive power in a single individual, ensures the supremacy of the office of the president over all other organs of government and lifts the presidency to enjoy immunity from the legal process, civil, and criminal as long as the president remained in office.

The Tanzania and Kenya models provide clear memories of the most recent past prior to the wave of the multi-party democracy in the region. The picture begins with the heads of states as the heads of their respective political parties which ensures that the legal basis executive power resides in administrative law, a complex maze of highly structured and coercive instruments, rather than in constitutional law.

In concluding his observations, Okoth-Ogendo argues that the idea of a constitution has indeed survived in Africa. The problem however, is that fundamental functions of a constitution, at least

along the liberal democratic theory, to regulate the use of executive power, are clearly not one that African constitutions perform.

The conclusions from Okoth-Ogendo's works is our starting point as we offer some ideas on transforming the Kenyan constitution to truly embrace and entrench the wishes of the Kenyan people to self-govern, and to effectively hold their government to account. We trace the history and practice on the institution of constitutions in Africa and Kenya in particular. Constitutions have existed over the years in Africa, largely founded on liberal democratic principles handed down at independence or reconstituted upon military coups or abrogation of the independent constitutions as the case may be. However, we have yet to witness a deep commitment to the principles of separation of power, checks and balances in the exercise of executive power. Indeed Africa has yet to learn lessons. Even where the opportunity exists to start afresh such as in the Kenyan case, the irony is that political elites still call for a strong, all pervading institution of the presidency, akin to an imperial presidency.

This brings us to the point of un-packaging the role of the people in the unfolding constitutional arrangements.

2.3 The concept of the People: Role and place in constitutional reforms

The Njoya case declared that this time around, the constitution-making project belongs to the people. The current constitution did not as we know, involve in its evolution, the people of Kenya. It was negotiated by select elite who did not necessarily have the interests of all Kenyans at heart. Further, all the amendments and alterations done on the constitution over the years did not in any way refer to the people. Most of the amendments especially those of the 1960s,

consolidated the authority of the executive, almost at the expense of all the other organs of government. The people were to this extent, strangers to the process of constitutional change. Besides, from a constitutionalism standpoint, the general profile of constitutional change was un-progressive. Rather than promote checks - and - balances, the changes tended to subordinate both the Legislature and the Judiciary to the rising institution of the imperial executive with hardly any informed participation by the people.

Indeed the very popular demand for constitutional reform today, is a reaction to an executive - centred constitutional order. Several factors contribute to the upsurge in a call for a new constitution order. Kenyans have increasingly become enlightened, what with global developments thrust upon them, and the increased despondency with the abuse of public power and individual rights. These have combined to move Kenyans to a realisation that constitutional change is desirable; that the centralised power of government ought to respond to more checks and balances; and that greater governmental accountability can only be realised with the operation of a greater plurality of decision - making centres hence the justification for a federal structure.

The essence of the CKRC Act was therefore to bring the constitution - making process to the people. A new constitution's legitimacy should have as a result, a strong and clearer imprint of the people in constitution- making than ever before. The constitution carries the most basic principles of law that relate to a nation's main political arrangements. These include governance patterns, as well as the public power schemes that the people have accepted, or acquiesced in, or been subjected to. Where such public power arrangements, find broad acceptance, outstanding problems of politics become only technical in nature. Where the people have acquiesced in such arrangements, again the unresolved issues of politics are in essence limited — because there is

no major quarrel with the power dispensations. Where the people have been subjected to an unpopular public power dispensation, a major problem of politics obtains, which persistently cries out for new political dispensations - and these must be given effect by new constitutional dispensations.

The people concept underscores popular constitutionalist theorists' premise that citizens play an active role in the day-to-day business of constitutional making outside the amendment clauses enshrined in the constitution. These occur at two levels and through: First, cultural expression and engagement i.e. social tolerance, stigma, equality, and other dynamics that contribute to the establishment and maintenance of constitutional norms. Secondly, traditional political channels, here the citizen sends a message along participatory pathways i.e. preferences, participation, and legitimacy. Preferences on a given constitutional issue, delineated through a constitutional culture by acts of political participation. And finally, the citizen grants legitimacy through compliance with constitutional norms.

The Bomas draft and the subsequent 'Wako' draft recognise and acclaim the concept of "we the people" of Kenya. The problem however is that the two drafts do not define who the people of Kenya are. The African Charter on Human and People's rights is one of the many instruments that employ the use of the term people. The French Constituent Assembly referred to both the rights of man and of peoples[51]. The adoption of the UN Charter was in the name of "we the people". In articles 1 to 55 the UN charter speaks of peoples in relation to the rights of self determination. The Common article one of the international covenant on economic, social and cultural rights and on civil and political rights 1966 provides "all peoples have a right to self-

[51] Ian Brownlie: The rights of the Peoples in Modern International Law. 9 Bull Austral Society Legal Philosophy (1985) 104.

determination. By virtue of that right they freely determine their political status and freely pursue their economic, social, and cultural development.

To agree with Professor Umozurike, the concept of the people's rights recognizes collectivities within the state, which may be controlled by one or more groups defined in terms of religion, language or class[52]. For the purposes of self-determination, the term peoples' rights have the following elements: a) the term people denote a social entity possessing a clear identity and its own characteristics. b) It implies a relationship with a territory, c) A people should not be confused with ethnic, religious or linguistic minorities, whose existence and rights recognised in articles 27 of international covenant on civil and political rights.

The Katangese congress –vs.-Zaire case demonstrated the controversy on the definition of the concept of the people. The issue in the case was not self-determination for all Zairians as a people but specifically for the Katangese. The Commission in dismissing the case, failed to address the definition of who the people are in the African Charter for Human and Peoples rights. Perhaps not surprisingly as the drafters had created the same confusion fearing as they said, to enter into difficult discussion of the term.

It is our view, that in looking at the question of who the people are in Kenya, we should construct that understanding from the over forty tribes/peoples of Kenya. The Kenyan constitution should recognise ethnic groups, their identity and geographical coverage. These ethnic groups have a long cultural history that should be recognised by the constitution. Kenya is divided along tribal lines, distribution of national resources have over the last four decades exacerbated this problem. It is therefore an anomaly to make reference to "we the people" of

Kenya and assume that the term is all embracing. There are people in parts of Kenya, such as the Somalis and Turkanas who, because of marginalisation, think they are not part of Kenya. Indeed some policy prescriptions have served to alienate some Kenyans from accessing state resources.

The American constitution opens with the following preamble: "we the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defences, promote the general welfare, and the blessings of the liberty to ourselves and our prosperity, do ordain and establish this constitution for the United States of America"[53]. The Bomas draft has the preamble as a prologue to the constitution, it proclaims the source of the constitution's authority and the great ends accomplished under it. The American constitution as discussed from the preamble, claims obedience, not simply because it is intrinsic excellence or the merit of its principles, but it is the people, who order and establish it.

The constitution making process should emanate from the people. To paraphrase Chief Justice Marshalls, a government of the union is emphatically and truly, a government of the people. In form and substance, it emanates from them. The people exercise power and for their benefit grant power. The basic argument is that the people and their elected representatives should- and often do- play, a substantial role in the creation, interpretation, evolution and enhancement of constitutional norm. This popular involvement takes place through the political process, but outside the formal confines of amendment clauses in the constitution, or a constitutional moment.

[52] Professor U. Oji Umozurike: The Afrcan Charter on Human and Peoples' rights, 2 Martinus Nijhoff Publishers The Hague 1991 pg 89.
[53] This is the preamble of the constitution of the United States of America.

Popular constitutionalists embrace the term people much as they are reluctant to define it. People, they say inhabit the shoes of among other entities, the electorate, prominent interests groups, identity based social movements, the delegates such as those at the Bomas process, parliament, the President, political parties etc. Legal scholars distil perspectives on the "people" into two highly polarised visions. One that trusts the people to make interpretive decisions about the constitution and one that does not. This constitutional theory sidesteps many of the complex and problematic aspects of how popular constitutionalism work:.

> We would rather use the term people to refer to citizens, not elected representatives, interest groups or political parties. Citizens are, admittedly, only one part of representative democratic culture in which the individual relationship with their governance often mediated by third parties. However, it is critical to define their identity and isolate their distinct role apart from representative institutions both to the understanding of what popular constitutionalists mean when they use the word "popular" and to breaking down the abstractions upon which constitutional theory has grown too reliant[54].

The history of agitation for constitutional change in Kenya points to civil society organisations who, many in authority saw as "constitutional insurgents", seeking to alter the constitution by communicating and operating outside formal political channels, exercising direct popular power, for example through extra legal assemblies, mass protests, strikes and boycotts.

From a normative front, popular constitutionalism produces at least two benefits: enhancing legitimacy and greater capacity for ongoing self-definition. It generates greater fidelity to constitutional values as the people expect their own constitutional values to matter while the constitution sustains its legitimacy and authority by incorporating quintessentially democratic attitude in which citizens know themselves as authorities, and authors of their own law.

The Constitution of Kenya Review Act[55] builds on the principles of constitutionalism on the premise that for the constitution to be legitimate, it must be people driven. The primary interest of the Kenyan people in securing a reformed constitution rests upon certain broad social welfare issues. In any country, citizens do expect governance systems to secure values such as equity, justice, peace and tranquillity. The attainment of these ends intimately link with the management of public welfare issues - in particular economic and social issues. Therefore, the critical issues underlying the procedural arrangements and juridical logistics of the constitutional order are: (i) access to economic sustenance; (ii) equity in the distribution of economic resources; and (iii) social empowerment for a better quality of life.

