Ten Years On

Assessing the Achievements of the Constitution of Kenya 2010

Yash Pal Ghai Emily Kinama
Jill Cottrell Ghai
(Eds)

Ten Years On

Assessing the Achievements of the Constitution of Kenya 2010

Edited by

Yash Pal Ghai Emily Kinama
Jill Cottrell Ghai

KATIBA Institute
Constitution as an Instrument of Change

TEN YEARS ON: ASSESSING THE ACHIEVEMENTS
OF THE CONSTITUTION OF KENYA 2010
Published by Katiba Institute
5, The Crescent, (off Parklands Road), Nairobi, Kenya
Postal address: P.O.Box 26586-00100, Nairobi Kenya.
Email address: info@katibainstitute.org
Mobile +254 704 594 962.

ISBN 978 9914 40 610 8

Cover design and layout by John Agutu
Email: agutujo@gmail.com

Printed by Chrome Partners

Published 2021

Katiba Institute:
Website: www.katibainstitute.org
Contacts: House No. 5, The Crescent, Off Parklands Road, Nairobi
Tel.: (+254) 704 594962; 704 594963
Postal address: PO Box 26586 – 00100
Email: info@katibainstitute.org

Contents

Foreword

In August 2017, like many Kenyans, I made my way to my local voting station, and cast my vote in the country's second general elections under the 2010 Constitution. Not because I was assured about the integrity of my vote, but I hoped that it mattered. This was, once again, occurring in a polarized, charged, and oft chaotic and violent context. Prior to this event, there had been a raft of changes made to the electoral law, through the legislature and the judiciary. However, as was evidenced by the aftermath of the general election day, those changes once again did not have the desired effect.

The events that followed that election day, related to the position of president, can be interpreted in different ways. These were the nullification of the presidential election results, calling fresh presidential elections, boycott of the fresh elections by the leading opposition party, the months of mass protests that followed, and finally the political settlement in the name of 'Building Bridges Initiative to a New Kenya' (BBI). Some will say the nullification of the presidential elections results signifies that the Constitution is working, that the Supreme Court did exactly what it was set up to do in terms of settlement of political disputes. Others will say the decision was a terrible indictment of the Independent Electoral and Boundaries Commission (IEBC): that after material and skills investment, we still do not have a properly functioning electoral body. Others still will say that we can't blame IEBC, that it was set up to fail, there must be an enabling political and social environment for IEBC to succeed and that was not there in 2013 and 2017. Therefore others will say that the lack of an enabling political environment to ensure the proper working of the IEBC and indeed other institutions involved in ensuring a free and fair elections is a failing of Chapter 6 of the Constitution. That the Leadership and Integrity Chapter failed to provide us with leaders with the correct moral and professional aptitude to shepherd the growth of a new republic. And ultimately others will say that the 2010 Constitution still does not enable Kenya to change government regimes peacefully, hence the extra-constitutional

political settlement, BBI. BBI provides fresh challenges to Kenya's democratic order. One thing this settlement did was to kill the official opposition, weakening the ability of Parliament to hold the executive accountable for use of public power. The above descriptor is provided for illustrative purposes in the sense that such an analysis is true for almost every chapter of the Constitution, if not all. We see progress in some areas and clawbacks in some. So that the full picture is of an incomplete transition process from the old order to what Kenyans hoped would be the new order.

The 2010 Constitution provided a general roadmap for its implementation in its Fifth Schedule. It was anticipated that the full raft of laws and institutions to ensure effective working of the Constitution would be passed at most within 6 years of its adoption. The Constitution mandated the creation of institutions to assist in a successful transition, such as the Transition Authority (under the Transition to Devolved Government Act, 2012), and the Commission for the Implementation of the Constitution (established under the Constitution and a 2010 Act). Both these commissions wound up within 5 years of the passing of the Constitution and their final reports provide an assessment resembling that in this book – that of an incomplete transition. At the time of publication of this book, it is 11 years since the adoption of the 2010 Constitution. During the 11 years of its existence, there have been about 12 attempts to amend several provisions of the Constitution, mostly as it relates to powers and privileges of members of Parliament.

Within that time there have also been 3 attempts to amend the Constitution by popular initiative, the Okoa Kenya initiative led by the leader of the Coalition for Reforms and Democracy, Hon. Raila Odinga, in 2016, the Punguza Mizigo Initiative, by the Thirdway Alliance Kenya leader Dr. Ekuru Okot, in 2019, and the BBI initiative (2020) led by President Uhuru Kenyatta and Hon. Raila Odinga, following their political settlement in 2018. The last represents the most serious attempt to amend the Constitution. These political actors have maintained that Kenya is in another constitutional moment and it is time we looked at amending our Constitution.

Whether or not the political context in Kenya from 2018 to date, 2021, was amenable to an honest and fact based assessment of the need to amend the Constitution is a discussion for another day. Whereas there is no benchmark or best practice on when to amend a constitution, in its over 200 years history, the American Constitution has only been amended about 27 times. There may be value in stating that a sufficient amount of time must elapse between the passage

of the constitution and any proposal to change it. Within that time there will have been generation of evidence to indicate what works best and what doesn't and thus has to be changed somewhat. Well, it's been 11 years now and, against the background of calls to amend the Constitution, Katiba Institute felt it would be worthwhile to have an analysis of where Kenya is in the process of implementation of its constitution. As has been noted in the Preface, this process began in 2018, not only to inform the discussion on the need for evidence based amendments to the Constitution, but also to inform the push to full implementation of the Constitution. This study offers just a snapshot of the possibilities of such an assessment; a more thorough assessment of such nature would need to be carried out in any officially sponsored and financed process, involving effective public participation. Hopefully such a process would lead to the establishment of a new schedule to full implementation of the constitution. Only such a framework, and its effective management, would lead to realisation of the ideals, values, principles and standards of governance, and human rights fulfilments contained in the 2010 Constitution; And to forestall future extra-constitutional agreements to settle leadership disputes, and destruction such as they have wrought to Kenya's economy and the psyche of Kenyans. The truth is that until the Constitution as it is now has been properly implemented Kenyans will not really understand what it says and what its potential is, nor whether it really needs amendment.

Katiba Institute extends its gratitude to the authors of the various chapters of this book, for their time and effort, and patience, in its development and to the Open Society Initiative for Eastern Africa for their financial support in publishing it.

Christine Nkonge
Executive Director, Katiba Institute
November 2021

Preface and Acknowledgements

This book seems almost as long in the preparation as the Constitution! The first contributions seem to have been dated 2018.

It would be tedious to relate all the reasons for the delays—but we apologise to the authors and to our prospective readers.

Some readers got a foretaste in 2019 when the editors of *Awaaz Magazine* published shorter versions of ten of the chapters. We are grateful to them. This version, we are afraid, has no illustrations—or at least no cartoons.

We just invited a number of people with expertise in particular aspects of the Constitution to write a short piece (originally we said 4,000 words but upped it to 5,000 or even a bit more) and gave them no hints about direction. It was striking to us how little fault they found in the Constitution as such. A few suggested a small number of possible changes. But most felt that the main issue was failure of implementation.

This fitted with views we received from citizens in some audit workshops in 2019. Most of a piece from Katiba Corner in the *Star* newspaper arising from those events is part of the Epilogue to this book. Wananchi focused on many things – but changing the Constitution was not one of them. It became clear to them and to us that carrying forward the vision of the Constitution with energy, commitment and speed was what was needed.

Meanwhile some in the political class were having other ideas. As this is proofread, the Court of Appeal has upheld the High Court judgment in the main Building Bridges Initiative cases. The focus in those cases is on the proposals to change the Constitution. The case is going to the Supreme Court. The Epilogue was put together when judgment in the Court of Appeal was awaited. Even if the Supreme Court disagrees with the lower courts it will probably be too late to amend the Constitution before the elections.

This is not intended to be an academic book. It is intended to be a book reflecting the expertise and the views of the contributors. Some of these are lawyers, some academics, some NGO workers, one a priest. Their styles are different. We have tried to respect academic standards by giving correct citations to sources. These include internet addresses (urls) for most sources that are available in that way. Rather than giving very long internet addresses that are almost impossible to copy accurate from a printed sources, most long urls have been changed to short ones using "tinyurl".[1] We have departed from proper academic practice by not saying "accessed on …[date]".

There is no index, but the contents pages are full. And at the end of the book there is a list of all the Articles of the Constitution mentioned, and the pages where you will find the mentions. You should find it relatively easy to find the points that interest you. There is also a list of Kenyan cases referred to in the book, so if you know there is a particular case on a point you can find what is said about the case easily.

A few points do not have separate identifiable chapters—notably corruption. The word appears 100 times in the text! You might say it is pervasive—as it is in Kenyan society.

Not all rights are discussed in detail. There is a regrettable lack on the issue of persons with disability. But again rights are pervasive, and most feature at some point in the book (as can be traced from the list of Constitution Articles).

Finally—we are grateful first and foremost to the authors for their contributions and the work, knowledge and thought that went into them. Then for their patience and co-operation.

And we gratefully acknowledge our donors especially Open Society Initiative for Eastern Africa (OSIEA) for a grant for printing. And we thank the book designer John Agutu.

The Editors

[1] For that useful service see https://tinyurl.com/app/.

List of Abbreviations

AG	Attorney-General
BBI	Building Bridges Initiative
CAJ	Commission on Administrative Justice
CBK	Central Bank of Kenya
CIC	Commission for the Implementation of the Constitution
CIDP	County Integrated Development Plans
CJ	Chief Justice
CKRC	Constitution of Kenya Review Commission
CoE	Committee of Experts
CORD	Coalition for Reform and Democracy
CRA	Commission on Revenue Allocation
CRC	Convention on the Rights of the Child
CS	Cabinet Secretary
DORA	Division of Revenue Bill or Act
DP	Deputy President
DPP	Director of Public Prosecutions
EACC	Ethics and Anti-Corruption Commission
EIA	Environmental impact assessment
ELC	Environment and Land Court
EMCA	Environmental Management and Coordination Act
ESCR	Economic social and cultural rights
FIDA	Federation of Women Lawyers
IBP	International Budget Partnership
ICESCR	International Covenant on Economic, Social and Cultural rights

IEBC	Independent Electoral and Boundaries Commission
IG	Inspector-General (of Police)
IPOA	Independent Policing Oversight Authority
JSC	Judicial Service Commission
KDF	Kenya Defence Forces
KICA	Kenya Information and Communications Act
KLRC	Kenya Law Reform Commission
KNCHR	Kenya National Commission on Human Rights
KPS	Kenya Police Service
LAPSSET	Lamu Port-South Sudan-Ethiopia Transport Corridor
MCA	Member of a county assembly
MCK	Media Council of Kenya
NCIC	National Cohesion and Integration Commission
NEMA	National Environment Management Authority
NET	National Environmental Tribunal
NGEC	National Gender and Equality Commission
NHRP	National Human Rights Policy
NIS	National Intelligence Service
NLC	National Land Commission
NLP	National Land Policy
NPS	National Police Service
NPSC	National Police Service Commission
ODM	Orange Democratic Movement
ODPP	Office of the Director of Public Prosecutions
PFM	Public financial management
PM	Prime minister
PSC	Parliamentary Service Commission
SDGs	Sustainable Development Goals
SEA	Strategic Environmental Assessment
SRC	Salaries and Remuneration Commission
TJRC	Truth, Justice and Reconciliation Commission
TSC	Teachers Service Commission
UHC	Universal Health Coverage

About the Authors

Eva Maria Anyango Okoth is a Programme Officer with Natural Justice*. Prior to her appointment, she served as a Legal Fellow at the same organisation, a position she earned on merit after winning the Extractives Baraza Moot Court Competition in February 2018. Eva Maria is an Advocate of the High Court of Kenya and holds a Master of Laws in Public International Law. She brings to the table her technical and legal expertise in human rights, climate change and environmental justice.

*As a team of pioneering lawyers and legal experts, Natural Justice specialises in human rights and environmental law in pursuit of social and environmental justice for communities in Africa.

Rose J. Birgen is a Senior Programme Officer with Natural Justice- Nairobi Hub. She works on cross-cutting issues across all programmes. She also oversees the legal empowerment programme, where she provides guidance and oversight to the community environmental legal officer team, comments on relevant laws and project impact assessments. Rose has expertise in environmental impact assessments and strategic environmental assessments. She is an advocate of the High Court of Kenya, holding an LL B from Moi University, a PG-Dip from the Kenya School of Law and an LLM from the University of Cape Town.

Father Gabriel Dolan is an Irish missionary priest who has been in Kenya since 1982. Currently he works in Mombasa and is the Executive Director of Haki Yetu. He is also a board member of the Kenya Human Rights Commission as well as Katiba Institute. In the past he has been a regular columnist with the *Saturday Nation* newspaper and later the *Sunday Standard.* But he gave up his column in each case. He has a strong commitment to human rights, especially freedom of speech – shown by his ending his connection with each newspaper over that issue – and the rights of the marginalised, including against land grabbing.

Jill Cottrell Ghai is a retired law lecturer. She holds LLM degrees from the University of London and Yale University. After formal retirement she has had experience in advising on constitution making processes in several countries. She is one of the founder of Katiba Institute, and is now chair of its board of directors. She spends a good deal of her time researching, writing and editing for Katiba Institute. With Yash Pal Ghai she wrote *Kenya's Constitution: An Instrument for Change* (the second edition of which has just appeared).

Yash Pal Ghai was born in Ruiru, not far from Nairobi. He is best known in Kenya as the chair of the Constitution of Kenya Review Commission, which was in charge of the first phase of making Kenyan's current Constitution**.** To lawyers he is also known as the co-author of the best known book on Kenya's first Constitution: *Public Law and Political Change in Kenya* (1971). He taught law at universities in five continents, and has authored or edited nearly 20 books and written nearly 200 articles and book chapters. He has advised on many other constitutions. He holds degrees from the University of Oxford and Harvard University including the Doctor of Civil Laws from the former (based on three decades of published work).

Cicilia W Githaiga is an advocate of the High Court of Kenya and both practises as an advocate and is a Consultant at Veridis Environment and Natural Resources Solutions Ltd. Previously she worked at Natural Justice as Programme Manager for 1 year and 3 months after serving as legal officer and senior legal officer at the National Environment Management Authority in Kenya for a 8 years and 4 months. Before this, she engaged in active private practice/litigation for five years. She is now a trained Environmental Impact Assessment Expert, and is undertaking a master's degree in Environmental Policy. She undertook research on climate change in Germany at the Institute for Advanced Sustainability Studies in Potsdam, Germany on an Alexander von Humboldt Climate Protection Fellowship, and she holds an MA in Environmental Policy (CASELAP-UoN) in addition to her qualifications in law.

Lotte Hughes is an historian of Africa and empire, with a Kenya specialism. She was formerly Senior Research Fellow at the Open University (OU). Since retiring at the end of 2017, she has become an independent scholar. Research interests include cultural and land rights, heritage, indigenous peoples, the politics of identity, FGM and strategies to prevent it, memory and memorialization, including

that relating to Mau Mau. Before becoming a scholar, she spent 23 years as a journalist and editor, and still writes occasionally, mostly for the Kenyan media. Her recent research (as Principal Investigator of a team) focused on the exercise of constitutional cultural rights in contemporary Kenya. The project – Cultural Rights and Kenya's New Constitution – was funded by the UK Economic and Social Research Council, and ended in September 2017.

Nkatha Kabira is a Senior Lecturer at the University of Nairobi, School of Law and a post-doctoral Fellow at the Ife Institute for Advanced Studies, Ile Ife, Nigeria. She completed her doctoral degree at Harvard Law School in May 2015 and has since been working towards converting her doctoral thesis on the Place of Commissions in Law and Governance in Kenya into a book. She has professional and research experience in several areas ranging from law and language to democracy and governance and to gender and the law. As well as the Harvard doctorate she holds an LLB. from the University of Nairobi and an LLM from Harvard. She has received several awards in recognition of excellence in teaching. She has been associated with various institutions of legal teaching and research internationally including being *Iso Lomso* ("eye of tomorrow") Fellow, Institute of Advanced Studies, Stellenbosch, South Africa.

Tom Kagwe served for six years as a Board Member of the Independent Policing Oversight Authority (IPOA). He possesses a Master of Arts Degree in International Studies from the University of Nairobi, and has wealth of practical and theoretical experience in the fields of human rights, security sector and general governance. He has authored many papers, written several book chapters and edited and reviewed numerous publications in the human rights and governance sector. The views contained in his contribution to this books are those of the author and therefore, do not reflect those of IPOA, or the inaugural Board.

Francis Kariuki is an advocate of the High Court of Kenya and a lecturer at the Strathmore University Law School. He holds a Bachelor of Laws (LLB) and a Master of Laws degree (LLM) from the University of Nairobi, and a Doctor of Philosophy (PhD) from the University of the Witwatersrand, South Africa. He is a Fellow of the Chartered Institute of Arbitrators (CIArb) London and Kenya, and is an experienced arbitrator and an accredited mediator. He is also a listed arbitrator and mediator with the Nairobi Centre for International Arbitration in Kenya, and

a member of the Strathmore Dispute Resolution Centre. He is accredited as a mediator by the Mediation Accreditation Committee under the Kenyan Judiciary. His research interests are in land law, traditional knowledge, environmental law, Alternative Dispute Resolution, and traditional justice systems.

Emily Kinama is a research and litigation counsel at Katiba Institute (KI). She holds a LLM (International Law) degree and a LLB degree from the University of Pretoria, where she was also a research associate. Professionally, Emily is an Advocate of the High Court of Kenya. Previously she served as a law research clerk at the Supreme Court of Kenya and the Constitutional Court of South Africa. She has a passion for human rights law and social justice and has published journal articles on access to justice, cultural rights, women's rights and environmental law. She conducts public interest litigation on socio-economic rights, women's rights, children's rights, environmental rights, and community land rights.

Henry O Maina is a public and social policy analyst and governance specialist passionate about addressing global justice issues. He is an experienced independent Consultant with a demonstrated history of working in the civic and social organization industry. He has appeared in many international and national media outlets including BBC, CNN, Al Jazeera, and VOA as well as writing many commentaries and opinion pieces on topical human rights and governance issues. He holds a Master of Laws degree in International Development Law and Human Rights from the University of Warwick. His policy and research areas of interest include media regulation, access to information, data protection, cybersecurity, hate speech and anti-corruption. He founded and for a decade led ARTICLE 19 Eastern Africa into one of the lead organizations with cutting edge impact on freedom of expression in 14 Eastern Africa Countries. Previously he had worked as Deputy Director, Legal Resources Foundation Trust and pioneered programmes on prison paralegalism and human rights education. He is a member of the Kenya Media Complaints Commission.

Allan Maleche is the Executive Director of Kenya Legal and Ethical Issues Network on HIV and AIDS (KELIN)*. In 2016, he was named Kenya's Pro Bono Lawyer of the Year. In the same year, he was listed as one of the Top 40 under 40 men in Kenya's *Business Daily*. In 2018, he was honoured as the fourth recipient of the prestigious Elizabeth Taylor Human Rights Award, during

the 22nd International AIDS Conference in Amsterdam, Netherlands A former fellow at the FXB Center for Health and Human rights at the Harvard T.H. Chan School of Public Health, Allan holds a Bachelor of Laws from the University of Nairobi, and a post graduate Diploma in Gender and Human Rights from Uppsala University. His research and writing has appeared in peer-reviewed academic journals, including the *Lancet*, *Harvard Health and Human Rights Journal*, and *Health Research and Policy Systems*. Allan is a practising lawyer and human rights activist with over fourteen years' work experience in the field of law, ethics, governance, policy, health and human rights related issues.

* KELIN (Kenya Legal & Ethical Issues Network on HIV and AIDS) was formed in 1994 and registered as a Non-Governmental Organisation (NGO) in 2001. While originally created to protect and promote HIV-related human rights, its scope has expanded. Its goal is to advocate for a holistic and rights-based system of service delivery in health and for the full enjoyment of the right to health by all, including the vulnerable, marginalized, and excluded populations.

Abraham Rugo Muriu is the Country Manager of the International Budget Partnership Kenya*. Prior to joining IBP in July 2017 he worked at the Institute of Economic Affairs (2007-2013) and as a public sector consultant (2014-2016). He has a wealth of experience working in decentralization, participatory governance, and public finance management in Kenya. He holds Master's and Doctoral Degrees in Public Management from the University of Potsdam, Germany. He has a passion for home grown solutions to society problems and works to localize and personalize policy matters that are otherwise complicated.

*IBP Kenya focusses on increasing public understanding of and engagement with budgets with a focus on transparency, accountability, participation and equity. It engages with civil society, media and government at both national and county level. Its work consists of collaborative research, capacity building, advocacy and reflective learning.

Lucyline Nkatha Murungi holds LLB (Moi), LLM (Uiv of PretoriaP), and LLD (University of the Western Cape) degrees. She is currently the Assistant Director, Centre for Human Rights at the University of Pretoria, and oversees the Centre's women's rights, disability, and children's rights Units. Dr. Murungi is an advocate qualified to practice law in Kenya, and a senior lecturer and researcher in human rights with a keen focus on the rights of vulnerable groups such as children, women,

and persons with disabilities, as well as sexual and reproductive health rights. She has extensive experience in pan-African human rights policy, programming and advocacy, civil society engagement, working with the African Union and its mechanisms, as well as human rights research, particularly in Africa.

Jessica Musila has a BA in Communication from Daystar University and a Master of Public Policy (MPP) from the University of Erfurt, Germany. She is a policy analyst and communication specialist, passionate about addressing societal inequalities and ensuring the public has responsive governance. At the time of writing this chapter she was Executive Director of Mzalendo Trust,* but is currently the Founder and Lead Consultant of Shomer Consulting.

* Mzalendo is a non-partisan project with the mission to 'keep an eye on the Kenyan parliament.' Its site seeks to promote greater public voice and enhance public participation in politics by providing relevant information about Parliament and its activities.

Walter Khobe Ochieng is a Lecturer at the Department of Public Law, Moi University and an advocate of the High Court. He is also a fellow of the centre for jurisprudence and Constitutional Studies at Kabarak University, and an active practising advocate. He holds an LLB degree from Moi University and an LLM from in Human Rights and Democratisation from the University of Pretoria. His research interests include constitutionalism, human right, Third World approaches to international law and African legal thought. He is a prolific author, particularly on constitutional issues, in local journals.

Nicholas Orago is a European Union Horizon 2020 Marie Curie Fellow and a holder of degrees of LLB (Nairobi) LLM (Pretoria) and LLD (Western Cape). He is currently a Senior Lecturer, School of Law, University of Nairobi and the Executive Director at the Economic and Social Rights Centre-Hakijamii*. His Ph.D. topic was *Poverty, inequality and socio-economic rights: A theoretical framework for the realisation of socio-economic rights in the 2010 Kenyan Constitution*. He also has a Post-Doctoral Diploma in Law on the Justiciability of Economic, Social and Cultural Rights: Theory and Practice from the Institute for Human Rights, Åbo Akademi University, Turku Finland, 2014 and has undertaken Post-Doctoral Fellowships with the University College Cork in Ireland, the Centre for Law and Social Transformation of the University

of Bergen, Norway, and the Centre for Environment and Development of the University of Bern, Switzerland. He is an advocate of the High Court of Kenya. He has several publications on economic social and cultural rights in Kenya that could be accessed at https://scholar.google.com/scholar?hl=en&as_sdt=0%2C5&q=nicholas+wasonga+orago&oq=Nicholas+wasonga+or

* A National Human Rights Organization that works with marginalized groups to support them to claim their economic and socio-cultural rights.

Smith Ouma is a PhD Researcher, Centre for Law and Global Justice - University of Cardiff, Wales, where he does some teaching. He has in the past taught land law at Strathmore University, Nairobi, and conducted research on various areas in land and health law. His PhD focusses on how participatory planning approaches can enable communities within informal settlements to improve their health outcomes. He holds a Bachelor of Laws (LLB) degree of the University of Nairobi, and a Master of Laws of Loyola University, Chicago. He is also an Advocate of the High Court of Kenya.

Tabitha Saoyo holds an LLB (Moi University), Post Graduate Diploma (Kenya School of Law), and LLM (University of Pretoria). She is an advocate of the High Court of Kenya with over eight years' experience navigating the policy, human rights, health and governance spaces in East Africa. Her special bias is in Sexual and Reproductive Health Rights, particularly having engaged in programmes targeted at addressing unsafe abortion, sexual violence, forced sterilisation and teen pregnancies. Professionally, Saoyo has worked in private practice, served at the Federation of Women Lawyers-Kenya and consulted for UNDP in contextualizing HIV and the linkages to sexual and gender based violence. Until recently, she was the Deputy Director and Head of Programmes at KELIN. She is currently a doctoral researcher at the University of Cardiff, School of Law and Politics in Wales.

Seema Shah holds a PhD, University of California, Los Angeles. She just taken up a post at International Idea in Stockholm, as Head of Democracy Assessment. Immediately before that she was she was Regional Research and Strategy Specialist for the International Rescue Committee, based in Amman. Before that she was Director of Research at Kura Yangu Sauti Yangu in Nairobi, where she conceptualized, led and implemented a research and advocacy agenda and work-

plan for the promotion of electoral integrity in Kenya, with a specific focus on the 2017 election.

Ben Sihanya holds a JSD degree from Stanford University in the USA – after having obtained his LLB degree from the University of Nairobi), and LLM from the University of Warwick, UK. He is now Professor of Intellectual Property Constitutional Law at the University of Nairobi, and a Public Interest Advocate and Mentor. He runs Sihanya Mentoring and Prof Ben Sihanya Advocates, Nairobi and Siaya. His research interests are particularly Copyright & Intellectual Property, Transfer of Technology, Constitutional Democracy, Education, Training and Mentoring Law and ICT Law for Sustainable Development in Kenya and Africa. He is a prolific author. And also a poet.

Gitungo Wamere is a policy and governance expert and a regular analyst at Inooro TV and radio. He is a Helmut Schmidt scholar trained at the Willy Brandt School of public policy in Germany. He has interest in civic tech, political parties, parliament openness and public finance management. He is a former program officer - parliament affairs at Mzalendo Trust. He has also worked at the Ministry of Foreign Affairs and Hanns Seidel Foundation - Kenya.

Nerima Were is a Programme Officer with KELIN for the Sexual and Reproductive Health and Rights thematic Area. She holds Masters and Undergraduate degrees in Law from the University of Pretoria. She previously worked with the Judiciary in South Africa serving as a researcher at the Land Claims Court and the Constitutional Court in South Africa. She worked with KELIN as a volunteer, intern and eventually pro bono lawyer between 2014 and 2015 when she left the organisation to complete her pupillage. Nerima also works as a Tutorial Fellow at the University of Nairobi, teaching in the evenings and engaging in research for the University.

Chapter 1

Kenya's Constitution 2010: Record of Implementation

Yash Pal Ghai

Making a Constitution legally effective is perhaps easier than giving meaningful effect to it, so that it becomes the basis, successfully, for elections, policies, institutions, and a large number of decisions. This is what we call 'implementation'. Some provisions are easier to implement than others, depending on how far the new constitution differs from the previous one.

The implementation of a constitution like the 2010 Constitution, prescribing major changes or additions in values, institutions and structures, is complex. Commitment to its implementation is often even more critical than its adoption (as the experience of many African states shows). The kind of groups or parties which are or get into power are often resistant to its implementation, given its orientation (of democracy, accountability, integrity, and human rights—as with the 2010 Kenya Constitution).

The classic case of this is the way in which Jomo Kenyatta (on his own) completely dismantled the constitution which had brought independence to Kenya, with an elaborate set of values and an even more elaborate set of institutions. Amending the constitution was not easy, but through several strategies (like bribing members of parliament) he was able to move to a new, simple constitution giving him most of the powers of the state. Our present, 2010 Constitution, is fundamentally different from those of Jomo and Daniel arap Moi—in terms of values, principles and institutions. It is not the creature of the president, but of Kenyans. There has been no constitution in Kenya (or in our neighbouring states) which is the result of such consultation and negotiation among people and communities of all kinds.

Responsibilities for implementation, for the adoption, understanding, and maintenance of the Constitution are clearly allocated by the Constitution to a number of institutions, political and administrative, and also - occasionally but critically - to citizens. Given that the roots of this Constitution lie in the people, it is unfortunate that civil society hardly receives any recognition – only the right to form and join organization, as aspect of the right of association. (A veto was exercised during constitution making on my proposal to have a small section recognising the role of civil society, as in the Philippines constitution.)

Civil society has played a role but the impact of their activities can be only limited, as in many respects, the matter rests with the state. Consequently the people must not be held responsible if the Constitution is disregarded by the state officials, especially in respect of their rights. This book analyses, primarily, the role of the state which clearly has the primary responsibility for primary critical issues to implement the Constitution.

Origin of the Constitution

It is over ten years since the Constitution came into force. It is not an unsuitable time to do a review of its principal provisions and examine how far they have been implemented, or attempts to do so have been made. It is also worth noting if there are procedures for implementation and penalties for breach of the rule. It is also interesting to see the degree of respect shown by the President and his officials for the Constitution through the implementation.

The Constitution was achieved largely by the struggle of the people, over a period of 20 years. It is the only Kenyan constitution achieved essentially by the people. It is also the most comprehensive of our constitutions. It is very people oriented, reflected in a number of national values and principles, which are binding on both the state and the public (Article 10). The Constitution acknowledges, both in the Preamble and the first Article, the sovereignty of the people. The Constitution is the result of that sovereignty, and the people have set out in the Constitution how that sovereignty should be exercised by the people and the state, including the people's right of participation in the affairs of the Parliament (Articles 118 and 119)

The colonial state was marked by overwhelming dominance of the state—and after independence, despite the authority of the people, this changed little. The people's authority is unambiguously acknowledged in the 2010 Constitution. A major issue is, therefore, what is the balance now between the state and the

people (have the people been able to dictate to state officials and politicians, in addition to whether there is a fair electoral process, or the state dictates the lives and choices of the people?). There is a general feeling that the power of the state, particularly of senior politicians and officials, has not changed significantly. And even when 'people' have exercised some influence, it is for the most part, the favoured business community, local and foreign.

The object of this study is to assess the effectiveness of major key parts of the Constitution. The status of the Constitution as supreme law is reiterated in Articles 2 and 3: it binds all persons and all state organs at both levels of government; and every person has obligations to respect, uphold and defend the Constitution.

The obligations of 'every person' (including individual politicians and citizens) are seldom discussed; the youth, for example, express their criticism of the regime and their own neglect but less often invoke the Constitution which in several ways provides remedies—similarly the people's discontent with the police. Yet this is, after all, the people's constitution—fought for by them, drafted and endorsed by them, and dependent on their integrity and action.

Nature of the State

The characteristics of the state that the Constitution aims at are different from both the colonial model (British rule for British interests) and the post-independence (local rule for local elite-cum-crooks). It seeks to move way from ethnic politics and control of state. A high premium is based on patriotism: meaning the love of the country; what unites us is that we belong to it. Closely related is national unity, highest virtue. We want to govern the state in a democratic way, sharing and devolving power, and promoting the participation of the people in affairs of the state. The conduct of the state is to be managed through the rule of law (including the Constitution and laws, and the institutions of justice) as well as integrity.

These objectives are sought in a number of different ways, including rules governing citizenship and guaranteeing equal rights to all citizens. The Bill of Rights applies to all persons, except for political rights (Article 38). Only citizens are entitled to ownership of land, others are restricted to leaseholds not longer than 99 years (Article 65). Only citizens are entitled to hold most state posts (Article 78), whether by appointment or election (Article 81). Of particular importance are the basic requirements for political parties (Article 91): to have a national character, promote and uphold national unity, abide by the democratic principles of good governance, promote and practise democracy through regular, have fair

and free elections within the party, respect the rights of all persons (i.e., citizens) to participate in the political process, including minorities and marginalised groups, promote the objects and principles of the Constitution and the rule of law—and the much ignored rule that no party can be founded on a religious, linguistic, racial, ethnic, gender or regional basis or seek to engage in advocacy of hatred on any such basis (Article 91(a)).

National values and principles of governance

Any study of the implementation of the Constitution must begin with national values and principles. Much of the Constitution is woven around them. The values are divided into four categories: the nature of the state; the rights of the people; mode of governance; and sustainable development. The state is based on patriotism (rather than ethnicity), national unity, sharing and devolution of power, democracy, participation of the people, and the rule of law. People's rights are shown in the stress on human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised. Governing the country requires good governance, integrity, transparency and accountability.

Sustainable development

This is the last mentioned national value in Article 10. The concept of sustainable development is often associated with the environment, to counter the degradation of forests, water supply—and other natural resources, which alas is happening in Kenya. The Constitution sets out guidelines in the chapter on Land and Environment, directing that land must be 'held, used and managed in a manner that is equitable, efficient, productive and *sustainable*' (Article 60(1)). It also requires 'sound conservation and protection of ecologically sensitive areas'. More detail is in Article 69, which sets out the obligations of the state, and of citizens. You will find this discussed in Chapter 14.

There is another, more recent understanding of 'sustainable development', under the title of 'The Sustainable Development Goals (SDGs)' or 'Global Goals', accepted by the international community. The United Nations Development Programme (UNDP) has described the 17 Goals of SDGs as built on the successes of the Millennium Development Goals, while including new areas such as climate change, economic inequality, innovation, sustainable consumption, peace and justice, among other priorities. The goals are interconnected – often the key to

success on which one will involve tackling issues more commonly associated with another.

Most of the values of the Constitution come close to the SDGs, especially Goal 16:

> Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels.

Sovereign people

The Constitution belongs to the people of Kenya and their sovereign power, which they have delegated to certain institutions, can only be exercised in accordance with it (Article 1). People are told they can exercise their power directly or leave it to specified state institutions. A large part of their powers are delegated, through the Constitution itself, to various institutions: national and county legislative bodies and executive authorities, and the national judiciary and independent tribunals.

The Constitution is not very clear about what powers the sovereign people might exercise directly. The value of public participation does – or should – mean that the delegated powers can be exercised only by reference to the people, but not necessarily in accordance with their preference. And the provisions about referendums in changing the Constitution allow direct people power, but not all changes are made through referendum.

The Constitution has made it easier to become a citizen as compared to previous constitutions (especially for women). For one, it allows dual citizenship (particularly helpful if wife and husband belong to different nationalities, provided one is a citizen). It has also become easier than before for people with connections with Kenya to become citizens (Chapter 3).

It is in the chapter on human rights (Chapter 4) that the rights of the people are extensive and clearest—and provide a very good test of the commitment of the state to acknowledge the fundamental rights of the people.

Participation of the people in affairs of the state is both an entitlement and obligation. You will find that it is important in many of the chapters of this book. It is given particular emphasis in relation to the functions of legislatures, and in managing and protecting the environment, and has been relied on, often successfully, to challenge governmental actions in court.

Political rights

Article 38 recognises the political right of every citizen, including the right to form or participate in political party affairs and campaigning for a party. All citizens have the 'right to free, fair and regular elections based on free and secret ballot'. These rights are also to be guaranteed to the youth. Minorities and marginalised groups are entitled to participate or be represented by others, in governance (Article 56). So are the older persons (Article 57).

In relation to the state, citizens have the 'right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair' (Article 47). If the human right of a citizen is likely to be adversely affected by administrative action that person has the right to be given written reasons for the action. Parliament has passed legislation to ensure that above procedures are followed (notably the Fair Administrative Action Act, 2015).

Citizens' most important role is the election of the members of the legislative bodies at the national and county levels. It is not unusual for the people to disagree most seriously with the conduct of parliamentarians, most of whom more or less act in their own interests. The Constitution now provides for the recall of an MP if enough registered voters take the initiative. Law passed by Parliament made this almost impossible, but a court held that law unconstitutional, leaving no detailed law on the subject in the case of *Katiba Institute and Another v the Attorney-General and Another*.[1]

Bill of Rights

The principal features of people's rights appear in the Bill of Rights (Chapter 4). The wide scope and purpose of human rights are captured in the first Article of the Bill: that it is 'an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies'. The purpose of rights is 'to preserve the dignity of individuals and communities and to promote social justice and the realization of the potential of all human beings'. The Constitution provides for a strong system for the enforcement of rights. It minimises qualifications on rights: 'they belong to people and not bestowed by the state'; they are not limited to those specified in the Constitution; and rights must be interpreted broadly. The state must take special steps to 'address the needs of vulnerable groups within

[1] Petition No. 209 of 2016; [2017] eKLR.

society, including women, older members of society, persons with disabilities, children, youth, members of minority or marginalised communities, and members of particular ethnic, religious or cultural communities' (Article 21(3)). Outside Chapter 4, there is an obligation on Parliament to 'enact legislation to promote the representation in Parliament of (a) women; (b) persons with disability; (c) youth; (d) ethnic and other minorities; and (e) marginalised communities (Article 100).

Special provisions are made for the enforcement of human rights. Every person can initiate proceedings before the court, either on their own behalf or that of another, to protect their rights. Courts are instructed to apply a broad approach to the application of rights, including *developing* the law necessary to give effect to the right. They must interpret rights and the law in a broad way, keeping in mind 'the values that underlie an open and democratic society based on human dignity, equality, equity and freedom and the spirit, purport and objects of the Bill of Rights'. A right can be restricted only through law—and legislation restricting a right must satisfy stringent rules. And there are some rights that cannot be limited at all like the right to a fair trial and the right not to be tortured (Article 25).

Our Bill of Rights is one of the most comprehensive globally. It is concerned with personal, social, economic and political rights. Somewhat unusually it covers labour relations and trade union rights, environment, consumer rights and fair administrative action. It is also unusual in providing a special section with the rights of the children, persons with disability, youth, minorities and marginalised groups, and older members of society—all very vulnerable, and likely to be overlooked.

There are also two independent but state sponsored bodies, the Kenya National Commission on Human Rights and the National Gender and Equality Commission, as the principal organs of the state in ensuring compliance with obligations. They have a wide range of functions in the promotion of human rights, including investigating violation of rights under international instruments, and education on rights. They sometimes also go to court to protect rights.

Structures of government

Though 'sovereignty' belongs to the people, much of that sovereignty is in practice exercised by the institutions and procedures of the state. The range of institutions covered by the 'State' is obvious from its definition in the Constitution: 'the collectivity of offices, organs and other entities comprising the, government of the Republic, under this Constitution'.

The institutions are very varied, in their composition, functions, resources, and accountability. It is useful to divide them into different functions: policy and law making; implementing laws and policies; and dealing with constitutional and other disputes, applying the law—a fairly standard breakdown. The respective institutions are the legislature, the executive and the judiciary. All three institutions interact, legislative and executive more often than the judiciary with them—as the judiciary's role is to uphold the Constitution and laws, in which role it has to decide on the validity of the acts of the other two, and thus must keep a distance.

National legislature

The national legislature consists of two bodies, the National Assembly with broad functions and the Senate with functions restricted to matters concerning the counties. The two bodies have not got on well. There seems considerable misunderstanding by each house of the role of the other; and instead of co-operation they seem to see each other as enemies. Better relations would have helped them to deal more effectively with the national and county executives, and the functions of the Senate more effectively. Nor have these bodies, particularly the Senate, established the kind of relationship between them and the counties that would have strengthened the counties. Each wants to encroach upon the territory of the other.

The principal tasks of the legislature are to make laws, including a role in the amendment of the Constitution, levy taxes, and allocating money to other state bodies (though in practice on the requests of the executive), keep an eye on state policies and conduct, and can remove the President and other senior officials.

People have relatively little role in the conduct of the work of the assemblies. Though the Constitution requires Parliament to protect the Constitution and promote the democratic governance of the country (Article 94(4)) and to deliberate and resolve issues of concern to them (Article 95(2)), politicians have shown little interest in the concerns of the people, indeed great hostility to them, including civil society. Not only did Parliament try to make it impossible for the people to remove their elected member, the National Assembly has shown little appetite to review the conduct of the President, Deputy President and state officers, much less considering removing them from office (Article 95(5)).

Article 118 requires Parliament to conduct its business in an open manner, and to 'facilitate public participation and involvement in the legislative and other business of Parliament and its committees'. Normally the public and media

cannot be expelled from its meetings. Article 119 says that everyone has the right to petition Parliament to 'consider any matter within its authority, including to enact, amend or repeal any legislation'. On the whole relatively little use has been made of these provisions. Parliament gives very limited notice to the public about participation.

You will find analysis of how Parliament has performed its role in Chapter 2.

Executive

The national executive, consisting primarily of the presidency (President and the Deputy President) and the supporting cabinet governs most aspects of state policies, including preparing the budget and other policies for consideration and adoption by the legislature. The President is ultimately responsible for a large number of policies and administration (certainly the most important person in the land)—but very many of his/her responsibilities are delegated to officers—so effectively the president may have little knowledge of many policies and administration. The public service (the largest state institution) is supposed to be independent - appointed and disciplined by the independent Public Service Commission.

The adoption of presidency as the main office of the state goes against the decision of the Bomas National Constitutional Conference (2003-4)— and all other constitution drafts before the final one - and still remains controversial to some extent. There are two major differences between the presidential and parliamentary systems. In the presidential, the president, elected by the people, has absolute power over the executive and its policies, and no direct accountability to the legislature, while in the parliamentary the head of the largest political grouping becomes the head of government ('prime minister'). The president now is elected by the people, for the maximum of two terms of five years each. Article 129 says that the authority of the executive 'derives from the people, to be exercised in accordance with the Constitution'. The executive consists of at least two categories: political like the president and those appointed by the president (Article 130), referred to as the cabinet (Article 152) and as cabinet secretaries—and the other what we might call public servants (Article 232) (the most senior of whom are principal secretaries. That authority must be exercised in a manner compatible with the principle of service to the people of Kenya, 'and for their well-being and benefit'. Article 130(2) requires the composition of the national executive to reflect the regional diversity of the people.

The Constitution sets out at length the responsibilities of the president—they are of great importance, including upholding the Constitution and safeguarding the sovereignty of the republic. The president is a symbol of national unity, who must respect, uphold and safeguard the Constitution, promote and enhance the unity of the nation, and ensure the protection of human rights and fundamental freedoms and the rule of law Article 131 (2)).

Allegedly the president is accountable to the people, but this is of practical importance only when a president stands for re-election. The mechanisms for the removal of the president, for illness or misbehaviour do not involve the people (Articles 144 and 145).

The performance of the executive is analysed in Chapter 4.

Judiciary

For the most part, the state is bound to ensure that the rights/entitlements of the people are delivered to them, but, ever since independence, the state has for the most part evaded these responsibilities. So to enjoy most of their entitlements, the people have to fight for them, or seek the help of other state institutions, civil society, or their own action. The proposal for an office of the Public Defender, for assistance to the people, not only in litigation but also in securing their rights, was removed by the parliamentarians who met in Naivasha in 2010 and mutilated the draft Constitution (the same who changed the parliamentary to a presidential system). No reason was given but perhaps there might be hope in the new Legal Aid Act whose implementation is yet to be finalized.

The judiciary had a lowly status before the 2010 Constitution, due to weaknesses in competence and corruption of a large number of judges (from private sources as well as at the behest of the government). But the drafters of the Constitution looked to the judiciary for the safeguarding of the Constitution, and therefore they strengthened the independence of the judiciary through a more representative and independent judicial service commission (with judges/lawyers in clear majority), which alone can appoint and dismiss judges. The judiciary is now supposed to enjoy secure financial resources (see Chapter 5 in this book).

Like other authorities, the authority of the judiciary is derived from the people (Article 159). But unlike the other authorities, the people play a minute role in the appointment of judges, being represented by two people out of eleven members of the appointing body (the Judicial Service Commission)—and even these two are appointed by the President without any consultation, though with

the approval of the National Assembly (normally with a majority of members from the president's party). As with the appointment of most commissions and state offices, members of the public can object to the appointment of members of the commission as well as of judges.

According to Article 21 (3), the judiciary, like other state organs, has the duty to 'address the needs of the vulnerable groups within society, including women, older members of society, persons with disabilities, children, youth, members of minority or marginalised communities, and members of particular ethnic, religious or cultural communities'. Courts have to develop the law where the law does not reflect the protection of a right—this means that those rules that courts not Parliament have developed may have to be changed by the courts to reflect the Constitution especially rights, and Acts of Parliament must if possible be read in a way that complies with the Constitution, otherwise they are unconstitutional.

The Constitution sets other guidelines for courts in the exercise of their authority. These include that 'justice shall be done to all, irrespective of status' (Article 159). The administration of justice must be directed to the promotion of the purposes and principles of the Constitution. Article 47 gives the judiciary a specific role in reviewing the administrative law and practice of state authorities. The rules of interpretation – which bind all state and private parties, not merely the courts – require that the Constitution should be interpreted to promote its purposes, values and principles; advance the rule of law and human rights and fundamental freedoms; permit the development of the law; and contribute to good government.

Judges are now appointed through an open process from among those who apply by the supposedly independent JSC. Once appointed, they have secure tenure of office and can be dismissed only after a hearing and for serious misbehaviour. The process, and the reasons, by which they decide cases are transparent and their decisions can be questioned in a higher court. Access to courts is much easier than before. The judiciary is required to uphold national values and principles—and of course the Constitution and laws. Article 258 says that every person has the right to institute court proceedings, 'claiming that this Constitution has been contravened, or is threatened with contravention'. A person can go to court, not contesting any personal right, but in the interests of a group or class of persons—or acting in the public interest.

The Supreme Court and the constitutional division of the High Court have done much to clarify the constitutional position on controversial issues and thus provided very useful guidance on the interpretation of the Constitution, emphasising its radical and transformative character.

The bad reputation of the judiciary before 2010 has not been entirely overcome, but some corrupt judges have been removed and some excellent ones appointed. The judiciary has easily become the most favoured and trusted institution since the new Constitution was enacted, especially with the appointment of Dr Willy Mutunga as the first Chief Justice and his policy of reform, pursued by his successor Justice David Maraga. In one sense, it is the strongest, most powerful agent of the state: it is the ultimate interpreter and safeguard of the Constitution. On the other hand, it is unable on its own to enforce its judgments and instructions. This dilemma defines the judiciary and puts a high premium on the wisdom and integrity of judges.

At the same time, the long delays in court hearings and even longer delays in delivering its judgments have cost the judiciary considerable public sympathy. Perhaps in recognition of this, the Constitution encourages people to settle their disputes in other ways, through other forms of dispute resolution like mediation and arbitration.

Despite the good efforts of the judiciary, the legislature and the executive have intensified their disregard of the spirit and letter of the Constitution, as you will see in Chapter 5.

Counties

Counties or devolution are a new feature of the Constitution. The independence constitution had an elaborate scheme for the sharing of power on a territorial basis —7 regions, later called provinces. One object then was the protection of minority groups. *Majimbo* was a complex system with substantial powers to the devolved areas but it was abolished by Jomo Kenyatta within a very short period.

The boundaries now (of counties based on former districts) are, as then, drawn on the basis of ethnicity. It would be interesting to see how far the ethnic basis of devolution is hindering the non-ethnic objectives of devolution. The establishment of devolution was later than the rest of the Constitution, so the experience is limited and commentary/analysis somewhat harder (though it is now in its second government).

I have explored this issue further in Chapter 7.

The Constitution requires the county governments to have reliable sources of revenue (both from the centre and local levies) to enable them to govern and deliver services effectively (Article 175). In the chapter on finance (9), this process is discussed.

Integrity

Few constitutions pay as much attention to integrity in public life as the Kenyan: a whole constitutional chapter (Chapter Six) is devoted to it. Senior state officers exercise a public trust, to be exercised in a manner that 'is consistent with the purposes and objects of this Constitution; demonstrates respect for the people; brings honour to the nation and dignity to the office; and promotes public confidence in the integrity of the office and vests in the State officer the responsibility to serve the people, rather than the power to rule them' (Article 73). They must be recruited on the basis of personal integrity, competence and suitability; and in their work show 'objectivity and impartiality in decision making, and in ensuring that decisions are not influenced by nepotism, favouritism, other improper motives or corrupt practices; selfless service based solely on the public interest, demonstrated by honesty in the execution of public duties and the declaration of any personal interest that may conflict with personal interest that may conflict with public duties'. They must be accountable to the public for decisions and action and demonstrate discipline and commitment to the service of the people. They must avoid any conflict between personal interests and public duties. There are a number of rules and practices to ensure the financial probity of officers. An independent ethics and anti-corruption commission has been set up to ensure that these principles are observed (Article 79).

Public Finance

This chapter of the Constitution (12) is long, in part because it is dealing with finances of governments at both the national and counties levels. They are intended to have fair and open norms and procedures. A great deal of thought was given to the subject.

Like other chapters, that on public finance starts with principles: openness and accountability, including public participation in financial matters; promotion of an equitable society (by sharing fairly the burden of taxation), sharing national revenue equitably among national and county governments; and expenditure which promotes the equitable development of the country, including special provision for marginalised groups and areas; financial burdens to be shared equitably between present and future generations; prudent and responsible use of public money; and responsible and clear financial management and its reporting.

A novel feature is of course funding for counties, which occupies a substantial part of the chapter, dealing with the ability of counties to raise their own funds as well as contribution from national funds. The principles governing funding of counties include enough resources to fund their functions, development and other needs and special funds for disadvantaged areas and groups.

Another important concern of the chapter is the budgetary process, of both the counties and the centre, the latter tidier than before. Parliament, as before, is the ultimate approver of funding (with a special role for the Senate on funds for counties). The power to raise funds and taxes is with the national government but is subject to parliamentary approval—except to the extent that counties may impose property rates, entertainment taxes, and 'any other tax that is authorised by an Act of Parliament' (Article 209 (3)). The taxation and other revenue raising powers of the counties may not be 'exercised in a way that prejudices national economic policies, economic activities across county boundaries or the national mobility of goods, services, capital of labour' (Article 109 (5).

The sources of funds for the national government depend on the approval of Parliament whether as tax or loan (Articles 210 and 211). Parliament is given significant theoretical control over national government borrowing, though it is doubtful if this is exercised if the president enjoys significant support in the National Assembly.

Financial institutions

The Constitution introduces a number of institutions including the Salaries and Remuneration Commission (to fix the salaries and other benefits of state officials, and advise on those of public servants generally), and Commission on Revenue Allocation (with advisory functions regarding the allocation of funds as between the national and county, and between counties). The Auditor-General retains the previous role of supervising the expenditure of funds at all levels (including political parties) but now extended to counties (Article 229). His or her report confirms whether or not public money has been applied lawfully and in an effective manner. But the role of approving the withdrawal by the government from the national funds is now transferred to the Controller of Budget—a change welcomed by the Auditor-General at the time of the enactment of the Constitution.

The final financial institution is the independent Central Bank of Kenya (Article 231). Its primary task is to promote good monetary policy, promoting price stability, and issuing currency. Notes and coins are issued by the Bank—which no

longer can bear the portrait of any individual, meant to exclude presidents! But strangely the image of Jomo Kenyatta appears more widely than before.[2] The bulk of the functions of the Central Bank are set out in legislation. Since the primary agency of the government is the Treasury (close to the President) there could be serious conflicts between the Bank and Treasury.

The area of public finance has, not surprisingly, been controversial. In a country which is as corrupt as ours, that is not surprising. Few have challenged the Treasury despite widespread knowledge of corruption. Even now only the head of the Central Bank has had the courage to challenge the integrity and competence of the Treasury.

Commissions and independent offices

Commissions and independent offices are an essential part of the structure of the state. Although they assist in the functioning of the other state institutions, they play a special role—checking and redressing the role of other bodies. However what remains critical is the different forms of independence the bodies possess. This includes functional/operational and financial independence. Article 249 sets out their objects and authority as to (a) protect the sovereignty of the people; (b) secure the observance by all state organs of democratic values and principles; and (c) promote constitutionalism. In order for them to serve these objectives, they are (a) 'subject only to this Constitution and the law; (b) are independent and not subject to direction or control by any person or authority'. The general function of commissions and offices is to conduct investigations, on their own or on complaints made to it, with the power for conciliation, mediation and negotiation.

They are guaranteed their own budget, with 'adequate funds' to enable the performance of their responsibility. Appointments to these bodies are to 'take account of national values referred to Article 10, and the principle that the composition of the commissions and offices, taken as a whole, shall reflect the regional and ethnic diversity of the people of Kenya'. Appointments are usually on a six year, non-renewable, basis.

---

[2] It appears in the form of the statue outside the Kenyatta International Conference Centre – and a court decided that this did not violate the Constitution because this was a statue and not a portrait. One judge disagreed: *Simon Mbugua v Central Bank of Kenya* [2019] eKLR

The independent offices are two: the Auditor-General and the Controller of Budget. The commissions are 10—dealing with human rights, land, elections, revenue allocation, police, parliament, teachers, salaries remuneration, judiciary, public service and teachers.

There are other bodies too which come under this scheme but are not listed in Chapter 15. In its Fifth Schedule, Parliament has to establish the Ethics and Anti-Corruption Commission within a year, foreshadowed in Article 80 (Leadership and Integrity). Article 133 established the Advisory Committee on the Power of Mercy (to advise the President on mitigation of punishment, or pardon, in a criminal case).

One of the questions that should be answered is how the performance of independent commissions and offices can be measured. There are several independent offices that have been under the public scrutiny for their failure to discharge their mandate. How can the public hold these independent offices accountable too?

It is unclear as to the successful achievements of the objects outlined in Article 249. The CIC did a reasonable task within the limits of their functions and power—and duration. Neither the government nor parliament intended it to have any significant role. The Auditor-General and the Controller of the Budget did (and are doing) a reasonable job, despite the hostility of the government to the Auditor-General.

Chapter 6 discusses the commissions and their performance and Chapter 9 the Auditor-General and Controller of Budget.

Security: Police and defence forces

The police and army have become key components of the state—and are seen as the instruments of the state to curb the people. The role and the acts of the police and army have for long been associated with colonial practices, which were harsh, brutal and discriminatory. Collective punishment was another feature. There was little improvement after independence, and in some respects things got worse, as the democratic constitutions were replaced by draconian rule. The current Constitution takes a completely different view of national security: 'National security is the protection against internal and external threats to Kenya's territorial integrity and sovereignty, its people, their rights, freedoms, property, peace, stability and prosperity and other national interests' (Article 238). The

same article says that 'national security shall be pursued in compliance with the law and with the utmost respect for the rule of law, democracy, human rights and fundamental freedoms'.

The Inspector-General who exercises independent control over the police is appointed by the President with the approval of Parliament. The Inspector-General may be instructed by the cabinet on policy issues but not on specific matters, like investigation of particular offences (Article 245)(4)). The affairs of the police, including disciplinary matters, are to be governed by an independent commission.

This approach to security (I do not cover external matters) is unusual by Kenyan standards, but was well received by the people. However, the police have frequently used violence against Kenyans, in practice often under the direction of the President and senior officials and sometimes to hide their own misdeeds. Another characteristic of the police practice is to demand bribes from people under the threat of arrest and charges—with considerable success as people are too busy to spend a day or so at the police station or even in a police cell (the more so because police cells fall far short of the standards under Article 51 of the Constitution on humane treatment, and of those under the Persons Deprived of Liberty Act, passed to implement Article 51). Overall their behaviour has been very different from that required by the Constitution.

The Independent Police Oversight Authority, the watchdog over the police (not created by the Constitution), has been less effective than people had hoped. The whole thing smacks of the colonial period—but less disciplined.

People deal mostly with the police, but we should not forget the military. The Constitution makes it clear that the time for the military to be insulated from law has gone. Specifically it says national security must be pursued 'with the utmost respect for the rule of law, democracy, human rights and fundamental freedoms'.

Unfortunately members of the various services including police are deprived by the Constitution of the protection of various rights, including privacy, the freedoms of association and assembly, as well as economic and social rights (like health, education, food and water) and the rights of arrested persons, also to fair labour relations. This is both unnecessary, and unfair.

However, they do have the right to a fair trial—even in a court martial for the military. And as has happened in some other countries the day may come when soldiers can sue the government for serious errors (though probably not those in the heat of battle) that lead to unnecessary injury or death. And possibly the military may be held legally responsible for violations of human rights of those

outside the services, even perhaps outside Kenya. The Constitution offers some basis for these sorts of decisions.

A more detailed discussion of the police is in Chapter 8.

Conclusion

Article 1 acknowledges the supremacy of the people (they and not a king or president are sovereign). How have they lived up to their role? Or more realistically, how far have the people been allowed to be sovereign?

The decision to shift to a presidential system of government produced a less pro-people system than a parliamentary one might have been. Maybe doing away with a middle level of devolution weakened the system (leaving only the rather small counties on the one hand against the national government on the other). Retaining the electoral system (which only the first, CKRC, draft would have changed significantly) means that many votes have little effect.

But the Constitution can still be said to put the people first, it is intended to give the people a more active role, including through devolution and in public participation at all levels, and it is intended to be more inclusive (including through provisions to ensure representation of women, youth, persons with disability and the marginalised in other ways). It should give a greater sense of belonging to the people.

Most clearly, perhaps, the record shows how hard it is to keep the promise of a constitution when those intended to implement it have vested interests in its not working as planned. It is the people who have the greatest interest in its working as designed. They must not be seduced by the others to abandon their best interests for temporary gain (like a bribe or a rush of electoral enthusiasm for 'our person' however incompetent and corrupt).

Only then will the Constitution be truly transformative.

Chapter 2

The Vulnerable Guardian Angel: Kenya's Parliament in the Post-2010 Constitution

Jessica Musila and Gitungo Wamere

Introduction

A key driver to enactment of the 2010 Constitution was the public demand to take back ownership of the nation from the power elite and re-establish a shared whole. Article 1 captures this notion aptly by clearly stating that power lies with the people and all the arms of government exercise delegated power. The new dispensation introduced a bicameral Parliament established with the mandate to exercise the people's sovereign power, represent the diversity of the nation and their will[1]. In ascribing to Parliament these lofty goals, Kenyans sought a departure from the tyrannical rule of the imperial presidency that had evolved from independence.

This chapter explores whether the new structure of Parliament has been beneficial to the country as envisioned and how the institution has conducted itself in undertaking its roles and responsibilities as captured in Articles 94 – 96. It also looks at Parliament's structure, direct obligations placed on it by the 2010 Constitution and constitutionality of laws passed, the effectiveness of parliamentary committees following the shift of ministerial power to the executive and the introduction of public participation. First we look at the reintroduction of a bicameral (two house) Parliament.

---

[1] Art. 94

The bicameral Parliament

The bicameral Parliament was introduced as a remedy against the strong hold on power which the imperial presidency had developed between 1966 and 2002. The presidency evolved over time by imposing constitutional amendments and practices that rendered the other arms of government, especially Parliament, mere lackeys[2] and also infringed on rights of the public. In view of these infringements, the 2010 Constitution mandated Parliament to vet all presidential appointees, exercise oversight over revenue and its expenditure and over the presidency and other state officers.

While these myriad changes were introduced, the quality of the work has been questionable over the past ten years. Parliamentarians have heavily catered to the President's and cabinet secretaries' wishes in exercising their vetting and oversight powers over state officers. The legislators have not demonstrated objectivity in their relationship with the executive, and government-allied MPs have been quick to use 'tyranny of numbers' to quickly push through their agenda through both chambers of the house. Cases in point include the debate around Security Laws in 2014[3] and the Election Laws in late 2017.[4]

A stark example of presidential influence is that, though the election of the Speaker of each of the two houses is vested collectively in the members of parliament, in practice the legislative party majority – most often from the President's party – have tended to yield to the executive's preference (or some sort of pre-election agreements). *De facto* control by the President over the Speaker then hinders Parliament in its responsibility to ensure executive accountability.[5] For instance, in the context of the 'handshake' (a 2018 post-election gentleman's agreement between President Kenyatta and opposition leader Raila Odinga) the country has experienced a scenario where Parliament is a marionette of the

---

2 *Ben Sihanya, The Presidency and Public Authority in Kenya's New Constitutional Order*, Society for International Development (SID), Regional Office for East & Southern Africa, Constitution Working Paper No. 2, 201. http://sidint.net/docs/WP2.pdf.

3 Challenged, partially successfully, in court in *Coalition for Reform and Democracy (CORD) v Republic of Kenya* [2015] eKLR.

4 Challenged, partially successfully, in *Katiba Institute & 3 others v Attorney General & 2 others* [2018] eKLR – attempt to remove from the law the provision that formed the main basis for the Supreme Court declaring the August 2017 presidential election invalid 'allowing such an amendment would be to ignore constitutional principles in our transformative Constitution that there should be free, fair, transparent and accountable elections'.

5 After the 2017 elections, President Uhuru promised former Bungoma County Governor Kenneth Lusaka that he would make him the Speaker of the Senate by instructing the chamber to appoint him and that's exactly what happened.

two leaders. A case in point is in June 2020 where Parliament's leadership was reshuffled, MPs loyal to President Kenyatta and Raila Odinga were awarded with house leadership positions while rebels were punished by being removed.

Lack of ideology–driven political parties in part contributes to the weak Parliament as Kenyan parties are personality cults and lack structures. Therefore, in the case where an individual such as the President is the key financier of a political party, legislators elected under his outfit feel obligated to follow his directives. The 12th Parliament has essentially operated without any opposition since the 'handshake'. This means that the executive has had its way in Parliament without the minority demand for accountability. After the handshake, the Orange Democratic Movement abandoned their manifesto and joined the government like their party leader.

On the other hand, since Kenya embraced the presidential system, the place of the opposition in the National Assembly has been rather weak as the leader of the opposition is not automatically the Leader of Minority in either the National Assembly or Senate. If the opposition leader is a defeated presidential candidate he or she becomes an alternative centre of power outside the legislature with substantial power to weaken its authority from without—like Raila Odinga after both the 2013 and 2017 elections. If the opposition appointees serving as the leaders of minority within Parliament are weak, this compromises the entire oversight function in both chambers, as they may choose to trade off on some issues.

Performance of the Senate

Like its predecessor at independence, the Senate's re-establishment in 2013 has sailed into controversy. Since day one, it has been facing existential challenges. Ideally, the Senate is supposed to be the upper house, with more experienced members, but the structure of the law has ensured that the Senate remains an underdog. It is no surprise that debate on the importance of the Senate lives on.

In the first few months of its existence, the Senate had to go to the Supreme Court. The National Assembly had resolved that the Senate had no business with the enactment of the Division of Revenue Bill, despite this being a function that was key to the roles and responsibility of the Senate in regard to county government. In 2019, the Senate went back to the High Court to contest its isolation by the National Assembly in regard to passing of 23 Bills which were later approved by the President. The High Court declared the Acts unconstitutional in 2020. These pronouncements by the court have helped in strengthening the role of the Senate.

Generally, the Senate did not make a big contribution to legislation during the 11th Parliament's tenure, since the majority of the Bills emanated from the Leader of the Majority in the National Assembly. In most cases, it was just a matter of procedure for the Bills from National Assembly touching on counties to pass through the Senate. A perusal of the Bills revealed few changes. The Senate only made laws that facilitated counties in exercising their mandate which is derived from Schedule Four of the Constitution. The law never even gave Senators a mandate to vet state officers. To contest for this space, a Senator in the 11th Parliament drafted a Bill to give Senators powers to vet state officers (since almost all are, under the Constitution, to be vetted by the National Assembly alone); unfortunately, by the end of the 11th Parliament's tenure the Bill had not reached its final stage.

The National Assembly was also good at using delaying tactics to frustrate laws from the Senate. A good example is Kiraitu Murungi's Bill on the restructuring of the Parliamentary Service Commission in order to accommodate the Senate. The National Assembly delayed this because they had their own ideas on how the Parliamentary Service Commission should be structured. These two Bills awakened the superiority battles between the two chambers and the 11th Parliament's term came to an end before this issue was agreed upon.

Along the corridors of Parliament, the Senate is described as a boring house. It is perceived as less busy and with lesser powers compared to the National Assembly. This could be one of the reasons for the migration of members from the Senate to other positions in the 2017 elections. For instance, there is a senator who chose to decamp and vie for the position of a member of a county assembly (MCA). This migration may be translated to mean that the Senate may not be a pleasant place especially for politicians who want to be in positions of authority in order to exercise power.

The Senate also had its lows and a myriad of missed opportunities. The major constitutional responsibility of the Senate is to protect the interests of devolved units. To this extent, the failures of county governments may be blamed on the aloofness of the Senate. The Senate did not use its oversight powers to the maximum in order to hold governors to account. In some instances, the authority of the Senate was trimmed and decisions overturned by the court, bringing more ignominy to the house. The poor performance of the county assemblies may also be blamed on the Senate. Most MCAs were rudderless and uninformed on their roles. The Senate should have ensured proper capacity building among MCAs to execute their mandate properly and as per the Constitution. As the debate on the place of the Senate persists, it will be interesting to see how future ones operate.

Custodian of the people's interests

In March 2013, the 11th Parliament, the first parliament in the new constitutional dispensation, came into being. Additionally, it was the largest and most inclusive parliament in the history of Kenya. The post-2010 parliament has a lot of powers which can be used for the good of the nation. Article 94 (4) empowers Parliament to be a prefect of all institutions by guarding the Constitution. This may be extrapolated to mean that Parliament has powers over all institutions except the courts in executing its oversight duties. Parliament is evidently the guardian angel that ought to jealously protect the Kenyan dream.

Article 1 of the Constitution recognises that all sovereign power is in the people, then Article 1(3) 'takes' some of those powers and vests them in Parliament to exercise them in trust for the Kenyan people. In light of this, Kenyans legitimately place their many needs and aspirations before Parliament. The Constitution positions Parliament as the institution with the mandate to salvage good governance and eventually consolidate Kenya's infant democracy.

Unfortunately, the 11th Parliament may not be Kenya's favourite despite its inclusivity and therefore a diverse wealth of experience. The National Assembly was defined by misbehaviour and inadequacies that ranged from physical fights to passing pathetic laws. In a way they gave credence to parliamentary democracy pessimists like Vladimir Lenin, when he wrote in his *State and Revolution*, 'parliamentarians are members of the oppressing class voted by the oppressed to go and repress them further'.[6] The Senate on the other hand, spent most of its time crying wolf and therefore there was nothing much to write home about.

Parliamentary democracy optimists like Edmund Burke hold parliaments in high esteem and define their place in society as ' a deliberative assembly of one nation, with one interest, that of the whole; where, not local purposes, not local prejudices, ought to guide, but the general good, resulting from the general reason of the whole'.[7] Here Burke laid out Chapter 8 of Kenya's Constitution in a nutshell. The place of Parliament as defined by the 2010 Constitution is yet to be understood by Kenyans and, indeed, by parliamentarians themselves. This goes far to explain why Parliament remains largely underutilised in changing Kenya's governance landscape, an opportunity that even the current 12th Parliament has largely missed. The new constitutional order was meant to inspire optimism but pessimism with Parliament among the Kenyan masses persists. The roles of

---

6 Vladimir Lenin, *State and Revolution* (1917)

7 Edmund Burke, 3 Nov 1974 'Speech to the electors of Bristol' https://tinyurl.com/BurkeBristol.

representation, oversight and legislation entrusted to Parliament by Article 94 continue to be poorly executed making the principle of public participation in governance ever more critical.

Representation, openness and public participation

'Political representation is the activity of making citizens' voices, opinions, and perspectives present in public policy making processes.'[8] Considering that Parliament is one of the most critical institution of representation, it should be more open and accommodating to the members of the public. It is for this reason that Parliament should listen to the people more and give them information that is necessary in enhancing public participation. The people and their representatives ought to always be in a consultative mode.

Unfortunately, the Kenyan public is still largely unaware of policies and legislation made. Yet, the involvement of the public in decision making would enhance the growth of our democracy and reduce the burgeoning mistrust of government agencies. There is a need for a paradigm shift in how Parliament operates.

Ironically, Kenya's Parliament buildings provoke fear from *mwananchi* and are among the public institutions the people think are secluded for a few. This thinking is evoked by the unfriendly reception that members of the public are likely to get whenever they want to access information or Parliament precincts. Common feedback Mzalendo[9] has received from the public is the constant denial of access to important information from Parliament's premises.

This explains why Kenyans are bitter about parliamentarians because they see them as masters who are hell-bent to make their lives difficult rather than servants. It is not surprising that in 2016 when a bomb attack alert was given to Parliament, Kenyans were not empathetic. Comments that followed a news piece published by *Daily Nation*'s Facebook outlet were very telling of Kenyans perception of their members of Parliament with many wishing them ill. Ideally, parliaments are for the people, but the Kenyan parliament is far from being owned by citizens.

---

8 Hannah Pitkin, *The Concept of Representation* (University of California Press, 1967)

9 Mzalendo: Kenya's Parliamentary Monitoring Organization https://info.mzalendo.com/.

Self-governance through public participation is enshrined in Kenya's Constitution; however, Parliament is yet to actualize it in legislation (by the time of writing this article a Bill was in Parliament under public participation).[10] Bureaucracy and poor communication by the institution of Parliament remain the major impediments to realising the principle of public participation. Critical parliamentary information like reports are often published late and calls for public input given a very short notice. Consequently, rarely does the public get wholly involved in the legislative process.

The 11th Parliament for instance had the notoriety of giving very short notices about public participation ranging from a minimum of one day to a maximum of five days.[11] To include people in legislation, sufficient time and information on Bills ought to be easily accessible. Apart from the short notice, there is also inefficiency in dissemination of information to the public.

In this age when many Kenyans are online, Parliament should not solely depend on print media to communicate to Kenyans. The COVID-19 pandemic has underlined the need to embrace a multi-media approach in dispensing parliamentary information. It is in the public domain that the largest group of Kenya's population is the youth who rarely, if at all, buy newspapers. Therefore, by using newspapers as the only channel of communication, Parliament automatically locks out the youth from participation. What if Parliament proactively used bulk SMs, Facebook, Twitter or even Instagram for outreach? Just consider how many people it would reach. If Parliament was effective in communication then Parliament buildings would be flocked whenever there is a public participation sitting.

There has been another grey area in our parliament: opening up plenary discussions alone is not enough. Parliament needs to draw back the secrecy in committees. It is in the committees where the most important things happen. Parliament ought to make public committee attendance reports and information on its deliberations as Hansards or minutes. There are a number of civil society organisations (CSOs) that deal with parliamentary monitoring work that would wish to get this information to strengthen their work. We may be in a new constitutional dispensation, but are living in the old one. Article 118 of the Constitution demands public access and participation in Parliamentary affairs so as to enhance transparency and accountability. Kenyans may be apathetic but in many ways their attitude towards Parliament is instilled rather than inherent. After

---

[10] Public Participation Bill, No. 4 of 2018

[11] In 2016, Mzalendo compiled all call for participation notices to find the average time given to members of the public to submit their memoranda.

2010, Kenyans envisioned a bottom-up approach in decision making but this has not been the case.

Bipartisanship and nation building

If national interests were the common denominator of our parliamentarians, then the kind of political posturing and bickering we witness would be non-existent. The Security Laws (Amendment) Act of 2014 comes to mind, as does the Election Laws (Amendment) Act of 2017, shortly after the nullification of the August 8th presidential elections (see above). The ruling party – Jubilee – has in many instances attempted to use Parliament to make 'partisan laws'. This has never been taken in good faith however well-intentioned the laws might have been. The majoritarian tyranny may not auger well for national cohesion and therefore nation building. In a fragile country like Kenya, this may only serve to sink the wedge of mistrust deeper, therefore, institutions ought to be wise in their exercise of power.

It is on very rare occasions that Parliament has embraced the spirit of bipartisanship; those moments have been when deals were made. Personalization of Kenyan politics has made the institutionalization of Parliament difficult. For instance, when party leaders of big political parties disagree, unfortunately, it is the institution of Parliament that has always been picked to flex the ego muscles. It is unfortunate, because Parliament ought not to be an arena of combatants with irreconcilable interests. For example, in the months preceding the annulled presidential elections, Kenya sailed in uncharted waters and, despite Parliament being in place, it made the situation worse.

Law is the glue that binds our social contract together. If a situation arises where one segment of society makes laws that suit them in total isolation from the rest, then the balance is tilted and the contract may no longer hold. The dangers of tampering with the social contract may be dire to the extent of throwing Kenya into anarchy. Therefore, when making the law all sections of the society must be considered. Constitutionally, Parliament ought to be the facilitator in bringing this consensus, rather than parliamentarians becoming extremists.

Constitutional obligations laid upon Parliament

The 5th Schedule of the 2010 Constitution laid obligations upon Parliament to enact key legislation to gave life to principles and ideals the people deemed important. Some laws had to be passed within various time frames ranging from a year after the Constitution's promulgation to within five years. The laws covered issues such as: citizenship, land, detention, gender representation in elective and appointive roles, natural resource sharing, right of recall, and various laws to strengthen devolution, the police force command and specific ones on various commissions. While Parliament passed most of the laws within the stipulated time; most were rushed through the house last minute and quite a number did not comply with the standards or thresholds set by the Constitution - e.g. the Leadership and Integrity Act. The public participation that happened around the laws' development was also questionable. For example, the laws on political parties and right of recall were rather weak, making it difficult to establish truly national parties and on the other hand making it almost impossible for the public to recall their elected leaders.

In addition, although laws were enacted to establish ten independent commissions and two independent offices, their impact has so far been limited by the calibre of commissioners appointed to manage them as conflict of interest has frequently been cited. The commissions are discussed in Chapter 6. Independent offices include the Auditor-General and Controller of Budget. Commissions such as Kenya National Commission on Human Rights, National Land Commission, and Judicial Service Commission, as well as the Auditor-General's office that have powers to summon witnesses as part of their investigations have consistently complained of being under-resourced by Parliament which hinders them from fully undertaking their mandate.

