KATIBA Institute

Constitution as an Instrument of Change

Presents

An Audit of the 2010 Constitution of Kenya

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KATIBA INSTITUTE - WHO WE ARE

Katiba Institute (KI) is a non-profit non-governmental body established as a company limited by guarantee in Kenya. It began its work in 2011, with three directors, with a grant from the Ford Foundation. Between the years 2011-2013, KI was hosted by and operated as a project of Akiba Uhaki Foundation (AUF). During the hosting period, KI was responsible for its programme work while AUF handled its financial and administrative affairs. KI was registered in July 2012, and now administers its own financial and other management affairs. Its activities are overseen by a Board of Directors.

The principal objective of KI is to achieve social transformation through the Constitution, by promoting its implementation. Our support to that implies a number of strategies: education, outreach, mobilisation, lobbying, scrutiny of laws and policies, and using institutions for its enforcement (such as the judiciary and independent commissions). The substantive areas of KI's work include leadership and integrity, human rights, devolution, facilitating public participation, recognition of gender and minority rights, elections, preventing land misappropriation and evictions of indigenous people and other long-term settlers, and protection against illegality and harassment by the police.

Our long-term objective is to establish a culture of constitutionalism, a secure foundation for the constitutions and its values, including a participatory and accountable democracy.

Our Vision

Social transformation through constitutionalism

Our Mission

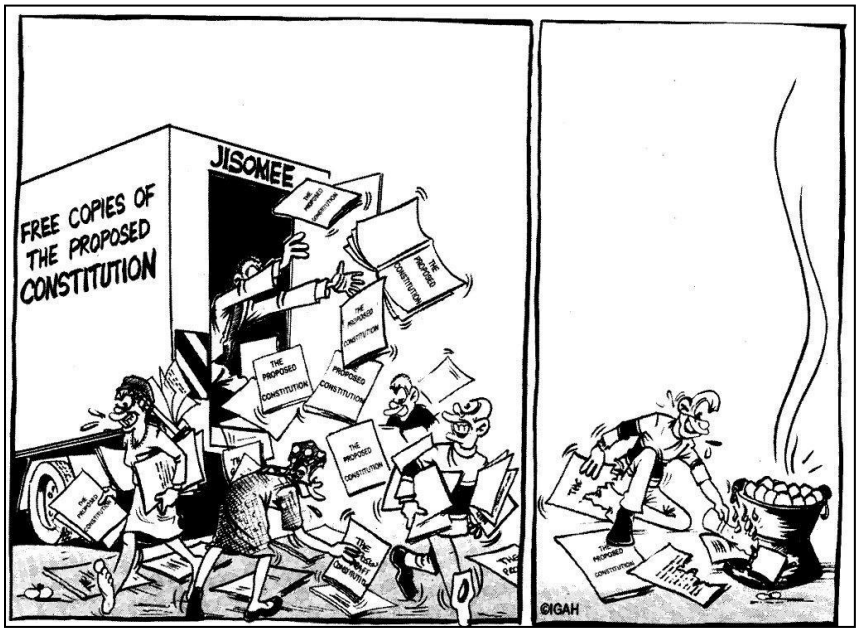
To entrench constitutionalism through research, litigation and promoting public participation

Our Slogan

Constitution as an instrument of change

About The Event And These Materials

Welcome to Katiba Institute's Conference on a partial audit of the 2010 Constitution. The materials you have in your hand are important for the topics we shall be discussing, and we hope you will find them useful and keep them. You may remember that, when the Constitution was being made, and copies of the drafts being circulated, various cartoons like this were published:



Please don't treat these materials like that!

What is an Audit?

We are not talking just about whether money has been spent in the right, lawful, and cost-effective way (which is what the Auditor-General does). But the underlying idea is similar: there is a set of rules and guidelines about how something should be done – how does actual behaviour measure up to these?

For this exercise the rules and guidelines are those found in the Constitution of Kenya 2010 – decided upon by the people of Kenya over the 10-year period of active constitution making. How money has been spent (or stolen) comes into it, of course, but so do a host of other things like:

- How have the rights of Kenyans been respected, protected and fulfilled?
- How have elected representatives performed their constitutional tasks?
- Have the national values and principles been respected in the way the country has been governed, including public participation, accountability and inclusion?
- How have new institutions worked – like commissions and devolution?

Background to the Event

Katiba Institute has been working for some time, with a number of distinguished Kenyans, on a book that is a sort of audit of the Constitution. That book will be ready in the near future and will contain about 20 chapters. Meanwhile, the editors of the magazine *Awaaz* suggested that they should publish short versions of some of the chapters. They chose ten (and those ten are in this set of materials for you to keep.)

Katiba Institute has planned for some time to hold some meetings at which the public could discuss how well the Constitution has worked, making use of the material from the book project.

The Event

This is the first of these meetings. The topics chosen (except one) do have short versions of the writings, which are in these materials. The "except one" is commissions, and we have produced a short version of one of the chapters in the ultimate book, and you find that here, too.

So, the topics are: commissions, devolution, parliament, elections and gender. They are all topics on which important provisions exist in the Constitution, provisions that were intended to have impacts on the way that Kenya is governed.

Is About the "Referendum"?

The short answer is "No". The slightly fuller answer is that when we all became aware that politicians were raising questions about changing the Constitution, Katiba Institute felt that - before there could be any serious talk about making changes - it was important to ask "How is the Constitution actually working? If it is not working as we had hoped, is this because of something about the Constitution, or something about how it has been implemented?"

This event is part of trying to answer these questions.

No Constitution is perfect. And no sensible person would argue that the Constitution of Kenya cannot be improved. But we can't know how, if at all, it should be changed, if we do not understand what might be wrong with it. We need to think about the questions underlined earlier.

If there are problems but they are with the way the Constitution has been operated, especially by politicians, and by public servants, but also by the people, we need to fix these things. Otherwise any changes will really make no difference.

Changing a Constitution is something very newsworthy. But it is also a distraction from the hard work – and that is governing the country and making the Constitution work. Another cartoonist put it this way:

What we want to avoid is being diverted from things to pursue the "skunk of referendum" like the media in the cartoon.

Kenyans should keep their "eyes on the ball". And the ball for our current purpose is whether the lives of Kenyans are being made better by their governments, and particularly whether the Constitution is contributing to a more inclusive, just, peaceful country and to effective and accountable government.

Enjoy the discussions! You will find a Table of Contents of these materials on the next page.

KATIBA CORNER: EXTRACTS FROM RECENT ARTICLES TOUCHING ON ISSUES TO BE DISCUSSED AT THE FORUM

Over the last months, the Katiba Corner slot in the Saturday Star newspaper (Siasa section) has touched on many of the issues that are being publicly aired about implementing the Constitution. Here we have brought together a few extracts of those articles to provide some further background to the issues being discussed at the Katiba Institute meetings on the Constitution nearly 9 years on.

On reducing the size of Parliament

From Okoa Kenya mess reborn as Punguza Mizigo by Jill Cottrell Ghai

A mixed bag of ideas

Many of Thirdway Alliance's underlying issues are things that Kenyans will have much sympathy with: far fewer members of Parliament, no allowances for MPs etc., abolish Deputy Governors, any commissioners to be few (not more than five, and part-time only), audit and other reports on corruption to be automatically adopted, and trials to be done in 30 days, life sentences for those convicted, ID card means you are registered to vote.

But five minutes' reflection would show that many of them are very superficially thought through. And now that we have the Bill, too, which Thirdway had to present to the IEBC with their signatures, this becomes more obvious.

Counties would be constituencies; each to elect two MPs, a woman and a man. Lamu (with 69,793 registered voters in 2017) would have the same number of MPs as Nairobi (2,251,921 registered voters). The voice of every Lamu voter in the National Assembly would be 32 times as strong as that of every Nairobi voter. We have some of this imbalance now with the county women representatives. And we have it with the Senate, but as a counterbalance to the National Assembly. Suppose we shifted to a parliamentary system (Raila's preference): the voice of a Lamu voter would be equal to that of 32 Nairobi voters in deciding which party would form government.

Away with the Senate? **Jill Cottrell Ghai**

Second chambers and devolved systems of government

Many countries with a two (or more) tier government system have one house of their parliament with responsibilities particularly connected to that system. These include the United States, Canada, Australia, Germany, India and South Africa.

Our National Assembly members cannot represent the counties as such. They represent (or at least are elected by) the people of the counties (in their constituencies) - but only in connection with the matters that are the responsibility of the national government.

Neither the national government nor the National Assembly really respects the county government system. They find it hard to accept that counties are not just local authority areas. There is always a bit of a tussle over how much national revenue will be allocated to the counties. And it took court action to push the National Assembly

to limit the Constituency Development Fund to matters that are the responsibility of the national government. The counties need a body that understands their issues and protects them

The powers of the Senate

That body is supposed to be the Senate, the major ways the Senate is supposed to do that are:

- Playing a major role in fixing the national revenue that goes to the counties each year, and the allocation between counties
- Participating in passing legislation that concerns counties
- Playing an important part in changing county boundaries
- Having the power to approve/disapprove the use of the processes by which the President may suspend a county government, and the power to lift the suspension at any time.
- Ensuring that a President is not removed when national MPs would want this to happen by playing a major role in the process of impeachment of the President.

The County Governments Act adds to these a major responsibility in removing a Governor.