The realisation of the above-mentioned attributes is a function of power allocation and power management. These are the ultimate concerns of any constitution worth its salt. Hence, a constitution establishes the most crucial public institutions, defines their functions, and assigns them powers. The Constitution, then, must address the issue of the relationships among the various organs thus established, and must deal with checks and balances. Appropriate checks and balances, in their precise details, for any particular country will depend on the social and political experiences of that country; the broad outlook of its people; that country's moral ethos, and its fundamental policy goals.

It is our suggestion that in the search for a better constitutional dispensation, Kenyans expect a distribution of power along a devolved federal structure. This will enable them participate in the management of their federal affairs as well as national affairs as appropriately delineated in the final constitution.

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[54] JM Balkin: Populism and progressivism as constitutional categories, 104 Yale L.J. 1935, 1950-54 (1995) in Distinguishing Populist and progressive influences on Constitutional theory.
[55] Constitutional amendment Act.

2.4 Was the National Constitutional Conference (Bomas) an inclusive constitution making process?

The Bomas conference goes down in history as the best attempt at an inclusive and representative process in the Kenyan constitution making process. The discussions and final proposals of the draft Bomas constitution on federal and devolved governments form the basis of our thesis. The conference report noted that the devolution question is not only one of the concepts that the Review Act mandates the Commission to look at, but is also, one of the mechanisms that recent constitutional documents, all over the world, are presenting as a mechanism to deal with rising demands by the people. These demands include the distribution of state power and self-governance, participatory approaches to governance and development and the broader question of cultural identity[56].

The Njoya case presents the best examples of the arguments for and against the CKRC/Bomas led process.[57] The thrust of this case was to stop the work of the National constitutional conference (NCC) and to prevent parliament from enacting the draft constitution adopted by the National Constitutional Conference (NCC). The proceedings also sought a mandatory requirement for a referendum on the draft constitution from the Bomas process. The CKRC Act left it up to the NCC to decide whether or not, to refer contentious issues to the referendum. The applicants argued that such a provision violates their constitutional right to a referendum on the new constitution. They also argued that the NCC was itself unlawfully constituted and that the majority of its members were selected rather than elected directly. Further, they argued that the composition of the conference did not observe the principle of equal representation as all parliamentary constituencies and districts had the same number of representatives regardless of

[56] Devolution Report, Special Working Document for the National constitutional conference, issued on 19th August at page 32.
[57] Re: Constitution of Kenya, Njoya v Attorney General

their size, which varied considerably. Finally, the litigants sought a ruling to the effect that parliament could not repeal, nor replace the current constitution but only amend it under section 47 of the current constitution. It was therefore their contention, that s.28 of the Review Act, which required Parliament to enact the draft constitution, was invalid.

In finding for the applicants, Justice Ringera said, inter alia, the following: the people have the 'constituent power' i.e. the power to make the constitution. That this power derives from the concept of national sovereignty because the sovereignty of the republic equates with the sovereignty of the people and that the sovereignty of the people is superior to the constitution- because it is the basis of the constitution. The constitution recognises the constituent power of the people by establishing Kenya as a sovereign republic, by providing that Kenya is a multi party democracy, by providing for the amendment in s.47. To him, the constituent power should take the path of a constituent assembly as well as that of a referendum.

Ringera further asserted that the Constitution of Kenya Review Act had deprived the people of Kenya their right to a constituent assembly and referendum. His reasons: 1) the National Constitutional Conference (Bomas) does not meet the criteria for a constituent assembly because such a body should comprise elected representatives, which the NCC was not. 2) The last general elections for members of parliament, in which the constitution was an issue, these members do not constitute a constituent assembly. Theirs is a smaller role given that the majority of members of the NCC were unelected. The referendum requirement can only be satisfied, he argued, by a compulsory referendum not one contingent upon disagreement and a vote to send certain issues to the people, as under the review act s.27 (5) and (6)

This is not the place to critique the Ringera judgement. Suffice it to note, that this decision largely contributed to the ongoing constitutional crisis. It served the interests of the executive and even as the NARC government rejoiced as it mutilated the Bomas draft through the Wako draft, the Kenyan people were on the other hand waiting with their votes, to vote down the draft as presented to them by the government. To the majority of Kenyans, the rejection of the Wako draft at the referendum came as no surprise. The government, which had fronted the draft as its own project, found itself nursing political and legal wounds in the wake of the referendum.

2.5 Safeguarding or eroding Wanjiku's (people's) views?

The Bomas draft and process records clearly that Wanjiku, (representing the people) wanted a responsible and responsive government; a government that would, among other things, deliver in terms of development and security. The people wanted a government that would prevent abuses of human rights and a government that would promote their dignity. However, the political elites on the other hand worried, not about failure of the government to deliver on development, but its failure to deliver on the political front. The political elites saw development coming through delivery of the political services. They acknowledged the significance of ethnicity and the politicised nature of the government process. As a solution to ethnicity, they designed a new structure of government that would accommodate ethno-regional interests and provide opportunities for representation in senior positions of government, for the various ethnic groups. Some of the agreed issues such as devolution, divisibility of the executive were declared contentious and subjected to further negotiations among the political elites.

Arguments as to on whether to have more than one centre of power (the Prime Minister and the President) without the derailing of the executive power, tore the National Rainbow Coalition into

two main factions. One that favoured the retention of the status quo, and the other that sought to have the executive split between the prime minister and federal governments. Political mistrust and ethnicization of the factions came from the feeling by other ethnic groups that the Kikuyus, after acceding to power through the help of other ethnic groups, were keen to use the new constitution to fence off the presidency from any future access or encroachment by other groups.

This blatant subversion of the people's views was later to haunt the NARC government when citizens handed it a huge defeat at the referendum on the draft constitution. This was a protest vote by the people against what they perceived as high handedness and unilateralism by government.

The next section responds to the need to entrench, and protect people's voices in the constitution.

2.6 Safeguarding the voices of the people: Political and constitutional theory on Federalism

Political theory and comparative constitutional law offer federal systems of governance as a way of power sharing. In contrast to the highly centralized systems of government that followed major revolutionary movements in the eighteenth century Europe and the post independence Africa, federal systems take the doctrine of separation of powers to the next level. A federal system of governance constructs democracy from the people upwards and ensures the retention of power by the people to control and hold their leaders to account. Federal strategies emphasise the distribution of political power widely, provide a multiplicity of institutional structures, and facilitates citizens' participation in the governance of their own affairs through strengthened sub-national institutions. Federalism therefore, is the best vehicle for the realization of constitutionalism and democracy.

This discussion forms part of the tributaries that flow into the ocean of sovereignty in both the political and constitutional theory. The extent to which sovereignty is divisible or otherwise is the substance of the debate. In the case of ***U.S. Terms Limit Vs. Thornton***[58], Justice Kennedy described the constitution as having 'split the atom of sovereignty' with the effect of creating a nation in which people saw themselves as citizens of both their state and of the larger nation that their state was a part of. The European thought took the idea of indivisible sovereignty further by providing for legislative powers essentially reflecting the sovereign will and the control of the exercise of all other powers.

Federalism is widely employed in the world today. Examples of countries with federal systems include Canada, Australia, India, Germany, Switzerland, Belgium, Russia, South Africa, Nigeria, and Venezuela. Critical to all forms of federalism is the allocation of powers between the national and sub-national structures. Typically, the national or central government retains power over foreign affairs, the military and national defence. In other areas distribution of power varies widely.

Deep societal divisions pose a grave problem for democracy. It is generally difficult to establish and maintain democratic government in divided society than in homogeneous ones. The problem of social, economic and political divisions is greater in countries that are not yet democratic or fully democratic than in well-established democracies. The successful establishment of democratic government in divided societies requires two elements: power sharing and group autonomy. Power sharing denotes the participation of representatives of all significant communal groups in political decision-making, especially at the executive level. Group autonomy means

[58] 514, U.S. 779 (1995)

that these groups have authority to run their own internal affairs, especially in the areas of education and culture. The two characteristics are the primary attributes of a democratic system that is often referred to as power sharing democracy or, to use a technical political science term, "consociational" democracy.[59] A host of scholars have analysed the central role of these two features and are sympathetic to their adoption by divided societies.[60] Based on empirical data, Ted Robert Gurr[61] reaches the conclusion that institutions of autonomy and power sharing can usually accommodate the interests and demands of communal groups.

Long before scholars began analysing the phenomenon of power sharing democracy in the 1960s, politicians and constitution writers had designed power-sharing solutions for the problems of their divided societies. The examples of these include; Australia, Canada, Colombia, Cyprus, India, Lebanon, Malaysia, the Netherlands, and Switzerland.[62]

The experience of the United States constitution making process resonates with the constitution making process in Kenya. The fear of the British domination necessitated a clamour for a federal system in the US. Kenyans have, on their part, suffered two authoritarian regimes after colonialism in the hands of the British. The thought of an imperial presidency pushes Kenyans to a similar position with the Americans. It strengthens the call for a federal in order to diffuse and share out power.

