CONSTITUTIONAL AMENDMENTS AND THE CONSTITUTIONAL AMENDMENT PROCESS IN KENYA (1964-1997)
A STUDY IN THE POLITICS OF THE CONSTITUTION

BY GITHUI MUIGAI

A THESIS SUBMITTED IN FULFILMENT OF THE REQUIREMENTS OF THE DEGREE OF DOCTOR OF PHILOSOPHY OF THE FACULTY OF LAW OF THE UNIVERSITY OF NAIROBI

NAIROBI SEPTEMBER 2001
DECLARATION

I, Githu Muigai, do declare that this is my original work and has not been submitted and is not currently being submitted for a degree in any other university.

Signed

Githu Muigai

This thesis is submitted for examination with our approval as university supervisors.

Signed

Professor Kivutha Kibwana
Associate Professor faculty
Of Law University of Nairobi.

Signed

Professor Maria Nzomo
Associate Professor
institute of Diplomacy & International Studies
University of Nairobi.
ACKNOWLEDGMENTS

The work on this thesis would never have been finalised without the guidance and support of Professors Kivutha Kibwana, Maria Nzomo and Yash Ghai, who served as supervisors. I also owe a great intellectual debt to Professor Macharia Munene and Dr Makumi Mwagiru without whose assistance the final form of the Thesis would have been less presentable. Finally, to Professors Okoth Ogendo and J B Ojwang whose pioneering work on constitutionalism in Kenya was of much inspiration and who extended to me their personal and professional support and Dr Willy Mutunga who first interested me in an academic career.
TABLE OF CONTENTS

DECLARATION ............................................................ ii
ACKNOWLEDGMENTS .................................................. iii
TABLE OF CONTENTS ................................................... iv
ABSTRACT OF THESIS .................................................... ix
ABBREVIATIONS .......................................................... xiii
TABLE OF CASES .......................................................... xv
TABLE OF STATUTES: Colonial Constitutional Documents and Statutes .......... xxi
Post Colonial Constitutional Documents and Statutes ...... xxii

CHAPTER ONE: SCOPE OF THE STUDY

Introduction ................................................................. 1
The Problem ................................................................. 1
Literature Review .......................................................... 2
Justification of the Study ............................................... 29
Objectives Of The Study ............................................... 29
Theoretical Framework .................................................. 30
Hypotheses ................................................................. 37
Research Methodology .................................................. 38
Chapter Outline ........................................................... 39
Conclusion ................................................................. 39

CHAPTER TWO: CONSTITUTIONAL CHANGE AND CONSTITUTIONAL POLITICS IN
COLONIAL KENYA, 1887-1960

Introduction .................................................................. 41
The Introduction Of British Imperial Rule ......................... 42
The Constitutional Basis Of Protectorate Rule ...................... 44
The Commissioner ......................................................... 46
The Genesis Of Constitutional Institutions ......................... 47
The Governor ............................................................... 48
The Executive Council .................................................... 48
The Legislative Council ................................................... 49
CHAPTER THREE: THE MAKING OF THE INDEPENDENCE CONSTITUTION
1960-1963

Introduction .......................................................................................................................... 77
The 1960 Lancaster House Conference .............................................................................. 77
The 1960 Constitution ......................................................................................................... 79
The Second Lancaster House Conference ........................................................................... 81
The 1962 Self Government Constitution ........................................................................... 83
The Third Lancaster House Conference ............................................................................ 86
The Independence Constitution ....................................................................................... 89
The Executive .................................................................................................................... 92
Legislative Power .............................................................................................................. 92
Regional Government ...................................................................................................... 93
Minority Rights .................................................................................................................. 95
The Judiciary ...................................................................................................................... 96
The Civil Service .............................................................................................................. 97
Elections ............................................................................................................................. 98
The Bill Of Rights .............................................................................................................. 98
Citizenship .......................................................................................................................... 99
Land ..................................................................................................................................... 99
The Alteration Of Constitution ......................................................................................... 100
The Complexity Of The Constitutional Settlement ......................................................... 101
CHAPTER FOUR: CONSTITUTIONAL AMENDMENTS UNDER JOMO KENYATTA (1964-1978)

Introduction ................................................................................................................. 110
The First Amendment: Constituting The Republic ...................................................... 110
The Second Amendment: The Deconstruction Of Majimbo .................................... 116
The Third Amendment: Amending The Amendment Procedure .............................. 118
The Fourth Amendment: Further Expansion Of Presidential Powers ..................... 122
Setting The Stage For The Fifth, Sixth Seventh And Eighth Amendments ............ 124
The Fifth Amendment: Executive Control Of Parliament .......................................... 125
The Eighth Amendment: Clarification Of The Fifth Amendment ............................. 128
The Sixth Amendment: Expanding The Emergency Powers Of The President ....... 130
The Seventh Amendment: Abolishing The Senate .................................................... 131
The Ninth Amendment: The Death Of Regionalism ................................................. 133
The Tenth Amendment: Changes In Election Laws ................................................. 133
The Eleventh Amendment And The Revision Of The Constitution ......................... 135
The Twelfth Amendment: Lowering The Voting Age .............................................. 136
The Thirteenth Amendment: The Official Language Amendment .......................... 136
The Fourteenth Amendment: The Second Official Language Amendment ............ 138
The Fifteenth Amendment: Expanding The Prerogative Of Mercy. [Ngei's Amendment] ................................................................................................................. 139
The Sixteenth Amendment: Setting up the Court of Appeal .................................... 140
The Politics Of Constitutional Amendments Under Kenyatta ................................ 141
Conclusion .................................................................................................................... 146

CHAPTER FIVE: CONSTITUTIONAL AMENDMENTS UNDER MOI (1979 - 1997)

Introduction ................................................................................................................. 149
The Seventeenth Amendment-The Third Official Language Amendment .............. 149
The Eighteenth Amendment - Eligibility For Election ............................................. 150
The Nineteenth Amendment-The Creation Of The One Party State ....................... 151
<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Limits Of The Export Model Constitution</td>
<td>222</td>
</tr>
<tr>
<td>Constitutional Lacuna</td>
<td>228</td>
</tr>
<tr>
<td>The Place Of The Official Opposition</td>
<td>228</td>
</tr>
<tr>
<td>Coalition Government And Government Of National Unity</td>
<td>228</td>
</tr>
<tr>
<td>Political Parties</td>
<td>229</td>
</tr>
<tr>
<td>The Civil Service</td>
<td>229</td>
</tr>
<tr>
<td>Parliamentary Sovereignty</td>
<td>230</td>
</tr>
<tr>
<td>Judicial Independence</td>
<td>230</td>
</tr>
<tr>
<td>The Problem Of Public Law</td>
<td>231</td>
</tr>
<tr>
<td>The Judiciary And The Subversion Of Constitutional Intent</td>
<td>232</td>
</tr>
<tr>
<td>The Consequence Of The Constitutional Changes</td>
<td>234</td>
</tr>
<tr>
<td>The Kenyatta-Moi Legacy In Constitutional Amendment</td>
<td>237</td>
</tr>
<tr>
<td>The Lessons Of History</td>
<td>239</td>
</tr>
<tr>
<td>Conclusion</td>
<td>240</td>
</tr>
<tr>
<td>Bibliography</td>
<td>242</td>
</tr>
</tbody>
</table>
ABSTRACT OF THESIS

The Constitution of Kenya was amended twenty eight times between 1964 and 1997. Cumulatively the amendments radically altered both the institutional structure and the legal content of the Constitution. Similarly, they fundamentally re-designed the structure of the post independence state. Ostensibly the amendments were made in order to facilitate effective governance and to make the Constitution more autothonous. In reality, the use of the constitutional amendment process was opportunistic, self-serving and manipulative of the constitutional order, with the intention of serving partisan and parochial politics. Consequently, a crisis of both legitimacy and relevance confronted the entire constitutional order.

In effect, the amendments consolidated personal rule over institutional rule, institutionalized political expediency as the yardstick for constitutional change and undermined the claim of the Constitution as the basic law and the fountain of political stability. Structurally, the integrity and autonomy of the institutions created under the Constitution was severely distorted, eroded and undermined. Not surprisingly, respect for and adherence to Constitutionalism and the rule of law have been seriously compromised.

To the extent that Constitutions are meant to subject political activity to a set of predetermined rules, the constitutional amendments in Kenya effectively shifted the goal posts thereby distorting the competition for power and undermining constitutional democracy. Predictably, the manipulation of
the Constitution through amendments spawned a crisis in the constitutional order. The current constitutional crisis presents itself both as a crisis of legitimacy and of expectations.

This study has a number of objectives. First, is to understand the nature and scope of the constitutional amendments that were effected between 1964 and 1997 and the impact of those amendments on the structure and content of the Constitution. Secondly, is to understand the dynamics that have galvanized the constitutional amendment process. Thirdly, is to understand the role played by the judiciary in the constitutional amendment process. Finally, is to understand the impact of the various amendments on the state's capacity to adhere to constitutionalism and the rule of law.

It surveys the history, jurisprudence, sociology and politics of the constitutional changes effected through amendments to the constitution of Kenya between 1964 and 1997 by examining both the process of constitutional change and the substance of the changes. Several themes are explored in the study. First, the study investigates the history of the making of the Constitution of Kenya. Secondly, the study seeks to understand the limitations of the Independence Constitution and the dynamics that gave the impetus for constitutional amendment. Thirdly, the study seeks to understand and explain the role of the judiciary in the constitutional amendment process. Finally, the study seeks to understand the effect of the constitutional amendments on political institutions and political life in Kenya.
The central thesis of this study is that the Constitution and the constitutional process are eminently political as they embody political values and choices. Consequently, the challenge of constitutional scholarship must be to understand the ontological causality between the form of government a constitution endorses and the socio-economic structures of the society to which it is applied. In this regard, the study of constitutional law and constitutional politics demands more than the abstraction of constitutional controversies from the world of politics and subjecting them to the sterile rules of interpretation. It entails more than merely an appreciation of the substantive legal provisions of the Constitution and requires an appreciation of the socio-political dynamics that find expression in these provisions and the underlying struggle between various groups in society to structure public power and the governance process in the manner most advantageous to them.

Further, it is argued that the constitutional amendment process is a window through which constitutional lawyers, political scientists, sociologists and historians are able to examine the political societies struggle to give legal expression to the various forces demanding articulation within the polity. It is therefore a process that tells us much more than what the constitution has been amended to say at any given historical time. Significantly, it tells us why this is the case. It tells us much about the complex process of subjecting the political process to the governance of rules, structuring public power, drawing the power map and allocating public resources. Finally, it also tells
us much about the even more complex forces in society that impacts on the process of law making generally and constitutional making in particular.

In the specific context of Kenya, the study postulates that on the one hand, the process of constitutional amendment has been part of a larger political program seeking to develop indigenous domestic institutions, against a background of political instability caused by the struggle to contain class, racial, ethnic, religious and other differences that the independence constitution and the constitutional process subsumed in broadly worded guarantees of equality and which were assumed would thereafter pose no constitutional problems. On the other hand, the amendments have reflected the attempt by the power elite to manipulate the levers of power to exclude or at least minimize the competitiveness of politics. In this respect, the amendment process has been part of the political process of limiting the arena of competitive politics by making opposition to incumbent power very difficult, if indeed not virtually impossible. Thus in the constitutional history of Kenya, partisan politics has been the major determinant of not only, the proposals for amendments but also of the content of the amendments and the interpretation of the said amended Constitution.
1. AIR - All Indian Reports
2. CLR - Commonwealth Law Reports
3. Col. L. R. - Columbia Law Reports
4. EALR - East Africa Law Reports
5. Ch. D - Chancery Division
6. EAPH - East African Publishing House
8. How. St. Tr. - State Trials
9. HCCC - High Court Civil Case
10. ICJ - International Commission of Jurist
11. ICLQ - International and Comparative Law Quarterly
12. J.P - Justice of Peace and Local Government Review
13. Ind. L. J. - Indian Law Journal
14. Kam - Kames Law Reports
15. KLR - Kenya Law Reports
16. LQR - Law Quarterly Report
17. LLR - London Law Report
19. K. B. - Kings Bench
20. Misc. Civil Appl. - Miscellaneous Civil Application
21. NLM - Nairobi Law Monthly
22. NLR - Newfoundland Law Reports
23. NLR - Nigeria Law Reports
24. OUP - Oxford University Press
25. Q.B. - Queens Bench
26. SCR - Supreme Courts Reports
27. SALJ - South Africa Law Journal
28. Tenn. L. R. - Tennessee Law Reports
29. W.L.R. - Weekly Law Reports
30. W.L.R. - Western Law Reports
30. Y.L.J. - Yale Law Journal
<table>
<thead>
<tr>
<th>Case Title</th>
<th>Volume/Year</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ahokwe v Registrar of Trade Unions, Nairobi Civil Appeal No. 26 of 1977</td>
<td></td>
</tr>
<tr>
<td>An Application by Mwau, NLM 12 – 13 Jan 1989</td>
<td></td>
</tr>
<tr>
<td>Anarita Karimi v Republic (No. 2), NLM Vol. 20</td>
<td></td>
</tr>
<tr>
<td>Anarita Karimi Njeru v Attorney General, (1979) KLR 154</td>
<td></td>
</tr>
<tr>
<td>Angaha v Registrar of Trade Unions, (1973) EA 97</td>
<td></td>
</tr>
<tr>
<td>Attorney General v Lesinot Ndaina and two others, Criminal appeal No. 52 &amp; 53 of 1979</td>
<td></td>
</tr>
<tr>
<td>Attorney General of New South Wales v Trethowan, (1932) AC 526 PC</td>
<td></td>
</tr>
<tr>
<td>Attorney General v Momodou Jobe, (1984) AC 689</td>
<td></td>
</tr>
<tr>
<td>Awolowo v Minister of State, (1963) LLR 69</td>
<td></td>
</tr>
<tr>
<td>The Bribery Commissioner v Ranasingh, (1965) 25A 429</td>
<td></td>
</tr>
<tr>
<td>Cameroon v Hogan (1934) 5 ICLR 358</td>
<td></td>
</tr>
<tr>
<td>Charles Rubia Exparte the Principal Immigration Officer, Civil Case No. 5404 of 1989</td>
<td></td>
</tr>
<tr>
<td>Charles Young Okany v Republic, Criminal Case No. 1189 of 1979(unreported)</td>
<td></td>
</tr>
<tr>
<td>Coleman v Miller, 146 kan 390 (1937), 307 US 433 (1939)</td>
<td></td>
</tr>
<tr>
<td>Corbett Ltd v Floyd, (1958) EACA 389</td>
<td></td>
</tr>
<tr>
<td>David Onyango Oloo v Republic</td>
<td></td>
</tr>
<tr>
<td>D.C. of Nairobi v Wali Mohammed, (1914) 5 EALR</td>
<td></td>
</tr>
<tr>
<td>Dent v Kiambu Liquor License Court, (1968) EA 80</td>
<td></td>
</tr>
<tr>
<td>Dillon v Gloss, 256 US 368</td>
<td></td>
</tr>
<tr>
<td>Don John Francis Douglas Liyanage v The Queen, (1967) AC 259</td>
<td></td>
</tr>
</tbody>
</table>

DPP v Chike Obi, (1961) NLR 186

Earl of Eroll v Commissioner of Income Tax, (1940) 7 EACA 7

El Mann v Republic, (1969) E.A. 357

Ex Parte Selwyn, (1872) 36 J. P. 54

Felix Njage Marete v Attorney General, Misc. Application No. 668 of 1968

Fernandez v Kericho Liquor Licensing Court, (1968) E.A. 640

Gatabaki v Attorney General, Misc. Criminal Case No. 100 of 1993

General v Whiteman, (1991) 2 WLR 1200

Gitobu Imanyara v Attorney General, Nairobi HCCC, Miscellaneous Civil application no.7 of 1991

Golak Nath v Punjab, (1967) AIR (5) 1643

Haridas Changanlal v Kericho Urban Council, (1965) E.A. 640

Harris v Minister of Interior, (1952) 2 SA 429

Hawke v Smith, 253 US 221 (1920)


Herbert v Phillips and Searley, 10 (1967) West Indian Report 453

Hinds v The Queen, (1977) AC 195

Hollingsworth v Virginia, Dall. 378 (US) 1978

Indira Ghandhi v Raj Narain, AIR (1975) SC 2299

Isaac Wainaina v Murito wa Indagara, KLR 103

James Keffa Wangara and Rumba Kinuthia v John Anguka and Ngaruso Gitahi, HCCC No.724 of 1988

James Aggrey Orengo v Daniel Arap Moi, Election Petition Case No. 8 of 1993

John Harun Mwau v Republic, Nyeri Court of Appeal 128 of 1983

Kaira v Attorney General

Kamau Kuria v Attorney General, Misc. Civil application 552 of 1988 in NLM (Mar/April) 1989

Kenneth Stanley Matiba v Attorney General, High Court Civil Application No. 66 of 1991

Kenneth Stanley Matiba v Daniel Arap Moi, Presidential Election Petition No.1 of 1993

Kesevanda Bharati v State of Kerala, AIR (1973) S C 1461

Kiraitu Murungi v Musalia Mudavadi, HCCC 1524 of 1997

Koigi Wa Wamwere v Attorney General, Misc. Application No. 574 of 1990

Kokolongo v Attorney General of Trinidad and Tobago, (1981) WLR 106

Kuchasu v Attorney General, (1983) CH 77


Lesser v Garnett, 258 US 130

Liversidge v Anderson, (1942) AC 206

Liyanage v The Queen, (1967) AC 259

Luther v Borden, How. 7 US 1894

Madzimbamuto v Lardner Burke, (1968) SA 284

Maina Mbacha and Two Others v Attorney General, Misc. Civil application 356 of 1989 Vol. 17 N.L.M

Maneka Gadhi v Union of India, (1978) AIR SC 243


xvii
Marbury v Madison
Margaret Magiri Ngui v Republic, (1978) KLR 105
Mathew Ondenyo Maribari v David Onyancha and Another, HCCC 1528 of 1988
(Unreported)
Mbondo v Ngei, Election Petition No. 16 of 1974
McCawley v The King, (1920) AC 691
Meshnuar Jacob Samuel v Commissioner of Lands, [Nairobi] Land acquisition
Appeal No. 2 of 1986
Meyes v Nebraska 262 US (1923) 390
Miller v Miller, Civil Appeal No. 70 of 1998 reported in the NLM, April, 1988
Minerva Mills v India, AIR (1980) SC 1789
Minister of Home Affairs v Fisher and Another, (1980) AC 319
Mirugi Kariuki and Another v Attorney General, H.C. Misc. Application No. 88 of
1991 (Unreported)
Mugaa M’sampwii v G N Kariuki, (NBI) HCCC 556 of 1981
Munzimba v Uganda, (1969) E.A. 433
Muhozya v Attorney General, Tanzania HCC 206 of 1993
Mwangi Stephen Mureithi v Attorney General, No. 1170 of 1981
National Prohibition Cases, 253 (1920) US 221
Nawa Shariff v President of Pakistan, PLD (1993) SC 473
New Kakuzi Sisal Estate Ltd v Attorney General, (1971) KHCD
Ngwenya v Deputy Prime Minister, (Swaziland Civil Appeal No. 4 of 1973)
Nyalì Ltd v Attorney General, (1956) 1 K.B 15

Ole Njongo and Others v Attorney General of East African Protectorate, (1914) S. W. A. L. R. 70

Olive Carey Jaundoo v Attorney General, (1979) CLR. 164

Ooko v Republic, HCCC No. 1159 of 1986

Patel and Others v Dhanji and Others, (1975) E.A. 301

R v Amalgamated Press of Nigeria Ltd., (1961) I All NLR 199

R v El Mann, (1969) E.A. 357

R v Commissioner of Prisons ex Parte Kamonji Wachira, Edward Akong Oyugi and George Moseti Anyona, HCCC 60 of 1984

R v Mark Mwithaga, (1969) EA

R v Ndlovu, (1968) 4 S.A. 515

Raila Odinga v Attorney General, Misc. appl. 104 of 1986

Raila Odinga v Francis Ole Kaparo and Detainees Review Tribunal, HCCC 394 of 1993

Ram Krishnan v Delhi, (1962) ALR 318

Re Maangi, (1968) E. A 637

Re Miles Application, (1958) E. A

Reynolds v Simms, 377 US (1964) 553

Richard Kimani v Nathan Kahara, Criminal Application 39 of 1985 (HCCC Nairobi)

48

Rotimi Williams v Majekodunmi, (1962) 1 All Nigeria Law Reports 413

Sakae Papers v Union of India, AIR 1962 SC 305

Salim Ndamwe and Others v Attorney General, HCCC 253 of 1991
Sallah v Attorney General, (1970) NLR 54

Sam Karuga Wandai v Daniel Arap Moi, Misc App. 140 of 1998

Shah v Attorney General, NLM Vol. 19

Shipango v Attorney General.

Stanley Munga Githunguri v Attorney General, High Court Misc. Application No. 279 of 1985

State v Dosso, (1958) 2 Pakistan SCR

State v Zuma, (South African Constitutional Court) 1995 (4) BCLR 401

Steel and Others v Attorney General, (1967) African Law Reports

Steel v Sirs, (1980) 1 WLR 142

Tera Aduda v Registrar of Trade Unions, (1948) KLR 119

Terel v Secretary of State, (1958) 2 QB 482

Uganda v Matovu, (1966) EALR 514

Uganda v Republic, (1960) E A 745

Wandua v City Council of Nairobi, (1968) E A 406

Wangari Mathaai v Kenya Times Media Trust Ltd., HCCC 5504 of 1988

Wallace Johnson v Republic, (1940) AC 231

Wesberry v Sanders, 376 US 11 (1964)
TABLE OF STATUTES

Colonial Constitutional Documents and Statutes

1. Colonial Laws Validity Act, 1865
2. East African Order in Council, 1879
3. Foreign Jurisdictions Act, 1890
4. East African Order in Council, 1897
5. East African Order in Council, 1899
6. East African Order in Council, 1902
7. East African Order in Council, 1905
9. Legislative Council Ordinance of 1919
12. Lyttleton Constitution, 1954
14. Legislative Council (Constituency Elected Members) Act, 1959
15. Independence Order in Council, 1963
Post-Colonial Constitutional Documents and Statutes

Constitutional Instruments

1. The constitution of Kenya (amendment) act no. 28 of 1964
2. The constitution of Kenya (amendment) act no. 14 of 1965
3. The constitution of Kenya (amendment) act no. 16 of 1966
4. The constitution of Kenya (amendment) act no. 17 of 1966
5. The constitution of Kenya (amendment) act no. 18 of 1966
6. The constitution of Kenya (amendment) act no. 40 of 1966
7. The constitution of Kenya (amendment) act no. 4 of 1967
8. The constitution of Kenya (amendment) act no. 16 of 1968
9. The constitution of Kenya (amendment) act no. 5 of 1969
10. The constitution of Kenya (amendment) act no. 2 of 1974
11. The constitution of Kenya (amendment) act no. 2 of 1974
12. The constitution of Kenya (amendment) act no. 1 of 1975
13. The constitution of Kenya (amendment) act no. 14 of 1975
14. The constitution of Kenya (amendment) act no. 13 of 1977
15. The constitution of Kenya (amendment) act no. 1 of 1979
16. The constitution of Kenya (amendment) act no. 5 of 1979
17. The constitution of Kenya (amendment) act no. 7 of 1982
18. The constitution of Kenya (amendment) act no. 7 of 1984
19. The constitution of Kenya (amendment) act no. 6 of 1985
20. The constitution of Kenya (amendment) act no. 14 of 1986
21. The constitution of Kenya (amendment) act no. 20 of 1987
22. The constitution of Kenya (amendment) act no. 4 of 1988
23. The constitution of Kenya (amendment) act no. 17 of 1990
24. The constitution of Kenya (amendment) act no. 10 of 1991
25. The constitution of Kenya (amendment) act no. 12 of 1991
26. The constitution of Kenya (amendment) act no. 6 of 1992
27. The constitution of Kenya (amendment) act no. 7 of 1997
28. The constitution of Kenya (amendment) act no. 9 of 1997
Statutes

1. Public Security (Detainee and Restricted Persons) Regulations of 1966
16. Non Governmental Organizations Co-ordination Act, 1992
CHAPTER ONE
SCOPE OF THE STUDY

INTRODUCTION

As a historical analysis of the problem of constitutional amendments and constitutionalism in Kenya, the scope of this study is wide. It covers the period 1964 to 1997. This period represents the time in which far-reaching changes were made to the Constitution. Largely, the study calls for the application of constitutional theory to an analysis of the historical experience. At the level of legal theory, the study seeks to establish the legal significance of the Constitution, the essence of constitutionalism and the proper scope of constitutional amendment. As far as the historical experience of Kenya is concerned, the study seeks to map out the content and structure of the independence constitution and to analyse its ability to generate constitutionalism. The study then seeks to explain the reasons why amendments were made to the Constitution and the effects of these changes on the content, structure, philosophy and efficacy of the Constitution. By analysing each specific amendment, the study seeks to establish the extent to which each of them was consistent with sound constitutional theory and the extent to which, as amended, the Constitution retained internal consistency and coherence and was capable of retaining fidelity to constitutionalism. Finally, the study seeks to establish how the Constitutional amendments impacted on the legitimacy of the Constitutional Order.

THE PROBLEM

The research problem in this thesis has three dimensions. First, is the nature and impact of constitutional amendments and the Constitutional amendment process in Kenya between 1964 and 1997. It is not clear why, how and with what consequences
the Constitution of Kenya was repeatedly amended during the period under review. It is particularly important to understand how the amendments affected the structure, values, internal consistency and coherence of the Constitution. The second problem is to understand how the amendments have affected the practice of constitutionalism and the observance of the rule of law, and the impact of the amendment process on the legitimacy of the Constitutional order. Third, is to establish the role and influence of the judiciary on the amendment process and the practice of constitutionalism in Kenya.

LITERATURE REVIEW

The literature review that follows is in two parts. First, is the review of the literature on the jurisprudence, both academic and judicial on constitutional amendments generally. Second, is to review the literature specifically dealing with the constitutional amendment procedures and processes in Kenya.

The most important theoretical issue at the heart of this study, is the question of the proper scope of constitutional amendment. This issue is linked to the relationship between a constitution that is supreme and a legislature which is sovereign. A constitution, which is supreme, is the creator of the legislature, while a sovereign legislature has the power to amend the Constitution. The Constitution therefore simultaneously authorises political action and limits it. In its ultimate expression of legitimate power relations within the state, the Constitution logically assumes supremacy over the institutions and processes that it creates or sanctions. At the same time, by recognising the need for both continuity and change, the Constitution institutionalises the process of its own amendment through the legislature.
In theory, the scope of amendment will normally depend on the nature of the amendment clause or process anticipated by the Constitution. In practice, the true nature of this complex relationship depends on several other issues, the principal one being whether the Constitution is written or unwritten. Consequently, the literature in Anglo-American jurisprudence, which holds sway in the common law world, falls into two distinct categories. Those who, inspired by English constitutional theory, contend that the power of Parliament to amend the Constitution is illimitable and those who, inspired by the American experience, contend that there are both express and implied limitations on the power of parliament to amend the Constitution.

English common law has always venerated the sovereignty of parliament. A V Dicey's seminal treatise, An Introduction to the study of the law of the Constitution, which was the first serious work to attempt a restatement of English constitutional law, posited the principle of parliamentary sovereignty as fundamental to English constitutional jurisprudence. Dicey, a professor of law at Oxford University, taught that sovereign legislative power was perpetual, illimitable and indivisible. From this premise, he argued that parliament could legislate for all persons and all places, at any time, for any reason, and that there was no fundamental law which parliament could not amend or repeal like any ordinary legislation. Dicey emphasised the doctrine of the absolute sovereignty of parliament in the following terms:

"The principle therefore, of parliamentary sovereignty means neither more nor less than this, namely that "parliament" has the right to make any law whatever, and further, that no person or body is recognized by the law of England as having a right to override or set aside the
legislation of parliament, and further that this right or power of parliament extends to every part of the king's dominion".2

Dicey went further than merely declare the sovereignty of parliament, he taught that parliament could not bind its successors nor could the legality of an Act of the British parliament be questioned in any court of law.3 Dicey remained a major influence among English constitutional lawyers, who were enticed by the apparent logic of legislative sovereignty and supremacy. Dicey's formulation of the sovereignty of parliament continued to influence several generations of English constitutional scholars and still has an enduring influence today.

For a long time after Dicey, no significant developments were made in English constitutional scholarship until Ivor Jennings published his book, The Law of the Constitution4 in 1959. In this book, Jennings, while not challenging the wisdom of Dicey's formulation of the doctrine, asserted that no legal authority existed for the general proposition. Jennings developed an alternative theory in which he sought to draw a distinction between continuing and self-embracing parliamentary sovereignty. He argued that limitations on parliament's power to make law may actually be placed by parliament itself and yet be consistent with parliament's sovereignty:

"If a prince has supreme power, and continues to have supreme power, he can do anything, even to the extent of undoing the things which he had previously done. If he grants a constitution, binding himself not to make laws except with the consent of an elected
legislature, he has power immediately afterwards to abolish the legislature without its consent and to continue legislating by his personal decree. But if the prince has not supreme power, but the rule is that the courts accept as law that which is made in the proper legal form, the result is different. For when the prince enacts that henceforth no rule shall be law unless it is enacted by him with the written consent of the legislature, the law has been altered, and the courts will not admit as law any rule which is not made in that form. Consequently a rule subsequently made by the prince alone abolishing the legislature is not law, for the legislature has not consented to it, and the rule has not been enacted according to the manner and form required by the law for the time being."

Jennings then proceeded to explain the difference between situations where there could be no limitations at all and those where there were explicit limitations. He explained:

"The difference is this. In the one case, there is sovereignty. In the other, the courts have no concern with sovereignty, but only with the established law "legal sovereignty" is merely a name indicating that the legislature has for the time being power to make laws of any kind in the manner required by law. That is, a rule expressed to be made by the king, "with the advice and consent of the lords spiritual and temporal, and commons in this present parliament assembled, and by the authority of the same" will be recognised by the courts, including a rule which alters this law itself. If this is so, the "legal sovereign" may impose legal limitations upon itself, because its power to change the law includes the power to change the law affecting itself".

Jennings contribution to the reformulation of English constitutional theory was immense. The dichotomy between continuing and self-embracing parliamentary sovereignty that Jennings advocated is amenable to three different interpretations that remove much of Dicey's confusion. First, is the composition of parliament, the manner in which it exercises its powers and the limitless ambit of its power, are the subject of a fundamental unalterable rule. Second, parliament can change its

---

5. Ibid. p.142.
6. Ibid. p.142.
procedure and the manner and form in which it legislates but cannot impose limits on the content of the legislation. Third, the rule of parliamentary supremacy is totally self-embracing; therefore, it can be amended by parliament in any respect whatsoever.7

Following Jennings, Lord Lloyd in his book, *Introduction to Jurisprudence*8 was able to demonstrate that Dicey’s argument as to the illimitability of sovereignty was based on a fallacy. The fallacy, as Lord Lloyd suggested, was that “sovereignty is not a metaphysical entity with an ineradicable logical structure. On the contrary, it is a practical devise of law and politics whereby effect is given to the practical need in any political community for some final or ultimate legal authority. There is, therefore, no logical or any other compulsion to make this authority indivisible”9.

Geoffrey Marshall, an Oxford constitutional scholar, in his books *Parliamentary Sovereignty and the Commonwealth*10 and *Constitutional Theory*11 extended Jennings critique of Dicey and has argued that a theory of procedural restraints on sovereign legislative power is consistent with English constitutional law. Marshall demonstrated this using examples from the new constitutions of the Commonwealth, that the mere act of retrenching certain constitutional provisions concedes the argument on sovereign self-limitation. In both books, he further argued that a legislature is not fettered in its sovereignty when a simple majority is restrained from enacting its will into law.

7. Ibid. pp. 142-143.
George Winterton wrote two very influential articles on the subject, the first was "The British Grund Norm. Parliamentary Supremacy Re-examined" and the other was "Parliamentary Supremacy and the Judiciary". He advanced the view, that modern notions of "continuing" as opposed to "self-embracing" parliamentary supremacy create unwarranted constitutional rigidity and severely curtail the capacity of parliament to adopt the Constitution to current exigencies.

While Dicey's theory contains a major paradox - on the one hand denying the existence of any legal provisions not subject to amendment, and on the other treating parliamentary sovereignty as one of the very rare common law fundamental principles that cannot be altered by statute, it still informs mainstream English constitutional theory and casts a shadow over both academic and judicial discussions on the amenability of the Constitutions cloned from the Westminster model. For example, professor H W R Wade, in his article "The Legal Basis of Sovereignty" which he restated in his book, Constitutional Fundamentals, supported Dicey's formulation of the rule and argued that the ability of parliament to legislate both as to substance and as to the manner and form of legislation is a unique rule which is beyond the reach of statute and unchangeable by parliament.

Professor Hood Phillips, in his book Constitutional and Administrative Law, has similarly argued, that only the limitations of a practical nature such as mandate or party manifesto, public opinion and deference to interest groups should interfere with

---

Parliamentary sovereignty.

Ian Loveland in his book *Constitutional Law: A Critical Introduction*\(^8\) has suggested that there is no domestic limitations on the power of Parliament to legislate as it pleases and if, therefore, a dispute were to reach British courts questioning the power of parliament to enact law in any manner, the courts would most likely adopt the reasoning of the Court of Appeal in the case of *Madzimbamuto v Lardner Burke*,\(^9\) where it stated that "it is often said that it would be unconstitutional for... Parliament to do certain things, meaning that the moral, political and other reasons against doing them are so strong that most people would regard it as highly improper if parliament did these things. But that does not mean it is beyond the power of parliament to do such things. If Parliament chose to do any of them, the courts could not hold the Act of Parliament Invalid".\(^10\) But Loveland's book also demonstrated that contemporary practice recognises the legislative authority of the Parliament of the European Union and the overriding impact of European Union Law over British law in some key areas.\(^11\)

The literature on English constitutional theory, starting with Dicey addresses the problems of an unwritten constitution and consequently, its main concern is the issue of the sovereignty of parliament and not the supremacy of the Constitution. On the issue of whether or not any implied limitations relating to substance can exist on the amending power, English constitutional literature is not helpful.

---

\(^9\) Ibid. p.63.
\(^10\) Ibid. p.63.
\(^11\) Ibid. p.508.
The United States has been the leading country in the common law based jurisdictions, in which this matter has received the widest attention. This is probably because the United States developed the doctrine of judicial review of the constitutionality of legislation earlier than most other jurisdictions. In 1919 William Marbury wrote a seminal and provocative article entitled, "Limitations Upon the Amending Power", in which he argued that the power to amend the Constitution had inherent restrictions and that it was not intended to include the power to destroy the Constitution. He further argued that the term amendment implied an addition or change within the framework of the original instrument, hence any amendment had to improve or better carry out the purpose for which the Constitution had been framed. Marbury contended that the Constitution had a fundamental content that lay beyond the amending power and that an amendment of the Constitution ad infinitum would destroy what the Constitution constituted. Marbury had no doubt that the Supreme Court had jurisdiction to not only review the procedure or form of an amendment but also the substance.

Marbury's thesis aroused reaction from those who were influenced by the Diceyan concept of the illimitable sovereign legislature. W. L. M. Frierson, who wrote in direct response to Marbury, contended in an article entitled "Amending the Constitution of the United States" that there was no constitutional limitation on the amending power. He argued that it was a very wide power and covered any

amendment, which was regularly proposed and ratified. He further contended that the Constitution committed to Congress and not to the courts the duty of determining when amendments were necessary and that the courts could only look at the procedure of amendment and not its substance. But Marbury's thesis also found favour with other constitutional scholars. George Skinner, was impressed by the argument regarding the "unamendable constitution", in his article "Intrinsic Limitations on the Power of Constitutional Amendment" he extended the argument questioning the legality of fundamental constitutional changes made in the name of amendment. He posed the question whether in the United States constitution:

"Is it competent under the Constitution for three-fourths of the states to change the government into hereditary monarchy, to abolish the senate and House of Representatives and convert this government into an autocracy? It certainly is not. The state cannot under pretence of amending the Constitution, subvert the structure, spirit and theory of this government".

Subsequent academic debate has fallen into either of the two camps with a few attempts to find some middle ground. The most articulate and prolific modern exponent of Marbury's view has been Professor Walter Murphy of Princeton University. In several articles, namely, "An Ordering of Constitutional Values", "Slaughter-House, Civil Rights, and the Limits of Constitutional Change", "The Right to Privacy

27. Ibid. p.25.
and Legitimate Constitutional Change". Wolter Murphy argued that the Constitution has placed both explicit and implicit limits on the power of Congress to change the Constitution and that those limitations are necessary for the stability of constitutional democracy. In the article "Slaughter House, Civil Rights and the Limits of Constitutional Change" Murphy justified the implied limitations in the following way:

"the Constitution included not only the text of an amendment document but also certain choices and agreements. Because it "constitutes" the nation, it imposes real limits not only on the procedure through which the Constitution can be changed but also on the substance of valid changes. If an amendment exceeds these limits, it is proper for institutions with authority to interpret the Constitution to declare the amendment invalid" 

Murphy's views were strenuously opposed by Professor John Vile, who in his two books The Constitutional Amendment Process in American Political thought and Contemporary Questions Surrounding the Constitutional Amendment Process and in his article "The Case Against Implicit Limits on the Constitutional Amending

---

Process" argued that there are and ought not to be, any implicit limits on the amending power save those explicitly set out by the Constitution and that a properly proposed and ratified amendment would be a valid part of the Constitution. He further argued that it is not the business of the courts to get embroiled in controversies relating to the propriety of constitutional amendments. In the book Contemporary Questions Surrounding the Constitutional Amendment Process Vile demonstrated that the distinction between amending and abrogating is crucial. He argued that the mandate to write a new constitution is not granted by the amending power and that the argument is even better clarified if the further distinction between amending the Constitution and amending a statute is made.

Indian constitutional literature offers an interesting contrast between the American and British jurisprudence. When the Supreme court of India decided, in the case of Golak Nath v Punjab, that the Constitution of India had a basic structure that not even Parliament could amend, there was an outcry among jurists of all sorts of jurisprudential persuasion. H M Seerai, author of the acclaimed Constitutional Law of India doubted that the concept of basic structure was well founded. He declared that "The Majority decision clearly wrong is productive of the greatest public mischief and should be overruled at the earliest opportunity". 39

S.P. Sathe, author of *Fundamental Rights and Amending the Constitution*[^40] and *Constitutional Amendments* took the view that the basic structure doctrine was a fundamental safeguard for the constitution against the whims of a transient majority. In similar vein and in the context of the Indian experience, long before the numerous amendments that gave rise to the litigation discussed above Sathe had argued that:

"The power of constitutional amendment cannot be exercised so as to change a democracy into a totalitarian government or to substitute a theocratic rule in place of the secular state. So long as a constitutional amendment does not tend to undermine the enduring values enshrined in the Constitution, it is within the scope of the power of constitutional amendment given by article 368. It is submitted that although parliament can amend the Constitution so as to take away or abridge the fundamental rights, such amendments must be consonant with the enduring values such as liberty, equality, and justice, which the Indian constitution proudly enshrines"[^41].

What then does the literature on constitutional amendments reveal? Basically, that the position taken by constitutional scholars on this issue is informed in large part by their underlying philosophies of government and in particular the way in which the various arms of government ought to relate and the manner in which a representative democracy ought to work.

The Literature on the amendment process in Kenya is quite diverse. Chanan Singh, later to be a judge of the High Court of Kenya, was among the first commentators on the Independence Constitution. In an article entitled "The

Republican Constitution of Kenya", he outlined the historical changes that had culminated in the Republican Constitution. His main concern was in documenting the evolution of the constitutional process. He saw the changes that led to the creation of the Republic as both logical and necessary given the political struggles that had preceded independence.

Charles Njonjo, the then Attorney General and architect of most of the amendments reviewed in this study, was among the first commentators on the first amendments to the Constitution of Kenya. Njonjo's article entitled "Recent Constitutional Changes in Kenya" sought to justify the changes that created the Republican constitution. He argued that the Constitution was inherently unworkable since it had been imposed on the country by the colonial government without regard to the special circumstances of Kenya. He singled out what he claimed were four major defects in the Constitution. First, that it militated against government at the centre. Second that it prevented the co-ordination of the national effort at a time when it was most important that development be planned on a nation-wide scale. Third, that the system of regional governments was both costly and cumbersome and that they made heavy demands on the country's inadequate resources of trained manpower. Fourth that the Independence Constitution made provision for a monarchical form of government, a form which was alien and confusing to the people of Kenya.

Among academics, the earliest student of the Constitutional amendment

---

process in Kenya was Cherry Gertzel. In December 1966, she published an article entitled "Kenya's Constitutional Changes"44 in which she analysing the amendments that had been made between 1964 and 1966. Soon thereafter, she published her pioneering work on the political process in Kenya since independence under the title, The Politics of Independent Kenya.45 In both the article and the book Gertzel rationalised the Constitutional changes as providing "strong and wise government" necessary at the stage of the country's growth. In particular she applauded the creation of the executive presidency as useful in that regard. In her view, it provided a national leadership that Kenyans could understand and relate to. Her work documented in detail the political climate of the day, which provided the background to the amendments.