The National Assembly has resisted the role of the Senate. They tried, for example, to exclude the Senate from involvement in the passing of the law dividing national revenue between the national government and the counties. The Supreme Court had to put it right. And in another case the courts had to correct the National Assembly when it ignored the role of the Senate when passing law relating to health functions of the counties

How does the Senate perform its role?

One important point about the Senate is that for most purposes it has just 47 voting members, and each county has one vote. But in the National Assembly the number of county representatives range from two for Lamu to 87 for Nairobi. In the Senate the counties are equal, which give more power to smaller counties that could band together to challenge issues on which perhaps bigger counties might differ from the smaller.

The Senate has consistently pushed for more money for the counties. As recently as September this year Senators of both main parties were reported as resisting government budget cuts for counties.

However, they seem to have resented the higher profiles of Governors (and perhaps their chances for corrupt benefits). They have tried to trespass on their powers, as when they established boards on which they would sit to develop county development policies (the courts put an end to this – though it is in the Court of Appeal).

Constitutional weakness?

There is one particularly worrying constitutional provision: The Senate "exercises oversight over national revenue allocated to the county governments". This was introduced by the Parliamentary Select Committee during the constitution making process. It muddies the waters over the role of the county assemblies (the primary body to oversee county government work). Many projects are probably funded by both nationally raised revenue and county raised revenue, making a power to oversee just the former problematic. It has perhaps encouraged the Senate to summon county governors –further exacerbating poor relations.

Earlier drafts of the constitution would have made up the Senate in different ways. The first Committee of Experts draft would have had Senators elected by the county assemblies. The very first draft (2002) would have also involved the Chairs of the lowest level of government.

Under such arrangements Senate would have been much more part of the county government system. They are similar to

those in Germany and South Africa. Direct election by the people of the county has perhaps played into the hands of Kenyan politicians who seem prone to view everything from their own personal perspective.

On changing the election system

The Pros and Cons of Proportional Representation by Jill Cottrell Ghai

What is PR?

The point of PR is to ensure that the number of seats in a legislative body reflects very closely the percentage of votes each party wins.

The US, Canada, Australia, India and the UK are among countries that have a system of single member constituencies, like ours. Much of Europe has PR.

The simplest PR system involves people voting for parties, not individual candidates. Each party publishes a list of candidates that voters can study before the election to decide whether they like the list, as well as thinking about other reasons for voting for or against each party. Each list is in order of preference. When the result of voting is known, and, for example, the largest party wins 40% of the votes, enough candidates are taken from the party's list, starting at the top, to fill 40% of the seats.

In some countries, including the Netherlands, the whole country is one constituency. Everyone has to choose between the same lists. In others there are many constituencies each with many seats. Some countries, including in Scandinavia, have "open list" systems: voters can also vote to move individual candidates up or down the list, or even say they want to strike some off the list.

In Ireland, among other countries, voters vote for candidates (not lists) in order of preference. If there are three seats in the constituency, say, a voter may mark three names, ranking them 1 to 3. So voters do not have to restrict their choice to one party, or even to party candidates at all. A voter's second and third choices will be used if their first choice is elected with more than enough votes. This system is a bit more complicated for voters, and a lot more complicated to understand.

In some countries, including Germany and Lesotho, there are two types of member.

Each voter votes for a constituency candidate and a party list. At least one third of the members will usually be list members in this system - called Mixed Member Proportional (MMP). Enough candidates are taken from each list to ensure that the final make-up of the elected body reflects the overall voter support for the party. This is different from Kenya where list members are assigned depending on how many seats each party won in constituencies, so do not make the whole body proportional to votes.

Advantages of PR

The first argument in favour is that it seems fairer: winning vote's means winning seats to the same extent.

With a PR system, the Mombasa county assembly, to take one example, would probably not be so overwhelmingly ODM. In the presidential election Mombasa voters supported Raila to the extent of almost 70% and Uhuru to almost 29%. If they supported ODM to the same extent in the county assembly elections, of the 30 ward seats ODM would have won 21. Jubilee supporters would feel less excluded. And maybe there would have been a stronger opposition voice in the assembly. Similarly,

Uasin Gishu assembly might not have 90% Jubilee members when 78% voted for UhuRuto. Votes are not "wasted". Now, in Mombasa, Jubilee voters probably feel "What is the point of voting; we can never have any impact?"

And ODM voters may feel, "Why bother to vote; the result is a foregone conclusion". In a PR system, every vote counts.

In our current system, parties may hardly bother to campaign in their opponents' "strongholds". But in a PR system it is worth campaigning everywhere, giving voters more of a choice.

In a PR system it is common for there to be more parties winning seats. Smaller (and newer) parties get a better chance. Often none has a majority. So governments are very often coalitions. Parties must work together and extreme views are moderated to achieve compromise. Politics becomes more cooperative and less confrontational.

More groups and communities are often involved in government. There is more inclusion – a national value under our constitution.

Party lists themselves are often inclusive. Every party wants to broaden its appeal to all voters. They can see the benefit of including among their candidates' persons with disability, women, and minorities (because these people also vote and their votes count).

It is easier to require parties to ensure women are elected. Parties may be required by law (or they may choose) to alternate men and women on the list, or have a woman at least every third name on each party list. Some countries even require party lists to begin with women. Rules like this much increase the chances of having a good percentage of women elected.

In PR systems (except MMP), all MPs are elected on the same basis, unlike Kenya now, where some MPs, Senators or MCAs represent a clear geographical constituency while others have a less clear role, which is often misunderstood**.**

Disadvantages of PR

Some are unenthusiastic about having many small parties. "Way-out" ideas may find their way into legislatures. Coalitions may comprise many parties and be unstable. Parties involved may cease to agree, and may vote out the head of government. In some countries this may happen quite frequently. Some countries limit the number of small parties by saying no party gets any seats unless it gets, for example, 5% of the overall votes.

A party with a clear programme may find it hard to carry it out if it has to compromise in order to get into government at all.

In some ways PR may be less democratic. In negotiations to form a government a small, even extreme, party may insist on its policies being adopted as a price for entering government. These policies may have very little public support.

Sometimes independent candidates cannot stand in list systems. (Sometimes the law does allow groups of non-party people to form a list to offer to the voters. A very popular individual might even be able to stand alone.)

Voters have less connection with those elected, who have no roots in particular places. People can't identify "our MP". Parties have a lot of power in choosing candidates. Accountability to voters may be weaker. However, sometimes in PR countries parties allocate their elected members to certain areas to strengthen links with voters. Presumably our MPs would insist on this – otherwise how could they have CDF?

Other considerations

How a system works in a particular country depends on many factors, including parties. Ours are usually ethnic parties, though not by name, or they group people from several communities. Their members are not united by political philosophy or policy concerns. There is little continuity of party membership, or indeed of parties. But a new system might change politics.

Parliamentary elections here do not decide who forms government: that depends on the presidential election. PR systems have more impact in a parliamentary system (like most of Europe and New Zealand).

On Devolution

Understanding "Three levels of government" by Jill Cottrell Ghai

Raila Odinga favours a shift from two levels of government—the national and the county—to three levels, the third being between the other two. This is part of his push for bringing back 'Bomas': the draft constitution produced in 2004 by the National Constitutional Conference (NCC).

Majimbo

The 1963 majimbo constitution (designed to a considerable degree to protect minority communities) created seven regions (similar to the provinces until 2013) with Nairobi as a capital city, not a region. Each region had an elected assembly, which elected a President from among its members. Each regional government took the form of a committee of the regional assembly, with the regional President as a member and a public servant as chief executive officer. It was a four-tier system. Within each region there were local authorities: the top level being either municipalities or counties (rural), and the second level townships, divisions or local councils. In fact divisions were themselves to be divided into local council areas. All councils were to have at least 75% elected members, with possibly some appointed ones, also.

Regions could make law on a wider range of matters than the modern counties. They had far more powers to tax than current counties. And though there was a national police force, each region had a contingent, for which it paid.

It was clearly envisaged that these various assemblies and councils would be part-time.

This system was strangled soon after birth by Jomo Kenyatta who had plans for a highly centralised government, with himself at its head.

The CKRC

Yash Ghai had a vision of a country building from the bottom. Below the national government there would be four levels: village, location, district, and province (the village symbolic of people's sovereignty). Village and district councils would be directly elected by the people, and at the district level a governor would be also directly elected. Location councils would be composed of members of village councils. Districts would be the main level of government, partly because some provinces were so large that their headquarters were as remote from most people as Nairobi itself, and also because of concerns around identity and potential conflict.

Under time pressure, the CKRC envisaged that many details of the new system would be worked out in legislation to be passed by Parliament including on the role of provinces.

Bomas process

A number of NCC delegates recommended that provinces cease to exist or be broken up. "That system has made us think in terms of tribes and we know tribalism is the biggest cancer in this country today," a Moyale MP said. But the former Vice-President of a Region in the majimbo period argued "had we been allowed to continue, the story today in terms of development, would have been different".

Much discussion cantered on having larger regional units as the principal level of devolution: perhaps 10, 13, 18 or even 27 units. By mid-September 2003 the conference had decided on 18 "zones", but, for reasons that are not really clear, the 18 regions were reduced to 14 in February 2004. At the end of January 2004, many issues were still "contentious" including: "Whether there should be three or four levels of devolution; whether the constituency rather than the district should be a unit of devolution; and Distribution of powers between various levels of government".