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[59] The secondary characteristics are proportionality, especially in the legislative elections (in order to ensure a broadly representative legislature-similar to the aim of effecting a broadly constituted executive) and a minority veto on the most vital issues that affect the rights and autonomy of minorities

[60] Some of these scholars include William T. Bluhm, John McGarry, Kenneth D. McRae, David Welsh, and Steven B. wolinetz. Their most important writings on the subject can be found in the bibliography of Arend Lijphart, Power-Sharing in South Africa (Berkley, Carlifornia Institute of International Studies, University of Calfornia, 1985, page 137-71

[61] In Minorities at risk: A Global view of ethno political conflicts, Washington, D.C.: U.S. Institute of Peace Press, 1993, 292.

[62] Arend Lijphart: Constitutional design for Divided Societies, Journal of Democracy April 2004, Volume 15,Number 2.

2.7 The American constitution making experience and the voice of the people

The American constitution sets forth ideals and reflects standards that amount to an American creed. The creed stresses rights of men, equality under the law, limited government, and the government by the consent of the governed. The American philosophy of government runs " we hold these truths to be self evident, that all men are created equal, that they are endowed by their creator with certain inalienable rights, that among these are life, liberty and the pursuit of happiness". For Americans these are democratic principles for self-governance and not for some Americans to govern others.

Drawing a parallel between the US constitutional convention and the Bomas process is invaluable. The convention had Seventy-four people invited as delegates though only 52 attended. Of whom only 39 took a leading part in deliberations. The Virginia delegates, who were anxious to establish a strong central government, took advantage of an eleven-day delay in opening of the convention – a delay due to the failure of a sufficient number of delegations to appear at the scheduled opening time for the convention, to prepare a series of proposals. This gave the nationalists time to prepare a plan that imparted to the debates, a direction where the less nationalistically inclined delegates were never able to reverse. Eventually the Virginia plan, with some modifications, became the constitution.

The Virginia plan had the following ingredients: a central government with power to pass laws and with authority to enforce these laws through its executive and judicial branches. It proposed that the congress be a bicameral legislature with states represented based on wealth and population. It suggested that congress be given all powers vested in the then existing congress

plus the authority to legislate in all cases to which the separate states are incompetent. Delegates from the less populous states were afraid that the national legislature, dominated by representatives of the larger states, would overlook their interests. They favoured a less powerful national government with more independence of action by the states.

The alternative to the Virginia plan was the New Jersey plan. The plan basically proposed that congress be given power to regulate commerce and levy taxes and that all states should have the same weight in a single chambered national congress. It also suggested a plural executive to administer the laws, and a single national supreme court to supervise the interpretation of national laws by the state courts. The New Jersey plan suffered rejection even though some of its provisions found their way into the constitution.

The acrimony and near pandemonium witnessed at times during the Bomas process was not unique to Kenya's constitution making process. During the Philadelphia convention, delegates from small states grew increasingly disenchanted with the deliberations and threatened to withdraw. The convention became deadlocked over the issue of representation in the upper house of congress. Finally, the appointment of a committee of eleven picked from among delegates from each state to work out a compromise. The result, a Connecticut compromise presented several days later. The nationalists conceded to have equal representation for each state in the upper house of congress, but on condition that the money bill should originate from the lower house. Delegates at this point agreed to a strong federal government. All supported the idea of a republican form of government that the powers of national governments distributed among legislative, executive, and the judicial branch.

On the final day, September 17, 1787 delegates took seats and the Secretary Read out the new constitution and there after, Dr Franklin rose, too feeble to speak for himself, he spoke through James Wilson:

" I confess that there are several parts of the constitution that I do not at present approve, but I am not sure I shall never approve of them..... the older I grow, the more apt I am to doubt my own judgement, and to pay more respect to the judgement of others. On the whole sir, I cannot help expressing a wish that every member of the convention who may still have objections to it would with me, on this occasion doubt a little of his own infallibility- and to make manifest our unanimity, put his name to this instrument"

After this, all delegates with the exception of only three signed the constitution. It was however, not ratified until after a bitter struggle within the states, especially in Virginia, Massachusetts, and New York. By end of June 1788, ten states had ratified. One more than needed. The drama that followed the Kenya's constitution making process attests to a lack of commitment by the political elites to rise beyond their self interest.

A Speech similar to that Dr Franklin's is the one thing that missed out at the conclusion of Bomas process. Instead the political elites dragged Kenyans into schemes that sought to water down the achievements of this national undertaking. It is our view that like the Americans, the way forward in Kenya is the adoption of a federal structure of governance. The new constitution should reflect this reality.

2.8 Federalism in Kenya: safeguarding and entrenching the people's voices

Federalism may be conceived as political device for establishing viable institutions and flexible relationships capable of facilitating interstate relations (division of powers between orders of government), intrastate linkages (representation at the central level), and inter community cooperation. Federalism is a conflict solving mechanism, a shield for minority groups that would otherwise feel threatened. To Alain Gagnon,[63] conflict management, protection of minorities and social engineering, politics of representation and innovation, form the core tenets around which federalism is capable of making a strong contribution to human kind and to the furthering of democracy and democratic traditions.

Federalism is a commitment to a contractual arrangement between political units that decide to create a new political space. "What touches all must be approved by all."[64] Daniel Elazar argues that "In a larger sense, however, federalism is more than an arrangement of governmental structures: It is a mode of political activity that requires the extension of certain kinds of cooperatives relationship throughout any political system it animates."[65]

While conflict management may not necessarily be the preserve of the federalist idea, the success of federal systems is measured in their capacity to regulate and manage conflict. It eases tension and it is sensitive to diversity. Moureen Covell puts it "on balance it seems that federal institutions should ease the process of conflict resolution, at least low – to medium – level conflicts. At the

[63] Alain-G. Gagnon, The political uses of federalism in New Trends in Canadian Federalism, edited by Francois Rocher & Miriam Smith, 1998
[64] James Tully: "Multirow Wampum, the charter and federalism", a paper presented to University of British Columbia, May 15-16, 1992

simplest level, federalism may lower the temperature of elite competition by multiplying the number of available political and bureaucratic posts..... when lack of liberal representation in the western Canada lowers the capacity of national level institutions for handling Canada's regional tensions, the possibility of federal – provincial negotiation provided a useful alternative....."[66]

According to Pierre Elliot Trudeau:

> "one way of settling the appeal to separation is by investing tremendous amount of time, energy, and money in nationalism, at the federal level... resources must be diverted into such things as national flags; anthems; education; arts council, broadcasting corporations... In short, the whole of the citizenry must be made to feel that its only within the framework of the federal state that their language, culture, institutions, sacred tradition, and standards of living can be protected from external attacks and internal strive."[67]

We are careful to note that federalism is not there to resolve conflicts but manage them. To accommodate diversity, it is recognized that conflicts are inherent to the federal settings. The multiple access points that federalism provides to political elite ensures safety valves for the expression of dissatisfaction with government policies thus federalism encourages proposals and solutions to the crises that erupt from time to time.

Federalism is necessary in the Kenyan context, as a shield for minorities and regional interests. Most ethnic groups and regionally structured communities are likely to see federalism as a response to problems occurring in multicultural and multilingual settings. Federal systems constitute interaction and interrelation modes that allow for consideration of relation between local, regional, and central orders of government. Federalism is sensitive to intergovernmental cooperation and

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[65] Daniel Elazar: American Federalism: a view from the states, third edition, New York: Haroer & Row, 1984.
[66] Maureen Covell, Federalization and federalism: Belgium and Canada, in Backvis and Chandler, Federalism and the role of the state: 57-81, 1987.
[67] In the practice and theory of federalism, in Michael Oliver, ed, social purpose for Canada, 1961.

confrontation. It encompasses, reflects and fosters diversity essential in the maintenance of regionally based specific community identities.

Alain Cains argues

> the provinces, aided by secular trends that have enhanced the practical significance of their constitutionally based legislative authority, and by the deliberate improvement of their own bureaucratic power and capacity, have given a new salience to the politics of federalism and territorially based directives which it encompasses reflects, and Fosters.[68]

Federalism's strength and importance is in its long-term capability to manage antagonistic cooperation. Ivo Duchacek argues

> federal constitution may therefore be seen as a political compact that explicitly admits of the existence of conflict among the component territorial communities and commits them all to seek accommodation without outvoting the minority and without the use of force. Or in other words, a federal constitution expresses the core creed of democracy, pluralism, in territorial terms.[69]

Federalism does not entail the elimination of political conflicts but rather it permits the full expression of diversity. This view holds that federalism is always in the process of being ameliorated and is not necessarily attained at once. In short, federalism is about social engineering and political ingenuity. To Ivo, depending on the basis upon which they are organized, pressure groups may serve to integrate a federal society or to fragment further.

In search of a balance, A.V. Dicey is relevant. The essential element of federalism to Dicey is that people desire to find equilibrium between forces of centralization and decentralization or else

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[68] Alan C Cairns: Constitution, Government, and society in Canada ed. Douglas Williams, 1988.
[69] Ivo Duchacek: Comparative Federalism: The territorial Dimensions of politics, 1970.

between provincial and federal powers "must desire union and must not desire unity."[70] A central feature of federalism is its ability to establish varying balances between centripetal and centrifugal forces. Federalism achieves various ends. Not just to fight disparities but to cope with deep societal cleavages in plural societies. This has led for instant, to federal governments striking deals to share powers based on differences of culture, religion, and language that colour a country.

We must note however, that forces of unitarism, continually threaten federalism and that people need to be aware of such challenges. To allow one order of government to take precedence over the other is to render federalism fiction. There will be time when the dynamic forces throw the balance in one direction or the other, forcing political elites to elaborate political arrangement that better fit the changing reality.

