

**Structural Sources of Constitutional Conflicts: A Conflict
Analysis of Constitution-making in Kenya, 1997-2005.**

Robert Mudida

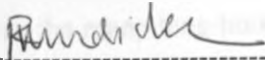
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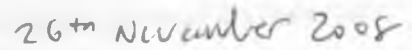
**A thesis submitted in fulfilment of the requirements of the degree
of Doctor of Philosophy in International Studies, Institute of
Diplomacy and International Studies, University of Nairobi.**

September, 2008

Declaration

I Robert Mudida declare that this is my original work and has not been submitted and is not currently being examined for a degree in any other university.

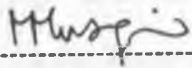


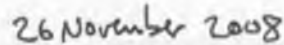


Robert Mudida

Date

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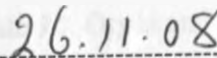
Professor Makumi Mwangi

Date

Institute of Diplomacy and International Studies

University of Nairobi





Professor Peter Wanyande

Date

Department of Political Science and Public Administration

University of Nairobi

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Abstract

The study investigates the structural sources of constitutional conflicts in Kenyan society by examining the process and content debates in the constitutional review process that took place between 1997 and 2005. The study is based on the premise that a country's constitution is a fundamental pillar on which the society is structured. The study applies the structural violence theoretical framework to provide a deeper insight into Kenya's constitutional debates. It develops the hypothesis that an anomalous constitution engenders structural violence in society. Both primary and secondary sources of data were used to carry out the study. Non-probability stratified sampling is used in the study. This study argues that the existing Kenya constitution is a fundamental source of structural violence in Kenya. Constitutional conflicts arise because the constitution does not address many of the concerns of its citizens such as equitable distribution of resources and the protection of individual and minority rights. The study also contends that the process of constitution-making and the content of the constitution are inextricably linked. A defective process leads to an anomalous constitution. The study also finds that attempts to address constitutional conflicts in Kenya have often been settlement rather than resolution-oriented thereby rendering them less effective. Constitution-making is eminently a political process and both the Kenyan political landscape and the broader political context of African states need to be considered to adequately appreciate Kenya's constitutional conflicts.

Abbreviations

CKRC	Constitution of Kenya Review Commission
CNC	Coalition for National Convention
IPPC	Inter-Parties Parliamentary Committee
IPPC	Inter-Parties Parliamentary Committee
IPPG	Inter-Parties Parliamentary Group
KANU	Kenya African National Union
KHRC	Kenya Human Rights Commission
LDP	Liberal Democratic Party
MoU	Memorandum of Understanding
NAK	National Alliance of Kenya
NARC	National Rainbow Coalition
NCA	National Convention Assembly
NCKK	National Council of Churches of Kenya
NCEC	National Convention Executive Council
NCEC	National Convention Executive Council
NDP	National Development Party
RPP	Release Political Prisoners
USSR	Union of Soviet Socialist Republics

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Chapter One

Background to the Constitution as a Source of Structural Violence in Kenya

Introduction

The concepts of structural violence and constitutions are central to this study which applies conflict analysis to constitution-making in Kenya. Structural violence is a sub-set of conflict analysis since conflicts can either be structural or manifest in the form of physical violence. In the context of the conflict cycle, structural violence which is not attended to eventually becomes violent conflict. The challenge during the earlier stages of the conflict cycle is that of peace management. If peace management is not effectively undertaken, the conflict cycle moves to a phase of crisis. At this point the challenge is to undertake crisis management. If crisis management is not effectively undertaken physical or behavioural violence eventually results.¹

The fundamental concepts of conflict and constitutions will first be developed. Conflicts arise when parties pursue incompatible goals.² de Reuck discusses the origins and development of conflict and states:

“The more valuable the objectives the more intense the conflict. The more numerous the objectives, the greater is its scope. The more parties there are in the conflict, the larger its domain. These are the main dimensions of conflict. The relations between the conflicting parties and their behaviour toward one another is a function of these dimensions and of the nature of the issues...The incompatibility may arise because parties are like players competing for the same prize (such as government office or territory or raw materials) or disagreeing about the rules of the game (the Rhodesian constitution was an example). The

¹ M. Mwagiru, *Peace and Conflict Management in Kenya* (Nairobi: Centre for Conflict Research and Catholic Peace and Justice Commission, 2003) pp. 55-64.

² M. Mwagiru, *Conflict: Theory, Processes and Institutions of Management* (Nairobi: Watermark Printers, 2000) p. 3.

former are conflicts of interest and the latter are conflicts of value, though the distinction is rarely clear-cut.”³

Galtung enlarges the discourse on conflict by defining the concept of structural violence as a condition where “violence is present when human beings are being influenced so that their actual somatic and mental realisations are below their potential realisations.”⁴ Structural violence is adopted in this study because if violence were restricted to physical only, highly unacceptable social orders would still be considered to be peaceful. The structure that underlies social relationships may be a source of conflict. This may occur, for example, where an anomalous constitution prevents people in a society from realising their full potential. This type of conflict is referred to as structural violence. Although structural violence may not have immediate physical manifestations, if the social structure that generates the conflict continues, structural violence may eventually be transformed to physical violence. In societies where there is structural conflict, violence may not be in evidence yet peace is absent. Curle⁵ refers to such a situation as “unpeaceful”. According to him, “unpeacefulness is a situation in which human beings are impeded from achieving full development either because of their own internal relations or because of the types of relations that exist between themselves (as individuals or group members) and other persons or groups.”⁶ In some unpeaceful situations parties may be perfectly aware of the discordance of their aims while in other situations the conflict is not clearly recognized. Curle⁷ identifies various types of unpeaceful relationships. These are relationships in which power is approximately balanced, but

³ Ibid, p. 97.

⁴ J. Galtung, “Violence, Peace and Peace Research”, *Journal of Peace Research*, Vol. 3 (1969) pp. 167-191.

⁵ A. Curle, *Making Peace* (London: Tavistock, 1971) pp. 1-26.

⁶ Ibid, p. 1.

⁷ Ibid, pp. 1-26.

there is awareness of the conflict. Alternatively, there are relationships where power is unbalanced but there is awareness of the conflict. Thirdly, there are relationships where power is unbalanced but awareness of the conflict is low. Like Galtung, Curle maintains that structural violence impedes individuals from achieving their full potential. The concept of structural violence is central to the analysis of the constitution as a source of conflict in Kenya.

The concept of a constitution will now be developed. A constitution is a body of the fundamental rules in society. It describes the society's core institutional framework and how power is to be shared in the process of governance.⁸ A constitution contains the most important rules about the government of a country.⁹ It sets out the framework and operations of government, and makes declarations about the purposes of the state and society. A country's constitution defines the organs of government and their relationships.¹⁰ A democratic constitution distributes power among the organs of government and aims to check the exercise of power by those who hold power. It spells out the inalienable rights and freedoms of the individual and ensures their protection. A constitution provides a foundation on which a society can build itself into a prosperous one.¹¹

⁸ K. Kibwana, "The Fate of the Constitution in Contemporary Africa" in K. Kibwana(ed), *Readings in Constitutional Law and Politics in Africa: A Case Study of Kenya* (Nairobi: Claripress, 1998) pp. 38-47.

⁹ S. de Smith and Brazier, *Constitutional and Administrative Law*, Sixth Edition (London: Penguin, 1989) pp. 1-14.

¹⁰ K. Kibwana, "The People and the Constitution: Kenya's Experience" in K. Kibwana, C. Maina Peter, J. Oloka-Onyango(eds), *In Search of Freedom and Prosperity: Constitutional Reform in East Africa* (Nairobi: Claripress, 1996) pp. 340-350.

¹¹ C. Mpaka, "The People and Their Constitution: Kenya's Constitutional Process and the 1990-91 KANU Review Committee" in *Democratization and Law Reform in Kenya*, S. Wanjala and K. Kibwana(eds) (Nairobi: Claripress Limited, 1997) pp. 1-27.

A constitution expresses the fundamental values of the society of a country.¹² Other laws of a country obtain their validity from the constitution, which can be considered “the law behind the law.”¹³ Kelsen emphasizes the importance of a constitution within a country’s legal system by arguing that it is the *grund* norm among the community of legitimate laws¹⁴. He contends that the legal system is ordered hierarchically. There is unity in this system because every norm is derived from a previous norm. This leads to the basic norm or the *grund* norm which is the ultimate norm. Hence the constitution is the highest law and other laws obtain validity from it.¹⁵ Besides legal rules, constitutions can be supplemented or modified by usages, customs and conventions.¹⁶ Ordinarily the amendment of the constitution is more stringent than for other laws. In most democratic societies, a constitutional amendment can only be effected if it is supported by at least two thirds majority of the members of parliament.

A constitution creates the key institutions of the state: the judiciary, the executive and the legislature. Phillips and Jackson define a state as an independent political society occupying a defined territory, the members of which are united together for the purpose of resisting external force and the preservation of internal order.¹⁷ A constitution has been defined as a social contract between the governors) and those who are ruled (the governed).¹⁸ In this view, individual members of society surrender some of their powers to the governors. Hence a small, elected group is given the responsibility and power to

¹² J. Adler , *Constitutional and Administrative Law*, Second Edition (Houndmills: Macmillan, 1994) pp. 3-21.

¹³ *Ibid*, p. 3.

¹⁴ H. Kelsen, *The Pure Theory of Law*, translated by B.L. Paulson and S.L. Paulson (Oxford: Clarendon, 1992) pp. 55-75.

¹⁵ J. Adler , *Constitutional and Administrative Law*, op.cit, p. 18.

¹⁶ K.C. Wheare, *Modern Constitutions* (London: Oxford University Press, 1966) pp. 1-13.

¹⁷ O. H. Phillips and P. Jackson, *Constitutional and Administrative Law*, Seventh Editon (London: Sweet and Maxwell, 1987) pp. 3-16.

¹⁸ J.J. Rousseau, *The Social Contract* (London: Penguin, 2004) pp. 14-20.

rule on behalf of the majority. In return, the governors must guarantee harmony and prosperity in the society, and respect and protect the rights of citizens. If the rulers violate the rights of citizens, their right to rule may be withdrawn resulting in their loss of power and privileges.¹⁹ Hence governments must recognize that in a democracy the people are sovereign.²⁰ The government is simply the institutional expression of this sovereignty. A government that upholds the rule of law should not behave in a manner which results in the permanent transfer of sovereignty from the people to itself. In cases where a government regularly behaves illegally, the government loses its constitutional legitimacy. Constitutional conflicts are prevalent in such a situation.

Under the current Kenya constitution, the president is both the head of state and head of government. The president is nominally answerable to parliament but has significant powers which are regularly used to reduce the effectiveness of the legislature and the judiciary.²¹ The rationale of separation of powers is to enhance the sharing of power between the executive, the judiciary and the legislature thereby avoiding the concentration of power in any one of them to avoid tyranny. The Kenya Constitution vests greater power in the executive than in the legislature and the judiciary. The judiciary and parliament do not provide effective safeguards to executive authority.

A constitutional conflict may arise because the excessive powers of the president militate against the development of democratic tenets and practices.²² This conflict is

¹⁹ Ibid.

²⁰ W. Maina "Constitutionalism and Democracy" in K. Kibwana, Chris Maina and Joseph Oloka-Onyango(eds) *In Search of Freedom and Prosperity: Constitutional Reform in East Africa* (Nairobi: Claripress, 1996) pp. 1-15.

²¹ K. Kimondo "Separation of Powers/Control of Executive Powers" in K. Kibwana, K.Kimondo and J. Gathii, *The Citizen and The Constitution* (Nairobi: Claripress Limited, 1996) pp. 50-53.

²² M. Mwangi, "The Constitution as a Source of Crisis: A Conflict Analysis of Democracy and Presidential Power in Kenya" in L. Chweya (ed) *Constitutional Politics and the Challenge of Democracy in Kenya* (Nairobi, Sareat, 1999) pp. 173-195.

manifested in two ways. Firstly, there is a conflict between the powers of the president as enshrined in the constitution, and the powers that are actually exercised by the president. Secondly, there is a conflict between an extremely powerful presidency and the requirements of democratic government. The exercise of wide presidential powers reduces the possibility of free and fair elections, the realization of human rights and freedoms and political accountability.²³ Conflict also manifests itself when the president allocates himself extra-constitutional powers. These powers have been exercised through unconstitutional presidential decrees and proclamations. Examples of the use of these powers include land allocations, pardon and the allocation of public funds. Since the constitutional review process began there have been three successive regimes, the Kenya Africa National Union (KANU), National Rainbow Coalition (NARC) and the Grand Coalition Government²⁴ which have been similar in some respects although there have also been fundamental differences between them. Thus, for example, the use of extra-constitutional powers by the president has been considerably reduced in the last two successive regimes. However, some process challenges in constitution-making continued to be characteristic of all the regimes, particularly attempts by the ruling elite to maintain the *status quo*.

Statement of the Research Problem

A country's constitution is a statement about the way core relations in that society are organized. When framed and adopted it tends to reflect the dominant beliefs, values and interests which are characteristic of the society at the time.²⁵ The constitution is,

²³ Ibid.

²⁴ The agreement setting out the conditions for the present Grand Coalition is set out in the *National Accord and Reconciliation Act*, 2008.

²⁵ K.C. Wheare, *Modern Constitutions*, op.cit.

therefore, a fundamental pillar on which society is structured. A citizen-inspired constitution is a core component of democracy. It is, however, possible for the constitution not to embody the interests, objectives and aspirations of a country's citizens.²⁶ This occurs where the rulers are responsible for developing constitutional rules that enable them to rule without significant obstacles or restraints. In Kenya constitutional conflicts arise largely because of the excessive powers of the president as provided for in Section 23 of the Kenya constitution which relates to executive authority.²⁷ Constitutional conflicts are also generated by anomalous provisions with respect to the legislature, the judiciary, devolution, land, property, public finance, amendment and transfer of power of the constitution.²⁸ Such a defective constitution is usually maintained by the coercive tools of the state and the continued application of such a constitution engenders conflict.²⁹ In such a situation, the citizens are governed on the basis of a philosophy that they no longer identify with.

This study seeks to investigate the contribution of the constitution to structural violence in Kenya. It focuses on constitution-making in Kenya in the period 1997-2005 and seeks to explain how a deficient constitution-making process affects the content of the constitution and consequently causes structural violence. The fundamental research question being investigated is: In what ways have anomalies in the constitution and the constitution-making process impacted on structural violence in Kenya?

²⁶ K. Kibwana "The Citizen, the Constitution and Democracy" in Kibwana, Kimondo and Gathii, *The Citizen and The Constitution* (Nairobi: Claripress Limited, 1996) pp. 1-4.

²⁷ These powers of the executive are comprehensively discussed in Chapter Five of this study which considers the content debates in constitution-making in Kenya.

²⁸ These sources of constitutional conflicts are discussed in Chapter Five of this study.

²⁹ M. Mwangi, "The Constitution as a Source of Crisis", op.cit.

Objectives of the Study

The general objectives of the study are to apply the theory of structural violence to the debates on constitutional reforms in Kenya with a view to providing perspectives on resolving constitutional conflicts in Kenya.

The specific objectives of the study are:

Firstly, to deepen the understanding of the theoretical linkages between structural violence and constitutional conflicts.

Secondly, to assess the extent to which a defective constitution-making process has contributed to structural violence in Kenya.

Thirdly, to evaluate the extent to which content anomalies in the constitution have contributed to structural violence in Kenya.

Justification of the Study

The study can be justified from an academic and policy perspective. The academic justification for the study centres on providing a conflict perspective of the debates on constitutional reform in Kenya. Current contributions to this debate have mainly been from the perspective of political science, history and legal theories. A structural conflict perspective, which is situated within the discipline of conflict studies, is however vital to understanding the constitutional debates in Kenya and to resolving the conflicts arising from them. The study enlarges the theoretical discourse on the linkages between structural violence and constitutional crises.

The findings of the study should also prove useful to policy makers in Kenya by providing them with additional insights about problems arising from an anomalous

constitution-making process and content. Policy makers in countries other than Kenya where the constitution generates structural conflicts may also find the study useful to analysing and developing policies to manage and prevent constitutional conflicts.

An Overview of the Literature

An extensive literature review is carried out in Chapter Two of this study which considers literature on structural violence, the role of third parties in conflict, the meaning and functions of constitutions, and constitutional development in Kenya. This section will provide a brief overview of that literature.

Most of the contributions to the literature on structural violence have built on the seminal work of Johan Galtung. Galtung considers structural violence to exist when the actual realisations of human beings were below their potential realisations.³⁰ Such a situation arises because of anomalous social, political, economic or legal structures. A major critic of the work of Galtung has been Kenneth Boulding. Boulding considers Galtung's ideas as too taxonomic in a world that contains discontinuities and large elements of randomness.³¹ Curle has also made an important contribution to the intellectual tradition of structural violence by reconceptualising the traditional dichotomy between war and peace.³² He introduces the possibility that a society may be neither at war nor at peace. Curle regards such a situation as "unpeaceful" in that human beings are impeded from achieving their full potential because of relations that exist in society. The debate on structural violence has also been considerably enriched by human needs

³⁰ J. Galtung, "Violence, Peace and Peace Research" op.cit.

³¹ K.E. Boulding, "Twelve Friendly Quarrels with Johan Galtung" *Journal of Peace Research*, Vol. 14, No. 1.(1977), pp. 75-86.

³² A. Curle, *Making Peace* (London: Tavistock, 1971).

perspectives, many of which build on the work of John Burton.³³ Burton provides some insights into structural violence through the human needs theory, of which he is one of the main advocates.³⁴ He argues that systems, no matter how coercive, that neglect human needs must generate protest behaviour and conflict. Burton contends that there are certain ontological and genetic needs which will be pursued, and that socialisation processes, if not compatible with such human needs will lead to frustrations and anti-social personal and group behaviour.

There is a broad range of literature concerned with the role of third parties in conflict. Such literature is important to consider because the study to some extent deals with the management of constitutional conflicts in the Kenyan context. Third parties have often played a vital role in such conflict management. A lot of the existing literature on third parties in conflict builds on the work of Bercovitch and Wall . Bercovitch argues that the inclusion of a third party in a conflict may exacerbate the conflict or may change the parties' relationship from a destructive to a more co-operative one.³⁵ Bercovitch and Houston focus on the factors that influence the mediators' behaviour and choice of strategies.³⁶ Wall in a further enlargement of the debate on the role of third parties in conflict presents a broader mediation paradigm which includes not only the mediators and negotiators in a conflict, but also their constituents.³⁷ Groom makes an important

³³ J. Burton, *Human Needs Theory* (London: Macmillan, 1990).

³⁴ J. Burton, *Conflict Resolution and Provention*, (London: Macmillan, 1990) pp. 32-48.

³⁵ J. Bercovitch, *Social Conflicts and Third Parties: Strategies of Conflict Resolution* (Boulder: Westview Press, 1984) pp.12-33.

³⁶ J. Bercovitch and A. Houston, "Why Do They Do It Like This? An Analysis of the Factors influencing Mediation Behaviour in International Conflicts", *The Journal of Conflict Resolution*, Vol. 44, No. 2, April 2000, pp. 170-202.

³⁷ J.A. Wall, "Mediation: An Analysis, Review and Proposed Research", *The Journal of Conflict Resolution*, Vol. 25, No. 1. (March, 1981), pp. 157-180.

distinction between settlement and resolution of conflict.³⁸ Settlement, he argues, does not address the root causes of conflict. Resolution, on the other hand, is a situation where the relationships between the parties are legitimised and self-sustaining without the imposition of behavioural patterns. Resolution therefore seeks to address the root causes of conflict.

De Smith, Wheare, and Kelsen provide an important analysis on the meaning and functions of constitutions.³⁹ They argue that constitutions when they are framed tend to reflect the dominant beliefs and interests characteristic of a particular society. Reinforcing this foundational literature is a broad range of literature on the debates on constitutionalism. Nwabueze, an important early scholar in this regard, argues that the existence of a formal written constitution does not necessarily imply that the government is a constitutional one.⁴⁰ The determining factor, he posits, is whether the constitution imposes limitations upon the powers of the government. Underlying a lot of the literature on constitutionalism by scholars such as Vile, Kurland and Vincent is the notion of the separation of powers.⁴¹

Literature on constitutional development in Kenya is also considered. Central to this literature are works by scholars such as Ghai and McAuslan, Okoth-Ogendo, Ojwang

³⁸ A.J.R. Groom, "Paradigms in Conflict: the Strategist, the Conflict Researcher and the Peace Researcher" in J. Burton and F. Dukes (eds) *Conflict: Readings in Management and Resolution* (London: Macmillan, 1990) pp. 71-98.

³⁹ See, for example, S. de Smith and R. Brazier, *Constitutional and Administrative Law* (London: Penguin, 1989); K.C. Wheare, *Modern Constitutions* (London: Oxford University Press, 1966) and H. Kelsen, *The Pure Theory of Law*, translated by B.L. Paulson and S.L. Paulson (Oxford: Clarendon, 1992).

⁴⁰ B.O. Nwabueze, *Constitutionalism in the Emergent State*. (London: C.Hurst and Co, 1973).

⁴¹ See, for example, M.J.C Vile, *Constitutionalism and the Separation of Powers*, Second Edition (Indianapolis: Liberty Fund, 1998); P.B. Kurland, "The Rise and Fall of the Doctrine of Separation of Powers" *Michigan Law Review*, Vol. 85, No. 3, Dec. 1986 and A. Vincent, *Theories of the State* (Oxford: Blackwell, 1987).

and Muigai.⁴² This literature generally agrees that the post-independence period in Kenya was characterised by a gradual erosion of the principle of constitutionalism. The various constitutional amendments since independence were opportunistic and self-serving and consolidated personal rule at the expense of institutional and democratic rule.

There is, however, a dearth of literature that applies the concept of structural violence to constitutional debates, thus necessitating this study.

Theoretical Framework

The theoretical framework for this study is based on structural violence. This section briefly explains the framework of structural violence. Chapter three of the study provides a detailed theoretical exploration of the linkages between structural violence and constitutional crises. Galtung develops the concept of structural violence by considering violence to be the result of the difference between the potential and the actual.⁴³ He defines the potential level of realization as that which is possible with a given level of insight and resources. In cases where insight and resources are monopolized by a group or class or are used for other purposes, then the actual level falls below the potential level, and violence is present in the system. Structural or indirect violence exists in so far as insight and resources are channelled away from constructive efforts to bring the actual closer to the potential. Direct violence exists where there is an actor who commits the violence, whereas in the case of structural violence there may not be any person who

⁴² See, for example, Y.P. Ghai and McAuslan, *Public Law and Political Change in Kenya* (Nairobi: Oxford University Press, 1970); H.W.O. Okoth-Ogendo, "The Politics of Constitutional Change in Kenya Since Independence, 1963-69" *African Affairs*, Vol. 71, No. 282, January 1972, pp. 9-34; Ojwang J.B. *Constitutional Development in Kenya: Institutional Adaptation and Social Change* (Nairobi: Acts Press, 1990); and G. Muigai, *Constitutional Amendments and the Constitutional Amendment Process in Kenya, 1964-1997: A Study in the Politics of the Constitution*, Unpublished PhD thesis, September 2001.

⁴² Ibid, p. 235.

⁴³ J. Galtung, "Violence, Peace and Peace Research" op.cit.

directly harms another person in the structure.⁴⁴ Structural violence is built into the structure of society and shows up in unequal power and consequently in unequal life chances. Most fundamentally in a situation of structural violence the power to decide over the distribution of resources is unevenly distributed.

The concept of structural violence is derived from re-conceptualizing the dichotomy between peace and war. In the classical discourses in political science, international relations and international law, there is a clear dichotomy between war and peace. Exponents of structural violence visualize a situation which does not fit into the classical dichotomy of peace or war. Such societies in Curle's⁴⁵ conceptualisation are "unpeaceful". Curle argues that absence of peace is a situation that characterizes many situations that do not present overt conflict⁴⁶. In such societies peace is deficient because the relations in those societies are organized in such a way that the potential for the development of some members of the society is impeded.

This study develops the thesis that the constitutional structure is a fundamental source of structural violence in Kenya. This proposition is based on the notion of objectivism. According to the objectivist viewpoint, it is possible for people to be in situations of conflict without immediately realising or readily experiencing it⁴⁷. Given that conflict is embedded in the social structure, it can exist independently of people's perception of it. According to objectivism conflict can be removed by changing the structure responsible for the conflict. Structural violence originating from the constitution can be considered as being objective in that it need not be felt for it to exist. There are

⁴⁴ Ibid.

⁴⁵ A. Curle, *Making Peace*, op.cit.

⁴⁶ Ibid.

⁴⁷ M. Mwagiru, *Conflict: Theory, Processes and Institutions of Management*, op.cit.

Research Methodology

This study utilised both primary and secondary data.

Primary Data

Primary data was aimed at obtaining up-to-date information directly relevant to the study. Primary sources included relevant constitutional documents, especially various Constitution of Kenya Review Acts dating from 1997 onwards. The researcher also conducted interviews with key players in the constitutional review processes in Kenya. A total of ten people were interviewed by the researcher over a period of several months. This included a sample of six Constitution of Kenya Review commissioners out of the twenty eight commissioners and four other individuals who had played a role in other aspects of the review process, for example, as members of the Committee of Eminent Persons or academics who had participated in some of the constitutional debates. Review commissioners, having been involved in the review process for several years, had detailed information on both the process and content of the constitutional review.

The sample of Constitution of Kenya Review commissioners was carefully selected so as obtain a diversity of views on fundamental issues in the review process. The process involved was therefore one of non-probability stratified sampling which makes allowance for known differences in the underlying population. The sampling of the individuals interviewed attempted to ensure a diversity of ethnic background, gender and professions in order to obtain a balance of views. Thus the people interviewed were not only legal professionals but also academics and professionals from other disciplines. For example, some of the individuals interviewed such as Ambassador Bethwell Kiplagat, former chairperson of the Eminent Persons Committee on Constitutional

Review, had a conflict management and mediation background thus providing a useful insight into the conflict dimension of constitutional debates. This broader selection was based on the belief that constitution-making is not simply a legal process but also has conflict, political, social and economic dimensions. Careful sampling aimed at obtaining a diversity of opinions was vital so as to address the issue of bias which sometimes arises in using the instrument of interviews for data collection.

Semi-structured interviews were used for collecting primary data for the study. This entailed the administration of an interview schedule by the researcher. In structured interviewing the interviewees are all given exactly the same questions whereas in the case of semi-structured interviews, the researcher had an interview guide for each interviewee which was prepared in advance but occasionally varied the sequence of questions asked as the interview developed and as specific issues arose on which the researcher wanted clarification.⁴⁸ In addition the researcher took some latitude to ask further questions in response to what were seen as significant replies. The questions asked were always open-ended to enable the interviewee to develop their responses and explanations more fully.⁴⁹ The questions covered both the process and content issues of the review. In addition, the questions asked were often slightly different for each interviewee in order to obtain more detailed information, especially in the interviewees' areas of competence or specialisation. For example, interviewees who had a legal background were asked questions on the review process that were of a more technical legal nature than those who did not.

⁴⁸ A discussion of semi-structured interviews is found in A. Bryman, *Social Research Methods*, Second Edition (Oxford: Oxford University Press, 2004) p. 113

⁴⁹ The questions addressed to each interviewee are available in Appendix A of the study.

The researcher administered the primary data instruments himself and did not make use of research assistants for the purpose of this study. This was to ensure that the objectives of the study were adequately achieved in the administration of the instruments.

Secondary Data

Secondary data also formed a key aspect of the research methodology for this study. Secondary sources included relevant journal articles, books, law reports and newspapers. Secondary sources were especially useful in guiding the theoretical foundations of the study and also in tracing the historical development of the key issues that inform the study.

Data Analysis

Analysis of the data was qualitative. Thematic analysis was used in the study. Key themes were identified in the study such as process and content challenges in constitution-making. Logical inferences were made from both primary and secondary data sources. For example, information provided by respondents in the study was transcribed and later incorporated into the study based on the theme that it fitted into. Quantitative measures of data analysis were not utilised in the study because the attributes studied were not quantitative in nature.

Limitations and scope of the study

The study focused on the constitution as a source of structural violence in Kenya. It therefore adopted a structural violence perspective to constitutional debates in Kenya. The study did not focus on non-conflict perspectives in constitutional debates. Although these have yielded some insights of their own, they are largely beyond the scope of the study.

In addition, the study did not consider in detail other sources of structural violence in Kenya, for example, those arising from anomalous economic structures. This was because the study sought specifically to consider the constitution as a source of structural violence. Occasionally, however, there was an interdisciplinary overlap between, say, constitutional and political issues. However, it was recognised that there are other sources of structural conflict in Kenya apart from the constitution and these, like the constitution, prevent many Kenyans from achieving their full potential as human beings. These can provide the basis for other studies. This study nevertheless argued that the constitution is the fundamental source of structural violence in Kenya. This argument is based on the importance of constitutions within a country's overall institutional framework.

Originality of the study

The originality of the study derives from providing a structural violence perspective on the process and content issues in the constitutional review process in Kenya from 1997-2005. The existing literature addressing constitutional debates in Kenya over this period primarily adopts a legal, political science or historical perspective. The study builds on Mwangiri's 1999 article where a conflict perspective is first used to analyse democracy and presidential power in Kenya.⁵⁰ The publication, however, focuses fundamentally on the issue of excessive presidential powers as a source of constitutional conflicts in Kenya and does not consider other content-generating issues within the constitution or specifically address the constitutional review process in Kenya which was in its incipient stages at that time. This study extends that earlier analysis on executive power to include

⁵⁰ M. Mwangiri, "The Constitution as a Source of Crisis: A Conflict Analysis of Democracy and Presidential Power in Kenya" in L. Chweya (ed) *Constitutional Politics and the Challenge of Democracy in Kenya* (Nairobi, Sareat, 1999) pp. 173-195.

several other conflict-generating content issues in the constitution such as the judiciary, the legislature, devolution, land and property, public finance, amendment, succession and transfer of presidential power. In addition to considering this broader range of conflict-generating content issues within the review process, it also provides a detailed analysis of the process challenges in constitution-making in Kenya (1997-2005) from a structural violence perspective.

Chapter Two

Conflict and Constitutions: The Intellectual Tradition

Introduction

This chapter examines the relevant literature on conflict and constitutions. It endeavours to deepen the theoretical foundations of the study and to provide insights into what has already been done in the area relevant to the study, highlighting the strengths and weaknesses of existing studies. Gaps in the literature are identified and used as part of the justification for undertaking the study.

The chapter begins by considering the literature on structural violence. It then considers other relevant literature in conflict, especially those relating to the role of third parties. A review is then undertaken of the literature linking conflict and constitutions which is central to the theme of the study. Literature on the meaning and functions of constitutions is reviewed, followed by a consideration of the discourse on constitutionalism. The chapter concludes with an examination of relevant literature on constitution-making in Kenya.

Structural Violence: The Intellectual Tradition

The earliest seminal contributions to the theory of structural violence were made by Johan Galtung. In one of his earliest contributions to the theory of structural violence Galtung developed a structural theory of aggression between individuals, groups and states.¹ The theory views a social system as consisting of units in interaction and as stratified according to a number of rank-dimensions. The theoretical basis of his analysis

¹ J. Galtung, "A Structural Theory of Aggression", *Journal of Peace Research*, Vol. 1, No. 2 (1964), pp. 95-119.

is the differential treatment and relative deprivation that arises from rank-disequilibrium. He further develops a methodology for testing the theory and a number of implications of the theory for economic development, revolutions and states in the international system. He emphasizes the importance of economic development in such a way that there is multi-dimensional growth and a parallel development between nations.

In a later article Galtung analyses the applications and definitions of the terms “peace” and “violence.”² He provides an extended concept of violence, which is related to the difference between the potential and the actual. He defines and explains structural violence in the following way:

“Violence is present when human beings are being influenced so that their actual somatic and mental realizations are below their potential realizations...Violence is that which increases the distance between the potential and the actual...The potential level of realisation is that which is possible with a given level of insight and resources. If insight and/or resources are monopolised by a group or class or are used for other purposes, then the actual level falls below the potential level, and violence is present in the system...We shall refer to the type of violence where there is an actor that commits the violence as personal or direct, and to violence where there is no such actor as structural or indirect”.³

He also makes a distinction between negative and positive peace which has proved very influential in the discourse on structural violence. He states:

“An extended concept of violence leads to an extended concept of peace. Just as a coin has two sides, one side alone being only one aspect of the coin, not the complete coin, peace also has two sides: absence of personal violence, and absence of structural violence. We shall refer to them as negative peace and positive peace respectively.”⁴

Galtung distinguishes between different dimensions of violence such as physical and psychological. Physical violence works on the body while psychological violence

² J. Galtung, “Violence, Peace and Peace Research” *Journal of Peace Research*, Vol. 3 (1969) pp.167-191.

³ *Ibid*, pp. 168-170.

⁴ *Ibid*, p.183.

works on the soul and takes the form of lies, brainwashing, and indoctrination of various kinds. He also distinguishes between direct and indirect violence. Galtung considers structural violence as a situation where there is social injustice. He argues that structural violence may exist even where it is unintended.

Galtung further develops his theory of structural violence by applying it to the inequality among and within states.⁵ He argues that the world consists of centre and periphery states, but that each state has its centre and periphery. He contends that any theory of structural violence presupposes adequate ideas of a dominance system against which liberation is directed. He focuses on imperialism as a special type of dominance system. Galtung contends that under imperialism there is a vertical interaction between states which is the major factor behind inequality, and is reinforced by the feudal interaction which maintains and reinforces this inequality by protecting it. He distinguishes between economic, political, military, communication and cultural imperialism. He argues that redistribution from the haves to the have-nots is insufficient and that the conflict-generating structure has to be changed.

Galtung makes a follow-up of his concepts of structural violence by discussing the concept of cultural violence which he considers as “any aspect of a culture that can be used to legitimise violence in its direct or structural form.”⁶ He explores the relationship between direct, structural and cultural violence. Cultural violence tends to legitimise some forms of structural violence and thus make them acceptable in society. Galtung, who was influenced by the Gandhian tradition of non-violence, also relates cultural violence to two fundamental aspects of Gandhism: the doctrines of unity of life and the

⁵ J. Galtung, “A Structural Theory of Imperialism”, *Journal of Peace Research*, Vol. 8, No. 2 (1971), pp. 81-117.

⁶ J. Galtung, “Cultural Violence” *Journal of Peace Research*, Vol. 27, No. 3, 1990, pp. 291-305.

unity of means and ends. He views the inclusion of culture as a major focus of peace research as deepening the quest for peace.

Galtung takes stock of the developments in peace research by considering the ten major dilemmas of peace research over a period of 25 years.⁷ He views these dilemmas as:

“the definition of peace research; peace research as the absence of violence; violence as an obstacle to basic needs; extension to peace in nature; human and social spaces; the dialectic between research, education and action; the social role of the peace researcher; the basic strategies of peace action; the methods of peace research; the choice of intellectual style; and the conception of peace in various civilizations”.

The central conclusion in his discussion is that the basic concern of peace research is the reduction of violence of all kinds which is done by progressively removing barriers in space, in the organisation of knowledge, and in time by integrating empirical studies of the past with critical studies of the present. He sees peace research as an effort to counteract fragmentation in the social sciences.

Despite the immense contribution of Galtung to the intellectual tradition of structural violence, several scholars have raised fundamental objections to his conceptualisation of structural violence and its application to conflict and peace studies. Boulding argues that since Galtung is a structural theorist, he tends to think mainly in terms of static patterns and forms.⁸ This implies that structuralists, like Galtung, tend to evaluate the structures in existence at a given point in time. In this context, Boulding argues that Galtung’s metaphor of structural violence diverts attention from the process by which anomalous structures lead to behavioural violence. Boulding argues that “the

⁷ J. Galtung, “Twenty-Five Years of Peace Research: Ten Challenges and Some Responses” *Journal of Peace Research*, Vol. 22, No. 2, June 1985, pp. 141-158.

⁸ K.E. Boulding, “Twelve Friendly Quarrels with Johan Galtung” *Journal of Peace Research*, Vol. 14, No. 1.(1977), pp. 75-86.

study of the structures which underlie violence are a very important and much neglected part of peace research and indeed of social science in general.”⁹ He further takes issue with Galtung’s thought which he considers to be too taxonomic and as underestimating the random element in social systems. In this respect Boulding notes:

“Galtung’s thought strikes me as too taxonomic in a world that is essentially continuous and in which taxonomy is usually a convenience of the human mind rather than a description of reality... He constantly thinks, in terms of dichotomies-structural versus behavioural violence, top dogs versus under dogs, center versus periphery, and so on, in a world which is much more complex in its speciation and more continuous than any dichotomy can accomplish...His thought prevents him from perceiving the real discontinuities and patterns of the world. He tends to underestimate the large elements of randomness in social systems and the extraordinary difficulty that is introduced into the perception of social systems by frequent but unpredictable parametric change, that is, what might be called system breaks, in which a previous set of regularities is replaced by a new set.”¹⁰

Boulding further contends that Galtung gives an overwhelmingly strong value to equality and does not spell out what his ideal society would be.¹¹ This leads him to underestimate the costs of equality which can be lack of quality and liberty. Boulding considers that Galtung never really faces the possibility that equality involves loss of liberty.¹² He also criticises Galtung’s aversion to dominance and therefore of hierarchy. This aversion, Boulding argues, “leads to an almost total rejection of hierarchy as a principle of social organisation.”¹³ According to Boulding the inefficiencies of hierarchy must be dealt addressed within the structure of hierarchy itself. He also takes issue with Galtung’s contention that poverty and inequality are mainly the result of oppression. Boulding argues that “the dynamics of poverty and the success or failure to rise out of it are of a

⁹ Ibid, p. 83.

¹⁰ Ibid, p. 78.

¹¹ Ibid, pp. 79-80.

¹² Ibid.

¹³ Ibid, p. 80.

complexity far beyond anything which the metaphor of structural violence can offer.”¹⁴ He considers that “while the metaphor of structural violence performed a service in calling attention to a problem, it may have done a disservice in preventing us from finding the answer.”¹⁵

Galtung responds to Boulding’s critique by focusing on the notion of structural violence and argues that Boulding underestimates the fundamental role of structurally induced inequality in human affairs. He argues that Boulding has a tendency to use the term ‘structural’ when he really means institutional and ‘dialectical’ when he really means Marxist. He disagrees with Boulding’s proposed gradual approach to reducing tension arising from structural violence. He argues that the response to exploitation and repression tends to be revolutionary. He sees the removal of gross structural violence as a necessary condition for one to obtain what Boulding refers to as stable peace.¹⁶

Gronow and Hilppo provide a further critical appraisal of Galtung’s concept of structural violence.¹⁷ They argue that a clearly political goal is hidden in Galtung’s concept of violence in that by social injustice Galtung implies unequal distribution of power. They object to Galtung’s concept of power as follows:

“To have power to decide over resources and especially over the distribution of them, one necessarily needs resources. Problems concerning the concept of power become fundamental in this context. Secondly, unless Galtung’s concept of power, which he unfortunately does not specify, is very broad, the equal distribution of power does not yet guarantee equality in any other influence relations...Usually, the equal distribution of power is regarded only as a condition of equality, and

¹⁴Ibid, p. 84.

¹⁵ Ibid, p. 84.

¹⁶ J. Galtung, “Review: Only One Quarrel with Kenneth Boulding”, *Journal of Peace Research*, Vol. 24, No. 2.(Jun. 1987), pp. 199-203. In this response and critique, Galtung reviews two of Boulding’s books, *The World as a Total System* (Beverly Hills and London: Sage, 1984) and *Human Betterment* (Beverly Hills and London: Sage, 1984).

¹⁷ J. Gronow and J. Hilppo, “Violence, Ethics and Politics” *Journal of Peace Research*, Vol. 7, No. 4, 1970, pp. 311-320.

equality is only one, perhaps necessary but by no means sufficient, condition of justice.”¹⁸

Gronow and Hilppo further argue that Galtung’s approach to structural violence is holistic rather than individualistic which they consider as problematic. They contend:

“In social influence relations there is always a subject, and this subject is not a holistic structure. Social influence always takes place between the members and groups of a society. The defining factors are objective, but the holistic structure exists only in the mind of man.”¹⁹

Gronow and Hilppo propose that social structure can be defined in terms of the properties of the members of groups of a society and the relations between them. Social structure can be reduced to concepts like social position (class and status) and interaction (exchange and influence) relations and to concepts such as groups, organisations, and institutions.²⁰

Derriennic provides a further critical appraisal of Galtung’s analysis of structural violence.²¹ He argues that Galtung’s idea of violence without an object and subject seems highly questionable. Derriennic argues that even violence exerted through a structure or organised violence is not violence without a subject. He further maintains that it is necessary to consider a society’s values to decide whether a social feature widens the gap between the actual and the potential level of achievement. It is thus misleading to take into account only the researcher’s values, and not at all the values of the people concerned. A fundamental challenge to Galtung’s structural violence framework according to Derriennic is therefore:

¹⁸ Ibid, p. 314.

¹⁹ Ibid, pp. 315-316.

²⁰ Ibid, p. 315.

²¹ J.P. Derriennic, “Theory and Ideologies of Violence” *Journal of Peace Research*, Vol. 9, No. 4, pp. 361-374.

“the question of the relations between what the researcher decides to call violence and what is called so in the society he lives in, or he studies. These relations work in both directions. There is an influence from current ideology on scientific theory on violence, and scientific theory cannot grapple adequately with real phenomena without taking into account their ideological aspects.”²²

Curle makes a vital contribution to the discourse on structural violence by re-conceptualising the traditional dichotomy between war and peace.²³ In the classical discourses of international studies there was a clear distinction between war and peace. Curle, however introduces a possibility where a society may be neither at war nor at peace. He contrasts peaceful and unpeaceful social relationships. In this regard he states:

“Absence of peace, in my definition, is characteristic of many situations that do not present overt conflict. Unpeacefulness is a situation in which human beings are impeded from achieving full development either because of their own internal relations or because of the types of relation that exist between themselves (as individuals or group members) and other persons or groups...Conversely in my terms, peace is a condition from which the individuals or groups concerned gain more advantage than disadvantage.”²⁴

Curle thus accepts Galtung’s basic argument that violence exists whenever an individual’s potential development, mental or physical, is held back by the conditions of a relationship. He, however, introduces a useful perspective by considering such a relationship of structural violence as “unpeaceful” and as an extension of the classical dichotomy of war and peace. Curle identifies various categories of “unpeaceful” relationships, based on the degree of awareness of conflict and the balance of the power relationship. He argues that some techniques of conflict management are more appropriate than others to particular forms of conflict. Curle posits that conciliation and bargaining are of little value in revolutionary situations, or in situations that cannot be

²² Ibid, p. 373.

²³ A. Curle, *Making Peace* (London: Tavistock, 1971) pp. 1-27.

²⁴ Ibid, p.1.

changed without a revolutionary adjustment of relationships. He argues that one of mankind's most urgent challenges is to find ways of eliminating unpeaceful relationships without resort to dehumanising violence.

Curle in a further development of the concept of an "unpeaceful relationship" provides the prototypical example of a master and a slave.²⁵ The slave may be unaware of the enormity of his position and of the fact that it could ever be changed, and so apathetically accepts it. Curle argues that the situation can only be changed by education, which implies some growth of awareness of the slave's position. Once the slave is aware, he/she struggles to reach a position of equality with his/her master so that their relationship can be reordered in accordance with principles of justice. This, according to Curle, represents the stage of confrontation. Thus the conflict becomes increasingly polarised as the slave becomes more aware. Curle considers that it is essential in many situations for relationships to undergo radical change if they are to be made peaceful. In all revolutions there has, at some stage, been a movement from a lower to a higher level of awareness about the situation, which is followed by a striving for greater balance. Resultant rebellions are either put down, and may re-emerge later, or they may be successful thereby leading to a greater degree of balance between the conflicting parties.

Webb, in line with Galtung's conceptualisation, argues that structural violence may be legitimised by the prevailing political and social norms.²⁶ Webb is, however, also critical of the concept of structural violence. Thus he notes:

"While the concept of structural violence has an intuitive appeal for many, both the concept and its empirical demonstrations should be approached with caution.

²⁵ A. Curle, *Mystics and Militants*, "A Study of Awareness, Identity and Social Action" (London: Tavistock, 1972) pp. 2-3.

²⁶ K. Webb, "Structural Conflict and the Definition of Conflict", *World Encyclopaedia of Peace*, Vol. 2 (Oxford: Pergamon Press, 1986) pp. 431-434.

First, how much structural violence there is will depend on the comparative units used. For example, if classes within a poor developing nation were compared, there might appear to be less structural violence than if that nation were compared to a rich industrialised nation in a study of international stratification. Secondly, it is not necessarily the case that all inequality and hence structural violence is due to the nature of the relationships between groups...Inequality can result from differences in natural resources, or through a population's technological incapacity to develop what resources it has..."²⁷

Webb makes an important contribution to the debate on structural violence by making a distinction between objective and subjective conflict. He states:

"The center of the debate revolves around the question of whether for a conflict to exist, it has to be perceived by the participants in the situation. Those who believe that for a conflict to exist there has to be at least some perception of incompatible goals by the social actors are termed "subjectivists" while those who maintain that conflict can exist without the awareness of the actors are termed "objectivists." To the latter conflict is an "objective" phenomenon and is not dependent on perceptions. How then does the peace researcher recognise an "objective" conflict that is not visible to the actors? The answer is by the presence of "structural violence".²⁸

Other scholars such as Groom²⁹ and Mwagiru³⁰ have also contributed to the debate on subjective and objective views of conflict, and in this way have brought out more clearly the differences between peace research and other paradigms in conflict. As Groom puts it:

"The conceptual world of the peace researcher is very different, since it is not the subjective element in the nature of relationships that is important for him, but the deep rooted structure which gives rise to them... the structuralists argue that conflict is an objective phenomenon. It emerges from a real clash of real interests rather than a

²⁷ Ibid, p. 432.

²⁸ Ibid, p. 431.

²⁹ A.J.R. Groom, "Paradigms in Conflict: the Strategist, the Conflict Researcher and the Peace Researcher" in J. Burton and F. Dukes (eds) *Conflict: Readings in Management and Resolution* (London: Macmillan, 1990) pp. 71-98.

³⁰ M. Mwagiru, *Conflict: Theory, Processes and Institutions of Management* (Nairobi: Watermark, 2000) pp. 15-16.

perceived clash of interests, although the actors may not perceive who their real enemies are.”³¹

Mwagiru in a further contribution to the subjective/objective debate argues:

“The subjective/objective debate has far reaching implications for conflict and its management. For the subjectivists, because the parties to a conflict must experience it, conflict management must centre on the efforts and inputs of the parties themselves. For the objectivists, since people may be in a conflict without realising it, third parties can enter into the conflict, and be instrumental in its management...Subjectivists approach the conflict from the perspective of negotiation and analysis, while the objectivists approach it from the perspective of taking action to change the structure.”³²

The discourse on structural violence has been further enriched by human needs perspectives. The linkages between human needs deprivation and violence have been extensively studied by Burton. He traces the causes of conflict to the lack of fulfilment of certain basic needs which are both biological and ontological.³³ These needs include, for example, the need for recognition and dignity. Burton makes a fundamental distinction between negotiable interests and non-negotiable needs. He argues that “the former could be dealt with by legal and bargaining processes. Non-negotiable needs, on the other hand, require processes that would lead to altered perceptions by the parties concerned, and in some cases agreed structural change”³⁴ Burton notes that “needs theory became a short-hand way of describing the problems created by structural violence and pointed more directly to ways in which they could be tackled”.³⁵ Burton also attempts to relate unaddressed structural violence and human needs:

³¹ A.J.R. Groom, “Paradigms in Conflict: the Strategist, the Conflict Researcher and the Peace Researcher” in J. Burton and F. Dukes (eds) *Conflict: Readings in Management and Resolution* (London: Macmillan, 1990) p. 91 and p. 93.

³² M. Mwagiru, *Conflict: Theory, Processes and Institutions of Management* (Nairobi: Watermark, 2000). p.16.

³³ J. Burton, *Human Needs Theory* (London: Macmillan, 1990).

³⁴ J. Burton, *Violence Explained: The Sources of Conflict, Violence and Crime and their Provention* (Manchester and New York: Manchester University Press, 1997) p. 35.

³⁵ Ibid.

“The human-needs frame of analysis is based on the proposition that, while structural violence is a reality, while, that is, there is a large degree of forced compliance, there are situations and conditions which are beyond the capability of the person or identity group to accommodate. There are human needs that will be pursued. In response to structural violence there will be resistance to the imposed conditions, violent resistance if necessary.”³⁶

Christie also considers structural violence from a human needs perspective.³⁷ He posits that systematic inequalities in economic and political structures deprive certain segments of society opportunities of satisfying their needs. He presents human needs theory as a theoretical basis for peace psychology. Christie argues that from a human needs perspective, conflicts are managed and social justice is pursued through the satisfaction of human needs. He posits that since material deprivation impacts adversely on human growth and development, the reduction of this form of structural violence occurs when a society is moving towards the sustainable satisfaction of needs for all members of the society. Christie contends that quality of life indices are among the best measures of structural violence since they reflect how well members of a society take care of one another. In order to reduce structural violence in a sustainable way all human needs relevant to the reduction of direct and structural violence must be satisfied simultaneously, since needs that are left unsatisfied could manifest themselves in some form of violence.

Rubenstein also enters the debate on the human needs perspective and structural violence.³⁸ He contends that major episodes of unanticipated social conflict have called

³⁶ Ibid, p. 33.

³⁷ Daniel J. Christie, “Reducing Direct and Structural Violence: The Human Needs Theory” *Peace and Conflict: Journal of Peace Psychology*, 3(4),1997, pp. 315-332.

³⁸ R.E. Rubenstein, “Unanticipated Conflict and the Crisis of Social Theory” in J. Burton and F. Dukes(eds), *Conflict: Readings in Management and Resolution* (Houndmills: Macmillan, 1990) pp. 316-327.

attention to the failure of existing social theories to develop an adequate conception of the individual in society. He posits that without such a foundation, deep-rooted conflicts cannot be resolved. He emphasizes the importance of human needs theory where an effort is made to define the basic needs shared by human beings and whose non-satisfaction can generate destructive behaviour. He identifies the existence of ontological needs for security, identity, meaning, bonding, and development which human beings will try to satisfy whatever those in authority say or do. He considers that in cases where conflict has been generated by unsatisfied basic needs, the parties in conflict may need to make changes that involve fundamental structural alterations in political and social systems. He underscores the necessity of understanding how human needs and their satisfiers reveal themselves over time in connection with continuous changes in the natural environment, production systems and systems of social meaning.

Pilisuk reinforces the view that structural violence is associated with perpetuating social arrangements associated with poverty, inequality and elite domination of resources.³⁹ He argues that violent behaviour is a surface manifestation and to reduce its incidence the underlying and often hidden structures that promote it must be identified and changed. Structured patterns that produce unneeded suffering are not acts of nature but the products of social arrangements created by people and sanctioned by normative beliefs and practices of culture. He considers structural, cultural and direct violence to be interrelated. Pilisuk further argues that structural violence is harder to identify than direct violence because it looks normal on the surface and hence the structural roots of violence and typically ignored leading to a continuation of the cycle of violence.

³⁹ M. Pilisuk, "The Hidden Structure of Contemporary Violence" *Peace and Conflict: Journal of Peace Psychology*, 4(3), 1998, pp. 197-216.

Gil, like Pilisuk, traces the roots of violence within and between societies to the human condition and to human-evolved social institutions and values.⁴⁰ He argues that the long-range goals of overcoming vicious circles of violence require non-violent social movements aimed at transforming the relations of domination and exploitation into relations of equality and liberty. Gil argues that each institutional system in human society interacts with all the others and depends on them. Variations in institutional systems generate specific characteristics of different societies. He further argues that the mode of operation of societal institutions and the resulting conditions and quality of people's lives are influenced by a society's dominant social values and ideology. He notes that value dimensions are of particular relevance to the discussion of structural violence as they exert a decisive influence over essential institutional processes such as equality versus inequality. Gil further argues that societies are social-structurally violent when people are not considered and treated as equals and as such do not have equal rights and responsibilities concerning the key institutions of social life. The establishment and maintenance of unequal levels of rights and responsibilities concerning key institutions of social life is usually not possible without overt and covert dominance and coercion. This implies that the exchanges between people, groups and classes in social-structurally violent societies are discriminatory, unfair and unbalanced.

Vayrynen further enlarges the discourse on structural violence by arguing that in a vertical social structure, violence is a means of both maintaining and challenging

⁴⁰ David G. Gil, "Understanding and Overcoming Social-Structural Violence", *Contemporary Justice Review*, April 1999, Vol. 2, Issue 1.

power.⁴¹ In a situation where there is a social order in which the prerogatives of the power elite starts crumbling, violence becomes an instrument of repression and empowerment. Vayrynen distinguishes between reactive and proactive violence. Reactive violence is aimed at defending the entitlements that a certain group has gained. Proactive violence, on the other hand, aims to appropriate new entitlements not previously enjoyed by a certain group. In a situation where the subordinated groups challenge the vertical social structure, their action is proactive. He argues that collective violence cannot be separated from the social structures and their transformation. Vayrynen also notes that a dynamic analysis of conflicts is vital since issues, actors and interests change over time owing to social, economic and political conditions of societies. Conflicts are continuously transformed even if efforts to resolve them do not seem to have made any visible progress. Many intractable conflicts may only be resolved through transformation. Transformation may involve actor transformation or issue transformation. In actor transformation there are internal changes to major parties to the conflict or there is appearance and recognition of new actors. Issue transformation, on the other hand, changes the relative importance of issues on which antagonism exists. Conflicts may also be restructured through role transformation, which tries to redefine the norms which actors are expected to follow in their mutual relations. Vayrynen also identifies structural transformation which concerns the entire structure of inter-actor relations. The external structure of a conflict may be transformed either if the distribution of power between the actors changes significantly or if their mutual relations experience a qualitative change.

⁴¹ R. Vayrynen, "To Settle or to Transform? Perspectives on the Resolution of National and International Conflicts" in R. Vayrynen (ed), *New Directions in Conflict Theory: Conflict Resolution and Conflict Transformation* (London: Sage Publications, 1991), pp. 1-25.

Several other scholars have emphasized the importance of understanding the dynamism of conflicts. Mwangiru has given some attention to this process through the analysis of a conflict cycle through which structural violence is transformed into behavioural violence.⁴² The basis of the conflict cycle is the idea that conflicts evolve from tensions to a crisis and eventually to physical violence. De Reuck also provides some useful insights into the dynamism of conflicts.⁴³ He argues that the dynamics of conflict depend upon the range of parties involved in the process and every new participant contributes to the definition of the issues at stake. De Reuck emphasizes that conflict is always about change in social structure and institutions, the distribution of resources and in human relations at many levels.

Harris and Lewis provide further insights into the concept of structural violence.⁴⁴ Structural violence describes the structures which maintain the dominance of one group at the centre of power over another group, often a majority, at the periphery. At a practical level structural violence for those at the periphery or who are marginalised implies low wages, landlessness, illiteracy, poor health, limited or non-existent political representation or legal rights and broadly, limited control over much of their lives. The exploitation, neglect and repression of structural violence kill slowly in comparison with direct violence. Reducing structural violence involves putting in place structures which provide increasing degrees of political liberty and social justice. Harris and Lewis further argue that to achieve lasting peace, peace must be a positive and proactive process which

⁴² M. Mwangiru, *Peace and Conflict Management in Kenya* (Nairobi: Centre for Conflict Research and Catholic Peace and Justice Commission, 2003) pp. 55-64.

⁴³ A. de Reuck, "The Logic of Conflict: Its Origin, Development and Resolution" in M. Banks(ed) *Conflict in World Society: A New Perspective on International Relations* (Sussex: Harvester Press, 1984) pp. 96-111.

⁴⁴ G. Harris and N. Lewis, "Structural Violence, Positive Peace and Peacebuilding" in G. Harris (ed) *Recovery from Armed Conflict in Developing Countries* (London: Routledge, 1999) pp. 29-36.

deals with the sources of structural violence underlying a particular conflict. Unless inequalities and injustices are addressed new cycles of direct violence are likely to occur. Like Galtung, Harris and Lewis note that positive peace takes a long-term view of conflict and underscores the fact that peace is fundamentally aimed at the transformation of the relationships, issues and causes underpinning conflict.

Several scholars have focused specifically on empirically explaining the concept of structural violence. Hoivik, for example, demonstrates how demographic concepts can sharpen the operational definition of structural violence.⁴⁵ He argues that the distribution of a society's resources affects not only the standard of living, but also the chances of survival itself. A more equitable distribution will normally increase the average length of life in society as a whole. Hoivik develops measures of structural violence based on the potential increase in the life expectancy and shows how they are related to the annual number of deaths and total death rates. He develops an index of structural violence which measures its intensity.

Kohler and Alcock also identify empirical indicators of structural violence.⁴⁶ They argue that both armed and structural violence can cause manifold and immense physical, social and psychological damage in addition to causing death. The measurement of violence is reached by measuring either violence input or violent output. They present estimates of the magnitudes of structural violence for the world's countries in 1965. They compare the fatalities due to structural violence those arising from civil and international conflicts.

⁴⁵ T. Hoivik, "The Demography of Structural Violence" *Journal of Peace Research*, Vol. 14, No. 1, 1977, pp. 59-73.