Only days before the winding up of the NCC, Ghai produced a "Compromise Proposal for Devolution" making it clear that there was still a good deal of confusion on the topic. He suggested that the root of the problem lay with the question of what was the principal unit of devolution: "One group favours the district, the other the region. The compromise the committee struck (which reflects CKRC's proposal) is to vest significant devolved powers in the district but to find a not unimportant role for the region. … This produces somewhat confused lines of authority as well as adding greatly to the cost of devolution."

Ghai proposed about 20 units at the intermediate level. This would have enabled greater participation of people than would be possible in a smaller number of large units. The smaller regions would be less threatening to national unity and more protective of the interests of minorities.

Bomas draft

However, in March 2004 the NCC adopted 14 regions, and 70 districts (the latter as the main recipient of powers). The regions were to "co-ordinate the implementation, within the districts forming the region, of programmes and projects that extend across two or more districts of the region". On these issues they would have the power to make law which would prevail over district laws.

Each region would have had an assembly composed of four delegates from each district, elected by the district council but not members of the district council. The regional executive included a premier, elected by all the district councils, with other members chosen by the premier and approved by the regional assembly.

This obviously would have been very expensive: 70 districts and 4 Nairobi boroughs, plus 14 regions, and locational government (elected by the residents) too. However, although this was not spelled out, there was still an assumption that assembly and council members would be part-time, like the old local authorities.

Committee of Experts (CoE)

The CoE's first draft in late 2009 drew heavily on the Bomas draft. And the weakness of the Bomas provisions about the role of regions was pointed out by some commentators on the CoE draft: that the role of the regions was not very clearly explained. So was the existence of an intermediate level of government actually justified?

The CoE responded by removing this element of their draft. They reduced the number of districts (now called counties) to 47, thus making them rather larger on average. They also significantly increased the size of county assemblies by the provision on top-up members to ensure gender balance. The result of this (however desirable from the gender perspective) is

currently to increase the number of MCAs from 1450 (for wards) to 2086 (including 542 extra women and 94 for marginalised groups – of whom about half are women).

The CoE second draft was laid on the table of the Parliamentary Select Committee in Naivasha, and duly hacked about, but they did not do much to devolution.

Is three tiers a way ahead?

The South African Constitution does have three tiers. We could earn a good deal from them. There are in fact many issues that would have to be thought about and resolved if the Bomas model was to be adopted, including on the legal position of the capital. Bomas itself was clear about neither the powers nor the institutions of regional government (again due to time pressure). These we would need to clarify in any revision of the constitution that adopted three tiers.

The Constitution now allows counties to set up joint committees and authorities, and several grouping of counties are emerging. Would establishing intermediate governments work better than this? Or is it possible that county groupings might be different for different purposes?

Thirdly, below county level administration does not have to be democratically elected. Is this a good thing?

Fourthly, the nature of county government now—with full time MCAs, and so many of them, and with little presidents as governors (with motorcades, mansions and flags)—is much more elaborate and expensive than the drafters imagined. But can they ever be scaled down (fewer counties or fewer MCAs)? Would a referendum support this? If not, can we afford an intermediate level of government? Or can we scale down Parliament to some reasonable number (perhaps 94 MPs, one woman and one man, for each county as has been suggested)? Would the turkeys—in this case MPs—vote for Christmas?

Alternatively—or additionally—is there some way we can constitutionally guarantee more modest payments for those elected? The drafters tried, with the Salaries and Remuneration Commission. The SRC tried. But the burden of paying politicians remains enormous.

Nairobi: whose right to the city/county? **By Jill Cottrell Ghai**

Kericho Senator Aaron Cheruiyot has drafted a Bill that would change Nairobi from a county to a responsibility of the National Government, with a Cabinet Secretary with responsibility for Nairobi Affairs.

Constitution drafts

Interestingly, early drafts for a new Constitution proposed something similar. The Constitution of Kenya Review Commission's draft (2002) left the matter of governing Nairobi to an Act of Parliament. It said that the law must take account of the city's role as national capital and major economic, administrative and social centre.

But it must provide for the people of Nairobi to participate in the nation's democracy.

No draft went into great detail, but none would have treated Nairobi just like any other county, with the same powers as other counties. But, at the last minute (early 2010, after the Parliamentary Select Committee had done its worst) the Committee of Experts decided to leave Nairobi in the same position as any other county. Their final report did not explain why**.**

Lessons from elsewhere

Many other capital cities around the world face similar issues. A city is a home to many people, who are entitled to

participate in national democracy (as the CKRC said). Indeed, they would probably want to have a say in the sorts of decisions that local authorities (or, in Kenya, counties) make that affect the liveability of the city.

But a capital city serves national functions. It is a symbol of the nation (sometimes its name is synonymous with national government – people might say "Washington decrees" or "New Delhi has decided" meaning the US or Indian government). Its buildings, roads (even ones that would be county roads in any other county), and its open spaces are of national importance.

Its water and electricity, its public transport, and its traffic jams, are not just local concerns.

Local governments often raise money by charging a property tax (we call it "rates" because the amount depends on the property value). In a capital city, a lot of the land is occupied by national institutions. Do they have to pay that tax? (Kenyan law seems in some confusion on this point.)

There is a wide variety of approaches to dealing with the status of capital cities. In many countries, capital cities are national territories with fewer powers than other sub-national areas. Some have a status similar to other governments below the national level, though perhaps with rather fewer powers. Powers that other sub-national governments have may be shared between capital and national authorities. They may have special financial arrangements with the national government. Residents may have less democratic space than in other places (in Washington, residents do not even vote for members of Congress). Some have democratic local authorities within the national capital area.

Realities of Nairobi

On some estimates the population of Nairobi now may be as high as six million. Proposals to make it a government department seem to imply that, while Nairobi will elect MPs, as now (presumably the same nine constituencies), it will have no Senator, and no local assembly, and no woman county representative.

One oddity is that many people who live in Nairobi do not consider it "home". They vote somewhere else, and expect to be buried somewhere else. This may be exaggerated; 2.25 million people in Nairobi were registered to vote in the 2017 elections. That is not such a low percentage of potential voters. The IEBC registered 19.6 million voters overall – 39% of all residents, many of whom are not citizens so cannot vote. So most Nairobi residents vote in the city, not somewhere else.

In reality, a county in Kenya does not have many more powers than local authorities have in many countries, and used to have here. Police are a national, not a county, matter. Counties do not control education (except early childhood and "village polytechnics"). They do control most health facilities (but three national referral hospitals – run by the national ministry - are in Nairobi).

A national ministry will be concerned with the sorts of things identified earlier. Will a national department be concerned about issues of concern to the true residents of Nairobi? Not the legislators, civil servants and judges, and business people, who occupy Upper Hill, Harambee Avenue and City Hall Way, but the residents of Buru Buru, Huruma, South C and Eastleigh? Will a national government department be concerned about encouraging urban agriculture, on which Nairobi passed a law in 2015, after much interaction between county and knowledgeable civil society?

Some people might argue that the CDF will cater for local concerns. So - would Nairobi MPs get more than others because all matters would be within their remit? Some of us think that the CDF is unconstitutional anyway, making MPs administrators, and not just legislators.

On not rushing into solutions

This is a very complex matter. The current proposal will take away some voting rights of citizens, it will reduce the representation of women of Nairobi, and it will undo devolution for perhaps 12% of the people of Kenya. It would require a referendum.

What solution would ensure that Nairobi is an efficient, welcoming city for the public governmental functions of a national capital, and for its international role?

And, that solution must also ensure, as a matter of equal or greater priority, that it is a city that embraces its residents, the people who make it work and make it welcoming, and does not drive them to its periphery. Can we ensure that the right to the city is not further undermined with more of what Ambreena Manji calls "spatial injustices" with more exclusionary government developments, to add to the malls and gated communities?

As long ago as 1994, Mazingira Institute said the people have "the human right to live with a safe and sufficient water supply, sewers, drains or services to cope with waste disposal, and without overcrowding and cramped living conditions" (The Struggle for Nairobi). The struggle continues!

On gender and representation

A Snapshot: Quest for Implementation of the Two Thirds Gender Rule through the Courts by Christine Nkonge (ED of KI)

No issue in Kenya has drawn more divergent and impassioned views on its definition and implementation as the two-thirds gender rule. Next year marks the 10th anniversary of the Constitution, yet it's imperative on gender composition of public bodies has never been fully implemented; and there is currently no clear direction in sight from the government on how this the issue will be resolved. How can this major legislative task set by the Constitution have proved so hard for multiple governments and Parliaments to tackle? Could this be by design?

The two-thirds gender rule is a constitutional requirement. The principle of equity in gender composition of elective and appointive positions in public institutions is a recurring theme in our constitution. Its importance is reflected by the fact that it is also a fundamental right within our Bill of Rights. The Constitution requires that 'not more than two-thirds of the members of elective public bodies shall be of the same gender' (Articles 81(b), 175(c), and 177(1) (b). This refers to representation in the National Assembly, the Senate and County Assemblies. Political parties (under Articles 91(1)(f)) and the Judicial Service Commission (under Article 172(2)(b)) must promote and ensure gender equality. The chairperson and vice-chairperson of constitutional commissions must not be of the same gender under Article 250(11); while Article 197(1) requires that 'not more than two-thirds of the members of any … county executive committee shall be of the same gender'. And finally more broadly, Article 27(8) on equality and freedom from discrimination, requires the State 'implement the principle that that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender'.