Oversight and implementation of Parliament's decisions

In addition to being the guardian of the people, Parliament is also the protector of our resources and our values which are encapsulated in the Constitution. To 'be a significant political factor, then it must have specialised committees of limited membership and considerable scope of power.'[12] The stronger the committees, the higher the possibility of delivering. Article 124 of the Constitution gives Parliament powers to form committees through its standings orders; it goes further

[12] Joseph LaPalombara, *Politics within Nations* (Prentice Hall,1974)

in Article 125 to empower the committees to execute their functions unfettered. Despite these powers, parliamentary committees do not have an impressive score card in flexing their muscles especially in protecting Kenya's meagre resources. The government side in Parliament is still stuck in the old mentality of receiving orders from the executive, while the opposition in the 11th Parliament largely embraced a cry baby stance in political rallies rather than providing alternative solutions in the house.

Take, for instance, Article 95 (5) (a) and (b): the National Assembly has the ability to rein in every state officer who violates Chapter Six of the Constitution but this has not been used. From 2013 to date, the country has experienced intensified loot and plunder of public resources. For parliamentarians to come down hard on integrity they, like Caesar's wife, must be beyond suspicion. But they had a false start when they watered down laws on integrity that sought to raise the bar for them.[13] It is important to conduct a lifestyle audit for state officers but all Acts of Parliament that were enacted to give effect to Chapter Six of the Constitution, conspicuously missed this provision. The 11th Parliament did not bother strengthening the Ethics and Anti-Corruption Commission (EACC) to enable it to conduct lifestyle audits either.

Again, in the new dispensation, the role of making budgets was taken away from the executive and bestowed on Parliament. In other words, because Parliament makes the budget it has the ability to track the expenditure and discover institutions that are misappropriating public funds. But, we have a Parliament that approved budget proposals without noticing that the Eurobond[14] money was not sufficiently 'accounted for'. A keen eye for detail in matters parliamentary is important.

Parliament also has the role of making sure that the decisions they make are implemented lest it ends up becoming a mere talk shop. The responsibility to monitor the extent to which the laws it has passed are implemented and their impact is also part of the oversight role. To do this, Parliament formed the Committee on Implementation. The committee draws its mandate from Standing Order No. 209,[15] and is mandated to scrutinise the resolutions of the house, including adopted committee reports, petitions and the undertakings given to the government on the floor of the house. The committee also examines the

---

13 Ethics and Integrity Act, 2012

14 Eurobond: A first Eurobond loan borrowed by Kenya in 2014

15 Parliament of Kenya, The National Assembly Standing Orders (4th Edition) https://tinyurl.com/KenHASO4th

implementation of legislation passed in the house.[16] In 2016, Mzalendo made a request to monitor this committee but to our surprise the committee had not done much due to internal and external challenges it faced in carrying out its mandate. The challenges included lack of co-operation between the National Assembly and Senate, dismissive cabinet secretaries and county governments and inaccurate reporting by mandated agencies.

Quality of legislation

The post-2010 Parliament has been accused of not legislating quality laws. Some laws have been declared unconstitutional or even creating overlapping roles for different institutions thereby creating administrative crises. The laws often fell short of constitutional expectations and probably those of the '*mwananchi'*. This could be because the laws were passed hurriedly or because Parliament lacks the necessary capacity to scrutinise them carefully. There is need to build the capacity of our parliamentarians to exercise powers within their jurisdiction properly—budget making is another case in point.

Law and policy are closely intertwined, therefore the process of making each must be informed by the other. Legislation is an exclusively parliamentary task, consequently legislators are expected to take time and observe the environment in its entirety before making a law. In this sense, legislative work is tedious and requires dedication. For a long time now, research for quality law making has been missing. Some laws from Parliament have been shallow and just cosmetic. This has led to making laws and policies that are out of touch with reality or wholly incompetent legislation. This may explain why Kenya has so many laws that are at times not effective.

In this regard, complaints have been made on the floor of the National Assembly against Members of Parliament who often have not even read Bills. Once, Marakwet East MP, David Bowen was recorded complaining on the floor of the Assembly that MPs are not reading Bills which makes it hard to debate them.[17] Lack of commitment also adds to the time taken to deliberate on Bills. Additionally, it reinforces the viewpoint that many parliamentarians are just joy-riders. A parliament that links legislation making process with the policy needs of a people would be more effective and people driven. It is a challenge

---

16 Standing Order No. 209.

17 See Mzalendo blog https://tinyurl.com/Mpsshouldstudy.

for parliamentarians to spend some more time reading and researching so as to improve their input in parliamentary business. In the wisdom of David Ogilvy, 'Ignoring research is as dangerous as a general who ignores decodes of enemy's signals'.

Corruption and greed

In the last ten years there have been many occasions when MPs sat to discuss increment of their pay in total disregard of their constituents' outcry. At one point activists in Nairobi paraded pigs outside Parliament to protest the greed of members of parliament with placards written 'MPigs' and the names of some prominent parliamentarians on the sides of the pigs. In Kenya where the inequality divide between the rich and poor is so huge, it is unfair for members of parliament to take home $120,000 per annum. The Constitution tried to solve this by establishing the Salaries and Remuneration Commission (SRC) and in Article 210 (3) states that no state officer shall be exempted from paying tax. Members of the 11th Parliament defied this remedy, by blackmailing the SRC and continue take home huge sums of money in total disregard of Kenya's rising wage bill. Parliament has also been using its budget making role to blackmail the executive in order to allocate themselves more money through the Constituency Development Fund (NG-CDF) despite its unconstitutionality.[18]

In most cases, pundits reckon that the problem with Africa is the existence of 'constitutions without constitutionalism'. For instance, the Ethics and Anti-Corruption Commission (EACC) in 2015 issued a damning report incriminating the Parliamentary Service Commission (PSC) over corruption in Parliament. The PSC, which is chaired by the Speaker of National Assembly, pays MPs for 'cooked up' mileage and sitting allowances, though many frequently skip committee and plenary sittings. This is gross abuse of the trust that Kenyans have confided in the house.

Weak parties and negative political culture

'When examining Parliaments in their environments, the character of the institutions depends on the political party and electoral system and relations with

[18] The issue of constitutionality is before the Supreme Court.

the nation's executive'.[19] The centrality of political parties in the establishment of progressive politics cannot be gainsaid. In democracies political parties are supposed to be incubators of ideas in a society. Here, expectations are that they set the standards of good leadership and progressive politics. They are the drivers of politics and the determinants of the overall politics in a state.

The founding philosophy of most parties, if not all, is rogue. Therefore, Kenyans find themselves dealing with parties that do not have an agenda. This observation is buttressed by the Institute of Education in Democracy in a report 'From Law to Practice' which found that all political parties in Kenya in 2014 were illegal.[20] Illegal because of their lack of adherence to law. Evidently, the party chiefs run them like tuck shops. Lack of citizen engagement starts from the party, even parties that boast of possessing democratic principles are dictatorial in a real sense. Most party officials totally disregard the bottom-up approach in developing the party's agenda.

When Kenyans were birthing a new republic in 2010, they recognised the importance of political parties as the primary institutions of democratic governance. This cognizance is found in Articles 91 and 92 of the Constitution. The law sets the threshold for political parties reasonably high in order to prepare them for the respectable job of governing a country, in case of winning an election. In their deplorable state, political parties are not used as institutions of merchandizing sound and concrete ideologies. But instead, they have been hijacked by self-interested individuals for business and political brokerage. Political parties in Kenya are rickety because the political class wants them that way. In the recent past, Kenya has witnessed political parties' indiscipline at its peak.

Take for instance, the 10th Parliament legitimized party-hopping when they amended the Elections Act in 2012. Their main line of argument was that there is lack of internal democracy, and members of political parties should be free to switch their allegiance at will. In hindsight, this claim is true. Parties act as a sole proprietorship: one person together with his cronies call the shots in every aspect of the party. Consequently, fears that if the party custodians do not like you they may lock you out are valid.

---

[19] Copeland, Gary W and Samuel C. Patterson. 'Parliaments and legislatures' in George Thomas Kurlan (ed.) *World Encyclopedia of Parliaments and Legislatures vol. 1* (Washington D.C: Congressional Quarterly Inc.1998)

[20] Institute of Education in democracy *From law to practice: A report on the assessment of political parties' adherence to law in Kenya* (2015) https://info.mzalendo.com/media_root/file_archive/From_Law_to_Practice.pdf

Gender rule

Parliamentarians' commitment to implementing the letter and the spirit of the Constitution has been sluggish. Ten years on, Parliament has never implemented the 'two-thirds gender rule'[21] yet it was among the provisions that had to be enacted by August 2016. There has been a window of opportunity during the 12th Parliament to salvage the bad image of Parliament by legislating a law on the implementation of 'two-thirds gender rule'. There was a proposal to have the 'rule' implemented by nominating women in Parliament or through progressive implementation. The first option was more popular within the civil society circles while the second one was favoured by those who fear for the escalating wage bill. However, the 12th Parliament has wasted the opportunity to make the requisite change forcing the Chief Justice to declared Parliament unconstitutional and advised the president to dissolve it.

Beyond the various preferences by competing groups, the Constitution of Kenya 2010 gave Kenyan women a promissory note of inclusivity. The spirit of Kenya's Constitution is so uncompromising on matters of equity and equality such that the laws made to implement it must include women sufficiently. In light of this, Parliament has a choice to bury its head in the sand or face the issue head-on.

Conclusion

Though the Constitution envisioned the creation of a true democracy galvanized by the people's will[22] through Parliament's representation, our MPs may be by the people but not for the people. The interests and constitutional spirit have not been visible by the legislature both in its legislative and oversight role. As Arthur Schlesinger states in *War and the American Presidency,*[23] 'The Constitution might be an extra-ordinary document but it is a document all the same,' in reference to the blatant disregard of the Constitution. The executive and legislature have reduced the 2010 Constitution to a document.

---

21 Articles 27 (8) and 81 (b) of the Constitution of Kenya.

22 H. Okoth-Okendo, 'Constitutions without Constitutionalism: Reflections of an African Paradox; in D. Greenberg et al. *Constitutionalism and Democracy: Transitions in the Contemporary World* (Oxford University Press, 1993) 74.

23 WW Norton, 2004, p. 11

As the Building Bridges Initiative sought Kenyans' views on how to turn Kenya into a cohesive nation, one of the ideas mooted is the possibility of a referendum to vote on whether a new framework of government should be introduced with three tiers – as proposed in the 'Bomas' Draft Constitution in 2004. Our reflection is adding an additional tier of government would not give Kenya the government it deserves. (This proposal did not appear in the BBI final Report).

What is needed is a commitment to constitutionalism and the tenets of democracy. The bicameral Parliament has not served Kenya's interests as the levers that allow the executive to continue to have indirect influence over it remain in place. Some scholars argue that even with good leadership, an effective government is difficult to function due to the political systems in place, more so, political parties.[24]

The opportunity that exists is to have a referendum question that sets political party structures, reduces the size of the Parliament and make the right of recall of elected representatives by the people very explicit in order to rein in the legislators and push them to be effective.

Finally, in the words of the Bible, Luke 12:48b, parliamentarians should remember, 'For unto whomsoever much is given, of him shall much be required; and to whom men have committed much, of him they will ask the more.'

---

[24] Allan Savory, 'Good Governance in Africa' (Savory Institute, 2007) https://savory.global/good-governance/.

Chapter 3
Elections

Seema Shah

Introduction

The seventh chapter of the Kenyan Constitution, dedicated to representation of the people, is critical. In a country where electoral victory has often opened the door to opportunities for vast personal enrichment, and where legislators rank among the top-earning MPs in the world, it is little wonder that elections are such high stakes affairs.

Given this context, it is unsurprising that the drafters of the Constitution designed a robust system that seeks to ensure ethical and independent electoral management, broad public participation, and transparent electoral administration.

An examination of the most urgent election-related issues, including voter registration, political party nominations, voter identification, results counting, and the independence of the IEBC (Independent Electoral and Boundaries Commission), however, reveals serious gaps in implementation of these constitutional provisions. Indeed, a close look at the most pressing concerns shows that – very often – those responsible for implementing the law have the greatest stakes in maintaining the status quo.

The electoral vision of the Constitution

Unsurprisingly, when given a chance, Kenyans responded to the theft of national resources by voicing concerns about the lack of accountability from elected representatives; they expressed a desire for stricter standards for those interested in public office. In their submissions to the Constitution of Kenya Review Commission, Kenyans suggested curbing elites' ability to use elective

office for personal enrichment through various rules, including mandatory pre-election declaration of candidates' assets, voters' right to recall non-performing representatives, proof of leadership qualities for candidates, and the inclusion of independent candidates in elections.

The public was also concerned about the lack of representation for certain segments of the population and the difficulties associated with obtaining national IDs—essential to register as a voter. They raised issues of outdated electoral systems, the problems associated with linking residence and voting rights, and the need for a more vigilant electorate as points of consideration for a new constitution.[1]

Chapter Seven of the Constitution is based on five key principles: participation, inclusion, accountability, independence and integrity. These frame the general expectations and rules for those who participate in and administer elections. The Chapter Seven provisions are tied to Article 38 (in the human rights chapter), which recognises citizens' political rights with regard to the activities of a political party, free and fair elections, and voting as well as to provisions in Chapters Eight and Nine, which focus on the composition of the legislature and the executive.

Participation

Participation and democracy are fundamental values of the Constitution (Articles 10(2)(a) and 38). Citizens are empowered by basic rights that promote and encourage their active participation, including the right to join political parties, to lobby parliament, and to vote in and contest elections. Chapter Seven also elaborates three specific forms of participation: voter registration and voting, joining political parties, and contesting elections. The right to vote is bolstered by the lack of residency requirements for registration and by the requirement that voting be simple and transparent.[2] It is undermined by the exclusion of persons declared to be of 'unsound mind' or bankrupt. Such exclusions are common but becoming less so. Relatively few people in Kenya are formally declared to have a mental disorder (the phrase now used in the relevant law), or bankrupt, so the exclusionary impact is less than it might have been.

---

1 CKRC *Final Report of the Constitution of Kenya Review Commission* (2005), pp 172-173.

2 Article 82(2).

Participation as a candidate is supposed to be limited by ethical requirements – but the wording of Article 73(2)(a) implies that winning an election may trump ethical considerations. It states that the guiding principles of leadership and integrity include 'selection on the basis of personal integrity, competence and suitability, or election in free and fair elections.' This has sometimes been read to mean that a person who can win a free and fair election need not satisfy integrity requirements.

Law may impose education requirements for standing for office.[3] And the Elections Act requires that candidates for President and Deputy and Governor and Deputy must have a degree, while candidates for any other elective post (and this includes what people often call 'nominated' seats), must have completed secondary school and have some post-secondary qualification after at least three months of study. Having educational qualifications is somewhat controversial as it excludes large sections of the population, but the Court of Appeal has approved the qualifications for standing as MP.[4] But from 2022 those qualifications are toughened: candidates for MP or MCA must have a degree—this requirement was introduced into the Elections Act in 2017, but postponed in its effect till the next election. [At the time of finalising the book, this is a matter of renewed controversy, and the High Court declared the requirement for MCAs unconstitutional for want of public participation.]

Inclusion

Inclusion and participation go hand in hand. The Constitution ensures broad based inclusion, with a special emphasis on certain historically marginalized groups, women, and the disabled. For instance, not more than two-thirds of the members of elective bodies may be of the same gender[5] and there must be 'fair representation' of persons with disabilities.[6] The Constitution also includes provisions for independent candidates who do not feel aligned to policies of any other party, and it mandates reserved seats for women and marginalized groups in the National Assembly, Senate and county assemblies—though not enough to achieve the two-thirds rule. Finally, there are rules about political parties being inclusive (see below).[7]

---

3 See Chapter Six and Articles 99 (1) (b) and 193 (1) (b) of the Constitution.

4 *John Harun Mwau v Independent Electoral & Boundaries Commission & Attorney General* [2019] eKLR.

5 See Chapter 18 in this volume.

6 Article 81(b) and (c).

7 Article 91.

The principle of inclusion is limited by the use of the first-past-the-post system for members of parliament, governors, women's representatives and members of county assemblies. In other words, the person who gets the largest number of votes wins, even if far more people voted against them. The Constitution's reliance on this majoritarian, winner-take-all system promotes divisive politics, creating little incentive for candidates to seek support outside of their core support bases.

Accountability

The Constitution, by mandating that voting be verifiable, tries to ensure that the processes through which leaders are elected are open and publicly accessible. The IEBC must openly and accurately collate results and promptly announce them at the polling station.[8] Announcing results at the polling station level allows the public to follow the results from their areas through the different levels of collation and to ensure that they are accurately reflected in the final count.

Accountability is also required within political parties, which must be internally democratic. These provisions are bolstered by the requirement that the IEBC regulate party nominations, develop a candidate registration method, limit the amount of money that a candidate and party can spend during elections, and develop a code of conduct.

The Constitution falls short, however, with regard to the IEBC's accountability. Although Article 254 requires the IEBC to submit a report to the President and Parliament at the end of each financial year, there is no detail on what is to be included in such reports.[9] Since Article 254 applies to all constitutional commissions, it would be possible to establish some basic minimum standards for what should be considered, including an overview of activities, the amount of money allocated and spent, and lessons learned.

Independence

The Constitution's definition of a free and fair election rests partly on the requirement that such elections are conducted by an independent body.[10]

---

8 Articles 86 (a), (b) and (c).

9 Article 254.

10 Article 81(e)(3).

As a constitutional commission, the IEBC is independent and not subject to direction or control by any person or authority.[11] Additionally, individuals who have contested elections in the past five years and those who are state officers are barred from being members of the commission. Commission members cannot be removed from office other than for reasons of incompetence, bankruptcy, gross misconduct, serious violation of the Constitution, or incapacity to perform the functions of office.[12]

Integrity

Overall, the Kenyan Constitution's vision of electoral integrity is centred on an easy to use and inclusive, publicly verifiable system.[13] It strives to ensure that all citizens are empowered to demand voter-centred elections and to hold those who have power over electoral processes accountable for their decisions and actions.

Monitoring and observation

Given the Constitution's emphasis on public participation, accountability and transparency, it is surprising that there is no right that elections be independently observed and/or monitored. In fact, the 2017 election cycle was controversial partly because of a decision that forbade Kenyans from being on the premises of polling stations for any reason - outside of voting on election day. This directive caused significant confusion and suspicion, with citizens questioning whether they would have access to publicly displayed results forms. This kind of situation is likely to discourage citizens from active engagement, restricting their participation and weakening democracy.

The practice of elections does not seem to meet the high constitutional standards of democracy and integrity. In fact, all three of the most recent Kenyan national elections have failed in this regard. Either constitutional standards fail in practice or electoral actors violate the Constitution. To this issue we now turn.

---

11 Article 249(2)(b).

12 Article 251(1).

13 Article 81(e).

Implementation of provisions on elections

Unfortunately, both the 2013 and 2017 electoral cycles – marked by complex and opaque technical procedures, rampant corruption, and lack of accountability – demonstrated how deeply engrained past systems of administering elections are. It is clear that certain deep-seated, key issues remain stubbornly unresolved, risking the credibility of future elections before they even occur. These include voter registration, voter identification and voting, results counting, political party behaviour, and the independence and integrity of the IEBC. Together, they risk the undermining the Constitution.

Issue 1: Voter registration

Voter registration is a critical part of the electoral cycle. The Constitution seeks to make the process simple. In fact, it removed most previous restrictions on registration, and Article 83(3) emphasises that administrative arrangements for registration should facilitate and not deny eligible citizens the right to vote. Despite implementing laws which echo the Constitution, including provisions for continuous registration, public inspection and verification of data in the Register, and independent audits of the Register, the process of registering to vote and the integrity of the Register of Voters have seriously marred the credibility of the past two elections.

National identification cards

One of the most fundamental problems with the voter registration process is the national identity card, available to citizens over 18 and required for voter registration, and for registering a phone number and other purposes.[14] The card is notoriously difficult to obtain, especially for minority communities, whose members are disproportionately subject to lengthy and onerous 'special vetting procedures.'[15] Sources have explained that special vetting procedures, applied to 'border locations,' or those from border areas, are synonymous with rejection and denial of the ID card.[16] It may take many years to get an ID. Incidentally, years ago this sort of discrimination in issuing IDs was held unconstitutional by a court.

---

[14] Kenyans may use their passports instead of ID cards.

[15] http://www.informaction.tv/index.php/news-from-the-field/item/564-election-watch-report-2

[16] See previous footnote.

One must be a citizen to vote. Some concern to establish nationality is understandable in a country with over 400,000 refugees, but it is clear that these rules exclude many who are undoubtedly citizens, and violates the Constitution's principles of universal suffrage based on equality of the vote. They also violate the constitutional provision requiring administrative arrangements to facilitate the right to vote. The best solution is to ensure that IDs are readily available to citizens, which requires giving up some attitudes of suspicion towards communities that have some origin in or connection with places outside Kenya.

Internal integrity

Changing Numbers

The Register of Voters has also been plagued by allegations of internal errors and inconsistencies. In 2013, for example, the final number of registered voters increased by 12,500 voters between December 2012, when the provisional register was released, and February 2013 when the final register was announced. While it was understandable that the number of voters would decrease as the IEBC purged duplicates and other erroneous entries, it was unclear how the number could have increased during this period. Similar issues were noted in August 2017 when the number of registered voters increased by 25,000 after election day.

In addition, there were significant changes to the number of registered voters in the two main parties' stronghold areas in 2013. In Nyanza, for example, the number of registered voters decreased by 15,026 while, in the Rift Valley, the number of registered voters grew by 67,000.

When such changes occur, the IEBC must be open about the reasons so the public has faith in the credibility of the Register. In both the 2013 and 2017 electoral cycles, Kenyan civil society raised multiple questions about the changing numbers; the IEBC never responded. In 2017, the Africa Centre for Open Governance sued the IEBC for violating a law requiring the Register of Voters to be publicly accessible.[17] In response, the IEBC published the list on its website. Unfortunately, however, it was not possible to see the list all at once and therefore impossible to verify the final number of registered voters. Since then, the IEBC has even removed that list from its website.

---

[17] Elections Act s. 6A(3)(b)

Dead Voters and Access to Data

The Kriegler Commission[18] described the Register of Voters as seriously defective, noting the low rate of registration, the inclusion of about 1.2 million dead voters and the significant under-registration of women and youth. Indeed, these problems were partly responsible for the decision to create an entirely new Register in 2013. It was thus disappointing that, four years later, an audit of the Register of Voters found that the list potentially contained 1,037,260 dead voters.[19]

However, the IEBC is not entirely to blame for the retention of dead voters in the Register. It is the Civil Registration Bureau that maintains death records, and the IEBC relies on that data to purge the Register of voters who have passed away. Out of 1,534,009 expected deaths of Kenyans age 18 and above between 2012 and 2016, the Bureau was only able to provide the auditors with 332,551 records, representing just 22 percent of all expected deaths.[20]

Inconsistencies and Errors

The audit also revealed numerous errors and inconsistencies in the Register. Some of the most notable examples include:

- 5,247 records of individuals lacked fingerprints[21]
- 93,548 records showing duplicate ID numbers or passports shared across 197,677 records[22]
- 29,199 records with inaccurate names and particulars[23]
- 264,242 records of IDs which are either duplicates or 'out of range'[24]

The Constitution and the Elections Act require the IEBC to keep the Register of Voters updated, but the IEBC is weighed down by data deficiencies in the records of various responsible public bodies. The IEBC has its own faults as well, especially including inefficient and insecure data collection methods. Together, these issues make it difficult for Kenya's voter registration system and

---

18 *Report of the Independent Review Commission on the General Elections held in Kenya on 27 December 2007* (2008).

19 KPMG *Independent Electoral and Boundaries Commission Independent Audit of the Register of Voters* 2017. p 102.

20 KPMG 2017, p 101.

21 KPMG, 2017, p 137.

22 KPMG 2017, p 119.

23 KMPG 2017, p 119.

24 KPMG 2017, p 119.

its Register of Voters to comply with constitutional standards of transparency and accountability.

The Green Book and other lists

Notwithstanding a new biometric list of registered voters, the 2013 election cycle was marked by the IEBC's use of multiple lists. The most infamous was the manually created 'green book,' used at the polling station level to record the details of registered voters, which severely marred the legitimacy of the entire registration process. Soon afterwards, it became clear that other lists of registered voters were in circulation. These included a list that was given to political parties as well as the IEBC's 'special list' of registered voters who were not able to provide fingerprints. All these lists had different totals, and the IEBC was never able to explain the differences.

Given the IEBC's substantial investment in biometric registration technology for the 2017 election, it was surprising that civil society again observed the use of the green book.[25] Civil society's questions about this were never answered.

The Audit of the Register of Voters

In 2016, legal amendments provided for the IEBC to hire an independent and professional firm to undertake an audit to verify the accuracy of the Register, recommend mechanisms through which its accuracy can be enhanced, and update it.

Unfortunately, the Elections Act stops short of requiring audit findings to be publicly available. It was only after significant public demands from civil society that the report was made public.[26] Even then, the published version was incomplete: the chapter on database controls and infrastructure security was never made publicly available.

Issue 2: Voter identification and voting

The law and regulations do include provisions to facilitate simple and transparent voting, including transparent ballot boxes with lids colour coded to match ballots for various elective offices. New provisions also promote transparency by

---

[25] InformAction (IFA). 2017. 'ElectionWatch Report 3: Gateway to the Ballot Box.' Available at https://tinyurl.com/ElctionWatch3.

[26] See https://www.iebc.or.ke/iebcreports/index.php/full-report/ (no longer available)

requiring serialised ballots and permission for agents to remain in the stations during the entire process.

On the other hand, however, the IEBC's regulations add multiple layers of complexity to the process of voting. In the polling station, voters present the IDs they used to register to IEBC staff and have their fingerprints taken. The staff then search for a match in the (electronic) Register of Voters. If a match is found, the voter may proceed to cast her ballots. If not, the staff search the hard copy of the Register for the voter's ID data. If the voter is found there, she must fill out an affidavit and then may proceed to vote. If her data is not located, she may not vote. It remains unclear why the electronic and hard copies of the Register are different.

In 2013, voter identification kits failed at an alarmingly high rate, leaving the IEBC staff solely dependent on paper copies of the Register to identify people. In 2017, voter identification kits were more reliable, but a common complaint in both elections was from people who said that they had registered but whose names did not appear in the Register.

Laws require the IEBC to consider accessibility for persons with disabilities and special needs when deciding on the location and number of polling stations. In 2017, it was clear that the IEBC had done little to adhere to the spirit of the law. After the August election, the United Disabled Persons of Kenya described a general lack of ramps and poor lighting. Clerks were largely unaware of basic issues, such as the difficulties people in wheelchairs face when trying to reach the polling booths.[27]

Issue 3: Counting and recording results

The Constitution obliges the IEBC to count, tabulate and promptly announce results at both the polling station and constituency levels. The Elections Act thus specifies that the IEBC must publish results immediately after the close of polling, tally and verify results from constituency and county tallying centres, and publish the results forms on an online public portal. In theory, these requirements ensure that there is a check in place on both the hard and digital copies of results, that the IEBC is reviewing all incoming results for accuracy and that the polling stations results are shared with the public.

The Regulations require the IEBC to promote transparency by recording the number of ballots issued, displaying all marked ballots as they are counted to

[27] https://www.the-star.co.ke/news/2017/08/17/iebc-shortchanged-us-in-polls-the-disabled_c1617816.

others in the room, recording reasons when ballots are rejected, providing copies of results, and posting copies of results sheets at the polling stations.

Nonetheless, the counting, recording and transmission of results have always been problematic and tainted with allegations of fraud. The Africa Centre for Open Governance's study of 2013 polling station results forms included the following findings[28]:

- In at least 138 polling streams[29], the numbers on the forms did not add up.
- In at least 28 polling streams, the number of votes cast exceeded the number of registered voters.
- In at least 27 polling streams, the number of registered voters, as recorded on the forms, was different from the number of registered voters as published by the IEBC before the election.
- In at least 80 polling streams, results forms were missing.
- In at least 64 polling streams, numbers on the forms had been changed without an authorizing signature.

In both 2017 elections, forms were similarly problematic. This time, however, forms were also found to have been irregularly printed. The Registrar of the Supreme Court, who oversaw the scrutiny of forms during the August presidential election petition case, found that[30]:

- 56 out of 291 constituency level tallying forms bore no watermark
- 31 out of these forms did not have serial numbers
- 189 out of these forms contained incomplete 'handover' sections
- 287 out of the forms contained incomplete 'takeover' sections
- Form 34C, used by the Chair of the IEBC to announce the final presidential result, was a photocopy of the original form. The original form was never given to the court.

---

28 AfriCOG. 2014. 'Election Day 2013 and its Aftermath.' Nairobi: Africa Centre for Open Governance, pp 6-7, https://tinyurl.com/ElectionAftermath.

29 In 2013, each polling station was divided into various 'streams.' In 2017, streams were called polling stations.

30 Registrar of the Supreme Court of Kenya. 2017. 'Scrutiny report as filed by the Registrar', pp 9-11 https://tinyurl.com/ScrutinyReport.

In October 2017, when the credibility of the election was again challenged in the Supreme Court, the scrutiny of forms showed similar problems.[31]

Some genuine mistakes are inevitable during counting and tallying results, especially in the high pressure environments of Kenyan polling stations as votes are counted. Currently, however, the process fails to live up to constitutional standards of transparency and accountability. The methods used to complete results forms and the procedures through which mistakes and purposeful fraud are addressed must be publicized so that citizens understand how their votes are counted and thus continue to have faith that their votes *are* counted.

Future reform efforts might include a campaign to specify the procedures and rules for addressing errors on results forms in the election law. This would promote transparency, accountability and verifiability in the results counting phase. It would also allow the public to understand and participate in cross checking results, thereby promoting the kind of participation and engagement envisioned in the Constitution.

The other problem is the use of technology in results transmission. The law is clear, directing the IEBC to electronically transmit and physically deliver tabulated presidential results to the constituency and national tallying centres. It also requires the commission to verify the results received.[32] In 2013, the electronic results transmission system malfunctioned, causing a freeze in the streaming of results. Soon thereafter, the IEBC announced that the entire system had shut down. In order to count results, the IEBC was forced to rely solely on paper forms, which had to be physically transported from all over the country to Nairobi. This risky process was unable to deliver a complete set of results, and the IEBC announced a final presidential result without 2,585 polling station forms.[33] To date, there is no publicly available record of polling station results from that election.

In 2017, transmission remained an unclear and problematic process in both elections. In August, part of the Supreme Court's justification for annulling the results was the IEBC's failure to electronically transmit all its results, as required by the law. This issue was compounded by the IEBC's failure to obey court orders to open its servers for scrutiny. In 2017, the law also required the IEBC to establish a public, online, portal which would provide the public with photos of

---

31 AfriCOG and Kura Yangu Sauti Yangu, 2018. 'Unanswered Questions - Findings from the Scrutiny of the October 2017 Fresh Presidential Election' Nairobi: Africa Centre for Open Governance, pp 15-16, https://tinyurl.com/UnansweredQQ.

32 Elections Act section 39(1C) and (1D).

33 AfriCOG. 2014. 'Election Day 2013 and its Aftermath.' p 8.

the polling station forms and a running count of results. When the Supreme Court case proceedings revealed that the results on the portal were different from what the IEBC was announcing, the IEBC claimed that the portal results were 'mere statistics,' not necessarily representative of the true results. This situation worsened in October. In the aftermath of that election, a court-ordered scrutiny process found that results from the portal again differed from the IEBC's official results.[34]

Arguably the law should require the IEBC to publicly release its IT (information technology) records, including server logs and KIEMS kit logs,[35] so that it is possible to verify that the transmitted results are the same as the announced results. However, it is worth noting that the polling station forms are already publicly accessible through the portal. The law should certainly require the announced results to match what is shown on the portal, and that the IEBC must explain any difference. The legitimacy of the publicly accessible forms is also in doubt, because the October election showed differences between the IEBC's physical forms and what had been posted on the portal. This raises questions around the IT logs, which are the only way to prove what is and is not a truly original form.

If there is no will to be open under the current law, it seems unlikely that more legal provisions will change that. In September 2017, the Supreme Court's majority decision stated that the record of results must be accessible in a way that allows the public to understand and crosscheck them. This ruling could act as a springboard for ideas about what such a record would look like and how to achieve that.

Minor legal amendments could help in ensuring transparency and accountability. A legal requirement that the critical records of the day – including the number of ballots used, the reasons for rejecting ballots, the polling station diary, and the copy register – are easily accessible could help in any public effort to verify election results. These are currently kept in sealed ballot boxes across the country. Digitizing the records and posting them online, or at least consolidating them at a central location, would be a strong move to promote transparency. Finally, the IEBC must be compelled to publicize disaggregate results down to the polling station for all elective offices. The lack of these records is unacceptable, raising serious questions about the IEBC's competence, control of records and its legitimacy as a neutral electoral authority.

---

34 AfriCOG and KYSY. 2018.

35 Kenya Integrated Election Management System – used to check identity of voters and transmit result. Actual voting is manual.

Issue 4: Political parties

The Constitution envisages a key role for political parties in electoral and policy activities (Article 91). Each party must have a national character and a democratically elected governing body. Parties must promote and uphold national unity, exercise democracy through regular, fair and free internal elections, and more broadly promote the objects and principles of the Constitution. In particular, parties cannot be founded on religious, linguistic, racial ethnic, gender or regional bases. Parties must respect rights of minorities and other marginalised people. The Constitution thus aims for parties to be democratic strongholds, modelling inclusion, diversity and accountability. In practice, however, few parties seem to respect or understand these provisions.

In order to ensure that parties achieve some degree of national representation, the Constitution mandates that certain parliamentary seats are reserved for women, minorities and other disadvantaged groups.[36] Other provisions apply to county assemblies. The gender issue is discussed in Chapter 18.

At national and county levels, achieving inclusive representation that actively works to represent the varied interests and goals of those groups requires more than a certain number of members of particular groups. An individual's identity as part of a particular group does not guarantee that this person qualifies to represent the interests of that group. A law that tries to achieve representation for a specific group of people requires a set of standards of expertise and experience in working for that group. Without the will to go beyond quotas, national unity will remain elusive.

Parties' continuing struggle to practice internal democracy is clear in the way they conduct their nominations. The Constitution and law give little guidance on the process. The IEBC is limited to supervising nominations only when parties request it. And the Regulations merely explain the administrative steps and timelines related to filing nomination papers.

One of the most problematic aspects of party organization and nominations is the clear lack of reliable membership lists. In 2017, this, coupled with the absence of an updated Register of Voters, contributed to shambolic nominations marked by delays, cancelled voting and multiple voting.[37] In some instances, observers noted party officials handing out membership cards in rooms adjacent to voting areas.

---

[36] Article 98.

[37] Kenya National Commission on Human Rights, *The Fallacious Vote* (2018), (on the party primaries) 19. https://tinyurl.com/KNCHRfallacy.

The 2017 nominations were also marred by violence and intimidation. In Isiolo, members of the Borana community stopped voters from the Turkana community from casting votes in certain polling stations.[38] In Kisii disgruntled candidates violently stormed polling stations, and in Kericho one politician's hired 'goons' destroyed voting materials.[39] Overall, the Kenya National Commission on Human Rights (KNCHR) witnessed acts of violence in virtually all 33 counties that it monitored.[40]

A third serious problem in 2017 was the lack of internal party commitment to democratic standards for fair nominations. In Kisumu, two of ODM's returning officers awarded nomination certificates to two different alleged winners, incumbent Governor Jack Ranguma and Senator Anyang' Nyong'o. The matter was eventually taken to the Political Parties Dispute Tribunal. The chaos and confusion surrounding ODM primaries also led to one death and several injuries in Mombasa and Homa Bay.[41] ODM nominations were also characterised by missing returning officers, secret tallying centres, and instances of candidates buying their nomination certificates.[42]

Amending the Constitution will not address parties' lack of commitment to democracy. One key reform that could help, however, is the strengthening of the Office of the Registrar of Political Parties—tasked with supervising parties, administering the Political Parties Fund, ensuring that parties publish their accounts and audit reports, verifying party membership lists, maintaining a register of parties, and ensuring compliance with the law. A strong Registrar who is committed to the law could ensure that parties establish and maintain high standards of democratic practice. A permanent Registrar was finally appointed in mid-2018.

Issue 5: IEBC independence and integrity

As a constitutional commission, the IEBC is subject only to the Constitution and the law, and not subject to direction or control by any person or authority.[43] Members

---

38 IFA, June 2017. 'Burning Ballots: Kenya's Chaotic Primaries.' Available at https://tinyurl.com/BurningBallots.

39 IFA 2017, Burning Ballots.

40 KNCHR 2018.

41 Tony Omondi, 'Death, chaos as ODM polls off in some centres.' *Daily Nation* 24 April 201, available at https://tinyurl.com/Deathchaos.

42 https://tinyurl.com/Standardshambles.

43 Constitution Article 249(2)(b).

of the commission are also protected from being easily removed from office.[44] The IEBC Act contains a code of conduct which obliges the members and employees of the commission to, among other things, impartially and independently carry out its work.[45]

Despite the law, the IEBC's independence has been widely questioned since 2013. In the aftermath of that election, the former chair of the IEBC, Isaack Hassan, submitted an affidavit to the Supreme Court as part of the IEBC's response to a petition challenging the election. That affidavit, which contained personal attacks on a particular presidential candidate, revealed clear political bias. In fact, the lead up to the 2017 election was marked by opposition-led protests for the removal of the IEBC leadership, partly because of perceived bias. Unfortunately, even with a new set of IEBC commissioners, little improved. In the aftermath of the August 2017 election, the resignation of an IEBC commissioner and internal commission memos leaked to the public revealed serious internal divisions and allegations of political bias.

The IEBC's legitimacy has also been tainted by multiple allegations of corruption related to procurement of electoral technology. During the 2017 electoral cycle, the commission circumvented procurement rules by using time pressure as an excuse to award direct contracts to favoured companies, and ignored its own plenary's recommendation that electronic voter identification kits be leased rather than purchased.[46] The KIEMS kit preparation and technological project management were overpriced and unnecessary; companies were engaged and paid without signed contracts.[47] Corrupt activities depress public faith in the body charged with administering elections and reinforce perceptions that elections are money-making enterprises for those in positions of power within the system.

Any reform effort must include substantial attention to ensuring enforcement of the law. One option may be to establish a public committee, comprising election experts, embedded in the commission to observe all activities and decision-making processes. This committee could issue regular reports on the status of preparations.

---

44 Article 251(1). See also Chapter 6 on Commissions.

45 IEBC Act, Section 16 and Fourth Schedule

46 Ken Opala, 'IEBC: Anatomy of a cash cow with serial abortions and indiscretions.' *Daily Nation* December 16, 2018. https://tinyurl.com/Nationcashcow.

47 Walter Menya. August 26, 2018. 'Final audit exposes tender rot at IEBC that could have led to loss of billions.' *Daily Nation* https://tinyurl.com/IEBCRot.

Conclusion

Kenyan elections are in dire need of reform, but it is unclear that constitutional amendment is an urgent priority. First and foremost, authorities must remember that the Constitution envisions elections to be in service of the people. Voters are meant to be at the centre of electoral processes, and administrative procedures in relation to the vote must actively facilitate voting instead of conferring it as a privilege. Second, authorities stand to win a great deal of public confidence if they are more forthcoming about how things work, what might go wrong and what is being done to address it. This is especially true when it comes to voter registration, voter identification, and vote counting. Third, public consensus around a set of minimum standards for the conduct of elections could help bring people together, both in understanding of sometimes opaque election technicalities and in prioritizing standards of electoral integrity. Fourth, it is necessary to think critically about how to urgently shrink the stakes of winning elections. If elective office was divorced from access to resources, representatives' priorities and motivations might move in the direction of public rather than self-interest. Together, these categories of reform may help Kenyans urgently address the dire lack of the rule of law in relation to electoral processes. Some very targeted constitutional change may be necessary in the long term, but the most critical priority now is how to breathe new life into the Constitution.

Chapter 4

Executive Government and Presidency

Yash Pal Ghai

Background

The executive is one of the three principal aspects of the modern state. The Constitution states, 'Executive authority is derived from the people and shall be exercised in accordance with this Constitution' and 'in a manner compatible with the principle of service to the people of Kenya, and for their well-being and benefit'. The presidency is the most prominent aspect of the state and government (Art. 131). The President's responsibilities include the protection of the Constitution, safeguarding sovereignty of the state, promoting and enhancing the unity of the people and communities of Kenya; and ensuring the protection of human rights and fundamental rights, and promoting the unity of the nation (including diversity of the people and communities). This chapter discusses primarily the responsibility of the President and his or her chief officers, focusing on the executive headed by the current President, Uhuru Kenyatta.

Like all state organs, the executive is bound by national values and principles of governance (Article 10). The President has most extensive and important responsibilities including good governance, state finance, integrity, transparency, accountability and foreign affairs (Chapter 12).

Kenya became independent with a parliamentary system, headed by a prime minister as the British did not want a concentration of state as under a President—in part because of the diversity of Kenya's regions and people. This fairly complex system of sharing of power was abolished by the first prime minister, Jomo Kenyatta, within a year of independence, changing the system to a presidential system. He assumed complete state power, exercised largely by his close relatives and fellow tribespeople; so we had as President the leader of the largest tribe.

He also changed the system from a bicameral (with two houses of Parliament, a form of power sharing) to unicameral system by bribing Senators to agree to its abolition by giving them substantial state money and the membership of one, new, legislature.

The presidential system had (has) the disadvantage that the post was effectively confined to one of the five major tribes—it was liable either to conflict among these tribes or making deals to the disadvantage of the state and other communities. During the Bomas negotiations for a new constitution, when it appeared to Kibaki that he would not win on basis of tribes, he argued against presidentialism as the 'imperial presidency' but when he had defeated Moi's chosen candidate, Uhuru Kenyatta, he shifted to favouring presidentialism. So did leaders of all major tribes, with similar expectations, when reviewing and revising the draft constitution in Naivasha in 2010.

Responsibilities of the President

The President is elected by the people, for a maximum of two terms of five years each. According to Article 129 the executive authority 'derives from the people, to be exercised in accordance with the Constitution'. The executive consists of at least two categories: those elected like the President and those appointed by the President (Article 130), referred to as the cabinet (Article 152). Both must exercise their power in a manner compatible with the principle of service to the people of Kenya, 'and for their well-being and benefit'. The composition of the national executive must reflect the regional diversity of the people (Article 130(2)).

Principal secretaries (civil servants previously known as permanent secretaries) are appointed by the President on the basis of recommendations by the Public Service Commission, and that commission appoints other public servants (Article 234). These are essential to the work of the executive, but, are not included as a part of the executive by the Constitution.

The President is accountable to the people, but there are few mechanisms for the removal of the President**:** none that can be invoked by or involves the people. Dismissal can only be by the Senate by two-thirds of its members (in a case brought by the National Assembly) for gross violation of the Constitution or any local or international law, or gross misconduct (Articles 144 and 145).

As the head of the government and of other organizations, the President wields great authority—which is spread throughout the Constitution. He or she is

bound by responsibilities of leadership (Article 73, Chap. 6): must be consistent with the Constitution, demonstrate respect for the people, bring honour to the nation and dignity to the office, promote public confidence in the integrity of the office—and, most importantly, the Constitution vests in the President 'the responsibility to serve the people, rather than the power to rule them'.

The President has major responsibilities of the state, except in some respects for the counties though on some issues the counties do interact with the President. The President has an important responsibility vis-à-vis a county (under Article 192): (a) in an emergency arising out of internal conflict or war or (b) in any other exceptional circumstances (not defined) the President may suspend a county government. However, presidential authority is not absolute even in this regard. First an independent commission of enquiry has to find prescribed grounds for suspension, and secondly the Senate can terminate the suspension at any time. In the one occasion when the commission found ground for suspension and so advised Uhuru Kenyatta, he declined to suspend the government but cautioned it on better behaviour.

We can best understand the role of the President, or the way presidential power is exercised, by considering how the holder of the office relates to other institutions.

Presidency and legislatures

A major difference between presidents in presidential systems and prime ministers in parliamentary systems is in their relationship to the legislature—the president is directly elected by the people and is not a member of the legislature, the other is normally the leader of the largest party in parliament. The prime minister (PM) participates in parliamentary proceedings, senior members of the PM's party are responsible for most policies and laws, generally without veto in the legislature.

In the Kenyan system, the President has less influence over members of parliament than in a parliamentary system—but recent manoeuvres resulting from the falling apart of the Jubilee Party show how party power to remove members from chairs of committees etc. can be used to intimidate parliamentarians.

Government proposes many Bills to Parliament, and generally they are passed, though MPs may make some changes. But occasionally they dig in their heels, sometimes for their own benefit.

One unsatisfactory element of the Constitution, and practice, concerns the presidential veto. If a law passed by parliament is rejected, parliament can nevertheless adopt it if two-thirds of its members support it (Article 115 (4)). In practice, in Kenya, the President's reservation seems to be the end of the matter —MPs just vote to accept his wishes. Sometimes it seems that the office of the President, and the Attorney-General, do not pay careful enough attention to what Parliament is passing. This method has become too easy for the President—he effectively becomes a super-legislator. The language of the Constitution suggests that there is no choice for MPs: accept what the President wants unless they can muster two-thirds. In the USA, if the President vetoes the Bill dies.

Presidency, judiciary, and legal authority

Attorney-General

The Attorney-General (AG) is appointed by the President subject to the approval of the National Assembly (Article 156(2))—provided the person has at least the same qualifications as the Chief Justice. The AG is the major legal adviser to the national government, represents it in legal proceedings (other than criminal proceedings) and has such other functions as are instructed by the President or a law. The AG has major responsibility to the public—in addition to (and possible conflict with) the directions of the President: he or she has major public responsibilities: 'to promote, protect and uphold the rule of law and defend the public interest' (para 6). The AG can appear in civil cases as friend of the court (*amicus curiae*) with the approval of the judiciary. However, the AG has acted as amicus – so not specifically for the government – only in presidential election petitions. Yet the AG is appointed and can be dismissed by the President—so it is hard to view the office as independent,

DPP

The Director of Public Prosecutions (DPP)'s primary function is taking suspected criminals through trials before the courts—based solely on his or her own decision. However the constitutional direction is that his/her powers must be exercised 'with regard to the public interest, the interests of the administration of justice and the need to avoid abuse of the legal process' (Arts. 157(10) and (11)). The DPP's appointment is made by the President with parliamentary approval, with qualifications similar to those of a High Court judge, and removal procedure of

the DPP is rather similar to that for removing judges (Article 158). Yet this is also an independent office in the sense that it may not be directed by anyone else. It is unfortunate that this office, like the AG, is included in the executive chapter of the Constitution – this may partially account for President's apparent belief that he can direct the DPP what to do – the courts have been firm that no-one can do this.[1]

Judiciary

The judiciary is the third major part of the state. The President has little power to make or remove judges. But his or her engagement at various points of the organization of the judiciary can create some confusion. A number of key decisions are made by the Judicial Service Commission—an independent body of which the President appoints two lay members. It seems that the President's choice of these has been from those who can take orders from him—not allowed by the Constitution, as the JSC members must be independent.

The President formally appoints as judge a candidate chosen by the JSC (Article 172 (1)). He has used this power improperly, and in defiance of court orders, to prevent the appointment of a few candidates he did not like for some reason for longish period. As the High Court said, 'the President's failure to appoint the persons recommended for appointment as Judges violates the Constitution and the Judicial Service Act'.[2] He has also criticised judges in office, especially in recent years, and often when his own position is concerned (as in elections). It does seem that he has trespassed beyond his rights.

The President has been among a sadly large number of state officers who have defied court orders, instead of leading the way in showing respect for the rule of law

President and devolved government

The President has limited authority in respect of devolved governments. The number, size and functions of the counties are determined in the Constitution: 'The governments at the national and county levels are distinct and inter-dependent and shall conduct their mutual relations on the basis of consultation and co-operation'. The national state is guaranteed 'reasonable access to its services in all parts of the

---

1 *Michael Sistu Mwaura Kamau v Ethics & Anti-Corruption Commission* [2017] eKLR

2 *Adrian Kamotho Njenga v Attorney General* [2020] eKLR.

Republic' (Article 6 (3)). Many aspects of the activities of the national and county governments are set out in the Constitution, which minimises interference by the central government. But in practice in some key areas counties are under central control, so the centre continues to play key roles in them. As shown in the chapter on Devolution, the responsibilities for many functions and resources overlap, in which case there are rules about when the centre prevails in case of conflict.

President and economy

African governments play a significant role in their nations' economy, even though it may be small by general standards of governments in other regions. The lack of a structure for exchange of products placed a heavy load of the economy on the colonialists. Over the decades the state has helped to establish a modern economy, increasingly based on the private sector, local as well as foreign. Governments, including ours, have established institutions of various kinds to regulate economies on regional and international levels. The Kenya government has probably retained more of a direct engagement with the economy than many. The state has also affected the economy in financial, monetary and other areas. Just as the state can influence the economy, the economy can influence the state. I now turn to various aspects of the economy, starting with his encounters with the Chinese.

International commercial responsibilities of the President

Uhuru Kenyatta is not known for his commercial skills, though the Kenyatta family is now the owner of largest commercial (including financial) enterprises by far in Kenya, perhaps in Africa. Nor did Uhuru distinguish himself when he was Minister of Finance some decades ago. He has left family business matters to his brother. But he is not without interest in commerce.

His greatest venture has been in his deals with the Chinese, of which the best known is in replacing the existing rail line which has long served the country (from Mombasa now to Naivasha).[3] The President took upon himself to negotiate with the Chinese government for skills, equipment, and money (largely secretly, as Chinese prefer these transactions). A Kenyan court has decided that by-passing the

[3] For a detailed study of the relations of China with African and Asian states, particularly with Kenya, see Yash Ghai and Jill Cottrell Ghai :'Security, Economy, Politics: The Chinese Agenda' in Cora Chan and Fiona de Londras, eds., *China's National Security: Endangering Hong Kong's Rule of Law?* (Hart Publishing, 2020) 307-332)

law on public procurement on the excuse of a government-to-government contract was illegal.[4] He has seriously failed in negotiating by himself and implementing the scheme—there has been corruption in purchase of land for the line and station; little control over the construction of the line done by Chinese; very little attention given to the position of Mombasa as a county and the major harbour in negotiating with China. Other problems have risen but many issues remain secret between the President and his immediate staff and China, though there are many Chinese secrets that the President or Kenya officials involved have no idea of. Despite all this and the public humiliation of Uhuru by the Chinese President in a recent major China-promoted International Belt and Road Initiative conference in China, Uhuru has continued to rely on Chinese investments in Kenya.

There have been concerns about the environmental impacts of many big Chinese projects including high-speed trains and big dams.[5] Kenya is an example where environmental concerns seem to have been ignored. China was at one point financing a coal-fired power project that is strongly resisted by the local community and would harm its inhabitants, and that evidence suggests is not needed in view of Kenya's renewable energy sources. The controversial railway also has negative impacts for Kenya's wildlife—the second phase passes through the Nairobi National Park despite vigorous opposition from civil society, and court rulings. China takes a hands-off approach on this, as on other non-commercial issues; it is clear that the decisions on the railway's route are those of the Kenyan government. But there is some perception that the Chinese are a negative influence on conservation in other ways.

Uhuru and the administration have been remiss in other ways. Local firms have suffered by the government's preference for Chinese firms for construction and other projects.

Generally the state (which means the executive) has not done well in commercial deals with outsiders or insiders. The ministers and other staff do not seem to have much skill in economic negotiations, and seem confounded by foreign and local entrepreneurs, having run up astoundingly high debts, little short of disaster.

---

4 *Okiya Omtatah Okoiti & 2 others v Attorney General & 4 others* [2020] eKLR.

5 B Gokkon, 'Environmentalists are Raising Concerns over China's Belt and Road Initiative' *Pacific Standard* (18 July 2018), available at psmag.com/environment/environmental-concerns-over-chinese-infrastructure-projects.

Parastatals

The Constitution does not deal with parastatals, though it is a major responsibility of the President, which Uhuru has taken 'seriously', if not sensibly. The famous socialist British politician, Herbert Morrison, said in respect of parastatals, 'We are seeking a combination of public ownership, public accountability and business management for public ends …' together with private sector. He said that a public corporation should be free from interference together with day-to-day operations on commercial lines.[6] Uhuru has shown more interest in parastatals than most other aspects of the business.

There are around 260 state owned enterprises covering a huge variety of topics (commercial like the Kenya Ports Authority, infrastructure like the Rural Electrification Authority, regulatory like the National Environment Management Authority, social functions like Kenyatta National Hospital, and teaching and research like universities). Each of them has a board of several members.

The President must realise that the general views of parastatals are negative, for several reasons: (a) politicization and poor corporate governance; (b) their boards and chief executives are appointed by the politically powerful —President and the relevant cabinet secretary. Thus many operational decisions are not necessarily made by the non-partisan or the skilled. The role of the state corporations' advisory committees is just advisory with little impact on policy or practice. The supervisory mechanism is weak. The structure of financing and financial management is weak—many state corporations are allocated funds through line ministries and thus end up being chronically underfunded. They are allowed to borrow funds but many have not repaid their loans. Expenditure controls are weak. Prosecution of chief executives for abuse of office and misappropriation of funds is rare—though there have been several recent ones at least initiated. When it is the President who chooses appointees, some say, the whole basis for parastatals is undermined.

The Task Force on Parastatals, set up by the President himself in 2013 identified a number of problems, including:

- Boards are not held accountable for board decisions when things go wrong but are rewarded when performance is good.
- Due to over regulation and rigid control, there is no clear boundary between the ministry and the state corporation.

---

[6] Herbert Morrison, *Socialization and Transport* (1933), p 149.

- There is no commitment to good corporate governance at the top where the tone is set.
- Appointment of CEOs and boards are sometimes political and they feel a hand over their heads and pressure to toe the political line.
- Politicians are interested in state corporations because they view them as cash cows and employment outlets for their supporters.
- Employment of unqualified staff who become untouchable, loyalty owed to the politician not the corporation, impunity, corruption.
- According to the task force, parastatals salaries are higher than those of the private or the public sector. Even if the post is not salaried, there are the notorious sitting allowances. And then there is the hope that if you please the appointing authority you might move on to other more remunerative things.[7]

The President does not seem to have liked the analysis of the team he had set up, and turned to another group (largely in government). Its function was to recommend re-organisation of parastatals. It seems that there is no record of the President's engagement with parastatals except to make appointments of senior staff to reward his failed politicians—instead of to people 'on the basis of personal integrity, competence and suitability'. The message is repeatedly reinforced that if you support political leaders, you may be rewarded. By making appointments on ethno-political bases, the President breaks another obligation of his office: promotion of respect for the diversity of the people and communities. Nor should we forget that the Constitution requires executive authority to be exercised in a manner compatible with the principle of service to the people of Kenya, and for their well-being and benefit.

A process that was genuinely open and competitive would be far more likely to produce appointees who were not only competent but whom the public considered to be competent. But even if the appointees are the best available, the whole process is wrong—it depends far too much on patronage. A normal pattern for appointment of at least chairs of parastatal boards is by the President (occasionally after a competitive process).

It is heartening to see now that many citizens and organisations have raised their objections to the presidential appointments on grounds of violation of the letter and spirit of the Constitution. Self-interest lies at the heart of what ought to

---

7 *Report of The Presidential Taskforce on Parastatal Reforms* (October 2013)

be public service. Very few seem to be there because they want to do a good job for the people of Kenya. No-one seems seriously to care about the gross waste and theft of public money. So why not enrich yourself?

So all too often parastatals are not properly supervised by the organs that the Constitution envisages, including Parliament, do not even operate on a commercial basis, and are subject to political interference of a different kind, best described as patronage.

There are cases before the courts on some of these issues—and the High Court recently declared a large number of parastatal appointments invalid, saying that various laws 'confer discretion on the President and his cabinet to make appointments without regard to the Constitution and applicable values and principles. This, in our view, violates the founding values of transparency and accountability in Articles 10, and the values and principles of public service in Article 232(1)'.[8] In another case the court emphasised that appointment to parastatal boards should be competitive.[9]

Promoting or fighting corruption

One of the most – perhaps the most – critical elements in the scheme of the executive is unfortunately corruption—starting with Jomo, followed by Moi, and now again in the regime of Jomo's family. The economy is closely connected with corruption, a kind of partnership between politicians and public servants with business people. Various attempts are made through the Constitution to eliminate corruption. Chapter Six ('Leadership and Integrity') aims to eliminate corruption by senior state officers—a wide list of state officers, from the President through cabinet officers, members of parliament, judges, Director of Public Prosecutions, and county officials down to the Inspector-General of the National Police Service, a list which can be enlarged by legislation. Article 73 sets out the high standard demanded of them, including bringing honour to the nation and dignity of the office and 'promotes public confidence in the integrity of the office'—and avoiding personal interests with obligations to the state. Their task is to serve the people, rather than to rule them. The Constitution sets out in detail their responsibilities under headings like 'Financial probity', and 'Restrictions on activities'. Some legislation has been enacted to implement the Chapter Six

---

8 *Katiba Institute v Attorney General* [2020] eKLR

9 *Katiba Institute & another v Attorney General & another; Julius Waweru Karangi & 128 others (Interested Parties)* [2021] eKLR.

objectives. The grip of the executive on appointments is a major obstacle to the elimination of corruption.

The Constitution also seeks to ensure integrity through rules governing public finance (Chapter 12). These include (a) openness and accountability, including public participation in financial matter; (b) public finance to promote an equitable society; and (c) expenditure to promote the equitable development of the country, including by making special provision for marginalised groups and areas. A number of institutions are established by the Constitution to ensure that these and other objective are observed, the most important being the Auditor-General (also appointed by the President). The responsibilities include audit of major public institutions, at both the national and county levels.

Despite these important and sensible institutions their goals are seldom achieved. Not all are committed to the goals while others do not have enough resources. Other relevant institutions like the Director of Public Prosecutions, Ethics and Anti-Corruption Commission, and Inspectorate of General Corporations seem to have poor records—for the most part. It is clear that under the circumstances, the objectives of the Constitution cannot be achieved. Much depends on the willingness and effectiveness of the President—factors effectively missing in the present President.

In the 10 years since the Constitution, the situation about corruption has increased beyond imagination. Every sector of the economy has been penetrated. It is rarely that business related acts can be conducted without significant bribes (and this is a major deterrent to foreign investment). Corruption within state institutions has never been so intensive—taxes, customs, contracts, procurements, land appropriations, schools and universities, etc. The police, meant to help us, are perhaps the most corrupt institution that we have—as well as brutal. Of late the President has shown an apparent concern to fight corruption. But dealing more firmly with people within his administration who are suspected of corruption should have been a policy from the beginning. The executive cannot maintain that 'others' are corrupt.

An outdated style of presidency

President Uhuru Kenyatta was born when his father was about to become President, and that father died as President. He has perhaps been influenced by that early experience, in his adoption of a sometimes mediaeval monarchical style. By this I mean the tendency to use patronage for appointments, already remarked

on. A disregard of the rule of law is another—monarchs, they used to say, 'can do no wrong'. Both these tendencies were shown in Uhuru's decision to create a set of new posts—Cabinet Administrative Secretaries. This is not a constitutional post. Posts in the public service are created by the Public Service Commission not the President. And the PSC decides who fills most posts. Again a court recently held that these posts had been unconstitutionally created.[10]

While people are no longer appointed, or, worse, dismissed, by roadside pronouncements, as in the Moi period, some of the President's pronouncements are as inappropriate. He orders the Director of Public Prosecution to do something (but he has no power to order that independent officer to do anything), he ordered all HIV positive school children to be registered—and a court pointed out that this was a violation of their privacy.[11] His tendency to express disagreement in rather violent terms – with the judiciary, for example – would have been more appropriate for a monarch several centuries ago than in an elected leader.

President and the people

The great increase in corruption may no doubt make more Kenyans rich people. But they also make infinitely larger number of other Kenyans poor, increasingly deprived of the basic necessities of life. It is a matter of great sadness that the increase in corruption should have taken place under Uhuru. It reinforces the Kenyatta family's reputation for corruption and securing the goods of other. On a broader basis, the President has shown little sympathy for the poor, whose proportion as citizens has increased—not decreased.

The President's responsibilities are numerous and important, the most fundamental issue being the entitlements of Kenyans. The Constitution has provided many rights and benefits to them—including a major share in policy making. Indeed the authority of the President itself comes from the people (Article 1). The President is also bound by many other obligations. He or she is accountable to the people, but there are few mechanisms for the removal of the President and those that can be invoked do not involve the people ((Articles 144 and 145).

It would be fair to say that the Uhuru has little real regard for the Constitution, though he pays lip service to it. More specifically, he has scant regard for the rule

---

[10] *Okiya Omtatah Okoiti v Public Service Commission* [2021] eKLR

[11] *Kenya Legal and Ethical Network on HIV & AIDS (KELIN) v Cabinet Secretary Ministry of Health* [2016] eKLR.

of law. If the law does not suit him, ignore it, seems to be his philosophy. He often seems more concerned about foreigners (note the large number of trips abroad) than Kenyans.

The fundamental basis of his responsibilities is the Bill of Rights (which the Constitution describes as 'an integral part of Kenya's democratic state'). It is clear from numerous violations that he has no regard for human rights or regard for the poor. He has ignored the right of persons to life, enabling or encouraging the security services to do the same. Since the Uhuru regime took over the state, the police have been encouraged to exercise violence and even killing of citizens—in complete violation of the Constitution. Article 244 requires the police to prevent corruption; it is well known they are constantly stealing from citizens under the threat of imprisonment or worse. The police must foster and promote relationships with the broader society; instead they kill them. The police have become the law themselves.

People in political office love to think of themselves. But what has come from the top in Kenya has been very weak leadership. There seems to be a tendency to believe that leadership means cracking down on people who step out of line —from the treatment of Miguna Miguna after the 'swearing-in' of Raila Odinga as 'People's President' in 2018, despite court orders, to the vicious treatment by the police of ordinary citizens for petty offences, or none at all, particularly noticeable during the coronavirus pandemic. The treatment of the media, too, after the swearing-in was a clear violation of the Constitution—shutting down media houses for some time. It is a weakness not a strength of leaders to try to prevent the people knowing about uncomfortable truths.

Conclusion

Things have changed from the days of Kenyatta I and Moi, no doubt. And some of the problems we experience can be partially laid at the door of the Constitution. That is particularly so of the poor decision late in the process, changing to a presidential system, when a major motive for seeking a new Constitution was to move away from the presidential system that made being President such an attractive prize that some would do almost anything to get it. Worse, when that shift was made, the MPs and the Committee of Experts failed to realise that they were giving the President some functions that had been designed for a ceremonial President, as well as those assigned to the effective head of government. But the search for and the exercise of political power in Kenya has remained too much of

a personalised issue – for self and family, by manipulation of ethnicity – not for country. Kenyans seem to continue to elect people who follow the same path. But following that path is a matter of choice by those elected.

Chapter 5

Institutional Transformation and Performance of the Judiciary in the Post-2010 Dispensation

Walter Khobe Ochieng

Introduction

A key feature of the 2010 Constitution is its commitment to fundamental change from the old authoritarian order to a new democratic, accountable, participatory, and egalitarian order. This can be seen in Article 10 of the Constitution which articulates the national values and principles of governance intended to inform the application, and interpretation of the Constitution; the enactment, application and interpretation of laws; and the making, and implementation of policy decisions. These national values and principles are the Constitution's goals at their highest level of generality. The rest of the Constitution attempts to elucidate the means by which these goals will be achieved. In order to accomplish this objective, the Constitution created institutions rooted in these ideals including an independent judiciary whose institutional transformation and performance is the subject of this chapter.

This chapter is divided into four sections. The first part sets the stage for the ensuing discussion. The second part is focused on institutional transformation. This section analyses the institutional design of the judiciary and how the design affects the institution's independence and its relationship with other arms of government. The third part analyses the jurisdictional design of the court system and how this has affected access to justice and delivery on the judicial mandate. The last part, the conclusion, offers views on whether it is necessary to have constitutional amendments with respect to constitutional provisions with implication for the judiciary.

Institutional design and inter-branch relationship

It is the role of the judiciary to uphold the Constitution and to exercise checks and balances on the other branches of government within the scheme of the separation of powers. The judiciary must be able to act as a guardian of the Constitution and uphold the rule of law without fear or favour. It must also be seen to be independent in order to ensure public confidence in its ability to fulfil its mandate. It is the realization of this goal through the institutional design of the judiciary that is the subject of this section.

The Constitution establishes an elaborate institutional and normative framework that guarantees *de jure* judicial independence and functional autonomy to the judicial branch of government. This has been done to ensure that the judiciary operates optimally and is not captured and hollowed out. The judiciary in the post-2010 period is generally regarded as independent and frequently strikes down actions of the legislature and executive. This is in stark contrast to the pre-2010 dispensation when courts were highly deferential to the executive and legislature, and only rarely curbed the efforts of either branch to pursue authoritarian ends.

The Constitution has entrenched the principle of separation of powers by vesting judicial, legislative and executive authority in three different branches of government in terms of Articles 94, 129, and 159 of the Constitution. The judiciary is tasked to exercise checks and balances over the executive and legislature and plays a crucial part within the separation of powers (though the judiciary is not free from checks and balances exercised by the other branches, especially over dismissal of judges, and appointment of the Chief Justice). Article 160 clearly articulates independence as a necessity for the judiciary. The judiciary is subject to the Constitution and the law only, and is not 'subject to the control or direction of any person or authority'. Further, certain safeguards of the broader goal of independence are enshrined in the Constitution: for instance, Article 160(3) and (4) provides that the remuneration of judges may not be reduced and Article 168 contains provisions which cover the terms of office and removal of judges and ensure that judges are not removed from office on whimsical grounds.

Before 2010, the process of appointing judges was not transparent and no public input was canvassed. Appointment to the bench was undoubtedly influenced by political factors. The process of appointment that has been prescribed by Article 166 of the 2010 Constitution goes a long way towards supporting the achievement of independence and competence in the judiciary. The process is conducted by the Judicial Service Commission. This is an independent body composed in line

with Article 171 of the Constitution; it is made up of representatives of judges, magistrates, the Law Society of Kenya, and two members of the public nominated by the President and appointed with the approval of the National Assembly. The process starts with the commission advertising vacancies in the judiciary in various media. The finalised short list is publicly announced for comment, after which public interviews are held. This process for the appointment of judges is clearly an improvement on what went before. In this way, the Constitution has helped to build public confidence in the independence of the judiciary.

It is clear that gains have been made in terms of the independence and functioning of the judiciary. However, an institutional design flaw that affects judicial self-governance that was not adequately addressed by the drafters of the Constitution relates to the funding of the operations of the judiciary. Article 173 of the Constitution provides for the creation of a Judiciary Fund administered by the Chief Registrar of the Judiciary. The Chief Registrar prepares annual estimates of expenditures of the judiciary to be approved by the National Assembly. Once approved the fund is a charge on the Consolidated Fund (this means that no further parliamentary approval is required). This provision has proved to be inadequate in securing financial independence for the judiciary, especially because of resistance from the Treasury. There is no effective constitutional provision or guarantee that its mandate will be adequately funded.

Following the annulment of the August 8th 2017 presidential election, the executive made a decision to slash the budgetary allocation for the judiciary and a number of independent constitutional offices. The government rationalized this reduction of budgetary allocation on the basis that it needed money for the repeat presidential elections and to enhance free day secondary education.

Earlier, in 2015, the National Assembly had slashed the budgetary allocation to the judiciary and the Senate as a punishment for the Supreme Court's Advisory Opinion to the effect that the Senate had to be involved in the approval of the Division of Revenue Bill that fixes the allocation of funds between the national and county governments. The intentional withholding of funds from the judiciary shows that the institution continues to be under-resourced thus compromising its ability to deliver justice effectively. The process of budgeting and monetary allocation remains a political process as the political branches of government use this as a mechanism to reward or punish the judiciary depending on the stance that the judiciary takes in political disputes. Furthermore, the process of lobbying by the judiciary for more financial resources remains a political endeavour that potentially threatens judicial independence. Turning the leadership of the

judiciary into politicians' supplicants carries with it an obvious risk to judicial independence. A possible solution to this threat to judicial independence would be a constitutional amendment to have a fixed percentage of the budget reserved for the judiciary as this would eliminate at least the appearance of negotiation between the judiciary and political branches of government. Interestingly, in Costa Rica there is a guarantee that the judiciary will receive 6% of the budget.[1]

While the judiciary has achieved the goal of playing its role within the separation of powers, the exercise of its powers has been met with attacks from the executive and, most alarmingly, non-compliance with court orders on the part of the state. The blatant disregard of court orders has the potential to result in a constitutional crisis. It should be noted that the question of compliance with court orders is not new. One of the worse areas of non-compliance with court judgments by the government is with respect to monetary orders. However, the bad blood between the executive branch of government and the judiciary following the 2017 elections has escalated the problem. The list of cases where the government has defied the courts includes a number of game-changing political judgments, including the orders for the release of the detained and then deported opposition politician Miguna Miguna. Another involves orders to switch on spectrum for several television stations that were switched off by the Communication Authority of Kenya for airing the mock swearing-in of the leader of opposition Raila Odinga as the 'people's president' on 30th January 2018. Unfortunately, the government flagrantly disobeyed the courts with limited consequences. If court orders in the most high profile of cases are not adhered to at the very highest levels of government the trickle-down effects are significant.

In order for a democratic system to function effectively, it is essential that the different branches of government adhere to the rule of law and submit to the checks and balances which the other branches exercise over it. Rule of law means both citizens and politicians respect the law and its institutions. Furthermore, judicial independence cannot be secured if the impression given by the government is one where judgments are adhered to only when politically expedient to do so. If the decisions of the courts are not obeyed and if their orders are not effectively implemented, the 'bite' of the Constitution will disappear and it will become largely a semantic document. This follows from the truism that courts are in fact unable to bring about significant policy change without the political will to enforce their decisions. There is need to borrow from Article 2 of the Constitution of

---

[1] (Rachel E Bowen, *The Achilles Heel of Democracy: Judicial Autonomy and the Rule of Law in Central America* (Cambridge University Press, 2017) p 77.

Ghana a constitutional provision that makes failure to comply with judicial orders or directions a 'high crime' under the Constitution, and providing that conviction for such a crime results in loss of eligibility for election or appointment to any public office in addition to imprisonment without the option of a fine.

The concerns relating to the financing of the judiciary and respect for court orders reflect a lack of ability, willingness or commitment to achieve the goals of the Constitution, which cannot be remedied by constitutional design changes alone. There is an important question here as to how much can be attributed to the Constitution and how much to wise political leadership. It is clear that without the latter, the Kenyan transition might not succeed. It is perhaps time to call for a recommitment to the vision of the 2010 Constitution and a rededication to efforts to achieve its goals.

Still rampant in the post-2010 constitutional order is the allegation that judicial officers engage in corruption and abuse of office. This is so despite the fact that upon coming into effect of the Constitution, all serving judicial officers underwent a constitutionally ordained vetting process to determine their suitability to continue serving in the judiciary. It was hoped that the vetting process and subsequent transparent recruitment process for judicial officers would yield a competent and ethical judicial service. However, the vetting process, transparent recruitment process, and the disciplinary process under the Judicial Service Commission have failed to effectively root out corruption and abuse of office by judicial officers.

Moreover, the composition of JSC has been a source of constant public concern. The Constitution designates two advocates as representatives of the statutory body responsible for the professional regulation of advocates to the JSC. Legal practitioners elected as commissioners of the JSC have continued to engage in active private legal practice while serving as commissioners raising concerns about conflict of interest given the scenario of an employer appearing before an employee. These concerns are informed by the possibility of undue influence on judicial officers as the JSC commissioners play a role in the promotion, transfer, and disciplinary processes of judges and magistrates. It has also been argued that the representatives of judges and magistrates to the JSC are protective of the interests of their constituencies and this hampers the effective functioning of the disciplinary mechanism for judicial officers. In view of these concerns, I recommend a constitutional amendment with respect to the composition of the JSC to have *retired* judges, magistrates, and advocates as the representatives of judicial officers and the Law Society to the JSC.

Jurisdictional design for various courts

Chapter 10 of the Constitution that establishes the judicial branch creates a structure with various facets. Perhaps the most important new institution created is the Supreme Court. This is expected to serve as the ultimate guardian of the 2010 Constitution. The creation of a new apex court was thought to be an imperative as the allegiance of the then existing judges to the new constitutional order could not be guaranteed. The other new courts created by the Constitution are the Environment and Land Court, and the Employment and Labour Relations Court created by Article 162(2). The major persuasion that motivated the establishment of the specialised courts were: improved access to justice, development of expertise by judges, development of clear and effective jurisprudence, and faster and efficient disposal of matters.

Article 163 of the Constitution vests the Supreme Court with the exclusive jurisdiction to hear and determine disputes relating to the elections to the office of President, and an appellate jurisdiction to hear and determine appeals from the Court of Appeal - either as of right in any case involving the interpretation or application of the Constitution or in case where it is certified that a matter of general importance is involved. The Supreme Court may also give an advisory opinion with respect to any matter concerning county governments, when approached by a state organ.

The vesting of the Supreme Court with the exclusive jurisdiction over disputes relating to the presidential elections was intended to channel the inevitable and traditional political conflicts for judicial resolution. To a large extent the Constitution has delivered on the promise of channelling disputes over presidential elections and avoided extrajudicial resolution of such disputes as happened during the 2007-2008 post-election violence. The Supreme Court has handled three presidential election petitions following the 2013 and 2017 General Elections.[2] To a large extent the political class and the general populace have accepted and abided by the determinations by the court even in instances where they disagree with the determination. Thus, the Supreme Court as an innovation of the 2010 Constitution has played an important role in resolving political conflicts. Nonetheless, there is an increasing sense that individuals need to go outside these

---

2 *Raila Odinga & 5 Others v Independent Electoral and Boundaries commission & 3 others*, [2013] eKLR), *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others*, (Presidential Petition 1 of 2017), and – after the repeat 2017 presidential election – *John Harun Mwau & 2 others v Independent Electoral and Boundaries Commission & 3 others* [2017] eKLR.

structures to make political gains as is evident with the 2018 'Building Bridges' truce between President Kenyatta and his political rival Raila Odinga.