⁴⁶ G. Kohler and N. Alcock, "An Empirical Table of Structural Violence" *Journal of Peace Research*, Vol. 13, No. 4, 1976, pp. 243-356.

The Constitution and Structural Violence

This thesis examines the structural sources of constitutional conflicts, using Kenya as a case study. Having considered the general discourse on structural violence, this section will examine the literature related to the core theme of the study, and endeavour to examine what gaps there are in this literature which will provide a justification for the study. There is generally a dearth of literature that analyses constitutional issues from the perspective of structural violence. The study builds on Mwangi's 1999 article which considers the constitution as a source of crisis in Kenya and adopts a conflict analysis of democracy and presidential power in Kenya.⁴⁷ He argues that the principles of democracy are universal in content and, therefore, the issue of their transplantation from one country to another does not arise. Constitutional conflict in Kenya manifests itself in two ways. Firstly, there is a conflict between the powers of the president as enshrined in the constitution and the powers the president actually exercises. Secondly, a conflict arises between an extremely powerful presidency and the tenets of democratic governance. Mwangi then reviews the presidential powers as enunciated by the constitution and as exercised in practice. He argues that the conflict between presidential powers and democratic governance in Kenya is worsened by the suppression of calls for democratisation. The article considers the Kenyan constitution as the basis of structural violence. However, it concentrates on how excessive presidential powers limit the practice of democratic governance. It does not address other sources of structural violence in the constitution such as those arising from provisions relating to the legislature, the judiciary and land. Having been written in 1999 it also does not consider

⁴⁷ M. Mwangi, "The Constitution as a Source of Crisis: A Conflict Analysis of Democracy and Presidential Power in Kenya" in L. Chweya (ed) *Constitutional Politics and the Challenge of Democracy in Kenya* (Nairobi, Sareat, 1999) pp. 173-195.

the structural violence issues that may have emerged from the process of constitution-making in Kenya, as distinct from its content, which was largely carried out after 1999. This study will focus on constitution-making in Kenya and seek to explain how a deficient constitution-making process causes structural violence.

Mwagiru also briefly revisits the issue of the structural basis of constitutional conflicts in a later work.⁴⁸ In this study he evaluates the theoretical notions of structural conflict and violent conflict. He analyses the structures that generate conflict in society in terms of economic, social, psychological, religious and legal structures. The author argues that the constitutional structure is probably the most fundamental source of structural violence in Kenya since the constitution no longer meets the needs and expectations of Kenyan society. He also considers structural conflict in the international system. This work, while alluding to the constitution and structural violence does not provide a detailed analysis of the content and process as sources of constitutional conflicts although it provides a useful overview of structural sources of constitutional conflicts. Our study will fill the gaps.

Mwagiru frames the epistemology within which constitutional diplomacy in Kenya has taken place and raises the issue of whether the common good has been accounted for in the process.⁴⁹ He considers whether given the diplomatic processes that have taken place, the outcomes of the process will reflect the common good, viewed through the lenses of legitimacy. The article also has an underlying conflict perspective since it is concerned with the diplomacy of conflict management. Mwagiru considers the

⁴⁸ M. Mwagiru, *Conflict: Theory, Processes and Institutions of Management* (Nairobi: Watermark, 2000) pp. 1-35.

⁴⁹ M. Mwagiru, "The Constitution was Ours Before We Were the Constitution's: Framing the Normative Epistemology of Constitutional Diplomacy in Kenya" in E. Oketch, L. Franceschi and P. Mimbimbi (eds) in *Politics and the Common Good* (Nairobi: Strathmore University Press, 2006) pp. 186-206.

broad debates in Kenya's constitutional diplomacy such as the issues of governance, the locus of constituent power, entrenching sector interests, institutions of the republic and the entry into force of a constitution. He argues that in the constitutional review process, the common good of Kenya and Kenyans has not been sufficiently taken into account. Mwangiri contends that the process of constitutional diplomacy in Kenya needs to be nested on a normative epistemology which is underpinned by moral values and ethical considerations. He further argues that there is a need for actors to agree on a problem-solving framework as the most suitable way forward. This article does not adopt a structural conflict perspective on the constitutional debates in Kenya, but considers how diplomacy may be useful in addressing constitutional issues if the common good is sufficiently taken into account.

Mwangiri and Mutie in another article consider the linkages between governance and conflict management in Kenya.⁵⁰ Although the article is not focused specifically on constitutional conflicts, it raises some important issues in this regard. The development of conflicts in Kenya is analysed in terms of the conflict cycle. The authors relate conflict management to the issues of transition in Kenya, arguing that the competition between the Kenya African National Union (KANU) and the National Rainbow Coalition (NARC) during the 2002 elections was about different ways of managing the social, economic and political affairs of Kenya. They also contextualise constitutional conflicts and their management. They argue that constitutional conflicts arose from the inability of the constitution to tackle many of the concerns of Kenyan citizens such as resources and their distribution. The authors further contend that there is need to create new structures

⁵⁰ M. Mwangiri and P.M. Mutie, "Governance and Conflict Management" in P. Wanyande, M. Omosa and C. Ludeki (eds) *Governance and Transition Politics in Kenya* (Nairobi: University of Nairobi Press, 2007) pp. 131-154.

and mechanisms to manage Kenya's constitutional conflicts since the current constitution-making environment is different from the one that prevailed in the 1990s. In the article the constitution is considered as anomalous paradigm which needs to be radically overhauled. This builds on Kuhn's epistemological perspective regarding paradigm shifts. Kuhn although not specifically concerned with constitutional conflicts, provides some useful epistemological insights into the process of constitutional reform if one considers a constitution as a paradigm for the way relationships in a society are organised.⁵¹ An existing constitution serves well as a paradigm for the way these relations are organised as long as it adequately reflects the aspirations and expectations of a given society. However, given the dynamism of society, constitutions over time will begin to develop significant anomalies which make the existing constitutional paradigm inadequate. Addressing these anomalies eventually calls for a revolutionary change or overhauling of the paradigm which Kuhn refers to as overthrowing the existing paradigm or a paradigm shift. Thus constitutional reform can be viewed as a process of addressing constitutional anomalies that have arisen by overhauling the existing constitutional paradigm.

Thus the existing literature on the constitution and structural violence reveals that there is a clear gap which necessitates the study. The study builds principally on Mwagiru's analysis in this area by extending the discourse to consider a broader spectrum of conflict generating issues in both the content and process of Kenya's constitutional review process.

⁵¹ T.S. Kuhn, *The Structure of Scientific Revolutions*, 3rd Edition (Chicago: University of Chicago Press, 1996) pp. 52-135.

The Role of Third Parties in Conflict Management

This study of constitutional conflicts in Kenya is to some extent concerned with their management hence the need to consider the role of third parties. Third parties are particularly vital in addressing situations of structural violence because it is possible for individuals not to be aware of their predicament. Thus third parties can help to increase awareness of structural injustices.

Bercovitch provides some useful insights into the role of third parties in conflict management.⁵² A third party influences the behaviour of other actors in a conflict but neither actor relinquishes control over decision making. A third party can be an individual, a group of individuals, an organisation or even a state and may be invited by one or both parties in a conflict. Bercovitch argues that the inclusion of a third party in a conflict between two or more disputants has important structural implications for conflict management. Third parties may have the possibility of exacerbating a conflict or may act as catalyst in changing the parties' relationship from a destructive to a more co-operative relationship. Thus the third party has the effect of modifying the nature of interaction between the conflicting parties. Bercovitch in a later work underscores the importance of mediation in conflict management and considers the factors that influence it.⁵³ He argues:

“Mediation is a dynamic process taking place within a political context, which affects, and is in turn affected by, the practice of mediation. International mediation is truly the continuation of global politics by other means. As such it can only be comprehended as a contingent and reciprocal form of political behaviour. The nature and effectiveness of mediation depend, therefore, as much

⁵² J. Bercovitch, *Social Conflicts and Third Parties: Strategies of Conflict Resolution* (Boulder: Westview Press, 1984) pp.12-33.

⁵³ J. Bercovitch, “The Structure and Diversity of Mediation in International Relations” in J. Bercovitch and J.Z. Rubin, *Mediation in International Relations: Multiple Approaches to Conflict Management* (London: Macmillan, 1992) pp. 1-29.

on the context, as they do on the identity and activities of the mediator... International mediators operate in a complex arena of interdependent relations. They enter that arena to influence, change or modify some of its aspects. The best way to understand their endeavours is to analyse the common dimensions of any interaction, namely, actors, interests, resources and behaviour”⁵⁴

In a later study Bercovitch and Houston revisit the theory and empirical evidence on mediation.⁵⁵ They argue that mediation is one of the most promising approaches to constructive conflict management. They reinforce Bercovitch’s earlier argument that mediation is related to the overall context in which it occurs. This context affects mediation and in turn is affected by it. Bercovitch and Houston adduce empirical evidence to demonstrate their thesis that the success of mediation depends on four key factors: who the parties are, the character of their conflict and interaction, who the mediator is, and on the mediation process.

Bercovitch and Houston extend their discourse on mediation further when they examine mediator behaviour and evaluate the factors that influence mediators’ behaviour and choice of strategies.⁵⁶ They depart from traditional studies on international mediation which tended to focus on the impact and effectiveness of mediation. They build on their previous analysis which had identified the contextual dimensions that exert an influence on mediator behaviour. In addition, to the conflict context, the identity of the parties, the identity of the mediator and the actual mediation event, they also identify the centrality of background factors to influencing mediator behaviour, particularly the effect of information from previous mediation efforts. Their results suggest that the conditions of

⁵⁴ Ibid, p. 25.

⁵⁵ J. Bercovitch and A. Houston, “The Study of International Mediation: Theoretical Issues and Empirical Evidence” in J. Bercovitch (ed), *Resolving International Conflicts: The Theory and Practice of Mediation* (Boulder and London: Lynne Rienner, 1996) pp. 11-35.

⁵⁶ J. Bercovitch and A. Houston, “Why Do They Do It Like This? An Analysis of the Factors influencing Mediation Behaviour in International Conflicts”, *The Journal of Conflict Resolution*, Vol. 44, No. 2, April 2000, pp. 170-202.

the mediation environment and the identity of the parties in conflict are the most significant influences on the mediator's choice of strategy.

In his seminal article Wall presents a mediation paradigm which he uses as a basis for an analysis of the mediation process.⁵⁷ In relation to the mediation environment he states:

“The mediated negotiation system is composed of the mediator, the two negotiators, and the relationships between them. The environment of this system includes the negotiators' constituents, the mediator's constituents and the third parties who affect or are affected by the process and outcomes of the mediated negotiation. Also included in this environment are the variety of factors- for example, societal norms, economic pressures, and institutional constraints- which directly or indirectly affect the negotiation.”⁵⁸

In a later article Wall and Lynn review the mediation literature over the preceding decade.⁵⁹ They integrate the literature into a framework that focuses on the mediator's decision to mediate, the choice of mediation techniques, the outcomes of mediation, and the determinants of these factors. Wall, Stark and Standifer organise the literature of the past decade into six topical areas: the determinants of mediation, mediation *per se*, approaches employed by mediators, determinants of mediation approaches, outcomes of mediation, and determinants of the mediation outcomes.⁶⁰ Their analysis reveals that authors were for the most part rediscovering the wheel when they discussed the outcomes of mediation. They also find that there was a continued focus on the outcomes of the aggregate overall mediation process rather than on the outcomes of specific techniques.

⁵⁷ J.A. Wall, “Mediation: An Analysis, Review and Proposed Research”, *The Journal of Conflict Resolution*, Vol. 25, No. 1. (March, 1981), pp. 157-180.

⁵⁸ *Ibid*, p. 158.

⁵⁹ J.A. Wall and A. Lynn, “Mediation: A Current Review”, *The Journal of Conflict Resolution*, Vol. 37, No. 1, March 1993, pp. 160-194.

⁶⁰ J.A. Wall, J.B. Stark and R.L. Standifer, “Mediation: A Current Review and Theory Development”, *The Journal of Conflict Resolution*, Vol. 45, No. 3 (June 2001), pp. 370-391.

Kriesberg makes a distinction between mediating services provided to ameliorate international conflicts and who provides them.⁶¹ He notes that the services may be provided by a person, group or organisation playing the role of mediator, or by a quasi-mediator which is a social entity not so designated who may even be a member of one of the adversaries. Kriesberg examines the contribution that social units providing mediating services in different roles can make towards de-escalating international conflicts. He draws evidence from cases of mediation conducted officially and non-officially especially in the US-Soviet and Arab-Israeli conflicts. In a later work, Kriesberg maintains the distinction developed in his earlier work between mediators and quasi-mediators and argues that in the case of large-scale intractable conflicts, formal mediators have played vital roles once the parties come close to reaching de-escalating agreements.⁶² He notes that “quasi-mediators by making probes, offering suggestions, and providing reassuring information to their constituency and to the adversary, have often played crucial roles in moving adversaries into position for such agreements.”⁶³ He also analyses the factors contributing to success and failure in mediation. In this regard he argues:

“Success in mediation is never attributable to a single cause or factor, and consequently no one mediating activity can be the sufficient cause for the movement; it may, however, add a necessary or critical element. A mediating activity may contribute to the de-escalation movement even without being necessary, however-for instance, by improving the quality or speed of the de-escalation. There are also varying degrees to which mediating efforts contribute to failure. A mediating activity may simply contribute nothing to an ongoing struggle; it may be essentially irrelevant. Or it may be one of the factors that

⁶¹ L. Kriesberg, “Formal and Quasi-Mediators in International Disputes: An Exploratory Analysis”, *Journal of Peace Research*, Vol. 28, No. 1 (February 1991), pp. 19-27.

⁶² L. Kriesberg, “Varieties of Mediating Activities and Mediators in International Relations” in J. Bercovitch (ed) *Resolving International Conflicts: The Theory and Practice of Mediation* (Boulder and London: Lynne Rienner, 1996) pp. 219-223.

⁶³ *Ibid*, p. 232.

impedes a de-escalating process from making progress by, for instance, allowing one party to appear to be seeking a settlement while it holds out for better terms in the future. The introduction of the mediator's own interests may also disrupt an accommodation."⁶⁴

An aspect of the discourse on the role of third parties in conflict management is the distinction between settlement and resolution. Groom in analysing various paradigms in conflict makes an important distinction between settlement and resolution.⁶⁵ Settlement, he argues, is based on deterrence or coercion without which a conflict would resume since the behaviour of some actors is decided on criteria not acceptable to them. It is based on a realist conceptualisation of relations between actors. Settlement does not address the root causes of a conflict. Resolution, on the other hand, is meant to be a situation in which relationships between the parties are legitimised and self-sustaining without the imposition of behavioural patterns. With resolution, parties to a conflict accept the relationships between them and base their behaviour on criteria fully acceptable both to them and to the other actors in the system.

Other scholars have also contributed to this discourse on settlement and resolution. Burton posits that "there are three elements in the settlement or resolution of conflict: the degree of third-party coercive intervention, the degree of participation by the conflicting parties, and the degree of communication between the parties."⁶⁶ He contends that the history of conflict management shows a continuous decline in the degree of third party coercion, and a continuous increase in both participation and communication between the parties. He views this trend as implying that there has been a continuous

⁶⁴ Ibid, p. 231.

⁶⁵ A.J.R. Groom, "Paradigms in Conflict: the Strategist, the Conflict Researcher and the Peace Researcher" in J. Burton and F. Dukes (eds) *Conflict: Readings in Management and Resolution* (London: Macmillan, 1990) pp. 71-98.

⁶⁶ J. Burton, *World Society*, (London: Cambridge University Press, 1972) pp. 150.

shift away from settlements toward attempts at resolution. Burton anchors his world society approach on conflict resolution. This approach encourages the parties involved to understand the sources of conflict and to resolve them. Mitchell reinforces the distinction between settlement and resolution by arguing:

“Any compromise settlement, whether arranged bilaterally or through the action of intermediaries is likely to leave at least one party feeling that important goals remain unfulfilled. As with suppressed conflict, dissatisfaction is likely to remain until the deprived party perceives some opportunity to re-open the issues and redress the balance. At times a settlement will have to be guaranteed by the promises, sometimes the threats of some powerful third party...In contrast, techniques of conflict resolution aim at providing a solution which is generally acceptable to parties to the conflict, which they themselves have evolved and which for these reasons is self-supporting.”⁶⁷

Mitchell strongly supports Burton’s world society approach, arguing that it provides a new starting point for considering the nature of global society.⁶⁸ He notes that “the whole prescriptive approach is based partly upon the conception of a system interacting with its environment and maintaining itself through internal adaptation and efficient information processing, rather than through brute efforts to make the environment adapt to it.”⁶⁹ Vazquez⁷⁰ also reinforces Burton’s position by challenging realism’s objections to conflict resolution. He argues that to emphasise on global anarchy, as realism does, obscures the existence of important pillars of order in the global system.

It is vital to consider the role of third parties in conflict in the context of the study because the process of constitution-making in Kenya often made use of such parties. This

⁶⁷ C.R. Mitchell, *The Structure of International Conflict*, (London: Macmillan, 1981) p.276.

⁶⁸ C.R. Mitchell, “World Society as a Cobweb: States, Actors and Systemic Processes” in M. Banks (ed) *Conflict in World Society: A New Perspective on International Relations* (Sussex: Wheatsheaf Books, 1984) pp. 59-77.

⁶⁹ Ibid, p. 75.

⁷⁰ J.A. Vazquez, “Why Global Conflict Resolution is Possible: Meeting the Challenges of the New World Order” in J.A. Vazquez et. al (eds) *Beyond Confrontation: Learning Conflict Resolution in the Post-Cold War Era* (Michigan: University of Michigan Press, 1995) pp. 131-153.

makes it useful to have an analytical framework to examine their role from a conflict perspective. The constitution-making process itself can be viewed as an attempt to manage diverse conflicts in the Kenyan society.

The Meaning and Functions of Constitutions

There is a diversity of literature addressing the meaning and functions of constitutions. De Smith and Brazier argue that a constitution sets out the framework of government.⁷¹ They posit that the law set out in the constitution is a higher form of law and is hierarchically superior to other laws and is not alterable except through a specially prescribed procedure for amendment. They consider various procedures for constitutional amendment and contend that constitutions are fundamentally about political authority and power: the location, conferment, distribution, exercise, limitation of authority and power among the organs of a state. Constitutions are concerned with procedure and substance. They argue that the form and content of a constitution will depend primarily on the forces at work when the constitution is created and amended. In addition, considerations of practical convenience and precedents available to politicians and their advisors affect the form and content of a constitution.

Where assesses the nature of constitutions and rationalises their existence.⁷² He considers why some countries think it necessary to give a constitution a higher status in law than any other rules of law. Where also considers the classification and content of a constitution. He argues that constitutions are the result of a combination of political, economic and social forces operating at the time of their adoption. He contends:

⁷¹ S. de Smith and R. Brazier, *Constitutional and Administrative Law* (London: Penguin, 1989) pp. 1-14.

⁷² K.C. Wheare, *Modern Constitutions* (London: Oxford University Press, 1966) pp. 1-82.

“Constitutions, when they are framed and adopted tend to reflect the dominant beliefs and interests, or some compromise between conflicting beliefs and interests, which are characteristic of the society at the time. Moreover, they do not necessarily reflect political or legal beliefs and interests only. They may embody conclusions or compromises upon economic and social matters which the framers of the constitution have wished to guarantee or to proclaim”.⁷³

Wheare further argues that since constitutions are a product of their times, as times change constitutions should be changed to reflect this. Wheare then considers the different ways for changing constitutions through formal amendment, judicial interpretation, usage and convention.

Duchacek discusses the functions and content of a constitution.⁷⁴ Unlike de Smith, Brazier and Wheare, he considers a constitution as a reflection of the elite’s concept of how the national community should be governed for its own or the elite’s good. For him constitutions contain four inter-related elements. Firstly, all constitutions begin with the affirmation of the major principles and characteristics of their communities as interpreted by the drafting elite. Constitutional preambles and bills of rights contain a clear indication of the elite’s belief about what people want and reject. Preambles and introductory articles primarily address collective memories and goals. Secondly, constitutions describe how a community’s goals as set and interpreted by the elite are to be attained. Thirdly, the constitution’s text is the elite’s concept of the way in which individual and group interests should be articulated and communicated. This encompasses constitutional guarantees of the right to vote, the right to freedom of expression and assembly, and to form political parties and interest groups. The common denominator of these rights of access to rule-making and rule enforcement is

⁷³ Ibid, p. 67.

⁷⁴ I. D. Duchacek, “National Constitutions: A Functional Approach” *Comparative Politics*, Vol. 1, No. 1, Oct. 1968, pp. 91-102.

communication where messages are transmitted to the system for authoritative action. Fourthly, constitutions contain provisions for their legitimate revision. The aim of adopting a new constitution and prescribing a legitimate procedure for its change is to avoid violent transformation. Duchacek emphasizes that present-day expectations as to the planned and unplanned effects of national constitutions are very modest compared to the excessive hopes of the eighteenth and nineteenth centuries when many people assuming the perfectibility of human beings and society tended to view constitutions as paths to utopia.

Kelsen makes an important contribution to the discourse on constitutions by contextualising the importance of constitutions within the legal systems.⁷⁵ He contends that the legal system is a system of norms and that the validity of norms can be traced back to a single norm, the *grund* norm. Through the process of derivation of validity, all laws of any legal system must derive their validity either directly or indirectly from the authority of the legal system's constitution. He argues:

“Tracing the various norms of legal system back to a basic norm is a matter of showing that a particular norm was created in accordance with the basic norm...if one asks about the basis of the validity of the criminal code, one arrives at the state constitution, according to whose provisions the criminal code was enacted by the competent authorities in a constitutionally prescribed procedure...If one goes on to ask about the basis of validity of the constitution, on which rest all statutes and the legal acts stemming from those statutes, one may come across an earlier constitution, and finally the first constitution.”⁷⁶

He further argues that the legal system has a hierarchical structure in that lower-level norms are created in accordance with higher-level norms. In this regard he notes:

⁷⁵ H. Kelsen, *The Pure Theory of Law*, translated by B.L. Paulson and S.L. Paulson (Oxford: Clarendon, 1992) pp. 55-75.

⁷⁶ *Ibid*, p. 57.

“The relation between the norm determining the creation of another norm, and the norm created in accordance with this determination can be visualised by picturing a higher and lower-level ordering of norms. The norm determining the creation is the higher level norm, the norm created in accordance with this determination is the lower-level norm. The legal system is not, then, a system of like-ordered legal norms, standing alongside one another, so to speak; rather it is a hierarchical ordering of various strata of legal norms. Its unity consists in the chain that emerges as one traces the creation of norms, and thus their validity, back to other norms, whose own creation is determined in turn by still other norms. This regress leads ultimately to the basic norm—the hypothetical basic rule—and thus to the ultimate basis of validity, which establishes the unity of this chain of creation.”⁷⁷

The constitution, Kelsen argues, is the *grund* norm in that the creation and validity of other norms can ultimately be traced back to the constitution. He notes that “the essential function of a constitution consists in governing the organs and process of general law creation, that is, of legislation.”⁷⁸ Kelsen further argues that for its own amendment or repeal, the constitution must provide for procedures different from and more demanding than the usual legislative procedures. Kelsen’s theory emphasizes the importance of the state and the constitution in relation to the rest of the legal system, and the concepts of constitutional authority and constitutional development.

Maier is, however, critical of Kelsen’s views on the basic norm as providing the reason for the validity of the historically first constitution. In this context he argues:

“The idea of pre-supposing a norm to give validity to a constitution for which no legal authority is forthcoming makes a sort of sense in the (rare) situation where a constitution is promulgated in a legal vacuum, where there would be no point at all in searching for legal justification....but this theory is open to the well-known objections that it does not satisfactorily explain the constitutional basis of legal systems or states which derive their independence by means of a valid legal act of another state or whose existence has arisen largely as the result of the merger of existing states.”⁷⁹

⁷⁷ Ibid, p. 64.

⁷⁸ Ibid, p. 64.

⁷⁹ G. Maier, “Custom and Constitutions” *Oxford Journal of Legal Studies*, Vol. 1, No. 2, Summer 1981, pp. 167-176.

He argues that Kelsen, as a legal positivist for whom the central model of law-making is a form of deliberate action at some particular time and place, fails to take into account the nature and role of customs in constitutions. In this regard he contends:

“There is some difficulty in stating what Kelsen is referring to in his discussion of the role of custom in constitutions. Kelsen stresses that custom to be of relevance to the legal scientist must be deliberately made and “positive”, that is constituted by the actual behaviour of persons. Further he is of the view that the persons concerned must feel themselves bound by the conduct in question, though not bound as a matter of law. But these points tend to be eclipsed by the later emphasis he gives to the essentially unwritten basis of custom when he discusses custom as a decentralised form of law-creation. At least in his discussions of constitutional authority and the place of customs in this, he takes the view that whereas written constitutions have their origins in specific acts performed by one or more persons in some identifiable way, unwritten constitutions are in contradistinction based on custom....The existence and importance of custom-based practices of the constitution in unwritten constitutions is obvious, almost by definition. Written constitutions will also display important customary developments, for once a written constitution has been set up, then almost inevitably conventions will arise to supplement and put into practical effect the express provisions of the written constitutions.”⁸⁰

Maier further contends that whereas jurisprudence still has value in considering problematic areas of law, one must be wary of uncritically accepting general models of law such as Kelsen’s in relation to particular legal systems or particular legal problems. Our study will examine these issues in the context of the Kenyan constitution-making process.

The Discourse on Constitutionalism

The discourse on constitutionalism is a central one in constitutional theory and practice. At the heart of this debate is the issue of separation of powers. Nwabueze argues that the concept of constitutionalism recognises the necessity of government but insists

⁸⁰ Ibid, pp. 170-171.

upon a limitation being placed on its powers.⁸¹ It, therefore, connotes a limitation on government, which is the antithesis of arbitrary rule. Nwabueze succinctly advances his position as follows:

“That there is a formal written constitution according to whose provisions a government is conducted is not necessarily conclusive evidence that the government is a constitutional one. Again the determining factor is: Does the constitution impose limitations upon the powers of the government? There are indeed many countries in the world today with written constitutions without constitutionalism. Normally, a constitution is a formal document having the force of law, by which a society organizes a government for itself, defines and limits its powers and prescribes the relations of its various organs *inter se*, and with the citizen. But, a constitution may also be used for other purposes than as a restraint upon government. It may consist to a large extent of nothing but lofty declarations of objectives and a description of the organs of government in terms that import no enforceable legal constraints. Far from imposing a brake upon government, such a constitution may indeed facilitate or even legitimise the assumption of dictatorial powers by the government.”⁸²

Nwabueze further contends that the separation of functions between the executive and legislature, requiring separate procedures is of fundamental importance, for even if a government is regarded as a single, indivisible structure, the separation in procedure will necessarily operate as a limitation upon the incidence of arbitrariness. A separation in procedure implies the idea of a separate agency or structure. Constitutionalism requires for its efficacy a differentiation of governmental functions and a separation of agencies which exercise them. The diffusion of authority among different centres of decision-making is vital to preventing totalitarianism or absolutism. The separation is extended beyond functions and agencies to the personnel of the agencies. The same person or group of persons should not be members of more than one agency. The idea of checks and balances seeks to make the separation of powers more effective by balancing the powers of one agency against those of another through a system of positive mutual

⁸¹ B.O. Nwabueze, *Constitutionalism in the Emergent State* (London: C.Hurst and Co, 1973) pp. 1-21.

⁸² *Ibid*, p.

checks exercised by the governmental organs upon one another. The concept of checks and balances presupposes that specific function is assigned primarily to a given organ, subject to a power of limited interference by another organ to ensure that each organ keeps within the sphere delimited to it.

Vile extends the discourse on separation of powers by significantly distinguishing between the pure doctrine of separation of powers and a modified doctrine which includes deviations from the pure form.⁸³ He argues that the doctrine has rarely been held in its extreme form and even more rarely put into practice in its pure form. However, this pure form provides a benchmark to enable one to assess the changing historical development of the doctrine. A fundamental tenet of the doctrine of the separation of powers is the restraint of governmental power which is arguably best achieved by setting up divisions within the government to prevent the concentration of such power in the hands of a single group of individuals. He contextualises constitutionalism by arguing that it advocates a certain type of institutional arrangement on the grounds that certain ends will be achieved. The normative element of constitutionalism is therefore based on the belief that there are certain demonstrable relationships between given types of institutional arrangements and the safeguarding of important values.

Kurland further extends the debate on separation of powers by arguing that the original constitutional notions of division of powers and functions were based not only on “separation of powers” but also on a concept of balanced government and checks and balances.⁸⁴ These three ideas rested on a single base of mistrust of governmental

⁸³ M.J.C Vile, *Constitutionalism and the Separation of Powers*, Second Edition (Indianapolis: Liberty Fund, 1998) pp. 1-22.

⁸⁴ P.B. Kurland, “The Rise and Fall of the Doctrine of Separation of Powers” *Michigan Law Review*, Vol. 85, No. 3, Dec. 1986, pp. 592-613.

authority concentrated in the same hands. However, he contends that the three ideas were different in their forms. Checks and balances suggested a situation where there was oversight of one agency by another. Balanced government involved separation but by way of providing different voices for the different elements in a society. The notion of separation of powers, he argues, encompasses the notion that there are fundamental differences in governmental functions, each of which must be maintained as separate and distinct with none operating in the realm assigned to another.

Vincent reinforces the views of Nwabueze, Vile and Kurland by providing a broader context for the development of the constitutional theory of the state.⁸⁵ He argues that constitutional theory seeks the limitation and diversification of authority and power. He posits that the constitutional theory of the state tries to overcome one of the intrinsic problems of absolute sovereignty, the transition and continuity between sovereigns. A structure of rules and principles is maintained which allows for change and emphasizes institutionalising power relations, creating offices with rights and duties operating within specific rules. Constitutional theory, he contends, is also concerned with establishing how fundamental rules are to be modified. He emphasizes the value of individual persons as central to constitutional theory. Constitutions are meant to protect the dignity and worth of the individual. The rights of the person therefore become a central preoccupation of constitutional theory.

Lutz in a further contribution to the discourse on constitutionalism reflects on its position at the start of the twenty-first century.⁸⁶ He argues that constitutionalism is animated and defined by universal human hopes, an inclination for self-preservation,

⁸⁵ A. Vincent, *Theories of the State* (Oxford: Blackwell, 1987) pp. 77-118.

⁸⁶ D.S. Lutz, "Thinking about Constitutionalism at the Start of the Twenty-First Century", *Publius*, Vol. 30, No. 4, pp. 115-135.

unfettered sociability and beneficial innovation. He considers constitutionalism as having institutional implications in terms of the rule of law, republicanism and limited government. He contends that the rule of law was developed to minimise arbitrariness, especially that which threatened one's life and livelihood. He posits that popular sovereignty is at the base of constitutionalism. A critical implication is that if the people are sovereign and not parliament or the state, the popular sovereign can easily distribute power to multiple agents. In the absence of *de facto* popular sovereignty, long-term constitutionalism becomes problematic.

Constitutional Development in Kenya

This section of the literature review focuses on the case study of Kenya. It is divided into two parts: the first deals with literature that addresses the historical development of the constitution in Kenya and the second reviews the literature that underscores the need for constitutional reform in Kenya and an analysis of the shape that reform has taken. Kenya's constitutional developments were also informed by the broader constitutional context in African states and so some of this literature is also reviewed to provide deeper insights into the Kenyan situation. Many post-independence constitutional developments in Kenya mirrored the challenges experienced at the continental level.

Considerable literature also exists on the historical background and development of Kenya's constitution. Ghai and McAuslan analyse the development of public law in several fields in Kenya through the colonial period up to the immediate post-

independence period.⁸⁷ They underscore the importance of a government creating confidence in the institutions of government so that they become legitimate in the eyes of citizens. People's attitudes towards institutions of the state are influenced by their experience of the legal system. It is argued that although confidence in the institutions and mode of government was created in the first two and a half years after independence, a turning point occurred after 1966 when the government became negligent about the need for legitimacy and the dictates of constitutionalism as it introduced amendments to increase the powers of the executive. This study by Ghai and McAuslan provides a good background for the study of constitutional conflicts in Kenya.

Ghai in a later work considers the colonial and some immediate post-independence trends in Kenya, Uganda and Tanzania.⁸⁸ He particularly emphasizes that constitutions do not act as unchanging umpires over the political process. He argues that although it was intended at independence that constitutions would have an autonomous existence and a controlling influence in political activity, the role of the constitution in East Africa did not alter significantly in the post-independence period. The provisions of the constitution were allowed to operate only if their consequences could be foretold, controlled or manipulated. He considers a post-independence challenge as one of using the constitutional process to change and direct the political system without destroying the notions of moral value and autonomy of the process. He notes in relation to the trend towards the strengthening of executive power:

“The creation of the office of the executive presidency leads to some coalescence of power; places the leader to some extent above the system, in which criticism of

⁸⁷ Y.P. Ghai and McAuslan, *Public Law and Political Change in Kenya* (Nairobi: Oxford University Press, 1970).

⁸⁸ Y.P. Ghai, “Constitutions and the Political Order in East Africa”, *The International and Comparative Law Quarterly*, Vol. 21, No. 3, July 1972, pp. 403-434.

him is scarcely possible. It gives the president considerable capacity to manipulate the system; and in this perhaps he performs some of the aspects of the role of a colonial governor. In Kenya, for example, even though the presidency is a parliamentary executive one, criticism of the presidency is not permitted unless on substantive motion, and the government and the ministers themselves have been allowed to hide behind this rule. Moreover, the presidents are often placed above the law and their powers of detention serve to remove from the scene those who might pose a threat to the system.”⁸⁹

Ghai considers an effective strategy for national consolidation and political development as being one where the political system could be defined under the umbrella of the leader of the state and then the charisma of the leader transferred to institutions established and regulated by the constitution. However, he contends that in Kenya the leader by his political partisanship seriously undermined his potential for such as role.

In a later article Ghai reinforces some of the views expressed in his earlier work. Although the article addresses the broader African context it accurately mirrors the post-independence constitutional developments in Kenya.⁹⁰ He posits that there is a wide consensus that a society should be regulated by law, and that public power should be exercised in accordance with its due process. With reference to African states he observes:

“The authoritarian character of the state is its dominant feature. Constant threats to the political hegemony of the ruling group lead to the intolerance of independent centres of authority or power. The state seeks the total subjugation of the civil society, and permits autonomy only where it is functional to its own purposes. The greater the role of the state in accumulation, the less the scope for social autonomy.”⁹¹

⁸⁹ Ibid, p. 418.

⁹⁰ Y. Ghai, “The Role of Law in the Transition of Societies: The African Experience” *Journal of African Law*, Vol. 35, No. 1, 1991, pp. 8-20.

⁹¹ Ibid, p. 14.

time emphatically rejecting the classical or liberal democratic notion of constitutionalism. The result of this paradox is that only the idea of the constitution has survived. He traces the origins of this paradox firstly to the legal order that many African states inherited at independence and perpetuated. Colonial power and administration was dominated by bureaucracy and a coercive orientation. At independence the colonial order was often preserved intact as the foundation of administration in the post-colonial state. The author further argues that in the African context, the idea of the constitution is a means of demonstrating the sovereignty of the state. Contemporary elites in Africa are preoccupied with the perfection of ways and means of their own survival and the expansion of opportunities for private accumulation. The constitution is thus seen as a power map on which framers delineate a wide range of concerns. He posits that constitutionalism is the end product of social, economic, cultural, and political progress which can only become a tradition if it forms part of the shared history of a people.

In another article Okoth-Ogendo considers recent constitutional developments in Kenya.⁹⁴ He first analyses the global context of constitution-making by distinguishing the different phases in which constitution-making has come over the last century. He focuses on the constitution-making process in Kenya firstly tracing its evolution since the 1960s and then focusing on the different debates in the review process. He considers the post-1997 period as having been defined by a number of struggles over the design of the review process, the struggle to control the process itself and the struggle over the outcome of the review process. He emphasizes the importance of considering the political parameters that shaped the struggle such as the fact that reform between 1997

⁹⁴ H.W.O. Okoth-Ogendo, "The Politics of Constitution-making in Kenya: An Introspective Survey", A Public Lecture Presented at Moi University Main Campus, on Thursday February 6th, 2003, Revised on April 7th, 2004.

and 2002 was taking place with a sitting president barred from succeeding himself in office. He underscores that stakeholder interests or concerns in the review process were wide-ranging and complex including fear of religious, economic or political marginalisation. In addition, there was a fear of loss of power by those who had acceded to executive authority under the current Constitution. This constitution had provided them with a considerable concentration of power in the executive which was also linked to economic accumulation.

Ojwang also considers constitutional history of Kenya from colonial times.⁹⁵ He then considers the political party as an organic component in the constitutional development of Kenya. He undertakes an analysis of the executive, the legislature and the judiciary in the context of constitutional development. He argues that the circumstances of African countries must be incorporated in the scheme of public institutions. He contends that failure to incorporate these in governance would imply a dislocation between popular reality and the scheme of public affairs. Constitutional practice, therefore, must consider differing political arrangements that accord with the social, economic and cultural conditions in a given case. Ojwang's analysis in a sense sought to justify the necessity of the one-party state and the accompanying post-independence constitutional amendments.

Muigai provides an authoritative study on Kenya's constitutional development by examining the twenty eight amendments between 1964 and 1997.⁹⁶ These amendments, he contends, cumulatively radically altered the institutional structure and legal content of

⁹⁵ Ojwang J.B. *Constitutional Development in Kenya: Institutional Adaptation and Social Change* (Nairobi: Acts Press, 1990) pp. 1-18.

⁹⁶ G. Muigai, *Constitutional Amendments and the Constitutional Amendment Process in Kenya, 1964-1997: A Study in the Politics of the Constitution*, Unpublished PhD thesis, September 2001.

Kenya's constitution. They also contributed to a re-design of the structure of the post-independence Kenyan state. He summarises his view on Kenya's post-independence amendments as follows:

“Ostensibly, the amendments were made in order to facilitate more effective governance and to make the constitution both autochthonous and more relevant to the 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.”⁹⁷

In another article Muigai extends the debate on constitutional amendments and provides a theory in this regard in which he argues that the demand for far-reaching constitutional change has often been circumscribed by the complexity of having to carry out the changes within the procedures and processes of the existing constitution.⁹⁸ He aims to delineate the legitimate parameters of amending or altering the constitution. Muigai argues that unless the amendment provision specifically provides for an amendment procedure whose mandate is to undertake any type of constitutional change, the standard amendment clause implies a limited power which ought not to be invoked to carry out structural or fundamental changes which are inconsistent with the existing constitution. He therefore contends that the power to amend or alter the constitution is not a power to make a new constitution but is rather a power to modify within ascertainable limits the

⁹⁷ Ibid, p. 235.

⁹⁸ G. Muigai, “Towards a Theory of Constitutional Amendment”, *The East African Journal of Human Rights and Democracy*, Vol. 1, No. 1, September 2003, pp. 1-12.

existing constitution. Thus an entirely new constitution he argues cannot be written under the guise of amending or altering the old one.

On the basis of the aforementioned adverse effects of the amendments in Kenya, by the early 1990s a literature began to emerge advocating for constitutional reform so as to inculcate democratic values within the constitution.

Nowrojee provides a strong case for constitutional reform in Kenya.⁹⁹ He develops five arguments why the Kenya constitution should be reformed. Firstly, the checks upon a Kenyan president are extremely weak. He argues that there is neither law nor any independent civil society safety pillar which can check potentially tyrannical activities of a Kenyan president. Secondly, Nowrojee argues that there is a total concentration of power, including executive power, in the office of the presidency. Thirdly, he argues that there are structural deficiencies in Kenya's constitutional and legal structure characterized by the existence of contradictory and undemocratic legislation. Fourthly, Nowrojee argues that Kenya's governmental structure is not based on an adequate theory of constitutional form or practice. He, therefore, argues that changes in the constitution are vital for establishing proper, consistent and recognizable forms of government practice based on proper, consistent and recognizable theories of state structures. Fifthly, Nowrojee argues that in the current constitutional set-up democratic processes can and are still being subverted. He argues that true change in Kenya will occur with the functioning of democratic structures and practices.

Gatheru and Shaw present a strong argument for constitutional change and in the process consider a number of key issues that have generated constitutional conflicts in

⁹⁹ P. Nowrojee "Why the Constitution needs to be Changed" in K. Kibwana, C. Maina Peter and J. Oloka-Onyango(eds), *In Search of Freedom and Prosperity: Constitutional Reform in East Africa* (Nairobi: Claripress, 1996) pp. 386-403.

Kenya.¹⁰⁰ They do not, however, adopt a conflict perspective in their analysis. Instead they provide political, economic and legal perspectives on anomalies in Kenya's constitution. They identify a pervasive lack of confidence in governmental institutions, a lack of constitutive values, poor institutional design, the subordination of the legislature and judiciary to the executive and weak succession mechanisms as fundamental constitutional problems that need to be addressed. They argue that the current constitution is inadequate as an instrument of governance. They consider the fundamental challenge of reform to be that of building confidence in government institutions. They argue that the Kenya constitution should be overhauled to reduce the powers of the president, enhance the parliamentary features of the government and split the headship of the government from that of the state. Gatheru and Shaw also consider the linkages between constitutional and economic reforms, arguing that the current extensive regulatory framework offers multiple opportunities for corruption, thus undermining the possibility of viable economic reforms.

Mutunga also advocates the need for constitutional changes in Kenya.¹⁰¹ He posits that the constitution reflects a society's contract between the governed and the governors. Over thirty years after the first constitution there is a need for a new social contract reflected in a new constitutional dispensation. He argues that the amendments in the independence constitution consolidated a one-party dictatorship and created an executive with the powers of an absolute monarchy. As such it does not reflect a multi-party political environment. In addition, economic reforms being carried out cannot be

¹⁰⁰ Gatheru and Shaw (eds), *Our Problems, Our Solutions* (Nairobi: Institute of Economic Affairs, 1998) pp. 1-18.

¹⁰¹ W. Mutunga, "The Need for Constitutional Changes" in K. Kibwana, C. Maina Peter and J. Oloka-Onyango (eds) *In Search of Freedom and Prosperity: Constitutional Reform in East Africa* (Nairobi: Claripress, 1996) pp. 410-415.

fully and efficiently implemented unless the constitution reflects a liberal democratic economy. Mutunga also views a new constitution as vital for diffusing ethnic, racial, economic, cultural, social and political tensions that are threatening national survival since the review process would provide a forum for dialogue and compromise. In a later publication¹⁰² Mutunga provides an analysis of the drive towards constitutional reform against the background of transition politics in Kenya between 1992 and 1997. He provides a useful context within which to assess the dynamics of the reform process. Mutunga emphasizes the importance of civil society in providing intellectual leadership for social transformation particularly in the process of democratisation. He views it as vital for civil society to become a powerful political lobby and advocates the use of peaceful mass action, civil disobedience and non-violent agitation as a way of putting pressure on dictatorial regimes to adopt more democratic tenets.

Maina extends the debate on the need for constitutional reform in Kenya by analysing the linkages between constitutionalism and democracy.¹⁰³ He identifies a number of elements by which to decide whether the government upholds the rule of law or not. A key element is that the government should recognize that the people are sovereign. He argues that the primary purpose of the rule of law is to ensure respect for constitutionalism. The author examines ways of monitoring constitutionalism through the exercise of the rule of law. He posits that one of the most important mechanisms for constitution monitoring and of the rule of law is inclusive and periodic, free and fair elections. The author proceeds to explore liberty and equality as constitutional values

¹⁰² W. Mutunga, *Constitution-Making from the Middle: Civil Society and Transition Politics in Kenya, 1992-1997* (Nairobi: Sareat, 1999) pp. 232-242.

¹⁰³ W. Maina, "Constitutionalism and Democracy" in K. Kibwana, Chris Maina and J. Oloka-Onyango (eds) *In Search of Freedom and Prosperity: Constitutional Reform in East Africa* (Nairobi: Claripress, 1996) p. 1-15.

which are necessary for the survival of a democracy. In a later paper Maina¹⁰⁴ analyses constitutional developments in Kenya and emphasizes the crisis of the state that is apparent in Kenya and many African countries. He argues that this crisis is manifested in the pervasive lack of faith and trust in state institutions, which in turn has engendered a crisis of governance. This crisis of governance is manifested in political and economic society. Given that the state is bereft of social support and is distrusted by the majority of the population, it must necessarily centralize power in order to survive. The article traces the centralization of the state from colonial times and argues that the excessive powers of the president are the logical outcome of the evolution of the state. He, therefore, considers the excessive powers of the president as a symptom of an underlying crisis of state institutions. He argues that the nurturing of constitutional culture and the strengthening of mechanisms to monitor the government are vital features of a functioning democracy.

Munene reinforces Maina's view that the institutions of the state in Kenya are in a state of crisis.¹⁰⁵ He assesses the events in Kenya in the period from 1995 to 1997 when there was a considerable crisis of confidence in the government. This was a period of considerable advocacy for political reforms. On the one hand the government was blamed for many ills but at the same time, opposition politicians were also accused of failing to focus on what was needed to reform the political process. He argues that the National Convention Executive Council (NCEC) emerged as force that could mobilise the public in a way in which the politicians had found impossible. He contends that the

¹⁰⁴ W. Maina, "Democracy, Good Governance and Economic Recovery", Seminar paper presented at a workshop on Professional Ethics and Responsibilities, Safari Park Hotel, 28th and 29th July, 1999.

¹⁰⁵ M. Munene, "Crisis and the State in Kenya, 1995-1997: An Appraisal" in G. Okoth and B.A. Ogot (eds) *Conflict in Contemporary Africa* (Nairobi: Jomo Kenyatta Foundation, 2000) pp. 152-176.

Inter-Parties Parliamentary Group (IPPG) reform package helped to restore some legitimacy to the political class and to some extent reduce the crisis of confidence in the Government.

Kuria underscores the view that the institutions of the state in Kenya are in crisis by considering the experience of the Kenya Africa National Union (KANU) government which he argues exceeded the limits of political manipulation and undermined the constitution in the interest of assuring its political longevity.¹⁰⁶ He argues that the civil service existed primarily to serve those who supported the ruling party and those who did not support KANU were not entitled to any services from the government. Laws during the KANU era could be ignored or manipulated where they conflicted with powerful vested political interests. There was a threat of denial of development funds to Kenyans who did not support the ruling party. Kuria, therefore considers a new constitution as indispensable for dealing with the crisis of the state institutions in Kenya.

Literature also exists on the constitutional review process itself and the implications of the various stages.

Wanjala considers the Inter Party Parliamentary Group (IPPG) reform package and its aftermath.¹⁰⁷ He considers the Constitution of Kenya (Amendment) Act and its impact on the nomination of members into parliament, the Electoral Commission, legal reforms and freeing the airwaves. He wonders whether the IPPG reforms were capable of guaranteeing free and fair elections and argues that since the presidential powers were left almost intact, the changes did little to level the playing field. The Electoral

¹⁰⁶ G.K. Kuria, "Competing Visions of Kenya: A Democratic United Nation Versus a Multinational State based on a Federation of Ethnic Nations", *The Nairobi Law Monthly*, No. 51, January 1995, pp. 3-4.

¹⁰⁷ S. Wanjala, "The Implications of the IPPG Brokered Reform Package on Kenya's Democratisation Process" in S. Wanjala, K. Akivaga and K. Kibwana (eds) *Yearning for Democracy: Kenya At the Dawn of A New Century* (Nairobi: Claripress, 2002) pp. 359-370.

Commission was beefed up but was not reconstituted into an independent organ. The author contends that the IPPG reforms would not in themselves guarantee free and fair elections although they would ensure more competitive elections than in the past.

Ringera considers the implications of the Bomas meeting of 11th May 1997 which brought together all political parties, the major religious organisations, professional and other civil society organisations and community interest groups.¹⁰⁸ He considers both areas of agreement and disagreement of the parties to the Bomas meeting. Areas of agreement, for example, included a broad consensus on the need to look afresh at several matters in the Constitution of Kenya Review Commission Act 1997 and that the review process needed to begin at grassroots level. Areas of disagreement included whether or not to hold a referendum and if the President in exercise of his role as head of state should have a discretion in the appointment of the commissioners or their chairman. Ringera also considers possible parameters of discourse in the aftermath of the Bomas meeting such as the time frame of the constitutional review process and the need to develop a mechanism for breaking deadlocks should they arise. He notes that a national consensus on engaging in the process of constitutional reform began to develop right from the advent of multi-party politics in Kenya in 1992.

The Report of the Constitutional Review Commission on the review process outlines the constitutional review process in Kenya which gathered momentum in the 1990s.¹⁰⁹ It traces the development of certain obstacles in the process such as the existence of the parallel processes which eventually merged. The Report analyses the

¹⁰⁸ A. Ringera, "The Constitutional Review Process: A Review of the Bomas Meeting" in *Africa Law Review* No. 73 July/August 1998, pp. 4-7.

¹⁰⁹ Constitution of Kenya Review Commission, *The People's Choice: The Report of the Constitution of Kenya Review Commission, Short Version*, Issued by the Constitution of Kenya Review Commission in Mombasa on Wednesday 18th September, 2002.

goals and values of the process and the civic education undertaken by the commission. It also considers the analytical process that led to the preparation of the draft constitution and also highlights the key features of the draft constitution.

The Final Report of Constitution of Kenya Review Commission is based on views collected by the CKRC throughout Kenya between December 2001 and July 2002.¹¹⁰ The Report records the stages of negotiations that led to the establishment of the Constitution of Kenya Review Commission itself. It discusses Kenya's constitutional development and the conduct of the reform process. A detailed analysis of the Bomas national constitutional conference is undertaken. The report also provides an analysis of the post-Bomas legal obstacles and deadlock-breaking initiatives.

The Report of the Committee of Eminent Persons on the Constitution Review Process was prepared in the wake of the constitutional referendum in Kenya held on 21st November 2005 which produced deep divisions in Kenyan society.¹¹¹ The appointment of the committee followed the verdict of Kenyans not to ratify the proposed new constitution of Kenya during the referendum. The Committee was mandated with undertaking a successful evaluation of the constitution review process and recommending a roadmap for the successful conclusion of the process. The committee compiled the report after listening to diverse views and was also informed by the findings of several studies and a national survey that the committee commissioned in order to ensure that views of Kenyans from all over the country were captured. The Report concludes that the president holds the key to unlocking the review process and that only dialogue

¹¹⁰ Constitution of Kenya Review Commission, *The Final Report of the Constitution of Kenya Review Commission*, Approved for Issue at the 95th Plenary Meeting of the Constitution of Kenya Review Commission held on 10th February 2005.

¹¹¹ Republic of Kenya, *Report of the Committee of Eminent Persons on the Constitution Review Process*, Presented to His Excellency Hon. Mwai Kibaki President of the Republic of Kenya on the 30th May, 2006.

between the different political factions can bring about a new constitution. The Report recommends that the president reaches out to the opposition and those opposed to the constitution proposed during the referendum to discuss modalities for restarting the review process. The Report identifies ethnic differences as a central obstacle to the entire process.

In a recent study Lumumba writes an insider's account of the constitutional review process in Kenya.¹¹² As the former Secretary of the Constitution of Kenya Review Commission, he considers the genesis of the review process and comments on the numerous obstacles that characterised it culminating in the 2005 referendum. He provides a useful legal and political analysis of some of the key process issues, although he does not adopt a conflict perspective in doing so.

The foregoing analysis has shown that there is a considerable amount of literature on constitutions and constitution making. This literature does not in most cases adopt a conflict perspective on constitutional issues. The perspectives adopted tend to focus on legal, political or economic approaches to constitutional debates. In addition, the literature available on structural violence issues does not generally apply itself to analysing constitutional conflicts and rather tends to focus on other aspects of undesirable social structures such as the inequality in the distribution of resources. The exception to this general trend is Mwangi's 1999 publication which first uses a conflict perspective to analyse democracy and presidential power in Kenya.¹¹³ Mwangi's article, however, focuses on the issue of excessive presidential powers as a source of constitutional

¹¹² P.L.O. Lumumba, *Kenya's Quest for a Constitution: The Postponed Promise* (Nairobi: Jomo Kenyatta Foundation, 2008).

¹¹³ See M. Mwangi, "The Constitution as a Source of Crisis: A Conflict Analysis of Democracy and Presidential Power in Kenya" in L. Chweya (ed) *Constitutional Politics and the Challenge of Democracy in Kenya* (Nairobi: Sareat, 1999) pp. 173-195.

conflicts in Kenya and does not consider other conflict-generating issues arising from the constitution. It also does not address the question of constitutional conflicts arising from the constitutional review process in Kenya which was in its incipient stages at that time. The present study therefore extends Mwagiru's earlier analysis in several ways: it includes other conflict-generating issues in the constitution, apart from the executive, such as the judiciary, the legislature, devolution, land and property, public finance, amendment, succession and transfer of presidential power. There is, therefore, a clear gap in the literature from the standpoint of a structural analysis of constitutional conflicts, hence necessitating this study. This study also provides a detailed analysis of the process challenges in constitution-making applying a structural violence perspective which is not done by Mwagiru's article. The present study therefore fills a clear gap in the literature.

Chapter Three

Structural Violence and Constitutional Conflicts: a Theoretical Analysis

Introduction

The previous chapter surveyed the literature on conflict and constitutions. This chapter proceeds to further develop the theoretical foundations of the study by examining in greater detail the linkages between structural violence and constitutional conflicts. The chapter seeks first to develop the concept of structural violence. It then proceeds to examine constitutional anomalies from a structural violence point of view. The analytical tools developed in this chapter will then be applied to the case study of Kenya in Chapter Four and Chapter Five.

The Concept of Structural Violence

Conflict is a general feature of human activity and can be defined in terms of the wants, needs and obligations of the parties involved.¹ A conflict exists when individuals or groups want to carry out acts which are mutually inconsistent or when there exists an incompatibility between the goals of different parties.² Conflicts abound in all forms of social behaviour such as in domestic or international politics, in industry and in families.

¹ M. Nicholson, *Rationality and Analysis of International Conflict* (Cambridge: Cambridge University Press, 1992).

² C.R. Mitchell, *The Structure of International Conflict* (London: Macmillan, 1981) pp. 15-34.

The goals of the parties offer an insight into the underlying source of a conflict. The essence of conflict is therefore the incompatibility of goals.³ The more valuable the objectives being sought by the parties, the more intense is the conflict. Conflict can result in either physical violence or structural violence. The distinction depends on whether the incompatibilities of goals are articulated in a manifest way or in the structures in society. Physical violence involves the deliberate use of physical force to injure, subdue or kill another human being. Conflict in this case is manifest. Structural violence, on the other hand, is embedded in the structure of relationships and interactions.⁴ Galtung defines structural violence as “present when human beings are being influenced so that their actual somatic and mental realizations are below their potential realizations.”⁵ In a situation of structural violence, overt violence is absent.⁶ In a society prone to structural violence, an actor or group is prevented, by structural constraints, from developing its talents or interests in a normal manner, or even from realising that such developments are possible.

Structural violence is often harder to identify than physical violence because it is not overt. Structural roots of physically violent acts are typically ignored and these roots continue to generate a cycle of physical violence.⁷ This dynamism of conflict is reflected in a distinct life cycle.⁸ In the context of the conflict cycle, structural violence which is

³ A. de Reuck, “The Logic of Conflict: Its Origin, Development and Resolution” in M. Banks (ed) *Conflict in World Society: A New Perspective on International Relations* (Sussex: Harvester Press, 1984) pp. 96-111.

⁴ M. Mwangi, *Conflict: Theory, Processes and Institutions of Management* (Nairobi: Watermark Printers, 2000) pp. 14-15.

⁵ J. Galtung, “Violence, Peace and Peace Research”, op.cit., p. 168.

⁶ A.J.R. Groom, “Paradigms in Conflict: The Strategist, the Conflict Researcher and the Peace Researcher” op.cit.

⁷ M. Pilisuk, “The Hidden Structure of Contemporary Violence”, *Peace and Conflict: Journal of Peace Psychology*, Vol. 4(3) (1998) pp. 197-216.

⁸ M. Mwangi, *Peace and Conflict Management in Kenya* (Nairobi: Centre for Conflict Research and Catholic Peace and Justice Commission, 2003) pp. 55-64.

not attended to eventually becomes violent conflict. The challenge during the earlier stages of the conflict cycle is that of peace management. If peace management is not effectively undertaken, the conflict cycle moves to a phase of crisis. At this point the challenge is to undertake crisis management. If crisis management is not effectively undertaken physical or behavioural violence eventually results. Once such violence breaks out the challenge becomes one of managing physical violence, which if successful leads to peace agreements followed by a period of post-conflict peacebuilding. If the stage of post-conflict peace-building is adequately addressed then this can lead to peace thus completing the conflict cycle. The conflict cycle illustrates the dynamism of conflict or conflict transformation. In any conflict situation, the actors, issues and interests are being constantly transformed.⁹ As Vayrynen posits:

“A dynamic analysis of conflicts is indispensable; the study of their resolution in a static framework belies social reality....the issues, actors and interests change over time as a consequence of the social, economic and political dynamics of societies....New situational factors, learning experiences, interaction with the adversary and other influences caution against taking actor preferences as given....conflicts are continuously transformed even if efforts to resolve them explicitly have not made any visible progress. As a matter of fact, many intractable conflicts of interests and values may find their solution only through the process of transformation.”¹⁰

Conflict is an intrinsic aspect of social change.¹¹ Conflict is an expression of the heterogeneity of interests and values that arise as new constructs generated by social change come up against previous constraints. Social change is structural and may

⁹ R. Vayrynen, “To Settle or to Transform? Perspectives on the Resolution of National and International Conflicts” in R. Vayrynen (ed) *New Directions in Conflict Theory: Conflict Resolution and Conflict Transformation* (London: Sage, 1991) pp. 1-25.