Gertzel's book, was the real first in depth study of politics in Kenya since independence. In it, she analysed Kenyan politics between 1963 and 1968 thereby capturing one of the most dynamic phases in the political history of the country. Gertzel analysed extensively the colonial legacy against which the independence constitution was placed and then proceeded to examine the dynamics that informed change in the immediate post-independence period. Her central thesis was that the political changes could be explained by reference to the very weakness of KANU as a party and the very determined efforts of the Kenyatta Government to consolidate executive power through the civil service as opposed to the ruling party. Internal party procedures were debated in the precincts of parliament in a desperate attempt by the members of parliament to control their

parties executives.

She observed that the voluntary dissolution of KADU did not strengthen KANU as a party but only reinforced the right wing tendencies within the KANU leadership. The ideological debates that followed in which "Capitalists" were pitted against "Socialists" and which ultimately gave birth to KPU as an opposition party were in Gertzel’s view, symptoms of much deep seated policy problems facing the KANU government. She further noted that the KANU government responded to the political crises in which it found itself relative to its opposition by changing the rules - amending the Constitution to retain a dominant position in the political process and denying the opposition any space in which to organise. Her primary thesis, like Njonjo’s, was that the Constitution inherited at independence was too complex and unworkable in the context of the political reality existing at that time. This was largely correct. However for an academic, she was not critical enough in analysing the motives and timing of the amendments. For this reason, she missed the crucial fact that, notwithstanding the shortcomings of the independence constitution, the amendments were largely motivated by partisan political considerations.

Gertzel was also involved in a collaborative work with other teachers of political science at the University of Nairobi, which was published in 1969 under the titled, Government and Politics in Kenya. This book described the Constitutional structure and put together various articles on different aspects of government in independent Kenya. Intended mainly as a college text, the emphasis was on breadth of material and not of analysis. No specific view can be said to emerge as

to the process the authors had observed for five years. The text, however, brought together material on the crucial issues of the day including rich with parliamentary debates on the Constitutional amendments.47

In December 1967, Yash Ghai published two articles, “The Government and the Constitution in Kenya Politics”48 and “Independence and Safeguards in Kenya”.49 In the two articles, he addressed the issue of the amendments to the Constitution that had been made over the three years since independence. His main emphasis was on the inevitability of the amendments, because he argued that the structure established by the Constitution at independence was too complex and elaborate, and that it was unrealistic to expect that government could be carried on within its framework. He noted that the ease with which amendments were effected created a cynicism that made it seem acceptable that the Constitution could be changed to suit political party ends. He further noted that the development of the tendency to view all political issues as problems for constitutional settlement had overburdened the Constitution and had made constitutional manipulations by way of amendments imperative. In assessing the impact of the amendments, he concluded that if the Independence Constitution had erred on the side of weak government, the amended constitution erred on the side of too strong a government.

A few years later Ghai further reinforced his views, when together with Patrick McAuslan, he published the book, *Public Law and Political Change in Kenya*.\(^5\) In this work, the authors expressed concern over both the content of amendments and their effect on the Constitutional process. As regards the effect of the Constitutional amendments on the legitimacy of government, they noted that:

"Whereas confidence in the institutions and mode of government was generated in the first two and a half years of independence, a turning point seems to have occurred in 1966. From that time the Government has become increasingly careless of the need for legitimacy, and the dictates of constitutionalism, in their alterations of the Constitution and in the administration of the laws relating to government and administration and there is a corresponding loss of confidence and increase in cynicism about these matters amongst some important sections of the ruled".\(^5\)

At about the same time, McAuslan published his own independent study of the public law system in East Africa under the title, "*The Evolution of Public Law in East Africa in the 1960s*".\(^6\) He characterised the period 1957 to 1967 as the decade of constitutional innovations in Africa and sought to understand the nature of the changes made to the inherited constitutions by the independence governments. In respect of the Kenya Constitution, McAuslan took the view that the independence constitution was so unwieldy, with its favours so divided between the central and regional governments and other institutions, that the effective use of power, leave alone its abuse was rendered extremely difficult. He argued that the key to understanding the amendments lay in studying the dissonance between a liberal


\(^5\) Ibid. p.506.

constitution and the dictates of the autocratic administrative structure inherited from colonialism and retained intact by the new government. This was a most insightful observation. Furthermore, he identified the suppression of executive power as the major source of instability in the Constitutional order and the main impetus for constitutional change. He demonstrated the necessity of factoring in an analysis of politics in a study of constitutional amendment.

In 1986, Y P Ghai revisited the subject against a new theoretical framework on the legitimacy of government in an article entitled "The Rule of Law, Legitimacy and Governance".\textsuperscript{53} He concluded that the amendment process had ultimately been used to reflect and reinforce the political order. In a sense, the amendment process amounted to no more than the manipulation of the process. He further contended that the key to understanding the Constitutional changes lay in understanding the fluidity of the political order. He summarised his thesis as follows:

"If the Constitutional system of Tanzania has been used to reflect and reinforce the political order, the position in Kenya has been that the Constitution has been used much more actively to define and modify the political system. The weaknesses of party institutions in Kenya have pushed what would more properly be party discussions in the state institutions, particularly the National Assembly. Equally, the government has used state institutions to affect party matters. The history of the Constitution since independence is revealing. The political order emerges as fluid and unsettled with the party resorting to constitutional changes as a substitute for controlling its backbenchers through the party machinery or dealing with the opposition in the open market place of politics. Soon after independence, the government justifiably used its legislative majority to dismantle regionalism, but since then many changes in the Constitution have been made to achieve particular party advantage, even if this produces constitutional inconsistency and incongruity."\textsuperscript{54}


\textsuperscript{54} Ibid. p.188.
Ghai's research into how the Constitutional amendment process had been placed at the service of power politics added to the mounting body of evidence on the matter.

In his autobiography published under the title of **Freedom and After**\(^\text{55}\) Tom Mboya, the first Minister for constitutional affairs, reviewed the major pre-independence constitutional changes and portrayed them as major political milestones that were achieved through major struggles with both the colonial and the Imperial governments. He further contended that the ethnic cleavages in Kenyan politics served to make the Independence Constitutional settlement inherently unstable and necessitated the changes that followed. This latter point was collaborated by Gideon Cyrus Mutiso, in his book, **Kenya: Politics, Policy and Society**\(^\text{56}\) in which he explained the instability of Kenyan politics on the existence of deep cleavages.

Oginga Odinga's book **Not yet Uhuru**\(^\text{57}\) while being mainly autobiographical confirmed the major thesis expounded by Gertzel. Odinga pointed out that KANU had never been a strong centralised party but an amalgamation of many diverse tendencies and policies which contributed to the instability both of the party and the government and provided the impetus for many of the immediate post-independence changes. He revealed that KANU's post independence agenda was dominated by the desire to rewrite the Constitution it believed was imposed on it at Lancaster and in particular the removal of regionalism and ideological and


20
personality squabbling on the other hand. Jomo Kenyatta’s collection of speeches published under the title *Suffering Without Bitterness*\(^\text{58}\) give further credence to the view that the dynamics of factional politics gave impetus to the numerous constitutional amendments. Kenyatta confirmed that there was less interest creating more viable constitutional institutions than there was in dealing with what he described as "dissident activity".

In 1972, Okoth Ogendo wrote an article concerning the politics of constitutional amendments entitled, "The Politics of Constitutional Changes in Kenya Since Independence".\(^\text{59}\) Like Ghai, he doubted the suitability of the Independence Constitution and was convinced of the inevitability of amendments. He contended that the Westminster export model constitution that Kenya had inherited represented very little "home-grown" character and that once the power to initiate change had passed to the new state, change was a mere question of time. He however observed that many of the factors prompting change were not constitutional but political problems. He further noted, that while the process of constitutional change had paradoxically committed the government to the notion of constitutionalism, the process itself had become highly politicised as a result of which, the character of the Constitution changed. His basic contention was that it was necessary to understand the political circumstances of the day in order to understand constitutional change. He, however, seems to have modified his views on the matter, because, when sixteen years later he authored a chapter on the constitution in a government sponsored publication, the *25th Independence Anniversary Official Handbook*, he claimed that:


"in spite of fairly extensive change in the structure of the country's constitutional process as envisaged by the original document remains the same."

He concluded that: -

"In addition to the specific amendments alluded to above, there have been others, the total effect of which has been to reshape the Constitutional order in a manner that better serves the need of strong and effective presidential government."\(^{60}\)

Okoth Ogendo's modified views are not supported by the historical evidence and contradict his own well-researched original study. They can only be explained by the fact that they were written in the context of government document. There was no doubt that the fundamental structure of the Constitution had changed and the necessity of a strong executive presidency was highly debatable.

J B Ojwang has paid a lot of academic attention to constitutional development in Kenya. His 1976 masters of law thesis was on the subject of Executive Power in Independent Kenya's Constitutional Context.\(^{61}\) On the issue of constitutional amendments, he concluded that they had widened the powers of the executive at the expense of other organs of government and that most of the amendments ran counter to the principles of constitutionalism. Like Ghai and Ogendo, he argued that some of the amendments were necessitated by the rigid character of the independence constitution and rationalised the amendments on the needs of emergent statehood and the necessity for a relatively relaxed executive decision making structure. When he revisited the issue in 1990 in his book Constitutional

---


Development in Kenya, his rationalisation of the amendments had become more tolerant and accommodating. He summarised his thinking on the matter in the following words:

"Since independence Kenya has had on average one constitutional amendment a year. Some of the amendments have affected the basic structure of the original constitution, in the event resulting in a simpler document with a focused allocation of functions. Others have been purely procedural but essential to the coherence of the Constitutional document. Yet others have been somewhat anecdotal in character essentially responding to specific management situation."

Ojwang's book also sought to defend the legality and necessity of the one party state at a time when there were very sustained demands for a return to multi-partysim in Kenya. Macharia Munene in his article "Constitutional Development in Kenya: A Historical Perspective" argues that Ojwang came close to an analysis of constitutionalism in Kenya but that, in attempting to justify mono-partism, the timing of the publication was completely out of tune with the reality in Kenya. Munene further argued that the key to understanding the instability of the post independence constitutional order lies in the realisation that those who were entrusted with its implementation had no faith in it. In his book, The Politics of the Transition in Kenya, Munene argues that, in 1997 Kenya underwent a political transformation in which the claim of the political class to a monopoly of initiatives on constitutional and political reforms was challenged by civil society. He further argued that the 1997

---

64. Ibid p.61.
constitutional amendments must be seen as an attempt by the political class to reclaim legitimacy.

S B O Gutto “Constitutional Law and Politics in Kenya since Independence”⁶⁶ analysed the Constitutional changes in Kenya from a Marxist point of view. He developed the thesis that the entire constitutional law process in Kenya had been used as a tool in the hands of the ruling classes to narrow the arena of mass involvement in democratic practices at the political, economic, social and cultural levels. He postulated that the amendments to the post-independence constitution had been largely part of the process of asserting class domination. Gutto’s paper addressed a neglected area of the problem; the dynamics of class politics in the Constitutional amendment process.

Ndoria Gicheru and Kabuya Miano, in their book, A Text of the Constitution and Government of Kenya,⁶⁷ provided a descriptive account of the basic structure of the constitution and its institutions. Intended primarily as a textbook for secondary schools, it did not provide much analysis of constitutional issues or problems. Kivutha Kibwana in his article “The People and the Constitution”⁶⁸ and in the book Sowing the Seed of the Constitution in Kenya⁶⁹ argued that constitutional change in Kenya had historically served the interests of the political elite and had failed to address basic governance problems thereby precipitating a constitutional crisis that could only be addressed by comprehensive constitutional reforms.

---

Peter Okondo, a former Minister in the 1980's, and key player in the defunct Kenya African Democratic Union (KADU), in his book entitled, *Commentary on the Constitution of Kenya,* being his reflections on the evolution of the Constitutional process in Kenya, has argued, that the Constitutional amendments since independence were largely directed at creating a unitary state which was at complete variance with the wishes of the majority. Okondo argued that the amendments had been manipulative and self-serving. While lamenting the collapse of the KADU blue-print, he contended that the constitutional changes had resulted in the creation of a "constitutional tyranny". Sam Waruhiu's book *From Autocracy to Democracy* contains a historical account of the Constitutional process in Kenya from colonial times to the return of multiparty politics. He argued that the numerous changes made to the Constitution since independence had the effect of creating an autocratic and dictatorial system that undermined the rule of law and the practice of constitutionalism. He further argued that multi-party democracy could not be realised under the current system and there was need to make far-reaching amendments to the Constitution. Michael Blundell, a veteran politician of colonial politics, opined in his memoirs *A Love Affair with the Sun* that the growth of constitutional authoritarianism arose out on a perceived necessity for political stability but in effect had the exact opposite effect.

---

Willy Mutunga’s book, Constitution Making From The Middle, reviewed the critical role-played by civil society in Kenya in bringing about the 1992 and 1997 constitutional amendments. Historically, civil society had been at the periphery of constitutional change and had made little direct contribution to constitutional amendments. All these changed in the late 1980’s and early 1990’s. Mutunga’s book affirmed both the dynamic role of civil society and of its inherent limitations.

Colin Ley’s study, which covered the period 1964 to 1971 and which, was published under the title Underdevelopment in Kenya applied a Marxist analysis to the politics of Kenya. His major thesis was that the Politics of Kenya could only be understood in the context of a class analysis. He argued that in Kenya a ‘national bourgeois’ which was financially and politically weak had inherited state power at independence, and it was bent on using the state machinery to make itself rich by inserting itself as a sort of commission agent into the foreign dominated commercial system. Colin Ley’s argument was that most of the conflicts that informed post-independence political change were caused by intra-class conflicts. Ley’s further argument was that the weakness in institutions and the rise of a strong executive relates more to the needs of accumulation than to the dictates of governance. His model found favour with subsequent students of Kenyan politics, notably Nicola Swainson, whose book The Development of Corporate Capitalism in Kenya and George Kitchings book Class and Economic Change in Kenya analysed the political

economy of Kenya in the immediate post independence period from a marxist perspective. They both attributed the instability of the political and constitutional processes to the rise of an African economic class that had hijacked the national economy at the expense of the masses. Henry Bienen’s book *Kenya: The Politics of Participation and Control* brought into the study of Kenya politics a new dimension. His argument was that the key to understanding politics in Kenya lay in understanding personal leadership, whether manifested as charismatic or as leadership of a personal, political - machine type or patrimonial - traditional type or combinations of two types. He argued that the weakness of Institutions was precisely because of the strength of the personal rule and that apparent stability of government could be explained by the very complex patron - client network that cut across both occupational and ethnic groups. Bienen’s study showed the very serious difference between the institutional framework and the political culture, in much the same way as subsequent studies by lawyers would show.

John Okumu and Joel Barkan took up from where Gertzel had left off and developed the argument that the political crisis in Kenya, which inspired most of the Constitutional amendments was informed by the weakness of KANU as a party even after the banning of KPU in 1969. They argued that because Kenyatta and subsequently Moi wanted to use the bureaucracy as opposed to the party as the basis of legitimacy this resulted in concurrent growth of Presidential power which in effect dwarfed other political institutions, expanding the sphere of the state and


creating political volatility.

In her book, *The Rise of a Party State in Kenya*, Jennifer Widner has argued that the political history of Kenya has been dominated by the political elite's desire for complete political control. She contends that this has been achieved by using the dominant party KANU as an extension of the state and by manipulating the Constitutional process. The same view is espoused by David Throup and Charles Hornsby, in their book, *Multi-party Politics in Kenya*, which is a study of politics in Kenya after the return of competitive politics in 1992. In his book, *Post Colonialism and the Politics of Kenya*, Pal Ahluwalia contended that constitutional development in Kenya had been shaped by the tension between the democratic and authoritarian tendencies inherited from colonial rule. He further argued that the post-independence political elite manipulated the Constitution to safeguard its political and economic interests at the expense of the rule of law.

This study is a continuation of the scholarship discussed above. It explores further and updates the dominant theme in the literature that contends that constitutional changes in Kenya have reflected attempts to fit political expediency into a constitutional framework and as a result the sanctity of the Constitution and the Constitutional process have been extensively compromised and eroded.

---

JUSTIFICATION OF THE STUDY

This study can be justified on several grounds. First, it will attempt to address a unique and rarely studied aspect of constitutional practice in Kenya. By analysing constitutional amendments and the Constitutional amendment process, it seeks to find out the linkage between constitutional change and the politics of the Constitution. This in turn will offer an insight into the workings and failure of Kenya’s constitutional experience since independence. A Second justification of this study is the truism that in order to build a stable and enduring constitutional order in Kenya, it is necessary to understand the evolution of the present constitutional order and its effect on the content and structure of the Constitution and the practice of constitutionalism. Thirdly, the study will attempt to gain insight into the political, social and economic dynamics that inform constitutional change in Kenya, thereby providing important material for future constitutional discourse. The study is likely to show a linkage between the Constitutional infrastructure generated by the Constitution and the political activity that operationalises the Constitution.

OBJECTIVES OF THE STUDY

The study has four research objectives. First, to analyse the Constitutional amendments effected on the independence constitution between 1964 and 1997. Second, to examine the impact of these amendments on the content, structure and philosophy of the Constitution and the impact of these amendments on the practice of constitutionalism in Kenya. A third objective is to evaluate how the manner in which the Constitution has been amended has affected the legitimacy of the
Constitutional and political process. Fourth, to assess the extent to which the amendments made were in accordance with sound constitutional theory and the extent to which the basic philosophy and structure of the Constitution remained coherent. Finally, the study suggests several ways in which the constitutional amendment process can be used to restore the constitutional order to viability, legitimacy, and fidelity to constitutionalism.

THEORETICAL FRAMEWORK

There are several theories of law and schools of Jurisprudence in contemporary legal scholarship. The most significant ones are the natural law school, the analytical positivists, the sociological school, the historical school, and the realists, the Marxists, critical legal theory and feminist jurisprudence. 83 The definition of law is the fundamental controversy that defines each school. 84 Traditional Jurisprudence, as exemplified by analytical positivism, has always taught that an accurate definition of what is legal, entails delineating law from other social phenomenon that have similar characteristics as law, such as morals and ethics and by separating it from the baggage of sociology and politics. 85

The controversies that exist in general jurisprudence exist with even greater intensity in constitutional jurisprudence, due to the logical nexus between power, politics and the Constitution. Traditional constitutional jurisprudence taught that law and the State were neutral, value-free arbiters independent of, and unaffected by,

83. For a discussion of the several schools of jurisprudence see Lord Lloyd of Hampstead and M D A Freeman, Lloyd’s Introduction to Jurisprudence (London: Stevens & Sons Ltd, 1986) and R W M Dias, Jurisprudence (London: Butterworths, 1985).
social, political and economic relations. Historically, therefore, the doyens of common law jurisprudence did not investigate the symbiotic relationship between social-economic phenomenon and the law. In the area of public law generally and constitutional law in particular this meant a denial of the very essence of legal phenomenon. When Dicey for instance taught that constitutional law consisted only of the rules affecting the structure and powers of government which are enforceable in courts of law, he omitted reference to the patterns of official behaviour that develop around the formal Constitution and which are equally if not more crucial.

When Austin on the other hand taught that constitutional law meant “the positive morality and positive law which fixes the Constitution or structure of the supreme government-which determines the character of the person or the respective characters of the persons in whom for the time being the sovereignty shall reside” he was similarly assuming an instrumentalist view of the Constitution that does not fully explain what Constitutions are and what they do.

Traditional constitutional law scholarship was therefore largely dedicated to the limited role of examining constitutional ideas, institutions and processes and the systematisation of judicial opinions on the Constitution. While this served the important function of establishing the province of the discipline and rationalising doctrine, it did not address the crucial issue of why constitutions define power relations in the manner that they do; the nexus between politics and law. The

89. John Austin, The Province of Jurisprudence Determined, pp.257.
limitation of traditional constitutional law scholarship therefore consists, mainly of ignoring or failing to articulate the symbiotic relationship between the normative framework that is the Constitution, and the political dynamics that give it life. While most scholars acknowledge that constitutions are essentially instruments of power, traditional constitutional legal scholarship fails to address the existence of extra-constitutional forces that define the scope of constitutional authority and the limitations of constitutional methods per se in countervailing autonomous political power.

Yash Ghai captures this limitation as follows:

"Traditional legal scholarship fails to uncover these extra constitutional forces and to reveal the ways in which state institutions really operate. Nor does traditional legal scholarship provide an adequate understanding of the nature of public power or state in the third world. Constitutional forms in the West grew based on a well-established economic system, served largely to legitimise, and consolidate that system. The true basis for power was not therefore the Constitutional or state institutions, but property in the economic sphere. Because the Constitutional forms reflected the underlying forces in society, their observance was not problematic. The development of the state in the third world has followed a different historical trajectory. Closely associated with colonialism, the state forms were instrumental in establishing the economy and shaping society. On independence, especially when political power passed into the hands of those groups, which did not enjoy a superior economic position, the state and the resources it deployed or regulated became crucial for these groups in establishing an economic base for themselves. For a variety of reasons, the relation between the state and economy has, to some extent, become reversed. The centrality of the state is also emphasised by the tasks forced on it in developing countries; consolidating of independence, national integration, and economic development as well as mediation with external economic and political forces. The importance and the relative autonomous nature of political power means that it cannot be easily controlled by constitutional and legal methods."  

The major failing of traditional constitutional law scholarship therefore lies in regarding constitutions as essentially legal instruments capable of abstraction from the political conditions that they are called on to regulate and in viewing the task of legal scholarship as merely the exposition of the rules of the Constitution and the systematisation of judicial decisions on it. Constitutional lawyers steeped in this tradition abstract constitutional controversies from the world of politics in which they are born and subject them to the sterile rules of interpretation and precedents. The result is that the essentially political nature of the Constitution and the Constitutional process is masked and mystified.

This study proceeds on the basis that there is need to adopt a more analytical basis of studying constitutional problems. Serious constitutional law scholarship must address the symbiotic relationship between law and state that is at the heart of any serious analytical jurisprudence. It must in essence establish the basic linkage between law and politics.

The theoretical framework of this study is inspired by critical legal theory as expounded by the critical legal studies school. In essence, this movement represents a progressive analysis of law that challenges the assumptions and teachings of traditional legal scholarship as exemplified by positivist jurisprudence. In particular it challenges the teachings of analytical positivism that there exists a necessary and

---

93. Ibid. p.106.
Critical legal theory proceeds from the basic notion that the Constitution by its very nature is a political document because Constitution making is a pre-eminently political process, which is the product of political negotiations and compromises. The Constitutional process is similarly essentially a political one. This acknowledgement does not alter the significance of the legal character of the Constitution and its processes. It merely recognises the symbiotic fusion of the two. The Constitution embodies a philosophy of the organisation of public power, government and governance. This is a political philosophy. It also includes a core set of social values that define the relationship between the governors, the governed and individuals inter se. This is a matter of moral philosophy. Once these are acknowledged, the alleged neutrality of law and state are demystified.

From its basic notion, critical constitutional theory has a number of fundamental propositions. First, there is an emphasis on the open-ended character of the social and political context in which substantive law is shaped. Second, there is the rejection of liberalism and the liberal legal orders' attempt to separate the law and politics and to portray law as standing above and apart from politics and governed by reason. It is contends that the real task of law is the legitimation of politics. Third, it is argued that neither formal logic nor purposive analysis can produce legal reasoning shorn of substantive value choices. Consequently, legal reasoning cannot legitimately lay claim to rationality other than the minimal one of

moral and political controversy. Finally, it is argued that legal institutions ought to be transformed to accommodate disputes over the power structures and social hierarchies that are taken for granted in current legal and political culture.

From a critical legal theory perspective, the most important role of constitutional law is its capacity for legitimation and perpetration of a conservative hegemony. It is contended that the notion of constitutional law as neutral, objective and quasi-scientific lends legitimacy to the judicial process which in turn lends a broader legitimacy to the social and power relations and ideology that are reflected, articulated and enforced by the courts. Thus, in acknowledging a dichotomy between the public and the private, constitutional law legitimises private dominance and serves to de-politicise or remove crucial issues from the public agenda. Constitutional law therefore protects the dominant system of social and power relations against political, ideological and even physical challenges.98

Critical constitutional theory asserts that contrary to the claims of traditional constitutional law scholarship, the state is not a neutral framework that mediates social conflict. Indeed, the state is one of the parties in the social conflict. The alleged neutrality of the state and law is an illusion. No rule of law is value free, least of all rules of constitutional law. A mechanistic jurisprudence that views law in a simple cause and effect paradigm is of little value in the analysis of constitutional problems. Rules of constitutional law embody a set of values and fundamental assumptions about how political power should be structured and how social life

should be organised. There is therefore the need, if constitutional law scholarship is to advance, to understand the relationship between form and substance in the Constitutional order. The challenge Karl Lowenstein posed for western constitutional scholars fifty years ago is relevant to constitutional scholarship today. He wrote:

“We have not yet begun to investigate the ontological causality between the form of government a constitution endorses and the socio-economic structure of the society to which it is applied. The inquiry is hampered by still existing residues of the naïve optimism of the eighteenth century that a functionally well constructed constitution can adjust peacefully to any power conflict. That much can be learned from the crude materialism of the Soviet-orbit constitutions; viz., that a definitely chosen socio-economic pattern requires a commensurate institutionalisation of the power situation. The communists realised that not every constitution can accommodate any form of a specific constitutional order. The concept that the Constitution confined to the jurisdictional determination of authority can be "neutral" and "objective" toward the power process is as much a by-product of liberal relativism as is the concept that the written constitution itself is a child of liberal rationalism. In the light of our admittedly limited historical experience, it seems likely that an inner congruity exists between constitutional form and substance”.

It is further contended that progressive constitutional law scholarship must not only investigate the dialectical relationship between constitutional form and substance but must seek to explain why there exists a lacuna between constitutional ideals and constitutional reality.

This study uses the tools of critical constitutional theory as the basis of analysing the process and impact of constitutional amendments in the Constitutional development of Kenya. It seeks to deconstruct the façade of constitutional

governance by exposing the inability of the Constitution to generate constitutionalism and the rule of law.

HYPOTHESES

This study will test the following hypotheses:

a) That there are limits set by sound constitutional theory regarding the extent of the alteration of the Constitution whether by way of amendment or interpretation.

b) That the Constitution of Kenya at independence, though formally committed to constitutionalism was grafted on a constitutional and legal tradition which was at variance with the values and institutions of the new constitution and which therefore made the Constitutional order inherently unstable.

c) That the amendments of the Constitution were aimed at creating what the political elite thought was a more viable and workable structure and later motivated by the desire to centralise all power and authority in the presidency, and to overcome all forms of opposition.

d) Cumulatively, the amendments of the Kenya constitution have been largely informed by the dictates of power politics and not by constitutional principle. They have therefore been opportunistic and manipulative. They have seriously eroded the sanctity of the Constitution as supreme law and rendered the observance of constitutionalism impossible.

e) The amendments of the Constitution have significantly altered the basic structure of the Constitution, created internal incongruence, distorted the balance of power among the arms of government by strengthening the executive at the expense of the legislature and the judiciary, and subordinated all other institutions of government to the presidency.
f) The Judiciary while purporting to interpret the Constitution, has effectively "amended" it and further complicated both the Constitution and the amendment process and

g) Because the Constitutional amendment process has facilitated the manipulation of law, the legitimacy of the Constitutional and political process has been compromised.

RESEARCH METHODOLOGY

This study is both theoretical and historical. It therefore relies mostly on secondary material and library research. The library of parliament, the national archives and the University of Nairobi library contain a wealth of information on the background of the process of constitutional change, which will be utilised in this study. The Hansard and newspaper reports will provide the bulk of the information relating to contemporary developments. Many non-governmental organisations such as the Law Society of Kenya, the International Commission of Jurists (Kenya section), Citizens Coalition for Constitutional Change (4Cs), the National Convention Executive Council (NCEC) have documentation centres that contain a lot of information on the process of constitutional change in the 1990s, this too will serve as sources of information for this study which are consulted.

Moreover, unstructured interviews will be conducted with as many of the surviving participants in the negotiation for the independence constitution, participants in the Constitutional amendment process and commentators on the Kenyan constitutional process.
CHAPTER OUTLINE

This study contains Seven chapters. Chapter one addressing the issue of the legitimate scope of constitutional amendment and reviews the literature on the nature and background of the problem of constitutional amendments in Kenya. Chapter two traces the evolution of the constitutional process in Kenya from colonial times to independence. Chapter three analyses the making of the independence Constitution. Chapter four examines the various amendments made to the Constitution between 1964 and 1978, during the presidency of Jomo Kenyatta. Chapter five examines the various amendments made to the Constitution between 1979 and 1997, during the presidency of Daniel Arap Moi. Chapter six reviews the various cases in which the judiciary has interpreted the Constitution with the result of amending the Constitution. Chapter seven contains an appraisal of the problem of constitutional amendment in Kenya and makes the lessons that can be learned.

CONCLUSION

What the legitimate scope of constitutional amendment ought to be, and by whom and how the sanctity of the amendment process should be secured are complex matters that do not lend themselves to a single interpretation. However, notwithstanding the academic and judicial controversy that may exist, this chapter has demonstrated a number of things.

First, is that there are both explicit and implicit limitations on the power to amend the Constitution that are to be found both within the text of the Constitution and in its underlying values. Such values include the sanctity and supremacy of the Constitution, the sovereignty of parliament and the autonomy of constitutional institutions. Second, the chapter has demonstrated the symbiotic relationship
between the constitutional process and politics and therefore the necessity to structure constitutional amendment procedures so as to insulate them from partisan politics. Third, the chapter has demonstrated the link between political stability and legitimacy, and the adherence to constitutionalism.
CHAPTER TWO

CONSTITUTIONAL CHANGE AND CONSTITUTIONAL POLITICS IN COLONIAL KENYA, 1887-1960

INTRODUCTION

This chapter traces the evolution of the Constitutional system and constitutional politics in colonial Kenya. It seeks to identify from a historical perspective the salient values, themes and institutions that informed the constitutional process. The constitutional evolution in colonial Kenya took roughly seventy years and involved complex constitutional engineering to accommodate different political interests within the colony. Essentially the constitutional transformation in the colonial period was directed at accommodating the various political challenges of the time. For convenience of analysis, this period can be divided into four segments based on Yash Ghai and Patrick McAuslan’s book *Public Law and Political Change in Kenya*.¹

The first phase, between 1897 and 1905, involved the rudimentary constitutional structure and the establishment of the initial machinery of government in the protectorate. The second phase between 1905 and 1923 saw the constitutional transformation of the protectorate into a colony and the attempts by European settlers to establish their supremacy over other races. The third phase, between 1924 and 1951 witnessed the consolidation of colonial rule and the balancing and adjusting of the political claims of the various races in an attempt to introduce multi-racialism. The fourth phase, between 1952 and 1960, was a period of much

constitution making activity aimed at introducing constitutional mechanisms in reaction to the Mau Mau war and in preparation for independence.

THE INTRODUCTION OF BRITISH IMPERIAL RULE

Kenya as a state is a creation of British colonial rule, which sought to weld diverse and independent ethnic groups into a state. The constitutional evolution of what later was to be known as Kenya was long, slow and complicated. Initially, the dealings of the British government with the territory that became Kenya was not direct but through a chartered company - the British East African Association (later known as the Imperial British East Africa Company - I B E A). The company was perceived of as a cheap and indirect manner of retaining and probably expanding British influence in the area.2

The very first constitutional document in the history of Kenya was the agreement signed by the Sultan of Zanzibar on May 24, 1887 in favour of the British East African Association granting the company a fifty-year lease over the coastal strip. The ten mile coastal strip with a radius of five miles extending from the Ruvuma river in the south to Mogadishu in the north had earlier been recognised by an international commission (comprising British, German and French representatives) as belonging to the Sultan of Zanzibar.3 In March 1890, a further development took place. The lease was converted into a concession to be administered and held for the same period and on the same terms and conditions as the original agreements.4

The administration of the territory by the company was, however, to be carried on in

the name of the Sultan and under his flag. Under the power of administration ceded to it, the company could appoint commissioners to administer districts, promulgate laws and establish and operate courts of justice. It was further empowered to acquire or regulate land which had not yet been occupied, and all public lands were to be purchased either by the company or through it. The company however suffered from serious administrative problems and was poorly capitalised. Consequently, it was unable to undertake any meaningful operations over the acquired territory. Armed with the concession from the Sultan of Zanzibar and in spite of its financial and other problems, the company was able to move the British government to grant it a Royal Charter, which it received in September 1888 in the name of the Imperial British East African Company.

With the legal authority of the company flowing directly from the charter, the company was thus constituted as an instrument of British imperial policy owing no loyalty to the Sultan. Under its new Charter, the company was obliged to carry out all the obligations assumed by the British government under any treaty or agreement and was in that regard directly answerable to the Foreign Secretary in London. While the company held the coastal strip under the terms of the Sultan's concession, the authority for the administration of the hinterland was the Imperial Charter of 1888. Despite having the charter, the company continued to suffer from serious administrative and financial problems. It therefore did little to open the interior of East Africa and indeed lost control of some of the original territory.

With time, it became apparent that the company was not viable as a vehicle
for British imperial policy in East Africa. In June 1895, eight years after the company took possession of the coastal strip it was forced to surrender both its Charter and the lease to the coastal strip. In the same year the British government took over the territory and declared a Protectorate under a separate treaty concluded with the Sultan of Zanzibar. The treaty provided that the British government was to administer the territory subject to the sovereignty of the Sultan over it. While the territory ceded under the treaty related exclusively to the coastal strip, the British government was forced to take possession of the territory in the interior which had previously been under the control of the Imperial British East Africa Company. The territory acquired was in 1896 named the East African Protectorate. This declaration of Protectorate status signalled the first direct British involvement in the territory that was later to be named Kenya.8

**The Constitutional Basis of Protectorate Rule**

The *Foreign Jurisdiction Act 1890* empowered Her Majesty to exercise jurisdiction over any territory obtained by lawful means (including capitulation and sufferance) in a foreign country in the same way as she would have done had the territory been obtained by cession or conquest. The exercise of jurisdiction under the *Foreign Jurisdiction Act* was effected under Orders in Council. The Orders in Council empowered consuls and the officers who later succeeded them, to hold courts, promulgate legislation and administer the areas that the Order applied to.9

When the British government took over the territories formerly administered by the Imperial British East African Company, the coastal strip was subject to the *Zanzibar Order in Council of 1884* that had provided authority for the Consul to

---

8. Ibid. p.13.
promulgate legislation known as Queens Regulations. These regulations were binding on all persons (including both the Sultan's subjects and British subjects). The rest of the protectorate was subject to the Africa Order in Council 1889 as amended from time to time. The Order had been enacted under the Authority of the Foreign Jurisdictions Acts 1843-78. Thus, while the order had been promulgated as a general order to be used for the limited purposes of establishing limited consular jurisdiction in Africa, it was now used for the purposes of providing the legal basis for the assumption of governmental authority over the Protectorate. The two Orders in Council remained operational for two years after the declaration of Protectorate but were deemed insufficient to provide for a proper system of administration.

The East Africa Order in Council of 1897 was promulgated as the first comprehensive constitutional instrument relating to the protectorate. It however failed to set out as capacious and effective a system of administration as was desirable in the circumstances. It manifested the conceptual confusion in the colonial office as to the real effect of the declaration of a protectorate relative to the rights of the native inhabitants. Administratively, the 1897 Order in Council was intended to increase the authority of the Commissioner vis-à-vis the natives while recognising that they were, in law, not British subjects and their territory was foreign.

In reality the Order dealt primarily with judicial matters. A court for the entire Protectorate was established in Mombasa, with appeals to the High Court in Zanzibar. Native courts were also set up with exclusive criminal jurisdiction over Africans. There was serious doubt among British constitutional lawyers as to whether

10. Ibid, p.13
12. Ibid, pp.43-47.
this was permissible and consequently the 1899 East African Order in Council specifically provided that Queen's regulations were to apply to natives of the protectorate unless a contrary intention appeared. The Queen's Regulations and select English and Indian law were also made applicable to Africans subject to the limitations of the order. In the administrative sphere, the order made provision for the office of the commissioner.

The Commissioner

The 1897 Order in Council provided for the position of the Commissioner who was to be the chief executive of the protectorate and was to be appointed by Her Majesty the Queen. He had the responsibility of establishing an administration and maintaining law and order. The latter entailed legislating a legal order for the Africans within the protectorate. To carry out this task the Commissioner had very extensive powers to legislate, establish courts and to deport persons he deemed undesirable. He was placed beyond the powers of the courts. Significantly, the Commissioner had power to make law by way of Queen's Regulations, subject to the approval of the Secretary of State in Britain, in respect to matters relating to customs, inland revenue, post offices, land highways, railways, money, agriculture and public health. He was also empowered to establish a constabulary or other force to be employed in the maintenance of order or in defence of the Protectorate and to secure the observance of any treaty for the time being in force relating to the protectorate or of any native or local laws. Finally, he could make rules generally for the peace, order and good government of the Protectorate. The powers of the

---

13. Ibid. p.47.
Commissioner were so extensive that while both legislative and executive powers vested in him, he was immune from the process of the court by way of judicial review. He was accountable only to the Colonial Secretary in Whitehall.\textsuperscript{16}

In 1902 the \textit{1897 East Africa Order in Council} was repealed and in its place a new Order in Council was promulgated. Under the new Order in Council, greater attention was directed at the problem of administration within the protectorate. The Commissioner's position was strengthened and the supervision from Whitehall reduced drastically but was nonetheless retained. The Commissioner was empowered to create provinces and districts. His legislative powers were elaborated and expanded. His legislation was to be known as ordinances as opposed to regulations.\textsuperscript{17} On 1st April 1905 the responsibility of supervising the protectorate was transferred from the foreign office to the colonial office. A colony was not however declared at this time. Indeed it was not until 1920 that a colony was declared.\textsuperscript{18}

\textbf{The Genesis of Constitutional Institutions}

1903 saw the beginning of serious white settlement in the protectorate and their presence greatly affected the pace of constitutional development and change. On the whole, white settlers desired to establish a colony, which would one day achieve self-rule under their leadership.\textsuperscript{19} Their agitation, in this regard, in part resulted in the repeal of the 1902 \textit{Order in Council} and the promulgation of the 1905 \textit{Order in Council}. The latter had far-reaching constitutional significance as it made substantial changes in the structure of administration of the protectorate.\textsuperscript{20} The Order in Council created the position of governor and established a legislative council.

\begin{footnotes}
\item[16] Low, "British East Africa, The Establishment of British Rule 1895-1912" p.44.
\item[17] Ibid. p.38.
\item[18] Ibid. p.39
\item[20] Ibid. pp.20-21.
\end{footnotes}
The Governor

The office of the Commissioner was transformed into that of Governor and Commander in Chief of the Armed Forces of the Protectorate. The Governor personified the crown in its governance of the territory. He was appointed by, and held office at the pleasure of the monarch. The executive powers of the crown were vested in him. He exercised all the constitutional functions of the crown within the territory, including the royal prerogative of mercy. The Governor was only responsible to the Secretary of State for the colonies, who advised the crown on matters affecting the colonies. While the Governor, unlike the Commissioner, lost the power to unilaterally make law, he nonetheless remained one of at least three members of the Legislative Council. Within the Legislative Council, he could exercise a veto over legislation. In a significant way therefore, the Governor's powers increased compared to those of the Commissioner in that he was now entrusted with the appointment of all judicial officers, including High Court Judges.

The Executive Council

The colonial government had conceived of the Executive Council, as a countervailing force against the Legislative Council that had the potential for being dominated by settlers. This council was to be composed exclusively of officials who were supposed to advise the Governor on matters relating to the administration of the territory. Neither its function nor its composition was specifically provided for in the 1905 Order in Council that set it up. It was merely indicated that its members were to be appointed under royal instructions. The Crown appointed a minimum of two other

22. Ibid. pp.32-33.
23. Low, "British East Africa, The Establishment of British Rule 1895-1912" p.44.
unofficial members.24

The Legislative Council

The Legislative Council established under the 1905 Order in Council was largely in response to settler pressure. Its principle function was to give formal sanction to laws, budgetary estimates and supplies and to express public (settler) opinion on the issues of the day. It was composed of six officials and two unofficial members. The unofficial members were appointees of the Governor and were intended to represent the settlers. The settlers were however keen on having elected representatives in the Council and they initially responded by boycotting its sittings.25

While the Council had power to make laws for the peace, order and good government of the protectorate, the British government retained power to disallow legislation made by it and also the powers either to legislate directly for the protectorate by way of Orders in Council or to issue royal instructions on legislation.