What have the Courts said on implementation of the two-thirds gender rule?

This issue has been taken to the courts perhaps more than any other constitutional principle. And considerable creativity has been displayed by the parties who have taken it there, faced with the obstinacy of the political leaders. You can see this from

the following brief snapshot of the cases and the responses of the courts in the order in which they happened.

2012

The quest to determine the timeline for implementation of the two-thirds gender rule began in 2012 when the then Attorney General, Hon. Githu Muigai, sought an advisory opinion from the Supreme Court. He wanted clarification on whether the two-thirds gender rule was to be implemented progressively or was applicable immediately including to the then upcoming 2013 general elections. The Court was of the view that this rule should be implemented progressively – so not for 2013. But it said the law must be passed no later than 27th August 2015. This was because Schedule Five of the Constitution (on timelines for passing legislation required by the constitution) gave that date for law "promoting" the representation of women. By the way, Chief Justice Mutunga disagreed with his colleagues and said that the two-thirds principle applied immediately. (The case was called In the Matter of the Principle of Gender Representation in the National Assembly and the Senate).

The deadline provided by the Supreme Court (and even an extension of one year that Parliament gave itself) lapsed with no law having been put in place to operationalize the two-thirds gender rule in Parliament.

2016

It is not just Parliament that has more than two-thirds men. Marilyn Muthoni and others took a case to the High Court seeking dissolution of the then cabinet for violating the two-thirds gender rule. The late Justice Onguto delivered a decision which asserted that this rule equally applies to cabinet appointments as it does to elective bodies. Therefore, the President had violated the Constitution by nominating and maintaining a Cabinet that did not met the two-thirds gender rule, and Parliament did the same by approving it. The Court however suspended the enforcement of the dissolution order because the country was heading for another national election, ordered that when the next Cabinet was constituted the Constitution must be complied with. (This was Marilyn Muthoni Kamuru v. Attorney General).

2017

In 2016, the Centre for Rights Education and Awareness (CREAW) brought the two-thirds in Parliament issue back to court. They asked for an order dissolving Parliament for failure to pass the necessary law within the time stipulated under the Constitution and the Supreme Court. Justice Mativo found that indeed Parliament was in violation of its obligation. He directed Parliament to pass the required legislation with sixty days. If this did not happen, any person could petition the Chief Justice to advise the President to dissolve Parliament. It would be more than advice" –the President would have to act. (Centre for Rights Education and Awareness v Speaker the National Assembly) [.

This time lapsed on 28th May 2017, once again with no law having been passed by Parliament.

Also, in 2017, the Katiba Institute took a case to the High Court arguing that the Independent Electoral and Boundaries Commission (IEBC) had a constitutional obligation to ensure that political parties' lists of candidates for the various positions complied with the two-thirds rule. Justice Mwita agreed that the realization of the two-thirds gender principle could not be left to the legislative process alone. He noted that the phrase 'other measures' in Article 27(8) shows that the principle may be attained through other means apart from law. Therefore, political parties were under an obligation to ensure that proactive measures were taken to assist in the implementation of the principle. However, the short time period before the August 2017 general elections meant that to order the IEBC to act straight away would lead to

confusion. This decision therefore means that the IEBC is under obligation to ensure that for the next general elections this judgment is complied with. (Katiba Institute v Independent Electoral & Boundaries Commission).

2019

Parliament appealed against that 2017 decision in the CREAW case. Parliament argued that dissolution of Parliament would create to a constitutional crisis. On the other hand, CREAW and others argued that complying with provisions of the Constitution cannot result in a constitutional crisis. The real crisis was the deliberate refusal to enact legislation required by the Constitution, thus undermining the rule of law. They pointed out that the Constitution itself provided for dissolution, if Parliament failed to enact any legislation required under it.

The Court of Appeal gave its judgment very recently. It found that the timeframes set under the Constitution have been exhausted and the decision of the High Court to extend this period by sixty days was logical. It therefore agreed with Justice Mativo. (Speaker of the National Assembly v CREAW).

What does all this mean?

The law, as has been developed by our courts, is that the two-thirds gender rule must now be realized for both elective and appointive positions. It also means that the two-thirds gender rule is not just a 'women's issue' but is a constitutional imperative, one that is at the foundation of democracy and the right to representation of a majority. As the Court clearly 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. And going back to our question (Could this be by design?), the Court of Appeal commented that the repeated failure to get a quorum to pass the law "does not speak of a good faith effort to implement the gender principle".

There are further implication of these decisions, some of which are before the courts. Various other institutions, including the Supreme Court and national and county executives may be held not to be lawfully composed.

BASIC ARTICLES OF THE CONSTITUTION RELEVANT TO THE CONVENING ON JUNE 18TH 2019

National Values

10. (1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them––

(*a*) applies or interprets this Constitution;

(*b*) enacts, applies or interprets any law; or

(*c*) makes or implements public policy decisions.

(2) The national values and principles of governance include––

(*a*) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;

(*b*) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;

(*c*) good governance, integrity, transparency and accountability; and

(*d*) sustainable development.

Devolution

6. (1) The territory of Kenya is divided into the counties specified in the First Schedule.

(2) 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.

174. The objects of the devolution of government are—

(*a*)to promote democratic and accountable exercise of power;

(*b*) to foster national unity by recognising diversity;

(*c*) to give powers of self-governance to the people and enhance the participation of the people in the exercise of the powers of the State and in making decisions affecting them;

(*d*) to recognise the right of communities to manage their own affairs and to further their development;

(*e*) to protect and promote the interests and rights of minorities and marginalised communities;

(*f*) to promote social and economic development and the provision of proximate, easily accessible services throughout Kenya;

(*g*) to ensure equitable sharing of national and local resources throughout Kenya;

(*h*) to facilitate the decentralisation of State organs, their functions and services, from the capital of Kenya; and

(*i*) to enhance checks and balances and the separation of powers.

175. County governments established under this Constitution shall reflect the following principles.

(*a*) county governments shall be based on democratic principles and the separation of powers;

(*b*) county governments shall have reliable sources of revenue to enable them to govern and deliver services effectively; and

(*c*) no more than two-thirds of the members of representative bodies in each county government shall be of the same gender.

Parliament

93. (1) There is established a Parliament of Kenya, which shall consist of the National Assembly and the Senate.

(2) The National Assembly and the Senate shall perform their respective functions in accordance with this Constitution.

94. (1) The legislative authority of the Republic is derived from the people and, at the national level, is vested in and exercised by Parliament.

(2) Parliament manifests the diversity of the nation, represents the will of the people, and exercises their sovereignty.

(3) Parliament may consider and pass amendments to this Constitution, and alter county boundaries as provided for in this Constitution.

(4) Parliament shall protect this Constitution and promote the democratic governance of the Republic.

(5) No person or body**,** other than Parliament**,** has the power to make provision having the force of law in Kenya except under authority conferred by this Constitution or by legislation.

95. (1) The National Assembly represents the people of the constituencies and special interests in the National Assembly.

(2) The National Assembly deliberates on and resolves issues of concern to the people.

(3) The National Assembly enacts legislation in accordance with Part 4 of this Chapter.

(4) The National Assembly––

(*a*) determines the allocation of national revenue between the levels of government, as provided in Part 4 of Chapter Twelve;

(*b*) appropriates funds for expenditure by the national government and other national State organs; and

(*c*) exercises oversight over national revenue and its expenditure.

(5) The National Assembly—

(*a*) reviews the conduct in office of the President, the Deputy President and other State officers and initiates the process of removing them from office; and

(*b*) exercises oversight of State organs.

(6) The National Assembly approves declarations of war and extensions of states of emergency.

96. (1) The Senate represents the counties, and serves to protect the interests of the counties and their governments.

(2) The Senate participates in the law-making function of Parliament by considering, debating and approving Bills concerning counties, as provided in Articles 109 to 113.

(3) The Senate determines the allocation of national revenue among counties, as provided in Article 217, and exercises oversight over national revenue allocated to the county governments.

(4) The Senate participates in the oversight of State officers by considering and determining any resolution to remove the President or Deputy President from office in accordance with Article 145.

97. (1) The National Assembly consists of—

(*a*) two hundred and ninety members**,** each elected by the registered voters of single member constituencies;

(*b*) forty-seven women**,** each elected by the registered voters of the counties, each county constituting a single member constituency;

(*c*) twelve members nominated by parliamentary political parties according to their proportion of members of the National Assembly in accordance with Article 90, to represent special interests including the youth, persons with disabilities and workers; and

(*d*) the Speaker, who is an *ex officio* member.

98. (1) The Senate consists of—

(*a*) forty-seven members each elected by the registered voters of the counties, each county constituting a single member constituency;

(*b*) sixteen women members who shall be nominated by political parties according to their proportion of members of the Senate elected under clause (*a*) in accordance with Article 90;

(*c*) two members, being one man and one woman, representing the youth;

(*d*) two members, being one man and one woman, representing persons with disabilities; and

(*e*) the Speaker, who shall be an *ex officio* member**.**

90. (1) Elections for the seats in Parliament provided for under Articles 97(1) (*c*) and 98 (1) (*b*), (*c*) and (*d*), and for the members of county assemblies under 177 (1) (*b*) and (*c*), shall be on the basis of proportional representation by use of party lists.