According to Trudeau,

> the compromise of federalism is generally reached under a very particular set of circumstances. As time goes by, these circumstances change, the external menace recedes, the economy flourishes, mobility increases, industrialization and urbanization proceed, the federated groups grow, sometimes at uneven paces, and their cultures mature, sometimes in divergent direction. To meet these changes the terms of federative pact must be altered as smoothly as possible by among others, administrative practice, judicial decisions, and constitution amendment, giving a little more regional autonomy here, a bit more centralization there, but at the same time taking care to preserve the delicate balance upon which the national consensus rests.[71]

Federalism is about representation and by extension, about democracy. Whitaker maintains, in one of the clearest statements about federalism to date

[70] A.V. Dicey: Introduction to the study of the Law of Constitution. (Indianapolis: Liberty Classics, 1982) p.36.
[71] Pierre Trudeau: Federalism and the French Canadians, 1968

> modern federalism is an institutionalism of the formal limitation of the national majority will as the legitimate grounds for legislation. Any functioning federal system denies by it very process, that the national majority is the efficient expression of the people. A federal system replaces this majority with a more diffuse definition of sovereignty. It does this not by denying the democratic principles as such, but by advancing a more complex political expression and representation in dual (sometimes even multiple) manifestation, which may even, be contradictory and antagonistic.[72]

This gives credence to the expression of different majorities in the same nation - state. Such an understanding does not challenge the principle of democracy but rather, allows a more sophisticated kind of representation whereby sovereignty is more diffused and imaginative than under a simple majority rule.

We deploy two examples to illustrate how federalism has been employed to address deep societal issues. We start with the example of Canada and then proceed to that of Switzerland.

2.8.1 The Canadian Case

The Canadian nation was born in 1867 with the Constitution Act of 1867, which sought to unite the provinces of Canada, Nova Scotia, and New Brunswick into the dominion of Canada. With the central government in Ottawa, other government powers are exercised through the provincial and federal governments. The adoption of the federal system sought to preserve the diversity among the previously separate colonies. Suffice it to note at this stage that the vexing issue of the French speaking Quebec, seeking special status contributed to the constitutional turmoil in Canada.

It combines both the parliamentary with a federal system. Executive power is exercised with the Prime Minister and cabinet, who hold power with the confidence of the House of Commons.

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[72] Reginald Whitaker: A sovereign idea: Essays on Canada as a democratic community, 1992.

The constitution Act of 1867 governs the distribution of powers between the federal and provincial governments. When Canada adopted the charter in 1982, it sought and received permission from Britain to fully 'patriate' its basic laws. The Canada Act was therefore approved and Britain ceded its vestigial authority to legislate.

Canada recognizes the judicial supremacy. It also recognises legislative powers in the provinces as a matter of constitutional law. On Canada, the common law is national, the only provincial law is statutory, and the statutes are subject to interpretation by the Canadian Supreme Court. However, after the judiciary finds a certain law unconstitutional, that ruling is subject to override by popular vote in any province. The judiciary is not accepted as the final arbiter, nor is the federal system.

2.8.2 The Swiss case

The thirteenth century treaty on the everlasting alliance by the 'men of the valleys' was a defence treaty, which later expanded to include additional members to form the confederation. Switzerland accepted a constitution in 1874, which was later, revised and adopted in 1874. Professor Kolman says that the confederation of the Swiss confederation is very old, and the desire of the people to belong to their particular cantons is very much alive today. Out of 26 cantons, several have German as the official language, with a few French speaking and Italian. Its legislative system, which is bi-cameral, is not without its own challenges. It has tensions between the urban and rural cantons that are a problem of mentality. There is the tension of French speaking and the German speaking cantons since the admission of the French speaking cantons. Other tensions are among workers, bourgeoisies, and tension among political parties. It

is to be noted that parties are organised on a central basis but once the elections are over, the winners and the losers begin to work together.

It has been observed that the Swiss federalism is an influencing, aggravating and a calming factor. Cantons are centres of experiments before issues are put to the federal level. On the other hand, new ideas will not inundate the whole country because it is hard to take over a confederation of 26 cantons. The Swiss federal courts have admitted the existence of fundamental rights generally accepted in western democracies such freedoms of speech, assembly, and human rights.

The organisation of federal power in the Swiss system takes the people as the main organ represented through in federal assemblies through two houses. This is in line with the American system of a bi-cameral legislature. The federal court has thirty judges from all over the country and it is also a multi faceted court hearing civil, criminal and constitutional cases.

The cantons have unicameral parliaments most of which are elected on proportional basis. Any change of the cantonal constitution and any new law must usually be submitted to a referendum. Referendums and popular initiatives therefore are two specific tools of the Swiss democracy. The referendum is used to overturn laws and in large cantons, large expenses accepted by Parliament but opposed by a group of citizens. On its part, the popular initiative is a 'prodding' instrument. With it, a sufficiently large group of citizens may force government and parliament to acts or contentious issues.

The above mechanisms i.e. of the referendum and the popular initiatives effectively turn the people, citizens into the opposition and offering democracy of compromise. For parliament

together with the people constitute the legislature and the people and the cantons together constitute the constitutional power. The effect is actually the division of sovereignty into the cantonal and federal sections.

Conclusion

This chapter has gone into details to present basic tenets of federalism. It argues the case for the people's involvement in the political and constitution making process. By drawing on the United States experience in the constitution making, the African Charter on Human and Peoples' rights, and the treatment of the people concept in the Bomas and Wako draft constitutions, we advocate for the application of a liberal rather than a narrow interpretation of the concept of the people concept. We refer to the Njoya case, which among other conclusions, suggests that the constitution making process is the legitimate responsibility of the Kenyan people much as it does not define who the people of Kenya are. We draw a parallel with the founders of the African Charter on Human and People's rights who chose to evade the definition of the term "people" to escape treading on "difficult terrain".

We note that the idea of federalism has been resented and feared in Africa. It has variously been associated with fragmented states and the negative ethnicity. In Kenya, a genuine debate on the value of federalism has been obscured and highly politicised with the aim of causing fear by reference to tribal schisms and conflict as the downside of federalism. Suffice it to say, federalism offers us in comparative constitutional law, one of the best ways in our view for power sharing in Kenya. Federalism, well implemented, should serve to water down the executive and assign responsibility along the subsidiarity principles in a state.

CHAPTER THREE: IMPERIAL PRESIDENCY: THE NATURE OF EXECUTIVE POWER, ETHNICITY AND THE CONSTITUTIONAL CRISIS IN KENYA

3.0 Introduction

Having made the case for a participatory democratic process and justified federalism as the best mechanism in our circumstances in chapter two, chapter three begins to review, as Chinua Achebe would say, where the rain began beating us. Kenya's independence constitution started on the wrong foot. The Lancaster House conference had handful representatives and in many respects, did not have the best interests of the Kenyan people at heart. However, the final constitutional design of the government was particularly, influenced by KANU (Kenya African National Union), in favour of a centralised system. KADU (Kenya African Democratic Union), which represented the interests of smaller "nations", strongly proposed a system to protect and secure minorities from domination by bigger nationalities

Kenya's history attests to a deep colonial heritage reflected through a post independence constitution and political practice firmly entrenched in the old colonial ways. More fundamentally, various constitutional amendments entrenched excessive powers in the executive as reflected in strong presidency. The net result is a country deeply divided along ethnic, social, cultural, political, and economic lines suffering a deficit on the balance sheet of constitutionalism. It is our view that federalism can assist in the alleviation of these problems by entrenching and safeguarding the people's voice.

Constitutional lawyers should go back to the root causes to understand the genesis of the current constitutional crisis. This chapter revisits a number of issues, which have cumulatively led to the constitutional crisis. First, we mention the shortcomings of the independence constitutions in Africa that advocated principles that the colonial governments hardly espoused. The net effect is that as soon as the African leaders took the reins of power, they sought to imitate their colonial governors while dismantling the liberal democratic provisions as provided for in the independence constitution. This is on the account of the various constitutional amendments in Kenya. Secondly, the deficiency in the liberal constitution and its inability to hold back the presidency from falling into the trap of combining the traditional chieftaincy into the presidency, giving rise to the imperial president, at the expense of the institutions of checks and balances i.e. parliament and judiciary. Thirdly, a deliberate marginalisation of parts of the country along ethnic lines due to their voting patterns herald regional disparities in service delivery for instance.

3.1 Kenya's Independence Constitution

The Kenyan constitution making process unlike that of the United States of America had a handful of delegates participating in the Lancaster conference. There were no serious attempts to ensure a representation of the various interests and stakeholders. However, the constitution that emerged set Kenya off, at independence, with a dual Executive: the Queen -represented by the Governor-General- as Head of State and Commander-in-Chief of the Armed Forces, and the Prime Minister (Head of Government and leader of the largest political party in the National Assembly). This contained an element of check-and-balance: The Head of State held a ceremonial position while the Head of Government was the "efficient" executive organ. Yet the

instruments of constitutional action were in the custody of the Head of State. The real power holder had to work in consultation with the constitutional head i.e. the Head of State.