These constitutional developments had profound effects on the evolution of the constitutional process in Kenya. Through them, a duality of administration was created by which the protectorate was governed locally through the Legislative and Executive Councils and the Governor, and controlled from the Colonial Office through the Governor. The local administration was however subordinate to the imperial government.26 In 1916, European settlers elective representation in the Legislative Council was conceded and was given effect by the Legislative Council Ordinance of 1919. It was hoped that someday the council would evolve into a fully-

In constitutional terms, the creation of the two Councils was a significant step forward in that the autocratic edifice that had been the Commissioner’s powers was to be mediated by a form of nascent separation of powers. Moreover, the debate on constitutional advances and changes was henceforth carried out within the Councils thereby establishing an evolutionist and constitutionalist tradition, which was to inform the process of constitutional change in later years.28

FROM PROTECTORATE TO COLONY

In June 1920 the constitutional structure of Kenya changed radically. The entire Protectorate save for the ten-mile coastal strip was annexed as a British colony. The coastal strip however remained a protectorate administered by the British on behalf of the sultan of Zanzibar. In recognition of the duality, the official name of Kenya became Colony and Protectorate of Kenya. The immediate reason for the transformation of the protectorate into a colony was to facilitate a development loan, which was being negotiated and could be secured under the Colonial Stock Act only if the protectorate became a colony. The settlers saw this as a confirmation of their victory in their quest to make Kenya a white man’s country that would someday become self-governing state under their rule.29

The change in the status of Kenya had very significant constitutional ramifications and made the constitutional basis of governance even more complex, not least due to the co-existence of the colony and the protectorate. In this regard Ghai and McAuslan have observed that:

29. Ibid. p.45.
“Henceforth, constitutional instruments providing for the government of Kenya had to differentiate between the colony and the protectorate. For the former, prerogative forms replaced the orders in council. The basic constitutional framework was set out in letters patent under the great seal, while the details were supplied in the Royal instructions under the sign manual and signet. Most of the changes were therefore made through additional Royal instructions, only the most fundamental alterations requiring amendments of the patents. The coastal protectorate, however continued to be provided for by orders in council as it fell within the Foreign Jurisdiction Act”.

As at 1920 the Constitution of the colony of Kenya was established by Letters patent and Royal instructions. No separate constitution was established for the protectorate, the institutions of the colony – Governor, Executive Council, Legislative Council and the courts were deemed to be the same. In reality therefore, the colony and the protectorate were administered more or less in the same manner. The Governor, the Executive Council, the Legislative Council and the courts of the colony were responsible for the protectorate as well. Nor was there much difference in the manner in which the government was run. The Legislative Council in its power and functions essentially remained the same although its composition was slightly altered to cater for Indian and Arab representation. The Indians were permitted two nominated members under the 1919 Royal instructions, while the Arabs had one unofficial nominated member to represent their interests. This balancing of racial interests and claims remained a dominant theme of constitutional development in Kenya.

The Executive Council on the other hand, functioned as before - as an advisory body. The Governor was expected to consult the Council in the exercise of his power and authority but he nonetheless was entitled to act without consulting the

---

30. Ibid. p. 51.
Council in a number of situations. The Governor retained his dominant position in the administration. He continued to preside over both Councils and had immense powers over both of them. For example he had the power of veto over legislation and he could suspend or remove any member other than ex-officio members. He could prorogue or dissolve the Legislative Council at any time and he alone could initiate legislation or motions on finance. There was however a narrow sense in which the Governor's powers were not absolute. Both he and the Councils were directly supervised in their operations by the British government through the Colonial Office. The Crown had also retained the power to legislate directly and the power to veto legislation.

**COLONIAL POLITICS AND CONSTITUTIONAL CHANGE**

From the onset of white settlement, the settlers had made it clear that they intended to make Kenya a white man's country, with the aim of eventually creating a self-governing crown colony. The early political history of Kenya was therefore dominated by the struggle between the emigrant communities, the white settlers and the Indians for political influence and dominance. The settlers were convinced that the Indians, who had been brought in to build the railway but who had stayed and settled as a merchant class, posed a threat to the creation of a white ruled colony. Other than reason of sheer racism, the hostility to Indians was partly due to the fact that the Indians had a longer historical claim to settlement in Kenya and partly due to the fact that as traders, Indians were relatively prosperous and therefore independent of settler control. The settlers therefore sought to keep the Indians out

32 Ghai & McAuslan, Public Law and Political Change in Kenya, p.53.
33 Ibid. pp. 53-54.
of any involvement in policy and administration. They attacked Indian presence in
Kenya on the ground that it was prejudicial to African development. This way, they
hoped to halt further Indian migration in order to safeguard their own position.36

There were four major issues on which the Europeans and Indians disagreed;
namely: political representation in the Legislative and Executive Councils (as well as
municipal councils); racial segregation of Indians, the reservation of the highlands for
European settlement only and the restriction on Indian migration.37

The European settler lobby was very strong. At the political level, it successfully
opposed Indian settlement in the white highlands and successfully opposed Indian
representation in the Legislative Council. Indeed, it was not until 1909 that the first
Indian was nominated to the council and in any event he was not re-appointed due
to settler pressure.38 On their part the Indians had two major constitutional demands.
They wanted equality with the European settlers in the Legislative Council and a
common roll for Indian and European voters. This was a controversial matter because
at this point in time the Indians outnumbered the Europeans 3 to 1. The Indians had
long favoured the common electoral roll mode of election as distinct from
communal mode of election. On a common electoral roll, both Europeans and
Indians would be elected on a non-racial basis while in a communal roll each
community would elect representatives on racial basis with a quota set aside for
each race without reference to population.

The British government on the other hand felt constrained to safeguard the
interests of the indigenous people, against the prospects of the future of Kenya being

36. Michael Blundell, A Love Affair with the Sun: A Memoir of Seventy Years in Kenya (Nairobi:
37. Ross, Kenya from Within, pp.21-22.
shaped by the rivalry between the Indians and Europeans in pursuit of their respective interests. It perceived its position as that of a trustee over the natives and was very concerned about being seen to balance racial interests and claims in the Colony.39

**Ethnicity and the Politics of the Constitution**

The policy response of the Colonial Office to the wrangling in Kenya was set out in the *Devonshire White Paper of 1923*. The paper, while failing to resolve the various disputes between the Indians and the Europeans, made the crucial policy declaration that the British government viewed the interests of the natives in the colony as paramount. It noted, however, that time was not yet ripe for direct native representation.

At the same time, the paper failed to upgrade the Indians to the same position as the Europeans. It rejected the common roll advocated by the Indians. It gave them only five separately elected representatives. It further rejected the principle of equality of representation in the council. Nor did it review the white *highland policy*.40

Similarly, the paper rejected the claim for responsible government and an unofficial (settler) majority in the Legislative Council put forward by the settlers, which was granted to the settlers in Rhodesia. It did however end the settler domination of the voting franchise, while asserting the Colonial Offices trusteeship on behalf of the Africans. It asserted the paramountcy of African interests, in the following words:

> "Primarily, Kenya is an African territory and his majesty's government thinks it necessary definitely to record their considered opinion that the interests of the African natives must be paramount, and that if and when those interests and the interests of the immigrant communities

---

should conflict, the former should prevail... His Majesty's government regard themselves as exercising a trust on behalf of the African population, and they are unable to delegate or share this trust, the object of which may be defined as the protection and advancement of the native races".41

The refusal of the imperial government to accede to the demand of the settlers for responsible self-government was a severe blow to the Europeans' aspirations for hegemony in Kenya, more so, as this was already happening in Rhodesia.42 This blow was also made worse by a further refusal to concede to a greater number of communal representatives (the unofficial) than of government officials (official) in the Legislative Council. The Devonshire White paper also rejected the calls for a common roll and endorsed the communal roll. It reasoned that the latter would lessen rather than increase the tension between the races and would facilitate the eventual co-option of Africans as a communal group into the constitutional process.43 This set the tone for future constitutional negotiations. The paper was nonetheless reconciliatory to the Europeans and allotted them eleven seats in the Legislative Council. Indians were allotted five places, which were to be elective, while the Arabs were to be represented by one unofficial representative in addition to one nominated official member. As to African representation, the paper took the position that there was no articulate African representation and therefore Africans were to be represented by a nominated unofficial member chosen from among Christian missionaries. In 1924 Dr John Arthur, a Presbyterian missionary, was nominated to represent African interests in both the legislative and Executive

42. Kamoche, "Imperial Trusteeship", p.74.
43. Ibid. p.77.
Councils.

STRUGGLES OVER THE CONTROL OF THE STATE

While the white paper failed to draw up specific lines of constitutional evolution in Kenya, the period between 1923 and 1951 nonetheless saw a significant transformation of the constitutional structure. Several themes dominated this era of constitutional change. First, the European settlers did not give up their attempt to dominate the government. The focus of the struggle however shifted to the control of the Legislative Council and greater participation in the Executive Council. The settlers were particularly unhappy with the official majority in the Councils. Second, the Indians did not give up their struggle for equality with the Europeans. Third, the post-Devonshire White Paper era witnessed increased African political activity through African political associations. The earliest African political organisations had been the East African Association which had been formed in 1921 and the Young Kavirondo Association formed in 1922. These associations added a third dimension to the existing power struggle between the Europeans and Indians and had far reaching consequences on the evolution of the constitutional process. Increasingly the Africans agitated for direct political representation.

In 1924 the government set up Local Native Councils (LNCs) under the Local authority Ordinance. The purpose was to contain African politics at the local level. These councils were not elective. The Africans who sat in them were nominated by field officers and had no relationship with traditional institutions. The LNCs were under the District Commissioners who were part of the Colonial civil service; they

44 Ross, Kenya from Within, p.468.
45 Berman, Control and Crisis in Colonial Kenya: p.199.
47 Berman, Control and Crisis in Colonial Kenya p.216.
were the officers who administered the colony on the ground. They formed a formidable paramilitary Corp royal to the Governor. The District Commissioners used the LNCs, the chiefs and headmen to govern the Africans indirectly. While for non-Africans the colonial legislature was the main organ of colonial government, for the Africans there was the illusion of local government under the Local Native Councils.

The imperial government displayed a lack of clarity about which policies it sought to pursue at two levels. At one level, the government appeared confused as to whether to develop African local governments as an end in themselves or as a means of introducing African political representation in the colonial legislature. At another level, while officially the Devonshire White Paper had committed the government to the paramountcy of African interests, the government simultaneously sought to have both a dual policy within Kenya and a policy of closer union within the region. Having failed in the bid to convert Kenya into a white man’s country, the settlers developed the idea of a federation or closer union of the British territories of East and Central Africa, which would form a Dominion under European settler control.

This followed the Ormsby-Gore parliamentary committee set up in 1924 to investigate and report on various aspects of life in the East African colonies and which committee substantially altered the recommendations on the Devonshire white paper on the paramountcy of African interests. It is testimony to the relative political clout of the settlers that the British government felt obliged to placate them by setting up a commission to look into this matter. In the event, the commission had

---

50. Kamoche, “Imperial Trusteeship” p.94.
more ramifications than anticipated.

The Hilton Young Commission

The British government set up the Hilton Young Commission between 1929 and 1930 with the mandate of considering the prospects of greater union in Eastern Africa. The commission ended up addressing the critical constitutional issue of the balance of power between the Indians and the European settlers, and between the emigrant communities and the indigenous ones.

The Indians suspected the commission of being a plot to hasten European control of the whole of East Africa. The thirty-seven African political associations, which were in their nascent stages, were, on the other hand, galvanised into action by the visit of the Commission, which they saw as a forum to ventilate their grievances. Like the other racial groups they too appeared before the commission and presented written memoranda on a wide range of grievances but essentially on their political marginalization.

The emergence of the Africans injected new dynamics into the constitutional-political process. Their main grievance centred on the land question. The judicial interpretation of the 1915 Crown Lands Ordinance had effectively rendered Africans squatters on their own land. The Supreme Court of Kenya had stated that:

"the effect of the crown lands ordinance 1915, and the Kenya (annexation) order in council 1920, by which no native rights were reserved, and the Kenya colony Order in Council, 1921...is clearly...to vest land reserved for the use of the native tribe in the crown. If that be so, then all native rights in such reserved land whatever they were under the gethaka system disappeared, and the natives in occupation of such crown land became tenants at will of the crown of the land actually occupied".

---

52 Ibid. pp.55-56.
53 The most prominent were the Kikuyu Central Association and the Kavirondo Tax payers Welfare Association. Bruce Berman, Control and Crisis in Colonial Kenya, p.28.
55 Isaac Wainaina v Murito Wa Indagara (1923) 9 20 K L R 102.
Before the Commission, the Africans expressed the fear that a settler majority in the Legislative Council could possibly lead to further loss of land and to increased forced labour. Furthermore, they felt that the Europeans could not represent their interests in the Council as their sympathies lay elsewhere. Consequently, they demanded their own direct representation by twelve Africans.56

For the Asians, the most important issue was related to the communal roll. Indeed, they had boycotted the Legislative Council in protest against the refusal of a common roll by the government. They were not successful in this demand. The Commission recommended that ultimately a common roll would be desirable for all races but that franchise qualifications would have to be introduced in order to ensure that the other races did not overwhelm the Europeans.57

The Commission made a number of other far-reaching recommendations. One was on the adoption of an unofficial majority. It proposed the reduction of the official seats by four, to be transferred to the unofficial side. This would mean twenty unofficial as against sixteen officials. On the issue of African political representation the commission took the view that the African was not, and could not be, in a position to protect his own interest in the central legislature, and it was therefore imperative to continue imperial control of the colony indefinitely.58

For the settlers, who were the dominant political force, the most important question related to progress towards responsible self-government, which was tied to the issue of greater majorities in the Legislative Council and greater participation in

56. Kenneth Robinson, The Dilemmas of Imperial Trusteeship, p.49.
the Executive Council. They therefore had agitated for an unofficial majority in the Legislative Council. The Commission had some sympathy with the idea of an unofficial majority but was unable to find an acceptable way to implement it. It therefore recommended the reduction of the official seats by four, to be transferred to the unofficial side meaning that there would be twenty-two unofficial as against sixteen officials. This however, was not to be a majority of settlers but of all races combined, which is not what the settlers intended. The Commission nonetheless felt that sufficient checks and measures were already in place and therefore, no harm would be suffered by the failure to increase the unofficial representation. It noted that:

"unofficial opinion has in practice obtained a much larger influence in the counsels of governments than accords with the strictly constitutional position. The Government still retains an official majority in the Legislative Council. Two of the European elected members of the Legislative Council have been nominated as members of the Executive Council, and have thus been admitted to the inner Counsels of the Government...A practice has grown up in the Legislative Council of referring all questions of importance to select committees in which the official majority is seldom retained. These committees consist for the most part of a large proportion of unofficial members with only such officials as are directly concerned with the subject in hand. This method of reference to select committees is now firmly established by custom over the whole of the business of the Legislative Council, and results in the exercise of considerable influence by the Legislative Council in the executive sphere".⁵⁹

Ultimately, the commission struck a balance and recommended both against constitutional provisions for greater East African federation, which the settlers were opposed to, and the interference with the official majorities in the Council, which the settlers favoured.

Following the publication of the report of the Hilton Young Commission, a labour government took office in 1929 and Sidney Webb became Colonial Secretary. The balance once more shifted in favour of the doctrine of the paramountcy of African interests. Webb stated his vision of the constitutional future of the colony as follows:

"The goal of constitutional evolution in Kenya, as elsewhere, is admittedly responsible government by a ministry representing an electorate in which every section of the population finds an effective and adequate voice. But that goal cannot be reached at an early date in a community where it has so far been practicable to enfranchise less than one per cent of the population, and where the idea of any substantial extension of the franchise finds little general support. For the native African population, indeed, insofar as the tribal organisation is still the basis of its social organisation, the most promising line of development for near future may well lie, not in any direct participation in the Legislative Councils but in the increasing importance to be given to the native councils".60

Webb refused to permit a substantial alteration of the Constitution of Kenya as it stood. Indeed, except for purposes of addressing the question of African representation (where two people were to be nominated to represent Africans) the Devonshire compromise was to be retained. He however expressed the commitment to a qualified common roll at a future date. He rationalised this position as follows:

"The conclusion to which His Majesty’s government have come to is, at this juncture, to leave the constitution of the Kenya Legislative Council substantially unchanged and to retain the official majority. The eleven elected European members, the five elected Indian members, and the one elected Arab member together with the twenty official members should for the present remain unaltered. His Majesty’s government proposes that there should be two (instead of one) members nominated by the Governor without restriction of race, to be particularly charged with defending the interest of the Africans and other underrepresented persons... With regard to the franchise for the Legislative Council of Kenya, his majesty’s Government are of the opinion that the establishment of a common roll is the object to be aimed at and attained with an equal franchise of a civilisation or

60. Quoted in Kamoche, “Imperial Trusteeship”. p.136.
education character open to all races”.\(^6^1\)

This remained the official position for quite a long time.

**The Evolution of the Executive and Legislative Councils**

When the Executive Council was first set up, it was purely an advisory body to the Governor and its entire membership consisted of senior civil servants. It was not until 1919 that the first unofficial members were appointed. The Executive Council was not accountable to the Legislative Council. Even when finally unofficial members were permitted in the Legislative Council they were not elected but were nominated by the Governor. Although the settlers made greater unofficial representation in the Executive Council their principal political issue, it was not until 1938 that parity was achieved between the official and unofficial representatives.\(^6^2\)

The official members who were members of both the Executive and Legislative Councils were the Chief Secretary (formerly known as Colonial Secretary), The Attorney General, Financial Secretary, and the Chief Native Commissioner. The unofficial nominated members were two Europeans, one Asian and one European to represent Africans. It was not until 1944 that an African was nominated to represent Africans.\(^6^3\) Prior to 1945, the Executive on the whole consisted of the Chief Secretary who ran all departments through Directors and Commissioners and the Governor to whom he was directly answerable.

The executive arm of government was therefore solely in the hands of civil servants as the role of the non-official members was merely advisory and they had no executive authority. After 1945, the Governor Sir Phillip Mitchell introduced the


\(^{63}\) Ghai & McAuslan, *Public Law and Political Change in Kenya*, p.60.
concept of a membership system in the Executive Council. Under this system, groups of government departments were brought together under the direction of a member of the executive. Members could be chosen from either the official or the unofficial side. Where, however, the appointee was an elected member, he had to resign his position in order to take up the new position. This system was the genesis of the ministerial system and was a significant advance towards responsible government (although it remained unaccountable to the Legislative Council) as under the new system, its role ceased to be merely advisory.64

Africans continued to be represented by missionaries and retired civil servants until 1944 when Eliud Mathu became the first African to be nominated to the Council. FW Odede followed him in 1946. The number of nominated Africans in the Council was increased to four in 1948, but still none of them was elected. These among other issues continued to be a source of great grievance among the Africans.65

The Carter Commission and the Constitutional significance of the Land Issue

The land issue in Kenya had always been an important part of the constitutional struggles taking place in the country. In June 1932, the then Colonial Secretary Phillip Cunliffe Lister appointed a Commission to look into the land question under Sir Morris Carter. After very extensive interviews with all the various racial groups in Kenya, the Commission issued its report in 1933. The Commission made a number of far reaching recommendations affecting the future of constitutional development of the colony. First, it recommended that the white highlands continue to be reserved for Europeans only and that an Order in Council be promulgated to safeguard that position. Second, that some additional land be added to the African

64. Ibid. p.62.
reserves to address the problem of overpopulation and that the boundaries be properly delineated. Third, that the Native lands trust board be retained to safeguard African land as separate and distinct from Crown Land. Finally, that a lands trust board be set up to administer Trust land.\textsuperscript{66}

Except for the Europeans who were to keep the highlands exclusively, the other racial groups were unhappy with the decision of the commission. The Africans and the Asians were united in their opposition to preserving the white highlands for Europeans only. The Asians were most unhappy that they had not received protection for their township holdings. For them, the loss of the fight for the white highlands following their loss of their struggle for the common roll had sealed their political fate in Kenya. The Africans on the other hand felt that the additional reserve land was inadequate. Land grievances continued to be the main cause of their discontent.\textsuperscript{67}

\textbf{FROM IMPERIAL TRUSTEESHIP TO MULTIRACIALISM}

In the inter-war years, the colonial government continued to have no policy to pursue in respect to African political representation. Attempts to build up the LNCs into viable political institutions by creating Provincial Councils were unsuccessful. The issue of involving Africans in the Legislative Council was revived and, when in 1944 the Governor nominated the first African, it was merely a question of time before the question arose as to how many more Africans were necessary to adequately represent African interests.

The triumph of a labour government in the United Kingdom after the Second World War gave tremendous impetus towards achieving the goal of serious African

\textsuperscript{67} Ibid. p.86.
representation in the Legislative Council. The labour government was prepared for some limited measure of decolonization within the empire. But it still believed that political and constitutional reforms had to be gradual and cautious.\textsuperscript{68} In Kenya there was an important shift from the ideology of \textit{Imperial trusteeship} to one of multi racialism. This was understood to mean the ultimate participation of all racial groups in one unitary political system. So, while Uganda was seen as essentially an African country, Kenya was seen as a multiracial country in which all the races had a historical claim. But by abandoning Lord Lugard's dual policy of the separate development of the races, the government was admitting the untenability of the policy. This provoked more questions than it answered. The crucial one was whether all Africans were eventually to participate fully in the political affairs of the country or whether participation would be limited only to the few "civilised" ones and whether there was to be free universal suffrage or limited suffrage for a few.\textsuperscript{69}

The European settlers were in favour of extending the franchise to a few Africans only, based on education and wealth. They insisted on the continuation of the communal roll, as they were worried that the numerical superiority of the Africans would make the settlers political position vulnerable. In response to the settlers concerns, the imperial government adopted a cautious and gradualist approach to all political reforms but in particular the inclusion of Africans in the Legislative Council.\textsuperscript{70} Between 1945 and 1952 few constitutional changes were effected in pursuit of \textit{multi racialism}. It was not until 1944, when L J Becheer the European missionary representing African interests resigned that an African, Eliud Mathu, was

\textsuperscript{70} Ibid. pp.50.
appointed to represent African interests. In 1947 B A Ohaga was appointed bringing the number of Africans to two. In 1948, two more African representatives were added. This remained the case until the 1954 Lyttelton Constitution.\textsuperscript{71}

The Constitutional changes were in response to political pressures from both the Africans and the settlers. African pressure intensified with the return of Jomo Kenyatta in 1946 shifting the mantle of African political leadership from Eliud Mathu and his Kenya African Study Union to him and the newly renamed Kenya African Union (KAU). Consequently, the agitation for constitutional reform assumed a new vigour. KAU sought greater African participation in the affairs of the colony with eventual independence under majority rule. While KAU became the focus of African political activity, the Electors Union (E U) became the major mouthpiece of the settlers. It was opposed to the demands of the Africans. Just as KAU was committed to the emancipation of the Africans, so was the EU committed to the constitutional entrenchment of the supremacy of the Europeans.\textsuperscript{72}

In 1948, the E U declared its objectives to be: maintaining the existing European political dominance and gradually to move towards reduction of direct influence and intervention of the colonial office in the internal affairs of the colony; to increase the influence of the European community in the leadership of the colony; to ensure that the development of the colony was carried out along British lines so that upon the colony’s attainment of self-government it could remain part of the British commonwealth; and to demonstrate the importance of the role of Kenya and East Africa in any scheme of imperial defence.\textsuperscript{73}

\textsuperscript{71} Ghai & McAuslan, Public Law and Political Change in Kenya, p.64.  
\textsuperscript{72} Blundell, A Love Affair with the Sun, pp.88.  
The government's commitment to multi-racialism and gradual constitutional change leading to self-government had to contend with the conflicting nationalism of the Africans on one hand and Europeans on the other hand. The Imperial government took the view that these issues would resolve themselves in the long run and that there was no need as yet for any drastic action. This slow, uncoordinated and half-hearted response to African grievances failed to placate them. Ultimately, armed uprising presented itself as a possible and necessary manner of resolving long standing grievances among a section of the population. In October 1952, following sustained Mau-Mau attacks on white settlers, native collaborators and government installations in the colony, the Governor declared a state of Emergency. The resultant break down in the constitutional system had serious constitutional significance. In this regard, Ghai and McAuslan have observed that:

“The failure of the constitutional system to accommodate the legitimate demands of the Africans was partly responsible for the outbreak of the Mau-Mau, which brought about a state of Emergency, declared on 20 October 1952. The normal constitutional process was partially suspended, enormous powers of legislation were vested in the Governor there was a temporary set back to the constitutional progress”.  

Constitutional Impact of Mau Mau War

Mau-Mau achieved two things. First, to convince both the imperial and colonial authorities on the need to embark on far reaching constitutional reforms to contain African discontent and lay the basis for eventual independence. Second, the war brought the imperial government more intricately into the management of the internal affairs of the colony. As a result, local political institutions were rendered less powerful than before and the process of constitutional change was thereby

---

75. Ghai & McAuslan, Public Law and Political Change in Kenya, p.66.
invigorated.\textsuperscript{76}

Two major constitutional changes can be attributed directly to Mau Mau. These are the Lyttleton and Lennox Boyd constitutions. Both were intended to provide some minimal concessions to "moderate Africans" in order to isolate Mau Mau and its sympathisers.\textsuperscript{77} The Mau-Mau war and the attendant state of emergency pressed home the point that it would be impossible to achieve any form of lasting order without making immediate and significant concessions to the African people. It also became quite clear that a political rather than a military solution was called for. The initiative for constitutional change shifted from the colonial to the imperial government. Sir Oliver Lyttelton the new Colonial Secretary under a conservative government, saw the immediate task as suppressing Mau-Mau. He was convinced that no serious constitutional negotiations could be held before this was achieved. He was also convinced that the East African Federation was a very good idea and sought to push this idea as a condition precedent to constitutional changes in the East African territories.\textsuperscript{78}

**THE LYTTELTON CONSTITUTION**

Following extensive consultations between settler political leaders in the colony, and both the labour and conservative secretaries of state, the colonial office drafted a white paper from which a new constitution was proposed. This was the constitution that came to be known as the Lyttelton Constitution, named after the Colonial Secretary. The Constitution essentially sought to address three issues. First, it aspired to effect the principle of multi-racialism. Second it sought to correct the

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{76} David Throup, The Economic and Social Origins of Mau Mau, (London: James Curly, 1987) pp.244-45.
\item \textsuperscript{78} Ogot, "The Decisive Years", 1945-55, pp.55-57.
\end{itemize}
\end{footnotesize}
anomaly of the powers and composition of the Executive Council. Third, within a broader framework, it sought to regulate African political participation by providing for separate racial representation.\textsuperscript{79}

The new constitution made a number of significant changes. First, it established a ministerial system that took over some of the functions previously performed by the Executive Council. Under this new arrangement, a Council of Ministers was created to exercise collective responsibility over government policy. It consisted of the Governor, the Deputy Governor and six unofficial members, three of whom could be drawn from European elected members, two Asians and one African. For the first time an African would occupy a ministerial office; that of the ministry of community development.\textsuperscript{80}

The Executive Council nonetheless continued to exist albeit with much reduced functions. All the ministers were members of the Executive Council and in real terms the executive function served no purpose other than to give Africans, Asians and Arabs the illusion that they were represented in the government. Ghai and McAuslan have observed that the only functional relevance of the Council of ministers was that the Governor could refer any Bill to be tabled in the Legislative Council to the Council. He could also do the same for any matter after first seeking the opinion of the Council of Ministers.\textsuperscript{81} He however had to consult the Executive Council before exercising his prerogative of mercy. Like the old Executive Council, it served at the pleasure of the Governor and was not responsible to the Legislative Council. There was also the possibility of further members being added if the Council


\textsuperscript{80} Ogot “The Decisive Years”, 1945-55, p.60.

\textsuperscript{81} Ghai & McAuslan, \textit{Public Law and Political Change in Kenya}, p.70.
of Ministers unanimously agreed. Further, there were to be no more than five and no fewer than three under-secretaries of whom one would be an Arab and two would be Africans. The question of the franchise for Africans was also eventually addressed. A commission was set up in 1955 to study the best manner of choosing African representatives. The imperial government, however, decided that there would be no changes in the communal basis of franchises before the elections expected in 1960.82

In 1954 a British parliamentary delegation visited Kenya and made a report to the Colonial Secretary. The report emphasised the need to permit Africans to participate in the politics of their country and the need to develop a multi-racial society. It also recommended that an acceptable basis for the election of African members of the Legislative Council at the next general elections be found. Between 1953 and 1956 there had been a total ban on nation-wide African political organisation.

Following the visit to Kenya of the all party parliamentary delegation, and particularly in light of its recommendation that there should be elections for African members of the Legislative Council at the elections scheduled for 1956, the government decided to allow the formation of district political associations.83

The removal of restrictions on African political activity did not extend to central province, which was still under a state of emergency. Nor was any national political body uniting all the various African communities permitted. In 1955 the Governor, Sir Evelyn Baring, appointed Sir Walter Coutts, a former District Commissioner in Fort Hall

to investigate and advise on the best system or systems to be adopted in choosing African representative members of the Legislative Council. The Coutts Report recommended that there should be a qualitative franchise based on education, property and service. It established voting qualifications as income of 120 pounds a year. For the Kikuyu, Meru and Embu who were involved in the Mau-Mau, there was the added requirement that they had to acquire a certificate of loyalty in order to be eligible to vote.\textsuperscript{84} Oginga Odinga, who became one of the first African elected political leaders, estimated that only one in every twenty Africans qualified to vote under this scheme.\textsuperscript{85}

Consequent upon the commission's report, a law governing African voting was promulgated with an elaborate criterion to be fulfilled. Elections were held in March 1957 under the new electoral law. By this time, there were about ten African political organisations. Eight Africans were elected into the Council in the elections. Till then, the African members of the Legislative Council had been nominated by the Governor from names submitted by the African District Councils. A new, more assertive group led by Tom Mboya and Oginga Odinga replaced six of the eight previously appointed members. Daniel Arap Moi previously a nominated member was elected to represent Africans in the Rift Valley.

Once they were elected, Africans formed African Elected Members Organisation (AEMO) which they used to make demands on the British government.\textsuperscript{86} They rejected the Lyttelton constitution outright and demanded fifteen more seats for the Africans so as to give them a majority. They declined to accept a post reserved


\textsuperscript{85} Odinga Oginga, \textit{Not Yet Uhuru}, pp.79-80.

for them in the Council of Ministers and generally assumed a position of non-co-
operation, effectively precipitating a constitutional crisis. They demanded more and
far reaching reforms across the board. In the first press statement by the African
elected members organisation (AEMO) they stated that:

"We declare the Lyttelton plan and agreement null and void. That none
of the undersigned shall accept a ministerial post or the position of
parliamentary under-secretary. That the most important and immediate
need is to secure constitutional reforms in the legislature giving everyone
effective and real representation, to which end it is our intention to
direct all our efforts and energies. We are firmly and unequivocally
opposed to any system which serves as a device to secure for certain
people permanent political and economic domination of other sections
of our community, which end the Lyttelton plan is promoting to the
advantage of the European community in Kenya. We shall fight to build
a government and society in which all enjoy equal rights and
opportunities and no one enjoys privileges or a privileged position".87

Against this background, although the Lyttelton constitution was meant to last
until 1960, the new Colonial Secretary, Lennox-Boyd (later Lord Boyd), was forced to
take a fresh look at the constitutional arrangement then obtaining and to make fresh
recommendations. He utilised a provision in the Lyttelton constitution which provided
that if the Constitution proved unworkable any time before 1960 the Colonial
Secretary would have a free hand in organising a fresh constitutional arrangement.
Lennox-Boyd requested and got the resignation of all cabinet ministers and thereby
nullified the basis of the Constitution. The recommendations that he made and which
resulted in the Lennox-Boyd Constitution the following year, built on and expanded
the theme of multi-racialism that the previous Constitution had established.88

87. Quoted in Odinga, Not yet Uhuru, p.51.
THE LENNOX-BOYD CONSTITUTION

The Lennox-Boyd Constitution was a final acknowledgement that Kenya would never be a settler's country. It recognised the imperative of increasing African representation but nonetheless remained committed to preserving a multi-racial government. In this regard, it maintained the principal tenets of the Lyttelton Constitution. It, however, sought to achieve two conditions prior to the establishment of a truly multiracial society - to end racialism or the colour bar and to provide securities for the migrant minorities. The theme of protection of minority interests was to become a major issue in Kenya's constitutional development in subsequent years.

From a technical point of view, the introduction of the Lennox-Boyd Constitution was the first time that an Order in Council was used to legislate for the constitutional structure of the colony. The effect of the Order in Council was to repeal all the royal instructions, letters patent and Orders in Council, which constituted the old Constitution, which in effect created an entirely new basis for the legal-constitutional order in the colony. The new Constitution made far-reaching changes in the constitutional order. First, it increased the number of elected African members in the Legislative Council from eight to fourteen, the same number as the Europeans. This represented a significant loss of privilege for European representation. Until then, European members had always equalled or exceeded all the other groups put together. While the seats in the Legislative Council remained divided on racial lines, there was in the new Constitution some provision for departure from the principle of the communal role in that it provided that, after members were elected

89. Published by the colonial Secretary as, Proposals for the New Constitutional Arrangements Cmnd 309, and enacted as The Kenya (Constitution) Order in Council 1958, (S 1 600).
90. Ibid. pp.70-71.
to the Council they would then convene as an electoral college and choose twelve specially elected members who were meant to represent all communities. But even these were divided between the races; four seats for each racial group. Africans, Europeans and Asians. Very significant safeguards were built into the Constitution to protect the interests of the migrant minority communities. The principal one was the council of state. This was set up specifically to protect any of the racial groups from legislation harmful to its interests. It was constituted by ten members and a chairman appointed by the Governor. If it was the opinion of the council that a bill or any subsidiary legislation was discriminative it could table an objection before the Legislative Council and the latter would not enact the bill or approve subsidiary legislation without the report of the former. If the Legislative Council wished to proceed with the bill or other legislation then the council of state could ask the Governor to reserve the bill for Her Majesty’s certification.91

One interesting aspect of the council’s constitutional provision was the entrenched clause providing that the Governor could not alter the existing provision as to the specially elected members unless the Council considered and approved the proposed alterations. As part of the reform of the executive, the Executive Council was abolished and Council of Ministers established in its stead. The Council of Ministers was to have sixteen members, half of whom were to be appointed from the elected members, the maximum number of officials allowed being eight. Two ministers were to be selected from the African members, one of whom would serve in the portfolio of adult education and community development. Two ministers would be Asian and there were to be four Europeans without portfolio. There would be no

less than three and no more than six parliamentary secretaries (Assistant ministers),
two of whom were to be Africans with one Asian and one Arab. The powers of the
Governor remained largely unaffected except that a distinction was made between
powers he exercised at his discretion and those for which he needed to consult the
Council of Ministers.\textsuperscript{92}

With all its significant innovations, the Lennox-Boyd Constitution was, too little
too late, as far as the Africans were concerned. They rejected the constitutional
arrangement as presented. They demanded the total control of government that
their numerical superiority democratically entitled them to. They demanded a
common electoral roll and unrestricted adult franchise. They refused to cooperate in
the implementation of the constitutional arrangement and even boycotted the
Legislative Council, although they remained in the Council of Ministers.\textsuperscript{93}

In June 1958 Oginga Odinga made a speech in the Legislative Council in
which he referred to Kenyatta, who was still in detention as a "respected leader". In
September Tom Mboya called for the 20\textsuperscript{th} of October, the day when Kenyatta and
other political leaders were detained, to be observed as an annual day of fasting.\textsuperscript{94}
When at the end of 1958 the Governor, Sir Evelyn Baring insisted that the
constitutional arrangement would stay, all fourteen elected African Members walked
out of the Council chambers and effectively withdrew from participation in all
proceedings thereafter.\textsuperscript{95} The mood of the African population was becoming more
militant and the African Members of the Legislative Council were making the
multiracial constitutional arrangements inoperable. In January 1959 all the elected

\textsuperscript{92} Ibid. p.1092.
\textsuperscript{93} Odinga, Not yet Uhuru, p.163.
\textsuperscript{94} Ogot, "The Decisive Years, 1945-55", pp.60-61.
\textsuperscript{95} Ibid. p.164.
African members together with one Asian and one European member formed the Constituency Elected Members Organisation (CEMO). They sent a delegation to London demanding the appointment of a constitutional adviser followed by a constitutional conference to discuss a new Constitution that would lead to majority rule. Inevitably a constitutional crisis arose.96

Finally, in early 1959, after a visit by a multi-racial group of political leaders, the Secretary of State accepted the African demand and Professor W J M Mackenzie of Manchester University was appointed constitutional adviser. Following consultations between the constitutional adviser and the various parties the first Lancaster House constitutional conference was convened in 1960. The twilight of the colonial state and the bargaining for the independence Constitution had began in earnest.97

CONCLUSION

This chapter has traced the genesis and evolution of the Constitution and the constitutional system in colonial Kenya. It has explored the background to the legal and political processes in the colony and established the historical basis of the dynamics that informed the decolonization constitution. It has mapped out the legacy of the colonial constitutional order and the complex political issues that informed colonial constitutional making.

---

96. Berman, Control and Crisis in Colonial Kenya, pp.399-400.
CHAPTER THREE

THE MAKING OF THE INDEPENDENCE CONSTITUTION 1960-1963

INTRODUCTION

Between 1960 and 1963 the pace of constitution making increased in earnest. Both the imperial and colonial governments had largely conceded the fact that Independence was inevitable. Indeed there was no doubt that Kenya would proceed to independence under African majority rule. All the parties now concentrated on thrashing out a political compromise that would form the basis of a constitutional framework to facilitate independence. The negotiations were conducted in the context of constitutional conferences held at Lancaster House in London.

THE 1960 LANCASTER HOUSE CONFERENCE

By the time the first constitutional conference opened at Lancaster House, London, in January 1960 Lennox-Boyd had been replaced by Ian Macleod as Colonial Secretary. Both the Colonial Office and the Conservative Party had significantly changed their policies and were more willing to shift the balance between settler control and African nationalism. Furthermore, Britain was under increasing international pressure for decolonization from both the United States and the Soviet Union and from the growing block of non-western states.

The conference held seventeen full plenary sessions between 18th January and 21st February 1960. Various groups with different views were


77
assembled at Lancaster House. Indeed, the meeting was essentially a conference of racial groups. In total there were 19 Africans, 17 Europeans, 8 Asians, and 3 Arabs. The delegation of African members of the Legislative Council had Leonard Ngala as the Chairman and Tom Mboya as Secretary. But while provision had been made for delegation advisers, Macleod rejected a request for Jomo Kenyatta, who was still restricted, and Mbiyu Koinange who was in London but viewed as a one of the instigators of mau mau, to be brought in as advisers to the African delegation. The African group demanded responsible government in 1960, a common roll with universal adult suffrage, the right of the majority to form the new government, the abolition of nominated and specially elected members, the release of Jomo Kenyatta and the opening up of the white highlands to all racial groups.4

Among the several unofficial delegates from Kenya were the New Kenya Party (NKP) led by a former agriculture minister Michael Blundell. The NKP purported to pursue a multi-racial agenda that would have granted special protection and status to the expatriate races. 46 members of the Legislative Council, 21 of them government nominees and all the specially elected members backed it. There was also the United Party (UP) led by Group Captain Briggs which advocated regionalism and which therefore wanted to see the Legislative Council dismantled and regional assemblies set up. The sole Arab member wanted autonomy for the coast while the Somali member wanted the

---

4. Odinga, Not Yet Uhuru, p.177.
right to secede and join the Republic of Somalia. For its part, the colonial government, through Macleod, wished to direct the constitutional changes towards a Westminster parliamentary system, the so-called de-colonisation export model, which would incorporate provisions for the protection of minorities. While the former caused little controversy the latter was the subject of serious disagreement. The principal issues that had to be resolved included the question of safeguards for minorities, the composition of the Legislative Council, the franchise and the character of the executive.

THE 1960 CONSTITUTION

When all the parties had made their speeches and no agreement could be reached on any of the key issues, Macleod was forced to put forward his proposals on a "take it or leave it basis". In Macleod's proposal, were nonetheless far reaching. The legislative council was to be reduced to a total of sixty-five members. Of these thirty-three would be elected on a common roll. There would nonetheless be twenty reserved seats for the minorities—ten for Whites, eight for Asians and two for Arabs. But all persons on the common roll would also be eligible to elect these members. The other twelve would be "national members", four members each for Africans and Whites, three for Asians and one for Arabs; all chosen by the fifty-three elected members.

There would be twelve members of the council of ministers who would be appointed by the Governor. The Council would be composed of four African

---

members, three whites and one Asian.\textsuperscript{9}

The Macleod constitutional proposals, as Tom Mboya observed, “reversed the entire constitutional process”,\textsuperscript{10} but they did not meet the expectations of any of the parties involved. African leaders felt that the proposals did not go far enough in eliminating the communal and racial basis of representation, which had been at the heart of the Lennox-Boyd constitution. They also felt that the movement towards independence was too slow. At the same time, the settlers felt that too many concessions had been made to Africans and sufficient safeguards had not been built in to protect their interests. To the settlers the Constitution represented a betrayal by the imperial government threatening the very survival of the Europeans in Kenya.\textsuperscript{11} While none of the parties felt that the Constitution had achieved what it desired, the 1960 constitutional conference made significant progress towards independence under African majority rule. In the meantime the fragmentation of the African coalition that had negotiated the 1960 Constitution began with the lifting of the emergency and the formation of nation wide political parties.\textsuperscript{12}

The Kenya African National Union (KANU) was formed in April 1960 with James Gichuru as acting president, Odinga as vice-president and Tom Mboya as secretary. Although Ronald Ngala was elected treasurer and Daniel Moi assistant treasurer, both rejected the positions.\textsuperscript{13} The leaders who had agreed to form KANU proceeded to convert their existing district associations into branches of

\textsuperscript{9} Ghai & McAuslan, Public Law and Political Change in Kenya, pp.75-76.
\textsuperscript{10} Mboya, Freedom and After, p.128.
\textsuperscript{12} Bogonko, Kenya: 1945-1963, pp.244-247.
\textsuperscript{13} Mboya, Freedom and After, p.84.
the new national organisation. KANU's stated goal was to unite Kenyans under one party in preparation for independence, and to retain the unitary character of the state. It united the more educated and more politically active communities such as the Kikuyu, Luo, Embu, Meru, Kamba and Kisii.14

In rejecting positions in KANU, Ngala and Moi exposed the disunity among the African leaders. They went on to join in the formation of the Kenya African Democratic Union (KADU) whose stated objective was the "protection of minority tribes" and demanded the formation of a federalist state. They depicted KANU as a party of the majority tribes, the Kikuyus and the Luos, who were out to dominate the minorities.15 KADU united the smaller ethnic groups, most of them pastoralists. It received financial, administrative and policy assistance from the New Kenya Party (NKP), which was a white settler party led by Michael Blundell.16

Mboya contended that the KADU agenda was the brainchild of liberal Europeans, and that "apart from Muliro, very few KADU politicians are convinced Regionalists-the others are tribal leaders".17 This disunity among the Africans was to complicate the negotiations for the independence Constitution.