¹⁰ *Ibid*, p. 4.

¹¹ O. Ramsbotham, T. Woodhouse and H. Miall, *Conflict Resolution*, Second Edition (Cambridge: Polity, 2005) p. 13.

introduce new incompatibilities of goals.¹² It is therefore vital to take the social context into consideration in any analysis of conflict situations.

The theoretical basis of structural violence are structuralist theories which explain the relationships by reference to the underlying structure.¹³ Structuralists assume that human behaviour cannot be adequately understood by examining individual motivations and intentions because, when aggregated, human behaviour precipitates structures of which individuals may be unaware.¹⁴ Structuralism emphasizes the whole since this has a greater impact than the sum of its parts. Structure takes on a life of its own and determines future behaviour and individuals find it difficult to escape from such constraints or alternatively to create new ones to their own liking. Structuralist theories provide the basis for peace research. The focus in peace research is not in the subjective element in the nature of relationships, but in the deeply rooted structures which give rise to them. Peace research therefore considers conflict as objective since it is possible for parties to be in a situation of conflict without knowing it.¹⁵

Where the underlying structure of relationships is unjust and inequitable, conditions of structural violence result in which the weaker party suffers even though not always visibly. Structural violence affects human beings indirectly because repression is built into the structure and shows up as unequal power and life chances rather than as overt violence.¹⁶ Whereas a focus on physical violence would lead one to create

¹² J. Galtung, "A Structural Theory of Aggression" *Journal of Peace Research*, Vol. 1, No. 2 (1964) pp. 95-119.

¹³ M. Mwagiru, *Conflict: Theory, Processes and Institutions of Management*, op.cit., pp. 14-15.

¹⁴ A.J.R. Groom, "Paradigms in Conflict: the Strategist, the Conflict Researcher and the Peace Researcher" in J. Burton and F. Dukes (eds) *Conflict: Readings in Management and Resolution* (London: Macmillan, 1990) pp. 71-98.

¹⁵ Ibid.

¹⁶ J. Galtung, "Violence, Peace and Peace Research" *Journal of Peace Research*; Vol. 3 (1969) pp. 167-191.

institutions that can prevent parties from exercising such violence, for example, by punishment, a focus on structural violence would lead to a critical analysis of the structures and an effort to overhaul these structures. This is because the conflict is embedded in the social structures and can only be addressed by dealing with the anomalies within them.

In the contemporary world this may be manifested in the role of women or class, race, ethnic or religious discrimination. Women may, for example, be discriminated against where legislation does not allow them to have the same rights to property as men. Ethnic groups may also be discriminated against if they are marginalized from resource allocation by an existing political order. Structural violence may sometimes take the form of cultural violence which, according to Galtung, is “any aspect of a culture that can be used to legitimise violence in its physical or structural form.”¹⁷ These aspects of culture may be exemplified by acts of religion, ideology, traditions or even language and art which make direct or structural violence acceptable in society. The violent culture, whether in its physical or structural form, then becomes internalised or institutionalised.

In order for structural violence to exist, the inequalities must be the result of relations between groups, and where no such relations exist which give differential access to social goods structural violence cannot be said to exist.¹⁸ Structural violence may be legitimised by the prevailing political and social norms. Webb, like Galtung, considers negative peace to prevail where there is an absence of physical violence but where there is structural violence.¹⁹ Positive peace is defined in terms of harmonious relations

¹⁷ Ibid, p. 291.

¹⁸ K. Webb, “ Structural Conflict and the Definition of Conflict” *World Encyclopaedia of Peace*, Vol. 2 (Oxford: Pergamon Press, 1986) pp. 431-434.

¹⁹ Ibid.

between parties, which are conducive to mutual development, growth and the attainment of goals. In order for positive peace to exist, a structural change in relations in society has to take place.

Structural violence if not addressed may eventually lead to physical violence as life in the structure becomes unbearable.²⁰ Indeed, the strongest predictor of physical or behavioural violence is stagnation in economic and social development.²¹ In conditions where social equity is constant, productive growth will result in improved access to goods and services needed for human well-being thereby reducing the potential for physical violence. However, where social equity declines, there is a greater difference between the “haves” and “have nots” as structural violence becomes more deeply embedded in societies. Governments in such countries tend to grow more rigid in limiting options to redress social inequalities. This situation, for example, occurred in Liberia and Nicaragua where structural conflict eventually led to physical violence.

Nevertheless, the measures of normal levels of equity are specific to the history and culture of a particular society. Acceptable levels of social differentiation vary widely from one country to another.²² As such the intensity of structural violence tends to vary among societies from very low to very high. These variations reflect differences in social values and in degrees of inequality with respect to key institutions of social life. The higher the degrees of inequality, the higher also are likely to be the levels of coercion necessary to enforce the inequalities, and the levels of structural violence. Hoivik

²⁰ M. Mwangi, *Conflict: Theory, Processes and Institutions of Management* (Nairobi: Watermark, 2000) p. 25.

²¹ R. Garfield, “Indicators of Social System Vulnerability and Resilience to Violent Conflict”, Paper Presented at U.N. Expert Group Meeting on Structural Threats to Social Integrity: Social Roots of Violent Conflict and Indicators for Prevention, 18-20 December 2001, United Nations, New York, pp. 1-3.

²² D.G. Gil, “Understanding and Overcoming Social-Structural Violence” *Contemporary Justice Review*, April 1999, Vol. 2, Issue 1.

demonstrates how demographic concepts can be used to develop a clear definition of structural violence.²³ He argues that the distribution of a society's resources affects not only the standard of living but also the chances of survival itself. A more equitable distribution will normally increase the average length of life in society as a whole. He argues that the loss of life from an unequal distribution is an aspect of structural violence. He develops measures of structural violence based on the potential increase in life expectancy. Whenever significant inequalities are prevalent in a society concerning the key institutions of social life, its ways of life involve domination, exploitation, injustice and widespread underdevelopment. In such a case, its people are not free in a meaningful sense and its political institutions are essentially undemocratic, coercive and structurally violent, in spite of the existence of formal democratic structures. This is the case in Kenya where an anomalous constitution provides for the existence of political institutions, such as the executive, which are in conflict with the tenets of democratic governance. The reasons for this situation will be discussed later in the chapter.

Curle develops the idea of structural violence by challenging the traditional dichotomy between war and peace.²⁴ In the classical discourses there was either war or peace. It was not possible to have both simultaneously. Curle, however, argues that it is possible to have a condition in between which he characterised as "unpeaceful". The absence of peace is characteristic of many situations where there is no overt conflict.

²³ T. Hoivik, "The Demography of Structural Violence" *Journal of Peace Research*, Vol. 14, No. 1, 1977, pp. 59-73.

²⁴ A. Curle, *Making Peace* (London: Tavistock, 1971) pp. 1-26.

In unpeaceful situations, human beings are impeded from achieving full development either because of their own internal relations or because of the types of relationships that exist between themselves and other persons or groups.

Curle provides the prototypical unpeaceful relationship as that of a master and a slave.²⁵ The slave is unaware of the injustice in his position and of the fact that that it could ever be changed, and so apathetically accepts it. In other words, the slave is objectively in conflict which he does not realise. However, polarisation of the conflict changes this structure so that the formerly happy slave eventually subjectively realises that he is in conflict. Curle argues that this can occur through the role of a third party who can do something about the happy slave by polarising the conflict so that the slave realises what kind of condition he/she is living in. This implies some growth of awareness in his position as a slave as a result of empowerment by the third party. Once the slave is aware, he struggles to reach a position of greater equity with his master so that their relationship can be reordered in accordance with principles of justice.

This, according to Curle, represents the stage of confrontation. Kenyan society conforms to Curle's conceptualisation of an unpeaceful society in that there are relatively few instances of overt conflict and yet the relations in society are structured in such a way that many Kenyans are impeded from achieving their full development. Although all societies may have elements of "unpeacefulness" the degree of structural anomalies differ from one society to another. In Kenya the constitutional setup is a fundamental contributory factor to this situation. This is because the existing constitution has ceased

²⁵ A. Curle, *Mystics and Militants, A Study of Awareness, Identity and Social Action* (London: Tavistock, 1972) pp. 2-3.

to adequately meet the needs and expectations of Kenyan society.²⁶ Constitutional conflicts arise because the Kenya constitution does not tackle many fundamental concerns of its citizens such as equitable resource distribution, the delivery of justice and the recognition and protection of individual and minority rights.²⁷ In this situation incompatibilities of goals, which are the essence of conflict, develop.

Objective and Subjective views of Conflict

Curle introduces an interesting dimension in respect of the degree of perception or awareness of the conflict.²⁸ He argues that in many unpeaceful relationships the parties are perfectly aware of the discordance of their aims. In others, however, the conflict is not clearly recognized. He distinguishes between various types of unpeaceful relationships on the basis of whether the power relations are balanced or asymmetrical and whether there is considerable awareness of the conflict. He argues that in situations where conflict is absent because of low awareness, there is at least latent or potential conflict. Individuals in such a society may be politically unaware, but this does not imply that they are happy.

This leads to an epistemological debate in conflict theory, which revolves around the question of whether for a conflict to exist it has to be perceived by the participants in the situation.²⁹ If one holds an objectivist view of conflict, conflict need not be felt for it

²⁶ K. Kibwana, "Issues of Constitutional Reforms in Africa: The Example of Kenya" in K. Kibwana (ed) *Readings in Constitutional Law and Politics in Africa: A Case Study of Kenya* (Nairobi: Claripress, 1998) pp. 15-37.

²⁷ M. Mwangi and P.M. Mutie, "Governance and Conflict Management" in P. Wanyande, M. Omosa and C. Ludeki (eds) *Governance and Transition Politics in Kenya* (Nairobi: University of Nairobi Press, 2007) pp. 131-154.

²⁸ A. Curle, *Making Peace*, op.cit.

²⁹ K. Webb, "Structural Violence and the Definition of Conflict", op.cit.

to exist. Conflict is, therefore, not dependent on subjective perceptions and it can be perceived by third parties even if it is not perceived by the actors. This is the standpoint of the peace researcher who argues that the victims of adverse structures may not perceive them and thus be “happy slaves”.³⁰ Conflict, it is argued, emerges from a clash of real interests rather than a perceived clash of interests, although actors may not perceive who their real enemies are. This implies that if in a particular social system one group gains what the other loses, structural conflict exists even if the loser does not understand what is happening. However, even the objectivist perceives social reality through the lens of his or her own values.

According to the subjective view, for a conflict to exist there has to be at least some perception of the incompatible goals by the actors. For subjectivists if people cannot subjectively perceive a conflict and its effects they are not in a situation of conflict.³¹ This is the position of the conflict researcher who considers conflicts as subjective. This is because the parties can change their goals or reassess their values thereby changing the conflict.³²

In Kenya there exist individuals who are politically unaware but it is clear that they are confronted with the consequences of the deeply embedded structural violence. A number of Kenyans are, however, clearly aware of the situation of structural violence in which they live. The evidence for this assertion is the increasing role that members of the public play in criticizing the conduct of the government.

³⁰ A.J.R. Groom, “Paradigms in Conflict: the Strategist, the Conflict Researcher, and the Peace Researcher”, op.cit.

³¹ M. Mwangi, *Conflict: Theory, Processes and Institutions of Management*, op.cit.

³² A.J.R. Groom, “Paradigms in Conflict: the Strategist, the Conflict Researcher and the Peace Researcher”, op.cit.

Their participation in the debates in the media also shows some awareness of the conflict they face. It will be argued that it is not necessary for all Kenyans be aware that they are in conflict in order for that conflict to exist. Structural violence can exist without necessarily being perceived. However, in practice, civil society and the media have a very important role in increasing the general awareness of Kenyans about the anomalous state of the constitution.

The distinction between objectivists and subjectivists is important because it has important implications for conflict management.³³ Since the subjective viewpoint considers that for conflict to exist the parties must experience it, conflict management must focus on the efforts and inputs of the parties themselves. On the other hand, objectivists hold that people can be in a conflict without realizing it and as such third parties should focus on changing the conflict generating structure. Curle,³⁴ for example, considers it essential for relationships to undergo radical change if they are to be made peaceful. In the case of all revolutions there must, at some stage, have been a movement from a lower to a higher level of awareness. In the case of deeply embedded constitutional conflicts, a complete overhaul of the constitution is necessary in order to change the conflict generating structure. Those who favour this approach have argued that the constitution is fundamentally flawed. This would be aimed at removing the conflict-generating constitutional structure that currently exists.³⁵ A re-writing of the constitution and not amendments of the existing one is required.

³³ M. Mwagiru, *Conflict: Theory, Processes and Institutions of Management*, op.cit.

³⁴ A. Curle, op.cit.

³⁵ M. Mwagiru, "The Constitution as a Source of Crisis: A Conflict Analysis of Democracy and Presidential Power in Kenya" in L. Chweya (ed) *Constitutional Politics and the Challenge of Democracy in Kenya* (Nairobi: Sareat, 1999) pp. 173-195.

This is because the many constitutional amendments that have been made since 1963 have destroyed the principle of constitutionalism in terms of the necessary checks and balances which a limited government needs.³⁶

An alternative approach is through piecemeal constitutional change aimed at dealing with the most overt defects in the constitution. Those opposed to fundamental reform want a constitutional repair job.³⁷ This approach is based on the assumption that the Constitution of Kenya is basically sound and the solution is therefore to fix those parts of the constitution that are causally related to the current constitutional conflicts.

Structural Violence and Human Needs Theory

Burton provides some insights into structural violence through the human needs theory, of which he is one of the main advocates.³⁸ He argues that systems, no matter how coercive, that neglect human needs must generate protest behaviour and conflict.

Human needs theory argues that there are certain ontological and genetic needs which will be pursued, and that socialisation processes, if not compatible with such human needs will lead to frustrations and anti-social personal and group behaviour. Needs, as Burton uses the term, reflect universal motivations which are an integral part of the human being. Human needs theory assumes that there is a common pattern of response to the frustration of human needs by structural circumstances at all social levels

³⁶ G. Muigai, *Constitutional Amendments and the Constitutional Amendment Process in Kenya, 1964-1997: A Study in the Politics of the Constitution*, Unpublished PhD Thesis, September 2001.

³⁷ W. GATHERU and R. SHAW (eds) *Our Problems, Our Solutions: An Economic and Public Policy Agenda for Kenya* (Nairobi: Institute of Economic Affairs, 1998) pp. 1-18.

³⁸ J. BURTON, *Conflict Resolution and Prevention*, (London: Macmillan, 1990) pp. 32-48.

determination are systematically denied to certain segments of society. There is a strong linkage between the structural violence perpetuated by Kenya's constitutional conflicts and the inadequate satisfaction of basic human needs in Kenyan society.⁴²

According to Article 2A(f) of the Constitution of Kenya Review Act, 1997 a fundamental purpose of the constitutional review process is "ensuring the provision of basic needs of all Kenyans through the establishment of an equitable framework for economic growth and equitable access to national resources".⁴³ Christie argues that systematic inequalities in the distribution of economic and political resources lead to a deprivation of needs satisfaction for certain segments of society.⁴⁴ The maldistribution of power in societies has provided the opportunity for needs gratification on the part of some at the expense of others.⁴⁵ As long as a state represents sectional rather than common interests, thereby creating divisions in society, the use of differential power will remain the ordering principle and the needs of many citizens will remain unsatisfied. As the crisis in the distribution of power is recognised, the state will usually become increasingly coercive or manipulative and continue to serve sectional interests. The extent to which basic needs are met provides one basis for judging the legitimacy of an existing political order.

The marginalisation of certain segments of Kenyan society is a fundamental issue that the constitutional review process attempts to address. When people's basic needs are not met adequately, there is a gap between their potential and actual realisation.

⁴² This view articulated by Prof. J.B. Ojwang, Judge of the High Court of Kenya, in an interview with the researcher on 23rd February 2007 in Nairobi.

⁴³ Republic of Kenya, *The Constitution of Kenya Review Act*, 1997, Article 2A (f), Kenya Gazette Supplement No. 73, Acts No. 7.

⁴⁴ *Ibid.*

⁴⁵ P. Sites, "Legitimacy and Human Needs" in J. Burton and F. Dukes, *Conflict: Readings in Management and Resolution* (London: Macmillan, 1990) pp. 117-141.

Addressing human needs is closely tied to the debates on human security which focus on insecurities that threaten human survival or the safety of daily life or imperil the natural dignity of human beings⁴⁶ It contrasts with state security which focuses on safeguarding the integrity of the state and therefore has only an indirect connection with human security. Human security is closely related to human development which is fundamentally concerned with issues affecting the quality of life of human beings. The historical marginalisation of certain communities in Kenya dominated the constitutional debates and were carried over into the Bomas constitutional conferences.⁴⁷ The constitutional review process was therefore to some extent perceived by some parties as a way of redressing past grievances, especially those related to marginalisation from the centre of political and economic power.⁴⁸

Structural Sources of Constitutional Conflicts

Earlier in this chapter, some key perspectives on structural violence were developed. The structural sources of constitutional conflicts, which relate to the central theme of the study, will now be considered.

Phillips and Jackson argue that a modern state is expected to deal with many social problems, either by direct activity or by supervision or regulation.⁴⁹ In order to carry out these functions, the state must have agents or organs through which it operates. The appointment or establishment of these agents or organs, their functions and powers, their relationships *inter se*, and between them and the private citizen, form a significant

⁴⁶ Commission on Human Security, *The Final Report on the Commission on Human Security*, 2003.

⁴⁷ This view was articulated by Prof. Wanjiku Kabira, a former CKRC Vice-chairperson, in an interview with the researcher on 12th January 2007 in Nairobi.

⁴⁸ A detailed discussion of issues of marginalisation in the context of debates on devolution is undertaken in Chapter Five.

part of the constitution of a state. Constitutions may be written or unwritten.⁵⁰ Kenya has a written constitution. In written constitutions there is an identifiable physical document known as the constitution. Many countries have written constitutions, but some like Great Britain, New Zealand and Israel do not. An unwritten constitution has an effect on the sources of law and makes it more necessary for the existence of a free political system in which official decisions are subject to open scrutiny by parliament.⁵¹ In such countries there is no written constitution and as such the rules of the constitution derive from customs, traditions, conventions and case law.

The constitution is the fundamental law of a country and in many countries its supremacy means that any laws that are contrary are invalid. Constitutional rules are, therefore, seen as so critical that they override all other rules. In Kenya, for example, Section 3 of the Kenya Constitution states:

“This constitution is the Constitution of the Republic of Kenya, and shall have the force of law throughout Kenya and, subject to section 47, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void”⁵².

In many countries constitutions are thought of as instruments by which government can be controlled.⁵³ Constitutions arise from a belief in limited government although countries differ on the extent to which they wish to impose limitations on government. Whatever the extent of restrictions, they are based on a belief in limited government and in the use of a constitution to impose these limitations. The type of the

⁴⁹ O. H. Phillips and P. Jackson, *Constitutional and Administrative Law*, Seventh Edition (London: Sweet and Maxwell, 1987) pp. 4-5.

⁵⁰ S. de Smith and Brazier, *Constitutional and Administrative Law* (London: Penguin, 1989) pp. 11-12.

⁵¹ E.C.S Wade and G.G. Phillips, *Constitutional and Administrative Law*, Ninth Edition (New York: Longman) pp. 1-8.

⁵² *The Constitution of Kenya*, Revised Edition 2001 (Nairobi: Government Printer, 1998) Section 3.

⁵³ K.C. Wheare, *Modern Constitutions* (London: Oxford University Press, 1966) pp. 1-82.

limitations imposed on a government, and the degree to which a constitution will be supreme over a government depends on the objectives that the framers of the constitution wish to safeguard.

The doctrine of separation of powers advocates the prevention of tyranny by the conferment of too much power on any one person or body, and the check of one power by another.⁵⁴

A written constitution such as Kenya's describes the basic character of the governmental system, establishes the main divisions of public power and incorporates provisions on the relationship between the state authority and the individual⁵⁵. Constitutionalism implies that the government is subject to restraint in the interest of ordinary members of the community. The government is not arbitrary or totalitarian. In cases where a constitution contains clear checks and balances on the exercise of public power, it will serve as a basis for the practice of constitutionalism. However, a constitution that merely establishes the machinery of government, but does not provide for a balance in the relationship between the machinery and the people does not espouse the principle of constitutionalism. This implies that the mere existence of a constitution is not necessarily proof of a commitment to constitutionalism.⁵⁶ Lack of constitutionalism would occur in a situation where the constitution does not contain clear checks and balances to the exercise of public power. Both constitutionalism and democracy are inspired by the principle that the management of public authority should be guided by the welfare and rights of a country's citizens.

⁵⁴ O.H. Phillips and P. Jackson, *Constitutional and Administrative Law*, op.cit., pp. 4-5.

⁵⁵ J.B. Ojwang, *Constitutional Development in Kenya: Institutional Adaptation and Social Change* (Nairobi: Acts Press, 1990)pp. 1-16.

⁵⁶ B.O. Nwabueze, *Constitutionalism in the Emergent State*. (London: C.Hurst and Co, 1973) pp. 1-21.

When the constitution ceases to adequately meet the needs and expectations of a society it may become a major source of structural violence. Constitutions, when they are framed and adopted, are a reflection of the dominant beliefs and interests, or some compromise between conflicting beliefs and interests, which are characteristic of a society at a given time.⁵⁷ The beliefs and interests of a society may, however, change over time such that the constitution ceases to reflect the prevailing beliefs and interests of a society. In this case the constitution becomes a source of structural violence. The constitution becomes a source of structural violence in a situation where it contributes to the human beings in a given society being unable to achieve their full potential. The centrepiece of constitutional conflicts is that the constitution no longer adequately reflects the society and its expectations. It is also unable to adequately perform some of its fundamental functions such as power and resource distribution.

From an epistemological perspective, a constitution can be viewed as a paradigm for the way relationships in a society are organised.⁵⁸ An existing constitution serves as an adequate paradigm for the way social relations are organised as long as it adequately reflects the aspirations and expectations of a given society. However, given the dynamism of society and its expectations, constitutions are likely over time to develop significant anomalies which render the existing constitutional paradigm inadequate.⁵⁹ These anomalies usually develop gradually. However, they eventually become significant and addressing them requires revolutionary change or an overthrow of the existing

⁵⁷ K.C. Wheare, *Modern Constitutions* (London: Oxford University Press, 1966) p. 67.

⁵⁸ For a discussion on paradigms and the nature of paradigm shifts see T.S. Kuhn, *The Structure of Scientific Revolutions*, Third Edition (Chicago: Chicago University Press, 1996) pp. 52-135.

⁵⁹ M.Mwagiru and P.M. Mutie, "Governance and Conflict Management" in P. Wanyande, M. Omosa and C. Ludeki (eds) *Governance and Transition Politics* (Nairobi: University of Nairobi Press, 2007) pp. 131-154.

paradigm.⁶⁰ Constitutional reform can therefore be viewed as the process of overthrowing an existing anomalous paradigm, although not necessarily in a violent way. Constitutional conflicts can also be a source of violent conflict as happened in Kenya during the violence and deaths the country witnessed on July 7th (*Saba Saba*) and August 8th (*Nane Nane*) 1997.⁶¹ These rallies were pushing for an overhaul of the constitutional dispensation.

Conflicts arising from constitutional anomalies are known as constitutional conflicts. In relation to the Kenyan context Mwangi and Mutie observe:

“One of the major problems facing the country is the constitutional conflicts. These conflicts were inspired by the belief that the Kenya constitution does not tackle many of the concerns of the citizens, such as the resources and their distribution, the systems for delivery of justice, and the recognition and protection of individual and minority rights. Equally important, the constitution is the basis on which the 2002 elections were fought. In that election, some of the major issues, in terms of promising a new way of solving the important problems of the day required an enactment of a new constitution that would enshrine these new problem-solving methodologies. Hence the electoral platforms of the Rainbow Coalition included creating new structures for the clearer separation of powers, trimming the excessive powers of the presidency, enshrining the security of tenure of holders of constitutional offices, and creating structures for the devolution of powers. All of these were to be reflected in the content of a new constitution that was to be enacted within the first 100 days of the NARC regime.”⁶²

Anomalies in the existing Kenya Constitution have therefore contributed to the inability of many Kenyans to achieve their full potential. In constitutional conflicts, there is usually no actor who directly harms another although the constitution may sustain a highly repressive social structure.

⁶⁰ See T.S. Kuhn, *The Structure of Scientific Revolutions*, op.cit for a discussion on the way in which anomalies develop, eventually necessitating an overthrow of the existing paradigm.

⁶¹ K.Kibwana, “Issues of Constitutional Reforms in Africa: The Example of Kenya” in K.Kibwana(ed) *Readings in Constitutional Law and Politics in Africa: A Case Study of Kenya* (Nairobi: Claripress, 1998) pp. 15-37.

⁶² M.Mwangi and P.M. Mutie, “Governance and Conflict Management”, op.cit, pp. 142-143.

A constitution reflects a society's social contract in that it is a pact between the governed and the governors.⁶³ Since no society is static, any contract should change with changing circumstances. A new social contract has to be reflected in a new constitutional order.

Constitutional reform is the process through which a country debates and establishes the constitutional principles and rules through which it wishes to be governed.⁶⁴ Constitutional reform involves re-evaluating the social contract, especially in view of changing circumstances in society. An anomalous constitution is often maintained by the coercive instruments of state and its continued application becomes a fundamental source of structural conflict.⁶⁵

The present constitution of Kenya dates from the formation of the republic in 1963 and draws heavily on the Westminster model, although it has been amended 38 times.⁶⁶ The Westminster form of government implies that executive power lay with the Queen who delegated it to the Governor General.⁶⁷ The Governor General appointed the Prime Minister from the House of Representatives. The National Assembly in Kenya was bicameral with the House of Representatives being the Lower House and the Senate the Upper House. As a result of the amendments to the constitution in the period 1963 to 1969 a Republic was established replacing the Westminster form of government.

⁶³ W. Mutunga, "The Need for Constitutional Changes" in K. Kibwana et.al. (eds) *In Search of Freedom and Prosperity: Constitutional Reform in East Africa* (Nairobi: Claripress, 1996) pp. 410-415.

⁶⁴ K. Kibwana, "The People and the Constitution: Kenya's Experience" in K. Kibwana et.al. (eds) *In Search of Freedom and Prosperity: Constitutional Reform in East Africa* (Nairobi: Claripress, 1996) pp. 340-350,

⁶⁵ M. Mwagiru, "The Constitution as a Source of Crisis: A Conflict Analysis of Democracy and Presidential Power in Kenya", op.cit, pp. 173-195.

⁶⁶ G. Muigai, *Constitutional Amendments and the Constitutional Amendment Process in Kenya, 1964-1997: A Study in the Politics of the Constitution*, op.cit.

⁶⁷ Ibid.

The position of executive president was established who was the Head of State, the Head of Government and the Commander in Chief of the Armed Forces. In Kenya constitutional amendments after independence were justified on the basis that they would bring the constitution more in line with traditional African values and customs.⁶⁸ These constitutional amendments, however, did not represent a progression towards democratization and better protection of rights but rather for the most part tended to entrench presidential authoritarianism. This encouragement of authoritarianism contributed to a lack of accountability which led to the growth of corruption and abuse of public office and misuse of public resources.

There is currently a crisis of the institutions of state in Kenya. This crisis is especially prevalent in the judiciary, legislature and the executive. There is a widespread mistrust of the judiciary and oversight institutions such as parliament are relatively weak. There is also a crisis of confidence in the constitution arising from the effects of the various amendments made.⁶⁹ The many amendments to the Kenya constitution have radically altered its character since independence. In this regard Muigai contends:

“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 severely undermined and rendered ineffectual. The accountability of government was seriously

⁶⁸ Y.P. Ghai, “Constitutions and the Political Order in East Africa”, *The International and Comparative Law Quarterly*, Vol. 21, No. 3, July 1972, pp. 403-434.

⁶⁹ Institute of Economic Affairs and Society for International Development, *Kenya at Crossroads Scenarios for Our Future* (Nairobi: 2000) pp. 7-10.

impaired and the rule of law replaced by administrative fiat. The constitution was rendered incapable of yielding constitutional governance.”⁷⁰

Constitutional Conflicts and Constitutionalism

A fundamental source of constitutional conflict occurs when a constitution exists but the concept of constitutionalism is not espoused. This may, for example, occur where the president is directly and indirectly accorded extensive powers by the constitution, but without effective checks and balances.⁷¹ The concept of constitutionalism recognizes the necessity of government but insists on a limitation being placed on its powers.⁷² It connotes a limitation on government which is the antithesis of arbitrary rule. The existence of a formal written constitution by which a government is conducted is not necessarily conclusive evidence that the government is a constitutional one.⁷³ The determining factor is whether the constitution imposes limitations on the power of government.

Normally, a constitution will be a formal document which has the force of law and embodies a selection of the most important rules of the government of a country.⁷⁴ It provides for a means by which a society organizes a government for itself, defines and limits its powers and prescribes the relations of its various organs *inter se*, and with the citizen. However, a constitution may be used for purposes other than as a restraint on government. This occurs where a constitution consists of nothing but lofty declarations

⁷⁰ G. Muigai, *Constitutional Amendments and the Constitutional Amendment Process in Kenya, 1964-1997: A Study in the Politics of the Constitution*, op.cit., pp. 234-235.

⁷¹ M. Mwangi, “The Constitution as a Source of Crisis: A Conflict Analysis of Democracy and Presidential Power in Kenya”, op.cit., pp. 173-195.

⁷² B.O. Nwabueze, *Constitutionalism in the Emergent State* (London: C.Hurst and Co, 1973) pp. 1-21.

⁷³ Ibid.

⁷⁴ S. de Smith and Brazier, *Constitutional and Administrative Law*, op.cit., p.3

of objectives and a description of the organs of government in terms that import no enforceable legal constraints. In such a case the constitution may facilitate or even legitimise the assumption of dictatorial powers by the government.⁷⁵

The separation of functions between the executive and legislature, requiring separate procedures is important for operating as a limitation on arbitrariness.⁷⁶ A separation in procedure implies the idea of a separate agency or structure. Constitutionalism requires for its efficacy a differentiation of governmental functions and a separation of agencies which exercise them. The diffusion of authority among different centres of decision-making is vital to preventing totalitarianism. The separation is extended beyond functions and agencies to the personnel of the agencies. The same person or group of persons should not be members of more than one agency. A structure of rules and principles is maintained which allows for change and emphasizes institutionalising power relations and creating offices with rights and duties operating within specific rules.⁷⁷ The principle of separation of powers is also vital in guaranteeing the independence of the judiciary. Only in such a case would the judiciary be able to effectively discharge its responsibility of acting as the sentinel of constitutionalism.

The idea of checks and balances seeks to make the separation of powers more effective by balancing the powers of one agency against those of another. This is achieved through a system of positive mutual checks exercised by governmental organs on one another.⁷⁸ The concept of checks and balances presupposes that a specific function

⁷⁵ B.O. Nwabueze, *Constitutionalism in the Emergent State*, op.cit.

⁷⁶ Ibid.

⁷⁷ A. Vincent, *Theories of the State* (Oxford: Blackwell, 1987) pp. 77-118.

⁷⁸ Ibid.

is assigned primarily to a given organ, subject to a power of limited interference by another organ, to ensure that each organ keeps within the sphere delimited to it. It suggests an oversight of one agency by another.⁷⁹ Balanced government involves separation but by providing voices for different elements in society.

Nwabueze argues that there has been an erosion of the principles of constitutionalism in many African countries.⁸⁰ Constitutions have tended to lack legitimacy for the masses and the ruling politicians. Politicians in many developing countries have the wrong attitude towards the constitution in that they often regard it as a weapon which can be used and altered to gain temporary and passing advantages over political opponents. The four decades in Kenya's post-independence history are replete with examples of the manipulation of the constitution to serve political ends especially of the ruling elite.⁸¹

In many developing states the values and ideas enshrined in constitutions are different and opposed to those of the rulers. Whereas a constitution is meant to be a check on power, the politicians often tend to be impatient with, and want to break away from all constitutional restraints; and if the constitution proves to be an obstacle, then it must be bypassed or made to bend to their desires. This situation results in a systematic perversion of the institutions and processes of government combined with amendments to the constitution where it is thought necessary to maintain an appearance of legality.

⁷⁹ P.B. Kurland, "The Rise and Fall of the Doctrine of Separation of Powers" *Michigan Law Review*, Vol. 85, No. 3, Dec. 1986, pp. 592-613.

⁸⁰ B.O. Nwabueze, *Constitutionalism in the Emergent State*, op.cit.

⁸¹ For a discussion of the politics of the constitutional change in Kenya in the first decade of independence, for example, see H.W.O. Okoth-Ogendo, "The Politics of Constitutional Change in Kenya since Independence, 1963-69" *African Affairs*, Vol. 71, No. 282 (Jan. 1972) pp. 9-34. See also G. Muigai *Constitutional Amendments and the Constitutional Amendment Process in Kenya, 1964-1997: A Study in the Politics of the Constitution*, op.cit., for a discussion of the politics underlying the various post-independence constitutional amendments.

Ghai reinforces Nwabueze's view by arguing that in many African countries the authoritarian character of the state is a dominant feature.⁸² Politically hegemonic groups are intolerant of independent centres of authority or power. Presidents who are unable or unwilling to assert moral authority seek wide constitutional powers and have a vast patronage network. Since the state is the primary instrument of accumulation, corruption becomes endemic and woven into the fabric of the apparatus of the state. The pressures towards corruption arise not only from economic greed, but also from the attempts at political survival since the primary base of a politician's support is generally not the political party but clientalism which is sustained by regular favour to one's followers. The primacy of the constitution is ultimately rejected in favour of the primacy of politics over the constitution.⁸³

Okoth-Ogendo considers the problem of constitutionalism experienced in many African states as a paradox of the simultaneous existence of what appears to be a clear commitment by African political elites to the idea of a constitution, while at the same time rejecting the liberal democratic notion of constitutionalism.⁸⁴ The result of this paradox, he argues, is that only the idea of the constitution has survived. He traces the origins of this paradox to the legal order in many African states inherited at independence and perpetuated thereafter. He argues that contemporary elites in Africa are preoccupied with the perfection of means of their own survival and the expansion of opportunities for private accumulation.

⁸² Y.P. Ghai, "The Role of Law in the Transition of Societies: The African Experience" *Journal of African Law*, Vol. 35, No. 1, 1991, pp. 8-20.

⁸³ Y.P. Ghai, "Constitutions and the Political Order in East Africa" *op.cit.*

⁸⁴ H.W.O. Okoth-Ogendo, "Constitutions without Constitutionalism: Reflections on an African Political Paradox" in D. Greenberg et.al (eds) *Constitutionalism and Democracy: Transitions in the Contemporary World* (Oxford: Oxford University Press, 1993) pp. 65-82.

The constitution is therefore seen as a power map on which framers delineate a wide range of concerns. Constitutions which are not developed through a truly open and democratic process cannot be considered as legitimate since they have not paid attention to the aspirations of the people.⁸⁵ The hallmarks of imposed or government promulgated constitutions are that they are never subjected to genuine popular debates or referenda. This was the case, for example, of the piecemeal constitutional changes that President Mobutu attempted to introduce in Zaire. If at any point constitutions were subjected to public debates, such debates were often too brief, carefully monitored and frequently manipulated. Where referenda were called, the results were often rigged in favour of the state and its custodians. In a number of cases in African states such as Nigeria reports of constitutional commissions were simply ignored after elaborate ceremonies aimed at diverting public opinion and convincing donors and the international community that something positive was being done about democracy.

The case of Kenya is a typical one where structural violence has arisen partly because of a conflict between an extremely powerful presidency and the practice of constitutionalism. The constitution of Kenya, however, grants the president extensive powers.⁸⁶ There is lack of separation of powers between the executive and the judiciary.⁸⁷ The Kenya constitution gives the president significant powers over the judiciary, in terms of the appointment of judges. The president has the sole power to appoint the Chief Justice.⁸⁸ Although judges of the High Court and Court of Appeal are

⁸⁵ J.O. Ihonvbere, "Politics of Constitutional Reforms and Democratisation in Africa" *International Journal of Comparative Sociology*, Vol 41 (Feb. 2000), Issue, pp. 9-25.

⁸⁶ M. Mwangi, "A Review of Presidential Powers in Kenya" in K.Kibwana (ed) *Constitutional Law and Politics in Africa: A Case Study of Kenya* (Nairobi: Claripress, 1998) pp. 260-276.

⁸⁷ For a discussion on the concentration of power in the executive in Kenya and how this impacts on the independence of the judiciary see Chapter Five of this study.

⁸⁸ *The Constitution of Kenya*, Section 61.

appointed by the president on the recommendation of the Judicial Service Commission,⁸⁹ members of this commission are themselves appointees of the president. A fundamental principle of the independence of the judiciary is that judges of the high court should enjoy tenure of office.⁹⁰ According to Section 62 of the Constitution of Kenya judges shall only lose office on the recommendation of a tribunal. However since this tribunal is appointed by the president the independence of the judiciary is not adequately upheld. In addition, the Constitution of Kenya confers on the president the power to pardon or to grant amnesty to a convicted person⁹¹ thereby enabling the president to vary the judgement of a court of law.

There is also no effective separation of powers between the executive and the legislature.⁹² Section 46 of the Kenya Constitution gives the president the power to veto a bill thereby ensuring that a bill which has otherwise been approved by parliament does not become part of the laws of Kenya.⁹³ Although parliament can override a presidential veto by a vote of 65% of its members, it is difficult for those opposed to the veto to raise the required majority vote. The president also has other legislative powers which may affect the deliberations and work of parliament. Section 58 of the Kenya Constitution enables the president to determine when each session of parliament shall commence and this power is exercised only subject to section 58(2) which provides that parliament may not remain out of session for more than eleven months at a time.

⁸⁹ *The Constitution of Kenya*, Section 62.

⁹⁰ M. Mwangi, "A Review of Presidential Powers in Kenya", op.cit.

⁹¹ Section 27.

⁹² See Chapter Five for a discussion of this lack of effective separation between the executive and legislature.

⁹³ M. Mwangi, "A Review of Presidential Powers in Kenya", op.cit., pp. 260-276.

The president may also under section 59 dissolve parliament, a power which is exercisable whenever the president calls for a general election. If this power is exercised before the next election is due it may serve to arbitrarily defeat the decision of the electorate who elect representatives to parliament for a specific period of time.

Lack of Democracy and Constitutional Conflicts in Kenya

It was widely expected that the repeal of section 2A of the constitution allowing political pluralism would lay a firm foundation for the democratisation process in Kenya.⁹⁴ The repeal of this section of the constitution, however, required a process of fundamental restructuring of the constitution to reflect a new social contract after decades of one party rule. When Kenya reverted to a multi-party system of government in 1992, the only laws and structures changed to reflect the new political reality were those dealing with the electoral system which now permitted multiple parties.⁹⁵ However, the country continued to operate under structures that favour an unaccountable and powerful executive. Thus the return to multiparty politics does not itself ensure democracy even though it may in the short run create a possibility for greater political participation.⁹⁶ This is because political operations are still at the discretion of those who control the apparatus of the state.

⁹⁴ K. Kibwana and W. Mutunga, "Promoting Democracy in Sub-Saharan Africa: Lessons from Kenya" in K. Kibwana (ed) *Readings in Constitutional Law and Politics in Africa: A Case Study of Kenya* (Nairobi: Claripress, 1998) pp. 98-109.

⁹⁵ Kenya Human Rights Commission, "Independence Without Freedom: The Legitimization of Repressive Laws and Practices in Kenya" in K. Kibwana (ed) *Readings in Constitutional Law and Politics in Africa: A Case Study of Kenya* (Nairobi: Claripress, 1998) pp. 113-162.

⁹⁶ G. Muigai, "Legal Constitutional Reforms to Facilitate Multi-Party Democracy: The Case of Kenya" in J. Oloka-Onyango, K. Kibwana and C. Maina Peter, *Law and The Struggle for Democracy in East Africa* (Nairobi: Claripress, 1996) pp. 526-544.

Kiai argues that the amendment of a democratic constitution becomes necessary when its provisions are inadequate for the proper and just management of relationships in society.⁹⁷ A democracy is a system of government based on equal and effective participation in setting the agenda for the formulation of public policy, electing representatives to implement the policy formulated, and ensuring that the policy yields the intended results. Sastry argues that there is no contradiction between the democratic principle which prescribes that the government should implement the will of the people as expressed through periodic elections and the constitutional principle which circumscribes the government so as to ensure the lasting values and wishes of the citizens.⁹⁸ Kiai identifies a number of conditions that must be fulfilled for a country to qualify as a democracy.⁹⁹

Firstly, the government should be genuinely accountable. This implies that the governed are able to censure the government for any of its acts or omissions. The following examples illustrate the lack of accountability of the government in Kenya. Little or no action is taken against individuals implicated in corruption. The Auditor General's reports which periodically reveal instances of massive corruption are never followed through since the prosecution of wrongdoers rests with the Attorney General who is a part of the politicised executive function.¹⁰⁰ This arises in part because the Attorney General is appointed by the president and may therefore be unwilling to prosecute politically sensitive cases which portray the government negatively.

⁹⁷ M. Kiai, "Why Kenya Needs Another Constitution" in K. Kibwana et. al (eds) *In Search of Freedom and Prosperity: Constitutional Reform in East Africa* (Nairobi: Claripress, 1996) pp. 270-280.

⁹⁸ K.S. Sastry, "Equality, Basic Needs and Democratic Constitution" *Perspectives*, Vol. 3, No. 5, 2002.

⁹⁹ M. Kiai, "Why Kenya Needs Another Constitution", op.cit.

¹⁰⁰ W. Gatheru and R. Shaw (eds) *Our Problems, Our Solutions: An Economic and Public Policy Agenda for Kenya* (Nairobi: Institute of Economic Affairs, 1998) pp. 1-18.

Secondly, elections should be held freely and fairly at frequent and determinable intervals and should involve the biggest proportion possible of the population. The idea is that the governed should regularly be given a chance to determine which candidate can best represent their interests. The electoral system in Kenya is, however, designed in such a way that a small number of people have a greater say in the affairs of the country due to the uneven distribution of constituencies.

Thirdly, there should be an adequate and effective protection of human rights. There has not been an effective protection of human rights in Kenya as evidenced by restrictions in the freedom of association and assembly. In addition, the freedom of expression has also been restricted, although this situation has improved markedly since the regime change in 2002.

Fourthly, there should be no interference by one organ of the state in the functions of other organs. This is the concept of separation of powers of three organs of government: the legislature, the judiciary and the executive, which has been discussed under the concept of constitutionalism.

The Kenyan Constitution does not adhere to any of these tenets of a democratic government and as such is a major source of structural violence. In Kenya the powers of the president are exercised in ways that militate against the development of democracy in the country.¹⁰¹ In a democracy, government is not sovereign since the sovereignty belongs to the people.¹⁰² The government merely serves as the institution through which this sovereignty is expressed.

¹⁰¹ M.Mwagiru, "The Constitution as a Source of Crisis: A Conflict Analysis of Democracy and Presidential Power in Kenya" op.cit., pp. 173-195.

¹⁰² W. Maina, "Constitutionalism and Democracy" in K. Kibwana et.al (eds), *In Search of Freedom and Prosperity: Constitutional Reform in East Africa* (Nairobi: Claripress, 1996) pp. 1-15.

Where the tenets of democracy are observed, government should not behave in a manner that results in a permanent transfer of sovereignty from the people to itself. The citizen's ability to set and control the government's agenda is one of the decisive criteria of the depth of a democratic transformation.¹⁰³

Effective constitutional reform is a fundamental pillar in the promotion of democracy.¹⁰⁴ The transition from a single party to multi-party era defused political tensions and was widely perceived as the basis for further democratisation in Kenya. This was not, however, to be the case since the government stalled in providing the accompanying constitutional overhaul that was required. It was thought that Kenya would be among the first countries in sub-Saharan Africa to democratise because of its relatively large and influential middle class, economic infrastructure and a fairly large educated population.¹⁰⁵ The ruling class particularly of the KANU regime was, however, very effective in preventing democracy from taking root in the country by putting obstacles in the way of genuine constitutional reform.¹⁰⁶

¹⁰³ K. Kibwana and W. Maina, "State and Citizen: Visions of Constitutional and Legal Reform in Kenya's Emergent Multi-party Democracy" in J. Oloka-Onyango et.al, *Law and the Struggle for Democracy in East Africa*, (Nairobi: Claripress, 1996) pp. 420-476.

¹⁰⁴ K. Kibwana and W. Mutunga, "Promoting Democracy in Sub-Saharan Africa: Lessons from Kenya" op.cit.

¹⁰⁵ Ibid.

¹⁰⁶ See Chapter Four for a discussion of the obstacles to genuine constitutional reform put up by the successive regimes in Kenya.

The Development of Structural Violence and its Relationship to Constitutional Conflicts

Galtung argues that structural violence shows a certain stability whereas physical violence shows tremendous fluctuations over time.¹⁰⁷ A type of violence built into a social structure should exhibit a certain stability because social structures are not usually changed quickly. Physical violence which is to a large extent dependent on the whims of individuals shows less stability than structural violence. Constitutions establish the way in which relations in a certain society should be organised on a long-term basis and by their very nature tend to show stability over time.¹⁰⁸ This is also partly because in many countries, including Kenya, the amendment of the constitution requires a specialized procedure. This specialised procedure makes it more difficult to alter the constitution compared to ordinary legislation. However as the Kenyan case in the post-independence period illustrates, amendments may be subject to political considerations.

In Kenya, constitutional conflicts have tended to become more severe because the various constitutional amendments made since independence have served to entrench an authoritarian system of government. These amendments have embedded structural violence more deeply in Kenyan society.

Muigai analyses the amendment process of the Kenya constitution between 1964 and 1997.¹⁰⁹ He first considers the constitutional amendments under Jomo Kenyatta in

¹⁰⁷ J. Galtung, "Violence, Peace and Peace Research, op.cit., pp. 167-191.

¹⁰⁸ de Smith and Brazier, *Constitutional and Administrative Law*, Sixth Edition, (London: Penguin, 1989) pp. 3-7.

¹⁰⁹ G. Muigai, *Constitutional Amendments and the Constitutional Amendment Process in Kenya, 1964-1997: A Study in the Politics of the Constitution*, op.cit.

country.¹¹³ Another adverse amendment in the period of the Moi presidency was the twenty second amendment which removed security of tenure of constitutional office holders, specifically the Attorney-General and the Controller and Auditor general. This amendment was another step in creating a presidency that was unimpeded by legal impediments and which was intended to dominate all other public institutions.¹¹⁴

The amendments between 1987 and 1992 targeted the judiciary. Parliament in Act Number 20 of 1987 made all capital offences non-bailable. In this way the legislature interfered with the judiciary's discretion to award or refuse to award bail depending on the circumstances of each case. In addition, the amendment interfered with the basic constitutional right of bail which is premised on all accused persons being innocent until proved guilty. The twenty fourth amendment entitled the police to hold suspects in capital offences for up to fourteen days before bringing them to court, instead of the previous twenty four hours. In addition, it removed the security of tenure of the members of the Public Service Commission and judges of the High Court and Court of Appeal. This amendment went against the principle of separation of powers because it gave the executive powers to interfere with the judiciary and the civil service with little restriction.¹¹⁵ Eventually the tenure of constitutional office holders was restored by the twenty fifth amendment and this marked the beginning of the long process of undoing the considerable harm done by the constitutional amendments since 1982.¹¹⁶ The 27th amendment marked a return to multiparty politics and in this regard Muigai argued:

“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

¹¹³ Ibid, p.151.

¹¹⁴ Ibid, p.157.

¹¹⁵ Ibid, p.162.

¹¹⁶ Ibid, p.163.

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."¹¹⁷

The repeal of Section 2A was, however, not done voluntarily by the government but was a culmination of pressure from pro-democracy groups both locally and internationally.

Muigai argues that, on the whole, the amendments to the constitution since independence were intended to ensure that a viable opposition did not arise and to concentrate power in the hands of the president.¹¹⁸ They resulted in the monopolising of power by a small political elite and circumscribed free political activity. In addition, the enjoyment of basic human rights was subordinated to the survival and continuity of the state. Constitutional amendments in the post-independence period, especially to strengthen the executive were an example of politics dominating law. They were an attempt by the political elite to get the law to follow politics. They represented a clear impact of the political process on constitutional developments.¹¹⁹ This situation differed from the making of the independence constitution which was achieved largely outside the political process.

The Preservation of the *status quo* and Constitutional Conflicts

When the existing structure in a society is threatened, those who benefit from the structural violence, especially those at the top will try to preserve the *status quo* which is

¹¹⁷ Ibid, p.168.

¹¹⁸ G. Muigai "Legal Constitutional Reforms to Facilitate Multi-Party Democracy: The Case of Kenya" in J. Oloka-Onyango, K. Kibwana and C.M. Peter, *Law and the Struggle for Democracy in East Africa* (Nairobi: Claripress, 1996) pp. 526-544.

¹¹⁹ Prof. Githu Muigai, a former CKRC Commissioner and Associate Professor of Public Law at the University of Nairobi, advanced these arguments in an interview with the researcher on 11th December 2006 in Nairobi.

geared to protecting their interests.¹²⁰ Thus in the case of constitutional conflicts, those with vested interests in maintaining the existing constitutional structure will resist attempts for that structure to be changed. In Kenya, for example, the process of genuine reform of the constitution did not receive support from the Kenya African National Union (KANU) during its tenure because certain individuals in the party had vested interests in maintaining the *status quo*. This was partly because of a fear of losing what had been acquired corruptly.¹²¹ The KANU elite found it difficult to give up its considerable power and were not committed to limited government whose power was subject to effective checks and balances.¹²² Thus KANU was unwilling to change the existing constitutional setup unless it could control the process of change such that it gains the most from the changes.

By observing the activities of various groups and persons when a structure is threatened, and particularly by noticing who comes to the rescue of the structure it may be possible to rank the members of the structure in terms of their interests in maintaining it. However, those interested in the maintenance of the *status quo* may not come openly in defense of the structure.¹²³

They may instead mobilize the police, the army or their loyalist supporters against the sources of the disturbance and remain themselves in a more discrete, remote seclusion from the turmoil of personal violence. For example, the violence committed by the police is often manifest, yet they are called into action by expectations of those

¹²⁰ J. Galtung, "Violence, Peace and Peace Research" op.cit., pp. 167-191.

¹²¹ For an analysis of corruption in Kenya during the KANU regime see K. Kibwana, S. Wanjala and Okech-Owiti, *The Anatomy of Corruption in Kenya: Legal, Political and Socio-Economic Perspectives* (Nairobi: Claripress, 1996).

¹²² K. Kibwana and W. Mutunga, "Promoting Democracy in Sub-Saharan Africa: Lessons from Kenya," op.cit., pp. 98-109.

¹²³ J. Galtung, "Violence, Peace and Peace Research" op.cit., 167-191.

interested in preserving the *status quo* which is deeply rooted in an anomalous structure. Attempts to covertly maintain the *status quo* were in evidence during the KANU regime in the 1990s. KANU overtly stated that it was interested in an overhaul of the constitution despite covertly trying to sabotage the process of reform.¹²⁴ Most fundamentally, the KANU government wanted to maintain a constitutional structure that was essentially suited to a one party state even though a multi-party system nominally existed.¹²⁵ KANU in its attempt to control the constitutional review process put obstacles to the merging of the parallel constitutional review initiatives. There were problems at the level of enacting the Bills that provided for the merger.¹²⁶ Attempts by KANU to control the review process were, for example, demonstrated by proposals to have civic education conducted by the commission, which was viewed by the regime as easier to manipulate.

The Nature and Nurture debate and Constitutional Conflicts in Kenya

Some useful insights into Kenya's constitutional conflicts can be gained by analysing the nature and nurture debate and its implications for conflict. The nature and nurture debate is a major debate in conflict theory.¹²⁷ Those who advocate the nature view argue that human beings are by nature violent and aggressive as a result of an innate drive in human beings for domination. Aggression is seen as a dominant impulse, which

¹²⁴ For a discussion on how the KANU regime attempted to sabotage the constitutional review process see Chapter Four of this study.

¹²⁵ K. Kibwana, "One Year After Multi-Party Elections: Whither Patriotism, Democracy and Kenya" in K. Kibwana et.al(eds), *In Search of Freedom and Prosperity: Constitutional Reform in East Africa* (Nairobi: Claripress, 1996) pp. 311-339.

¹²⁶ A discussion of the problems of merging the parallel constitutional review processes is provided in Chapter Four.

¹²⁷ M. Mwangi, *Conflict: Theory, Processes and Institutions of Management*, op.cit., pp. 16-18.

is triggered by political disputes that provide the necessary rationalization for violence.¹²⁸

The aggressive urge distorts perceptions and magnifies perceived threats thereby contributing to violence. The nurture school, on the other hand, contends that human beings are not violent and aggressive by nature.¹²⁹ The environment plays a fundamental role in conditioning violence and aggression.

The nature/nurture debate has vital implications for the management of conflict.

As Mwagiru posits:

“This debate has very important consequences for conflict management. If those in authority take the nature view, their response to conflict in society would be the use force and repression. If, on the other hand, they take a nurture view, their responses to conflict within society would be one of accommodation and negotiation.”¹³⁰

In the case of structural constitutional conflicts in Kenya, the KANU government adopted the nature view and responded through repression. The occasional appearance of accommodation on the part of the government was an outcome of pressure rather than a genuine belief in accommodation and compromise. The KANU government was pressured into repealing single party legislation in 1991. The change from a one party system to a multi-party one did not stem from a change in perception on the part of the government.¹³¹ It was an act of political expediency. The change to a multi-party system was an attempt by the ruling party to stymie further dissent and possible revolt. The KANU government’s approach in dealing with the advocates of a multi-party system varied between initial outright hostility to an insincere concessional approach at a later stage. These initial measures included detention without trial, imposed exile abroad,

¹²⁸ S.J. Rosen and W.S. Jones, *The Logic of International Relations*, (Cambridge: Winthrop, 1974) pp. 246-249.

¹²⁹ M. Mwagiru, *Conflict: Theory, Processes and Institutions of Management*, op.cit., pp. 16-18.

¹³⁰ Ibid, p. 17.

¹³¹ K. M’noti, *The Judiciary and Multi-party Politics in Kenya, 1990-1992* in K. Kibwana(ed) *Constitutional Law and Politics in Africa: A Case Study of Kenya* (Nairobi: Claripress, 1998) pp. 535-549.

violent assaults, political prosecutions for sedition, treason and unlawful assemblies. These measures were gradually relaxed as the clamour for a multi-party system increased. There was no commitment to a functional multi-party system or the evolution of a democratic culture in Kenya.

The KANU government equated the restoration of multipartyism to a call for it to resign and as a result was pre-occupied with the fight for survival.¹³² It had initially hoped to almost completely control the constitutional review process through the Constitution of Kenya Review Commission. The government was, however, pressured to merge the Constitution of Kenya Review Commission with the *Ufungamano* initiative after several months of negotiations.¹³³ The tendency of the KANU government to adopt the nurture view even while a constitutional review was going on was further underscored by the approval by parliament of the repressive and widely condemned Statutory Law (Miscellaneous Amendments) Bill 2002 aimed at controlling the media.¹³⁴ This bill was widely seen as an attempt to control the media coverage of political events in an election year.

The NARC regime which succeeded the KANU regime appeared initially to focus more on accommodation and negotiation, and hence to adopt the nurture view of society. Indeed, the NARC coalition itself was a product of such accommodation and negotiation. NARC had campaigned on a platform of reforms and Kenyans expected a major political transition.¹³⁵ However, the limited progress made on constitutional reform in Kenya

¹³² G. Kamau Kuria, "Returning Kenya to Its Original Values" in J. Oloka-Onyango, K. Kibwana and C. Maina Peter (eds), *Law and the Struggle for Democracy in East Africa* (Nairobi: Claripress, 1996) pp. 341-361.

¹³³ For a discussion on the challenges on the road to a merger see Chapter Four.

¹³⁴ *Daily Nation*, Friday May 10, 2002.

¹³⁵ P. Wanyande, "The Politics of Coalition Government" in P. Wanyande, M. Omosa and C. Ludeki (eds) *Governance and Transition Politics in Kenya* (Nairobi: University of Nairobi Press, 2007) pp. 107-129.

since 2002 suggests that this overtly accommodating approach may not have been genuine. In this regard Mwagiru and Mutie contend:

“The current post-revolutionary approach to dealing with the constitutional conflicts in Kenya creates an unsettling feeling of *déjà vu*. In the current management approaches, similar tactics to those employed in 1997 are being resorted to. These entail collecting together individuals from different political parties and putting them in a position where they can make amendments to the Bomas draft through the membership of the Parliamentary Select Committee on Constitutional Review. The belief now, as in 1997, is that the politicians involved belong to different political parties and will therefore legitimise the outcomes that they agree on the basis of political expediency.”¹³⁶

A key source of instability in the previous coalition, and even in the present Grand Coalition, is the mistrust between the coalition partners accompanied by the coalition being made up of politicians who do not share a common vision for the country.¹³⁷

¹³⁶ M. Mwagiru and P.M. Mutie, “Governance and Conflict Management”, op.cit., p. 144.