The resulting strong presidency emasculates the executive and marginalises the judiciary and the legislature. This is the very antithesis of the principles of constitutionalism, which seek to ensure that there are sufficient checks and balances between the three organs of the state: the judiciary, the executive and the Legislature within the concept of separation of powers. At the national level, one observes increased inequality in allocation of resources across the regions of Kenya, and a rise and duplication of institutions performing similar functions, which in turn trample over each other in the absence of clear constitutional provisions that separate and delineate each of their functions and space. Examples of this abound. Suffice it to mention the contentious issues of prosecutorial and investigative powers vested in the Attorney General's office and the Police departments respectively, vis-à-vis the Kenya Anti-corruption Authority.

The independence constitution had two major principles: parliamentary democracy and devolution of powers as instruments for the protection of the minority. The governance structures comprised of the national government, a system of eight semi- autonomous regions as well as an elaborate system of local government. The independence constitution also had the following principles of devolution. To promote social and economic development through out the regions, to ensure equitable distribution of national and local resources through out the regions, to provide essential services to the people effectively and economically, to facilitate cooperation between central and regional governments, and lastly, to protect and protect interests of the minorities.

The gradual erosion of the devolved government structure in the independence constitution through constitutional amendments effectively introduced the current centralised government with an elaborate system of provincial administration. The provincial administration is an extension of the executive arm and executive powers that has only served to entrench the imperial presidency.

Several constitutional amendments since independence aimed at consolidating the power of the Presidency with the effect that, the thirty-some constitutional changes that took place from the date of inauguration of the Republican Status (December 12, 1963) boil down to one reality. In terms of governmental power, the pluralistic and the checks-and-balance constitutional model of 1963 was debunked. In its place, a monolithic constitutional structure where the Head of Government merged with that of the Head of State, in the person of an executive president with the fullest control over government, and very substantial influence and control over Parliament emerged. In addition, the president has the constitutional authority over the make-up of the judiciary in terms of appointments of judges. To many observers, this over centralised executive is, indeed, the very kernel of the drive and agenda for Kenya's constitutional reform campaign.

The multiplicity of public institutions under the 1963 constitution clearly intended to serve the cause of controlled government, with minimal abuse of power. The controls were inherent not only in the design of the legal and administrative arrangements, but also in the political dimension of public life as manifested by the interplay of political parties inside and outside the National Assembly.

The limitation of governmental power is a desirable thing as it checks abuse and enlarges the scope for individual self-fulfilment and the enjoyment of human rights. The limitations placed on

public power by the original Constitution can readily be associated with the goals of constitutionalism and the rule of law, which most will agree, ought to feature prominently in a reformed Kenyan Constitution.

By 1970, Kenya no longer had a Westminster Model constitution - founded on multi-parties, the central role of Parliament, the executive's accountability to Parliament, the autonomy of the Judiciary. The controlling environment for the functioning of constitutionalism and power checks - and - balances, that is, the buoyant play of a multi-party political system, had vanished. Kenya was now a settled one-party system with a unicameral Parliament and a much scaled-down institutional base for autonomous constitutional agencies. Between 1965 and 1970, Kenya had a flowering of power concentration in the hands of the executive, in post-independence Kenya's entire historical profile. By 1992, Kenya's history was marked by a constriction in space for political activity - and thus for the exercise of civil rights linked to political activity. In the whole time-span running from 1965 to 1997, there have been piecemeal changes to the constitution, providing for momentary power-shift demands; and these have emanated mainly from government although sometimes also from Parliament or civil society.

The Kenyan constitution, today, is essentially patchwork carrying only somewhat truncated principles; rather inchoate lines of political inspiration; and in a number of cases, apparent contradictions (e.g. of Sections 23-25 on the one hand and Sections 107-108 on the other, on the subject of the exercise of Presidential prerogatives). The net effect of this is the undermined role of the constitution as a dependable legal instrument for the protection of the individual, and for assuring the decisive conduct of governmental business.

3.2 The Nature of Executive Power in the Presidential System

The executive consists of a single individual, and is independent of the Legislature and the judiciary. Taking the example of the framers of the American constitution, they were exercised by the question of whether the executive branch of their new government should consist of a single individual or a plurality of persons. Emerging from a bloody armed confrontation with a monarchical government, monarchy or any other form of government by a single individual stirred hate and fear among most of the Americans. It symbolised tyranny and oppression, and all other forms of evil of governmental absolutism. However, after lengthy discussions at the constitutional convention in Philadelphia, of the various plans presented, the framers unable to devise a more satisfactory alternative settled for an executive of one man. Article ii of the US constitution declares, "Alternative executive power shall be vested in a President of the USA". This therefore precludes the vesting of power in two or more persons of equal authority as the case of the collegiate executive of the Swiss system.

The Kenyan discussion on whether or not to share executive power between the President and the Prime Minister comes to mind. This study makes the federal argument as a dispersal point for the executive power. In that respect, we do not favour the divisibility of the executive power between the President and the Prime Minister as long as we have a federal structure that serves to entrench people's voice and responsibility in their governance.

3.3 The nature of executive power: Residual and inherent power theory

The executive power is a term of uncertain meaning. The widest view of executive power is that it embraces every power, which by nature is neither legislative nor judicial.[73] Executive power is what remains of the functions of government after taking away legislative and judicial powers. It is not

limited to the execution of the laws and, provided law does not forbid it, action by government need not wait upon legislation expressly empowering government to do it. The executive power comes with the formulation of policy and the preliminary steps necessary to implement it by legislation[74].

The US constitution vests the executive power in the president as the head of state. The vesting of the executive power in the president operates as a limitation on congress' legislative power, precluding it from using the executive power to divest the president of any function that properly forms part of the executive power.[75]

The inherent power theory postulates that the executive power confers an inherent authority to exercise any function inherently executive in nature. This would exclude functions such as policy and administration of law. The theory agrees with the residual power theory to the extent that they both assert that the executive has an inherent authority to act without prior authority conferred in every case by a specific legislation or other law.

In 1789 in the very first congress under the US constitution, congressman Stone, in a debate touching upon the constitution said " if gentlemen will tell us that powers, impliedly executive, belong to the President, they ought to go further with the idea, and give us a correct idea of executive power, as applicable to their rule. In an absolute monarchy there never has been doubt with respect to imp-location, the monarch can do what he pleases. In a limited monarchy, the prince has powers incidental to kingly prerogative. How far will a federal executive, limited by a

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[73] Nwabueze, B.O. Presidentialism in commonwealth Africa
[74] Allan Gledhill, Pakistan: The development of its laws and constitution, 2nd edition (1967), p.42
[75] Myers vs. United States 272 US 52

constitution, extend in implications of this kind and alternatively, confined to restrained monarchy?[76]

The constitution of Malawi for instance, expressly provided for imperial presidency right from the onset. It provided that "where under the existing law, constitutional custom or convention of any prerogatives or privileges are vested in Her Majesty in respect of Malawi or in the Governor-General on behalf of her majesty; they shall with effect from the appointed day, vest in the president and, subject to the constitution or any other law, the president shall have power to do all things necessary for the exercise thereof.[77] The effect of these provisions is the importation into Malawi, Zambia, Kenya, all prerogatives of the crown in Britain, which undermined the separation of power and constitutionalism while shrinking the democratic space.

3.4 Imperial Presidency and the death of democracy in Kenya

We are concerned here with what has been called 'democratic centralism' as opposed to 'democratic decentralization', and the chronic issue of the over concentration of power in the hands of the presidency and the executive. Clearly, the emerging historical pattern is one where the legislature is subordinated to the executive, and where bicameralism replaced by uni-cameralism and federalism by Unitarianism.[78] The far-reaching implication is centralism in the organisation of state power, and in the organisation of politics as well as in the administration of government. The primacy of the presidential executive and its overwhelming power also manifests itself in the

[76] Quoted in the judgement of Justice McReynolds in Myers vs. United States 272 US `52 at page 237
[77] Constitution of the Republic of Malawi Act 1966, S.18 of the Zambia Independent Order, 1964, S.16 of the constitution of Kenya (amendment) Act 1964, S.128 constitution of Gambia 1970
[78] Nwabueze B.O. Presidentialism in commonwealth Africa

fearsomely vast security powers and in its arrogation of the constituent power of the state, the ultimate mark of the sovereignty of the state.[79]

To understand the African Presidency, the lawyer should look beyond what creates and defines them. It is important to understand the African's traditional attitude towards power and conception of authority, the colonial experience, and the mystique and charisma, which the nationalist struggle has bestowed upon the leader. On top of this, the lawyer should also understand the circumstances of under-development and the newness of the state, the heterogeneity of its society, and the tensions of modernisation, and the personality of the individual presidents.

While it is important that governments pursue economic and basic needs i.e. food, water, shelter, education and health services, the constitution of a country must also afford the citizen the opportunity to develop his personality, initiative, creativity, his power of thought and expression. It is our view that a strong presidency with excessive executive powers, the absence of a devolved power sharing mechanism is an impediment to the realisation of this objective. We now turn to some very significant aspects of governance and the elaboration of the executive power, to highlight the genesis, justification for the indivisibility of the executive power, while arguing at the end, for an alternative power arrangement.

