

**Kenya Constitutional Documents: A Comparative Analysis
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Abstract

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

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

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

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

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

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