¹³⁷ P. Wanyande, “The Politics of Coalition Government”, op.cit., pp. 107-129.

Chapter Four

Process Challenges to Constitution-making in Kenya: 1997-2005

Introduction

The previous chapters provided a background to the study, identified the gaps in the literature and established the theoretical foundations of the study. The present chapter applies these foundations to the Kenyan case. There have been two fundamental components of constitution-making in Kenya. The first component dealt with the process and raised issues regarding how best to conduct the exercise. The second component dealt with the content of the existing constitution and how these could be addressed through constitutional review. Constitutional conflicts can arise either from the process of constitution-making or from the content of an anomalous constitution or both. This chapter will therefore address the process issues in Kenya's constitution making process between 1997 and 2005. It analyses them from a conflict perspective. The main argument of this chapter is that the constitution-making process in Kenya in the period mentioned was influenced by deeply rooted structural violence.

A fundamental characteristic of the constitution-making process in Kenya between 1997 and 2005 is that it was contingent on pressure being exerted on the KANU Government and later on the NARC government to address the constitutional anomalies that had motivated the review process. However both governments constantly sought to

manipulate the process to serve their own interests. The constitution-making process was thus largely hostage to vested interests during the period under study.¹

The period 1997 to 2005 was characterised by the sequential establishment of four legal regimes in the process of attempting to reach consensus on a suitable law on how to change the constitution². Firstly, the Constitution of Kenya Review Commission Act, 1997 which was developed by KANU without substantial input from the opposition or civil society. This Act guaranteed virtual presidential control of the constitutional review process. Secondly, the Constitution of Kenya Review Commission (Amendment) Act, 1998 which was negotiated by politicians and civil society at the Bomas of Kenya and Safari Park. This Act created a substantial role for the citizens in the constitution-making process. Thirdly, the Constitution of Kenya Review (Amendment) Act 2000 which was developed by KANU and the National Development Party (NDP) through a Parliamentary Select Committee. This Act envisaged a crucial role for parliament in the constitution-making process. Fourthly, the Constitution of Kenya Review (Amendment) Act 2001 which arose from negotiations between a religious sector-led civil society initiative and the opposition on the one hand, and the KANU-NDP axis on the other.³

The processes and challenges leading to the creation of these different legal regimes will be analysed in this chapter. However, a background analysis dating from independence will first be undertaken so as to provide the broader context for the period

¹ N. Ng'ethe and M. Katumanga, "Transition and the Politics of Constitution-Making: A Comparative Study of Uganda, South Africa and Kenya" in W.O. Oyugi, P. Wanyande and C.O. Mbai (eds), *The Politics of Transition in Kenya: From KANU to NARC* (Nairobi: Heinrich Boll Foundation, 2003) pp. 303-344.

² K. Kibwana, "Constitution-making and the Proposal for a Democratic Transition in Kenya" in L. M. Mute, W. Kioko and K. Akivaga (eds), *Building an Open Society: The Politics of Transition in Kenya* (Nairobi: Claripress, 2002) pp. 262-281.

³ Ibid.

under study. This background will provide an insight into the factors that contributed to the need to consider constitutional reforms in the 1990s.

Background to the Constitution-making Process in Kenya up to 1997

The current Kenyan constitution has its origins in the independence constitution. The independence constitution has been amended thirty eight times to the extent that the values and orientation of the existing constitution differ considerably from the independence constitution despite legal continuity.⁴ The independence constitution resulted from negotiations among various Kenyan political parties and the British government. The system of parliamentary democracy in the independence constitution reflected the classic British Westminster model separating the Head of State from the Head of Government. The Head of state had a largely ceremonial role although he or she could play an important role in forming and dismissing the government and dissolving the legislature. The Head of state appointed the Head of government called the Prime Minister. Parliament was made up of two Houses, the House of Representatives which represented the national constituencies and the Senate which represented the regions.

The independence constitution was anomalous in the sense that it was generated largely outside the political process. It was achieved primarily through a technical process. The British viewed the process of decolonisation and the granting of independence as a technical and not a political process, even though some Kenyans were

⁴ Constitution of Kenya Review Commission, *The Final Report of the Constitution of Kenya Review Commission* (Nairobi: CKRC, 2005) pp. 24-37.

sent to Lancaster House for constitutional negotiations.⁵ In relation to the weaknesses of the independence constitution Muigai notes:

“While the independence constitution tried to instil the values of constitutionalism and 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 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 a third issue, the control of executive power, in the context of a *majimbo* framework a bulwark against central government control. As the constitution was the product of compromises between 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.”⁶

In constitution-making, the political process usually generates the momentum for political change and the constitution reflects the struggles that have gone on in the political field.⁷ These political struggles dominated the constitution-making processes in the post-independence period in Kenya.

Okoth-Ogendo⁸ argues that although the process of political survival in Kenya did not take the extreme authoritarian forms witnessed in many African states such as the Democratic Republic of Congo, the process of reshaping the constitution towards the political survival of the ruling party was evident by the seventh amendment after independence. The seventh amendment in effect amalgamated the two houses of the

⁵ This view was articulated by Prof. Okoth-Ogendo, a former CKRC Vice-chairperson and Professor of Public Law at the University of Nairobi, in an interview with the researcher in Nairobi 1st of December, 2006.

⁶ G. Muigai, *Constitutional Amendments and the Constitutional Amendment Process in Kenya, 1964-1997: A Study in the Politics of the Constitution*, Unpublished PhD Thesis, September 2001, p. 108.

⁷ This view was articulated by Prof. Githu Muigai, a former CKRC Commissioner and Professor of Public Law at the University of Nairobi, in an interview with the researcher in Nairobi on 11th December, 2006.

⁸ H.W.O. Okoth-Ogendo, “The Politics of Constitutional Change in Kenya since Independence, 1963-69” *African Affairs*, Vol. 71, No. 282, Jan. 1972, pp. 9-34.

National Assembly by effectively abolishing the senate, even though the government argued that both houses had merged.⁹ Ghai¹⁰ reinforces this view by arguing that constitutional frameworks in many post-independence African states, including Kenya, shifted their bias towards instrumentalism. Politically hegemonic groups became intolerant of independent centres of authority or power.

Presidents who were unable or unwilling to assert moral authority sought wide constitutional powers and developed a vast patronage network. The increase in the concentration of power in the executive branch of government was a fundamental characteristic of constitutional amendments in Kenya in the post-independence period. In this regard Muigai observes:

“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 effective checks and balances from the judiciary and legislature virtually useless. 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.”¹¹

The primacy of the constitution over politics was rejected in favour of the primacy of politics over the constitution.¹² This trend was clearly evident in the decades after independence until the early 1990s when the demands for constitutional change began. This contributed to the rise of the autocratic state in Kenya where personal rule

⁹ G. Muigai, *Constitutional Amendments and the Constitutional Amendment Process in Kenya, 1964-1997: A Study in the Politics of the Constitution*, op.cit, p. 131.

¹⁰ Y.P. Ghai, “The Role of Law in the Transition of Societies: The African Experience”, *Journal of African Law*, Vol. 35, No. 1, 1999, pp. 8-20.

¹¹ G. Muigai, *Constitutional Amendments and the Constitutional Amendment Process in Kenya, 1964-1997: A Study in the Politics of the Constitution*, op.cit. pp. 235-236.

¹² Y.P. Ghai, “Constitutions and the Political Order in East Africa”, *The International and Comparative Law Quarterly*, Vol. 21, No. 3 (July 1972), pp. 403-434.

was to prevail at the expense of popular participation by the citizens.¹³ This autocratic state was also associated with the prevalence of ineffective party politics, the lack of a well articulated ideology and the use of coercion to enforce political obedience.

The demands for constitutional review in Kenya should be seen against the background of changes in the global and African context in the post-Cold War period. Pressure for reform was not unique to Kenya and there was a global wave of democratisation and constitutional reform in the wake of the collapse of the Soviet Socialist Republics (USSR) and its satellite states in the late 1980s and the consequent realignment of geopolitical relations in the Post-Cold War era.¹⁴ This led to a spread of liberal ideas on state organisation thus challenging the ideology of the developmental state which was still prevalent among the African elite. A consequence of this post-Cold War trend was to open up the political space for internal dialogue in most African countries which led rapidly to pressure for constitutional reform. This period is sometimes known as Africa's "second liberation" and pressure for reform was exerted particularly by civil society organisations. The "first liberation" represented the struggle against colonial rule whereas the "second liberation" was a struggle by many African states against tyrannical rule which had emerged in the post-independence period. They often engaged in demonstrations and media campaigns to oblige ruling regimes to embrace liberal constitutional values. Thus in the 1990s Africa seems to have entered a new phase of constitutional development concerned with ensuring that constitutional values were internalised and adhered to. Particular concerns in many African states

¹³ C.Odhiambo-Mbai, "The Rise and Fall of the Autocratic State in Kenya" in W.Oyugi, P. Wanyande and C. Odhiambo-Mbai (eds), *The Politics of Transition in Kenya: From KANU to NARC* (Nairobi: Heinrich Boll Foundation, 2003) pp. 15-95.

¹⁴ *Ibid*, pp. 39-40.

existence of a constitution does not imply adherence to the tenets of constitutionalism.¹⁷ Constitutionalism envisages a sharing of power among the different centres of decision-making namely, the executive, the judiciary and the legislature. This separation of powers presupposes checks and balances. Thus a fundamental source of constitutional conflicts in Kenya is that the current constitution does not espouse the concept of constitutionalism.

On 3rd December 1991 KANU after considerable pressure decreed that section 2A of the Kenya Constitution which had since 1982 established Kenya as a *de jure* one party state be repealed. Internal pressure arose from reformist politicians especially Charles Rubia and Kenneth Matiba who called for the freedom to form alternative political parties and stated their plan to hold a political rally in Nairobi on July 7th 1990 without a licence.¹⁸ Although they were both detained prior to the intended meeting, people turned up for the meeting which degenerated into skirmishes with the police and became known as the *Saba Saba* (July 7th) riots¹⁹ The U.S Ambassador Smith Hempstone also played an important role in exerting pressure on the government to allow for political pluralism. External pressure arose primarily from the international financial institutions, especially the International Monetary Fund which made its funding to Kenya increasingly conditional on political reforms.

The constitution was eventually amended in December 1991 by the one party parliament. After the repeal of Section 2A there was an expansion in certain basic

¹⁶ M. Mwangi, *Conflict: Theory, Processes and Institutions of Management* (Nairobi: Watermark, 2000) p34.

¹⁷ B.O. Nwabueze, *Constitutionalism in the Emergent State* (London: C. Hurst and Co, 1973) pp. 1-21.

¹⁸ S.W. Nasong'o, "Negotiating New Rules of the Game: Social Movements, Civil Society and the Kenyan Transition" in G.R. Murunga and S.W. Nasong'o (eds) *Kenya: The Struggle for Democracy* (New York: Zed Books, 2007) pp. 19-57.

¹⁹ *Sunday Standard* (Nairobi) "Kamukunji: Police Disperse Rioters", July 8th 1990, p. 1.

political and civil rights, although certain types of repression such as those associated with the freedom of speech continued.²⁰ The agitation for constitutional reforms began in earnest in 1992 when it was agreed, during a symposium organised by the National Council of Churches of Kenya (NCCCK) to debate Kenya's transition into multiparty politics, that a national convention be convened on July 20th 1992 to debate a new constitution.²¹ The Coalition for National Convention (CNC) which advocated for this second symposium was initially composed of the Release Political Prisoners (RPP) and the Kenya Human Rights Commission (KHRC). The objectives of the RPP were the release of all political prisoners, the repeal of all repressive colonial and neo-colonial laws, the decriminalisation of political activities and the return and rehabilitation of exiles and political prisoners. The KHRC agitated against human rights violations and demanded a new constitution for Kenya. The CNC saw the agenda of a proposed national convention in terms of discussing the stages towards fuller democratisation. The CNC suggested that the 1962 independence constitution be adopted on the basis that the existing constitution had been subjected to many contentious amendments since 1963.

The CNC, however, had neither the support of the religious sectors nor that of the political opposition parties in urging for the convening of a national convention. A national convention was eventually not convened. The failure of the CNC to convene a national convention reflected the political context in which constitution making would have to be undertaken. This context was characterised by ethnic, racial, regional,

²⁰ W. Mutunga, "Building Popular Democracy in Africa: Lessons from Kenya" in J. Oloka-Onyango, K. Kibwana and M. Peter (eds), *Law and Struggle for Democracy in East Africa* (Nairobi: Claripress, 1996) pp. 199-235.

²¹ W. Mutunga, *Constitution-Making from the Middle: Civil Society and Transition Politics in Kenya, 1992-1997* (Nairobi: SAREAT, 1999) pp. 28-146.

religious, generational, personality and gender divisions which would continue to complicate the constitution process long after 1992. Ultimately, the December 29th elections took place under the old constitution.

The focus at the time seemed to be on removing the incumbent president rather than considering what the new leaders would do with the constitutional, legal, administrative and extra-judicial powers of the presidency in the event that Moi was removed. This underscored the problem, common in societies where structural violence is prevalent, that it is possible to be critical of existing structures in society without seriously considering what the alternatives would be if the existing structure is removed.²²

The lack of government commitment to substantive constitutional reform led to pressure being exerted by several constitution making initiatives which arose in the country in the period between 1993 and 1997. Fundamental among these initiatives were the Citizen's Coalition for Change (4-Cs) Model Constitution, the National Convention Planning Committee (NCPC) and the National Convention Assembly (NCA).

At the beginning of 1995 President Moi made a pronouncement that he was convinced that Kenya needed a new constitution and that he would invite foreign experts to Kenya and their task would be to collate views from Kenyans about a new constitution.²³ These experts would provide a draft constitution for debate and ratification.

At the beginning of 1995 it seemed that national consensus on the need for constitutional reform had emerged with the critical issue being the best way to achieve

²² M. Mwagiru, *Conflict: Theory, Processes and Institutions of Management*, op.cit, pp. 24-35.

²³ *Daily Nation* (Nairobi) "Moi Pledges Action on New Constitution", January 1, 1995, pp. 1-2.

such reform. On the 6th January 1995 it was proposed by the Steering Committee of the Proposed Model Constitution that the proposed constitution be renamed the Citizen's Coalition for Constitutional Change (4Cs).²⁴ While the President's pledge on the new constitution was welcomed there was a conflict over the process of achieving constitutional change. There were two schools of thought on how the constitutional review process should proceed. President Moi and the KANU government were of the view that the constitutional review process should be undertaken by foreign experts. On the other hand, it was argued by many civil society organisations that Kenyans should be at the centre of the process of constitution-making and foreign experts should only be involved to supplement the national initiative.²⁵ The Steering Committee of the Proposed Model Constitution, for example, argued that foreign experts would suffer from limitations due to lack of understanding of domestic politics, culture and conflicting interests in the process.

It subsequently emerged that President Moi was not serious about the constitution-making process and his announcement was mainly a political diversionary tactic. By June 1995 the President had reneged on his earlier promise to bring in foreign experts to collect views from Kenyans on the constitutional reforms. In June 1995 the government promised minor changes which would be debated in parliament, although this was not done.

In August 1995 the President announced that Kenya did not have a constitutional crisis.²⁶ He argued that changes should not be forced on Kenyans and that the review

²⁴ W. Mutunga, *Constitution-Making from the Middle: Civil Society and Transition Politics in Kenya*, op.cit., pp. 28-146.

²⁵ Ibid.

²⁶ *Daily Nation* (Nairobi) "Moi Rules Out Forced Change", August 15th 1995, p.3.

would take place when Kenyans made that decision themselves.²⁷ The KANU government resisted attempts at a national convention or any other forum outside parliament to review the constitution arguing that the existing constitution adequately served a multi-party system.²⁸ The ruling party KANU argued that the existing constitution was negotiated along the lines of standard Western diplomacy and guaranteed separation of powers of the executive, judiciary and legislature.²⁹ In addition, KANU contended that Kenya had enjoyed more than 30 years of stable constitutionalism and rule of law.

Lawyers and opposition leaders reacted angrily to KANU's contention and accused it of arrogating to itself powers to decide whether or not Kenya should have a constitutional review process.³⁰ By arguing that constitution-making was the preserve of parliament KANU wanted to adopt constitution-making from the top rather than from the bottom. This would ensure that it controlled the process and so would change only those aspects of the constitution that would be safe for its survival. There have been two approaches to constitutional change in Africa, namely, the bottom up and top down. The top down approach is easier for leaders to control while the bottom up one is more difficult to control.³¹ The KANU government was keen on maintaining the *status quo* since changing the constitution fundamentally would imply that there would be free and fair competition for political power in which KANU would most likely lose. When the existing social structure is threatened, those at the top will try to preserve the *status quo*

²⁷ Ibid.

²⁸ *Daily Nation* (Nairobi) "KANU Organs Close Door on Convention", August 22nd 1995, pp. 1-2.

²⁹ Ibid.

³⁰ *Daily Nation* (Nairobi), "You're Way Out of Line KANU told", August 23rd 1995, pp. 1-2.

³¹ J.O. Ihonvbere "Politics of Constitutional Reforms and Democratization in Africa", *International Journal of Comparative Sociology*, Feb. 2000, Vol. 41, Issue 1, pp. 9-25.

minimum constitutional reforms to be enacted and implemented before the general election. The principle of minimum reforms was broadly accepted and the KANU regime was gradually isolated on this issue. However the players did not clearly define what constituted minimum reforms.

The National Convention Executive Council (NCEC) and Mass Action

1997 marked a turning point in the process of constitution-making in Kenya. The KANU regime was not persuaded to embrace minimum reforms through dialogue. Since there was no crisis in Kenya, the regime did not perceive the process of constitution-making as a necessary activity.³⁶ The reform movement therefore perceived that it needed to engender a crisis, the magnitude of which would force the KANU regime to undertake constitutional reforms. In the absence of a widespread crisis the KANU regime appeared legitimate in the public realm.

Mass action which started on May 3 1997 and ended on October 20th 1997 was aimed at pressurising the KANU government to accept minimum reforms.³⁷ Mass action was aimed at challenging the legitimacy of the social order under KANU. This mass action was based on the legal theory that immoral laws required defiance and disobedience.³⁸ When citizens take the route of civil disobedience, they have deliberately chosen to break the law in an attempt to secure desired change of the law. Having failed to secure regime change by ordinary civil action, the Kenyan citizens now committed themselves to mass civil disobedience. The citizens felt that civil disobedience was

³⁶ S.W. Nasong'o, "Negotiating New Rules of the Game: Social Movements, Civil Society and the Kenyan Transition", op.cit., pp. 19-57.

³⁷ *Sunday Standard* (Nairobi) "Day of Chaos: MPs and Clergymen Clobbered as Police Break up Meeting", May 4th 1997, pp. 1-2.

³⁸ K. Kibwana, "The Right to Civil Disobedience" in K. Kibwana, C.M. Peter and J. Oloka-Onyango(eds) *In Search of Freedom and Prosperity: Constitutional Reform in East Africa* (Nairobi: Claripress, 1996) pp. 362-385.

justified because the KANU government had closed the avenues to peaceful and lawful change. Citizens have a right to civil disobedience because they stand above the government. This is based on social contract theory where the constitution is viewed as a social contract in which the individual members of society surrender some of their powers to a few members of society who are the governors.³⁹ In return for the privilege to govern, the governors are expected to guarantee harmony and prosperity in the society while also respecting the rights of the citizens. The government is therefore the agent of the citizens and if it consistently refuses the citizens' bidding then they can resort to acts of civil disobedience have the character of defiance or undermining of the government.

The Kenyan experience with mass action demonstrated an important inter-relationship between structural and physical violence. Prolonged exploitative conditions eventually produce violent resistance.⁴⁰ Thus as the NCEC agitated for constitutional reforms through mass action, the streets of Nairobi turned into battlegrounds between the government and the reformers. The country witnessed violence and deaths on July 7th (*Saba Saba*)⁴¹ and August 8th (*Nane Nane*)⁴². KANU's initial reaction to the violence was to accuse the opposition leaders of plotting to create anarchy and to disrupt the forthcoming general election.⁴³

The mass action undertaken to address conditions of structural violence eventually contributed to physical violence. Thus civil disobedience although possessing a legal basis often has revolutionary consequences. Even essentially non-violent

³⁹ J.J. Rousseau, *The Social Contract* (London: Penguin, 2004) pp. 14-20.

⁴⁰ H.W. Jeong, *Peace and Conflict Studies: An Introduction* (Aldershot: Ashgate, 2000) pp. 19-30.

⁴¹ *East African Standard* (Nairobi) "Horror of Saba Saba-Seven Die as Violence Erupts at Reform Rallies", July 8th, 1997, pp. 1-3.

⁴² *East African Standard* (Nairobi) "Rally Violence", August 9th 1997, pp. 1-2.

⁴³ *East African Standard* (Nairobi) "Opposition Accused of Anarchy", July 8th 1997, p.1

processes have the potential for leading to physical violence because of radical individuals who may make the mass action anarchical.⁴⁴

The Inter-Parties Parliamentary Group (IPPG)

The measures taken by the NCEC to pressurise the Government to undertake reforms bore fruit on 17th July 1997 when the government announced that it would undertake minimum reforms before the 1997 general elections.⁴⁵ The KANU National Executive Council requested the government to set up a commission to review the constitution.⁴⁶ This was preceded by President Moi's initiation of dialogue when he met with religious leaders from the Christian and Muslim communities on 15th July 1997.⁴⁷ The President held discussions with seventeen key Christian and Muslim religious leaders at State House in Nairobi. The meeting agreed that it was necessary to review the country's constitution so it could be more effective in serving the needs and aspirations of a modern Kenyan state.⁴⁸ However, events later in the year would demonstrate that KANU was not genuinely committed to deep-rooted constitutional reform. Its apparently conciliatory attitude merely represented a change of strategy under the pressure of mass action. Thus although it agreed to constitutional reforms, in principle, it continued to control the scope of these reforms.

⁴⁴ This argument was made by Dr. Willy Mutunga, a former NCEC activist, in an interview with the researcher on 13th December 2006 in Nairobi as he reflected on his experience with mass action in 1997 when agitating for constitutional reform in Kenya.

⁴⁵ *East African Standard* (Nairobi) "It's Yes to Reforms", July 18th 1997, pp. 1-2.

⁴⁶ *Ibid.*

⁴⁷ *East African Standard* (Nairobi) "Crucial Meeting on Reforms: Moi Talks to Top Leaders", 16th July 1997, pp. 1-2.

⁴⁸ *Ibid.*

The path to dialogue with a broader range of stakeholders especially civil society in constitutional reform continued to be conflictual. The NCEC doubted the sincerity of KANU in the review talks from the beginning because of KANU's previous reluctance to facilitate constitutional reform. Thus, shortly after the government's announcement on reforms NCEC accused KANU of having abandoned the review talks and vowed to continue with mass action to pressure for genuine reform.⁴⁹ Some evidence of this insincerity was manifested when KANU skipped the reform talks for the second time in one week thereby missing the official launching ceremony.⁵⁰ It was not until pressure began to be exerted to postpone the general elections that were due later in that year that KANU began to appear to be more committed to reforms. Eighteen Catholic bishops urged the government to postpone the elections until the reforms had been put in place.⁵¹

The next day a breakthrough was reported, with more than one hundred KANU and opposition members of parliament meeting and agreeing that there was a need for fundamental constitutional reforms to reflect the current realities in Kenya.⁵² One group in the meeting allied to KANU, however, argued that whereas constitutional reforms were a right of all Kenyans, the legislative mandate and responsibility for the reforms was the preserve of parliament as established by the law.⁵³ The NCEC, however, challenged this position and vowed to transform the National Convention Assembly into a Provisional Constituent Assembly which would collect and collate views from Kenyans

⁴⁹ *East African Standard* (Nairobi) "NCEC Says KANU has Quit Talks on Reforms" August 21st 1997, p. 1.

⁵⁰ *East African Standard* (Nairobi) "KANU Team Skips Reform Talks" August 26th 1997, pp. 1-2.

⁵¹ *East African Standard* (Nairobi) "Catholic Bishops Tell Government to Delay Polls" August 28th 1997, pp. 1-2.

⁵² *East African Standard* (Nairobi) "Breakthrough: KANU and Opposition Agree on Reforms" August 29th, 1997, pp. 1-2.

⁵³ *Ibid.*

on reform. They considered the parliamentary committee which had been set up as a “KANU hoax”.⁵⁴

The then Vice President, George Saitoti invited KANU and the opposition MPs to discuss options of averting a crisis and it was under these auspices that the Inter-Parties Parliamentary Group (IPPG) was born. The intention of KANU and President Moi was to restrict the reform discussions to parliamentarians. This option appealed to him because it would have been easier to control the members of parliament. It represented a top-down approach. Many opposition MPs abandoned the NCEC and decided to participate in the IPPG reform discussions. The high incidence of political opportunism and the weakness of opposition parties in Kenya can be partly explained on the basis of their ideological bankruptcy and inadequate resources.⁵⁵ As Nasong’o observes:

“The clearer and more realistic the objectives, the greater the chances of crafting effective strategies for their realisation. The Kenyan movement for democratisation, however, lacked a clear-cut definition of the objectives; hence there was no agreement on the strategies to be employed in pursuit of the objectives. More perceptive elements within the civil society organisation ranks correctly identified the key objective as deconstructing the authoritarian state through constitutional engineering. For opposition politicians, on the other hand, the key task at hand was the removal of Moi from power and the legalisation of multiparty politics. They had personal grievances against Moi for having marginalised them from power and were impatient with prescriptions for engaging in a more fundamental struggle for constitutional change.”⁵⁶

Many actors in the constitutional review process were often prepared to change their views and support one faction or another depending on where they stood to gain the most.

⁵⁴ Ibid.

⁵⁵ C. Odhiambo-Mbai, “The Rise and Fall of the Autocratic State in Kenya”, op.cit, p.70.

⁵⁶ S.W. Nasong’o, “Negotiating New Rules of the Game: Social Movements, Civil Society and the Kenyan Transition” op.cit, p. 48.

The IPPG was a joint forum of all parliamentary political parties and its objective was to introduce minimum constitutional reforms before the 1997 elections. It comprised of 36 opposition MPs and the KANU parliamentarians.⁵⁷ The IPPG was formed to remove the impetus of reform from the NCEC which following its mass campaign during most of 1997 had emerged as the main actor in the constitutional reform movement.⁵⁸ The IPPG was created on the basis of the argument by KANU and some opposition MPs that the focus for any constitutional reforms had to lie with the elected representatives of the citizens in parliament rather than pressure groups and NGOs which they claimed did not enjoy the mandate of the people. The IPPG was therefore aimed at diffusing the political crisis which the Moi-KANU regime had on its hands.⁵⁹

A general consensus had emerged on the issue of minimum reforms before the general election. KANU initially rejected this general consensus by a broad section of stakeholders. The party eventually came on board for the following reasons. Firstly, because it faced a major political crisis. Secondly, the party was convinced that any reforms reached would be unlikely to be far-reaching. However, even within the IPPG deliberations KANU showed insincerity when it tried to pre-maturely end debate on the Constitutional (Amendment) Bill.⁶⁰ This move resulted in the opposition threatening to block the passage of the IPPG Bill and withdrawing their support. In response to opposition threats the government dropped its attempt to end debate on the Constitutional

⁵⁷ Ibid.

⁵⁸ M. Mwangi, "Elections and the Constitutional and Legal Regime in Kenya" in L. Chweya (ed) *Electoral Politics in Kenya* (Nairobi: Claripress, 2002) pp. 28-51.

⁵⁹ W. Mutunga, *Constitution-Making from the Middle: Civil Society and Transition Politics in Kenya, 1992-1997*, op.cit.

⁶⁰ *Daily Nation* (Nairobi) "Government Blunders on IPPG Deal", October 23rd, 1997, p.1.

(Amendment) Bill.⁶¹ The NCEC was suspicious of KANU's intentions in the IPPG reforms and called for an extension of the life of parliament to ensure genuine deep-rooted reforms.⁶² President Moi however rejected the NCEC's call. He argued that an extension of the life of parliament would contradict the principles of democracy.⁶³ He contended that parliament had no mandate to extend its life without consulting the electorate.

The IPPG amendments were eventually enacted in November 1997 a month before the general elections.⁶⁴ The three Bills to which President Moi assented and which constituted the IPPG package were: the Constitution of Kenya (Amendment) Bill 1997, the Statute Law (Repeals and Miscellaneous Amendment) Bill and the Constitution of Kenya Review Commission Bill, 1997.⁶⁵ A fundamental component of the IPPG proposals was the inclusion of a Constitution Review Commission which was to be answerable to a Select Committee of Parliament to work under a set time schedule. The Constitution Review Commission Act was subsequently passed before the dissolution of parliament.

One of the most crucial of the reforms which the IPPG passed was on the constitution of the Electoral Commission. Ten more electoral commissioners were appointed by the President on the recommendations of some of the opposition political parties. Previously the opposition had no say in the appointment of electoral commissioners. The IPPG reforms resulted in the opening of some democratic space and

⁶¹ *Daily Nation* (Nairobi) "Government Retreats on IPPG Debate: Saitoti Says All Still on Track" October 24th 2007, p.1.

⁶² *Daily Nation* (Nairobi) "Don't Rush Poll NCEC Tells Government" October 16th 1997, p. 36.

⁶³ *Daily Nation* (Nairobi) "Moi says No to NCEC Poll Plan", October 17th 1997, p. 1.

⁶⁴ *Daily Nation* (Nairobi) "Reform Bills Signed into Law" November 8th 1997, pp. 1-2.

⁶⁵ *Ibid.*

served to regulate the electoral process in a better manner than during the 1992 electoral process. However, critics of the IPPG argued that the reforms were inadequate. For example, the Catholic bishops in Kenya immediately reacted to the IPPG reforms enactment by arguing that the reform bills assented to were inadequate for a free and fair election.⁶⁶ The bishops called for the extension of parliament to enact further reforms such as limiting the powers of the president and establishing clearer procedures in the case of indecisive election results. The 4Cs viewed the IPPG package as an appeasement strategy of President Moi and rejected it on the grounds that it did not deal with some of the key aspects that had motivated constitutional reform such as the excessive concentration of power in the executive.⁶⁷ In addition, soon after the IPPG reforms became law parliament was dissolved. The IPPG reforms thus became law on November 7th 1997 and Parliament was dissolved on November 10th 1997.⁶⁸

The opposition considered this rapid dissolution of parliament as a betrayal of the spirit of the IPPG arguing that the president's move showed the need for constitutional reforms to trim presidential powers to make the legislature more independent of the executive.⁶⁹ The IPPG was ultimately a reflection of powerful vested interests in Kenyan society which were bent on using the minimum reforms as a means of preserving the *status quo*.

⁶⁶ *Daily Nation* (Nairobi) "Bishops say IPPG Package Inadequate" November 8th 1997, pp. 1-2.

⁶⁷ S.W. Nasong'o, "Negotiating New Rules of the Game: Social Movements, Civil Society and the Kenyan Transition", op.cit.

⁶⁸ *Daily Nation* (Nairobi) "All Clear for Election 1997: But Opposition Feels Betrayed" November 11th 1997, p.1.

⁶⁹ Ibid.

The KANU government would not accept a postponement of the elections since this would result in pressure for the enactment of additional reforms suggested by other stakeholders such as the NCA and the religious sector. Such reforms would likely result in KANU's defeat when the elections were ultimately called.

After the 1997 elections there were demands that the unfinished business of minimum reforms be completed. A number of vital reforms had been excluded from the IPPG recommendations on the grounds that they could be dealt with more effectively only in comprehensive constitutional reforms after the elections.⁷⁰ However, as part of the IPPG package, the Constitution of Kenya Review Act, 1997 came into force with the intention of meeting the objectives of post-election constitutional review.⁷¹ The 1997 Act did not, however, satisfy all interested stakeholders since it was initiated by the government through the Attorney General without consulting civil society on substantive issues legislated by the Act. Since KANU's objective had been primarily to use the IPPG talks to outmanoeuvre both the opposition and the NCEC, it continued to undermine the process of constitution-making after elections by trying to ensure that the continuing talks did not achieve any deep rooted reform.

⁷⁰ M. Mwangi, "Elections and the Constitutional and Legal Regime in Kenya", op.cit., pp. 28-51.

⁷¹ Constitution of Kenya Review Commission, *The Final Report of the Constitution of Kenya Review Commission*, op.cit, pp. 41-43.

The Safari Park Talks

After the 1997 elections, the state half-heartedly engaged the opposition and civil society organisations in talks on constitutional reforms. Initially, the Attorney General assumed the leadership of a 25-member informal parliamentary group known as the Inter-Parties Parliamentary Committee (IPPC). In response to this informal and exclusive process, the NCEC called for the establishment of a multi-sectoral forum to facilitate the comprehensive review of the constitution. Once the NCEC demands were taken up by church leaders⁷², the KANU government was pressured to renegotiate the 1997 Review Act which was viewed by civil society and the official opposition as a self-serving governmental mechanism.⁷³ These groups demanded an opportunity to participate in the constitutional review process.

This set the stage for what came to be known as the Safari Park talks which were held between June and October 1998. The aim of the talks was to identify an acceptable framework for the constitutional review process. The talks were characterised by deep suspicions between the parliamentary group and civil society organisations.⁷⁴ The IPPC was pitted against civil society which demanded an immediate disbandment of the IPPC and the unconditional resignation of Amos Wako as the forum chairman. Both the IPPC and Amos Wako were seen as obstacles to a genuine constitutional review process.

On June 23rd 1998 the Safari Park I meeting appointed a Committee of 10 members to draft amendments to the Constitution of Kenya Review Act of 1997 and

⁷² *East African Standard* (Nairobi) "Catholics Say Talks May Flop", June 1st 1998, pp. 1-2.

⁷³ Constitution of Kenya Review Commission, *The Final Report of the Constitution of Kenya Review Commission*, op.cit, pp. 41-43.

⁷⁴ *Kenya Times* (Nairobi) "Forum Ends in Disarray", June 23rd 1998, pp. 1-2.

present it to parliament.⁷⁵ The Committee comprised 5 members of the Inter-Parties Parliamentary Committee (IPPC) and 5 drawn from the religious and civil society sectors. At a later meeting the various parties eventually reached a consensus on some of the key modalities of the Constitution Review Process. The Safari Park II meeting agreed to have a three-tier structure of the constitution review process with the National Consultative Forum as the supreme decision-making organ in the process accompanied by a Constitution Review Commission and District Committees.⁷⁶ The meeting did not, however, agree on many of the contentious details of the three organs and how they would be appointed. There were divisions between those who favoured district and ethnic representation in the National Consultative Forum and the Review Commission and those who preferred representation through interest groups.

It was tentatively agreed that the National Consultative Forum should have two representatives from each district with Nairobi counting as four districts and Mombasa as two, in addition to one representative each from the various civic, religious, human rights and youth interest groups. However, the NCEC argued that this would give too much weight to ethnically based administrative districts and they felt that KANU with its strong grassroots organisation would infiltrate the National Consultative Forum at the expense of other interest groups and political parties.⁷⁷

Out of these talks emerged the Constitution of Kenya Review Commission (Amendment) Act, which arguably was the most progressive of the process laws to

⁷⁵ *East African Standard* (Nairobi) "Team Named" June 24th 1998, pp. 1-2.

⁷⁶ *Kenya Times* (Nairobi) "Consensus Reached on Structure: All Set for Law Review" June 30th, 1998, p. 1

⁷⁷ *Ibid.*

emerge between 1997 and 2002 in that it created a substantial role for citizens in the constitution-making process.⁷⁸

The Safari Park process was strong on people's participation in that it provided for district forums whose composition would involve many people since all locations in Kenya would send three delegates to the district forum.⁷⁹ The clergy within the districts and local members of parliament and councillors were also to be involved. In addition, the District forums had a strong civic education and mobilisation mandate. Each District was to send one woman, one youth and another person to the national forum. Under the Act the review commission also comprised nominees by stakeholders named in the Act. The National Convention Assembly/National Convention Executive Council (NCA/NCEC) were very instrumental in exerting pressure to achieve the 1998 people-driven constitution-making law which the president assented to on 24th December 1998.⁸⁰ The assent set the stage for the establishment of a commission of twenty five people. The nomination of commissioners by political parties, civil society and special interest groups was to be done within fifteen days from the Act's commencement.

The rationale behind the Constitution of Kenya Review Act was a "people-driven" process which was aimed at being inclusive in terms of accommodating a diversity of the Kenyan people including socio-economic status, race, ethnicity, gender, religious faith, age, occupation, learning and persons with disabilities.⁸¹ The Act carefully set out the tasks and stages involved in the process and also specified the organs

⁷⁸ K. Kibwana, "Constitution-making and the Potential for a Democratic Transition", op.cit.

⁷⁹ W. Kioko, "The State of Constitutional Development in Kenya" in I. Shivji(ed), *Constitutional Developments in East Africa for the Year 2000* (Dar-es- Salaam: E & D, 2003) pp. 11-32.

⁸⁰ *Daily Nation* (Nairobi) "Key Step Taken for Law Review" December 26th 1998, pp. 1-2.

⁸¹ Republic of Kenya, *Report of the Committee of Eminent Persons on the Constitution Review Process*, op.cit., p. 19.

that would undertake them. The process was to be initiated by the Constitution of Kenya Review Commission (CKRC) appointed by the president on the nomination of parliament. The KANU government thus appeared to support the Constitution of Kenya Review Commission (Amendment) Act 1998. This was because in 1998 it lacked the political strength to oppose or undermine it.⁸² However, even at the Safari Park forum KANU had often maintained that only parliament should review the constitution.

The Constitutional Review Process Stalemate in 1999

The pre-1999 consensus reached by the citizens in developing a people-driven process of constitutional review began to be reversed in 1999. The strategy of the ruling elite was initially to frustrate the establishment of organs for the review of the constitution and thus impede the implementation of the review law. The Constitution of Kenya Review Commission (Amendment) Act was to come into operation on January 25th 1999.⁸³ Initial nominations to the Review Commission were expected to be done within fifteen days from January 15th 1999 although this did not materialise.

During the Safari Park forum, KANU argued that it was not necessary to specify the number of commissioners that each political party was entitled to nominate since the Inter Parties Parliamentary Committee (IPPC) would settle the issue.

Informally, however, an agreement had been reached on how the 13 seats reserved for parliamentary political parties would be sub-divided. However, the parliamentary parties failed to achieve a consensus on the issue when they met in

⁸² K. Kibwana, "Constitutional Development in Kenya" in K. Kibwana, C.M. Peter and N. Bazacera (eds), *Constitutionalism in East Africa: Progress, Challenges and Prospects in 1999* (Kampala: Fountain, 2001) pp. 1-17.

⁸³ *Daily Nation* (Nairobi) "Law Review Starts on January 25th" January 1st 1999, p. 1

January, February and March 1999.⁸⁴ The reform meeting was to distribute the thirteen seats in the constitutional review committee to the parliamentary political parties. The opposition rejected KANU's proposal that the seats be allocated according to each party's parliamentary strength which would have implied KANU be given seven seats. Instead the opposition proposed that each of the ten parties represented in parliament should be given one seat and the remaining three should go to women and the youth. This disagreement resulted in a stalemate with each protagonist resolving to proceed guided by distinct approaches.⁸⁵

After frustrating the establishment of the Commission, President Moi, KANU and the co-operating opposition National Development Party (NDP) mounted a vigorous campaign which claimed that constitution-making was the preserve and responsibility of parliament, and not civil society. A KANU parliamentary caucus meeting in October 1999 resolved to seek changes to the 1998 review law to exclude civil society involvement in the constitutional review process.⁸⁶ By December 1999, President Moi had secured a political strategy for the amendment of the 1998 Constitution of Kenya Review Commission (Amendment Act). This was to be achieved through a parliamentary select committee which was headed by Raila Odinga the leader of NDP. The parliamentary select committee was established ostensibly to break the stalemate on the constitutional review. The committee was, however, dominated by KANU and NDP. Fifty-four non-NDP opposition MPs who were led by the Democratic Party (DP) had previously boycotted the parliamentary proceedings seeking to establish the

⁸⁴ *Daily Nation* (Nairobi) "New Deadlock in Reform Talks" January 26th 1999, pp. 1-2.

⁸⁵ Constitution of Kenya Review Commission, *The Final Report of the Constitution of Kenya Review Commission*, op.cit.

⁸⁶ *Daily Nation* (Nairobi) "Now Reform Law Faces Major Test", October 20th 1999, p. 1-2.

parliamentary select committee. Moi's attempt to lobby opposition leaders to embrace the route of parliamentary review of the constitution failed and with the exception of three parliamentarians, the non-KANU NDP MPs boycotted the proceedings of the select committee. On 17th December 1999 Raila Odinga, the chairman of the parliamentary select committee, announced that his committee would meet Kenyans and foreign experts with a view to soliciting their opinions on the review process.⁸⁷

The Emergence of Parallel Constitutional Review Processes

In response to Moi's political strategy to restrict the review process to parliament, civil society and reform-inclined opposition politicians established a parallel system whose mandate was to make and enforce a people-driven constitution.⁸⁸ The faith-based organisations in co-operation with opposition political parties, professional societies and civil society launched a parallel process of reviewing the constitution in April 2000 by establishing the People's Commission of Kenya which was chaired by Dr. Oki Ooko Ombaka.⁸⁹ This process was also popularly referred to as the *Ufungamano Initiative*. Its aim was to collect the views of Kenyans and prepare a draft constitution in accordance with the review process previously agreed on by all stakeholders.

Parliament, on the other hand, sponsored another process through the Constitution of Kenya Review Act 2000 (Review Act). Under this Act, the National Assembly and the Constitution of Kenya Review Commission (CKRC), chaired by Prof. Yash Pal Ghai, was appointed by the president in November 2000. The existence of the CKRC on the one hand and the Ufungamano initiative on the other, was evidence of a fundamental

⁸⁷ *East African Standard* (Nairobi), "Raila Team to Consult Experts" December 18th, 1999, p.2.

⁸⁸ Constitution of Kenya Review Commission, "The People's Choice, *The Report of the Constitution of Kenya Review Commission*, Short Version, Issued on Wednesday 18th September, 2002, pp. 1-10.

⁸⁹ *Daily Nation* (Nairobi), "Law Team to Be Sworn in Today", April 27th 2000 p. 2.

division in the Kenyan political landscape.⁹⁰ The CKRC was perceived by many Kenyans as an instrument of the ruling party.

The goals of the review through the CKRC were similar to those contained in the 1998 Act although there were some amendments. The 2000 Act amended the 1998 Act and watered down some of the fundamental strengths of the Safari Park process. Under the 2000 Act, the Parliamentary Select Committee made itself the appointing authority while giving the president the power of veto.⁹¹ District forums were scrapped and replaced with Constituency forums. This aspect provided a fertile ground for rigging the process. The resolutions of the National Constitutional Conference had no binding effect and could thus be vetoed by parliament.

The existence of these parallel review processes produced deep divisions in Kenyan society accompanied by significant social and political tensions. There was also no real prospect that the draft constitution produced by either process would be enacted given that neither side had a two-thirds majority in the National Assembly. Although the Parliamentary Select Committee could cloak itself in the armour of legality and government backing, it was sensitive to the accusations that it lacked legitimacy from the people.⁹² Prof. Ghai mediated between the parliamentary Select Committee on the constitution and the *Ufungamano Initiative* with a view to merging the two processes.⁹³ The mediation was motivated by several factors.⁹⁴ Firstly, was a pragmatic aspect since

⁹⁰ Republic of Kenya, *Report of the Committee of Eminent Persons on the Constitutional Review Process*, op.cit., pp. 20-21.

⁹¹ W. Kioko, "The State of Constitutional Development in Kenya", op.cit.

⁹² L. M. Mute, "Constitutional Developments in Kenya: A Critical Appraisal" in J. Oloka-Onyango (ed) *Constitutional Development in East Africa for Year 2001* (Dar es salaam: E & D Press, 2003) pp. 11-47.

⁹³ *Daily Nation* (Nairobi) "Fresh Unity Bid for Reform Rivals: Ghai Declines Oath as Chairman in Sign of Good Faith" 29th November 2000, pp. 1-2.

⁹⁴ In an interview with the researcher on 10th December 2006 in Nairobi, Prof. Ghai expounded on his reasons for wanting a merger of the parallel constitutional review processes.

Prof. Ghai realised that neither group had sufficient votes in parliament to get their draft passed. He was also very concerned about the divisiveness of the two parallel processes which was already leading to an alarming level of violence in the country. Prof. Ghai also thought it was possible to establish a common agenda despite the considerable degree of suspicion and misunderstanding in the process. He also considered that constitutions were different from other types of legislation in that they should reflect a large degree of consensus. A common process he argued was also likely to be more participatory than one that was not.⁹⁵

The last few months of 2000 were characterised by Ghai-led negotiations to merge the two parallel processes. The process was, however, extremely complex and it often seemed as if it would fail. There were disagreements within the CKRC and in the *Ufungamano Initiative*. For example, in April 2001 a visit by some members of the commission to State House led to serious differences among members of the Constitution Review Commission team.⁹⁶ This visit was widely interpreted as one of seeking instructions from or reporting to the President on the Commission apparently to undermine its independence.

There was also an attempt to block the Bills which were to enable the merger between the two groups from being tabled in the National Assembly. President Moi on several occasions expressed his dissatisfaction with merging the parallel review processes.⁹⁷ He, for example, questioned the suitability of the individuals picked by the *Ufungamano Initiative* for the Constitutional Review Commission terming them as

⁹⁵ Ibid.

⁹⁶ *Daily Nation* (Nairobi) "Visit to Moi splits Ghai's Reform Group", April 13th 2001, p.1

⁹⁷ *Daily Nation* (Nairobi) "Moi Rejects Reform Deal", April 8, 2001, pp. 1-2.

political activists and casting doubt on the mandate of *Ufungamano*. The apparent split between opposition members of parliament and the Kanu hardliners over the merging of the review processes was widely perceived as an attempt by KANU to derail the constitutional review process.⁹⁸ Within the *Ufungamano* initiative itself there was a group that was against the merger arguing that it would be manipulated for minimum reforms as opposed to the comprehensive reforms that *Ufungamano* had always insisted on.⁹⁹ The efforts to merge the parallel processes eventually succeeded and in June 2001 the CKRC was expanded to include representatives of the People's Commission of Kenya.

The obstacles associated with merging the parallel review processes reinforce the argument that the original intention of the KANU government was to undertake a review process that was carefully monitored and that could be manipulated to suit its needs even though public debate on the constitution was ostensibly allowed.¹⁰⁰ The intention was to come up with a government promulgated or top-down process even though the process was theoretically to be people-driven. The inclusion of the *Ufungamano* Initiative in the review process was resisted by KANU since it was perceived as making the control of the review process by the government more difficult. President Moi appeared satisfied with the conditions that enabled him and his party, KANU, to hold on to power and a new constitutional dispensation was acceptable provided it did not change these conditions fundamentally. The constitutional review process represented a potential threat to the

⁹⁸ *Daily Nation* (Nairobi) "MPs allege KANU ploy to derail reform process", April 15th 2001, p.1

⁹⁹ *Daily Nation* (Nairobi), "Yes to Merger", March 22nd 2001, pp. 1-2.

¹⁰⁰ For a discussion of this trend in African states see J.O. Ihonvbere "Politics of Constitutional Reforms and Democratization in Africa", *International Journal of Comparative Sociology*, Feb. 2000, Vol. 41, Issue 1, pp. 9-25.

existing structure perpetuated by the KANU government. Those who benefited from the structural violence were attempting to preserve the *status quo* which was geared to protecting their interests.¹⁰¹ A genuine constitutional reform process would have radically altered the *status quo* which certain individuals in the ruling party had vested interests in maintaining. The existing constitutional set-up had benefited a few individuals, but for the vast majority of Kenyans it had contributed to perpetuating poverty, inequality and elite domination of resources.¹⁰² From a human needs perspective, structural violence occurs when systematic inequalities in the distribution of economic and political resources exist in a society.¹⁰³ These structures therefore systematically deprive the satisfaction of needs for certain segments of society. This situation was very much in evidence in Kenya.

There was public support in Kenya for the merging of the parallel constitutional review processes owing to a hope that this would contribute a much more genuine constitutional review process. This overwhelming public support put pressure on the ruling party to finally accept the merging of the parallel review processes. Kenyan society during this stage typically represented Curle's conceptualisation of an unpeaceful society.¹⁰⁴ There was no overt conflict yet there was an absence of peace. However, the overall effect of merging the parallel review processes was to make the constitution-making process more participatory and hence more people-driven since a broader cross-

¹⁰¹ J. Galtung, "Violence, Peace, and Peace Research" *Journal of Peace Research*, Vol. 3 (1969) pp. 167-191.

¹⁰² M. Pilisuk, "The Hidden Structure of Contemporary Violence" *Peace and Conflict: Journal of Peace Psychology*, 4(3),1998, pp. 197-216.

¹⁰³ Daniel J. Christie, "Reducing Direct and Structural Violence: The Human Needs Theory" *Peace and Conflict: Journal of Peace Psychology*, 3(4),1997, pp. 315-332.

¹⁰⁴ A. Curle, *Making Peace* (London: Tavistock, 1971) pp. 1-26.

section of views would be represented. The process of constitution-making is vital to the acceptability and legitimacy of the final document.¹⁰⁵

The Attempt to Entrench the Review Process in the Constitution

By the beginning of the second quarter of 2001, the Attorney General had prepared the Constitution of Kenya (Amendment) Bill No. 1, 2001 for debate. Its purpose was to entrench into the constitution the statute setting out the merger formula.¹⁰⁶ It sought to protect the review process from attack which could arise, for example, by the passage of a parliamentary bill repealing or amending the merged process. The bill was to remain in limbo for many months and it eventually fell by the way-side without being legislated in 2001.

When the Bill was initially published on the 22nd of March 2001, the Attorney-General withdrew it so as to make minor technical corrections. The Attorney General was generally perceived by the public as an individual who used his extensive experience to serve the KANU government's needs without compunction. Whether it was the fight against corruption or the constitutional review process the ruling elite benefited from the Attorney General's apparent blunders.

After some delay, an attempt to discuss the Bill in parliament in December 2001 proved inconclusive despite a plea from religious leaders to parliament to entrench the Act into the constitution before the Christmas recess.¹⁰⁷ It was expected that the Bill would be discussed by Parliament during its first session in 2002. This, however, never occurred despite considerable pressure. Parliament's failure to pass the Bill during the

¹⁰⁵ J.O. Ihonvbere, "Politics of Constitutional Reforms and Democratization in Africa", op.cit., pp. 9-25.

¹⁰⁶ *Daily Nation* (Nairobi) "House to Debate Review Bills" April 2nd 2001, pp. 1-2.

¹⁰⁷ *Daily Nation* (Nairobi) "Plea to MPs over Law Review" December 4th 2001 p.3

whole of 2001 could be interpreted as a design to leave the ruling elite through parliament with a way to disrupt the commission if it failed to follow a specific line. The NCEC argued that the constitutional review process would remain vulnerable as long as it was not entrenched into the Constitution. It could be declared unconstitutional by the courts as had happened to the Kenya Anti-corruption Authority (KACA). In addition, the considerable powers exercised by the president could arguably be used to undermine the entire review process.

An analysis of the conceptual and practical problems of entrenching a constitution into the review process is provided by Muigai.¹⁰⁸ He argues that there was a need to reconcile the Review Act and the Constitution. This was because the details of undertaking the Review process lay with the Review Act while the power to enact a constitutional amendment in terms of scope and procedure lay with the Constitution. Thus there was a theoretical problem posed by attempts to amend the Constitution outside parliament. The attempt to entrench the Review process into the constitution envisaged the need for a whole new section of the Constitution, although Muigai argues that the logical thing would have been to amend section 47 of the Constitution. This is because until Section 47 of the Constitution is amended, the sole prerogative of amending the constitution remains with parliament thus making the work of the Review Commission and of the National Conference merely advisory. In addition, even if the National Constitutional Conference and parliament were in complete agreement on the text of a new constitution, that constitution would have to be enacted within the terms of Section 47 of the current constitution and as such would have to meet the narrow criteria

¹⁰⁸ G. Muigai, "Towards a Theory of Constitutional Amendment", *The East African Journal of Human Rights and Democracy*, Issue 1, No. 1, September 2003.

of an alteration or amendment. However the whole process of the review of the constitution had proceeded on the basis that it is an overhaul of the constitution. Muigai¹⁰⁹ thus argues that the power to amend or alter the Constitution cannot be a power to make a new constitution.

The Time frame in the Constitutional Review Process

The Constitution of Kenya Review (Amendment) Act 2001 established the organs through which the Constitution would be reviewed.¹¹⁰ These organs were the Constitution of Kenya Review Commission, the Constituency Constitution Forums, the National Constitutional Conference, the Referendum and the National Assembly. The Constitution of Kenya Review Commission which was established under Section 6 of the Constitution of Kenya Review (Amendment) Act 2001 was the main organ through which the constitutional review process in Kenya was to be conducted.¹¹¹ However, the CKRC did not have full control of the process because once the CKRC started operating there was a great deal of debate and conflict over the process itself.¹¹²

There were conflicts over the extent to which the ordinary people should be involved in the process, the type of questions to be administered to the public and how these were going to be analysed. The result was that no clear work plan could be followed because of the endless cycle of conflict over process, content, commissioners and the initial draft. This in turn implied that appropriate length of time for the

¹⁰⁹ Ibid.

¹¹⁰ Republic of Kenya, *The Constitution of Kenya Review (Amendment) Act, 2001* (Nairobi: Government Printer, 2001).

¹¹¹ Republic of Kenya, *The Constitution of Kenya Review (Amendment) Act, 2001*, Section 6 (Nairobi: Government Printer, 2001).

¹¹² This view was articulated by Prof. Okoth-Ogendo in an interview with the researcher in Nairobi on 1st December, 2006.

constitutional review process was a source of constant debate both nationally and in the Review Commission itself.

In the Review Act a period of two years (to have ended on 3 October 2002) was specified for the completion of the review process.¹¹³ However, in June 2002 the Commission decided that the process could not be completed on time, and under section 26(3) of the Act requested the National Assembly for an extension until June 2003. The National Assembly in response to a general public insistence for both timely elections and that the election be held under a new constitution agreed to an extension but only until 3rd January 2003. The National Assembly also amended the Act primarily with a view to shortening the period of public consultation and debate on the report and recommendations of the Commission from 60 to 30 days in order to facilitate the completion of the process on time.

Throughout most of 2002 the Chairman of the Constitutional Review Commission Prof. Ghai insisted that the constitutional review process could be completed in time for the general elections which he argued could be held under a new constitution.¹¹⁴ There were divisions on this issue even within the Constitutional Review Commission itself. Indeed, the Commission was characterised by constant squabbling and factionalism.¹¹⁵ The Commissioners were often said to be undermining each other or undermining Prof. Ghai's chairmanship. It became commonplace for the Commissioners to disagree with or contradict their chairman in public on issues such as the length of time it would take to review the constitution, resources allocated to the Commission, and on the integrity of the

¹¹³ Constitution of Kenya Review Commission, *The People's Choice, The Report of the Constitution of Kenya Review Commission*, Short Version, Issued on Wednesday 18th September, 2002, pp. 1-10.

¹¹⁴ *East African Standard* (Nairobi), "We Can do It, Ghai Assures on Review", 24th May 2002, pp. 1-2.

¹¹⁵ L.M. Mute, "Constitutional Developments in Kenya: A Critical Appraisal" op.cit., pp. 11-47.

Commissioners. The Commission was involved in adverse publicity, a war of words and the eventual replacement by the Commission of its first secretary, Okoth Owiro. Thus the Commission can be said to have begun its substantive work by the beginning of the third quarter of 2001 as it had to navigate a minefield of real and contrived problems before it got down to the serious business of constitutional review.

The Parliamentary Select Committee on Constitutional Reform supported the idea of the extension of parliament and postponement of the general election arguing that this was necessary in order to allow the constitutional review process to be completed.¹¹⁶ The attempt to extend parliament in order to accommodate the constitutional review process was widely viewed by the public as an attempt to extend President Moi's tenure in office, although members of parliament were divided in support of and against the move.¹¹⁷ Opponents of the extension argued that if parliament was extended the general election could be delayed for up to one year. Eventually, the proposal to extend the life of parliament was withdrawn and the Commission's life was pegged to the expiry of the last parliament on 4th February, 2003.¹¹⁸

Time was also an issue. The argument was that even if a constitution were ready before the elections, there would be insufficient time to operationalise it.¹¹⁹ This problem was aptly illustrated by the IPPG package. In it some of the best changes proposed by the IPPG such as the alterations in the Chiefs Authority Act could not be operationalised before the elections. The lesson we learn from this is that when one is making

¹¹⁶ *East African Standard* (Nairobi) "General Election Set for Next Year" May 29th, 2002, pp. 1-2.

¹¹⁷ *Kenya Times* (Nairobi) "Mixed Reaction to Extension of Parliament" May 30th, 2002, p. 1

¹¹⁸ *Kenya Times* (Nairobi) "House Extension Plan Shelved" June 1st, 2002, p. 1

¹¹⁹ This argument was made by Prof. Okoth-Ogendo, former CKRC Vice chairperson and Professor of Public Law at the University of Nairobi, in an interview with the researcher in Nairobi on 1st December, 2006.

fundamental changes to the constitution there must be time to operationalise those changes.