The African-ness of the presidency in Africa refers to the fact that it is largely free from such limiting constitutional devices, particularly those of a rigid separation of powers and federalism. Implied in the universal absence of such restraint mechanism is the qualifying word "African".[80] In Kenya, it is widely acknowledged that under the current constitution, the presidency is far too powerful. The new constitution, it is suggested, ought to distribute power away from the

[79] Nwabueze, B.O. ibid

Presidency[81]. It was none other than the then President of Kenya, Daniel T. Moi who, as early as 1998, suggested that the focus of the remaking of the Kenyan constitution should be to ensure that the over concentration of power in the Presidency is done away with.[82]

3.5 The doctrine of separation of powers

The doctrine of separation of power developed to void absolutism by preventing a monopoly of power. In England, these ideas emerged early with the distinction between the King-in –Council and the king-in Parliament. John Locke, writing after the revolution of 1688, in an apparent justification of the revolution, was to recommend that the legislative and executive arms of government should be in separate hands, for the sake of efficiency as well as the protection of liberty[83]. Picking this up later, Viscount Bolingbroke, and Montesquieu emphasized the need for the three agencies of government, to perform functions separately. They also subscribed to the principles of checks and balances.

In the case of ***Myers vs. United States***[84] Justice Brandeis in a well-known passage in his dissenting judgement recognized the inherent conflict between preventing tyranny and assuring efficiency. He observes,

> The doctrine of separation of powers was adopted (not) to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the

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[80] Nwabueze BO Presidentialism in Commonwealth Africa
[81] Reference to the verbatim reports of the Constitutional review commission attests to the fact that most of the Political parties were agreed that the new constitution spreads out power. The parties included Democratic party and the Liberal Democratic party.
[82] Sunday view by Gitau Warigi, Sunday Nation, 30th August 1998, page 6
[83] John Locke, Two Treatises of Government edited by Laslett, 1960
[84] 272, US 52 (1926) at 391.

> governmental powers among three departments, to the save people from autocracy.[85]

Experience with constitutions world over attests to the fact that separation of power was never meant to be air or watertight. There are many incidences where such powers inter mix as with the participation of the US President, and many other presidents, in the legislative process through the veto power. Restraints by one branch of government upon the other, provides the requisite checks and balances.

The doctrine of separation of power is as old as the history of liberal democracy. While in theory the separation of power ensures the maintenance of checks and balances, it varies especially in light of presidential and parliamentary systems. Where Parliament is Sovereign as is the case in UK, the executive tends to have more accountability even as the role of the judiciary as the third player tends to be lower. Contrasted with the US system, the three arms of government tend to exercise a fair balance of their powers.

We now make a brief assessment of the politics and the concept of ethnicity.

3.6 The politics of Ethnicity

The question of what is ethnicity is an important one as is its history and political basis which goes back to the colonial times and the successive independent governments. To Lonsdale:

> Ethnicity is a consciousness of being a member of one ethnic group as opposed to another group. It is about defining oneself using an identity that excludes or outbids another group. It is a belief in and practice of exclusion and discrimination of others on basis of not sharing a common ancestry, language, and culture or even territory. Ethnic consciousness in Africa, however, is not a phenomenon located within the history and traditions of the African societies; it is the product of colonial rule and in

[85] Gerald Gunther and Kathleen Sullivan, Constitutional Law, 13th edition, 1997.

> particular the formation of the colonial state and consolidation of colonial capitalism. Pre-colonial ethnic groups, though conscious of their identity, used to exist in non-competitive manner. They were inter-related by 'civic virtue' on which lay a clearly defined logic of social obligations. Relations between groups were generally 'characterised by exchange of specialised products… rather than by domination.[86]

Ethnicity provides the basis for collective improvement of a group. It is about what the membership of an ethnic group does, collectively, to improve the group's status and promote harmony among its members and the society in general. It is about 'collective civic virtue' of a community - the quest to improve the status of a group. Significantly, moral ethnicity binds group members together. It reinforces values of 'citizenship'; group members have certain obligations to each other and to their ethnic group. The identity of the group, on the other hand, provides the medium for solidarity among group members. This solidarity is an essential security; it is the source of stability in the group.

The creation of Native Reserves by the colonial administration had other consequences. The Reserves, as argued by Mamdani[87] with regard to colonial rule in settler economies in sub-Saharan Africa, reinforced ethnic consciousness and therefore ethnicizing the society. It created divisions based on ethnicity and territory. Each group became conscious of its territory as an attribute distinguishing the group from others. The groups were administered separately by use of its own customary law. This reinforced groups' collective identity, which concretised and became the basis for associational life among group members. These associations laid the conditions for political competition based on ethnicity. Overall, moral ethnicity gave birth to numerous ethno-regional welfare associations many of which transformed into political associations. Today, they are an important medium for politics and feature of Kenya's economic and political life.

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[86] Lonsdale, 1994: 137.
[87] Mamdani 1996

Political tribalism is about use of ethnic identity in competition with other groups. It is about appropriating ethnic differences and attributes to gain advantages over other groups. As observed by Lonsdale, 'political tribalism' thrives by silencing the quarrelsome civic virtues of invented moral ethnicity that first gave it birth[88]. It manifests itself in competitive situations and especially in situations leading to competition over resources and political power in particular.

The post-colonial state has played a fundamental role in the constitution of political tribalism by promoting conditions for competition over resources access to state power. In this framework of political tribalism, those in position of power use their position to influence distribution and allocation of public resources towards their regions and ethnic constituencies. They transform public positions into conduits for state resources to regions where the elite came from. Allocations and distribution of resources is done in favour of politically powerful groups and in line with the share of power in the hands of ethnic elites. An ethnic group that has politically powerful elites tends to act the gatekeepers at the centre of power. They increasingly use ethnic criteria to lock others out. Again, in this framework of political tribalism, the local communities are expected to perform the role of defence and insulation mechanisms for their 'sons' without whom the communities are made to believe that they would not get development benefits.[89]

Having seen the role and place of ethnicity in the social, political and economic life, it is necessary for us to see the regional disparities associated with the ethnocentric resource allocation.

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[88] Lonsdale, 1994:141.

[89] State development services were used in the past to justify elite mobilisation of ethnic constituencies. Declining capacity of the state to deliver development in recent years has made it even easier for the elites to justify their relations with ethnic constituencies.

3.7 Regional disparities in basic services

Specific examples abound of inequalities along deliberate ethnic marginalisation. One caveat taken into consideration here is that some of the provinces are multi-ethnic in population composition. One cannot conclude that a particular ethnic group is the main beneficiary of any particular service. One can make inferences with regard to how different groups benefit from state development services and whether this may be attributable to their domination in government. Ethnic groups are likely to be vastly different in terms of preferences and endowments. Groups only use political processes to widen the differences. Competition to control the state in order to transfer benefits to their groups is an important requisite.[90]

Nairobi and Central province for instance, have higher density of roads than other areas. Taking the example of the density of roads against the geographical size of each region as well as the population size, one can argue that there is no justification for central having such a high density. What comes immediately to the mind is that the region was favoured by the colonialists and that upon independence, for political, economic and ethnic considerations, the government continued the very policies that favoured it. North Eastern and the Coast provinces are least served.

Looking at children's enrolment in primary schools from the 1970s, although central province was one of the leading provinces in terms of school enrolment, the figures declined considerably. From about 25% in the 1970s the enrolment declined to about 13% in 2001. Rift Valley on the other hand had an improved school enrolment: from 15% to 26% during the period. No other province witnessed such changes during the period. Among other factors, ethnicity contributes to these

[90] Kimenyi, 2003.

changes, there is need to underline the fact that the Moi's first decade in power, witnessed frenetic development of schools in the whole of Rift Valley. Building schools and mobilising local resources to support the development of education in the area were some of the principle activities Moi associated with in his home region read among his ethnic group.

The development of health institutions shows Nairobi, Eastern and Western to have had the highest increase between 1979 and 2001. Central province had the lowest growth during the period. A detailed discussion of factors responsible for this growth need not detain us here. Suffice to note that political marginalisation of central province began from mid-1980s and the main stratagem used to win support from other provinces included state distribution of resources for development projects and harambee[91] fundraising events for various development projects.

On poverty trends, the figures are more revealing of this disparity. From a report by the Institute for Economic Affairs (IEA), Nyanza Province has the highest incidence of poverty (63%). Analysis of this by districts in the province show that Luo Nyanza or districts inhabited largely by the Luo ethnic group have relatively high incidences of poverty compared to districts inhabited by the Kisii, the second main ethnic group in the district. Central has the least incidences of poverty – 31% - followed by both Rift Valley and Nairobi whose incidence of poverty is 50%. Indeed Central has had the least incidences of poverty for almost a decade[92]

The United Nations Development Programme (UNDP) report on Human Development in Kenya (2001) provides also revealing data on trends in human development in the country and by regions. Comparing data on life expectancy, adult literacy, and GDP by regions, the report shows that

[91] Means pulling and pooling together. It refers to communities mobilising and pooling together resources to complete certain tasks. It is a development strategy that achieved official recognition from the 1960s as a way of mobilising local resources to supplement government development efforts (see Kanyinga, 1993; Barkan and Holmquist, 1984)

Human Development Index (HDI) in the country varies considerably across Provinces or regions. The region with the highest HDI is Nairobi (0.783) followed by Central (0.604) and Rift Valley (0.510). The HDI value for these regions is above the national average of 0.539. North East has the least HDI.

These observations on HDI value can be stretched a little to mean that Central Province, Rift Valley and Nairobi are relatively more developed than other Provinces. The observation can mean that among all the eight numerically important groups in Kenya, the Kikuyu (and the Kalenjin to some extent because they live in Rift Valley) are less poor than other main ethnic groups. The poorest among the numerically large groups are the Luo in Nyanza province, the Kamba in Eastern Province, and the Mijikenda in the Coast Province and the Luhya in Western Province. North Eastern Province stands out as the poorest of all regions. There are obvious reasons for this.