(2) The Independent Electoral and Boundaries Commission shall be responsible for the conduct and supervision of elections for seats provided for under clause (1) and shall ensure that—

(*a*) each political party participating in a general election nominates and submits a list of all the persons who would stand elected if the party were to be entitled to all the seats provided for under clause (1), within the time prescribed by national legislation;

(*b*) except in the case of the seats provided for under Article 98 (1) (*b*), each party list comprises the appropriate number of qualified candidates and alternates

between male and female candidates in the priority in which they are listed; and

(*c*) except in the case of county assembly seats, each party list reflects the regional and ethnic diversity of the people of Kenya.

(3) The seats mentioned in clause (1) shall be allocated to political parties in proportion to the total number of seats won by candidates of the political party at the general election.

Electoral Integrity

81. The electoral system shall comply with the following principles

(*a*) freedom of citizens to exercise their political rights under Article 38;

(*b*) not more than two-thirds of the members of elective public bodies shall be of the same gender;

(*c*) fair representation of persons with disabilities;

(*d*) universal suffrage based on the aspiration for fair representation and equality of vote; and

(*e*) free and fair elections, which are—

(i) by secret ballot;

(ii) free from violence, intimidation, improper influence or corruption;

(iii) conducted by an independent body;

(iv) transparent; and

(v) administered in an impartial, neutral, efficient, accurate and accountable manner.

86. At every election, the Independent Electoral and Boundaries Commission shall ensure that—

(*a*) whatever voting method is used, the system is simple,

(*b*) the votes cast are counted, tabulated and the results accurate, verifiable, secure, accountable and transparent; announced promptly by the presiding officer at each polling station;

(*c*) the results from the polling stations are openly and accurately collated and promptly announced by the returning officer; and

(d) appropriate structures and mechanisms to eliminate electoral malpractice are put in place, including the safekeeping of election materials.

Commissions

249. (1) The objects of the commissions and the independent offices are 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.

(2) The commissions and the holders of independent offices—

(*a*) are subject only to this Constitution and the law; and

(*b*) are independent and not subject to direction or control by any person or authority.

(3) Parliament shall allocate adequate funds to enable each commission and independent office to perform its functions and the budget of each commission and independent office shall be a separate vote.

250. (1) Each commission shall consist of at least three, but not more than nine, members.

(2) The chairperson and each member of a commission, and the holder of an independent office, shall be—

(*a*) identified and recommended for appointment in a manner prescribed by national legislation;

(*b*) approved by the National Assembly; and

(*c*) appointed by the President.

(3) To be appointed, a person shall have the specific qualifications required by this Constitution or national legislation.

(4) Appointments to commissions and independent offices shall take into account the national values mentioned in 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.

(6) A member of a commission, or the holder of an independent office—

(*a*) unless *ex officio*, shall be appointed for a single term of six years and is not eligible for re-appointment; and

(*b*) unless *ex officio* or part-time, shall not hold any other office or employment for profit, whether public or private.

(7) The remuneration and benefits payable to or in respect of a commissioner or the holder of an independent office shall be a charge on the Consolidated Fund.

(8) The remuneration and benefits payable to, or in respect of, a commissioner or the holder of an independent office shall not be varied to the disadvantage of that commissioner or holder of an independent office.

(9) A member of a commission, or the holder of an independent office, is not liable for anything done in good faith in the performance of a function of office.

Gender

27. (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.

…

(3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.

(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

(8) …the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.

81. The electoral system shall comply with the following principles––

(*a*) freedom of citizens to exercise their political rights under Article 38;

(*b*) not more than two-thirds of the members of elective public bodies shall be of the same gender; …

91. (1) Every political party shall—

(*f*) Respect and promote human rights and fundamental freedoms, and gender equality and equity …

172 (2) In the performance of its functions, the Commission shall be guided by the following—

(*b*) the promotion of gender equality.

197. (1) Not more than two-thirds of the members of any county assembly or county executive committee shall be of the same gender.

INDEPENDENT COMMISSIONS AND OFFICES

Nkatha Kabira and Jill Cottrell Ghai

Introduction

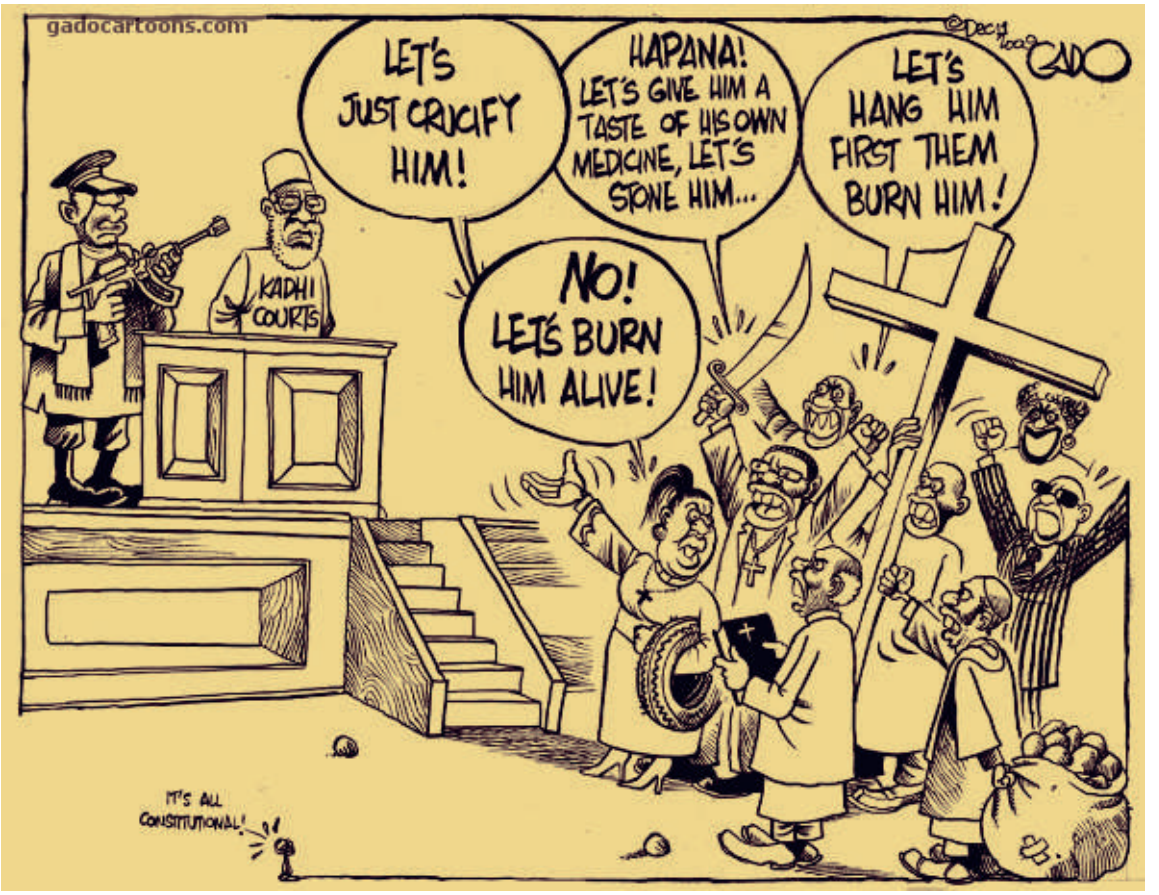
The Constitution of Kenya Review Commission ("CKRC") reports reveal that the demand for the constitutional entrenchment of Commissions was triggered by the long tolerance of a culture of impunity by the Kenyan government.

Auditors General have a long history. Commissions are more recent. Various motives underlie their creation, including:

- Taking certain decisions away from politicians
- Enabling bodies with particular expertise to deal with certain issues
- To make it easier to bring together a variety of skills and interests
- To monitor the public service including through complaints from the public
- To enable decisions that might be viewed as against government to be made by bodies that have security of tenure, as courts do.

Body	**Mandate**
Kenya National Commission on Human Rights (KNCHR)	Promote respect for human rights and develop a culture of human rights; to investigate human rights violations pn complaints or on its own initiative.
National Gender Commission (NGEC)	Rights issues connected with equality and freedom from discrimination, and concerning special interest groups including minorities and marginalised persons, women, persons with disabilities, and children.
Commission on Administrative Justice (CAJ) also calls itself the "Ombudsman".	Fair administrative justice (Article 47). Looks into abuse of office, and improper conduct of public officers, on complaints or its own initiative, seeks redress for victims; makes proposals for improvement of public service.
National Land Commission (NLC)	Managing public land for national and county governments. Investigates land injustices, and recommending redress; to encouraging the application of traditional dispute resolution mechanisms; assess land for taxes; oversight responsibilities over land use planning.
The Independent Electoral and Boundaries Commission (IEBC)	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	Provides "services and facilities to ensure the efficient and effective functioning of Parliament".
The Judicial Service commission (JSC)	In charge of safeguarding judicial independence and accountability. Selects judges and magistrates, recommends judiciary conditions of service, receives complaints and disciplines judiciary workers, continuing