Civic Education in the Constitutional Review Process

Civic education is vital in the constitution-making process since it enables ordinary people to understand the meaning and process of constitutional reform so that they can effectively participate in the process.¹²⁰ In order to be effective civic education should target all layers of society. Civic education provision was, however, one of the key process challenges to the constitutional review.

Between 1997 and 2002 the debate about who should carry out civic education in the constitutional review process was a heated one. President Moi initially opposed the involvement of the Church and non-governmental organisations in civic education for the constitutional review.¹²¹ The hard-line elements in the establishment argued that the CKRC should not only facilitate civic education, but that it should deliver it to the exclusion of traditional civic education providers.¹²² President Moi argued that churches and non-governmental organisations were being manipulated by foreign donors to impose on Kenyans ideas which were aimed at serving the interests of foreigners. In reality, this attitude was informed by the fact that traditional civic education providers were mainly civil society organisations which tended to be non-conformist and opposed to the partisan demands of the KANU government.

¹²⁰ K. Kibwana, "The People and the Constitution: Kenya's Experience" in K.Kibwana et.al (eds) *In Search of Freedom and Prosperity: Constitutional Reform in East Africa* (Nairobi: Claripress, 1996) pp. 340-350.

¹²¹ *Sunday Standard* (Nairobi) "Keep Off Review Process Moi tells NGOs", July 22nd 2001, pp. 1-2.

¹²² L.M. Mute, "Constitutional Developments in Kenya: A Critical Appraisal", op.cit., pp. 11-47.

The validity of giving the CKRC a role in civic education was also questioned since the Commission would also collect views from citizens. It was argued by civil society that the Commissioners may be involved in a conflict of interest if they facilitated civic education and collected views from the public. Civil society also questioned whether the Commission had sufficient capacity and resources to conduct civic education. There was also the pertinent issue of whether civic education was a one-off event to precede constitutional review, or whether it should be facilitated on a continuous basis throughout the review process. The non-governmental organisations opposed the government's stand on reform arguing that they were prepared for civic education despite its efforts to keep them out of the review process.¹²³ The National Council of NGOs insisted that the organisation would conduct civic education despite the government's efforts to keep them out of the constitutional review process.

The Commission in accordance with its mandate conducted and facilitated civic education programmes related to the constitutional review process. The commissioners travelled throughout the country.

There were also many civil society organisations that conducted civic education programmes. Civic education meetings were, however, frequently disrupted by the police and the provincial administration. Prof. Ghai at one point accused the police and the provincial administration of making civic education almost impossible to carry out because of their frequent disruptions of meetings.¹²⁴

The issue of civic education can be analysed in terms of the objective and subjective views of conflict. The ruling party was interested in controlling civic

¹²³ *Daily Nation* (Nairobi), "NGOs oppose stand on reform", August 13th 2001, p. 6.

¹²⁴ *Daily Nation* (Nairobi), "Keep off civic education, Ghai tells the police" July 20th 2001, p. 3.

education as part of its attempt to control the constitutional review process. Civic education, if properly conducted, would play a role in polarising the existing structural violence in the short run because it would increase the awareness of individuals that they were in a conflict situation. This would make the government's position more difficult since it would accelerate the demand for change. If one takes the subjectivist viewpoint, then people cannot be in a conflict if they don't perceive it.¹²⁵ The issue of awareness of the conflict is therefore vital in this conceptualisation. Objectivists, on the other hand, argue that conflict can exist without the awareness of the actors. Where such a view is taken, third parties such as non-governmental organisations have a vital role to play in managing the constitutional conflicts by increasing the level of awareness of the conflict since parties may be in a conflict without realising it.¹²⁶

Although on the whole civic education considerably enlightened people on constitutional matters there were doubts about its adequacy and access to civic educational materials.¹²⁷ Concerns on civic education re-emerged during the referendum in 2005 where the polarised political climate that dominated the period leading up to the referendum affected the delivery of civic education. It was difficult to be neutral in civic education and officials of the CKRC were openly partisan. Religious leaders, especially from the dominant Christian churches refused to give direction and urged their followers to vote according to their conscience.¹²⁸ The time for civic education during the

¹²⁵ K. Webb, "Structural Violence and the Definition of Conflict" *World Encyclopaedia of Peace*, Vol. 2 (Oxford: Pergamon Press, 1986) pp. 431-434.

¹²⁶ M. Mwangi, *Conflict: Theory, Processes and Institutions of Management*, (Nairobi: Watermark Printers, 2000) pp. 15-16.

¹²⁷ Republic of Kenya, *Report of the Committee of Eminent Persons on the Constitution Review Process*, op.cit pp. 57-59.

¹²⁸ Ibid.

referendum was also too short to accomplish much even had the political climate not been as tense as it was.

The Bomas National Constitutional Conferences

Under Section 27(1) of the Constitution of Kenya Review Act,¹²⁹ the Constitution of Kenya Review Commission (CKRC) was required, after compiling its report and preparing a draft Bill, publishing and disseminating them, to convene a National Constitutional Conference for discussion, debate, amendment and adoption of its report and draft Bill.

Kenyans were to have 30 days to debate the draft constitution after its release.¹³⁰ In exercising the powers provided for under Section 27(1), the Commission published a notice convening the National Constitutional Conference to commence in October 2002. However, parliament was dissolved on 26th October 2002 although the 8th Parliament's term was scheduled to end on 4th February 2003. This dissolution led to a postponement of the National Constitutional conference.¹³¹ The dissolution of parliament by President Moi was widely perceived as an attempt to derail the constitutional review process since the President claimed that the Commission had been disbanded until the commencement of the new parliament.¹³² At the time parliament was dissolved 260 delegates were already attending pre-conference activities. The President's position on the disbandment of the Commission was later overruled by the Attorney General.¹³³

¹²⁹ Republic of Kenya, *The Constitution of Kenya Review Act*, Revised Edition 2001(2000) (Nairobi: Government Printer, 2001) Section 27(1).

¹³⁰ *Ibid.*

¹³¹ *East African Standard* (Nairobi) "Parliament is Dissolved: Countdown to General Election Begins" October 26th 2002, pp. 1-2.

¹³² *East African Standard* (Nairobi) "Constitutional Review Process in Disarray" October 26th, 2002, pp. 1-2.

¹³³ *East African Standard* (Nairobi) "Ghai Commission still Intact says Wako" October 30th 2002, pp. 1-2.

The Attorney General said that according to Section 33 of the Review Act which set up the CKRC the Commission could only stand dissolved when there was a new constitution in place or if the Act which set up the Commission was repealed. The president had prior to the dissolution of parliament criticised the draft constitution. Attempts were also earlier made to question the very legality of the Commission.¹³⁴ The writing of Kenya's new constitution was stopped on August 30th 2002 by High Court Judge Richard Kuloba. The order was requested by Tom K'Opere and John Njogoro who accused the CKRC chairman Prof. Ghai of involving a foreigner, South African Prof. Phil Knight, in the process and excluding the commissioners. They also accused Prof. Ghai of proposing radical changes to the judiciary where all judges would vacate office and fresh appointments would be made.

The constitutional conference was eventually convened after the elections at the Bomas of Kenya on 30th April 2003 in what were known as the Bomas I Conference talks.¹³⁵ The Conference was to include all members of parliament, the members of the CKRC, one representative from every political party that was registered when the review process began. Debates at the Bomas I talks were organised into daily sittings and sessions during which the chapters of the CKRC Report and corresponding provisions of the draft Bill were presented by the Commissioners of the CKRC and discussed by the conference simultaneously.¹³⁶ There were no decisions taken on the CKRC Report and Draft Bill in the general debate since this was reserved for subsequent stages of the

¹³⁴ *Saturday Nation* (Nairobi), "Judge Blocks Ghai" August 21st 2002, p.1.

¹³⁵ *Daily Nation* (Nairobi) "Now it's Over to You: Kibaki officially Kicks off the Great Debate on Review with a Plea for Openness and Honesty at National Conference and a Pledge of No Meddling by Government" May 1st 2003, p. 1

¹³⁶ Republic of Kenya, *Report of the Committee of Eminent Persons on the Constitution Review Process*, op.cit, pp. 21-26.

conference proceedings as prescribed in Clause 20 of the Constitutional Conference Regulations. The Bomas I constitutional conference adjourned on 6th June 2003.

The National Constitutional Conference re-convened on 18th August 2003 and continued until 26th September 2003 in what was known as Bomas II.¹³⁷ Bomas II was supposed to consider and deliberate on the CKRC Report and Draft Bill presented by the Commission to the conference during Bomas I. This process was to be achieved through the established twelve technical working committees.¹³⁸ During the conference delegates tended to caucus along provincial lines rather than in terms of the statutory categories provided. It was therefore decided by the Steering Committee that delegates be organised on that basis and that coordinators be identified for the purposes of assigning delegates evenly to the committees.

What made some of the issues contentious was not so much the propriety or constitutional value of the proposals made in the Draft Bill but rather their implications for Kenyan politics.¹³⁹ Some delegates were clearly apprehensive about the radical changes being proposed to the Draft regarding the overall system of government given that these had profound implications for the existing power arrangements. Some delegates were unable to extricate themselves from deep-seated ethnic and religious loyalties. Thus the talks were virtually paralysed on the issue of whether to have an executive prime minister or not. The debate on Kadhis' courts also led to the taking of hardline positions by some non-Muslim religious organisations. Debate on the proposals to restructure the legislature, especially the issue of recall of members of parliament, was

¹³⁷ *Daily Nation* (Nairobi) "Constitution Review Talks Resume Amid Controversy" August 18th 2003, p. 1.

¹³⁸ Republic of Kenya, *Report of the Committee of Eminent Persons on the Constitution Review Process*, op.cit, pp. 21-26.

¹³⁹ *Ibid.*

also hampered by fears of loss of status and privilege currently enjoyed by sitting members of parliament rather than fundamental constitutional principles. The Bomas II talks were adjourned on 26th September 2003.

The talks that were to reconvene in November 2003 were known as the Bomas III talks. The adjournment motion had fixed the date of the resumption of the talks as 17th November 2003 although this was not to be. Bomas III was expected to be the last round of the national constitutional conference. However, the government attempted to derail the convening of Bomas III arguing that it would be a waste of time and resources, and that it would have been much more productive to turn over the remaining phase of the constitutional review to a small group of experts.¹⁴⁰ This could be interpreted as fears within the ruling elite that was motivated by the fact that Bomas III would come up with a new constitutional order not favourable to them.

Rather than adjourn in about the second week of November 2003, the Commission was informed that parliament would extend its sittings well past the date of the expected reconvening of the Bomas III talks.¹⁴¹ Approximately one-third of the Conference delegates were parliamentarians thus making it impossible to reconvene the Conference without their presence. The announcement of the extension of parliament's sittings was seen by many delegates as evidence of attempts to scuttle the conference.¹⁴²

Although the NARC government had campaigned on a clear platform of constitutional review, now that they were in power they began to adopt a similar position to that which had been adopted by President Moi. It would appear that similar fears had

¹⁴⁰ *Daily Nation* (Nairobi), "Ghai Group Defies Police in Protest over Review Delay" November 18th 2003, pp. 1-2.

¹⁴¹ Republic of Kenya, *Report of the Committee of Eminent Persons on the Constitution Review Process*, op.cit, pp. 21-26.

motivated President Moi and the KANU regime to defy for several years the call for a “people-driven constitution”. A Bomas Delegate Kiriro wa Ngugi made the following observation:

“On 28th October 2002 the KANU government sent out police to stop a meeting of the National Constitutional Conference at Bomas. Eventually those involved were assured the process was safe. A year later on November 17th, the NARC government sent mounted police to deny a group of dedicated conference delegates access to Bomas.”¹⁴³

On the other hand, key KANU leaders like William Ruto who were at the forefront of opposition to the review process during the days of the KANU regime now began to vigorously clamour for drastic constitutional reform since they were no longer part of the ruling party. In the period before Bomas III was reconvened, there was extreme pressure by some members of parliament such as Kiraitu Murungi on Prof. Ghai to resign on the basis of his alleged mismanagement of the review process and his supposed rebellion against the government.¹⁴⁴ Prof. Ghai, however, declined to resign.¹⁴⁵ He also appealed directly to President Kibaki through the press to provide leadership in the making of a new constitution.¹⁴⁶ Many Kenyans ultimately supported Prof. Ghai’s continued stay in the review process.¹⁴⁷ Prof. Ghai, however, also faced considerable opposition within the CKRC where several commissioners wanted to depose him as chairman.¹⁴⁸ Thus 17 out of 27 commissioners attended a meeting aimed at toppling Prof.

¹⁴² *Daily Nation* (Nairobi) “Confusion as Police Guard Bomas Venue: Some Delegates Threaten to Ignore Postponement Order” November 17th 2003, p. 1.

¹⁴³ *Sunday Nation* (Nairobi) “Will the Bomas Constitutional Review Talks Remain on Course?” November 23rd 2003, pp. 12-13.

¹⁴⁴ *Kenya Times* (Nairobi) “You Will be Sacked, Kiraitu Warns Ghai” November 24th 2003, pp. 1-2.

¹⁴⁵ *Daily Nation* (Nairobi) “Raila and Kiraitu in New Clash Over Ghai: Review Boss Remains Firm: I’ll Not Resign as Chairman” November 24th 2003, pp. 1-2.

¹⁴⁶ *Daily Nation* (Nairobi) “Ghai Plea to Kibaki” November 28th 2003, pp. 1-2.

¹⁴⁷ *Daily Nation* (Nairobi) “Prof. Ghai Deserves Support and Must Stay”, November 26 2003, p. 9.

¹⁴⁸ *Saturday Nation* (Nairobi) “Commissioners in bid to topple Ghai” 29th November 2003, p. 2.

Ghai, accusing him of being a lone ranger and for going against the postponement decision of the Bomas talks.

The Bomas III talks were eventually reconvened in January 2004.¹⁴⁹ The process of deliberations was extremely stormy and at a certain point in January 2004 the religious leaders released a parallel draft constitution which was supported by some members of the government such as Prof. Kivutha Kibwana.¹⁵⁰ The faiths-led Ufungamano Initiative released its own draft Constitution on January 15th 2004.¹⁵¹ The Ufungamano Initiative claimed that it wanted to present its draft constitution to Kenyans through a referendum run by the Electoral Commission. They argued that the ongoing Bomas III process was not people-driven. Thus a parallel review process once again threatened to emerge.

The Ufungamano group was against a prime minister with executive powers and also advocated for a single chamber parliament. This parallel draft constitution was sent to Bomas III and was eventually incorporated into the deliberations taking place. The deliberations of the Bomas III constitutional conference ended in March 2004 and submitted its final report and Draft Bill to the Government in what came to be known as the Bomas Draft Constitution. This draft Constitution *inter alia* suggested a trimming of the president's powers including barring him or her from dissolving parliament.¹⁵² It also provided for the post of a prime minister which proved extremely controversial and was largely opposed by the NARC regime. Bomas delegates also unanimously resolved to

¹⁴⁹ *Kenya Times* (Nairobi) "Bomas Talks Resume as Raila Vows No Deal Without Executive PM" January 12th 2004, pp. 1-2.

¹⁵⁰ *Daily Nation* (Nairobi) "Kibwana Thrown Out of Bomas", Tuesday, January 20th 2004, p. 1.

¹⁵¹ *Daily Nation*, "Churches Plot Constitutional Takeover", January 16th, 2004.

¹⁵² *Kenya Times* (Nairobi) "Bomas Strips President of Powers Over House" January 15th 2004, p. 1.

limit the number of cabinet ministers and their deputies that the President would be allowed to appoint from a list of nominations drawn up by the prime minister. Members on the Technical Committee on the Executive at Bomas III set the lower limit at 15 and the maximum number of ministers at 20. In the current Constitution the president appoints and fires ministers on his own and can select a cabinet of any size. The Bomas III delegates also gave poll terms on the presidency whereby they proposed that the President would have to wait for 21 days before he or she is sworn in to allow time for all the petitions against his or her election to be determined.¹⁵³

Legal Challenges to the Enactment of the Bomas Draft

The Bomas draft was adopted by acclamation by the conference sitting in plenary on 23rd March 2004 and it was handed over to the Constitution of Kenya Review Commission.¹⁵⁴ Just before the conference adjourned a number of delegates and observers went to court challenging the legitimacy of the entire constitutional review process and its outcome.¹⁵⁵ These cases raised technical, legal and political challenges to the remaining phases of the constitutional review process. A fundamental case that beset the review process was *Timothy Njoya & Others v. CKRC and the National Constitutional Conference*.¹⁵⁶ The Constitutional Court held *inter alia* that section 28(4) of the Review Act requiring the Attorney General to table the draft Bill before the National Assembly for enactment was unconstitutional.

¹⁵³ *Kenya Times* (Nairobi) "21-Day Proposal on Future Presidents" January 20th 2004, p. 1.

¹⁵⁴ *Daily Nation* (Nairobi) "At Last Here's the Draft" March 24th 2004, pp. 1-3.

¹⁵⁵ Republic of Kenya, *Report of the Committee of Eminent Persons on the Constitution Review Process*, op.cit, pp. 27-29.

¹⁵⁶ See *Timothy Njoya & Others v CKRC and the National Constitutional Conference*, High Court Miscellaneous Application No. 82 of 2004.

The court further ruled that the people of Kenya have a right to ratify the Draft Bill in a mandatory referendum and that parliament had no jurisdiction under Section 47 of the Constitution to abrogate the existing constitution and enact a new one in its place. The court did not, however, provide for the procedure for the holding of the referendum.

In the *Wa Kareng'e Case*¹⁵⁷ the High Court in its ruling prohibited the Commission from preparing its final report and the Draft Bill on the chapters relating to the legislature, the executive, devolution, public finance, and revenue management, and transitional and consequential provisions until the matter was heard and determined. The court also prohibited the Attorney General from receiving the final report and the draft Bill from the Commission until the final determination of the matter. The *Martin Shikuku Case*¹⁵⁸ following on the decision of the Njoya case sought orders *inter alia* that the constitutional amendments since 1963 are unconstitutional and that Kenya should revert to the 1963 independence constitution.

The applicants also sought a declaration that the Bomas draft be submitted to the people of Kenya for a referendum. In the interim, the applicants sought that all debate, discussion and action on the Bomas draft be prohibited pending the determination of the case.

The Naivasha Accord

The way in which the Bomas Conference was concluded and the court decisions on the various Bomas related cases created fundamental divisions in Kenyan society

¹⁵⁷ See *Njuguna Michael Kung'u, Gacuru wa Kareng'e and Nichasius Mugo v the Republic, Attorney General and CKRC*, High Court Miscellaneous Application No. 309 of 2004.

¹⁵⁸ See the *Martin Shikuku Case*

which in turn were replicated in the country's political leadership.¹⁵⁹ Prof. Ghai resigned in June 2004 maintaining that the Commission had no work to do after the adoption of the Draft Constitution by the National Constitutional Conference and the preparation of its Report.¹⁶⁰ Prof. Ghai was replaced by Mrs Abida Ali-Aroni who had been second Vice Chairperson of the CKRC.

The president in July 2004 incorporated some members of the opposition such as Simeon Nyachae and William Ole Ntimama into his cabinet, a move which was not well received by some of the partners in the ruling coalition.¹⁶¹ These divisions in turn manifested themselves in the Parliamentary Select Committee on Constitutional Review. One Member of Parliament, Otieno Kajwang, for example, accused the Parliamentary Select Committee of fraudulently taking over the Bomas Draft constitution to distort it under the guise of amending it.¹⁶² At this time the view had gained currency that the main obstacles to the realisation of a new constitution were the so-called contentious issues arising from the Bomas draft and that if the political leadership could agree on these, parliament could amend the Constitution and pass a law validating the draft, on which a referendum could be held. Based on this assumption, the Parliamentary Select Committee began a series of meetings aimed at seeking agreement among the political players on the contentious issues. These meetings culminated in the Naivasha retreat of the Parliamentary Select Committee held between the 5th and 7th of November 2004 which resulted in the Naivasha Accord.¹⁶³

¹⁵⁹ Republic of Kenya, *Report of the Committee of Eminent Persons on the Constitution Review Process*, op.cit, pp. 29-31.

¹⁶⁰ *Kenya Times* (Nairobi) "Ghai Quits CKRC as Chairman" July 2nd 2004, pp. 1-2.

¹⁶¹ *Kenya Times* (Nairobi) "It's Government of National Unity: Kibaki Move Kills NARC Neutralises Opposition" July 1st 2004, pp. 1-2.

¹⁶² *Kenya Times* (Nairobi), "Why Kajwang Quit House Review Team" August 4th 2004, p. 1.

¹⁶³ *Sunday Standard* (Nairobi) "Consensus Struck over Review as Retreat Ends" November 7th 2004, p. 1.

the government printer that incorporated the Naivasha Accord.¹⁶⁷ Thereafter the two NARC factions, NAK and LDP, decided to support different Bills to jump-start the review process. The government announced that it would not publish a Bill that proposed a two-thirds requirement to alter the Bomas draft, whereas LDP and KANU said they would not negotiate to change their position on the Bomas Draft and the Naivasha Accord.¹⁶⁸ The Minister for Constitutional Affairs was to later say that the government would not support the Naivasha Accord.

The Parliamentary Select Committee became the next area for constitutional conflicts as the government moved to replace William Ruto of KANU as Chairperson with Ford-People leader and Cabinet Minister Simeon Nyachae. LDP members were similarly replaced by NAK leaning members within the Parliamentary Select Committee. This turn of events led to the withdrawal of KANU and LDP members from the Parliamentary Select Committee leaving it exclusively to government members of Parliament.

The Consensus Building Group

An informal group of members of parliament led by John Koech and Jimmy Angwenyi began to spearhead a process they claimed was aimed at building consensus on contentious issues arising from the Bomas draft under the auspices of a group known as the Consensus Building Group.¹⁶⁹ The declared objective of this group was to introduce legislative amendments to the Review Act to take the process forward. The

¹⁶⁷ *Kenya Times* (Nairobi) "Law Review in Disarray as Rift between PSC, Kiraitu Widens" November 17th 2004, p. 1.

¹⁶⁸ *The East African Standard* (Nairobi) "Raila Party to Boycott Crucial Vote on Review" December 2nd, 2004, pp. 1-2.

¹⁶⁹ *Kenya Times* (Nairobi) "MPs Retreat Lays Ground for Second Round of Talks" May 17th 2004, pp. 1-2.

efforts of the Consensus building Group culminated in the publication of the Constitution of Kenya Review (Amendment) Bill also known as the Consensus Bill which later developed into the Consensus Act.

The essence of the Bill was to permit Parliament to make amendments to the Bomas Draft and thereafter submit it to the public for a referendum. The Bill, as passed by parliament, stipulated that for any clause in the Bomas Draft to change, a sixty-five percent majority in parliament would be required.¹⁷⁰ This provision to some extent appeased the opposition who felt that the government side would be unable to impose its position on them. However, the president refused to assent to the Bill¹⁷¹ on the grounds that it was in conflict with Section 54 (1) of the Constitution which provides that “Except as otherwise provided in this Constitution, any question proposed for decision in the National Assembly shall be determined by a majority of the votes of the members present and voting”.¹⁷²

This implied that the Bill be amended and re-introduced in Parliament. Before the adjournment of parliament in December 2004, the Bill was introduced with the controversial clause deleted and replaced with a simple majority.¹⁷³ The government was reasonably confident of securing a simple majority on any question owing to its incorporation of some opposition members. The government was determined to make changes to the Bomas draft after which its preferred draft would be taken to a referendum.

¹⁷⁰ *Kenya Times* (Nairobi) “Legislators Pass Review Amendment Bill” August 6th 2004, p. 2.

¹⁷¹ *Kenya Times* (Nairobi) “Kibaki Declines to Give Assent to Consensus Bill” August 21st 2004, p. 1.

¹⁷² The Constitution of Kenya, Section 54 (1)

¹⁷³ Republic of Kenya, *Report of the Committee of Eminent Persons on the Constitution Review Process*, op.cit. pp. 33-35.

The constitutional conflicts were further aggravated by the replacement of a provision that required the proposed new constitution to be passed by at least sixty-five per cent of the voters with one requiring only a simple majority. In addition, a provision requiring at least twenty five per cent of the voters in more than half of the provinces to support the proposed new constitution had been removed.

The process by which the Consensus Act was passed set the stage for intense constitutional conflicts at the referendum stage. The Consensus Act as passed by the government did not represent an outcome that was negotiated with the opposition. This factor was later capitalised on by the opposition to argue that the proposed new constitution was an imposed document.

The Kilifi Retreat and the Publication of the a New Constitution

Following the passage of the Consensus Act, the Parliamentary Select Committee under Simeon Nyachae began consultations on proposals for the amendment of the Bomas draft. However, the mistrust that had developed led opposition members of Parliament to largely ignore the Parliamentary Select Committee.¹⁷⁴ The opposition strategy was basically to await whatever draft constitution would emerge from the process and attempt to defeat it at the referendum since they lacked the numbers to defeat or attempt to alter it in parliament. Within NARC the LDP faction led by Raila Odinga also said they would have no option but to support mass action if what they called a minority in NARC insisted on imposing their will on Kenyans and interfering with the Bomas draft.¹⁷⁵

¹⁷⁴ *Kenya Times* (Nairobi) "Review Hit by New Hitch as 33 KANU MPs Walk Out" June 8th 2005, p.1

¹⁷⁵ *Kenya Times* (Nairobi) "Review Split Deepens as NARC factions Dig in" May 4th 2005, p. 1.

In July 2005 the Nyachae-led Parliamentary Select Committee organised what came to be known as the Kilifi Retreat in which members of parliament were invited to join the Parliamentary Select Committee and put together its recommendations for the amendment of the Bomas Draft.¹⁷⁶ However, the Kilifi Retreat was predictably largely boycotted by the opposition members of parliament and became a forum of mainly government-friendly members of parliament. The Speaker of the National Assembly Francis Ole Kaparo was later to rule that the Parliamentary Select Committee had exceeded its mandate by purporting to prepare a draft constitution instead of merely proposing amendments to the Draft to be considered by parliament.¹⁷⁷

The Parliamentary Select Committee Report and the Kilifi amendments were debated on 21st July 2005 and eventually the government triumphed over a spirited opposition.¹⁷⁸ The stage was thus set for Attorney General Amos Wako to prepare the final draft of the Proposed New Constitution for submission to the people in a referendum. The mandate of the Attorney General was mainly technical and restricted to the reduction of the Kilifi amendments into a single intelligible document. On 23rd August 2005, the Attorney General published the Proposed New Constitution.¹⁷⁹ By this time the political climate was extremely negative and the stage was set for an epic battle at the referendum. A trend soon emerged where a large section of the opposition attacked

¹⁷⁶ *The People on Sunday* (Nairobi) "MPs Coast Parley Mutilates Draft" 17th July 2007, pp. 1-2.

¹⁷⁷ Republic of Kenya, *Report of the Committee of Eminent Persons on the Constitution Review Process*, op.cit., pp. 33-35.

¹⁷⁸ *The People Daily* (Nairobi) "House Approves Nyachae Report: Pro-government Forces Win by 102 Votes to Opposition's 61" July 22nd 2005, p. 1.

¹⁷⁹ *Daily Nation* (Nairobi) "Review Bill Now Ready says Attorney-General" August 23rd 2005, p. 1.

and dismissed the Proposed New Constitution which became known as the Wako Draft while the government and its supporters greatly praised the Draft. Opponents of the Wako Draft questioned the legality of the referendum and tried to unsuccessfully stop its publication by legal means.¹⁸⁰

The Constitutional Referendum of 2005

Referenda are in principle supposed to let the people have a say in the regulation of their own affairs and are usually used infrequently by governments to provide a useful *ad hoc* solution to a particular constitutional or political problem.¹⁸¹ However, there is a debate on whether referenda are controlled and pro-hegemonic based on whether governments only submit issues to referendums if they are certain they will win. The initial Constitution of Kenya Review Act 1997 did not provide for a referendum.¹⁸² However, Articles 27(6) and 27(7) of the Constitution of Kenya Review Act 2000 provided for a restricted referendum if there were contentious issues. Thus Section 27(6) provided that “the Commission...shall in the absence of a consensus, submit the question or questions to the people for determination through a referendum”.¹⁸³ Sub-section (7) further provides that “A national referendum under subsection (6) shall be held within two months of the National Constitutional Conference.” The Consensus Act however allowed for an unrestricted referendum. The *Referendum Case*¹⁸⁴ later upheld the view of the Consensus Act by holding that:

¹⁸⁰ See for example *Patrick Ouma Onyango and Other v the Attorney-General and Others* which was also known as the Yellow Movement Case.

¹⁸¹ M. Qvortrup, “Are Referendums Controlled and Pro-Hegemonic”, *Political Studies*, Sept. 2000, Vol. 48, Issue 4, pp. 821-826.

¹⁸² Republic of Kenya, *The Constitution of Kenya Review Act*, 1997.

¹⁸³ Republic of Kenya, *The Constitution of Kenya Review Act* (Nairobi: Government Printer, 2000) Articles 27(6) and 27 (7).

¹⁸⁴ Republic of Kenya, *The Referendum Case*, Civil Application No. 677 of 2005.

“We find that the referendum does in a way, for a split second give the people Executive, Legislative and Judicial powers to determine whether they were sufficiently involved and consulted and whether the final product has the content and the substance, whether the final product was properly framed and whether it is a document that they would want to enact.”¹⁸⁵

The holding of a constitutional referendum in Kenya was considered necessary since there were several contentious clauses in the previous draft constitutions, particularly the draft emerging from the Bomas III process, and it was argued by the National Rainbow Coalition (NARC) government that it was necessary to directly obtain the people’s opinion on these issues. The NARC government hoped to be able to manipulate the process by spending a considerable amount of public resources on the referendum and hence to secure acceptance of its position on the key contentious issues which were given expression by the Proposed New Constitution of Kenya which was to be put to a referendum.

Nowrojee argues that the referendum was based on a tainted legal process. He argues that under the existing constitutional order, every law must be passed by parliament.¹⁸⁶ The proposed new constitution presented at the referendum was not, however, to be passed by parliament. Even had the people voted “Yes” during the referendum, the Wako Draft would still not have gone to parliament for passing but directly to the President for publication and proclamation. Thus Nowrojee argues that the referendum process was not in conformity with any provision of the existing valid constitutional order where the President has no power to bring a new law into being in this manner, much less a new constitution.

¹⁸⁵ Ibid.

¹⁸⁶ P. Nowrojee, *The November 2005 Referendum and Kenyan Politics Today: Directions in Constitutional Reform* (Nairobi: African Research and Resource Forum, 2006) pp. 4-8.

Although Wako had argued that in a constitutional democracy the constituent power of the people itself and the exercise of that power are written into the existing constitution and constitutionalised, his own Wako draft was not written by the people and thus the exercise of their constituent power had not been constitutionalised. The Wako draft which was to be affirmed through a referendum was not the product of a constituent assembly. Another major shortcoming of the referendum is that it required the public to either accept or reject the entire proposed constitution. It would have been fairer to have made the referendum more issue based where since the public would have been allowed to vote in specific issues.

On November 21st 2005, a constitutional referendum was held.¹⁸⁷ The proposed constitution was voted down by a 58% majority of Kenya's voters.¹⁸⁸ Many government officials, including President Kibaki, campaigned for a "Yes" vote on the constitution, which divided the ruling NARC coalition into camps, for and against the proposal.¹⁸⁹ The referendum divided Kenyans and spurred physical violence between "Orange" (anti-proposed constitution) and "Banana" (pro-proposed constitution). Nine people died during the campaign period which lasted for the last few months of 2005.¹⁹⁰

The main issue of contention related to how much power should be vested in the head of state. In the original Bomas Draft those who feared a concentration of power in the hands of the president added provisions for power-sharing between the president and

¹⁸⁷ *Kenya Times* (Nairobi) "It's Your Verdict: As President Calls for Peace and Calm" November 21st 2005, pp. 1-2.

¹⁸⁸ *Kenya Times* (Nairobi) "Kibaki Concedes" 23rd November 2005, pp. 1-2.

¹⁸⁹ *Daily Nation* (Nairobi) "Kibaki: I'll Lead Yes Vote on Constitution" August 10th 2005 pp. 1-2.

¹⁹⁰ Republic of Kenya, *Report of the Committee of Eminent Persons on the Constitutional Review Process*, op.cit., pp. 35-36.

prime minister although the proposed referendum constitution retained sweeping powers for the head of state. The issue of land reforms was also prominent on the agenda.¹⁹¹

Since President Kibaki so vigorously promoted the new constitution, many voters used the referendum as a means of voicing their approval or disapproval of the Kibaki government. In other words, many voters paid little attention to the actual text of the constitution and were effectively saying “Yes” or “No” to the president.¹⁹² The referendum was thus ultimately related to the issue of the mandate of President Kibaki’s government although that was not the original intention of the ruling elite.

The defeat of the Proposed New Constitution cannot be regarded as an endorsement of the current constitution.¹⁹³ The current constitution was not really an issue in the referendum since Kenyans had already previously agreed that the current constitution does not adequately meet the needs and aspirations of the Kenyan people. The Proposed New Constitution also fell short of the aspirations of the Kenyan people and of the guiding principles and values of the constitutional review process set out in the Constitution of Kenya Review Act. The Act has minimum criteria related to process and content that had to be met for the Proposed New Constitution to be acceptable to Kenyans.

The referendum also clearly revealed the ethnic conflict prevalent in Kenyan society. The referendum was turned into an instrument of settling political grievances among leaders representing ethnic interests.¹⁹⁴ Regarding the Wako draft, ethnicity was used to rally support or opposition to it. Thus the Wako draft was primarily supported or

¹⁹¹ Ibid.

¹⁹² Ibid.

¹⁹³ Ibid.

¹⁹⁴ Ibid, pp. 47-50.

opposed by many people on the basis of ethnicity. Many of those who appeared before the Eminent Persons Committee on the Constitution Review Process were of the view that the Wako draft was tailored to the interests of people from the Mount Kenya region. There was a clear ethnic pattern in voting in the referendum. Except in Central province where there was resounding support for the Wako draft, and Eastern province where support for and against was relatively equal, other provinces of the country voted overwhelmingly against the Proposed New Constitution.

Politics of the Memorandum of Understanding (MoU) also spilled over to the review process.¹⁹⁵ The failure to respect the MoU which was entered into just before the 2002 general elections by the key partners of the National Rainbow Coalition (NARC) contributed to divisions in the review process. Failure to resolve disagreements arising from the MoU caused permanent tension between the NAK and LDP factions of the ruling coalition. There was a perception by the public giving submissions to the Eminent Persons Committee on the Constitution Review Process that both factions sought to manipulate the review process to achieve different goals in the context of the MoU. There was a sense in which the National Alliance of Kenya (NAK) wanted to use the process to frustrate the MoU and defeat the Liberal Democratic Party (LDP) side. LDP was also perceived as seeking to use the constitution-making process as a means of enforcing the MoU which had provided for an executive prime minister.

This chapter has demonstrated that the process of constitution-making in Kenya between 1997 and 2005 was characterised by a deeply embedded structural violence. The obstacles put initially by the KANU and later the ruling elite of the NARC government in the way of achieving a genuine people-driven process were considerable.

The constitution was thus perceived, as indeed it had to some extent been since independence, as a weapon in a struggle to gain a temporary advantage over one's political opponents.¹⁹⁶ The excessive focus on the process issues of constitution-making until 2001 in a sense implied that inadequate attention was paid to vital content issues of constitution-making during this period. The difficulties that arose from the process issues of constitution-making were to some extent derived from the extreme reluctance by both the KANU and NARC regimes to meaningfully alter the content of the constitution in a way that would adversely affect their continuation in power. The KANU and NARC regimes were aware that if the constitutional reform process significantly changed the *status quo* then their grip on power, and the immense benefits they derived, would be considerably weakened. Ironically, the extreme reluctance by the KANU government to review the Constitution was precisely one of the main factors that led to their downfall in the 2002 elections. The majority of Kenyan citizens became immensely disillusioned with the overt attempts of the KANU and later the ruling elite of the NARC government to put obstacles in the way of genuine constitutional reform.

From a conflict analysis perspective, it would appear that empowerment of the citizens which the KANU and later NARC regime had so dreaded was ultimately irreversible. Thus the very obstacles put in the way of constitutional reform served to empower and enlighten the Kenyan citizens. The next chapter will explore the key content debates in the constitution-making process, once again emphasising a structural violence perspective.

¹⁹⁵ Ibid.

¹⁹⁶ Y.P. Ghai and J.P.W.B. McAuslan, *Public Law and Political Change in Kenya* (Nairobi: Oxford, 1970) pp. 511.

Chapter Five

Content Debates in Constitution-making in Kenya: 1997-2005

Introduction

This chapter builds on the issues raised in Chapter Four by focusing on the content issues raised in the constitutional review process. These debates began in earnest in late 2001. The chapter adopts a structural violence perspective on the substantive contentious issues in the constitution. The key contentious issues are initially analysed by contrasting the concept of constitutionalism with the actual provisions in the Kenya Constitution relating to the executive, the judiciary and legislature. In addition, other contentious or conflict-generating issues in the current constitution are considered including the debate on devolution, land and property, public finance, the amendment of the constitution and transitional issues. Each of these issues will be examined in terms of its background, key principles, current constitutional provisions and suggestions by Kenyans on how the conflictual aspects could be addressed.

The positions taken by different protagonists in the content debates will also be discussed. The existing constitution will be viewed as a specific paradigm about the way social relations should be organized. The process of constitutional reform in Kenya will be viewed as one of trying to find an alternative paradigm given the many anomalies that have arisen in the paradigm of the existing constitution.¹

¹ For a discussion on the way in which anomalies in an existing paradigm develop and how this leads to its eventual overthrow see T.S. Kuhn, *The Structure of Scientific Revolutions*, Third Edition (Chicago: University of Chicago Press, 1996) pp. 52-91.

As Mwangi and Mutie² note “These conflicts were inspired by the belief that the Kenyan constitution does not tackle many of the concerns of the citizens, such as resource distribution, delivery of justice, and the recognition and protection of individual and minority rights.” The existence of a written constitution according to whose provisions a government is conducted is not necessarily conclusive evidence that the government is a constitutional one.³ It is vital that the constitution also imposes limitations on the power of government since in some cases a constitution may facilitate or even legitimise the assumption of dictatorial powers by the government.⁴

The Executive and Constitutionalism in Kenya

A main content issue in constitution-making in Kenya is the conflict between an extremely powerful executive and the concept of constitutionalism. Section 23 of the Kenya Constitution vests executive authority of the government of Kenya in the President and subject to the Constitution, enables him to exercise this authority either directly or through officers subordinate to him.⁵ The powers of the president can be analysed in the framework of constitutional powers of the presidency, those granted by other laws and those not conferred by law.⁶ The constitutional powers of the presidency include powers in relation to appointment, dismissal, pardon, legislation, judiciary, the civil service, elections, public security and trust land. Each of these will be analysed in turn.

² M. Mwangi and P.M. Mutie, “Governance and Conflict Management” in P. Wanyande, M. Omosa and C. Ludeki (eds), *Governance and Transition Politics in Kenya* (Nairobi: University of Nairobi Press, 2007) pp. 131-154.

³ B.O. Nwabueze, *Constitutionalism in the Emergent State* (London: C. Hurst and Co, 1973) pp. 1-21.

⁴ A discussion of how a lack of constitutionalism contributes to constitutional conflicts is undertaken in Chapter Three.

⁵ *The Constitution of Kenya*, Revised Edition 2001 (Nairobi: Government Printer, 1998) Section 23.

⁶ M. Mwangi, “A Review of Presidential Powers in Kenya” in K. Kibwana (ed), *Readings in Constitutional Law and Politics in Africa: A Case Study of Kenya* (Nairobi: Claripress, 1998) pp. 247-276.

The Kenya Constitution accords the president extensive powers of appointment. For example, under Section 15 of the constitution the president has powers to appoint the vice-president and to dismiss him or her should the need arise.⁷ Section 16 of the Constitution allows the president to appoint cabinet ministers and under Section 19 he can appoint assistant ministers.⁸ The president also has powers to appoint certain officers in the public service. For example, the president under Section 22 of the Constitution may appoint permanent secretaries, and under Section 24, may constitute and abolish offices of the Republic of Kenya. Under Section 27 of the Constitution the president enjoys the prerogative of mercy entailing granting a pardon to a person convicted of an offence.⁹ Section 28 of the Constitution provides for an Advisory Committee on the prerogative of mercy. These prerogative powers have often been seen as part and parcel of the quest for excessive executive powers which have been used to attain political ends.¹⁰ The power to pardon has generally been abused by successive regimes since independence. Successive presidents have often failed to act as specified in Section 27 of the Kenya Constitution which requires that only those who have been tried and convicted to qualify for consideration under the prerogative of mercy. An example is the pardon of Paul Ngei by president Kenyatta. President Kenyatta's pardon in this case was preceded by a constitutional amendment which extended the president's prerogative of mercy to include pardoning Members of Parliament or an election candidate who has been disqualified from an election on the grounds of an election offence.¹¹

⁷ *The Constitution of Kenya*, Section 15.

⁸ *The Constitution of Kenya*, Sections 16 and 19.

⁹ *The Constitution of Kenya*, Sections 27 and 28.

¹⁰ W. V. Mitullah, "Exercise of Executive Powers in Kenya: The Case of the Prerogative of Mercy" in M. Odhiambo et.al (eds) *Informing a Constitutional Moment: Essays on Constitutional Reform in Kenya* (Nairobi: Claripress, 2005) pp. 1-17.

¹¹ *Ibid*, p. 11.

The president also has powers with respect to the civil service with exclusive powers of appointment to crucial senior offices in the public service.¹² Section 110 of the Constitution, for example, provides the president with powers to appoint the Controller and Auditor General.¹³ The Auditor General has security of tenure and may only be removed on the recommendation of a tribunal appointed by the president.¹⁴ Section 111(1) allows the president the exclusive power to appoint permanent secretaries, the secretary to the cabinet, and the director of personnel management.¹⁵ In addition, under Section 111(2) the president has exclusive powers to appoint Ambassadors and High Commissioners.¹⁶ These senior public servants appointed by the president are extremely unlikely to behave independently and often perceive that they owe their allegiance to the president.

Under the Constitution the president also has certain legislative powers.¹⁷ One of the most strategic of these is provided for under Section 46 which gives the president the power to veto a Bill, ensuring that Bill that has otherwise been approved by parliament may not become part of the laws of Kenya.¹⁸ Although Section 46 also provides that parliament can override a presidential veto by a vote of 65 per cent of the members of parliament, in practice it is almost impossible to raise the required percentage. This implies that the president effectively has considerable strategic power to decide which Bills will become law in Kenya. The president also has other powers over parliament which affect its work. Under Section 58 the president determines when each session of

¹² M. Mwagiru, "A Review of Presidential Powers in Kenya", op.cit., pp. 247-276.

¹³ *The Constitution of Kenya*, Section 110.

¹⁴ M. Mwagiru, "A Review of Presidential Powers in Kenya", op.cit., pp. 247-276.

¹⁵ *The Constitution of Kenya*, Section 111(1).

¹⁶ *Ibid*, Section 111(2).

¹⁷ M. Mwagiru, "A Review of Presidential Powers in Kenya", op.cit., pp. 247-276.

¹⁸ *The Constitution of Kenya*, Section 46.

parliament commences subject to Section 58(2) which provides that parliament may not stay out of session for more than eleven months at a time.¹⁹ The president may also under Section 59 of the Constitution dissolve parliament.²⁰

Under Section 85 of the Kenya Constitution the president is accorded considerable powers regarding public security.²¹ Section 85 gives the president the power to call into operation the provisions of part 3 of the Preservation of Public Security Act through an order published in the Kenya Gazette. This provision effectively enables the president to declare a state of emergency in Kenya which may be made indefinite by the dissolution of parliament.

The president also has certain powers with respect to trust land under Section 118 of the Constitution.²² This Section provides that where the president is satisfied that the use and occupation of a trust land area is required for purposes of government, of a body corporate, of a company where shares are held by or on behalf of the government or for the prospecting for or the extraction of mineral or mineral oils, the president may give notice that the land in question be set aside for use and occupation for those purposes. The provisions relating to presidential powers over trust land have been open to abuse and led to widespread grabbing of public land especially during the KANU era. Illegal and irregular allocation of public land were common during the Moi regime. The Ndung'u Report as well as various reports of the Public Investment Committee provide

¹⁹ *The Constitution of Kenya*, Section 58.

²⁰ *Ibid*, Section 59.

²¹ *Ibid*, Section 85.

²² *Ibid*, Section 118.

numerous cases of illegal allocation of public land to individuals and companies in disregard of the law and public interest.²³

A study of the executive in Kenya is therefore essentially a study of presidential power.²⁴ There was at independence a disconnect between the legal traditions of the colonial system and the more liberal ethos of the independence constitution. Law in the constitutional context was perceived as an instrument of domination rather than of accountability or participation. This colonial legal tradition was stronger than the legal instruments made at independence which assumed liberal documents with a totally different kind of legal framework, attitudes and approaches than the colonial one. Hence the independence constitution immediately came into conflict with the oppressive administrative practices such as those practiced by the provincial administration which had been inherited from the colonial era, and contrary to what constitutional theory would lead one to expect, it is the constitution that gradually gave in and not the administrative practices.²⁵

There was an attempt to ensure that the constitutional order conformed to the inherited legal order whenever conflicts arose between the provisions of the constitution and those of specific legislation.²⁶ This was manifested in Kenya's move to a presidential form of government shortly after independence accompanied by the

²³ See also the Report of the Kenya National Commission on Human Rights, *Unjust Enrichment: The Making of Land Grabbing Millionaires, The Plunder of Kenya's State Corporations and Protected Lands*, Vol. 2.

²⁴ Y.P. Ghai and McAuslan, *Public Law and Political Change in Kenya: A Study of the Legal Framework of Government from Colonial Times to the Present* (Nairobi: Oxford University Press, 1970) pp. 220-258.

²⁵ These arguments were made by Prof. Yash Ghai, former CKRC Chairperson and Professor of Public Law at the University of Hong Kong, in an interview with the researcher on 10th of December 2006 in Nairobi.

²⁶ H.W.O. Okoth-Ogendo, "Constitutions without Constitutionalism: Reflections on an African Political Paradox, in D. Greenberg (ed), *Constitutionalism and Democracy: Transitions in the Contemporary World* (Oxford: Oxford University Press, 1993) pp. 65-82.

strengthening of the powers of the executive which was often achieved at the expense of constitutionalism. The president was increasingly accorded extensive powers by the constitution without effective checks and balances.²⁷ The creation of an executive presidency led to some coalescence of power which placed the leader above the system whereby criticism of him was hardly possible.²⁸ This in turn gave the president considerable power to manipulate the system and in this regard he performed some of the functions similar to the role of a colonial governor. Presidential powers in Kenya were considerably strengthened during the one party era which lasted from 1969 to 1991. It was argued by Kenya's political elite that since Kenya was a developing state where socio-political institutions were weak, political stability would be enhanced by a powerful president. It was argued that a fragmented power structure would also pose severe drawbacks to central planning, financial co-ordination and the formulation of policies on vital matters such as health, education and agriculture.²⁹ In addition, a powerful executive was justified by Kenya's ruling elite on the basis of the need to unify diverse communities within a nationalist framework. Constitutional amendments to centralise power were also partly justified on the grounds that they would bring the constitution more in line with African values.³⁰ In the traditional African method of resolving controversies it was argued by advocates of centralisation of power that each issue be considered on its own merit unencumbered by factions and divisions, and discussions continued until agreement was reached.

²⁷ M. Mwagiru, "The Constitution as a Source of Crisis: A Conflict Analysis of Democracy and Presidential Power in Kenya" in L. Chweya (ed), *Constitutional Politics and the Challenge of Democracy in Kenya* (Nairobi: Sareat, 1999).

²⁸ Y.P. Ghai, "Constitutions and the Political Order in East Africa", *The International and Comparative Law Quarterly*, Vol. 21, No. 3, July 1972, pp. 403-434.

²⁹ H.W.O. Okoth-Ogendo, "Constitutions without Constitutionalism: Reflections on an African Political Paradox", *op.cit.*, pp. 65-82.

³⁰ Y.P. Ghai, "Constitutions and the Political Order in East Africa", *op.cit.*, pp. 403-434.

However, underlying constitutional provisions to strengthen the executive was the link between power and the accumulation of resources.³¹ The constitution in the post-independence period in Kenya was increasingly viewed as an instrument for accumulation. The constitution, in principle, distributes power to many different centres. Individuals in search of accumulation do not want this distribution of power but would rather prefer its concentration since this makes resource accumulation easier. Having seen the efficiency with which control of state institutions enabled the colonial elite to convert the national economy into opportunities for private gain, the ruling elite was reluctant to consider any suggestion that there should be a reduction of state power in public affairs.³² Thus the ruling elite in Kenya proceeded to amend the constitution in a manner which sought to recentralise power as it had been under colonial rule. In the event the colonial power map was reconstituted and the constitution came to be seen increasingly as an instrument for the appropriation of power.

The constitutional amendments in Kenya since independence created a strong unitary state with centralized authority and distorted the separation of power between the three arms of government by creating an extremely powerful executive.³³ An example of such an amendment was the nineteenth amendment which converted Kenya into a *de jure* one party state. The post-independence amendments can be seen as an attempt by the political elite to get the law to follow politics.³⁴ The constitution and the process of

³¹ This argument was made by Prof. Okoth-Ogendo, a former CKRC Vice chairperson and Professor of Public Law at the University of Nairobi, in an interview with the researcher on 1st December 2006 in Nairobi.

³² H.W.O. Okoth-Ogendo, "Constitutions Without Constitutionalism: Reflections on an African Political Paradox" op.cit., pp. 65-82.

³³ G. Muigai, "Towards a Theory of Constitutional Amendment", *The East African Journal of Human Rights and Democracy*, Vol. 1, No. 1, September 2003, pp. 1-12.

³⁴ This argument was made by Prof. Githu Muigai, former CKRC Commissioner and Professor of Public Law at the University of Nairobi, in an interview with the researcher in Nairobi on 11th of December, 2006.

amendment in Kenya have often been used to solve political problems.³⁵ The first ten amendments in the 1960s had the effect of dismantling the power limitations imposed by the 1963 Constitution. The constitution began to be reshaped towards the political survival of the ruling party and it could be argued that political interests have largely dictated constitutional change in Kenya. Constitutional amendments in the 1960s brought an end to regionalism which led to increased executive control over parliament. Both President Kenyatta and President Moi exercised strong personal influence over the ruling parliamentary party. On the amendments in the Kenyatta period Muigai states:

“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, 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 centralized 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.”³⁶

On the amendments during Moi’s regime Muigai notes that:

“Moi continued the 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....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.”³⁷

The excessive powers of the executive have contributed to considerable constitutional conflicts in Kenya. The provisions of the constitution have contributed to conflict

³⁵ H.W.O. Okoth-Ogendo, “The Politics of Constitutional Change in Kenya since Independence, 1963-69”, *African Affairs*, Vol. 71, No. 282 (Jan. 1972), pp. 9-34.

³⁶ G. Muigai, *Constitutional Amendments and the Constitutional Amendment Process in Kenya, 1964-1997: A Study in the Politics of the Constitution*, Unpublished PhD thesis, September 2001, pp. 146-147.

³⁷ *Ibid*, p. 173.

because they have led to mutually incompatible objectives related to the increasing power of the executive. Underlying constitutional conflicts about the executive in Kenya is the fact that there are no provisions elsewhere in the constitution to control how executive power is exercised. This is not just an issue of lack of or inadequate checks and balances. The executive is also the source and manager of public resources in the country which contributes to making the executive the most fundamental content issue that has to be dealt with to address Kenya's constitutional conflicts.³⁸ Although the executive is only one pillar in constitutional development, if it controls all the other pillars of constitutional development such as the judiciary and legislature then its excessive powers have to be addressed.

Constitutional amendments since independence, which have considerably strengthened the executive, have served to embed structural violence more deeply in Kenyan society. Kenyan society therefore conforms to Curle's characterization of an unpeaceful society.³⁹ In Curle's conceptualization the absence of peace is characteristic of many situations that do not present overt conflict. Curle reconceptualised the traditional dichotomy between war and peace by providing for the existence of a situation where a society is neither in conditions of war or peace. In an unpeaceful situation human beings are impeded from achieving full mental or physical potential because of the conditions of a relationship. In unpeaceful societies there may be little or no physical violence in evidence yet peace does not prevail. Excessive power of the executive in Kenya has created a situation in which the ruling elite and its beneficiaries have tried to

³⁸ This view was articulated by Prof. Okoth-Ogendo, former CKRC Vicechairperson and Professor of Public Law at the University of Nairobi, in an interview with the researcher on 1st of December 2006 in Nairobi.

³⁹ A. Curle, *Making Peace* (London: Tavistock, 1971) pp. 1-8.

preserve the *status quo* which is well geared to preserving their interests. In this situation many Kenyans have been prevented from achieving their full potential even though physical violence has not been much in evidence. Any attempts to significantly reduce executive power were resisted by both the KANU and NARC regimes.⁴⁰ This is because excessive executive power has led to a concentration of power in the hands of the ruling elite which has been accompanied by considerable exercise of power over resources. Thus excessive executive power in Kenya, through the powers of the executive discussed earlier, has undermined the application of the doctrine of constitutionalism in Kenya.⁴¹ It has contributed to patrimonialism whereby there exists a form of personal rule in which administration is based on the supreme power and discretion of the president.

Debates on the Executive during the Constitutional Review Process

The debates on the executive began in earnest when the Ghai team started collecting views in December 2001.⁴² Before this time the debates in the constitutional review process were centered fundamentally on process issues such as the merging of the two parallel review processes.⁴³ These debates were generally informed by two schools of thought and protagonists: one associated with the ruling elite argued that the president should retain executive powers while the other advocated for the reduction of executive power or its transfer to other offices. In Kenya's constitutional conflicts successive ruling parties have been in a position of considerable power because of the concentration

⁴⁰ For a discussion on attempts by both the KANU and NARC regimes to derail attempts to reduce the executive power see Chapter Four.

⁴¹ K.J. Omolo, "The Constitution and the Executive" in L.M. Mute and S. Wanjala(eds), *When the Constitution Begins to Flower: Paradigms for Constitutional Change in Kenya*, Vol. 1 (Nairobi: Claripress, 2002) pp. 11-34.

⁴² *Daily Nation* (Nairobi) "Ghai Team Gets Proposals on Presidency, Land Issue" December 10th 2001, p. 5.

⁴³ A discussion of the various process challenges to the review process is contained in Chapter Four of this study.

of executive power. This type of conflict is known as an asymmetric conflict in which the root of the conflict is the structure of the relationship between the parties.⁴⁴ The only way to resolve the conflict is to change its structure, but this is not usually in the interest of the stronger party who would rather maintain the *status quo*. In Kenya the stronger party was the ruling party initially KANU and later NARC. In the Kenyan context a discussion of the debates surrounding the executive are therefore essentially about attempts by the KANU and NARC governments to retain the considerable powers of the presidency in the face of pressure from the opposition parties and the general public that these powers be reduced.

From early on the debate centered on whether or not an executive prime minister's post should be created and the implications this would have for the presidency. KANU's then Secretary General Joseph Kamotho, for example, argued that certain politicians from Nyanza province wanted to manipulate the constitutional review process and push for the creation of a prime minister's post and non-executive president. He introduced ethnicity into the debate. Kamotho asked KANU MPs to stand firm and support the party's position which advocated for an executive presidency.⁴⁵ The likely possibility that a genuine constitutional review process would recommend a substantial reduction in executive powers contributed to the KANU regime putting up serious process challenges to the review process. This led to parliament's pre-mature dissolution just when the Bomas National Constitutional Conference was about to begin.⁴⁶ It was

⁴⁴ O. Ramsbotham, T. Woodhouse, H. Miall, *Conflict Resolution*, Second Edition, (Cambridge: Polity, 2005) pp. 21-22.

⁴⁵ *Daily Nation* (Nairobi) "Kamotho Alleges Review Ploy: Nyanza Politicians Want to Manipulate Process says KANU Official" *Daily Nation* December 10th 2001, p. 32.

⁴⁶ For a discussion of the process challenges faced during the KANU regime see Chapter Four.

clear that KANU wanted to maintain the *status quo* in relation to the powers of the executive.

After the 2002 elections, the debates on the executive began with the resumption of the Bomas talks in August 2003. These debates were considerably informed by the politics of the Memorandum of Understanding (MoU) that had been signed before the 2002 general elections but which was later ignored by President Kibaki. A clear indication of the government's position on the executive came when the cabinet decided to go to Bomas II supporting a dilution of the prime minister's powers contained in the draft constitution. The decision taken by the cabinet followed a sub-committee of 11 ministers chaired by Mr. Awori, a member of parliament at the time. This sub-committee aimed at having the NARC members of parliament agree on a common stand for the Bomas II talks, especially on the contentious issue of the prime minister. The team chaired by Mr. Moody Awori also recommended that all the 15 parties that made up NARC would have until the end of December to dissolve and merge into one party.⁴⁷

The decision that followed the recommendations by the Awori team was made by the cabinet. This meeting also agreed that the position of a non-executive prime minister would be created. The position of prime minister was to be based on the Tanzanian model where the holder is appointed by the president who has the power to remove him or her. The cabinet suggested that the premier's position would be below that of the vice president in the government hierarchy and the appointment would have to be endorsed by a simple majority in parliament. The national assembly would also have the power to sack the person by passing a vote of no confidence by a two-thirds majority. This

⁴⁷ *Daily Nation* (Nairobi) "NARC to Merge as One Party by the End of the Year: Also Awori Team Supports the Post of Prime Minister" August 15th, 2003, pp. 1-2.

decision to have a non-executive prime minister was to be presented to the constitutional conference during the Bomas II talks.