We can make several other observations about the relative development of Central Province and relative underdevelopment of North Eastern Province. Firstly, Central Province had infrastructure for development laid down during the colonial situation. The Province was proximate to the White Highlands, which the colonial administration expropriated and scheduled for the white settler economy. Central Province, owing to its proximity to the highlands, became an important source of labour for the settler economy. This provided the Kikuyu with an entry into wage labour with remittances back home from their earnings for other activities[93]. The settler economy required adequate infrastructure in order to stabilize and to attract the settlers themselves. Roads, schools and hospitals in Central Kenya, Rift Valley and Nairobi meant to address the settler needs as well as the

[92] Institute of Economic Affairs Kenya, 2002.
[93] Ngunyi, M 1996

needs of those who provided the labour for the economy.[94] The successive Kenyatta and Moi governments continued these policies and thereby heightening the disparities.

North Eastern Province was of little interest to the colonial administration. It was far from the fields of accumulation as well as from the fields of power. It was arid and of no significance to the administration. This became the basis for its neglect. As noted by Oyugi,[95] colonial development strategies tended to favour some groups at the expense of others. Open areas with more missionary stations received early and relatively better education as the closed areas (inhabited by the nomads) lagged behind[96]. This way, the Kikuyu, Luo, and Luhya became beneficiaries of the early education opportunities. Education later became an important criterion for accessing opportunities in the public and private sector as well as progressing to other economic activities.

Conclusion

This chapter notes the fact that the rise of the imperial presidency elevated the institution of the presidency to that of a paramount chief or a monarch in tandem with the expectations of its ethnic group. The imperial presidency directed its loyalty and allegiance to its own ethnic group. Whereas some of the regional disparities were heightened by government policies, others were propelled by self-initiative in the respective regions. The imperial presidency deepened ethnicity as resources were unevenly distributed and regional disparities entrenched.

Clearly, excessive executive and presidency is not the right way to go. What the constitution should embrace are principles of self-governance as the foundation of devolution. This is the

[94] Brett 1973; Ngunyi 1995; Ndii, 2002.
[95] 1997

antidote for the imperial executive. It also means that Kenya needs to ensure the sovereignty of the people and the supremacy of the constitution reflect the fact that the organs of devolved government are part of the structures that people delegate their power to govern.

The independent constitution, largely influenced by the ethnic factor had, with hindsight, perhaps a better vision. The unfortunate resort to constitutional amendments that entrenched a strong Presidency was blind to the fears of those who advocated federal structures. The erosion of democracy continued even as elections were regularly held. The result reflected an enlarged executive, an ever shrinking legislature, and distortion of the principle of separation of powers.

It is our view that, in order for the new constitution to increase the people's voice, it should adopt federal governance principles. Federalism will ensure the consolidation of democracy and the participation of the people in all processes as actors and benefactors. By adopting a bi-cameral legislature, care must be taken to reflect the principles of regional interests in the senate while at the same time the new constitution should enforce the principle of restraint of federal government. The federal government should be required to seek authority from the upper house, to avoid a runway federal government and unnecessary frictions between the national and sub-national structures.

[96] Oyugi 1997:43

CHAPTER FOUR: THE PEOPLE'S VOICE AND FEDERALISM

4.0 Introduction

From the very beginning of this thesis, we have taken the view that the current constitutional crisis and the clamour for a constitutional overhaul, has largely been people driven. The very creation of Constitution of Kenya Review Commission created by the Constitution of Kenya Review Act is symbol of the people's struggle. The creation of CKRC is a declaration of the fact that it was the people's turn to construct a new constitution in keeping with their aspirations. The commission derived its whole mandate from this Act. The broad task of the Constitutional Review Commission was to serve as an instrument for the comprehensive review of the Constitution by the people of Kenya.

The development of a new constitutional document was in keeping with the history of constitutional dissatisfaction among a cross section of Kenyans and the clamour for reform within the context of popular participation, and of consultation with the National Assembly as the principal representative constitutional forum in the country.[97]

To satisfy the principles of popular participation the constitutional review had to be open to public participation, transparent and accountable to the people, as well as inclusive of, and accommodating to the diverse categories of Kenyan people and their peculiarities such as those relating to faith, ethnicity, gender, race, occupation, etc.[98]

[97] Section 4 of the CKRC Act

This chapter lays out the suitable federal structures for Kenya. We largely endorse the Bomas draft with some suggested amendments. We briefly discuss the basis of our recommendations while anchoring them in the context of political and constitutional theory.

4.1 Basic features of federalism

Federalism is where the constitution divides governmental powers between a central and sub-national government giving each a substantial function. In contrast, a unitary system is one where the constitution vests all governmental power in a central government. In a unitary government, the central government may delegate authority to local units. However, it can take back what it gives. Plenty of examples of this point to the district focus for rural development, the constant tug of war between the Minister for Local government and local authorities, the creation and abolition of district level service delivery structures, among other examples. Where as in a federal system the constitution is the source of both central and sub-national authority, each unit has a core of power, independent of the wishes of those who control the other level of government.

Taking the example of the United States of America, there are several bases for constitutional federalism: The constitution grants certain legislative, executive, and judicial powers to the national government. It at the same time reserves to the states, the powers not granted to the national governments. The constitution makes the national government supreme. The constitution and all laws passed in pursuance thereof, and treaties entered into by the US are supreme laws of the land. At the same time, the constitution denies some powers to both the

[98] Section 5 of the constitution Review Act cap 3A.

national and state governments, gives only some to the national government, and still others only to the state governments.

Two contending views in respect to the interpretation of the federal constitution are worth noting. There are those who argue that in the federal American system, the constitution is a compact among states. The states, it is argued created the national government and gave it certain limited powers. The nationalist argue however that that power should be construed narrowly and should not be expanded by interpretation. The existence of national government does not in any way curtail the full use by the states of their reserved powers. However, the existence of the reserved powers of the states does restrict the scope of the nationalist government's granted powers.

The nationalists on their part reject the whole idea of the constitution as a compact among that states and deny that the national government is an agent of the state. Rather, they argue that the constitution is supreme law and emanating from "we the people of the United States of America". They argue that it was the people not the state governments who created the national government and they gave it sufficient power to accomplish the great objectives listed in the preamble. To them therefore, the national government is not subordinate to the state government.

Let us now examine the question of people's voices.

4.2 Voice and local level governance

There is direct relationship between people's participation in local level government and their level of awareness, responsiveness and increased reports of positive voice, participation and

information.[99] States that have been referred to as "developmental authoritarian" states such as Indonesia once focused on fostering economic success and delivery of concrete material benefits as a claim to political legitimacy while simultaneously creating institutions through which popular participation in politics was structured, channelled, and thereby marginalised.

The clamour therefore is for a radicalised decentralisation and devolution of responsibilities to regional governments, such countries as Indonesia and Kenya face economic, social and political change.

The new era calls for the creation of more participatory and accountable local level governments. We now turn to federalism as a political device.

4.3 Federalism as a political and constitutional device

The post-independence history ingrained in Unitarian and the federalist themes. In addition, these themes have already been recurrent in constitutional talk in Kenya even after the referendum on the Wako draft. The problem however, even after the resounding rejection of the Wako draft at the referendum, is the somewhat blurred vision in the minds of the interlocutors, and specifically, as regards to the understanding of ordinary Kenyan people. Since the Kenya government's business have been conducted on the basis of a unitary constitutional structure going back to the mid -1960s, most citizens today have known no other practice. It is clear to us that the majority of Kenyans have lived under the unitary constitution but know little about federalist systems. Decentralised or devolved governmental structures work well in many countries of the world — the U.S.A. Switzerland, Belgium, etc. Nevertheless, the national

[99] World Bank Policy Research Working Paper 2981, March 2002.

integrity of these countries is compromised and that there are more than sufficient resources to keep the decentralised units permanently running. All the people in the nation have full freedoms of movement residence and work throughout the federal units; and the rule of law and democracy are in full play to protect the dignity of all the people wherever they are in those countries.

Generally, second parliamentary chambers are an inseparable concomitant of federal constitutional structures. This is because the disparate interests to be protected in the federal states, must also have a forum of expression at the national level, hence the Senate to represent the federal units or the provinces. Such was also the case under Kenya's Independence Constitution, which provided for semi-federal Regions. However, second chambers can be function independent of federal systems — as is the case, for different historical reasons, with Great Britain's House of Lords. There is a good case for a second chamber as evidenced by the Kenyan opposition's attempt to canvas for it.

4.4 Federalism and the foundation for ethnic harmony:

The Bomas draft constitution, tries to incorporate views by the different groups. The document clearly reflects a synthesis of submissions by different people 'what the people said'. The key challenge and to Kenyans in general remains, how would the diversity of interests around the constitution as well the multi-ethnic concerns be faithfully satisfied?

The Bomas draft recognises the sovereignty of the people of Kenya in the constitution and the centrality of the people and need for the state to promote democracy, good governance, development and human rights. The preamble emphasises the need for unity in diversity given

the multi-ethnic, multi-cultural and diverse religious groups that make up the Kenya. The draft also identifies a comprehensive list of goals, values and principles that would guide the new constitution. These include equal values of all communities, democracy, good governance and the rule of law, and human rights. It recognises the diversity of the people and the promotion of the cultures of all the people.