	education of judges; advises the government on the administration of justice. For senior court judges, sets up a body to investigate complaints, but cannot dismiss them.
Commission on Revenue Allocation (CRA)	Recommends basis for equitable sharing of revenue raised by the national government between national and county governments, and among county governments. Recommends criteria for distributing the Equalisation Fund for basic services for marginalised communities.
Salaries and Remuneration Commission	Sets the salaries and benefits of state officers (members of the national and county executives, legislators, judiciary, Governors and some other major office holders) and advises governments on those of public officers. Supposed to ensure fairness as between public and private sectors.
The Public Service Commission (PSC)	Managing human resources in the Civil Service. Appoints public servants, develops codes of practice, and is responsible for discipline.
The Teachers Service Commission (TSC)	Registers trained teachers; employs teachers, assigns them to public schools, promotes, disciplines, and, if necessary, dismisses them.
The National Police Service Commission (NPSC)	Appoints police and in charge of discipline for senior officers.
The Commission for the Implementation of the Constitution (CIC) (ceased to exist after five years).	Oversaw development of laws, institutions and procedures to implement the Constitution; coordinate with the Attorney-General and the KLRC in preparing legislation and work with other commissions to ensure that the letter and the spirit of the Constitution was respected.
Kenya Law Reform Commission (KLRC)	The Constitution recognised the KLRC giving it a role in preparing the laws needed to implement the Constitution. It generally reviews laws, proposes new ones etc.
Ethics and Anticorruption Commission (EACC)	Required but not created by the Constitution. Develops standards and best practices in anti-corruption, develops codes of ethics, and investigates allegations and recommends prosecution for acts of corruption.
National Cohesion and Integration Commission (NCIC)	Pre-dates the Constitution of Kenya; to encourage ethnic harmony in various ways.
Auditor General	Audits accounts of national and county level government bodies, including commissions, to confirm whether public money has been applied lawfully and in an effective way, and for the purposes intended.
Controller of Budget	To approve expenditure, ensuring that it is authorised, to try to control expenditure before it is carried out.



Religion and the Kenyan Constitution[191]

By Father Gabriel Dolan

Father Gabriel Dolan is an Irish Missionary Priest and 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 KHRC, the Katiba Institute, Muhuri and is a regular columnist with the Sunday Standard

The first time visitor to Kenya will soon discover that Kenya is a very religious country. Churches and mosques 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).

Yet the religious feature of life is not confined to houses of worship. Almost every public event begins and ends with a prayer. It is hardly surprising then that religion would have found a significant space in the 2010 Constitution especially so since religion is not perceived as a private affair like in 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 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 is worthy of celebration and a reason to be proud.

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. Yet, the dominant religious culture is Christian so how do religions that are minorities feel at home and protected in such an environment? Do other faiths feel threatened or undermined or misunderstood? How can their needs be recognised and addressed?

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, the issue of Kadhi Courts tested that relationship, as a large percentage of Christian leadership representatives believed that 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 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 under the expected Article 27(4) which states that the State must not discriminate directly or indirectly against any person on any ground, including race, sex, religion etc.

The division was real and worrying at a critical stage in the process. Ultimately reason and compromise won the day. The argument went that why should the courts be removed since they are not only no threat to non-Muslims but 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 that prevail among the religions. In the end Kadhi Courts were granted the status of a subordinate court like Magistrates Courts. Article 170 describes in detail the role of the Kadhis and their powers.

However, the final clause in that article did not get the full approval of all Kadhis. It said, 'The jurisdiction of a Kadhi 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 Kadhi courts'. This confirmed two things. Firstly, the law 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.

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 over 50 today. 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 Islam as a 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 2009 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 the inclusion of Kadhi Courts 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 their 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.

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. The recent declaration by President Kenyatta that all schools under church sponsorship should be returned to the respective churches is 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.

Recently religious tensions and differences have resurfaced over the right of Islamic Girls to wear hijab as part of school uniform. The matter has been referred back to the High Court by the Supreme Court. However, should such matters ever appear in court at all? Adversarial justice should rarely apply in matters of such a sensitive and delicate nature.

Common sense, dialogue and respect for religious diversity should take precedence over judicial decisions that could divide Kenyans along religious lines. Schools that welcome students of different faiths should respect the religious culture of all of their students. If the school cannot integrate a diversity of religious practises then how can it claim to be an institution of education and nation building?

The hijab, Sikh turban, Jewish skullcap and the Christian cross are all explicit symbols, but they do not represent a threat or insult to others**.** Courts are a last resort and frequently give unsatisfactory judgments on religious and cultural matters. Surely this is the best argument for Alternative Dispute Resolutions (ADR) for addressing such matters – something the Constitution encourages.

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. 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 society. Yet, we are consistently reminded that President Jomo Kenyatta said that religions must be the conscience of society. 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. 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.

But when boundaries are clear and religion does not compete for power or honour but as a witness 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. For that is when religion has the possibility and space to operate and become an agent of change that is implementing the constitution.

The Right to Culture

By Lotte Hughes & Emily Kinama

Lotte Hughes is an historian working on contemporary Kenya. Until recently she led a major research project on culture and constitutional change.

Emily Kinama is a litigation and research counsel at Katiba Institute.

Once seen as less important than other human rights, cultural rights are now recognized internationally as something indivisible from people's humanity, dignity, and sense of who they are. Increasingly, cultural and minority rights are mentioned in national constitutions around the world.

The Constitution of Kenya

The Constitution recognizes culture as 'the foundation of the nation' and the 'cumulative civilization of the Kenyan people' while the Preamble says the Kenyan people are proud of their cultural diversity. The State must promote all forms of national and cultural expression through literature, the arts, traditional celebrations, science, mass media, publications and libraries; 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' (Article 11).

In the Bill of Rights (the framework for policies), cultural groups or communities receive special recognition. The State must address their needs (Article 21 (3)) cultural ties are relevant to fixing county and constituency boundaries (Article 95), and legislation must ensure that community and cultural diversity is reflected in county assemblies and executive communities (Article 197 (2) (a)).

Protection for intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of communities – which can also be seen as cultural resources – is mentioned in Article 69. One example is the indigenous Endorois community who now earn royalties for the industrial use of unique microbes and micro-organisms found in Lake Bogoria, which are used in the biotech industry. 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.

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 traditional ways of life.

Article 63(1) defines community land as 'held by communities identified on the basis of ethnicity, *culture* or similar community of interest'. Many communities, especially but not exclusively indigenous ones, regard their land as a cultural resource, and believe that they have a cultural right to it.

Customary law is recognized in Kenya, but laws that are inconsistent with the Constitution, are invalid (Article 2(4)). And traditional dispute resolution mechanisms should be promoted (Article 159(2) (d)).

Cultural rights under the Bill of Rights

The right to culture in Article 44 covers language and culture. It includes participation in a person's chosen cultural life, joining in cultural organisations. But no one is to be compelled to participate in a cultural practice. And Articles 53 and 55, require State programmes for the elimination of 'harmful cultural practices' in children and youth.

Article 56 requires state programmes to ensure that minorities and marginalized groups can develop their cultural values, languages and practices. 'Marginalized communities' are those like pastoralists, forest dwelling communities, and others who, by choice or circumstances, are 'unable to fully participate in the integrated social and economic life of Kenya as a whole' (Article 260).

The uses of culture in Kenya today

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 traditional ways of life. But globalization has its uses: globalized internet activism, much led by indigenous peoples, has influenced other minorities to assert their rights to culture. One example is the activities of Nandi 'cultural entrepreneurs' who use the memorialization of folk hero Koitalel Arap Samoei to claim recognition for their community, and the resources that can flow from that.

How heritage and culture are now being used and negotiated is often more to do with futures than pasts. The Endorois have used the royalties mentioned earlier to pay

for children's school fees. Poor farmers and fisher folk in Siaya have used notions of culture (and constitutional cultural rights) to win a court case against a commercial farm encroaching on their territory.

The Constitution helped to create new visions of an imagined future for Kenya. Devolution has played a key role in this renaissance, with responsibility for culture management largely devolved to county governments (Fourth Schedule).

Many county governments have enthusiastically embraced culture, and used it to brand their counties, attract investment and tourism, and market their county's resources. Cultural festivals have sprung up across the country, and have become big business. Some have developed their own cultural policies, County officers are learning to negotiate with 'stakeholders', including community-based organizations, councils of elders, non-governmental organizations, private investors and international organizations like UNESCO. However, these activities are not focused on cultural rights, but on the exploitation and marketization of culture, much of it mono-ethnic.

Culture serves political purposes such as the ceremonial homecomings of politicians, to anoint politicians from a different ethnic group as 'tribal elders'. Political campaigning and the wooing of new potential voters often involve embracing the culture of other involved communities. It is deemed safe to focus on 'culture' (which is regarded as soft) rather than on the ethnicity of the particular politician or party.

Legislation

Article 11(3) of the Constitution mandated Parliament to pass legislation on culture. The Protection of Traditional Knowledge and Cultural Expressions Act provides various forms of protection for traditional knowledge and expressions of culture, including requiring collection of data, and rights to claim benefits from commercial exploitation.

Various provisions of the County Government Act highlight the importance of recognising cultural diversity; through ward boundaries, political parties, establishing villages and other units, selecting county executive members, and through county planning.

Culture and cultural rights in the courts

Recent court 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.

Mohamed Ali Baadi v the Attorney General concerned the impacts of the Lamu port project on the livelihood and culture of Lamu people and the Lamu World Heritage site. The Court held that Articles 11(1) and 44 meant that cultural rights are to be awarded the highest respect and protection. It held that consultation must take place with affected indigenous communities when planning development projects, and failure to do this was a violation of cultural rights. Again, the failure of the government to draw up a management plan to preserve the rich legacy of Lamu Island was a violation of the right to culture of the indigenous communities. The court ordered the government to draw up such a plan, and report to the court.