THE SECOND LANCASTER HOUSE CONFERENCE

Political pressure for the convening of the independence conference to hammer out a final constitution that would lead to self-government continued to mount. The new Colonial Secretary Ian Macleod visited Kenya in October 1961.

and declared that the independence constitutional conference would begin in October 1962.\textsuperscript{18}

The second Lancaster House conference was held between 15\textsuperscript{th} February and 6\textsuperscript{th} April 1962 under the Chairmanship of a new colonial secretary, Reginald Maulding. The conference was primarily concerned with drawing up the outlines of the independence Constitution. But while at the 1960 Conference the Africans had been united as a racial group and appeared to have common cause against other racial groups, at the second conference, they were already split into two antagonistic political parties. The Kenya African National Union (KANU) and the Kenya Democratic Union (KADU). There was also the less significant Mwambao United Front (MUF) representing the Coast. This party had been formed by the Arabs of Mombasa with view that "if the for any reason the Sultan of Zanzibar abdicated his sovereignty over mwambao, it would necessarily follow that mwambao would become an independent sovereign state".\textsuperscript{19}

While the parties reflected ethnic alliances among the African communities in Kenya, this did not in any way reduce the significance of race. At the conference, the delegates were varied and racially diverse, comprising thirty-seven Africans, fourteen Europeans, eleven Asians and three Arabs and there definitely was no united position.\textsuperscript{20}

The main dispute was on whether Kenya should have a federalised (called majimbo) or a unitary state. On this issue, KADU through Ronald Ngala

\textsuperscript{18} Ogot, "The decisive Years: 1956-1963", pp.68-69.
\textsuperscript{20} Ibid, pp.268-269.
and Peter Okondo, supported by settler leaders Michael Blundell and Wilfred Havelock, demanded a federal state, to consist of six regions each having its own government. KANU demanded a unitary state with Kenyatta, Mboya and Odinga seeking to show the impracticability of a federal structure in Kenya. Five weeks into the conference the parties were deadlocked.²¹

The Colonial Secretary proposed a compromise in which there would be "strong and effective central government...responsible for a wide range of activities but with a maximum possible decentralisation to effective authorities drawing their being and power from the constitution and not from the central government".²² As a crucial part of the settlement, the parties agreed that both KADU and KANU would hold office in the Government that would negotiate the detail of the final constitution. The coalition government was to be headed by the Governor and Kenyatta and Ngala were to be Ministers of state. A self-government constitution was agreed upon by the time the parties left London and in August 1962 Kenyatta and Ngala held the first "Kenya We Want" convention, at which various committees were formed to thrash out details of future government.²³

**THE 1962 SELF GOVERNMENT CONSTITUTION**

The self-government Constitution with very minor modifications became the model for the Independence Constitution. As a result of the 1962 Lancaster House Conference, the 1962 self-government constitution was promulgated. The

²² Ibid, pp.149-150.
²³ Ogot, "The Decisive Years: 1956-1963" p.73.
major characteristics of the self-government constitution were the Westminster form of government and an elaborate system of regionalism. The Prime Minister was to be appointed by the Governor from amongst members of the House of Representatives most likely to command the support of the majority. Important powers were however still vested in the Colonial Office. The Governor controlled external affairs, defence and internal security. He also retained his veto over legislation. The legislature had been renamed central legislature and consisted of the national assembly and the Queen. The national assembly itself became bicameral, with the House of Representatives as the Lower House and the Senate as the upper house. The senate was intended as a bulwark for Majimbo representing the ethnic interests that KADU had advocated.24

The theme of regionalism which was to dominate subsequent constitutional talks assumed an important position at this time and indeed, the main provisions of the 1962 conference reflected the fundamental concern with regionalism.25 Following the report of the Regional Boundary Commission, which had been set up by Maudling as part of the Second Lancaster house constitutional settlement, Kenya was divided into seven regions and one Extra-Regional area, Nairobi. Nairobi was to be administered directly by the centre. Each of the regions was to be controlled by a Regional Assembly (consisting of twenty to thirty elected members). Each region was to have its own public service recruited and disciplined by its own public service commission. Save for a

few secondary and other education institutions described as national in character which were to remain under the control of the centre, all education up to secondary School level was to be controlled by the regions. Save for certain specified hospitals and medical and research institutions of a national character, all hospital services were to be controlled by the Regions. Various other services and institutions which were to be controlled exclusively by the regions were listed in schedules in the Constitution.26

The centre could delegate any of its executive powers to the region but the reverse was not possible. The police force was to be divided into regional contingents, a Nairobi contingent and specialised branches. The only police under the control of the centre was to consist of the Nairobi contingent and the specialised branches. Land in African areas was to be vested in county councils, which are bodies representative of the local people. Land, which previously vested in the central government or in Her Majesty in right of the Kenya government, was now to vest in the regions. Regions were to have a voice in the appointment of the Chief Justice, the functioning of the National Security Council through their representative members, the removal from office of the Attorney General, the Controller and Auditor-General, the Chairman or the deputy Chairman of the Central Land Board or a puisne judge. The power of the regions could not be taken away except by amending the Constitution and in the case of the entrenched provisions this could not be done without a majority.

of 90% in the Senate. After the 1962 second Lancaster Conference settlement, what followed was a process of implementation. Ronald Ngala, leader of KADU and Jomo Kenyatta the leader of KANU were appointed ministers of state. In the meantime, the Boundary Commission had delineated regional boundaries. In May 1963 elections were held on a common roll, pitting KANU and its unitary philosophy against KADU and its majimbo policies. The result was a decisive victory for Jomo Kenyatta and KANU with majorities both in the Lower House and in the senate.

On June 1, 1963 Kenyatta became Prime Minister with Odinga as minister of Home affairs and Mboya as Minister of justice and constitutional affairs.

The elections having brought KANU to power and relegated KADU to the opposition altered the balance of power in Kenya significantly. It was however felt that a final and long lasting constitutional arrangement should be set out. The imperial government was now particularly concerned not as much with the welfare of the African majority but the welfare of the minority expatriate communities.

**THE THIRD LANCASTER HOUSE CONFERENCE**

On becoming Prime Minister, Kenyatta pressed the colonial government for changes in the 1962 Constitution. This led to the third Lancaster House conference, which was held between September and October 1963 and which

---

27. Section 12 of the Independence Constitution.
produced, the Independence constitution. The Conference was one between two governments: the Kenya government and the British government. KADU as the official opposition attended as an observer. Although multi-racialism had been abandoned as a constitutional option, there was a European delegation because the Secretary of State had promised the European community in Kenya that they would be represented at the final conference. No special representation of Asians was made.

In theory the Conference was merely intended to tie up any loose ends on the majimbo Constitution. In reality the matter was more complex. Duncan Sandys the Commonwealth relations secretary, (as Kenya was no longer under the colonial office) was confronted by a government backed by a huge mandate demanding substantial changes and an opposition, backed by European settlers calling for a confirmation of regional safeguards under the existing constitution. KANU was demanding removal of safeguards of the regions, control of the police force, control of the public service and relaxation of the rule on the amendment of the Constitution. KADU was opposed to Sandys attempting to re-arbitrate issues that they considered already settled. The British government was concerned that unless a consensus was arrived at KANU would unilaterally declare independence. Finally the British government decided to side with KANU although the demands made were "contrary not only to previous

---

agreements reached by Secretaries of State various in various Nairobi talks but also to the Lancaster House framework itself".  

In the end, a consensus emerged that the next constitutional development was towards Dominion (as opposed to Republican) status with the Queen as head of state. Various formal amendments were made to the existing constitution in order to make the Constitution more workable and durable. There was some dilution of the regional powers and the issue of citizenship was addressed in some detail.  

Because of the significance that the parties attached to the constitutional arrangement, one of the most significant issues agreed upon was that the power to amend the Constitution was to be seriously circumscribed. As enacted, the amendment provision required a ninety-percent majority in both houses before an amendment could be effected. Further, it was provided that any proposals that failed to become law through that provision could do so if supported by a two third majority in a nation-wide referendum.  

Kenya became independent on 12 December 1963. Two legal instruments facilitated the transfer of power and sovereignty from the United Kingdom. The Kenya Independence Act 1963, which was enacted by the British parliament, renounced Britain's right to govern and legislate for Kenya. It also removed all limitations on the competence of Kenya's parliament to legislate, by removing the application of the Colonial Laws Validity Act 1865 to legislation enacted.

---

32. Ibid, 192.
34. Section 12 of the Independence Constitution.
after independence. It was however made clear that the power of the new parliament to make or amend law did not extend to amending the constitutional provisions (the act and the Independence Order in Council) in a manner not provided for in the Constitution itself. The second instrument was the Independence Order in Council 1963. The second schedule of the order contained the Kenya independence Constitution. The order also provided for transitional matters, including the continuance in force of existing laws.35

THE INDEPENDENCE CONSTITUTION

As finally enacted, the Independence Constitution was a long, detailed and highly complex document. It reflected the diverse positions taken by the parties who negotiated it. In many ways it was a less than perfect document. It sought to capture the fragile compromise that the parties had thrashed out at the Lancaster House conferences. It was also, unfortunately, a document that the protagonists did not have much faith in because of its failure to provide for their version of good government. In this sense, it was also inherently unstable.

In a very real sense however, it institutionalised, entrenched and legitimised the colonial political and legal legacy thereby creating continuity and some measure of stability. More significantly, it provided the parameters for all latter discourse on the political future of the country and its people.36

The Constitution had both political and legal significance. First, it was a symbol of the fact of independence and the creation of a new state. Second, it provided a measure of legitimacy for the new rulers who had been associated

89
with its creation and who had assumed office under it. Third, it was an indication of national unity because it was contemporaneous with the formation of the new state and had been endorsed in principle by most of the political leaders at the pre-independence constitutional conferences.37

The Constitution was essentially designed as a vehicle for introducing new values to the emergent state. The most important of these were: the notion of Constitutionalism; the limitations of the powers of government and the assurance of the rights of the citizenry; and liberal democracy in the sense of the right of the majority to rule on the basis of free and universal suffrage. This value-creating role of the Constitution was particularly important given the history of the colonial constitutional order. In this regard, Patrick McAuslan has commented that:

"It is important to see the independence constitution in the terms of introducing certain values, rather than either reflecting already existing values or imposing certain values. It is certainly true that the colonial power wanted certain values and principles incorporated into the Constitution and was prepared to insist on this if necessary, but the coercive role of the colonial power is to be seen more in the actual detailed rules and institutions of the Constitution rather than the principle".38

In substance, the Constitution was based on two overriding principles, parliamentary government and the protection of minorities. As regards the former, the American Style Executive Presidential System had been Debated at Lancaster and rejected.39 In respect of the latter, the scheme for the protection of minorities had a long history. At the Lancaster House conferences it had

38 Ibid. pp.7-8.
elicited the greatest controversy. Its inclusion fundamentally affected the structure of the Constitution by establishing a quasi-federal state. In a sense, it also introduced a serious incongruence because a parliamentary system by definition is unitary and centralised while a federal system is decentralised. The parliamentary system in Kenya therefore started life in a severely modified form.

Above all else, compared to the colonial government, the one envisaged by the Constitution was a weak one with severely curtailed powers. At the institutional level, in theory, Britain was bequeathing to Kenya the Westminster model constitution but in reality, the two differed in a number of important respects.

First, the Independence Constitution was a written constitution invested with special legal sanctity. It was the fundamental or basic law and any legislation or other administrative act inconsistent with it was deemed null and void and could be so declared by the High Court. Second, the legislature had a very central and critical role in the total political process. For example, special majorities were required to alter the Constitution or to introduce a state of emergency and parliament could pass a vote of no confidence in the government. Third, the judiciary, manned by judges who enjoyed security of tenure, was to be the final arbiter in the interpretation of the Constitution. Fourth, a bill of rights, against which all legislative and administrative action would be measured was inserted in the Constitution. Fifth, the civil service and the police were insulated from political pressures. They were controlled by

the Public Service Commission and were not required to take any advice in the
discharge of their duties. Sixth, the Constitution assumed that there would always
be an opposition party in the legislature that was to be consulted whenever
changes to the Constitution were proposed.\footnote{Cherry Gertzel, "The Constitutional Position of the Opposition in Kenya: The Appeal for
Efficiency", \textit{East African Journal} 4, 6 (1967) pp.9-11.} This requirement of prior
agreement and continued consultation with the opposition had the effect of
making the Constitution into a form of treaty between all the parties. Finally, the
amendment process was rigid and to some extent inflexible.

The Executive

As a dominion, executive power lay with the Queen who was head of
state. It was in practice delegated to the governor-general who was resident in
the country. The governor-general had very extensive powers relating to
defence, external affairs and internal security and could even veto legislation.
Whereas he was expected to act on the advice of a cabinet, he was in fact
answerable to the Colonial Office. The Prime Minister was head of government
and was appointed by the governor-general from amongst the members of the
House of Representatives with the largest majoritarian backing. He therefore had
to be a Member of Parliament.\footnote{Section 75(3) of the Independence Constitution.}

Legislative Power

The National Assembly was bi-cameral (had two chambers) with the
House of Representatives as the Lower House and the Senate as the upper
The lower house was composed of not more than 130 and not less than 110 members elected from constituencies created by the Electoral Commission.\(^4^4\) The senate was intended as a political safeguard for Majimbo, since it had a crucial role in the procedure for constitutional amendment and the declaration of a state of emergency. In every other respect, the Senate was subordinate to the House of Representatives and was similar to the House of Lords in the United Kingdom.\(^4^5\) There were direct elections into the senate from forty districts including Nairobi. The districts as much as possible were tribally homogeneous in order to ensure equitable representation of tribes in the upper chamber. The senate was in some way modelled on the American System, as it was a continuous body; one third of its members were to resign every two years. The longest term that a Senator could serve was six years.

**Regional Government**

The Constitution provided for regionalism or what KADU had called Majimboism, a loose form of federalism. The country was divided into seven regions each having its own legislative and executive powers. In each region, there were elected and specially elected members.\(^4^6\) In order to vote in a region, one had to show a genuine connection with the region, such as having been born there or it being his permanent residence. The boundaries of the regions could not be changed by the central government nor could the central

---

\(^4^4\) Sections 36, 37 & 49 of the Independence Constitution.
\(^4^6\) Section 92 of the Independence Constitution.
government change the boundary of a region without its consent.47

The government of the region was complex. The president of the region was elected to the office by the elected members either from among themselves or from those qualified to be elected as such. In order to be elected, a candidate needed two-thirds majority of an Electoral College, which was composed of all members of the Provincial Assembly. Once elected, he could only be removed by a vote of three-quarters of all members. The executive functions of the region were in the hands of the Finance and Establishment Committee of the Assembly. The Chief Executive Officer of the region was the civil secretary who was appointed by the Public Service Commission after consultation with the regional President. The Public Service Commission also made appointments to the civil service of each region. Each region had a police contingent under a Regional Commissioner, which however was under the overall control of the Inspector General of police who was an officer of the central government.48

The relationship between the central government and the regional government was thus complex. The legislative and executive powers of the regions were subject to the right of intervention by the central government. This right weakened regional government. Regional governments were not in a position to restrain the central government. In effect therefore, “powers were so divided between central government, regional and other authorities that the effective exercise, let alone the abuse of power on the part of the KANU

47. Sec 239 of the Independence Constitution.
Government was rendered extremely difficult if the Constitution was to be adhered to".49

**Minority Rights**

The need to settle the claims of the various tribes and races to political power gave rise to the issue of minority rights in the Constitution.50 During the colonial times, various political methods had been employed by the government to safeguard the interests of the various groups but it was only in the late fifties that efforts were made to integrate safeguards in the Constitutional structure.51 After the 1960 constitutional conference, the Colonial Secretary made it clear that Kenya was to develop as an African country. Consequently, the Asians and Europeans concentrated on protecting their specific interests as opposed to fighting for a share in political power.52 The Europeans wanted to secure their property and land rights. The settlers, in particular, were concerned about compensation in the event that their land was compulsorily acquired, while European civil servants were concerned about obtaining their retirement benefits and compensation in case of premature retirement. 53 The Asians on the other hand were worried about the security of their investments and the right to continue working and residing in Kenya.

Smaller African ethnic communities worried about domination by larger,

50 Ghai, "Independence and Safeguards in Kenya" 1967, p.27.
52 Ghai, "Constitutions and the Political Order in East Africa", p.407.
better educated and politically more active communities. They wanted greater control of their own regional areas and less dependency on the central government, in this way they hoped to maintain control over their resources.\textsuperscript{54} The Arabs and the Somalis for their part wanted to secede from Kenya, the former to Zanzibar and the latter to Somalia. The Constitution dealt with these concerns by providing an elaborate scheme for the protection of minority rights secured by a bill of rights and enforceable by the judiciary.\textsuperscript{55}

**The Judiciary**

The Constitution provided for an independent and impartial judiciary to regulate the exercise of public power, prevent its abuse and corruption and generally enforce the rule of law. The appointment of judges was insulated from politics by vesting it in an independent Judicial Service Commission and by according judges security of tenure. Thus they could only be removed from office after very exhaustive investigations by an independent tribunal made up of senior judges from the commonwealth.\textsuperscript{56} Security of tenure was also extended to the Attorney General who was the principal legal adviser to the government and the chief public prosecutor. Although he was a member of the government, he was expected to be completely independent in the execution of his duties.\textsuperscript{57}

\textsuperscript{55} Ghai, "Independence and Safeguards in Kenya", p.29.
\textsuperscript{56} Sections 184 and 185 of the Independence Constitution.
\textsuperscript{57} Section 86(7) of the Independence Constitution.
The Civil Service

The Constitution provided for an independent and apolitical civil service. An independent Public Service Commission, whose members were appointed on the advice of the Judicial Service Commission, was set up. It was not under the direction of any other person or authority. Recruitment and promotion within the civil service was to be done by the Public Service Commission, which also had powers to dismiss public servants. The Commission also had jurisdiction over all public servants employed in the regions. Officers could only be removed from office after a judicial enquiry.58

In the appointment of very senior civil servants the commission had to consult the Prime Minister or the Regional President as the case required. Some civil servants such as the Attorney General and the Auditor and Controller General enjoyed security of tenure and could not be removed by the Commission. A separate Appointments Commission was set up for the police force. It consisted of the chairman of the Public Service Commission, a judge appointed by the Chief Justice and three other members appointed by the first two after consultation with the Inspector General. The Police Service Commission had the same powers over the police force as the Public Service Commission had over the public service. These powers included the power to appoint the Inspector General.59

58. Section 186-188 of the Independence Constitution.
59. Section 49 of the Constitution.
Elections

The Constitution protected the conduct of elections by setting up an independent Electoral Commission, which was to be responsible for ensuring impartiality and honesty in the conduct of elections and drawing up of constituency boundaries. The Electoral Commission comprised of the speakers of the two national houses, a nominee each of the Prime Minister and the Regional Presidents. The Electoral Commission was supposed to ensure that Government would not determine the composition of the Parliament directly or indirectly, either by gerrymandering, manipulation of voter registration or vote rigging.

The Bill of Rights

The Constitution contained a fairly extensive bill of rights that was to be supreme over ordinary laws. The Bill secured for every person in Kenya whatever his race, tribe, place of origin or residence, political opinion, colour, creed or sex, subject to respect for the rights and freedoms of others and for the public interest, the following: Life, liberty, security of the person and the protection of the law, the freedom of conscience, of expression and of assembly and association and the protection of the privacy of his home and protection of property from deprivation without compensation.

---

60. Section 48 of the Constitution.
Citizenship

The Constitution also dealt with the very complex issue of citizenship. Until independence there was no Kenya citizenship and therefore neither political nor other rights were conditional on it. There were two problems to be resolved by the provisions on citizenship. The first was the status of immigrants resident in Kenya at independence. The secondly was the position of those born after independence. In a fairly elaborate criterion, the Constitution provided that some persons would become citizens automatically by operation of law while others would be registered as such if they so desired. All the indigenous communities automatically became citizens of Kenya, as did a section of the migrant communities. The great majority of the residents of Kenya, provided they were British subjects could qualify to become citizens of Kenya. A curious provision gave non-citizens who were ordinarily and lawfully resident in Kenya on the date of independence a constitutional right to reside in the country and protection from deportation. This provision was inserted to protect those immigrants who wanted to live in Kenya yet did not want to take out the country’s citizenship.

Land

Historically, land in Kenya fell into three categories. The land alienated to Europeans in the white highlands, which was known as the scheduled land. The land set-aside for the Africans on a tribal basis, which was known as the native
reserves or trust land. The third category was crown land, which consisted of forests, and other un-alienated land. The Constitution confirmed the existing titles and interests in land and where land was subject to an un-adjudicated claim under the Land Titles Ordinance, subject to such adjudication. 66

Most of what used to be crown land was vested in the regions. The central government however got public and trusts land in the Nairobi area. The Trust land was vested in the county councils within whose area of jurisdiction it was located. The councils held the land in trust for the people resident there. 67

The Alteration of Constitution

The Constitutional amendment process was part of the larger constitutional settlement. It is significant that the language used to describe the process was that of alteration and not amendment. 68 Serious efforts had gone into ensuring that the amendment process was insulated from unilateral and partisan action. Initially, it was proposed that changes would require a majority of 75% of each house except in respect of amendments seeking to alter the entrenched rights of individuals, the regions, tribal authorities or districts in which case the required majority in the Senate would be 90%. 69

As finally enacted, therefore, there were two categories of amendments, ordinary amendments and amendments to specially entrenched provisions. The specially entrenched provisions could not be altered except by a bill secured by
75% of the votes of all the members on the second and third reading in the House of Representatives and nine-tenths of the members in the Senate on similar readings. The entrenched provisions related inter-alia to fundamental rights, citizenship, elections, the senate, structure of regions, the judiciary and the amendment process itself. The non-entrenched provisions of the Constitution could be altered much more easily; all that was required was of 75% of all members in both houses on the 2nd and 3rd readings. Significantly, if a decisive vote was not obtained, the bill could be presented to the electorate in a referendum and if supported by 2/3 of the votes it would be reintroduced into the house and passed by a simple majority just like ordinary legislation.\textsuperscript{70}

The Complexity of the Constitutional Settlement

The Independence Constitution was the product of political struggles stretching back to the time when African members first began appearing in significant numbers in the Legislative Council. It had to cater for innumerable fears and accommodate the innumerable demands of the various groups.\textsuperscript{71} In reality, it was a highly complex and to some extent unrealistic document that sought to capture a compromise that was both fragile and transitory. The Constitution had been tailored to address subsisting problems without much regard for its long-term institutional viability, it was therefore excessively concerned with accommodating existing problems at the expense of the likely future developments.\textsuperscript{72}

\textsuperscript{70} Section 71 (3) of the Independence Constitution.
\textsuperscript{71} McAuslan, "The Evolution of Public Law in East Africa in the 1960's," p.1.
\textsuperscript{72} Ghai, "Constitutions and the Political Order in East Africa", p.403.
Foremost, the Constitution sought to establish an entirely new form of governance that neither the new governors nor the governed had any experience with. Because it showed an amazing distrust of power, it provided for a weak form of government by diffusing power into numerous institutions. This was in sharp contrast to the colonial state, which was one monolithic and unaccountable edifice of power. Regionalism or Majimboism was the most contentious issue in the negotiations that led to the Constitution and it was the one issue that made the Constitutional arrangement almost unworkable. “The powers and functions of the state among a central and various regional governments... [were] so meticulously were these allocated between them that if the intention was to prevent a planned economic and social development of the country success could not have been more complete”.73

The Power Elite and the Constitution

The political elite who negotiated the Independence Constitution was a loose coalition that neither enjoyed a coherence of ideology nor a consensus on political programmes. Party discipline across the board was at best poor and the goals short-term. KANU’s immediate concern was self-government and the transfer of political power. KADU’s concern was the limitation of political power and the articulation of the interests of what were referred to as minority communities. The political culture that the politicians inherited at independence had no tradition of government by rules as a legitimate system much less of the Constitution as the basic law that was sacrosanct. Indeed, the African politicians

were complete strangers to competitive politics. Principled opposition had no tradition. None of the key African politicians had any experience in government save for the very few that had been in the Local Native Councils and later in the Legislative Council.

The reaction of the key political players towards the Constitution was interesting. Most politicians, especially those within KANU viewed the Constitution with great suspicion. They viewed it as one thrust upon them as the price they had to pay for early independence. Macharia Munene, then Professor of History at the University of Nairobi, had observed that:

"KANU, with very little chance of its constitutional desires prevailing at Lancaster, and confident of its electoral popularity in Kenya, did the politically expedient thing and accepted the Majimbo constitution. The acceptance was meant to enable KANU leaders to assume power as soon as possible without believing in the document they had accepted. According to Odinga, Kenyatta told KANU delegates" to reach a settlement" if they did not want to have government "snatched from our hands...We might be forced to accept a constitution we did not want, but once we had the government we could change the Constitution".74

Those politicians in KADU saw the Constitution as a guarantee against the domination and oppression of the communities that they represented. In this view the Europeans and Asians supported them.75 For its part, the Colonial Office saw the Constitution as a means by which Britain's historical colonial responsibility of trusteeship of the underdeveloped and the protection of the minorities was to be finally and honourably discharged.

75. Ibid p.56.
For all the parties there was a belief, that most political and not a few social and economic problems could be resolved by constitutional devices. The Constitution therefore bore a heavy burden of arbitrating political conflict among factions, some of who were plotting to change it.

The colonial government had been obsessively determined to limit executive power. This was partly to protect the minorities but also to contain the new African leadership particularly Jomo Kenyatta whom they still accused of instigating Mau-Mau and whom they did not trust. The consequence of this was that the powers of the central government were so curtailed and its relationship with the regions so complex that Oginga Odinga, noted that “the first requirement was a skilled corps of lawyers and clerks in the centre and the regions to explain to legislators what they were required, permitted or forbidden to do under scores of legally worded clauses”.

There was also a feeling among the African political leadership, that the Constitution was not perfect and that amendments were necessary, to make it more realistic and workable. Oginga Odinga, Minister for Home Affairs in the government said of it:

“We knew that the period for the regional constitution was short lived, and so and we honoured the undertaking to hand over schedules but we improvised a new way of keeping as much centralised control as possible, ready for the new day when strong central administration would be reinstated”.

---

76. Ghai, "Constitutions and the political order in East Africa", p.410.
Tom Mboya described it as "an experiment...and it is obvious that it contains a number of unworkable and unfair provisions" while Ronald Ngala called it "a breach of faith". Most of the politicians in KANU seem genuinely to believe that the Constitution would act as a break to what they perceived as necessary development and national goals. They saw the opposition as a luxury that the new state could not afford. Patrick McAuslan captures the dilemma of the leadership:

"The government saw the Constitution as presenting a challenge to it, for which the opposition was responsible. To confirm meant to cease to exercise powers which had hitherto been considered necessary in Kenya to tackle problems which remained in existence notwithstanding independence; to ignore was to run the risk of retaliation from the opposition, given a powerful position by the Constitution. The only way out of the dilemma was to amend the Constitution, and this meant re-enacting the pre-independence political struggles."  

Charles Njonjo, who became the first African Attorney General was clearly inspired by this view and believed that the Constitution was a handicap to development. Commenting on what he perceived to be the shortcomings of the Independence Constitution, stated:

"First of all it militated against effective government at the centre. Secondly, it prevented the co-ordination of the national efforts at a time when it was most important that development should be planned on a nation-wide scale. Thirdly, the system of regional government was both costly and cumbersome and made heavy demands on the country's inadequate resources of trained manpower. Fourthly, the independence constitution made provision for a monarchical form of government, a form which is

---

alien to the Kenya people. Amendment of this constitution was therefore imperative.82

There was also the important issue of the personality and charisma of Jomo Kenyatta, the first Prime Minister and who later became president of Kenya. Kenyatta and his close advisers were determined to be the sole determinants of the direction of political change in Kenya and would not be hampered by constitutional restrictions that they did not approve. In this, Kenyatta was reinforced by the belief among politicians that a strong centralised executive was necessary.

Finally, many politicians argued that the Independence Constitution did not sufficiently reflect African traditions and values, because it was an imposition by the colonial government. It would therefore be important, so the argument went, to have a constitution with greater autochthony. Right from Lancaster house, the political elite did not perceive the Constitution as a neutral framework for political competition. Instead, they saw the Constitution as a weapon in the power struggle. There was therefore no notion of its permanence.83

IMPEDIMENTS TO CONSTITUTIONALISM

The growth of institutional politics in the period leading to independence created a process whereby constitutional issues were negotiated and thrashed out within the framework of a rudimentary constitutional system. This background ensured that a constitutionalist culture was embedded in the nascent political

culture of the new state and made subsequent political problems to be addressed by reference to the Constitution.

The Independence Constitution had attempted to freeze the political situation at the time. After independence, the Constitution became the focus of much political controversy and activity. The Constitution was now to be the fundamental law, the basis of the organisation of state and power and the framework for all political competition. The post-independence constitutional order was in this sense to commence life as an experiment.

At independence, a heavy burden was therefore imposed on the Constitution. As the basis of a new state, it was expected to foster nationalism and to create national unity out of the diverse ethnic and religious communities. It was also expected to foster democracy, the rule of law and constitutionalism while ensuring a capacity for administration. The state as constituted by the Independence Constitution was radically different from the colonial one. In conception, it was both liberal and democratic but in reality, it retained some of the fundamental attributes of the colonial state. While the colonial state reposed absolute power in the administration, the Independence Constitution showed a remarkable distrust of centralised power. It sought to countervail it by dissipating it into various autonomous institutions, which were sometimes isolated from each other and at other times opposed to each other.85

While the Independence Constitution tried to instil the values constitutionalism and the rule of law no changes were made to the underlying regime of public law or to the system of public administration. The three major themes that ran through the Independence Constitution, regionalism, protection of minorities and the control of the exercise of executive power reflected deep-seated political divisions within Kenyan society. The first two issues were largely the agenda of the expatriate communities and small size communities supported a federalist agenda. Regionalism was related to the third issue, the control of executive power, in the context of majimbo a bulwark against central government control. As the Constitution was the product of compromises between the various groups involved in its negotiations, it sought to accommodate the concerns of each group within the framework of the Westminster export model and it ended up as a document that failed to satisfy any group entirely. Each group therefore perceived the next phase of the political struggle as involving changes to the Constitution.

CONCLUSION

The making of the independence constitution was affected by a number of factors that made its stability questionable. First, none of the parties conceived of the Constitution as basic law or clothed it with any sanctity. They saw the Constitution as a legitimate weapon in the political struggle for supremacy. Right from the beginning, the various political groups plotted against

it. Second, the Constitution itself created a multiplicity of institutions most of which were politically isolated from each other, such that it was very difficult to operationalise the system. Perhaps the most complex of the relationships was that between the central government and the regional governments since the provisions required immense political good will to implement. Third, the Constitution made various assumptions about the commitment of the governors to constitutionalism and the rule of law, which ran counter to the monopoly of power that the political elite sought.

90 McAuslan, “The Evolution of Public Law in East Africa in the 1960s” p.18.
91 Oginga, Not Yet Uhuru, p.70.
INTRODUCTION

The Independence Constitution started life in very controversial circumstances. The power elite who was to run the independence government was opposed to its basic structure and had no commitment to retaining it. No effort was made to implement most of the majimbo provisions, which made up the bulk of the Constitution. That the Constitution was going to be substantially amended under the new government was therefore never in doubt. What was unclear was the timing, extent and scope of the amendments to be made. But, not even its worst critics could have foreseen the changes that were to be made, in the succeeding three decades. In the event, the changes were both radical and profound. By the close of the first decade, the Constitution bore little resemblance to the original document. By the close of the second decade, it had created an entirely new power structure. By the third decade, a constitutional crisis was imminent.

This chapter explores the nature of the constitutional amendment process and the specific content of the various amendments and their impact on the practice of Constitutionalism in Kenya during Jomo Kenyatta's presidency.

THE FIRST AMENDMENT: CONSTITUTING THE REPUBLIC

The first constitutional amendment Bill was introduced in the House of Representatives in October 1964, barely nine months after independence. The amendment made far-reaching changes to the structure and content of the

1. Personal interview with Duncan Ndegwa, First African Secretary to the Cabinet, Nairobi August 1996.
independence Constitution. First, it established Kenya as an independent Republic, thereby removing the final vestiges of imperial rule. Second, it created an American type executive Presidency and abolished the post of Prime Minister. The President was to be both head of State and of government, and the Commander-in-Chief of the Armed Forces. The privileges and prerogatives of the Queen in relation to Kenya were transferred to the new Republican government to be exercised by the President. The amendment further provided that the first President would be the man holding office as Prime Minister immediately prior to the establishment of the Republic, meaning that the first president was to hold a constitutional office to which he had not been elected. Future Presidents would be elected at general elections unless the president resigned, was legally removed or died in office. A candidate for the presidency had also to be a candidate for the House of Representatives. His nomination had to be supported by one thousand registered voters. All candidates for the House of Representatives had to indicate their support for a presidential candidate. The presidential candidate who, having won his constituency seat also received a majority of votes was declared elected. At times other than a general election, for instance on the death or resignation of the president, the House of Representatives, acting as an electoral college, would elect a successor by a procedure laid down in the Constitution.

Another significant change included the provisions for a Vice-president appointed by the president from among the elected members, to be the “principal assistant of the president in the discharge of his duties” but not to automatically succeed him. The president was permitted to appoint and dismiss ministers, including the Vice-president, without consultation with any one, as was previously expected of the Governor. He was further permitted to appoint and dismiss public officers previously under the Public Service Commission, while at the same time he was exclusively the one to appoint the Public
In his capacity as Head of State, the president was entitled to address either House of the National Assembly or both houses sitting together and he could, as a member of the House of Representatives and as member of the cabinet, attend the deliberations of the House and indeed vote on any issue. Similarly, as the head of cabinet, he could attend the proceedings of the Senate and participate in its proceedings. He had the power to summon, dissolve or prologue Parliament at his discretion.

The amendment also removed all except specially entrenched powers from the Regional Assemblies by amending Schedule One of the Independence Constitution that defined the legislative and executive powers of the regions. Most of all, the non-entrenched regional provisions, and in particular Schedule Two which dealt with areas of concurrent central and regional powers over some agricultural, veterinary and educational matters, were deleted. The entire financial arrangements between the regions and the centre, especially those concerning regional taxation powers were similarly revised. The powers over the control and operations of the police force were also revised with the regional contingency forces being abolished. The powers of the regions in the establishment and supervision of local authorities were taken over by parliament. Moreover, the provisions for the independent revenue of the regions were repealed. The central land board, which had initially been conceived as a bulwark against the misuse of power relating to the volatile land question, was abolished. The powers over government land were vested exclusively in the president.

---

1. Amended the original sections 186(2) and 188.
2. Sections 58 and 59 of the Independence Constitution.

---
When moving the Bill in the National Assembly, the then Prime Minister Jomo Kenyatta, portrayed the amendment as one that was dictated by lofty constitutional principals, so as to “embody the fact of national leadership as seen in the eyes of the people, the concept of collective ministerial responsibility and supremacy of parliament”.7

Kenyatta was keen to present the amendment as one that had been consented to by the people and indeed one that they had demanded. When moving the motion he further commented that:

“During the campaign last year, KANU told the country that we would seek to establish in Kenya an independent Republic. It was the wish of the voters of this country that we should have a Republic on the very day of independence. The majority of voters agree with KANU that the original nature of the Constitution itself was too rigid, expensive and unworkable. We have discussed with the people in the field the modifications we need”.8

In reality, however, these did not appear to be the immediate concerns of the Bill. Beyond the rhetoric, the Bill was intended to achieve and did achieve a significant configuration of the power map in Kenya. In this respect, it was a major victory for the government of the day. It provided KANU with the model of government it had failed to extract from the negotiating table at Lancaster House. The political impact of the changes was enormous.

First, it established Kenya as a sovereign Republic and hence no longer part of the Queen’s dominions. In a sense, these completed the independence process, as Kenya was no longer accountable to any external power. Second, it established a strong unitary state with an equally strong centralised government and thereby seriously undermined the loose federalism favoured by KADU and the colonial government. In this regard, the amendment commenced the very complex and elaborate process of deconstructing the “jimbos”. By

---

repealing nearly all non-entrenched provisions relating to the powers of the regions, the substantive powers of the regions had been effectively removed. Now the regions could only do what was expressly provided for by the central government and no more. Third, by establishing the office of the President both as head of government and of state the amendment paved the way for a complete centralisation of all power and authority within the state. This was to be the basis for the emergence of the imperial Presidency. Fourth, and perhaps of greater significance, in this regard, was the fundamental alteration of the whole philosophy of government that lay behind the old constitutional order. The Independence Constitution had broadly created a Westminster type of parliamentary government. The new amendment created a presidential type of government in the American tradition yet retained the Westminster nexus between the Head of government and parliament. The incompatibility of the two systems appears to have been lost on the drafters of the amendment. The forced coexistence of the remnants of the Westminster system alongside the new presidential system was to be the basis of great tension within the constitutional order in later years. Moreover, in declaring the incumbent Prime Minister the President by a constitutional amendment without recourse to an election, as would be demanded by the most basic requirements of democracy, the government was committing itself to a theory of the Constitution and a method of constitutional change that compromised the Constitution as fundamental law.

The 1964 amendments commenced a tradition of constitutional manipulation that was to assume alarming proportions in subsequent years. It is important to note that prior to

---

1 Ogendo, "Constitutions Without Constitutionalism:’ p.17.
the introduction of the Bill in parliament, due to KANU's lack of confidence as to its ability to master the requisite majority, another Bill providing for the holding of a referendum on the constitutional proposals had been drafted. That Bill provided that, in the event the proposals were not supported by 75 per cent of the vote in both houses as was provided for by section 71 of the Constitution, then a referendum would be conducted. The referendum would not however be supervised by the Electoral Commission as mandated by the Constitution but by officers appointed by the government.\(^{12}\) This in itself was a major inroad into the sanctity of the constitutional arrangement in which the autonomy of the Electoral Commission was an integral part.\(^{13}\) As fate would have it, the dissolution of KADU both as a party and as the official opposition was declared in parliament on 10th November 1964. It therefore never became necessary to deal with the issue of the referendum.

The demise of KADU had been on the cards for a long time. The historical reasons for its existence had long ceased to exist. First, there had been the collapse of its partnership with the African Peoples Party (APP). Later, there were the defections to KANU by its Members in order to enjoy the benefits of patronage that a ruling party could dispense.\(^{14}\) The demise commenced a significant theme in the politics of post-independence Kenya: politics as a zero-sum game with the winner taking it all.

The death of KADU had two other immediate repercussions. It made the constitutional limitations on the power to effect constitutional amendments academic. Further, the right wing elements dominant within KADU, reinforced similar elements within KANU and slowly established a fairly right wing government for whom the manipulation of

\(^{2}\) Act number 24 of 1964.
the constitution by amendments was a simple political necessity. This government was completely unfettered by the limitations of Constitutionalism. Against this background, the stage was set for more extensive and far-reaching changes to the Constitution. The KANU government was determined to rewrite the Constitution to reflect what it would have wanted at the Lancaster House conference: strong centralised authority and a strong, imperial head of state.

J B Ojwang has identified two main consequences of the first amendment on the future practice of Constitutionalism in Kenya. First was the concentration of power in the executive-presidency. Second was the narrowing down of the institutional basis of government and the unlimiting of government. To this, one could add the distortion of the separation of powers. The presidency as created overshadowed and dominated all other constitutional institutions and organs and undermined any possibility of constitutional accountability.

The first amendment in many ways set the tone and theme for the subsequent amendments, which followed, in quick succession.

THE SECOND AMENDMENT: THE DECONSTRUCTION OF MAJIMBO

The Second amendment continued the themes of de-regionalisation and the centralisation of power and politics. By the time it was published KANU and KADU had already merged on 10th November 1964. Consequently, the defence of regionalism had fewer advocates than before. Not surprisingly, the second Amendment Bill was passed unanimously and without any amendment on 1st December 1964, barely a month after the merger of KANU and KADU and two months after the first amendment. The main objective

of the second amendment was to consolidate the gains made earlier in dismantling regionalism and centralising power.