There was an immediate reaction with a group of NARC backbenchers allied to the Liberal Democratic Party(LDP) saying they would not recognise the recommendations of a cabinet sub-committee on reforming the coalition.⁴⁸ The Liberal Democratic Party demanded for the position of an executive prime minister which they claimed had been agreed upon in the MoU. Cabinet ministers from the Liberal Democratic Faction organised two functions in Western and Nyanza provinces to reiterate their demands for the creation of a post of executive prime minister a day before the resumption of the Bomas II national constitutional conference.⁴⁹ Most of the members of parliament dismissed the cabinet decision to recommend a non-executive prime minister. They were joined by the KANU Members of parliament in demanding that Mr Raila Odinga of LDP assume the prime minister's post once it was created.

Soon after on August 18th 2003 the NARC Parliamentary group met in an attempt to agree on a common stand on the various contentious issues. During this meeting President Kibaki stated that a prime minister could only be appointed after a new constitution was in place and after the life of the government at the time.⁵⁰ He argued that there could not be two governments. This provided an insight into the position of the ruling elite with regard to the implications of introducing an executive prime minister. There was dissent over whether or not a premiership should be embedded in the new constitution. The meeting failed to conclusively resolve the matter of the prime minister

⁴⁸ *Daily Nation* (Nairobi) "MPs say No to Cabinet on Reforms" August 15th 2003, p. 2.

⁴⁹ *Daily Nation* (Nairobi) "Western Kenya Rallies Demand Executive Prime Minister" August 18th 2003, pp. 1-2.

⁵⁰ *Daily Nation* (Nairobi) "Kibaki Confronts MPs Over Prime Minister: Tension as NARC Caucus Defines Stand on Review" August 19th 2003, pp. 1-2.

with some members of parliament supporting the recommendation for a non-executive prime minister while others insisted that the coalition should adopt the MoU signed before the general election which stated that the NARC government would create a prime minister with executive powers.⁵¹

After failure to reach a consensus on the contentious issue of the executive, the NARC Parliamentary Group appointed a 23-man committee to deliberate further on the issue. The Committee was composed of ten members of parliament from the Liberal Democratic Party and ten from the National Alliance Party of Kenya (NAK) while the remaining three were drawn from Sisi Kwa Sisi and Muite's Safina Party. These groups were, however, never able to reach consensus on the contentious issue of the executive. President Kibaki, in a reaffirmation of his position on an executive prime minister, was later to assert that his Office was the sole centre of power. He reiterated that there could not be two centers of power in the country.⁵² This was his strongest public statement against the creation of the post of an executive prime minister.

Opponents to the position of prime minister then attempted to discredit the report of the Bomas proceedings.⁵³ The Kabete MP who was then the Chairman of the Parliamentary Select Committee on Constitutional Reform dismissed as "inaccurate" the official record of proceedings at the Bomas II constitutional talks especially the sections on power-sharing between the president, vice-president and the Prime Minister. He challenged the rappateur-general's report which guided delegates' discussions at the talks. The MP argued that the summary of delegates views contained in the report

⁵¹ *Kenya Times* (Nairobi) "Row Over PM Post: NARC to Name Team: Coalition Fails to Reach Consensus" August 19th 2003, p. 1.

⁵² *Daily Nation* (Nairobi) "Politicians Back Kibaki Over Position of Premier" September 9th, 2003 p. 3.

⁵³ *Daily Nation* (Nairobi) "Now Prime Minister Critics Wage War on Bomas Report: Constitution Talks Records are Misleading argues Muite" September 20th 2003, pp. 1-2.

suggested that the speakers had recommended and agreed on the position of executive prime minister. According to the MP, however, no such consensus was reached by the plenary even for the creation of the position of prime minister in the first place.

His position was, however, immediately countered by Bomas conference members Otieno Kajwang and William Ruto. In a later development in the debate on the executive, Aloo Aringo a conference member, proposed a motion in the committee on the preamble to declare Kenya a Parliamentary Democracy.⁵⁴ Under a parliamentary system the government would be led by a powerful prime minister elected by and directly accountable to parliament as opposed to a presidential system in which the president has executive authority. Aringo asked the Committee on the Preamble to amend Article 1 of the draft Constitution to read “Kenya shall be a Parliamentary Democracy, and that the people of Kenya shall govern through their parliament”. He was accused by other conference members, including Prof. Yash Ghai, of sneaking the article into a committee that had no mandate to deal with the issue.⁵⁵

As the Bomas II talks adjourned there appeared to be broad agreement over the issue of the executive.⁵⁶ Prof. Ghai, Kiraitu Murungi and Raila Odinga separately said that a consensus had been reached on the issue of the executive where a hybrid system combining a parliamentary and presidential system was accepted. Mr. Raila Odinga had earlier emerged as the leader of a group supporting the shift of executive power to the prime minister, a proposal which was strongly opposed by President Kibaki and his key supporters. Upon the adjournment of Bomas II, the technical committee on the executive

⁵⁴ *Daily Nation* (Nairobi) “Aringo’s Motion on PM Causes a Storm” September 24th 2003, p. 1.

⁵⁵ The Committee on the Executive had been charged with proposing a system of government for Kenya.

⁵⁶ *Daily Nation* (Nairobi) “Delegates Agree Over PM as Bomas II Ends: Experts to Refine Draft Constitution before Conference Resumes in November” September 27th 2003, p.1.

agreed on a system where the president would share power with the prime minister, vice-president and the cabinet. However, the apparent consensus on the executive had broken down by the time the Bomas III talks resumed in January 2004.

On the eve of the resumption of the Bomas III talks, the Liberal Democratic Party (LDP) vowed to cripple any bid to impose a presidential system of government.⁵⁷ Raila Odinga the then Minister for Roads, Public Works and Housing categorically stated that LDP would accept nothing short of an executive prime minister. He argued that the presidency with executive powers was outdated, dictatorial and a recipe for anarchy in modern society. Amid this acrimony Chris Murungaru, who was then closely allied to Kibaki, revealed that there was a parallel consultative process going on at Safari Park which he claimed had already made a breakthrough on the contentious issues.⁵⁸ Thereafter there were several attempts to build consensus, particularly on the issue of the executive, but without much success. For example, a thirty one man team established to build consensus started its work on January 30th 2004.⁵⁹ It was made up of representatives of the National Alliance Party of Kenya (NAK), the Liberal Democratic Party (LDP) and the Coalition of National Unity (CNU).

The team, however, failed to reach a consensus. Eventually the vice president Moody Awori led a walkout from the Bomas talks of 138 delegates to protest a rejection of a report by the team set up to build consensus.⁶⁰ The delegates who walked out

⁵⁷ *Kenya Times* (Nairobi) "Bomas Talks Resume as Raila Vows No Deal Without Executive PM" January 12th 2004, pp. 1-2.

⁵⁸ *Kenya Times* (Nairobi) "Murungaru Rubbishes Bomas Talks" January 14th 2004, p.1

⁵⁹ *Kenya Times* (Nairobi) "Arbitrators on Review Differences Start Work Today" January 30th 2004, p. 24.

⁶⁰ *Daily Nation* (Nairobi) "VP Leads Bomas Walk Out: But Raila Stays After Consensus is Turned Down" March 16th 2004, p. 1.

particularly disliked the conference's decision to revert to the zero draft which effectively stripped the president of many of his powers and transferred them to a prime minister.

According to CKRC recommendations which were reflected in the CKRC draft constitution, a purely presidential system in which all power is vested in the president would not assist in overcoming the culture of authoritarianism.⁶¹ That office would continue to be the focus of elections and the source of power. Kenya's history has demonstrated that an over-powerful president would retard the effective separation of powers and the system of checks and balances. It would also continue to foster ethnic politics where each ethnic group would want a member of their community to occupy that office. A pure presidential system would promote fears of ethnicisation and personalisation of state power. A purely parliamentary system would also not serve Kenya's interests since it would shift most of the powers to a prime minister and would lessen people's control of the choice of their leaders.

The CKRC suggested a modified parliamentary system with the cabinet as the principal decision-making body. It argued that this would allow collective decision-making and the accommodation of various interests including multi-ethnic ones. Under such a system the Head of State should be more than ceremonial and should have reasonable powers. Examples of such powers would include the power to assent to Bills before they become law and to preside over the National Security Council. The prime minister in the CKRC draft would be the head of government and the leader of the cabinet. The prime minister would chair all cabinet meetings and keep the president informed of government business. The cabinet would be drawn largely from outside

⁶¹ Constitution of Kenya Review Commission, *The Final Report of the Constitution of Kenya Review Commission*, op.cit, pp. 193-202.

parliament to promote effective government and separation of powers. It was recommended that parliament be strengthened with more control over its calendar and resources and a greater ability to exercise greater supervision over and accountability by the government.

During the Bomas constitutional conferences, there was broad agreement that executive authority should be shared between the president and cabinet headed by the prime minister although the exact distribution of power between the two was an issue of controversy at the conferences and generally informed the debates on the executive discussed earlier in this chapter.⁶² The primary concern at the Bomas conferences was that any power-sharing model should avoid unnecessary conflicts in the execution of governmental functions. There was also a concern that procedures for appointment and dismissal of the prime minister be clearly established. Other issues of concern relating to the executive which were raised included the upper age limit for candidates vying for the presidency and the procedure of providing for the impeachment of the president. In particular, there was debate about the exact roles of the two chambers in the investigation of impeachable offences, the framing of articles of impeachment and the determination of guilt or innocence. There was also debate about whether members of the cabinet other than the prime minister and deputies should be appointed from outside parliament as proposed in the CKRC draft constitution.

The Wako draft vested the executive authority in the president. It provided that the president would be the head of state, the head of government, the commander-in-chief of

⁶² Constitution of Kenya Review Commission, *The Final Report of the Constitution of Kenya Review Commission*, op.cit, pp. 399-406.

the Kenya Defence forces and the chairperson of the National Security Council.⁶³ The Wako draft thus re-introduced a strong executive president.

The Judiciary and Constitutionalism in Kenya

A dependable judiciary is a basic requirement of a vibrant democracy.⁶⁴ A benchmark of judicial integrity is that judges and magistrates should be guided by the rule of law, protect and enforce it without fear or favour and resist any encroachment by governments or other actors on their independence as arbiters of justice. The judiciary is a vital organ of constitutional balance and may be regarded as the main restraint on the exercise of power by the executive.⁶⁵ Effective legal guarantees of basic civil liberties enforced by an independent judiciary are vital for the effective practice of constitutionalism. Judicial independence implies freedom from interference by the executive or the legislature in the exercise of the judicial function.⁶⁶ It, however, also implies independence from influence whether exerted by political organs of government or by the public.⁶⁷ Independence, however, does not imply that the judiciary is entitled to act in an arbitrary manner. Its duty is to interpret the law and the fundamental assumptions which underlie it to the best of its abilities. The judiciary is also supposed to apply the law. The mode of appointment of members of the judiciary has an important effect on judicial independence and the power that goes with it. There are potential dangers in exclusive appointment by the legislature, executive or judiciary. Despite the

⁶³ See Chapter Twelve of the Proposed New Constitution of Kenya which was issued on 22nd August 2005 for the provisions on the Executive.

⁶⁴ C. Mulei, "The Judiciary and Constitutionalism: Creating New Ethos and Values" in L.M. Mute and S. Wanjala (eds) *When the Constitution Begins to Flower: Paradigms for Constitutional Change in Kenya*, Vol. 1 (Nairobi: Claripress, 2002) pp. 58-88.

⁶⁵ J.B. Ojwang, *Constitutional Development in Kenya: Institutional Adaptation and Social Change* (Nairobi: Acts Press, 1990) pp. 151-173.

⁶⁶ C. Mulei, "The Judiciary and Constitutionalism: Creating New Ethos and Values", op.cit.

⁶⁷ B.O. Nwabueze, *Judicialism in Commonwealth Africa: The Role of the Courts in Government* (London: C. Hurst and Co, 1977) p. 280.

principle of security of tenure, it should be possible to remove judges on the grounds of misconduct or physical or mental incapacity.

In many countries in sub-Saharan Africa judicial systems have been considerably neglected. Mingst explains this neglect by arguing that it stems from the continent's political culture as developed during the colonial era.⁶⁸ Under the authoritarian rule implicit within colonial systems there was a fusion of executive, judicial and legislative functions with the executive generally predominant. When the colonies gained independence, a separate judiciary was established, but Mingst argues that such judiciaries never functioned as anticipated. Thus the immediate experience of colonialism did not portend political institutions which favoured a strong independent judiciary. Mingst further contends that the lower priority attached to the judiciary points to the plethora of problems that confronted African countries at independence. Faced with racial, class and strong ethnic diversity, the goal of most independence African political leaders including in Kenya was to create strong national integration.

In order to achieve national integration, many African leaders advocated the establishment of precise, albeit detailed constitutions. They feared disorder and disintegration and created safeguard clauses to ensure order and derogation clauses which abrogated basic human rights during times of national disorder. The maintenance of order was regarded in many independent states as the responsibility of the executive and not the judiciary. This implied that legal safeguards could be usurped by the executive, and judicial remedies could be by-passed. Thus at independence in many African states, instead of the judiciary developing its own legitimacy, executive-inspired and defined

⁶⁸ K.A. Mingst, "Judicial Systems of Sub-Saharan Africa: An Analysis of Neglect" *African Studies Review*, Vol. 31, No. 1, April 1988, pp. 135-147.

political necessities took precedence contributing to a situation where independence models were very similar to those of the colonial experience. Thus decolonization in many African countries brought political independence but it did not generally change the underlying social and economic structures in society. According to Ghai, in the post-independence period, the constitutional and legal framework established at independence was loosened and shifted its bias towards forms of patrimonialism with highly personalized presidential authority.⁶⁹ This in turn adversely affected the separation of powers and the independence of the judiciary.

In Kenya's case the greatest impediment to the effective functioning of the judiciary has been the absence of clear-cut constitutional safeguards to prevent interference with the judiciary thereby impinging on the administration of justice. The independence of the judiciary is a core value which an overhauled constitution should provide for. The judiciary is one of the most criticized sectors of Kenyan public society alongside politicians and the police.⁷⁰

On the basis of the views collected by the Constitution of Kenya Review Commission, ordinary Kenyans were most concerned about issues of delay, expense and corruption in the judiciary. Lawyers were especially concerned about competence and lack of independence of the judiciary from the government. These challenges have contributed to a general lack of legitimacy of the judiciary in the eyes of many Kenyans. The judiciary in Kenya has functioned as an appendage of the executive and the constitutional review process in Kenya has demonstrated that just as one cannot trust the

⁶⁹ Y.P. Ghai, "The Role of Law in the Transition of Societies: The African Experience," *Journal of African Law*, Vol. 35, No. 1, 1991, pp. 8-20.

⁷⁰ Constitution of Kenya Review Commission, *The People's Choice: The Report of the Constitution of Kenya Review Commission*, Short Version, 18th September, 2002, pp. 51-59.

executive with fundamental change, the judiciary cannot be relied upon either to bring about deep-rooted constitutional change.⁷¹ The judiciary posed formidable legal obstacles to the constitutional review process, especially in the post-Bomas period.⁷²

Some evidence can be given for the assertion that the judiciary in Kenya has functioned as an appendage of the executive. Several past chief justices in Kenya have been extremely executive-friendly. For example, Chief Justice Hancox ruled that civil servants held office at the pleasure of the president. Justice Dugdale in the *Maina Mbacha v. Attorney General* case, without the benefit of hearing the applicants, ruled that the entire Bill of Rights in the Kenya Constitution was unenforceable.⁷³

In the early 1990s Chief Justice Hancox maintained Justice Dugdale as the duty judge for over three years. The office of the duty judge acts as a clearing-house for cases that have been filed and the duty judge is required to assign them to different courts for hearing and determination.⁷⁴ If manipulated, this process assigned to the duty judge can lead to a considerable erosion of judicial independence. Justice Dugdale, for example, was thought to favour the government in human rights cases because of some of the decisions he made, for example, in the *Maina Mbacha v Attorney General* case. As duty judge, Dugdale often allocated human rights cases to himself or dismissed them without allocation to any court. This ensured that human rights cases never came before independent-minded judges.

⁷¹ This view was articulated by Prof. Okoth-Ogendo, former CKRC Vice chairperson and Professor of Public Law at the University of Nairobi, in an interview with the researcher on 1st December 2006 in Nairobi.

⁷² For a discussion of these legal obstacles to the constitutional review process see Chapter Four.

⁷³ See the *Maina Mbacha v. Attorney General* case, Misc. Civil Application Number 356 of 1989.

⁷⁴ Institute of Economic Affairs and the Society for International Development, *Kenya at the Crossroads: Scenarios for Our Future* (Nairobi and Rome: IEA and SID, 2001) pp. 11-13.

This trend of an executive-friendly judiciary had begun as early as 1966. Faced with growing opposition on the policy direction he was following, President Kenyatta used the crisis in Northeastern Kenya to persuade parliament to make it easier for him to use emergency powers on the pretext that it needed to address the *Shifta* problem.⁷⁵ Many of the powers claimed under these new emergency laws were, however, used to stamp out dissent and applied almost immediately. Two weeks after the enactment of the detention laws in 1966 eight Kenyans were detained, four of whom were associated with the opposition party, Kenya People's Union. One of the detainees Paddy Ooko went to court and in the case of *Ooko v. the Republic*⁷⁶ challenged his detention on the grounds *inter alia* that the minister had violated the constitution and that he failed to tell Ooko through a detention order why he was detained. The presiding Judge Rudd ruled that on the minister's failure to supply Ooko with the reason for his detention, the court could not examine the grounds or the necessity. In the judge's view, these were decisions for the detainees review tribunal and ultimately the minister. The detainees review tribunal was an administrative tribunal which periodically reviewed detainees cases but which had no power to free them.

The executive further increased the scope of its detention powers and in 1968 further changes were introduced to increase emergency powers. The rule that an order authorizing detention without trial could only last eight months was removed. Following this measure, detention laws were more overtly enlisted as a way of silencing critics.⁷⁷ For example, in May 1967, John Keen, a member of parliament was detained for remarks

⁷⁵ Ibid.

⁷⁶ See the case of *Ooko v. the Republic*, HCCC 1159 of 1966 (unreported).

⁷⁷ Institute of Economic Affairs and the Society for International Development, *Kenya at the Crossroads: Scenarios for Our Future*, op.cit, pp. 11-13.

made in parliament, regardless of the fact that speech made in parliament is privileged. Two members of parliament Shikuku and Soroney were detained in 1975 for declaring that "the ruling party is dead". In 1977 another member of parliament George Anyona inquired about the health of his two detained colleagues in parliament and he joined them in detention soon afterwards.⁷⁸ In all these cases the judiciary never stood up in defence of rights. These cases illustrate that there is an incompatibility conflict between a powerful executive and an independent judiciary that is supposed to uphold the rule of law. Such an incompatibility is at the heart of constitutional conflicts related to the judiciary.

The current constitution makes several provisions on the judiciary. The procedure for appointing judges is stipulated in Section 61 of the Constitution.⁷⁹ The president appoints the chief justice and, on advice from the Judicial Service Commission appoints other judges. The Judicial Service Commission is established under the Constitution.⁸⁰ The removal of judges in case of infirmity or misconduct is preceded by a tribunal appointed by the president on advice from the chief justice to consider the issue and report to him for action. Despite this theoretical check there has been a tendency to appoint magistrates who have been perceived as being pro-executive. A powerful executive is incompatible with the tenets of constitutionalism regarding an independent judiciary. de Reuck⁸¹ argues that the more valuable the objectives the more intense is the

⁷⁸ Ibid.

⁷⁹ *The Constitution of Kenya*, Section 61.

⁸⁰ Ibid, Section 68.

⁸¹ A. de Reuck, "The Logic of Conflict: Its Origin, Development and Resolution" in M. Banks (ed) *Conflict in World Society: A New Perspective on International Relations* (Sussex: Harvester Press, 1984) pp. 96-111.

conflict. The issue of having an independent and efficient judiciary is a vital objective in a democratic society and can provide an effective check on executive power.

Views collected by the CKRC advocate for a more open, transparent and accountable procedure for the appointment of judges with many Kenyans suggesting that judges should be nominated by an enlarged and independent Judicial Service Commission with representation from for example, the Law Society of Kenya, Law Faculties and Civil Society, and that the nominations for appointment as judges should be vetted by parliament.⁸² Views collected by the CKRC also advocate that the Judicial Service Commission be reconstituted so as to be more independent and involve more people who are not part of the legal system. Suggestions to the CKRC were also made regarding reforming the procedure for removing judges from office. The suggestion was that any citizen should have the right to file a complaint with the Judicial Service Commission requesting the removal of a judge suspected of misconduct.⁸³

Attempts to propose radical change in the judiciary, however, met with almost immediate resistance from the judiciary itself. Prof. Ghai was accused of recommending drastic action against the judiciary.⁸⁴ It was claimed by Justice Ngororo that Prof. Ghai had in documents stated that all judges should vacate office and that fresh appointments should be made. Debate at the judiciary committee at Bomas was acrimonious. A fundamental contentious issue in the committee on the judiciary was that of Kadhis' courts which is discussed in the following section.

⁸² Constitution of Kenya Review Commission, *The People's Choice: The Report of the Constitution of Kenya Review Commission*, op.cit., pp. 51-59.

⁸³ Ibid.

⁸⁴ *Daily Nation* (Nairobi) "Judge Blocks Ghai" August 31st 2002, p. 13.

The Constitutional Conflicts Regarding Kadhis' Courts

Kadhis' courts are enshrined in the Constitution and are part of the current structure of the Kenyan judiciary.⁸⁵ The Constitution provides for the office of Chief Kadhi and such number of other Kadhis as the law may prescribe. The jurisdiction of the Chief Kadhi and the other Kadhis is to hold a court with jurisdiction in Kenya and extending to determining questions of Muslim law on personal status, marriage, divorce or inheritance in proceedings in which all the parties are Muslim. The constitutional status of Kadhis' courts is based on a treaty to which the Kenya, Zanzibar and British governments were parties where the sultan of Zanzibar agreed to cede his authority over the coastal strip to Kenya. The Kenya government in turn undertook to implement various measures for the protection of the former subjects of the sultan, including incorporating a system of Islamic law and courts.

The CKRC received a number of submissions on the expansion and reform of their jurisdiction and structures, especially from the Muslim communities.⁸⁶ Many muslims considered that neither the Kadhis nor their courts are given sufficient respect and recognition. They also identified a number of problems in the law and practice regarding the application of Islamic law. They argued that Kadhis' courts have neither been satisfactorily integrated into the national legal system nor given their proper structure and hierarchy, with no distinction being made between the judicial role of the Chief Kadhi and his role as a spiritual leader. The rules of procedure or evidence of Islamic law have not been enacted, and the Evidence Act is relied upon by Kadhis although Section 2 of that Act expressly states that it does not apply to Kadhis' courts.

⁸⁵ *The Constitution of Kenya*, Section 66.

⁸⁶ Constitution of Kenya Review Commission, *The Final Report of the Constitution of Kenya Review Commission*, op.cit, pp. 204-214.

There appears to be a conflict between Section 6 (iii) of the Kadhis' Court Act which allows for the application of the law of evidence under the Evidence Act and Section 2 of the Evidence Act which excludes Kadhis' courts from its application.

In addition, Islamic law on personal matters has not been codified and the matter is left to individual courts.⁸⁷ The growth of Islamic jurisprudence has been hampered by the absence of reports on their judgements. The Muslim community also requested the CKRC to ensure that there were enough Kadhis courts throughout the country and that their jurisdiction be extended to civil and commercial matters. Furthermore, it was requested that a separate structure of appeals should be established for Islamic law. An appeal from a Kadhis' court goes to the High Court which sits in appeal with the Chief Kadhi or other Kadhis as assessors. The opinion of the Kadhi assessors is, however, not binding on the judge in deciding the appeal, especially if he disagrees with their opinion. An appeal to the Court of Appeal is also possible from the High Court but in that court the Chief Kadhi or any other Kadhi does not even sit as an assessor. The Muslim community also wanted to be consulted on the appointment of the Chief Kadhi and other Kadhis.

The issue of Kadhis courts was contentious because of the difficulty of balancing between the goal of national unity and the recognition of religious diversity. Kadhis courts became a constitutional conflict issue because Kenya is a secular state, which raises a controversy about whether one religion's interests should be enshrined in the constitution as opposed to general statutes. Many christian groups were opposed to a strengthening of Kadhis' courts.⁸⁸ A section of the delegates within the judiciary

⁸⁷ Ibid.

⁸⁸ *Kenya Times* (Nairobi), "Christians Now Want their Court in Constitution" February 18th 2004, p. 1.

committee at Bomas proposed that Christian courts be created at the same level with Kadhis' courts in the new constitution. The Chairman of the committee on the judiciary Bishop Philip Sulumeti reiterated that if Kadhis' courts have been mentioned in the Chapter, then the Christian courts should also be mentioned. Other delegates, however, warned of the danger of entrenching some religious courts in the constitution arguing that it would discriminate against other religions such as Hindu, Sikh and traditional religions. Some delegates argued that the entrenchment of Kadhis' courts and christian courts would contradict Section 1 of the CKRC draft constitution⁸⁹ which states that:

- a) State and religion are separate
- b) There shall be no state religion and
- c) The state shall treat all religions equally.

Some Bomas delegates supported the creation of a Christian court as a subordinate court similar to that of Kadhis' courts with jurisdiction limited by an Act of Parliament.⁹⁰ A CKRC commissioner Prof. Okoth Ogendo later argued that Kadhis courts were an important right for the Muslim community. He argued that if Kadhis courts were removed from the draft constitution the Muslim community would find it difficult to recognise or respect the government.⁹¹

In conflict analysis, marginalisation of Kadhis' courts can be considered as cultural violence.⁹² Cultural violence is an aspect of culture that can be used to legitimise violence in its direct or structural form. Cultural violence may be based on aspects of religion, ideology or language differences. The fact that the predominant culture in Kenya

⁸⁹ *Constitution of Kenya Review Commission Draft Constitution*, Section 1, Issued on 27th September 2002.

⁹⁰ *Kenya Times* (Nairobi) "Christians Now Want their Court in Constitution" op.cit., p. 1.

⁹¹ *Kenya Times* (Nairobi) "Kadhis Courts an Important Right for Muslims says CKRC Commissioner" June 7th 2005, p. 2

⁹² J. Galtung, "Cultural Violence" *Journal of Peace Research*, Vol. 27, No. 3, Aug. 1990, pp. 291-305.

is non-Islamic contributed to a lack of understanding of the issue of strengthening Kadhis' courts. While the Muslim community considered it vital others did not understand it. Such cultural violence can in turn be regarded as a species of structural violence which does not cause direct physical harm but is built into unjust social structures that may discriminate against certain communities. In the controversy over Kadhis' courts insufficient attention was given to the fact that they were part of a historical bargain between the Sultan of Zanzibar and Kenya and British governments which guaranteed the continued existence of Kadhis courts. In addition, submissions to the Constitution of Kenya Review Commission showed that Kadhis courts had become for Muslims an indispensable symbol of their Islamic faith and culture.⁹³ For Muslim women the courts had become an important place for resisting the oppression experienced in marriage and in domestic circumstances in a traditionally patriarchal and male-dominated society. These courts enabled Muslim women to fight for protection and enforcement of their rights as guaranteed under Islamic law, and to challenge the negative cultural practices of Muslim communities that tended to undermine those rights.

The Legislature and Constitutionalism

The legislature or parliament can be either unicameral or bicameral. The choice between unicameral and bicameral systems usually has roots in a country's history.⁹⁴ In

⁹³ Constitution of Kenya Review Commission, *The Final Report of the Constitution of Kenya Review Commission*, op.cit, pp. 204-214.

⁹⁴ A. Oloo and W. V. Mitullah, "The Legislature and Constitutionalism in Kenya" in L.M. Mute and S. Wanjala (eds) *When the Constitution Begins to Flower, Vol. 1: Paradigms for Constitutional Change in Kenya* (Nairobi: Claripress, 2002) pp. 35-57.

addition to prescribing the membership and powers of the legislature, a constitution may also specify the arrangements for elections.⁹⁵

Legislatures perform the functions of representation, law-making and the supervision or the oversight of government.⁹⁶ The representational function of legislatures arises from the fact that in most jurisdictions, legislators are elected by the people and have the mandate to propagate their views. Legislatures therefore represent the sovereignty of the people. Effective legislatures should have effective ways of bridging the gap between the people and their government so as to ensure that the views of the people are reflected in every governance issue.

The law-making function of legislatures exists because laws ought to express people's sovereignty. Legislatures ought to ensure that people's aspirations are safeguarded. And the legislature should have the capacity to transform people's ideals into enforceable norms. Law-making function is sensitive because it deals with power allocation, distribution of national resources and social optimization of resources and opportunities to benefit all regions.

In its supervisory or oversight function, the legislature is expected to act as a watchdog over the executive.⁹⁷ The doctrine of the separation of powers gives the legislature power to exercise effective political control especially over the activities of the executive. The legislature's ability to perform its supervisory role effectively depends on the formal supervisory powers that it draws from the constitution, the expertise at its disposal and the political will and consciousness of the members of parliament.

⁹⁵ B. Thompson, *Textbook on Constitutional and Administrative Law*, Second Edition (London: Blackstone Press, 1993) p.10.

⁹⁶ Constitution of Kenya Review Commission, *The Final Report of the Constitution of Kenya Review Commission*, op.cit, pp. 186-193.

⁹⁷ B. Thompson, *Textbook on Constitutional and Administrative Law*, op.cit.

Constitutional amendments in Kenya since independence have had a significant impact on the legislature.⁹⁸ At independence in 1963 parliament was bicameral consisting of the senate and the house of representatives. In December 1966 it was resolved to amend the constitution and merge the senate and the house of representatives into one parliament in the process creating an additional 41 new constituencies.⁹⁹ The Constitution was being gradually reshaped to facilitate the survival of the ruling party.¹⁰⁰ The process of constitutional amendment was employed to weaken the power of the legislature. Parliament in 1966 passed a constitutional amendment that came to be known as the “turncoat rule” where a member of parliament who had abandoned the party that sponsored him for election must seek a fresh electoral mandate from the voters in a by-election. This implied that KANU members of parliament who had left to form the KPU would have to face the electorate again. The sixth amendment had the effect of enlarging the government’s emergency powers, and wiped out existing legislation relating to parliamentary control over emergency legislation and the law relating to public order.¹⁰¹ The subservience of the legislature to the executive was also demonstrated after the arrest and detention of members of parliament Shikuku and Seroney in 1975.¹⁰²

When Moi came to power in 1978 he adopted a different strategy of exerting control over the legislature. Unlike Kenyatta who used his personal authority and

⁹⁸ For a discussion of these amendments see G. Muigai, *Constitutional Amendments and the Constitutional Amendment Process in Kenya, 1964-1997: A Study in the Politics of the Constitution*, Unpublished PhD Thesis, September 2001, pp. 110-173.

⁹⁹ Ibid.

¹⁰⁰ H.W.O. Okoth-Ogendo, “The Politics of Constitutional Change in Kenya since Independence, 1963-69” *op.cit.*, p. 28.

¹⁰¹ Ibid.

¹⁰² Institute of Economic Affairs and the Society for International Development, *Kenya at the Crossroads: Scenarios for Our Future*, *op.cit.*, pp. 13-15.

patronage to exert control, Moi used patronage and the KANU party machinery.¹⁰³ He revitalized KANU and strengthened its internal disciplinary procedures to keep his critics at bay. By outlawing other parties he made sure anyone wanting to participate in politics had to be endorsed by KANU.¹⁰⁴ The parliamentary calendar is also open to manipulation by the majority party sometimes leaving the legislature with inadequate time to address issues. For example, in 1998 the members of parliament sat for less than 60 days.¹⁰⁵

The constitution has several provisions on the legislature. Section 30 of the current constitution provides for a parliament which is unicameral and composed of the president and the national assembly¹⁰⁶. Members of the national assembly are either elected periodically on the basis of constituencies established by the Electoral Commission of Kenya or nominated by parliamentary parties. The procedures for electing the officers of parliament and their roles, functions, tenure and the removal are found in Sections 37 and 38 of the current Constitution.¹⁰⁷ According to the Constitution, the summoning, prorogation and dissolution of parliament lie in the hands of the president.¹⁰⁸ Under Section 46, the legislative power of parliament is exercised by way of Bills which it passes and forwards to the president for assent within 21 days.¹⁰⁹ The Kenya parliament has power to make standing orders of procedure for the orderly conduct of its business and also to establish committees to facilitate its work. These provisions demonstrate a further conflict between the exercise of executive power and the

¹⁰³ Ibid.

¹⁰⁴ The Constitution of Kenya Amendment Act of 1982 introduced a new Section 2A which converted Kenya into a *de jure* one party state.

¹⁰⁵ Ibid.

¹⁰⁶ *The Constitution of Kenya*, Section 30.

¹⁰⁷ *The Constitution of Kenya*, Sections 37 and 38.

¹⁰⁸ *The Constitution of Kenya*, Sections 58 and 59.

¹⁰⁹ *The Constitution of Kenya*, Section 46.

existence of an independent legislature. There is lack of an effective separation of powers between the executive and the legislature.

In addition, the legislature does not effectively control the flow of resources in the country. The legislature does not function as the public conscience of the people by criticizing the other organs of government and bringing them to account.¹¹⁰ Such a situation can be considered further illustration of a situation whereby there is an absence of behavioural violence but relations are marked by structural violence.¹¹¹ An anomalous relationship between the executive and legislature in Kenya exacerbates the situation of structural violence in Kenyan society. The ineffectiveness of the legislature hence contributes to Kenya's constitutional conflicts.

A fundamental debate at the Bomas constitutional conferences in relation to the legislature was how to reduce executive control over parliament. In January 2004 delegates at Bomas III stripped the president of his powers to dissolve parliament.¹¹² The delegates resolved that parliament should have its own calendar which should indicate the expiry date of every parliamentary term. The House, the delegates argued, should also regulate itself and decide on its recess, opening dates and programmes. They argued that parliament should no longer be convened or dissolved at the whims of an individual. It should, the delegates argued, be respected and allowed to function without undue external interference.

¹¹⁰ These views were expressed by Prof. Okoth-Ogendo, former CKRC Commissioner and Professor of Public Law at the University of Nairobi, in an interview with the researcher on the 1st of December 2006 in Nairobi.

¹¹¹ K. Webb, "Structural Conflict and the Definition of Conflict" *World Encyclopaedia of Peace*, Vol. 2 (Oxford: Pergamon Press, 1986) pp. 431-434.

¹¹² *Kenya Times* (Nairobi) "Bomas Strips President of Powers Over House" January 15th 2004, p. 1.

According to the views expressed by Kenyans to the Constitution of Kenya Review Commission, Kenyans wanted the legislature to be more responsive to their needs, to share power with the executive and to manage its own affairs free of executive interference.¹¹³ Specifically, the people told the Commission that parliament should vet and approve appointments to various constitutional and public offices such as those of the Attorney-General, the Auditor-General, Permanent Secretaries, the Chief Justice and Judges.¹¹⁴ In addition, the people told the Commission that parliament should be strengthened through the Committee system to enable it to perform its functions more effectively. It was further suggested that members of parliament should satisfy educational, moral and ethical standards for election to parliament and should be subject to recall.¹¹⁵ Members of the public also suggested to the CKRC that members of parliament should have their remuneration packages determined by an independent commission.¹¹⁶ It was also felt that measures should be taken to increase women's participation in parliament. Many Kenyans also expressed the need for a second chamber, although views differed on its role and composition.¹¹⁷

The suggested provision on recall of members of parliament was extremely contentious. A move to discuss the controversial clause on the recall of inefficient members of parliament was at one point thwarted by the committee of the legislature.¹¹⁸ Some delegates supported the inclusion of the clause in the new constitution on the grounds that it would limit defections to other parties.

¹¹³ Constitution of Kenya Review Commission, *The Final Report of the Constitution of Kenya Review Commission*, op.cit, pp. 186-193.

¹¹⁴ Ibid.

¹¹⁵ Ibid.

¹¹⁶ Constitution of Kenya Review Commission, *The Final Report of the Constitution of Kenya Review Commission*, op.cit, pp. 186-193.

¹¹⁷ Ibid.

¹¹⁸ *East African Standard* (Nairobi) "Debate on Recall of MPs is Thwarted" February 19th 2004, p. 4.

The Constitution of Kenya Review Commission in its Draft Constitution of 2002 recommended that there should be a second chamber to be called the national council (In the 1963 Constitution this second chamber was known as the senate).¹¹⁹ The main reason for this was to protect the system of devolved government although it was to have other objectives such as to check and balance the activities of the lower house. In addition, it was to act as a mechanism of inter-linkage between the district and the central government. It could also try the president on impeachment charges brought by the lower house. The issue of the second chamber was contentious and was intensely debated during the Bomas constitutional conferences. Despite a feeling amongst the majority of the delegates that the bicameral structure proposed in the CKRC draft constitution was acceptable, some delegates wanted a number of outstanding details resolved.¹²⁰ These included the size of the proposed second chamber, the linkages between the second chamber and units of devolution, the manner in which legislative authority was to be shared between the two chambers and clarity in the roles and responsibilities of the two chambers. Other delegates at Bomas thought that a bicameral system was unnecessary and expensive, and was also a significant departure from systems in operation in East Africa.¹²¹

Constitutional Conflicts related to Devolution

Since the repeal of Section 2A of the Kenya Constitution which ushered in multi-partyism there was a sustained advocacy by some for a federal or quasi-federal system of

¹¹⁹ Constitution of Kenya Review Commission, *The People's Choice: The Report of the Constitution of Kenya Review Commission, Short Version*, 18th September, 2002, pp. 38-39.

¹²⁰ Constitution of Kenya Review Commission, *The Final Report of the Constitution of Kenya Review Commission*, op.cit, p. 401.

¹²¹ Ibid.

government which has sometimes been referred to as the *Majimbo* debate.¹²² This debate focused on the structure and principles of devolved government, the organization of district government in terms of its powers and functions, and the relationship between the national and district government. Devolution refers to those situations where a previously unitary state transfers power to other territorial units at a sub-national level.¹²³ By dispersing power to different levels devolution promotes good governance, enhances the separation of powers, enhances bureaucratic effectiveness, transparency and accountability of government power.¹²⁴ The extent to which devolution succeeds in limiting power and enhancing good governance depends much on its design. The ideal is to have a model that ensures effective separation and functions at all levels, compared to a system where institutions and functions overlap. The different levels of devolution should act as locations of power and enlargements of democratic space and people's participation in government processes.¹²⁵ The location of power closer to the people also achieves public accountability because power is easier to control more at the local rather than the national level. A vital characteristic of effective devolution is that residents are regularly consulted on decisions that affect their well-being thus making them part of the decision-making process.¹²⁶ Such participation nurtures the spirit of ownership of development processes and is able to achieve a more responsive and effective

¹²² S.K. Akivaga, "Federalism and Unitary Government: What Option for Kenya?" in M. Odhiambo et.al (eds) *Informing a Constitutional Moment: Essays on Constitutional Reform in Kenya* (Nairobi: Claripress, 2005) pp. 19-47.

¹²³ W. Oyugi, "The Search for an Appropriate Decentralisation Design in Kenya: Historical and Comparative Perspectives" in K. Kindiki and O. Ambani (eds) *The Anatomy of Bomas: Selected Analyses of the 2004 Draft Constitution of Kenya* (Nairobi: Claripress, 2005) pp. 57-106.

¹²⁴ Constitution of Kenya Review Commission, *The Final Report of the Constitution of Kenya Review Commission*, op.cit., pp. 228-233.

¹²⁵ Ibid.

¹²⁶ W. Oyugi, "The Search for an Appropriate Decentralisation Design in Kenya: Historical and Comparative Perspectives" op.cit., p. 62.

management of resources. Care should be taken on devolution to ensure that it does not serve to put power in the hands of local autocracy. Hence the polities to which power is devolved will not automatically increase access by the people to resources or offices. There is the possibility that unless proper control mechanisms are established corruption may continue even at the level of the devolved polities.¹²⁷

Kenya's independence constitution provided for a relatively decentralised structure of government which gave autonomy to the regions and tended to limit central government power. The rationale of regionalism was that it was not enough to be protected from tyrannical rule but it was also vital to be able to participate in the processes of government.¹²⁸ Regionalism was aimed at making such participation possible even by the minority tribes. In each of the seven regions created there was a regional assembly with elected members. The regional boundaries could not be altered unilaterally by the central legislature, and such alteration required the consent of the regions affected by the changes. Regions enjoyed certain taxation and financial powers. At independence Kenya was therefore a constitutionally devolved state with significant power devolved to the regions.¹²⁹

The situation provided for in the 1963 independence constitution with regard to regionalism was dismantled in the period between 1963 and 1965.¹³⁰ By the first amendment after independence through Act. No. 28 of 1964 Kenya was declared a

¹²⁷ This argument was made by Prof. Patricia Kamari-Mbote, a former member of the Eminent Persons Committee on Constitutional Reform and Associate Professor of Law at the University of Nairobi, in an interview with the researcher on 28th December, 2006.

¹²⁸ Y.P. Ghai and J.P.W.B. McAuslan, *Public Law and Political Change in Kenya: A Study of the Legal Framework of the Government from the Colonial Times to the Present* (Nairobi: Oxford University Press, 1970) pp. 196-219.

¹²⁹ Constitution of Kenya Review Commission, *The Final Report of the Constitution of Kenya Review Commission*, op.cit., pp. 228-233.

¹³⁰ H. W. O. Okoth-Ogendo, "The Politics of Constitutional Change in Kenya since Independence, 1963-69", op.cit., pp. 9-34.

republic with a presidential government and nearly all non-entrenched regional provisions especially Schedule 2 which dealt fundamentally with areas of concurrent regional and central powers over some agricultural and veterinary matters and aspects of educational standards were removed. In addition, the entire financial arrangements between regions and the centre, especially those related to regional taxation powers were revised.¹³¹ The provisions relating to the control and operation of the police force and especially those relating to the maintenance of regional contingency forces were deleted by the first amendment of 1964. Finally, the regional powers concerning the establishment and supervision of local authorities were transferred to parliament. With the second amendment regional presidents were re-designated as simply chairmen.¹³² The power to alter regional boundaries which was formerly vested in regional assemblies was transferred to parliament.¹³³ In 1968 the regional institutions now effectively bereft of all their powers were finally abolished. The senate, was in 1968 merged with the house of representatives to establish a unicameral house.¹³⁴

The current constitution does not provide for any form of devolved government or make any significant reference to the local government system. The only mention in the current constitution of local government is in the provisions vesting trust lands in the county councils. Many Kenyans expressed views on the issue of devolution of power.¹³⁵ Many people, especially in the Coast Province and in some parts of the Rift Valley

¹³¹ For a discussion of the second amendment related to the destruction of devolution see G. Muigai, *Constitutional Amendments and the Constitutional Amendment Process in Kenya, 1964-1997: A Study in the Politics of the Constitution*, Unpublished PhD thesis, September 2001, pp. 116-118.

¹³² Act. No. 38 of 1964.

¹³³ Ibid.

¹³⁴ H. W. O. Okoth-Ogendo, "The Politics of Constitutional Change in Kenya since Independence, 1963-69", *op.cit.*

¹³⁵ Constitution of Kenya Review Commission, *Source Book for Civic Education: Referendum 2005*, (Nairobi: CKRC, 2005) pp. 83-91.

Province, recommended *majimbo* while many other Kenyans opposed *majimbo*. Many Kenyans also expressed a feeling of alienation from central government power and marginalization. Such marginalisation occasioned by excessive centralization of power has contributed to structural violence. The actual somatic and mental realizations of people end up being below their potential realizations.¹³⁶ Christie,¹³⁷ who considers structural violence from a human needs perspective argues that it arises when there are systemic inequalities in the distribution of economic and political resources in society. Economic and political structures systematically deprive the satisfaction of basic needs of certain segments of society. Thus in the Kenyan situation some provinces such as North Eastern lag far behind the others in terms of virtually all the indicators of the quality of life such as health and education thereby contributing to considerable structural violence within Kenyan society.

Despite the fact that the principle of devolution was broadly embraced by the Bomas constitutional conferences, its structure and levels as presented in the Constitution of Kenya Review Commission Draft Constitution was a subject of intense debate.¹³⁸ The key issues of contention related to the extent of devolution and whether the principal unit of devolution should be at the district or the provincial level. A fundamental challenge was to find the level and form of devolution most appropriate to the Kenyan context. For example, at one stage the devolution committee was discussing eighteen zonal clusters that had been identified in order to devolve power. The delegates warned that the creation

¹³⁶ J. Galtung, "Violence, Peace and Peace Research" *Journal of Peace Research*, Vol. 3, 1969, pp. 167-191.

¹³⁷ D.J. Christie, "Reducing Direct and Structural Violence: The Human Needs Theory" *Peace and Conflict: Journal of Peace Psychology*, 3(4), 1997, pp. 315-332.

¹³⁸ Constitution of Kenya Review Commission, *The Final Report of the Constitution of Kenya Review Commission*, op.cit. p.403.

of such administrative zones was a way of balkanising the country.¹³⁹ At Bomas, many delegates were in support of the district as the principal centre of devolution although it was feared that too many districts would arise from a devolution process. The cost of running a devolved system of government was also the subject of considerable controversy at the Bomas constitutional conferences and afterwards.

Constitutional Conflicts relating to Land and Property

Land and property have formed a vital part of constitutional conflicts in Kenya. Land issues are an important part of structural conflicts in Kenya but have also often degenerated into violent conflicts. Central to this discourse are the ownership, access and use of land and property. The advent of colonialism led to radical changes in land relations in Kenya and particularly in the system of ownership, control and use by indigenous communities.¹⁴⁰ Indigenous communities in Kenya were deprived of ultimate ownership by European settlers who assumed control of the most fertile areas of the country. The land question was the primary drive in the independence struggle. After independence the land question became a fundamental factor in the dynamics of power and wealth allocation among the elite, who were in control of the instruments of state. At the heart of constitutional conflicts related on land are problems of land tenure and administration. Land tenure refers to the terms and conditions under which access rights to land are acquired, retained, used, disposed of or transmitted. The issue of how land is held and its ownership is regulated has vital consequences for agrarian societies.¹⁴¹ It also

¹³⁹ *Daily Nation* (Nairobi) "Minister Fears the Return of Majimbo" September 25th 2003, p. 5.

¹⁴⁰ H.W.O. Okoth-Ogendo, *Tenants of the Crown: Evolution of Agrarian Law and Institutions in Kenya* (Nairobi: ACTS Press, 1991) pp. 27-78.

¹⁴¹ K. Kanyinga, "Speaking to the Past and the Present: The Land Question in the Draft Constitution of Kenya (2004)" in K. Kindiki and O. Ambani (eds), *The Anatomy of Bomas: Selected Analyses of the 2004 Draft Constitution of Kenya* (Nairobi: Claripress, 2005) pp. 25-56.

affects the mode of organization of a particular society and its politics. Thus land has been an important factor in the politics of constitution-making. Some of the debates of the constitutional review process were shaped by issues of access to and control of land.¹⁴² This is because the issue of how land is held and its access regulated are important aspects of the organisation of power in a society. The structure of land ownership is an important determinant of the structure of political power in agrarian societies like Kenya.

There is no legal requirement under the Government Lands Act¹⁴³ for the government to respond to any legal obligation on the stewardship of land classified as “government” land. This implies that there is no category of land that is public in the sense that it is held for and meant to be used for the benefit of the citizens. It is thus not surprising that government land has often been the object of questionable appropriation, especially given that the government is the largest owner of land. A fundamental problem with the existing constitution is the legitimisation of illegal land acquisition.¹⁴⁴ Since the land owned by the government is in trust the beneficiaries who should be the public find it difficult to know whether land was properly allocated. The current constitution therefore protects land even if it is illegally acquired.¹⁴⁵ Part of the constitutional conflict in this context is that there are vested interests of some individuals which are threatened by a new constitution that would remove the constitutional protection of property that was improperly acquired. There is also a focus on protection

¹⁴² Ibid.

¹⁴³ Cap. 280.

¹⁴⁴ This view was articulated by Prof. Patricia Kameri-Mbote, a former member of the Eminent Person’s Committee on Constitutional Reform and Associate Professor of Law at the University of Nairobi, in an interview with the researcher on 28th December, 2006.

¹⁴⁵ Ibid.

of private property but there are many other types of property such as community land which are not adequately protected.¹⁴⁶

There is also a significant problem relating to land expropriations in colonial and post-colonial Kenya.¹⁴⁷ A significant concern here is ethnic Arab occupation of land in the coastal strip and the massive expropriation of Maasai land in deceptive agreements signed with the colonial authorities in 1804 and 1911. More recently, expropriations have occurred as a result of ethnic clashes in the Rift Valley, Coast and parts of Western and Nyanza provinces.¹⁴⁸ Land tenure systems in Kenya have also discriminated against women who despite constituting over half the population own less than 10 per cent of the available land. Lack of ownership of land and property by women reduces production incentives and retards development. This is a fundamental aspect of structural violence since women have not been allowed to achieve their full potential because of the existing land tenure systems.¹⁴⁹

Land administration has also resulted in conflicts in Kenya. Land administration embraces activities regarding the procedures for delivering land rights, systems of land rights, security, land use planning, land market regulation and processing of land disputes.¹⁵⁰ A fundamental weakness of the current land administration is the lack of transparent and effective institutions to deal with public and customary land, the administration of which is perceived to be corrupt, over-centralised and remote from resource users.

¹⁴⁶ Ibid.

¹⁴⁷ K. Kanyinga, "Speaking to the Past and the Present: The Land Question in the Draft Constitution of Kenya (2004) op.cit., pp. 30-39.

¹⁴⁸ Ibid.

¹⁴⁹ For a discussion on women in conflict situations see M. Mwagiru, M. Munene and N. Karuru, *Understanding Conflict and its Management* (Nairobi: CCR-WLEA Publications, 1998).

¹⁵⁰ Constitution of Kenya Review Commission, *The Final Report of the Constitution of Kenya Review Commission*, op.cit., pp. 271-291.

Under the 1963 constitution, any land rights were conferred on the region where the land was situated.¹⁵¹ This implied that crown land and the interest in leased land, when the lease ended, reverted to the Government. All land in “native reserves” became trust land vested in the county councils.¹⁵² In the current constitution land rights are protected by Section 75 and may not be expropriated without prompt compensation. Chapter IX of the constitution vests trust land ownership, control and management in county councils which must hold and use them for the benefit of the communities entitled to them by customary law.¹⁵³

Kenyan offered extensive views on the land question and especially the constitutional status of trust lands.¹⁵⁴ They suggested that all land should belong to the people and not to the government. Many Kenyans felt that the president should lose the power to allocate public land for political favours and that the thousands of ethnic clash victims displaced during the ethnic clashes in the Rift Valley in 1992 and 1997 should be resettled by the government.¹⁵⁵ It was also recommended that government land which has been grabbed should be repossessed and that land distribution should generally be more equitable.¹⁵⁶ Trust land should be vested in local communities directly. It was noted that the effects of unjust deprivation of land during the colonial period were still felt by some communities, and many Kenyans also advocated that women should have better rights to land in terms of control of the land they cultivate, inheritance rights, and matrimonial property rights.

¹⁵¹ H.W.O. Okoth-Ogendo, *Tenants of the Crown: Evolution of Agrarian Law and Institutions in Kenya*, op.cit., pp. 159-165.

¹⁵² Ibid.

¹⁵³ *The Constitution of Kenya*, Chapter IX.

¹⁵⁴ Constitution of Kenya Review Commission, *The Final Report of the Constitution of Kenya Review Commission*, op.cit., pp. 271-291.

¹⁵⁵ *East African*, “Take Away President’s Power to Dish Out Land” July 18th- 24th 2005, p. 6.

¹⁵⁶ *Daily Nation* (Nairobi) “Ghai Team Gets Proposals on Presidency, Land Issue” December 6th 2001, p. 5.

Constitutional Conflicts Relating to Public Finance

The principles of effective and equitable distribution of financial resources are vital to a country's constitution. They promote efficient and effective management of public resources.¹⁵⁷ These principles apply at both the national and district levels. In most countries the government is the largest employer and its expenditure also accounts for a substantial proportion of economic activity.¹⁵⁸ Without financial resources, government activities cannot run smoothly. However, financial resources also require vigilance since they are prone to abuse. The use and abuse of government financial resources is one of the most severe constitutional conflicts.¹⁵⁹ Most of the conflicts focus on the allocation of financial resources on the basis of political loyalties and not need, the siphoning of public resources from places which generate them to those who are politically favoured, and the plundering of the state by corruption. There are currently inadequate constitutional provisions requiring those charged with raising and spending public money to generate an appropriate vision, strategies and programmes to ensure optimisation of revenue and expenditure programmes. There are inadequate provisions for efficient programme implementation and monitoring, evaluation and feedback to ensure value for money as part of the social contract between the governors and the governed. The existing provisions are essentially about ensuring that money is collected and spent by those who have authority to do so, but there is a lack of a real effort to ensure effective and efficient financial decisions.¹⁶⁰

¹⁵⁷ Constitution of Kenya Review Commission, *Source Book for Civic Education: Referendum 2005*, op.cit. pp. 49-51.

¹⁵⁸ Constitution of Kenya Review Commission, *The Final Report of the Constitution of Kenya Review Commission*, op.cit. pp. 293-318.

¹⁵⁹ Ibid.

¹⁶⁰ Ibid.

The current constitution has several provisions relating to public finance. The constitution prohibits the national assembly from proceeding with a Bill or a motion proposing taxation measures, a change in withdrawal of money from the consolidated fund, or composition or remission of a debt due to the government except on a recommendation of the president signified by a minister.¹⁶¹ Part VII of the constitution makes provisions for establishing and appropriating the Consolidated Fund, establishing a contingencies fund, managing the government's public debt, and the office of the Controller and Auditor-General. These provisions are further elaborated in specific Acts of legislation such as the Exchequer and Audit Act,¹⁶² the Kenya Revenue Authority Act,¹⁶³ the Paymaster General Act,¹⁶⁴ the Government Contracts Act¹⁶⁵ and the Central Bank of Kenya Act.¹⁶⁶ However, given the massive levels of corruption associated especially with public procurement, the existing constitutional structure remains inadequate and continues to generate structural violence.¹⁶⁷ These massive levels of corruption contribute to an unpeaceful society.¹⁶⁸ Pilisuk argues that structural violence is closely linked with perpetuating social arrangements associated with poverty and elite domination of resources.¹⁶⁹ The looting of public resources in Kenya certainly lowers the standard of living of average Kenyans who enjoy a lower quality of life and abject

¹⁶¹ *The Constitution of Kenya*, op.cit, Section 48.

¹⁶² *The Exchequer and Audit Act*. (Cap. 412).

¹⁶³ *The Kenya Revenue Authority Act*. (Cap. 469).

¹⁶⁴ *The Paymaster General Act*. (Cap. 413).

¹⁶⁵ *The Government Contracts Act*. (Cap. 25).

¹⁶⁶ *The Central Bank of Kenya Act*. (Cap 491).

¹⁶⁷ For an analysis on different aspects of corruption in Kenya and its extent see K. Kibwana, S. Wanjala and Okech-Owiti (eds), *The Anatomy of Corruption in Kenya: Legal, Political and Socio-Economic Perspectives* (Nairobi: Claripress, 1996) pp. 36-81.

¹⁶⁸ A. Curle, *Making Peace* (London: Tavistock, 1971) pp. 1-27.

¹⁶⁹ M. Pilisuk, "The Hidden Structure of Contemporary Violence" *Peace and Conflict: Journal of Peace Psychology*, 4(3), 1998, pp. 197-216.

poverty because resources that were to be used for improving their welfare have now been diverted to private use or mismanaged.¹⁷⁰

Kenyans who expressed views to the CKRC on public finance and revenue management advocated the strengthening of the independence and powers of the Auditor-General.¹⁷¹ In addition, they desired greater transparency of the public finance process and wanted better controls over expenditure of state revenue out of the budget. They also advocated a greater involvement of the public and parliament in preparing and approving the budget. They further felt that public finance and revenue management would be improved if senior officers of the Kenya Revenue Authority were appointed by parliament.

The CKRC draft constitution made detailed recommendation of ways in which to improve the management of public resources.¹⁷² On budgeting, for example, the CRKC recommended *inter alia* that the budget-making process should allow for participation by all the key stakeholders, taking into account the need for affirmative action for disadvantaged economic groups. The CKRC on the Office of the Controller and Auditor-General recommended that *inter alia* the president on recommendations from an appropriate constitutional commission should appoint the Controller and Auditor-general subject to ratification by parliament. In addition, the CKRC recommended that the Controller and Auditor General should enjoy security of tenure and that there should be severe consequences entrenched in the constitution for

¹⁷⁰ For a discussion on the various dimensions of corruption in Kenya see K. Kibwana, S. Wanjala and Okech-Owiti (eds) *The Anatomy of Corruption in Kenya: Legal, Political and Socio-economic Perspectives* (Nairobi: Claripress, 1996).