However, a challenge that has faced the hearing and determination of presidential election petitions is the inadequate time allocated for filing, hearing, and determining petitions under Article 140 of the Constitution. This provision provides that a petition challenging the election of the President elect must be filed in the Supreme Court within 7 days, and then the petition must be heard and determined within 14 days. The allocated time for hearing and determining a presidential petition has proved woefully inadequate in practice. I recommend that the timeline for hearing and determining a presidential election petition should be 30 days.

A vexing debate that has arisen is on the jurisdiction of the Supreme Court. The Constitution says that if a case involves the Constitution there is no need to get any permission to bring an appeal from the Court of Appeal to the Supreme Court. But if it does not involve the Constitution it is necessary to get a court to say that the case involves something of general public importance. However, it may not be easy to distinguish between legal issues involving interpretation and application of the constitution and non-constitutional matters in a legal system where all laws must conform to the values and principles of the Constitution. Critics have argued that the Supreme Court has adopted an expansive reading of its appellate jurisdiction, especially in electoral disputes, thus creating an appellate option above the Court of Appeal which militates against the constitutional dictate for timely resolution of electoral disputes. In defence of the Supreme Court, it is arguable that the 2010 Constitution creates a value system that underpins the entire legal order thus it is impossible to disengage the question of the exercise of franchise and assumption of public office from constitutional controversy.[3]

To its credit, the Supreme Court has responded to the problem of possibility of avalanche of suits by adopting the pragmatic approach that once the court has considered and settled a legal controversy, no further appeals will be entertained by the Court with respect to that legal question.[4] In addition, the Supreme Court has clarified that it will only take an election case involving a constitutional issue

---

[3] See Walter Khobe, 'From Willy Mutunga to David Maraga: Impending Jurisprudential Shift' (2016) Vol. 23 *The Platform* pp. 32-44. See also Robert Alexy, (trans Julian Rivers) *A Theory of Constitutional Rights* (Oxford University Press, 2009) propounding a theory of principle based reasoning that can be read to support the Supreme Court of Kenya's approach to its jurisdiction.

[4] *Wavinya Ndeti v Independent Electoral & Boundaries Commission (IEBC) & 4 others* [2015]eKLR paras. 38-44

if that constitutional issue was central issue to the trial at the electoral court, and the same constitutional point was the subject of appeal at the Court of Appeal.[5]

Another difficult question about jurisdiction after 2010 concerns the relationship between the High Court and the equal status courts i.e. the Land and Environment Court and the Employment and Labour Relations Court. The same jurisdictional dispute has been manifested with regards to the relations of the Subordinate (Magistrates) Courts and the equal status courts. The other teething problem was whether the Chief Justice could transfer or allocate the judges between the High Court and equal status courts. These led to mooting of the proposal by the Working Group on Socio-Economic Audit of the Constitution that the judges of the specialised courts should be regarded as part of the judges of the High Court who should be subject to deployment and transfer across the different courts in the same manner judges of the High Court are deployed and transferred from one division of the High Court to the other. This may be achieved through constitutional amendments to the provisions setting up the two specialised courts on the basis that it is not the judges who are special but the specialised courts that exercise special jurisdiction.[6]

These questions, although now settled through interpretation by the courts, proved to be a challenge at the initial stages and threatened to derail the goal of improved access to justice. The Supreme Court delivered judgment affirming that the High Court could not decide matters reserved for the specialised courts and *vice versa*. But some cases involve both issues for the specialist courts and ones usually more appropriate for the High Court (for example a land or environment issue and a human rights issue), and the issue may depend on which is the dominant issue. Further, the Supreme Court also held that judges appointed to the specialised courts and those of the High Court could only sit in the courts to which they were appointed and the Chief Justice lacked the authority to transfer judges between the three courts of equal status.[7] Finally, the Court of Appeal clarified that magistrates' courts could handle matters reserved for the specialised courts within their usual financial jurisdiction, and the specialised courts would hear any appeal from a magistrate in such circumstances.[8] This was an important intervention by the Court of Appeal as the overturned approach of the High Court,

---

5 *Zebedeo John Opore v Independent Electoral and Boundaries Commission & 2 Others* [2018] EKLR

6 Office of the Auditor General, *Report of the Working Group on Socio-Economic Audit of the Constitution of Kenya, 2010* (September 2016) at p 122

7 *Republic vs. Karisa Chengo & 2* others [2017] eKLR

8 *Law Society of Kenya Nairobi Branch v Malindi Law Society & 6 others,* [2017] eKLR

which had adopted the position that subordinate courts could not handle matters reserved for the specialised courts, had caused a hue and cry among litigants and litigation practitioners about delayed justice due to the limited number of judges in the specialised courts.

A final issue arises from Article 165(3) of the Constitution, which grants the High Court the jurisdiction to interpret the Constitution. The determination by the High Court is final on that question unless the matter is appealed to the Court of Appeal and further to the Supreme Court. It has been argued that the Supreme Court should be in a position to provide guidance and direction about the interpretation of the Constitution in order to avoid contradictory decisions by lower courts. To address this problem, the Working Group on Socio-Economic Audit of the Constitution recommended that the Constitution be amended to provide that all declarations of unconstitutionality by the High Court and the Court of Appeal cannot take effect until they have been confirmed by the Supreme Court.[9] This approach draws lessons from the South African Constitution. That provides that although the High Court and the Supreme Court of Appeal have jurisdiction to interpret the Constitution and make declarations of invalidity, such declarations do not take effect unless confirmed by the Constitutional Court if they concern unconstitutionality of an Act of Parliament, a provincial Act or conduct of the President. However, there is every risk that this proposal would increase the perennial problem of backlog in the Kenyan judicial system by creating an avalanche of suits to the Supreme Court. This would also increase the cost of litigation and access to justice unnecessary. However, usually a declaration of invalidity of a law arises in a case against the government. If the government believes the decision is wrong, unlike many other litigants it has the financial and human resource capability to sustain appeals to the Court of Appeal and the Supreme Court.

Conclusion and recommendations

I suggest below a number of changes to the Constitution that could help to address some of the shortcomings noted in this chapter. Yet, it is notable that, after this detailed and extensive study of the constitutional architecture and design with respect to the judiciary, I am making only a small number of recommendations. This suggests that the Constitution is a well-designed document with respect to

[9] Report of the Working Group p 122.

the judiciary and has, for the most part, been fit for the purposes it was meant to achieve. It simply does not require much amendment.

We can distil the following recommendations to be incorporated in any constitutional amendments aimed at improving the performance of the 2010 Constitution from the study:

- Constitutional amendment to have a fixed minimum percentage of the budget reserved for the judiciary as this would eliminate at least the appearance of negotiation between the judicial and political branches of government.
- Constitutional amendment to enact a constitutional provision that makes failure to comply with judicial orders or directions a high crime under the constitution, and conviction for such a crime to result in loss of eligibility for election or appointment to any public office.
- Constitutional amendment to article 140 of the Constitution to extend the timeline for hearing and determining a presidential election petition from the current 14 days to 30 days.
- Constitutional amendment with respect to the composition of the Judicial Service Commission to have only *retired* judges, Magistrates, and advocates as the representatives of judicial officers and the Law Society to the JSC.

Chapter 6

Independent Commissions and Offices in Post-2010 Kenya

Nkatha Kabira and Jill Cottrell Ghai

Introduction

The Constitution, in attempting to capture the spirit of the people, provides for the establishment and constitutional entrenchment of twelve constitutional commissions and two independent offices to manage constitutionality. It envisages that each of these commissions would safeguard the letter and spirit of the Constitution by defending the 'sovereignty' of Kenyans, preserving 'democratic values' and 'principles' and upholding 'constitutionalism' (Article 249(1)).

Background and context

The Constitution of Kenya Review Commission (CKRC) reports reveal that the demand for the constitutional entrenchment of commissions was triggered by the long experience of a culture of impunity by the Kenyan government.[1] Human rights abuses and violations continued and Kenyans generally feared that failing to address these in the new constitution would amount to their toleration. After decades of political violence and the breakdown of legal institutions and the failure of the three arms of government to protect their interests, Kenyans began to look to alternative forums to resolve political tensions. Commissions provided a forum in which public deliberation could take place. Kenyans began to view commissions as their protector from other state institutions.

---

1 CKRC *Final Report*, 2005, p 311-323

The CKRC recommended that commissions should be independent,[2] with clear complementary roles, accessibility and accountability.[3] Independence would be maintained through financial autonomy, appointment procedures, and the mode of establishment of the commission, and accountability would be through constitutionalized reporting requirements.

For the most part, the spirit of the CKRC findings on constitutional commissions made their way into the Constitution of Kenya 2010.

Independent commissions and offices in post-2010 Kenya

The Constitution established a National Human Rights and Equality Commission, but almost immediately it was restructured into three commissions. The functions of the Kenya National Commission on Human Rights (KNHCR) are to promote respect for human rights and develop a culture of human rights.[4] It receives complaints about human rights violations, which it investigates, but may also investigate matters without specific complaints. It is to seek redress for abuses of rights, and monitor and report on human rights violations.

The people wanted a Gender Commission to develop a policy on women's rights and facilitate the repeal of all gender discriminatory laws; customary laws and practices that discriminating against women and the girl child should be eradicated.[5] The National Gender Commission (NGEC) is also generally responsible for issues connected with equality and freedom from discrimination, and issues concerning special interest groups including minorities and marginalised persons, women, persons with disabilities, and children. It is also required to work with other relevant institutions in the development of standards for the progressive realization of the economic and social rights specified in Article 43, like the rights to health, housing and education.

There is some inevitable overlap between the works of these two commissions.

This Commission on Administrative Justice (CAJ) also calls itself the 'Ombudsman'.[6] It is mostly concerned with violation of the right to fair

---

2 CKRC Report, 2005 p 327

3 CKRC Report, 2005 p 328

4 Section 3(1) (a) of the KNCHR Act.

5 CKRC Report, 2005 p 314

6 The original ombudsman was developed in Sweden two hundred years ago to take complaints about failure of public agencies to act in accordance with the law, and report to Parliament.

administrative justice (Article 47). It looks into abuse of office, and improper conduct of public officers, on the basis of complaints or on its own initiative, seeks redress for victims, and makes proposals for improvement of public service.

The National Land Commission (NLC) has the core mandate of managing public land on behalf of the national and county governments.[7] Its functions include recommending a national land policy, investigating land injustices, and recommending redress; encouraging the application of traditional dispute resolution mechanisms in land conflicts; assessing land taxes and oversight responsibilities over land use planning.

The Independent Electoral and Boundaries Commission registers voters, fixes the boundaries of constituencies and wards, regulates party candidate's nomination processes, conducts all elections, and settles certain electoral disputes.

The Parliamentary Service Commission is responsible for providing 'services and facilities to ensure the efficient and effective functioning of Parliament'.[8]

The Judicial Service Commission (JSC) is responsible for selecting judges and magistrates, recommending the conditions of service for the judiciary, receiving complaints and disciplining judiciary workers, continuing education of judges; and advising the government on the efficiency of the administration of justice.[9] For senior court judges, the commission sets up a body to investigate complaints, but does not itself have the power to dismiss them.

The core mandate of the Commission on Revenue Allocation (CRA) is to recommend the basis for equitable sharing of revenue raised by the national government between the national and the county governments, and among the county governments, including the Equalisation Fund that is to be used for basic services for marginalised communities.

The Public Service Commission (PSC) has the task of managing human resources in the Kenya Civil Service.[10] It appoints public servants, develops codes of practice, and is responsible for discipline.

The Salaries and Remuneration Commission is constitutionally mandated to set the salaries and other benefits of state officers (members of the national and county executives, legislators, judiciary, governors and some other major office holders) and advise the national and county governments on the salaries

---

7 National Land Commission Act 2012.

8 Article 127(6).

9 Article 172.

10 Article 234.

and benefits of public officers.[11] To achieve these objectives it is to study how people are paid in the private sector, to ensure fairness as between public and private sectors.

The Teachers Service Commission (TSC) is responsible for registering trained teachers;[12] employing teachers, assigning them to public schools, promoting, disciplining, and, if necessary, dismissing them.

The National Police Service Commission is the equivalent of the PSC but with specific responsibility for the police. It receives civilian complaints about the police and refers them to the IPOA, the KNCHR, the Director of Public Prosecutions or the EACC. The statutory (not constitutional) Independent Police Oversight Authority (IPOA) has responsibility for investigating police abuses.

Other commissions and offices

Several other commissions and offices have (or had) responsibilities concerned with the constitution, but are, for different reasons, slightly different from the others.

The Commission for the Implementation of the Constitution (CIC) had a limited life (and ceased to exist after five years). It was created by the Constitution to oversee the development of laws, institutions and procedures required to implement the Constitution; it was to coordinate with the Attorney-General and the Kenya Law Reform Commission in preparing the necessary legislation and work with other bodies to ensure that the letter and the spirit of the Constitution were respected.

The Kenya Law Reform Commission (KLRC) already existed, but the Constitution gave it a role in preparing the laws needed to implement the Constitution. Generally it keeps under review all the law and recommends reforms to ensure that the law conforms to the letter and spirit of the Constitution; that the law systematically develops in compliance with the values and principles enshrined in the Constitution;[13] that the law is consistent, harmonized, just, simple, accessible, modern and cost-effective in application; and that it complies with Kenya's obligations under international treaties.

---

11 Article 230 (4) (b).

12 Article 237 (2).

13 Section 3 of the LRC Act

The Ethics and Anti-Corruption Commission (EACC) was required by the Constitution but not created by it. Its mandate is to uphold integrity in public leadership,[14] and the law elaborates this by charging it with the responsibility for developing standards and best practices in anti-corruption, developing a code of ethics, and investigating and recommending prosecution for any acts of corruption.[15]

The National Cohesion and Integration Commission (NCIC) pre-dates the Constitution, and has the mandate of encouraging national integration and cohesion especially focusing on issues of ethnicity.[16]

The Auditor-General is an independent office created in Article 229 of the Constitution with the sole purpose of safeguarding public money. Basically the office audits the accounts of all national and county level government bodies, including commissions. The purpose is to confirm whether public money has been applied lawfully and in an effective way, and for the purposes intended.[17] It may also look at whether value for money has been received.

Under the old constitution the Auditor-General was also the Controller of Budget, but now the roles are separate. The Controller is to approve expenditure, ensuring that it is authorised. The office thus functions to try to control expenditure before it is carried out while the Auditor-General reviews expenditure after the event.

Contributions of Commissions after 2010

Legislative and policy reform

Commissions have been instrumental in initiating and facilitating legislative reform. The CIC particularly played a significant role in the development of legislation and administrative procedures to operationalize the Constitution. Between 2010 and 2014 106 Acts were enacted, as well as various laws amending existing legislation.

---

14 Article 79.

15 Section 11 (d) of the EACC Act

16 See the National Cohesion and Integration Act 2008

17 Public Audit Act 2015

The KLRC reviewed 150 laws to align them to the Constitution.[18] Laws of particular importance included those on elections. It has also worked on the development and dissemination of county model laws: county may adopt them. It has also provided technical support to both national and county government ministries, departments and agencies to review and develop legislation. Its useful, practical, *Guide to the Legislative Process in Kenya* was disseminated in the counties. The commission specifically trained some county staff and officers on the legislative process and policy formulation. It has also provided advisory opinions, professional comments and opinions on key law reform issues.

The JSC has recommended that over 30 Acts of Parliament be amended in order to enhance dispensation of justice as well as three areas of interest requiring drafting of Bills identified to help clear backlog of cases (Speedy Trials Act, Mediation Act and Small Claims Court –only the last has been enacted and has not been implemented).

The KNCHR was also instrumental in increased infusion of human rights into Kenyan law, clearly part of its mandate. For instance, during the 2011- 2012 period, it reviewed 23 Bills and wrote 23 'advisories' on various aspects of law reform. A sample audit of 12 advisories found that, of 147 proposals made, 50 proposals (34.01%) were accepted and incorporated in legislation.[19]

Similarly, the NGEC reported that during 2015-6 it reviewed 21 county policies, 32 laws and 57 Bills to ensure compliance with article 27 of the Constitution on equality and inclusion.[20] It has also reviewed Bills on public participation, persons with disability and children to ensure that they conform to the Constitution. [21]

The NLC took an active role in drafting the Community Land Act and the Land Act.[22] It participated in formulation of the Evictions and Settlement Bill, and it also drafted the National Land Commission (Investigation of Historical Land Injustices) Regulations, 2017. The commission also prepared and presented memoranda on the Physical Planning Bill 2017 to the National Assembly and the Senate.[23]

---

18 Council of Governors and KLRC *Report on the Audit of National and County Policy and Legislation* (2018).

19 KNCHR *Annual Report 2011-2012*

20 NGEC *Annual Report 2015-2016* p 10.

21 NGEC *Annual Report 2017-2018* n 9.

22 *National Land Commission Report 2015-2016.*

23 NLC Report, *First Commissioners End of Term Report* < https://tinyurl.com/NLCendterm >

Institutional reform

Commissions have also played a significant role in the institutional transformations necessary to clothe the letter of the Constitution.

The CIC played a major role in developing the many laws on devolution. It also worked with other constitutional commissions and offices in consultative forums and consultative county visits, and in the 'Chairpersons' Forum' to deal with governance issues of public concern relating to effective implementation of the Constitution.[24]

The transformation of the judiciary, especially after the vetting process required by the Constitution, needed many new appointments. As early as 2014 the JSC had appointed 105 judges, recommended 14 judges for appointment, appointed 149 Resident Magistrates, 137 legal researchers, 177 judicial staff, 22 tribunal members, seven registrars, and 23 kadhis. The JSC has also processed 66 complaints against judges, judicial officers and staff. It was also involved in the processes of establishing the Supreme Court, decentralization of the Court of Appeal to Kisumu, Nyeri and Malindi, establishing 13 new High Courts stations, and the establishment of the Employment and Labour Relations Court and the Environment and Land Court.[25]

The KNHCR was instrumental in the reduction of systemic human rights violations by strengthening the Integrated Public Complaints Referral Mechanism. This is a joint initiative of the EACC, KNCHR, NCIC, CAJ, the National Anti-Corruption Campaign Steering Committee, and Transparency International (TI).[26] Its main purpose is to strengthen partnerships between the state oversight institutions in handling, management and disposal of complaints. KNCHR acts as the Secretariat of this initiative.

The commission, together with its partners under the USALAMA Forum actively engaged in advocacy for the enactment of various legislation targeting police reform. Various Acts passed by Parliament, incorporate numerous recommendations from the KNCHR.

It has been involved in the 2011 establishment of the National Council on the Administration of Justice (NCAJ), which has formulated policies relating to the administration of justice, to implement, monitor, evaluate and review strategies

---

24 CIC Report, 2012

25 Law Society of Kenya, *Annual Report, 2014*, p. 39 (section on the JSC).

26 KNCHR *Annual Report 2011-2012*.

for administration of justice and facilitate the establishment of court users' committees at county level.

Commissions have tried to expand beyond Nairobi to ensure access to everyone, including the KNCHR, the CAJ and the TSC which has also decentralized operations including management of discipline, recruitment, transfer and promotion of teachers to local offices.[27]

To conclude, commissions have played an important role in facilitating the enactment of an institutional framework that safeguards and protects the sovereignty of the people as well as promote constitutionalism.

Policy reform

Commissions have also been pivotal in policy formulation and implementation, in some instances within their own institution to improve their internal workings.

The KNHCR prepared the draft National Human Rights Policy and draft National Action Plan on Human Rights, which have been adopted, setting out a framework for the implementation of human rights in the country.

The KNCHR and its partners developed a police vetting framework; the vetting process did begin but has not yet been completed. This follows the work on the Judges and Magistrates Vetting Tool which was also developed by the KNCHR and which saw a number of judges of the Court of Appeal and the High Court, and a significant number of magistrates being dismissed from judicial service.[28]

The NLC has also developed a Research Compendium of Land Matters in Kenya (2017) to ensure that land policies are based on empirical studies.[29] It also developed the Riparian Lands Conservation and Management policy framework (2017/18) to advise the government on how to manage riparian land.[30] NGEC has reviewed several policies to ensure that they conform with the Constitution. [31]

---

27 TSC, *Strategic Plan for the Period 2019-2023* https://tinyurl.com/TSCStrPl

28 KNCHR Report 2012-2013

29 NLC Report, First commissioners' end of term report.

30 First commissioners' report.

31 Including - Public Participation Policy, The Youth Policy 2017, The Community Protection Policy, 2017, The National Education Sector Policy, CRA second policy on the criteria for identifying marginalized areas, the National school meal and institution strategy 2017 – 2022, the Development of spaces policy for survivors of violence policy for survivors of violence and negligence. See *Annual Report 2017-18* <https://tinyurl.com/NGECARep201718> and *NGEC-Strategic-Plan-2019-2024* https://tinyurl.com/NGECSP2019-20.

The Ombudsman functions

Three of the commissions (KNCHR, NGEC and CAJ) can be categorised as ombudsmen: intended to provide a cheap, speedy and simple route for public complaints.

In 2015-16 the KNCHR reported that it had received and processed 3,335 complaints. Their approaches to processing the complaints included providing legal advice, referral to partners with more relevant mandate, 'low level' alternative dispute resolution methods, conducting field investigations on admitted complaints, holding strategic meetings with state and non-state actors, and offering psycho-social support services to petitioners.[32]

The number of complaints to the NGEC were significantly fewer: in the tens rather than the thousands.[33] The CAJ on the other hand 'received 118,543 complaints and resolved 100,720'.[34]

Protecting the constitutional design through the courts

Commissions have also been instrumental in litigating to protect the integrity of the Constitution in other ways, including by protecting people's rights.

In *CAJ v AG*,[35] the High Court held that s. 16(2) (b) of the Supreme Court Act was unconstitutional because it added to the jurisdiction of the Supreme Court beyond what the Constitution had given to the court.

NGEC was an interested party in the case about the two-thirds gender rule, arguing that Parliament had failed to fulfil its constitutional mandate. The court refused to hold that Parliament would be unconstitutional if, following the 2013 election, it still had more than two-thirds male members. But it did hold that law to achieve the 'not more than two-thirds' must be passed by mid-2015.[36]

The NGEC lists seven cases in 2015-16 in which it had been in court to protect human rights.[37] In 2017/2018 the commission was involved in more than

---

32 Report 2015-16 p. 24.

33 Report 2015-2016 p. 22.

34 Report 2016

35 *Commission on Administrative Justice v Attorney General* [2013] eKLR.

36 *Centre for Rights Education and Awareness v Speaker of the National Assembly* [2017] EKLR

37 *Report 2015-2016* p. 16.

ten public interest cases.[38] In several cases it has sued another commission – the IEBC – in the election context (see below).

KNHCR participated in the challenge to the constitutionality of the Security Laws (Amendment) Act in early 2015. Two provisions were held unconstitutional because they violated the freedom of expression, one because it violated the right of a person being tried for a crime to get information about the prosecution evidence in advance, one because it limited the right to bail, and one because it violated the right to remain silent. One violated the right under the Refugee Convention (an international treaty that the Constitution makes part of Kenyan law) not to be sent back to a country in which a refugee risked persecution.[39]

Managing constitutionality

The various bodies have made distinct contributions to the achievement of the objectives of the Constitution, as they were created to do. The Auditor-General reports show that the office has made many contributions to uncovering misspending, misappropriations and corruption related issues.[40] Examples are the report that 215 billion shillings from a Eurobond issue were not accounted for, Nairobi City County failing to bank revenue amounting to 69.5 million and misuse of funds by members of county assemblies on going for training abroad.

Many counties have capacity weaknesses in connection with budgeting. The Controller of Budget has been instrumental in the development of county budgets. The office has made recommendations to county governments on effective planning and has also played a role in determining the capacity of county governments to plan realistic budgets.[41]

The National Land Commission has played a significant role in the increased uptake in the use of alternative (informal) conflict resolution mechanisms in land conflicts. The 2016/2017 report indicates that the commission has handled over 3000 land-related cases. And it has also played a major role in recovery of public land; for instance it revoked titles for Eldoret Stadium, and returned the land to the county government. It has participated in opening up closed or grabbed public spaces and access routes. By 2016, it had embarked

---

38 *Annual Report 2017-18*.

39 *Coalition for Reform and Democracy (CORD) v Republic of Kenya* [2015] eKLR

40 Auditor General, 'Summary of the Report of the Auditor-General on the Financial Statements for National Government for the Year 2015/2016' (2016).

41 Africog, *Kenya Governance Report 2014* https://tinyurl.com/AfriCOG14.

on the process, required by the Constitution, of accepting and trying to resolve historic land injustices. By late 2017 it had received well over one hundred complaints.[42]According to the KNCHR 2015-2016 report, the commission has been involved in monitoring the vetting of police officers,[43] developing draft regulations on police control of peaceful demonstrations, it presented a memorandum on electoral reforms to increase the promotion and respect of political rights. It has conducted a public inquiry into the conflicts within the greater Rift Valley, promoted human rights education through seminars and outreaches, and submitted alternative reports on the status of implementation of national values and principles of governance.

According to its 2015-1016 report the highlights of the year for NGEC included reviewing 21 policies, 32 laws and 57 Bills to ensure compliance with the principles of equality and inclusion; issuing ten advisories on integration of those principles, mapping of ethnic minority and marginalized communities in all the counties; assessing 153 State Corporations to establish how far they are inclusive, by gender, age and persons with disabilities; public education initiatives to promote the integration of the principles in public and private spheres.

The NPSC's first commissioners' end of term report[44] emphasises the recruitment of 40,000 officers, including an increase in women, the vetting process, improving training programmes, and other administrative reforms, including improvement of recruitment procedures after the negative court findings discussed below. They had vetted nearly 6000 officers of whom 445 were removed.

The SRC has carried out a job evaluation exercise for the public service, reviewed state officers' remuneration, and compared public and private sector remuneration, among other projects. [45]

The EACC states that in 2017-8 it achieved 39 convictions for corruption offences (and an 80% conviction rate). It also traced 14 illegally acquired public assets estimated at KES 2.3 billion and was in the process of recovering them. Assets valued at about KES 352 million (or US$3.5 million) were recovered through court and out-of-court processes.[46]

---

42 https://tinyurl.com/StarNLChistoric.

43 Cyrus Ombati, 'KNCHR Provides Hotlines for Reporting Malpractice in Police Recruitment: Kenya - The Standard' < https://tinyurl.com/OmbatiKNCHR > .

44 *Inaugural Commissioners' Exit Report October 2012 – October 2018*

45 *Salaries and Remuneration Commission Report, 2016-2017* is its most recent report.

46 *Ethics and Anti-Corruption Commission Annual Report 2017/2018*.

Promoting their mandates in other ways

Commissions also play an important role in the protection of rights in other ways. All three of the ombudsmanic commissions have produced valuable reports and educational materials on various aspects of human rights.

The KNCHR launched a documentary on the indigenous peoples featuring the Ogiek and Endorois communities and demonstrates the dilemma facing indigenous peoples and the efforts made by the African Court of Human and People's Rights in addressing their rights.[47] Other publications have dealt with mental health and rights,[48] and 'The Error of Fighting Terror with Terror'.[49] In March 2018 it presented a statement to the President raising a number of human rights concerns, on issues such as police brutality and the shrinking civil space.

Challenges in implementation

The EACC (2017-2018) outlined its challenges: inadequate staff capacity; politicization of the fight against corruption and unethical conduct; enforcement of Chapter Six of the Constitution [on integrity]; lengthy legal process for mutual legal assistance (cooperating with other countries) slowing the conclusion of investigations into cross-border corruption and economic crimes; and absence of proper wealth declaration management and administrative procedures in commissions responsible for sections of public officers. Other challenges identified include reluctance by county governments to mainstream the integrity and anti-corruption agenda; society appears to tolerate corruption and unethical conduct, and many Kenyan have negative perceptions that the commission is under the control of the executive.[50]

The Constitution envisaged that commissions would be independent by ensuring financial autonomy, accountability, accessibility and freedom from other arms of government.

However, commission reports cite financial and budgetary constraints as a major hindrance to their independence. The result is inadequate staff and

---

47 KNCHR *Annual Report 2011-2012.*

48 *Silenced Minds: The Systemic Neglect of the Mental Health State in Kenya* (2011) https://tinyurl.com/9yk6shb2.

49 *Preliminary Report of KNCHR Investigations on Human Rights Abuses in the Ongoing Crackdown against Terrorism* September 2015

50 Tuangamize Ufisadi and Tuijenge Kenya, *Report of Activities and Financial Statements for the Financial Year 2018/2019* 168.

resources. Most NLC county offices do not have Land Administration Officers, land use planners, surveyors, natural resources and research staff.[51] The CAJ had only 21.4% of its approved establishment of 336.[52]

The KNCHR relies to a considerable extent on direct support from the United Nations and foreign donors.[53] In 2015-16 the government contribution was Kshs. 459,100,000 and the balance of Kshs. 143,359,996 came from development partners. In fact, both this and the NGEC had increased government funding that year.

Relationships with the executive and legislature were often problematic. Approval of members is the first hurdle: the National Assembly has to approve most commissioner appointments, which may be problematic when parliamentarians consider a commission may be critical of them.[54] This process can become political, or indeed personal. Thus, one candidate for KNCHR commissioner was rejected at least partly because he litigated a case against the Constituency Development Fund.[55] In 2018 MPs tried to insist on their 'right' to vet a member of the JSC elected by the Court of Appeal, apparently with presidential support.[56]

Parliamentarians have had difficulty accepting that the SRC has the responsibility to fix their salaries and benefits. First, they tried to amend the Constitution to remove themselves from the category of 'State Officer' (and thus from the purview of the SRC). In 2018 they introduced legislation to enhance their allowances. When the former chair of the SRC was before the House for approval of her appointment as ambassador, one MP said, 'I was shocked to learn that Sarah Serem could not even understand the role of an MP. I am happy today that she knows the role of an MP—that an MP can give or deny you a job.'[57]

And the Auditor-General was also on the receiving end of parliamentary wrath when legislation was passed that tried to limit the independence of the office, a move successfully resisted in court.[58]

---

51 *National Land Commission Report, 2015-2016*

52 CAJ Report 2016 p. 54.

53 KNHCR Report

54 Waikwa Wanyoike, 'The Rationale for the Existence of Independent Constitutional Commissions' (The *Star*, Kenya) https://tinyurl.com/KIWaikwaCommissions.

55 See *National Assembly Official Report* (Hansard) Tuesday, 4th March, 2014.

56 Rejected by the courts*: Law Society of Kenya v National Assembly of the Republic of Kenya* [2018] eKLR

57 John Mbadi MP *National Assembly Official Report* Wednesday, 8th August 2018.

58 *Transparency International (TI Kenya) v Attorney General* [2018] eKLR. See also https://tinyurl.com/Presidenttoldoff; and https://tinyurl.com/MPstoldoff.

The independence of commissions has also been threatened by presidential powers. The President has used his powers to appoint two members of the JSC to represent the public in fact to choose political supporters.[59] Early on there were significant delays in appointments to the post of Registrar of Political Parties, and to the Ethics and Anti-Corruption, National Police Service, and National Land Commissions.

Another challenge was disregard of the constitutional implementation process and the mandate of the CIC. Some Bills were approved by the cabinet and subsequently passed by Parliament without being reviewed by CIC. A number of private member's Bills were also published and subsequently debated in Parliament without review by the CIC yet they have a direct bearing on the implementation of the Constitution. Some constitution implementing partners failed to submit Bills originated by them to CIC in good time. Thus, some Bills were reviewed by CIC within very tight deadlines, and Parliament was sometimes forced to enact pieces of legislation without first critically scrutinising them.[60]

Lack of co-operation from authorities may take various forms. The NLC comments on lack of co-operation from some county governments leading to delays in establishment of county land boards.[61] The CAJ complained that 'a number of institutions [were] unresponsive to inquiries by the Commission'.[62] The NLC has 'noted increased reluctance by state agencies to observe the seven principles of land management as anchored in the National Land Policy'.[63]

Lack of clarity on mandates is another issue. The KNCHR maintains that the protection of human rights in the country could have been better served if the human rights protection mandates were combined as envisioned in the Constitution. And there is some lack of clarity over the roles of it and NGEC especially on economic social and cultural rights.

The respective roles of the TSC and the SRC over teachers' salaries was discussed by the Court of Appeal. The Constitution is clear that the SRC advises on public servants' salaries. The Court of Appeal was right to say that the TSC must not make a decision without that advice, but not to suggest that the advice was 'binding'.[64]

---

59 See https://tinyurl.com/UhuruJSC (in relation to Winnie Guchu).

60 CIC Report, 2012.

61 *National Land Commission Report*, 2015-2016.

62 Report 2016 p. 59.

63 *Devolving Land Governance 2015/2016 Annual Report* p. 54.

64 *Teachers Service Commission (TSC) v Kenya Union of Teachers (KNUT)* [2015] eKLR

The EACC has complained about the lack of power to prosecute.[65] This is not an entirely clear-cut issue: there is some virtue in separating the power to investigate and that to prosecute as has been done with the police and the DPP in the last few years.[66] It has also complained of lenient sentences passed by courts.

The most dramatic example of lack of clarity over mandates has been the NLC. In the early stages the commission was persistently obstructed in its work by the Ministry of Lands. The situation got so bad that the opinion of the Supreme Court had to be sought.[67] But the commission has said, 'This challenge has persisted even after the Supreme Court delivered an advisory in December 2016.'[68]

Even more difficult to depoliticise has been the Independent Electoral and Boundaries Commission. In 2016 opposition demonstrations forced the dismissal of the former commission and the appointment of a new one. The new one proved unable to conduct elections in which people had faith. Incidentally, the manoeuvre to get rid of the previous commission (paying them off handsomely) was widely viewed as an interference with commission independence.

The various commission reports also report that the slow pace of institutional reforms has presented a major challenge for commissions. For instance, the slow pace in police reforms has made it difficult for KNCHR and others involved in Security Sector Reforms to advance. The fact that some institutions such as the judiciary are reforming much faster while others are dilly-dallying makes operations quite challenging.

Public apathy or lack of knowledge may also be an issue.[69]

Corruption has been a major challenge to commissions as to other sections of Kenyan society. At the time of writing, the former chair of the NLC is facing corruption charges. The Auditor-General has reported on several commissions. In 2015 he reported that he had detected fraudulent procurement of goods and

---

65 https://tinyurl.com/StandardEACCprosecute.

66 '… just as the police should concentrate on discovering the acts relevant to an alleged or reported criminal offence, including those which may end to exonerate the suspect, so should the [Crown Prosecution Service] concentrate on assessing both the strengths and weaknesses of the case which, if the decision is taken to proceed, will bring the defendant before the court.' UK *Royal Commission on Criminal Justice* CM 2263 (1993) p. 69.

67 *In the Matter of the National Land Commission* [2015] eKLR

68 *Devolving Land Governance: 2015/2016 Annual Report* p. 54.

69 Grace Kaome Injene and Catherine Ngahu, 'Challenges Faced by the Kenya Ethics and Anticorruption Commission in Implementing the Strategies Recommended by United Nation Convention against Corruption in Kenya' (2016) 1 *European Journal of Business and Strategic Management* 88.

services worth Kshs.9.2 million at the CIC, an unsupported rent payment of Kshs.59 million by NPSC, and a few other irregularities, though most got an unqualified audit report.[70] The office found numerous issues in connection with IEBC procurement for the 2013 election.[71]

When reviewing the Judicial Service Commission and judiciary, the Audit Office found that the JSC had gone beyond its mandate and interfered with the functioning of the judiciary, by taking decisions that were within the remit of the Chief Registrar as the judiciary accounting officer.[72]

Court challenges – and support

Commissions and offices have been repeatedly taken to court. Only a few cases can be mentioned here.

The court in *Busia County Government v Ethics and Anti-Corruption Commission* held that commissions must be properly constituted in order to perform their functions. The EACC could not legally conduct investigations including search and seizure when it was not properly constituted.[73] Nor could it recommend prosecutions to the Director of Public Prosecutions (DPP) when it had no commissioners, because staff could only act on the direction of the commissioners.[74]

The courts have insisted that commissions respect proper procedures, and human rights. In *Attorney-General v Independent Policing Oversight Authority*, the courts held that the NPSC recruitment process was unconstitutional, because of numerous procedural failures.[75] Before a police officer could be dismissed, he must be given a fair hearing by the commission.[76]

---

70 Address to Parliamentary Accounts Committee on the Highlights of the National Government Audit Report, 2013/2014 Financial Year, August 13, 2015.

71 *Special Audit on Procurement of Electronic Voting Devices for the 2013 General Election by the Independent Electoral and Boundaries Commission* (June 2014).

72 *Special Audit Report on the Judicial Service Commission and the Judiciary* (2014) pp 30-1.

73 *Busia County Government v Ethics and Anti-Corruption Commission* [2016] eKLR

74 *Michael Sistu Mwaura Kamau v Ethics & Anti-Corruption Commission* [2017] (Court of Appeal).

75 [2015] eKLR

76 *Charles Kinanga Arumba v National Police Service Commission* [2015] eKLR. See also *Gladys Boss Shollei v Judicial Service Commission* [2014] eKLR.

A court held that the CIC had failed, refused and or neglected to prepare the necessary Bill(s) to achieve the two-thirds gender rule in Parliament.[77] The CIC then prepared the Bills and tabled them before Parliament (though could not ensure they passed).

The IEBC has been the subject of many cases. Most prominent have been the presidential election petitions. The Supreme Court held that the presidential election held in August 2017 was not conducted in accordance with the Constitution and the applicable law rendering the declared result invalid.[78]

A court held that the IEBC must carry out a fresh procurement process when it had failed to carry out public participation, which is an essential element of public procurement as stipulated by Article 227 of the Constitution.[79]

The NGEC sued another commission – the IEBC – over the drawing up of party lists, under Article 90. The court held that the membership of the party lists is determined by the political parties in accordance with their own internal procedures and mechanisms, though it did also hold that the IEBC must collaboratively work on a programme for developing policies and measures geared towards increasing the participation in political processes of various marginalised groups.[80] However, in a later case a court did hold that the IEBC did have a greater role in how parties behaved, specifically in ensuring that they complied with the two-thirds gender rule.[81]

The NGEC also intervened in a case where the issue was whether the appointment of Justice Lenaola to the Supreme Court had violated the two-thirds gender rule. The court held the Supreme Court as constituted was (with five men and two women) constitutional.[82]

A court presented a problem for the NLC, when it pointed out that the Commission had ceased to have the power to review allocations of public land, because of a five-year time limit in the NLC Act.[83]

---

77 *Centre for Rights Education & Awareness (CREAW) v Attorney General* [2015] eKLR

78 *Raila Amolo Odinga v Independent Electoral and Boundaries Commission* [2017] eKLR

79 *Republic v Independent Electoral and Boundaries Commission Ex-parte National Super Alliance (NASA) Kenya* [2017] eKLR

80 *National Gender and Equality Commission v Independent Electoral and Boundaries Commission* [2013] eKLR

81 *Katiba Institute v Independent Electoral & Boundaries Commission* [2017] eKLR

82 *National Gender and Equality Commission v Judicial Service Commission* [2017] eKLR

83 *Republic v National Land Commission Ex-parte Samuel Githegi Mbugua* [2018] eKLR (s. 14 of the Act). The same objection applies to historical injustices jurisdiction (s. 15).

In many cases, the courts have upheld the independence and the mandates of the commissions. For example, the courts upheld the mandate of the NLC under Article 68(c) (v) of the Constitution, to review all grants or dispositions of public land to establish their propriety or legality.[84] In *Daisy Maitho*, the court ruled that it should not interfere with the constitutional mandate of the SRC in setting the remuneration of members of the National Assembly, unless there was clear evidence of violation of the Constitution or law, or serious unreasonableness.[85]

When the Ethics and Anti-Corruption Commission (EACC) asked the ministry to investigate a procurement contract for corruption, and the ministry had contracted the task to an accountancy firm, a judge said that a commission cannot delegate its core business. 'It is a violation of the commission's independence and mandate.'[86]

An even more serious case involved the President, the EACC and the Director of Public Prosecutions (DPP). The President directed the EACC to complete investigations on some people within 60 days and forward the report without delay to the DPP. Just as bad: the DPP did not seem to have made up his own mind, and instead just adopted the EACC's recommendation to prosecute. The court said '[The DPP should be] guided only by the Constitution, the law, and the evidence. He is not a rubber stamp, to mechanically approve the recommendations of the EACC.'[87]

In an important case about investigating public servants' unexplained assets, a court held that information acquired by the EACC in the process of carrying out their mandate could not be excluded on the basis that it was information incriminating the person who supplied it.[88]

The Supreme Court Advisory Opinion on the relationship between the NLC and the Ministry of Lands held that NLC functions were limited to those under Article 67 of the Constitution.[89] Another case also involved the relationship between the NLC and the Ministry. The court declared that various new land forms made and published by ministry without the input of the NLC (as well as without

---

84 *Compar Investments Ltd v National Land Commission* [2016] eKLR

85 *Daisy Kirigo Maitho v County Government of Laikipia* [2016] eKLR

86 *Midland Finance & Securities Globetel Inc v Attorney General* [2008] eKLR.

87 *Michael Sistu Mwaura Kamau v Ethics & Anti-Corruption Commission* [2017] eKLR.

88 *Ethics and Anti-Corruption Commission (the legal successor of Kenya Anti - Corruption Commission) v Stanley Mombo Amuti* [2015] eKLR. A decision in a criminal case would probably have been different, because of Article 50.

89 *Re National Land Commission* [2014] eKLR.

the necessary public participation and parliamentary scrutiny and approval) were unconstitutional.[90]

In a case about the JSC the court ruled that commissions are not subject to control by the National Assembly because of the doctrine of separation of powers. It said Parliament and the executive must 'fully understand the constitutional justification and rationale behind accountable government and the purpose it serves'.[91]

And in the Security Laws Amendment Act case, the High Court held that a new section of the National Police Service Act creating the National Police Service Board was unconstitutional because it tried to take over functions allocated to the NPSC.

Conclusion

This chapter has demonstrated that commissions have worked towards ensuring conformity to the letter and the spirit of the Constitution by facilitating legislative, institutional and policy reform and instigating knowledge generation and public participation. The chapter argued that despite the fact that the implemen-tation process has been characterized by numerous challenges, commissions have played a significant role in managing constitutionality. They have been pivotal in knowledge generation and management, protection and recognition of rights, shifting legal consciousness, internationalization of the law in Kenya, implementation of public participation and mainstreaming national values and principles of governance – all efforts which are geared towards implementing the letter and spirit of the Constitution.

The question remains whether safeguarding the letter and the spirit of the Constitution through the enactment of legislative and policy frameworks ensure constitutionalism? Will Kenya remain in a state of 'constitutions without constitutionalism'[92] and is constitutionalism is a 'chimera' unlikely to be achieved.[93]

---

90 *Anthony Otiende Otiende v Public Service Commission* [2016] eKLR

91 *Judicial Service Commission v Speaker of the National Assembly* [2014] eKLR.

92 H Okoth-Ogendo, 'Constitutions Without Constitutionalism: An African Political Paradox' in Douglas Greenberg S.N. Kartz, B. Oliviero and S.C. Wheatley (eds) *Constitutionalism and Democracy: Transitions in the Contemporary World* (OUP, New York, 1993).

93 Yash Ghai, "The Chimera of Constitutionalism: State, Economy and Society in Africa" in Swati Deva, ed., *Law and (in)Equality: Contemporary Perspectives* (Eastern Book Co., 2010) pp. 313-331; also available at University of Pretoria: https://tinyurl.com/GhaiPretoriaChimera.

Is changing the law in the books sufficient to bring about transformative changes in Kenya's socio-political context? Is the 'law in the books' shaping the 'law in action' through knowledge generation, management and control? This is a story for another day. For now, we rest our case.

Chapter 7

Fortunes of Devolved Government

Yash Pal Ghai

Some older history

Kenya is a country of many races and religions. Most communities had been in their places of residence long before the arrival of the British, with limited real connections with others. Even after British occupation, Kenya became not a state but a conglomeration of ethnic communities, with considerable diversity in religion, culture, and livelihood. Britain kept ethnic communities separate in order to keep its hold over a wide area.

When the British left Kenya around 80 years later the scene had changed completely, at least in urban areas, with both rich and poor communities, and relations between communities having begun to change. During negotiations on terms of independence between Britain and Kenyan delegates, the British realised that a few large tribes would dominate others, and insisted on a detailed system of devolution for the benefit of minority communities – including the Europeans. It was called regional government or *majimbo*.

However, Jomo Kenyatta, who had led the Kenya team to London to negotiate the terms of independence, and became head of the independent Kenyan government, at the end of the first year, abolished the devolution scheme devised for the benefit of minorities.

In due course most of the independence constitution disappeared so that the power of the president could hardly ever be challenged. The Constitution became increasingly irrelevant; even more so in the regime of Kenyatta's successor Daniel arap Moi.

More recent history

It was in Moi's regime that the movement for democracy and human rights won strong support internationally, and in Kenya. Freedom fighters like Willy Mutunga led the movement for democracy.[1] Early on, the legislation setting up the Constitution of Kenya Review Commission/Bomas Constitutional Conference process included that the purposes of review included '(d) promoting the peoples' participation in the governance of the country through … the devolution and exercise of power;…'. Devolution was very much on the agenda.

The 'Bomas' Constitution draft was the result of massive consultations throughout the country, including every community, before discussions by the constitutional conference commenced.

One typical statement, from one of the smaller tribes (i.e. not the 'big five') came from an MP:

> For heaven's sake, now that you have heard our cries, we, smaller communities, should be given a share of this national cake as a token so that we become satisfied and happy and Kenya remains united, Mr. Chairman. I am glad to realize that many Kenyans have now realized that and we are happy nobody is seceding. All that we want is the power to be devolved politically, economically, socially, educationally and administratively to the district and location. (Maalim Abdi Mohamed MP).[2]

Question of devolution

During the conference, there were tensions between those who favoured boundaries of units that reflected ethic distribution and those who wanted devolution to move away from ethnicity. By the end of the conference it was generally agreed that Kenya would be divided into fourteen regions, rather than the eight provinces, within which there would be 70 plus districts. There was a hope that the regions would bring together people from different groups. Inevitably each region would have had a major community but in most of them there would be several communities, without any hierarchies.

---

1 See his book*, Constitution-Making from the Middle: Civil Society and Transition Politics in Kenya, 1992-1997* (Mwengo 1999).

2 MP for Wajir East, speaking at the National Constitutional Conference, on 23rd May 2003' (available on the Archives website of Katiba Institute) https://preview.tinyurl.com/NCCDBCh10. It is quoted in a paper by the author and Jill Cottrell Ghai, 'Constitutional Transitions and Territorial Cleavages: The Kenyan Case' in George Anderson and Sujit Choudhry, eds., *Territory and Power in Constitutional Transitions* (OUP, 2019) 140-160 available at https://tinyurl.com/forrumfedkenya.

Participants at Bomas were convinced that this approach would strengthen national unity. The objective of Bomas was to inculcate a strong sense of Kenya as the home of a single nation not merely a collection of tribes. At the same time the intention was to enable people to feel that their identity and culture were respected, and that they had more control over matters that were important to them.

But after Bomas, there was a strong echo of history. The notion of Kenya being a nation seemed to have upset at least one leader of those five major tribes who thought that they dominate the country. President Kibaki, an eminent scholar and politician, and President of Kenya since the end of 2002, member of the same community as Jomo Kenyatta who destroyed *majimbo*, and his associates, wanted the Bomas draft taken over and amended.

What happened in 2004-5 was that the Bomas draft was mutilated, and, most relevant here, devolution was emasculated. It was not formally done away with but the regions were, and powers of the now single level of devolved government were weaker, and less protected than under Bomas. And there was no Senate to protect the system of devolution.

As two authors said, 'the parliamentary treatment of the constitutional draft after Bomas did not resolve the "contentious issues" on system of government and devolution of power. Rather, the process became embedded in struggles between ethnic leaders about which governance model was likely to serve their own interest in the short and long term (with the 2007 elections in mind).'[3]

Much of the Bomas draft was revived by the Committee of Experts process. But when people voted for the draft Constitution in 2010, few perhaps realised that there are two fundamental aspects which deviate markedly from Bomas,—the Executive and Devolution. Devolution in the second CoE draft had no regions, and 47 counties based on the colonial districts, of which Burbidge has written 'Kenya's original districts (upon which the counties are based) were expressly chosen by the British colonial authorities as zones of ethnic homogeneity in order to divide-and-rule'. [4]

Again a draft was taken over by politicians – the Parliamentary Select Committee. It changed little about devolution but did radically change the system of government (see the chapter on the Executive in this book). The motives were

---

[3] Bård Anders Andreassen and Arne Tostensen 'Of Oranges and Bananas: The 2005 Kenya Referendum on the Constitution' p. 3, available at https://www.cmi.no/publications/file/2368-of-oranges-and-bananas.pdf.

[4] Dominic Burbidge, *An Experiment in Devolution: National Unity and the Deconstruction of the Kenyan State* (Strathmore University Press, 2019) p. 73.

very similar to those highlighted by Andreassen and Tostensen (above)—selfish and personal.

One impact of restoring the presidential system, and weakening Parliament, was certainly to weaken devolution. To occupy that central role remains the ultimate aim of ambitious politicians. Counties will not satisfy them. And the sense of power and dominance that attaches to the President surely reinforces the lack of enthusiasm at the national level for recognising the counties as being more than local governments.

Counties

Structure

Each county has its own government, with an identical, complex, structure. It has to 'decentralise its functions and provision of its services to the extent that it is efficient and practical to so'. The county government mirrors the national: a head directly elected, a deputy who was an electoral running mate, an assembly and an executive – separate from the Assembly. No person can hold the governorship for more than two terms.

For somewhat small units (on average only one million people) the structure is too complex, and governors particularly have delusions of grandeur. Even the title 'Governor' is too grandiose.

Powers

Counties' principal functions relate to agriculture (including fisheries); county health services; county transport; cultural activities; county transport; animal control and welfare; trade development and welfare; county planning and development; implementing some items of national government on natural resources; fire-fighting; and county public control of drugs and pornography. There are considerable ambiguities about some aspects of these functions and powers. Functions and powers between levels of government can be transferred to another level only if the parties agree (Article 187).

What counties can do never received adequate attention during the constitution making process. Just to take three examples – the major area of possible expenditure on services – agriculture, education and health. The CKRC proposed that districts (which had most powers among the levels below the national

government in their system) would have responsibility for agricultural services, while the national government had policy responsibility. This was rephrased at Bomas in a way that seems wider: 'agriculture' although the concrete examples remain similar. This remained the same right up until the Constitution as adopted.

The CKRC would have given responsibility for pre-primary and primary education to the districts, and secondary education to both the district and national levels, with the national government having sole responsibility for tertiary education and policy. Bomas would have given those concurrent responsibilities to districts, leaving tertiary education and policy and standards to the national government. The CoE left counties with only pre-primary and village polytechnics – as now in the 2010 Constitution.

And on health: the CKRC would have made health centres, dispensaries, clinics, promotion of primary health care as concurrent matters (for both district and national levels), leaving everything else to the national level. Bomas introduced the phrase 'district health facilities' and with it the understanding that this included hospitals.

Detailed allocation of functions was made by the Transition Authority, though the work was not complete. The allocation of Level Five (Provincial) hospitals to the counties was controversial. So was not giving primary education to counties –historically local authorities had had some responsibility for such schools, but most had been transferred to the national government in 1969.

Finance

A major annual source of the income of counties is money raised by the national government: at least 15% of all the money raised by the national government (Article 203(2)) to be allocated among them by the Commission on Revenue Allocation (Article 216). Another source, somewhat limited, is the Equalisation Fund, equal to half of one percent of all national government revenue (Article 204), distributed to marginal areas/communities for basic services (listed) as 'necessary to bring the quality of these services in those areas to the level generally enjoyed by the rest of the nation, so far as possible'. Counties can make some money from small charges, such as licences of various kinds (roads and transport, liquor consumption, parking, dogs, trade, markets, co-operative societies, public entertainment, and natural resources). The only taxes they can raise are rates and entertainment tax. The former is potentially substantial for especially counties with large urban areas.

Counties, too, are sometimes not very clear what their powers are, especially when it comes to raising money.

Counties at the national level

The Senate represents and protects the rights of counties. It has special responsibility to consider, debate, and approve Bills concerning counties. It determines the allocation of national revenue among counties, and participates in enacting laws concerning the functions and powers of the county governments. But the National Assembly also participates - and its approval is necessary.

Yet county governments have no formal voice at the national level. Early drafts of the Constitution would have had the senators elected by county assemblies. But the CoE second draft changed this to the current system. The original scheme might have produced senators less focused on their individual status.

How have the formal values and arrangements worked?

Have national institutions been supportive of devolution?

On the whole the Senate has performed its duties well—though there is tendency sometimes for its members belonging to the larger counties to protect their interests over other counties when they coincide with their ethnicity.

Institutional and personal ambitions have hampered some aspects of the system. The National Assembly has tried to exclude Senate from some of its functions in connection with law making for counties. Senators have envied governors their profile, and perhaps their money making opportunities.

The national executive and Parliament (especially the Senate) have not fully accepted the idea that county governments are not just local authorities. Recent examples are the County Wards (Equitable Development) Act, and County Early Childhood Education Bill, introduced in the Senate. Parliament may pass laws on any topic, but when both national and county governments pass overlapping laws on subject within their powers, the courts may have to decide whether there is good reason for a national rather than a county law (Article 191). Another issue has been the continued existence of the national government's 'Provincial Administration'. It was to be restructured to fit with devolution but has simply been rebranded. And the national government has dragged its heels on establishing county policing authorities intended to improve liaison between national and county governments on security.

Sometimes one gets the impression that Article 6(2) of the Constitution is very much violated. It says that 'The governments at the national and county levels are distinct and inter-dependent and shall conduct their mutual relations on the basis of consultation and cooperation'. But the national government influences – or even makes – many decisions that ought to be made at the county level. A review of legislation said that 'there is inadequate consultation and cooperation between the two levels of government that can support and facilitate a holistic development of laws and policies at both levels of government.'[5]

The final arbiter of disputes is the courts, and they have protected counties against some attempts to subordinate them to the Senate. And they have insisted that legislation affecting counties must go to the Senate, even holding 23 Acts to have been unconstitutionally passed because the question of Senate involvement was not addressed.[6]

There are ways in which the national government is supposed to support counties, and occasionally to rein them in if they overstep their powers or there is some other sort of serious issue. Under Article 190 (2), Parliament must make law enabling the national government to intervene temporarily if it decides that the county is unable to perform its functions. Article 192 has a more punitive procedure for investigating a county governments and suspending it—and ultimately holding a new county election. Both are supposed to be exceptional measures. It is not clear why the national government did not use one of these for Nairobi rather than apparently forcing the governor to sign away some of the county's powers (purportedly using Article 187)—other than that this was a way of reasserting national government dominance over the largest and most prominent county.

Ethnicity and diversity

Has devolution actually reduced senses of exclusion? Many communities which had little role in the state policies or administration (and were even victims of the brutality of dominant communities) now have some 'territory' of their own within the nation and able to make policies on matters of immediate relevance to them. Leaders of these communities are also engaged in various national matters, especially through their membership of the Council of Governors.

In some counties groups that have generally been excluded nationally are now the largest – such as the Taita, Pokot, Turkana and Mijikenda. Within their

---

5 Council of Governors and Kenya Law Reform Commission, *Report on the Audit of National and County Policy and Legislation* (2018) p 357 https://tinyurl.com/Auditpolleg.

6 *Senate of the Republic of Kenya v Speaker of the National Assembly* [2020] eKLR.

counties they may control the county assembly and executive.[7] Small minorities within counties may have benefited less. The Constitution provides that ethnic diversity should be reflected in the county assembly and county executive, and minorities protected (e.g. list members – often called 'nominated' – are supposed to include members of marginalized groups, which include ethically marginalized). A study by Katiba Institute found that in many counties people from some groups still felt excluded because they did not see their own people in the county assembly. Realistically on the basis of numbers some communities can never get 'their' person elected, unless they form alliances with other groups. And the system of 'nominated members' is not necessarily seen as helping. 'The Ogiek further said that the community has only two nominated MCAs in Nakuru who don't help them much and are consider state agents and their interests are not those of the people they should serve'.[8]

Realistically for small communities formal representation alone does not give them the clout to fashion policies, which in many counties seems to be confined to the members of the dominant tribe.

Turning to appointed positions: the County Government Act says that at least 30% of positions must be filled by candidates not from the dominant local ethnic community.

One study showed that, in 2013-17, in about half the counties all members of the county executive came from a single ethnic community. The pattern is not very different when looking at the county public services. A report of the National Cohesion and Integration Commission suggested that some counties had a misunderstanding of the nature of devolution—namely that it was intended for the local community to monopolise resources within the county, rather than to ensure fairness across the country.[9]

National unity

Areas that suffered from discrimination in the past often did not feel a sense of belonging to the country. Many of these groups now have their 'own' government,

---

7 See Nyabira and Ayele, 'The state of political inclusion under Kenya's devolved system' *Law Democracy and Development* Vo. 20 (2016) 131 at p 147.

8 *Participation of ethnic minorities and marginalized communities in political and other governance processes: realities and approaches* (2019) p 29 https://katibainstitute.org/download/participation-of-ethnic-minorities/.

9 *Ethnic and Diversity Audit of the County Public Service* Vol1 para. 3.6 https://tinyurl.com/NCICcountydiversity.

with funding from the national government, and significant resources which they control. They are being more integrated into the rest of the country but the sense of a Kenya nation is still lacking in some counties (especially in the north).

The Council of Governors provides a good basis for co-operation among counties—and negotiations with the national government. There seems now to be much greater amity among the counties, and some sense of common purpose.

But devolution can also generate some disharmony. There are several conflicts between counties about their boundaries. And the 2019 census awakened counties to the significance of their population size, and to some governors trying to 'poach' residents of other counties by asking them to be in their 'home' counties on census registration night.

Another area of conflict arises from counties of major ethnic groups and others. The former have better connections in the national government as compared to the other communities.[10] The dominance of a few tribes at the national level naturally has an impact on the way counties are treated by the national executive.

There is, however, the rise of a general sense of nationhood despite considerable internal differences in resources, religions, priorities.

A recent book on devolution reports that people interviewed generally said that since devolution came into effect they feel more Kenyan than before. Some said they felt more Kikuyu, Luo, Maasai or whatever their ethnic group was, but for roughly the same percentage in most areas it made no difference. On the other hand, quite a lot felt it had made people generally feel more united—and only in the Western region did more people feel that people are less united.[11]

Participation and openness

It was expected that participation would more readily take place in counties because of the closeness of the people to the county government and the immediate relevance to them of issues and policies.

There is a plethora of guidance for counties on how to conduct participation —in the County Government Act, in Guidelines produced by the Ministry of Devolution for counties (but not for the national level) and in the counties' own Acts on participation.

---

[10] A point made in Judith Tyson et al., p. 19

[11] Dominic Burbidge, *Experiment in Devolution:* tables on pp. 231-2.

Some counties have made participation a reality. For example, Makueni County has institutionalised civic education and public engagement. The county trained 990 trainers of trainers on public participation and there is a structure of forums from the village to county level. Participation there is higher than in at least some other counties.[12]

However, courts have declared a number of pieces of legislation in other counties unconstitutional for lack of participation. For example, two Finance Acts of Kiambu County were declared unconstitutional because there was no genuine and effective participation.[13]

A 2019 report said, 'Although most of the counties have developed and enacted legislation on public participation, very little has been done to operationalize the legislation by developing regulations, setting up relevant institutions/offices, systems, guidelines and procedures or providing adequate budgetary provisions for public participation.'[14]

There are many complaints that county assembly members are not accessible. Information about country budgets was not available; some do not even have regularly accessible websites. A 2016 report by the Intergovernmental Technical Relations Committee said, 'The form, nature and levels of public participation are however unsatisfactory in both the county and national government. Both the national and county governments have not yet developed effective frameworks to facilitate public participation.'[15]

The International Budget Partnership has however said that there has been some improvement in the amount of financial information that counties are sharing though it was still not adequate. In their study of 2020 they said 'counties do not provide sufficient budget information, and where budget documents are published, they often lack essential budget information required for meaningful citizen engagement'.[16]

---

[12] Ken Ochieng' Opalo, 'What do Kenyans Know About Devolution? Survey Evidence on Political Knowledge and Public Opinion' (SSRN 2020) https://tinyurl.com/OpaloKnowledgeofDevolution.

[13] One was *Robert N. Gakuru v Governor Kiambu County* [2014] eKLR the judgment in which has become something of a classic

[14] Intergovernmental Relations Technical Committee, *The Status of Public Participation in National and County Governments* (2019) p. 65 https://igrtc.go.ke/download/final-public-participation-report/

[15] *The Status of Public Participation in National and County Governments* https://tinyurl.com/PPingovts.

[16] *Kenya County Budget Transparency Survey 2020*. For the 2019 survey see https://tinyurl.com/IBPcountysurvey2019.

Accountability

In the constitution making process, there was hope that, if government was closer to the people, accountability would be greater. There is some evidence that people find it easier to complain to county officials than to national ones. Initial attempts to impeach governors were unsuccessful (either because not accepted by the Senate or found by the courts to have been improperly conducted). Now the situation has changed fundamentally. Several governors have been charged for corruption and some even successfully impeached. Yet they are often still honoured by members of their own counties—though the orientation is changing.

It has been suggested that the failure of a significant number of incumbent governors to get re-elected – either in primaries or the 'real' election in 2017 is a form of accountability, and that the public are quite active at county level, on social media and even in boycotts – and strikes. But the county administrations are not currently well equipped to respond to vote and voice.[17]

Financial management

This has been a major area of difficulty – in terms of county level management, national responsiveness to county needs and the reaching of agreement on funding from the national level to the counties.

International Budget Partnership has concluded that budget credibility on the part of counties (how far they actually perform what they undertake in their budgets) is a challenge—but that they do have capacity to improve and some are improving.[18]

On average counties receive 90% of their funding from the national level. Many counties do not achieve their objectives for raising their own revenue. Indeed some have raised less than the old local authorities in the same area. In 2018/19, thirteen counties raised as much own revenue as they had targeted, better than the three the preceding year.[19] Various reports suggest ways of enhancing capacity to raise local revenue.

---

[17] Peter Gaitho Rigii, 'Accountability in Kenya's County Governments: Role of Vote and Voice in Improving Service Delivery' *Microeconomics and Macroeconomics* 2018; 6(2): 44-49

[18] Jason Lakin and John Kinuthia, 'Roll Over: Budget Credibility in Kenya's Counties' (December 2019) https://tinyurl.com/IBPcountybudgetcredibility.

[19] See Kippra https://tinyurl.com/KIPPRAstalemate.

Promoting economic and social development

When the new Constitution was promulgated and the devolved system of governance in Kenya began, the economy was expected to improve. The size of county economies varies enormously, with Nairobi contributing just over 21% to the gross domestic product while Isiolo contributes 0.2%. Interestingly a recent Kenya National Bureau of Statistics report indicates that agriculture is the fastest growing sector—interesting because agriculture is a major county responsibility, which makes it more likely that growth can be attributed to some extent to county government.

Significant numbers of counties, especially those hitherto marginalised, have seen definite benefits, with control of their resources, tarred roads, and medical services[20] beyond what they had ever seen. But too many counties spend less than the minimum 30% that law requires them to spend on development. The definition of development is rather narrow being concerned largely with infrastructure. And some problems arise with delayed sending of money to counties by the National Treasury: of late this seems to become the norm.

Another problem has been the lack of capacity of some counties to spend the money at their disposal.[21]

Groups of counties are forming regional economic blocs, of more than two counties that promise well for future development – in fact there are seven of these according to the Council of Governors.

Despite all this its real economic impact is much smaller than of the national government, which retains most of the national budget and various functions that contribute to development, such as responsibility for industrialisation. A recent study suggests that economic development and tackling poverty are not the product of a single dimension. Counties that are what it terms 'growth hubs' have 'positive economic and social contexts, stronger political and institutional environments and fewer problems with the environment, security and conflict' (though some have notably poor scores on the environmental front).[22]

---

[20] E.g. Phares Mugo et al., *An Assessment of Healthcare Delivery in Kenya under the Devolved System* KIPPRA Special Paper No. 19/2018 https://tinyurl.com/KIPPRAhealthcare.

[21] See e.g. Stephen Rutto 'Audit shows counties failed to spend Sh4.2b' in *Standard* March 4 2021, on reports of the Auditor General on Uasin Gishu and Trans-Nzoia counties.

[22] Judith Tyson et al., *Inclusive economic growth in Kenya The spatial dynamics of poverty Prepared for the FSD, AfRO and OSIEA 'Modelling an inclusive economy for Kenya's programme*, Overseas Development Institute (UK) 2020.

Information on how counties spend their money shows a varied pattern. On average, counties spend an average of about 24% on health in 2019-20. But this ranged from 40% in Kirinyaga to 7% in Taita Taveta.[23]

Equity and finance

There are two main aspects: how equitable is the distribution of funds from the national government between the countries, and how equitable is the way counties use their funds? Very often the inadequacy of data makes it hard to assess how equitable the use of resources is.

The Equalisation Fund is specifically designed to achieve equity for marginalised communities (Article 204). The first formula devised by the Commission on Revenue Allocation was not very effective in terms of fairness, but its second is based more on the situation of marginalisation within counties. The current formula for sharing the 'equitable share' – from national funds – among counties tries to take issues like poverty into account. The difficulty in reaching agreement between the National Assembly and the Senate in 2020 shows how hard these things are. In the end a temporary agreement was reach in the basis that no county will get less than it did the year before. This can probably not continue in perpetuity. The Constitution calls for co-operation—which is a vital aspect of operating such a system.

Within counties it is not clear that use of resources is always equitable. The Treasury has said that 'There are limited data on access to improved WASH [water, sanitation and hygiene] services at the county and sub-county level. Consequently, counties are not targeting their investments by need.'[24] And there is a tendency for each ward in a county to get the same amount of the Ward Development Fund—regardless of the differences in need. In fact a national Bill in 2018 said, 'The county executive committee member shall, with the approval of the respective county assembly, allocate funds equally to all the wards in the respective county'.[25]

---

[23] Africa Check https://africacheck.org/fact-checks/reports/verifying-kenyan-governors-claims-progress.

[24] *Public Expenditure Review Health, Water and Sanitation* https://www.unicef.org/kenya/media/556/file/Kenya-0000079.pdf.pdf; published in 2018.

[25] Development Equalisation Fund Bill. It did not become law.

Corruption

Some anticipated that corruption at county level would be less than at national because local accountability would be effective. Others feared that corruption would be devolved. The pessimists seem to have been proved right. Corruption is enormous. As corruption of tremendous extent is being admitted to at the national level it is clear that among politicians at both levels it is a routine matter. In one survey 42% of citizen respondents said that they felt devolution had increased corruption.[26]

The reports of both the Controller of Budget and the Auditor-General have consistently found not only disregard of law and procedures, and wastage of billions of taxpayers' funds, but expenditure that clearly indicates corrupt practices. Similarly the Ethics and Anti-Corruption Commission regularly investigates corruption allegations and risk at the county level, regularly finding failures to set up or maintain procedures intended to prevent corruption. A number of governors, past and present, are under trial and some others are likely to be.

These national bodies are trying to fulfil their obligations to support and strengthen institutions at the county level. But it is impossible for the governments to fulfil their responsibilities – about health and other responsibilities – when so much is siphoned off. If this continues, it is certain that the whole system of devolution will be areas will be under attack—perhaps something that the ethnic leaders of better endowed areas will be pleased about. The history of corruption among politicians and civil servants goes back to independence, promoted by our first president. It must be said there is no reason to suppose county governments to be inherently more corrupt than national level government—save perhaps for some lack of capacity.

Varied experiences

It is not to be expected that all counties would have similar experience with devolution. Arguably one function of the system is to give examples of better performance—hopefully other counties will try harder and thus improve service delivery and governance generally. Certainly in some counties people compare their own government favourably or unfavourably with others. Clearly the personalities and commitment of individual governors is a factor, but they cannot

---

[26] Transparency International, *County Governance Status Report 2016* p. 30 https://tikenya.org/wp-content/uploads/2017/06/county-governance-status-report.pdf

act alone. Baringo performs among the best in terms of budget transparency. Makueni has become known as a good example of devolution, and the Governor of Nyanza has said he wants to emulate his Makueni counterpart. They and some others have visions for their counties. In some other counties governors seem to have visions only of their own benefit.

Conclusion

Reports by the Controller of Budget, Auditor-General and various other bodies identify various serious weaknesses in implementation, including unnecessary conflicts, weak financial control, poor public participation, inadequate capacity, as well as tribalism and corruption. However, most reports also indicate considerable public commitment to devolution, greater trust in county than national government. In April 2018 an IPSOS poll showed 84% support for devolution with 90% in favour in the coast counties.

People do not necessarily always understand well how much responsibility counties have. They may credit the country with improvements in education and security—essentially national responsibilities. Their national loyalties may influence their perception of how well county governments perform—or indeed of who actually has responsibility for what.[27]

It is all too early to make any reliable final judgments: the experiment that it is would have been better without such a rush. Devolution has been a controversial subject, and it cannot be said that the Constitution, any more than the Bomas draft, provides a fully thought-out scheme. However, the best option for Kenyans now is to make it work in accordance with the spirit of the Constitution—and the wishes of a significant majority of the people. On the whole the efforts of county governments themselves, national institutions (less the nationally elected politicians) and the courts are working in that direction.

There have been a number of audits of the system or different aspects of it. One of the major ones was by the Office of the Auditor-General. Parliament mandated it to carry out a major review of the Constitution—perhaps hoping the conclusion might be negative. The review found many problems and made suggestions for improved implementation. Its overall conclusion on devolution included:

---

[27] Opalo, 'What do Kenyans Know About Devolution?' above.

> …devolution is not realizing its full potential because of several challenges. These include limited utilization of funds, poor inter-governmental consultation and cooperation, and lack of meaningful participation by citizens in making critical decisions on county development programmes.

But in the same paragraph it said,

> Devolution is itself the best development to take place in Kenya since independence in 1963. It is the main 'game changer' in Kenya today.[28]

[28] *Report of the Working Group on Socio-Economic Audit of The Constitution of Kenya*, 2010 (2016) para. 15-12 see http://oagkenya.oagkenya.go.ke/index.php/reports/cat_view/2-reports/72-special-audit-reports.

Chapter 8

Motion without Movement: An Insider's Reflection on Policing Reform

Tom Kagwe[1]

Introduction

Literally, the police were created to ensure that the lives of traders and private property within the Imperial British East African Company (IBEA Co.) were protected and respected. Basically, the Kenya Police and the Administration Police were created to serve different purposes: the latter to ensure the African 'natives' respected the rules of the IBEA Co. and the colony or protectorate, and the former to ensure that policing within urban areas was done. In the post-independence era, the mantra never changed, until the Constitution of Kenya was eventually promulgated.

The promulgation of the 2010 Constitution of Kenya was met with lots of optimism among many Kenyans. Although not perfect, similar to other constitutions in the world, the Constitution does provide for a different security system from that in colonial or even post-independence periods. It involves the autonomy of security forces, of which the police are a critical member. However, the promise of the independent authority of the police did not materialise. Reflecting back on those ten years, many have questioned why security sector reforms, which in this context means the National Police Service (NPS) but including some aspects of intelligence services or the military, have not yielded the yearned for fruits.

This chapter examines, from an insider perspective, where the country failed to realize the anticipated reforms, or more boldly transformation, including a comprehensive review of the security sector. It points out the institutional, policy,

[1] The views contained herein are those of the author and therefore, do not reflect those of IPOA, or the inaugural Board.

legislative, and administrative failures witnessed within those ten years. Third, it provides a collective memory of what transpired during those years, and why this constitution is proverbially a *Constitution without Constitutionalism* as the late Professor HWO Okoth-Ogendo, would have summarised the spectacle being discussed in this Chapter. That is, Kenyans ushered a new constitution, whose implementation remains more in the breach rather than the realization of its provisions.

The chapter provides a candid analysis of the challenges met, how some were surmounted, the lessons that were learnt, and also the amendments needed, if and when, the Constitution is reviewed in future. It is argued that, without these amendments, the people of Kenya would never benefit from the principles and values of the Constitution that they promulgated for themselves, the country and the future generations.

Constitutional Principles

The Constitution is not a hammer supposed to solve all the country's problems in a flash. Professor Yash Ghai, in many lectures and presentations has argued that constitutions do not make democrats. On the contrary, constitutions are made by democrats. But implementation of Kenya's Constitution was left to autocrats and authoritarian leaders of government afterwards, subject to scrutiny by independent constitutional commissions.

Germany's democratic constitution (the Weimar Constitution of 1919) was inherited by Adolf Hitler in 1933. The Third Reich, as Hitler's regime is commonly referred to, was not at all democratic. History shows how that constitution was disrespected and violated, with the Third Reich ending with its overthrow following the defeat of Germany by joint armies during the Second World War. Hitler not only ignored the edifice of the Weimar Constitution, but betrayed the dreams of its framers.[2]

Another example is South Africa, since Kenya's experiences with the constitutional review process was informed by the South African process of reviewing the post-apartheid status of the country, and the Constitution. South Africa promulgated, in 1996, a Constitution from which many ideas, and even provisions, of Kenya's Constitution come.