The Bomas draft is a clear departure from the independence constitution, which essentially is a 'compromise document' after a series of negotiations between elites who were uncomfortable with one another. The ethnic elites avoided entrenching the values and principles that would guide future growth of the independence constitution throughout the post-colonial period particularly because they were as divided on these values and principles as they were on the political future of the country. They opted to address the technical political questions and glossed over the fundamentals of constitutionalism.

The draft proposes a two-chamber house comprising the National Assembly and the National Council. The Council acts as a mechanism to inter-link the districts and the central government; and checks and balances the activities of the Lower House. The National Council also represents the interests of ethnic and other minorities, districts and provinces. The draft also recommends a Mixed Member Proportional (MPP) representation system for the election of MPs and District Councils.

The model proposed is a hybrid of parliamentary and a presidential system. It faithfully represents the interests of political elites who preferred a model that would accommodate ethno-regional interests than one that would promote the values and principles of the constitution. The draft constitution has an executive structure that reflects the influence and practise of ethnicity

and politics. In terms of strengths, the proposed structure dispersed powers from one office of the government to several offices: it entrenches the principle of sharing powers to cause efficiency in performance of tasks. On the question of ethnicity, the proposed structure appears aimed at managing ethnic diversities and conflicts surrounding distribution of power. It responds to realities in which struggle for political power has always been waged using ethnic constituencies.

The Bomas draft proposes devolution of power. The draft suggests the need for viable structures for the realisation of equitable resource allocation, accountable governance, delivery of services and the empowerment of the people. The principles that guide devolution include, among others: the need to promote peace, internal harmony, indivisibility of the Kenyan state, coherence and national unity. Another is to ensure equitable representation of all Kenyans in the national institutions and process. Protection of cultural, communal, religious, ethnic, linguistic minorities is yet another principle. The other principle is that of viability, sustainability, efficiency and effectiveness of devolved units of government, based on population geographic size, historical and cultural ties, economic and natural resources shall be considered in the establishment of units and levels of devolution and review of boundaries between the established units.

A majority of other countries have three levels of government. Taking into account the need to bring government closer to the people, the Bomas process, rather than propose three levels of government namely: The national level, the sub-national level, and the local government level, opts for four levels of government all the way to the locational level. The fourth level of government as envisaged is in our view, a red herring

The United States with 51 states has a devolved structure with the highest number of units at the sub-national level of government. Other countries have below 20 units. Uganda started with 36

districts, which were later increased to 46, and finally 56. However, they are now considering reducing the number, having found some not viable.

We agree with the proposals and principles of the Bomas draft on devolution with the exception of the number of levels. We suggest three rather than four levels. That said we endorse the fact that devolution addresses the question of policy divergence, by allowing for innovativeness and creativity of the people. Devolution brings in more to the process of public policy formulation and implementation. It opens the space, and accommodates regional preferences and diversity. It also provides a framework for better management of resources and delivery of services.

Devolution brings with it a number of recognised traits: a policy to accommodate and consolidate ethnic, regional, and religious diversity, as a response to accommodate the demands of ethnic groups and minorities for a bigger share in the governmental process. The means for the protection of ethnic interests and identities. It is also seen as a mechanism for promoting good governance, separation of powers, multiplying checks and balances, efficiency and effectiveness in services provision, transparency and accountability and the people's participation in the governance process. Lastly as a strategy for the reconciliation of ethnic, linguistic, and historical diversity in large-scale political organisation process.[100] We see it as the best mechanism of safeguarding the people's voices in the constitutional and democratic process as it responds to the ethnic balance in creation and allocation of wealth.

[100] Report on Devolution of Powers: SWD for the National constitutional conference, page 32-33

The adoption of the federal system has its advantages. We state some of these in brief.

4.5 Advantages of the federal government

The great advantage of the federal system is the principle of compromise between unity and diversity, which it embodies. It provides the means of uniting a number of small states into one nation under one national government, without extinguishing their separate Legislatures and Administration.[101] Federalism also ensures that a number of small states obtain greater strength through union while ensuring their individuality in essentially local matters. It prevents the rise (by force) of a despotic central government absorbing other powers and menacing the private liberties of citizen, and by creating many local legislatures with wide powers, relieves the national legislature of a part of that large mass of functions which may otherwise prove too heavy for it.

Federalism is the best way of preserving historic diversity and individuality within the framework of a greater national entity. Federalism facilitates the protection of minorities. The principle of subsidiarity, which is an element of the Roman Catholic social theory, is adduced to justify federalism. The smallest community capable of implementing meaningful solutions should solve their particular problem.

A federalist constitution always implies a vertical separation of powers which, like the horizontal separation, is an instrument to contain the power of the state through checks and balances. Thus,

the containment of state powers enhances individual freedoms. This might be contested however, in light of the US history and slavery. Federalism encourages democracy by providing an additional level of democratic participation. The traditional view that federalism opposes democracy since it restricts the options for having majority decisions at the federal level is outdated.

On the grounds of efficiency, federalism is a highly efficient system of government to the extent that functions can be discharged more efficiently by smaller units than by large ones. Federalism facilitates competition, which one element on which efficient allocation of resources as well as openness of a system depend.

4.6 Lessons from other Federal systems

We have already noted that the federal form of government best represents the argument about power sharing and minority protection. At the heart of the debate is the idea of the indivisibility of the sovereignty and the reality of the fact that the atom of sovereignty is divisible. Fleiner[102] argues that only states with internal structures can develop true federal structures of government. When one compares different federal states, it would seem that the more power is shared with the people, the more decentralized they are. It is against this background that he finds Switzerland with its strong direct democracy on the national, cantonal, and local levels, is much more decentralised than Canada or even Germany.

To Mark Tushnet, federalism promotes the gradual emergence of "a cross cutting" consensus sufficient to sustain liberal, morally pluralistic societies. Federalism therefore is the system in

[101] Bryce: The American Commonwealth, ch. Xxx on the merits of federalism.

which a constitution or other basic agreement defines the powers that the central, national or sub-national government posses and the allocation of authority can only be changed by constitutional amendment. Such constitutional amendments will also rule out the ordinary, typically majoritarian political processes of national decision-making.

It is therefore clear that federalism is an attractive solution to the problem of organising a national government in a polity characterised by reinforcing differences. Federalism equally offers a constitutionally protected sphere in which diverse groups can at least survive and possibly flourish, while offering a national link that coordinates the exchange and secure conditions of economic prosperity.

Conclusion

This chapter demonstrates the need for improved quality of government. It outlines the basic features of federalism and argues that the push for federal structures is as a result of a backlash against state centric approaches. The alternative is a call for political, economic and constitutional structures that ensure that the end users are engaged in decision making as beneficiary participants, empowered people, and in a deliberative development processes.

[102] In Vicki Johnson and Tushnet, Comparative constitutional Law, 2004

CHAPTER FIVE: CONCLUSION

This thesis has addressed itself to the issues of safeguarding the people voice through the adoption of a federal structure. Constitution making process in Kenya is at a crossroads and urgent steps are needed to ensure that this time round, the people of Kenya, in their diverse cultural and political background sit down to reason together and agree on the way forward.

The pitfalls of the Imperial presidency have been highlighted and emphasis made on its contribution to the dearth of democracy. The issue of ethnicity has been highlighted, both as an organising political vehicle in the past, and potentially a useful vehicle in the new constitution if it is creatively harnessed and built into the federal structures as we suggest.

Emphasis on how the constitution should be used to safeguard the role and place of the people in participatory democracy. It is our view that the constitutional mainstreaming of the popular participation by the Kenyan people in self-governance is very critical for the restoration of participatory democracy.

We make no assumptions that the new constitution will work out magic. If anything, we hold the view that having a new and acceptable constitution is only the first step. The next should be for the same to be internalised and tested and given time for it to grow and mature. Failure to do this, Kenya will remain in the realm of constitutions without constitutions as ably illustrated by Okoth Ogendo.

On the concept of the people, it is our argument that Kenya should harmonise its definition, in our view, the people are the 42 Kenyan tribes organised around ethnicity, having been socialised through colonialism and the subsequent governments after independence. Politics, and resource distribution has found expression either around regional or ethnic basis. With this in mind, recommendations are made to formally structure this through a federal system to ensure equity, regional balance, and fairness.

We have reviewed the Bomas process and fail to agree with those who faulted the process and the reasons given. Once again, the political elites have engaged the rest of Kenyans in unnecessary polemics on the substance of the constitution by declaring the chapter on devolution contentious for no clear reasons.

We make the following conclusions. Constitutions organise the political within the state. It determines how a polity is organised. It is the totality of the fundamental legal norms, the fundamental legal act that sets the principle legal norms. That said, we recognise the challenge of living through the spirit of the constitution i.e. constitutionalism.

We note complimentary global trends which are putting lots of emphasis on decentralisation while the concept of governance continues to be a subject of greater scrutiny. Clearly, there is a gradual shift from unitary constitutional structures to a federal or confederal form of governance for a large majority of people. The culture of governance is changing from a bureaucratic one to a participatory one, from command and control to accountability for results, from being internally dependent to being competitive and innovative.

It is observed that 'political tribalism' and ethnicity in general is concrete representation of group interests in relation to other groups. Political tribalism ordinarily acts as a lubricant to 'high politics', which involves competition between powerful elites at the centre.

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