¹⁷¹ Constitution of Kenya Review Commission, *The Final Report of the Constitution of Kenya Review Commission*, op.cit. pp. 293-318.

¹⁷² *Ibid.*

interfering with such a tenure. On taxation the CKRC recommended that there should be a clear basis for imposing any form of tax.

At the Bomas constitutional conferences it was felt that despite the consideration given to public finance in the CKRC draft constitution, there was need to give further thought to equitable sharing of national and local resources in the context of the principle of devolution of power.¹⁷³ In addition, it was felt by many delegates at Bomas that the office of the Controller and Auditor-General should be empowered to enable it to audit expeditiously the expenditures and revenues of all government departments and state corporations and provide timely reports to parliament. Many delegates at Bomas also felt that more serious consideration should be given to the proper management of taxes and revenue collection. A motion was also brought seeking to entrench safeguards in the constitution to ensure that the chapter on public finance is not subjected to amendments within a period of five years of the coming into effect of the new constitution.¹⁷⁴

Debates Related to Amendment of the Constitution

Amendment procedures of the constitution are vital since the amendments can often be abused. Amendment procedures help to protect the constitution against indiscriminate amendments. Indeed the 1963 Kenya Constitution has been amended 38 times with many of the amendments contributing to the strengthening of executive power.¹⁷⁵ If the amendment procedure of a constitution is too simple, it reduces public confidence in the

¹⁷³ Ibid, p.398.

¹⁷⁴ *Kenya Times* (Nairobi) "Review Checks Debate for Today" February 19th 2004, p. 4.

¹⁷⁵ For a discussion of post-constitutional amendments in Kenya see G. Muigai, *Constitutional Amendments and the Constitutional Amendment Process in Kenya, 1964-1997: A Study in the Politics of the Constitution*, op.cit.

constitution.¹⁷⁶ If, on the other hand, it is too rigid it may encourage revolutionary measures to bring about change rather than using acceptable constitutional means. It is therefore necessary to strike an appropriate balance in the constitutional amendment procedure. Muigai,¹⁷⁷ however, emphasizes that the power to amend or alter a constitution is not a power to make a new constitution and thus an entirely new constitution should not be written under the guise of amending the old one. The current constitution provides for an alteration of the constitution by parliament.¹⁷⁸ Such an alteration requires the support of at least 65 per cent of members of parliament. Parliament is vested with power to alter any section of the constitution. The independence constitution provided the procedure for constitutional amendment as requiring a majority of 90 per cent in the senate and 75 per cent in the lower house.¹⁷⁹ This amendment procedure was, however, changed by Act. No. 14 of 1965 which lowered the required majority to 65 per cent in both houses of the legislature.

Many Kenyans in giving views on the amendment of the constitution felt that a constitutional amendment should require a 75 percent vote in parliament.¹⁸⁰ It was also considered that the public should be involved in amending certain provisions of the constitution through referenda. A number of Kenyans who gave their views also felt that a distinction should be made between entrenched and non-entrenched provisions of the constitution, with a stringent mechanism being set up for amending the entrenched

¹⁷⁶ Constitution of Kenya Review Commission, *Source Book for Civic Education: Referendum 2005*, op.cit. pp. 103-104.

¹⁷⁷ G. Muigai, "Towards a Theory of Constitutional Amendment", *The East African Journal of Human Rights and Democracy*, Vol. 1, No. 1, September 2003, pp. 1-12.

¹⁷⁸ *The Constitution of Kenya*, Section 47.

¹⁷⁹ H.W.O. Okoth-Ogendo, "The Politics of Constitutional Change in Kenya Since Independence, 1963-69" op.cit., pp. 9-34.

¹⁸⁰ Constitution of Kenya Review Commission, *Source Book for Civic Education: Referendum 2005*, op.cit. pp. 103-104.

provisions which would include such aspects as supremacy of the Constitution, the Bill of Rights, land, the judiciary, security, finance and the system of government.

Constitutional Conflicts Related to Succession and Transfer of Presidential Powers

This issue is based on the transition from the current president to his successor. A critical issue here is the transfer of power in situations of absence or temporary incapacity of the holder of the office of president.¹⁸¹ Another issue is the transfer of power on death, removal or resignation of the president. A final vital issue is the actual modalities for the transfer of power. These issues have preoccupied Kenyans since the constitution was amended in 1992 to limit the presidential term of office to two five-year terms. Before 1992 there was no limit to the number of presidential terms an incumbent could serve and this enabled President Moi to serve for twenty four years.

The current constitution inadequately addresses the issue of transfer of power from one president to the next. The vice president is stated as being in the line of succession of power, and where he is unable to discharge such a function, a cabinet minister, appointed by the cabinet shall do so.¹⁸² However, a limitation in these succession arrangements is that there is no provision to compel the president to appoint a vice president following presidential elections or if a vacancy arises in the vice president's office. Thus following the 1997 elections the president Moi did not appoint a vice president for a long period of time and could not be compelled to do so. The constitution also provides that a person elected as president shall assume office as soon as he is elected and shall, unless his

¹⁸¹ Constitution of Kenya Review Commission, *The Final Report of the Constitution of Kenya Review Commission*, op.cit. pp. 331-335.

¹⁸² *Constitution of Kenya*, Section 6(2).

office becomes vacant by reason of death, resignation or ceasing to hold office for any other cause, continue in office until the person elected as president at a subsequent presidential election assumes office. There are no express provisions for a handing over period between the outgoing and president-elect.

The death of the vice president Kijana Wamalwa in August 2005 turned the spotlight on the gap in the current constitution which does not provide a clear line of succession in the Vice president's office.¹⁸³ In the event of both the presidency and vice president's office falling vacant at the same time, the constitution stipulates that the cabinet shall choose one among them to act as president which itself could precipitate a crisis should sharp differences emerge. Unlike the US Constitution which specifies the line of succession by naming each minister in turn who would take over in case both the presidency and vice presidency fall vacant, the Kenyan constitution only indicates that the choice lies within cabinet. Mutua proposes that the succession be defined up to the sixth tier so in the event of a national catastrophe, government carries on.¹⁸⁴ In the political climate that prevailed in August 2005 it appeared unlikely that NARC would have agreed on a successor for president Kibaki should the need have arisen. This is because of the deep divisions prevailing within NARC at the time.

Kenyan's in giving views to the CKRC suggested several ways to address the weaknesses of transitional arrangements.¹⁸⁵ It was felt that a clear line of succession should be established to avoid confusion in cases of the death or resignation of the president. Many proposed that the vice president should take over presidential powers for

¹⁸³ *Daily Nation* (Nairobi) "Succession Loophole in Constitution Now Comes in Sharp Focus" August 25th 2003, p. 3.

¹⁸⁴ *Ibid.*

¹⁸⁵ Constitution of Kenya Review Commission, *The Final Report of the Constitution of Kenya Review Commission*, op.cit. pp. 331-335.

the remainder of the term. They also proposed that the new president taking over after an election should be sworn in on a specified date. It was also felt that the duration of service as president should remain restricted to two five year term.

The CKRC recommended in its draft constitution that the order of succession should be vice-president, minister designated by the president, minister designated by the cabinet and then the speaker of the National Assembly.¹⁸⁶ It was proposed that when the president is absent from Kenya or unable to perform the functions of his office the vice president performs the functions of the president until the president returns or is able to perform them. The CKRC also suggested that the president-elect would assume office on swearing or affirming faithfulness and obedience to the republic and the Constitution of Kenya at a public swearing-in ceremony to be held on the day the incumbent's term expires.

This chapter has discussed the content issues in the constitutional review debates. It focused on the major or fundamental contentious issues raised during the review process. The chapter adopted a structural violence perspective. It also considered the positions taken by different protagonists in the content debates to bring out the conflict issues. The chapter has demonstrated that all of the so-called "contentious issues" in the constitutional review process were underpinned by incompatibilities of goals which were embedded in Kenya's social structures. These issues lay at the heart of Kenya's constitutional conflicts.

¹⁸⁶ Ibid.

Chapter Six

A Critical Analysis of the Structural Sources of Constitutional Conflicts in Kenya: 1997-2005

Introduction

A conflict perspective underlies this study because the central constitutional conflicts experienced in Kenya in the last decade are fundamentally about incompatibilities of goals among different actors. This chapter analyses the critical issues arising from the constitutional review process in Kenya. The critical themes emerging from the constitutional review process will focus on several themes in the process and content of constitution-making in Kenya. The critical themes reflect constitutional conflicts over the design, control and outcome of the review process.¹ An important issue in the review process is the debate about governance relating to by whom and how Kenya will be governed under a new constitution.² Another critical theme is about who has the power to make a new constitution, and the design of the review process. The most critical issues which divided politicians and contributed to the current constitutional stalemate were the system of government at the national level and the proposals for the territorial devolution of powers.³ The theme of devolution is also explored because it is closely tied to adequate governance structures. Another key theme emerging in the review process was how to entrench sectoral interests such as religion, gender and human rights within the review

¹ H.W.O. Okoth-Ogendo, "The Politics of Constitution-making in Kenya: An Introspective Survey", Public Lecture delivered at Moi University on February 6th, 2003, Revised on April 7th, 2004.

² M. Mwangi, "The Constitution was Ours Before We Were the Constitution's: Framing the Normative Epistemology of Constitutional Diplomacy in Kenya" in E. Oketch, L. Franceschi and P. Mimbi (eds), *Politics and the Common Good* (Nairobi: Strathmore University Press, 2006) pp. 186-206.

³ Y.P. Ghai, "An Alternative Draft of a New Constitution of the Republic of Kenya: Building on Bomas", Paper presented at a Public Forum on the *Options to Constitution-making Process in Kenya*, Kenya Human Rights Commission, December 9th 2006, Nairobi Safari Club.

process. The dynamism of constitutional conflicts is another vital theme that emerged in the review process. On a broader level the constitutional reform process was about whether constitutional reform should be limited to minimum reforms or should constitute comprehensive reform. Many constitutional conflicts were informed by this theme. An additional critical theme is the conduct of successive regimes in the review process and ultimately their failure to provide effective leadership to constitutional-making. Cognizance is also taken of the fact that the constitutional developments in Kenya can only be adequately understood by considering the broader constitutional context of African states. Given that the study adopts a structural violence perspective the overall theme of how to more effectively manage constitutional conflicts is considered. We shall discuss each of these themes in this chapter. We begin with the design and control of the constitutional review process.

The Design and Control of the Constitutional Review Process

The design of the review process is of concern because of the linkages between the process and content of constitution-making. A defective process virtually guarantees an anomalous outcome and perpetuates the structural violence in the constitution-making process and eventually in the country. Ruling elites with vested interests in maintaining the *status quo* are very reluctant to relinquish control over the constitutional review process since this could lead to outcomes unfavourable to their interests such as the reduction in the concentration of executive power.⁴ From a structural violence perspective, when an existing structure is threatened those who benefit from the

⁴ For a discussion on attempts of the ruling elites in Kenya to control the review process see Chapter Four.

accompanying structural violence, particularly the country's elite, will try to preserve the *status quo* which serves their interests.⁵ Debates about the design of the review process in Kenya were informed by the challenge of constitutional reform to the interests embedded within the existing constitutional structure and the resistance to reform by Kenya's political elite.

The discourse was initially divided between those who wanted the process to follow a National Convention or Constituent Assembly (which had been done in Benin, South Africa and Uganda), and those who wanted it to be an experts affair, or those who wanted it to involve general public enquiry.⁶ In the event a complicated people-driven process was designed between 1997 and 2001 consisting *inter alia* of the following organs: a Commission of 15 later expanded to 27, constituency constitutional fora, National Constitutional Conferences, an issue-based referendum and the National Assembly. The CKRC analysed the existing constitution and the submissions made to it by the people. It then proposed a CKRC draft to reflect people's recommendations and the reform agenda envisaged in the Review Act.⁷ After some public debate, the National Constitutional Conference met to debate and adopt the draft. Conflicts in the review process intensified when the National Constitutional Conference convened in April 2003. The Bomas conferences gave an opportunity for various stakeholders to identify with or discredit specific aspects of the CKRC draft and voice these concerns on the floor.⁸ Stakeholder interests or concerns were wide-ranging and included fears of religious,

⁵ J. Galtung, "Violence, Peace and Peace Research" *Journal of Peace Research*, Vol. 3 (1969) pp. 167-191.

⁶ H.W.O. Okoth-Ogendo, "The Politics of Constitution-making in Kenya: An Introspective Survey", *op.cit.*

⁷ Y.P. Ghai, "An Alternative Draft of a New Constitution of the Republic of Kenya: Building on Bomas", *op.cit.*

⁸ H.W.O. Okoth-Ogendo, "The Politics of Constitution-making in Kenya: An Introspective Survey", *op.cit.*

economic or political marginalisation; loss of power by those who had acceded to executive authority under the current constitution; the prospects of real power as a result of devolution; and expectations of a new era of democratic governance and public accountability.⁹ Towards the end of its work, a faction of the government took exception to some provisions of the Bomas draft and having been defeated in some of its motions, walked out. The National Constitutional Conference continued with its proceedings and adopted a draft constitution in accordance with the law, by two-thirds majority.¹⁰

However, the design of the review process provided for in the Review Act was later challenged when the opponents of the Bomas draft with the assistance of the courts of law prevented the submission of the Bomas draft to the National Assembly for formal enactment. At this point the debate about who was to review the process re-emerged sharply. In the *Timothy Njoya & Others v CKRC and the National Constitutional Conference* case, the constitutional court held *inter alia* that Section 28(4) of the Review Act requiring the Attorney General to table the draft bill before the National Assembly was unconstitutional.¹¹ It further ruled that the people of Kenya have a right to ratify the Draft Bill in a mandatory referendum or plebiscite and that parliament had no jurisdiction under Section 47 of the Constitution to abrogate the existing constitution and enact a new one in its place. The Court did not, however, provide a procedure for the holding of a referendum. Following the decision in the *Njoya Case* questions arose about whether it was necessary to amend the constitution to provide for a referendum or whether amendments to the Review Act would suffice.

⁹ A detailed discussion of these various stakeholder interests is carried out in Chapter Five of this study.

¹⁰ A discussion of the challenges leading to the adoption of the Bomas draft is contained in Chapter Four.

¹¹ See Constitutional Court ruling in the *Timothy Njoya & Others v. CKRC and the National Constitutional Conference*, High Court Miscellaneous Application No. 82 of 2004.

The National Assembly subsequently amended the Review Act to give itself powers to change the Bomas draft before submitting it to a referendum. In meetings of some parliamentarians at Naivasha and Kilifi, amendments were proposed to the Bomas draft although there were later disagreements about what exactly had been agreed upon.¹² The Attorney General was mandated to revise the Bomas draft which without further scrutiny was to be submitted to a referendum. After the end of the Bomas constitutional conference only a few members of parliament were involved in changes to the Bomas draft. The Naivasha and Kilifi processes were therefore not sufficiently inclusive.

The constitutional process at Bomas represented the triumph of the view that the people should make the constitution.¹³ The Wako draft on the other hand represented the view that the ultimate authority lay with parliament, even though the people would be given a chance to accept or reject the proposed constitution in a referendum. The view that the people should make the constitution is based on the social contract theory of governance.¹⁴ According to this theory, citizens share in sovereign power.¹⁵ Society is represented as based on a contract between the people and the government. The social contract is an agreement among people to constitute a corporate and collective person through which they endow themselves with a constitution or code of laws designed to regulate mutual relations and those with other people. In return for the privilege to govern the governors are expected to guarantee harmony and prosperity in society while also respecting the rights of the citizens. The final repository of authority is the people

¹² See Chapter Four of this Study for a discussion of the processes leading to Naivasha and Kilifi.

¹³ M.Mwagiru, "The Constitution Was Ours before We Were the Constitution's: Framing the Normative Epistemology of Constitutional Diplomacy in Kenya", op.cit.

¹⁴ A discussion of the social contract theory in the context of constitutions is undertaken in Chapter Three.

¹⁵ J.J. Rousseau, *The Social Contract* (London: Penguin, 2004) pp. 14-20.

and the power of the governors is only derivative. The government is simply the institution through which the sovereignty of the people is expressed.¹⁶

Constitutional change effectively implies re-negotiating the social contract and the authority to do this ultimately rests with the people. Hence the legitimacy of a constitution is measured by the extent to which the masses voluntarily participated in the process of developing the constitution.¹⁷ Such participation is considered important for effectively capturing the fundamental aspirations of the citizens. An imposed constitution or elite-driven process of constitution-making will engender constitutional conflicts. This is because such an elite process will not adequately address fundamental constitutional anomalies that have given rise to the need for a review process. A fundamental debate is whether the public can own a process without necessarily being directly involved in it.

The problem of direct public participation was illustrated during the 2005 referendum where many members of the public voted one way or another without necessarily understanding the issues involved. The evidence for this is the ethnic pattern of voting that emerged during the referendum.¹⁸ It is challenging to have a genuine people-driven process with high illiteracy levels in many of Kenya's constituencies.¹⁹ Having a referendum in an area with high illiteracy levels makes the people susceptible to the influence of individuals who may pursue a narrow populist agenda. The strong ethnic and political loyalties in evidence during the referendum illustrate this argument. There

¹⁶ W. Maina, "Constitutionalism and Democracy" in K. Kibwana, C. Maina and J. Oloka-Onyango (eds) *In Search of Freedom and Prosperity: Constitutional Reform in East Africa* (Nairobi: Claripress, 1996) pp.1-15.

¹⁷ J.O. Ihonvbere, "The Politics of Constitutional Reforms and Democratisation in Africa", *International Journal of Comparative Sociology*, February 2000, Vol. 41, Issue 1, pp.9-25.

¹⁸ A discussion of the Referendum is carried out in Chapter Four.

¹⁹ This argument was made by Prof. Githu Muigai, former CKRC Commissioner and Associate Professor of Public Law at the University of Nairobi, in an interview with the researcher on 11th December 2006 in Nairobi.

is an alternative perspective that argues that people even with only limited understanding of constitutional issues and debates can still contribute meaningfully to the constitutional review process and help to create a more responsive political system.²⁰ This argument is based on the idea that people have a good understanding of what their problems and concerns are and can articulate them. The challenge is that the public also sometimes have a perception that all their problems can be addressed through the constitution.

The argument that ultimate authority lies with parliament is based on the theory of representative democracy. Representative democracy implies less involvement by the citizens.²¹ Each individual representative has to take into account the wishes of the electors and this entails notions of responsibility and accountability.²² Although the role of parliament can differ from one country to another, the two of its commonest functions are the making of laws and to act as a watchdog over the executive.²³ However, representative democracy can sometimes become an elite process where representation does not necessarily take into account the wishes of electors.²⁴ Representative democracy may be powered by a rivalry of personalities or factions rather than competing ideologies. In the Kenyan context a challenge of the involvement of parliament in the process was that parliamentarians were greatly influenced by partisan perspectives and interests. The challenges of addressing political differences in the review process led to a debate on whether it is possible to design the constitutional review process by excluding politicians

²⁰ This argument was advanced by Prof. Ghai, former CKRC Chairperson and Professor of Public Law at the University of Hong Kong, in an interview with the researcher on 10th December, 2006 in Nairobi.

²¹ A. Vincent, *Theories of the State* (Oxford: Blackwell, 1987) pp. 111-112.

²² For a discussion of the notion of representative democracy see Chapter Five.

²³ Y.P. Ghai and J.P.W.B. McAuslan, *Public Law and Political Change in Kenya: A Study of the Legal Framework of Government from Colonial Times to the Present* (Nairobi: Oxford University Press, 1970) p. 312.

²⁴ G. Harrison, *Issues in the Contemporary Politics of Sub-Saharan Africa: The Dynamics of Struggle and Resistance* (London: Palgrave Macmillan, 2002) pp. 78-104.

from the review process. Ghai has argued that the role of parliament should be minimised in the review process given the tendency for party and sectarian interests to dominate politicians' perspectives on it.²⁵ Muigai questions the practicality of minimising the role of parliamentarians since constitution-making is by its nature a political process, and it is difficult to envisage a process of constitutional change of the democratic structures without politicians.²⁶

Another debate associated with the design of the review process was the role of constitutional experts in the process. The intention to use experts in the review process was initially intended as a diversionary tactic by the former president Moi, who in January 1995 announced plans to invite foreign experts to draft a constitution.²⁷ The use of experts is a possible way of de-politicising the constitutional review process. The debate over experts took the form of whether to bring local or foreign experts to engage in the review process. The problem of inviting foreign experts is that they would not have a detailed understanding of the aspirations of the Kenyan people and hence the resulting document was unlikely to be accepted by the people. The use of local experts could also be problematical because they may reflect the divisions of the society or of political parties.²⁸ For example, some local experts may give preference to ethnic rather than national interests. The use of experts alone to review the process would have made it technically a good process but by removing the politics out of the process would have led to an impractical constitution. This was one of the enduring weaknesses of the

²⁵ This view was articulated by Prof. Ghai, former CKRC Chairperson and Professor of Public Law at the University of Hong Kong, in an interview with the researcher in Nairobi on 10th December, 2006.

²⁶ This view was held by Prof. Githu Muigai, former CKRC Commissioner and Associate Professor of Public Law at the University of Nairobi in an interview with the researcher in Nairobi on 11th December, 2006.

²⁷ For a discussion on the review process in the 1990s see Chapter Four.

²⁸ This view was advanced by Prof. Ghai, former CKRC Chairperson and Professor of Public Law at the University of Hong Kong in an interview with the researcher in Nairobi on 10th of December, 2006.

independence constitution: it was reached largely through a technical process.²⁹ It was thus a constitution generated to some extent outside the political process. Leaving politics completely out of a review process can lead to later political problems.³⁰ For example, the land question was not adequately addressed in the independence constitution and has continued to be contentious. The political process generates the momentum for political change and the constitution reflects the struggles that have gone on in the political field.³¹

Ultimately experts, both local and foreign, ended up playing some role in the review process especially at the stage of drafting the different constitutional documents presented for consideration. There was considerable suspicion between professional input into the constitution-making process and public participation.³² At the Bomas constitutional conferences, for example, the delegates also wanted to be draftsmen. Many delegates were uncomfortable with the idea of giving views and instructions which the draftsmen would give a formulation. This led to some of the delegates getting stuck on particular words. For example, during the Bomas constitutional conferences one of the controversies was where to put the words “head of government”, whether they should go with the prime minister or the president. However, the vital issue is not where the words are put but the overall structure and content of the executive chapter.³³

²⁹ This view was held by Prof. Githu Muigai, former CKRC Commissioner and Associate Professor of Public Law at the University of Nairobi in an interview with the researcher in Nairobi on 11th December, 2006.

³⁰ This view was advanced by Prof. Okoth-Ogendo, former CKRC Vice-chairperson and Professor of Public Law at the University of Nairobi, in an interview with the researcher on 1st December, 2006.

³¹ This view was expressed by Prof. Githu Muigai, former CKRC Commissioner and Associate Professor of Public Law at the University of Nairobi, in an interview with the researcher in Nairobi on 11th December, 2006.

³² This view was articulated by Prof. Okoth-Ogendo, former CKRC Vice-chairperson and Professor of Public Law at the University of Nairobi, in an interview with the researcher on 1st of December, 2006.

³³ Ibid.

Despite attempts to specify the design of the review process in the various legal instruments known as the Review Acts, the process ended up being unpredictable and chaotic.³⁴ There was a multiplicity of actors and lack of proper consultation among the various actors resulted in unpredictability of the process. There was no synchronised unfolding of events including how these events should be timed and how one output from an event would lead to the next event. A major reason for this was because political actors sought to frustrate the process to achieve narrow partisan interests in the context of the review process. These factors contributed to the process being unnecessarily protracted and also intensified the contention associated with some of issues which would have been addressed by having better pre-planned fall back positions.

The CKRC despite having a work plan did not have full control of the process since from the time they started operating, there was debate and conflict over the nature of the process itself.³⁵ There was initially a debate on the extent to which the CKRC should involve the public in the process. Once this was sorted out there was a debate about how to proceed to prepare a schedule of interview questions by the CKRC.³⁶ Another conflict arose about how the questions were going to be analysed. A conflict about commissioners and the initial draft later ensued.³⁷ The negotiations at Bomas were complicated by the large number of delegates (629 in total) involved in the process which made it necessary to consider too many divergent interests.³⁸ As a result the CKRC draft

³⁴ Republic of Kenya, *Report of the Committee of Eminent Persons on the Constitution Review Process*, May 2006, pp. 37-40.

³⁵ Okoth-Ogendo Interview, *op.cit.*

³⁶ *Ibid.*

³⁷ *Ibid.*

³⁸ For a complete list of the Bomas delegates see Constitution of Kenya Review Commission, *Final Report of the Constitution of Kenya Review Commission*, February 2005, Appendix 4, pp. 581-601

was not improved in any significant way by the Bomas constitutional conferences.³⁹ It would have been more appropriate to have designed the review process to have broad consultations where various interests were represented but that involved a smaller number of people. This would have resulted in fewer actors and therefore fewer conflicting interests. A greater number of actors always complicates the nature of any conflict because more interests are involved.

Debates about Governance in the Constitutional Review Process

The structure of government was a central theme throughout the entire process and has manifested itself in the three different constitutional drafts since 1997: the CKRC draft, the Bomas draft and the Wako draft.⁴⁰ The design of the structure of government is the most important decision in making a constitution since the system of governance determines the composition and powers of the state and the manner of the exercise of these powers.⁴¹ Issues of governance were considered a *raison d'etre* of the constitutional review process from its inception. Section 2A (b) of the Constitution of Kenya Review Act 1997 which addresses the object and purpose of the review and eventual alteration of the Constitution is “establishing a free and democratic system of Government that enshrines good governance, constitutionalism, the rule of law, human rights and gender equity”.⁴² Section 2A (c) further underscores the importance of “recognizing and demarcating divisions of responsibility among the state organs of the executive, the

³⁹ This argument was advanced by Ms. Abida Ali-Aroni, former Chairperson of the CKRC former Chairperson of the CKRC after Yash Pal Ghai, in an interview with the researcher on 12th February, 2007 in Nairobi.

⁴⁰ For a discussion on the contentions on governance in these different drafts see Chapter Five.

⁴¹ Okoth-Ogendo Interview, op.cit.

⁴² Republic of Kenya, *The Constitution of Kenya Review Act, 1997*, Section 2A (b).

legislature, and the judiciary so as to create checks and balances between them and to ensure accountability of the Government and its officers to the people of Kenya.”

The structures of government of the existing constitution are anomalous and a major source of structural violence. This is partly because the existing constitution does not meet the needs and expectations of Kenyan society.⁴³ The amendments to the constitution in the post-independence period contributed to embedding an anomalous governance structure with excessive power in the executive.⁴⁴ The overall effect of these amendments was to adversely affect democracy and political accountability in Kenya. The constitutional review process in Kenya since 1997 has been an attempt to address the consequences of some of these post-independence amendments.⁴⁵ A related governance issue is that the current Kenya constitution does not provide effective checks and balances.⁴⁶

Debates on the system of government focused on whether to have an executive president or executive prime minister or a mixed system. The current system gives excessive power to an executive president. A concern in constitution-making is to design the power map of the state.⁴⁷ Such a power map determines the composition and competencies of state organs and the manner in which they are exercised. There are two major types of executive systems: the presidential executive system where executive power is vested in the president who is not a part of the representative assembly; and a

⁴³ K. Kibwana, “Issues of Constitutional Reforms in Africa: The Example of Kenya” in K. Kibwana (ed), *Readings in Constitutional Law and Politics in Africa: A Case Study of Kenya* (Nairobi: Claripress, 1998).

⁴⁴ For a discussion on the amendment process of the Kenya constitution in the post-independence period and how these contributed to embedding structural violence in Kenya see Chapter Three.

⁴⁵ Republic of Kenya, *Report of the Committee of Eminent Persons on the Constitution Review Process*, op.cit, p. 46.

⁴⁶ For a discussion on how the lack of checks and balances arises in the current constitution see Chapter Five.

⁴⁷ Constitution of Kenya Review Commission, *Final Report of the Constitution of Kenya Review Commission*, February 2005, pp. 185-220.

parliamentary executive where the president is part of the legislature and is a ceremonial head of state. A variation or combination of these two systems is a mixed presidential and parliamentary executive.⁴⁸ The character of the executive has a fundamental impact on its power and the means for its control. The executive in the current constitution exercises immense powers.⁴⁹ The lack of provisions in the existing constitution to control how executive power is exercised is not simply about checks and balances.⁵⁰ The executive is also the source and manager of public resources in the country. Although executive authority *per se* is not always the most important aspect of a constitution, where it exerts immense control over all other pillars of constitutional development then it has to be fundamentally addressed.⁵¹

Both the CKRC and the Bomas drafts provided for the sharing of powers between the president and the prime minister. During the collection of views by the CKRC many people favoured a parliamentary system of government, although some of those who gave their views anticipated that the present system would continue but with greatly reduced powers for the president.⁵² The CKRC draft was clearer on the separation of the president and the prime minister. The basic role of the president as envisaged in the CKRC draft constitution was the symbol of the nation in addition to other roles linked to constitutionality such as having the discretion to return a Bill to parliament for reconsideration. The prime minister in the CKRC draft was envisaged to be formally appointed by the president but with the support of parliament. The prime minister was

⁴⁸ See Chapter Five for a discussion of the debates relating to the executive.

⁴⁹ A discussion of these excessive powers of the executive in the existing constitution is found in Chapter five of the study. Chapter Three of the study provides a structural violence perspective on the constitutional anomalies associated with excessive executive power.

⁵⁰ Okoth-Ogendo Interview, *op.cit.*

⁵¹ *Ibid.*

⁵² Constitution of Kenya Review Commission, *The Report of the Constitution of Kenya Review Commission: The People's Choice: Short Version*, September 2002, pp. 36-64.

expected to run the government on a day to day basis. The prime minister was also to choose cabinet ministers and chair the cabinet.

There was fear that if the president was only given ceremonial powers, the prime minister could become as powerful as any president had been in the Kenyan system for many years. The basis of this fear was the post-independence experience with power increasingly concentrated in the presidency.⁵³ This fear reflected a misunderstanding of the CKRC draft since under this draft both the president and prime minister had real powers. Intense negotiations among politicians in Bomas led to compromises that blurred the distinction.⁵⁴ In the Bomas draft the office of prime minister was largely a coordinating role where the prime minister was responsible to parliament and chaired cabinet meetings.⁵⁵ This mixed system was criticised by some as being conflict generating and unworkable. Others argued that if the president was to lose many of his powers with most executive authority to the prime minister and the cabinet, it was expensive and unnecessary to have direct national elections for the presidency.⁵⁶ Another contention was that presidential powers which had been abused in the past were removed from the presidency and transferred to the office of prime minister. Hence the issue of excessive concentration of power in the executive which had motivated the review process was not adequately addressed since powers were merely being transferred from one office to another.⁵⁷

⁵³ For a discussion of post-independence amendments to strengthen executive power and their consequences see Chapter Five.

⁵⁴ Y.P. Ghai, "An Alternative Draft of a New Constitution of the Republic of Kenya: Building on Bomas", *op.cit.*

⁵⁵ Section 172, Bomas draft.

⁵⁶ *Ibid.*

⁵⁷ M. Mwangi, "The Constitution was ours before We Were the Constitution's: Framing the Normative Epistemology of Constitutional Diplomacy in Kenya", *op.cit.*

The Wako draft reintroduced a strong executive presidency and reversed one of the most important gains of the CKRC draft in respect of power sharing and accountability between the president and prime minister.⁵⁸ In the Wako draft the president had the power to appoint, specify the duties of, and dismiss the prime minister.⁵⁹ The Wako draft made it virtually impossible to remove the president although some of the earlier powers of the president such as the power to allocate public land and appoint high officials were removed.

Another contentious issue related to governance was about whether to have two Houses of parliament.⁶⁰ This debate was tied to devolution. A second chamber was proposed in the CKRC draft. The rationale for this second chamber in the CKRC draft was to protect the system of devolved government. The CKRC believed that the savings to the nation as a result of more effective devolution and the growth in investment and production would be many times the cost of the second chamber.⁶¹ The CKRC recommended a new House called the National Council to act as a mechanism of inter-linkage between the district governments and the central government, and to check and balance the activities of the lower House. There was considerable support for a second chamber although views differed on its role and composition. This proposal came under attack mostly from parliamentarians because it added to the expense and complexity of law making.⁶² Although there was agreement with the objectives of the CKRC proposed electoral system of proportionality and the fair representation of marginalized groups, the

⁵⁸ Chapter 12 of the *Wako draft*.

⁵⁹ Sections 163 to 165 of the *Wako draft*.

⁶⁰ See the detailed debates relating to whether to have two houses of parliament in the context of devolution in Chapter Five.

⁶¹ Constitution of Kenya Review Commission, *The Report of the Constitution of Kenya Review Commission: The People's Choice: Short Version*, op.cit, pp. 38-39.

⁶² *Ibid.*

electoral method proposed was criticised for being complex and expanding the list of nominated members.

Constitutional conflicts in Kenya on issues of governance were essentially related to vested interests that political groups had or did not have in constitutional reform.⁶³ This was the greatest impediment to the constitutional review process in Kenya. It was very difficult to get political parties to discuss and agree on differences. Many Kenyan politicians were interested in constitutional reforms only if they addressed short-term political interests.⁶⁴ This explains the focus by politicians on issues related to power structure, especially the executive. Politicians also often used the review process to settle political scores and to advance their political ambitions.⁶⁵ A nationalist outlook was lacking in the participation of the majority of politicians in the review process. The issues of power in the governance debates were about incompatibilities of goals among different actors.⁶⁶ Addressing these incompatibilities was vital to conflict management in the review process. In an effective constitutional review process it is vital to have a certain degree of flexibility where one position can be modified without necessarily abandoning important principles. A spirit of compromise is vital in effective constitutional negotiations accompanied by political good will.⁶⁷ The absence of a spirit of compromise and negotiation are a fundamental reason why debates on governance in the constitutional review process contributed to a stalemate.

⁶³ This argument was made by Prof. Ghai, former CKRC Chairman and Professor of Public Law at the University of Hong Kong, in an interview with the researcher on 10th December, 2006.

⁶⁴ This view was articulated by Dr. P.L.O. Lumumba, former CKRC Secretary, in an interview with the researcher in Nairobi on 15th of December, 2006.

⁶⁵ For a discussion on how the constitutional review process was used to settle political scores and advance political ambitions see Chapter Four.

⁶⁶ A. de Reuck, "The Logic of Conflict: Its Origin, Development and Resolution" in M. Banks (ed) *Conflict in World Society: A New Perspective on International Relations* (Sussex: Harvester Press, 1984) pp. 96-111.

⁶⁷ Githu Muigai Interview, op.cit.

Kenya's constitution-making was characterised by a power approach to constitution-making where the most vocal stakeholders were the politicians and the ruling elite.⁶⁸ These are the people who derive direct benefit from a particular power arrangement. The problems of a power-approach to constitution-making are related to the challenges of making a new constitution in an existing constitutional order. The people enjoying higher positions in an existing constitutional order do not have an express commitment to overhauling it in a manner which will change or deprive them of their powers.⁶⁹ This explains the reluctance of both the KANU and NARC ruling elites to support a system of governance which would considerably reduce the powers of the executive.⁷⁰

The political class in seeking to advance certain positions in the debate on governance represented deeply entrenched ethnic interests.⁷¹ There is a link in the Kenyan psyche between political and economic power which has contributed to ethnic rivalry.⁷² Thus members of different ethnic groups often defended or opposed certain power arrangements because of how they perceived they would affect the interests of their ethnic groups. Thus debates on governance in Kenya's constitutional review process were ethnicised. The ethnic character of Kenya's politics which had earlier been clear during Kenya's elections where voting often followed an ethnic pattern, became evident during the constitutional review process. To the extent that the constitutional review process is a political process and to the extent that Kenyan politics is informed by

⁶⁸ Okoth-Ogendo Interview, op.cit.

⁶⁹ Okoth-Ogendo Interview, op.cit.

⁷⁰ For a discussion on the preservation of the *status quo* and constitutional conflicts see Chapter Three.

⁷¹ This view was articulated by Prof. Patricia Kameri-Mbote, a member of the Eminent Person's Committee on Constitutional Reform, in an interview with the researcher on 28th December, 2006.

⁷² This viewpoint was expressed by Ambassador Bethwell Kiplagat, the Chairman of the Eminent Persons Committee on Constitutional Review, in an interview with the researcher on 10th January, 2007.

among other issues ethnic issues, it is true to say that the constitutional process like the political process reflects certain ethnic concerns.⁷³

Ethnic pluralism is not necessarily a negative factor. It gives one a rich diversity to balance in the constitutional structure. Sometimes an ethnic arrangement may strengthen the political process because it may be an effective way to getting power to the grassroots level.⁷⁴ Ethnicity becomes problematical when it is turned into an instrument of political discrimination. This may occur when power is monopolised by specific ethnic groups. Addressing issues of ethnic conflict requires a transformation of the relationship among different ethnic groups.⁷⁵ What is required is not a minimally acceptable political agreement but a basis for a stable, long-term peace and co-operative, mutually enhancing relationship that contributes to the welfare and development of all ethnic groups. Peacebuilding to address ethnic conflicts should focus on root causes which lead to mutually exclusive group identities and to addressing the relative socio-economic deprivation of certain ethnic groups.⁷⁶ A vital aspect of addressing ethnic conflicts and confidence-building is reciprocity of respect by different ethnic groups.⁷⁷ This requires that each ethnic group views other ethnic groups as having honourable and legitimate interests.

The debates about governance in Kenya can also be seen as the politics of the Memorandum of Understanding(MoU) concluded just before the 2002 general elections

⁷³ Githu Muigai Interview, op.cit.

⁷⁴ Okoth-Ogendo Interview, op.cit.

⁷⁵ H.C. Kelman, "Transforming the Relationship between Former Enemies: A Socio-psychological Analysis in R. Rothstein (ed) *After the Peace: Resistance and Reconciliation* (Boulder: Lynne Rienner, 1999) pp. 193-205.

⁷⁶ J.G. Cockell, "Conceptualising Peacebuilding: Human Security and Sustainable Peace" in M. Pugh (ed) *Regeneration of War-torn Societies* (London: Macmillan, 1999) pp. 15-34.

⁷⁷ D.A. Lake and D. Rothchild, "Containing Fear: The Origins and Management of Ethnic Conflict", *International Security*, Vol. 21, No. 2 (Fall 1996) pp. 41-45.

by the major partners in the NARC coalition.⁷⁸ Although the content of the Memorandum of Understanding was not well understood by the public until the disagreements came to the fore, failure to resolve these disagreements caused considerable tension between the NAK and LDP factions of the ruling coalition. Factional fights within NARC found expression in the constitutional review process, especially in the later stages of the Bomas conferences. During the Bomas conferences different political factions sought to manipulate the constitution-making process so as to achieve different goals in the context of the Memorandum of Understanding. The NAK faction of NARC sought to use the process to frustrate the memorandum of understanding thereby defeating the LDP side. The LDP on the other hand, sought to use the constitution-making process as a means of enforcing the memorandum of understanding. This was manifested in the debates on governance during the Bomas conferences where the LDP openly supported the position of an executive prime minister which was opposed by NAK. Failure to honour the MoU eroded the trust and confidence among political leaders and by extension different ethnic communities represented by these leaders.

Underlying constitutional conflicts about governance in Kenya is also a broader crisis of the state which in turn has engendered a crisis of governance.⁷⁹ Since the state lacks social support and is distrusted by the majority of the population it feels that it must centralise power in order to survive. The excessive powers of the president in Kenya can be interpreted as a symptom of an underlying crisis of institutions of state in Kenya. It is important for a government to create confidence in the institutions of the state so that

⁷⁸ Republic of Kenya, *Report of the Committee of Eminent Persons on the Constitutional Review Process*, op.cit. pp. 49-50.

⁷⁹ W. Maina, "Democracy, Good Governance and Economic Recovery", Seminar Paper presented at a workshop on *Professional Ethics and Responsibilities*, Safari Park Hotel, 28th and 29th July, 1999.

they can become legitimate in the eyes of its citizens.⁸⁰ The crisis of the institutions of the state became acute in the decades after independence reaching an all time low during the last decade of KANU's rule in the 1990s when there was considerable advocacy for political reforms.⁸¹

The existing constitution is anomalous because it provides for the excessive concentration of executive power. To address this constitutional conflict the existing constitutional structure needs to be changed to provide for effective checks and balances. This de-concentration of executive power is vital in any new constitutional structure in Kenya.

Debates about Devolution in the Review process

Devolution was at the core of the constitutional review process in Kenya. Indeed Article 2A (d) of the Constitution of Kenya Review Act 1997 considers one of the purposes of the review to be "promoting the people's participation in the governance of the country through democratic, free and fair elections and the devolution and exercise of power".⁸² This is further reinforced in Article 2A (f) which emphasizes the importance of "ensuring the provision of basic needs of all Kenyans through the establishment of an equitable framework for economic growth and equitable access to national resources".⁸³ There was a broad consensus among the delegates at Bomas that power and authority should be devolved.

⁸⁰ Y.P. Ghai and J.P.W.B McAuslan, *Public Law and Political Change in Kenya* (Nairobi: Oxford University Press, 1970) pp. 505-506.

⁸¹ M. Munene, "Crisis and the State in Kenya, 1995-1997: An Appraisal" in G. Okoth and B.A. Ogot (eds) *Conflict in Contemporary Africa* (Nairobi: Jomo Kenyatta Foundation, 2000) pp. 152-176.

⁸² Republic of Kenya, *The Constitution of Kenya Review Act, 1997*, Section 2A (d).

⁸³ *Ibid*, Section 2A (f).

It was traditionally assumed that only a strong national state with a unitary system of government could deploy resources and capacity.⁸⁴ However, unitary or centralised systems in Kenya increasingly came under criticism because of increased marginalization of minority groups, abuse of power and inequitable distribution and mismanagement of national resources. As the CKRC collected views it became increasingly clear that many people in Kenya felt alienated from the central government.⁸⁵ People especially in North Eastern province were very bitter and felt they had not been effectively part of the government and had been treated as outsiders. For about 60 per cent of the people the dominant concern is what the Review Act calls basic needs, the most critical needs being food and water.⁸⁶ The inadequate satisfaction of human needs is closely linked to structural violence in society.⁸⁷ When resources are inequitably distributed certain segments of society cannot fully satisfy their needs.⁸⁸ Basic human needs relate not only to needs such as food and shelter, but also those related to growth and development such as personal identity and recognition.⁸⁹ When people's basic needs are not adequately met, there is a gap between their potential and actual realisation.⁹⁰ This gap is the centerpiece of structural violence. Perceived marginalisation of certain groups in Kenyan society led to an increased call during the last two decades to decentralise government powers and functions.

⁸⁴ Constitution of Kenya Review Commission, *The Final Report of the Constitution of Kenya Review Commission*, op.cit, pp. 227-247.

⁸⁵ For a discussion on the extent of this marginalisation see Chapter Five.

⁸⁶ Constitution of Kenya Review Commission, *The Report of the Constitution of Kenya Review Commission: The People's Choice: Short Version*, September 2002, pp. 9-10.

⁸⁷ For a discussion on the linkages between human needs and structural violence see Chapter Three.

⁸⁸ D.J. Christie, "Reducing Direct and Structural Violence: The Human Needs Theory" *Peace and Conflict: Journal of Peace Psychology*, 3(4), 1997, pp. 315-332.

⁸⁹ J.W. Burton, *Conflict Resolution and Prevention* (London: Palgrave, 1990) pp. 36-48.

⁹⁰ For an analysis of the linkages between structural violence and human needs theory see Chapter Three.

At independence Kenya was a constitutionally devolved state with significant power decentralisation to the regions which were entrenched in the constitution.⁹¹ The reason why devolution eventually became important in the debate on constitutional review is that it was realized that devolution was one of the most effective ways of reducing excessive concentration of executive power.⁹²

Although the principle of devolution was broadly accepted during the Bomas Conferences, there were intense debates and disagreements about the structure and levels presented in the CKRC Draft.⁹³ While many people in some provinces such as Coast and parts of North Eastern and Rift Valley proposed a federal form of devolution, many people in Central, Nairobi, Eastern, Western and parts of Nyanza provinces proposed devolution within a unitary system.⁹⁴ In the debate on devolution, some thought that the proposals did not go far enough and should have provided for greater powers at the provincial level while others considered that they went too far and could threaten national unity.⁹⁵ The CKRC draft had proposed that the details of the devolution system should be left to an expert commission. The Bomas approach on the other hand specified many points of detail which should have involved greater research and consideration than was possible then.

A basic change introduced by the Wako draft was the removal of devolution to the regions and provinces and replacing them by a system of local government without entrenching its powers. This change reversed one of the most important gains of the

⁹¹ For a consideration of the nature of devolution in Kenya at independence see Chapter Five.

⁹² Okoth-Ogendo Interview, op.cit.

⁹³ For a discussion of the devolution debates during the Bomas constitutional conferences see Chapter Five.

⁹⁴ Constitution of Kenya Review Commission, *The Final Report of the Constitution of Kenya Review Commission*, op.cit, pp. 227-247.

⁹⁵ Y.P. Ghai, "An Alternative Draft of a New Constitution of the Republic of Kenya: Building on Bomas", op.cit.

CKRC and Bomas regarding devolution. With the removal of devolution in the Wako draft a vital opportunity for deconcentrating the excessive powers of the executive was lost. The fact that the position of prime minister was created in the Wako draft did not have much effect on the problems of the excessive concentration of executive power once the provisions on devolution were removed.⁹⁶

The problem posed by inadequate devolution is that it creates a gap between actual and potential realisation of human beings. People in marginalised regions are unable to fully realise their basic needs because of inadequate allocation of resources by the central government. An improvement in the devolution structure should be aimed at narrowing the gap between the actual and potential realisation especially of marginalised communities.

Entrenching sectoral interests into the review process

A contentious issue relating to sectoral interests in the review process was the question of Kadhis' courts.⁹⁷ This issue reflected divisions in Kenyan society on religious lines. The CKRC realized that there was a possible tension between the goal of national unity and the recognition of religious diversity. The CKRC draft proposed that Kadhis' courts be expanded and reformed in response to submissions received primarily from Muslim communities.⁹⁸ The issue of Kadhis' courts became extremely contentious during the Bomas constitutional conferences.⁹⁹

⁹⁶ Okoth-Ogendo Interview, op.cit.

⁹⁷ To see the evolution and historical basis of Kadhis' courts see Chapter Five.

⁹⁸ For a discussion of the CKRC proposals on Kadhis' courts see Chapter Five.

⁹⁹ For the contentions relating to Kadhis courts and their linkages to cultural violence see Chapter Five.

The three constitutional drafts broke new ground by enlarging the specific sectors and groups that fall under the Bill of Rights.¹⁰⁰ This was initially not envisaged as a fundamental issue that needed to be addressed in the constitutional review process but it emerged as an important issue from the collection of views from Kenyans.¹⁰¹ The CKRC draft recommended an expanded Bill of Rights which would protect not only civil and political rights but also confer social, cultural, economic and development entitlements.¹⁰² It was noted that the rights and freedoms entrenched in the current constitution were designed to protect only individuals and not communities.

A controversial issue at Bomas on the Bill of Rights was whether all the provisions in the Bill of Rights should apply to all persons without exception, and the exact circumstances under which any of these rights may be qualified.¹⁰³ Some delegates at Bomas were concerned that the CKRC draft contained no clear definition on a number of concepts including the right to life, family and marriage and customary practices. Many delegates felt that these definitions should take into account the African culture and context. The Wako draft maintained the fundamental gains in the Bill of Rights which had been achieved in the CKRC and Bomas drafts.

The dynamism of constitutional conflicts

The conflict-generating issues during the constitutional review process were dynamic and evolved as the process went on. Indeed, the emergence of three constitutional drafts that had some differences itself reflected an evolution of Kenya's

¹⁰⁰ M.Mwagiru, "The Constitution was ours before we Were the Constitution's: Framing the Normative Epistemology of Constitutional Diplomacy in Kenya", op.cit.

¹⁰¹ The Constitution of Kenya Review Act 1997 which in Section 2A provided the objectives of the review process does not specifically address this issue.

¹⁰² Constitution of Kenya Review Commission, *The Final Report of the Constitution of Kenya Review Commission*, February 2005, pp. 393-406.

¹⁰³ Ibid.

constitutional conflicts. Actors, issues and interests in conflict are being constantly transformed.¹⁰⁴ Conflicts typically involve some measure of interaction between parties and there are numerous opportunities for transformation.¹⁰⁵ The process of change is driven by interaction, and the degree of intensity and antagonism changes over time. The evolutionary process is not, however, a continuous movement along some fixed trajectory. Most conflicts comprise relatively static periods of contention marked by sporadic transitions associated with discernible shifts in levels of antagonism and severity. Seeing conflicts as dynamic processes that unfold through a series of phases raises the issue of transitions between different stages of the conflict cycle.¹⁰⁶

The constitutional review process began as quest for the removal of an oppressive leadership.¹⁰⁷ It began as an anti-Moi enterprise and took on negative connotations rather than being a means of creating a better constitutional order. The history of the constitutional review process in Kenya has been characterised by contention over process and content issues.

The dynamism of contentious issues has to some extent been informed by the political undercurrents of the day. This is apparent in the changes in the positions by various actors. Depending on the political undercurrents of the day the review process would be supported by some actors at certain points and then opposed at other times by the same actors. Constitutional conflicts in Kenya should be seen within the context of

¹⁰⁴ R. Vayrynen, "To Settle or to Transform? Perspectives on the Resolution of National and International Conflicts" in R. Vayrynen (ed) *New Directions in Conflict Theory: Conflict Resolution and Conflict Transformation* (London: Sage, 1991) pp. 1-25.

¹⁰⁵ W.J. Dixon, "Third-Party Techniques for Preventing Conflict Escalation and Promoting Peaceful Settlement", *International Organisation*, Vol. 50, No. 4, Autumn 1996, pp. 653-681.

¹⁰⁶ M. Mwangi, *Peace and Conflict Studies in Kenya* (Nairobi: Centre for Conflict Research and Catholic Peace and Justice Commission, 2003) pp. 55-64.

¹⁰⁷ Republic of Kenya, *Report of the Committee of Eminent Persons on the Constitution Review Process*, May 2006, pp. 37-40.

the patrimonial politics of sycophancy and factions. Politically hegemonic groups in Kenya have often been intolerant of independent centres of authority and power.¹⁰⁸ President Moi who was unable or unwilling to assert moral authority sought constitutional powers and had a vast patronage network. The state in Kenya increasingly came to be seen as the primary instrument of accumulation, and corruption became endemic and was woven into state apparatus. The state has traditionally dominated the distribution of national resources and every group has sought to obtain access to or control of the national cake.¹⁰⁹ Virtually all major groups, political and civil, have often focused on what they could get from the political system rather than trying to make it work fairly. The founders of political parties, which often have ethnic bases, perceive their parties as instruments for struggle to benefit their ethnic groups at the national level. This factor contributed to divisions in the political opposition which played into the hands of ruling elite, particularly during the KANU regime.

Contestations about the content of the constitution have implied that it has not always been very clear what the contentious issues are. One of the features of the various draft constitutions produced is that contentious issues have shifted over time. For example, the contentious issues at the Bomas conferences were not the only contentious ones at the referendum, as new ones emerged during the referendum process. At the referendum, for example, the issue of women's inheritance which had never been contentious in the CKRC and Bomas drafts became contentious.

¹⁰⁸ Y.P. Ghai, "The Role of Law in the Transition of Societies: The African Experience" *Journal of African Law*, Vol. 35, No. 1, 1991, pp. 8-20.

¹⁰⁹ A.G.R. Oloo, "The Contemporary Opposition in Kenya: Between Internal Traits and State Manipulation" in G.R. Murunga and S. W. Nasong'o (eds), *Kenya: The Struggle for Democracy* (Dakar: Codesria, 2007) pp. 90-125.

In addition to the challenge of identifying contentious issues, a theme that emerges from the constitutional review process in Kenya is that there has been no well established mechanism for addressing such issues.¹¹⁰ The attempts to address the contentious issues in the review process focused mainly on consensus-building. The constitutional review process tended to improvise on mechanisms for addressing contentious issues. For example, in the course of the Bomas Constitutional Conferences a number of issues which the stakeholders regarded as particularly contentious were isolated and subjected to mediation through various consensus-building initiatives in and outside the conference.¹¹¹ However, consensus-building initiatives did not always include all the relevant stakeholders and as such those who were excluded tended to sabotage any agreement reached. An aspect of effective conflict management is the inclusion of all the relevant actors and interests.¹¹² The exclusion of key stakeholders in consensus-building was aptly demonstrated in the post-Bomas Consensus Building Group which culminated in the publication of the Constitution of Kenya Review (Amendment) Bill, also known as the consensus Bill, which later became the Consensus Act. The process by which the Consensus Act was passed and its contents set the stage for the acrimony which was evidenced at the referendum.¹¹³ In addition, the constitutional review process in Kenya did not fully appreciate areas of agreement and there has been no clear strategy on how to exploit these. Thus areas of agreement tended to be overshadowed by contentious issues.

¹¹⁰ Republic of Kenya, *Report of the Committee of Eminent Persons on the Constitution Review Process*, op.cit.

¹¹¹ For a detailed discussion of these consensus-building initiatives see Chapter Four.

¹¹² M. Mwangi, *Conflict: Theory, Processes and Institutions of Management* (Nairobi: Watermark, 2000) pp. 96-106.

¹¹³ A discussion of process leading to the Consensus Act is found in Chapter Four.

Minimum versus Comprehensive Constitutional Reforms

The debate on minimum versus comprehensive constitutional reforms has re-emerged at various times during the constitutional review process. It began in 1997 when the perception was that the government could not allow comprehensive reforms and therefore it was necessary to push for minimum reforms. The approach of the KANU regime to the management of constitutional conflicts was to effect piecemeal amendments by repealing Section 2A of the constitution or in the style of the Inter-Parties Parliamentary Group (IPPG) reforms shortly before the 1997 elections.¹¹⁴ By the time the 1997 elections were close there was increasing pressure for a comprehensive review of the constitution. Such a review was, however, not acceptable to the ruling party KANU since it would have posed a serious threat to its survival during the 1997 elections.¹¹⁵ The IPPG reforms were thus a way of giving some semblance of constitutional review which fell short of a comprehensive review, but which could be accepted by political actors since it would assist them to survive politically. Piecemeal reform has, on the other hand, sometimes been advocated on the basis that any concessions from a ruling class when one has agitated for them should be accepted since such concessions in some way move the constitutional review process forward and result in some improvement of the existing constitution.¹¹⁶ Whatever concession one gets should be consolidated and then more can gradually be demanded. In this context constitution-making is viewed as a gradual, incremental process especially where there is

¹¹⁴ A discussion of these piecemeal constitutional reforms is found in Chapter Four.

¹¹⁵ M. Mwangi and P.M. Mutie, "Governance and Conflict Management" in P. Wanyande, M. Omosa and C. Ludeki (eds) *Governance and Transition Politics in Kenya* (Nairobi: University of Nairobi Press, 2007) pp. 131-154.

¹¹⁶ This view was advanced by Dr. Willy Mutunga, a former NCEC activist, in an interview with the researcher on the 13th of December, 2006 in Nairobi.

a government in power with vested interests in maintaining a particular constitutional dispensation.

However, if the constitution has been amended so many times that it is internally problematical then this requires a complete overhaul.¹¹⁷ Thus whether one goes for constitutional comprehensive or minimum reforms depends on the extent of anomalies in the existing constitution. Serious anomalies require constitutional overhaul. If one is going for minimum reforms then these reforms must indicate how they will eventually lead to comprehensive changes in the constitution.¹¹⁸

The contentious issues discussed earlier in this study indicate that a piecemeal approach to constitutional reform will not be effective since the issues giving rise to the need to review the constitution were fundamental and needed deep-rooted change. For example, the issues on governance cannot be adequately addressed by piecemeal changes. A fundamental problem of attempts to manage constitutional conflicts in Kenya since 1997 is that they have been mainly settlement-oriented rather than aimed at a resolution. There has been a deliberate attempt by ruling elites to manipulate constitutional reform processes so that deep-rooted issues are not addressed since addressing them would imply that their interests would have been adversely affected.¹¹⁹ An analysis of the critical themes of this thesis reveals that constitutional conflicts are amenable to resolution rather than settlement. Settlement is based on deterrence or coercion without which a conflict would resume since the behaviour of certain actors in

¹¹⁷ For an analysis of the amendment process of Kenya's constitution and an implication of the different amendments see Chapter 3.

¹¹⁸ This view was expressed by Prof. Okoth-Ogendo in an interview with the researcher on the 1st of December, 2006 in Nairobi.