---

[2] A possible source about the Weimar Constitution is https://www.bbc.co.uk/bitesize/guides/z9y64j6/revision/2.

Fortunately, South Africa had in 1994 elected as their President Nelson Mandela, who steered the country to nurture democracy. Unfortunately, under the reign of the Jacob Zuma, South Africa witnessed the most blatant corruption, inept leadership not to mention violation of constitutional safeguards, which ended up with his removal from office in 2018.

These stern warnings from history point to Kenya that leadership and its people, even with a democratic Constitution, are the determinants of progress democratically. Many amendments, amounting to 27, were made to the former Constitution. They watered down the very edifice of the Lancaster House Constitution. Instead of solidifying democracy, they created an autocracy, which was presided over by Jomo Kenyatta, Daniel Moi and continued for over half of Mwai Kibaki's tenure.

In comparison, the USA democratic constitution drafted in Philadelphia in 1787 has only 27 Articles, and there have been 27 amendments to it that have made more democratic gains to that Constitution. The first ten amendments, which were originally thought of in Philadelphia, but not agreed upon, were passed in 1789 and ratified by the states by 1791, as the 'Bill of Rights' which gave the USA a niche in the support for inalienable rights and the inviolability of human dignity.

Envisaged Reforms

The 2010 Constitution of Kenya envisaged wide-ranging reforms, indeed transformation, of the policing sector, intelligence sector, and the military sector. The sector was to be governed by the principles of the Constitution, which included that they will be subject to civilian authority, as guaranteed in Article 239(5). That markedly placed the security sector under the scrutiny of civilians, which includes the President as the Commander-in-Chief (CIC).

The three security services or agencies were to be independent in their management, but that was still on paper. To illustrate, Article 239(3) provides that the security agencies should not act in a partisan manner, further the interests of any political party and also prejudice a legitimate political cause or interest. But the record of the last ten years bespeaks volumes in terms of violation of that very Article.

Article 240 established the National Security Council, which was to be chaired by the President, with the heads of some departments to supervise security organs and develop security policies. The long haul towards institutional capture

by President Uhuru Kenyatta started in 2013, after the controversial elections of 2013. Under the former President, Mwai Kibaki, whose attitude was to wait, see and then seldom act, institutions had more leeway to work independently. He had misgivings about what the Constitution posed for his leadership.

The Constitution was crystal clear about the role of the heads of the different security sector agencies. What was camouflaged was the role of the civilian authorities, particularly the President, in making determinations on who would be the leaders of these security sector agencies. Second, as seen recently, is the mode of appointment, which, though intended to give an important role to the legislature, is usurped by the so-called tyranny of Jubilee Party, which rarely contradicts the President's preferred choices unless members' personal interests are involved.

The third factor is the political cherry-picking of the former political aspirants and candidates to head the various security dockets, as the government creates jobs for those whom it favours but who lose in the political parties' nominations or in elections. And finally, which is omnipresent in Kenya, is appointing persons to offices based on tribalism or ethnicity, usually either Kalenjin or Kikuyu. Evidence is clear from the Gazette Notices or Supplements about the number of Kikuyus and Kalenjins recruited into security dockets, especially at the very top.[3]

Whereas the Constitution established principles about the qualifications for office, in accordance with Chapter Six of the Constitution, with requisite legislation however weak, there have been deliberate attempts to thwart those principles to create room for political expediency and patronage. To date, Kenya does not have a comprehensive policy on what national security is about, and thus, positions are dished out according to ethnicity and patronage; seldom is there institutional succession, especially for police leadership.

The Constitution sets out with great care the objectives and functions of the Police under Article 244: striving for the highest standards of professionalism and discipline, prevention of corruption and promotion and practice of transparency and accountability, compliance with standards of human rights and fundamental freedoms, highest possible standards of competence and integrity and the protection of human rights and fundamental freedoms and dignity, and foster and promote relationships with the broader society.

---

[3] National Cohesion and Integration Commission, *Towards National Cohesion and Unity In Kenya Ethnic Diversity and Audit of the Civil Service Vol. 1* Abridged version – there is a Table on p. 8 showing Kalenjin at 20% of the police and Kikuyu at 16%. https://tinyurl.com/NCICethnicitycivilS.

The constitutional imperatives for police reforms are clear. Police appointments, transfers, promotions and demotion are to be made on merit, and to reflect the regional and ethnic diversity of Kenyans (Article 246(3)): that role is to be supervised by the independent National Police Service Commission (NPSC) (Article 249). Conversely, they were to ensure that there are internal mechanisms to deal with indiscipline or police misconduct which does not border on criminality, and therefore they required an outlay of work to be done between the commission and the leadership of the police.

The second anticipated reforms are to be carried out within the police, in and of themselves, led by the leadership of the police, beginning with the Inspector-General (IG). They were to prepare the Service Standing Orders (SSOs) within 12 months, which were to guide the police conduct in the day-to-day operations, as envisaged in the National Police Service Act of 2011. The first IG failed. The outgoing IG, Joseph Boinnet, launched the SSOs. However, these rules of procedure still remain on paper, with abysmal, if any, implementation. These reforms, if they had been successful, would have required the police to be led by reformers. Unfortunately, they were led, in both instances of the IGs, by insiders or conservatives.

When the governmental system under the Constitution was changed by the Parliamentary Select Committee, late in the day, in 2010, to a presidential system, the appointment of the IGP became much more a personal matter for the President. Before that major change the cabinet (a collective body) would have made the decision. Incidentally, soon after the Constitution was adopted, new legislation (the National Police Service Act 2011, section 12) provided that the IGP would be appointed by the President, but only following a process of open recruitment by the NPSC, involving public interviews. A short list of at least three people was then to be submitted to the President for his final selection, subject to parliamentary approval. But this was amended in 2014 to pare back the process to the constitutional provision: appointment by the President alone subject to parliamentary approval. And a court challenge to this failed.[4]

The civilian oversight authority, the Independent Policing Oversight Authority (IPOA), was created not by the Constitution but by legislation. This was to be the custodian of the constitutional pillar as guaranteed in Article 244: that police would be independent, transparent and with integrity, respect and protect fundamental freedoms and human rights. The Constitution also requires

---

4 *Coalition for Reform and Democracy (CORD) v Republic of Kenya* [2015] eKLR.

that, as they recruit, not only must the broader society be involved through public participation but also their rights must be respected.

The High Court made a determination that in the 2014 recruitment exercise the NPSC failed in these respects.[5] The whole recruitment exercise was declared invalid (see below).

It is also clear that the Constitution envisaged reforms in the other security agencies: the Kenya Defence Forces (KDF) and National Intelligence Service (NIS). Within Article 238, the principles that must guide national security include protection of both territorial integrity and human rights.

Therefore, it was impossible to divorce those territorial underpinnings without ensuring that fundamental freedoms are secured. Unfortunately, the National Police Service, the KDF, and somewhat the NIS failed, and have continued to fail, in understanding this.

Illustratively, the military was sent in October 2014 on an operation to restore peace in far flung areas of the former Northern Frontier District (NFD) but according to the KDF Act, sections 31 to 35, they were to report to the IG. But from the IPOA records, and reports filed, the military did not respect the chain of command as provided for between Sections 33 and 35 of the KDF Act, neither were they penalized for violating human rights.

Earlier that year the government argued that deployment to Lamu was 'an emergency' and thus needed only a report to, rather than approval by, the National Assembly – an analysis that the opposition queried.

Indeed, from an insider's perspective, the military do not honour constitutional and legal imperatives as they have split loyalties: between their chain of command and the police. Thus, they organize separate operations of the KDF while the police, on the other side, organize their own, but there is no structured reporting between both commands.

Further, operationally, the military is more disciplined than the police. Whereas both police and the military have been accused of egregious human rights violations, especially in far flung areas of the former NFD, the military has an internal disciplinary system of dealing with the same, albeit it is not fair to victims in most cases. The internal disciplinary process is not just a court martial but also investigation by the military police, which usually leads to administrative actions on the part of the leadership.

---

5 *Independent Policing Oversight Authority v Attorney General* [2014] eKLR and Justice Lenaola's decision was upheld by the Court of Appeal: *Attorney General v Independent Policing Oversight Authority* [2015] eKLR.

Unlike the military who usually take action, the police have never taken action in terms of arbitrary or false arrests, enforced disappearances, extrajudicial executions, corruption and extortion within the police ranks, and such other vices. The Internal Affairs Unit (to receive and investigate complaints against police) was only made operational in November 2018 but still faces a lot of challenges –from both within the police and outside. 'Very few Kenyans know it exists and those who do don't trust it because it's run in an opaque manner by police officers. The main allegation against it is that it covers up crimes committed by colleagues.'[6]

Failure from the outside

Definitely, security sector reforms were not conceived from an outsider perspective only. Police leadership was also to undertake reforms. The reforms envisaged in the Constitution were meant to be progressed from both the outside and the inside. The outside failed, as well as the inside.

On the outside were the NPSC, IPOA and the Ministry of Interior and Coordination of National Government, the last being responsible for policy guidance. These three policy and institutional enclaves were supposed to work together but never worked in tandem within the letter and spirit of the Constitution, and were bedevilled by institutional turf wars, which resulted in inefficacy, inefficiency and bureaucracy. Both the High Court and Court of Appeal passed the same verdict in the police recruitment case. Illustratively, from the court determination, the NPSC were at loggerheads with the IPOA, the latter being responsible for petitioning the High Court to quash the recruitment.[7]

The judgment was clear in terms of Chapter Six of the Constitution. The petitioners were IPOA and others from all over the country, who sought the quashing of that recruitment, since it violated the tenets of public participation, of leadership and integrity as there was outright bribery and favouritism among other issues. The High Court held that the recruitment was in violation of the Constitution which was designed to negate favouritism, nepotistic tendencies in the appointment and recruitment of public officers. In the summary, the court upheld that IPOA was not supervising any of the three arms, or even the ministry, but safeguarding constitutional imperatives.

---

6 Douglas Lucas Kivoi,' Kenya's policing is steeped in violence. Here's what must change' *Africa Report* 9 June 2020 https://tinyurl.com/Africareppolice.

7 The case referred to earlier – fn 5.

Reforming the security sector from outside is next to impossible. Several factors come into play. First, the inability of the police and other security sector institutions to situate their role in the constitutional dispensation, of course because of how they are appointed. Whereas the Constitution calls for public processes and participation, the leadership of the police is nowadays recruited behind 'closed doors', inside State House. Second is the archaic thinking of the security sector actors, which is to say, security is high level state work about territorial integrity, which civilians do not understand, and therefore, cannot be part of.

Third is the hierarchical nature and respect for titles or insignia worn on their lapels that is levels of constable to that of the Inspector-General. These do not make sense to any civilian, since civilians are not trained in the police colleges neither do they serve in the police service to make sense to them. Indeed, the insignia are not based on leadership qualities, level of strategic thinking, or when the officer was recruited, but through promotion, which is also not above board most of the time.

While police do not necessarily consider civilians capable, the fact is that civilians, especially human rights defenders, are more advanced in terms of the doctrine of security than the officers imagine. The civil society-led Police Reforms Working Group is a clear testament to this. Their proposals have been considered very seriously by the Ministry of the Interior in setting the September 2018 'Policy Framework' for police reforms and also the 'Implementation Matrix' that is guiding police reforms to date.

From the outside, the NPSC failed to fulfil the duty of ensuring that the vetting envisaged in the NPSC Act 'bore fruits', so to speak. Under section 7 of that Act, the NPSC was to conduct an assessment of police *competency* and *suitability*, and also ensure that their placement in the police is merited according to those two factors. What transpired, according to the civil society perspective, was an exercise in futility as many 'bad cops' still retained their jobs.

Throughout the NPSC hearings, rarely was any question asked about the human rights record of the officer being vetted, as the matter was chiefly about finances. The second issue was about zeroing on educational qualifications, since they were not concerned about whether the qualifications claimed were actually held**,** to fit the test of suitability or competency.

Finally, the 'vetters' were supposed to be upright, morally unquestionable and above reproach like Caesar's wife. But some had ongoing criminal cases in court, whilst others faced huge allegations of malpractice. Most of the commissioners and

vetting panel were accused of improbity and impropriety. Inaugural commissioners had been prosecuted for stealing public land, others faced allegations of soliciting bribes, and others of getting personal or sexual favours from police officers.

IPOA's inaugural board's mandate was to set up the Authority from scratch. IPOA was supposed to oversee police reforms as a civilian oversight mechanism. In its stead, as documented in the board's end-term report, IPOA faced both internal and external challenges.

One of the biggest challenges was the lack of strategic leadership at police levels, particularly their inability to comprehend and comply with IPOA's mandate within the context of police reforms. Lack of co-operation by the police contributed immensely to the lack of fulfilment of the entire IPOA mandate.

To IPOA, police were irresponsible, ineffectual and inefficient in executing their mandate as enshrined in the Constitution, which led to dismal performance on police reforms.

Failure from the inside

From the foregoing, it can be seen that the failure was also from the inside, including leadership challenges, lack of strategic focus and a failure to comprehend the simple logic of external oversight. Whereas the onerous role of reforming police was to begin in earnest after the promulgation of the Constitution, the police leadership kept on moving the targets. Police were inconceivably anti-reform, had stuck to previous logic that part of police internal transfers from one station or command centre to the next, were part of the reform agenda, and that welfare of police officers was a prerequisite to reforming the police. Thus, police prioritized housing, budgets, and police posts, purchase of motor vehicles, uniforms and promotion.

Within that anti-reform agenda was a structure that favoured use of police for political ends. Symbiosis with the state structures, while arising from the colonial period, had mushroomed to a situation in which the police never wanted the independence guaranteed by the Constitution. In their perspective, and as uttered many a time by their leadership, the police are part of the executive.

While the role of the executive in setting policy choices cannot be disputed, police should not be subservient to the executive. But police decisions have mirrored those of the Ministry of Interior, outside the framework of the Constitution. Past and current cabinet secretaries in charge of these ministries

have made proclamations that totally violate Article 245 of the Constitution (on independence and security of tenure), or even the Bill of Rights.

It is common to see media footage of a cabinet secretary threatening politicians with arrest or purporting to illegalize public demonstrations and gatherings: all of which are contrary to the express provisions of the Constitution. Article 245 says that the cabinet secretary may lawfully give a direction (which must be in writing) to the Inspector-General but only on policy, and not about the investigation of any particular offence or offences, the enforcement of the law against any particular person or the employment of any member of service.

On their part, the police are generally in total violation of the provisions of the Constitution and also other laws. These violations range from outright systematic abuse of office to flagrant disobedience of court orders, and of even respect for the rule of law. The police who commit these offences range from the top rank to constable.

Police resistance to reforms has been blatant, and commanders within the service made that clear. Second, systemic and structural problems afflicting the police have been deliberate and with the condonation of that very leadership. Third, frustrations of police reforms could not and will never be overcome by shuffling police officers from one station to the next, or from one county to the other: some officers must exit the service.

To be able to transform the police, Kenya does not need to create new taskforces, new reports, or new methodologies, but implement what is already there. As one activist quipped, Kenyans have turned every stone; what Kenyans have not done is to look at what is below the stones already turned.

Finally, in reflection, Kenyans do not need to hear the phrase 'police reforms' any more. Kenyans need a reformer, within the police at the very helm. An outsider IG who may be found among civilians, with relevant strategic and policy management and practice, is needed to lead the reforms. The matter of police reforms, from experience, cannot be left to conservatives or insiders.

It is plausible that officers at the helm of the police service in Kenya, do not value reforms. When confronted with actual reform imperatives as guaranteed by the Constitution, they would rather pass the buck to either 'a few rotten apples' as it were or external accountability institutions such as IPOA.

Looking back, it is seemingly clear that the presidency has eroded the potential and actual independence of the NPS, which therefore is a shell of what the Constitution provided for. Interestingly, the Constitution has not been

amended. However, effectively amendments have been brought about through legislation to water down the Constitution. What the political elite in Parliament failed to change in April 2010, and thereafter, has been amended through ordinary legislation. Be that as it may, there is something to salvage from that entire period of ten years, but also some issues that require dialogue, moving forward.

Dialogue moving forward

Debates are healthy in democratic countries, especially debates that hinge on political, policy, legal, institutional, economic, social and cultural fronts. This author offers various issues on what sort of debates should be taking place on the security services and the Constitution.

First, whether we need to have 'split' police, meaning whether the Kenya Police Service (KPS) and the Administration Police require to be separate, legislatively or even practically. Scholars should provide candid analysis of why there exist two policing units, based on tribal arithmetic, but also the urban-rural divide. Experience has shown that the APS and the KPS do not have to be 'split'.

These two units have problems of double procurements, double administration, double functions of beat-and-patrol, and also many other overlapping functions and duties of policing which need not be 'split'. Of course, after the launch of the 'Policy Framework' in September 2018, by the President, the merger of the general duty police officers from both the APS and KPS is a great indicator of that process.

The second point is whether IPOA should be constitutionally establishment. Because it is not a constitutional commission under Chapter 15 of the Constitution, thus having a lower status, the Salaries and Remuneration Commission (SRC), has fixed lower salaries and allowances for staff and the board.

The third issue is whether Kenyans and the police in particular, need the NPSC in its current form. While this author believes that is not the question, since the NPSC definitely is needed, the personnel and commissioners deserve re-examination. From experience, the cat-fights within NPSC pitting the commissioners against the leadership of the police, were unwarranted. It was a question of ego.

Whereas the NPSC Act had placed police as ex-officio members of the NPSC, amendments to the Act made them full time members, thereby instilling a sense of responsibility and also a duty to vote. Experience has shown that the police

leadership, being *bona fide* commissioners, determined many matters outside the purview of the Article 246, sometimes involving personal interests at the expense of the service.

The fourth matter is whether there is need to relook at Article 245 of the Constitution. The cabinet secretary in charge of security is authorized to make policy decisions, and in writing, sanctions are needed in case the person acts inappropriately. Kenyans have seen various CSs make very weird decisions arising from personal pique or annoyance, but they are not held to account.

Do we need to recruit so many police officers, and a host of KDF and NIS to be in charge of the security of the country, particularly internally? The numbers of police recruited, at 10,000 annually, has brought many problems for the training curriculum, accommodation at police colleges, logistical nightmares of stay in those colleges, among other challenges that have been ably documented by IPOA, in a public report on police training colleges.[8]

On police welfare, which should be addressed through sustainable recruitment levels, IPOA's report on police housing showed that when police are living within communities, there is lesser likelihood of crime occurring but also it would aid in community policing. Housing allowances, IPOA recommended, should be paid to police, not only to stem corruption that occurs in tendering to build police houses that are never completed, but also to ensure that police welfare and the attitudinal approach to citizens is less troubled. Eventually, after the Report of 2015, these proposals were launched by the President in September 2018. Have we got it right?

The deployment of military personnel for internal problems of the country, is not only unsustainable to say the least, but is a constant cause of the problems facing Kenyans, particularly the youth – with enforced disappearances especially. The youth of Kenya are under constant attack from these marauding 'gangs in uniform' who usually escape accountability.

There is need to debate the role of the principles and values of national and county governance as elucidated in the Constitution. All organs of the state are supposed to be transparent in their dealings, such as the procurement of goods and services, which do not necessarily need to be imprinted as 'state security apparatus'. Hiding behind these dealings are the most corrupt procurement of security equipment, in which millions of USA dollars are stolen. The Auditor-General's reports over the years point to wanton waste of public financial resources.

---

8 IPOA, *End Term Board Report 2012-2018* https://tinyurl.com/IPOAEndtermrep.

Opening up a bulk of these dealings to public scrutiny and public participation could save the country a lot of public funds.

Debates on the nature of sanctions to be imposed on police and other security agencies, both within their internal accountability mechanisms and also the external mechanisms, such as IPOA or NPSC, are seriously required. Police accountability has eluded this country for far too long, even with both internal and external mechanisms.

In making legislative or even constitutional amendments, there may be a case for stiffer penalties for those who violate human rights. While stiffer sanctions may exist but do not deter, then there is need for further strengthening institutions that can hold those security agencies to account.

Whether the Cabinet Secretary for Interior and Coordination of National Government, who has powers of policy prescription, should proceed and violate the Constitution with impunity has to be discussed. Further, the question of dealing with courts or parliamentary summons is another question. Eventually, we need to agree on the concept of punishment for those who defy court orders. Whereas courts of law have issued court orders, which include sanctioning the cabinet secretary either to appear in court or even jail the occupant of that office and some other senior officers in that ministry, none has been and can be arrested since the police report to that ministry, at least in practice. Therefore, stiffer constitutional or legislative penalties would assist in the realization of the Article 244, on professionalizing the police, away from politicizing the police.

Finally, the role of the KDF in local conflict resolution and keeping the peace needs serious interrogation, both at constitutional and legislative levels. Many a time, within the last eight years, the military has been deployed, whether under the rule of Kibaki or Uhuru, in defiance of Article 241, which says that if the military cooperate with other authorities in situations of emergency or disaster they must report to the National Assembly and they can be deployed to restore peace in any part of Kenya affected by unrest or instability only with the approval of the National Assembly.

This question begs some bit of introspection. Under Kibaki's regime, military were deployed in case of emergency. Under Uhuru, the military has been deployed haphazardly to deal with local or community policing matters, which has led to wanton violation of human rights. These questions deserve answers for the oncoming debate.

A president who enjoys wearing military uniform has been importing military and intelligence personnel into various positions. From the supply of military equipment to the police, like armoured personnel carriers, to the appointment of a military officer to head the Intelligence Service, and intelligence officers to head the police, to importing military officers into clearly civilian roles such as heading the Nairobi Metropolitan Services administration, we can see both a blurring of the distinction between military and police, and thus of the police role, and an increasing tendency to think of government as controlling the people through the disciplined forces.

Conclusion

There is need to re-examine the constitutional and legislative architecture, to ensure that principles, values and provisions of the Constitution are strictly adhered to.

There is nothing fundamentally or inherently wrong with the Constitution, or the framers for that matter, but, rather, it is the implementers of the Constitution that give rise to problems. It would have been possible to implement the Constitution as it is with the correct leadership, and particularly changed mind-sets on the part of those wielding political power are needed to uphold, defend and protect the Constitution.

It is evident that those who have taken the oath of office to defend the Constitution have defied that very same oath. The nature and trends of impunity in the country are dumbfounding. Kenyans, both leaders and followers, are yet to grasp the principles and values elaborated in Article 10 of the Constitution.

If the recommendations contained in this Chapter are implemented, there is possibility that this current generation may reap the fruits of the Constitution they promulgated for themselves and their children. If not, then perhaps the Constitution was not promulgated for this generation but for the next.

The reforms envisaged are similar to a docked boat, which is showing motion, but actually there is no movement. Perhaps through some constitutional and legislative amendments, Kenyans could remove the anchor in the ocean that holds back the movement towards true transformation and at last jumpstart it.

Chapter 9

Public Finance Management in Kenya since 2012: A review

Abraham Rugo Muriu

Introduction

When Kenyans jubilantly voted for a new constitution in 2010 there was a great expectation that life would get better for all. This was especially for those who had remained poor and marginalized from social, political and economic gains enjoyed by other citizens of the republic. The Constitution spells out the basis for a social contract between the people and the state. A central provision and thus expectation of the people is that the resources and especially public finances would henceforth be utilised for the common good based on some fundamental principles. Public finances are envisioned not as an end in themselves but as a means of achieving the aspirations of the people of Kenya. This pursuit is to be guided by fundamental principles of transparency, accountability, participation and equity.

This chapter reviews how these principles have been interpreted and implemented in the management of public finances. The chapter first looks at the software/value propositions of the public financial management (PFM) constitutional provisions, reflecting on the place of PFM as a means to realize the social contract between the government and the citizens. Second, it considers the hardware/structural aspects of PFM including the institutions, actors and processes. Third, it reflects on what we have observed in actual PFM by way of revenue raising and sharing, expenditure, public debt and possibly related to actual services delivered.

Connecting the constitutional aspirations to actual service delivery

A foundational aspect of the Constitution was to spell out the principles upon which the aspirations of the Kenyan people will be met. The principles set out in Article 201 provide the 'software' that links the constitution provisions and their fulfilment. Broadly the principles can be summarised under the acronym TAPE, namely Transparency, Accountability, Participation and Equity.

Transparency, accountability and participation

For many years, public resources had been managed behind closed doors and in opaque ways—even guided by a law named the Official Secrets Act. The process was not participatory and when it was it applied to limited aspects dictated by government officials. It was thus a great gain that the Constitution spelt out the new way of engagement.

Both how resources are raised and how they are used should be transparent. Transparency is key to ensuring that citizens know their rights and obligations in public governance, and enabling informed participation. Transparency makes it possible for the government officials to be accountable in how they apply public resources. It appears that indeed this has been a difficult part of the change.

Article 35 recognises a right of the public to access all public information. To effect this, the Access to Information Act was passed in 2016. It is not clear how far this Act amends the Official Secrets Act. It requires public bodies to publish important information about themselves and their activities, and gives citizens the right to ask for information, subject to certain restrictions. It has however not been fully effective for varied reasons.

There has in fact been an improvement on how much information, especially on public finances, is made public at the national level. This is especially through online platforms such as websites of the respective Ministries, Departments and Agencies (MDAs). At the county level, things are yet to pick up sufficiently. Not all information on public finances that is made public has been in sufficient quantity - providing detail sufficient for informed engagement of citizens and their representatives. Quality of such information should also be considered: the information should be factual and accurate and thus valid. A running difficulty has been on ascertaining the validity of budget information made public. Organizations like IBP Kenya are already starting to undertake county and national studies on the credibility of budgets that have this key aspect at their core.

Even when available, information is often in the form of either bulky, technical documents or in highly summarised versions, negatively impacting on transparency. It has also not been clear about how different contractors for public goods and services are identified or what the contracts entered into entail in any detail. The lack of transparency during implementation of the budgets raises concern as it impedes the public's ability to engage.

Even if quantity and validity are there, timeliness remains a challenge. Information should be availed in time to facilitate the key decisions. For instance, when the public only sees the budget documents on the day of discussions, when their input is sought, they can only engage so much.

Transparency by the national government has been a problem. Internationally comparable surveys conducted by the International Budget Partnership demonstrate this.[9] These assess transparency as a measure of the budget documents that are available on the official communication channels of the government especially websites and public libraries. The documents assessed for availability are a pre-budget statement, budget estimates by the executive, approved/enacted budget, citizens' budget, implementation reports, mid-year review and audit reports. The scores out of 100 were 49 (in 2012), 48 (2015) and 46 (2017). However, there was a slight improvement in the 2019 survey which gave Kenya a score of 50. This still means that Kenya's national government provides limited information to its public. To be fair it puts Kenya above the global average of 45 (though Uganda scored 58). This clearly is a factor in limited public engagement.

As for how much county governments make publicly available, IBP Kenya has conducted a semi-annual transparency survey from March 2015. This has aimed at establishing how many counties have the key budget documents on their official county websites. The documents include county development plans (CIDP & ADP), the county budget review and outlook paper, the county fiscal strategy paper, the proposed and approved programme-based budget, a citizen budget, and budget implementation reports. The findings year on year are that most counties never make available any of the above documents.[10] However, the latest survey of March 2019 assessing availability of seven documents, shows marked improvement in the information that counties make publicly available. Map 1 shows the colour spread of the document's availability in that year. The recently

[9] See https://www.internationalbudget.org/open-budget-survey/country-results/2019/kenya

[10] For all available documents see https://www.internationalbudget.org/budget-work-by-country/ibps-work-in-countries/kenya/understanding-county-budgets/tracking-county-budget-information-kenya/.

released 2020 survey concluded that progress was too slow, and 'on average about 42/100 points of information are missing from available budget documents'.

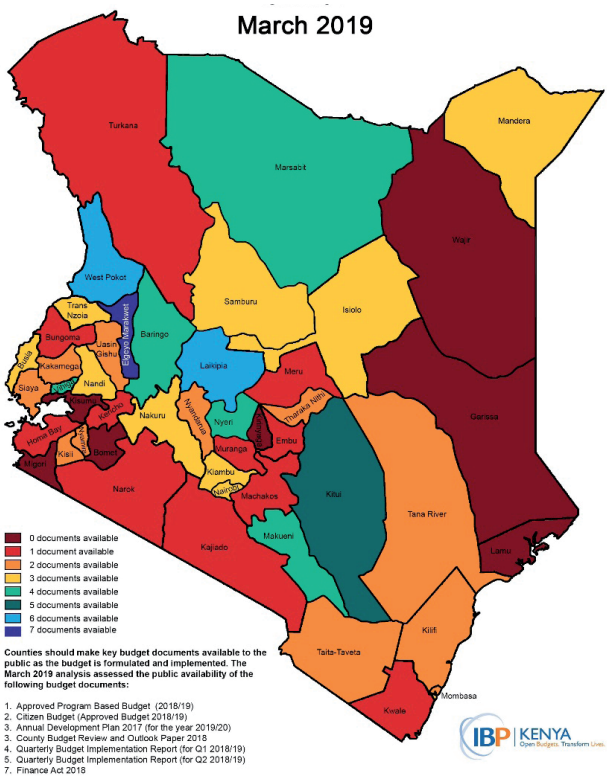


Figure 1: How Much Budget Information are Counties Making Available online?

Source: International Budget Partnership Kenya

Closely linked to transparency is accountability. The expectation is that all state and public officers hold and manage public resources in trust for the citizens. They must hold themselves to the highest standards of integrity and at all times provide an account of how they have used resources. Accountability is to be exercised directly to the citizens and indirectly through their elected representatives. In a modern democracy, accountability has to do with honouring the social contract. This is as contained in various policy documents and actualized through the annual budget allocations. The period under focus has seen a fair share of the test of accountability. The results are mixed.

Reports from the Office of the Auditor-General, the Ethics and Anti-Corruption Commission, Director of Criminal Investigations and the Director of Public Prosecutions indicate a high extent of non-accountability and misuse of public resources. This applies both to the executive and legislative arms of the different governments. At least 15 county governors have been investigated for misuse of public resources. The situation is no different at the national level. Not all resources have been misused but there is much more room to be done towards ensuring that public servants are accountable.

Undoubtedly the most progressive provision of the Constitution was the provision for public participation in public finance management. Participation is envisioned as a means to get public input on what public policy should focus on and also as a mechanism of co-producing public goods and services. The participation principle requires that the public be a central lever in the PFM system. A look at the laws passed since start of a devolved system indicates that public participation is elaborated in the county planning and budgeting process more than in the national one. For instance, up until 2018, the National Assembly never facilitated public participation outside Nairobi. The national ministries, departments and agencies (MDAs) have also commonly called the public to engage in the capital and in some rare cases in some county headquarters. This has meant that, while there is a great focus on about 20 per cent of the national resources used at the county level, there is limited focus on the 80 per cent utilised by the national government. This is a worrying reality that has gone unchecked for far too long. The 2017 Open Budget Survey found that the national government provides few opportunities for the public to engage in the public finance processes with a score of 15 per cent. In the 2019 survey this increased to 20,[11] but in the 2020 survey IBP concluded that 'public participation in budgeting is very low at 6/100 points'.

While some county executive members and assemblies have made genuine effort to make public engagement meaningful, many just undertake it to fulfil the requirements. A compelling requirement is that for the Office of the Controller of Budget to approve withdrawals from the county revenue fund and related operational accounts, it must confirm that the relevant expenditure plans were prepared with the public's input. Counties have to present lists of participants in the various consultations they have held. It requires empirical studies to establish if all the lists so presented are accurate, and whether the public engagement was structured in an effective way. Over and above meaningful engagement, is the concern of what happens to the input sought from the public? Is it ever considered

[11] See above.

and how do the final decisions made reflect it? That there is no proper feedback to the public limits any assessment of what happens to their input.

Equity

The second and arguably the greatest gain of the Constitution is equity – mentioned fourteen times in the document. Equity is both a process requirement and the desired end. Article 201(b) provides that the public finance system must promote an equitable society and specifically the burden of taxation is to be shared fairly; the revenue raised nationally must be shared equitably among national and county governments; expenditure must promote the equitable development of the country, including by making special provision for marginalised groups and areas; and that the burdens and benefits of the use of resources and public borrowing are to be shared equitably between present and future generations (Article 201(c)).

As a process consideration, equity is to guide planning and budgeting for service delivery programmes. Equity requires that resources are shared fairly, responding to need. Since needs vary from place to place and in different sectors, interventions on how resources are collected and spent should be differentiated. The goal of equity in planning and budgeting is that it will lead to equitable outcomes. That is, service delivery should address the various gaps and the improvement of livelihoods regardless of the starting point.

A starting point was to establish the Commission on Revenue Allocation (CRA), by Articles 215 and 216 of the Constitution. Currently the second commission is in place and serves for six years. The commission has the mandate to recommend to Parliament how to share revenue between national and county governments and across county governments. The commission also recommends how the Equalisation Fund under Article 204 is to be shared. The commission has published its first and second marginalization policies and criteria for allocating this fund. While the first policy identified marginalised counties, the second was based on wards and thus identified marginalized communities within counties and is broader and more inclusive.

The actualization of the equity principle has taken different dimensions. The first one has been through the formula developed by the CRA for distributing the equitable share across the 47 counties. The equitable share is an allocation to counties based on their functions, and it should not be less than fifteen per cent of the national revenue (Article 203). Two generations of the formula were developed, each covering 3 years. The draft third generation formula, to cover

a period of 5 years beginning in 2019/20, was released late in 2018. It was the subject of a much publicized series of abortive Senate sessions in August – September 2020. The major concern on the second formula was that, by using proxies of public needs such as population, poverty and land size, the inequalities in service delivery are not directly targeted. Further, there was been a concern about the size of the element that is equal for all counties, currently at 26 per cent of the total equitable share. Here the concern is that small (administratively) counties get much more than they need while large counties get just enough to run administrative functions.

The third generation formula seeks to cure this in several ways. It measures needs more directly as opposed to using proxies such as population and poverty. Some of the direct measures include on healthcare, agriculture services, urban services and water. Secondly it separates parameters for service delivery and those for developmental/infrastructure in nature. It reduces the allocation to basic administration that is shared equally between the counties. Finally, it creates explicit parameters meant to encourage fiscal prudence including greater own source revenue collection, transparency and accountability. The only way that the Senate could break its deadlock was to agree that no county would lose in the new formula.

While the focus has been on trying to resolve inter-county inequalities, especially in resource access, through the annual division of revenue process, it has emerged that the greatest challenge is between villages and wards within the counties. Available research shows that such intra-county inequalities are much more pronounced than inter-county ones.[12] Counties have tried different ways of addressing this challenge. Some have developed a formula (resembling the one developed by CRA) as Elgeyo Marakwet did under its Equitable Development Act, 2015. This distributes a portion of the development budget, of which the citizens determine the utilization. A contested approach has been the enactment of Ward Development Funds (WDF) that are inspired by the National Government Constituency Development Fund (NG-CDF). This is where the Members of the County Assembly (MCAs) have certain funds set aside for use in the wards of the county. Kenyans are anxiously awaiting the verdict of the Supreme Court on the constitutionality of the NG-CDF. The most relevant ground of challenge is that the NG-CDF infringes the separation of powers between executive and legislature —a point that the Court of Appeal accepted. In the case of counties, the same objection would apply, and has the additional backing of the County Governments

[12] See https://tinyurl.com/IBPSharingCounties2016.

Act, which provides that county assembly members must not be involved in the executive functions of the county government, nor in the delivery of services 'as if the member were an officer or employee of the county government' (s. 9(2)(b)).

Another concern about the WDF is that politicians tend to want each ward to receive the same amount of money regardless of their differing needs. Further, there is a concern that most of the projects thus proposed are capital in nature with no plans of how to keep them operational, causing a loss to the public. The rather small funds are spread thinly across the wards and sectors hence take long to complete. Currently there is a bill in Parliament (The County Wards (Equitable Development) Bill 2018) that would require counties to spread development expenditure equitably (rather than equally) across wards, and spend at least fifteen per cent of the county's development allocation through wards. It also would set up procedures and criteria for use of this money. It was passed by the Senate in June 2019, but was referred to a mediation committee after it was defeated in the National Assembly in September 2020.

The institutions, actors and processes

The Constitution established a number of institutions, actors, and processes for how public finances are to be raised, shared, used and reported on. Have these made PFM much easier or introduced complexity?

The number of PFM institutions and their connection mechanisms is at best a complex web. At both national and county level the executive treasuries are responsible for managing the revenues and disbursements to the different service departments. While the National Treasury has had to reorient to working in an intergovernmental framework that includes new steps in the budgeting process, the county treasuries had to be established from the ground. This process has not been entirely smooth. For instance, both levels are still unclear on classification of recurrent and development expenditure. They are also yet to establish effective mechanisms of public participation. This is partly because while the National Treasury is mandated to build the capacity of the county treasuries, it has had enormous demands on it, especially during the transition. The one-off trainings provided to county treasury staff have been far from sufficient.

The legislative bodies (parliament and the county assemblies) provide oversight on the utilization of public resources. They approve all laws and policies relating to public finance at the respective levels. They also keep the executive

offices accountable during implementation and approve the audit reports including directing specific courses of action. The period under focus has revealed the limited capacity of the county assemblies to hold their county executives to account. We have on several occasions witnessed chest thumping and standoffs as MPs and MCAs demand that the respective executive agree to certain benefits before they can approve the budgets. In other cases, blackmail through impeachment threats to heads of county treasuries have been used to coerce them to comply with legislators' wishes. Furthermore, the weaknesses of the capacity of the assembly members to effectively interrogate the budgets and their implementation plans has emerged as a key challenge.

Turning to revenue collection, the Kenya Revenue Authority handles the collection of most of the national government revenue. County governments have directorates and departments within their county treasuries that manage their revenue collection. Several have contracted external actors to collect certain streams for them and even sought to automate such processes. A study done by CRA, however, revealed that counties had spent varying amounts on procuring the automation many of which have not made any return on investments. In the 11 counties studied, one had spent about KES.15 million while the highest spender had spent KES. 85 million. Yet there is little evidence of improvements in counties' own source revenue. This could be due to the fact that the revenue streams have remained the same and thus automation has only improved efficiency in collection.

The fourth set of institutions are those that serve both the national and county governments concurrently. These include the CRA, Central Bank of Kenya (CBK), Salaries and Remuneration Commission (SRC), Office of the Controller of Budget, Office of the Auditor-General, and the Intergovernmental Budget and Economic Council. These institutions have settled into their roles and are able to report without excessive delays.

The content

This section reflects on the trends and practices in the realities of PFM from raising and sharing of revenue at national and county level, the expenditure and service delivery, and public debt. An emerging issue is the rise in public debt and what that has meant for service delivery and flexibility of public finance space.

Revenue

The constitution provides various avenues for raising revenue, the main one being the taxes to be collected at different levels. Article 209 provides that only the national government can impose income, customs, exercise and value-added taxes. County governments are to impose property rates, entertainment taxes and any other provided through an Act of Parliament.

The division of revenue has undoubtedly given rise to heated debates in the annual budgeting process. A concern has been the very low levels of public participation during this part of the budget process. The proposals from different offices have always been significantly different with no clear reasons. CRA makes its recommendations on the division of revenue in December. Thereafter the National Treasury makes its submissions when tabling the Budget Policy Statement in mid-February which is accompanied by the Division of Revenue Bill (DORA) and the County Allocation of Revenue Bill (sharing revenue between counties). As Table 1 shows, the figures proposed by CRA and National Treasury for the FY 2018/19 had a difference of 23.2 Billion. In the final round, the National Treasury figure of KES. 314 billion was approved by Parliament.

Table 1: CRA and National Treasury recommendations compared to the approved allocation for 2017/18

	DORA 2017	CRA Recommendation 2018/19	National Treasury (BPS 2018)	% Change between DORA 2017 and CRA Recommendations	% Change between DORA 2017 and BPS 2018 (National Treasury
Equitable share	302.0	337.2	314.0	11.7%	4.0%
Conditional Grants (Excluding Loans and Grants	23.3	30.5	25.5	30.9%	9.6%
Total	**325.3**	**367.7**	**339.5**	**13.0%**	**4.4%**

Source: DORA 2017, CRA Recommendations 2018/19 and BPS 2018

A look at the growth of the equitable share suggests that it has not been at par with the national revenue growth. As Table 2 below shows, while revenue has grown by about 13 per cent year on year, the equitable share including conditional grants to counties has only grown by 10 per cent.

Table 2: Growth in sharable revenue and counties allocation

Year	Public Debt Service	Sharable Revenue	Counties' Allocation	Growth in Public Debt Service	Growth in Sharable Revenue	Growth in County Allocation
2014/15	250.97	1,031.82	229.93			
2015/16	250.39	1,152.97	273.07	0%	12%	19%
2016/17	307.16	1,305.79	294.02	23%	13%	8%
2017/18	453.36	1,486.29	314.21	48%	14%	7%
2018/19	687.57	1,688.49	331.23	52%	14%	5%
Average				30%	13%	10%

Source: Various national government budget documents

A key aspect complicating the division of revenue is the interpretation of the criteria in Article 203. They include national interest, public debt, other national obligations and the needs of the national government. The National Treasury defines 'sharable revenue' as the residue that remains after deducting key national expenses especially things like expenses of independent commissions and offices, pensions, public debt servicing, and national security. This is set out clearly in the 'Explanatory memorandum' of the Division of Revenue Bill 2019. This practice has over the period reduced the shareable revenue to the disadvantage of counties and devolution. The greater the national obligations (defined by the national government) the less there is to be shared between the national and county governments. For instance in 2019-20, 63% of the national revenue is excluded from the shareable revenue.

This approach is in direct violation of the Constitution. There is no concept in the Constitution of 'shareable revenue': all revenue is to be shared. The 'national interest' that must be taken into account is not a series of financially costed things like police vehicles (to take one example) listed in the Memorandum to the 2019 Bill. It is a principle that must guide the whole process.

Also, some of the items earmarked as 'national interest', such as youth empowerment and fertilizer subsidy programmes, are also arguably county not national functions.

The Bill claimed that the equitable share was 30% of the 'audited revenue' —twice as much as the Constitution requires. Yet the county share of the total anticipated revenue for 2019-20 is only 16.5%. This discrepancy is because the Constitution says that the minimum is 15% of the revenue *in the latest year for which the audited accounts were approved by Parliament* – that is 2014-15. This rule provides an incentive to Parliament not to approve the Auditor-General's reports.

The Council of Governors in 2016 sought judicial interpretation of the 'national interest' and how it was to be implemented. The High Court referred it for mediation but, there being no conclusive progress, it was taken to the Intergovernmental Budget and Economic Council. The outcome is yet to be determined. The point was raised by the Council of Governors in a case before the Supreme Court, about the Division of Revenue Bill. But when the court set out the points on which it would give its advisory opinion, the 'national interest' point was not among them.[13] However, in December 2020 a single High Court judge held that '"national interest" as stated in Article 203(1) (a) of the Constitution does not necessarily connote functions of the national government', and '"National Interest" transcends both levels of government as it benefits the entire country'.[14]

The functions to be performed by the governments at both levels are provided for in Articles 85, 86 and 87 and detailed in Schedule Four of the Constitution. The expectation was that a process of unbundling and costing the functions would be undertaken by the Transition Authority (TA), with the support of the Commission on the Implementation of the Constitution (CIC). The goal was twofold: to ensure that there was clarity as to who does what, and that sufficient resources were allocated to enable functions to be effectively carried out. Finances should follow functions which means that every level of government should be allocated resources that are commensurate to their functions.

The unbundling and costing process was not finalized by the time the TA and CIC ceased to exist. However, the full transfer of functions to county governments was gazetted by the Transition Authority in 2016. It is thus no wonder that the process of dividing revenue has remained emotive with each side making a case devoid of a shared understanding of what the actual costs of delivering the services are and thus what the sufficient allocation for either level should be.

Another issue is the nature and size of conditional grants from the national government to county governments. These are supposed to be restricted funds that are to achieve national or other objectives that counties may not be able to budget for. The concern here has been the unclear basis upon which the areas and amounts of conditional grants are identified. Further the equity considerations in the distribution of the grants remain unclear. It is, for instance, noteworthy that three of the conditional grants in 2018/19 fiscal year were in the health sector which

---

[13] *Council of Governors & 47 others v Attorney General & 3 others (Interested Parties); Katiba Institute & 2 others (Amicus Curiae)* [2020] eKLR

[14] *Council of County Governors v Attorney General & 4 others; Controller of Budget (Interested Party)* [2020] eKLR

is largely a county government function. Table 3 shows the amounts allocated to the conditional grants over the last 4 years and proposals for 2019/2020.

Table 3: Conditional Grants

Current Conditional Grants (Billions)	2015/16 DORA	2016/17 DORA	2017/18 DORA	2018/19 DORA	2019/20 (National Treasury)	2019/20 (CRA)	% Increase of National Treasury Grants to DORA
Level 5 hospitals	3.60	4.00	4.20	4.33	4.33		0%
Free maternal health care	4.30	4.12	-	-	-		-
Compensation for user fees forgone	0.90	0.90	0.90	0.90	0.90		0%
Leasing of medical equipment	4.50	4.50	4.50	9.40	6.20	9.40	-34%
Road Fuel Levy Fund	3.30	4.31	11.09	8.27	8.98	8.98	9%
Development of Youth Polytechnics			2.00	2.00	2.00		0%
Supplement for construction of county headquarters			0.61	0.61	0.48		-21%
Grant to 5 Cities						5.0	
Total	***16.60***	***17.83***	***23.3***	***25.5***	***22.9***		**-10%**
Conditional allocations (loans and grants)		3.87	20.4		38.7		
Total + Other Conditional Grants		**21.70**	**43.7**		**61.6**		

Source: IBP Kenya compilation from various Division of Revenue documents

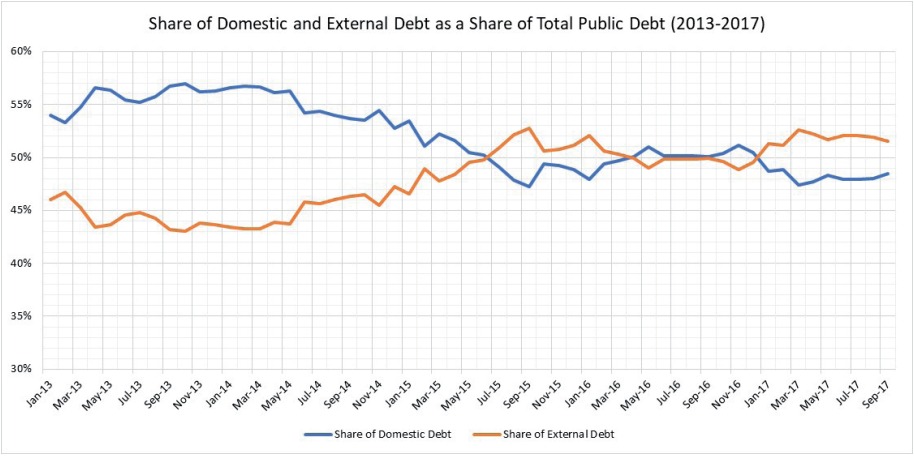
Public debt

Public debt is defined by the Constitution as 'all financial obligations attendant to loans raised or guaranteed and securities issued or guaranteed by the national government' (Article 214). The Constitution provides under Article 211 and 212 for the borrowing by the national and county governments respectively. Both have to get the approval of their legislatures, and borrowing by county governments has to be guaranteed by the national government. As such public debt is a mandatory government expense. That means that, regardless of how much revenue the

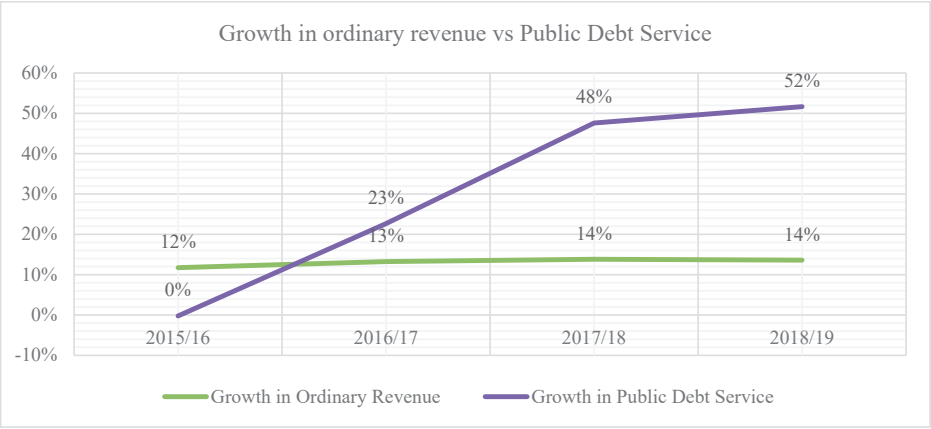
country collects, it must first give priority to this among certain other expenses, and the repayment does not need annual approval of Parliament.

The last seven years have seen a threefold rise in the public debt from KES. 1.3 trillion in 2010 to KES. 6.7 trillion by June 2020. There is a notable decline in domestic debt and an increase in external debt. It is worth noting that most of the recently acquired external debt is short-term and thus expensive. What is of concern beyond the total amount of debt is how the money has been utilised and what long-term strategies are in place to ensure that the country can repay when the loans are due without creating fiscal stress.

Source: Analysis from reports of CBK



It is also notable that allocations to debt servicing are rising at a much faster rate than the growth in ordinary revenue (excluding income from fees and sale of goods and services to consumers by various MDAs). Since 2014/15, the average growth in ordinary revenue has been 13 per cent while the average growth in debt service has been more than twice that at 30 per cent. This is shown in the table below for 2015-2019.



Source: Various reports of the National Treasury

Expenditures

Expenditure has been incurred at different levels of government. Besides core government ministries, departments and agencies at national and county level, there are several independent commissions. Further, since the Constitution requires every national body to decentralize its services to the extent that is possible, we have several and at times conflicting structures at the county level. The multiplicity of actors has come with increased costs of running the government and some duplication of functions. We have observed an increase in the annual budget spending given the two levels of service delivery.

Table 4 shows that growth in spending at national level and at county governments has not been in tandem, and is higher at the national level. This could be attributed to the disproportionate growth in revenues allocated to national and county levels. In the absence of assessments of service quality improvements especially at sector level it is impossible to assess whether the expenditures at national and county level have led to improvements in service delivery outputs and outcomes.

Table 4: Percentage Growth in spending at National and County Level

	2014/15 to 2015/16	**2015/16 to 2016/17**	**2016/17 to 2017/18**
National	23	26	-5
County	14	9	-2

Source: Different reports of the National Treasury

Audit of expenditures

The Auditor-General audits the public expenditures of both national and county public institutions. The latest audit reports are those for the financial year 2018/2019 while Parliament has approved up to 2017/18 The Constitution requires that audits of the year ending on June 30 be ready by December 31. There has been a notable improvement in the amount of time taken to produce the audit reports. For instance, it took over a year to produce the 2013/14 reports, it took eight months to produce those for 2017/2018. Timely release of audit reports serves to ensure that concerns expressed in the reports are addressed before much time has passed. It also helps strengthen systems based on fixing gaps and loopholes identified.

The first task of audit is to ensure that money is being spent in the right way, that all processes and procedures are followed, and proper records kept. The second is to establish whether the money was spent on the right things - right priorities as established in the budget. As has been established in several audits, over and above money being spent without due observance of the process, there are also several instances where money has not been spent on the approved budget priorities. The reasons for this are varied and explain the huge number of pending Bills for work that had been budgeted for, completed and cannot be paid for yet the money allocated for it has been spent. A third objective is to establish value for money on all expenditures - in the most economical way for the service or goods obtained.

The past audits have focused more on the first two objectives. They have consistently revealed that, despite improvements by different MDAs at national and county level, there remains a huge gap in proper use of public finances. The value for money enquiry has received limited attention. This could be attributed to poor keeping of records and comparative measures on various public goods and services. Service standards with approximate costs of different public works, goods and services would be of great value in advancing the value for money audits. The Office of the Auditor-General has since 2018 been developing a citizen engagement framework for social accountability in the audit process. This is meant to further enhance the evidence of value for money especially on capital projects undertaken in different counties.

Conclusion

This chapter has given a bird's eye view of the experience with public finance management in Kenya under the Constitution. It shows that, while the necessary systems have been put in place, there remains significant ground to be covered. PFM is the core of any democracy for it determines whether the social contract will be actualized or not. When public finances are utilised prudently then a society can progressively enjoy improved services and livelihoods. In Kenya, the challenge remains of enforcing accountability by those charged with PFM at both national and county level.

Chapter 10

Growing with Rights: An appraisal of progress towards the realisation of child rights in Kenya since the adoption of the Constitution

Lucyline Nkatha Murungi

Introduction

Children comprise a significant proportion of the population of Kenya. The 2019 census results show that more than 36% of the population are children below the age of 14, and a further 23% of the population are aged between 15 – 24 years. No less than 46% of the population is comprised of persons below 18 years of age, that is not adult.[1] This demographic trend is similar in most African countries.[2] The number of children means that, not only is it necessary to pay keen attention to the circumstances under which children in Kenya grow and develop, the very achievement of Kenya constitutional and developmental aspirations hinges to a very large extent on the investment made in children at the moment.

There are, in my opinion, a few key imperatives that underlie and inform the case for protection of child rights generally, and in Kenya specifically:

- The transient, yet highly impactful nature of childhood
- The consequent urgency of addressing the issues of childhood
- The large proportion of children in the general population, and
- The apparent lack or non-recognition of the agency of children, in other words their capacity to make decisions, act and influence matters in their lives. :

---

1 Section 53(1) of the Constitution of Kenya defines a child as any person below the age of 18 years.

2 This website enables comparison of age pyramids around the world very easily: https://www.populationpyramid.net/.

These factors not only justify, but also guide, the nature and manner of responses that need to be adopted to ensure optimum protection of the rights of all children in Kenya, and to guarantee their well-being. Constitutional protection of the rights of children is one such measure, with the potential to anchor and to further such protection.

A brief background to the development of children's rights in Kenya

The Constitution of Kenya (2010) is the first constitutional recognition of a distinct set of rights applicable to children in Kenya. The distinct provision (Article 53) complements other provisions set out in the Bill of Rights, which are applicable to all people in Kenya, including children. A similar approach is taken towards other vulnerable groups and communities—the Constitution says that it 'elaborates certain rights to ensure greater certainty as to the application of those rights and fundamental freedom to certain groups of persons' (Art. 52).

It is important to note that the constitutional recognition of the rights of children in Kenya was the culmination of a long process of progressively legislating and advocating for children in the country. Indeed, Kenya ratified the UN Convention on the Rights of the Child (CRC) in 1990 and spearheaded the development of the African Charter on the Rights and Welfare of the Child, which it ratified in the year 2000. The Children Act was passed in 2001. At that time the Act was one of the most progressive laws in the country. In addition to expressly claiming itself as bringing the two treaties into Kenyan national law,[3] it included provisions on a number of issues affecting children that had been previously unlegislated. These included provisions on parental responsibility, fostering, adoption, custody, maintenance, guardianship, care and protection of children, and administration of children's institutions. The Act has been criticised for some of its provisions such as those relating to parental responsibility of unwed fathers. Under section 24(3) of the Act, unwed fathers do not automatically acquire parental responsibility over their children, a practice that places a disproportionate burden on unwed mothers to take care of the child.[4] The Act also prohibited certain behaviour without indicating what might happen if someone violated the Act: for example by subjecting a child to female circumcision, or failing to protect a child

---

3 See the Preamble of the Children Act.

4 See a discussion of the implications of that section in J Sloth-Nielsen et al 'Does the differential criterion for vesting parental rights and responsibilities of unmarried parents violate international law? A legislative and social study of three African countries' *Journal of African Law* (2011) 203 – 229.

from abuse, drug use or sexual exploitation. Gaps identified in the course of its implementation were among the factors that informed the scope of Article 53 of the current Constitution.

Following the adoption of the Constitution, the Children Act has had to be amended several times in a bid to cover gaps arising from litigation or to align it with the Constitution. In light of the extent of amendments necessary to adequately respond to the constitutional and other emerging standards, an entirely new and comprehensive Bill has been developed but has yet to be adopted.[5] It ought to be noted that the process of amending the Act, or proposing the adoption of a new one has taken unjustifiably long (the process began in 2010), thereby raising questions as to the efficiency, responsiveness and effectiveness of the process and the overall political commitment to the realisation of the rights of children.

The Constitution and children's rights

The Constitution adopts a twin track approach to the protection of the rights of children in Kenya. All the rights under the Bill of Rights are recognised as belonging to children without discrimination on the basis of age.[6] And secondly there are the specific provision for the rights of children under Article 53. That article signals recognition of the need for specialised attention to the peculiar needs of children, and provides a basis for specialised policy and legislation. It highlights those rights that have either exclusive or of heightened relevance to children as compared to other members of society. These include the rights to:

- a name and nationality from birth;
- free and compulsory basic education;
- to basic nutrition, shelter and health care;
- protection from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment, and hazardous or exploitative labour;
- parental care and protection (including equal responsibility of the mother and father to provide for the child, whether they are married to each other or not);
- not to be detained, except as a measure of last resort, and to be kept

---

5 See https://tinyurl.com/ChildBillDraft.

6 Article 27(2)

separate from adults and in conditions that take account of the child's sex and age; and

- to have their best interests accorded paramountcy in every matter concerning them.

These entitlements straddle the civil and socio-economic rights divide yet, as far as Article 53 is concerned, there is no reference to progressive realisation of the rights. This approach distinguishes the obligations of the state in implementing the socio-economic rights under Article 53 from those under Article 43 on economic, social and cultural rights.[7] The approach of Article 53 is comparable to that of the African Charter on the Rights and Welfare of the Child in this regard, which Kenya had ratified before adopting the Constitution. The article also illustrates the influence of developments in other jurisdictions in articulating the rights of children. For instance, the formulation of Article 53(2) on the paramountcy of the best interests of the child, is drawn from section 28(2) of the South African Constitution.

While Article 53 is, in comparative terms, one of the most progressive constitutional recognitions of the rights of children in Africa, the current scope of the provision is very clearly a negotiated compromise. A comparison between the Bomas draft of the Constitution vis-à-vis the current Constitution reveals a number of trade-offs that were made. These are shown below (the order of the Bomas draft provision is changed so that similar provisions appear opposite each other):

Article 40 of the Bomas Draft	**Article 53 of the current Constitution**
(6) Every child has a right to –	(1) Every child has the right—
(a) a name and a nationality from birth and to have their birth registered;	(a) to a name and nationality from birth;
(c) free and compulsory basic education;	(b) to free and compulsory basic education;
(f) adequate nutrition, shelter, basic health care services and social services;	(c) to basic nutrition, shelter and health care;

[7] See Chapter 12 in this book: 'Economic Social and Cultural Rights' by Nicolas Orago.

Article 40 of the Bomas Draft	**Article 53 of the current Constitution**
(d) be protected from discrimination, harmful cultural rites and practices, exploitation, neglect or abuse;	(d) to be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment, and hazardous or exploitative labour;
(g) be free of corporal punishment or other forms of violence or cruel and inhumane treatment in schools and other institutions responsible for the care of children; (e) be protected from all forms of exploitation and any work that is likely to be hazardous or adverse to the child's welfare;	
(b) parental care, or to appropriate alternative care when the child is separated from its parents;	(e) to parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not; and
5) A child's mother and father, whether married to each other or not, have an equal responsibility to protect and provide for the child.	
(i) not be arrested or detained except as a measure of last resort, and, when arrested or detained, to be treated in a manner that promotes the child's dignity and self-worth and that pays attention to the child's rights, including but not limited to the right to – (i) be so detained only for the shortest appropriate period of time; (ii) be kept separate from adults in custody; (iii) be accorded legal assistance by the State; and	(f) not to be detained, except as a measure of last resort, and when detained, to be held— (i) for the shortest appropriate period of time; and (ii) separate from adults and in conditions that take account of the child's sex and age.

Article 40 of the Bomas Draft	**Article 53 of the current Constitution**
(4) A child's best interests shall be of paramount importance in every matter concerning the child. 40. (1) Children hold a special place in society. (2) It is the duty of parents, the family, society and the State to nurture, protect and educate children. (3) All children, whether born within or outside wedlock, are equal before the law and have equal rights under this Constitution. (h) not take part in hostilities or to be recruited into armed conflicts and to be protected from situations of armed conflict; (j) have a legal practitioner assigned to the child by the State and at State expense in other proceedings affecting the child, if injustice would otherwise result; and (k) know of decisions affecting the child, to express an opinion and have that opinion taken into account, taking into consideration the age and maturity of the child and the nature of the decision. (7) Children with special needs are entitled to the special protection of the State and society. (8) The State has the obligation to take steps to implement in law and administration the provisions of this Constitution and of international instruments and standards on the rights of the child.	(2) A child's best interests are of paramount importance in every matter concerning the child.

From a literal comparison of these provisions, Article 40 of the Bomas draft had a much wider ambit of protection for the rights of children. Of course, some of the protections listed under the article were eventually incorporated into the other articles of the Bill of Rights, for example the right not to be discriminated against on any ground including that of birth (which includes 'legitimacy') (Article 27). Nevertheless, some of the exclusions from the current Article 53 seem to be at the root of the emerging gaps and challenges in the protection of the rights of children as highlighted in the section below. From the table above, the key exclusions relate to:

(a) Value statements as to the equal status and benefit of all children regardless of the social and birth circumstances

(b) Protection from involvement in, and the consequences, of hostilities and conflict

(c) Protection from arbitrary arrest

(d) Guarantee of the protection of the dignity and self-worth of children when arrested or detained

(e) An entitlement to legal aid and representation

(f) Protection of the right of children to participate

(g) Special protections for children with special needs, and

(h) A requirement for consideration of international and regional standards in the implementation of the rights of children.

Article 40 of the Bomas draft survived through the second draft of the Committee of Experts early in 2010, but was entirely removed by the Parliamentary Select Committee. The CoE restored it but in the modified form currently reflected in Article 53. While I think that some of these exclusions were rightfully discarded or incorporated into other Articles, one cannot ignore the thread connecting their exclusion to current gaps in law and practice. Indeed, some of the key issues identified as presenting challenges to the attainment of the protective goals of the Constitution are directly related to these areas that are not addressed by the current Constitution.

Benchmarking progress in the protection of children's rights

An assessment of the impact of the Constitution on the actual status and lived experiences of children in Kenya is, obviously, methodologically beyond the

scope of this appraisal. Nevertheless, this paper attempts to highlight areas of growth (or lack thereof) relative to the rights of children, and which are, to some extent, attributable to the adoption of the Constitution in 2010. A number of tools and benchmarks can be applied for this purpose. Ideally, it would be desirable to assess the current status of child rights from a thematic perspective and using the year before or of the adoption of the Constitution as a baseline. This approach is however hard to achieve within the limited scope of an appraisal, and would further result in overlapping thematic assessment undertaken in other chapter of this book. This appraisal therefore applies some of the indicators drawn from the guidance of the UN Committee on the Rights of the Child and the African Committee of Experts on the Rights and Welfare of the Child.

Specifically, the general measures of implementation of children's rights proposed by both treaty bodies call upon states parties to adopt *legislative, administrative, and other measures* in order to give effect to the rights under the treaties.[8] In the limited scope of this appraisal, it would be hard to highlight all the steps taken in all these three areas. The appraisal is therefore further limited to progress in legislative and administrative measures.

Legislative measures

Legislative measures in this case refer to both constitutional recognition of the rights of children, as well as review of all legislation and related administrative guidance to give effect to the rights. A comprehensive and up-to-date children specific legislation is particularly recommended in this regard. It is evident from the Concluding Observations of both the African Children's Committee and the CRC Committee, that they consider the inclusion of Article 53 of the Constitution of Kenya a milestone in itself, with the potential to anchor the implementation of other measures for the enhancement of the rights and welfare of children in Kenya.

Since 2010, a number of laws have been adopted or amended to align with the constitutional provisions. Primary amongst these is the Children Act, sections of which were fundamentally altered by the Constitution, and significant amendments were therefore necessitated. The process of the review of the Children Act has however been protracted and inconclusive. The first set of comprehensive

---

[8] UN General Comment No. 5 (2003) on 'General Measures of Implementation of the Convention on the Rights of the Child'; and ACERWC General Comment No. 5 (2018) on 'State Party Obligations under the African Charter on the Rights and Welfare of the Child (Article 1) and systems strengthening for child protection'

amendments were proposed in 2010. A Bill was prepared in 2017, and a revised version in 2019 within the ministry.[9] By October 2021 it had reached the first reading stage in the National Assembly. Hopefully it will proceed faster than many Bills do. This raises the question as to the threshold of effectiveness of legislative review as a yardstick for measuring the implementation of child rights in Kenya. During the same period, a number of other laws have been passed, yet there is no clear reason for the delays on the Children Bill. The delay falls short of the standard of 'timely enactment and continuous review' of the law as stipulated by the African Committee of Experts.[10]

Other laws that have been adopted and which give effect to constitutional protections of children (especially in Article 53(1)(d)) include the Prohibition of Female Genital Mutilation Act,[11] and the Counter Trafficking in Persons Act.[12]

Administrative measures

The full catalogue of administrative measures necessary for the implementation of children's rights is too long to consider here. Primary amongst these is the development of a comprehensive national plan of action for children's rights, effective coordination of implementation, and safeguards to ensure that devolution does not undercut the role of the national government to ensure that all children benefit from all rights equally. A comprehensive National Plan of Action for Children (2015 – 2022) has been adopted,[13] and a central coordinating agency, that is the National Council for Children Services, established. With respect to management of devolution to guarantee equal access and benefit from rights for all children, there have been considerable challenges. These are discussed further below.

Emerging areas of concern

Devolution

There is no doubt that devolution of government structures and services has been one of the most transformative aspects of the Constitution. The benefits and pitfalls

---

9 Available at https://tinyurl.com/ChildBill2019. The Ministry website does mention a meeting with the Parliamentary Committee on Labour and Social Welfare to discuss the Bill on 6-7th November, 2020.

10 ACERWC General Comment No. 5 (as above).

11 No. 32 of 2011.

12 No. 8 of 2010.

13 https://tinyurl.com/ChildPlanKE.

of devolution are highlighted elsewhere in this book, and would be unnecessary to reiterate them here. Some of these are however particularly relevant to children and are hence worth a mention. The Fourth Schedule of the Constitution lists health services, including the establishment, resourcing and management of health facilities and primary healthcare[14], as well as pre-primary education and child care facilities[15] as part of the functions and powers of county governments. While this set up is reasonable in light of the proximity of counties to the communities that they serve, it has also resulted in a range of challenges for the implementation of children's rights.

In relation to education for instance, there has been a proliferation of policies and practices in the recruitment and retention of pre-primary education providers. Secondly, there are significant variations in quality and regulation of pre-primary education content and facilities. As a result, it is difficult to assess the extent of the realisation of the right to basic education for all children as required by the Constitution. A National Pre-Primary Education Policy to standardise the provision of pre-primary education for children aged 4-5 years was adopted in 2017 and began implementation in 2018.[16] Amongst other things, the policy establishes a pre-primary education coordination framework that, hopefully, will help to alleviate the challenges affecting the sector such as poor coordination between national and county governments, approaches to pre-primary teacher training to bolster the quality of pre-primary education, and monitoring of the implementation of pre-primary education.

Children are the greatest consumers of primary health care services. Accordingly, the devolution of primary healthcare has a direct effect on access to healthcare for children. Primary healthcare includes services that are almost exclusively beneficial to children, such as immunisation and maternity care. As has emerged in the past few years, implementing the constitutional provisions on the right to health has been one of the most difficult aspects of devolution. During the numerous strikes by medical professionals, children suffered immensely from the lack of access to health services.

While healthcare is an important and basic right for everyone, access to health services by children is particularly significant. Failure to access essential treatment for children has the potential to have lasting implications and to affect

---

[14] Fourth Schedule part 2.2

[15] Fourth Schedule part 2.9

[16] https://tinyurl.com/pre-primpolicy. It was supplemented by Standard Guidelines in 2018 see https://tinyurl.com/MinEdPPPGuidelines.

the lifelong chances of the affected child. The impact of disease or other ill-health in childhood is disproportionately higher than the same on an adult. Accordingly, there is a case to be made for retention of certain health functions that relate to vital medicine for children under the mandate of the national government. It is also unconscionable to consider that under the current state of healthcare management (as derived from the Constitution), children in some counties are bound to have considerable disadvantage in the pursuit of an adequate standard of healthcare due to the differences in the availability and quality of healthcare services from one county to another. This outcome undermines the very basis of devolution, which was to facilitate equal access to services. These inequalities are inevitable in light of the different levels of development of counties. However, the urgent and highly impactful nature of basic healthcare needs of children demands that measures be put in place in the immediate term to guarantee access basic healthcare in childhood equally across the country. The one way for this to be feasible is if it is legislated, administered and resourced by the national government. This can be done if the Equalisation Fund is used—but its criteria for distribution between counties (currently marginalised communities within counties) may not correspond to the specific needs of children. And only a few counties receive anything from this fund. The national government could give conditional grants to counties earmarked for children's issues, but the national government would not administer the funds locally.

Education

The Constitution recognises a right to education (Article 43(1) (f)), but makes further provision for education specific to children. In Article 53(1) (b), the Constitution recognises a right of every child to 'free and compulsory basic education.' To align education law and policy with the Constitution, the Basic Education Act was adopted in 2013.[17] The Act defines 'basic' education as from pre-primary to the end of secondary education. This provision has had the effect of both clarifying the extent of basic education (so that it is not synonymous with primary schooling), and also ensuring that the obligation to guarantee the right to education for children extends throughout childhood. Indeed, the regulations under the basic education policy stipulate that children may only start Standard 1 at the age of 6 years, meaning that the cumulative age of completing of school coincides with the end of childhood. This is commendable and a good practice

[17] Basic Education Act, No. 14 of 2013.

that, in theory, would go a long way to protect children from abusive practices such as child marriage and child labour. The new Competency Based Curriculum will work similarly: 2-6-3-3 or two years early education, 6 years primary school from age 6, 3 years lower secondary and 3 years higher secondary (followed by 3 years undergraduate or technical education if possible).

It is significant that the Constitution explicitly establishes basic education as compulsory and free. Whereas the extent of the implementation of this right has encountered significant headwinds such as failure to ensure genuinely free education at the secondary level, the constitutional basis thereof ensures that education is not used as a tool for political expediency as in the past, but rather an obligation incumbent upon all administrations, their political inclinations notwithstanding.

It is evident that the Constitution has influenced the formulation and implementation of basic education policy. There is no doubt that the Constitution's recognition of a right to free and compulsory basic education for all children has had a defining effect on the understanding of government responsibility for the delivery of secondary education. Prior to the Constitution, provision of free basic education was a political imperative subject to changes in political prioritisation, as opposed to a right-based obligation.

Much less seems to have been achieved in relation to the education of children in special circumstances such as children with disabilities and children deprived of liberty in rehabilitation institutions, and child refugees and displaced children. Arguably, the focus of basic education has focused predominantly on facilitating availability (geographic proximity) and accessibility (especially economic), while not paying equal attention to the acceptability (relating to curriculum content) and adaptability (relevant to inclusiveness of the content and mode of delivery) thereof. Indeed, Kenya is currently ranked highly for universal primary enrolment, but is consistently declining in indices assessing the quality of education and transition rates to secondary and tertiary levels. The challenges related to the devolution of pre-primary education as discussed in the preceding part may be recalled in this section as well.

Information technology and cyber security

Kenya is one of the foremost countries in relation to the information and communication technology (ICT) revolution in Africa, and leads the regional statistics on ICT penetration, innovation and investment. These developments are

pivotal to significant developmental milestones of the country. The accelerated role of technology (the full range of technology beyond internet) in the day-to-day functionality in society, as has been made even more evident in the context of the COVID-19 pandemic, is a development with fundamental implications for children. ICT has brought significant benefits to the lives of ordinary Kenyans including children.

Unfortunately, it has also opened new frontiers for the abuse and exploitation of children such as through cyber abuse, including a growing trend of cyber based sexual exploitation. Other issues such the potential of technology to accelerate inequality between children in resourced and in poorer households, potential breaches of the privacy rights of children, long-term impact of data gathering, predatory marketing and economic exploitation, as well as insufficient frameworks for cross-border accountability, call for meaningful reflection on the impact of the technology revolution on children. Legislation for, and enforcement of protection of children in the context of the digital sphere has not kept pace with the growth of the sector.

These issues were not as prominently defined at the time of the Constitution drafting process. Also, the Constitution may not be reasonably expected to address every issue in detail. In fact, it can be said to have laid sufficient ground for the overarching protection of children from abuse and exploitation in a manner that would allow reform of existing laws to respond accordingly. Nevertheless, the silence of the Constitution Article 53 on ICT in general is a missed opportunity to embed this protection into legislation in a manner that would ensure that children benefit from the technology while also enjoying basic guarantees of protection.

Child participation

The Constitution underscores public participation in key decision making processes in the country as one of the national values and principles of governance.[18] Unfortunately, the absence of a specific provision on child participation has meant that children may only be engaged within the broader public. Child participation is an expensive right with long-term benefits for the entire society. It is expensive because it requires substantial resources to be invested to ensure that participation is safe, voluntary, inclusive and meaningful. This demands, amongst other things, facilitating access to information to children at a level and manner that they understand, creating participation platforms and accountability frameworks

[18] Article 10(2)(a).

to facilitate their participation, and applying adapted strategies that enable participation in both private and public spaces for children. Child participation is one of the least understood and implemented provisions of the rights of children, yet one that contributes to a large extent to the building of democratic societies. Child participation inculcates a culture of speaking out and listening, as well as helping children to appreciate the need for accountability for their expressed opinions through feedback on action taken on the basis of their views.[19]

The invisibility of children in public spaces has meant that public participation is an adult affair. This is enabled by a lack of an expressly recognised right or duty to facilitate child participation, which means than little planning is made for it, and hence the resources and necessary adaptations are not made available. It seems, therefore, that the shedding of child participation from the Bomas draft has been highly consequential for the participation of children.