In terms of specific changes, the second amendment was as far-reaching as the first. First, it substantially amended Chapter ten of the Constitution, which dealt with the judicature and which had been specially entrenched in the Independence Constitution. The consequence of this was that the president gained enormous powers over the judiciary. The president could now appoint a Chief Justice without consulting the regions. He could also make the appointment at his sole discretion and did not have to consult the Judicial Service Commission. Moreover, he could if he so wished, instigate an investigation into the conduct of a judge for purposes of his removal. Second, the amendment transferred from the regions acting collectively, the power to alter regional boundaries and vested it in parliament. Third, it repealed all the specially entrenched provisions for independent regional revenue collection, thus rendering the regions financially destitute and wholly dependent on the central government for grants. Fourth, it permitted the delegation of executive authority of the regions, previously vested in their finance and establishment committees, to persons other than those serving in the establishments of the regions. Fifth, the designation of the regional heads was altered from "President" to "Chairman" apparently so that the title of "President" could be reserved only for the Head of state.

The second amendment confirmed the government's commitment to destroying the significance of the regions in the political life of the country and to centralisation of power in the presidency. In terms of the process, the government unfettered by an opposition in Parliament manifested greater confidence and self-assurance in the manipulation of the constitutional process to achieve its political objectives. Gradually this had the effect of eroding respect for the Constitution as the fundamental law and the observance of
constitutionalism.

THE THIRD AMENDMENT: AMENDING THE AMENDMENT PROCEDURE

The third amendment was published in June 1965.\textsuperscript{18} This amendment all but completely eliminated the regional structure. The regions and their assemblies were now designated "Provinces" and "Councils". Their exclusive legislative competence was compromised, with parliament assuming concurrent competence. The amendment was intended to underpin the government's stated policy of eliminating the last vestiges of "manjimboism". So effective had been the government's effort to undermine the independent operations of the regions that, as some commentators have observed, what was left of the regional system at this point amounted to a glorified system of local government.\textsuperscript{19} In a sense therefore, as a tool of deconstructing the regions, the third amendment was a case of killing a fly with a sledgehammer. The government's contempt for the role of the regions and its determination to eliminate them had long been fulfilled. Tom Mboya, then Minister of Justice and constitutional affairs had eloquently articulate this position:

"I see the position of regional assemblies as one which includes the translation of Government policy and the promotion of Government programmes at the regional level, as well as giving of guidance and assistance to county councils in their efforts to serve the day to day needs of our people at home. The regional authorities are not governments in themselves".\textsuperscript{20}

Undoubtedly, the most significant and far-reaching aspect of the third amendment related to the changes made to the constitutional amendment procedure itself. The constitutional amendment process had been highly insulated by entrenched clauses, to

\textsuperscript{18} The Constitution of Kenya (Amendment) Act, Number 16 of 1965.
\textsuperscript{19} Gertzel, The Politics of Independent Kenya p.53.
\textsuperscript{20} The East African Standard, 20\textsuperscript{th} March 1964.
deter partisan and self-serving amendments. To facilitate easier, future amendments, the third amendment sought to alter the amendment procedure itself.

Due to the significance of the amendment clause in this study and in order to appreciate the full impact of the third amendment it is useful to set it out in full.

1) Subject to this section, Parliament may alter this constitution.

2) A Bill for an Act of Parliament to alter this Constitution shall not be passed by the National Assembly unless it has been supported on the second and third readings by the votes of not less than sixty-five per cent of all the members of the Assembly (excluding the ex officio members)

3) If, on the taking of a vote for the purposes of subsection (2) the Bill is supported by a majority of the members of the Assembly voting but not by the number of votes required by that subsection, and the Bill is not opposed by thirty-five per cent of all the members of the Assembly or more, then, subject to such limitations and conditions as may be prescribed by the standing orders of the Assembly, a further vote may be taken.

4) When a Bill for an Act of Parliament to alter this Constitution has been introduced into the National Assembly, no alterations shall be made in it before it is presented to the President for the assent, except alterations which are certified by the Speaker to be necessary because of the time that has elapsed since the Bill was introduced into the Assembly.

5) A certificate of the Speaker under subsection (4) shall be conclusive as regards proceedings in the Assembly, and shall not be questioned in any court.

6) In the section –

(a) references to this constitution are references to this Constitution as from time to time amended; and

(b) references to the alterations of this Constitution are references to the amendment, modification or re-enactment, with or without amendment or modification, of any provision of this Constitution, the suspension or repeal of that provision and the making of a different provision in the place of that provision.

By dint of the third amendment, the majority required for an amendment of the Constitution was lowered from 90 per cent in the senate and 75 per cent in the Lower
House, to 65 per cent in both Houses and for all purposes. Henceforth there was to be no
distinction as the nature of the provisions sought to be amended. The government
appeared not to be sure that it could justify this radical measure, it therefore took the
circuitous route of repealing the entire schedule of specially entrenched clauses in toto.
Not unexpectedly, there was much criticism of this move. In reacting to the criticism by
members of Parliament, Tom Mboya defended the proposed amendment as follows:

"This is an amendment which is intended to make the Constitution more
logical and reasonable. There were fears, there were doubts and there were
suspicions, and we ended up with a Constitution which was the most rigid in
any part of the world. It amounts to giving a complete say in the matters in
the hands of the minority".21

And the Attorney-General, Charles Njonjo added for good measure that:

"the Constitution may be amended by a Bill supported by two thirds majority
in both houses of Parliament. Such a requirement is a sufficient safeguard
against ill-considered amendment. In the last resort, the only safeguard of the
Constitution is that it is acceptable to the majority of the people it governs".22

Abolishing all the entrenched clauses changed the character of the Constitution
radically. All parts of the Constitution were to be treated as equal and were to be subject
to the same amendment procedure.

The other important change brought about by the third amendment related to the
exercise of emergency powers. Under the Independence Constitution, the exercise of
emergency powers was one of the severely circumscribed executive functions. The
amendment provided that a simple majority in either House sufficed to authorise the
declaration of a state of emergency. The period within which the declaration had to be

approved by the National Assembly was extended from seven to twenty one days and the period within which an authorisation could last was extended from two to three months. In a very real sense, the president got power to rule almost by decree for almost a month. This further impacted on the already developing imbalance between the executive and the other branches of government. Parliament was not convinced that these powers were necessary. The government on the other hand sought to persuade parliament that the emergency powers it was claiming for the President were necessary in order to address the danger of an impending military offensive in the North-Eastern province over the Shifta problem. In moving the bill, the Attorney General, Charles Njonjo, stated that:

“There is no good reason why the authorisation of a declaration of emergency by either house should require any special majority. The period of two months for which a state of emergency lasts is too short. Unfortunately some emergencies, like that created by the shifta problem in the north-eastern region can last for a long time. Had it not been for the fact that the government has special powers in relation to north eastern region by virtue of section 19 of the order in council, the government would have to obtain the approval of both houses on no less than seven occasions”.

As a further onslaught on “majiboism”, the third amendment also abolished those Sections of the Constitution relating to the executive power of the regional assemblies. The assemblies were finally renamed provincial councils, and the amendment gave parliament the power to confer functions upon them. The right of appeal to the Privy Council was abolished and the Court of Appeal for Eastern Africa became the final court of Appeal for Kenya. The Supreme Court of Kenya was renamed the High Court. Abolishing the right of appeal to the Privy Council was significant. The judiciary in Kenya was now to grapple with the problems of constitutional interpretation without the benefit of the expertise built up by the Privy Council, in interpreting similar constitutions from all over the British Commonwealth.

The Judiciary was hardly suited for the job and this was to create serious problems in the
evolution of a jurisprudence of constitutional interpretation.25

Finally, the provisions relating to the control of agricultural land transactions were
removed from the Constitution altogether and were made the subject matter of ordinary
legislation.26 This significantly altered the original independence compromise on the very
delicate national question of land.

THE FOURTH AMENDMENT: FURTHER EXPANSION OF PRESIDENTIAL POWERS

The Fourth amendment gave further credence to the view that increasingly the
government perceived the Constitution as a weapon in the struggle to retain political
power and to out-maneuvre any opposition. When faced with the problem of internal
party discipline, or more accurately, lack of it, the KANU government sought to characterise
this as an issue of constitutional significance warranting constitutional intervention through a
constitutional amendment.27

The amendment provided that any member of parliament who, without the
Speaker's permission, absented himself from the National Assembly for eight consecutive
sittings or was sentenced to a term of imprisonment exceeding six months, would
automatically lose his seat in parliament.28 The President could however pardon an MP in his
sole discretion. The government’s justification for this amendment was that it had a duty to
save the Electorate from political opportunists who did not take their work seriously. It was
alleged that during the term of imprisonment, the electorate would be without
representation and ought to be availed the opportunity to change their parliamentary

Case", p.254.
representation.29

The real intention of the government appears to have been, consistent with previous amendments, to place more powers in the hands of the president in his control of parliamentarians and therefore of parliament itself. It is otherwise difficult to understand why these issues were deemed to warrant constitutional intervention. First, parliamentary attendance is ordinarily a matter of party discipline, which ought to be dealt with by the party whip. Second, if a sitting MP was found guilty of a criminal offence and jailed, his fate could be easily and efficiently dealt with under ordinary legislation on parliamentary elections.30 This apparent inability of the government’s legal advisers to distinguish between matters that could easily be regulated by ordinary legislation and those requiring constitutional amendment, was obviously the basis of most of the ill-advised amendments of this nature.

The second limb of the amendment was even more significant. It vested power in the President to constitute and abolish offices in the Republic and to appoint and terminate appointments to those offices. It further provided those public servants held office in the service of the Republic only at the pleasure of the President. This amendment had very far-reaching and significant impact in the conduct of public affairs in Kenya. The independence, impartiality and political neutrality of the civil service was one of the cornerstones of the West Minster constitutional model. An independent civil service was intended to provide continuity and stability in government where political parties came and went.31

By emasculating the Public Service Commission, which was specifically set up in order to insulate the public service from the vagaries of the political process, the KANU

government was deliberately setting up the Presidency and the person of the President as the focus of personal loyalty and patronage to the entire civil service. The consequence of this was that a real tension was created between the President and the Public service commission, as the powers of the former to remove persons from office contradicted those of the latter. The civil service was politicised in a manner that made it impossible for it to be independent.32

To a large extent, the fourth amendment was part of the process of creating the presidency into the most dominant institution within the state, controlling and dominating all other constitutional organs. The amendment further undermined the integrity of the Constitution and the constitutional process. The Fourth amendment therefore demonstrated the attempt by the government to constitutionalise personal rule through the amendment process without any regard for the dictates of Constitutionalism.

The last limb of the fourth amendment expanded the emergency powers conferred on the president under the third amendment. The President could now rule by decree in Marsabit, Isiolo, Tana River and Lamu in addition to North Eastern province.

SETTING THE STAGE FOR THE FIFTH, SIXTH, SEVENTH AND EIGHTH AMENDMENTS

While the dissolution of KADU and the creation of a defacto one party state had in the short run created unity of purpose in parliament which facilitated the first four amendments, it had also created deeper ideological divisions within KANU, which began to threaten the party’s very existence. These divisions manifested the amorphous nature of party politics in the emergent state and the inherent instability of politics generally.33 1966 witnessed a major eruption, of the simmering disputes within KANU as a party. Against a

background of accusations and counter-accusations the “right-wing” and “left wing” of the party led by Tom Mboya and Oginga Odinga respectively, braced for the final showdown at the now famous Limuru Conference, held between 12th and 13th March 1966. This meeting was touted as a fresh opportunity to reorganise the party. By this time, it was quite clear that Jomo Kenyatta had given the go-ahead for the sidelining of the “radicals”. Over time, they had been removed from positions of influence both within parliament and in the government. The Limuru Conference became a forum to humiliate Odinga personally and also to render him powerless within the party hierarchy by introducing multiple vice-presidencies based on provinces. A new party constitution was adopted. New office bearers were elected. Kenyatta was re-elected as party President. Neither Odinga, previously national Vice-President nor any of the “radicals” was re-elected. The day after the conference a number of KANU MPs resigned from the party and declared they would form their own party. On 14th April 1966 a month later, Odinga and more MPs followed suit, as did a section of the trade union movement. The Kenya Peoples Union (KPU) was born as an opposition party. It is against this background of intense political rivalry among the power elite that subsequent amendments to the Constitution must be seen.

THE FIFTH AMENDMENT: EXECUTIVE CONTROL OF PARLIAMENT

On 25th April 1966, a KANU Parliamentary Group decided to recall parliament for purposes of amending the Constitution to deal with the “dissidents”; meaning persons who had deserted the ruling party. On 26th April, President Kenyatta in a press statement from State House informed MPs that they were required to meet in a special session to pass an amendment to the Constitution requiring MPs who resigned from KANU to seek a fresh

---

mandate from the electorate in a by-election. On 27th April 1966, the Speakers of both Houses announced that the Houses would sit on 28th April 1966 at the request of the government. A Bill was published and signed by the acting Attorney General (the Attorney General was away in London). In the political excitement, apparently two Bills were published on the same matter. One was published on the morning of 27th April 1966 and the other in the evening of the same day. The latter Bill contained some amendments to the earlier version. This action definitely offended the express provisions of section 47 (2) of the Constitution, which prohibits any amendment to a Bill once it has been presented to parliament.

As enacted, the Fifth Amendment required that an MP who resigned from the party that had supported him at the time of his election, at a time when the party was a parliamentary party, should vacate his seat at the expiration of the session. This was the so-called "turn coat rule" that was already in place in other African countries dealing with similar crisis of party defections. By introducing the amendment, the government once again cast itself as the defender of the electorate and the public interest and sought to cast the "defectors" as opportunists and self-seekers. Moving the Bill, Tom Mboya claimed that:

"In the absence of the kind of public opinion that exercises the checks that we find in other democracies and in the absence of a strong individual conscience, to act according to the established practices upon which parliamentary democracy thrives the government was left with no alternative but to protect the interests of the voters in every part of Kenya".

---

38. See the speech of Bildad Kaggia, Hansard 28th April 1966, Column 2000.
It is doubtful whether the KANU government believed its on rhetoric on the matter. For if there were compelling political reasons to protect voters as was alleged, then the same logic should have applied to the crossing of the floor by KADU members in 1964. Bildad Kaggia while speaking for the “dissidents” seems to have captured the true constitutional issue posed by the proposed amendment. He argued that: “My contract here is not between me and the government which is now here trying to displace me. My contract is between me and my electors”.  

The Fifth Amendment raised serious questions relating to the constitutionality of an amendment that purportedly terminates the parliamentary tenure of sitting members on the base of a new set of *ex-post facto* rules and without reference to the electorate. Like the other amendments, it reveals a definite lack of a coherent philosophy of amendments among the draftsmen in the Attorney General’s office. It would appear that the dominant view was the technician’s view of the Constitution as being capable of any amendment for any purpose provided the formal requirements were met. Arising out of the technical incompetence of the draftsman, the amendments cumulatively created serious internal inconsistencies within the Constitution.

Above all else, the Fifth Amendment in many ways demonstrated the approach that the KANU government had adopted in the constitutional amendment process. The manner in which the Bill was tabled, debated and enacted set a precedent for later amendments. The Bill was read for the first time in the morning. At that time, Tom Mboya moved a motion to reduce the Bill’s publication period from 14 to one day. This was overwhelmingly approved. In the afternoon it was read for the second time. At 6.30 p.m., Mboya moved a

---

motion exempting the Bill from standing orders and thereby allowing the House to sit until business was completed. At the end of the second reading the Bill was passed by 97 votes to 11. Despite opposition, the House rose for 15 minutes to facilitate a third reading. A very tired House with a vote of 95 to 8 finally passed the Bill. The House rose at 10.10 p.m. The era of instant constitutional amendments had begun. Legal niceties no longer stood in the way.

Not unexpectedly, three days after the passing of the Fifth Amendment, parliament was prorogued and there followed the now famous little general election intended to send back the turncoats to the electorate. The results of that election were themselves interesting. KANU won 21 seats in the Lower House against KPU’s 7. In the senate KANU won 8 seats against 2 by KPU. Significantly although KANU won more seats than KPU, the latter polled more votes; it got Seventy three thousand compared to thirty six thousand for KANU. An electoral minority nonetheless produced a parliamentary majority. This was a very clear demonstration of what was wrong with an electoral system that did not facilitate proportional representation.

THE EIGHTH AMENDMENT: CLARIFICATION OF THE FIFTH AMENDMENT

Although the eighth amendment came much later in time, it is convenient to consider it at this stage since it was essentially intended to clarify the full intentions of the Fifth Amendment. The amendment specifically spelt out that the application of the Fifth Amendment was meant to be retroactive. It provided as follows:

“It is hereby declared for the removal of doubt that the reference in paragraph (a) and (b) of section 42A(1) of the Constitution to a member who in certain circumstances resigns from a party at a time when that party is a parliamentary party include and have always included, reference to a

member who, before the commencement of the Constitution of Kenya (Amendment) (No.2) act 1966, resigned in those circumstances...and accordingly (the members Parliamentary seat) shall be taken to have been duly vacated at the expiration of the session during which he so resigned". 46

This amendment was obviously occasioned by the incompetent drafting of the Fifth Amendment. The draftsman failed to cater for the all-important question of the retroactive application of the amendment. The aim of the Fifth Amendment had been to halt the immediate defections from KANU to KPU. The amendment did not however address the issue of prior defections from the party. A number of MPs who lost seats in the little general elections 47 filed a suit in the high court seeking an interpretation of section 42A of the Constitution and a declaration that as the Fifth Amendment was not retroactive the elections in which they had participated had no effect on their status as MPs. 47 Before the High Court could rule on this matter the eighth amendment was introduced into the National Assembly. This was a clear usurpation of the judicial power of the High court. The use of the Constitution to settle political scores was gaining root. One Member of Parliament was so concerned by legislation targeting particular persons that he felt compelled to warn that:

"We should pass laws which affect everybody, every citizen, equally and we should not choose a number of citizens and then change our constitution in order to get these people completely down". 48

With the eighth amendment, political opposition to the KANU government was well under control.

---

The sixth amendment was enacted six weeks after the Fifth Amendment amidst the spectre of what was billed by the Government as communist intrigue. The war between KANU and the fledging opposition was still on. Having kicked out most of the dissidents from the National Assembly, the government now sought to politically annihilate them by detaining them without trial in the name of public security.

In order to appreciate the full purport of the sixth amendment, it must be read in conjunction with amendments simultaneously made to the Preservation of Public Security Act. The amendment sought to amend section 29 of the Constitution. The new section as amended provided that:

Subject to the provisions of this section the President may at any time, by order published in the Kenya gazette, bring into operation, generally or in any part of Kenya, part 111 of the Preservation of Public Security Act or any of the provisions of that Act.

The amendment in effect vested in the President enormous emergency powers. All parliamentary supervision over the exercise of emergency powers was removed. The President literally got a blank cheque to run the country by executive decree. The period during which the President could invoke part three of the Preservation of Public Security Act without requiring parliamentary approval was extended to one month. Significantly also, the President could, on bringing into force part three of the Preservation of Public Security Act, authorise detention without trial with minimum safeguards.

If there were any doubts as to the purpose for which the amendments were intended, the doubts were soon dispelled. No sooner had Presidential assent been given to

---

49 Leys, Underdevelopment in Kenya: pp.245-246.
50 Chapter 57 Laws of Kenya.
the new amendment than were nearly all the trade unionists in KPU detained, thereby almost crippling the opposition party.53

The manipulation of the Constitution to forestall political opposition was proceeding in earnest. By this time, it was quite clear that the government viewed the Constitution as a legitimate weapon in power politics. Needless to say, this greatly undermined any possibility that may have existed of institutionalising Constitutionalism and the rule of law.

THE SEVENTH AMENDMENT: ABOLISHING THE SENATE

The government had long expressed an intention to abolish the Senate as part of its grand design of completely eliminating the last vestiges of regionalism. In December 1966, the Seventh Amendment was introduced to parliament for that purpose.

The Amendment in effect amalgamated the two houses of the National Assembly. This effectively abolished the Senate although the government preferred to say that both Houses had merged. The amendment simultaneously created forty-one new parliamentary seats in order to accommodate the ex-Senators who would otherwise have lost their parliamentary seats. Further, parliament whose term under the Independence Constitution would have expired in 1968 was granted another two years. The twelve specially elected members of the House of Representatives became specially elected members of the new parliament. Surprisingly, the government sought to justify this act by arguing that elections were tiresome, expensive and a waste of money. In moving the Bill on the amendment, the Attorney-General Charles Njonjo stated:

"With so much done Mr. Speaker, we have no time for elections for the sake of elections. The purpose of democratic institutions is to ensure that the people choose their leaders at reasonable intervals of time peacefully and freely. Sir, we have had quite a few by-elections including the "little general

election" last year. Those by-elections did not indicate that the people wanted a change of government. The "little General Election" certainly did not indicate that any alternative government is available. Therefore Mr. Speaker sir, it is the view of the President and his government that the new National Assembly should be re-elected when the new national assembly and the new constituencies have been in existence for a reasonable time.  

There are a number of blatantly unconstitutional and undemocratic aspects of the seventh amendment. First, it purported to bestow offices on persons who had not been elected to them. The former Senators were declared elected members of the new National Assembly and were assigned constituencies without any elections being held. This was not only manifestly undemocratic but also contrary to existing electoral laws.

The draftsman's view that it was sufficient to address the matter by a constitutional amendment was wrong. Second, the life of parliament was extended by two years beyond the constitutionally mandated period. This was from June 1968 to June 1970. No elections were held as required by law. The Constitution expressly provides that the life of parliament may not be extended unless Kenya is at war, and even then not for more than six months.

Again, it would appear that the government's legal advisers held the view that political legitimacy could be achieved, or at any rate a semblance of it maintained, by merely getting the Constitution to sanction ex-post facto political decisions. This view that the Constitution could sanction post facto political decisions undermined the integrity of the constitutional process and greatly compromised the growth of a culture of Constitutionalism.

55. Section 59(5) of the Constitution.
THE NINTH AMENDMENT: THE DEATH OF REGIONALISM

With the opposition in complete disarray and the regions all but dead, the government finally moved to finish off what was left of them. The Ninth Amendment abolished the semi-federal structure of regionalism by eliminating the provincial councils that previously had been regional assemblies. It repealed all past laws of the regional assemblies. It further deleted from the Constitution all reference to the provincial and district boundaries and their alteration, thereby removing the last vestiges of regionalism. By this act KANU finally had the unitary state that it had always wanted. As regionalism had been a very fundamental part of the structure of the Independence Constitution, the Ninth Amendment had the effect of finalising the process of changing that structure irredeemably.

THE TENTH AMENDMENT: CHANGES IN ELECTION LAWS

The Tenth Amendment made very significant and far-reaching changes in the method of electing the President. Originally, the President was elected by the people during a presidential election or by the National Assembly acting as an Electoral College if there was a mid-term vacancy in the office. Under the Tenth Amendment, the President would be directly elected by the national electorate during a general election. Parliament would have no say in the election of the President and, to that extent, would have less control over him. All candidates for a general election were required to be nominated and sponsored by a political party. The independent candidature was abolished. All candidates were therefore to be subject to the preliminary elections within their own parties. To a large extent, all parliamentarians were now to be subject to party disciplinary procedures.

57 Ghai & McAuslan, Public Law and Political Change in Kenya, p.222.
Further, the amendment required that during a general election every political party taking part in the election would have to nominate a presidential candidate. At the poll, the ballot paper would pair the presidential candidate and the parliamentary candidate belonging to the same party.

The amendment also altered the provisions for succession. If the office of president became vacant other than at the time of dissolution of parliament, an election for President would be held within ninety days. In the interim period, the Vice-president would exercise all the functions of the Office of president, but in certain matters, including the preservation of public security and the appointment and dismissal of Ministers would act only in accordance with a resolution of the cabinet. The amendment also removed the requirement that an order bringing Part III of the Preservation of Public Security Act, (which provides inter-alia for detention without trial) into force required to be reviewed and endorsed by the National Assembly every eight months. This finally gave the President full authority to invoke emergency powers without any restraint.

Finally, the tenth amendment altered the composition of the National Assembly by replacing the twelve specially elected members who were previously elected by members of the House of Representatives with twelve nominated members appointed by the President at his sole discretion. This was obviously intended to give the President extra power to pack the House with his own appointees to counter-balance any dissidents or free thinkers elected by the public.

The tenth amendment undermined the Constitution in three ways. First, by abolishing the independent candidates. This was of questionable constitutionality given the provisions

---

in the Bill of rights protecting the freedom of conscience and of association.\footnote{Section 78 and 80 of the Constitution.} Second, when read together with the National Assembly and Presidential Elections Act\footnote{Chapter 7 Laws of Kenya.} it elevated the ruling political party to a position of constitutional significance. Third, it further increased the President’s power over parliament by allowing him to nominate members to the House, with the potential of diluting any opposition.

**THE ELEVENTH AMENDMENT AND THE REVISION OF THE CONSTITUTION**

In April 1969 a revised Constitution was published. It brought together all the amendments made since independence. It also included a new addition, altering the membership of the electoral commission and providing that its members would now be appointed by the President as opposed to the Speaker as was the case previously. Prior to the enactment of the Eleventh Amendment the Constitution was contained in twelve different documents. The amendment was intended to bring all these documents together. In moving the Bill, the Attorney General said:

“This constitution is the product of the lawful legislative process by this House, and the sovereignty of this parliament is more impregnable, because the makings of this constitution has been entrusted throughout to this parliament”.\footnote{House of Representatives, Official Report, Vol. 16 Part III, 10th February 1969.}

But, although it was true that the Constitution became more streamlined and compact, it was also true that the constitution was no longer entirely coherent in terms of its basic structures, values and assumptions. Neither was the philosophy behind its amendment any more discernible than when the amendments first began.\footnote{Ghai & McAuslan, Public Law and Political Change in Kenya, p.215.} The constitution and the amendment process appeared captive to the whim and caprice of the President as the Constitution became what the President wished. In the process, the constitutional
document became a tool of what has been labelled as "imperial Presidency". After the 1969 amendments and the consolidation of all the constitutional amendments in a revised constitution, no further amendments were made for a period of five years. This period was a time of relative constitutional and political stability.

THE TWELFTH AMENDMENT: LOWERING THE VOTING AGE

After a long spell of virtual inactivity in the constitutional amendment process, the twelfth amendment was enacted in 1974. By it, Parliament lowered the voting age from 21 to 18 years through simultaneously amending the Age of Majority Act in the same terms. This amendment is interesting because it again brought to the fore the issue of the technical competence of the draftsman. There is no logical explanation as to why the issue of the voting age could not be dealt with within the legislative regime already in place and why it was deemed to warrant constitutional intervention. It is instructive to note that this amendment was effected at a time when the country was preparing for the 1974 general elections. It is open to speculation as to the political reasons for the amendment.

THE THIRTEENTH AMENDMENT: THE OFFICIAL LANGUAGE AMENDMENT

The Thirteenth Amendment made Kiswahili the official language of the national assembly. On the face of it, the move to have parliament deliberate in Kiswahili was non-controversial. Indeed, in the context of the cultural nationalism of the 1970s it was long overdue. What is notable however, was the manner in which the amendment was first mooted and effected which in a significant way began to redefine the sovereignty of parliament and the nature of the entire constitutional amendment process in Kenya. In the 1970s, it became increasingly clear that the real locus of political power lay, exclusively in

---

the hands of the President as an individual. Increasingly, talk of the President being above
the law was heard even from the government’s own legal advisers.67

On 4th July 1974 at a KANU Governing Council meeting, President Jomo Kenyatta
declared that the national and official language for all purposes including parliamentary
proceedings would be Kiswahili.68 When parliament reconvened the next day, it was not
clear whether parliament should obey the letter of the Constitution or the presidential
directive.69 There was a great deal of confusion with both languages being used. The
Speaker who was bound by the express provisions of section 53 of the Constitution
nonetheless informed the House that “it was his feeling (the president) that we should as an
experiment start straight away”.70

Ultimately a Bill was tabled before parliament to effect the changes directed by the
president in terms of procedure. The Bill first dispensed with the 14 days publication period
required by law and then waived the requirement that no more than one stage of the Bill
could be taken at the same sitting. Precedent for these short cuts in constitutional
amendment procedure had already been set in the 1960s. It is ironical that debate was, all
this while, being conducted in Kiswahili which was not yet the language of the House. The
Speaker overruled protests on this issue by J M Seroney and J M Kariuki.71 As if that was not
enough, ultimately the Attorney-General amended the Bill during deliberations to provide
for its retroactive application. This violated express constitutional provisions prohibiting an
amendment to a constitutional amendment after introduction into the National Assembly.72

---

68. Ibid. p.540.
71. Section 47 (4) of the Constitution.
In a blatant disregard of the law, the speaker overruled J M Seroney's opposition to the breaches of procedure in the haste to pass the amendment. Seroney was particularly disturbed by the emerging trend in which amendments were hurriedly made and hurriedly passed invariably without debate and with even less regard for the coherence of the Constitution. Seroney's concern that a bad legislative culture relating to constitutional amendments was taking root was vindicated by some of the amendments that were to follow. In terms of substantive law, the amendment was in direct conflict with section 34 of the Constitution that set out the minimum qualifications for a Member of Parliament and that did not include knowledge of Kiswahili. These internal inconsistencies within the Constitution were partly occasioned by erratic amendments.

**THE FOURTEENTH AMENDMENT: THE SECOND OFFICIAL LANGUAGE AMENDMENT**

In 1975, barely a year after the Thirteenth Amendment was enacted, parliament repealed it through the Fourteenth Amendment which provided that Bills in parliament would be presented in English and debated either in English or in Kiswahili. This was obviously a sensible compromise, one that Seroney had made to the Attorney General, who had rejected it offhand. Quite clearly, these changes regarding the use of language in the National Assembly could have been effected by amending the standing orders of the National Assembly or at the most by including them in the National Assembly (Powers and Immunities) Act. Indeed, the thirteenth amendment had been clearly in conflict with section 34 of the Constitution which set out the criteria for one to qualify as a member of the National Assembly, which criteria included a command of English but not of Kiswahili.

---

73. Ibid. Safu 98.
75. Baraza La Taifa, Taarifa Rasmi Vol. XXXV Safu 75.
Arguably, amendments of this nature betrayed either incompetent legal advice by the Legal advisers to the government of the day or a reckless and callous disregard of proper advice on the part of the government. Whatever the case, the authority of the Constitution was further eroded as a result.

THE FIFTEENTH AMENDMENT: EXPANDING THE PREROGATIVE OF MERCY (NGEI’S AMENDMENT)

For those, like Seroney who were increasingly concerned about the propriety of the procedure and substance of the amendments, the Fifteenth Amendment confirmed that these concerns were well founded. The cavalier attitude assumed by the Government in respect of the constitutional amendment process, and the institutionalisation of parochial, partisan and self-serving manipulation of the Constitution was clearly illustrated by this amendment.

The aim of the Fifteenth Amendment was to extend the prerogative of mercy enjoyed by the President under section 27 of the Constitution, in respect to the removal of disqualification imposed by an election court on a person against whom an election offence had been proved in an election petition. Both the substance and the procedure of this amendment made the bona fides of the government an issue and greatly compromised its alleged commitment to the rule of law. At the same time, it revealed Kenyatta’s personal disregard of the national interest in order to address partisan political issues. Paul Ngei, a friend of Kenyatta’s and a co-accused at the Kapenguria trial and formerly a Minister of Local Government, had less than a month prior to the amendment, been found guilty of an election offence in the case of Mbondo v Ngei and had been barred from contesting any elections for five years, as was then provided for in the relevant

Kenyatta decided to intervene to save Ngei from political oblivion. The result was the fifteenth amendment to the Constitution. The manner in which Kenyatta and Njonjo went about it was disastrous for the constitutional process. The Bill was published on 10th December 1975, a day before it was debated. It went through all the stages of parliament (1st, 2nd, and 3rd reading) in one afternoon. It received Presidential assent on 11th December 1975 and was given retroactive effect to be deemed to have come into force on 10th December 1975. It is unlikely that such lack of seriousness in dealing with the fundamental law of the country and such blatant manipulation of the Constitution could engender either constitutionalism or the rule of law. It is again not clear, why the amendment if at all necessary, could not have been effected through an amendment to the National Assembly and Presidential Elections Act as had been suggested by George Anyona, and in so doing saved the Constitution an unnecessary and ill-advised amendment. Whatever its motives, the effect of the governments actions was to undermined the integrity of the Constitution, the constitutional process and the rule of law, in a manner that further exacerbated the crisis of legitimacy brought in by previous amendments.

THE SIXTEENTH AMENDMENT: SETTING UP THE KENYA COURT OF APPEAL

The Sixteenth amendment of 1977 established a Kenya Court of Appeal after the East African Court of appeal collapsed with the East African Community. The amendment also abolished the right to remit compensation after compulsory acquisition without complying with foreign-exchange regulations set out in the Exchange Control Act.

---

80 Weekly Review, November 1, 1976.
81 Chapter 7 Laws of Kenya.
82 Hansard 11th December 1975, Column 1615/1616.
84 Chapter 113 Laws of Kenya.
It is interesting to note that the first part of the amendment created a situation in which the Chief Justice of the Republic is both a High Court judge and a judge of the Court of Appeal. When he sits in the former capacity, he can hear original matters as any other High Court judge and his judgements are subject to appeal to the Court of Appeal. When he sits in the latter capacity he takes precedence over all other judges and chairs the bench of the Court. While he enjoys security of tenure in his capacity as a judge of the High Court it, is doubtful whether section 61 confers on him tenure as Chief Justice. Theoretically, therefore, if he were to cease to be Chief Justice, he would cease to be a judge of Appeal but remain in the High Court. Furthermore, while this practice may give the Chief Justice better administrative control of the judiciary it no doubt creates an obvious anomaly in practice whereby his juniors are called upon to sit in judgement over his judicial decisions. 85

THE POLITICS OF CONSTITUTIONAL AMENDMENTS UNDER KENYATTA

The constitutional changes depict the nature of the relationship between the Constitution and the political process in Kenya since independence. While giving the impression of stability and continuity; Kenya’s constitution underwent a complete metamorphosis. The price paid for the apparent peace and stability was the awesome concentration of powers in the hands of the President and a complete emasculation of almost all-autonomous institutions of state and of organisations within civil society. This distorted the balance of power in government and widened the gap between state and society. This in turn precipitated a crisis of governance and legitimacy.

The power elite wished to manipulate the Constitution and subsequently allowed it to assume extra-ordinary political significance in which political problems were addressed as

---

85. Mwacharo Kubo had actually made this argument but it was ignored. See, The Hansard 15th September 1977 Column 136-137.
constitutional problems. The largest single problem for the new government at independence, was how to retain national unity once the colonial government had left. There was no shortage of prophets prophesying the breakdown of law and order and there was evidence from mau-mau days to show that this was a distinct possibility. The quest for political stability and order became almost an obsession. An ideology of order was born. The Constitution had to serve the cause of law and order.86

Majimboism had been the one issue that had generated the greatest controversy prior to and during the Lancaster House Conferences. Having found its way into the Independence Constitution the issue continued to generate a lot of political conflict. KANU had two strategies for dealing with the issue Majimboism. First was to co-opt into KANU the majimboist elements within KADU and thereby neutralise them. Second, was to manipulate the Constitution towards a unitary state. In the event both were achieved simultaneously. Yet the removal of Majimboism from the agenda of national politics only served to reveal the bankruptcy of both political discourse and the political culture at the time. Ethnicity disguised as ideology became the next principle item on the agenda of national politics.

Between 1965 and 1969 the ideological debate on what independence was intended to achieve raged throughout the country and especially in parliament. By publishing sessional paper No. 10 on African socialism and its application to planning in Kenya in 1965 the government hoped it would pull the rug from under the feet of the radical elements that favoured socialism. Against the background of this debate was the more engaging issue of western versus eastern alliances that were part of cold war politics in the third world at the time. The government played up the spectre of a communist take

over as part of its campaign in the ideological offensive against Oginga Odinga and the other radical elements within KANU. The inevitable collapse of the nationalist coalition within KANU came after the stage-managed KANU Limuru Conference in 1966 in which the Kenyatta/Mboya alliance felt that they could take on Odinga and the radicals head-on and still win. The result was the formation of the Kenya Peoples Union (KPU).87

The period 1966 to 1969 saw intense constitutional activity because for the first time KANU’s claim to power was under serious threat. The changes during this period created presidential authoritarianism. Anyang Nyongo has argued that this strong authoritarian president was born of the disintegration of the nationalist coalition and the desire of the bourgeoisie to continue dominating politics while not being able to do so outside the state apparatus. A strong president became a mediator of the various feuding factions of the bourgeoisie and their new insurance for political survival and the survival of class rule.88

The truth may however be much more complex. At the heart of the raging ideological battle was the whole question of the legitimacy of the KANU government. While Kenyatta was personally able to address the issue of legitimacy by pointing at his role during the independence struggle, the entire government needed more concrete basis. In a sense, Kenyatta undermined the stability that he craved to establish. By casting himself in the role of paramount chief mediating between various ethnic factions he set the stage for personal rule and the creation of a complex client-patron network that circumvented the democratic process. In this role he was able to subordinate each and every organ of the state and thereby rendering institutions secondary to his personality. The imperial Presidency was therefore as much a socio-cultural phenomenon as it was a political-economic

---

87 Leys, Underdevelopment in Kenya, pp.228-229.
phenomenon.\textsuperscript{59} Indeed, this may well explain why the manipulation of the Constitution was justified on the basis of the search for Autochony and African values.

The diversity of Kenyan society, in the form of ethnic, class, racial, religious groups as well as in terms of other aspects also served to create a polity very much in flux and needing a centre of focus in which to build the nation. Kenyatta could have chosen many other ways to build this centre. In the event he chooses himself. This could very well have been a result of either the logic of the situation as he saw it or as a result of his own vanity. Having chosen himself as the symbol of the nation and of its nationhood, his greatest historical error was the failure to breathe life into institutions while progressively receding into the background in order to allow constitutionalism and the rule of law to grow.\textsuperscript{50}

The banning of KPU, the detention of its leaders without trial and the assassination of Tom Mboya were both the logical culmination of a process and the beginning of an era. Even if the whole question of whether an incumbent party can legitimately ban the opposition were to be avoided, it would still be necessary to address the much more fundamental issue of the propriety of the ruling party manipulating law and the apparatus of state to fight political struggles with other parties. The assassination of Tom Mboya in itself brought to the fore the paradox of the imperial presidency. Its own strength, the domination of all politics was also its main weakness. As Kenyatta's personal venerability became apparent; the succession issue dominated politics. Indeed, Goldsworthy has demonstrated that Mboya was assassinated because of what was perceived to be his ambition to be the next president of Kenya.\textsuperscript{91}

\textsuperscript{50} Throup \textit{"The Construction and Deconstruction of the Kenyatta State"}, p.36-38.
\textsuperscript{91} Goldsworthy, \textit{Tom Mboya, The Man Kenya Wanted to Forget}, p.54.
As Anyang Nyongo has demonstrated, the assassination of Mboya and the banning of KPU further completed the break-up of the Kikuyu-Luo ethnic alliance that had largely defined post-independence politics.\(^9^2\) The more Kenyatta felt politically isolated the more he retreated into the cocoon of ethnicity to the extent of encouraging the formation of the Gikuyu, Embu and Meru Association (GEMA) as a coalition of the communities closest to the Kikuyu and who had participated in mau mau.\(^9^3\) GEMA aspired to be an alternative vehicle for political mobilisation since KANU had more or less lost all semblance of being a political party.

The assassination of J M Kariuki, another of those perceived to have presidential ambition, in 1975, was further manifestation of the underlying crisis in the polity. The populist political rhetoric of the MP had served to reopen the old ideological debate that KANU had hoped that had died with KPU. Government critics lay the blame for the assassination at the door of government. Increasingly, the Government was perceived as employing extra-constitutional measures to address constitutional and political problems. Consequently the Government’s professed commitment to Constitutionalism and the rule of law was frequently called into question. This only served to further plunge the government into even greater crisis of legitimacy.\(^9^4\)

As fears rose as to Kenyatta’s health, the question of succession loomed even larger on the agenda of national politics and the Constitution as a political weapon grew in stature. As the Constitution stood after the 1969 amendment, the Vice-President would ascend to the office of the President for ninety days pending an election. Several key politicians opposed the possibility that Daniel Moi, the Vice President, could come to power

---

2. Ngugi wa Thiongo, Detained a Writers Prison Diary, [Heinemann Nairobi 1982].
under these provision. The change the Constitution movement began as a lobby for an amendment of the Constitution to remove the possibility of the Vice-President succeeding the President. In the event, the amendment they desired was not effected. The movement’s effort is nonetheless instructive on the politics of the Constitution. It reinforced the view that the Constitution was merely a piece of paper that did not stand in the way of whatever political forces were strongest at a given time. The irrelevancy of the party as the focus of political mobilisation was similarly proved. Ultimately, it was not fidelity to the Constitution that won the day nor was it respect for the rule of law. Moi succeeded Kenyatta because the alignment of political forces favoured a peaceful transition. Moi appeared to the power brokers to be both lacking in personal ambition and loyalty to any of the feuding groups.

CONCLUSION

Whatever had been its political and technical problems, the Independence Constitution had sought to establish in Kenya a liberal democratic state in the Westminster tradition. It had been based on the fundamental assumption that by transplanting certain basic constitutional values and institutions, it would be possible to secure the practice of Constitutionalism in Kenya. This was to prove very difficult in practice.

Between 1964 and 1977 the Constitution was amended sixteen times. Some amendments were fundamental while others were minor. Cumulatively however, the amendments radically altered the content, structure and philosophy of the Independence Constitution. Moreover, the amendments fundamentally re-designed the structure of the post-colonial state and the entire basis of governance. Power and authority were centralised in an all-powerful executive that was only nominally accountable to Parliament.

and not accountable to the Judiciary. The arena of independent political activity outside the ruling party was severely circumscribed.