¹¹⁹ For a discussion of attempts by the KANU and NARC ruling elites to manipulate the constitutional reform process see Chapter Four.

the conflict is decided on criteria which are not acceptable to them.¹²⁰ Resolution requires that roots causes of conflicts be addressed and relationships between the parties be legitimised and self-sustaining without the imposition of behavioural patterns.¹²¹

Fundamental constitutional anomalies can only be resolved by overhauling the constitution rather than through piecemeal changes. Such constitutional overhaul effectively implies re-negotiating the social contract. It was found by the CKRC that to achieve the goals of the Review Act and incorporate the public's views it was necessary to have a fundamentally new document.¹²² It was not possible to facilitate the social, political and economic changes that the people wanted without fundamental constitutional change. This explains why the CKRC draft represented an overhaul of the existing constitution rather than piecemeal changes. In addition, the constitution comprises the apex of the hierarchical ordering of the various strata of legal norms and is the *grund* norm among the community of legitimate laws.¹²³ The importance of the constitution in the country's legal system implies that anomalies cannot be addressed superficially at a settlement level. In epistemological terms comprehensive constitutional reforms imply a paradigm shift.¹²⁴ A constitution can be seen as a paradigm which is acceptable as long as it adequately reflects the aspirations and expectations of a given society. However, constitutions will over time begin to develop significant anomalies

¹²⁰ A.J.R. Groom, "Paradigms in Conflict: the Strategist, the Conflict Researcher and the Peace Researcher" in J. Burton and F. Dukes (eds) *Conflict: Readings in Management and Resolution* (London: Macmillan, 1990) pp. 71-98.

¹²¹ Ibid.

¹²² Constitution of Kenya Review Commission, *The Final Report of the Constitution of Kenya Review Commission*, February 2005, op.cit. p. 70.

¹²³ H. Kelsen, *The Pure Theory of Law*, translated by B.L. Paulson and S.L. Paulson (Oxford: Clarendon, 1992) pp. 55-75.

¹²⁴ For a discussion on the epistemological basis of paradigm shifts see T.S. Kuhn, *The Structure of Scientific Revolutions*, Third Edition (Chicago: University of Chicago Press, 1996) pp. 52-135.

which eventually necessitate a fundamental paradigm shift through an overhaul of the existing constitution.

A debate related to comprehensive constitutional reforms is how to achieve such reforms when faced with a regime that wants to maintain the *status quo*. This relates to the debate on empowerment where when two actors have a conflict the stronger of the two will not be willing to enter into negotiations precisely because of it is in a position of greater power.¹²⁵ In this case the stronger actor is the ruling elite of the regime and the weaker actor is the public at large. The debate on empowerment relates to how to change an asymmetrical conflict in such a way that the stronger party is persuaded to negotiate. In Kenya agitation for constitutional reform with a view to reducing the asymmetry has often taken the form of mass action.¹²⁶ Thus, for example, mass action began in Kenya on 3rd May 1997 and ended on October 20th 1997. Mass action is aimed at challenging the legitimacy of the existing legal order by attempting to use non-violent means of protest. Mass action in this sense was used as an alternative to armed struggle.¹²⁷ Although civil disobedience has a legal basis, it often has a revolutionary content. The leadership of mass action needs to be very careful of the problem that some radical elements may make it anarchical. There is an extent beyond which civil disobedience may be subversive when it seriously challenges the authority of the government and this may lead to the outbreak of violence as the government tries to suppress it. Thus mass action should be carefully considered in terms of whether it is really necessary and

¹²⁵ M. Mwagiru, *Conflict: Theory, Processes and Institutions of Management* (Nairobi: Watermark, 2000) pp. 30-32.

¹²⁶ A discussion of mass action to agitate for constitutional reform in the Kenyan context is found in Chapter Four.

¹²⁷ W. Mutunga, *Constitution-making from the Middle: Civil Society and Transition Politics in Kenya: 1992-1997* (Nairobi: Sareat, 1999) pp. 149-190.

protection for those taking part in it. Thus even non-violent processes have the potential to lead to violence if not carefully managed.¹²⁸

Kenya's experience with mass action which eventually became violent shows how structural violence may eventually lead to direct violence. Conditions of structural violence may eventually lead to violent conflict as life becomes unbearable.¹²⁹ However, this presupposes that there is increasing awareness of the conditions of structural violence. The structural conflict in Kenya is objective it has been rendered subjective by the education of the public about democracy and constitutionalism.¹³⁰ Kenyan constitutional conflicts have become more intense over the last decade of reform because a growing section of the Kenyan public has become aware of the contentious issues and also attempted manipulation of the review process by the ruling elites of different regimes.

Despite considerable obstacles the citizens have continued to press for constitutional reforms because they see them as a way to delineate a wide range of concerns.¹³¹ New constitutions are increasingly seen as instruments in the protection of a broad range of rights including gender, environment, cultural and economic rights. Despite the considerable political obstacles to genuine reform, the constitution has remained a central question of political discourse.

¹²⁸ These arguments on mass action were made by Dr. Willy Mutunga, a former NCEC activist in an interview with the researcher on 13th December 2006 when he reflected on his experience with mass action in 1997.

¹²⁹ M. Mwangi, *Conflict: Theory, Processes and Institutions of Management* (Nairobi: Watermark, 2000) p. 25.

¹³⁰ M. Mwangi, "The Constitution as a Source of Crisis: A Conflict Analysis of Democracy and Presidential Power in Kenya" in L. Chweya (ed), *Constitutional Politics and the Challenge of Democracy in Kenya* (Nairobi: Sareat, 1999) pp. 173-195.

¹³¹ J.O. Ihonvbere, "The Politics of Constitutional Reforms and Democratisation in Africa", op.cit.

Successive Regimes and the Constitutional Review Process

A critical theme emerging from the review process in the period under study is the way in which successive governments have conducted themselves in the review process which has contributed to the *impasse* in the review process.¹³² Both the KANU and NARC regimes failed to provide effective leadership of the constitutional review process.¹³³ This was manifested in the lack of political will to facilitate a genuine review process. This lack of political will was in turn demonstrated by the failure to adequately reach out to other groups to meaningfully move the process forward. Political good will is vital for a constitutional review process to succeed because constitution-making is a political process.¹³⁴

When the constitutional review process began in 1997 it was initially viewed by the KANU regime as a process targeted at removing President Moi. This led to several attempts by the KANU regime to derail the review process.¹³⁵ The KANU regime behaved in a manner that suggested they were only interested in reviewing the constitution to the extent that it protected their power and the political and economic fortunes of those loyal to them. This represented an attempt to maintain the existing reward structure where the ruling elite had obtained more than their due through a process of accumulation and thus had vested interests in protecting the *status quo*.¹³⁶ The

¹³² Republic of Kenya, *Report of the Committee of Eminent Persons on the Constitution Review Process*, op.cit, pp. 51-52.

¹³³ This was identified as a fundamental obstacle in the review process by Prof. Ghai, a former CKRC Chairperson and Professor of Public Law at the University of Hong Kong, in an interview with the researcher in Nairobi on 10th December 2006.

¹³⁴ This argument was made by Prof. Githu Muigai, former CKRC Commissioner and Associate Professor of Public Law at the University of Nairobi, in an interview with the researcher on 11th December 2006 in Nairobi.

¹³⁵ For a discussion of these attempts by KANU to derail the process see Chapter Four.

¹³⁶ J. Galtung, "A Structural Theory of Aggression", *Journal of Peace Research*, Vol. 1, No. 2, 1964, pp. 95-119.

KANU regime was pressurised by mass action in 1997 to move the review process forward. However, they were never entirely comfortable with the review process and still struggled to control it as much as possible. The ruling elite of KANU was, for example, uncomfortable with attempts to merge the two parallel review processes by the Chairperson of the CKRC because the merger represented a broader stakeholder group and would have made it more difficult to control the outcome of the review process.¹³⁷

The NARC government had championed the cause of a new constitution before the 2002 elections. Professors Okoth-Ogendo and Yash Ghai¹³⁸ have argued that a constitution-making ripe moment¹³⁹ was missed before the 2002 elections. This is because whoever came into power after the 2002 elections was unlikely to be in a rush to facilitate a constitutional review process that had the potential to lead to a reduction in executive power. Once in power the NARC government did not facilitate adequate dialogue with groups opposed to the government position on constitutional review especially on issues related to governance. This was to some extent demonstrated by the walk out by the government side at Bomas when they were defeated in several motions. The idea of ripe moment is a central theme in the mediation of third parties in conflict.¹⁴⁰ It relates to the issue of the appropriate timing of the mediation and is vital for a mediation attempt to be effective.¹⁴¹ According to Zartman,¹⁴² an essential feature of a

¹³⁷ For a discussion of the merger of the parallel constitutional review processes see Chapter Four.

¹³⁸ Okoth-Ogendo and Yash Ghai Interviews, op.cit.

¹³⁹ The term constitution-making ripe moment is used by the researcher in the context of the optimal time at which to conduct the review process.

¹⁴⁰ J. Bercovitch, *Social Conflicts and Third Parties: Strategies of Conflict Resolution* (Boulder: Westview Press, 1984) pp. 12-33.

¹⁴¹ J. Bercovitch, J. T. Anagnoson, D. Wille, "Some Conceptual Issues and Empirical Trends in the Study of Successful Mediation in International Relations", *Journal of Peace Research*, Vol. 28, No. 1, 1991, pp. 7-17.

¹⁴² I. W. Zartman, Conflict and Resolution: Contest, Change and Cost, *Annals of the American Academy of Political and Social Science*, Vol. 518, Nov. 1991, pp. 11-22.

ripe moment is a deadlock that keeps both parties from achieving their goals. This takes the form of a stalemate that hurts both parties enough to make them feel uncomfortable and unable to break out by an escalation with acceptable costs.

The constitutional conflicts at Bomas should be viewed against the background of increasing acrimony within NARC in the later part of 2003 that spilt over into the constitutional conferences.¹⁴³ Thus the Bomas Constitutional Conferences can be considered to have died on the altar of the gradual collapse of the NARC coalition.¹⁴⁴ Had NARC remained together as some unified political alliance, the Bomas conferences may have produced a draft that would have been more generally acceptable. A fundamental source of instability in the NARC coalition has been the mistrust that exists between the coalition partners.¹⁴⁵ This mistrust originates from the failure by one coalition partner to fulfill pre-election agreements. The mistrust may also be attributed to politicians in the coalition who lack a common vision for Kenya. Some of the politicians in the NARC coalition did not have a vision for Kenya and may be considered to be political opportunists.¹⁴⁶ These factors have contributed to the lack of effective leadership in the constitutional review process.

The process that led to the adoption of the Wako draft was also contentious.¹⁴⁷ Genuine broad-based negotiations were required after the considerable constitutional conflicts experienced at Bomas. The Wako draft was, however, produced in a hasty and

¹⁴³ For a discussion on the increasing divisions within NARC and how these affected the Bomas constitutional conferences see Chapter Four.

¹⁴⁴ Githu Muigai Interview op.cit.

¹⁴⁵ P. Wanyande, "The Politics of Coalition Government" in P. Wanyande, M. Omosa and C. Ludeki (eds) *Governance and Transition Politics in Kenya* (Nairobi: University of Nairobi Press, 2007) pp. 107-129.

¹⁴⁶ Ibid.

¹⁴⁷ For a discussion of this process see Chapter Four.

non-inclusive manner which contributed to a general mistrust of the document.¹⁴⁸ The Wako draft was turned into a “government project” which was supported by key members of the government including president Kibaki despite the fact that the mandate of the constitutional review provided for a people-driven process. This aspect was exploited by opponents of the Wako draft who convinced their constituencies that the government had hijacked the review process and was imposing its views on the people.¹⁴⁹

The struggle over the outcome of the constitutional review process has been one for political survival once the transfer of power issues were resolved in December 2002.¹⁵⁰ Just as the KANU regime resisted change the NARC regime was also uncomfortable with it. The beneficiaries of the new regime are unwilling to see decisions already made under the current constitution re-opened.

It is vital to carefully appraise the role of the government in future constitutional review attempts. The conduct of the government is critical because it affects the legitimacy of the entire constitutional review process. The review process should attempt to limit the government’s role to objective facilitation of the process.¹⁵¹ The government should preferably not take a direct role in supporting or opposing any draft document. Its role should be limited to facilitating the process and allowing the organs of the review process to move the process forward. In this way it would provide effective leadership of review process which is likely to overcome the current *impasse*.

¹⁴⁸ An analysis of the process leading to the Wako Draft is contained in Chapter Four of this study.

¹⁴⁹ Republic of Kenya, *Report of the Committee of Eminent Persons on the Constitution Review Process*, op.cit., pp. 55-57.

¹⁵⁰ H.W.O. Okoth-Ogendo, “The Politics of Constitution-making in Kenya: An Introspective Survey”, op.cit.

¹⁵¹ *Ibid.*

The Broader Constitutional Context in African States

A fundamental theme emerging from the study is the extent to which the constitutional conflicts in Kenya reflect the broader problems of lack of constitutionalism experienced in many Africa states. Okoth-Ogendo¹⁵² considers this paradox as the simultaneous existence of what appears to be a clear commitment by African political elites to the idea of a constitution while at the same time emphatically rejecting the liberal democratic notion of constitutionalism. Kenya's constitutional impediments have been experienced by many other African states. Some scholars, for example, Ojwang¹⁵³ have argued that the circumstances of African countries must be incorporated into the scheme of public institutions. Constitutional practice he further contends should consider the differing political arrangements which contribute to differing social, economic and cultural conditions in particular cases.¹⁵⁴

In Kenya constitutional amendments immediately after independence were justified on the basis that they would bring the constitution more in line with traditional African values and customs.¹⁵⁵ This view tends to imply that the tenets of constitutionalism should to some extent be adapted to suit the African context. However, many other scholars disagree with this viewpoint and come up with some general tenets

¹⁵² H.W.O. Okoth-Ogendo, "Constitutions without Constitutionalism: Reflections on an African Political Paradox", op.cit.

¹⁵³ J. B. Ojwang, *Constitutional Development in Kenya: Institutional Adaptation and Social Change* (Nairobi: Oxford University Press, 1970).

¹⁵⁴ This view was also articulated in an interview the researcher had with Prof. Ojwang in Nairobi on 23rd February, 2007. Prof. Ojwang argued that there is a mismatch between perfectly balanced constitutional models and situations of gross underdevelopment in which people lack essentials of life. The application of democratic principles, he therefore contended, has to take into account the level of economic development in a particular state.

¹⁵⁵ Y.P. Ghai, "Constitutions and the Political Order in East Africa", *The International and Comparative Law Quarterly*, Vol. 21, No. 3, Jul.1972, pp. 403-434.

of constitutionalism. On this basis Nwabueze¹⁵⁶, for example, argues that the mere existence of a formal written constitution is not necessarily conclusive evidence that the government is a constitutional one. The determining factor of effective constitutionalism is whether the constitution imposes limitations upon the power of government.

In many developing states constitutions may facilitate or even legitimise the assumption of dictatorial powers by government. Constitutions in many developing states have tended to lack legitimacy for the masses. Politicians in these countries have often viewed the constitution as a weapon which can be used and altered to gain temporary and passing advantages over one's political opponents. The amendments of the Kenya constitution for the first two decades after independence, most of which strengthened executive power at the expense of other branches of government, give credence to Nwabueze's view. Ghai¹⁵⁷ reinforces Nwabueze's view by arguing that in many African countries the authoritarian character of the state is a dominant feature. Some share features with tyrannical regimes which according to Aristotle¹⁵⁸ are characterised by leaders who have no regard for any public interest but only for the private ends of the ruling elites. Politically hegemonic groups are intolerant of independent centres of authority or power. Presidents who are unable or unwilling to assert moral authority seek wide constitutional powers and have a vast patronage network. Since the state is the primary instrument of accumulation, corruption often becomes endemic and woven into the fabric of the apparatus of the state. The pressures towards corruption arise not only from economic greed, but also from the imperatives of

¹⁵⁶ B.O. Nwabueze, *Constitutionalism in the Emergent State* (London: C. Hurst and Co, 1973) pp. 1-21.

¹⁵⁷ Y.P. Ghai, "The Role of Law in the Transition of Societies: The African Experience" *Journal of African Law*, Vol. 35, No. 1, 1991, pp. 8-20.

¹⁵⁸ Aristotle, *Politics* (New York: Dover Publications, 2000) pp. 217-218.

political survival since the primary base of a politician's support is generally not the party or other political platform but clientalism which is sustained by regular favour to one's followers. Ultimately, the primacy of the constitution over politics is rejected in favour of the primacy of politics over the constitution.¹⁵⁹ Lewis argues that African politics often lacks legitimate and effective institutional rules and political life is thereby highly dependent on politicians and factions to keep it civil.¹⁶⁰ He further argues that in many African states political improvisation predominates. Constitutions in such situations become a commodity that the state can mobilise or manipulate.

Constitutional conflicts in Kenya should also be seen within the context of patrimonial politics of sycophancy and factions. Thus many actors in the constitutional review process are often prepared to change their views and support one faction or another depending on which side of the patrimonial political divide they stand. From a conflict perspective, it would appear that the problem of structural conflicts, particularly constitutional ones, is a common feature in many developing states. In this context many developing states, including Kenya, nominally adopted multi-party systems while retaining constitutions that were more tailored to a one party system. Thus Kenya's current constitution although containing a provision for a multi-party system still has many provisions that do not support such a system in reality, especially because of the excessive concentration of power in the executive branch.¹⁶¹

¹⁵⁹ Y.P. Ghai, "Constitutions and the Political Order in East Africa", op.cit.

¹⁶⁰ P. Lewis (ed) *Africa: Dilemmas of Development and Change* (Boulder: Westview Press, 1998) pp. 23-25.

¹⁶¹ For a discussion on this perspective see W. Mutunga, "The Need for Constitutional Changes" in K. Kibwana, C. Maina Peter and J. Oloka-Onyango (eds), *In Search of Freedom and Prosperity: Constitutional Reform in East Africa* (Nairobi: Claripress, 1996) pp. 410-415.

Kenya's constitutional conflicts thus reflect a broader crisis of the state which is apparent in many other African countries.¹⁶² There is a pervasive lack of trust in state institutions within many African countries which has engendered a crisis of governance. Since the state lacks social support and is distrusted by the majority of the population, it must necessarily centralise power in order to survive. The excessive powers of the president can therefore be seen as a symptom of an underlying crisis of institutions of the state in Kenya but which is common to many other African countries. It is vital for a government to create confidence in the institutions of the state so that they can become legitimate in the eyes of its citizens.¹⁶³ Although an attempt was made to create confidence in the institutions of the state in Kenya in the first two and a half years after independence, a turning point occurred in 1966 after which the government increasingly neglected the need for legitimacy and the dictates of constitutionalism as it introduced amendments to concentrate power in the executive arm of government. This crisis of the institutions of the state became even more acute in the later decades after independence. It reached an all time low especially in the last decade of KANU's rule in the 1990s when there was a considerable advocacy for political reforms.¹⁶⁴ For example, the era between 1995 and 1997 was a period of considerable crisis of confidence in the government. Addressing this pervasive lack of trust in state institutions is a considerable challenge that the government faces even presently as it attempts to address the structural violence in Kenyan society

¹⁶² W. Maina, "Democracy, Good Governance and Economic Recovery", Seminar paper presented at a workshop on Professional Ethics and Responsibilities, Safari Park Hotel, 28th and 29th July, 1999.

¹⁶³ Y.P. Ghai and McAuslan, *Public Law and Political Change in Kenya* (Nairobi: Oxford University Press, 1970)

¹⁶⁴ M. Munene, "Crisis and the State in Kenya, 1995-1997: An Appraisal" In G. Okoth and B.A. Ogot (eds), *Conflict in Contemporary Africa* (Nairobi: Jomo Kenyatta Foundation, 2000) pp. 152-176.

This crisis of the institutions of the state can be aptly conceptualised when the constitution is viewed as a social contract in which the individual members of society or the governed surrender some of their powers to a few members of society who are the governors.¹⁶⁵ In return for the privilege to govern, the governors are expected to guarantee harmony and prosperity in the society while also respecting the rights of citizens agreed to before hand. Government must recognise that the people are sovereign in a democracy and that the government is simply the institution through which this sovereignty is expressed.¹⁶⁶ In many African states, however, this social contract has been broken and governments regularly behave in a manner not laid down in the law or manipulate the law to suit political ends. Since 1988 the people in many African states have risen to replace one-party and military dictatorships with multiparty democracy.¹⁶⁷ However, many promising multi-party transitions have failed to bring about genuine democratic change. Power has continued to be exercised arbitrarily and many rulers have continued to act as if they were not accountable to the people. In many African states there has often been a struggle between the forces of the *status quo* and those advocating for change. Many elected governments in the multi-party era have often shown little commitment to the democratisation process of their countries.

Within the democracy movement itself, there is often a stark contradiction between the deepest aspirations of the masses and the narrow class interests of the leadership. There is in many African states a political culture in which opportunism takes

¹⁶⁵ M. Gitu, "An Enabling Constitution for Poverty Eradication" in *Basic Needs are Basic Rights: The Core Challenge for Constitutional Reform in Kenya* (Nairobi: Action Aid Kenya, 1999) pp. 2-13.

¹⁶⁶ W. Maina, "Constitutionalism and Democracy" in K. Kibwana, Chris Maina and Joseph Oloka-Onyango (eds), *In Search of Freedom and Prosperity: Constitutional Reform in East Africa* (Nairobi: Claripress, 1996) pp. 1-15.

¹⁶⁷ G. Nzongola-Ntalaja, "The State and Democracy in Africa" in G. Nzongola-Ntalaja and M.C. Lee(eds) *The State and Democracy in Africa* (Asmara: Africa World Press, 1997) pp. 9-24.

precedence over principle, with most leaders failing to honour agreements to which they subscribe in negotiations. The refusal of the NARC government to honour a pre-election MoU between the coalition partners is an apt illustration of this phenomenon. Decisions taken at democratic gatherings like national conferences are often easily overturned behind closed doors by self-serving politicians. Norms, values and culture make possible or constrain types of formal institutions.¹⁶⁸ Cultural values are shaped by education, leadership, and interaction with other societies.

There are several factors that have blocked a transition from authoritarianism to genuine democracy in many African states. Firstly, opposition parties in many African states have been weak and in many cases have split and collapsed as a result of personality rivalries and political opportunism.¹⁶⁹ In Kenya the split of the Forum for the Restoration of Democracy (FORD) into two factions, and generalised factionalism of the opposition allowed Moi to stay in power in the 1990s despite having a minority of the electorate's support. Many leaders of the democratic opposition are deserters from the ruling circles who are repositioning themselves for political office in the post-authoritarian era. This in part explains the high incidence of political opportunism, the endless divisions within opposition parties and the lack of respect for signed agreements and democratically adopted decisions that may not conform with narrow personal interests.¹⁷⁰ Thus democratic transitions have not fared well because leaders of the democratic opposition are often so preoccupied with winning political office for their

¹⁶⁸ F. Fukuyama, *State-Building: Governance and World Order in the Twenty-first Century* (London: Profile Books, 2004) pp. 39-57.

¹⁶⁹ G. Harrison, *Issues in the Contemporary Politics of Sub-Saharan Africa: The Dynamics of Struggle and Resistance* (London: Palgrave Macmillan, 2002) pp. 78-104.

¹⁷⁰ G. Nsongola-Ntalaja, "The State and Democracy in Africa" in G. Nongola-Ntalaja and M.C. Lee(eds) *The State and Democracy in Africa*, op.cit.

own material benefits and consequently prefer deal-making behind closed doors to transparent decision-making. They often end up betraying the deepest aspirations of ordinary citizens whose own political immaturity manifests itself in the uncritical support of such leaders, for example, during elections.

A second obstacle is the weakness of the means of subsistence of the middle class and its exploitation by the ruling group which often aims at paralysing democratic forces. The leadership of the democratic opposition in many African states comes mostly from the middle class including such professionals as lawyers, university professors and medical doctors. As professionals these groups have experienced a steady decline in income over the last two decades associated with the economic crisis in many African states. In Kenya the state has refused to significantly improve the salaries of professionals despite decades of neglect. Economic hardships have forced many professionals into lobbying for lucrative ministerial or other senior government appointments. Under both internal and external pressure to implement reforms, the ruling elite in many African states such as Kenya and Nigeria have exploited this situation through the cooptation of intellectuals into ruling circles and through the funding of nominal political parties so as to divide and weaken the real opposition.

Thirdly, in many African states elections have not always resulted in the replacement of dictators.¹⁷¹ There has been a notable rebirth of former dictators as new democrats sometimes resulting in them sometimes taking power in second elections. Between 1990 and 1997 more than half of Africa's political transitions resulted in a former dictator remaining in office mainly through surviving elections. This was the case

¹⁷¹ G. Harrison, *Issues in the Contemporary Politics of Sub-Saharan Africa: The Dynamics of Struggle and Resistance*, op.cit., pp. 78-104.

in states such as Kenya, Benin and Togo. This can be partly explained by the fact that incumbency allows those in power a considerably higher ability to distribute patronage, to manipulate electoral rules and to employ security forces to intimidate and split opposition parties.

These factors highlight that democratisation in many African states can sometimes be an elite process in which the notions of representation are quite removed from the real business of electoral politics.¹⁷² In such cases democratic politics can be powered by a rivalry of personalities or factions rather than competing ideologies. The experience of many Africa states, and indeed developing nations in general, has shown that it is possible for democratic regimes to co-exist with a variety of forms of informal repression. Thus the gradual process of popular empowerment in many African states that has been associated with the advent of the multi-party era has often been accompanied by significant counter-democratic trends particularly various forms of clientelism in which the electorate are seen as means to an end and a form of political competition characterised by rivalries within the political elites.

The aforementioned political trends have often provided the broader context of constitutional reform in many African states and partly explain the immense challenges often accompanying attempts to overhaul existing constitutional dispensations including that of Kenya. However, despite these challenges citizens in many African states continue to press for constitutional reforms because they see them as a way to delineate a wide range of concerns.¹⁷³ New constitutions are increasingly seen as instruments in the

¹⁷² Ibid.

¹⁷³ J.O. Ihonvbere, "The Politics of Constitutional Reforms and Democratisation in Africa", op.cit.

protection of broad range of rights including gender, environment, cultural and economic rights.

Despite the considerable political obstacles to genuine reform therefore constitutions have remained a central question of political discourse. A vital issue is the impact that political processes have on the legitimacy of constitutions. A constitution that does not emerge from widespread consultations with all key stakeholders cannot be regarded as legitimate since it does not effectively capture the fundamental aspirations of the citizens of a state. Many African states including Kenya have engaged in cosmetic reforms and calling stage-managed constitutional conferences. The process of constitution making is not simply about obtaining a new constitution but ensuring that such a constitution is legitimate. At the centre of many constitutional conflicts is the issue of power: how it is defined and allocated and how it is deployed in the quest for hegemony and relevance within political setup. As long as these issues are not addressed through a legitimate process the society where they are found will continue to conform to Curle's¹⁷⁴ characterisation of "unpeaceful societies" where there may be no overt conflict but human beings are impeded from achieving their full potential because of the conditions defined by the existing social structures.

Towards the Effective Management of Constitutional Conflicts in Kenya

A theme emerging from Kenya's constitutional review process is that the constitutional conflicts have been inappropriately managed.¹⁷⁵ The development of constitutional

¹⁷⁴ A. Curle, *Making Peace*, op.cit.

¹⁷⁵ For a discussion of the process and content aspects of constitutional conflicts in Kenya see Chapters Four and Five.

conflicts in Kenya has been profoundly influenced by the approaches adopted in their management. There is a need to create new structures, mechanisms and institutions for conflict management if the new government is to avoid the pitfalls of delivering less than it promised during its election campaigns in 2002.¹⁷⁶ Since the election of 2002 represented an overthrow of the old paradigm of addressing issues, including the management of conflicts, the new regime must find new ways of managing constitutional conflicts as part of the paradigm change.

The processes of constitutional conflict management are highly political. A proper conflict management of these conflicts requires an appreciation of political, ethnic and cultural diversities. Creative conflict management should also take into account the dynamism of Kenya's constitutional conflicts. Actors, issues and interests in Kenya's constitutional conflicts are being constantly transformed and this in turn reflects the dynamism of Kenyan society. Thus the mechanism for the effective management of Kenya's constitutional conflicts should take into account the fact that the constitutional conflicts in Kenya are operating in a very different environment from the one in 1997. Kenyan citizens have a much greater awareness of constitutional issues than they did in the 1990s.¹⁷⁷ Evidence of this is that the citizens are much more critical of constitutional developments than they were in 1997. Thus resorting to the conflict management methodologies of the 1997 period when the review process began is a recipe for failure. In the current constitutional conflict management approaches similar tactics are being adopted to those in 1997. This was demonstrated in the amendments made to the Bomas draft through membership of the Parliamentary Select Committee on Constitutional

¹⁷⁶ M. Mwangi and P.M. Mutie, "Governance and Conflict Management" in P. Wanyande, M. Omosa and C. Ludeki (eds) *Governance and Transition Politics in Kenya*, op.cit.

¹⁷⁷ An analysis of the factors contributing to this greater awareness is undertaken in Chapter Three.

Reform. This led to a situation where some politicians legitimised the outcomes agreed on the basis of political expediency. Effective management of Kenya's constitutional conflicts requires an inclusive process so as to provide the process with greater legitimacy. In this way, the inclusion of all key interested parties avoids the problem that they are likely to sabotage the process later. The issue is that Kenyans not only called for a new constitution but also wanted to participate in its creation.

Approaches to the management of constitutional conflicts in Kenya should ultimately be resolution rather than settlement-oriented. Resolution requires that root causes be addressed and the relationships between parties be legitimised without the imposition of behavioural patterns.¹⁷⁸ This is particularly vital for the issues in the review process which relate to fundamental structural anomalies in the constitution. The search for a resolution-oriented methodology has vital implications for effective negotiation strategies within the constitutional review process. The constitutional review process in Kenya has involved considerable negotiations which have been associated with various negotiation strategies. For negotiations to be compatible with the resolution of constitutional conflicts it is necessary for there to be a paradigm shift from a traditional negotiating paradigm of maximising one's self interest to a win-win paradigm. In the traditional negotiating paradigm the negotiating structure is perceived as zero sum where one party's gain means a loss for the other.¹⁷⁹

Negotiations in Kenya's constitutional conflicts have been complicated because many parties to the negotiations tended to view the issues as zero-sum. This paradigm is based on traditional thinking of negotiations where each side tries to maximise its own

¹⁷⁸ A.J.R. Groom, "Paradigms in Conflict: the Strategist, the Conflict Researcher and the Peace Researcher", op.cit.

¹⁷⁹ H.W. Jeong, *Peace and Conflict Studies: An Introduction* (Aldershot: Ashgate: 2000) pp. 170-172.

advantage and gain as much as it can, expecting that the gains will be at the expense of the other.¹⁸⁰ Adherents of this traditional paradigm tend to take a hard line in negotiations by arguing that by firmly holding to a desired position, negotiators will maximise their benefits.¹⁸¹ In this context making concessions is viewed as indicating weakness which will invite increased demands or rigidity from the opposing side. The unwillingness of individual parties to compromise their hard-line positions during negotiations has been one of the key obstacles to constitutional reform in Kenya.¹⁸² An attitude of compromise and willingness to occasionally make concessions is vital to making progress in addressing constitutional conflicts. The paradigm shift requires that each side's interest be satisfied without hurting the opportunity for the other side to achieve their goals. The best constitutional outcome would be to create a win-win situation in which all sides are better off than before.

The process of constitution-making in Kenya can be considered as one of managing constitutional and political conflicts within the polity, including those conflicts the process gave rise to.¹⁸³ Since the process of managing conflicts is a fundamental concern of modern diplomatic practice, the constitution-making process in Kenya can be characterised as a diplomatic process.¹⁸⁴ In the process of constitutional diplomacy in Kenya the issue of the common good has not been given insufficient emphasis. Searching for the common good implies that the dominant interests should not be those of political actors, but rather of the citizens of the republic. This is consistent with the social

¹⁸⁰ L. Kriesberg, *Constructive Conflicts: From Escalation to Resolution*, Second Edition (Lanham: Rowman and Littlefield, 2003) pp. 278-300.

¹⁸¹ Ibid.

¹⁸² Githu Muigai Interview, op.cit.

¹⁸³ M. Mwangi, "The Constitution was ours before we were the Constitution's: Framing the Normative Epistemology of Constitutional Diplomacy in Kenya", op.cit.

¹⁸⁴ Ibid.

contract between the governed and the governors.¹⁸⁵ The re-negotiation of this social contract implied by constitutional reform requires that the common good is still fundamentally upheld in the process. The process of constitutional diplomacy in Kenya therefore needs to be underpinned by moral values and ethical considerations. In this context it is vital to remember the considerations that initially gave rise to the need to overhaul the constitution.¹⁸⁶ Democracy, transparency and good governance cannot flourish on good intentions alone.¹⁸⁷ It is vital to establish a new set of principles, norms and institutional structures. That was and remains the promise offered to the Kenyan people by the second liberation which began in the 1990s.

The review process reveals different types of conflict present in Kenya society including political, ethnic and religious. These conflicts in turn manifested themselves during the constitutional review process. Thus the review process in a certain sense provides an opportunity to both understand and to some extent manage the different conflicts in Kenyan society. Indeed constitution-making can be seen as an instrument for conflict resolution.¹⁸⁸ However, to serve this role the constitutional review process should be well managed particularly in terms of providing a forum for mutually beneficial negotiations among different stakeholders in the process. Effective leadership of the process is also vital in achieving a legitimate and enduring outcome to the process.

The theoretical framework of structural violence used in the study underpins this critical analysis chapter and demonstrates how the critical issues could have been

¹⁸⁵ A discussion of this social contract is undertaken in Chapter Three.

¹⁸⁶ M. Mwangi, "The Constitution was ours before we were the Constitution's: Framing the Normative Epistemology of Constitutional Diplomacy in Kenya", op.cit.

¹⁸⁷ H.W.O. Okoth-Ogendo, "The Politics of Constitution-making in Kenya: An Introspective Survey", op.cit.

¹⁸⁸ Y.P. Ghai, "The Constitutional Reform Process: Comparative Perspectives", Paper Presented at a Workshop entitled *Toward Inclusive and Participatory Constitution-making*, 3-5th August, Kathmandu, Nepal.

resolved thereby addressing the *impasse* in the review process that emerged. Since the critical issues in the constitutional review process are a fundamental source of structural violence in Kenyan society, they support the fundamental argument of the study that understanding and resolving the structural sources of constitutional conflicts is vital to achieving the fundamental objectives of constitutional reform in Kenya.

Chapter Seven

Conclusions

Constitutional reform is fundamentally about evaluating an existing constitutional paradigm with a view to overhauling it. Such evaluation is necessary because the existing paradigm may have developed anomalies.¹ The conclusions of this study can be framed in terms of the quest to both evaluate and overhaul Kenya's existing constitutional paradigm in the period between 1997 and 2005 with unique insights from the theory of conflict. The study essentially explored the structural sources of constitutional conflicts in Kenyan society through the process and content debates relating to the existing constitution. This study applies structural violence as an analytical tool to analyse the constitution-making process in Kenya.

A constitution in this study is viewed as one of the most important paradigms defining relationships in society because, as Kelsen² notes, it is the *grund* norm among the community of legitimate laws. In a legal system which is a hierarchical ordering of various strata of legal norms when one traces the creation of individual norms, the regress ultimately leads to the *grund* norm or the constitution which is the ultimate basis of all validity. Constitutions also play a vital role in a democracy because they create the key institutions of the state which are the judiciary, the executive and the legislature.³ Given the importance of constitutions in democratic societies, an anomalous constitutional

¹ For a discussion on the overthrow of existing paradigms and how paradigms develop anomalies see T.S. Kuhn, *The Structure of Scientific Revolutions*, Third Edition (Chicago: University of Chicago Press, 1996) pp. 52- 135.

² H. Kelsen, *The Pure Theory of Law*, translated by B.L. Paulson and S.L. Paulson (Oxford: Clarendon, 1992) pp. 55-75.

³ K.C. Wheare, *Modern Constitutions* (London: Oxford University Press, 1966) pp. 1-13.

paradigm has far-reaching implications for the structure of relationships in society. Indeed an anomalous constitution can become a major source of structural violence in society. This is because structural violence, as conceptualised by Johan Galtung,⁴ exists when human beings are influenced so that their actual somatic and mental realisations are below their potential realisations. Thus anomalous constitutional paradigms are a species of structural violence in society. They are not the only contributor to structural violence in society because other structures such as inappropriate economic, psychological and religious structures are also species of structural violence.⁵

However, given the importance of the constitutional paradigm in defining social relations, an anomalous constitution can considerably impede individual and social development within a state. This is particularly the case because anomalous constitutions impede the realisation of basic human needs such as food, shelter and recognition.⁶ The study therefore establishes that constitutional conflicts are a fundamental source of structural violence in Kenya since the constitution does not adequately meet the needs and expectations of the society. The study also traces the origins of these anomalies to the amendment process of the Kenya constitution since independence which led to an increasing erosion of the principle of constitutionalism. The existing constitutional paradigm in Kenya is still suited to the reality of a one-party state. As a result of these constitutional anomalies Kenyan society conforms to Curle's⁷ "unpeaceful" society which re-conceptualises the traditional dichotomy between war and peace. Absence of

⁴ J. Galtung, "Violence, Peace and Peace Research" *Journal of Peace Research*, Vol. 3 (1969) pp. 167-191.

⁵ For a discussion of the various structures that generate conflict in society see M. Mwangi, *Conflict: Theory, Processes and Institutions of Management* (Nairobi: Watermark, 2000) pp. 1-35.

⁶ The relationship between human needs and conflict is discussed in J. Burton (ed) *Conflict: Human Needs Theory* (London: Macmillan, 1990).

⁷ A. Curle, *Making Peace* (London: Tavistock, 1971) pp. 1-26.

peace is characteristic of many situations which do not present overt conflict and in unpeaceful situations human beings are prevented from achieving their full development because of relationships in society. In such a situation “negative peace” may be said to prevail because although there is no behavioural violence relations are marked by structural violence.⁸ In the contrary situation of “positive peace” there are harmonious relationships between parties which are conducive to mutual development and structural violence has been brought to an end. Thus Kenya’s search for an alternative constitutional paradigm is viewed in this study as a search for positive peace.

Anomalous constitutions are also inherently conflictual since conflict is defined in terms of the incompatibility of objectives between two or more parties.⁹ Thus one can then speak of constitutional conflicts which arise particularly when parties attempting to change an anomalous constitution experience an incompatibility of objectives with parties who are in favour of the *status quo*. Anomalous constitutions also do not meet the expectations of a country’s citizens in a number of fundamental aspects such as the distribution of power and the distribution of resources. Since such constitutional conflicts are also intricately linked to structural violence one can then analyse the structural sources of constitutional conflicts. Constitutional debates have been entered into from many different perspectives including philosophical, political, legal and sociological. However, there is a dearth of scholarly literature that applies conflict theory to analysing constitutional debates. Such an approach is, however, important because once it is recognised that constitutional debates are essentially about the incompatibility

⁸ K. Webb, “Structural Conflict and the Definition of Conflict” *World Encyclopaedia of Peace*, Vol. 2 (Oxford: Pergamon Press, 1986) pp. 431-434.

⁹ A. de Reuck, “The Logic of Conflict: Its Origin, Development and Resolution” in M. Banks (eds) *Conflict in World Society: A New Perspective on International Relations* (Sussex: Harvester Press, 1984) pp. 96-111.

of goals, particularly with respect to power-sharing arrangements, then the diverse tools of conflict theory can be used to gain further insights into these constitutional conflicts with a view to achieving a sustainable resolution.

However, even the discipline of conflict management itself contains contending paradigms.¹⁰ Thus the strategist, peace research and conflict research paradigms make different assumptions about the nature of human beings and society at large. Although the perspective of structural violence is nested in the peace research paradigm, the study demonstrates that insights from the other paradigms are useful in understanding and addressing constitutional conflicts. Thus, for example, the role of perception which is considered as unnecessary for the existence of structural violence within the peace research paradigm because of its objectivist character is shown to be vital in affecting the intensity of constitutional conflicts because of the awareness that perception creates about those conflicts.

In addition, some of the differences in the paradigmatic approaches in conflict are themselves revealed in constitutional debates. For example, the strategist and peace research paradigm both advocate the use of force to address conflicts if necessary. Indeed, behavioural violence is seen as virtually inevitable in the peace research paradigm if structural conflict remains unaddressed for prolonged periods of time. However, the study argues that the violent overthrow of an existing constitutional paradigm does not necessarily lead to its replacement with a better paradigm. Indeed it is relatively easy to identify an anomalous paradigm but it is much more difficult to find a suitable replacement for such a paradigm. Non-violence therefore emerges as a viable

¹⁰ A.J.R Groom, "Paradigms in Conflict: The Strategist, the Conflict Researcher and the Peace Researcher" in J. Burton and F. Dukes (eds), *Conflict: Readings in Management and Resolution* (London: Macmillan, 1990) pp. 71-98.

alternative to the violent overthrow of an existing paradigm. Non-violence is also demands revolutionary change but restrains from using physical force on human beings.¹¹

This principle has to some extent been effectively applied in the Kenyan context by calling for mass action to pressurise incumbent regimes to initiate or sustain reforms. Such mass action, although peaceful in principle, has usually never been completely free of violence particularly because of the challenge that it represents to the *status quo* arrangements which those with vested interests are often prepared to defend. A key challenge is how to ensure that a structure put in place will be better than the existing one.

The struggle between *status quo* and pro-change actors is a defining feature of constitutional conflicts. Indeed, the actors in Kenya's constitutional conflicts can basically be classified into these two categories. The fundamental issues and interests in Kenya's constitutional conflicts revolve around the issue of power: how it is defined and allocated in a quest for hegemony. Power in turn gives considerable command over economic resources. The constitution is viewed as a primary instrument that defines how these power relationships are established. Given the complex ethnic diversity in Kenya, the way power relationships are defined affects the perceived gains and losses of different ethnic groups. Kenya's constitutional conflicts are a manifestation of the deep ethnic divisions that characterise Kenyan society. Thus balancing the interests of the forty two ethnic groups that make up Kenya is an extremely challenging task. Constitutional conflicts are particularly intense because of the zero-sum perceptions of certain actors in these conflicts. Zero-sum outcomes by their very nature are settlement-oriented because

¹¹ M. King, *Mahatma Ghandi and Martin Luther King Jr.: the Power of Non-violent Action* (Paris: UNESCO, 1999) pp. 240-280.

one party gains at the expense of another and the aggrieved party is likely to revive the conflict at a later time. The study establishes that the constitutional review process between 1997 and 2005 was overtly and covertly characterised by settlement rather than resolution methodologies. The move to resolution though desirable is extremely difficult to achieve because of the desire of *status quo* actors to control the constitution-making process so as to achieve a particular constitutional outcome.

Ultimately only resolution methodologies will address the root causes of the problem. However, these resolution methodologies will require parties involved in the process to seek a positive-sum rather than zero-sum outcome.¹² Only a positive-sum outcome can provide a new legitimate constitutional paradigm. However, for that to be achieved a legitimate process involving all relevant stakeholders is critical. Only a genuine constitutional review process can guarantee a legitimate constitutional outcome. This is the key to achieving progress despite the political obstacles that exist. Once a genuine and legitimate process is established for reviewing the constitution, the content will address the fundamental issues that motivated constitutional reform. The challenge will then become one of implementing such a positive-sum outcome. In this context greater awareness about constitutional debates is vital to ensuring effective implementation. Those with vested power interests in the *status quo* would never willingly implement a constitutional dispensation that would adversely affect their interests. In this context constant public pressure is a vital instrument for achieving the needed change. However, greater public awareness of the key constitutional issues is vital in this quest. Although structural violence in Galtung's original conceptualisation

¹² L. Kriesberg, *Constructive Conflicts: From Escalation to Resolution*, Second Edition (Lanham: Rowman and Littlefield, 2003) pp. 7-19.

are objective and do not need to be perceived in order to exist, subjective awareness is critical to the evolution and resolution of such violence. The importance of subjective perception is widely acknowledged. Perceptual processes may provide an accurate or inaccurate assessment of the conditions of social interactions, and they may also determine the extent to which parties see their situation as a win-lose or win-win one.¹³ Indeed it affects the dynamism and transformation of constitutional conflicts. The awareness of citizens is vital to the process and content of constitution-making. In this regard, civil society organisations and the media have played a vital role in transforming constitutional conflicts relatively low awareness to one of increasing awareness particularly of contentious issues.

The strength of a structural violence perspective is that it recognises that a constitution defines key relationships and institutions in society and thus affects the ability of individuals to attain their full potential. This perspective provides a vital linkage between constitutions, which are overtly legal instruments, and human development. The holistic perspective adopted by structural violence is also useful for analysing key societal trends in Kenya. However, the contention of a structural violence perspective on the objectivity of conflict is disputed in the study since subjective factors are also shown to be important in analysing constitutional conflicts in Kenya. The insights from the application of conflict theory are the main contribution of the study to understanding Kenya's constitutional reform discourse and how it can be adequately addressed.

¹³ J. Bercovitch, *Social Conflicts and Third Parties: Strategies of Conflict Resolution* (Boulder: Westview, 1984) pp. 21-22.

Appendix A: Questions administered by the researcher to interviewees.

Interview with Prof. Okoth-Ogendo, former Commissioner of the CKRC and Professor of Public Law, University of Nairobi, conducted on 1st December 2006, Parklands Campus, Faculty of Law, 3.30 P.M.

1. What do you consider as the main obstacles to undertaking a genuine constitution-making process in Kenya that reflects the needs and expectations of Kenyan society?
2. What do you consider as the essential ingredients in the process of effective constitution-making?
3. What have been some of the fundamental undercurrents in the debate over minimum and comprehensive constitutional reforms?
4. What is your view of the Inter-Parties Parliamentary Group (IPPG)? Did it in any significant way further the process of constitutional reform in Kenya? If so why? If not, why not?
5. What is your view on the inclusion of stakeholders in constitution-making? Who do you consider as vital stakeholders in constitution-making? Does all-inclusiveness not unnecessarily delay constitution-making and produce deep divisions?
6. Why has the issue of the time frame of the constitutional review process been controversial even within the CKRC itself?
7. You authored an article entitled "The Politics of Constitutional Change in Kenya since Independence, 1963 to 1969" in the *Journal of African Affairs* (1972). Are some of the issues you raised then still in evidence today on Kenya's political scene? Are there any meaningful ways to de-politicise the constitutional review process in Kenya so that the key issues that require reform can be adequately addressed?
8. Do you consider that there is an ethnic dimension to Kenya's constitutional conflicts? If so, are there any ways in which this dimension can be sufficiently overcome so as to allow for meaningful constitutional reform?
9. What have been some of the underlying reasons for the constitutional provisions to strengthen the power of the executive since independence?

10. Is the concentration of executive power the most fundamental content issue that need to addressed in Kenya's case?
11. What in your view is the best way to overcome this problem, to reduce executive power?
12. What do you consider as the main issues related to the judiciary that need to be addressed by the constitutional review process and how can this be best done?
13. What fundamental issues relating to the legislature should be addressed by the current constitutional reform process? How can this be best achieved?
14. What are some of the practical difficulties the CKRC experienced in the review process? Are there any insights that you gained as a CKRC commissioner that you would like to share?

**Interview with Prof. Yash Pal Ghai, Former Chairman of the CKRC,
10th December, 2006, 5.30 P.M, Serena Hotel.**

1. What, in your view, is the philosophical basis of constitutional reform?
2. What are the requirements, in your view, for constitutional reform to serve as a meaningful agent of social change?
3. In your article “the role of law in the transition of societies: the African experience” published in the Journal of African law(1991) and also in your earlier book Public Law and Political Change in Kenya you mention that in the post-independence period in many African states the constitutional frameworks shifted their bias towards instrumentalism. What in your view has accounted fundamentally for this trend towards authoritarianism in many Post-Colonial African states?
4. The Kenyan state has been a good example of the authoritarian trends you discuss in your article. What in your view and experience as CKRC chairman have been the greatest impediments to undertaking constitutional reform in the Kenyan context?
5. Kindly comment on the controversy about whether constitutions can be made in peace time or not.
6. In Kenya’s post-independence history do you think that we have missed any constitution-making ripe moments?
7. What is your view on the so-called contentious issues in the CKRC and Bomas Drafts? Is there any meaningful way in which consensus can be reached on these issues?
8. Do you believe that issues relating to the distribution of power by the constitution are the centrepiece of constitutional conflicts in Kenya?
9. What role do you think that parliament should play in the review process given the tendency for party and sectarian interests to dominate politician’s perspectives on the review process?
10. Do you agree with the view that referendums are controlled and pro-hegemonic in the sense that governments will only submit issues to referendums if they are certain they will win? Was a referendum necessary in Kenya’s case?
11. What are the key components of the alternative draft you are proposing? How does it differ from the previous CKRC and Bomas drafts?

12. What is your view on violence versus non-violence as means of changing oppressive social structures?
13. Which in your view are the most useful constitution-making experiences of other countries that Kenya can benefit from?
14. Are there any insights that you gained into Kenya's constitutional conflict and Kenyan society as a CKRC chairman that you would like to share?

Interview with Prof. Githu Muigai, Commissioner of the CKRC and Associate Professor of Law, University of Nairobi, 11th December 2006, 2.30 P.M.

1. Kindly elaborate on your viewpoint made in the article you authored in the East African Journal of Human Rights and Democracy that the demand for far-reaching constitutional change has often been circumscribed by the complexity of having to carry out the changes within the procedures and processes of the existing constitution.
2. In your view can fundamental constitutional changes be made effectively in peace time and within an existing constitutional order? What conditions should be present for effective constitution-making?
3. What conditions in your view should be present for effective constitution-making to take place?
4. Comment on the tendency for authoritarian regimes that disregarded the tenets of constitutionalism to emerge in many newly independent African states.
5. What was the rationale behind constitutional amendments in Kenya to remove the majimbo system?
6. Kindly comment on the political undercurrents behind the constitutional amendments in Kenya to strengthen executive power since independence.
7. Do you agree with the view that despite the repeal of section 2A Kenya's existing constitution still fundamentally reflects a one-party state structure.
8. What is your view on the so-called contentious issues in the CKRC and Bomas drafts? Is there any meaningful way consensus can be reached on these issues.
9. Do you think there is an ethnic dimension in Kenya's constitutional conflicts?
10. Who in your view are the key stakeholders in the constitutional review process and what is the best way to have a participatory process, while at the same time overcoming the challenges of involving too many stakeholders which can sometimes be divisive?
11. Just to develop on that a bit, with the benefit of hindsight now what do you think is the best way the process should have been undertaken? Should it have been concentrated more on experts themselves or should parliament have had more of role? Because the problem with parliament is that there are many partisan and sectarian

interests there. Or was it well managed? The views were well collected and it was participatory in that sense. When you look back at it what would you think should have been done differently?

12. Are there any insights you gained into Kenya's constitutional conflicts and Kenyan society as a CKRC Commissioner that you would like to share?

Interview with Dr. Willy Mutunga, Former Executive Director, Kenya Human Rights Commission, 13th December, 2006.

1. What were the fundamental issues that led to the agitation for constitution reform in the 1990s in Kenya?
2. What role did the Kenya Human Rights Commission play within the Coalition for National Convention?
3. The CNC suggested that 1962 Independence Constitution be adopted on the basis that the existing constitution had been subjected to many amendments since 1963. Did the independence constitution also itself not have certain weaknesses? What the idea behind the proposed national convention of CNC.
4. In your article “Building Popular Democracy in Africa: Lessons from Kenya” you argue that the political parties, religious groups and their leaders and the international community had vested interests in the status quo. What were these interests?
5. What were the respective platforms and stands of the Citizens’ Coalition for Change Model Constitution, the National Convention Planning Committee and the National Convention Assembly?
6. What the undercurrents behind President Moi’s pronouncement that he would invite foreign experts to undertake the constitutional review process?
7. What were some of the challenges faced by the 4Cs in 1995 as it tried to engage different stakeholders in the constitution-making project?
8. What were undercurrents behind the drive for minimum constitutional reforms in 1996?
9. What was the basis of the title of your book constitution-making from the middle? Did this reflect a certain belief about the way the constitution-making process should be carried out?
10. What is the legal basis for mass action in agitating for constitutional reform in Kenya been? Is such non-violent civil disobedience preferable to violent means to change an unjust social order?
11. What is your appraisal of the IPPG initiative? Did it significantly further constitutional reform in Kenya?
12. What in your view and experience have been the fundamental obstacles to undertaking genuine constitutional reform in Kenya?
13. What are the essential ingredients for effective constitution-making?
14. What is your view of the so-called contentious issues in constitution-making? Do you consider that consensus can be reached on these issues?

**Interview with Dr. PLO Lumumba, Former Secretary of the CKRC,
15th December, 2006.**

1. What do you consider as the main obstacles to undertaking a genuine constitution-making process in Kenya that reflects the needs and expectations of Kenyan society?
2. What do you consider as the essential ingredients in the process of effective constitution-making?
3. Kindly comment on the controversy regarding the entrenching the constitutional review process into the constitution?
4. What were some of the fundamental challenges of the Bomas national constitutional conferences?
5. What is your view on the role of referendums in the process of constitution-making? Was this role effectively played by last year's referendum in Kenya?
6. What is your view on the so-called contentious issues within the review process?
7. In relation to land and property, what are the weaknesses of the provisions of the existing constitution? How can these weaknesses be overcome?
8. What about the provisions relating to public finance in the existing constitution? Is there room for improvement?
9. Can some of the constitutional conflicts in Kenya be better understood by considering the broader context of African or developing states? Are there any useful lessons to be learnt from the constitutional reform experiences of other developing states?
10. What were some of the practical difficulties the CKRC experienced in the review process? Are there any insights that you gained as a CKRC commissioner that you would like to share?

Interview with Prof. Patricia Kameri-Mbote, Member of the Eminent People's Commission on Constitutional Review and Associate Professor of Law, University of Nairobi, 28th December, 2006, 11.15 A.M.

1. As a member of the eminent person's commission on constitutional reform what did you perceive as some of the fundamental obstacles in the constitutional review process in Kenya?
2. What do you consider as essential aspects of effective constitution-making in a country?
3. What is your view regarding the making of fundamental constitutional changes in peace time?
4. When you look back at Kenya's constitutional review process, do you feel the review process was adequately designed? If so why? If not, what were its shortcomings?
5. Are there, in your view, any vested interests in maintaining the existing constitutional structure?
6. What, in your view, are some of the undercurrents in the debate over minimum and comprehensive constitutional reforms?
7. In relation to land and property, what are the weaknesses of the provisions of the existing constitution? How in your view can these shortcomings best be addressed?
8. What other fundamental content issues do you feel need to be addressed in the constitutional review process?
9. What is your view on the role of referenda in constitution-making? Was this role adequately played in last year's referendum?
10. What is your view on the successive constitutional drafts: the CKRC draft, the Bomas draft and the Wako draft? Do you feel any of these adequately captured the main issues that motivated constitutional reform in Kenya?
11. Are there any lessons you think we can draw from constitution-making experiences in other countries for our Kenyan process?
12. Are there any other insights on Kenyan society or the process based on your participation that you would like to share?

Interview with Ambassador Bethwell Kiplagat, Former Chairperson for the Eminent Persons Committee on Constitutional Reform, 10th January 2007.

1. In your experiences as chairman of the Eminent persons Committee what do you consider as the main obstacles to constitutional reform in Kenya over the last decade?
2. What did the constitutional review process reflect about the different types of conflict in Kenyan society?
3. Do you consider that ethnicity revealed itself at different stages in the constitution-making process?
4. What is your opinion on the so called contentious issues in the review process?
5. What were the main recommendations your committee made on the best way to resolve the stalemate?
6. Are there any additional insights you would like to share on the constitutional review process?

Interview with Prof. Wanjiku Kabira, Former Vice-Chairperson of the CKRC, 12th January 2007 in Nairobi.

1. What do you consider as the fundamental obstacles in the constitutional review process?
2. To what extent did ethnicity manifest itself during the review process?
3. What do you consider as the essential ingredients in effective constitution-making?
4. What were the key concerns raised by the citizens during the review process?
5. What is your view of the successive constitutional drafts?
6. Kindly comment on some of the practical difficulties the CKRC experienced in the review process.
7. Are there any other insights that you gained as a CKRC commissioner that you would like to share?

Interview with Ms. Abida Ali Aroni, Chairperson of the CKRC after Yash Pal Ghai, Monday, 5th February, 2007, Nairobi.

1. What in your view were the fundamental obstacles to constitution-making in Kenya?
2. What do you consider as the essential elements in a people-driven constitutional review process?
3. What is your view about the design of the review process? Could it have been better designed to facilitate a more effective process?
4. What do you believe were the fundamental content issues that the review process needed to address?
5. What is your view of the successive constitutional drafts: the CKRC draft, the Bomas draft and the Wako draft? What were their strengths and weaknesses?
6. Do you think ethnicity was manifested during the review process?
7. Are there any additional insights you got into Kenyan society from your involvement in the review process?

**Interview with Prof. J.B.Ojwang, Professor of Constitutional Law,
University of Nairobi and Judge of the High Court of Kenya, 23rd
February, 2007.**

1. Kindly comment on the trend towards authoritarianism and the erosion of constitutionalism in the Post-Colonial constitutional development of many African states.
2. In your book *Constitutional Development in Kenya: Institutional Adaptation and Social Change*, you make the argument that the circumstances of African states should be incorporated into the scheme of public institutions. Has this not permitted autocratic rulers to take advantage by citing unique circumstances?
3. Were there any unique constitutional realities that explained the key amendments in the post-independence period?
4. What are the essential ingredients in effective constitution-making?
5. What is your opinion on the debate about whether constitutions can be made in peace time or not?
6. What do you consider as the main obstacles to constitution-making in the Kenyan context?

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