The Ogiek community, and individual members, who complain of eviction from their traditional forest lands, have litigated in various ways. In *Joseph Letuya and 21 Others v. Attorney General* the court found that the evictions 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.

The *African Commission on Human and People's Rights v. the Republic of Kenya* involved failure of the Kenyan government to respond to an African Commission order requesting them to suspend implementation of an eviction notice to the Ogiek. The African Court found that restrictions on Ogiek access to Mau Forest greatly affected their ability to preserve their traditions and interfered with their right to culture. Kenya had failed to prove that the need to preserve the natural ecosystem justified interfering with the Ogiek's cultural rights.

The Giriama (also called Giryama) are one of the nine ethnic groups that make up the Mijikenda (which literally translates to "nine towns").

The Government has formed a Task Force on implementing this decision. While the case was not based on the Constitution, a Kenyan court said the decision was binding on it because Article 2(6) makes international agreements part of Kenyan law (*John K Keny v Principal Secretary Ministry of Lands*).

In *J K (suing on behalf of CK) v Board of Directors R School* the court did not reject the argument that a boy should be allowed to wear dreadlocks in school on principle. The point was that it had not been proved that the child belonged to the Jamaican culture – just asserted.

Some cases based on culture have caused some concern. In *Republic v. Mohamed Abdow Mohamed* the court agreed that a murder prosecution could be withdrawn because the families of the accused and the deceased reached a settlement, and compensation was paid and rituals conducted according to Somali culture. The court relied on Article 159(2): courts should promote traditional dispute resolution. One issue about this and various other cases is about equal treatment. Should only some people who have committed murder be free from the consequences because of such 'cultural' decisions? The other issue is that, under the Criminal Procedure Code, only certain cases can be 'settled' by agreement; murder is not one. Relevant to both is Article 159: 'Traditional dispute resolution mechanisms shall not be used in a way that … contravenes the Bill of Rights … or is inconsistent with … any written law.'

In *Republic v. Abdulahi Noor Mohamed (alias Arab)* the court pointed out that a crime is not an injury to a person but against the society in general. In addition there were no policy guidelines on how to incorporate the alternative justice systems in criminal matters.

In a non-criminal case courts will more readily agree to refer a case to traditional mechanisms, as in *Lubaru M'Imanyara v Daniel Murungi* where the court referred the case to the Njuri Ncheke, Meru traditional tribunal. Both Article 159(2) (c) and Article 60(1) (g) (a principle of land policy is to encourage settlement of land disputes through recognised local community initiatives) supported this.

In recent cases on morality questions such as abortion and LGBTI rights, there have been people who have asked to be joined as interested parties to argue that the controversial activities are against Kenyan or a specific tribe's culture. A pending case asks whether prohibiting even adult women to undergo FGM is a violation of their cultural rights.

Conclusion

The Constitution has given an impetus to cultural identity and practices only touched on here. Many dilemmas are raised, and will continue to test the courts and policy makers.

Women's Gains under the new Constitution: Does reality match expectation?

By Prof. Jill Cottrell Ghai

Jill Cottrell Ghai, has been a Professor of law in numerous universities. She has extensive experience in advising on constitutions, including in Kenya, Nepal and Iraq. She has been an adviser on several constitution making processes and has a particular interest in human rights. She is a director at Katiba Institute.

The constitutional vision

The overall vision in the Constitution is of a Kenya where everyone is equal and equally respected.

Women and men have the right to equal treatment, including equal opportunities in all spheres of life (Article 27). And it is specially forbidden to discriminate on the basis of sex, pregnancy, marital status and dress.

Re 'socio-economic rights': health, education, food, water, housing and social security are the rights of everyone. But because women are often even more deprived than men, these rights may be particularly valuable for women. These rights are only required to be achieved progressively. The state must not wait for ever to do anything, but miracles are not required.

Article 56 requires affirmative action programmes to help minorities and marginalised groups (including women) participate in all aspects of life, including governance, 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).

Political parties must respect and promote gender equality and equity, must not 'seek to engage in advocacy of hatred on any such basis' nor 'engage in or encourage violence or intimidation'. Women usually suffer the most from political violence.

After the 2010 Constitution

Public bodies
The Constitution envisages that 'every public body will have not more than two-thirds of its members of the same gender' (Article 27(8)). Only for county assemblies does the Constitution say how this is to be done. The constitutional provisions have certainly had some impact. Now, in elected bodies, there are:

Body (total members in brackets)	Directly elected (total membership; % women)	County members	List (often called 'nominated') members for special interests (total)	Top-up list ('nominated') women(counties) and list women (Senate)	Total women (overall total; % women)
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)
Note: * indicates mandatory provision for women				Grand Total	844 (2640; 32%)

Results are very varied. In Nandi five of the 30 ward seats were taken by women—far better than the national average for any class of directly elected seat. But supposedly sophisticated Nairobi has only four women out of 85 ward members.

The low percentage of directly elected women in races where both sexes can vie is disappointing. However, in 2017, overall more women were directly elected 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. But in 2007, 7.27% women were elected for constituencies, little worse than the 7.9% in 2017. Parties hesitate to nominate women as candidates for these seats because they have 'their own' - county women - seats.

There is some sign that women can make a transition from county woman representative to constituency MP, and from list woman MP or Senator to directly elected. But it is a slow process.

There are methods that would ensure the two-thirds rule in Parliament without amending the Constitution, but male MPs see these as depriving them of 'their' seats. Maybe they prefer methods that introduce women in special seats, with less credibility than men. They prefer to amend that Constitution to provide extra seats. But somehow MPs have managed to stay away from the house whenever the issue has come up for a vote, nearly four years after a deadline set by the Supreme Court for passing the law.

Progress needs parties to cooperate. A court case has decided that next time the IEBC must ensure that parties put up no more than two-thirds male candidates. This would be an improvement, but no guarantee that the two-thirds rule is met.

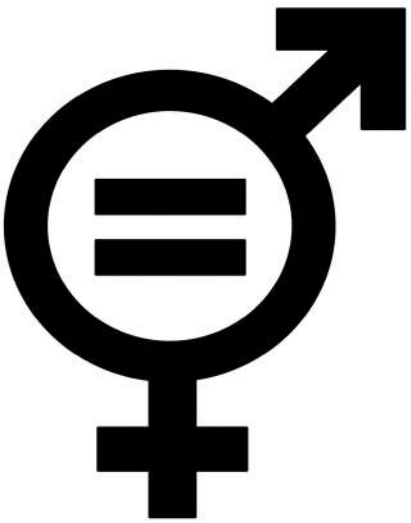
Most women representatives have problems their male colleagues do not face. Forty-seven represent counties equal to between two and 17 constituencies. Many have no geographical constituency: five list members in the National Assembly, 17 in the Senate and 559 in county assemblies.

Appointed bodies
Many Governors appoint only three women out of 10 county executive members. Honourable exceptions are Kisumu, Uasin Gishu and Kisii with four. Three out of 10 is 30% - not one-third.

Nationally, President Uhuru Kenyatta has never complied with this rule. Currently just 25% of the Cabinet are women. In 2017,

Justice Onguto held that the make-up of the cabinet violated the Constitution; this is likely to return to court soon.

There has been a good deal of improvement in the courts. The Supreme Court and Court of Appeal have about 29% women members, the High Court about 40% and the magistrates nearly 50%. However, cases about the composition of the Supreme Court, with two women and seven men (over 70% men) have been unsuccessful.



The Public Service Commission's Diversity Policy of 2016 undertakes that every public service institution will implement the two-thirds principle. Overall women are 30% of the public service. Independent Offices and Commissions have 41% women. Of Principal Secretaries, 29% are women. But among the new 'Cabinet Administrative Secretaries' 2 of the 12 are women. Seventeen of the 47 (26%) County Commissioners are women while 5.2% of the chiefs and 8.6% of assistant chiefs are women.

The police do have a policy of respecting Kenya's diversity in recruitment but it will be a long time before the threshold of one-third women is reached: about 15% are women, and seven out of 46 county commanders are women.

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. About 47% in the education sector are women. While numbers of men and women primary school teachers are roughly equal, in 2016 75.8% of primary heads were men. However, in 2010 85.5% of heads were men.

Private sector

Women are far less likely to be in waged employment than men. Women constitute under 20% of the boards of both listed and unlisted private companies. Not only are women less engaged in the formal, wage economy, but when they are employed they earn less - on average about two-thirds what men earn. Kenyan women still bear the lion's share of childcare responsibilities. Kenyan law is gradually moving in the direction the Constitution would suggest. Maternity leave is still limited (three months) and in practical terms available to few. There is provision for two weeks paternity leave (in the Employment Act since 2008), and new legislation provides for time and facilities for breastfeeding at work.

Marriage and family

The Bill of Rights says that 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 at the dissolution of the marriage (Article 45).

Many women were disappointed by the recognition of polygamous marriages in the new Marriage Act, and by the (predominantly male) MPs' rejection of any requirement that an existing wife's permission was necessary before another wife was taken. However, the latter provision was declared unconstitutional by Justice Mumbi Ngugi in 2015.

The existence of the kadhi courts, preserved by the Constitution and now more extensive than before, enable a Muslim woman to escape from a marriage that is not working, if the husband is not willing to divorce her.