These concerns are illustrative of the ramifications of the Constitution for rights and experiences of children. They do not represent an exhaustive list of the reach of the Constitution on children. For instance, the National Gender and Equality Commission has identified issues with access to justice 'particularly those with disabilities and children from hard-to-reach areas, informal settlements, children living on the streets and displacement camps, and those from forest and pastoralists communities'.[20] In addition, in its Concluding Observations on Kenya's report in 2016, the UN Committee on the Rights of the Child expressed concern about a number of things, such as the vulnerability of children with albinism, stagnation in the proportion of births registered, the extent of violence against children and of continuation of corporal punishment, sexual exploitation of children, and weak regulation of children's homes.[21]

More concerns also continue to emerge on the inadequacies of laws to give effect to the protections and entitlements of children under the Constitution.

Emerging frontiers of protection of children's rights

In the ten years since the adoption of the Constitution, issues significant to the protection of the rights of children have evolved and new frontiers of protection

---

19 See more generally, UN Committee on the Rights of the Child, General Comment No. 12 on 'The right of the child to be heard' (2009) available at https://tinyurl.com/GCRightChildHeard.

20 https://tinyurl.com/NGECDayAfChild.

21 G1605560 https://tinyurl.com/CRCConcluding2016.

have emerged. Furthermore, social sentiment has shifted significantly in relation to some of the issues that would have been relevant for inclusion into the Constitution. These issues include, for instance, discussion on adolescent autonomy and decision making on health decisions such as access to contraceptives. There has been much debate on the extent to which teenagers should have the freedom to make autonomous decisions on their sexuality. These discussions have been particularly amplified in the context of sex education within the basic education curriculum.

While these discussions can tend to be animated and emotional, they ought to raise questions as to the extent to which the Constitution's recognition of children's rights has created room to engage not only on the minimum standards of such rights, but also on the outer limits of the rights. In other contexts, children have been caught up in actions which, though not targeted at them, have serious consequences for them. These include children's exposure to, and recruitment into, terrorism, and bearing the brunt of politically instigated violence, disruption and displacement especially during the general elections, as well as high-handedness of the security response to threats to national security.

Similarly, the COVID-19 pandemic has presented a particularly challenging experience for children in Kenya, and around the world. The primary of these concerns is the extent to which responses to emergencies and crisis take into account the peculiar needs of children, and the particular weight of child welfare concerns in the determination of emergency measures. It appears, from the experience of the past year, that the policy infrastructure for response to disasters and emergency are not particularly designed with a child in mind. As a result, children's welfare has been addressed from a largely reactionary and experimental basis (as in the case of education and healthcare), which could undermine their long-term life outcomes.

The foregoing issues may not require a provision in the Constitution. But at the minimum, they call for a reflection on the extent to which certain constitutional guarantees can be applied to protect children in these contexts.

Concluding thoughts

The primary goal of this appraisal is to gauge whether the Constitution of Kenya has had a real impact on the lived experiences of children in Kenya in the past ten years. This is not a question that can be answered easily for a variety of reasons, including the difficulty of attribution. While the Constitution has certainly

managed to anchor the demands for investment into the welfare of children, some of the progress is also not purely attributable to the presence of the Constitution.

Children are an integral section of the society, and are therefore not immune from the consequences of the laws, policies or other actions taken in the course of the implementation of the Constitution. As a result, efforts made to implement other sections of the Constitution benefit children as much as they benefit from measures specifically targeted at them. Effectively therefore, an assessment of the implementation of children's rights may only be comprehensively understood within the broader context of the implementation of the Constitution. Furthermore, it is evident from this appraisal that recent developments relative to the rights of children emanate from both provisions of the Constitution that specifically target children and others. This means that the Constitution has no doubt impacted on the lives of children, and mostly positively. There are however some gaps that have emerged and which would be best addressed through legislation to give effect to the protections under the Constitution.

There is no doubt that the constitutional recognition of children's rights ignited social consciousness on the need to invest in children as a matter of right. This has resulted in a vibrant fledging stakeholder base working on children protection, budget scrutiny and accountability, and close monitoring of the implementation of government policies on children.

Ultimately, the purpose of the provisions on the rights of children under the Constitution is, at least, threefold: to guarantee protection from abuse and exploitation, to provide a suitable environment for their growth and optimum development, and to empower them to embrace and express their full human potential and capacity. Article 53 of the Constitution is very much directed towards to the protection of child rights. The implementation of the rights under the article, along with the other provisions of the Constitution, has the potential to ensure optimum development to a considerable extent. It is however apparent that the recognition of the actual and evolving capacities of children is not as sufficiently catered for.

Chapter 11

The Right to Culture: Challenges and opportunities after the 2010 Constitution

Lotte Hughes and Emily Kinama

This chapter discusses the protection of cultural rights in Kenya, ten years after the promulgation of the Constitution. It examines how culture is provided for in the Constitution and the impact of those provisions, especially of the rights to culture in the Bill of Rights. The chapter also analyses how Kenyans have brought legal claims for the protection of cultural rights, and gives other examples of how citizens have exercised their new rights, or engaged with culture, without necessarily going to court.

What are cultural rights?

Cultural rights are a sub-set of human rights. They were once seen as being less important than other human rights; indeed there is no mention of culture in the Universal Declaration of Human Rights of 1948. However, cultural rights are now recognised internationally as something indivisible from people's humanity, dignity, and sense of who they are. In 2008, the United Nations (UN) declared culture one of six cross-cutting themes of the UN Agenda on the sixtieth anniversary of the Universal Declaration. It said: '[t]he concept of Human Rights is bound closely to the belief that culture is precious and central to our identity.'[1] Increasingly, cultural and minority rights are mentioned in national constitutions around the world.[2]

---

1 Resolution 10/23 of the Human Rights Council, March 2009.

2 Harriet Deacon, 'A Comparative Review of Cultural Rights Provisions in the Kenyan Constitution' Desk study report for the project Cultural Rights and Kenya's New Constitution (The Open University UK 2016), p 7, citing Benedikt Goderis and Mila Versteeg, 'The Diffusion of Constitutional Rights'

The Constitution of Kenya 2010

Prior to the Constitution of Kenya 2010 being promulgated, the National Policy on Culture and Heritage was in existence.[3] This policy was informed by the continuous development that has been taking place in the country and the need to respect human rights with respect to cultural expression.[4] There are several provisions in the Constitution that deal with culture and cultural diversity, not necessarily in terms of a 'right' to culture.

Recognising the significance of culture

The Constitution states in Article 11 (1) that it recognises culture as 'the foundation of the nation' and the 'cumulative civilization of the Kenyan people' but it does not define culture. The Preamble puts culture at the heart of the Constitution with its recognition that the Kenyan people are proud of their cultural diversity. This acknowledges the fact that Kenyans are culturally diverse—while also, ideally, being united in their diversity. Article 11 (2) further requires the state to:

(a) promote all forms of national and cultural expression through literature, the arts, traditional celebrations, science, communication, information, mass media, publications, libraries and other cultural heritage;

(b) recognise the role of science and indigenous technologies in the development of the nation; and

(c) promote the intellectual property rights of the people of Kenya.

Protecting and promoting many of these elements on culture will not necessarily need laws: policies, practices and changes of attitude may be enough. But Article 11(3) specifically binds Parliament to pass law to achieve tangible benefits—

(a) ensure that communities receive compensation or royalties for the use of their cultures and cultural heritage; and

(b) recognise and protect the ownership of indigenous seeds and plant varieties, their genetic and diverse characteristics and their use by the communities of Kenya.

(2014) Vol 39 *International Review of Law and Economics* 1-19.

3 National Policy on Culture and Heritage, 2009 Office of the Vice President, Ministry of State for National Heritage and Culture https://tinyurl.com/CulturePolicy.

4 See Policy p 3 para 1.3.

Protection for intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of communities is also mentioned in Article 69 (on environmental obligations). It can be argued, however, that no single community 'owns' genetic resources such as plants, since they are often shared by different communities. The same can be said of traditional medical knowledge, which is protected (together with a wide variety of other cultural practices and knowledge) in the Protection of Traditional Knowledge and Cultural Expressions Act, 2016.

The Constitution emphasises the use of customary laws and practices about justice and dealing with disputes. Article 2(4) provides that customary law is recognised in Kenya. It also says that if these laws are inconsistent with the Constitution they are invalid. However, this is not special treatment for customary laws, but applies to all laws, and has been used to hold a good number of laws made by Parliament unconstitutional.

Article 159(2) (d) states that traditional dispute resolution mechanisms are a type of alternative dispute resolution mechanism, and should be encouraged. Again, traditional dispute resolution mechanisms cannot be used in ways that go against the Bill of Rights, or are inconsistent with any other part of the Constitution or any other written law (Article 159 (3)(a) and (c)). It adds that they are not valid if they are 'repugnant to justice and morality' (Article 159 (3)(b)). These various limits on the use of traditional mechanisms would exclude processes that discriminated against women, or involved ordeals (like half-drowning suspected witches, or holding suspects' hands to the fire – which used to be part of European traditional laws).

When speaking of criteria for drawing constituency and county boundaries, the Constitution refers to communities that are bound by cultural ties; for example, Article 89(5)(b)) provides that cultural ties are a consideration when fixing boundaries of constituencies, and when altering the boundaries of a county (Article 188(2)(c)). Parliament is also obliged by Article 197(2)(a) to enact legislation to ensure that community and cultural diversity is reflected in county assemblies and county executive communities.

Land and culture are very much intertwined. Article 63(1) defines community land as vested in and 'held by communities identified on the basis of ethnicity, *culture* or similar community of interest' (emphasis added). Article 63 mentions particularly land held as grazing lands, or by hunter-gatherer communities and 'trust land' – much of which was land under customary law but held as by local authorities as trustees for the communities.

Chapter 5 on Land and Environment does not specifically discuss cultural *rights*. However, many communities, especially indigenous ones, regard their land as a cultural resource, and believe that they have a cultural right to it. Indeed, many groups (not necessarily indigenous) see land as an integral part of their culture and identity. Some groups have successfully used this argument to press land claims[5] and, less successfully, in calls for the protection of their cultural integrity.[6]

Cultural rights under the Bill of Rights

Article 19(1) of the Constitution provides that the Bill of Rights is an integral part of Kenya as a democratic state and the framework for policies including those on culture.

Article 21(3) is designed to ensure fair treatment of everyone by state institutions. It says the state has a duty to address the needs of people including members of 'ethnic, religious or cultural communities'. However, it fails to explain what a cultural community is. But a reasonable assumption would be that the drafters had in mind people linked by cultural practices but not necessarily by ethnicity or religion - a situation that may arise based on occupation, geography or simply long living together. This concept also appears in relation to constituency and county boundaries, as we have just seen.

The specific right to culture is enshrined in Article 44 of the Constitution, titled 'language and culture'. Everyone has the right to participate in their chosen cultural life and to enjoy their culture and use their language. This includes the right to form and join cultural associations.

There is an important warning in Article 44(3) that the right to culture does not extend to forcing others to participate in a cultural practice. And Articles 53 and 55 call upon the state to set up programmes geared towards eliminating 'harmful cultural practices' in children and youth respectively.[7] The Children Act,

---

5 See Steve Ouma Akoth, 'Land as Culture: Discourse and narratives of land claims in postcolonial Kenya' (2018)_ 77(2) *African Studies* pp 189-203.

6 The concept of 'cultural integrity' is 'increasingly used to support indigenous peoples' cultural rights under international law', and involves seeing cultural rights holistically, Jérémie Gilbert and Kanyinke Sena, 'Litigating Indigenous Peoples' Cultural Rights: Comparative analysis of Kenya and Uganda' (2018) 77(2) *African Studies* pp 204-222.

7 Section 14 of the Children Act No. 8 of 2001 provides for the protection of children from harmful cultural rites as follows: '[n]o person shall subject a child to female circumcision, early marriage or other cultural rites, customs or traditional practices that are likely to negatively affect the child's life, health, social welfare, dignity or physical or psychological development.'

passed before the Constitution, specifically outlaws female circumcision and early marriage when it prohibits rites, customs or practices harmful to children.

When the Constitution was passed, indigenous and minority groups welcomed it as offering special safeguards for them – although it does not mention the word 'indigenous' very often, but rather, discusses the rights of minorities and marginalized groups, and includes indigenous peoples under the rubric of 'marginalized'.

As well as stressing that everyone is equal, and discrimination outlawed, the Constitution makes it clear that special steps must be taken to achieve true equality for those people and groups that have been discriminated against or marginalised in the past (Article 27); this is called affirmative action. Under Article 56 such affirmative action programmes must be used to make sure that minorities and marginalized groups can (among other things) develop their cultural values, languages and practices. There is a special definition (in Article 260) of 'marginalized community'—meaning a community that has been, by choice, or by the action of others, or because of other circumstances such as being small or remote, remained outside the general life of the nation. There is special mention of pastoralists, and hunter or gatherer communities.

Though some provisions on culture appear outside Chapter Four (the Bill of Rights), that chapter often provides the mechanisms for protecting those other provisions. Article 40 prevents the seizure of property (particularly land) especially without compensation. Article 44 on rights to culture makes most sense when viewed in the light of Article 11.

The uses of culture in Kenya today

In a fast-changing and sometimes frightening world, it is natural for people everywhere to ask themselves, 'who are we, and where are we going?' Culture, or notions of culture, lie at the heart of that individual and collective self-questioning. Expressions of culture, and assertions of cultural rights, have enjoyed a surge in Kenya in recent years, not all of it connected directly to the 2010 Constitution. Devolution, which the Constitution ushered in, has played a key role in this renaissance, with responsibility for culture management in large part devolved to county governments (as provided for in the Constitution's Fourth Schedule). Indeed, one of the purposes of devolution (Article 174) is to protect the rights of minorities and marginalised communities—which would include their culture, as we have seen.

Research shows that 'culture' and 'community' are becoming ways of organizing various forms of political action or activism, some of it linked to transnational movements.[8] There is a growing awareness of identity, much of it ethnic in Kenya's case, though identity need not be linked to ethnicity at all. Anxiety about identity and the perceived need to 'preserve' both it and culture can be traced to fears about modernity, rapid social change, and the impact of globalization on people's traditional ways of life. But globalisation also has its uses: the rise of globalised internet activism, much of it led by indigenous peoples, has influenced other minorities (and others who are not from minority or marginalized groups) to assert their rights to culture, as part of collective assertions of identity. One example that stands for many are the activities of Nandi 'cultural entrepreneurs' who are using the legacy and memorialization of folk hero Koitalel arap Samoei to claim recognition for their community, and the resources that can flow from that.[9]

The Constitution helped to create new visions of an imagined future for Kenya. Ironically, though cultural heritage is often seen as being about the past, the ways in which heritage and culture are now being used, engaged with and negotiated are often more to do with futures than pasts. For example, unique microbes and micro-organisms, found in Lake Bogoria, were removed from the lake without the residents' permission, and used by Procter and Gamble to make a detergent used to fade jeans.[10] The Endorois community, indigenous to this area, claimed these genetic resources and received royalties for this industrial use to pay for children's school fees, giving youngsters the chance of a better future.[11] Another example is the use of drugs for the treatment of diabetes, which were manufactured by the German company Bayer using bacteria found in Lake Ruiru in central Kenya.[12] Pastoralists in Northern Kenya are using notions of culture

---

8 Research on cultural rights and constitutional change in Kenya was carried out from 2014-17 for the ESRC-funded project 'Cultural Rights and Kenya's New Constitution'. Based at the Open University, UK, the project was led by Dr Lotte Hughes. One key output was Gordon Omenya and Mark Lamont, 'The Uses and Management of Culture by Kenya County Governments: A Briefing Report'. (2017). Milton Keynes, UK: The Open University.

9 Chloé Josse-Durand, 'The Political Role of 'Cultural Entrepreneurs' in Kenya: Claiming recognition through the memorialisation of Koitalel Samoei and Nandi heritage'. (2018) 77(2) *African Studies* 257-273.

10 John Harrington, 'Governing Traditional Medicine in Kenya: Problematization and the role of the constitution' (2018) 77(2) *African Studies* 223-239 at p 231, citing S Laird and R Wynberg, Access and Benefit Sharing in Practice. Trends in Partnerships Across Sectors. Technical Series No.38. Montréal: Secretariat of the Convention on Biological Diversity (2008).

11 See for example, https://tinyurl.com/LakeBogoria.

12 Harrington, 'Governing Traditional Medicine in Kenya' at p 231, citing J McGown, *Out of Africa:*

to try and reap benefits from large-scale development projects and resource extraction on their lands, while also strengthening their traditional authorities.[13] In another part of the country, poor farmers and fisher folk in Siaya County, Western Kenya, have successfully used notions of culture (and invoked constitutional cultural rights provisions) to win a land claim in a court case brought against a foreign-owned commercial farm which had encroached upon their territory.[14]

From other examples of the ways in which Kenyans have increasingly engaged with culture, and exercised their cultural rights, since 2010, a picture emerges of the growing expansion of culture as a complex vehicle for social mobilization, and of the increasingly politicized use of culture, for example in national election campaigns.

Cultural festivals have sprung up across the country, and have become big business. They range from festivals celebrating the cultural heritage of a single ethnic group, to events that celebrate the culture of several communities within an area or county,[15] to events such as Nairobi's biennial Samosa Festival that celebrates multiculturalism and cross-cultural fluidity.[16]

County governments are making increasingly heavy use of culture in their branding, marketing, and promotion of tourism. Some have developed, or are developing, their own cultural policies, though thus far these draw heavily on national policy. Many county websites focus heavily on culture. Most counties have cultural officers, tasked with managing cultural resources and organizing cultural events. Some officers report being hamstrung by lack of funding, and bemoan the fact that the 'culture' docket is often shared with sports, tourism and other dockets, to the detriment of culture. County officers working in the directorates of culture are learning to negotiate with an increasingly complex and numerous set of stakeholders, who can include community-based organizations, councils of elders, non-governmental organizations, private investors and international organizations like UNESCO.[17]

Mysteries of Access and Benefit Sharing. (Edmonds Institute, 2006). See also https://tinyurl.com/IPTradKnowledge.

13 Zoe Cormack, 'The Promotion of Pastoralist Heritage and Alternative 'Visions' for Development in Northern Kenya' (2016) 10(3) *The Journal of Eastern African Studies* 548-567.

14 Akoth (2018). The case was *Martin Magina Okoyo & another (Suing on their own behalf and on behalf of Yimbo Yala Swamp Farmers Society) v Bondo County Council and 2 others* [2016] eKLR.

15 For example the Lamu and Lake Turkana festivals.

16 https://samosafestival.com/.

17 Lotte Hughes and Mark Lamont, 'Introduction. Cultural rights and constitutional change'. (2018) 77(2) *African Studies* (Special Issue: Cultural rights and constitutional change) 159-170.

Culture is foregrounded in the ceremonial homecomings of politicians, when they return to their home constituencies from Nairobi, with the use of dress, adornment, dance, song and other signifiers of culture to visually declare (to both locals and nation, via media coverage) that this person is an ambassador for a particular cultural or ethnic group, and has been 'traditionally' blessed to represent it. It is also used to honour visiting politicians, or anoint politicians from a different ethnic group as 'tribal elders'. In the run-up to national elections, these opportunities to publicly embrace the culture of other communities are particularly in evidence—they are central to political campaigning, and the wooing of potential voters in 'alien' areas (that is, areas of the country where a particular party has not enjoyed much support in the past). They say in effect, 'he (much less commonly she) is one of us, and deserves our vote.' This type of public posturing is already well underway for the 2022 elections. It may be noted, in this and other scenarios, 'that "culture" has come to stand in for ethnicity and tribalism in contexts where it is no longer politically correct or safe to speak openly about "tribe"…'.[18] In other words, it is deemed safe to focus on 'culture' (which is regarded as soft) rather than on the ethnicity of the particular politician or political party.

Subsequent legislation

The Protection of Traditional Knowledge and Cultural Expressions of 2016 was passed to protect the rights of communities to their knowledge and culture, as Article 11 required.

The County Government Act of 2012, which elaborates how county governments are to operate, highlights the importance of the recognition of cultural diversity. For example, when county executive committees are nominated by the governor and approved by the county assembly cultural diversity must be one of the factors (section 35(1)(b) and (2)(c)). Political parties preparing lists of possible 'nominated members', as they are commonly called, of county assemblies must reflect the cultural diversity of the community (section 7(2)(a)). Cultural ties must be taken into account when creating boundaries of electoral wards (section 26(6)(b)) and establishing a village unit (section 48(3)(c)).

Section 97 sets out broad principles reflecting the Constitution and provides for the inclusion and integration of minorities and marginalized groups. It requires non-discrimination and equality of treatment in all areas of 'cultural life' of the

[18] Hughes and Lamont (2018), p 163.

marginalized and minority groups; and special protection to vulnerable persons who may be subject to threats or acts of discrimination, hostility, violence and abuse as a result of (amongst other things) their cultural identity; and promotion of diversity and intercultural education.

Section 103(g) provides that the objectives of county planning must include to protect cultural heritage within the county. This section mainly seems to contemplate physical planning.

Case law on culture and cultural rights

Since 2010, several court cases have touched on the right to culture and other cultural aspects of life. These cases show the interconnectedness of challenges to cultural violations and other issues, such as the right to a clean and healthy environment, prevention of harmful cultural practices, protection of the rights of indigenous and minority communities, and cases that involve alternative dispute resolution procedures.

The African Court

Since the promulgation of the Constitution there has also been one judgment against the Kenyan government at the African Court on Human and People's Rights[19] in relation to the right to culture of an indigenous community – namely the Ogiek. As the African Charter on Human and Peoples' Rights is part of Kenyan law under Article 2(6) of the Constitution, the decisions of the African Court also have special importance.

The court held that 'the protection of the right to culture goes beyond the duty not to destroy or deliberately weaken minority groups, but requires respect for, and protection of, their cultural heritage essential to the group's identity'.[20] Respecting cultural heritage meant that culture should be interpreted broadly to include the total way of life of a particular group. The court held that, for indigenous groups, the preservation of culture is important.

In October 2018, the Kenyan government formed a task force on the implementation of the decision of the African Court. One of the terms of reference

---

[19] *African Commission on Human and Peoples' Rights v. the Republic of Kenya* Application No. 006/2012.

[20] Para. 179 of the judgment.

of the task force is to 'identify any working mechanism or models between public institutions and indigenous communities of the application of traditional and indigenous knowledge in the management of forests.' The work of this body should contribute to the realisation of the right to culture under the Constitution.[21]

Kenyan courts

Culture and development

The *Mohamed Ali Baadi* decision in 2018 about the Lamu Port-South Sudan-Ethiopia Transport Corridor (LAPSSET) project is a landmark judgment on cultural rights.[22] The petitioners, people of Lamu, claimed that the government failed to consult the local community and hear its concerns about the effects of the construction of the mega-port and mega-city on their culture and demography.

The court held that a proper interpretation of Articles 11(1) and 44 of the Constitution meant that cultural rights are to be awarded the highest respect and protection. In addition, the court made a finding that culture is not static but fluid, and changes from time to time and can be influenced by several factors such as education, religion, and influence from other communities, urbanisation and inter-marriage. The court was also clear that certain aspects of culture identify a particular group, their history, ancestry and way of life, and that this diversity is recognised and protected by the Constitution.

Among the High Court's critical decisions in the case is that when planning and implementing development projects which could have an impact on culture, there is an obligation to ensure consultation takes place with indigenous communities. This is particularly the case where the infrastructural magnitude could possibly have an impact on their culture and cultural identity and the culture sought to be preserved is so unique and fragile. The fact that the petitioners were not consulted about the cultural effects of the planned Lamu mega-city, and the potential impact of the influx of 1.25 million migrant workers merely 20 kms away on the indigenous community of Lamu Island, was seen as a violation of cultural rights under Articles 11 and 44 of the Constitution (para 326).

The failure of the government to draw up a management plan to preserve the rich legacy of Lamu Island as a UNESCO World Heritage Site despite the

---

21 On 25 March 2020, the task force submitted its report to the Ministry of Environment and Forestry. However the report is yet to be published and publicized.

22 *Mohamed Ali Baadi and Others v the Hon. Attorney General and Others.* Petition No. 22 of 2012.

repeated declaration by UNESCO to do so was a violation of the right to culture of the indigenous communities of Lamu Island (para 327).

Marriage and family

In some cases appeals to culture have failed. In *Mary Wanjuhi Muigai v. the Honourable Attorney-General,*[23] the petitioner argued that the requirement to register traditional marriages was contrary to culture. It would formalize culture, contrary to the organic and dynamic nature of culture that arises naturally through the dictates of its environment, and that to seek to legislate such a process would in essence be purporting to control it. However, the court did not agree but accepted that the registration of marriages was necessary to bring some degree of certainty to a system of marriage that affected many, yet was outside the reach of the law (para 71).

In *Council of Imams and Preachers of Kenya, Malindi v. Attorney-General,*[24] three persons were charged with subjecting a 16-year-old girl to early marriage. The accused challenged the constitutionality of sections of the Children Act that criminalise early marriage on the grounds that they were unconstitutional and contrary to Islamic faith. The judge held that the constitutional concept of harmful cultural practices (prohibited under Article 53(1)(d)) includes religious practices.

The Court of Appeal robustly rejected an argument about women's rights to family land, which the court summarised as 'that in accordance with the tenets of *Kikuyu* customary law of succession, married daughters never inherit their fathers' properties; that such married daughters are only entitled to inherit from the families where they are married; that the Constitution of Kenya, 2010 had expressly recognised, elevated and given pride of place to culture and customary law; that the courts in Kenya were under a constitutional duty to uphold and apply customary law'. The court pointed out that the Constitution also has 'very strong pro-equality and non-discrimination provisions'. And they added: 'There is nothing in the Constitution to suggest that reference therein to culture, customary and personal laws was intended to substitute the universal law of succession of Kenya, with customary law. That would be an absurd assertion, which could easily be extended to, for example, replacing the universal penal law of Kenya with customary penal laws.'[25]

---

23 Petition No. 237 of 2014; [2015] eKLR.

24 Constitutional Petition No. 40 of 2011; [2015] eKLR

25 *Peter Karumbi Keingati v Ann Nyokabi Nguthi* [2015] eKLR

Dreadlocks: culture or not?

In a 2014 case the petitioner filed a suit on behalf of her 6-year-old son who was told that a primary school would only admit him if he cut his dreadlocks, in accordance with the school's code of conduct.[26] The court rejected the idea that – without providing evidence of the child's culture – it could be said that, by virtue of having merely visited his father in Jamaica, the child belonged to the Jamaican culture. Thus, the child's wearing of dreadlocks could not be afforded constitutional protection, and the case was dismissed.

However, in a later case the High Court accepted that a girl who wore dreadlocks was part of a family that adhered to the Rastafarian religion, and that to deny her the right to continue to wear them violated her rights.[27] The focus of the judgment was on religion rather than culture, though the parent had referred to both in the petition, and clearly the two are very closely linked.

Can the right be limited?

Like most rights under the Constitution, the right to culture can be limited by law. The limitation must be to achieve a purpose that is justifiable in a democratic society based on human dignity, equality and freedom. And the party who wants to justify the limitation must convince the court that the limitation in reasonable in the light of the purpose, and that the purpose could not be achieved by some method that limited the right less.[28] So in the case of the girl with the Rastafarian dreadlocks, the court said that 'where genuinely held religious beliefs clash with school rules, both sides must strike a balance between religion and education for the good of the learner and the institution.'

Culture and dispute resolution

Traditions form part of culture, and therefore it is important to examine cases dealing with traditional dispute resolution mechanisms, especially as the Constitution particularly encourages these.

Various cases have involved murder charges. In one, the families of the accused and the deceased reached a settlement agreement, and compensation was paid and rituals conducted according to Somali culture. The family of the deceased

---

[26] *J.K (suing on behalf of CK) v Board of Directors R School* Petition No. 450 of 2014; [2014] eKLR

[27] *J W M (alias P) v Board of Management [Particulars Withheld] High School* [2019] eKLR

[28] Article 24.

then wrote a letter to the Office of the Director of Public Prosecutions (ODPP), saying that it did not wish to pursue the matter further. That Office applied to have the matter marked as settled in view of Article 159(2) of the Constitution, and the court agreed.[29]

In another murder case, also involving a claim that the case had been resolved in accordance with Somali culture, law and Muslim religion, the court recognised culture as the foundation of the Kenyan people. However, the court found that because the prosecution was not involved in the agreement between the parties, this by-passed the key role played by the ODPP in criminal matters—because a crime is not an injury to a person but against the society in general, therefore the prosecution has a duty to protect the society in general. In addition the offence was a felony—which under the Criminal Procedure Code cannot be settled in this way [30]

In several other cases courts have cooperated when families have wanted to resolve homicide cases, often reducing the charge to manslaughter from murder and sentencing the convicted person to a short term of imprisonment.[31]

The Criminal Procedure Code was amended after the Constitution to make it easier to make agreements of this kind, but they may not be used in cases under the Sexual Offences Act. And the Director of Public Prosecutions must be involved.[32]

These cases remain a bit problematic because the role of the Director of Public Prosecutions is often neglected or ignored by those applying alternative justice systems. In August 2020, the judiciary published the Alternative Justice Systems Framework Policy: Traditional Informal and Other Justice Systems Used to Access Justice in Kenya.[33]

Civil cases cause fewer dilemmas. In *Lubaru M'Imanyara v Daniel Murungi* the parties filed a consent joint agreement in court seeking to have a land dispute referred to the Njuri Ncheke council of Lare Division in Meru County.[34] They

---

29 *Republic v. Mohamed Abdow Mohamed High Court* Criminal Case No. 86 of 2011; [2013] eKLR.

30 *Republic v. Abdulahi Noor Mohamed (alias Arab)* Criminal case No. 90 of 2013; [2016] eKLR http://kenyalaw.org/caselaw/cases/view/126069.

31 An example is *Republic v Joel Kipketer Malel* [2014] eKLR http://kenyalaw.org/caselaw/cases/view/100928.

32 Sections 137A-137O of the Criminal Procedure Code.

33 This policy was developed by the Taskforce on Alternative Justice Systems which was appointed by the former Chief Justice Willy Mutunga on 4th March 2016 to evaluate the different forms of alternative justice systems used in Kenya as well as develop a National Policy to this regard. Available at https://tinyurl.com/ADRPolicy.

34 Misc Application No. 77 of 2012; [2013] eKLR.

relied on Article 159(2)(c) and Article 60(1)(g) of the Constitution that provides that one of the principles of land policy is to encourage communities to settle land disputes through recognised local community initiatives consistent with the Constitution. The court agreed, and upheld the application and referred the matter to the Njuri Ncheke.

Discrimination

In the case of *Joseph Letuya and 21 Others v. Attorney-General* the Ogiek applicants argued that they were discriminated against by some of the respondents' actions concerning their eviction from the East Mau Forest. The court found that the eviction of the applicants from the forest prevented them as an indigenous and minority group from enjoying their culture as food hunters and gatherers in the forest, and that they had been discriminated against on account of their ethnic origin and culture.[35]

FGM (female genital mutilation)

A woman doctor challenged the law prohibiting female genital mutilation (circumcision or cutting) as it applies to adult women, because it prohibits them from participating in a part of their culture, in violation of Article 44 of the Constitution.[36] While the court agreed that this practice has been important culturally – including among the Kikuyu people to whom the petitioner belonged – it held that the Act of Parliament prohibiting FGM was justified. The court worked on the basis – of which there was considerable evidence given – that FGM was inevitably harmful to the woman. It also pointed out that FGM threatens other rights particularly health. And while one could say that the law discriminates against women because men can participate in male circumcision, the discrimination is justified because the male procedure brings health benefits while the female one does not.

Conclusion

The government of Kenya has followed through on some cultural rights elements of the Constitution. Firstly, the Protection of Traditional Knowledge and Cultural

[35] [2014] eKLR.

[36] *Tatu Kamau v Attorney General & 2 others; Equality Now & 9 others (Interested Parties); Katiba Institute & another (Amicus Curiae)* [2021] eKLR

Expressions Act 2016 was enacted. A long-awaited Culture Bill, however, is yet to be enacted.[37] Many county governments have enthusiastically embraced culture, and used it to brand their counties, attract investment and tourism, and market their county's resources. This has been easier for some counties than others, e.g. Narok and Lamu, where Maasai culture and Swahili culture (and cultural heritage, both tangible and intangible) respectively already had a strong presence. Some counties have developed, or are developing, their own cultural policies, and legislation. However, these – and county level cultural activities in general – do not necessarily enshrine cultural rights, but tend to focus on the exploitation and marketization of culture, much of it mono-ethnic.

On the other hand, there are still several instances where the state has violated cultural rights, as shown in the cases we have mentioned. However, the courts have interpreted the cultural rights provisions and made determinations in favour of communities and individuals. In recent cases that touch on issues related to morality questions such as abortion and the LGBTI (lesbian, gay, bisexual transgender and intersex) communities, there have been people who have approached the courts to be joined as interested parties to argue that it is against Kenyan or a specific tribe's culture to allow such actions. Indeed, in the High Court decision rejecting the petition to decriminalise homosexual activity, culture did figure in the court's reasoning.[38]

---

[37] It does not appear to have reached Parliament. For some detail see Kenya's 2016 Report to UNESCO https://tinyurl.com/KenUNESCO2016.

[38] *EG & 7 others v Attorney General* Petition 150 of 2016 para 388.

Chapter 12

Socio-economic Rights in the Kenyan Constitution 2010: A brief assessment of governmental action towards their realisation

Nicholas Wasonga Orago

Introduction

Poverty, inequality and socio-economic marginalisation have persisted in Kenya since independence. As many as 45.2% of Kenyans live below the national poverty line.[1] Further, 36% of the Kenyan population is multi-dimensionally poor (that is with poor health, lack of education, lack of access to adequate and safe/healthy food, inadequate living standard, lack of income, disempowerment, poor quality of work and threat from violence), while additional 32% live near multidimensional poverty.[2] Many other Kenyan households have low resilience and coping capacities and are threatened with poverty or reduced living standards in the event of occurrence of illness, disability, ageing or other disasters.[3] This has been laid bare by the COVID-19 pandemic.[4] Their situation is made worse by the lack of social security and social assistance programmes. Employment,

---

1 Richard Oliver and Anderea Morara, *UN Common Country Assessment 2018 - 2022*: p xiii https://tinyurl.com/UNAssessment2018.

2 UN Common Country Assessment 2018: xiii.

3 UN Common Country Assessment 2018: 7.

4 See Development Initiative 'Socio-economic impact of COVID-19 in Kenya: Background paper' (June 2020) https://devinit.org/resources/socioeconomic-impacts-covid-19-kenya/#downloads, which indicates that 86% of households are worried about not having enough food to eat; of those renting houses, 30.5% were unable to pay their rents due to reduced income or job losses; and, labour force participation had reduced from 75% to 56.8% (65.3% for men & 48.8% for women) with at least 1.7 million jobs lost.

which could have allowed access to socio-economic goods and services, is not available to about 40% of the population of working age. The youth (ages between 15-34) are the most affected, with 8 out of 10 being jobless.[5] The poverty and unemployment situation is exacerbated by the high population growth rate estimated at about 1.5 million per year, with children under 18 forming 49% of the population.[6] In a depressed economic growth context exacerbated by the COVID-19 pandemic, poor quality education and skills training as well as limited employment opportunities, this high population growth rate is bound to constrain Kenya's long-term socio-economic development if measures are not put in place to harness its potential to create a demographic dividend for the nation.

Kenya is ranked the 10th most unequal country in the world and the 5th most unequal in Africa.[7] Income inequality is especially poignant, with the richest 20% of the Kenyan population earning 11 times more than the poorest 20% of the population.[8] There is also great disparity in income levels between rural and urban households, with the country still being predominantly rural.[9] Statistics indicate that the poor constitute 50.2% of the rural population and 33.5% of the urban population, but urban poverty is growing rapidly due the adverse impacts on employment by the COVID-19 pandemic.[10] As a result, rural urban migration has resulted in the growth of informal settlements, effectively transferring poverty from the rural areas to the urban informal settlements that constitute two-thirds of the urban population.[11]

The high levels of poverty, inequality and unemployment have created a socially unstable and insecure country. This situation has also exposed the youth, the most affected sector of the population, to recruitment into extremist groups, migration, use of drugs, adverse coping mechanisms and membership of proscribed groupings. If Kenya is to benefit from its young population, it must create and implement suitable policies of high-quality education, skills development, employment creation and social security to enhance human well-

---

5 UN Common Country Assessment 2018: xii.

6 UN Common Country Assessment 2018: 4.

7 Kenya UNDAF 2014-2018: 2.

8 UN Common Country Assessment 2018: xii.

9 See Kenya National Council for Population and Development 'The state of Kenya's population 2017' (June 2018) 11, available at http://www.ncpd.go.ke/wp-content/uploads/2018/11/STATE-OF-KENYA-POPULATION-JUNE-2018.pdf (accessed 19 January 2019), which states that 31% of the Kenyan population is urban.

10 UN Common Country Assessment 2018: xiii.

11 UN Common Country Assessment 2018: xii & 5.

being. As such, the, state must promote effective and comprehensive realisation of economic and social rights like education, housing, healthcare, food, water and social security that have the capacity to enhance human development and the realisation of the potential of each human person.

The Constitution and the transformative agenda

One of the justifications for the clamour for a new constitutional dispensation was to address the prevailing situation of poverty, inequality, and vulnerability. In addressing these challenges, Kenya adopted a transformative constitution to channel collective power and resources for the advancement of freedom, equality, human dignity and social justice. The Constitution's transformative tools include: the prominence of international law in the domestic context in Articles 2(5) and 2(6), broad provisions in Articles 22 and 258 about going to court in the public interest, justiciable socio-economic rights (not just directives or aspirations) in Articles 43 and 53, positive state duties to combat poverty and inequality in Article 21(1) and 21(3), applying the Bill of Rights not only against the state but between citizens (Article 20(1)), directing the courts to develop common and customary law in line with constitutional values (Article 20(3)(a)), and wide court powers to give remedies (Articles 23 and 165).[12]

The entrenchment of justiciable economic and social rights is perhaps the most revolutionary aspect of the Constitution. Socio-economic rights are concerned with the enhancement of the material bases of the lives of individuals and communities and with enabling them to achieve their full potential. They include the right to shelter (housing), food, water and sanitation, healthcare, education, social security and clean and healthy environment.

The detailing of socio-economic rights in the Constitution in itself, though critical, is not sufficient to eradicate poverty, inequality, vulnerability and marginalisation that are the bane of the majority of Kenyans. There is need for effective planning, budgeting and implementation of these rights by the institutions of the state to enhance their realisation and achieve their promise of the improvement in the living standards of the Kenyan people.

---

[12] N Orago 'Political and socio-economic transformation in a new constitutional dispensation: An analysis of the 2010 Kenyan Constitution as a transformative Constitution' (2014) 2(1) *African Nazarene University Law Journal* 40-67.

I assess how far the entrenchment of these rights in the Constitution has enhanced the realisation of the transformative agenda through a brief assessment of governmental action using the framework of the Kenyan National Human Rights Policy (NHRP),[13] which encompasses all of government's five-year priority commitments as well as a matrix for governmental assessment and accountability.

Assessing the governmental implementation of the socio-economic rights

Kenya's adoption of the NHRP was informed by the reality that effective realisation of human rights requires lasting commitment, supporting legal and institutional frameworks as well as continuous implementation (NHRP, p 9). The policy demands the mainstreaming of human rights in national developmental planning, financing and implementation; embracing a human rights-based approach to socio-economic development for the benefit of Kenyans (NHRP1.4). It identifies key economic and social rights as priority areas of governmental action to enhance human development on the basis of this human rights-based approach: the rights to health,[14] land as a critical livelihood factor, housing, food, water, education as well as clean and healthy environment (NHRP section 3).

Land as a critical livelihood resource

Kenya is still a largely agricultural economy and access to land is critical for household subsistence and well-being.[15] Consequently, its protection is entrenched in the Constitution in Articles 60-68 and in Article 40 as an aspect of property. The land sector still faces a myriad of challenges such as disparities in land ownership that lead to problems of landlessness, squatting, urban squalor and evictions; land fragmentation resulting in deterioration of land quality and poor agricultural yields; lack of tenure security resulting in disinheritance (especially for women), land grabbing and forced evictions; and the breakdown in land administration systems that compound the above challenges (NHRP p 23).

---

13 National Human Rights Policy and Action Plan Sessional Paper No. 3 of 201.

14 For more on this right see Chapter 13 in this book.

15 See FAO-Kenya 'Kenya at a glance' (2019), which indicates that agriculture directly or indirectly contributes 53% of the GDP and provides livelihood (employment, income and food security) to over 80% of the population.

The NHRP details governmental commitment to address the above challenges through the creation of a system of land administration that guarantees equal access to land and secure tenure without discrimination (NHRP section 3.3.2). It set out to achieve this through legal reform of the land sector, enacting the Lands Act 2012, the Land Registration Act 2012, the National Land Commission Act 2012 and the Land Law (Amendment) Act of 2016. The legislation created the National Land Commission and divided land management roles between the commission and the Ministry of Lands so as to create a system of checks and balances to reduce instances of abuse of political and bureaucratic power in land administration.[16] The 2016 Amendment Act also details legal and procedural protections from evictions that are reflective of international standards, though its implementation remains a challenge as unlawful and forced evictions continue unabated in Kenya almost on a weekly basis with detrimental effect to the dignity, welfare, livelihoods and rights of affected populations. The government has also adopted the Community Land Act of 2016 to enhance the security of tenure, protection and management of community land.[17] These are important pieces of legislation; what is needed is the transformation of the precepts into practice through their effective and scrupulous implementation in an honest, transparent and accountable manner—the hope of Kenya's legal framework. In mid-2021 the Chair of the commission said that 'only five communities which are mainly former group ranches have been registered through transitioning of undissolved group ranches to community land.' And 'Out of the 24 counties mapped out as having community land, only 10 counties have submitted inventories,'[18]

On the creation of effective systems of land dispute resolution, the Constitution itself started the process by creating the Environment and Land Courts in Article 162(2)(b), which was operationalised through the Environment and Land Courts Act, 2011. The essence of these specialised courts is the quick resolution of land disputes so as to enhance sustainable investment in and utilisation of land for development. Though an improvement on the previous system of resolution of land disputes, the special courts are still considered as generally slow in resolving land disputes as cases still take between 3-10 years to resolve, are mostly unreachable

---

16 See Chapter 6 in this book.

17 Constitution of Kenya, Article 63(1) defines community land as those lands that vest in and are held communally by communities identified on the basis of their ethnicity, culture or other communities of interests.

18 Gilbert Koech, 'Historical land injustices: NLC gets 740 claims, deadline in two months' *Star* July 21 2021, https://tinyurl.com/NLC710claims.

by the poor (because of costs and location/distance), and are also affected by corrupt and unethical practices of judges and advocates.[19]

It is clear from the above assessment that the Kenyan government has expended some effort in enhancing its legislative and policy framework on the sustainable management of land as a critical socio-economic resource. The actual implementation of these legislative provisions, however, continues to be a challenge, with the provisions failing to effectively impact on the lived realities of the Kenyan population. If the key priorities of the NHRP are to be met, Kenya must do more than just developing policies and enacting legislation; there is need for the scrupulous implementation of these policy and legislative provisions to enhance the lives and livelihoods of the Kenyan people.

The right to accessible and adequate housing

The protection of land rights and the affirmation of tenure security lead to the protection of housing rights. The right to adequate housing is entrenched in Article 43(1)(b) of the Constitution and in several international and regional instruments ratified by Kenya.[20] The NHRP affirms that the right to adequate housing entails components such as availability, accessibility, affordability, cultural acceptability, habitability and tenure security (NHRP 3.2.4). The policy identifies informal settlements characterised by low quality housing, overcrowding, poor infrastructural and basic services and insecurity as a critical challenge to housing, especially in the urban areas.

In reality, the housing situation of the poor has not improved.[21] The dire housing situation, especially in the urban areas, has been exacerbated by rapid urbanisation that continues to exponentially increase pressure on the availability, accessibility and affordability of housing with a deficit at 200, 000 units a year. This has led to the expansion of barely inhabitable informal settlements in urban centres that lack critical survival, livelihoods and safety infrastructure.

---

19 Land Development & Governance Institute, *An Assessment of the Performance of the Environment & Land Court* 16th Score Card Report 2014, pp 14-18. https://tinyurl.com/AssessELC2014.

20 These international and regional legal instruments include: International Covenant on Economic. Social and Cultural Rights (Art. 11), Convention on the Elimination of All Forms of Discrimination Against Women (Art. 14 (2) (f), International Covenant on the Rights of Persons with Disability (Art. 26), and the Maputo Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Art. 16).

21 See KNCHR Statement on State of Human Rights in Kenya 2018: 8. https://tinyurl.com/StatementoinHR2018KNCHR.

Several efforts have been directed at this challenge by the government and its developmental partners such as the Kenya Slum Upgrading Programme and the Kenya Informal Settlements Improvement Project. These initiatives have been beset with several problems such as the complexities of tenure arrangements in informal settlements, conflicting and competing interests, lack of attention to the actual needs of targeted populations, and the lack of adequate land for the proposed projects, with the result the housing situation remains dire.[22]

The government has responded to this situation under the Big Four Agenda with a 1 million homes project to provide affordable housing to low-income households. The government intended to amend the Housing Act to provide a framework for the financing and construction of low cost housing (Housing Amendment Bill 2017: clause 4), but this does not seem to have become law. If the Agenda is to fulfil its purpose of actually delivering affordable housing, it will have to look for better mechanisms for financing as well as enhance the eradication of corruption under which the money is redirected to private pockets to the detriment of housing programmes and projects aimed at benefiting those in vulnerable housing situations. So far progress has been slow.

Freedom from hunger and the right to adequate food of acceptable quality

Food and nutrition security are critical for socio-economic and human development. The Constitution entrenches the right to adequate food of acceptable quality (Article 43(1)(c)) and affirms the application of international and regional human rights instruments entrenching the right to food, a critical tool for the advancement of food security for all.[23]

Kenya's food security situation has deteriorated over the years, especially with the restructuring of the economy in the context of the structural adjustment programmes. This has been made worse by long periods of drought followed by excessive rains over short periods of time—consequences of global climate change. Due to the continuing reliance on rain-fed agriculture for food production in the context of a changing climate, the neglect of rural development, lack of empowerment and support of smallholder farmers and the skewed international trading system that has led to dumping of subsidised foods in local markets, Kenya

---

[22] Leah Muraguri 'Kenyan Government Initiatives in Slum Upgrading' , *Les Cahiers d'Afrique de l'Est / The East African Review*: http://journals.openedition.org/eastafrica/534 pp 7-8.

[23] These international and regional legal instruments include: ICESCR (art. 11) CEDAW (art. 14 (2) (f), 24) and ICRPD (art. 26).

has largely been in food deficit. To spur food production, the government has adopted several legislative and policy instruments.[24] The challenge for Kenya has always been translating the precepts in these legislative and policy frameworks into actual implemented programmes that impact positively on food security and the realisation of the right to food for all.

In addressing food security challenges, the government has adopted irrigation for food production to increase yields and reduce drought risks as part of Vision 2030 Economic Pillar. To this end, it has invested KES 12.5 billion in the rehabilitation of the existing irrigation schemes in the country.[25] It also commenced the million-acre Galana/Kulalu Irrigation Scheme aimed at producing over 40 million bags of maize (20, 000 bags per 500 acre of land for the 200, 000 acres that was to be put under maize production in the project) and other staple foods to bolster food production and enhance national food security.[26] This project has largely not achieved its purpose, with only 5,500 acres of land having been developed by the end of the 2017 completion period due to continuing questions about its viability. The yield levels have also not been met, with the project so far failing to increase staple food production to bolster Kenya's food security. This necessitated further governmental investment in the subsidisation of maize importation to lower maize flour prices and cushion members of the public from high food prices resulting from droughts. In its next UPR report, in 2019, the Kenyan government did not mention Galana/Kulalu at all, stressing small scale household water projects to place 6000 acres under irrigation.[27]

Apart from food availability and accessibility/affordability, food quality and safety has also been a major concern for Kenya. A good example is the importation of contaminated maize and sugar that have not been fit for human consumption as well as the use of raw sewerage for food production and antibiotics (antimicrobials) for animal production. The government seems to have done nothing much about these illegal imports for which state officers seem to have primary responsibility, with parliamentary effort to hold relevant state officers accountable through the

---

24 Including the Agriculture and Food Authority Act 2013, the Crops Act 2013 and the National Food and Nutrition Security Policy.

25 Leonard Haggai Oduori and Timothy Njeru, 'A review paper on large-scale irrigation in Kenya: A case study of maize' (Tegemeo Institute of Agricultural Policy and Development) WPS 58/2016 available at: https://tinyurl.com/OduoriNjeru.

26 Kenya's 2nd Report for UN Universal Peer Review 2015, National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21) A/HRC/WG.6/21/KEN/1 (para. 61; Oduori & Njeru 2016: 2.

27 Both these documents can be downloaded from https://www.ohchr.org/EN/HRBodies/UPR/Pages/KEIndex.aspx.

Parliamentary Report on Importation of Contaminated Sugar being defeated on the floor of the house due to alleged widespread corruption and bribery of members of parliament. The negative impact of these unsafe imports is on the health and safety of Kenyans, with increasing cases of non-communicable diseases and their treatment burden increasing poverty in Kenya. It is thus critical that food safety is among the key priorities of the government in its efforts to ensure food security and the enjoyment of the right to food for all.

The right to clean and safe water in adequate quantities

Access to clean and safe water in adequate quantities was entrenched as a constitutional right (Article 43(1)(d)). The Human Rights Policy identifies Kenya as a water-scarce country experiencing declining quantity and quality of water resources (NHRP section 3.2.6). In its five-year priority plan, the policy reflects the commitment of the Kenyan state to progressively ensure that everyone has access to sufficient, safe, acceptable and affordable water.

In the five-year period of the NHRP, Kenya has enacted the Water Act 2016 and adopted the National Water Policy, the Water Master Plan, Irrigation Policy, Water Storage Policy, Trans-boundary Water Policy and Land Reclamation Policy. Despite these legal and policy frameworks, a large majority of Kenyans especially those in rural areas and in urban informal settlements still lack sustainable access to safe drinking water and sanitation services. Despite the clarity of this need and the vulnerability of communities not accessing clean and safe water, budgetary allocation for the provision of clean and safe water in adequate quantities is still very low. This is contrary to the requirement in Article 20(5)(b) that resource allocation decision making must prioritise the need to enhance the widest possible enjoyment of the relevant rights, especially for vulnerable and marginalised communities.[28]

The right to education

Education is one of the critical tools for the eradication of poverty, the realisation of sustainable human development and the achievement of sustainable socio-economic transformation of a society. For this purpose the Constitution entrenched the right to education (Articles 43(1)(f) and 53(1)(b)). The NHRP recognises the challenge of quality and relevance of education to Kenya's socio-economic and

[28] KNCHR Statement on State of Human Rights in Kenya 2018, p 8.

development needs and details the commitment of the state to ensure education for all (NHRP section 3.2.7).

In enhancing the provision of universal education for all, Kenya has adopted several legislative and policy instruments, including the Basic Education Act of 2013, the Universities Act of 2012, the Technical and Vocational Education and Training (TVET) Policy of 2012 and the National Special Needs Education Policy, among others. The government has put in place programmes to enhance access to education, especially the free primary education programme, the free secondary day schooling, secondary school fees guidelines and the provision of school meals to children in vulnerable and marginalised settings, among others, though recent reports suggest that the last is floundering after the government took it over from the World Food programme.[29] Expansion of access has not been met with commensurate expansion in the infrastructural and human resources, with the result that the quality of education has drastically deteriorated.[30] The deterioration in levels of education in both primary and high school is exemplified by the high levels of failure in national examinations that has been witnessed with the closure of avenues of exam malpractices. It is critical that the relevance and quality of education in the Kenyan schooling system is addressed if education is to enhance human capacity, build skills and ensure innovation and socio-economic development.

On the issue of quality and relevance, the state has engaged in an elaborate process of curriculum review that has led to a supposedly competence-based curriculum, intended to create a generation of engaged, empowered and ethical citizens with the required knowledge and skills to thrive in the 21st Century. The programme is already facing teething challenges as the training and equipping of teachers for the new curriculum has been inadequate. The new curriculum has also not addressed the basic infrastructural challenges of the previous system such as the high teacher-learners ratio, the lack of school infrastructure and other educational facilities, low motivation among teachers, poor industrial relations between the teachers and their employer as well as the direct and indirect costs of education to poor households, among others.[31] If these concerns are left unaddressed, the

---

29 KNCHR Statement p 8.

30 See Glennerster et al 'Access and quality in the Kenya education system: A review of the progress, challenges and potential solutions' (2011) 4; Institute of Economic Affairs (IEA) Policy Brief 'Enhancing accountability in the provision of free primary education' (March 2016) 1. https://tinyurl.com/IEABriefAccountabilityFRE.

31 See Oxford Business Group 'Changes to Kenya's education system seek to expand access and raise standards' a chapter in *Kenya: The Report 2018*, all of which are available at https://oxfordbusinessgroup.com/kenya-2018.

noble objective of the curriculum change will not be achieved, with detrimental consequences to citizen empowerment and socio-economic development.

The right to clean and healthy environment

Conservation and sustainable use of ecosystem services are critical to human survival and societal prosperity in the present and in the future. The Constitution entrenches this right in Articles 42 and 69-70. The NHRP identifies challenges to this right as being illegal deforestation, pollution, soil erosion, unsustainable exploitation of natural resources, and destruction of indigenous forests (NHRP section 3.2.8).

Kenya is still an agricultural society with agriculture contributing about 25.9% to the country's gross domestic product and being the source of direct or indirect employment to about 80% of the population. It is thus a great contributor to food security, livelihoods and the general socio-economic development of the nation, as reflected in the prominence it has received within the Vision 2030 Economic Pillar. Agriculture is, however, reliant on the environment and other ecosystem services for its sustainability and prosperity. It is this realisation of the importance of the environment to Kenya's socio-economic development that legislative efforts have been put in place to address environmental challenges through law reforms. For instance, the Environmental Management and Coordination Act is being reviewed to affirm the right of every Kenyan to a clean and healthy environment and empower Kenyans to be active participants in environmental protection. The Environment and Land Courts Act 2011 creates avenues for the remedying of activities harmful to the environment. In the context of climate change as a threat to the environment, Kenya has adopted the Climate Change Response Strategy and enacted the Climate Change Act 2016.

The National Environmental Management Authority has made an effort at implementation using the mechanism of environmental impact assessments and environmental audits to enhance environmental protection in the context of projects. It has also made efforts to ensure eradication of activities that endanger the environment, a case in point being the plastic bag ban that is aimed at ensuring a clean and healthy environment. Its functions are, however, affected by challenges of resources as well as the endemic corruption that affects all institutions of the state, with this reflected in court decisions that have indicated that EIAs had not been satisfactorily undertaken as was the situation in the Lamu Coal Plant case.[32]

---

[32] *Save Lamu & 5 others v National Environmental Management Authority (NEMA) & another* [2019] eKLR

Public empowerment through information and knowledge creation as well as public engagement in environmental decision making has also been piecemeal and ineffective. Though the environmental impact assessment and audit processes require public participation, in most instances, members of the public are not given sufficient time and information to actively and constructively participate. The result is that their needs, concerns and priorities are not taken into account to influence decision making on the viability of projects.

The future of socio-economic rights programming in Kenya's next planning period

In the 2013-2017 development agenda as elaborated in Kenya's Second Medium Term Plan, it was clear that governmental focus was on economic growth, and the chosen tool to achieve this was infrastructural development. However, the focus has shifted to human development and the improvement of the quality of life of Kenyans. Three of the Big Four projects – food security, health and housing – relate directly to the realisation of the entrenched socio-economic rights, with manufacturing also having a contribution to poverty eradication through creation of employment and other livelihood opportunities.

The shift to a focus on human development and poverty reduction is also reflected in Kenya's Third Medium Term Plan (MTP III) for 2018-2022.[33] It is focused on developing technical skills to generate a more adaptive and enterprising labour force required for economic growth, and seeks to create sustainable and decent employment opportunities. In its social pillar, MTP III seeks to improve the quality and relevance of education and training to meet Kenya's labour needs. It also seeks to enhance access to basic services such as universal health coverage and universal access to water and sanitation. On food security, it seeks to ensure the irrigation of 1.3 million acres of land for increased and sustainable food production. Further, it proposes to deal with issues of food safety and quality, especially pesticide and metal contamination of food and animal feeds. It also seeks to address the impacts of climate change on livelihoods.

Questions are bound to arise in relation to coordination in the context of various policy papers with overlapping mandates. A clear framework of implementation, financing, coordination and accountability must be put in place and implemented effectively to enhance the socio-economic well-being of the Kenyan people.

---

[33] Available for example at https://vision2030.go.ke/publication/third-medium-term-plan-2018-2022/

Realisation of socio-economic rights and the contribution of the Kenyan courts

Implementation of the legal, policy and programmatic frameworks for the realisation of economic and social rights is mainly the function of the legislative and executive arms of the state. However, where there are recalcitrance, bureaucratic bottlenecks and inertia leading to the violation of socio-economic rights, the courts become an important avenue where the affected people can seek remedial interventions.[34] The courts are made guardians of the Constitution with wide standing and remedial powers to ensure the vindication of rights and it also makes socio-economic rights subject to judicial consideration.[35]

The Kenyan courts have affirmed that violation of these rights can be brought to court, addressing cases relating to the right to health,[36] the right to housing, the right to livelihood that entails the right to food, the right to education, the right to water, and the right to a clean and healthy environment, among others.

On the right to housing, the courts have dealt with it mostly in the context of the obligation to respect and protect the housing rights of people facing evictions. Though the decisions in these eviction cases have been mostly positive, some courts have been callous to the plight of vulnerable persons despite the constitutional. A case in point in the *Mitu-Bell case*, where the Court of Appeal refused to accept the valuable remedy of structural injunctions where a court orders reports back, thus supervising the implementation of its orders.[37] The reasoning of the judges in this case show total disregard of the nature and character of socio-economic rights and international as well as comparative jurisprudence on the remedies that other courts have considered effective in the vindication of the rights.[38] However, this decision was reversed in a strong decision of the Supreme Court that recognised the remedy of structural injunctions, stressed that the right to housing was not

---

[34] See EACHRights 'A compendium on economic and social rights cases under the Constitution of Kenya 2010' (2014) 5-6, available at https://tinyurl.com/ESCRCompendium.

[35] See Orago N 'Socio-economic rights and the potential for structural reforms: a comparative perspective on the interpretation of the socio-economic rights in the Constitution of Kenya, 2010' in Mbondenyi M *et al* (eds.) *Human rights and democratic governance in Kenya: A post-2007 appraisal* (2015) 43-44.

[36] As the right to health is being discussed in an independent chapter in this book, this chapter will not look at litigation around the right to health.

[37] Mitu-Bell Appeal judgment, footnote 39 below paras. 69-73.

[38] For a broad analysis of some of the effective remedial choices that courts have used in the vindication of socio-economic rights, see Orago, 'Socio-economic rights and the potential for structural reforms, 69-78.

limited to those with ownership of land, and explained the place of international law in Kenyan law under the Constitution.[39]

Another such case is *William Musembi & 16 others* v *Moi Education Centre Co. Ltd* which involved the eviction of a community of 340 people from a piece of land they had occupied since 1968.[40] The High Court found that the community was evicted without notice, without a court order and in violation of their rights to human dignity, personal security, housing as well as the rights of children and elderly persons. Having affirmed the unlawfulness of the evictions it is sad that the Court of Appeal then took away the compensatory remedies awarded to the evicted community on the reasoning that no material was presented to the trial judge to help determine these awards, and that the proper remedy was therefore only a declaration of violation of rights. However, the Supreme Court, in July 2021, reinstated the High Court's award of compensation to the people evicted. Incidentally the court expressed regret over slow progress of developing legal frameworks for implementing Article 43 rights. It said, 'State has to take a more drastic and purposive approach to its mandate and obligations in ensuring that the rights to the people of Kenya are not violated, or in the very least, that these rights are not deprived or denied.'

The courts have been active in the vindication of other socio-economic rights. In *Micro & Small Enterprises Association of Kenya v Mombasa County Government & Others*, the court held that demolition of business stalls belonging to hawkers without provision of alternative venue of business was a violation of the right to a livelihood that is encompassed in Article 43 of the Constitution. The courts have also taken up litigation on the right to a healthy environment.[41] One such critical case was *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others*[42] where the court affirmed that coal mining is one of the most environmentally damaging activities, but the adverse consequences must be balanced by the need to utilise environmental resources to

---

39 *Mitu-Bell Welfare Society v Kenya Airports Authority; Initiative for Strategic Litigation in Africa (Amicus Curiae*) [2021] eKLR reversing the Court of Appeal - *Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others* [2016] eKLR.

40 [2017] eKLR paras. 3-8.

41 See *Mohamed Ali Baadi and others v Attorney General & 11 others* [2018], where the Court affirmed that the proponents of the LAPPSET Project had not put in place effective mitigation measures, and in the process violated the right to clean and healthy environment of the Lamu community. It made orders that the proponents put in place mitigation measures as per the environmental and social impact assessments so as to enhance the protection of the right to clean and healthy environment as per the requirements of the Constitution.

42 [2015] eKLR, paras 15ff.

achieve development,[43] and the petitioners had not produced sufficient evidence in court to convince it that the balance in this context lay in the protection of the environment as opposed to the utilisation of mineral resources for national development. In the Lamu Coal Power Plant Project case,[44] appellants challenged the environmental impact licence on various grounds including the environmental impact of the project and the lack of necessity for it. The National Environmental Tribunal declared the licence invalid, because of lack of public participation and on the basis of the precautionary principle: the failure to consider the Climate Change Act.

Conclusion

The Constitution sought to transform Kenya from a very unequal society to a more socially just and egalitarian society that enhances the general well-being of its people and ensures that each and every person is able to achieve his or her full potential, including through the recognition of socio-economic rights—as rights not as mere aspirations. This chapter has looked at the measures that the national government has put in place and how it has enforced them according to its priorities as reflected in the National Human Rights Policy. It is clear from the brief analysis that some measures – especially legislative and policy – have indeed been put in place. The major challenge, however, has been the lack of political will to finance and implement these measures so as to ensure better living standards for the Kenyan people. The assessment indicates that the government, due to this lack of financing and implementation of policies and programmes for the realisation of rights, has generally failed to meet its five-year commitments on economic and social rights as detailed in the NHRP. The result is the continuing situation of socio-economic destitution, poverty, inequality and poor standards of living for the Kenyan people.

---

43 Mui Coal Basin judgment, para. 120.

44 *Save Lamu & 5 others v National Environmental Management Authority (NEMA) & another*, Appeal 3 of 2018.

Chapter 13

The Right to Health: A case of contradictory narratives[1]

Nerima Were, Allan Maleche and Tabitha Saoyo

Introduction

The 2010 Constitution differs from its predecessor significantly in its recognition of socio-economic rights, the dismantling of parliamentary sovereignty, and the entrenchment of a devolved system of governance amongst others.

Chapter Four of the Constitution contains the Bill of Rights, which has been described as an integral part of the democratic state as it is applicable to all laws and allows for both vertical and horizontal application of the rights within the Bill of Rights—horizontal application meaning that it can be enforced against private individuals and entities, as well as against the state.

As part of this integral composition of rights, the right to health is guaranteed under Article 43(1) (a) which states that: 'every person has the right to the highest attainable standard of health which includes the right to health care services, including reproductive health care.' Article 43(2) provides further that a person must not be denied emergency medical treatment.

This paper interrogates the implementation of the right to health in Kenya since 2010.

---

[1] This Article is an adaptation of the 'Mapping Exercise on the Constitutional Provisions on the Right to Health and the Mechanisms for Implementation' prepared by Allan Maleche, Charles Dulo and Nerima Were for The Steering Committee of the Regional Network for Equity in Health in Southern Africa (EQUINET), with support from International Development Research Centre in Canada.

Situational analysis

The Kenya Demographic and Health Survey, 2014, is one of the most comprehensive documents on the country's health status and is useful in seeking to measure how well we are doing in terms of access to health care services. We shall only focus on a few significant metrics (infant mortality and maternal mortality as well as the global disease burden) noting that a much broader discussion can bae had on Kenya's health situation.

Infant mortality in Kenya stands at 39 deaths per 1,000 live births, and under-five mortality is at 52 deaths per 1,000 live births.[2] When this data is disaggregated, notable problem areas are the former Nyanza Province where a child is twice as likely to die before five as a child born in Central Province and where the infant mortality stands at 72 per 1,000 live births, almost twice the national average.[3] This is a significant shift from 1990 where the under-five mortality stood at 95.4 per 1,000 live births[4] and marks a 33% decrease in childhood mortality rates between 2003 and 2014.[5] Vaccination coverage at 2014, stood at 79% a slight increase from 77% in 2008/9 and an even greater increase from 44% in children ages 12-23 months.[6]

The maternal mortality ratio is 362 maternal deaths per 100,000 live births which accounts for 14% of all deaths among women aged 15-49 in Kenya.[7] The previous survey (2008-9) estimated a maternal mortality rate of 520 maternal deaths per 100,000 live births.[8] Adult mortality (all adults between the ages of 15-49) is estimated at 3.72 per 1,000 members of the population for women and 4.78 per 1000 for men, a decrease from 5.8 per 1000 and 6.2 per 1,000 respectively.[9]

---

2 Kenya National Bureau of Statistics et al (2015) 'Kenya Demographic and Health Survey 2014' available at https://dhsprogram.com/pubs/pdf/fr308/fr308.pdf at 111.

3 At p 111.

4 T Achoki et al (2019) 'Health disparity across the counties of Kenya and implications for policy makers, 1990-2016: a systemic analysis of the Global Burden of Disease Study 2016', *Lancet Global Health,* Volume 7, Issue 1 at e81 (https://www.thelancet.com/journals/langlo/article/PIIS2214-109X(18)30472-8/fulltext)

5 Above note 2 at 111.

6 Above note 2 at xxii.

7 Above note 2 at 327.

8 Kenya National Bureau of Statistics (2010) 'Kenya Demographic and Health Survey 2008-09' available at 272.

9 Above note 3 at 328 and 271 respectively.

Another significant metric is the Global Burden of Disease study, which systematically gathers, analyses and produces comparable estimates of health loss and related risk factors across locations, age groups and sex categories.[10] The 2016 study compared data for 1990, 2006 and 2016 and synthesised data from counties. It noted that there was an increase in all-cause mortality between 1990 and 2006 (850.3 per 100,000 population to 902 per 100,000), which was reversed to 579 per 100,000 in 2016.[11] This is because Kenya made considerable progress between 2006 and 2016 in reducing the burden of communicable diseases (particularly significant investments have been made to address HIV and AIDS, malaria, diarrhoeal diseases and lower respiratory infections). There has however been an increase in the burden of non-communicable diseases with high levels of cardiovascular diseases, hypertension, diabetes and cholesterol feeding into this growing burden.[12]

The legislative and policy framework on the right to health

Even before Kenya recognised health as a right in 2010 there was a tacit recognition that ensuring the health of its people was central to her development. Sessional Paper No. 10 on 'African Socialism and its Application to Kenya' of 1965 provided a blue print for post-colonial development and nation building through political equality, social justice and human dignity.[13] Through this, basic services including health care and water were delivered free by the government with minimal involvement of other actors.[14] While there were significant shifts in practice on the provision of basic services without user fees, the first major policy shift came in 1994 with the Kenya Health Policy Framework, which sought to promote equity in access to services but also recognised that the government will play a smaller role and sought to create an enabling environment for investment by private sector.[15]

---

10 Above note 4 at e82.

11 Above note 4 at e84.

12 Above note 4 and also W Mathenge, A Foster, H Kuper, 'Urbanization, ethnicity and cardiovascular risk in a population in transition in Nakuru, Kenya: a population-based survey.' *BMC Public Health 2010*; 10: 569. See also Ministry of Health, *KENYA STEPwise Survey for Non Communicable Diseases Risk Factors 2015 Report* https://tinyurl.com/NCDSurvey2015.

13 Government of Kenya Sessional Paper No. 10 on African Socialism and its Application to Kenya (1965), available at https://tinyurl.com/SessionalPaperNo10.

14 Notley J et al 'Lessons Learned & Good Practices from Support to the Kenyan Water Sector' (2010) Danida https://tinyurl.com/WaterLessons p 16.

15 Republic of Kenya 'Kenya Health Policy 1994 – 2010,' (Ministry of Health, 1994) https://tinyurl.com/HealthPolicyF1994.

The Constitution

The only mention of health in the previous Constitution was to indicate that protection of public health could justify limitation of rights.[16]

Article 43(1) (a) now guarantees the right to health. This provision is notably supported by Article 21(2) which places an obligation on the state to take legislative and policy measures to achieve the Article 43 rights, and, second, makes it apparent that that achievement is to be a matter of progressive realization. In other words, failure to achieve these rights immediately is not a violation, however this does not mean that inactivity is permitted.

The Constitution further requires that the state address the needs of vulnerable groups within the society including persons with disability, children, youth, members of marginalized and minority communities among others.[17] Thus progressive realization ought not to be considered in isolation but should be informed not only by available resources but also by the need to address the needs of vulnerable groups and peoples. However, Article 53(1) guarantees the child's right to health care. This is not subject to the progressive realization clause and thus should be interpreted as an immediate obligation for the state.

Health is not the same as health care. While the latter would include medical treatment and related care, health is affected by many factors, including diet, sanitation and environment. The general right, to be achieved progressively, is to health - not restricted to health care.

The broader right is not a right to be healthy. That cannot be promised. It is to the highest attainable standard. What is attainable depends on the person's genetic make-up and other personal factors, coupled with what medical care can offer, along with the resources available.

The Constitution becomes more prescriptive particularly in discussing resources that may be utilised in the realisation of socio-economic rights in Article 20(5). This Article provides that if the state claims it does not have the resources to implement a right, a court expected to provide a decision must be guided by the following principles:

a) It is the responsibility of the state to show that the resources are not available;

---

16 The Constitution of Kenya Act 5 of 1969.

17 Article 21(3).

b) In allocating resources, the state must give propriety to ensuring the widest possible enjoyment of the having regard to prevailing circumstances, including the vulnerability of particular groups or individuals; and

c) A court may not interfere with a decision by a state organ concerning the allocation of available resources solely on the basis that it would have reached a different conclusion.

The requirement of setting standards is innovative. It is intended to ensure that the state actually sets standards and targets for itself, so that progress, or lack of it, is measurable. It is also important to understand the requirement that the state observe, respect, protect promote and fulfil the right. The state must not positively hinder or hamper the right, for example by its environmental activities. It must, by the use of law, regulation and enforcement prevent non-state bodies from violating the rights. It must educate and in other ways encourage the respect for the right. And when necessary it must take positive steps to ensure it is achieved.

Significant Articles that can buttress the right to health include Article 46 guaranteeing consumer rights, Article 43(2) which prescribes emergency care, Article 26(4) which regulates safe abortion and Article 27 which demands that there be no discrimination on the basis of one's health status. Indeed, any form of discrimination based on personal characteristics is banned, unless for the sake of remedying past discrimination.

International law and treaties

International law has played a much greater role in Kenya since 2010, because the Constitution provides that all treaties and conventions ratified by Kenya now form part of our laws, so long as they do not contradict the Constitution[18] The right to health (or more narrowly health care) is set out in several international agreements.

The International Covenant on Economic, Social and Cultural rights (ICESCR) is significant in giving content to the state's obligation in the full realization of the right to health.[19] Article 12 goes further in framing the obligation of the state by providing some of the steps necessary to achieve the full realization of the right to health.

---

[18] Article 2(5) and (6) of the Constitution, 2010.

[19] Kenya acceded to the International Covenant of Economic, Social and Cultural Rights in 1972.

The Convention on the Rights of the Child (CRC) similarly has several provisions related to the right to health and access to health services including Article 24.[20] Given that this is a later document, there is a notable shift in the framing of the language from the ICESCR to more rights-based as opposed to obligation-founded. It is noteworthy that the CRC similarly provides for specific measures to be adopted by states to ensure that the child's right to health is realised.[21]

Regional law also has a role to play in shaping our legislative framework on the right to health. The African Charter on Human and Peoples' Rights,[22] which Kenya is a party to, provides in Article 16 that 'Every individual shall have the right to enjoy the best attainable state of physical and mental health.' The Charter further obliges the state to ensure that it takes necessary measures to protect the health of their people and ensure they receive medical attention when they are sick.[23] This is complemented by several other regional and sub-regional documents that Kenya has ratified including the African Charter on the Rights and Welfare of the Child, the Protocol to the African Charter on the Rights of Women in Africa and the East African Community HIV Prevention and Management Act.[24]

The relevance of these international instruments is that they help us to understand what our Constitution requires. This is illustrated by the use in at least one Kenyan case (*MA v Attorney-General*, below) of General Comment 14 of the Committee on Economic, Social and Cultural Rights. This is guidance by the United Nations Committee on Economic Social and Cultural Rights on what the right means and how it should be implemented.