Under Kenyatta, the constitutional amendments achieved two things. First, they completely destroyed Majimboism or regionalism and created a strong unitary state. Second, they distorted the balance of power between the three arms of government by creating an all-powerful executive presidency to which the legislature and the judiciary were subservient. The presidency created by the amended constitution, both as head of state and government, was so powerful that it could run the country by executive decree. Parliament dwindled in significance, becoming merely a rubber-stamp for executive orders and decisions. The executive determined its calendar and agenda so much so that the president could prorogue or dissolve parliament at any time at his discretion. The judiciary for its part was similarly rendered under the domination of the executive. So complete was this control that the judiciary kept its distance from political matters, refusing to be involved in any meaningful attempt to control executive power and frustrating any legislative effort to do so.

Ostensibly, the amendments were made in order to facilitate more effective governance and to make the Constitution both autochthonous and more relevant to local conditions and needs. In reality, the amendments were opportunistic, self-serving and manipulative of the existing constitutional order. The capacity of the Constitution to guarantee Constitutionalism was definitely eroded by the amendments. While the new constitutional order claimed to be libertarian, it continued with enthusiasm the colonial public law tradition of subjugating the people and containing political dissent. Building on

---

his authoritarian law and order tradition, the amendments consolidated personal rule at the expense of institutional rule, institutionalised political expediency as the yardstick for constitutional change and undermined the claim of the Constitution to being the basic law and the guarantor of political stability.99

INTRODUCTION

Kenyatta, the first President of Kenya, died on 22nd August 1978. Daniel Arap Moi, his long serving Vice-President became President. The Kenyatta succession politics had been intense and acrimonious, with numerous threats to amend the Constitution to deny Moi the chance to be president. From the outset, the Moi presidency was therefore confronted with serious legitimacy problems that would set the tone for some of the constitutional amendments that followed.¹

THE SEVENTEENTH AMENDMENT-THE THIRD OFFICIAL LANGUAGE AMENDMENT

The first Moi amendment, was the Seventeenth amendment, which sought to undo the damage of the 1974 "Kiswahili amendment".² It provided that English could be used as an alternative to Kiswahili in the National Assembly and further, that in future, proficiency in both English and Kiswahili would be a prerequisite for election to parliament. This dealt with the anomaly previously created by Section 34(c) of the Constitution, in which, Kiswahili was the language of deliberations in parliament yet only knowledge of English was a prerequisite for election to Parliament. The confusion created by the thirteenth amendment had not be adequately resolved by the 14th amendment. The seventeenth amendment intended to address this problem by amending both sections 34 and 53. As amended section 34 required proficiency in both English and Kiswahili and Section 53 provided that the official languages of the

---

National Assembly would be Kiswahili and English.

The first, second and third readings of the Bill were passed in one sitting. The Speaker allowed little time for debate and overruled those who sought to trace the history of the amendment and in particular those who sought to blame the Attorney-General for lack of foresight in drafting the amendment that created the problem in the first place.3

THE EIGHTEENTH AMENDMENT - ELIGIBILITY FOR ELECTION

The Eighteenth Amendment followed in quick succession. It set out the period within which certain public officers had to resign in order to qualify to contest parliamentary elections.4 Such period was specified as six months. The amendment was made amidst attacks and counter-attacks between the various political leaders in the run off to the 1979 elections. These elections were crucial in allowing Moi to establishment a post-Kenyatta ruling coalition.5 The amendment was intended to validate an extra-legal directive that had been issued by the government requiring all civil servants wishing to contest elections to resign by 15th May 1979. Ostensibly, the amendment was meant to eliminate the abuse of office by persons in public offices who intended to go into politics. In reality, as was noted by the press reports at the time, the changes were intended, as "a way of scaring would be opponents of sitting MPs".6

The Bills publication period was reduced from 14 to 8 days. It was subsequently read for the 1st and 2nd time on the first day, and was enacted into law without any

3. The Hansard 9th May 1979, column 239.
serious debate. It is worthy of note that after the amendment had been effected, the Attorney-General promised to issue a statement clarifying which public servants were affected by the amendment, although the amendment did not vest any such discretion in the Attorney General.7

THE NINETEENTH AMENDMENT—THE CREATION OF THE ONE PARTY STATE

The Nineteenth Amendment was a far-reaching and controversial amendment to the Constitution of Kenya. This is the amendment that introduced a new section 2A into the Constitution and converted Kenya into a de-jure one party state.8 The amendment outlawed all opposition and gave the ruling party KANU the monopoly of all political power in the country. The implications were ominous. There were two immediate consequences. First, one could not pursue elected office unless he was a member of the ruling party and had received its nomination. Second, one ceased to hold elected political office, if he was suspended or expelled from the ruling party.9

The change in the constitutional structure was equally profound. KANU, hitherto merely a political party registered under the Societies Act10 was henceforth to enjoy a position of immense constitutional significance.11 By this amendment KANU achieved a monopoly of all legitimate political activity in the country. The background against which the amendment was made is interesting. Oginga Odinga, George Anyona and others had intended to form a new political party, the Kenya Socialist Party (KSP) to challenge KANU. Speaking at a press conference Anyona stated that:

"...the true position is that the formation of a political party in Kenya is a constitutional right...As far as the constitution of Kenya is concerned, and there is nothing outside the constitution, the situation has not changed

7. The Hansard, 9th May 1979 Column 239.
from what it has always been since Lancaster House in 1960. This means that according to the constitution, Kenya is a de-jure multi-party state...They cannot have it both ways. They must therefore be told or be reminded, in case they have forgotten, that the system which they support, believe in and practice is multi-party democracy".

Subsequently, Oginga Odinga was expelled from KANU and George Anyona was detained without trial. A KANU Governing Council meeting ordered the Attorney General thereafter to prepare legislation immediately making Kenya a one party state. This was in itself an interference with the sovereignty of parliament and the independence and integrity of the office of the Attorney General. More significant, was the fact that in strict constitutional theory the amendment was outside the scope of the amending power granted to parliament by article 47 of the Constitution. As the constitutional guarantees to freedom of association were neither repealed nor abridged the amendment created serious internal inconsistencies in the Constitution and undermined basic democratic principles. For these reasons, there is no doubt that section 2A was unconstitutional ab initio. It had the effect of rewriting the Constitution, and especially the Bill of rights, in a most fundamental and unconstitutional way.

Yet, when the issue of the constitutionality of the amendment was canvassed in the Gitobu Imanyara v Attorney General. The High Court of Kenya at Nairobi (Dugdale J) dismissed the argument that the amendment was unconstitutional on the ground that it interfered with other rights guaranteed by the Bill of Rights. The court failed to appreciate or completely ignored the fundamental issues of constitutional jurisprudence raised in the case.

Parliament’s willingness to disregard its own procedure in dealing with the amendment was quite evident. Before the amendment was debated the Vice-President moved a procedural motion seeking to reduce the publication period of the Bill from 14 to 6 days. Indeed, he went on to say that the Bill was in the way of more important matters like supplementary budget estimates. Debate was kept to a minimum allegedly because the matter had already been debated at length in other councils of state. The debate consisted on the whole of the chorus of approval save for two MPs who voted against the amendment. The Bill received presidential assent on June 25th 1982.

By the time the nineteenth amendment was enacted, the effect of previous amendments had all but emasculated Parliament. Parliament had become completely subdued by a bloated executive and had settled to the role of a rubber stamp of party and executive decisions. At another level, underpinning the debate, was the erroneous assumption, now institutionalised, that parliament was competent to amend the Constitution in whichever way it desired. The speeches in parliament were lame and pedestrian attempts to justify the amendment. The arguments ranged from the comical contention that making Kenya a one party state was merely to legitimate a de-facto situation prevailing since 1969 to the absurd contention that this was the will of the people as gauged by their representatives.

---

As part of Moi's larger political strategy, while the Bill was going through parliament a massive crackdown on university lecturers believed to be unsympathetic to the government commenced. Soon thereafter there was an abortive coup which was followed by a state of great political tension and instability in the country. The need for a single party became a self-fulfilling prophecy. But at the same time, Moi was faced by the dilemma of "how to permit a more open political process in order to establish political legitimacy without releasing without forces anxious to challenge the regime".

It is important to recall that other than converting Kenya into a de-jure one party state; the Nineteenth Amendment formalised the position of the Chief secretary that before had existed administratively without constitutional recognition. The Chief Secretary was to be the head of the Public Service and was to exercise supervision over the Office of the President and generally supervise and co-ordinate all other departments of government. This position had existed in the colonial administration and its re-introduction was a pointer to the direction in which the government desired to move; which was concentration of power in the Presidents office.

THE TWENTIETH AMENDMENT – LIMITING THE JURISDICTION OF THE COURTS

The 1985 Twentieth Amendment to the Constitution made the High Court the final court as far as the hearing and determination of election petitions regarding membership to the National Assembly under Section 44 of the Constitution were concerned. The effect of this was to deny an aggrieved party accesses to the Court.

---

23. Throup "The Construction and Deconstruction of the Kenyatta State", pp.54-56.
of Appeal. The necessity for this was not obvious. In practice it gave the High Court, (sitting as an election court) enormous power capable of great abuse. This problem was compounded by an administrative decision made by the Office of the Chief Justice to set up one election court of three judges to hear all election petitions. Previously there had been several three-judge panels. This limitation in the scope of judicial review of elections had the effect of undermining the independence and authority of the judiciary.

The amendment also provided that a High Court judge who had been appointed to the Court of Appeal could be allowed to continue and complete cases he was hearing while sitting at the High Court. Further, it increased the membership of the Public Service Commission, to fifteen members (15) - excluding the chairman and vice-chairman and expanded its mandate to cover officials in Local authorities. This did not improve the capacity of the PSC as it had already become a toothless bulldog, with the powers of hiring and firing senior public officials having been assumed by the president. Commenting on the powers of the office of the President, a future chairman of the Law Society of Kenya, Paul Muite stated that:

"During Moi's presidency, the office has been expanded and extended far beyond anything either the Founding Fathers, or the original 1963 Constitution would have envisaged. Today, the Presidency looms over everything else, having assumed power and control over all other branches of government. The office of the president is a monolithic system, a government within a government that overshadows virtually all. It controls the entire civil service, the provincial administration, the public corporations, the police, the armed forces, the National Youth Service, the Immigration, all appointments to boards and senior positions in all public institutions, elections, name it.

As the situation pertains today, positions in public service which were previously tenured under an independent Public Service Commission, are held at the pleasure of the President. Hiring and

firing civil servants have become exercises in loyalty contests. The traditional insulation of the public service, which was intended to ensure an independent, efficient and detailed institution, has been subverted into an extension of executive authority—a highly partisan system serving the political interests of the President.”

At the technical level, it would appear that simple administrative restructuring which, if necessary, could easily have been effected by amendments of the relevant statutes, were improperly treated as issues of constitutional significance.

THE TWENTY FIRST AMENDMENT: CITIZENSHIP

The Twenty First Amendment of the Constitution also effected in 1985 repealed Section 89 of the Constitution, which provided for acquisition of citizenship of a person born in Kenya after 11th December 1963. After the amendment, only those who had a mother or a father of Kenyan citizenship qualified to be citizens of Kenya if born after 11th December 1963. This amendment in some way was part of the last process of removing some of the key bargains by the non-indigenous communities at Lancaster House. In effect, the door was being closed to persons who previously could have acquired Kenyan citizenship by virtue of being born in Kenya irrespective of their parentage.

THE TWENTY SECOND AMENDMENT: REMOVAL OF SECURITY OF TENURE OF CONSTITUTIONAL OFFICE HOLDERS

The Twenty Second Amendment was, in many respects a watershed amendment. First, it attracted a lot of adverse comments locally from various civic groups and for the first time, at least publicly; it brought the constitutional amendment

process in Kenya under international scrutiny.\textsuperscript{30} In many ways, it was the genesis of extensive ill-advised amendments that were made during this period. The amendment removed the security of tenure of the Offices of the Attorney-General and the Controller and Auditor general. These are two very key offices that under the original Constitution had been insulated from the vagaries of political life by granting them tenure, as they were conceived of as watch-dogs for the public good. The Attorney-General, particularly in his role as the Chief Public Prosecutor, was required to be independent and impartial in all the decisions that he made in that capacity.\textsuperscript{31} The Controller and Auditor General, in his position as custodian of the Consolidated Fund, was similarly intended to exercise the powers of his office without any undue pressure.\textsuperscript{32}

The amendment was yet another step in creating a Presidency that was unfettered by legal impediments and which was intended to dominate all other public institutions. It appeared as if the Government was committed to creating a virtual constitutional dictatorship.

The Bill caused an outcry from a wide cross-section of the public including the Law Society of Kenya (LSK), the National Council of Churches of Kenya (NCCK) and the Catholic Bishops. The basic criticism was that the Bill would have the effect of undermining the independence of offices that needed to be autonomous if they were to fulfil their constitutional mandate. The critics felt that the proposed amendments were politically inspired and would serve no positive legal purpose whatsoever.\textsuperscript{33} This unpopular Bill was nonetheless passed in record time with opposition from only two MPs. The amendments were justified as necessary in order to centralise power in the

\textsuperscript{31} Section 26 Constitution of Kenya.
\textsuperscript{32} Section 105 Constitution of Kenya.
President and avoid the growth of alternative centres of power as had occurred during the tenure of Charles Njonjo as Attorney-General. Unbelievably, Mathew Muli, picked from the High Court to be Attorney-General after the 1982 abortive coup, instead of protesting the erosion of the authority of his own office was eloquent on the need to rein in the independence of the office.

The amendment also abolished the office of the Chief Secretary, which had been created by the controversial 1982 amendment. The argument again was that this office had been set up at the behest of Njonjo and it was no longer relevant and should be abolished. Finally, the amendment altered the number of parliamentary constituencies by providing for a maximum of 188 and a minimum of 168. In respect of this particular limb of the amendment, the wisdom of limiting the number of constituencies in the Constitution and therefore periodically having to amend the Constitution is questionable. The more logical thing would of course be to have Parliament periodically set the number of constituencies in an Act of parliament to be reviewed each time on the advice of the Electoral Commission without the need for constitutional amendments.

The Bill was in many respects typical of the amendment procedure that was gaining acceptance with parliament but which was obviously undermining the constitutional process. The Bill was first introduced in parliament on November 25th 1986. A procedural motion was introduced which requested the house to allow the publication period to be reduced from fourteen to twelve days. The Bill was introduced

---

37. Section 42 of Constitution.
into the house for debate the following day. Debate was brief but interesting. On the critical issue of the security of tenure of the constitutional offices of the Attorney-General and the Auditor and Controller-General, the views of the government were most interesting. George Saitoti, later to become vice President stated that:

"It must be clearly understood that the security of the position that any officer in government has is the security of the confidence that particular officer commands in terms of his respect to his Excellency the President. Now if his Excellency the President does not have the confidence in that officer then it must be wondered what kind of security does he have (sic)"38

The Attorney-General, whose own tenure the Bill sought to be abolished was even more eloquent and his interpretation of what was about to happen was most curious if not altogether unintelligible. Either he was an extremely incompetent lawyer or an extremely dishonest person or both. In response to the criticism of the Bill by the Law Society of Kenya he stated that:

"I would like to dispel hullabaloo which has appeared in the local press since the publication of the Bill. I would like to make it quite clear that the impression which the press and the Chairman of the Kenya Law Society, in particular portrayed to the effect that the amendment was intended to remove the protection of tenure of the office of the Attorney-General and the Controller and Auditor General is completely Misconceived. I do not know whether he was speaking for himself or for the Kenya Law society as a whole, but whatever capacity he was reacting from I must tell him that this interpretation of the Constitution was unfortunately faulty. It was faulty because the learned friend has mixed up three concepts, namely tenure of office: Powers and functions of the officers concerned and procedural provisions relating to removal from office of these two officers for cause or causes.39

When the Bill was put to the vote on a third reading it was unanimously passed by 131 votes. Without any doubt, the basic structure of the Constitution had been

altered in a most significant and far-reaching manner not contemplated by the Constitution itself. There can be no doubt that this amendment was ultra-vires the Constitution and therefore unconstitutional. The effect was further to erode the capacity of constitutional watchdogs to perform their functions and thereby to distort the constitutional balance of power.

THE TWENTY THIRD AMENDMENT - LIMITING THE RIGHT TO BAIL

The Twenty Third Amendment of the Constitution was one of those rare but significant instances where the legislature overrules the judiciary. In the case of Margaret Magiri Ngui v Republic, the High Court sitting as a constitutional court held that an ordinary statute like the Criminal Procedure Act, could not abridge the fundamental rights guaranteed by the Constitution, in this case, the right to bail. The Twenty Third amendment made all offences under the Penal Code, which are punishable by death non-bailable.

Again, the wisdom of this amendment is questionable. In a significant way, this amendment was an unwarranted interference with the discretion of the courts to award or refuse to award bail depending on the circumstances of each case. Bail is a fundamental human right; criminal jurisprudence presumes all accused persons innocent until proved guilty. Historically the courts had often declined to release persons charged with capital offences on bail due to the possibility that the accused persons would abscond and fail to show up for their trials. This interference with judicial discretion and jurisdiction which was reflected in other amendments to statute law was unnecessary and confirmed that there was a deliberate effort to undermine the

---

41 High Court Criminal Application number 4 of 1985.
independence and impartiality of the judiciary and therefore weaken any controls on executive power. It cannot have been mere coincidence the amendment came at a time when the government was busy arresting and arraigning before the courts persons accused of belonging to an underground movement called “mwakenya” alleged to have been working to overthrow the government. The government was therefore placing the Constitution at its disposal in its fight with political opponents.

THE TWENTY FOURTH AMENDMENTS: REMOVING THE SECURITY OF TENURE OF JUDGES

The Twenty Fourth Amendment in part carried on the process commenced by the Twenty Third Amendment. However, it made more radical and substantial changes to the Constitution. The amendment further eroded the rights of suspects and accused persons by empowering the police to hold suspects held on capital offences in custody for more than 14 days. The maximum period previously provided for by law was 24 hours. Significantly, in the initial Bill, the Attorney-General sought to empower the police to hold suspects in respect of all offences for up to 14 days before taking them to court.

The resulting public outcry caused a last minute amendment limiting the application of the provision to suspects held on capital offences but did nothing to clarify the full import of the amendment. It would appear that all the police had to do in order to justify holding suspect for more than 14 days without charge was to allege that they were holding the suspect in connection with investigations into a capital offence. This amendment was made at a time when Kenya was facing various allegations of human rights abuses and especially of torture of suspects while in police

---

It was as ill timed as it was unnecessary and irrelevant. As a matter of practice, courts had always permitted the police to hold suspects after bringing them to court, in order to finalise investigations where this was deemed necessary. This amendment calls into question the competence of the legal advice that government was receiving and its own serious disregard of the constitutional process. If the first part of the amendment was ill advised, the second was completely outrageous. The second part removed the security of tenure of the offices of the members of the Public Service Commission and judges of the High Court and the Court of Appeal without providing any sensible justification whatsoever. Now the President at his sole discretion for whatever reason including unpopular decisions could remove Judges.

Central to the observance of constitutionalism and the rule of law is the doctrine of the separation of powers; which entails in part the independence and impartiality of the judiciary and the political neutrality and impartiality of the public service. The twenty third amendment therefore went against the entire philosophical and jurisprudential basis of the Constitution. In effect, the amendment gave to the executive powers to interfere with the judiciary and the civil service with impunity. There can be little doubt the amendment was intended to ensure that neither the Judiciary nor the civil service had meaningful autonomy, which would enable them to carry out their constitutional mandates. Nor can there be any doubt either that this further emasculation of the public service was intended to ensure complete and total subservience to an powerful executive. While the amendment was a logical extension of the process of concentrating immense powers in the executive and

reducing its accountability to other organs of government, it was blatantly unconstitutional. There can be no legitimate interpretation of the Constitution that can breathe into the amending power, a power to render one fundamental arm of government into a subservient puppet of the other. If there be such an interpretation, it is against constitutional theory, judicial precedent and the dictates of a democratic system of government.49

The Twenty Fourth Amendment, coming at a time that the Kenya government was being accused of autocracy and undemocratic practices was ill advised and unnecessary. In many ways, this amendment reveals a government that was more concerned with containing all political power at all costs and unconcerned with either constitutionalism or the rule of law. In its third part, the amendment recognised the creation of the Office of the Chief Magistrate and the Principal Magistrate within the judiciary. Again these were unnecessary changes that could have been dealt with by amendments to the Magistrates Court Act.50

THE TWENTY FIFTH AMENDMENT: RESTORING THE TENURE OF CONSTITUTIONAL OFFICE HOLDERS

The Twenty Fifth Amendment started the long and laborious process of undoing the great harm done by the hasty, ill-advised and downright unconstitutional amendments that had occurred since 1982.51 To some extent it represented a stemming of the tide and a possible return to some form of constitutional sanity. In essence, it sought to undo the effects of the Twenty Fourth Amendment. First, it restored the security of tenure of judges of the High Court and the Court of Appeal.

Second, it restored the tenure of the Attorney-General, the Controller and Auditor-General and members of the Public Service Commission.

The background to the amendment gives an insight into the workings of the constitutional process in Kenya under Moi, and in particular the disharmony between formal constitutional provisions and actual constitutional practice. While the Constitution provides that the Attorney-General is to act in total independence in the exercise of the functions of his office and that parliament is the supreme law making body in the land, the Attorney-General nonetheless did receive a directive in November 1990 to draft a Bill effecting the proposes changes. The directive left no doubt that parliament had no option but to pass the Bill when it came up for debate. The Bill brought out the very unprincipled and reckless way in which previous amendments had been made. The same parliament that had waxed eloquence on the insignificance of judicial tenure and the need of a strong presidency now fell over itself extolling the virtues of the independence of the judiciary secured by constitutional provisions on security of tenure. Most significantly, the amendment gave further credence to the view that in reality, constitutional provisions notwithstanding, the President was the real locus of all power and all other institutions were subservient and answerable to him.

It is noteworthy that in moving the Bill the Attorney-General sought to portray it as having emanated from the Saitoti Committee’s report. This was not quite true. In fact, the report, which has a special place in the constitutional history of Kenya, had different recommendations. A short background might be useful. On 21st June 1990, in

---

response to the politically explosive situation prevailing within the country and the pressures from without, the ruling party KANU at its Annual Delegate’s Conference, resolved to form a committee to look into the various grievances raised by the public. The conference identified as requiring particular attention, the KANU nomination rules, the KANU election rules and the KANU code of discipline.

In response to public criticism that the terms of reference were too narrow and did not address the dominant issue, which was political pluralism, the committee decided to expand its mandate to receive views and representations from a wide range of people and over a wide range of issues. Most of the representations were of a political nature. The most significant were: the constitutional term of the president; multiparty democracy and the repeal of the single party constitutional provisions, the restoration of tenure of judges, Attorney-General, Auditor and Controller-General; as well as members of public service commission; national constitutional convention; separation of party and government; national referendum; preventive detention; the role of the provincial administration in governance and ombudsman.

Although the committee was largely a public relations ploy, it agreed to hear representations on the issues outside its official mandate, it ultimately held itself unable to offer any views on the matter as the same were outside the scope of its terms. Indeed, the only change the committee proposed was to change the KANU queue-voting procedure and 70% rule. These were the controversial 1988 rules which provided that all preliminary voting before the general elections would be conducted by queue voting, whereby voters lined behind their candidates. In practice the procedure was

---

greatly abused. They also provided that any candidate who got 70 per cent of the vote during the queue voting would automatically proceed to Parliament unopposed. The fact that this disenfranchised non-party members did not seem to matter. The committee did however find it necessary to categorically state that there was no reason to repeal the single party provisions of the Constitution or to limit the term of the president. As fate would have it, and in spite of the committee's views on the matter, some of the proposals given by the public soon after resulted in some amendments discussed below.

Moving the Bill on the Twenty Fifth amendment, Attorney-General Matthew Muli argued that:

"This is a healthy Bill which conforms with the Saitoti committee as recommended in the report presented during the KANU delegates conference. The Saitoti committee noticed that there was a need to return the security of tenure of these people and the president directed this to be done that is why we are now formalising that lacuna which came in our constitution rather inadvertently if I may say so."

Perhaps what is most significant in this amendment is that it represents the first piece of credible evidence that the Kenya government was beginning to listen to both domestic and international criticism and, in particular, was beginning to respond to the views of the donor community. This amendment was therefore effected at a time when serious demands of transparency and accountability were being made on the government.

THE TWENTY SIXTH AMENDMENT-EXPANDING PARLIAMENTARY REPRESENTATION

The Twenty Seventh amendment followed closely on the Twenty Fifth and sought to provide a new maximum (210) and a new minimum (188) number of constituencies in the country. It was ill advised from the start. As discussed above, the function of specifying the number of parliamentary constituencies is in law reserved for the Electoral Commission, an independent constitutional body, which by law is not subject to the direction of any person or authority. The last review of electoral boundaries had been undertaken in 1986 and another was not due until 1994. By amending the Constitution, parliament was interfering with the work of the electoral commission in a manner not anticipated by the Constitution. This amendment by failing to meet a condition precedent may very well be unconstitutional. Coming as it did at a time when the government was faced with the prospect of an election, its bona fides were suspect. In terms of Constitutionalism it meant that the governments attempt to act more in accordance with the dictates of the rule of law as manifested in the Twenty Fifth amendment was short lived. Its philosophy and that of the draftsman remained the same.

THE TWENTY SEVENTH AMENDMENTS: RETURN TO MULTIPARTY POLITICS

The 27th amendment was a major watershed in the country's apparent swing back to the dictates of Constitutionalism and the rule of law. The amendment undid the damage done by the Nineteenth Amendment. The amendment repealed section 2A of the Constitution and opened the way to pluralist politics and put an end to Kenya's de-jure one party status. As already discussed in the context of the Twenty Fifth amendment, the repeal of Section 2A was the culmination of efforts of the various

---


167
groups within and outside the country that had directed intense criticism against the
government of Kenya for failure to countenance any form of political opposition. The
changes removed from the Constitution a blatantly unconstitutional amendment,
which was without doubt the worst amendment ever made. In essence it affirmed the
unconstitutionality of the Nineteenth amendment while setting the pace for the repeal
of similar provisions.

THE TWENTY-EIGHTH AMENDMENT: EXPANDING THE SCOPE OF LIBERTY

The reintroduction of multi-party politics significantly expanded the scope of
political activity in the country. Between 1992 and 1997, there was a lot of clamour for
what were dubbed "minimum constitutional and administrative reforms". With the
opposition hopelessly divided, a lot of the clamour came from non-governmental
organisations. They were well organised and vocal. They shifted the agenda of
constitutional reform squarely onto the national political agenda. They made it
impossible for the government to ignore the issue and pretend that it was business as
usual.\textsuperscript{62} The response of the government was to hijack the process from civil society
and channel the same through parliament. Before parliamentary and presidential
elections, which were scheduled for sometime in 1997, the government set up an inter-
parties parliamentary group (IPPG) for the purpose of formulating both constitutional
and administrative reforms.\textsuperscript{63}

The Twenty Eighth Amendment was largely the result of the work done by the
IPPG team, although the office of the Attorney-General undertook the final drafting.\textsuperscript{64}

\textsuperscript{62} Willy Mutunga, Constitution Making From the Middle-Civil Society and Transition Politics In Kenya p.19;
p.23.

\textsuperscript{63} Statute Law (Repeal and Miscellaneous Amendments) Bill 1997.

\textsuperscript{64} Constitution of Kenya (Amendment Act) Act No 10 of 1997.
This amendment had a number of significant alterations, most of them specifically to undo previous amendments. First, a new Section 1A was introduced which declared that Kenya would be a multiparty democratic state. The intention must have been to ensure that a single party would not be reintroduced again. Second, section 7 was amended to remove the requirement that the president could only form a government from members of his own party. The intention was to facilitate the formation of a coalition government. Third, Section 33 of the Constitution was amended to provide that members nominated to the National Assembly would be nominated by parliamentary parties and not by the President. These nominations are to be made by parliamentary parties each in proportion to its membership in the National Assembly. Similar requirements to be enforced by the Electoral Commission were inserted in Local Governments Act. Fourth, Section 41 was amended to provide that the number of commissioners in the electoral commission would be increased to twenty one. Moreover, section 42A was amended to give the Electoral Commission two other functions, namely to promote voter education and to ensure free and fair elections. Fifth, the jurisdiction of the Court of Appeal over appeals in election petitions was restored. Sixth, Section 82 of the Constitution was amended to include sex as one of the disallowed basis for discrimination. Seventh, Section 84 of the Constitution was amended to expand the right of appeal on constitutional matters to the Court of Appeal.

Despite the goodwill that attended the process of negotiating this amendment and although for the first time the constitutional amendment process was approached with a measure of professionalism and was not dominated by partisan politics, the old problem persisted. At the technical level, there was no underlying philosophy in the

---

amendments, linking them to each other and to the rest of the Constitution. The amendments therefore ended up as patchwork that did not address the problem of the Constitution's serious internal inconsistencies. Moreover, a new problem in constitution making emerged in the form of the imprecision of laws drafted by committees. In effect, some of the amendments were so broadly worded as to have very little meaning in practice.

CONSTITUTIONAL POLITICS UNDER MOI

To fully appreciate the nature of the process that facilitated the various amendments under Moi over the years, it is necessary to consider the political context within which they were made. In summing up Moi's historical position at the time of assuming power, Ooko Ombaka noted that:

"Unlike Kenyatta Moi came to power with no historic claim to it. He had played no direct role in the nationalist struggle leading to independence, had in fact been in opposition to the nationalist consensus as a member of KADU. Under the circumstances, his claim to leadership could at best be vicarious. Thus his rallying slogan of nyayo or following the footsteps of Kenyatta".68

By Moi becoming president, KADU effectively took over power and the character of KANU changed forever. By 1982 it was quite clear however that the tremendous goodwill that the majority of Kenyans manifested towards KANU as a party and Moi as President was waning. The government nonetheless did nothing to improve its governance. Moi literally stepped into Kenyatta's shoes both as a paramount chief to whom homage was to be paid by all and the imperial presidency to which all law and institutions were subordinate.69
The first serious indication that the state was back to form was the complete outlaw of all political opposition by way of inserting a new section 2A into the Constitution. Like the banning of KPU in 1969, this was proof that KANU could not countenance opposition, not for the sake of peace and stability as professed but for the real fear that its political survival would be jeopardised. Soon after followed the attempted coup and then a period of extreme political instability. The attempted coup in 1982 gave government the excuse for a crackdown on every known or suspected freethinker and hundreds were jailed on sedition and other political charges. Ooko Ombaka has documented with great insight the systematic criminalisation of politics and the emergence of a culture of political justice in this period.\(^{70}\) One can truly say that during this period the populace developed an attitude of cynicism with regard to governance and leadership and the ideology of order reigned supreme.

Between 1982 and 1989 the imperial presidency reached its apogee. Every conceivable autonomous centre of democratic expression was either co-opted into KANU or the wider system or banned altogether. From lecturers associations to trade unions none was spared. The presidency assumed even greater significance than ever before. The ideology of order was elevated to the level of a creed. The president by way of directives began to run virtually every single aspect of national life from whether children should learn new or old maths to whether tracks hauling goods would move during the day or during the night. Increasingly the contention that the president was above the law was heard and appeared to be believed.\(^{71}\)

The desire to build a more efficient patron-client machine would appear to have caused the one major blunder that was later to generate an intense momentum

\(^{70}\) Ombaka, "Political Justice in Kenya" p.234.

\(^{71}\) Ibid. p.233.
for change. The 1988 general elections were, as is now openly admitted by the
government widely rigged and interfered with. The 1988 KANU nomination rules
allowed queue voting and gave automatic entry into parliament, for a candidate who
got 70 percent of the vote during nomination. They were clearly unconstitutional and
denied million of voters who were not members of KANU and opportunity to vote.

The 6th parliament was not surprisingly, an assortment of politicians whose only
thought was how to remain in parliament and to appease whoever had rigged them
into office. No other group could have been more opportunistic and sycophantic than
this lot of people. Increasingly what was left of parliamentary dignity was eroded.
Parliament became in a real sense a rubber stamp, which spent all its time denouncing
dissidents, understood as any critic of government. Little wonders that the abuse of the
constitutional process at this time assumes an entirely new zeal.

The decade of the 1980s is when democratic institutions failed, respect for
human rights declined and tolerance for political culture was subverted. The arena of
political participation became small as the state became large and menacing
politically. The reason for this, was that the success of the imperial presidency as the
fountain of all power and authority had been so overwhelming that for a time all other
institutions were completely cowed into subservience. Yet this state of affairs could not
be sustained for long. The swing back to competitive politics after the repeal of section
2A of the Constitution in 1991 was an affirmation of the un-sustainability of the Imperial
presidency and it attendant constitutional devices.

Post 1991 constitutional amendments therefore represent, to a large extent an

72. Throup "The Construction and Deconstruction of the Kenyatta State" p.64.
73. Hornsby & Throup, "Elections and Political Change in Kenya" pp.178-188.
extensive rewriting of the power map, but not sufficient to remove the erosion of the rule of law brought about by the numerous previous opportunistic amendments.

Finally, the government under Moi was determined to give the international community the impression of stability and order in a continent known for the lack of it. Stability was understood as entailing orderly government. This was characterised by an observance of Constitutionalism and the rule of law in the formalistic sense. In reality, therefore, despite rhetoric to the contrary the government was more concerned with the form and not the substance of Constitutionalism. On the whole, the several amendments to the Constitution did not improve the ability of the system to observe Constitutionalism. In fact, most of the amendments were intended to circumvent even the most basic requirements of constitutionalism. Furthermore, the fundamental structural changes in the Constitution occasioned by the various amendments rendered meaningful constitutional government improbable.

CONCLUSION

This chapter has traced the history of the constitutional amendment process during the Moi era. It has demonstrated that Moi continued Kenyatta's amendment process with equal political zeal. Like Kenyatta, Moi used the constitutional amendment process to fight his political battles and consolidate his personal rule. Secondly, it has shown that as Moi's regime was confronted with more serious challenges the amendments became more erratic and radical. Consequently, most of the amendments had the effect of distorting the basic structure of the Constitution while creating serious internal inconsistencies and contradictions. Finally, this chapter has demonstrated that, by 1997 Kenya was faced with an enormous constitutional crisis with Moi largely exercising power outside the Constitution.
CHAPTER SIX
THE JUDICIARY AND THE AMENDMENT OF THE CONSTITUTION

INTRODUCTION

Often times, discussions on constitutional amendments proceed on the assumption that amendments to the constitution are only made by the legislature. In reality, the Constitution can and is often amended by those whose responsibility it is to interpret it, namely, the Judiciary. The judiciary normally amends the Constitution in the guise of interpreting it. This chapter analyses the manner in which judges in deciding constitutional disputes, assume methods of interpretation, whose effect is to alter the objective and meaning of the Constitution and in so doing amend it. In addition, the chapter analyses the manner in which the Judiciary in Kenya between 1964 and 1997 effectively amended the Constitution by making interpretations inconsistent with its letter and the spirit.

This chapter seeks to analyze the impact of certain approaches to constitutional adjudication on the amendment process and the influence of this, on the practice of constitutionalism in Kenya. The chapter considers the impact on the meaning of the Constitution that the decisions of the courts that purport to interpret the Constitution have. To appreciate why the courts have interpreted the Constitution they way they have, it is necessary to examine the limitations imposed by the legacy of the colonial judiciary. It then proceeds to consider the various decisions on the Independence Constitution as amended, as part of the larger amendment process and the impact on those amendments on the practice of constitutionalism in Kenya.
THE LEGACY OF COLONIAL JURISPRUDENCE

The Colonial Court System

The first system of courts in the then East African Protectorate began after 1895 and grew out of the agreements made between the British Government and the sultan of Zanzibar. A full judicial system was established in 1897 by the East African Order in Council of that year. The Courts were divided into three categories. At the Subordinate level there were Native Courts, Muslim Courts and Colonial Courts. These courts were manned by lay administrative officers. At the superior level, the Courts were divided into two. One was styled Her Majesty's Court for East Africa and from which an appeal lay to Her Britannic Majesty's Court at Zanzibar and eventually to the Privy Council in the United Kingdom. The other was the Chief's Native Court from which an appeal lay to the High Court. This system lasted for five years only but contained the basic structure of the latter system.

There was thus a dual-Court system- one to administer the law established by the new Colonial state and other to settle disputes among the Africans, as much as possible applying their own laws. Significantly, judicial officers were not independent of the executive, they were appointed by the Governor, upon the advice of Colonial Office, under the East African Order in Council of 1879. They held office at the pleasure of the Crown and could be dismissed by the Governor on the direction of the Secretary of State. In this sense, the executive and the judiciary were fused.

---

3. Terrell v Secretary of State (1958) 2 Q B. 482.
The Colonial Judicial Service and the Independence of the Judiciary

The Colonial State laid great emphasis on the administration of justice by the administrative officers whom it credited with an intimate knowledge of the people and their culture that no judge could rival. This non-separation of powers was justified by the argument that traditionally Africans did not have a distinct legal system and therefore no Independent tribunals existed. The District Officer therefore became, simultaneously the executive and the judicial arm. To facilitate the work of the lay-magistracy in the form of District Officers, the law provided that:

In the cases civil and criminal of which natives are parties, every Court shall decide all such cases according to substantial justice without undue regard to procedure and without undue delay.

It was therefore the intention of the colonial state to make sure that judicial independence and legal technicalities did not get in the way of the maintenance of law and order. But this merger of the judicial and executive functions of the colonial state in the administrative Officers eventually raised concern. The Commission of Inquiry into the Administration of Justice in Kenya, Uganda and Tanganyika Territory in criminal matters, of 1933 identified the conferring of excessive jurisdiction to Magistrates' courts as one of the principal reasons the machinery of justice did not work well and could not work well. The Commission pointed out that the District Officer was essentially an administrative officer charged with maintenance of law and order in his district leaving to the police the work of investigating crimes. It was therefore not easy in the circumstances for him to assume the judicial role and to proceed dispassionately in apportioning responsibility and arriving at a proper sentence.

---

Commission report, however, had little effect as administrative officers continued to preside over subordinate courts.

The Colonial Judiciary and Politics

The second feature of the colonial order that had a bearing on the judiciary was the almost unlimited powers of the executive as personified by the Governor. While he was nominally accountable to the Colonial Office, the courts gave the Governor as wide a latitude as possible in the exercise of his real and assumed powers, thereby making the governor unaccountable. In this way the courts denied themselves power to hold government accountable. A number of cases help to illustrate this point. The case of Ole Njogo and Others v Attorney - General of East African Protectorate involved the interpretation of two agreements concluded between the Maasai people and the British government. Under these agreements, the Maasai had agreed to move from their ancestral land to make way for white settlement. On the issues of the legal nature of the agreements concluded by the parties and as to whether the British Government was in violation of the agreements, the East African Court of Appeal held that the Maasai as a race still enjoyed vestiges of sovereignty even after a Protectorate was declared over them by the British Government, and therefore, they could conclude a treaty with the protecting power which, though not governed by international law, was governed by rules analogous to international law, and enforceable by a municipal court. In upholding the defence of an Act of State in respect of the actions by the Governor against the Maasai, the Court stated that:

---

2. (1914) 5 E.A.L.R. 70.
"In a court of law in respect of any kind of tortious act committed upon the orders of or subsequently ratified by the Government, he has no remedy against the Crown in tort, if he brings an action against any individual the latter can plead orders of the Government whereupon the act becomes an act of the Government and one for which the only remedy is an appeal to the consideration of the Government; the other remedies of diplomacy and war which might be available to a foreigner the subject of an independent state not being available to a native of the protectorate".\(^{10}\)

The logic of the decision was that the government could force the agreement on the Maasai, then enforce their obedience to it and when challenged, decline to allow the matter to be judged in the courts and prevent or punish any recourse to extra-legal remedies. The Court was thus sanctioning the powers of the Governor to run an arbitrary government that was not answerable for its conduct and which could take refuge under the act of State doctrine. In essence, the Courts were saying that they would not allow any challenges to the legal basis of colonialism.

This judicial attitude of giving government as wide a latitude as possible is perhaps most graphically illustrated by the case of Nyali Ltd. v Attorney-General,\(^{11}\) where Denning L. J. (as he then was), in examining the legal limits of the Crown in a Protectorate stated that:

"Although jurisdiction of the Crown in the protectorate is in law limited jurisdiction, nevertheless the limits may in fact be extended indefinitely so as to embrace almost the whole of government. The Courts themselves will not mark out the limits. They will not examine the treaty or grant under which the Crown acquired jurisdiction nor will they inquire into the usage or sufferance or other lawful means by which the Crown may have extended its jurisdiction. The Courts rely on the representatives of the crown to know the limits of its jurisdiction and to keep within it. Once
jurisdiction is exercised by the Crown, the Courts will not permit it to be
challenged."\textsuperscript{12}

In their jurisprudence, the Colonial Courts were influenced by English analytical
jurisprudence. They perceived law as a simple model of "commands of the sovereign
backed by threats of sanction".\textsuperscript{13} They were therefore convinced that the purpose of
law was to maintain order and that the function of the courts was to facilitate that
process. The claim by the government that it was entitled to exercise any power was
of itself self-legitimating and the courts could not inquire into the legality. The result was
that the executive got a blank cheque to maintain law and order and the rare
challenge of any government activity was invariably futile. This predilection by the
colonial judiciary with facilitating law and order was to metamorphosise into a
preoccupation with maintaining what was claimed to be state security in the post-
independence period.