National legislative and policy framework

Since 2014 there have been efforts to consolidate the laws governing health in Kenya culminating in the enactment of the Health Act, 2017.[25] It was hoped that this Act would give greater certainty on how the right to health shall be implemented

---

20 Kenya ratified the Convention on the Rights of the Child in 1990.

21 Article 24(2) of the Convention on the Rights of the Child.

22 Also see the Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa (Maputo Protocol) and the African Charter on the Rights and Welfare of the Child.

23 Article 16(1) of the African Charter on Human and Peoples' Rights.

24 The last is available on the KELIN website at https://www.kelinkenya.org/wp-content/uploads/2017/04/EAC-HIV-ACT-2012.pdf.

25 Other significant legislation that governs health and health services enacted since 2010 include the: Kenya Medical Supplies Authority Act No. 2 of 2013, National Authority for Campaign Against Alcohol and Drug Abuse Act No. 14 of 2013, Science, Technology and Innovation Act No. 28 of 2013 and the Public Health Officers (Training, Registration and Licensing Act) of 2013.

in Kenya. The Act is a wide-ranging. It recognises health as a right which includes 'progressive access for provision of promotive, preventive, curative and rehabilitative services'[26] It guarantees reproductive health and rights,[27] emergency treatment,[28] health information,[29] consent and confidentiality, and information that ought to be disseminated by government.[30]

There are a number of positives of this Act, including its recognition that health is a devolved function - discussed in greater detail below. It also takes into account that the health care rights of children are an immediate obligation and requires that national and county governments provide free and compulsory vaccination for children under five.[31] Finally, it recognises the need to protect the reproductive health and rights of women by obliging national and county governments to provide free and compulsory maternity care.[32] These rights are not, of course, a comprehensive statement of what is involved in achieving the health rights of children and women, but the Act sets priorities.

However, there are some significant problems with its framing that may affect how well it can truly serve as a framework for progressive realization of the right to health. Its exclusion of certain cadres of providers from holding certain administrative positions, without rationale has been contested. The position of Director General is limited to persons registered by the Medical Practitioners and Dentists Board which excludes nurses and clinical officers.[33] One of the more significant criticisms of the Act, is that, strictly read, it may subvert the constitutional promise of devolution (see below).[34]

The regulation of health includes several other documents including the Public Health Act, Sexual Offences Act, the Pharmacies and Poisons Board Act, Kenya Medical Practitioners and Dentist Act, Clinical Officers (Training Registration and Licensing) Act.

---

26 Section 5 of the Health Act, 2017.

27 Section 6.

28 Section 7.

29 Section 8.

30 Sections 9-11.

31 Section 5(3)(a).

32 Section 5(3)(b).

33 'Nurses criticize health law', available at https://tinyurl.com/StarHealthLaw.

34 Oduor delivers scathing criticism of establishment of the Kenya Health Human Resources Advisory Council, which he states - while couched as an advisory body to set norms and standards - has the potential to curtail county governments' role in ensuring they have the human resources necessary to meet their constitutional obligation. See M Oduor 'A Critical Overview of the Health Act 2017' (February 2018) available at https://tinyurl.com/RGOduorHealthAct.

A number of policies govern different facets of the right to health, but for our purposes we focus on the Kenya Health Policy, 2014-2030 which provides strategic guidance on how to improve the overall status of health in Kenya.[35] It is significant for a number of reasons including: first, it recognises health as a devolved function and its framework is informed by that recognition. Second, it purports to employ a rightsbased approach[36] to the progressive realization of the right to health as well as requiring healthcare delivery to integrate human rights norms and principles in their design.[37]

While both the Health Policy and the Health Act, 2017, recognise the right to health, they to some extent give lip service to a rights-based approach to health. It is unclear to what extent the current legislation and policy have been or can be effective to imbue the realization of health with a rights-based approach.

Other issues that have been or may be identified in the future include the classification of pregnancy related conditions as notifiable conditions and the possible impact on reproductive health and right. Coupled with the definition of 'trained health professional'[38] it seems that this provision is intended to narrow and scrutinise the possibility of medical termination of pregnancy, as permitted in some circumstances under Article 26 of the Constitution. Another issue is the possible duplication of roles between the existing regulatory systems and the new Kenya Health Professionals Oversight Authority.[39]

Case law on health

We shall highlight some of the significant jurisprudence and how it has shaped thinking around this right. *PAO and others v Attorney-General*[40] was the first case on the right to health and was centred on access to essential life-saving medicines for people living with HIV. The petitioners argued that 'counterfeit' in the Anti-Counterfeit Act, 2008 was so broadly defined as to include generic medication,

---

35 The policy aims to contribute to the attainment of the country's long-term development agenda outlined in Kenya's Vision 2030, through high quality health services with a view to maintain a healthy productive population able to deliver the development agenda.

36 This has been defined by the World Health Organization as one that: 'aims to support better and more sustainable outcomes by analysing and addressing the inequalities, discriminatory practices (de jure and de facto) and unjust power relations which are often at the heart of development problems'. Available at https://tinyurl.com/WHOgenderHRBA.

37 Kenya Health Policy (2014-2030) at page 1. Available at https://www.afidep.org/?wpfb_dl=80.

38 Both are in section 6.

39 Above note 37.

40 [2012] eKLR Petition No. 409 of 2009

which is much cheaper than brand name drugs and was the treatment therapy utilised by the petitioners and many others living with HIV as part of essential therapy to guarantee their right to life. The court found that the right to health is inextricably tied to the right to dignity and that an inability to effectively care for oneself would compromise their inherent dignity and their sense of self-worth. Thus, the provisions prohibiting 'counterfeit' drugs were unconstitutional.[41]

MA v The Attorney-General[42] recognised that detention of women for failure to pay for maternity services amounts to a violation of the right to health. It is also significant because it incorporates General Comment No. 14 by the UN Committee on Economic Social and Cultural Rights on the Right to Health[43] into Kenyan law. The court in *WJ & another v Astarikoh Henry Amkoah*[44] found that sexual violence was a violation of the right to health because there are significant physical and psychological consequences, effectively seeking to incorporate a broad definition of health which includes both physical and mental well-being. Both cases considered the effect of cruel and inhumane treatment on the health of a person.[45] And in *Federation of Women Lawyers (FIDA-Kenya) & 3 others v Attorney-General* the court held that withdrawing Guidelines for Safe Abortions violated the right to health, and other rights of women of reproductive age and other women and adolescent girls of reproductive age.[46]

The case of *Daniel Ng'etich and others v The Honourable Attorney-General and Others* provides a good example of the use of the legal process to influence the development of rights-based policy.[47] The case demonstrates the importance of the use of structural injunctions to compel various government departments to take action within certain time periods and report back to court.[48] A structural injunction involves the court directing a respondent to engage in a series of actions (perhaps legislating, policy making, engaging with the petitioners) and reporting back to the court. In this case the structural injunction was significant in that the state

---

41 At para 56.

42 Petition No. 562 of 2012, [2016] ekLR.

43 This is the leading document on what the right to health means. See https://www.refworld.org/pdfid/4538838d0.pdf

44 Petition No. 331 of 2011, [2015] e KLR.

45 Also see more recently, *Josephine Oundo Ongwen v Attorney General and 4 Others* Petition No. 5 of 2014 [2018] eKLR,

46 Petition No. 266 of 2015 [2019] eKLR

47 Petition No. 329 of 2014, [2016] eKLR.

48 Maleche A and Were N (2016) 'Petition 329: A Legal Challenge on the Involuntary Confinement of TB Patients in Kenyan Prisons' *Health and Human Rights Journal*, Volume 18, No. 1, available at: https://tinyurl.com/MalecheWereTB.

provided regular updates to the court and was forthcoming on difficulties it was facing in developing a policy on involuntary confinement of persons with TB, and after collaborative engagement with stakeholders and partners the Tuberculosis Isolation Policy was launched in June 2018.[49]

However, some cases have lessons in the limits of enforcing socio-economic rights, and have also been significant for an appreciation of how such cases should be litigated. *Luco Njagi v The Ministry of Health*[50] illustrates the courts' unwillingness to interfere in how the state allocates its resources. This case involved persons with renal failure who were unable to access adequate services at Kenyatta National Hospital. The court found that the state had already done enough to show that it did not have the resources available to ensure access for dialysis treatment for the persons involved in this case, and that the measures taken were reasonable in the circumstances. The court expressed the difficulty it would face if asked, for example, to direct how resources should be allocate as between kidney and cancer patients. In two other cases – *Kenya Society of the Mentally Handicapped (KSMH) v Attorney-General*[51] and *Okwanda v Minister of Health and Medical Services*[52] – Justice Majanja empathised with the difficulties set out by the petitioners but could not make a favourable finding on the basis of the evidence before the court. One case concerned the absence of policies to deal with mentally challenged persons, and the other the matter of treatment, nutrition and other facilities for diabetics. The judge said there was not enough foundation in terms of evidence nor of what policies and actions government to adopt. The cases show the difficulty of going beyond remedies for failures to respect the right to health to requiring authorities actively to promote and fulfil the right, as the Constitution requires.

These cases are by no means all those considered by the judiciary that touched on the right to health but they do provide some insight into the courts' general attitude towards them.[53] They are evidence of a judiciary willing to give

---

49 Ministry of Health 'Ministry launches TB Isolation Policy to prevent spread of TB' (26 June 2018) available at https://tinyurl.com/MoHTBIsolation.

50 Petition No. 218 of 2013, [2015] eKLR.

51 Petition No. 155A of 2011, [2012] eKLR.

52 Petition 94 of 2012, [2013] eKLR.

53 Please also see *Kenya Legal and Ethical Issues Network on HIV & AIDS (KELIN) & others v The Cabinet Secretary for the Ministry of Health and Others* Petition No. 250 of 2015, [2016] eKLR; *Jesca Moraa (on behalf of the late Alex Madaga Matini) and Kenyatta National Hospital and Coptic Hospital* (a complaint decided by the Professional Conduct Committee of the Kenya Medical Practitioners and Dentists Board); and *AAA v Registered Trustees (Aga Khan University Hospital Nairobi)* Civil Case No. 3 of 2013, [2015] e KLR (an ordinary negligence case about failed contraception)

content to the right to health and that has given greater understanding to how this right can be fulfilled in Kenya.

Health as a devolved function

Functions of national and county governments

Under the devolved system there are two levels of government: which are distinct and independent and are required to conduct business on the basis of consultation and cooperation.[54]

The Constitution in its Fourth Schedule prescribes the distribution of functions between the national and county governments. Health is a devolved function, except for policy making and national health referral facilities, which fall within the ambit of the national government.[55] County governments are responsible for county health services including facilities and pharmacies, ambulance services, promotion of primary healthcare, licensing, cemeteries, veterinary services and refuse removal.[56]

The Health Act, 2017 has made provision for the specific role of each of the governments in relation to health services and the right to health,[57] and is mostly reflective of the constitutional vision. However, the national government still plays a prominent role which may sometimes muddy the water in identifying duty bearers and establishing accountability mechanisms. Illustratively, section 5 of the Act stipulates that both the national and county government must ensure the provision of free and compulsory maternity care and vaccination for children under five. Both these functions fall within the ambit of primary healthcare which are solely a county government function.

Section 15(1)(c) elaborates the obligations of the national government to ensure the implementation of the Bill of Rights in respect to the right to health, reproductive health and emergency treatment. There is no corresponding obligation on the county governments, which are responsible for the implementation of health services. The Constitution imposes duties on 'the State' and the counties are just as much part of the state as the national government.

---

54 KELIN Kenya, (2016),' *Monitoring the Implementation of the Right to Health under the Constitution of Kenya: a Training Manual*' available at https://tinyurl.com/MeasurementManual.

55 The Fourth Schedule of the Constitution of Kenya, 2010 Part I.

56 The Fourth Schedule of the Constitution of Kenya, 2010 Part II.

57 Section 15 and 20 of the Health Act, 2017.

A further consideration is that devolution is governed by a number of laws other than the Health Act, 2017 and these must be considered in tandem with it.[58] Various counties including Laikipia[59] have enacted their own stand-alone health laws while a number have introduced Maternal Newborn and Child Health Acts.[60] In terms of policy a majority of the counties have addressed this through their County Integrated Development Plans (CIDP).

Devolution in practice

Universal Health Coverage (UHC) can be defined as 'access to key promotive, preventive, curative and rehabilitative health interventions for all at an affordable cost, thereby achieving equity in access.'[61] At the moment the current administration has prioritized achieving UHC by 2022.[62] As the state grapples nationally with how to achieve UHC, Makueni County remains the leading example of a devolved unit that has achieved this. Makueni, with an estimated population of 874, 323 people [63] has, since October 2014, been offering its residents free healthcare across public health facilities.[64] Its model is to utilise existing structures of the National Health Insurance Fund and the national government's free primary healthcare. Additionally, residents are required to pay an annual subscription of Kenya Shillings 500 per household to access primary healthcare free at point of service. This is aimed at limiting prohibitive out of pocket costs that limit the right to health. While there has not yet been an audit on health services in the county, it seems that Makueni may be developing a model that the national government may

---

58 J Kushner, 'Kenya's health system on the verge of collapse as doctors strike grinds on' 13 February 2017, *The Guardian*, available at https://tinyurl.com/Guardianonstrike.

59 Laikipia Health Act. Available at http://laikipia.go.ke/resource/the-laikipia-county-health-services-act-2014

60 Eg Makueni County Maternal, Newborn and Child Health Act. Available at https://tinyurl.com/MakueniHealthAct

61 World Health Assembly resolution 58.33. *Sustainable health financing, universal coverage and social health insurance*. https://www.who.int/health_financing/documents/cov-wharesolution5833/en/2005 World Health Organization WHO Doc. A58/20. *Social health insurance: Sustainable health financing, universal coverage and social health insurance; Report by the Secretariat* 2005 https://apps.who.int/gb/archive/pdf_files/WHA58/A58_20-en.pdf para. 2.

62 W Schultink, R Eggers & S Chatterjee, 'Accelerating Universal Health Coverage in Kenya – How do we get there?' Friday, 13 July, 2018 available at https://tinyurl.com/acceleratingUHC.

63 Population Action International: Healthy *Population Dynamics, Environment and Sustainable Development in Makueni County* available at https://pai.org/wp-content/uploads/2014/07/PAI_Makueni.pdf.

64 P Gathara, 'Devolved Healthcare: Makueni's trailblazing experiment in providing universal health coverage*',* January, 11 2018 available at https://tinyurl.com/GatharaMakueniHealth.

consider when planning its own roll out of UHC in Kenya. Indeed, since most health care is a county and not a national matter, it is essential that the national government works with the counties and does not undermine them. There is, however, a study showing weaknesses in the mental health services in Makueni.[65]

Challenges and opportunities of devolution

The 2017 there was a doctors' strike lasting more than four months (shortly followed by a nurses' strike). One significant observation during the strike was the misunderstanding on the role of devolution in the health sector both by the governments and the health sector. [66]

The lack of awareness and understanding also exists in communities, which serves as a barrier to state accountability because people do not understand and thus do not demand.[67]

Other challenges to devolution include significant capacity gaps within county political and management structures.[68] When resources were devolved, few counties possessed the administrative capability to absorb the available funding or plan for its use.[69]

One of the main opportunities provided by devolution is the ability to localize and address health issues in a meaningful way. This has been quite apparent in budgeting for health at the county level. In 2016/2017 the average health allocation as against the total budget for counties was 25.2%, which is significantly more than what the national government allocates and much higher than what the Abuja Declaration requires, namely a commitment by African governments to spend at least 15% of their budget on health care.[70] The disaggregated data in

---

65 Victoria N Mutiso, et al, 'Using the WHO-AIMS to inform development of mental health systems: the case study of Makeni County, Kenya' *BMC Health Services Research* volume 20, Article number: 51 (2020) available at https://tinyurl.com/MakueniMental.

66 Ngechu W. 'Inside the doctor's collective bargaining agreement (CBA) of 2013' 31 January 2017, Citizen Digital available at https://tinyurl.com/docsCBA.

67 Prompted by this awareness of a gap in knowledge around devolution, KELIN developed its manual on *Monitoring the Implementation of the Right to Health* (https://tinyurl.com/MeasurementManual). This was used in trainings for civil society that work with health to ensure they understand health as a devolved function and how to monitor it.

68 T Williamson and A Mulaki, 'Devolution of Kenya's Health System: the Role of HPP' (January 2015), USAID, PEPFAR and Health Policy Project available at https://tinyurl.com/DevolutionHealth at page 6.

69 Williamson and Mulaki, at p 6.

70 Ministry of Health 'National and County Health Budget Analysis FY 2016/2017' available at https://

this study shows that there is a decrease in the proportion of the budget allocated to recurrent expenditure on personnel from 72.5% in the previous year to 70.6% in 2016/2017. The Appropriation Act that fixes the planned expenditure for the national government for 2018-19 (Act No. 7 of 2018) provides for expenditure on health by the national government of 6.69%. While it must be accepted that county governments have fewer functions than their national counterpart the commitment to increase expenditure towards health must be seen as a commitment to improve the health of their people.

The COVID-19 pandemic and health crises

Kenya, like many other countries, was caught flat footed by the COVID-19 pandemic and, from the time the first case was confirmed on 12 March 2020, a number of measures were put in place to manage it. Numerous significant issues arose early on from the pandemic response, resulting in growing distrust between Kenyans and their government. These included: failure to provide accurate, timely and life-saving information; use of police to enforce public health measures often resulting in brutality; failure to guarantee essential services resulting in increased unintended pregnancies, births without access to skilled birth attendants and unsafe abortions; failure to protect frontline workers and ensure occupational safety resulting in loss of lives and strikes during the pandemic; and finally the pandemic response was not gendered and disproportionately affected marginalised communities like women, children, informal sector workers among others.[71]

The COVID-19 pandemic illuminated and exacerbated challenges with health and governance, and it also provided an opportunity to bolster our understanding of health systems, and underscore the measures to be taken to build resilient health systems.

---

tinyurl.com/HealthBudgetAnalysis.

71 KELIN et al, (March 2020), 'Advisory note on ensuring a rights-based response to curb the spread of COVID-19: People – not messaging – bring change' available athttps://tinyurl.com/cfj9tdjb. Also see A Maleche, T Imalingat and N Were 'Excessive Law Enforcement in Kenya' *Verfassungsblog on Matters Constitutional* (14 May 2020), available at https://verfassungsblog.de/excessive-law-enforcement-in-kenya/; and Maleche and Were, 'Kenya's growing anti-rights public health agenda during the COVID-19 Pandemic' *Bill of Health* ((21 May 2020) available at https://tinyurl.com/anti-rightsCOVIDagenda.

Critical analysis of the constitutional promise of the right to health and the reality

Our discussion above is evidence of the contradictory narratives in relation to the right to health in Kenya and while there have been significant strides in the development of an understanding of what health is by the judiciary that has not always translated to meaningful realization of the right through policy and service delivery.

The courts have played a significant role in building an understanding on the right to health. However, we must also note what we have failed to do. As has been mentioned already, devolution has provided both challenges and opportunities for health. The most significant thing is that one cannot understand what health means in a vacuum as to what devolution and governance is. It has become important to understand devolution as a means to the realization of the right to health. While devolution is governed by a body of law this is not always taken into consideration in the implementation of health services and the right to health.[72]

Another challenge facing the health sector and the realization of the right to health is misfeasance. According to the Global Corruption Report (2006), Kenya's health care system lacked accountability mechanisms allowing abuse and misappropriation of funds.[73] The most common forms of irregularity in public health facilities include unjustified absence among medical staff, mismanagement of procurement, theft of drugs or equipment, unauthorised use of equipment, facilities or supplies and unauthorised billing of patients.[74] Unfortunately this is one area of governance that does not seem to have improved since the Constitution. In September 2020, 45 non-governmental organisations wrote on open letter to the Ministry of Health and other bodies deploring the failure to deal with this threat to the right to health.[75]

---

[72] Other than the Constitution we can also consider: County Governments Act, No. 2 of 2012; County Governments Public Finance Management Act, No. 8 of 2013; Intergovernmental Relations Act, No. 2 of 2012; Public Finance Management Act, No. 18 of 2012; and the Public Service (Values and Principles), Act No. 1A of 2015.

[73] Transparency International, Global Corruption report 2006: Corruption in the health sector, seeking the cure, (2006) available at https://www.cgdev.org/doc/event%20docs/transcript_2.1.06.pdf.

[74] Kenya Anti-Corruption Commission, 'Sectoral perspectives on corruption in Kenya: The case of the public health care delivery,' (2010) available at http://www.eacc.go.ke/docs/health-report.pdf at page 20.

[75] https://tinyurl.com/CorruptionHealthletter.

This failure must be understood against the backdrop of limited resources and the understanding that health is not an absolute right and one that must be subject to progressive realization. How do we define and quantify progressive realization?[76] Can the courts take into account corruption when coming to a conclusion whether the state has done enough? These are questions that, almost eleven years after the provision, we still have difficulty answering because we have not had a case that has meaningfully interrogated the effect of corruption on health, and the bare minimum content for progressive realization.

Conclusion

We should note that Kenya has made great strides in giving content to the right to health since 2010. Massive gains have been made in addressing the general health and welfare of Kenyans and access to healthcare. However, absent an independent audit, the impact of the constitutional provision is difficult to pinpoint. Significant work has gone towards the development of a legislative and policy framework that may be the basis on which a rights discourse on health can be framed. Kenya began as a nation that recognised the necessity of free healthcare[77] and in 1994 sought to work towards the decentralization of the health sector[78] and there has been massive global support towards addressing communicable infections and diseases such as HIV, tuberculosis and malaria that have allowed us to frame access to these services as a right.

We have noted some shortcomings in the existing legislative framework notably around understanding of the roles that must be played by the different levels of government. However, as we continue the discourse, we must appreciate that we are at stage where formulating an understanding on who is accountable and how they can be held accountable is significant for building a state that respects, promotes, protects and fulfils health related rights.

---

[76] See The Committee on Economic, Social and Cultural Rights in General Comment No. 3: The Nature of the State Parties' Obligations (https://www.refworld.org/docid/4538838e10.html) and *Mitubell Welfare Society vs. The Attorney General* Petition No. 164 of 2011.

[77] Sessional Paper No. 10 (see fn 13 above).

[78] Kenya Health Policy Framework, see text to fn 15.

Chapter 14

Towards the Rights to Environment

Rose J. Birgen, Cicilia W. Githaiga and Eva Maria Anyango

Introduction

Environmental protection is provided in a number of statutes that deal with a range of issues including protected areas, conservation, flora and fauna, fisheries, biodiversity, heritage, water to name a few. However, current global trends point to the fact that environmental protection cannot be regarded in isolation and must be integrated with economic development and social upliftment as exemplified in the principle of sustainable development.

In 2010 – around the time the Kenya Constitution was adopted – a group of researchers and practitioners described how the world's leading institutions: education, the media, business, governments, traditions and social movements- could be harnessed to reorient cultures towards sustainability.[1] Transforming culture was a ground breaking idea and a means to subvert the age-old issue of consumption and consumerism.

Like a tsunami, consumerism has engulfed human cultures and Earth's ecosystems. Left unaddressed, we risk global disaster. But if we channel this wave, intentionally transforming our culture to centre on sustainability, we will not only prevent catastrophe but may usher in an era of sustainability- one that allows people to thrive while protecting, even restoring faith.

Internationally, the history can be traced back to 1987, when the Brundtland Commission proposed that, 'all human beings have a right to an environment adequate to their health and well-being'.[2] This proposition captured the concerns

---

1 The World Watch Institute *State of the World: Transforming Cultures from Consumerism to Sustainability* (2010) 142.

2 *Our Common Future, Report of the United Nations World Commission on Environment and Development* (Oxford University Press, 1987).

over the increasing deterioration of environmental quality and integrity, and in essence suggested that an anthropocentric approach to the environment might assist in finding solutions to the impending crisis of environmental degradation. (The anthropocentric approach focuses on the interconnectedness between humans and the environment and the important role that humans fulfil in nature.) It has been criticized as giving too much focus on human beings, and much more recent writing emphasises a more 'eco-centric' approach. However, a right in a constitution is almost always a right of humans not of nature.[3]

The Constitution of Kenya and other legislation incorporate international environmental principles such as inter- and intra- generational equity, the polluter pays principle, the precautionary principle and the principle of sustainable development.[4]

The Kenyan legislative and policy framework

It was with the enactment of the Environmental Management and Coordination Act (EMCA) in 1999[5] that the right to environment gained popularity and protection in Kenya. Preparation of the law began, soon after the key Rio Conference on Environment and Development in 1992, at which various international agreements and declarations were adopted.[6]

The Constitution

Kenya's Constitution before 2010 merely recognised the right to life (s. 70), while section 71 focused on legitimate exceptions to the right not to have one's life intentionally taken away but did nothing to protect the right to environment. '…

---

3 A few constitutions provide for the protection of animals and the natural world, but not as rights; see Kristen Stilt, 'Rights of Nature, Rights of Animals' (2021) 134 *Harvard Law Review Forum* 276 https://harvardlawreview.org/2021/03/rights-of-nature-rights-of-animals/. Ecuador's 2008 Constitution has a chapter on the Rights of Nature (Articles 71-74). Article 71 begins: 'Nature, or Pacha Mama, where life is reproduced and occurs, has the right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes.'

4 There is a useful brief account of these principles - albeit North America oriented - at https://elc.ab.ca/core-environmental-principles-for-environmental-laws-policies-and-legal-processes/.

5 Act No. 18 of 1999.

6 Agenda 21, the Rio Declaration on Environment and Development, the Statement of Forest Principles, the United Nations Framework Convention on Climate Change and the United Nations Convention on Biological Diversity.

The right to a clean and healthy environment was merely implied'.[7] There were a few cases under that Constitution including *Peter K. Waweru v The Republic*.[8] The Applicant in this case challenged charges of discharging raw sewage into a public water source on among other grounds that providing sewage treatment facilities was the responsibility of government and local County Council. While quashing the charges on technical grounds, the court went much further. It stated that the right to life is not just a matter of keeping body and soul together, because this right can be threatened by many things including the environment. The learned judges also pronounced itself on certain universal concepts of environmental law including sustainable development, the precautionary principle and the polluter pays principle. It ordered the Ministry of Water to construct sewage treatment works, and consider other temporary measures, and the use of restoration orders under EMCA against those responsible for the pollution.

In another interesting case, the challenge was over the introduction of the plant species commonly known as mathenge (*prosopis juliflora)* into an ecosystem where it became invasive. The judge said 'I would interpret the 'Right to life' using a broad meaning in this case that includes the right to be free from any kind of detrimental harm to human health, wealth and or socio-economic well-being', and ordered the government to produce a policy paper on the eradication of the plant and present it to Parliament within 60 days.[9]

The Bomas draft Constitution 2004 was very progressive as it included the right to environment as a justiciable human right. The ideas still appear in the Constitution as adopted.

In the Constitution, the main provision is Article 42, which has three general aims: first it guarantees everyone the right to a clean and healthy environment noting the need for equity within generations as well as between generations. Second, it mandates the state to take certain measures to realize this guarantee. These measures are spelled out in more detail in Article 69, which prescribes duties of both the states and persons. The state's obligations are:

a) Ensuring sustainable exploitation, utilization, management and conservation of the environment and natural resource;

---

7 A Mwenda & T Kibutu "Implications of the new Constitution on Environmental Management in Kenya" (2014) *Law, Environment and Development Journal* 79.

8 Nairobi Misc. Civil Application No. 118 of 2004 [2006] eKLR.

9 *Charles Lekuyen Nabori v Attorney General* [2008] eKLR,

b) Achieving and maintaining tree cover over at least ten percent of Kenya's land area;

c) Encouraging public participation in environmental matters;

d) Establishing systems of environmental impact assessments, and environmental audits and monitoring;

e) Eliminating processes and activities likely to endanger the environment;

f) Utilising the environment and natural resources for the benefit of the people of Kenya;

g) Protecting genetic resources and biological diversity; and

h) Protecting and enhancing intellectual property in and indigenous knowledge of biodiversity and genetic resource.

The obligation on persons is to cooperate with state organs and other persons to protect the environment and ensure ecologically sustainable development.

Finally, Article 42 mandates the judiciary to enforce environmental obligations while referring to Article 70. Thus anyone claiming that the right in Article 42 has been violated may seek redress from the court.

The inter- and intra-generational aspects of the right are at the heart of sustainable development, a national value and principle of good governance under Article 10. Equity within generations takes account of social and environmental justice, and is a critical approach since distributional inequalities are a major factor in environmental degradation.

The right to environment is non-discriminatory in that it recognises every person's right to a clean and healthy environment. It is also socio-economic in nature and is related to other socio-economic rights including the right to housing, right to food, right to health, right to clean and safe water for drinking, right to social security and right to education (Article 43(1)).

Other relevant constitutional provisions include the national value of sustainable development (Article 10). Article 44(2) recognises the right to enjoy one's language and culture, while Article 11 stipulates that the state must promote all forms of national and cultural expressions—some of which are related to environment and natural resources recognise the role of science and indigenous technologies in the development of the nation and promote the intellectual property rights of the people of Kenya. This links to the provision in Article 69 about intellectual property in, and indigenous knowledge of, biodiversity. Traditional knowledge has also been found to be beneficial under the international

environmental regimes such as the Convention on Biological Diversity (1992)[10] and its Nagoya Protocol.[11]

Other constitutional provisions important to the environment include the right of access to justice (Article 48), as well as the emphasis on public participation in decision making.[12]

Legislation, including the Environmental Management and Coordination Act

Parliament has enacted a number of statutes that attempt to protect environmental resources and regulate harmful impacts on the environment.[13] Other relevant laws implementing the Constitution include those on access to information[14] and fair administrative action.[15] The Protection of Traditional Knowledge and Cultural Expressions Act, 2016, is concerned with the protection for traditional knowledge including the environmental and 'knowledge associated with genetic resources or other components of biological diversity'.

The EMCA predated the Constitution and was influential on its drafters. It is the overarching environmental legislation in Kenya. It creates the National Environment Management Authority (NEMA)[16] as the lead environmental agency.

NEMA fulfils a general oversight role during the environmental impact assessment (EIA) process for development projects, monitoring the environmental performance of projects cleared, and acts as an enforcement agency. It is required to ensure that public participation in the EIA processes is effective and inclusive. For proposed projects, it must issue a licence to proceed, including sufficient conditions. It also plays a big role in monitoring compliance with licence conditions and enforcing the law in case of a violation.

---

10 *The Convention on Biological Diversity* (1992).

11 SCBD *Nagoya Protocol on Access to Genetic Resources and the fair and Equitable Sharing of Benefits arising from their utilization to the Convention on Biological Diversity, Montreal* (2011).

12 E.g. in Articles 10 and 118 (on Parliament) and 174 (on devolution) as well as Article 69.

13 Specific sectoral environmental concerns were addressed in legislation such as the Water Act 2016, Kenya Forest Act 2016, The Kenya Wildlife Management and Coordination Act 2013, Fisheries Resources Act, the Energy and Petroleum Act 2019, Mining Act 2016. The legislation dealing with waste is currently in the participation process.

14 Access to Information Act (implementing Article 35).

15 Fair Administrative Action Act (Article 47).

16 Sections 7, 9, 11 of EMCA.

Enforcement of environmental rights

Judicial enforcement

Perhaps the most important development in enforcing environmental rights has been the liberalisation of the legal rules that traditionally required that an individual must show some personal interest in a case before being able to sue. The new approach is found in the EMCA, section 3(4), and is elaborated in the Constitution.

Now other people or bodies can bring a case on behalf of those who are unable to do so themselves, or in the public interest.

The usual rule is that those who lose a court case have to pay the legal expenses of the winning side. Another important development has been that this rule is not normally applied in cases that are brought in the public interest. Each party usually bears its own costs.[17]

While the High Court has jurisdiction to decide whether human rights provisions of the Constitution have been violated, infringed or threatened, Article 162 creates a specialised Environment and Land Court (ELC). This decides disputes relating to environment planning and protection, climate issues, mining, mineral and other resources. This court has equal status with the High Court, and can hear constitutional cases on land and environment (see examples under Environmental Justice below). The EMCA establishes the National Environmental Tribunal (NET) to hear appeals about decisions on environmental licences.[18]

The responsibility does not lie solely with the judiciary. Lawyers must contribute to the development of good law on environmental rights by ensuring they provide courts with sound legal arguments, supported by reliable expert and scientific evidence.

Administrative enforcement

Legislation creates administrative bodies mandated to make decisions that affect the environment negatively or positively. These include NEMA and the National Environmental Complaints Committee – an environmental ombudsman (with the additional mandate to institute public interest litigation). The Kenya

---

17 *Jasbir Singh Rai v Tarlochan Singh Rai* Petition 4 of 2012 (2014) eKLR (Supreme Court)

18 Section 129 EMCA.

Forest Service, the Kenya Wildlife Service and the Water Resource Authority are a few of the others.

Article 47 has strengthened control over administrative bodies, by creating the right to fair administrative action, and it also enables a complaint to be made to the Commission on Administrative Justice. The Fair Administrative Action Act gives guidance on the implementation of Article 47.

Emerging areas of concern

Devolution and the environment

The objects of devolution under Article 174 of the Constitution support the right to environment as they seek to achieve, among others, social and economic development and the provision of proximate, easily accessible services throughout Kenya; equitable sharing of national and local resources; decentralization of state organs, their functions and services, from the capital of Kenya; protection and promotion of the interests and rights of minorities and marginalised communities, and social and economic development, all of which are important for the right to environment.

The Fourth Schedule of the Constitution allocates functions to the two levels of government, national and county. The national government is responsible for the 'protection of the environment and natural resources with a view to establishing a durable and sustainable system of development'. The schedule goes on to mention among other functions fishing and hunting, protection of animals and wildlife, water protection, securing efficient residual water, hydraulic engineering and the safety of dams and, energy policy.

Counties are assigned responsibility for implementation of national government policies on natural resources and environmental conservation, with respect to, among others, soil and water conservation including forestry. Counties also deal with refuse removal, refuse dumps and solid waste disposal, and control of air pollution, noise pollution, other public nuisances and outdoor advertising. Counties also have functions such as housing, water and sanitation services, markets, beaches and plant and animal disease control, all of which have environmental implications.

When counties have a 'function or power' under Schedule Four, they may pass law regulating the activity within counties, where suitable, carry out the activity themselves, and allocate and spend funds on the issues. Article 6(2)

emphasises that national and county government are distinct and inter-dependent from each other, but must consult and cooperate with each other, while Article 189 commands closer liaison, consultation and exchange of information.

The objects of devolution under Article 174 support the right to environment. The principles of devolved government enumerated under Article 175 also support the right to environment as they support democracy and the separation of powers. Article 186 distinguishes the levels that government functions can be performed as being exclusive, where the functions are performed by one level of government only; concurrent where the functions may be performed by both levels of government, and residual—these being those functions that are not assigned by the Constitution to either level of government and are therefore considered as functions of the national government.

The environment is a topic over which both national and county governments can make law. In case of conflict between law passed by a county and the national government, the national law would take precedence in certain circumstances (Article 191). These circumstances include protection of the environment. But this is so only if the matter cannot be effectively regulated at the county level. Another situation where national legislation will prevail is if it is aimed at preventing unreasonable action by a county that affects the interests of Kenya or another county, which might involve environmental issues.

The inter-dependent institutional arrangements, legal frameworks, and practical operations present a distinct advantage in achieving the right to environment including better monitoring and implementation of the laws and policies across levels of government. County governments are, of course, part of the state and thus have the duty to respect, protect, promote and fulfil rights including that to a healthy environment.[19] The implication is that something listed as a 'power' of counties will be a duty if it becomes necessary to satisfy that right.

Climate change

Climate change is increasingly being recognised as a developmental and an environmental issue. The last decade has witnessed an increasing focus on the relationship between climate change and human rights.[20]

---

19 Article 20 and 21 of the Constitution.

20 M Singh, *State Responsibility, Climate Change and Human Rights under International Law* (Hart Publishing 2019) 1.

The government of Kenya has given prominence to climate change and has developed various policies, legislation and strategies to address this challenge and meet international obligations and commitments.

Kenya has ratified the Paris Agreement[21] and submitted its first Nationally Determined Contribution (NDC),[22] showing the global community how it plans to address climate change, and with what support. It has also developed the Climate Change Act, 2016 putting in place structures and framework for implementing the NDC, including establishing a coordinating body: the Climate Change Directorate. Perhaps the greatest milestone in the Act is the obligation on NEMA to integrate climate risk and vulnerability assessment into all forms of assessments to understand the human rights implication of climate change induced or exacerbated by development. The National Climate Change Response Strategy (NCCRS) provides a framework that guides the integration of climate change concerns into development, government planning and budgeting.[23] The National Climate Change Action Plan aims to operationalize the NCCRS by providing the necessary analysis and enabling mechanisms. The country has now prepared its second National Climate Change Action Plan (2018-2022), repeating the commitment to reduce greenhouse gas emissions by 30% (relative to business as usual) by 2030.[24]

These various structures and mechanisms are not yet fully operational.[25] Among other actions, regulations need to be put in place to fully give life to the Act. Further, the study concludes that there are a general lack of awareness and poor technical skills among key stakeholders on monitoring and reporting, which need to be further developed in order to meet the requirements of the enhanced transparency framework of the Paris Agreement that requires countries to regularly measure and report on their emissions, adaptation efforts and any support received for climate action.[26]

The government's enthusiasm for the use of recently discovered coal reserves, and for a coal-fired power station run counter to the objectives of reducing greenhouse emissions.

---

21 United Nations *Paris Agreement* (2015) available at https://tinyurl.com/Paristext.

22 Ministry of Environment and Natural Resources *Kenya's Intended Nationally Determined Contribution (INDC)* (2015).

23 Government of Kenya, *National Climate Change Response Strategy* 2010.

24 Ministry of Environment and Forestry *National Climate Change Action Plan* (2018-2022) https://tinyurl.com/NCCAP2015-22.

25 Climate and Development Knowledge Network 'Kenya's progress in monitoring, reporting and verifying its climate actions' (2018) available at https://tinyurl.com/KeClimate.

26 Fn 25.

Administrative and political problems

NEMA is still marred by weak monitoring and enforcement of environmental compliance. This has largely been attributed to inadequate technical capacities, inadequate monitoring infrastructure and inadequate trained staff in enforcement institutions.[27] The organizational capacity of NEMA continues to pose a big challenge to environmental compliance. Remedying these would definitely add a major bonus to the other aspects of compliance.

The challenges experienced in achieving the massive improvements in tree cover needed to re-establish the country's water towers, and in operationalising the Bus Rapid Transit system for Nairobi (a project that ought to have incorporated climate change considerations) are examples, of the very real problems. Continued high levels of air pollution (internal and external) including lack of systematic monitoring, as well as continued inadequacies of solid waste handling are other problems that exist. Policies and legislation may abound, but the gaps between these and realization are often considerable.

Environmental justice

Environmental justice has been defined as the fair treatment and meaningful involvement of all people with respect to development, implementation, and enforcement of environmental laws, regulations and policies.[28] Environmental justice should ensure that no groups of persons bear disproportionate environmental burdens and second, that all have an opportunity to participate democratically in decision-making processes.[29]

In the Kenyan context, laws and policies have imposed environmental burdens disproportionately and have particularly excluded indigenous peoples and local communities from involvement in governance and management of natural resources.

The key elements in the achievement of environmental justice are access to environmental information, public participation and access to justice, all with support in the Constitution. These components are independent and functionally interlinked. A considerable number of cases have overturned NEMA's decisions

---

27 Government of Kenya, *Environmental Policy* (2013) 46.

28 U.S. Environmental Justice Agency, 'What is Environmental Justice?' Available at http://www.epa.gov/environmentaljustice/.

29 K Muigua and F Kariuki 'Towards Environmental Justice in Kenya' 2 available at https://tinyurl.com/TowardsEnvJustice.

to grant an environmental impact assessment licence at least in part on lack of public participation. For example, the NET held that the EIA on the proposed Lamu coal-fired power station had not involved adequate public participation. The decision in that matter was based on the provisions of EMCA and not on the Constitution.[30]

Access to environmental information is vital and a prerequisite to effective and informed public participation in environmental decision making. Access to justice is equally important as it provides a mechanism where people affected or aggrieved by environmental decisions can seek administrative or judicial remedies.

The Kenyan courts and jurisprudence

There seems to be a marked dearth of cases in which the right to a clean and healthy environment was fully utilised and clearly interpreted. This may be ascribed to a variety of reasons including failure of litigating lawyers to raise Article 42 or a lack of judicial familiarity with environmental law. This section surveys some major cases since 2010 to show how environmental cases have been litigated and the opportunities that have resulted in either sound jurisprudence in the area of law or missed opportunities.

Friends of Lake Turkana Trust v Attorney-General[31]

The genesis of this petition was the alleged existence of a memorandum of understanding between the Governments of Kenya and Ethiopia, whose object was the purchase of 500 MW of electricity from the Gibe III Project and the establishment of a grid connection worth $800 million between the two countries. The claim was based on the premise that this project would result in the violation of community members' fundamental rights and freedoms laid down under sections 70(a) and 71(1) of the 1963 Constitution, as well as Articles 26, 27(1), 28, 35, 42 and 44 of the current Constitution. The petitioners sought orders sanctioning the full disclosure of the memorandum of understanding and the suspension of the implementation of this project without conducting an independent environmental impact assessment study.

---

30 *Save Lamu v National Environmental Management Authority (NEMA)* [2019] eKLR. See also the Ali *Baadi* case below.

31 [2014] eKLR.

The court said that a petitioner must show the link between the actions/activities of the respondent and potential environmental harm that are likely to arise. Although not expressly stated in the judgment, a critical analysis of the court's views suggests its affirmation of the existence of a *link between the right to a clean and healthy environment and the right to life*.[32] The court also stated:

> The right to public participation could only be exercised where the public has access to relevant information, and is facilitated in terms of reception of views. It is the view of this Court that access to environmental information is therefore a prerequisite to effective public participation in decision-making and to monitoring governmental and private sector activities on the environment.

Accordingly, the court ordered the respondents to supply the petitioner with information on the arrangements entered into by the Governments of Kenya and Ethiopia. The court also ordered the respondents to take the necessary steps required for the sustainable management and utilization of the Lake Turkana resource.

Mohamed Ali Baadi v the Hon. Attorney-General[33]

The bone of contention in this case was the constitutionality of the process of conceptualization and implementation of the Lamu Port-South Sudan-Ethiopia Transport Corridor (LAPSSET) Project. The court emphasized the need to conduct a Strategic Environmental Assessment (SEA) on public policies, plans and programmes and impacts of the project, as required in law. Omitting this rendered the entire project procedurally infirm and contrary to the precautionary principle. The court noted that access to information, public participation and access to justice are important in identifying and resolving environmental issues sustainably at local, national, regional and even the global level. According to the learned judges, the importance of public participation in the EIA process cannot be overstated. In fact, the court further noted, '…public participation in environmental issues and governance has risen to the level of a generally accepted rule of customary international law…'.

---

[32] Quoting the cases of *Guerra v Italy* (1998) 26 EHRR 357 and *Oneryildz v Turkey* (2005) 41 EHRR 20 (European Court of Human Rights), the judge agreed that "there is a positive obligation on the part of public authorities to supply information about the risks involved in close proximity to an environmentally sensitive use, particularly one which poses a risk to their right to life.

[33] Petition No. 22 of 2012.

The court pointed out that environmental information is a self-standing regulatory instrument that makes the public aware of environmental risks and enables them to participate in environmental governance and enforce their environmental rights. As such, information availed to the public must be full, accurate and up-to-date.

It was the court's opinion that the right to a clean and healthy environment encompasses a plethora of other social and economic rights in the Bill of Rights, which are of an environmental character such as the right to water, food and shelter, just to mention a few. The court further observed,

The definition [of the right to a clean and healthy environment] transcends mere ecological interests. It explicitly includes dimensions of the environment beyond the bio-physical aspects such as the inter-relationship between people, the natural environment the socio-economic and cultural aspects underpinning that inter-relationship.[34]

In the court's view there was a right of traditional fishermen to continue to fish that had the status of a fundamental right—building on Articles 26 (right to life), 28 (dignity), 40 (property), 43 (economic social and cultural rights) and 70 (environmental rights). The court ordered that an elaborate plan be drawn up to rectify these various flaws, and to ensure the development of a World Heritage Management Plan, and required reporting back to the court within six months.

Martin Osano Rabera v Municipal Council of Nakuru[35]

This is one of several cases about waste disposal sites and the right to a healthy environment before Environment and Land Courts. The court stated '…a clean and healthy environment is a fundamental prerequisite for life. It is for that reason that the drafters of the Constitution of Kenya, 2010 saw it fit to provide for the right to a clean and healthy environment at article 42 within the Bill of Rights…'. It added that the duty imposed on the state under Article 69 to protect the environment for the present and future generations calls on both the state and other persons, natural or legal, to cooperate in the endeavour to protect and conserve the environment. The court found that the petitioner's right to a clean and healthy environment was violated. It recognised a dilemma, and quoted from an earlier case: -

---

34 Paragraph 276.

35 [2018] eKLR.

> I am alive to the fact that garbage is generated on a daily basis. There is no other alternative site, and if this is closed, then there will be nowhere to dump waste. I would not want to make an already bad situation worse. I think it is the role of the courts, especially, the Environment and Land Court, to be a part of the solution and not part of the problem, in so far as tackling environmental challenges is concerned. Ordering the dumpsite to be closed forthwith will not be helping matters.[36]

Just like the earlier case cited, the court ordered the county government to apply to NEMA to operate the dump site.[37]

Benson Ambuti Adega v Kibos Sugar and Allied Industries Limited[38]

In another Environment and Land Court case, the court said,

> That whereas the court agrees with the 1st to 3rd Respondents, the 5th Respondent and the Interested Party's position that closure of the Respondents' factories would have far reaching effect on the owners, employees and agencies receiving taxes and other payments from their activities, the court must also consider … the public interest where they need protection against potential harm to the environment through pollution which is not only affecting those who are alive today, but has the potential to negatively degrade the environment for the future generations.

It ordered that certain sugar cane mills be closed, pending their applying for fresh licences from NEMA.

Kenya Power and Lighting Company v Njumbi Road Residents Association[39]

The appellant appealed against the NET's decision to cancel the EIA licence issued to them by NEMA. The court dismissed the appeal and adopted the precautionary principle as was applied by the NET in arriving at its decision. The appellant had failed to show how they intended to mitigate any negative health and environmental impacts of routine equipment maintenance activities in their power supply substation. The court further stated that it was the court's duty to strike a balance between the public interest in having the appellant perform its function of distributing electricity on the one hand, and the constitutional right of every person

---

36 In *African Centre for Rights and Governance (ACRAG) v Municipal Council of Naivasha* [2017] eKLR.

37 See the similar case of *Martin Wanyonyi C.E.O Centre for Human Rights Organization) v County Government of Bungoma* [2019] eKLR.

38 [2019] eKLR.

39 ELC Case No. 8 of 2016.

to a clean and healthy environment, on the other hand. Consequently, the appellant was directed to move the equipment to a different location for safekeeping in order to prevent further risks posed to nearby residents due to potential fire outbreaks.

KM v Attorney-General[40]

This concerned lead pollution and poisoning emanating from a battery recycling plant. While the plant had ceased to operate, the claim – which was brought on behalf of a neighbouring village – was mainly against public authorities such as the ministry, the county government, NEMA and the Export Processing Zone Authority. The ELC decision was made on the basis of various human rights provisions, including Article 42, statute, and treaties including the Basel Convention on dumping of hazardous waste. It included a declaration of a right to a clean and healthy environment, an award of 1.3 billion shillings compensation (about 14 million US$) for all those affected. This was apportioned between the respondents, including the defunct company, according to their fault, and an order of mandamus against the ministry, the county government, and NEMA was issued 'to develop and implement regulations adopted from best practices with regard to lead and lead alloys manufacturing plants'.

Conclusion

The inclusion of an environmental right in the Bill of Rights set the stage for the development of an array of policies, legislation, judicial pronouncements and most importantly of environmental principles. By elevating this right to a fundamental, justiciable right, Kenya has irreversibly embarked on a road that will lead towards attaining a protected environment through an integrated approach, which takes into consideration socio-economic concerns.

Kenya is grappling with highly contested interests such as economic development and striving towards environmental protection, both very important for the growth of the country. The judiciary therefore has a role to look at these interests and strike a balance thereby enhancing and developing more jurisprudence on the various environmental principles such as the principle of sustainable development, and jurisprudence on the environmental rights, something that is still lacking.

---

40 [2020] eKLR (Environment and Land Court, Mombasa).

That said, while the Constitution is good and it gives hope for the future with respect to the environment, Parliament, the legislative arm of government, a place where we should find refuge, also poses the biggest risk. This is mostly because the legislatures often serve political interest at the expense of national interest and this is seen in the attempts to changing certain environmental laws like the recent EMCA amendments to section 125, which now requires the Chairperson of the National Environmental Tribunal (NET) to be elected by members of the tribunal as opposed to appointment by the Judicial Service Commission, and section 129(4), which replaces an automatic stay of a project that is the subject of the appeal with a requirement that an appellant files a separate and additional application for a stay order.

Further, while the judiciary remains a fundamental institution where people can challenge these laws, you can never be sure how the ruling might go. This remains a risk factor.

Chapter 15

Friend or Foe: How has the government supported or frustrated freedom of expression in Kenya?[1]

Henry O. Maina

Introduction

Kenya has witnessed phenomenal growth in private sector media in the last 20 years. In 2020, the number of FM radio stations was 131 for commercial radio, 13 for public radio and 42 for community FM radio stations, and the number of digital free-to-air television channels was 122.[2] This growth can be attributed to liberalization of the broadcasting media sector, digital migration that happened in June 2016 and the political gains that saw the repeal of sedition laws in 1997 and the promulgation of the Constitution of Kenya, 2010.

Many commentators then suggested that the media landscape could only change for the better. This belief was reinforced by the promulgation of the Constitution with some of the strongest guarantees on freedom of expression, media freedom and access to information in sub-Saharan Africa.

This belief was premised on the idea that the 2010 Constitution was more of 'hard law' than its predecessors, which were easily amended at the whims of political expediency. The Bill of Rights has, in fact, been protected, in the sense that no amendments can be effected without a popular referendum with a high approval threshold.

---

1 An earlier version of this paper *'*'Constituticide": Enacting Media Laws That May Undo Constitutional Gains in Kenya?*'*was published as a chapter in Schmidt, C (ed) *Kenya's Media Landscape: A Success Story with Serious Structural Challenges* (Edition International Media Studies IMS, 2014).

2 'Broadcasting Services Report 2nd Quarter FY 2020/2021 (October – December 2020)' https://tinyurl.com/Broadcasting2Q20-21 p. 6

The Constitution, however, cannot provide for the level of detail needed to cater for Kenya's unique country circumstances. As such, national legal frameworks are necessary to help elaborate and operationalise specific constitutional provisions. The Fifth Schedule to the Constitution outlines a five-year (2010-2015) timetable for implementing specific aspects of the document. According to the schedule, the laws touching on freedom of expression and freedom of the media were to be passed before the end of the third year of implementation. Consequently, the Kenya Information and Communication (Amendment) Act, 2013 and the Media Council Act, 2013 were enacted.

August 27th 2020 marked ten years since the adoption of the constitution. Unlike the implementation of the first (1963) and the second (1969) constitutions, the past decade witnessed some significant constitutional developments that indicate a solemn attempt to come to grips with the new dispensation. They also reveal the lingering struggle to mark a distinction from the exceedingly disputatious and conflict-ridden period between independence and the early 1990s.

The implementation of the 2010 Constitution is, however, like the preceding two, hampered by deep-seated interests that grasp every opportunity to undermine it. These interests seek to retain the *status quo*, to reverse any gains or to manipulate the content, direction and pace of the implementation and attendant reforms.

This paper highlights three critical legal points. First is the unrelenting vehemence with which some seek to keep most of the archaic laws that criminalize freedom of expression, such as criminal defamation, insult laws, publication of false news and official secrets law more than half a century after independence. Second is the continued fervour, which rides roughshod over media stakeholders' views, to enact laws that offer the executive more legal power to regulate the media, as manifested in the enactment of the Computer Misuse and Cybercrime Act, 2018; the Security Laws Amendment Act, 2014; the Parliamentary Powers and Privileges Act 2017; the Contempt of Court Act; Media Council Act and the Kenya Information and Communication (Amendment) Act both of 2013. Thirdly I note the reluctance to pass regulations necessary to fully operationalize the Access to Information Act, 2016, and the continued international charade—that the state is keen on enhancing openness and transparency whilst continuing to put unnecessary legal impediments in the way of media freedom thus keeping the big wheel rolling in reverse as opposed to forward.

The Enactment of Media Laws after Promulgation of the 2010 Constitution

The passing of the Constitution in 2010 provided a new and comprehensive legal framework that guarantees freedom of expression (Article 33), freedom of the media (Article 34) and access to information (Article 35). It could be argued that these provisions firmly buttress freedom of expression and support the democratic nature of the new state that Kenya sought to become.

In specific terms, the Constitution provides:

(1) Freedom and independence of electronic, print and all other types of media is guaranteed (Article 34)

(2) but does not extend to any protection to propaganda for war, or incitement to violence, hatred and discrimination (Article 33 with 34); and,

(3) The state may not (a) 'exercise control over or interfere with any person engaged in broadcasting, the production or circulation of any publication or the dissemination of information by any medium'; or (b) 'penalise any person for any opinion or view or the content of any broadcast, publication or dissemination' (Article 34(2)) .

(4) Broadcasting and other electronic media have freedom of establishment […] (Article 34(3).

Parliament enacted the Kenya Information and Communications (Amendment) Act [KICA] 2013, and the Media Council Act, 2013, claiming that they were meant to entrench freedom of expression as well as guarantee access to information. However, it is clear that these laws did not expand but limited freedom of expression and media freedom.

KICA establishes the Communications Authority of Kenya and creates a Communication and Multimedia Appeals Tribunal. The Communications Authority (CA) of Kenya is comprised of a chairperson appointed by the President, three principal secretaries working in the ministries of Finance, Information, Communications and Technology (ICT), and Internal Security, and seven other persons appointed by the Cabinet Secretary (Minister) in charge of ICT. The Tribunal has the power to impose hefty fines on media houses and journalists, recommend de-registration of journalists and impose any other sanction it considers necessary. Tribunal members are appointed through a process that seems intended to produce an independent body, but that independence is weakened because the Cabinet Secretary makes the final choice of each member (except the Chair) out of a short list of three (KICA section 102).

The Media Council Act 2013 repealed the 2007 Media Act and established a differently constituted Media Council of Kenya (MCK). Unlike its predecessor which was just a statutory body, the new MCK is required by the Constitution of Kenya, 2010 Article 34 (5) to be created, and is required, among other things, to set media standards, and regulate and monitor compliance with those standards. Under the Act the composition of the board is for the first time expected to reflect diverse interests of society and be independent of government control or of influence of political and commercial interests. The previous board comprised government and media organisations nominees. The law also establishes the Media Complaints Commission designed to be a dispute resolution forum for complaints by media consumers and subjects against media practitioners and media houses.

While there are a number of serious concerns about the legislation, the laws do offer limited gains. The role of the government is now limited to merely formalizing appointments to the Media Council, as opposed to previous provisions that gave the executive the ultimate decision in selecting members of the Council.

The two laws are, however, problematic as they allow the state to control broadcast media regulation by creating executive discretion over appointments to the Board of the Communications Authority, which regulates the broadcast and telecommunications sector. They also create punitive penalties for media outlets and journalists contrary to recognized regional and international standards. This is particularly so for KICA, which includes fines of up to US $200,000 (KShs 20 million) for media outlets and close to US $5,000 for individual journalists to be imposed by the Tribunal for violations of the Act

Further, the KICA undermines the independence and legitimacy of the Media Council. It gives the Multimedia and Communications Tribunal jurisdiction to hear appeals from the Media Council without clarifying whether such appeals may be on matters of law as opposed to facts. However, it is possible to appeal against decisions of the Tribunal to the High Court.

The Code of Conduct for Journalists, as under the previous Act, is statutory, not just a matter for professional decision, as it is in many countries. Although the Cabinet Secretary may alter the Code, this is only when asked by the Media Council. However, in theory Parliament itself could change the Code.

The courts have however been strong as they have declared a number of sections unconstitutional. For instance, the High Court found section 29 of Kenya Information and Communication Act that criminalised misuse of licensed

telecommunications system to be unconstitutional as it was overbroad.[3] Other sections of the two laws may be challenged in future.

These are not the only laws affecting the media. In *Coalition for Reform and Democracy (CORD) v Republic of Kenya* five judges of the High Court declared eight sections of the Security Laws (Amendment) Act unconstitutional, two of them for violation of the freedom of expression.[4]

There is a general danger that the scenarios that characterized the earlier periods in Kenya with regard to freedom of expression may be replicated with different tactics but the same desired outcomes. The following gives some examples of just such problematic scenarios which are resurfacing in the current constitutional dispensation.

Past laws and practices inimical to media freedom that are resurfacing

Continuation of restrictive colonial media laws and policies

Under the guise of managing public order, public safety and national security and breathing life into internationally acceptable limitations to freedom of expression, the independent government retained the archaic 1905 Books and Newspapers Act without any changes. In 2002, this law was amended to require newspaper publishers to register with the government and to post a libel insurance bond of one million shillings (about US$10,000), with sureties if required. The publishers had also to submit two copies of every publication to the Registrar of Books and Newspapers (held by the Registrar General in the State Law Office). These legal requirements saw many community-owned newspapers and magazines close as they were unable to afford the bond, or when they submitted two copies there was no proper acknowledgment of receipt.

It also seemed to indicate to the judiciary that the award of damages above 1 million shillings was acceptable. As a result, most media houses suffered heavy financial losses as a result of defamation suits.

The 1930 Penal Code still criminalizes ‘obscenity’ without defining it, but it was decided in the case of *Geoffrey Andare* that the same word (and certain other words) used in KICA section 29 were too vague and therefore the section is unconstitutional. There is a risk that someone can be convicted on the basis of the prejudices of a very limited number of people.

---

3 *Geoffrey Andare v Attorney General* [2016] eKLR.

4 [2015 eKLR].

A few years ago, a morning radio programme on Classic FM that discusses marital issues was subjected to undue attacks by the authorities under the pretext of enforcing legal provisions on public morality which outlaw publication and broadcasting of obscene materials.

Fortunately, courts have held that it was unconstitutional to retain the offence of defamation (*Jacqueline Okuta v Attorney General* [2017]), and the offence of doing or publishing anything to undermine the authority of a public officer (*Robert Alai v The Attorney General* [2017]). And sedition, an offence for which many political activists were jailed, was abolished in 1997.

Risks remain. The recent Prevention of Terrorism Act criminalizes independent investigative work around the security sector. Section 19 penalises disclosing information that may prejudice an investigation even if the person does not know there is any investigation, if they had 'reasonable cause to believe it'.

Government Denial of the Media's Constitutional Freedom

Although the clamour for independence was peppered with calls for enhanced freedom of expression in general and media freedom in particular for the majority, media freedom has not been a given in Kenya since independence.

The 1963 Independence Constitution of Kenya broadly guaranteed freedom of expression for the individual and not specifically freedom of the media.

Thus, the media did not enjoy specific constitutional protection. Further, the constitutional guarantee of freedom of expression remained subject to many limitations and grounds for derogation. Basically, there was no substantial right protected.[5]

Instead of protecting media freedom, the constitutions of 1963 and 1969 gave power to the government to legally entrench exemptions from the protection of those rights. It was against this background that the government limited freedom of expression especially if the freedom was deemed inimical to the political survival of the regime.[6] This was justified in the name of nation-building and the responsibility of the Kenyan press to African values.

The media during the Kenyatta, and large portions of the Moi era, between 1963 and 1989 tended to restrict themselves to supporting of the status quo, as any

[5] See Constitution of Kenya, 1963, Section 79 (2).

[6] Peter Wanyande, 'Mass Media-State Relations in Post-Colonial Kenya' in: *Africa Media Review*, Vol. 9, No 3. (1995): available at https://tinyurl.com/WanyandeMassMedia accessed May 21 2021.

attempt to be critical would be met with harsh sanctions. The situation worsened between the years 1989-1992 as there was a new outcry for constitutional reforms. A number of the champions of multiparty politics – John Khaminwa, Raila Odinga, Mohammed Ibrahim, Gitobu Imanyara, Kenneth Matiba and Charles Rubia among others – were detained and jailed under the sedition law. Then then executive through its majority in the National Assembly quickly enacted more laws limiting media freedom.[7]

The Official Secrets Act of 1968 provides that official public information is secret unless a government agency has specific authorization to disclose it, and it imposes severe penalties for breach. Activities defined very broadly and vaguely are still crimes, some of them threatening freedom of expression. In fact, there have been recent moves to add to the Act provisions requiring anyone who controls equipment (including a computer) that sends data to or receives data from another country to disclose the original and related documents—without any requirements of a court order or warrant. There is considerable scope for interference with privacy and free expression.

This Act is now to 'apply subject to Article 35 of the Constitution and the law relating to access to information'. But in reality this will make little difference. The law needs rethinking to ensure that it complies with the right to information and the duty to disclose proactively.

The 1960 Preservation of Public Security Act is designed to come into effect if there is a state of emergency. It allows emergency regulations to include 'the censorship, control or prohibition of the communication of any information, or of any means of communicating or of recording ideas or information, including any publication or document, and the prevention of the dissemination of false reports. Similarly, the Public Order Act, the Chiefs' Act and the Armed Forces (Out of Bounds Areas) Act were also used to unduly limit freedom of expression.

Ironically, the independence government retained most of the laws that denied the wider population these freedoms, and passed many others unduly limiting freedom of expression and circumscribing media operations.

Kenya ratified the International Covenant on Civil and Political Rights in 1972, and the African Charter on Human and Peoples' Rights in 1992, both of which protect freedom of expression. However, the latter says, 'Every individual shall have the right to express and disseminate his opinions within the law' (Article 9.2). This is very weak because it limits the right to what the law allows. The

[7] Wanyande.

Constitution of Kenya is much stronger because limitations on rights by law must satisfy the requirements of Article 24.[8]

Tom Mboya, one of the most prominent independence leaders in Kenya, set the tone for what was to be the relationship between the press and the government. He said:

> Does this press in Africa recognize that in our special circumstances it has a duty to Africa and in fact we expect it to make constructive contribution toward our general efforts? Can the press in Africa afford to behave and write as though it were operating in London, Paris or New York where the problems and anxieties are entirely different from those current in Africa.[9]

Any of the older statutory provisions that are still law would now be subject to the Constitution. Article 232 (1) (f) and Sixth Schedule Section 7, requires that all laws in force must be construed with alterations, adaptions and qualifications necessary to bring them into conformity with the constitution. The laws could be challenged in court, as we saw was done for section 29 of the Prevention of Terrorism Act, 2013.

One old criminal offence under English law that was exported to many colonies was that of purveying 'false news'. In Canadian law it penalised anyone who 'wilfully and knowingly publishes any false news or tale whereby injury or mischief is or is likely to be occasioned to any public interest'. This was declared unconstitutional by the Canadian Supreme Court in 1992 and had been abolished many years before in England. But it has had a rebirth in Kenya. In the Computer Misuse and Cybercrime Act, 2018 there are offences of publishing false information with serious penalties. Yet some of these offences can be committed by a person who had no intention to cause any harm. Ironically these offences have been created around the time when the Kenyan courts were declaring that the criminal offence of defamation was unconstitutional as 'not reasonably justifiable in a democratic society' (see above).

Unfortunately the High Court held that the new offences of false information were not objectionable.[10] The case is now before the Court of Appeal.

---

8 See p. 172 in this book.

9 See Mboya,Tom (2003): 'This is what the press must do', quoted in David Makali, (Ed*.)*, *Media Law and Practice: The Kenyan Jurisprudence* (Phoenix Publishers, Nairobi, 2003) p 72.

10 *Bloggers Association of Kenya (BAKE) v Attorney General & 3 others; Article 19 East Africa & another (Interested Parties)* [2020] eKLR

S. 23 of that Act, which the High Court held was unobjectionable says (left hand in the box below):

23 A person who knowingly publishes information that is false in print, broadcast, data or over a computer system, that is calculated [calculated does not mean intended but likely to] or results in panic, chaos, or violence among citizens of the Republic, or which is likely to discredit the reputation of a person commits an offence…	66 Any person who publishes any false statement, rumour or report which is likely to cause fear and alarm to the public or to disturb the public peace is guilty of a misdemeanour.

The decision is inconsistent with the earlier cases holding an offence of defamation unconstitutional, as just commented. And it is also inconsistent with a later (2021) case in which the High Court held s. 66 of the Penal Code unconstitutional (see the right hand text in the box above).[11]

The judge in the recent case said,

> What amounts to fear and alarm to the public or what is likely to disturb public peace is undefined and it is therefore difficult for an individual to freely express oneself without the risk of committing the offence created by the impugned law. It is therefore my finding and determination that …. it unjustifiably suppresses freedom of expression, denies citizens the right to receive and impart information. It is a law that has no place in a just and democratic society.

Hopefully the Court of Appeal will produce some clear ruling on this case.

The NGO Article 19 has said of this Act that it (Article 19) 'continues to document instances where free expression online is stifled using these broad provisions, in relation to the ongoing corona virus pandemic. This happens to Internet users generally, and has specifically affected bloggers, citizen journalists, activists, whistleblowers and politicians.'[12]

Further, in the first year of the second Kenyatta's first government, the media was also put under intense pressure to self-censor, especially during the Westgate terrorist attack and its aftermath. The terrorist attack on the upmarket shopping mall on 21 September 2013 left 67 people dead and over 200 wounded but it was the confusion and uncoordinated efforts by security agencies for over three

---

[11] *Cyprian Andama v Director of Public Prosecutions & 2 others; Article 19 East Africa (Interested Party)* [2021] eKLR

[12] https://www.article19.org/resources/kenya-court-of-appeals-ruling/.

days and subsequent looting of shops, allegedly by security agents, that saw the government seek to censor media from continued coverage of the attack.[13]

The enactment of the Media Council Act and of the KICA laws may also be thought to have been as a result of the perceived media refusal to 'toe the line' in the coverage of the then ongoing trials of both President Kenyatta and his Deputy Ruto for crimes against humanity before the International Criminal Court.

During the COVID-19 pandemic attacks on journalists and use of these new laws have increased. Violence against journalists has doubled Article 19 says, including from the police.[14]

Government Raids on Media Houses

There is a long history of government raiding media establishments, particularly during the Moi regime. In 1993 state security agents raided the premises of a printing firm, Fotoform Limited, the printer of a number of magazines that did not enjoy government approval. The High Court refused to grant compensation.[15] The same year police raided the office of *Finance* magazine, smashed the computers and stabbed Information Technology manager David Njau. In May 1993, police raided the offices of *Jitegemea*, a monthly publication by the Presbyterian Church of East Africa, and seized 6,000 copies of it.

This did not end with the departure of Moi. In the early hours of 2 March 2006, about 30 heavily armed and hooded police officers believed to be from an elite squad, ostensibly formed a year earlier to fight armed and dangerous criminals, raided the Standard Group's offices. They broke doors, and forcibly took employees' cell phones, yanking away CCTV cameras and carting away 20 computers. They later disabled KTN TV, keeping the channel off air for about 13 hours.

The then minister for Internal Security, John Michuki, later justified the raid in an interview on a national television station[16] and claimed the Standard Group was planning to publish articles that could have instigated ethnic animosity and

---

13 Peter Greste, *Kenya's Shambolic Response to Westgate Siege*. In: Al Jazeera (2013). Available at: https://tinyurl.com/Westgatesiege.

14 See Article 19 'Kenya: Journalists attacked and silenced during COVID-19 pandemic' https://www.article19.org/resources/kenya-journalists-attacked/.

15 High Court of Kenya, Miscellaneous Civil Application No 418 of 1993.

16 Fred Oluoch, *Attack on Standard Group shakes media*. *Daily Nation* November 24 2013 Available at: https://tinyurl.com/Michuki.

compromised national security. He cited Section 88 of the Kenya Information and Communications Act.

The same section 88 was invoked when the same Minister of Internal Security banned live coverage in 2007 after the disputed presidential elections. Section 88 of KICA was repealed in 2009 after concerted efforts from media freedom advocates.[17]

Since the new Constitution such assaults on freedom of expression have been rarer, but in 2018 some TV stations were taken off air by the Communications Authority because they were covering the 'swearing-in' of Raila Odinga as 'People's President'.[18] This action of the regulator shows the weakness, in terms of freedom of expression, of the regulatory system under Kenyan law.

The Judiciary's Subservience to the Executive

The judiciary, for its part, repeatedly failed in the past to provide protection against excessive hostility towards media practitioners on the part of the state.

To take just one example, the High Court ruling in the *Financial Review* case endorsed the view that a commercial transaction is a legitimate basis for justifying a surrender of constitutional rights. In October 1987, the magazine carried a story lamenting the rising cost and failing standards of education in schools. It also condemned the 1988 queue and vote elections[19] and malpractices in government. The magazine was ultimately banned in 1989. The *Financial Review* predicament illustrates how the government used existing laws with the assistance of a subservient judiciary to stifle freedom of expression.

Since 2010 it must be admitted that the courts have been much firmer in upholding independence of the Judiciary, as some of the cases mentioned here show.

But if court orders are ignored, the situation may be little improved. Interim court orders over the TV shut-down seem to have been ignored, at least initially.

---

17 See among others Peter Oriare, Rosemary Okelle-Orlale & Wilson Ugangu, *The Media We Want: The Kenya Media Vulnerabilities Study* (Friedrich Ebert Stiftung, 2010) p 26, available at: http://library.fes.de/pdf-files/bueros/kenia/07887.pdf, and Rebecca Wanjiku, 'Kenya Communications Amendment Act (2009) progressive or retrogressive?' (Association for Progressive Communications, 2009) at: https://www.apc.org/en/system/files/CICEWAKenya20090908_EN.pdf.

18 See Article 19: https://tinyurl.com/OdingaSwearing.

19 A system under which voters stood in line reflecting their choice of candidates thus completely negating the secret ballot.

While a desire to prevent expressions that denigrate other communities and may stir up ethnic hatred is commendable, and the Constitution does not give hate speech a protected status, it is all too easy for comments that someone does not like to be used to harass – or worse incriminate – political enemies. There have been some signs of this in Kenya in the last few years.

Reluctance to enact regulations to operationalise the Access to Information Act

On World Press Freedom Day in 2013, the President promised that the Access to Information law would be passed immediately and that his government was keen on enhancing transparency and accountability. In his address to the media fraternity a year later, instead of highlighting his legislative agenda to enhance media freedom, he criticized journalists for not getting their facts right.[20] A comprehensive access to information law was at last passed in 2016, having been introduced as a private member's Bill. Five years later the necessary regulations to make sure that we have a near seamless implementation have not been passed, though the Act is in operation. Regulations are however, in the pipeline, being developed by a Task Force set up by the Commission on Administrative Justice. Meanwhile, there is great scope for the Act to be used, regulations or no regulations. In fact it has been used a good deal, though disappointingly little by the media.

The media are not blameless

However, we cannot wholly blame freedom of expression issues and lack of access to information on government actions. The media, too, must take part of the blame.

Despite the oppressive laws and restrictive nature of the earlier constitution, the independent media was able to push the limits. The mainstream media however was cowed and largely became the government's mouthpiece – meaning that any gains in press freedom were to a large extent due to the private media. Unfortunately, the situation has hardly changed today and there are no independent media that exclusively serve the public interest as before. Freedom of the media has also been sacrificed for economic interests and survival of media enterprises.

---

[20] Muchemi Wachira, 'President Kenyatta takes on journalists over errors in stories', *Daily Nation,* 2 May 2014 https://tinyurl.com/Journalistserrors.

The media are excessively dependent on government advertising revenue, and government has worsened the situation by paying them very much in arrears. The Government Advertising Agency has largely been deployed as a soft-censorship tool for state agencies.

Media cross-ownership

Another factor that limits the range of media available to the Kenyan audience, and the ability of the media to report freely is cross-ownership. There are three aspects to this: media companies that own more than one type of outlet, media companies with non-media interests, and politicians with media interests. Moves to tackle these issues to some extent in the constitution making process did not bear fruit.

Though Kenya does have some anti-monopoly law in the form of the Competition Act, there is no evidence that the Competition Authority of Kenya under the Act has ever considered, or been invited to consider, issues of media ownership and control.

Examples of concentration of power include the role of the commercial empire of the Aga Khan who owns several print media and television stations, hospitals, as well as hotels and is also spiritual head of a significant commercial community in Kenya. The Standard Group is believed to be at least indirectly and partially controlled by the family of the late former President Daniel Toroitich arap Moi. It also has two television stations and a newspaper, as well as other interests. Various other politicians have interests in FM radio stations.[21]

In terms of political context, this is a government that is not pro-reform. Deputy President William Ruto was against passing the constitution and President Kenyatta was ambivalent. It is also notable that even before he became President, Kenyatta had filed several cases with the Media Council of Kenya against the media, ostensibly for writing unfavourable stories and opinion pieces against him.[22] Thus, the enactment of the KICA and Media Council Act, 2013, did not

---

[21] See Othieno Nyanjom, *Factually true, legally untrue: Political Media Ownership in Kenya* (Internews, 2012) esp. Table on p 46, available at https://tinyurl.com/mediaownership. And see also Kipkirui Kemboi Kap Telwa and Dr Barnabas Githiora, *Effects of media ownership, commercialization and commoditisation on editorial independence* available at https://tinyurl.com/commoditisationation.