In the case of \textit{Isaac Wainaina v Murito-Wa Indagara}, the fundamental question
of the nature of native land rights after British occupation was raised. The Supreme
Court took the view that the effect of the 1915 Crown Lands Ordinance and the two
Orders in Council which converted the Protectorate into a Colony was to take away
all native rights in the land and vest all land in the crown and leave Africans as
tenants-at-will in whatever land they occupied. While it could not have been lost on
the court that the impact of this decision was to render landless all the natives of

\textsuperscript{12} (1956) 1 K B 15.
\textsuperscript{13} John Austin, \textit{The Province of Jurisprudence Determined}, (London: Wiedenfeld & Nicolson 1955)
pp.363-93.

179
Kenya, the court nonetheless was willing to declare so in order to facilitate what it perceived as the *civilising* mission of the government.\textsuperscript{14}

Moreover, the courts were not interested in safeguarding even the most elementary notions of the rule of law. In *D.C. of Nairobi v Wall Mohammed*, a British Indian resident in Nairobi was sued for failure to pay his poll tax. At his trial, the issue was raised that the ordinance under which he was sued was invalid, because a British subject could only be taxed while within the realm and with the consent of Parliament. The Supreme Court of Kenya held that the Crown had a right to tax its subject residing in Kenya notwithstanding the fact that neither the *Foreign Jurisdiction Acts* nor the Orders in Council conferred any authority to tax.\textsuperscript{15} In *Earl of Errol v Commissioner of Income Tax*, the Earl of Errol refused to pay tax assessed by the Commissioner of income Tax on the grounds that the *Income Tax Ordinance, 1937* was invalid in that, the Kenya Legislative Council, which enacted it, did not contain a majority of elected representatives and so could not enact for direct taxation without infringing the Law of England and the rights of the subject under the magna charta, the Bill of Rights,\textsuperscript{16}, the Petition of Rights,\textsuperscript{16}25, and the Act of Settlement, 1700. The Court of Appeal for Eastern Africa, upheld the decision of the Supreme court of Kenya and further held that the tax legislation enacted by the Kenya Legislative Council was valid notwithstanding the fact that the Legislative Council was unrepresentative of the population of the colony. The Court rejected outright and without discussion the notion that the legitimacy of the legislative process was dependent on its being representative in a democratic manner.\textsuperscript{16}

\textsuperscript{14} (1923) K.L.R., 103.
\textsuperscript{15} (1914) 5 E.A.L.R., 175.
\textsuperscript{16} (1940) 7 E.A.C.A., 7.
The judiciary continued to bend over backwards to facilitate and sanction the declared policies of the colonial government and to dismiss all opposition thereto. The case of *Corbett Ltd. v Flyod*, offers another illustration of the willingness of the colonial judiciary to legitimate the executive's exercise of power. In 1939, an *Emergency Powers Order in Council* was passed to provide for the administration of Kenya during the war period. When a State of Emergency was declared in Kenya on 20th October 1952, Section 6 of the *Emergency Power Order* was applied to the colony. In certain material aspects, the legislative powers of the Governor became exactly co-extensive with those of the Legislative Council. The question that arose in the case was whether or not the Governor, like the Legislative Council, could legislate retrospectively as he had purported to do. Briggs, Vice-President of the East African Court of Appeals held that the Order in Council was valid and therefore empowered the Governor accordingly. He stated that:

"It has never in twenty years been suggested that the Order in Council was itself ultra-vires and although since the end of the War, measures taken under it have been criticised as dictatorial, undemocratic and destructive of liberty, it has never so far as we are aware been suggested that such measures were incompetent".18

In essence, the argument was that the judiciary could not engage in an evaluation of the legality of legislation, which satisfied the formal criteria of validity. This decision further illustrates that the colonial courts never perceived of themselves as having any active constitutional role whatsoever in the limitation of executive authority.19 Against this background, it is true to say that the colonial judiciary was

---

essentially preoccupied with the question of public order and stability. At no time did a concern for civil liberties engage the courts. The agenda of the courts was in the whole confined to legitimating the actions of the administration in the process of governance. This preoccupation is perhaps best illustrated by the case of Ugunda v Rex. In this case, the court held as seditious, public statements by Ugunda, a trade unionist, who accused the colonial government of having perpetrated undemocratic activities including holding onto political power without the consent of the colonized people and denying them the right to self determination.20

Such type of decisions made the African majority, perceive the court not as an impartial arbiter in disputes, but as part of the machinery of government for coercing people into submission.21

The Colonial Judiciary and Professionalism

The third significant characteristic of the colonial judiciary related to the personnel who ran the Courts. The East African Order in Council of 1897 under which judges were appointed, provided that one could be so appointed if he was a member of the bar in England, Scotland or Ireland of not less than three years standing.22 The bench was inevitably filled up with Europeans, who obviously were not the cream of the profession in their countries as logically the best stayed at home. They essentially saw themselves as part of the civilising mission of the colonial state and therefore consciously manifested a deep sympathy for the colonial government in its attempt to develop the colony. The sympathy was not only racial but also class

20 (1960) E A L R 745 (C.A.)
22 Section 7 (5) of the East African Order in Council of 1897.
sympathy as well. These sympathies came out clearly in the judgements that were rendered which largely supported the status quo. 23

The partisanship of the judiciary became most evident during the State of emergency that was declared in October 1952. Many of the regulations and rules promulgated in response to the emergency affected the operation of the legal system. The regulations reduced the procedural and other safeguards surrounding the conduct of criminal trials and in a number of instances took away judicial discretion as to the sentences that could be imposed. The obvious purpose was to speed up trials and increase the rate of convictions. For example, the rules of evidence relating to confessions made to police and Administrative Officers were substantially relaxed. The judiciary, judging by the numerous death-sentences handed down, participated in this orgy with unbridled enthusiasm. 24

Ghai and McAuslan have summed up the prevailing situation as follows:

"The judiciary could not but accept this assault upon the safeguards of the criminal trial. In addition it is reasonable to suppose that they shared the horror of the administration and settlers at what they conceived to be the bestiality of Mau Mau". 25

In addition the Courts denied themselves of jurisdiction to review administrative acts. In Re Marles Application, the issue that arose was the interpretation to be given to the Immigration Ordinance 1956, Section 10 of which provided that no court of law could question any order of the Minister made under the Act. In an application for mandamus and certiorari against the order of the Minister denying the applicant a

25. Ibid. p.160.
work permit, the Court held that it had no jurisdiction to question the Minister's order because the Minister was under no obligation to act judicially.26 The effect of this decision was to make the Ministers the judges of whether or not, in the exercise of their administrative functions they had complied with the Law.27

In many respects, therefore, the judiciary was neither free nor independent of the executive. It was designed to serve the Colonial state and not the subjects and was therefore removed from the majority of the people. No African had been appointed to the formal judiciary by the time of independence. For the African population, the judiciary was part and parcel of the colonial order; it was neither humane nor impartial. Moreover, the duality of the court system meant that there was justice for white people in white courts and justice for the natives in native courts. The courts appeared partial towards power, wealth and influence and impatient with the poor and the illiterate. This was another of the enduring legacies of the colonial judiciary.28 Kenya therefore became independent with a judiciary that was far from satisfactory both in terms of commitment to democratic values and to its impartiality. Moreover, the judiciary espoused a highly positivistic philosophy of law that was neither compatible with the liberal legal order envisaged by the Independence Constitution nor consistent with the expectations of the people.29

28 Pfeiffer, " Notes on the Role of the Judiciary in the Constitutional System of East Africa Since Independence, p.28.
The Judiciary at Independence

As Kenya approached independence, the British government, the colonial government and the settlers all expressed great anxiety as to the future of the country. Both in the 1960 and 1962 constitutional conferences, issues relating to the judicial protection of human rights, the entrenchment of the basic rights in the Constitution and the impartiality and independence of the judiciary assumed great significance. A very paradoxical situation arose, which Ghai has described as follows:

"The Constitution, which during the colonial period has never been a determinant of power relationship (sic) suddenly becomes the centre of all controversies. ... There is tendency (sic) to view all political issues as problems for constitutional settlement."30

At the pre-independence constitutional talks, there was a broad consensus that the monolithic structure of colonial power had to be dismantled and reconstructed along the lines of a liberal democratic model under pinned by a written constitution.31 Consequently, the Independence Constitution provided for a weak form of government. There was a marked contrast between the autocratic administrative structure inherited at independence and the liberal political order envisaged by the new Constitution. While the entire colonial edifice was built on power, the new government was expected to function on the basis of new and fragile institutions and to be responsive to numerous checks and balances within the system.32 While the independence Constitution did not lack power altogether, it was radically different from the previous order. It introduced new political and constitutional values, which

30 Ghai, "Constitutions and the Political Order in East Africa", p.403.
32 Ghai, "Constitutions and the Political Order in East Africa", pp.412-413.
had never been part of the colonial order. These values were essentially, liberal, democratic and western. One such value was the autonomy, impartiality and independence of the Judiciary.

At independence, therefore, the Constitution provided for the separation of powers and for a very central and special role for the judiciary. The governor-general on the advice of the Prime Minister appointed the Chief Justice. The governor-general acting on the advice of the Judicial Service Commission appointed all puisne judges. Judicial tenure was guaranteed. A Judge could only be removed from office after investigations by an independent tribunal comprising judges from the commonwealth. Questions involving the interpretation of the constitutional document could be referred to the Supreme Court. Appeals from the East African Court of Appeal lay to the Privy Council in London. There was a justiciable Bill of Rights guaranteeing a wide range of human rights whose protection was entrusted to the Supreme Court.

The Independence Constitution therefore created an entirely new judicial order and sought to foster a new judicial culture. The difficulty lay in the fact that this was expected to be achieved with the same old personnel and against the background of a wholesale adoption of colonial law and legal institutions.

THE POST INDEPENDENCE JUDICIARY AND THE INTERPRETATION OF THE CONSTITUTION

Several factors characterised the post-independence constitutional-legal order. First, the KANU Government that took office in 1963 was most disgruntled about

33 McAuslan, "The Evolution of Public Law in East Africa in the 1960's", p.73.
34 Section 184 of the Independence Constitution.
the nature of the inherited Constitution and so between 1963-1969, undertook to amend it substantially.36 The immediate result of these constitutional amendments was to increase the powers of the executive and to decrease the powers and influence of other institutions. This was particularly so in the case of the judiciary. In the immediate post-independence period, parliament was a vibrant institution in which backbenchers routinely called upon the Government to account.37 The High Court, for its part, grappled with the enforcement of the Bill of Rights, with some reasonable success, especially as regards claims for compensation of expropriated property.38 But as the constitutional presidency was gradually replaced by the Imperial Presidency there was a concomitant decline in the capacity of parliament and the courts to keep the executive in check.39 In a very real sense, the courts operated as a wing of the Attorney General’s office. Initially, the Attorney General, in his presumed role as minister for justice had been responsible for the recruitment of judges under the British Overseas Development Assistance programme. The expatriate judges recruited under this scheme were essentially compliant careerists who did not wish to be embroiled in any of the political controversies that could affect the renewal of their contracts.40 It was not until 1994 that the “judicial service” was de-linked from the civil service, and even then merely for purposes of providing more competitive salaries.

Secondly, other than the unification of the court system to combine the regular courts and the native courts, which was done in 1964, no effort was made to restructure the inherited legal system either in terms of substantive law or procedure.

Given the oppressive nature of much of the public order legislation that had been intended to subjugate the African masses, there was a major incongruence between that legislation and the basic law.

Third, for many years and well into the 1980s the judiciary on the whole remained in the hands of an expatriate white community, as indeed, did the entire legal profession. The result was that there was continuity in colonial attitudes and practices. All the judges were schooled in the English tradition either as barristers or solicitors. Almost none of the judges had any exposure or experience in operating within a written constitution and they tended to treat the Constitution as just an ordinary statute. Equally significant was their commitment to the status quo. Finally, the lawyers themselves were, like their colleagues on the bench, ill suited to handle the concepts in the written constitution. In the early years, few cases were litigated on the Constitution, when this did happen, the level of advocacy and the commitment to constitutional values was lack-lustre. It was not until the mid 1980s that serious constitutional litigation began.

The Crisis in Constitutional Adjudication

The effort of the post-independence judiciary to adjudicate constitutional disputes during the period under review was largely eclectic. On the whole, the courts assumed a conservative, highly technical and inflexible attitude towards the Constitution. The courts eschewed judicial activism, choosing instead to interpret the Constitution restrictively in order to fit it within the existing body of public law.

---

Sometimes the Courts made an effort to show formal compliance with legal doctrine. At other times, the Courts did not care and were involved in cynical manipulation of the Constitution for political ends.\textsuperscript{44}

There are many ways in which the Judiciary, in abdicating its role as the defender of the Constitution, failed the constitutional expectations. In a bid to avoid constitutional controversies the judiciary devised several strategies. One is where it denied itself jurisdiction to hear the matter in question on the grounds that the matter was outside the ambit of judicial review. This was sometimes achieved by creating an artificial dichotomy between administrative and judicial functions or setting up the political question doctrine.\textsuperscript{45} An example is where the High Court of Kenya twice held that it was incapable of enforcing fundamental constitutional rights on the basis that section 84 of the Constitution did not provide a mechanism for enforcement.\textsuperscript{46} The second way, was where the court denied the applicant \textit{locus standii} on the basis that he was unable to establish sufficient nexus or interest with regard to the dispute in issue. This would usually be the case in numerous situations where citizens attempted to compel the Government to observe the law in matters of the land use, planning and environmental control.\textsuperscript{47} The third excuse was where the court would overlook and ignore binding principle and precedent in order to reach a conclusion that appeared politically convenient and expedient.\textsuperscript{48} The fourth way involved adopting a


\textsuperscript{47} See for example \textit{Wangari Maathai v Kenya Times Media Trust Limited}, HCCC 5505 of 1998.

\textsuperscript{48} See for example \textit{Kenneth Stanley Njindo Matiba v Daniel Arap Moi} Presidential election petition number 1 of 1993 in which the election court reversing decades of precedent held that an appeal lay to the court of appeal in an interlocutory matters arising from an election petition.
method of interpreting the Constitution that treated the Constitution like any other statute. The courts would prefer a narrow, technical and literal interpretation even where it violated the basic intention of the Constitution.49

The fifth way is where the courts went out of their way to intimidate litigants and counsel, dismissing whatever issues that had been raised as a waste of the courts time.50 In this way judges refused to allow any case that they deemed politically undesirable to go beyond the stage of preliminary objections and be heard on the merits.

Amendment in the Guise of Adjudication

The fundamental philosophy of the conservative tradition of constitutional amendment was best captured in 1969 by Sir Charles Newbold, formerly President of the East African Court of Appeals, when he stated:

"The Courts derive a considerable amount of their authority and perhaps, even more (important), the acceptance of their authority, from independence of the executive, from their disassociation from matters political. In a democracy the determination of matters political rests ultimately with the will of people through the ballot box. For that purpose the people elect the executive and the legislature and it is on these two branches that the primary responsibility rests. The third branch the judiciary is not elected and should not seek to interfere in a sphere, which is outside the true function of the judges. It is the function of the Courts to be conservative, so as to ensure that the rights of the individual are determined by the rule of law".51

49. For example the High court of Kenya in the case Stanley Njindo Matiba v Attorney General Misc. Civil Application Number 666 of 1990 ruled that an application under section 84 of the Constitution had to identify specifics as opposed to general provisions of the bill of rights which had been infringed.
This dichotomy between matters legal and matters political lies at the heart of the conservative constitutional jurisprudence. It is argued that political matters raise issues that can only be resolved by the political authorities and which are, therefore, non-justiciable and beyond the competence of the Courts. The upshot of this is that the courts defer to the judgement of the political authorities. This deference continued after the attainment of independence. For instance, in *R v El Mann*\(^52\) Kitili Mwendwa, Kenya's first African Chief Justice, unreservedly endorsed the application of this basically conservative creed in constitutional adjudication, by declaring that: “in one cardinal respect, we are satisfied that a Constitution is to be construed in the same way as any other legislative enactment”\(^53\). The case before the court involved a charge against the Appellant made under the *Exchange Control Act*\(^54\). EL Mann had been compelled to give certain information in an official declaration form, which information tended to incriminate him in respect of an offence under the said act. He argued in his defence, that his being compelled to provide the information had violated his rights under Section 77 of the Constitution protecting him from self-incrimination. The Court rejected that argument and held that the Appellant was only protected from self-incrimination at the trial itself and not during interrogation.

The Court's reading of the Constitution was flawed. First, as a matter of legal logic, the right against self-incrimination can only make sense if all persons who potentially can be prosecuted enjoy it. For those already being prosecuted, the benefit of the right may be lost. Second, the court appears to have taken the view, that an ordinary statute can abridge a fundamental constitutional right. The effect of

---

\(^{52}\) (1970) E A 420.

\(^{53}\) See also the case of *Charles Young Okany v Republic*. Criminal case 1189 of 1979 (unreported).

\(^{54}\) Cap 113 Laws Of Kenya.
this was to make the Constitution subject to other laws contrary to the express provisions of Section 3.

The decision in EI Mann’s case was even the more confounding, given that Chief-Judge Mwendwa was known to hold views contrary to those in the EL Mann decision. For example, in the case Okunda v Republic, Mwendwa argued that:

"The Constitution is the instrument, which brought into being the entire state and government machinery that exists today. The legislature, the executive and the judiciary owe their existence to the Constitution".

Before his appointment as Chief Justice, Mwendwa as Solicitor General had stated that:

"If constitutional Laws are to qualify as such, independent Courts of law must have the power to uphold them either by positive enforcement or by rendering ineffectual any breach of those laws as may be appropriate".

Mwendwa understood the proper theory of constitutional interpretation. He also understood the political context in which the courts operated. This context gave rise to a different type of theory, which was not to allow constitutional rights to get in the way of the government’s enforcement of law and order.

The involvement of the post-independence judiciary in subverting constitutional intent can be traced back to case of Ooko v Republic. The appellant, Patrick Paddy Ooko, had been detained in 1966 in the wake of the government’s crackdown on KPU members and sympathisers. The detention order was made by the Minister for Home Affairs under the Public Security (Detained and Restricted Persons) Regulations of 1966.

56 Ibid p 454.
58 HCCC 1159 of 1966 (unreported).
He sought a declaration that his detention was illegal on two grounds. First, that the person referred to as Patrick Ooko in the Detention Order was a different person and second, that Section 27 of the Constitution had not been complied with in terms of serving detention grounds on the Applicant within the stipulated period. Justice Rudd disposed of the first ground by holding that although the applicant had been mis-described there was no doubt as to who the detention order related to. As to the second ground the judge adjourned the matter for ten days to allow the Republic to supply "further and better particulars" of reasons for the detention. At the resumed hearing, upon ascertaining that particulars had been supplied to the applicant, the judge dismissed the Applicant's case holding that the Court had no jurisdiction to investigate the merits of the grounds of detention themselves. He opined that:

"The ground stated if true could legally justify (Ooko's) detention. The truth of these grounds and the question of the necessity or otherwise of his continued detention are (not matters of) this court. Since I consider that the ground stated are capable of justifying the detention I have no power to order Mr. Ookos release". 59

The court's reasoning in the Ooko case reveals inconsistencies. If the Constitution gave the executive power to detain persons for specified reasons and goals, then those reasons ought to be justiciable matters, to determine whether the law was complied with. The court appears to have taken the view that the reasons why a person has been detained are "political" and it is not for the court to inquire as to their validity or adequacy. This reasoning leads to the conclusion that the court should not review the substantive basis for the exercise of constitutional powers once it is satisfied that there has been formal adherence to the constitutional provisions.

---

59. Ibid p. 4.
This line of reasoning was institutionalised in numerous cases that later arose on the same question of Judicial review of detention orders.\textsuperscript{60} In a very extensively argued case, \textit{R v Commissioner of Prisons, ex parte Kamonji Wachira, Edward Akong Oyugi and George Moseti Anyona}, involving the detention of University lecturers and opposition politicians after the 1982 coup attempt, the High Court reaffirmed its refusal to look into the validity of the detention orders.\textsuperscript{61} In the case of \textit{Raila Odinga v Attorney General} the Court held that if at any point the Applicant, even informally, acknowledged the sufficiency of the reasons on which the detention was based, he was thereafter precluded from requiring further particulars and hence relying on those grounds to invalidate his detention.\textsuperscript{62} Although Chief Justice Madan, who heard the matter, cited with approval the West Indies case of \textit{Herbert v Phillips and Sealey}\textsuperscript{63} as authority for the proposition that the grounds of detention must be supplied to enable the detainee defend himself before the Detainees Tribunal, he nonetheless went on to hold that the sufficiency or otherwise of the grounds of detention is a relative matter and need not invalidate the detention.

By denying themselves jurisdiction to review the substantive basis of detention orders, the Kenyan courts rendered the constitutional protections meaningless. But more significantly, they extended to the executive absolute power in matters of personal freedom, meaning that the executive could detain any person for any reason or no reason and the courts would provide not provide a remedy.

\textsuperscript{61} HCCC 60 of 1984 (Unreported).
\textsuperscript{62} Misc. application 104 of 1986.
\textsuperscript{63} (1967) 10 West Indian Rep. 435.
The other way through which the courts declined to offer relief for alleged constitutional violations was by claiming that the applicant lacked the *locus standi* to invoke the jurisdiction of the court. The failure of the courts to exercise judicial review was not limited to detention cases; it extended to criminal as well as civil cases. *Anarita Karimi Njeru v Attorney General* was the first case that raised the issue of the judicial protection of constitutional rights in a non-detention case.\textsuperscript{64} The facts of this case were as follows: The applicant was charged with a criminal offence in a resident magistrate’s court. She applied in the course of the trial for an adjournment in order to enable her to call a defence witness she considered crucial for her case. The magistrate refused her application. She was entitled at that stage to make a reference to the High Court complaining about the violation of her fundamental rights, but she did not. She was convicted. She did not appeal within the stipulated time. She then applied for leave to file her appeal out of time, which was denied. She brought an application under Section 84(1) of the Constitution of Kenya seeking redress for what she claimed was the violation of her fundamental rights to reasonable facilities to conduct her defence before the trial court.

The High Court (Trevelyan and Hancox JJ) dismissed the application holding *inter alia* that by filing an application to appeal out of time the applicant had availed to herself other action and the court should not be asked to adjudicate on the matter twice. The court stated that one could apply for redress under Section 84 only where she has not utilised any other action available to her. Section 84(1) states that the right of any person is “without prejudice to any other action with respect to the same matter which is lawfully available” The effect of the courts interpretation was to render

\textsuperscript{64} (1979) K L R 154.
ineffectual the right of access to the constitutional court thereby undermining the enforcement of the entire Bill of Rights.

The second one was a civil case. The case of Mwangi Stephen Mureithi v A G called upon the judiciary to resolve the internal inconsistencies created within the Constitution by various amendments. The applicant, a senior police officer was retired from the force and purportedly transferred as a manager to run a pig factory. He filed suit seeking a declaration that his letter of retirement was bad in law and therefore his retirement was null and void. He contended that Section 25 of the Constitution which provided that all public servants held office at the pleasure of the president did not apply to him and he could not be dismissed by the president or any person purporting to act on behalf of the president because he was subject only to the jurisdiction of the Public Service Commission set up by Section 108 of the Constitution. He further argued that the power of the President to dismiss public servants under Section 25 could not have been intended to override the constitutional protection of public office. Reference was made to the protection of the tenure of Judges, the Attorney General and the Controller and Auditor General. Justice Hancox, who was later to be appointed Chief Justice, held that the president had the power under Section 25 to dismiss a police officer or any other officer at pleasure, and the provision of Section 108 was additional to, and not in derogation thereof was not a restriction on this power. Muriithi had therefore no basis for suing.

The case had proceeded on the basis that Sections 25 and 108 of the Constitution were in conflict. But a serious analysis reveals that in essence there was no conflict that could not be resolved by sound interpretation. The plain language of

65 HCCC 1170 of 1981 (Unreported).
Section 25 is "Save in so far as maybe otherwise provided by this constitution". On the other hand, Section 108 expressly vested the power to appoint and discipline officers of the Kenya Police above the rank of Assistant Inspector in the Public Service Commission. The correct interpretation would therefore be that Section 25 was intended to deal with those Public Officers whose tenure of office was not otherwise regulated by any other constitutional Provision. That is why Section 25 cannot be deemed to affect the tenure of judges or the Attorney General. The purpose of the Public Service Commission was to insulate the Public Service from political pressure. The Constitution even as amended could not have intend to provide the Presidency with a blanket power over all public servants. By reading Section 25 as providing a blanket power to the presidency to remove any public officer, the court was rewriting the Constitution and nullifying the protection of the public service accorded by section 108.

The judiciary also failed to give the Bill of rights its proper interpretation. While its task was made complex by the co-existence of the libertarian Constitution with the repressive regime of public law inherited from the colonial state, there was nonetheless a problem of principle. This was particularly evident in the various sedition cases that were prosecuted in the 1980s and 1990s. The law of sedition provided a fertile ground for the contest between the claims of liberty and the claims of public order. In these cases, the judiciary was called upon to reconcile penal code provisions that criminalised political dissent with constitutional provisions that guaranteed political freedoms. Consistent with its emerging theory of constitutional

interpretation, the judiciary chose to interpret the Constitution subject to sedition law and not vice versa.

The effect was to amend the Constitution in a most fundamental sense and in so doing made the enjoyment of political freedoms dependent on the whims of state authorities. The real question in sedition law at this time was the extent to which the freedoms of speech, assembly and association guaranteed by Sections 79 and 80 of the Constitution could be abridged by Section 57 of the penal code. In the interpretation of these provisions perhaps the case that best illustrates the issue is that of David Onyango Oloo v Republic. Oloo was a University of Nairobi student who was charged with sedition allegedly for writing, publishing and possessing a seditious publication, "A Plea to Comrades". After a number of defence lawyers had withdrawn from the case after failing to persuade him to plead guilty, Oloo conducted his own defence. In his submissions he sought to know from the Prosecution and the Court how his unfinished paper analysing contemporary social issues could promote disaffection, ill-will or lead to the illegal overthrow of the Government. He further sought to know the legal definition of Sedition and in particular the "demarcation point" where somebody says: "here is where constructive criticism stops and this is where sedition begins". The accused was jailed for six years for sedition. The appellate Court rejected his appeal on conviction. The Court took the view that the issues raised in his paper, while definitely topical and relevant were raised in a manner that amounted to sedition and therefore not protected by the constitutional guarantees of freedom of expression.

---

68. Ibid p.147.
70. Ibid. p.1.
Another category of cases that illustrates this same problem relates to the judicial review of administrative action that raises constitutional issues. In *Angaha v Registrar of Trade Unions*, Angaha and others appealed against the decision of the Registrar of Trade Unions, refusing to register their proposed trade union, the Kenya Institutional workers Union following an objection by the Domestic and Hotel workers Union. The refusal was based on the ground that the interests sought to be protected by the proposed union were already substantially taken care of by existing trade unions. In the High Court the issue was raised as to whether the Registrars decision did not encroach on the Applicant's freedom of association as enshrined in Section 80 of the Constitution. Justice Mathew Muli, answered the question in the negative. In his view:

"Under sec.80 of the constitution, freedom to belong to a trade union or association is protected. There is the trade Union Act which makes provision for registration or refusal on the ground that other trade unions are sufficiently representative of the whole or a substantial proportion of the interests in respect of which registration of a trade union is sought. The trade union act is not inconsistent with or in contravention of the constitution. It follows therefore that the right to be registered as a trade union is a contingent right acquired upon fulfilment of the requirements of the provisions of the Trade Union Act. The registrar is charged with the duty to satisfy himself that the policy laid down under the constitution and safeguarded under the trade Unions act is not infringed".

The Courts interpretation implied that the provisions of an ordinary statute or the bureaucratic considerations of an official in the Registrar's office could abridge the constitutional right of association. Further, the court appears to have suggested that in the evaluation of the desirability of registering a new union the burden is on the Applicants to bring themselves within the statutory exceptions and that the

---

72. Ibid, p.299.
constitutional assumption in favour of free association does not weigh in their favour to mitigate the rigor of statute. The effect of this judicial view is to it rewrites constitutional provisions in the guise of interpreting them.

A final illustration of how seriously the judiciary was rewriting the Constitution in the guise of interpreting it is provided by the so-called "passport cases". The most illustrative of these cases was that of an Application by Mwau. John Mwau's passport had been impounded by the Immigration department for unspecified reasons. He sought an order of mandamus directed to the Principal Immigration Officer compelling him to return his passport. The applicant contended that Section 81 of the Constitution, which guaranteed his freedom of movement, had been infringed by the government's retention of his passport. It was argued for the government that the passport was a privilege and not a right and that in any event it belonged to the government which could withdraw it at anytime if it so wished. The Court made several interesting conclusions of law. First, it held that whereas Section 81 of the constitution recognised the right of a citizen to leave and to return to Kenya this was dependent on having the necessary travel documents. Second, that the right to leave and return to Kenya freely was not an absolute one but was conditional upon the person having a passport upon having satisfied the relevant officials that he was a fit and proper to hold one. Finally, the Court further held that, in any event, the immigration officials had no legal duty to issue a passport and therefore mandamus could not lie against them. In the Court's reasoning every citizen has a constitutional right to travel that is conditional upon his having a passport, which passport may be

issued or denied, and once issued may be impounded by the government and if that happened the Courts would not inquire as to reasons for the action nor provide any remedy.

This judicial deference to the executive was extended to cover cases involving the rights of an accused person to be represented by counsel of his choice. In *Mirugi Kariuki & another v Attorney General*,75 the Plaintiff, who was charged with treasonable felony and conspiracy, had instructed his advocate in Kenya to brief a British Queen's Counsel, as a senior, as required by the Advocates act, the local advocate sought the consent of the Attorney General. The Attorney General rejected the application and Mirugi Kariuki filed an application for judicial review of the Attorney Generals decision. Justice Dugdale who heard the matter, refused to grant leave for the applicant to file for the writs of *mandamus* and *certiori*. In his opinion the statute gave the Attorney General absolute discretion and the constitutional right of the plaintiff to be represented by an advocate of his choice did not in any way affect that discretion. Similarly, in *Kenneth Stanley Njindo Matiba v Attorney General*,76 the court declined to quash the decision of the Attorney General denying the applicant the right to bring in a Queen's Counsel to conduct his election petition. In yet another case involving Kenneth Matiba, the court placed the burden of proving that alleged constitutional violations were expressly prohibited, on the complainant. In *Kenneth Stanley Njindo Matiba v Attorney General*,77 Matiba had been detained under the *Preservation of Public Security Act*78 and he sought to challenge the legality

75 High Court Misc. Civic Case number 88 of 1991 (unreported). Leave to apply for judicial review was however granted by the court of appeal in civil appeal number 70 of 1991.
77 High Court Civil Application number 666 of 1991.
78 Cap 57 Laws of Kenya.
of his detention. The detaining authorities refused to allow a commissioner of oaths access to him for purposes of swearing an affidavit in support of this application. Matiba then moved the court under Section 84 of the Constitution to compel the Government to allow access to him by a commissioner of oaths. The court proceeded to dismiss his claim on the basis that he had been unable to identify the specific right in the bill of rights that had been violated. The effect of the court’s interpretation of Section 84 was to deny access to the courts rendering the bill of rights ineffectual.79

In Mwau’s, Kariuki’s and Matiba’s cases, the Courts were faced with two apparently conflicting but important values. In Mwau’s case the conflict was between the right of the state to regulate immigration and the right of the individual to travel and to have full protection of the law, while in Kariuki’s and Matiba’s cases, the conflict was between the need of the state to regulate the legal profession and access to restricted persons, and the right of an accused or detained person to have a choice of counsel. In ruling the way they did, the Courts were allowing further abridgement of individual rights beyond the limitations already permitted by law by sanctioning bureaucratic and political ill-will against individuals. This had the effect of amending the Bill of Rights.

The judicial whittling away at the Bill of Rights was evident in other cases. The case of Koigi wa Wamwere v AG80 raised and argued the scope of the protection afforded by the courts to persons claiming that their constitutional rights had been violated and was heard in full without preliminary objections from the Government. Wamwere was a long time political dissident, who was charged with the offence of

80. Miscellaneous Application Number 574 of 1990 (Unreported).
treaason contrary to Section 40 of the penal code. While the trial was pending, he filed a constitutional reference under Section 84 of the Constitution in which he alleged that his constitutional rights had been violated by the police, the prison authorities and the Attorney-General and that, in the circumstances, his trial should be terminated. He alleged that his constitutional right to a fair trial had been prejudiced by the fact that he was abducted from Uganda, was physically and mentally tortured by the police and was the subject matter of widely publicised condemnations by politicians.

Justices Dugdale, Mbaluto and Mango dismissed Wamwere’s claim that he had been illegally arrested. The court then went on to suggest that having perused the file of the criminal case pending in the lower court, there was nothing in the file to suggest that the applicant’s contentions were true. This, in spite of the fact that the state never contested the allegation of abduction by affidavit evidence and indeed the court conceded the point that there was no contravening evidence. The court condemned counsel for bringing the application in the first place. As far as the court was concerned, none of the issues raised by the application was of any constitutional significance. The court stated:

"the question of the applicants alleged kidnapping from a neighbouring country or the alleged failure to follow normal extradition procedures are not covered by any specific provisions of the constitution. Similarly the matters complained of in prayer number 3 i.e. the public condemnation and denunciation of the applicant can hardly be said to be in any way connected with the requirements of Section 77(2)(a) under which an accused person is to be presumed innocent until he is proved guilty or has pleaded guilty. The same points can be made regarding the complaints in prayers number 4 and 5 (access to his lawyer in prison and right to be represented by Queens Counsel), which if anything raise administrative issues which should have been dealt with as such. In this respect we must observe that there is nothing constitutional about the Attorney General’s alleged failure and/or refusal to exercise his powers..."
under Section 11 of the Advocates act; if any issues arises therefrom it would be an administrative law issue rather that a constitutional issue.\textsuperscript{81}

The court was impressed by the dichotomy between administrative and constitutional issues and was furious with counsel for what it alleged was his misapprehension of the Constitution. The anger appeared to be because Counsel had forced the Court to address the issue of constitutional rights. In \textit{Gitobu Imanyara v Attorney General},\textsuperscript{82} Imanyara a lawyer and publisher of the \textit{Nairobi Law Monthly} filed an application challenging the constitutionality of the 1982 amendment that converted Kenya into a \textit{dejure} one party state. Justice Dugdale held that Section 80 of the Constitution did not guarantee the right to form or join any political party or association. He was of the view that there was no question of the amendment having been unconstitutional because:

Kenya is a sovereign Republic; parliament may alter or amend the constitution at any time and in any manner, subject to its own procedural practices as set out in Section 47 of the constitution. Parliament may even alter or amend the said procedural practices.\textsuperscript{83}

Neither was there, in his opinion, any evidence that Section 80 of the Constitution in protecting the freedom of association intended to protect the right to belong to political parties or associations. The courts reasoning effectively rendered inoperative the provisions of the Constitution relating to freedom of association.

\textsuperscript{81} Ibid. pp.4-5.
\textsuperscript{82} Miscellaneous civil appeal No 7 of 1991. (unreported).
\textsuperscript{83} Miscellaneous civil appeal No.7 of 1991.
The same issue arose in the case of Salim Ndamwe & Others v AG & Registrar of Societies. Ndamwe and other pro multiparty activists brought an application under Section 84 of the Constitution, as interim officials of an organisation that the Registrar of Societies had refused to register on the basis that it was for all intents and purposes a political party. The applicants argued that parliament did not, by enacting Section 2A, intend to make politics the preserve of KANU, as that would have violated the constitutional protection of freedom of association and assembly. Justice Dugdale was not persuaded. He stated that:

"Section 2A of the Constitution is a clear statement of the intention of the legislature. It refers to a political party. Section 80 refers to freedom of assembly and Association. Nowhere in the Section is the expression political party used or referred to in any way. Nor does the word political appear. There is no conflict between the two Sections".

The effect of this line of cases was to abridge substantially fundamental rights in a manner that amounted to an amendment of the Constitution.

Amendment by Lack of Enforcement

In a number of cases in the late 1980s and 90s, the Courts went out of their way to deny themselves jurisdiction to hear constitutional matters, or denied the plaintiff locus standii to raise the matters desired, or having conceded both jurisdiction and the plaintiffs locus standii, refused to follow clear constitutional doctrine or binding precedent. It cannot have been coincidental that most of these cases coincided with an exposition of constitutional litigation challenging government or ruling party activities. Neither can it have been coincidental that invariably, in most of these cases the substantive issues never went for trial as the suits were usually disposed of after the

84. HCCC number 253 of 1991.
defendants' "preliminary objections" were upheld by the court.

The first significant case in this tradition, was that of James Keffa Wagara v Gitahi Ngaruro & Another.\textsuperscript{85} This case was the first in a line of cases involving the interpretation of the issue of whether the High Court could offer redress to a member of the sole political party, KANU, who alleged that the nomination process of the Party had not been free and fair. The background to this problem was that some time in 1988 KANU had adopted que-voting procedures for its nomination process. This process eliminated the secret ballot. It also made the president of the party, the final arbiter of the fairness or otherwise of the nomination process but failed to provide any clear machinery for resolving disputes. In this particular case, the plaintiffs argued that they were not allowed to witness the counting of the votes as required by equity and fairness and therefore had been prejudiced. The court entertained a preliminary objection raised by counsel for the defendants relating to the Court's jurisdiction to hear the matter. Counsel for the applicants argued that the matter complained of was entirely an internal matter, regulated by the KANU nomination rules as KANU was in the nature of a domestic body which was self-regulating and therefore could not be the subject of the Court's review. Counsel for the applicants further argued that KANU was not a mere club but the sole political party in the country and hence the "internal affairs rule" could not apply. Second that the Constitution of the party was subject to the Constitution of the Republic and could not take away freedoms granted by the latter.

\textsuperscript{85} HCCC 724 of 1988 (unreported).
In upholding the preliminary objection and dismissing the applicants claim, Justice Akiwumi, relied on the East African Court of Appeal decision in Patel’s case which had established the “hands off” approach to club affairs. He stated:

“...If the rules and regulations are not illegal or repugnant to justice and morality and no property rights are involved this Court would be most reluctant to interfere with the decision of the office bearers of KANU taken in the discharge of their powers derived from the Constitution of KANU or the Rules, unless bad-faith is proved against them. Decisions arrived at honestly and fairly or even mistakenly will not be disturbed and I am prepared to go further and say that in appropriate cases a Court would give effect to them”.

The same issues of the appropriate scope of judicial review of the activities of KANU arose again in the case of Mathew Ondenyo Nyaribari v David Onyancha & another. The same preliminary objection was taken up and Justice Tanui upheld the objection. In this particular case, unlike in the previous one, Nyaribari specifically canvassed the constitutional issue. He contended that the unlimited civil and criminal jurisdiction conferred upon the High Court by the Constitution could not be abridged other than by an express constitutional provision and that, in any event the High Court maintained a supervisory role over all judicial, quasi-judicial and other offices concerned with the administration of law and that this doctrine of judicial review was fundamental to the constitutional process. The Court rejected the argument that it had a general supervisory jurisdiction over all matters of constitutional significance which could not and had not been ousted. The Court in its reasoning was of the view that it did not have exclusive jurisdiction because the constitution envisaged the formation of other tribunals and therefore Section 60 of the Constitution could not

---

86. (1975) EA 301.
87. HCCC Number 1528 of 1988 (unreported).
have been intended to grant the High Court exclusive jurisdiction. This point had never been in issue; indeed, when the court raised it, the plaintiff had conceded it. What the Court refused to grasp was the seemingly basic argument, that the High Court retained constitutional jurisdiction to review the acts of all subordinate tribunals and persons acting in a manner that affected the constitutional rights of others and that jurisdiction could not be ousted by the internal regulations of those that the court was constitutionally mandated to supervise.

These cases raised a number of significant legal issues. First, they departed from established legal principle and ignored binding precedent in order to arrive at the decisions that they did. In *Miller v Miller* the Court of Appeal, a few months earlier, had categorically stated that the unlimited and original jurisdiction of the High Court could only be ousted by an express provision in the Constitution. Second, the decisions proceeded in respect of a number of issues on the basis of assumptions that were totally untenable. The Court equated a mass political party, the sole avenue of political participation in the entire country, to a mere social club. The Court ignored fundamental constitutional principles on the rights of individuals to participate unhindered in the political process.

The issue of substance before the court was whether the constitutional right to vote and to participate in the political process could be abridged by a political party that enjoyed a monopoly of political power through its own internal rules and, if not, whether the court would provide relief to an injured party. To this issue, the Courts' answer was that it would not interfere in an internal matter of an organisation no matter the issues involved. The refusal by the courts to address the larger questions

---

raised by the cases adversely affected clear constitutional provisions. The Courts were in effect saying that the supervision of the sanctity of the electoral process lay outside their jurisdiction.

In **Kamau Kuria v Attorney General**, the Court’s denial of its own jurisdiction reached new heights. In this case, Counsel for the Plaintiff sought to have a Constitutional Court set up under Section 84 of the Constitution to hear and determine the issue of whether the impounding Kamau Kuria’s passport abridged his right to travel in the manner protected by the Constitution.

The operative part of Section 84 of the Constitution provides as follows:

The Chief Justice may make rules with respect to the practice and procedure of the High Court in relation to the jurisdiction and powers conferred on it by or under this Section (including rules with respect to the time within which applications may be brought and references shall be made to the High Court).

Chief Justice Miller held that Section 84 of the Constitution was inoperative as no rules had been made thereunder as anticipated by the Constitution and as such jurisdiction to protect fundamental rights could not be invoked through the Section. He thereby set a precedent for this interpretation of section 84 which could be emulated by other judges. Indeed, Justice Dugdale in the case of **Maina Mbacha v Attorney General** cited Miller’s decision as authority to reach the same conclusion. The applicants in this case sought to have a Resident Magistrate’s Court restrained by way of prohibition from continuing to hear a case against them because, it was alleged, that it would infringe their fundamental rights as set out under Sections 72, 77,

---

90. Section 84, Constitution of Kenya.
79 and 82 of the Constitution. Justice Dugdale did not entertain any arguments as to
jurisdiction or any other issue. He read a ruling during the mention of the case, citing
Miller in the Kamau Kuria case, and similarly holding that Section 84 of the Constitution
was inoperative for want of specific rules and dismissed the application. He also
dimissed attempts to have this "ruling" reviewed.92

The two rulings in Kamau Kuria and Maina Mbacha are remarkable for a
number of reasons. First, because of their rejection of binding precedent and legal
history. In both cases the Courts must have been aware of close to twenty years of
litigation centred on Section 84 of the Constitution.93 This is the more surprising,
because in both cases the court choose to ignore the list of authorities laid before
them Court before commencement of arguments.

Chief Justice Miller had sat in the Court of Appeal when that Court decided in
the case of Anarita Karimi (2) v Republic that Section 84 of the Constitution vested
original jurisdiction in the High Court.94 He thus ignored his own binding precedent.
Second, the question of whether rules had or had not been made under Section 84 of
the Constitution did not arise at all. The High Court had itself settled the issue. Millers'
predecessor as Chief Justice, Justice Madan had in the case of Raila Odinga v
Attorney-General and Detainees Review Tribunal held that the failure of a rule making
authority to make rules to enforce legal rights does not defeat those rights.95 Third, it
was the Chief justices duty to make rules under Section 84 and for a Chief Justice to
allege that constitutional rights were not justiciable because he had made no rules as
required by the Constitution was untenable.

94. (1979) KLR 154.
95. (1979) CLR 164.
Over time, the Court appears to have gotten confused as to how it wished to rationalise its denial of jurisdiction basis. In Stanley Njindo Matiba v The Attorney General,\(^{96}\) the High court purported to rely on the judgement in Anarita Karimi Njeru as authority for the proposition that the court only has jurisdiction under Section 84 of the constitution only where the applicant is able to show that a specific provision of the of the bill of rights had been violated. It ignored the precedent set by Chief Justice Madan in Stanley Munga Githunguri v Attorney General,\(^{97}\) where he held that case the Attorney General's right to prosecute a citizen eight years after representations were made to him that to the charges had been dropped, was held to have been in violation of the applicants constitutional rights to the full protection of the law.

In the election petition between James Aggrey Orengo v Daniel Toroitich Arap Moi\(^{98}\) an important constitutional issue came up for determination. Orengo, an opposition member of Parliament contended that the Moi who had been declared winner of the 1992 presidential elections by the Electoral Commission of Kenya could not have been validly elected as he had already served two terms as President and a further term was prohibited by Section 9(2) of the Constitution. The amendment of the Constitution in 1992 had a new provision in Section 9 which provided that "no person shall be elected to hold office as President for more than two terms".\(^{99}\) This clause had been drafted in an ambivalent manner in that no exemption was provided for the serving president. At the hearing of the case, it was common ground that Moi had been elected president in 1979, 1983 and 1988 and had therefore served for more

\(^{96}\) Misc. Civil Application number 666 of 1991.


\(^{98}\) Election Petition case number 8 of 1993.

than two terms. The real question for determination by the Court was therefore whether the amendment was intended to be retrospective or prospective.

In a lengthy judgement, the court arrived at the conclusion that the application of the controversial clause was prospective not retroactive. The court argued that had parliament intended the Section to apply retroactively it would have said so. In reaching that decision, the court ignored the intent of parliament to limit any person’s presidential term and eliminate the possibility that a president could hold office for more than two five year terms. It betrayed the court’s inclination to ignore the basic rules of statutory interpretation in order to achieve a politically predetermined result. The Court’s reasoning opens up a more serious and problematic possibility - that a person who has served as president for two terms can stand again after resting for one term. The court effectively was amending the Constitution.

Later, the Court was called upon to determine a number of constitutional issues relating to the powers of the Presidency. In Sam Karuga Wandai v Daniel Arap Moi\textsuperscript{100} the case arose out of the following facts. After the 1997 elections the President had failed to appoint a Vice-president. He had also proceeded to create 27 ministries and appoint ministers to the same. The applicant argued that the failure to appoint a vice president was a serious Constitutional neglect of duty and rendered the cabinet incomplete as a vice-president was expressly required by Section 17 of the Constitution. He also argued that the ministries as constituted having not been sanctioned by parliament as mandated by Section 16 of the constitution were illegal. An application was made by the respondent to strike out the motion on the grounds that by virtue of Section 14 of the Constitution he enjoyed immunity from all civil

\textsuperscript{100}. Misc. Application 140 of 1998.
proceedings. Relying on the decision in Jean Njeri Kamau and Another v The Electoral Commission and Daniel Arap Moi\textsuperscript{101} the court held that it had no jurisdiction to summon the president to court other than in an election petition questioning his election.

In both cases the court was wrong. The court failed to make a distinction between the immunity of suit of the president in civil and criminal matters which is envisaged by Section 14 and constitutional actions to compel his performance of his constitutional duties as president. The court was endorsing the notion of the President being above the law. The notion of the President being above law allows the president to appoint judges from persons not qualified, to refuse to declare elections after the term of parliament is over or refuse to leave office himself without any action being brought against him. By reading into the Constitution these broad immunities the court was amending the Constitution.

CONCLUSION

The purported interpretation of the constitution revealed in the above-cited cases has been damaging to the evolution of a coherent and principled judicial interpretation of the Constitution. To the extent to which those decisions can and are cited, as authority for what the Constitution in Kenya means, they are in effect amendments to the Constitution.

The effect of these interpretations of the constitution has been to undermine the claim of the Constitution to be the fundamental law, of the law standing above all

\textsuperscript{101} Misc. Application number 193 of 1998. In this case the Applicants sought to question the presidents nomination of women into the parliament under the Constitution of Kenya (Amendment) Act, number 7 of 1997.
laws, institutions and individuals; to expand the scope of executive power beyond the scope anticipated by the Constitution, to render the Presidency beyond the constitutional supervision of either parliament or the Judiciary; to render the central role of the judiciary as the impartial arbiter of constitutional interpretation ineffectual; to undermine the enjoyment of human rights by making them conditional upon the whims of state bureaucrats; and to compromise the functioning of constitutional government in Kenya by rendering the rule of law ineffectual in the absence of principled constitutional adjudication.

Together with the amendments undertaken by parliament, the virtual effect has been to radically alter the Constitution of Kenya and make the exercise of constitutionalism virtually impossible.
INTRODUCTION

The Constitutional amendments discussed in this study have had very profound effects on the practice of constitutionalism in Kenya, precipitating a crisis of confidence in the Constitution as the fundamental law and casting doubts on the appropriateness of the Constitutional amendment process as the basis of establishing autothony in constitutional government. This Chapter summarises the lessons to be drawn from this study.

THE PROBLEM OF CONSTITUTIONAL CHANGE IN KENYA

This study has attempted to explore four dimensions of the problem of constitutional change in Kenya. First, was to understand why, how and with what consequences the Constitution of Kenya was repeatedly amended during between 1964 and 1997 and the effects of those amendments on the structure, values, internal consistency and coherence of the constitution. The second was to understand the impact of the amendment process on the legitimacy of the Constitutional order or how the amendments have affected the practice of constitutionalism and the observance of the rule of law. Third, was to establish the role and influence of the judiciary on the amendment process and the practice of constitutionalism in Kenya. Fourth, was to understand the linkage between constitutional change and the political process.

The Dynamics of Constitutional Change

The Independence Constitution was shaped by various forces that rendered it inherently unstable and susceptible to political manipulation. Indeed these forces
created the impetus for its amendment. These forces were identified as: the continuing influence of colonial law and institutions, the underdevelopment of African politics, the complex nature of the Constitutions itself, the negative attitude of the power elite towards the Constitution and the challenge of the practice of constitutionalism in an emergent state.

The Legacy of Colonial Law

The Colonial state and law had been geared towards the subjugation and domination of the colonised people. Both were buttressed by a tradition of authoritarianism in public administration, which entailed the general use of law as a tool for domination and control. The state had been both a physical and ideological imposition on the colonised people. It had drained them of all sovereignty and monopolised all power within society. It was autocratic, authoritarian and undemocratic. It was largely characterised by significant intervention in almost all spheres of social life, dominating and subjecting the colonised people to its hegemony. There was very little participation by, or accountability to, the colonised people. Moreover, it was the dominant economic enterprise and the major employer of all skilled and professional people. Those highly placed within it, had comparatively high incomes, the potential of access to its vast resources and could use its bureaucracy and highly coercive machinery to fight political opponents. These attributes were preserved intact and continued to define the essential character of the post-independence state.

---

Colonial law and legal institutions in turn reflected the authoritarian character of the colonial state and its autonomy from the people it governed. Colonial law essentially served to dominate and control the colonised people. The judicial system was law and order oriented and showed little regard for the rights of the colonised people. Not surprisingly, until the end of colonial rule, the state and law were viewed as both alien and oppressive. To facilitate its operations, a labyrinthine bureaucracy and highly coercive machinery were established. These were preserved intact and were bequeathed to the post-colonial state where they continued to define the character of the new legal order. The wholesale acceptance of colonial institutions and laws by the Independence Constitution did little to change the sense of alienation by the majority of the people. Indeed, this became a source of tremendous disharmony within the legal order.

Historically, the Executive as personified by the Governor had dominated the colonial constitutional and political order. Initially, legislative, executive and judicial powers were all vested in him. Although in later years there was increasingly some minor separation of powers, in practice the executive was supreme over both the legislature and the judiciary, and was not answerable to them. Even in peacetime, the Governor had operated a quasi-military administration, and as the emergency period demonstrated later, by simply invoking emergency regulations, he could suspend the normal constitutional process and assume wide discretionary powers. This domination of other organs of government by the executive made rule by decree a constitutional

possibility. The limit of executive power by the independence Constitution did little to alter this reality. The Colonial legislature was dominated by civil servants and was at best a rubber stamp for the Governor's decisions. In theory, the Governor was answerable to the colonial office. The Colonial Office, manned largely by civil servants, could legislate directly for the colony through orders in council or other prerogative forms. The Colonial Office itself was scarcely responsible to anyone in the exercise of its legislative or executive supremacy in the colony. The British parliament was content to leave the colony to the civil servants manning the Colonial Office. On the other hand the Colonial judiciary was neither free nor independent of the executive. It was designed to serve the Colonial State and not the subjects, and was therefore removed from the majority of the people. The dominant judicial philosophy was in favour of supporting governmental action and there was little experience with defending individual rights. The enduring legacy of the colonial judiciary was therefore one of compliance.

At independence, the colonial experience cast a large shadow over the new Constitution. In fact, the political, legal and institutional legacy of the colonial state was woven into the new constitutional order. Similarly, the nature of colonial politics had been such that its influence was long lasting. The Colonial settlers in particular had played a dominant role in the shaping of events in Kenya. Whatever their contribution to economic growth and the creation of an efficient, large and well-qualified administration; (as to which points there are two views) the truth is that, the presence of the settlers exacerbated politics; forcing it to develop along racial lines. Moreover, due to their presence politics developed a class society, and helped to maintain the

7. Ghai, "Constitutions and the Political Order in East Africa", p.403.
authoritarian tendencies of the colonial administration that continued to dog the Constitutional process.⁹

**Political Struggle and Constitutional Change**

One of the most enduring legacies of colonial rule in Kenya was the fusion of constitutional change and political struggle. In this sense, the political history of Kenya has been the history of constitutional struggles between the various races and ethnic groups for power and influence. Colonial politics had been characterised by the dominance of the expatriate races and the exclusion of the Africans. The colonial administration had always been hostile to African politics, which were perceived as subversive of the colonial order. This was part of deliberate colonial policy, denying the colonised people of any meaningful participation in the political affairs of their countries and relegating them to the status of lower class citizens. This hostility towards African politics was manifested in the rigid enforcement of the policy of native reserves, which segregated communities within their own tribal ghettos and made it impossible to organise African politics on any other basis other than parochial ethnic lines. Kenya, like most colonial societies, came to independence with a relatively backward political culture in which the leadership had had very little experience in national governance.

Nation-wide African political activity was only permitted in the immediate pre-independence period. The whole idea of organising and managing political parties on a national scale was therefore novel to the new African political leadership. For this reason, the so-called political parties that emerged prior to independence found it almost impossible to translate themselves into viable political institutions leave alone vehicles for democratic governance. At best, they remained loose ethnic-based coalitions that revolved around personalities rather than issues. They lacked any serious

---

ideological orientation or any long-term commitment to any clear policies or goals. At worst, they were vehicles for the realisation of the parochial political ambitions of the emergent African political elite.\textsuperscript{10}

Two problems arose from this. Tribal animosities were reflected in political party formations and political parties assumed the character of alliances of ethnic power barons. By the time the ban on nation-wide African political parties was lifted and attempts were made to create national parties, the African political leadership was already deeply fragmented. With independence and multi-partyism, ethnic politics assumed even more significance. Political society was on the whole fragmented along ethnic lines. As a consequence, many of the assumptions of the new Constitution as to the nature of the underlying political order, particularly of its capacity to engender nationhood were largely misplaced. There was no historical basis for assuming that there existed a stable and mature political culture within which the Constitution would be supreme over politics. Moreover, the assumption that the state declared by the Constitution would immediately arise from a union of the diverse ethnic groups, was most ambitious as the divisiveness of ethnicity had been experienced not only in the formation of political parties but also in the campaigns for the first elections.\textsuperscript{11}

The political culture within which the Constitutional order had to operate was therefore severely underdeveloped. The political elite manipulated the masses by reference to ethnicity, religion, race, class and every other attractive reference for gaining a vantage position in the factional conflict that was in lieu of politics.\textsuperscript{12} The dominant political culture was the pursuit of power for its own sake and for the sake of

\textsuperscript{10} Nyong’o, “State and Society in Kenya”, \textit{African Affairs}, pp.23-39.

\textsuperscript{11} Ogendo, “The Politics of Constitutional Change in Kenya Since Independence”, pp.9-34.

\textsuperscript{12} Throup, “The Construction and Deconstruction of the Kenyatta State”, pp.87.
the enormous financial gains that went with it. Politics was perceived of as a zero sum game, in terms of polarities; that is those in the inside and those on the outside, "Us" versus "Them". The political annihilation of them sometimes created the necessity to circumvent constitutional institutions.13

The culture of "big men" which dominated the parties that negotiated the Independence Constitution was later to militate against the institutionalisation of constitutional government and instead encouraged personal rule.14 Real power therefore lay not within but outside the Constitutional framework.

At independence, the Kenya African National Union (KANU) and Jomo Kenyatta its first prime minister, accepted the compromise thrashed out at the Lancaster House Conference, which was embodied in the Independence Constitution, purely as a tactical step. Neither had any faith in the compromise that the Constitution represented. They intended neither to retain the Constitution in the form that they had received it nor to implement some of its essential provisions.15 In fact, as soon as they had the opportunity, they began the process of amending it. The fact that the Constitution itself had limited the changes that could be made to mere "alterations" was not a deterrent.16 Jomo Kenyatta who led the KANU delegation to the 1962 Lancaster House conference negotiations insisted that the Constitution was full of "massive compromises" and that it "failed completely to satisfy the majority of people whose lives it was supposed to govern".17 KANU was therefore convinced that the Constitution was unworkable and was an impediment to the creation of a truly united

16 Section 71 the Independence Constitution and Section 47 of the current constitution.
nation. Consequently, KANU perceived its immediate task as one of creating what it considered a more viable constitutional order. This would entail a rewriting of the Constitution to accord with what it had advocated at the Lancaster house constitutional conference.18

The Limits of the Export Model Constitution

The other basis of constitutional instability in Kenya, is to be found both in the nature of the process of negotiating the Independence Constitution, and in the inherent weaknesses of the ready made export model constitution that was part of the decolonisation process in the former British empire.19 The British had held out to the end, and when finally they decided to grant independence to Kenya, the Constitutional negotiations were haphazard and largely cosmetic.20 The export model constitution was offered to the political elite who went to Lancaster House Conference on a take it or leave it basis. Very few alterations, basically to address majimboism, were entertained. Not much effort went into addressing the specific historical problems of Kenya.

In many respects therefore, serious political problems were swept under the carpet. Given the fundamental nature of some of the problems, such as land and ethnic relations, the draftsmen of the Independence Constitution were quite naive if they expected a functional democracy to be founded on it.21 Perceived partly as an imposition and partly as a compromise, the political elite had very little regard for the Constitution negotiated at Lancaster. Indeed, KANU unashamedly claimed to have accepted the Constitution merely to facilitate an expedient handing over of power.

but had no intention of enforcing parts of it and indeed intended to make major changes as soon as power was in their hands. On the whole, the parties perceived the Constitution as a weapon in the power struggle. The main emphasis in the Constitution making process, for the settlers and the parties representing the so-called minority tribes, was therefore not on how to ensure that a stable democratic government evolved, but rather how to ensure that an independent government would not upset the vested interests of the various groups. It was very difficult therefore, in the context of the fragile constitutional negotiations to address significant and practical issues of how the country was to be governed. As time was of the essence, where problematic issues arose during the negotiations, they were conveniently swept under the carpet to facilitate an expeditious settlement of the Independence question. The last thing on the minds of the drafters of the Constitution was how to safeguard constitutionalism, democracy or the rule of law.

Fundamentally, the new Constitution was at great variance with the regime of public law and the administrative structures inherited from the colonial state. While the Constitution espoused liberal political and legal values, the legal process and the administrative system were defined by their law and order orientation. While the Constitution sought the development of a liberal democratic society, the entire legal and administrative superstructure that practically towered over the Constitution militated against the development of such a society.

McAuslan observed:

"Colonial law rule was an autocratic method of government and the autocracy took the form of an authoritarian administrative structure. The paternal rule of the District officer combining in his office legislative, executive and judicial powers— not always clearly

separated in practice—was government to the Africans, for most of the colonial period. It was in such a society, used to autocracy in government that the rulers of the new states were brought up and learned their politics, and although they may have grown to dislike colonialism authoritarianism, they inherited its legal and administrative superstructure at independence. Thus, the values of the Constitution they were concerned to introduce were at variance with the values of the administrative structure that they inherited and had lived with.\(^\text{24}\)

In this dissonance between a liberal constitution and an autocratic administrative and public law superstructure, lies the key to understanding the underlying instability of the Constitutional order and the basic impetus for constitutional change. The challenge for the political elite was either to amend public law and alter administrative patterns to accord with the Constitution or to amend the Constitution to accord with existing public law and administrative patterns. For none constitutional reasons, they choose the latter and the rest is history.

Moreover, the main themes of the Independence Constitution were inherently parochial. The major one was, off course, regionalism or majimboism. This loose form of federalism was perceived by its proponents as a bulwark against the domination of the smaller ethnic groups by the larger ones. The other one was the protection of minorities, that is, the Asian commercial class, the European settlers and civil servants.\(^\text{25}\) The British government under tremendous pressure from the White settlers and the Indians most of whom had British nationality, felt that they had a moral obligation to ensure that the British subjects who wished to stay on in Kenya would be protected from any excesses of the new government. Predictably, the Constitution demonstrated an incredible mistrust of power in the hands of the new government. Not surprisingly, the new African

\(^{24}\) McAuslan, "The Evolution of Public Law in East Africa in the 1960's, (part one)" p.12.

power elite looked at the Constitution with resentment, both as an imposition of the colonial government and as a very serious restraint on their freedom to act in order to fulfil the promises of Uhuru.  

No matter the apparent elegance in the drafting of the Independence Constitutional document, in reality the Independence settlement produced a constitution that was difficult to implement. For example, the complex provisions relating to the quasi-federal majimbos demanded so much in terms of resources and expertise that they were effectively unworkable. On the other hand, the concept of a separate head of state from head of government was viewed with suspicion as an attempt to dilute the powers of the new African government and to retain some form of imperial control. The regional assemblies were viewed as small governments of their own.

The reality was that the Constitution was excessively concerned with accommodating existing problems at the expense of the likely future developments including how to effect and safeguard a constitutional democracy. Predictably therefore, the immediate post-independence period witnessed intense political activity to dismantle the Independence Constitution. Given Kenya's political history, too heavy a political burden was imposed on the Independence Constitution. As the basis of a new state, it was expected to foster nationalism and to create national unity out of the diverse ethnic and religious communities. It was also expected to foster democracy, the rule of law and constitutionalism while ensuring a capacity for administration. Yet, the state as constituted by the Independence Constitution was radically different from

\[27\] Ibid., p.191.  
the colonial one. In conception, it was both liberal and democratic. In reality, it retained some of the fundamental attributes of the latter. While the colonial state reposed absolute power in the administration, the Independence Constitution showed a remarkable distrust of centralised power. It sought to countervail it, by dissipating it into various autonomous institutions, which were sometimes isolated from each other and at other times opposed to each other. This was quite frustrating to the new power elite and herein lay a great impetus for constitutional amendment. The fact that KANU, as the ruling party was dissatisfied with the Independence Constitutional arrangement, and was particularly opposed to regionalism and the balkanisation of the country into semi-governing provinces, meant that the constitutional settlement was inherently unstable.

While in theory, the Independence Constitution created a Westminster type of government, in practice the Constitution was at great variance with the Westminster model in several material respects. A number of innovations purposely inserted by colonial office legal draftsmen for the export model constitution had actually made the Constitution more complex and inflexible. First, the Constitution was a written document invested with special legal sanctity beyond an ordinary act of parliament. Consequently, it assumed tremendous political significance being invoked to legitimate all exercise of power. The process of amendment would therefore become a search for legitimacy. Second, the legislature was vested with a very central role in the political process and in particular as guardian of the Constitutional amendment process. Special majorities were required to alter the Constitution. Consequently the amendment process was rendered highly political. Third, the judiciary was vested with

special authority as the final interpreter of the Constitution, with power to declare parliamentary enactments null and avoid. Depending on how this jurisdiction was used, the possibility of the judiciary itself amending the Constitution was real.

Fourth, a bill of rights was written into the Constitution against which the legality of all administrative and legislative decisions was to be measured. Ideally this should have guaranteed the enforcement of basic human rights.

Fifth, the head of State who was different from the head of government, other than being required to be politically non-partisan was actually politically isolated from the process. Sixth, the Constitution assumed that there was, ought to be and would continue to be a multiparty democracy and that therefore there would be at all times an opposition party in parliament which would be consulted in respect of important legislation, particularly in the nature of constitutional amendments. Significantly therefore, the Constitution as enacted had no basis either in the political experience of Kenya or indeed of Britain. This was to be a further basis for the instability of the Constitutional order.

The negotiations that led to the Independence Constitution had been protracted and complex. There had been too many sectional interests to be catered for. There had also been too many fears, suspicions and mistrust between the various political factions. The parties sought to use the Constitution and the Constitutional settlement process as a means of positioning themselves strategically for what they perceived as the struggles that would inevitably follow independence.
Constitutional Lacuna

As a blueprint of governance, the Constitution contained substantial lacuna. It was silent on a number of critical issues that in Britain would have been governed by well-established constitutional conventions. Most of these conventions had been in place throughout much of English constitutional history and were essentially part of English political life. They now formed an integral part of the unwritten constitution of the United Kingdom, from where the drafters of the Independence Constitution derived their inspiration.

In Kenya there were no similar conventions and it was not very realistic to expect an importation of British conventions without the same political tradition and culture. Without the appropriate conventions important constitutional issues were left to the vagaries of politics. This lacuna included:

The Place of the Official Opposition

The whole question of who constituted the opposition and how the opposition was to function in the national assembly was not catered for despite the fundamental constitutional assumption of the importance of the opposition in the political process. These important issues were to be relegated to the imprecise standing orders of the National Assembly. The same was true of the position, powers, privileges and functions of the leader of the opposition, which similarly were regulated by the standing orders of the National Assembly.

Coalition Government and Government of National Unity

The Constitution did not address the issue of formation of a coalition government, where no clear winner emerged after a general election, an important

safety net in a multiparty democracy. The whole issue was left to chance. The assumption, reckless to the extreme, was that there would always be a party that on its own could form the government. This contributed to “the winner takes it all” attitude that dominated electoral politics.

Political Parties

The question of the formation and management of political parties, the main vehicles of competitive political activity was not deemed to be a matter of constitutional significance and was relegated to the Societies Act\textsuperscript{32} just like football clubs and tribal welfare societies. Conceivably, a party with the Constitutional mandate to govern could be de-registered by the Registrar of Societies and the country would be thrown into a constitutional crisis.

The Civil Service

The civil service had played a very significant role in the history of the colony. As discussed in chapter four, there was never a serious separation of powers during colonial rule. In real terms, the civil service administered the colony. Unlike in the United Kingdom, the civil servants were not insulated from politics indeed they were very much part of the political process. So much so, that from the inception of the colonial legislature the civil servants formed the majority.\textsuperscript{33} The Independence Constitution while setting up a seemingly independent Public Service Commission failed to provide a legal framework for the operations of the provincial administration. This thereby permitted the executive to operate the provincial administration as a parallel system to the democratically elected local authorities thereby substantially undermining their

\textsuperscript{32} Chapter 80 Laws of Kenya.
\textsuperscript{33} Y P Ghai and J P W B McAuslan, Public Law and Political Change in Kenya, p.53.
Parliamentary Sovereignty

While the Constitution placed a lot of hope in Parliament as the bulwark against executive autocracy, there was little in the Constitution that facilitated parliamentary autonomy. On the contrary the Constitution left immense powers in the hands of the executive to determine almost all aspects of parliamentary life, including the parliamentary calendar and parliamentary business. In reality the Constitution created a Parliament without teeth and an executive without checks. Parliament was not an equal partner with the executive in the management of government; it was the lesser partner. Parliamentary rule as envisaged by the Constitution was therefore not possible.

Judicial Independence

The Independence Constitution addressed the issue of the independence of the judiciary by providing security of tenure to judges in the High Court and the Court of Appeals. The magistracy, the bulk of the judiciary, enjoyed no such protection from interference. The process of the appointment and promotion of judges remained largely at the discretion of the executive though nominally acting on the advice of the Judicial Service Commission. The executive indirectly controlled the Judicial Service Commission. Its three most important members, the Chief Justice (the chairman); the Attorney General and the chairman of the Public Service Commission were appointees of the executive. In day to day operations the judiciary remained linked to the rest of

the civil service and operated broadly on the same conditions. This did not create any real chances of judicial independence.

The Problem of Public Law

The structural limitations of the Independence Constitution were compounded by yet another legacy of colonial rule. The autocratic system of public law. The continuity of the colonial legal order and particularly the regime of public order law sapped the Constitution of its real liberating potential. Independence did not affect the continuity of the Colonial legal order. Indeed the Independence Order in Council specifically provided for the continuity in force of all existing law. Therefore, other than the cosmetic renaming of the statutes from "ordinances" to "acts" the entire corpus of colonial law was adopted at independence as part of the law of the new nation. Moreover, the labyrinthine bureaucracy and highly coercive machinery that had characterised the colonial legal order were similarly adopted. The grafting of what was essentially a Liberal-democratic constitution, over an authoritarian Public law system is one of the most significant themes in Kenya's constitutional and political history. The corpus of repressive laws which ranged from the Chiefs authority act through the Public order act to the Preservation of public security act had been used in one form or the other by the colonial regime to repress African nationalism and generally to subjugate and humiliate the Colonised people. These laws were largely inconsistent with express provisions and values of the new constitution.

The wholesome importation of this entire corpus of law into the post-independence Constitutional-political order therefore armed the new government with a formidable weapon that could, and as history now shows, did endanger the very survival of the nascent culture of competitive politics and multi-party democracy. Historians may in the end find, that it was the totalitarian nature of the system of public law which militated more against democratic activity than did the Constitution per-se.

THE JUDICIARY AND THE SUBVERSION OF CONSTITUTIONAL INTENT

The colonial judiciary had been partisan against African interests and in favour of the colonial rulers.\textsuperscript{42} Even in the darkest hour of the Mau-Mau war, and the subsequent state of emergency, the judiciary failed to manifest any independence or any concern for basic human rights. The post independence judiciary was similarly, unable to provide any meaningful checks on the exercise of executive power. Despite its new and very important power as the final arbiter in the interpretation of the Constitution the judiciary continued in the colonial tradition of timidity, compromise and compliance.\textsuperscript{43} But the judiciary went further than merely support the status quo, it systematically interpreted the Constitution in a manner that was subversive and the consequence of which was to effectively amend the Constitution.

The Independence Constitution had addressed the issue of the independence of the judiciary by providing security of tenure to judges in the High Court and the Court of Appeals. The magistracy, the bulk of the judiciary, enjoyed no such protection from interference. The process of the appointment and promotion of judges remained


largely at the discretion of the executive though nominally acting on the advice of the Judicial Service Commission. The executive indirectly controlled the Judicial Service Commission. Its three most important members, the Chief Justice (the chairman); the Attorney General and the chairman of the Public Service Commission were appointees of the executive. In day to day operations the judiciary remained linked to the rest of the civil service and operated broadly on the same conditions. In reality this did not create any real chances of judicial independence.

The Judiciary's main problem stemmed from its unwillingness to pursue a coherent philosophy of constitutional interpretation. Throughout the thirty three years of constitutional change, the subject of this study, the judiciary in Kenya failed to interpret the Constitution on the basis of sound constitutional principles. On the whole, the Court's jurisprudence was muddled and confusing, changing from case to case and offering little precedent value. In their interpretation, the Courts were preoccupied with narrow technical considerations intended to undermine and subvert the true substance of the Constitution. Most often, while purporting to interpret the Constitution, the courts would either deny themselves jurisdiction, dismiss cases on the slightest technicality, ignore binding precedent or give an interpretation wholly incompatible with basic constitutional principles and the perceived requirements of justice.⁴⁴

Most judges in Kenya came from a tradition, once described as "more executive than the executive".⁴⁵ They viewed their role as upholding the powers of government in the face of any challenge in order to ensure the stability of the political order. Consequently, in most of the decisions, the Courts while purporting to interpret

⁴⁵ Lord Atkin in Liversidge v Anderson (1942) A C 206.
the Constitution effectively amended it in an attempt to arrive at decisions more in tune with perceived government interests.

THE CONSEQUENCE OF THE CONSTITUTIONAL CHANGES

Notwithstanding the fact that the Constitutional-legal order at independence created an imperfect environment for the creation and sustenance of constitutionalism, democracy and the rule of law; the post-independence political dynamics resulted in such extensive tinkering with the Constitution that the prospect became even dimmer. Yet whatever had been its political and technical problems, the Independence Constitution had sought to establish in Kenya a liberal democratic state in the Westminster tradition. It had been based on the fundamental assumption that by transplanting certain basic constitutional values and institutions, it would be possible to secure the practice of constitutionalism in Kenya. The politics of post independence Kenya made this quite difficult to achieve.

Between 1964 and 1997 the Constitution was amended twenty eight times. Some of the amendments were radical while others were minor. Cumulatively however, the amendments totally altered the content, structure and philosophy of the Independence Constitution. The amendments also fundamentally re-designed the structure of the post-colonial state and the entire basis of governance. The amendments were, on the whole, intended to centralise political power in the executive, and to ensure that a viable and vibrant opposition did not take root. Cumulatively the amendments created an entirely different power map from that anticipated by the independence Constitution. The main checks and balances in the

---

Independence Constitution were either removed altogether or severally undermined and rendered ineffectual. The accountability of government was seriously impaired and the rule of law replaced by administrative fiat. The Constitution was rendered incapable of yielding constitutional governance.

Ostensibly, the amendments were made in order to facilitate more effective governance and to make the Constitution both autochthonous and more relevant to local conditions and needs. In reality, the amendments were opportunistic, self-serving and manipulative of the existing constitutional order. The capacity of the Constitution to guarantee constitutionalism was definitely eroded by the amendments. While the new constitutional order claimed to be libertarian, it continued with enthusiasm the colonial public law tradition of subjugating the people and containing political dissent. Building on this authoritarian law and order tradition, the amendments consolidated personal rule at the expense of institutional rule, institutionalised political expediency as the yardstick for constitutional change and undermined the claim of the Constitution to being the basic law and the guarantor of political stability.

Under Jomo Kenyatta, the amendments were mainly geared towards repealing the Lancaster House bargain. Between 1964 and 1978, Kenyatta used constitutional amendments to dismantle majimbo, centralise authority in the Presidency and to restrict any form of political opposition. Under Moi the amendments were used to further subordinate other organs of government to the Presidency and to render an effective checks and balances from the judiciary and the Legislature virtually useless.

---

48. See for example the speech of Josphat Koranja, Vice president and the Attorney General Justice Mathew Muli, when moving the controversial amendment to remove the tenure of judges and other constitutional office holders. The Hansard, Tuesday 2nd July 1988 Vol. I xxxv.
Between 1979 and 1997 Moi used the Constitution in the fight to eliminate all opposition. The Judiciary, Parliament and the civil service lost their independence and autonomy.

The immediate political impact of the constitutional changes was enormous. First, the Constitution became a major weapon in power politics. Power was monopolised in the hands of a small political elite who hid behind the Constitution as they manipulated the political and constitutional process. Invariably, this clique became an economic elite and was able to monopolise the control of the state and its resources, which they used to dispense patronage. Politics was reduced to a zero sum game in which the winners took everything and the losers were sometimes eliminated. Second, there was a shrinking of the arena of popular political participation and the state became largely undemocratic and autocratic. The parameters of free political activity by individuals or groups were circumscribed. Third, by the manipulation of public law and the judicial system, legitimate political activity was criminalized. The exercise and enjoyment of basic civil liberties and human rights was subordinated to the survival and continuity of the state. State security was elevated to the level of an ideology. The Presidency was established as the ultimate bastion of political power largely beyond the reach of either the legislature, the judiciary or civil society, at times acting not only in breach of specific constitutional provisions but at times exercising power completely outside the constitutional framework.

THE KENYATTA-MOI LEGACY IN CONSTITUTIONAL AMENDMENT

One of the most striking aspects of the Constitutional process was that while the government was most contemptuous of the Constitution, it was nonetheless very keen to be perceived as constitutionalist. It therefore went completely out of its way to wage the political war within formal constitutional limits. There was therefore an observance of the rule of law in the narrow and formal sense. But for all the lip service paid to constitutionalism and the rule of law the substance was different. There were, however, several measures of glaring dubious constitutionality. The worst example was the banning of the Kenya Peoples Union (KPU) in 1969 and the subsequent detention of its leadership and that of sympathetic trade Unions under the Preservation of Public Security Act. There couldn’t have been any constitutional reason that could justify the party in power allegedly banning other parties with which it was in political competition for power.

The government’s fidelity to constitutionalism, even in the narrow sense, was again greatly put to the test when in 1982 the Constitution was amended to outlaw all political opposition and to constitute the ruling party as the only legitimate vehicle for political expression and action. The facade of constitutionalism could no longer be maintained without a serious challenge to the existing power structure. This purported amendment was obviously unconstitutional as being inconsistent with the Constitution and its underlying basic philosophy and structure.

Between 1964 and 1997, the dominant political culture was the pursuit of

political power by all means possible as a means of controlling the state and its enormous financial resources. The various manipulations of the Constitution by way of amendments notwithstanding, power was largely exercised outside the Constitutional process. This failure of the Constitutional process to contain political struggles sometimes resulted in situations where political opponents were physically eliminated.\textsuperscript{58} This obsession with power bred the need to have total and complete domination over politics. The Constitution was perceived as a handmaiden in this process.\textsuperscript{59}

In the absence of serious ideological issues or political programmes, the political elite manipulated the mass of the people by reference to ethnicity, religion, race, and class in the quest to retain a vantage position in the factional conflict that was in lieu of politics.\textsuperscript{60} Ethnic power barons projected their own personal interests as communal interests and sought to create ethnic coalitions that ensured their own personal survival. An elaborate patron-client network, which cut across ethnic, class, and racial lines was also put in place in an attempt to give the regime broad based appeal. This created an illusion of political and constitutional stability. This system could only thrive if the patron enjoyed substantial powers over the state and its resources. Personal rule in lieu of constitutional government was therefore a logical necessity.\textsuperscript{61} Under this system the distinction between the ruling party, the government and the state were completely blurred. The imperial presidency ran all three without much distinction in functions.

In addition to the enormous powers amassed by the executive through the numerous amendments to the Constitution, the executive had over time assumed immense extra-constitutional powers. Rule by decree, circumventing the legal

\textsuperscript{58} Nyong'o "State and Society in Kenya", p.48.
\textsuperscript{59} Widner, The Rise of a Party State in Kenya; From Harambee to Nyayo, pp.27-34.
\textsuperscript{60} Throup "The Construction and Deconstruction of the Kenyatta State", pp.54-56.
\textsuperscript{61} Jackson & Rosberg: Personal Rule in Black Africa, pp.98-112.
machinery became common. Real power was substantially exercised outside the Constitutional framework. Needless to say, these developments seriously undermined constitutionalism, the rule of law and the democratic governance.

THE LESSONS OF HISTORY

The foregoing notwithstanding, it would be greatly misleading to suggest that the Constitution has ceased to function altogether, or that it has become irrelevant in the governance of the state. The truth is that the Constitution retains a number of significant legal and political attributes. First, it remains the symbol of nationhood. Second, it continues to be the basis of political debate on the future of the country. Third, it retains a reasonable capacity for legitimating government. Finally although the Constitutional amendment process has been largely discredited it remains in the minds of most people the only avenue for reconstructing a legitimate constitutional order.

This study has established that the following lessons can be drawn from the history of the constitutional amendment process in Kenya:

a) That at independence, though the Constitution of Kenya was formally committed to constitutionalism, it was grafted on a constitutional, legal and political tradition which was at variance with the values and institutions of the new constitution and which therefore made the Constitutional order inherently unstable.

b) That the constitutional amendment process in Kenya proceeded without a coherent theory regarding the explicit and implicit limitations on the power to alter the Constitution.

c) That the Judiciary while purporting to interpret the Constitution effectively “amended” it and further compromised the integrity of both the Constitution and of the amendment process.
d) That the pious claims of the power elite notwithstanding, the amendments were mainly influenced by the dictates of power politics and not by constitutional principle. They were therefore opportunistic, manipulative and self-serving. In effect, they altered the basic structure of the Constitution, created internal incongruence, distorted the balance of power among the arms of government and subordinated all other institutions of government to the presidency. They eroded the sanctity of the Constitution as supreme law and rendered impossible the observance of constitutionalism.

CONCLUSION

This study has raised several questions regarding the manner and content of constitutional amendments and the nature of the underlying legal and political culture within which they have been undertaken. The most enduring lesson has been the difficulty of subjecting power to law, while the tendency of power is to corrupt and to circumvent the law. While the tension between law and power exists in every legal system, it is more acute in Kenya, because often, centres of power are independent of the Constitutional organs, and governance therefore takes place outside the legal framework. The political elite perceives a real tension between the dictates of legality and the perceived licence of authority. They appear to believe that there ought to be a trade-off between strict compliance with the Constitution and the rule of law and the unfettered right to govern.

This study has established that the constitutional amendments have reflected an unsuccessful attempt to contain the reality of power within the Constitutional

---

framework. As a consequence, the Constitutional amendment process in Kenya has suffered from a serious crisis of legitimacy. This crisis has its origins in the partisan and self-serving tradition of the overall constitutional process. Those who have had control of the legislative process have used the Constitution in general and the amendment process in particular as a weapon in the political struggle for power and influence. The judicial process has similarly failed to safeguard the integrity of the Constitution and has in fact been used to undermine it. Moreover, this study has demonstrated that in addition to the legal framework of constitutional amendments the political culture in which the Constitution functions is crucial and that it is a fallacy to believe that well drafted legal documents yield good legal results. The truth is that all legal documents, constitutions included can only yield the predetermined results when applied in good faith. The process is as important as the substance. The political and the legal merge. That is the lesson of this study.
BIBLIOGRAPHY

PRIMARY SOURCES

BOOKS


REPORTS


PERSONAL INTERVIEWS

Dr Julius Gikonyo Kiano – Nairobi, June 2000

Mr Duncan Nderitu Ndegwa – Nairobi, April 1996

Mr Jeremiah Kiereini – Nairobi, December 1997
SECONDARY SOURCES

BOOKS


Lloyd L & M D A Freeman, Lloyds Introduction to Jurisprudence (London: Stevens & Sons Ltd 1987).


ARTICLES IN JOURNALS


THESES & DISSERTATIONS


NEWSPAPERS AND PERIODICALS

The Daily Nation

The East African Standard

The Hansard

The Nairobi Law Monthly

The Weekly Review