[22] The Complaints Commission of the Media Council of Kenya found the *Star* Newspaper to have breached the code of conduct for publishing an offending opinion piece. See https://tinyurl.com/endvibrantmedia.

come out of the blue. We have also witnessed a number of recent incidents where editors were summoned to State House, something that was common in Moi's time. Two cases illustrate this emerging trend. First, the President in the early days of his tenure had a breakfast session with most senior journalists and editors in the country where he pledged that his government will be open, accessible and pro-media.[23] In the second incident, the President summoned *Standard* newspaper editors and managers over an investigative story on how the 2013 elections were botched. A watered-down version of the story was aired after the meeting. In addition, the *Standard* editors for the first time in many years ran an apology on the first page of the newspaper. And media houses have had editors fired at the behest of senior politicians and members of the executive branch of government.

Conclusion

Given the reluctance to enact progressive media laws, there is a real danger that the restructuring of the core institutions of government, reinforcement of the separation and balance of power, and protection and promotion of rights envisaged in the Constitution will be undermined. By not adhering to the correct meaning of the Constitution, the emerging constitutional practice – legislative, policy, institutional and administrative practices – may distort the letter and kill the spirit of constitutionalism. It is this frustration of the reforms with the intention to keep the status quo or reverse them totally that I call Constituticide. Its reverse is what most other constitutional law scholars have called constitutionalism.

Legal frameworks constitute the formal expression of a state's intentions and have a legally binding and long-lasting nature. That is why it is important to keep assessing them.

Without deliberate and concerted efforts by media freedom enthusiasts, the media landscape in Kenya may not remain as promising—indeed is already seeming less promising than we believed in 2010. What is worrying is that the attitude of the current government has a lot of similarities with previous regimes in as far as freedom of expression is concerned.

While it is generally accepted that freedom of expression has limitations, it is unacceptable for a government, commercial entities and powerful individuals, to manipulate any exception to curtail this freedom and set their own agenda as to

[23] The Standard Digital website (12 July 2013): President Uhuru hosts a breakfast for editors, https://tinyurl.com/mediabreakfast

what is acceptable and what is not. If Carl Bernstein and Bob Woodward had not investigated the Watergate scandal, Richard Nixon would have got away with wire-tapping and spying on the Democratic Party officials. Investigative journalism is key to accountability in governance, and threats to investigative journalists are a threat to the well-being of any political system. Kenya is no exception.

As a country that is still in transition to democratic rule, Kenya must endeavour to support freedom of expression, not when it suits the agenda of the government, but at all times. In a country where access to information is primarily provided by the media, especially radio, television and newspaper, the government must respect the constitutional provision for access to information which is dependent on freedom of expression. We have already seen a tendency to crack down on social media – a major source of information, and of course often disinformation – for the people. Civil society and other stakeholders must remain vigilant and ensure that the government is checked in case of excesses. The Constitution offers a framework for regulating expression—through Article 24 and Article 34. It must be applied in the thoughtful and balanced way it envisages. If not, Kenya may well lose any little progress that it has made since independence.

Chapter 16

The Politicisation of Land Law Reforms in Kenya in the Post-2010 era

Francis Kariuki and Smith Ouma

Introduction

Land law reform has been elusive throughout Kenya's history. In the colonial era, the reforms aimed at addressing problems occasioned by the imposition of British property relations and a cash crop economy. The reforms undertaken did not seek to resolve native land rights issues as such.[1] Upon the attainment of independence, the land reform process was framed in a manner that was essentially a continuation of the colonial land policies and which promoted a cash crop economy led by the remaining settlers and new African political elites.[2] Lack of political goodwill to reform and of fidelity to the law if reformed has meant that the numerous efforts to reform land laws have not addressed the problems of poor land governance and administration, landlessness, dispossessions, inequitable land distribution, land grabbing, and land degradation amongst others. Often these problems have transformed the land question into an overly emotive and sensitive issue in the Kenyan political process. For instance, it is reported that land was one of the main factors that contributed to the 2007/8 political violence. Consequently, during the National Dialogue and Reconciliation process, and in the Waki Commission Report,[3] land reforms were cited as one of the long-standing issues that needed to be addressed. Land reforms were therefore critical and the issue had already been raised in the previous attempts to draft a new constitution for Kenya. It is in this

---

1 See R J M Swynnerton, *A Plan to Intensify the Development of African Agriculture in Kenya,* 1955.

2 Paragraph 9, *National Land Policy* (2009).

3 *Report of Commission of Inquiry into Post-Election Violence*, 2008, 30 – 33, available at https://tinyurl.com/KenyaLawWaki.

regard that land and environmental matters were enshrined in the Constitution adopted in 2010.[4]

What is clear is that the land law reform discourse in Kenya has largely been shaped and informed by the politics of the day.[5] According to Okoth-Ogendo, political objections by individuals with vested interests in the status quo pose a huge threat to the implementation of land reforms.[6] Negative political influence means that the enactment even of excellent laws and policies it is likely to be an exercise in futility. All these challenges have resulted in what has predominantly been referred to as the land question which has manifested itself in various forms. Particular attention in this chapter is paid to the political manifestations of these questions.

An impetus for change

Problems in the land sector in Kenya have spiralled out of control in the recent years necessitating reforms.

The pre-2010 land law reform initiatives

The land reform conundrum in Kenya has been severely impacted by its colonial legacy. British property laws were imported and imposed without taking into account the social and cultural dynamics of African landholding. One of the effects was the existence of multiple land laws and breakdown of land institutions as they could not effectively deliver on their mandates due to confusion on how the principles guiding them were to be applied.[7] The functionality of these institutions was obscured in a shadow of mystery as they could not live up to their statutory mandates. Some of them were used by politicians to achieve their selfish ends, negatively affecting land administration and governance.[8] It is not surprising that land reforms around the time of Kenya's independence were designed to

---

4 See Kenya National Dialogue and Reconciliation, 'Agenda 4 Implementation Framework,' 2008, available online at https://www.peaceagreements.org/viewmasterdocument/688.

5 See Ambreena Manji, 'The Politics of Land Reform in Kenya 2012' (2014) 57 *African Studies Review* 115-130.

6 H W O Okoth-Ogendo, 'The Last Colonial Question: An Essay in the Pathology of Land Administration Systems in Africa' A Keynote presentation at a Workshop on Norwegian Land Tools Relevant to Africa, Oslo, Norway, 3-4 May 2007, available at https://tinyurl.com/LastColonialQ.

7 H. W O. Okoth-Ogendo, 'The Politics of Constitutional Change in Kenya since Independence, 1963-69' (1972) 71 *African Affairs*, pp 9-34.

8 Kwame Owino, 'Reassessing Kenya's Land Reform' (2000) 40 *Bulletin of the Institute of Economic Affairs* 7.

reaffirm the dominant settler hegemony and to satisfy the new elite while doing little to ensure redistribution to the majority who had been victims of colonial expropriation.

Writing on constitutionalism in Africa, Okoth-Ogendo makes the following observation:

> …the colonial powers imposed upon the new African regimes constitutions which were inherently fragile and which depended for their stability largely upon the maintenance of good public relations in politics -- the one thing which most ruling elites were not prepared to guarantee.[9]

This eventually resulted in the breakdown of the constitutions and constitutionalism in the new African states, and is also true in relation to the land regime in Kenya. The new land management models and land laws did not reflect the realities that existed in the country. Moreover, politicians were hell-bent on ensuring that any reforms proposed were not successful so that they could benefit from the resultant breakdown of land institutions.[10]

Numerous efforts towards land law reforms followed, including the establishment of commissions of inquiry to deal with specific aspects of the land problems. For instance, in 1999, President Moi appointed a Commission of Inquiry into the Land Law System of Kenya (Njonjo Commission). The commission undertook among other things to analyse the legal and institutional framework of land tenure and recommend reforms.[11] It recommended the formulation of a National Land Policy to guide the establishment of a land institutional framework. Since the commission completed its work in 2002, just before the general elections, its recommendations were not immediately implemented by the National Rainbow Coalition (NARC) government. Further, the implementation of the commission's recommendations was hindered by the fact that its report was not made public and by frustration by those keen on maintaining the status quo.[12]

In 2003, the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land (Ndung'u Commission) was appointed.[13] It was required to

---

9 Okoth-Ogendo, fn 7 'at p. 10.

10 See Duncan Okowa, 'Land Reforms in Kenya: Achievements and the Missing Link' available at https://tinyurl.com/LamdMissingLink.

11 Report (2002) p 4.

12 See Africog, 'A Study of Commissions of Inquiries in Kenya' Africog Reports, 2007, https://www.africog.org/reports/Commissionsofinquirypaper.pdf.

13 See *Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land* (Government Printer 2004) https://tinyurl.com/NdunguReport.

document public land that had been illegally/irregularly allocated and to identify those culpable for these allocations. It identified many substantive and procedural abuses committed by government officials (including former Commissioners of Land in conjunction with local politicians) in allocating public land,[14] and listed the large tracts of public land which had been grabbed by various individuals and companies.

Although these commission reports were instrumental in highlighting land issues requiring special attention, and proffered several recommendations, those recommendations have encountered implementation hurdles with dire consequences.[15] It is likely that failure to implement the recommendations of the two commissions contributed to the violence that erupted after the 2007 general elections. This violence occurred at the hands of some communities who attacked non-locals and evicted them from their land,[16] and is a depiction of the interplay between national politics and land-related violence, and proof that land has always been the fulcrum of major political events in Kenya.[17]

Consequently, land-related issues occupied a central place in the ensuing mediation, led by Kofi Annan, to resolve the political impasse. The Kenya National Dialogue and Reconciliation process identified historical land injustices as an Agenda 4 ('Long term measures and solutions') item of the National Accord signed in 2008, and land was identified as a source of economic, social, political and environmental problems. The constitutional and land law review processes were proposed to address the challenges bedevilling the land sector.[18]

Immediately after the formation of the coalition government in 2008, the National Land Policy (NLP) was adopted to guide the quest for the enactment of new land laws and institutional frameworks.[19] This was significant, because before 2009, Kenya did not have a single land policy, a factor that contributed to

---

14 Ndung'u Report pp 7-15.

15 Nicholas Odoyo, 'A Political Economy of Land Reform in Kenya: The Limits and Possibilities of Resolving Persistent Ethnic Conflicts' in Kimani Njogu *et al, Ethnic Diversity in Eastern Africa: Opportunities and Challenges* (African Books Collective, 2010) pp 201 - 219.

16 See Daniel Forti and Grace Maina, 'The Danger of Marginalisation: An Analysis of Kenyan Youth and their Integration into political, socio-economic life' in Grace Maina ed., *Africa Dialogue Monograph Series No. 1/2012 Opportunity or Threat: The Engagement of Youth in African Societies*, pp. 55-85 available at https://www.accord.org.za/publication/opportunity-or-threat/ accessed 27 December 2019.

17 Karuti Kanyinga 'The legacy of the white highlands: Land rights, ethnicity and the post-2007 election violence in Kenya' (2009) 27 *Journal of Contemporary African Studies*, pp 325-344.

18 See 'Agenda 4 Implementation Framework,' fn 4.

19 *Sessional Paper N. 3 of 2009* available at https://tinyurl.com/NLP2009.

the incessant land problems.[20] The adoption of the policy cannot be delinked from the political processes at the time. Its adoption was part of the momentum that was building in the land reform arena and in the build up to the promulgation of a new constitution which would have elaborate provisions on land.

The policy was meant to guide the manner in which land is allocated, distributed, utilised and managed to cure the land problems bedevilling the country.[21] It was to guide the country towards an efficient, sustainable and equitable use of land for prosperity and posterity.[22] It also required the land administration and management system to be reformed in order to provide: all citizens with the opportunity to access, beneficially occupy and use land; economically viable, socially equitable and environmentally sustainable allocation and use of land; efficient, effective and economical operation of land markets; efficient and effective utilisation of land and land-based resources; and efficient and transparent land dispute resolution mechanisms.[23] One key recommendation of the policy was a National Land Commission (NLC) to be tasked with the management of public land. Most of the recommendations in the NLP were subsequently reflected in the 2010 Constitution. Indeed, earlier drafts of the Constitution had included similar provisions, based on earlier drafts of the NLP, originally by the Kenya Land Alliance.

Following the 2007/2008 violence, the Truth, Justice and Reconciliation Commission (TJRC) was established in 2013 as part of the accountability component of Agenda 4. It was hoped that by addressing the root causes and effects of historical injustices (including those related to land) and gross violations of human rights, the TJRC would contribute towards national unity, reconciliation, and healing. However, like numerous commissions before it, the TJRC was operating within a political context heavily shaped by stalwarts of the status quo and the commission trivialised this reality.[24] The establishment of the commission also formed part of the 'institutional fix' strategies which failed to take into consideration the power relations and state structures in which these

---

20 Collins Odote, 'The Impact of Recent Constitutional and Land Policy Reforms on Community Conservation Initiatives in Kenya' Africa Biodiversity Collaborative Group (ABCG) Land Use & Governance Thematic Meeting, Nairobi, 3 May 2011) A presentation is available at https://tinyurl.com/OdotePresentation, while a paper (presumably essentially the cited document) a report for the Northern Rangelands Trust is available at https://tinyurl.com/OdoteNRTReport.

21 National Land Policy, above fn 20 paragraph 1.

22 Executive Summary.

23 Ndung'u Commission Report.

24 Gabrielle Lynch, *Performance of Injustice: The Politics of Truth Justice and Reconciliation in Kenya* (Cambridge University Press, 2018).

institutions are embedded.[25] It did not come as a surprise when the commission was subsequently embroiled in internal strife leading to the publication of different versions of the TJRC Report to the utter disappointment of many Kenyans, whose hopes had been heightened by the belief that the commission's recommendations would both be useful and be implemented. To date, the TJRC Report has not been tabled before Parliament for debate and adoption. It is apparent that the bone of contention in the Report has always been its chapter on land.[26]

Reforms under the Constitution of Kenya 2010

The promulgation of the Constitution in 2010 ushered in a new era in the administration and management of land. The drafters of the Constitution dedicated an entire chapter to land and the environment. This is a marked departure from the repealed Constitution which did not contain elaborate safeguards for land (though there was a good deal in the 1963 Constitution[27]). The Constitution stipulates that land must be held, used and managed in an equitable, efficient, productive and sustainable manner (Article 60(1)). These principles are to be implemented through a National Land Policy developed and reviewed regularly by the national government and through legislation (Article 60(2)). This means that a National Land Policy is mandatory.

In line with the National Land Policy, the Constitution classifies land into public, community and private (Article 61). It established the National Land Commission (NLC). Its tasks include: managing public land on behalf of the national and county governments; recommending a national land policy to the national government; advising the national government on a comprehensive programme of registration of land titles in the whole country; researching on land and the use of natural resources and making recommendations to relevant authorities; investigating and recommending remedies, on its own motion or on the basis of a complaint, on present or historical land injustices; encouraging the use of traditional dispute resolution mechanisms in land conflict resolution; assessing land tax and immovable property premiums in areas legally prescribed; and monitoring and overseeing land use planning (Article 67(2)).

---

25 See Catherine Boone, et al., 'Land Law Reform in Kenya: Devolution, Veto Players, and the Limits of an Institutional Fix', (2018) *African Affairs* 118 (471), pp 215-237

26 See Nzau Musau, 'Tale of strange calls, threats that killed TJRC report on land', *Standard digital* 15th September 2018, available at https://tinyurl.com/TJRCbutchery.

27 https://constitutionnet.org/sites/default/files/KEL63-002.pdf (Chapter XII).

The National Land Commission Act assigns additional functions to the NLC. These include: managing allocation of public land; monitoring the registration of all rights and interests in land; ensuring sustainable management of public land; developing and maintaining an effective land information management system at both levels of government; managing and administering, on behalf of the county governments, all unregistered trust lands and unregistered community lands.[28]

In delivering on its mandate, the NLC has undertaken various other functions which have been outlined in the commission's End of Term Report. It has made fact-finding visits in a number of counties with a view to addressing perennial land issues there; it has taken a proactive stance by encouraging communities and individuals to solve land and boundary disputes through traditional and other alternative dispute resolution mechanisms; and taken steps to ensure protection of public land.[29] The NLC has for instance embarked on a process to issue titles to public schools in a bid to protect land held by these schools.[30]

The Constitution further identifies the importance of ensuring that land and related resources are held in a manner that is sustainable and that does not lead to the degradation of the environment.[31] In this regard, the Constitution creates an obligation on the state to eliminate processes and activities that are likely to endanger the environment and to ensure that the environment and natural resources are utilised for the benefit of the people of. Thus, the role of Parliament includes to revise, consolidate and rationalise existing land laws; and to prescribe minimum and maximum land holding acreages in respect of private land.[32]

Reforms of the land laws

One of the key areas of success is the enactment of new land laws that revise, consolidate and rationalise land laws that were in force before the 2010 Constitution.[33] Parliament has so far enacted the Land Act, the Land Registration Act, the National Land Commission Act, and Community Land Act. There have

---

28 Section 5(2).

29 National Land Commission, *First Commissioners' End of Term Report* Chap 3 https://tinyurl.com/NLCendterm.

30 See Ambreena Manji and Smith Ouma, 'A Lost Opportunity: Can the National Land Commission Reclaim its Original Mandate and Regain the Public's Trust?' *The Elephant* February 28, 2019, https://tinyurl.com/ManjiNLC.

31 Article 60 outlines the principles of land policy including that land must be held in a sustainable manner.

32 Article 68 (c).

33 Article 68.

also been efforts to revise various sectoral land use laws dealing with the forests, water, fisheries, agriculture, mining, oil and gas, and environment in accordance with the Constitution. Likewise, the current land laws have established institutions to facilitate implementation of land law reforms. The principal institutions are the NLC, the Ministry of Land and the Environment and Land Court (ELC). The NLC has been established to, among other things, manage public land in a bid to rectify the previous over-centralisation of powers in the executive in public land management. Most importantly, the law has attempted to define the role of the NLC and the Ministry of Lands, a significant departure from the repealed land law regime where there were overlaps in the responsibilities between the President, Commissioner of Lands and the Ministry of Lands. The mandate of the Ministry and the NLC was further elaborated by the Supreme Court in *In the Matter of the National Land Commission*[34] where the court held that the two have complementary functions with neither playing a subordinate role to the other.

As the Constitution requires (Article 162(3)), legislation has established a court, with equal status to the High Court, to decide disputes relating to the environment and the use and occupation of, and title to, land: the Environment and Land Court.[35] This was profoundly important, and aimed at facilitating the just, expeditious, proportionate and accessible resolution of environmental and land disputes.

Numerous stakeholders have however decried the amount of time it took to enact the Community Land Act and the slowness of the registration processes.

Assessing the land law reform processes

Huge milestones have been reached in the land law reform process in Kenya. However, despite the adoption of the NLP and the 2010 Constitution, and the attempts at setting up a sound land governance infrastructure, it has been rightly opined that Kenya missed a real opportunity to enshrine in law radical principles for land reform largely due to the politics surrounding land governance.[36] The lack of political goodwill to fully implement those reforms and the politicisation of the reform process has led the public to question the genuineness of the reform initiatives.

---

34 *Re National Land Commission* 2014 eKLR.

35 Section 4, *Environment and Land Court Act* (Cap 12 A).

36 Ambreena Manji, 'Whose Land is it Anyway? The Failure of Land Law Reform in Kenya' available at https://tinyurl.com/LandFailure.

Moreover, some of the principles of land policy, for instance equity as enshrined in the TJRC report, are yet to be realised. The explanation lies partly in the failure to enact legislation such as the law on minimum and maximum land acreage. (The latter was always controversial and indeed was probably the factor that most threatened a 'Yes' vote in the 2010 referendum on the Constitution.)

Additionally, in spite of the requirements for stakeholder participation enshrined in the Constitution, the executive and the legislature have performed dismally in engendering the inclusion of all segments of the society in the land reform process. Also, the process of formulating laws has been shrouded with secrecy with the public being given limited opportunities to participate.[37] This explains the dissatisfaction amongst a majority of Kenyans with the land administration systems. They allude to the fact that these processes lack transparency and are undemocratic.[38] The Law Society of Kenya has also faulted the lack of transparency by the Ministry of Lands with regards to ministry digitization of the land transaction processes.[39] Moreover, the limits of the law in these reform initiatives has also been highlighted especially where the law making process is badly done and the resulting laws are disconnected from their guiding document, as is the case with Kenya.[40]

Additionally, Parliament has done much to erode the trust that citizens had in the land reform initiative by not giving the law making process the seriousness it deserves. This is particularly evident in the delay witnessed in enacting a number of laws. Thus the Community Land Act was passed in 2016, and the Physical and Land Use Planning Act in 2019. Regulations gave the NLC some power to deal with – but only to make recommendations on – historical land injustices. The Maximum and Minimum Acreage Bill was never passed, but the Land Act (section 160) provides that the NLC or cabinet secretary may make regulations on the matter—which has not been done. And only certain provisions on evictions were introduced into the Land Act though there is still hope of passing an Eviction and Resettlement Bill. The 2010 Constitution required Parliament to enact these laws by 27th August 2015, but this did not happen and Parliament had to extend

---

37 Examples of this can be seen in the circumstances surrounding the drafting of the *Land Laws (Amendment) Bill 2015 and the Physical Planning Bill 2015.*

38 LDGI, 'Land Reforms in Kenya: Gains and Challenges One Year into Implementation' available at https://tinyurl.com/landscore.

39 Kamau Muthoni, 'Lawyers Society Wins Round One in Land Case', *Standard Digital* 19th April 2018 available at https://tinyurl.com/LandRoundOne.

40 Ambreena Manji, 'Land Reform in Kenya: The History of an Idea', 2019 (39) *The Platform* 28.

the deadline by a year.[41] Parliament has also been used as a tool to claw back some of the reforms that have been undertaken in the land sector. For instance, through the Land Laws (Amendment) Act, Parliament sneaked in a number of provisions that weakened the mandate conferred on the NLC by the NLC Act and the Constitution.

An example concerns the commission's mandate to carry out investigations of claims arising from historical land injustices. At first the National Land Commission Act pushed this down the line by giving the commission two years to propose legislation to Parliament (section 15 of the original Act). When this produced nothing, Parliament in 2016 amended the Act, to read that the Commission should itself deal with historic injustices provided that any claim 'is brought within five years from the date of commencement of this Act' (s. 15(3)(e) in the amended version). This remarkable piece of incompetent drafting means that the window for filing claims was only one year – since the Act itself had taken effect in 2012. However, it seems to have been read as (one hopes) it was intended—for the five years to begin in 2016. But still the period is short, and to make matters worse the amendment went on to state that the provisions of the section shall stand repealed within ten years (what does 'within' mean?). Furthermore, on the face of it the NLC has power to make recommendations only. However, this seems to be contradicted by the provision (s. 15(10)) that any agency 'recommended' to take action must do so within three years. This history shows the dubious approaches that have been adopted when dealing with historical land injustices, a process that has been hijacked by the political hegemonies and the beneficiaries of these injustices. As argued by Ambreena Manji, such ambiguities in the enacted legislation were also meant to present obstacles to the land reforms that Kenyans had envisioned.[42] The NLC did in fact make its first set of historical land injustices 'recommendations' in December 2018. As September 2021, five years from the 2916 amendment to the law, approached the NLC announced that it had received 740 claims. These were very unevenly distributed—for example, 360 claims were from Rift Valley, but none from the North-East.[43]

Moreover, and in a bid to emasculate the constitutional design, some of the laws enacted by Parliament are unconstitutional. The Land Laws (Amendment)

---

41 See 'Parliament Stares at Dissolution as Crucial Bills Deadline Draws Near,' *Standard Digital,* 8th August 2015

42 Ambreena Manji, 'The politics of land reform in Kenya 2012', (2014) 57(1) *African Studies Review* pp 115-130.

43 Gilbert Koech, 'Historical land injustices: NLC gets 740 claims, deadline in two months' *Star* July 21 2021, https://tinyurl.com/NLC710claims.

Act contained numerous provisions that sought to weaken and undermine NLC in land management and administration by vesting unconstitutional powers in the cabinet secretary.

Whereas the establishment of the NLC was revolutionary, meant to infuse good governance into the land sector,[44] the commission has been involved in constant wrangles with the executive over their respective mandates, staffing and funding instead of dealing with the land problems the country is facing.[45] The problems bedevilling the NLC started immediately after the promulgation of the Constitution when there were delays in appointing the commissioners. This formed the subject of a court case – *Amoni Thomas Amfry v The Minister of Lands*[46] – where the High Court directed the President to proceed to appoint the commissioners of the commission as required by law. The delay was a precursor to the challenges from the executive that the NLC was to encounter in its work. Similar delays were witnessed in the appointment of the second batch of NLC commissioners with these delays being viewed as an attempt by the executive to scuttle land reforms.[47]

The NLC and the Ministry of Lands have also been embroiled in disputes trying to consolidate their respective mandates and powers under the law. [48] Whereas the Constitution and land laws made attempts to define the role of the two institutions, the ministry's approach towards the NLC was that of a principal-agent and on numerous instances it attempted to undermine the operations of the NLC. This approach by the ministry was supported by the Executive Order in which the President conferred responsibilities on the Ministry of Land, Housing and Urban Development including on land administration and management.[49] Whether this was deliberate on the part of the executive is not clear. It is not the only instance in which the relationship between supposedly independent commissions and the relevant ministry has been confused.

Consequently, there were glaring overlaps in responsibilities, for instance when the ministry went ahead to issue title deeds in certain parts of the country without the involvement of the NLC and enactment of requisite regulations by

---

44 See National Land Policy fn 20.

45 Ambreena Manji, 'Whose Land is it Anyway?' fn 36.

46 Petition No. 6 of 2013.

47 Ramadhan Rajab, 'Uhuru's Delay in Naming Team to Hire NLC Bosses Frustrates land Reforms', *The Star* 14th April 2019

48 Billy Mutai, 'Executive Seeks to take over land agency's powers, roles', *Daily Nation* Saturday, September 26, 2015.

49 Executive Order No. 2 of 2013 on the Organisation of Government of the Republic of Kenya issued by the President on 20th May 2013.

Parliament.[50] The conflicts between the two institutions have also revolved around who has the power to issue title deeds, renew leases and approve transfer of land ownership.[51]

Conflicts between the two institutions have made the public lose trust in the land administration institutions further negatively affecting service delivery.[52] These challenges have been exacerbated by the fact that a majority of citizens are not aware of the constitutional provisions about the division of functions between the Ministry and the NLC.[53] These turf wars mirror the struggles that have been witnessed in the past in relation to centralisation of powers in the President and the executive in relation to land management. The turf wars are also syptomatic of the challenge of concerted resistance that has been put on the path of the independent commission by an executive that has been determined not to lose control of management of land.[54] The dismantling of the County Land Management Boards even before their full establishment further shows the determination of the 'veto players' to frustrate the land reform process and to curtail the powers of the NLC.[55]

Overlaps have also been witnessed when it comes to resolving land-related disputes. A decision of the Supreme Court established that judges of the ELC are specialised and can only hear land and environment matters.[56] It was held that a court can only exercise jurisdiction conferred upon it by the Constitution. Issues that are primarily about constitutional matters, but also touch on land, may still go to the High Court. But the ELC may also deal with constitutional issues if they concern land or environment. A 'jurisdictional gaze' has in effect constantly accompanied the operations of the superior courts including the ELC, and judges in these courts have adopted convoluted approaches to interpreting their jurisdictional reach with litigants being thrown into disarray from these confusions.[57] The Court of Appeal has held that both the ELC and the magistrates

---

50 See 'Jubilee's three million title deeds may be declared illegal' *Standard* December 14th 2017 https://tinyurl.com/Illegaldeeds

51 See 'Ministry to issue a million title deeds despite NLC row' *Business Daily* March 31 2014 available at https://tinyurl.com/Milliondeeds.

52 Land Development and Governance Institute, 'Land Reforms Implementation: An Analysis of Citizens' Perception of the Relations between the National Land Commission and the Ministry of Lands' available at https://tinyurl.com/NLCMoHPerceptions.

53 Land Development and Governance Institute fn 51.

54 Ambreena Manji and Smith Ouma, fn 30.

55 Catherine Boone, fn 3, p 3.

56 *Republic v. Karisa Chengo & 2 others* [2017] eKLR (para. 50).

57 See Smith Ouma, 'Jurisdictional fetishes, Jurisdictional Minefields and Incompatibilities with the Rule of Law', Paper presented at the Second Biennial Conference on Law and Society in Africa, Cairo, Egypt, 3rd April, 2019.

courts have jurisdiction over land matters—the magistrates' jurisdiction being limited, like other civil cases, by the value of the property or money at stake in the case.[58]

Conclusion

The foregoing discussions have put land as the focus of law reform initiatives being undertaken. However, the reforms have been riddled with political undertones which have slowed down the process and inhibited the implementation of those reforms. Moreover, in spite of the identification of land problems facing the country in the reports by commissions of inquiry, the adoption of the NLP and enactment of the 2010 Constitution, the land governance framework still faces political interference from an executive that is keen on maintaining the status quo. And that status quo is marked by corruption, opacity, inefficiency and centralisation of land administration and management. There is need for full adoption and implementation of the recommendations of the Ndung'u Commission, the Njonjo Commission and the TJRC report, and full implementation of the NLP and 2010 Constitution, if land law reforms are to substantively contribute to an efficient, sustainable, productive and equitable land governance framework.

The National Land Commission must also take its rightful place with regards to land governance while ensuring that it is guided by the principles outlined in Articles 10 and 60 of the Constitution. The commission must take advantage of the goodwill that it enjoys among a majority of Kenyans and other stakeholders to effectively discharge its mandate. This extends to the commission's mandate to review grants and dispositions of public land and establishing their propriety or legality and the mandate to investigate historical land injustice complaints and recommending appropriate redress. Ultimately, land law reform initiatives must be alive to the politics of the day in order for the processes to be structured in a resilient manner that facilitates the adoption of appropriate responses to various demands.

The brief history discussed in this chapter is a reminder that fidelity to the law and vigilance by the public and the independent institutions established by the Constitution are key in ensuring that the aspirations of Kenyans enshrined in the Constitution are met and that the gains made since the adoption of the 2010 Constitution are safeguarded.

---

[58] See *Law Society of Kenya Nairobi branch v Malindi Law Society* Civil Appeal No. 287 of 2016.

Chapter 17

Religion and the Kenyan Constitution

Gabriel Dolan

A religious society

The first time visitor to Kenya will soon discover that Kenya is a very religious society. Churches of every description and size are found on most streets and in the remotest of places. Visit the Coast or North Eastern and you will almost certainly waken up to the Islamic Adhan call to prayer. Even before you fall asleep you may have to endure a Disco Matanga (wake) or a Pentecostal all night Kesha (vigil). Smaller religious groups are the Hindus – of more than one sect – Jains and Sikhs, and even fewer Parsees, all originating from the Indian sub-continent. The 2019 census recorded just over 60,000 Hindus (presumably including Jains and Sikhs who are not mentioned separately), 318,000 adherents to traditional religions, and 755,000 (1.6%). There were also 400,000 of 'other religions' (Jews and Bahais would be among them).

Yet the religious feature of life is not confined to houses of worship. You would not be surprised to find a Precious Blood Butchery or Allah Is Great Driving School. Almost every public event begins and ends with a prayer and even handshakes and greetings among friends frequently begin with invocations to God. It is hardly surprising then that religion should have found a significant space in the 2010 Constitution, especially so since religion is not perceived as a private affair like most of the Western World. Religion is very much a public affair in Kenya and it permeates all aspects of human life.

The first sentence of the Preamble to the Constitution then confirms the importance of religious belief when it states, 'ACKNOWLEDGING the Supremacy of the Almighty God of all Creation'. In the same Preamble we are reminded, 'PROUD of our ethnic, cultural and religious diversity and determined to live in peace and unity as one indivisible nation'. This sentence states emphatically that

religious diversity exists and that it is worthy of celebration and a reason to be proud because religions have lived in harmony side by side since time immemorial.

That may well be true but the making of the new constitution exposed very real theological and moral tensions between the faiths that at one time almost wrecked the whole process. Article 8 states briefly and simply, 'There shall be no State religion'. That is saying clearly that no religion will have special privileges over another and the state will treat all with equal respect under the law. In fact the very first constitution draft added precisely that: 'The state shall treat all religions equally'.

However, we must bear in mind that the original colonisers were Christian and that all presidents since independence have also come from the Christian faith. The dominant religious culture is mostly Christian, so how do religions that are minorities, and those who believe in no religion, feel at home and protected in such an environment? Do other faiths feel threatened or undermined or perhaps misunderstood? How can their needs be recognised and addressed?

Religion and making the Constitution

The major contentious issue during the reform process concerned whether Kadhi Courts should be included in the Constitution. Christians and Muslims had worked in harmony on constitution making ever since they shared a platform at Ufungamano House when they attempted to salvage the process that in its infancy was hijacked by the political and ruling classes. However, Kadhi Courts tested that relationship as a large percentage of the Christian leadership representatives believed that by entrenching the courts in the constitution would be giving special privileges and status to the Muslim faith. As a result they felt that they were being discriminated against and in the process being asked to pay for the Kadhi Courts.

Kadhi Courts apply Islamic law to issues of family, marriage, divorce and inheritance. They had already been in existence and operational before the constitutional review but now Muslims wanted to guarantee their security and permanence in the constitution so that they would be recognised and funded like all the other state courts. They argued that it would be discriminatory if they were not entrenched as Article 27 (4) had stated that the 'State would not discriminate directly or indirect against any person on any ground, including race, sex, religion' etc. Women's groups, however, also took issue with the courts claiming that they were discriminatory in that polygamy was only available to men. For them, Kadhi Courts were an obstacle to the realisation of women's rights.

The division was real and worrying at a critical stage in the process. Ultimately reason and compromise won the day. The argument went: why should the courts be removed since they are not a threat to non-Muslims but were an important feature of Muslim law? The fears that they would lead to a spread in Islamisation were unfounded and exaggerated also.

But the issue did reveal the suspicions and ignorance that prevail among the religions. On the other hand, it was a challenge to all faiths to recognise and respect different world views and practise even as they retain a fundamental belief that they are the true religion. Kadhi Courts were granted the status of a subordinate court like Magistrates Courts and Courts Martial. Article 170 describes in detail the role of the kadhis and their powers. But the idea in the original draft of 2002 that the Chief Kadhi should be on the Judicial Service Commission disappeared,

However, the final clause in Article 170 (clause 5) did not get the full approval of all kadhis. It said, 'The jurisdiction of a Kadhis court shall be limited to the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion and submit to the jurisdiction of the Kadhis' courts'. This confirmed two things. Firstly, Muslim law, Shari'a, only applied to Muslims. Secondly, there was an opt-out clause if one of the parties chose not to submit to the Kadhi Court but decided instead to have the matter dealt with in a regular court. That is where the compromise came in. Finally, the Kadhi Courts were not granted powers to handle cases of a criminal nature – as they had not even under the old Constitution. That was a setback for some leaders in the Islamic faith who wanted Kadhi Courts to have powers beyond family and inheritance matters.

However, when the matter reached resolution the tension reduced and the courts today provide an important service and access to justice for Muslims. Not only that, they have seen a considerable expansion from 15 in 2010 to now 52 kadhis sitting in 44 locations (according to the Judiciary's *State of the Judiciary and Administration of Justice Report 2019-2020*). There is still an ongoing debate as to why women are not permitted to qualify as kadhis and this dispute will surely continue. What must be noted is that the outcome and agreement illustrated the challenges and the benefits of living in a truly pluralistic society. The state recognised the uniqueness of Islamic law and tradition and acknowledged that Islam as a valid religion alongside others in Kenya.

It must as a result have gone a long way in assisting Muslims to feel at home in a country where they only represent 11% of the population according to the 2019 census. One should not underestimate how any minority and especially

a religious one requires special consideration and attention to ensure that their rights are respected. Article 56 on minorities recognised that right and the need for affirmative action to protect their interests and rights and Kadhi Courts' inclusion could indeed be viewed as an affirmative action outcome.

There are many positive lessons that can be learned from this experience that will benefit Kenya and other societies that have similar differences in religion and its relationship with the law. For this debate and resolution has certainly fostered religious pluralism and diversity in Kenya. That is not to suggest that similar tensions cannot emerge around other issues of difference between the faiths. However, a wise and inclusive agreement set a profound precedent for future engagements and challenges.

Being mindful of the risks

We have already referred to the fact that religion is a very public affair in Kenyan life and that too may well produce many tensions and challenges in the not too distant future. Politicians openly profess their faith and preference in a manner that may offend others or seem to give particular preference to one religion or denomination.

When Daniel Moi was President, many considered that the African Inland Church (AIC) was like the State Church as it appeared to get preferential treatment with regards to services, land and positions in government bodies. There is not a huge body of evidence to support that view. However, perceptions are important too and must not be underestimated in determining how all the religions of the country are respected and made to feel at home and retain a sense of belonging and welcome in pluralistic Kenya.

Since religion also affects almost every aspect of life it is inevitable then that there may emerge many differences and conflicts over issues of sexuality, marriage, reproductive rights, health welfare and education matters in the near future. These may be disputes among the faiths but they may also be cases where the faiths combine together against the state over particular legislation dealing with morality that may be opposed by several religions. As society changes these challenges are inevitable.

The declaration by President Kenyatta in 2018 that all schools under church sponsorship should be returned to the respective churches was bound to cause controversy and confusion. He also suggested that where schools are built on

church land then the title should be restored to the churches. The roles of religion and the state would be severely altered and challenged if this is implemented and it is inevitable that a variety of groups and opinions would challenge this declaration especially as it is not consistent with current law and understandings. In fact it contradicts several clauses of that legislation. The issue may yet resurface.

We should expect challenges, collisions and differences as well as power politics from both religions and the state parties to emerge soon in this debate. Indeed it may well come down to a debate over the legality of an executive declaration as opposed to the state's law and policies on matters of education. But if there is a failure to restore the land to the churches it is inevitable that the churches will not let the matter end there.

It would be prudent for all parties to have structures for dialogue and cohesion in place so that the deepest of differences between state and religious bodies on any given topic can be addressed in a sober manner because indeed these issues will soon emerge and could be very divisive. Perhaps an important step would be for faiths to have their own parliamentary watchdog teams in place. Would it be too much then to hope that the different religions might work together on a project like this?

Article 32 guarantees freedom of religion. However, religions must accept that they are not above the law and that practices must meet certain standards and be accountable. Rwanda has in the recent past approved legislation that effectively deregistered several denominations and approved new policies with regards to practise, buildings, noise pollution, health and safety standards as well as professional training of religious leaders. In fact in 2016 Kenya made moves in the same direction, drafting regulations that required churches not just to register as societies which was already the case, but required pastors to have qualification. These were withdrawn quickly after consultation with churches. As late as September 2020 the church was complaining that for six years no new churches had been formally registered. In reality churches continue to mushroom especially in urban centres and there seems to be no effective supervision or legislation in place. But there most certainly will come a time when the state will intervene and respond to the growing mushrooming of churches and sects. Perhaps soon there may be a clamour for churches to pay taxes like other institutions and that would most likely be resisted also.

Religion in the courts

In various ways issues about freedom of religion have come before the courts. The courts have not always got it right, but they have made some decisions that have upheld the principle of freedom to choose, observe, and exercise one's religion.

Several cases have involved the question of dress rules or preferences of different religions. Unfortunately there is no Supreme Court ruling on this. The Court of Appeal said that 'To force students to abandon or refrain from a practice or observance dear to them and genuinely held as a manifestation of their religious convictions, as happened herein, violates their conscience, is the antithesis of freedom, is unconstitutional and is therefore null, void and of no force or effect.'[59] And school rules were to be applied in a way that allowed Muslim girls, for example, to wear the hijab, in addition to the general school uniform. This case went to the Supreme Court but it held that the issue had been raised improperly so could not be decided.[60]

Courts have held that to prevent Seventh Day Adventist students observing their day of rest by compelling them to go to classes on Saturday violates their rights. And that to compel Seventh Day Adventists to work on Saturday does the same.

The court have tried to balance the various interests involved. They are not opposed to school uniforms – look how the hijab was to be additional to the uniform, not instead of it. And they draw a distinction between a fashion statement and a way of dressing that genuinely reflects religious conviction. So one young person won a case about dreadlocks while another lost—see the chapter on Culture in this book.

The positive potential of religion in society

However, the larger question that remains is that of the positive role that religion can play in a democratic society. It is easy to identify the struggles and the differences that might emerge in the coming years. We might be tempted to view religious conflicts as inevitable and religion as a divisive force in a pluralistic

[59] *Mohamed Fugicha v Methodist Church in Kenya* [2016] eKLR

[60] *Methodist Church in Kenya v Mohamed Fugicha & 3 others* [2019] eKLR

society. Yet, we are consistently reminded that President Jomo Kenyatta said that religions must be the conscience of society.

That, first of all, calls on all religions to not confine their commitment to defence of their own beliefs or the promotion of their own power or priorities. Being the conscience of society should mean that they promote the rights of all citizens but with a fundamental and clear option to defend the rights of the poorest, most vulnerable, and most neglected groups of society. Being the conscience means defending any socially or economically marginalised group.

In a country with such massive inequality it is essential that, if religions are to remain credible and relevant, they must speak on behalf of the poor. The poor include women, unemployed, homeless, disabled as well as those 20% of citizens who go to bed hungry. In other words, the focus of all religion must be not its own preservation or promotion but the commitment and service to the common good.

That is a radical step in that religions must look outwards beyond their own congregations and be equally committed to serving those of other faiths and none. That is what the common good as a religious and human value requires. It also demands that religions be prophetic and speak truth with kindness and humility to power. That would in effect mean that religions are able to reach out and convince all citizens of the value of inclusive and tolerant policies and legislation that helps the most neglected climb the ladder of respectability and dignity.

All religions present the Golden Rule to love thy neighbour as thyself as their motto and origin and that should be the motivation and inspiration of all their activity. However, when they ignore that vision and seek power and privileges instead of service they soon lose their voice and in the process are unable to challenge the government on essential issues with regards to the common good. Faiths that become lazy, power hungry or lovers of wealth are easily silenced and compromised.

But when boundaries are clear and religion does not compete for power or honour but witnesses to values and service then it has the power to transform the whole of society. That is surely what the drafters of the Constitution intended when they said that there shall be no state religion, but religion has the possibility and space to operate and become an agent of change that is implementing the constitution.

Chapter 18

Women's Gains under the New Constitution: Does reality match expectation?

Jill Cottrell Ghai

In 2010, there was a great deal of talk about the gains for women that it represented. So, after 10 years, how much progress on gender equality has been realised?

Introduction

Even the old Constitution prohibited discrimination on the ground of sex. But the right did not affect adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law, or customary law. It did not prevent sex discrimination in setting requirements for appointment in any public body.

The overall vision of the new Constitution is of a Kenya in which everyone is equal and equally respected. The particular needs of groups that have been disadvantaged must be taken into account. And the state has responsibilities to be proactive to realise the full vision, including in areas of particular concern for women such as reproductive health and education. Everyone reading the Constitution would also think that every public body ought to have at least one-third women.

Human rights are a good place to start. Human dignity, and the key concept of equality are well recognised in the Constitution. And every right in the Bill of Rights is equally applicable to women, whether it is the right to vote, assemble, express oneself, or any other right.

The 'socio-economic rights' – health, education, food, water, housing and social security – are the rights of everyone. They may work differently for women. Maternal health raises particular issues for women, as does 'reproductive health'

which is specifically identified as a protected right. With water, one thinks of the women who have to walk long distances to collect water from rivers.

Article 56 requires the state to create affirmative action programmes to help minorities and marginalised groups participate in all aspects of life, including governance, have special opportunities in educational and economic fields and for access to employment, as well as reasonable access to water, health services and infrastructure (like roads). 'Marginalised groups' are those disadvantaged because of past discrimination—which would include women.

A general provision in the human rights chapter is relevant to women: 21 (3) 'All state organs and all public officers have the duty to address the needs of vulnerable groups within society, including women…'

Finally, the human rights commission (now three commissions) established by the Constitution is required to promote gender equity and equality, and facilitate gender mainstreaming in development (Article 59(2)(b)).

If all these rights were properly respected for women, undoubtedly their position would be very much improved.

The two-thirds rule, and generally women in public bodies

There are various constitutional provisions about 'the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender' (like Article 27(8) Article 81, and Article 175(c)). Article 177 actually guarantees this: by mandating that every county assembly has enough special seat members to ensure the 'no more than two-thirds rule'.

The make-up of the Parliamentary Service Commission and the Judicial Service Commission must include a certain number of women, but neither guarantees that the two-thirds rule is achieved.

Women's presence in elected bodies

The formal provisions, and the invigoration of women's campaigns for greater involvement have had an impact. Following the 2017 elections:

Body (total members in brackets)	Directly elected (total; %)	County members (NA)	List# members for special interests (total)	Top-up list women (counties) and list women (Senate)	Total women (total; %)
National Assembly	23 (290; 7.9)	47*	5(12)		75 (349; 21.5)
Senate	3(47; 6.4)		2(4)*	16*	21(67; 31.3)
Governors	3(47; 6.4)				3(47; 6.4)
County Assemblies	96(1,450; 6.6)		90 (188; 48%)	559*	745 (2197; 34)
					Grand Total 844 (2640; 32%)

*Note: * indicates mandatory provision for women*
 # Members on party lists, published before elections, taken in order from the top of list, depending on how many seats their party has won. Often, misleadingly, called 'nominated'.

However, we still fall below a number of other African countries. Perhaps the most worrying is the low percentage of *directly elected* women—where there can be rivalry between men and women (so not for county women representatives in the National Assembly). Worrying because direct election shows confidence in a woman (or at least that being the woman has been no disadvantage). Secondly, people tend to take such members as 'real' members, while they are less positive about women only contests (for county women MPs) and list members (sometimes insultingly called 'Bonga points'—bonus points for mobile phone use).

Interestingly, while in Nandi five ward seats were taken by women – only 16.7%, but far better than the national average – supposedly sophisticated Nairobi has only four women out of 85 ward members (4.7%). Overall more women were directly elected in 2017 than in 2013: up from 84 for county wards to 96, from zero to three for governors and for senators, and 23 MPs for ordinary constituencies up from 16 in 2013.

Although in 2017 7.9% of the general constituencies were won by women, even in 2007 7.27% of constituencies were represented by women. Parties seem more reluctant to nominate women as candidates for these seats because they have 'their own' seats (the county women seats). Also women seem to prefer standing for county women seats, rather than compete with men in the regular constituencies.

Arguably this was the purpose of county women seats—avoiding women being compelled into financially, and in other ways, bruising competition with men. Some might think that in the long run men and women will be able to compete

on equal terms. Special seats for women have sometimes helped this happen,[61] and there is some sign that it may be happening now.[62] Probably, even without any such special measures, over time women's numbers in directly elected positions will improve. Indeed, none of the three women governors, and only one of the three county women Senators had been a 'nominated' or list representative.

For many the Constitution has not had sufficient impact. Many women would want a true guarantee of at least one-third of the seats in each house of Parliament. At least two methods have been identified that would achieve this within the existing framework of the Constitution. But so far there has been no acceptance of these methods which male MPs see as depriving them of 'their' seats. They may also prefer methods that introduce women with less credibility than the men. They have preferred a version of the method used for the county assemblies: extra seats. If this method was used in the current Parliament, the house would have to be around 411 strong to achieve one-third women.

Is this the 'fault' of the Constitution?

A constitution cannot specify how everything is to be legislated for. But there are some perhaps unnecessarily vague provisions in the Constitution about the two-thirds 'principle'. But what is a principle? Does it mean 'This must happen and must happen now', or 'Later will do' or just 'Make an effort'? Article 27(8) is also equally important, and puzzling: the state must do what is necessary 'to implement the principle'.

The Supreme Court decided just before the 2013 election that 'principles' were not firm rules.[63] And affirmative action, such as special measures to get women into Parliament, was something to be achieved gradually. Chief Justice Willy Mutunga disagreed. He would have insisted on the necessary law being passed then. The court majority, however, said that by 2015, the law guaranteeing the gender quota must be in place.

By 2015 this had not happened. It still has not happened (late 2021). MPs have just not turned up in sufficient numbers to pass the necessary Bills to implement this decision. On March 29th 2017 Justice Mativo ruled that Parliament had failed

---

61 Cecily Mbarire, Maison Leshomo, Millie Odhiambo, and Sophia Noor have made a transition from 'nominated' to elected in competition with men.

62 E.g. Naisula Lesuuda MP, Dulla Fatuma Adam Senator.

63 *In The Matter of the Principle of Gender Representation in the National Assembly and the Senate* [2012]eKLR

to do what the Supreme Court had directed. He told them they must do it by May 29th, otherwise anyone could apply to the Chief Justice asking for an order that Parliament should be dissolved (which means an election). And the Chief Justice must ask the President to dissolve Parliament, and the President must do so (Article 261(7)). In 2019 the Court of Appeal rejected an appeal by the Speaker of the National Assembly. It said, 'As of now, Parliament has not enacted any legislation and any interested party may petition the Chief Justice to advise the President to dissolve Parliament.'[64] Eventually the Chief Justice did 'advise' the President'. But a court order suspended this action and by the time of writing nothing had happened.

Parties and women's representation

Political parties are required to respect and promote gender equality and equity. But no party may be founded on a gender basis (or religious, linguistic, racial, ethnic or regional basis). There can be no women's party—though women's issues may be part of a party's agenda. Parties must not 'seek to engage in advocacy of hatred on any such basis' nor 'engage in or encourage violence by, or intimidation of, its members, supporters, opponents or any other person'. (All these provisions are in Article 91). It is women who often suffer the most from political violence. A provision that the Political Parties Fund would be used to encourage parties to put forward more women disappeared after the COE's second draft, but now appears in a weak form in the law on the fund (weak because the impact of the fund on this point is small, and few parties benefit).

The current system of elections does not help women. To get adopted as a candidate requires support from male dominated parties. This is true also of being in a party list, even to increase the number of women.

Another court agreed that one way is for parties to put forward enough women candidates, and that the IEBC should pressurise parties to do so. But the judge said that because time was short, he would not order this for 2017. But for next time the IEBC must take this approach. Of course, a party might nominate women as candidates for half its constituencies, but if these were constituencies the party was least likely to win, it might end up with well under one-third women members actually elected. However, more women candidates is surely likely to produce more women members.

---

[64] *Speaker of the National Assembly v Centre for Rights Education and Awareness* [2019]eKLR.

Is women's presence effective?

The mere fact of having women is good: women have a right to be there. But many argue that women will bring something to Parliament that is missing without them—maybe a concern for women's issues, a focus on peace, and environment.

The role of those representing counties is poorly understood. They also have a task greater than their male colleagues because they represent counties equal to between two and 17 constituencies. Five list members in the NA have no sort of physical constituency. In the Senate, two represent clear non-geographical constituencies, but 16 list members have hardly any voting power and represent women in a general way. In the county assemblies most women have no sort of geographical constituency.

However, a rare effort to gauge their contribution, by Mzalendo in 2015, concluded that women county representatives contributed to issues of national interest, did not focus solely on family related matters, but showed a particular concern for special groups such as women, children and people with disabilities and articulated those interests well. 'They provide just as much value as male parliamentarians.'[65]

Women in appointed bodies

Most commissions and other public bodies do have one-third women. There is also a provision that 'The chairperson and vice-chairperson of a commission shall not be of the same gender' (Article 250(11)).

The same is not always true of government executives: nationally or in the counties. Many governors appoint three women out of 10 executive members (e.g. Nairobi, West Pokot, Turkana). Honourable exceptions are Kisumu, Uasin Gishu and Kisii with four. Kiambu and Kitui have 2 out of eight. Three out of ten is 30% —not one third. In fact the Constitution says that the county executive committee includes the governor and deputy, so an executive with ten 'ministers' actually totals 12, and, three executive members constitute only 25%.

Nationally, the President has had trouble complying. Currently the cabinet comprises 25 people, including the President and Deputy, Attorney-General and 21 CSs. Of these seven are women—just 28%.

In 2017 Justice Onguto held that Article 27(8) had been violated because cabinet had more than two thirds men. However, because of the imminent election

---

[65] *Debunking Myths: Women Contributions in Kenya's 11th Parliament* https://tinyurl.com/ye53vc58.

he said the cabinet did not have to be changed immediately, but a wrongly made-up cabinet after the election would be invalid. He did not accept the idea that this was a matter for progressive realisation. This is likely to return to court soon.

The public service more generally

The Public Service Commission found that in 2013–14 the ratio of men to women in the public service was 70:30, but at policy making levels women were only 23%. It developed a Diversity Policy in 2016, including on implementing the two-thirds rule. By 2017 the overall situation had not changed: women still constituted 30% of the public service. There was much better gender balance attained in independent offices and commissions with 41% women, while statutory commissions and authorities had 48% women.

The President's new category of 'Cabinet Administrative Secretaries' initially had very few women, probably because the office seems designed for political reward and patronage, which benefits few women—though the 2020 *Economic Survey* said there were now 33.3%. Of the 31 principal secretaries, nine (or 29%) were women.

In the former Provincial Administration (now the National Government Coordination system), although 17 of the 47 (26%) County Commissioners are women, only 15%) of sub-county commissioners, 5.2% of chiefs and 8.6% of assistant chiefs.

Overall, about 36% of those working in public administration are women.

Other aspects of public service

The judiciary has among the better gender distributions. The Supreme Court has (July 2021) about 43% women judges, and the Court of Appeal 45%,[66] since recent judicial appointments. The High Court has about 40% and the magistracy nearly 50%.

The Judicial Service Commission that appoints judges has a guarantee of three women among its 11 members, but will now have six because of the presence of the former chair of the Public Service Commission, of the Deputy Chief Justice as Supreme Court elected representative, and now of the new woman Chief Justice—in other words, 55%.

---

[66] If the President had done as the Constitution requires, and appointed all the judges nominated by the JSC, (see p. 57) the Court would have had 37.5% women—still well over one third.

How about the disciplined services? It is true that in 2015 the Ministry of Defence organised a conference on women in the security sector—some sign of recognition of modern realities. And the police do have a policy of respecting Kenya's diversity in recruitment processes. However, it will be a long time before even one third women is reached. The 2018 *Economic Survey* showed that in 2017 just under 15% were women (in 2013 it was 11.5%). Among prison officers the proportion is just under 18% (though only about 12% of convicted prisoners are women, there is no bar to women prison officers working in some capacities with male prisoners).

The military seems less committed, or at least does not seem to make its policies understood.[67] 'A senior military official, who wished not to be named, termed military duty as different from other employments thus hiring many women as required by law will undermine KDF work.'[68] It has been reported that only about 1000 of the 30,000 strong Kenya Defence Forces are women, though there is now a woman Major-General. The Air Force is said to be somewhat better.

'Caring professions'

More women work in the 'Human health and social work activities' sector: 80,200 to 58,800 men. Over 40% of probation officers are women. This sector is the only one with more women than men other than the 'activities of households for own use' where you would find domestic staff.[69]

Teachers in early learning are predominantly women—around 80%. Overall in the education sector about 47% are women. While numbers of men and women primary school teachers are roughly equal, in 2016 75.8% of head teachers in primary schools were men. However, this is a bit better than in 2010 when 85.5% of heads were men.[70]

Overall the number of women employed has risen. From 2016 to 2017 the number employed rose from 879,100 to 970,800—a far greater increase than for men. The 2018 Economic Survey suggests that 'female participation has shown an increasing trend across most sectors which could partly be attributed to the

---

67 See 'Why scores of ladies were turned away from KDF recruitment' *Standard* February 15 2018 https://tinyurl.com/KDFwomen1.

68 The *Star* February 16 2018 (no longer online)

69 Kenya National Bureau of Statistics *Economic Survey 2018* p 44 https://www.knbs.or.ke/?page_id=3142.

70 *Monitoring of Learner Achievement at Class 3 in Literacy and Numeracy in Kenya Summary of Findings and Recommendations* available athttps://tinyurl.com/KNECClass3.

government's affirmative action on employment in public institutions.'[71] The Constitution has something to do with this development.

Access to high office

No provisions try to guarantee that a woman might be President or Governor or even deputy. Our electoral system possibly reduces their chances. It is harder for women to stand and campaign for directly elected offices like Governor or President. If we had a parliamentary system in which the head of government was the head of the largest party in Parliament or county assembly, more women might have a chance. At the time of writing, of ten women heads of state worldwide very few are either also head of government or operate in a system in which the president shares executive powers with a prime minister. There are however 13 women prime ministers, all in parliamentary systems—chosen by their party or by the parliament.

Private sector

Women are far less likely to be in waged employment than men: only 34% in what the Economic Survey calls the modern sector and 33% in waged agricultural employment. The figures are even lower in manufacturing (16%) and wholesale (23%).

Women constitute under 20% of the boards of both listed and unlisted private companies, and under 10% of the chairs of these boards. And even if women are heading firms sometimes, it is suggested, they may be ineffective as they are treated as token appointments.[72]

The Constitution says that no-one may discriminate, but achieving a better gender balance requires laws including procedures and targets. The Capital Market Authority has Corporate Governance Guidelines for companies that issue shares or other securities to the public, which include that company boards must have gender sensitive appointment processes.[73]

---

71 P 43.

72 See *Diversity Management and Pluralism in Kenya's Major Private Sector Firms* Institute of Economic Affairs 2018? p. 30. Available at https://tinyurl.com/ieadiversity.

73 See https://tinyurl.com/y4lbe6ts.

Women's equality rights

The Constitution is clear. Article 27 (on equality) includes that women and men have the right to equal treatment, including to equal opportunities in political, economic, cultural and social spheres (clause (3)). And sex, pregnancy, marital status and dress are among the specifically banned bases of discrimination (clause 4). Now a man who marries a Kenyan woman has the same rights as a foreign woman who marries a Kenyan man to become a citizen. This benefits both the man and the woman.

However, not only are women less engaged in the formal, wage economy, but the Global Gender Gap Report 2018 estimated that Kenyan women on average earn about two-thirds what men earn.[74] One factor is that more women are part-time, which they may prefer for family reasons. Secondly they are often concentrated in particular, often less well-paid, professions (is the work less well paid because women do it, or women get those jobs because they are less well paid?). In some fields women are recent entrants and are in the lower ranks.[75]

Kenyan women still bear most childcare responsibilities. Kenyan law is only gradually moving in the direction the Constitution would suggest. Maternity leave is still limited (three months) and in practical terms available to few. Provision for two weeks paternity leave has been part of the Employment Act since 2008, and new legislation provides in rather unclear terms for time and facilities for breastfeeding at work.

Women have sometimes been able to go to court to protect their right to equal treatment.[76]

Economic empowerment

Article 27 requires affirmative action to ensure women can enjoy equal economic opportunities. The Public Procurement and Asset Disposal Act, 2015, following Article 227, provides that the national government and counties must have preference and reservations schemes for women in their procurement systems. The Public Procurement Regulatory Authority also carries out training for women to enable them to benefit. A public fund, dating from 2007 provides credit for

---

74 http://www3.weforum.org/docs/WEF_GGGR_2018.pdf

75 Most of the points are made in Stellar Murumba and Naima Mungai, 'Gender Pay Gap: Why do Kenyan women get paid less than men for equal work' Elephant March 8, 2018 https://tinyurl.com/elephantPayGap.

76 E.g. *V M K v C U E A* [2013] eKLR, discrimination on the basis of sex, HIV status and pregnancy.

women's enterprises. However, the PPRA has reported that many entities were not apparently reserving the required 30% of their procurement budgets for disadvantaged groups, though the percentage of compliance may be increasing.[77]

Marriage and family

Marriage must be based on the free consent of the parties. The parties to a marriage have equal rights at the time of the marriage, during the marriage and on divorce (Article 45).

This Article requires law recognising marriages under any system of personal law. The 2014 Marriage Act embraced all systems: Christian, civil, customary, Hindu, and Muslim. Someone married under Christian, civil or Hindu marriage may not marry anyone else unless they divorce or the other party dies (section 6(2)).

The recognition of the possibility of polygamous marriage, though not new, was a disappointment for many women, though even women were not unanimous. In future someone may challenge the possibility of polygamous marriage as contrary to Article 27 on equality, maybe arguing that a marriage of several women with one man is inherently unequal. However, the Constitution specifically says that in the case of Muslim personal law the issue of inequality may not be raised. This also protects the rule that a man may divorce his wife under Muslim law by using the triple talaq but this is not possible for the wife who wishes to divorce her husband.[78] The Maputo Protocol (a treaty linked the African Charter of Human and People's Rights, and which is part of Kenyan law) says that divorce must be by court order – but the Marriage Act says that for Muslims it is decided by Shari'a.

Many women's groups had pressed for a requirement that the permission of an existing wife be sought before another is taken. This was rejected by the (mostly male) members of Parliament. However, allowing for polygamous marriages without the consent of any existing wife was declared unconstitutional by Justice Mumbi Ngugi in 2015.[79]

---

77 *Annual Report* 2018: 110 out of 153 procuring entities complied – p 6.

78 Unless a Kenyan court was emulates the Supreme Court of India in deciding that the triple talaq is not part of Sharia law: *Shayara Bano vs Union of India* (Writ Petition (C) No. 118 of 2016) https://indiankanoon.org/doc/115701246/ (for a summary see https://tinyurl.com/Banotalaq). At least one Kenyan Kadhi has expressed unhappiness with the assumption that Muslim man can divorce his wife freely for no reason by means of the *talaq*: *S S v H A* [2017] eKLR.

79 *Mary Wanjuhi Muigai v Attorney General* [2015] eKLR.

However, one benefit to Muslim women is the existence of the Kadhi Courts, preserved by the Constitution and in fact now more extensive than before. They are the only way that a Muslim woman can escape from a marriage that is not working if the husband is not willing. The efforts of the former Chief Justice Mutunga to get women kadhis appointed were, however, unsuccessful. Debate on the issue was again stimulated by the appointment of a woman Chief Justice and familiar divisions among Muslim clerics again appeared.[80]

Court have enforced Article 53(1)(e): both parents of a child (married to each other or not) have equal responsibilities to care for the child.

Child marriage was prohibited before the Constitution. Marriage rights apply only to adults. It is clear that many children especially girls, do get 'married' under 18, but the courts will not endorse it. Indeed, a court rejected an argument that the law violated religion and culture.[81]

Women, property and marriage

Early draft constitutions said, 'Women and men have an equal right to inherit, have access to and control property', but it was removed by the MPs at Naivasha. However, general principles on land management still include the 'elimination of gender discrimination in law, customs and practices related to land and property in land' (Article 60).

However, though most agricultural work in Kenya is done by women, most land belongs to men. Only 2% of titles granted since 2013 have been to women.[82]

Article 68 (b)(iii) was intended to require provisions in law protecting spouses (not necessarily women) from being evicted from their home because the other spouse had sold, mortgaged or let it. The Land Act (s. 79(4)) says the 'matrimonial home' cannot be mortgaged without consent of both spouses.[83] Unfortunately, this does not seem to prevent the home being sold without the consent of one spouse, so does not fully implement the Constitution.

The Matrimonial Property Act (s. 7) touches on property and divorce: ownership of matrimonial property is in both spouses according to the contribution of each to acquiring it, and if the marriage ends it will be divided between them.

---

80 See Benard Sanga and Ishaq Jumbe, 'Justice: Is time ripe to appoint female Kadhis?' *Standard* June 21 2021 https://tinyurl.com/amvfc5wx.

81 *Council of Imams and Preachers of Kenya, Malindi v Attorney General* [2015] eKLR.

82 https://tinyurl.com/StarWomenLand.

83 Land Act 2012 s. 79(4).

FIDA recently failed in an attempt to get the High Court to hold that this division must be 50:50.[84] FIDA plans to appeal to the Court of Appeal.[85]

Various cases, even under the old Constitution, have held that women – even if married – cannot be deprived by customary law of an equal right with their male siblings to inherit land.[86]

The Constitution does provide the basis for fairness in land. But more needs to be done to ensure that those who administer the law are aware of the rights of women, As FIDA says,[87] chiefs or other government officials may be 'influenced by prevailing cultural beliefs' in which 'women are not considered to have enforceable property rights.' Women themselves must be made aware of their rights. The result is that the Constitution has made little difference to the law on this point.

Domestic and other violence

The constitutional provision that everyone has the right to be free from violence had women particularly in mind. Domestic and other violence remains a serious problem—as it does in other countries. A Human Rights Watch report on the 2017 elections 'demonstrates the Kenyan state's/authorities' failure to prevent election-related sexual violence, properly investigate cases, hold perpetrators accountable, and ensure survivors of sexual violence have access to comprehensive, quality, and timely post-rape care.'[88]

A 2014 national survey showed that between 27.8 and 43.7 per cent of women (depending on age) had ever experienced sexual or physical violence from a husband or partner.[89] Women in informal settlements are particularly vulnerable.[90]

Some efforts are made to combat the issue. Many police stations now have gender desks, while all stations are supposed to have officers dealing with gender

---

84 *Federation of Women Lawyers Kenya (FIDA) v Attorney General & another* [2019] eKLR.

85 See Capital FM https://tinyurl.com/FIDAappeals.

86 E.g. *Jenniffer Kathuku Mathiu v Francis Mubichi Mukiira* [2016] eKLR.

87 *Women's Land and Property Rights in Kenya: A Training Handbook* p. 2 http://fidakenya.org/wp-content/uploads/2017/04/Women-Land-rights-Handbook.pdf

88 *'They Were Men in Uniform': Sexual Violence against Women and Girls in Kenya's 2017 Elections* pp. 1-2.

89 *Demographic and Health Survey Key Indicators 2014* p. 59..

90 Claire Mc Evoy, *Battering, Rape, and Lethal Violence: A Baseline of Information on Physical Threats against Women in Nairobi* A Working Paper of the Small Arms Survey, 2012. See also Institute for War and Peace Reporting, *IWPR Radio Debate Addresses Sexual Violence in Nairobi Slum*, 30 September 2014, ACR Issue 398, available at: http://www.refworld.org/docid/542e86454.html [accessed 27 May 2018]

based violence (GBV).[91] The purposes are to make it easier for victims to report sexual offences, and possibly to work to cut down future abuses by counselling the parties. But some studies have suggested these are not very effective.[92]

The Ministry of Health has also developed guidelines for the response to victims of GBV. And law includes the pre-Constitution 2006 Sexual Offences Act. This provides for very heavy minimum penalties for defilement (sex with child under 18). The severity of the sentences has somewhat backfired: judges sometimes reach strained findings of fact to acquit an offender in order not to impose a life, or other heavy, sentence—especially when the accused young man is barely older than the victim, and the judge is convinced that the girl was entirely willing.

The Act does not penalise marital rape (s. 43(5)—poorly worded and far from the section on rape). This reflects a very outdated view of marital relationships, in which the woman was there to do what the man wanted in a sexual sense at least. One day the High Court may decide that this is incompatible with the Constitution's provisions on equality including in marriage.

The obligation of the police and other authorities to protect women against sexual violence or at least to investigate when offences are alleged was asserted by the court in the 160 Girls case in 2013. The judge decided that to fail to conduct 'prompt, effective, proper and professional investigations' into complaints of defilement and other sexual violence was a violation of the constitutional rights of the girls who complained. The judge ordered that immediate investigations were carried out.[93]

The Protection Against Domestic Violence Act 2015, is supposed to guide in domestic violence cases. It gives the courts power to make an order to a person not to do certain things amounting to sexual violence or abuse including even keeping away from the joint home.

Conclusion

Progress is slow, but tangible. The same is true of maternal health, not discussed here. The framework of the Constitution is strong, but changes in society, including in the determination of women themselves to struggle for their rights, will be as important as formal laws.

---

91 Albert Ndungu Wanjohi, *The Effectiveness of Police Gender Desks in Addressing Gender Based Violence: A Case of Nyandarua County - Kenya* MA thesis, 2016, Kenyatta University.

92 Wanjohi p. 63. https://tinyurl.com/KNBS2014Key

93 *C K (A Child) through Ripples International as her guardian & next friend) & 11 others v Commissioner of Police / Inspector General of the National Police Service* [2013] eKLR.

Chapter 19

Amending the Constitution of Kenya 2010 Post 2017: Interests, process and outcomes

Ben Sihanya[1]

Introduction and typology on amending the Constitution of Kenya 2010

I address three research questions on amending the Constitution of Kenya 2010 after 2017. First, whether the Constitution has addressed the targeted challenges and aspirations. What are the interests of the people and the leading politicians?

President Uhuru Muigai Kenyatta's interests appear to be securing a presidential legacy and the interests of his primary constituents. He also has to balance the agenda regarding the 'handshake' with former Prime Minister Raila Amolo Odinga on March 9, 2018, and the 2022 succession and transition. Raila Odinga's interest is cementing his legacy as a constitutional democrat and a unifying factor in Kenya and Africa by championing good governance, an all-inclusive government. Deputy President William Ruto has been focused on being President. With regard to the 2022 succession question, President Kenyatta stated thus with regard to Ruto: 'They have been talking about being tired of families what if I also said that two tribes (Kikuyus and Kalenjins) have held the presidency hence the need to allow others the chance.'[2]

---

1 The content and structure of this essay have evolved while the hypothesis and argumentation has remained consistent: the tribalism and the complexity associated with the challenges and opportunities for constitutional reform in Kenya. I am grateful to Prof Yash Ghai and Prof Jill Cottrell Ghai for comments and encouragement, and Mr Eugene Owade of Sihanya Mentoring and Prof Ben Sihanya Advocates for excellent research assistance. Mr E Naibei helped with an earlier draft.

2 Joseph Muraya (2021) 'Raila echoes Uhuru on Rotational Presidency in all Tribes,' *Capital News,* Nairobi, December 1 2021.

This intensified debate as to whether Kenya should adopt a rotational presidency to ensure that in the long term, all the 42 (or 75?) tribes are represented at the top of the executive structure, to promote and ensure inclusivity in Kenya.

The second question is whether the Constitution is ripe for amendments - and which are necessary or desirable. The third question relates to the appropriate Constitution amendment process including popular participation.

Nearly 70% of Kenyans who voted favoured adoption of the Constitution in 2010. The contentious provisions and emerging issues should now be addressed especially in the light of the experience of ten years. The amendment should address challenges identified both *before* and *after* adoption.

Some civil society organisations (CSOs), scholars, representatives of religious organisations, gender lobby groups and members of the three arms of government have identified contentious provisions which need to be reviewed after 2010. Most of the key proposals amendments are identified as part of the nine thematic areas in the Building Bridges Initiative (BBI) Reports 2019 and 2020. These proposals were then addressed in the Constitution of Kenya (Amendment) Bill 2020.

What was intended in adopting the Constitution may be discerned through a three-pronged methodology. First, textual analysis of the Constitution, including the Preamble, Articles 1, 2, 3, 10 and the general values and principles that undergird every chapter. These include provisions on the arms of government and the key operative rules, clauses or provisions on sovereignty, electoral justice, socio-economic justice, inclusion, and governance.

Second, reviewing the history and practice including the preparatory materials or record of proceedings associated with the final drafting and adoption or promulgation under the guidance of the Committee of Experts (CoE). Equally important is the earlier work by the Constitution of Kenya Review Commission (CKRC).[3]

Third, the subsequent or emerging practice and usage under the Constitution. These include interpretation by courts and tribunals, interpretation by the legislature, especially through legislation, motions and petitions. Also crucial is interpretation by the executive and administrative bureaucracy through administrative actions or omissions as well as proposals for constitutional, statutory and regulatory reform. Interpretation by the people through direct actions, activism, petitions,

---

[3] Most of the CKRC work has been archived by the Katiba Institute (see http://archives.katibainstitute.org/).

demonstration and picketing should be given serious consideration. Various proposals for constitutional amendment or reform since 2010 should also be considered.

Debates on amending the Constitution re-emerged following the 2018 handshake between the President and Mr Raila Odinga. The handshake and the Building Bridges Initiative (BBI)[4] presented an opportunity for Kenyans to review the historical, continuing and persistent challenges and aspirations regarding elections, socio-economic justice, inclusion and good governance.

The nine key handshake issues are ethnic antagonism and competition, lack of national ethos, ethnic inclusivity, devolution, divisive elections, safety and security, corruption, shared prosperity, and responsibilities and rights.[5] In light of these, discussions and strategies on constitutional amendment should seek to address at least three governance challenges and aspirations.

First, socio-economic imbalance and injustice whereby certain tribes or communities and regions have been marginalised economically and socially since independence in 1963.

Second, the recurrent electoral injustices. Third, facilitate and encourage good governance and human rights, the rule of law, and due process while addressing tribalism, corruption or looting and incompetence.

Central to all these are Kenyans, not special interest groups. Article 1(1) states that all sovereign power belongs to the people, to be exercised only in accordance with the Constitution. Thus sovereignty, democracy, governance structure and administrative justice must undergird constitutional amendment. Debates should focus on key constitutional rules, values and principles, even as we seek reform.

Challenges to the Constitution of Kenya, 2010

Although the Constitution was to transform Kenya's elections and governance, the Kibaki and Kenyatta administrations have undermined constitutional gains, by manipulating or (informally) 'amending' its key provisions.

---

4 This was a 14-member committee that was officially gazetted and given one year to submit a comprehensive report.

5 Building Bridges Initiative Memorandum of Understanding. According to many, inclusivity entails the incorporation of all tribes in governance so as to give different communities opportunity to participate in the governance of the nation, and the question of gender equity in representation.

There are three main challenges to implementation. First, in eleven years, major constitutional organs and commissions have experienced intimidation, limited funding and acquiescence thus hindering the Constitution's full implementation. These hindrances largely originate from key political figures seeking to secure their individual interests at every step of constitutional implementation.

For example, the National Assembly's Budget and Appropriations Committee slashed the budget of the Salaries and Remuneration Commission (SRC) for the 2014/2015 financial year by Kshs 50 million from the 170 million originally requested as the judiciary lost KES 500 million planned for construction of court buildings.[6]

From the very beginning, there was disregard, by high-ranking officers, of the Commission for the Implementation of the Constitution (CIC).

State authorities bear criticism for not (sufficiently) enabling Kenyans to appreciate the Constitution and their rights. Disregard of other constitutional institutions such as the judiciary have been witnessed on numerous occasions. President Kenyatta was perceived as having sought to intimidate the judiciary especially in relation to the presidential election process and outcomes.[7] Moreover, the Speaker of the National Assembly, Justin Muturi, dismissed an advisory opinion of the Supreme Court on the Division of Revenue Bill.[8]

The Senate also ignored court orders barring them from debating impeachment of Martin Wambora, and Kivutha Kibwana, governors of Embu and Makueni Counties, respectively and Bernard Kiala, the Machakos County Deputy Governor.[9] Another example was the unlawful detention and deportation of Miguna Miguna by Cabinet Secretary Fred Matiang'i and the Immigration Department.[10]

---

6 Edwin Mutai, 'House budget team wants economic audit of Constitution,' *Business Daily,* Nairobi, 25/2/2014. In 2020-2021, the Judiciary was allocated only KShs18.1 billion (Kshs 0.7 billion less than the 2019-2020 budget allocation), out of a Judiciary budget of Kshs 33.3 billion and a total Government budget of KShs 3.2 Trillion. Only Kshs 50 million was allocated for development.

7 See Chapter 30 in Ben Sihanya, 'Presidential and Premier Election, Succession and Transition in Kenya and Africa in 2017, 2022 and Beyond,' in Sihanya, *Constitutional Democracy, Regulatory and Administrative Law in Kenya and Africa* Vol 2 (forthcoming 2021) (CODRALKA 2).

8 Alphonce Shiundu, 'Justin Muturi rules Charles Nyachae out of order on Judiciary's mandate,' *Standard*, Nairobi, 24/10/2014. The case is *Speaker of the Senate & Another* v. *Hon. Attorney-General* [2013] eKLR.

9 Eg *Martin Nyaga Wambora* v. *Speaker of the Senate* [2014] eKLR.

10 Paul Ogemba 'CS Matiang'i, Boinnet and Kihalangwa in trouble for disobeying court orders,' *Standard*, Nairobi, 28/3/2018. ,

The second challenge is lack of civic education on the Constitution, which makes it difficult for most Kenyans to identify or confront violations of it. The executive and relevant agencies have not provided civic education on socio-economic rights, justice, inclusion, and the relationship between the national government and the 47 county governments. The judiciary has sometimes also been compliant in non-implementation of the Constitution.[11]

Third, there has been continuing impunity and application of double standards in the anti-corruption struggle and the enforcement of human rights. For instance, unconstitutional investigations, arrests, prosecutions, bail or bond terms, as well as lifestyle audit of state officials has been promoted under President Kenyatta. This is mainly in response to public complaints on the rising cases of looting, corruption and impunity. These appeared to target selected cabinet secretaries, principal secretaries, some parastatal heads, procurement officers and accountants or politicians.[12]

Moreover, a 'life style audit' ordered by President Kenyatta was not done within the framework of Chapter 6 of the Constitution on leadership and integrity. Most of the 'anti-corruption' measures have been undertaken in a manner that fails to comply with fair administrative action, natural justice, due process and the rule of law. Significantly, the proposed amendment to Art. 80 required that Parliament enacts legislation establishing mechanisms to facilitate investigation, prosecution and trial of cases relating to corruption and integrity. This is to expedite the process of dealing with such integrity and anti-corruption cases.

Remarkably, there is no indication that senior government officials including President Kenyatta and Deputy President William Ruto have been audited even though they reportedly claimed the process and accountability generally would begin with them.

These and other challenges have negatively affected the realization of the fruits of the Constitution of Kenya 2010. As these administrative, managerial, political and governance challenges persist, proposals have been advanced to amend the Constitution.

---

[11] Although the post-2010 Judiciary acquiesced in numerous cases of constitutional non-compliance, infidelity, and reversal, Retired CJ Maraga (2016-2021) performed better than former CJ Willy Mutunga (2011-2016) and the late CJ Johnson Evan Gicheru (2003-2011).

[12] Ben Sihanya and Eric Ngumbi, "Lifestyle Audits as an Emerging Anti-Corruption Tool in Kenya and Africa: Concept, Essentials and Prospects," (2020) 4(1) *Journal of Anti-Corruption Law,* 80-117, online at https://tinyurl.com/ajryvd4s.

Proposed amendments to the Constitution of Kenya

Proposals to amend the Constitution have been introduced in two main phases: before and after the 2017 general elections. None has yet been enacted or adopted.

Proposed constitutional amendments in the 2010-2017 period in Kenya

Between 2010 and 2017, at least five constitutional amendment proposals were made by the key players in Kenya's elections, governance, constitutional sociology, and political economy, generally.[13] Proposals in the 2013-2017 period are discussed briefly below.

The *Pesa Mashinani* (money at the grassroots) campaign was initiated by governors under the umbrella of the Council of Governors, and pushed for increasing revenue to county governments from at least 15% to at least 45% of the national revenue.

This was also part of the *Okoa* (save) Kenya Movement initiated by the principals of the then Coalition for Reform and Democracy (CORD).[14] The other broad proposals were strengthening the National Land Commission (NLC), electoral reforms, provisions for ethnic inclusivity and diversity, and strengthening public institutions.[15] The strategy used was the popular initiative and referendum under Article 257.

I also disagree with those who cite costs of the referendum. I argue that constitutional democracy may be expensive but far cheaper than civilian dictatorship, dominant tribal or party rule, military rule or anarchy. These cost lives, as well as the costs of (in)security, and economic decline during electoral chaos and transitions. I have always argued that if the Constitution was effectively implemented and systems working as they should, devolution and the Constitution generally would generate finances.[16]

The *Punda Amechoka Punguza Mzigo* (the donkey is tired, relieve the burden) was a move by Moses Kuria, Jubilee Party's Gatundu South MP. His proposals

---

13 Willis Otieno (2014) 'Proposed amendments to the Constitution since 2010'[no longer available online].

14 The principals were: Raila Odinga (ODM), Kalonzo Musyoka (Wiper Democratic Movement Party), Musalia Mudavadi (ANC), and Moses Wetangula (Ford-K).

15 See the Constitution of Kenya 2010 (Amendment Bill, 2015 (Okoa Kenya Bill) dated 23/4/2015.

16 See Justus Wanga 'Too many interests stand in the way of the Constitution' *Saturday Nation,* 23 August 2014.

included scrapping the Senate, women representatives and nominated members of county assemblies, and the merging of the 47 counties to reduce the number to 18.[17] After allegedly collecting 300,000 signatures, this push subsided when the August 2017 General Election campaigns approached and its fate was unclear. This was clearly a cynical and mischievous move to counteract or manipulate progressive reforms.

The Building Bridges Initiative and constitutional amendment proposals in Kenya in 2017 and beyond

Since 2018, there have been at least six proposals to amend the Constitution of Kenya, 2010 by different Members of Parliament, one by civil society organizations, and one by rapprochement (March 2018 Handshake and BBI).

First, the Constitution of Kenya (Amendment) Bill, 2018, No. 4 of 2018 by Aden Duale, which sought to give effect to the one-third gender principle through the creation of special seats on the model of the top-up seats for county assemblies.

Second, the Constitution of Kenya (Amendment) Bill, 2018, No. 5 of 2018, by FORD-Kenya MP, Chris Wamalwa, that sought to push general elections from the second Tuesday of every fifth August to the third Monday in December of every election year.

Third, Kassait Kamket, Tiaty MP, drafted a Bill to shift Kenya to a parliamentary system. It proposed a prime minister as head of government coming from Parliament, and a more ceremonial President.[18]

Dr Ekuru Aukot's Thirdway Alliance party floated a popular initiative entitled '*Punguza Mizigo* (relieve the burden).' Unlike the Okoa Kenya initiative that failed to obtain one million or more valid signatures, this one got to the stage of being referred to counties. But it failed to get support from 24 counties or more to proceed to Parliament under Art. 257(7).Indeed, only Uasin Gishu County Assembly and Kirinyaga County Assembly were reported to have supported it.[19] It would have raised the counties' minimum equitable share of revenue raised

---

17 Fred Kibor 'MP Kuria collects over 300,000 signatures in referendum push,' *Standard*, Nairobi, 11 January 2016,). Therefore, would Kuria support the Raila-Bomas Draft view that Kenya needs 14-16 regions, discussed below?

18 Ibrahim Oruko 'William Kamket: The first-time MP behind Bill on presidency,' *Daily Nation*, Nairobi, 28/2/2018, See Sihanya, Chapter 11 and 12 on 'President and Deputy President in Kenya and Africa,' in CODRALKA 1 (forthcoming 2021).

19 'End of the road for Punguza Mizigo,' *Standard,* 17 October 2019.

nationally to 35%, reduced MPs to 100 (one of each sex from each county plus six 'nominated'), changed the presidential term to a single one of seven years, among other proposed amendments.[20]

Fourth, civil society organizations, including the Better Kenya Team, proposed amendments to increase revenue allocation to the counties from 15 to 40 percent. The BBI 2019 and 2020 Reports proposed amendment to Article 203 (equitable share and other financial laws) in the Constitution of Kenya (Amendment) Bill 2020 to increase county revenue allocation to 35% to strengthen devolution, development and equitable resource sharing between the national government and 47 county governments.

Fifth, there was also a proposal to let the national government have direct control over Nairobi City County.[21] Some critics argued that this proposed model for Nairobi was likely to have an ethnic and executive interest in controlling Nairobi. The proponents argued that the situation of Nairobi is unlike that in other countries which have a special constitutional executive and administrative arrangement for the capital city, for instance Washington DC in the US and Abuja Federal Capital Territory in Nigeria

Sixth, the main constitutional amendments or reforms fronted but not formally presented before Parliament came after the famous handshake in March 2018. They largely sought to transform the system and structure of government at the national level from an executive presidency to a parliamentary leaning hybrid system. This is principally by Raila Odinga and the Orange Democratic Movement (ODM) and the National Super Alliance (NASA) leaders including, Kalonzo Musyoka and Musalia Mudavadi.

Some of the changes envisaged in the initial stages included a shift from two levels of government (the national and the county) to three levels, the intermediate being 14 to 16 regions. One proposal is that the regions would consolidate the legislative process at that level. Then the counties would remain administrative units under the regions.[22] Counties have themselves recognised the need to work together hence the emergence of seven regional economic blocs.

---

20 See the Bill, at https://tinyurl.com/PunguzaBill.

21 Kembi Gitura (2018) 'Place Capital City under national government,' *Star*, Nairobi, 5/5/2018, (accessed 18/7/2018); Jemimah Mueni (2020) 'BBI Proposes Retention of Dual NMS-City Hall Administration in Nairobi,' *Capital News,* Nairobi, October 22, 2020, (accessed January 12, 2021); Dennis Mwangi (2020) 'Uhuru Reverses Controversial BBI Proposals,' *Star,* Nairobi, November 25, 2020.

22 Raila Odinga's speech in Kakamega during the Fifth Devolution Conference, 2018, at https://www.youtube.com/watch?v=OrPCQuCq93g.

Yet merger requires deeper consultation and public participation before, during and after the process, especially during and in the post-coronavirus disease 2019 (COVID-19) pandemic period.[23]

Some county governors also reportedly proposed constitutional amendments to remove the two-term limit for governors (Art 180(7)). Governors also sought an amendment to secure immunity or privilege from prosecution. They problematically argued that governors, just like the President, are heads of government.[24]

Seventh, the Building Bridges Initiative (BBI), through public participation, collected views of Kenyans, facilitated debate, validation, consensus building, and facilitated the compilation of the BBI 2019 and 2020 Reports. The reports addressed four key reforms: constitutional, policy, legislative, and administrative reforms.

The pro-amendment pact proposed a parliamentary-leaning hybrid system. The Constitution of Kenya (Amendment) Bill 2020 proposed the sharing of powers and functions at the top of the executive between the President (Article 131(1)(b)), Deputy President (clause 22 of the Bill, Article 130(1)), a Prime Minister (new Article 151A), and two Deputy PMs (new Article 151D). This is crucial to ensure real power sharing based on portfolio balance, including, checks and balances to control tendencies towards the imperial presidency but also limit gridlock between the power holders.

The hybrid or semi-presidential system that Kenya had in 2008-2013 informed the reforms. Clearly, executive power sharing is one of the key issues in tribal inclusion, socio-economic and electoral justice, and good governance. Some politicians misinterpreted the argument by saying the amendment is only to create jobs for the rich few,[25] and to accommodate the leaders of leading political parties within the national executive rather than jobs for the people.[26]

---

23 Titus Too, Lydiah Nyawira and Kevine Omollo 'Why regional blocs flopped even before hitting ground,' *Standard on Sunday,* August 9, 2020.

24 Benjamin Immende, 'We need immunity just like the President, say governors,' *Star*, July 10, 2018). Presidential immunity or executive privilege is itself not absolute. See Ben Sihanya Chapters 11 and 12 on 'President and Deputy President in Kenya and Africa,' CODRALKA 1 (forthcoming 2021).

25 Stanley Ongwae, 'An angry Ruto on big Four Agenda and declares defiance,' *Star,* October 16, 2020.

26 Gerald Mutethia, 'There's no government without me - Ruto,' *Star,* Nairobi, October 19, 2020.

Reviewing executive powers and structure in Kenya

In the ongoing quest for further constitutional changes in Kenya, the focus is particularly on the executive and the presidency. Executive powers affect the people more directly and frequently in Kenya and Africa.

The role of the presidency in Kenya has animated and dominated popular and political discourses on constitution making, constitutional review and implementation, as well as political processes, since independence in 1963.[27] Presidential executive power permeates all the arms and organs of government and the entire public sector.

Significantly, the authority bestowed upon the President in Kenya is still very extensive. My preference is that executive power should be shared at the top. The parliamentary model of 1961-1963 and 2008-2013 showed that power sharing at the top is crucial. And the experience from 2011 to 2020 in Kenya demonstrates that if power is not checked properly at the top it is liable to abuse and constitutional implementation will be a façade. Hence the growing ethnic exclusion, looting and corruption; indebtedness, and poor service delivery at national and county government levels.

The powers of the President are substantial and centralized. They should be shared. The DP and cabinet secretaries still lack an independent power base and are often countermanded by the President, leading to his violation of the Constitution. This is despite the fact that Article 131(1)(a) and (b) that makes him the Head of State and Government do not grant him plenary executive authority over cabinet secretaries, and principal secretaries, who have substantial independent constitutional and statutory powers.[28]

Thus, the Constitution is ripe for amendment. The 'handshake', the BBI proposals and debate, and the Constitution of Kenya (Amendment) Bill 2020 present an opportunity to correct some of the most persistent governance challenges which mainly arise from concentration of power in one office in the executive. Other issues include presidential electoral justice, tribal and gender inclusivity in governance, integrity and anti-corruption, socio-economic equity and justice, and sustained good governance.

---

27 Ben Sihanya, 'The Presidency and Public Authority in Kenya's new Constitutional Order,' Constitution Working Paper Series No 2, Society for International Development, at http://sidint.net/docs/WP2.pdf; revised and forthcoming (2021) in Sihanya, CODRALKA 2.

28 See also Article 130 of the Constitution which provides that 'The national executive of the Republic comprises the President, the Deputy President, and the rest of the Cabinet.

In the light of the arguments advanced above on the challenges and issues on the Constitution of Kenya 2010, a pure presidential system in Kenya is not appropriate. The Bomas draft on the cohabitation or power sharing between the President and Prime Minister provides a useful model that can be adapted.

Thus, a hybrid system is appropriate for Kenya. It would allow greater inclusion and hence popular representation and participation in governance. At present most Kenyan people are underrepresented at the top of the executive with overrepresentation in some legislative organs which so far have been used as executive rubber stamp or corruption channels.[29]

The process or approaches to be taken in constitutional amendment in Kenya should reflect the concerns raised by stakeholders including the people, leaders of political formations, politicians, civil society organizations, academia, and experts in constitution making.

Approaches to constitutional amendment in Kenya from 2017 and beyond

Constitutional text and intention have and can be positive and progressive. The challenge has been implementation and enforcement under the rule of law. The following 'people's' strategies are crucial but have not proved sufficient: petitions, demonstrations, protests, picketing, other forms of alternative dispute resolution[30] and traditional dispute resolution,[31] public interest lawyering, litigation, impeachment and election.

As Kenya embraces the formal amendment process, individual political ambitions should not control the discussions on constitutional amendment or reforms. And as Yash Ghai opines in one of his newspaper articles, politicians should not take charge of the constitutional amendment process.[32]

The Grand Coalition Government, media and civil society organizations, including NGOs performed reasonably well in facilitating a people-centred process in the adoption of the Constitution of Kenya in 2010.

---

29 See Ibrahim Oruko, 'MPs bribed to throw out report on bad sugar,' *Daily Nation*, 11 August, 2018.

30 The constitutional and juridical (ADR) measures include mediation and arbitration.

31 Traditional dispute resolution (TDR) is mentioned in Article 159(2)(c). However, TDR has not been elaborated through legislation, policy or administrative reforms.

32 Yash Ghai, 'People's mandate: Why I don't trust politicians to amend the law,' *Standard Digital News*, Nairobi, January 27 2018.

The main role of the people if the proposed referendum in Kenya happens will mainly be to participate in the debates and decision making by voting. All the relevant government agencies need to put in place measures to ensure the interests and will of the people are realized.

There is also an important role for the socio-economic and political elite. Political leaders, lawyers, civil society activists, intellectuals and academics should play a key role in cementing constitutional democracy in Kenya through active participation in review processes. Experts in constitutional democracy including scholars, academics, judges, magistrates, lawyers, and relevant civil society practitioners should also secure or be given a central role in the crucial process.

Kenya has numerous lessons to learn from previous experiences. The constitution making process in the 2000-2010 period illustrates that constitution making and amendment can have either unifying or divisive consequences or both.[33] At the peak of Kenya's constitutional review process, different actors joined to lobby for change especially after the post-election violence of 2007/8. For example, some leading actors in the police and security reform sector decided to form a coalition which later developed into the Usalama Reforms Forum.

The constitution amendment or making process is fundamentally political. It is about individuals contesting or negotiating power. It is about interests, principles, policies, programmes, projects, strategies, and tactics which can include obstruction and sabotage.[34] It can also be an opportunity for unification, consensus building and compromise. Constitution amendment or making process have otherwise been turned into political competition versus trust and consensus building processes.[35] These are some of the contentious issues surrounding the debates on the Building Bridges Initiative (BBI), and the Constitution of Kenya (Amendment) Bill 2020.

---

[33] Yash Pal Ghai and Jill Cottrell Ghai, 'Constitution making and democratization in Kenya (2000-2005)' (2007) 14:1 *Democratization*, 1-25: Sihanya, "Constitution Making, Amendment, Interpretation, Construction, Translation, and Implementation and Reform in Kenya and Africa 2010: Interests, Process and Outcomes,' Chapter 31 in Ben Sihanya *Constitutional Democracy, Regulatory and Administrative Law in Kenya and Africa* (CODRALKA) Vol 1 (forthcoming 2021); Ndulo, Muna, 'Constitution-Making in Africa: Assessing Both the Process and the Content' (2001), *Cornell Law Faculty Publications*. Paper 57. http://scholarship.law.cornell.edu/facpub/57.

[34] Yash Ghai, 'The role of constituent assemblies in Constitution making,' (for International IDEA 2006) available at https://tinyurl.com/GhaiRoleCAs.

[35] Justin Kimani, 'Mutual trust critical to the success of national aspirations,' *Standard,* December 22, 2020.

Additionally, the will of the people of Kenya must be considered as paramount in any constitutional reform and amendment process. The Constitution of Kenya (Amendment) Bill received over 4 million signatures of Kenyans in support of the constitutional reform process.[36] This signifies Kenyans' need for inclusivity, gender equity in representation, equitable resource allocation, employment opportunities, shared prosperity; demand for transparency and accountability in public service, appointment, and service delivery. Kenyans must therefore demand for non-politicking on matters of constitutional reform, amendment and implementation.

Further, despite support by at least 4 million Kenyans (1 million required), 44 out of 47 counties (24 needed), 51 out 67 Senators, and 235 out of 350 MPs (simple majority required), and ignoring the two promoters, some politicians and activists in Kenya reportedly adopted delaying tactics to sabotage constitutional reform process and referendum in 2021.[37]

The court affirmed the constitutionality of the BBI Task Force and that the President could establish the Task Force under Articles 131 (2) and 132(1) (c) (i) of the Constitution in *Thirdway Alliance Kenya* v. *Head of the Public Service; Martin Kimani* (2020) (BBI 1).[38]

The other litigation is *David Ndii & 4 Others* v. *Attorney-General & 3 Others* (2020) (BBI 2).[39] The five judge High Court bench decision was appealed on the basis that its findings were not constitutional, especially because the doctrines of the basic structure and eternity clauses were imported from India and Germany; and the finding that three (3) Independent Electoral and Boundaries and Commission (IEBC) commissioners cannot transact business yet Art. 250 permits that.

Why would some leaders, elected by Kenyans to safeguard and promote their best interests, personalize constitutional amendment processes?[40] Deputy President William Ruto's ambivalence emerged more clearly when he celebrated the High Court decision and when he had earlier demanded three things: first, include women representatives (as under Art. 97 and not as senators?). Second,

---

[36] Patrick Lang'at, 'Legal timelines begin with submission of BBI signatures to IEBC,' *Daily Nation,* December 12, 2020.

[37] Jacob Ng'etich, 'Inside Ruto's game plan to push the plebiscite to 2022,' *Standard,* December 6, 2020, see also Mireri Junior, 'Ndii: Our aim is to cure political mischief not to switch off BBI reggae,' *Standard,* September 18, 2020.

[38] *Thirdway Alliance Kenya & Another* v. *Head of the Public Service-Joseph Kinyua & 2 Others; Martin Kimani & 15 Others (Interested Parties)* [2020] eKLR.

[39] *David Ndii & 4 Others* v. *Attorney-General & 3 Others* [2021] eKLR.

[40] Andrew Kipkemboi, 'Why you ought to worry about post-BBI Kenya,' *Standard,* December 21, 2020.

introduce multiple questions in the referendum. Third, delay (or cancel?) the referendum?[41]

The verification of signatures is followed by at least five other processes. First, submission of the Bill to the County Assemblies for consideration and debate within three months after submission (Art. 257(5)). To progress, the Bill would have to be approved by a majority (at least 24 out of 47) counties.

Second is submission of the Bill to Parliament by the Speaker of each county assembly that approved the Bill, within three months. Where a majority of the county assemblies approve the Bill, it must then be introduced in Parliament for consideration and debate without unnecessary delay (Art. 257(6) and (7)). Being a Constitution Amendment Bill, it would take ninety days between the first and second reading to ensure effective public participation.[42]

Third, the Bill would then proceed to a referendum if a majority of legislators (at least two-thirds) in both houses of parliament approved, or where the proposed amendments fall under the Art. 255(1) as the BBI and the Constitution of Kenya (Amendment) Bill 2020 does.

In my view, the Bill would proceed to a referendum since, among others, it specifically addresses the following four matters that are listed under Art. 255(1) as necessitating a referendum. First, proposed amendments to Chapter 2 on national values and principles of governance under Art. 10(2) (proposed Art. 10A on regional integration and cohesion; Art. 11 on economy and shared prosperity). Second, proposed amendment to Chapter 4 (Bill of Rights) to enhance the right to privacy of citizen's data (Art. 31).

Third, the Bill proposed to enhance the accountability of the judiciary through the introduction of an independent Office of the Judiciary Ombudsman (Art. 172A). This can be classified as a proposed change under Article 255(1)(g) (as relating to independence of the judiciary and the commissions and independent offices). Also, the proposed amendment to Article 248 to include the Office of the Director of Prosecutions as a functionally and budgetary independent office under Chapter 15.

Fourth, the Bill also proposed to introduce the Office of the Prime Minister (new Art. 151A), with the President nominating, and Parliament playing a key role through approval or rejection of the presidential nominee (Art. 151(B)(3)).

---

41 'BBI has derailed Jubilee's Big 4 agenda - DP Ruto,' *Star,* December 26, 2020; Brian Ojama, 'Ruto: Handshake, BBI politics have dimmed Jubilee's Big 4 agenda,' *Daily Nation,* December 26, 2019; Jacob Ng'etich, 'Inside Ruto's game plan to push the plebiscite to 2022,' *Standard,* December 6, 2020.

42 Jill Cottrell Ghai, 'BBI: How much is it about what you think?' *Star,* October 31, 2020.

This can be classified as affecting (or enhancing) the functions of Parliament as a ground for a referendum on the Bill under Article 255(1)(h).

Fifth, the BBI Bill would then be taken for presidential assent under Article 256(5)(a) and (b) if a majority of Kenyans vote for the Bill. Fifth, the assented Bill would then be gazetted within 30 days upon assent by the President (Art. 256(5)(b)).[43]

Summary: interests, process and outcomes

This essay has addressed three research questions. First, whether the Constitution of Kenya 2010 has addressed the targeted challenges and aspirations, and if not, why not? Second, whether the Constitution is ripe for amendments and which are necessary, and or desirable. Third, what are the appropriate constitutional amendment processes? I focused on reviewing the literature, law and policy as well as content analysis of the professional and popular media.

The three key findings are that: first, the Constitution's intention can be discerned from textual analysis including the Preamble and Articles 1 and 10 and general values and principles that undergird every chapter. Further, subsequent or emerging practice and usage of the Constitution through interpretation by the courts and tribunals, and the legislature, especially exhibit constitutional infidelity and reversals in legislation, motions and petitions. It is important to view the foregoing in light of the challenges facing implementation, and constitutional amendment proposals or reform since 2010.

Second, the Constitution has faced three major challenges. First, the intimidation, limited funding and acquiescence of various constitutional organs and commissions. Second, the lack of civic education which has made it difficult for Kenyans to identify or confront its violations. Third, the continuing impunity and application of double standards or ambivalence in the anti-corruption struggle and the enforcement of human rights under the Constitution. These and other challenges have negatively affected the realization of the fruits of the Constitution of Kenya 2010.

Third, that constitutional amendment proposals must be inclusive of key players in Kenya's elections, governance, constitutional sociology and political

---

[43] Prof Ben Sihanya,'Why Benin and Kenya need the Space to own their Constitutional Development,' March 2, 2021, *Ventures Africa*.

economy, generally. These include academics, lawyers, civil society organisations (CSOs), and activists.

Additionally, where issues of costs arise, I argue that constitutional amendment may be expensive but cheaper than civilian dictatorship, or rule by the dominant tribe or party, military rule or anarchy. Therefore, Kenyans should prioritize effective implementation of the Constitution, and if they were working as they should, then devolution and the Constitution generally, would generate and safeguard finances.

Relatedly, constitution amendment processes are fundamentally legal and juridical or political. However, Kenyans should uphold and promote unification, consensus building and compromise rather than the pursuit of selfish political interests. The political class should also embrace honesty, legitimacy, and to uphold the national values and principles of the Constitution including public participation, in promoting the best interests of Kenyans. Significantly, the 2010 Constitution was enriched by contributions from different actors and the review process in Kenya beyond 2017 should also benefit from actors from diverse sectors.

Therefore, constitutional reform, amendment and implementation processes should be viewed as 'win-win' situation; as democratic, holistic and consensus building processes.[44] And President Kenyatta's enduring legacy would not be the 'Big Four,' but facilitating succession and transition, tribal inclusion and shared prosperity, through progressive constitutional amendment including BBI and a break from the post-independence electoral fraud, impunity and sense of tribal entitlement or privilege.

---

[44] Macharia Munene, 'Why Kenya's constitutional duels are all about power struggles among the elite,' *The Conversation* October 18, 2020.

Epilogue:
Particularly on the Building Bridges Initiative

This book is appearing in the middle of something of a crisis for the Building Bridges Initiative (BBI) process (in view of the High Court and Court of Appeal judgments, now before the Supreme Court). The main theme emerging from most of the writers of this book is that there is not so much wrong with the Constitution – it needs to be implemented.

But readers will surely be asking: what is the connection between this book and what is/was being considered through BBI? So rather than write something new we include here a collage of extracts from articles published mostly in the Katiba Corner column in the *Star* over the last 2 years. The original source and author is mentioned for longer pieces only. The original text is in this font, more recent comment is in this font.

The focus is about recommended changes to the Constitution (especially in the BBI Bill of 2020, which at the time of writing the High Court has put a stop to[1]).

But before we move to that, Katiba Institute held some meetings with Kenyans (in Kitale, Kilifi and Nairobi) asking them for their views on implementation of the Constitution.

Is constitutional change really what we need? (from an article by Jill Cottrell Ghai in the *Star* September 2019)

Despite all the "referendum talk", interactions with Kenyans about what really worries them about the way the country is going often lead somewhere else. Here are a few examples of issues recently raised with Katiba Institute.

---

1 *David Ndii & others v Attorney General & others* [2021] eKLR.

Nepotism

"Prominent officials tend to appoint their relatives to posts". While it is not necessarily wrong to appoint a relative as an official -at least if they are properly qualified, and appointed as the result of a well-conducted process uninfluenced by relatives already in office - it still tends to raise suspicions. The Constitution does have something to say about it: Article 73 says that the principle of leadership include "ensuring that decisions are not influenced by nepotism, favouritism, other improper motives or corrupt practices".

People tend to expect "the Constitution to do something about it". But the Constitution does not do anything. It is not some sort of fierce guard dog that can detect by a sense of smell that a person has been guilty of nepotism (or favouritism, other improper motives or corrupt practice) and will gobble that person up.

There are things that the Constitution, or other law, provides can be done to such a person (impeach a governor, recall an MP, sentence a corrupt person, dismiss a person in the public service, including a cabinet secretary or a county executive member etc). But, between offence and punishment, the intervention of human beings is needed. Someone must suspect, investigate, collect evidence, and report to the authority with the power to take action (not necessarily in this order). Serious breaches such as repeated, or the most blatant, nepotism can justify impeachment, and no doubt dismissal, though they may not be a crime. The Court of Appeal has told us this.

Unreasonable taxes

'This county imposes excessive taxes'. A particular complaint might be about taxing the burying of bodies, or transporting produce, or boda-bodas.

The Constitution does say something about excessive taxes: 'the burden of taxation shall be shared fairly'. Practically speaking, this may be hard to enforce or even to fully understand. But a constitution cannot say in detail what taxes and what amounts can be raised. This is one of the central questions to be decided by any government – in a democratic way – and cannot be fixed in advance by a constitution.

In fact, can counties tax boda-bodas, death or transporting goods? They can tax land (rates) and entertainment, and otherwise only what Parliament allows, and Parliament has not allowed any other. In fact, the 'cess' imposed by some counties on agricultural produce has been held unconstitutional by courts. Again,

if people do not detect the unconstitutionality and complain about it (or go to court about it) counties may get away with illegal taxes.

Counties can charge for services, and for approvals that are necessary for a regulatory function that they have under Schedule Four of the Constitution. But if someone has to pay something in return for no service, and if the payment is not connected to regulating an activity but is only about raising money for the county, this is a tax, not a charge.

The Division of Revenue Bill shambles

'It took far too long to resolve the stand-off about the share of the counties' – is this a problem with the Constitution?

Every year there is a budget and a law giving the actual amount to be allocated —the Commission on Revenue Allocation (CRA) must comment. In 2019 the CRA recommended 335.70 billion shillings for counties. The Treasury wanted this to be 310 billion. The Senate (guardian of the interests of county government according to the Constitution) wanted the CRA recommendation adopted. Finally they were persuaded (under presidential pressure it seems) to accept a compromise of 316 billion. This followed failure of the mediation arrangements, including a joint committee of the two houses, to reach a compromise. Maybe some pig-headedness on all sides is involved.

Could the Constitution do something about this? It could have made the CRA recommendations mandatory—but could we be sure that this would have been acceptable? People also sometimes complain about commissions. The Constitution opted to leave the final decision to the democratic process. But do our politicians have the necessary democratic orientation? But if the Constitution took the choice away from them when would they ever develop this orientation?

And the National Assembly seems deliberately to drag its feet in considering the Auditor-General's annual reports on public expenditure (the National Assembly is several years behind). Why? Maybe because each year public revenue tends to rise, and the county share should also rise—but the minimum percentage of national revenue that counties are to get is based on the last National Assembly approved national accounts. In other words, the delay benefits the national level of government. [The BBI 2020 Constitution Amendment Bill did have a solution for this.]

If the Treasury and the MPs did their jobs properly, counties would get more money, and unreasoned calls for 'more money to counties' might lose their appeal.

Conclusion

In short, the Constitution very often does say something about the behaviour that the public tend to deplore. It is usually hard to see how the situation could be improved by amending the Constitution, without undermining the democratic process, which means undermining the rights of the people also.

Improvement will only come if elected and appointed officers (servants of the nation) take seriously what they are supposed to do and how. And they will only do that if other people also take these things seriously and expect compliance with the Constitution. That also means using the tools the Constitution, and the democratic process, provide for controlling misbehaviour.

The greatest of the checks and balances in the Constitution are found in the self-interest of others. And that includes the self-interest of the people, who must understand where their interests lie, and insist that all authority is exercised in the public interest, as the Constitution requires.

Asking to amend the Constitution is usually not addressing the real cause of the problems.

Now we turn to the BB proposals, and to whether they would address issues raised in this book.

BBI and Parliament

The BBI proposals affecting Parliament were in a sense central: in addition to the President and Deputy there would come out of the National Assembly a prime minister and two deputies, and also ministers (no longer cabinet secretaries) would be from Parliament.

This is really concerned less with the functioning of Parliament and more with the availability of more posts for 'inclusion' which we have tended to criticise as really a matter of providing appealing posts for leaders of the five biggest communities – or even for certain individuals. We shall return to the matter under 'Executive' below.

But: the National Assembly is expanded by including the Leader of the Opposition (the best loser in the presidential election - see below), the Attorney-General - and any cabinet ministers not already members of the house. Presumably most will be – because clearly this provision in intended to please MPs. But any additions who are men will require further additions of women to ensure the gender rule is obeyed.

[From "'Inclusion" in the BBI: and the latest, bizarre proposals on elections' by Jill Cottrell Ghai and Yash Pal Ghai November 2020]

If the BBI Bill were passed there would be a requirement that parties must nominate at least one third women candidates for constituency seats. But there is no way parties can be required to nominate the women for seats the party is likely to win. However, let us assume that of the 360 constituency members under the BBI changes this rule produced 90 (25%) women MPs. Add the three women for seats for persons with disability and youth - that is 93 women altogether. For the moment, assume that that is out of a total membership of 366 – so 25.4% women. Now extra women are added to ensure the gender rule, and every time more women are added the total size goes up of course. To get to one third women we would need 38 more women, meaning a total house of 404.

The BBI proposes that the extras needed will come from defeated candidates for constituencies. Of course the defeated women candidates – though they do not put that very clearly. (They have done something similar for the county assemblies.)

So you are bringing into the house, on our hypothetical calculation, 38 women who lost elections. Identifying them would begin with the woman who got the highest vote (provided she comes from a party entitled to extra, top-up, seats). She might have come quite close to the winner. As you go down the list, the vote for defeated women will get less and less.

Thus in our scenario 38 constituencies would find that, not only did their first choice not become their MP, but – if that person is male – they would also see their second or even third choice in Parliament. A person whom more people rejected than supported. But that person will not represent them.

The (connected) Leader of the Opposition proposal *[from an 'Open Letter to Bunge' from Jill Cottrell Ghai Part II March 2021]*

The BBI proposal is that the person who comes second in the presidential election should become Leader of the Opposition with a seat in the National Assembly.

This is odd. In 2007/8 Mr Odinga believed he had won—as did many others (the rights and wrongs are not relevant here). He – and those who instigated violence at that time – were not convinced they should not be in power. The same was true in 2017. They did not want to be Leader of the Opposition. Indeed Odinga was Leader of the Opposition in 2007. Apart from ensuring that one person does not find him/herself in the political cold (with no publicly paid income and no

obvious role) it serves very little purpose. And if that person's party actually wins most seats in the National Assembly he/she (though clearly a really credible player) would not become Leader of the Opposition anyway, because the Prime Minister would come from that party, but would already be in Parliament.

The BBI Bill would also have increased the number of MPs, adding 70 constituencies (to named counties), abolishing the county women seats, and adding as many additional seats for women as needed to meet the no more than two-thirds of either gender rule [as just discussed]

None of these changes met the closing comments of the author of the chapter on Parliament in this book: 'The opportunity that exists is to have a referendum question that sets political party structures, reduces the size of the Parliament and make the right of recall of elected representatives by the people very explicit in order to rein in the legislators and push them to be effective.'

The Senate

Another Katiba Corner piece ['The Senate and the BBI' by Jill Cottrell Ghai] dealt with the Senate under the BBI Bill (December 2020).

Countries with a second level (or more) of governments commonly have two houses of parliament. Usually one of them reflects the nation in a way that is different from the other house –particularly to give the small lower level units more of a say. The second house may have a close connection with the governments at what we call the county level. And it may have special functions in connection with the system of lower level government. Sometimes the second house has different types of qualifications for members, or they stay in office for longer.

Our Senate has no such different qualifications, nor different terms of office. Nor do its members have any special connection with the county governments; a proposal in the Bomas draft that Senators should be elected by county assemblies, or equivalent, was removed by the Committee of Experts. Like governors, most Senators are directly elected by their county voters. Sometimes they are not even from the same party as their county's governor.

Senate's role is focused on county government. Laws passed by the National Assembly that will not affect counties are not considered by the Senate. To ensure that the Senate does consider laws affecting counties, the Speakers of the two houses must discuss each Bill to agree whether it should go to the Senate. This

has not been happening – and the High Court recently said quite a number of laws were unconstitutionally enacted as a result.

So our Senate is not designed as a body of older, wiser and more experienced people, who might act as a restraining force on the possible excesses of the other house.

Senate has important roles in allocation of national revenue to the counties. It must be involved in passing the Act that divides national revenue between the national and county level (the Supreme Court clarified this). It decides every five years how that money for the counties will be shared among the individual counties – the National Assembly may overturn the Senate decision but only if two thirds of MPs agree.

And the Constitution says that the Senate "exercises oversight over national revenue allocated to the county governments". This is just one of the problems created by a Parliamentary Select Committee that reviewed the draft Constitution in 2010. It caused surprise because the primary overseer of spending by counties must be the county assemblies. Indeed the Constitution says that assemblies "may exercise oversight over the county executive committee and any other county executive organs".

The other oddity is that counties spend money from the national revenue and from their own revenue on the same activities and people wondered how the Senate could draw the line demarcating its jurisdiction. The courts have found it difficult, the Court of Appeal referring to this 'operational quagmire'.

This looked like something to please the Senators—though that select committee had otherwise tried to demean it, by suggesting it be called the 'second house of Parliament'.

The Senate has an important role in impeachments—the removal process for the President and governors (like Sonko).

And if the national government is moved to intervene in county government matters – because the county government is unable to cope and needing help, or because of some serious crisis in the county—the Senate can bring this intervention to an end.

Senators now and under BBI

Now the Senate consists of 47 directly elected county senators (three of them now women), plus 16 women, and four members representing youth and those with disabilities (a woman and a man for each) who come in through party lists.

Normally each county has one vote only (usually cast by the county Senator)—and the Senators not representing specific counties must go along with the vote of the county where they are registered as voters.

The BBI team, with some justification, decided that list mechanisms were not a good idea. List members tend to be viewed as not 'real' members. And to have most women come in through lists undermines the credibility of women members. The BBI amendments would do away with the 16 women in the Senate, but not the other four list members. And they would introduce 47 more members – because now every county would have both a man and a woman directly elected.

This means every Senator, man or woman, would have their own vote. There seems little wrong with this: already Senators do not necessarily vote in a way that reflects the view of their county's government. In many other countries – like the US, which has two Senators from every state – every individual Senator has their own vote.

The four Senators for youth and persons with disability would also each have their own vote—no doubt with guidance from their parties. But it does mean that up to four counties would have an extra vote in the Senate, which slightly undermines the idea that in the Senate every county, large or small, would have the same voice.

Ironically, having removed the women party list from the Senate (the house that was already pretty close to having one third women) the BBI team, under pressure, introduced a list system for women into the National Assembly. What happened to their principle?

What would Senate do?

Senators would have loved to be like other second houses and have a say on all legislation. Perhaps like the South African Council of Provinces, which considers all legislation but whose voice counts for more on laws affecting the provinces. This they did not get—clearly the MPs counted for more in the BBI calculus. (Incidentally the Thirdway Alliance *Punguza Mizigo* Initiative would have made the Senate a genuine second house of Parliament).

The Senate's anomalous power to oversee 'national revenue allocated to the county governments' would actually be extended by the BBI to <u>all</u> county expenditure. This continues the national level disregard and disrespect for county institutions, and would leave county executives being supervised by two legislative bodies (its county assembly and the Senate).

The Senate's powers in connection with national revenue for counties would not be affected, nor its powers in connection with national government intervention in county governments, nor its role in impeachment.

Senators might feel aggrieved by the BBI proposals because that even though now MPs might become ministers, this privilege would not be enjoyed by Senators. It is not uncommon for members of second houses in parliaments in systems with two tier governments to be able to be ministers. Australia and Canada are examples. No such chance for Senators here!

Overall the Senate's functions would not change much –not nearly as much as Senate would have wished. It would not be demoted in any sense. Whether we really need these changes is entirely another matter.

Elections

Violent elections were identified as perhaps the main spur to the whole BBI process. Inclusion of the sort just mentioned is supposed to deal with this.

[From "'Inclusion" in the BBI: and the latest, bizarre proposals on elections.' by Jill Cottrell Ghai and Yash Pal Ghai]

The BBI aims to achieve greater equality in voting—so that each person's vote counts for roughly the same. This is an objective of the Constitution as it is.

In reality the system we have now produces grave imbalances in terms of representation and equality of vote. The population of constituencies varies enormously. Lamu has three MPs, while Nairobi with 32 times the number of people as Lamu has 18 MPs. These figures include the women representatives. So if you are a Lamu voter the impact of your votes for MPs is much greater than if you were a Nairobi voter. And your voice through your MPs is much greater than that of a Nairobi voter.

In addition because the list seats (12 in the National Assembly and 20 in the Senate plus those in county assemblies) are allocated on the basis of the number of seats parties have won, they tilt the balance towards the parties that have won more seats—to 'them that have shall be given'.

The BBI proposals would deal with this issue in several ways. Abolishing the 47 women seats in the National Assembly would improve somewhat the equality of votes for the Assembly. So would deciding how many list seats parties get on the basis of votes received and not seats won. Progress towards equality of vote

in the National Assembly could have been made by the IEBC modifying constituency boundaries while retaining 290 constituencies—without adding 70 new constituencies. But presumably the BBI has experienced a familiar problem: current MPs feel a vested interest in their constituencies and would resist their abolition.

The method of giving more seats to areas with more people by allocating the seats by counties, without a detailed examination of figures and boundaries smacks more of placating certain heavy voting areas rather than adjusting inequities. The Constitution design was that this sort of task was to be done by the Independent Electoral and Boundaries Commission—not by politicians. This was a factor in the High Court decision against the BBI.

None of these changes reflected things pinpointed by Seema Shah in her chapter in this book. And none of the BBI proposals really addresses the crisis of confidence in the management of Kenya's elections which she identifies.

Executive

This is where the nub of the BBI is to be found: in proposals for a group of new jobs at the top of the political system.

[From Letter to Bunge II]

This is supposed to cure the curse of violent elections. It makes the assumption that any serious possible contender for President will be prepared to participate in a deal under which only one person stands for President and others get much less exalted positions if the first person wins.

Kenya has many people with legitimate ambitions to stand for President. It is a now long past the time when the one-party state crushed serious opposition and ambition. The likelihood is that, even with this change, two or three people with some credibility would stand for President as part of ethnic alliances. If election processes continue to lack credibility, one defeated candidate may reject the result, and violence ensue. The recent by-elections give us cause for reflection.

It is true that Tanzania and Uganda have prime ministers. But those people are very low key (though with the current mystery over the whereabouts of the Tanzanian President the Prime Minister is becoming visible[2]). But who, in Kenya, among the powerful politicians, would be content with this role? The lure of the powerful presidency will remain strong. Kenya has a vibrant political culture, and this proposal will not do what it is touted to do.

---

[2] The original was written when President Magafuli was in hospital or perhaps even dead.

Ironically the underlying ethnic calculations go quite counter to the BBI's supposed spirit.

Any deal that arises out of recent history might stand for 2022, but will it work for future elections? Shall we be amending the Constitution again for 2027?

[From "'Inclusion" in the BBI' by Jill Cottrell Ghai and Yash Pal Ghai]

Inclusion and the expanded executive

This takes us to the proposal for adding a prime minister and two deputies. This is supposed to be about 'inclusion', and is the most discussed proposed change. 'Lack of inclusivity is the leading contributor to divisive and conflict-causing elections. Kenyans associate the winner-take-all system with divisive elections and want an end to it.' This is the change that the sponsors of project BBI really want, and is not changed in the Bill.

Apart from the improbability that expanding individuals' ethnicities at the top of the tree from two (President and DP) to three (the PM—the deputy PM positions are really non-jobs) will make a radical change, let us 'unpack' this proposal.

It assumes that that people will feel included because their leader holds a big office. Is this because those big officer holders will ensure that their own regions, or 'tribes', get benefits? If we asked them – Uhuru, Raila, Mudavadi, etc. – would they say 'Yes; as a national leader, I shall try to benefit my people more than others'? Would they make appointments disproportionately from their own tribes? If so, it is clearly wrong, morally and politically—and unconstitutional. If not they, who is it who convinces the people that this is the reality of Kenyan politics?

Surely the real way to include everyone is for the government to work for justice, fairness and inclusion through its policies and practices? And the Constitution already requires this!

Yash Ghai in his chapter on the Executive – although he had recommended, with the CKRC, and always supported, a parliamentary system – identifies the issues with the executive as being mainly a failure of those who make it up, especially the President, to abide by their obligations, legal and moral. Since the BBI would largely leave the powers of the President untouched, these proposals would have little effect on these issues—as indeed we have suggested they would on the troubled issue of violent elections.

Judiciary

[From 'The Judiciary and BBI', by Christine Nkonge, Executive Director of Katiba Institute December 2020]

A couple of weeks ago I participated in a webinar discussion on how the Building Bridges Initiative's proposed constitutional amendments would affect the judiciary. This is of particular concern to us, as Katiba Institute, given the critical role the judiciary has played in the last 10 years to safeguard the gains to our democracy and human rights protections afforded under the 2010 Constitution. I think we all agree that our democracy would have been much worse without the numerous judicial decisions declaring laws, government actions and decisions unconstitutional. The weakening of Parliament as an institution overseeing executive actions meant more and more controversies of a political nature found themselves in court, increasing conflict between the judiciary and the other two arms of government.

The political class seems to want to create the perception of a hierarchy of those arms: with perhaps the executive at the top, followed by the legislature and then the judiciary. This is definitely reflected in the funding of the three. It is also reflected in a culture of government officials choosing which court decisions to abide by and which to disregard – creating a culture of impunity and a breakdown of rule of law. Enter the handshake and the BBI Taskforce's resolve that reforms must protect the "independence of the judiciary … as a fundamental principle, while the judiciary should be accountable in a clear manner to the sovereign people of Kenya".

The current Constitution

Like other public institutions, the judiciary is required to protect and uphold the Constitution. It plays a critical role: applying and interpreting laws, policies and practice that govern Kenya. To equip the judiciary for that role, the Constitution provides judicial officers with: immunity from legal liability for performing their judicial functions and security of tenure for judges. Judges' salaries are charged to the Consolidated Fund (and must be paid); their remuneration cannot be changed to their disadvantage during their lifetimes; the Judiciary Fund is to be administered by the judiciary; it is hard to remove judges; and the Judicial Service Commission takes part in hiring, dismissal, and promotion of judicial officers. As a final layer of protection, any constitutional amendments affecting independence of the judiciary, must be approved by referendum (Art. 255(1)). And the judiciary

is subject only to the Constitution and law and not to the control or direction of any person or authority (Art. 160(1)).

Independence of the judiciary

The Supreme Court's remarks in the *National Land Commission* case in 2015 about independent commissions apply to the judiciary also. It referred to

- "Functional independence"—carrying out functions without receiving any instructions or orders from other state organs or bodies;
- "Operational independence"—through procedures for appointments of commissioners [or judges], and for decision making of the commission;
- "Financial independence"—accessing funds reasonably required for its functions; and
- "Perception of independence"—that people can see that the commissions carry out their functions free from external interferences.

Of particular importance vis-à-vis the BBI proposals, are operational independence and perception of independence.

BBI Bill to amend the Constitution

The Bill proposes to change the judiciary first by limiting the terms of the President of the Court of Appeal and the Principal Judge of the High Court to one term of 5 years. Why? The concern may be to curb the influence of the holder of the office over other judicial officers and the system. However, persons elected to that position do not seem to stay in that role for too long; Justice Kihara, was President of the Court of Appeal for 6 years and Justice Mwongo of the High Court, for 5 years.

It proposes that the Supreme Court should not hear any appeal from the Court of Appeal in an election petition even if it involves a constitutional point or a matter of general public importance. The Supreme Court has been criticised for hearing such appeals as it prolongs a final decision on whether someone has been validly elected. (Presidential election petitions go straight to the Supreme Court.)

BBI would increase the minimum professional experience to become a Supreme Court Judge to 20 years and to 15 years to become a Court of Appeal Judge; an increase of 5 years for each position. The rationale could be to distinguish qualifications for High Court (10 years) and Court of Appeal judges. Generally, however, judges already meet these qualifications. A few people with

lower qualifications have tried to apply, but did not get very far in the recruitment process.

The office of Judiciary Ombudsman would be established with, among others, the power to receive and conduct inquiries into complaints against judges, registrars, magistrates, and other judicial officers and other judiciary staff. The Judiciary Ombudsman was an administrative office created by former Chief Justice Mutunga to, among others, expedite processing of complaints from members of the public.

The BBI report says this is to enhance the independence of the judiciary. But until now, the appointment of an Ombudsman has been a purely judicial affair (and therefore independent). This Ombudsman is now to be appointed by the President with the approval of Senate (curiously)—and therefore lessens the independence of the commission (and therefore the judiciary). The President already exercises sufficient influence over the JSC by the three persons he appoints (the Attorney-General and the two persons supposedly to represent the public); do we want to add to that?

The proposals provide that the Judiciary Ombudsman could bring to the JSC a motion to remove a judge. The JSC could still initiate removal and could still receive other people's motions for removal. If the Ombudsman does initiate the process, doesn't this seem to confuse the roles of investigator, prosecutor and judge?

The JSC would be given power to receive complaints against judges, investigate and discipline judges by warning, reprimanding or suspending a judge. Currently, the JSC's powers of discipline (other than removal which is now the only effective sanction for judges) have applied only to magistrates and staff. This could be a useful tool for the JSC in enhancing standards of discipline among judges, but we may have to be cautious—suspension may be a serious interference with the judiciary.

The proposals would limit the tenure of JSC members, except the AG and Chief Justice, to one term of 5 years. Currently, they could be nominated for a further term of 5 years. This would put JSC members more on par with other commissioners under Chapter 15—they serve one term of 6 years. Again, maybe this is to curb influence of JSC members. Article 171 is also proposed to be amended to provide that JSC members shall not practice in courts and tribunals during their period of service with the commission. There has been some suggestion that the advocate members can intimidate judges (whom they may have been involved

in appointing). The downside to this proposal is that it may limit the range of advocates who would wish to serve on the JSC.

Conclusion

All in all, we must ask: what are the problems under the current system that BBI has identified and how would proposed changes address the problems, if any? Is it necessary to introduce these provisions at all or can any supposed problems be cured by practice, policy or legislation? Are the supposed solutions enhancing independence of the judiciary and rule of law? In other words, do these changes address funding, appointment of judges and obedience of court orders—currently our greatest concerns?

The BBI proposals did address two issues that our contributor Walter Khobe identified as major issues in his chapter in this book. These are to first have only *retired* Judges, Magistrates, and advocates as the representatives of judicial officers and the Law Society to the JSC (note Christine Nkonge's concern about this). The BBI Bill would provide that elected advocates in JSC would not be permitted to practise in the courts and tribunals in order, to minimize possible conflicts of interest. The other is to increase the period during which the Supreme Court would decide a presidential election petition from fourteen days to thirty days.

The other two issues Khobe particularly mentions do not figure in the BBI. One is for a fixed minimum percentage of the budget to be reserved for the judiciary; the other is making failure to comply with judicial orders or directions a high crime under the constitution, leading to loss of eligibility for election or appointment to any public office.

This is in line with the BBI report's reluctance to attribute any fault or responsibility to those who were their sponsors.

Devolution

[From 'Devolution and the BBI' by Jill Cottrell Ghai December 2020]

This column has suggested before that the Bill (and the whole BBI) is really about more jobs for a certain class of politicians, on the basis that this will lead to peaceful elections. The rest is sugar coating. Where devolution is involved we can see how an appeal is made to governors and MCAs.

Pleasing MCAs

MCAs will welcome the chance to become county executive committee members. Governors may welcome it too, because they might be able to placate a few potentially troublesome MCAs by making them executive members.

MCAs will love the Ward Development Fund. Many of them seem to think that their job is overseeing local projects. Governors may be less keen since 5% of the county revenue, at least, would be assigned to this fund – so less for the governors and their executives to control, take credit for, and perhaps worse. Indeed some counties have already not been spending much more than 5% of their revenue on development.

There is a reluctance to accept that a county has a government, which needs to operate with the checks and balances of a government. The provision on the Ward Development Fund is an example. Arguably it is a bad idea—and currently unconstitutional. But if you believe it may be a good idea, why not let individual counties decide whether this works for them or not?

More money for counties?

More money for counties is gladdening the hearts of government and many people in counties. Instead of a minimum of 15% of the national revenue being (supposedly) earmarked for the overall counties' share through the "equitable share", it is to be 35%.

But it won't happen. For one thing, the national government must cater for the enormous debt it has been building up.

Another issue is the responsibilities of each level of government. On one account the national government in 2016 had 180,600 public servants plus 297,800 employed by the Teachers Service Commission. There are others, too but it is not clear which have to be paid from national government revenue. These two groups anyway total 478,400 people. Counties on the other hand have 118,900 public servants—or a quarter as many as the national government. Four times the employees indicates a corresponding financial burden—and not only in salaries: they all work in buildings, use equipment, electricity and so on. And the national government does genuinely have responsibility for some large expenditure—notably the military, the police, schools, big roads, railways and airports, courts and various other public institutions.

The Treasury already fudges the figures, using a concept of shareable revenue which does not appear in the Constitution.[3] It will simply fudge some more. In the present dire economic situation caused by the pandemic, you can be sure that 35% will not look very much greater than 15%.

This approach violates a fundamental principle of devolution: that finance follows function. Yet the BBI does not discuss what counties are supposed to do with their extra money. We know that some counties' capacity to spend what they get already is limited. Admittedly the unreliable flow of money from the Treasury does not help.

Less money for counties that need it

Commentators have begun to note the most worrying proposed constitutional amendment. The BBI seems to want ('seems' because the wording is unclear) no county to get, by way of equitable share from the national revenue, more than three times per person what any other county gets per person.

This is for the "one person, one vote one shilling" brigade, prominent in former Central Province, but would benefit better off counties generally. And be disastrous for the poorer and less densely populated. These tend to be counties that have been neglected over the years, and fall far behind in development and statistics of health, education etc. They still have to run the county governments, they need more catch-up with county roads, and they have less capacity to raise money from their own counties.

This is a completely irresponsible proposal by the BBI. Allocation of resources in a devolved country is always a sensitive matter, and can tear a county apart. They have taken an important function away from the expert Commission on Revenue Allocation, and the associated democratic and participatory processes, into their own inexpert and politics-driven hands.

County assemblies

The make-up of county assemblies would not change much. Extra seats (for gender purposes) remain, as do seats for inclusion of marginalised groups.

Currently the number of these seats each party gets depends on how many ward seats they have won. BBI amendments would make it depend on how many votes each party received. So a party that won 30% of the votes but 50% of the

[3] See Abraham Rugo's chapter on Public Finance management in this book.

seats (which can happen in our system) would now get 30% of the extra seats not 50%.

The most peculiar change is about the gender seats. They would not come from a party list—which has been published before the elections so you could factor it into your voting choice. They would come from the defeated candidates for ward seats—the best loser principle. So IEBC would list the unsuccessful women candidates (putting those who got the most votes at the top). Then the number needed for each party would be chosen. Some wards would thus have 2 people in the Assembly.

Maybe the new rule that parties must have no more than two thirds of their candidates from one gender would help—and it would not matter that this arrangement ends after two more elections.

What are the problems with Devolution? Yash Ghai quoted the Auditor-General working party? '...devolution is not realizing its full potential because of several challenges. These include limited utilization of funds, poor inter-governmental consultation and cooperation, and lack of meaningful participation by citizens in making critical decisions on county development programmes.'

But the BBI proposals are to give more money to counties generally (when they already have difficulty using what they have effectively). Yet it would give less to some most in need. It would do one good thing not mentioned in the article just quoted: to provide that even if the National Assembly drags its heels in approving annual accounts once audited by the Auditor-General the accounts to be used to assess the minimum to be given to counties would be the most recent accounts.

Police

Tom Kagwe asked various questions, not all of which could be answered by the Constitution. He touched on whether the KPS and the Administration Police require to be separate, whether IPOA should be constitutionally establishment, and whether the NPSC was properly constituted in terms of its make-up. He commented that 'Police accountability has eluded this country for far too long, even with both internal and external mechanisms.'

The BBI Bill would have in fact made IPOA a constitutional commission in its first draft Bill appended to its second report. But this disappeared

in the final Bill. Why? But the changes to the NPSC weaken rather than strengthen accountability you might think. It would particularly lose any role in disciplines of the police, and lose some in connection with promotions. They justify the latter on the basis that it would 'provide clarity on the centrality of command by the Inspector-General of Police to the Police Service'. But under the Constitution that command is restricted in practice because the IGP is appointed by the President.

Public Finance

Abraham Rugo identified accountability as the real issue for public finance management (PFM). Lurking behind that is of course the issue of corruption (as well as incompetence). It is striking how little attention the BBI paid to corruption.

The constitutional proposals that affect public finance management (PFM) mostly concern devolution. We have commented earlier on the proposals of amounts to be transferred to counties.

It is also notable that nothing is done in the BBI proposals to prevent the Treasury creaming off amounts under headings such as "national interest" before dividing revenue between levels of government.

SRC

It may be worth mentioning under PFM the Salaries and Remuneration Commission. The SRC was designed as a body with professional skills that is independent of the people whose salaries it has a role in fixing. The proposed changes rather undermine this. At present its make-up is a balance—people nominated by various bodies that are affected by its decisions, plus input from those not directly affected but with valuable insight into the issues. There is a government nominated presence but not in the majority. And Parliament – definitely affected by SRC decisions – does not have a say.

The BBI proposal does not guarantee an independent process of appointment. It leaves appointments with the President and Parliament. It is understandable that parliamentarians may like this better—but there was a clear rationale for not involving them in these particular appointments. It looks like another measure to appeal to a certain section of those who might vote for the BBI proposals.

Rights

Our authors on rights do not offer criticism of the Constitution as such. Their concerns focus around implementation.

The BBI Bill would make only one minor - and unnecessary – change in the Bill of Rights. This would be to add the phrase 'and their personal data infringed' to the protection against infringement of privacy under Article 31. This adds absolutely nothing to the right under the Article not to have their personal information revealed.

All the chapters show how important the judiciary is to the protection of constitutional rights. Yet the BBI has nothing to offer on that issue – especially on the vexed issue of executive failure to obey court orders.

Land

Again, on land, the chapter authors' comment is on the crucial importance of 'fidelity to the law and vigilance by the public and the independent institutions established by the Constitution.

Land lies at the base of much of what is described as post-election violence. Yet the BBI had nothing to offer on this fundamental question.

Gender

The only specifically women-related issue tackled by the BBI is the vexed question of the two thirds rule. This has been discussed earlier. In brief the solution for the Senate is probably an improvement. For the National Assembly and county assemblies, though the two-thirds rule would be technically met, it leaves the issue of women being mostly there on a different (and assumed inferior) basis.

What has BBI to do with Bomas?

Katiba Corner addressed some other aspects of the issue. One was to respond to the discussion about the BBI that kept mentioning the Bomas draft Constitution (2004).

[From 'Explaining "Bomas" and what it has to do with BBI' by Jill Cottrell Ghai and Yash Pal Ghai]

If you are younger than about 30 you may find a bit mystifying the references to Bomas that sometimes lurk in the background in the discussions about the BBI.

Bomas, with its central auditorium holding up to 3000 people was the setting for the National Constitutional Conference from 2004-5. That conference was usually referred to as "Bomas".

And the draft of a new Constitution that the conference worked on, and adopted early in 2004 is commonly called the "Bomas draft". It has often figured in discussions about constitutional changes that seem to lie at the heart of the BBI.

The system of government

Bomas recommended a parliamentary system of government. The media tend to focus on the existence of a 'Prime Minister' (PM). And this office is at the heart of a parliamentary system: the PM is the head of government because he or she is usually the head of the largest party in the National Assembly (in Kenya's case), or if not is supported by a majority of MPs.

In most parliamentary systems the ministers are also MPs, chosen by the PM from among his or her supporters. In some countries some ministers can be from outside Parliament, and in France (not a fully parliamentary system) MPs who become ministers have to give up their seats while they serve as ministers. Bomas proposed that Ministers be MPs—rejecting the recommendations of the CKRC that some must come from outside.

There is still usually a president (or a king or queen) in most parliamentary systems. And generally, in modern times, that person has very few real powers. The hope is that the head of state will be a national unifying force, a symbol of the nation, be involved in ceremonial matters, and perhaps be able to offer quiet advice to the PM. Often the president is chosen by Parliament (and thus likely to be of the same party as the PM at least when chosen—because the president's term is not necessarily the same as the PM's, this may change).

The Bomas President

Although Bomas opted for the parliamentary system, the role of the president was different from that normally found in a parliamentary system. The president was to be elected directly by the people (this is like the Irish Constitution, where the President has few powers but a certain status and moral authority because of being elected by the people and not chosen by a government).

A primary duty of the Bomas president was as a symbol of national unity (without membership of any political party), with responsibility to safeguard the sovereignty of the country, promote and respect the diversity of the people and communities, protect human rights and safeguard the Constitution.

The president was to address the opening of each newly elected parliament, and in consultation with the PM, to report to parliament (thus to the people), on all the measures taken to achieve the realization of national values and goals. There were some other functions that required the approval of the prime minister/cabinet and yet others which required joint action (for example international relations, securing for courts and other independent bodies 'their independence, impartiality, dignity, accessibility and effectiveness as contemplated in the Constitution'). The president was to ensure that public participation requirements concerning the enactment of legislation had been observed by parliament.

But the president had little power to compel government to do anything, and no role in policy or day-to-day government.

The Bomas Prime Minister

The president would appoint the leader of the largest party in the National Assembly as Prime Minister. If she was not acceptable by the Assembly, the president would propose the leader of the second largest party, then his/her own nominee, and if that also failed also, the Assembly would have forwarded its own candidate. If the Assembly could not agree on any candidate, there would have been a fresh election.

The prime minister presided over the cabinet (which was formally appointed by the president on the recommendation of the prime minister from among parliamentarians) and co-ordinated the work of ministries and preparation of legislation. Ministers were in charge of their ministries and could be removed either by a vote of no confidence by the Assembly or by the prime minister.

The prime minister was to be responsible to Parliament—meaning that he or she could not be dismissed by the president, but could be removed by Parliament. The president, or any MP with the support of one third of the members, could propose the removal of the prime minister. Actual removal of the prime minister required 50% of the votes in support.

Because the PM (and the ministers) would be from Parliament, probably with long membership of Parliament – and because of the tradition of parliamentary questions to PM and ministers – the assumption is that the government would be in tune with parliament, the elected representatives of the people.

There is also a hope in parliamentary systems that the choice of a PM is less about the individual's personality, and less about tribe, and more about policies and competence. This may be a vain hope in a country like Kenya.

All this was abandoned when the Parliamentary Committee looking at the second draft by the Committee of Experts in 2010 decided to shift to a presidential system. Raila Odinga's party supported that shift.

Conclusion

Bomas is not the answer. Because, as Gabriel Dolan says, we are not asking the right question.

The real question is why we cannot elect people who govern this country in the interests of the people who pay their salaries. We can fiddle with systems of government all we please, but so long as the current political scenario continues nothing will change.

The message of the handshake and the aftermath is 'If you let us all into government (with the possible exception of William Ruto) we shall stop fighting each other over who is in power and start governing for you'. Really?

We have been there before

Involving everyone so that no-one feels left out is the sovereign remedy the BBI proposes. But in 2008 we had power sharing—the so-called national accord. Was it a success? A government that was divided into two parts. Such a disappointment that the people cheerfully accepted the abandoning of a parliamentary system in 2010 (the attitude seems to have been: 'if having a prime minister means that – we don't want it').

Don't we have power sharing now? Uhuru and Ruto essentially sold themselves to the Kenyan people in 2013 as the way to peace: 'let us both (and 'our' people) in and we shan't fight.' The people elected them. Did you expect it to last?

Give the people what they have always wanted

Why do we not focus on how we can help the people to achieve the objectives they have long wanted—even since independence? They had told the CKRC at length of their wishes, perhaps hopes too. Out of an extensive round of consultations with Kenyans throughout every part of Kenya, with a remarkably modest budget, the CKRC gathered a huge volume of ideas and wishes and on that basis set out to draft the constitution—not merely listing people's wishes, but also setting the framework and institutions for their achievement. People wanted national unity, moving away from tribes (quite the opposite to what is really espoused by BBI

whatever its promoters say), meaningful democracy, participation, human dignity, human rights, protection of the marginalised, and on the part of the government (listen politicians!) good governance, integrity, transparency and accountability and sustainable development.

Please Kenyans, reject the false promise of BBI.

The need for the people to be vigilant

This may yet become relevant if the Supreme Court reverses the lower Court decisions on the BBI.

[From 'The BBI, the Bill, the Referendum – where are we now?' by Jill Cottrell Ghai]

I get a distinct feeling that the country is sleepwalking into constitutional change, led, cajoled and misled by people who often do not fully understand what they are doing, except to the extent it benefits them. There have been good comments in the media. But also mediocre ones. And some positively misleading and politically driven.

Do we need a referendum?

At least one author has suggested that actually no referendum will be needed—every change proposed could go through Parliament and become law without a referendum. However, almost certainly a referendum would be required on some issues. Many people would say that the Judiciary Ombudsman as a member of the Judicial Service Commission threatens the independence of the judiciary. Some would say that changing the structure of the IEBC would affect the independence of that body. Giving Parliament the job of approving a prime minister is affecting the functions of Parliament. All these issues are listed in Article 255 as needing a referendum to change the Constitution.

But it is not clear that increasing the money for counties affects the 'objects, principles and structures of devolved government' so needs a referendum. Nor that making the best loser in the presidential election the Leader of the Opposition, or abolishing women county representatives in the National Assembly needs a referendum. Whether issues like these need a referendum will be vigorously argued—including in court

But Mr Odinga seems to want a referendum. He wants his victory to come from the people not Parliament. So who decides? First the President asks the IEBC to hold a referendum and presumably specifies on what. But only if the "amendment" passed by Parliament relates to matters listed in Article 255. This is where the courts will come in—and if he tries to have a referendum on matters not listed people will almost certainly go to court to stop it. And if the referendum does include matters not in Article 255, a negative vote by the people could not prevent the decision of Parliament having effect.

Over to you

If we get to the stage of a referendum you need to understand what exactly you will be voting on. According to the High Court in the *David Ndii* case in 2021, you would be asked a series of questions not just one global Yes or No as in 2010. It would be very complex in view of the large number of issues and you would have to be very clear in your own mind well before going into the polling booth.

If that aspect of the decision was changed in a higher court, you would not get the chance, for example, to say 'Yes' to 35% for counties but 'No' to a prime minister.

So if it does comes to an actual referendum, do be sure that you understand what your vote or votes will be about. If you get only one vote 'Yes' or 'No', it would make no sense to vote 'Yes' because you like one small thing in the Bill even if this means you are approving some big things that you really dislike about it. It would be equally unwise to vote 'No' because you do not like some idea in the BBI report, or in the Bill passed by Parliament, if in fact you are not being asked your opinion on it. Know what your vote means.

But how to educate yourself? Certainly don't believe everything you read in the newspapers. A great deal of inaccuracy appears there and in other places. Sometimes there is honest error, often just replicating the errors of others, sometimes deliberate misinformation. At least get hold of the Bill, read it and discuss it with others. Don't necessarily rely even on the BBI report, which discusses all sorts of stuff that is not in the Bill.

List of Kenyan cases mentioned (with the internet addresses)

Note: full names of individuals are usually given. Names appear in the way they appear in case documents, which usually means with surname at the end of the name. This index is normally in alphabetical order including of surnames. But those surnames are emboldened in this list to make it clear which is the surname. Cases known by initials only are listed by the first initial.

When the reference to the same case in different courts is included these are grouped together, using the name of the petitioner/claimant at first instance.

After the case details and url are the pages in this book on which the case is mentioned; if the page number is followed by n this indicates that the case is referred to only in a footnote on that page.

List of Articles of the Constitution and where they are referred to

This lists all the Articles, as an overview of the Constitution. It also shows which Articles are referred to (the Article number is emboldened) and on what page (but does not show individual clauses of particular Articles). The page numbers are given here only when the Article is referred to by number. But if a Chapter or specific Article of the Constitution is the central focus of a chapter in this book, this is indicated by a Chapter number enclosed in square brackets, like this: [Chapter 0].

CHAPTER EIGHT—THE LEGISLATURE [Chapter 2]

CHAPTER NINE—THE EXECUTIVE [Chapter 4]

CHAPTER ELEVEN—DEVOLVED GOVERNMENT [Chapter 7]

CHAPTER TWELVE—PUBLIC FINANCE [Chapter 9]

CHAPTER FIFTEEN—COMMISSIONS AND INDEPENDENT OFFICES [Chapter 6]

248—Application of Chapter 15 290
249—Objects, authority and funding of commissions and independent offices 15, 16, 39, 49, 77, 117
250—Composition, appointment and terms of office 268
251—Removal from office 39, 50
252—General functions and powers
253—Incorporation of commissions and independent offices
254—Reporting by commissions and independent offices 38

CHAPTER SIXTEEN—AMENDMENT OF THIS CONSTITUTION [Chapter 19]

255—Amendment of this Constitution 290, 291, 304, 317
256—Amendment by parliamentary initiative 291
257—Amendment by popular initiative 290

CHAPTER SEVENTEEN—GENERAL PROVISIONS

258—Enforcement of this Constitution 11, 179
259—Construing this Constitution
260—Interpretation.

CHAPTER EIGHTEEN—TRANSITIONAL AND CONSEQUENTIAL PROVISIONS

261—Consequential legislation 267
262—Transitional and consequential provisions
263—Effective Date
264—Repeal of previous constitution.

SCHEDULES

First Schedule—Counties
Second Schedule—National symbols
Third Schedule—National oaths and affirmations
Fourth Schedule—Distribution of functions between national and the county governments 138, 154, 165, 203, 215, 295
Fifth Schedule—Legislation to be enacted by Parliament 16, 27, 226
Sixth Schedule—Transitional and consequential provisions 232

Ten Years On

Assessing the Achievements of the Constitution of Kenya 2010

Nearly twenty authors, academics, civil society activists and lawyers, were asked to write a short chapter assessing the achievements of the Constitution since it became law in August 2010. Each contributor had a particular area of expertise. Authors were not prompted about the direction they should take.

However, the message from almost all the chapters in this book is that the Constitution has survived now eleven years without radical faults being identified. Some authors have suggested minor changes, but the overwhelming sentiment is that the priority is full implementation.

The chapters cover the following specific topics: parliament, elections, the executive, the judiciary, commissions, devolution, public finance, economic social and cultural rights, freedom of expression and media, right to health, the rights of the child, right to environment, land, police, religion, culture, the position of women, and amending the Constitution. The book begins with an overall survey chapter and ends with one comprised mainly of extracts from newspaper article (in the Katiba Corner series in the Star newspaper) on the Building Bridges Initiative to amend the Constitution.

We believe it will be of interest to a wide range of Kenyans – and to people outside the country. The most recent attempt to change the Constitution – the Building Bridges Initiative – has been knocked back by the courts. But an appeal is before the Supreme Court. Should this be successful the relevance of the book would be varied a little, but not diminished

The book has a powerful message for Kenyans, and for politicians and public servants: We have a good Constitution, let's make it work as it was supposed to.

Katiba Institute:

KI is an NGO based in Nairobi, founded in 2011, to contribute to the full implementation of the 2010 Constitution of Kenya, so that it is genuinely an instrument for change. A major activity is public interest litigation – to protect the constitutional rights of people and to try to ensure that the Constitution is in all its aspects obeyed and fulfilled. KI conducts research, publishes both popular and more academic publications, comments on draft legislation to implement the Constitution, and conducts civic education and some other training projects. It collaborates closely with other organisations both public and in civil society.

KATIBA Institute
Constitution as an Instrument of Change

ISBN 978 9914 40 610 8
9 789914 406108