Parliament must pass a law to protect the matrimonial home 'during and on the termination of marriage' (Article 68). The Land Act (s. 79(4)) says the 'matrimonial home' cannot be mortgaged without the consent of both spouses. Unfortunately, this does not seem to prevent the home being sold without the consent of one spouse, and so does not fully implement the Constitution. The Matrimonial Property Act (s. 7) says that matrimonial property belongs to both spouses according to the contribution of each to acquiring it. There was some dis-

appointment with a 2018 court's rejection of an argument that on divorce the property must be divided 50:50.

Gender Based Violence (GBV)

The constitutional right to be free from violence had women particularly in mind. But domestic and other violence remains serious, including at election times, as a Human Rights Watch report on the 2017 elections showed.

Many police stations now have gender desks, while all stations are supposed to have officers dealing with gender based violence (GBV).

Many police stations now have gender desks, while all stations are supposed to have officers dealing with gender based violence (GBV). The Ministry of Health has also developed guidelines for the response to victims of GBV. The obligation of the police and other authorities to protect women against sexual violence, or at least to investigate when such offences were alleged, was asserted by the court in the '160 girls' case in 2013.

The Protection against Domestic Violence Act passed in 2015 gives the courts power to make protection orders to prevent violence, even to keep a partner away from the joint home.

The (pre-Constitution) Sexual Offences Act does not penalise marital rape, reflecting a very outdated view of marital relationships. The High Court might well decide that this is incompatible with the Constitution's provisions on equality, including in marriage.

Progress there definitely is. Full equality and full respect are still elusive.

Friend or Foe:
The Government of Kenya and Freedom of Expression

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Introduction

Many commentators expected change for the better when the Constitution was adopted because it provides a new, comprehensive legal framework guaranteeing freedom of expression (Article 33) and of media (Article 34), and access to information (Article 35) - some of the strongest guarantees in sub-Saharan Africa. And, unlike its easily amended predecessors, the new Bill of Rights cannot be amended without a referendum.

The constitution cannot provide all the detail necessary to deal with all circumstances. Kenya has therefore fast tracked the enactment of specific legislation, including laws touching on freedom of expression and the media.

The first eight years of implementation witnessed some significant positive developments. They also reveal the lingering struggle to move away from the exceed-

ingly conflict-ridden period between independence and the early 1990s, and to resist deep-seated interests that grasp every opportunity to retain the status quo, or to manipulate reforms.

Media Laws

Parliament in 2013 enacted the Kenya Information and Communications (Amendment) Act, [KICA] and the Media Council Act (MCA), claiming that they were meant to entrench freedom of expression as well as guarantee access to information. The reality was rather different. KICA establishes a Communications Authority (CA) and a Communication and Multimedia Appeals Tribunal, which can fine media houses and journalists, recommend de-registration of journalists and impose other sanctions.

The MCA established the Media Council as required by the Constitution, to set media standards, and monitor compliance with them. The board must reflect diverse interests of society and be independent of government control or the influence of political and commercial interests. Its Complaints Commission is to resolve complaints by media consumers and subjects against media practitioners and houses.

The laws do offer limited gains, including that the executive no longer selects members of the Media Council.

However, KICA gives the President or Cabinet Secretary the final say in appointments to the Board of the CA – which regulates the broadcast and telecommunications sector. They create punitive penalties for media outlets and journalists including fines of up to KShs 20 million for media outlets and half a million shillings for individual journalists who breach provisions of KICA (s. 102E).

The courts have however been strong. For instance, the High Court found section 29 of KICA that criminalised misuse of licensed telecommunications system to be unconstitutional as it was over broad (*Geoffrey Andare v Attorney General* [2016]).

In *Coalition for Reform and Democracy 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.

Remembering the past to protect the future

The past reminds us why vigilance must be eternal. The judiciary, in the past, repeatedly failed to provide protection against state hostility towards media practitioners. That history – which we cannot recount here – shows how important an independent judiciary is to preserve our freedoms including that of expression.

The 1963 Independence Constitution of Kenya broadly guaranteed freedom of expression for the individual and not freedom of the media. The independence government never sought to change this, and 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.

Tom Mboya, set the tone for what was to be the relationship between the press and the government.

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?

The colonial Books and Newspapers Act was amended in 2002 to increase penalties, and raise the bond that newspaper publishers must post with government in case they are convicted of a crime to one million shillings. This requirement saw many community-owned newspapers and magazines close as they were not able to post the surety.

The 1930 Penal Code still provides a broad and vague definition of 'obscenity'.

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.

However, risks remain. The recent Prevention of Terrorism Law criminalizes independent investigative work around the security sector. Section 19 penalises disclosing information that may prejudice an investigation even if the journalist does not know there is any on-going investigation, but just if they had 'reasonable cause to believe it'.

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. It 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 closure of TV stations that broadcast Odinga's 'swearing in' in 2018 revived memories of Moi and Kibaki regime raids on media premises. In 1993 state security agents raided the premises of a printer of magazines that did not enjoy government approval, causing the owners large financial losses. The High Court refused to grant compensation.

In 2006, armed and hooded police officers raided the Standard Group's offices, yanking away CCTV cameras and carting away 20 computers, then disabled the printing press and burned thousands of copies of the day's edition. The minister for Internal Security claimed the Standard planned to publish articles instigating ethnic animosity and compromising national security. He relied on Section 88 of KICA – fortunately repealed in 2009 after concerted efforts by media freedom advocates.

Other factors affecting press freedom

Addressing the 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. A year later his theme was journalists were 'not getting their facts right'. The Law was finally passed in 2016, as a private member's, not government, Bill. The Act is in operation and has been used a good deal. Progress on making regulations has been disappointingly slow, but apparently a draft should soon be published.

Despite earlier oppressive laws, independent media were able to push the limits, while the mainstream media however was cowed and largely became the government's mouthpiece. Now there is no really independent media that serves the public interest as before. Freedom of the media has also been sacrificed for economic interests tied to the survival of media enterprises.

Mainstream media reliance on government advertising is an example.

But times are hard for the industry, and government holds them to ransom by failing to pay for advertising (In 2018, the debt was 2.5 billion shillings).

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. Examples of concentration of power include the role of the commercial empire of the Aga Khan who owns several print media and a television station, 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 former President Moi. It also has two television stations and a newspaper, as well as other interests. Various other politicians have interests in FM radio stations.

The current government is not pro-reform. E.g. the president summoned *Standard* newspaper editors and managers over an investigative story on the 2013 elections. A watered-down version of the story was then aired after the meeting, and the editors, for the first time in many years, ran an apology on the front page of the newspaper. The same year, the media was put under intense pressure to self-censor, especially during the Westgate terrorist attack and its aftermath.

Recent concerns

Article 19, a Human Rights NGO, has highlighted issues on media freedom, and freedom of expression generally. Taking only some recent examples, we should be concerned about the intolerant puritanism displayed by the Kenyan Film and Classification Board, expansion of its supposed role and its attempts to become our moral guardians.

In another instance, GSU police assaulted journalists covering the Miguna Miguna affair. And violence against journalists was common during the 2017 election period. Article 19 notes that in 2017-18 they 'recorded 94 incidents of violations against individual journalists and media workers, including bloggers, in Kenya'.

In 2018, a Computer and Cybercrimes Act was passed. Article 19 criticised it for provisions that make it a crime to publish 'false information', yet the provisions are vague and broad, do not give any defence for publishing in the public interest, and impose heavy penalties. A court suspended some sections of the Act, but in October 2018, the suspension was lifted because the case was not pursued vigorously. This shows how important it is that laws be properly scrutinised before they are passed.

The Right to Health in Kenya:
A case of contradictory narratives

By Allan Maleche, Tabitha Griffith Saoyo and Nerima Were

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Tabitha Griffith Tsaoyo is a human rights advocate, researcher and academic with a focus on the rights to health and water

Nerima Were is a human rights advocate, researcher and academic with a focus on the rights to health and water

The Constitution of Kenya, 2010 is celebrated as a trend setting and progressive document that protects the right to health generously. Article 43 (1) (a) recognizes the right to the highest attainable standard of health including reproductive health. Before 2010, health, and other socio-economic rights were not recognized as justiciable rights and litigators were compelled to creatively read the right to life as including the right to health.

Article 21(2) places an obligation on the State to take legislative and policy measures to achieve the Article 43 rights progressively. Whilst failure to achieve these rights immediately is not a violation, as was emphasised by the court in *Luco Njagi v Ministry of Health,* 2015, this does not necessarily mean that inactivity is permit-

ted; steps towards realisation should be made immediately. Indeed, Article 20(5) provides that if the State claims it does not have the resources to implement a right, it must prove it does not have the resources. Priority must be given to ensuring the widest possible enjoyment of the right, including taking into account the vulnerability of particular groups or individuals.

The obligation of the State in giving life to rights is spelled out as the duty to observe, respect, protect, promote and fulfil the rights. The State must not positively hinder the right. It must, by the use of law, regulation and enforcement prevent non-state bodies from violating the rights. It must also educate and in other ways encourage the respect for the right and when necessary it must take positive steps to ensure it is achieved.

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. The Act recognizes health as a right including: 'progressive access for provision of promotive, preventive, curative and rehabilitative services.' It guarantees reproductive health and rights, emergency treatment, health information, consent and confidentiality, and information that ought to be disseminated by government.

There are a number of positives in this Act. First is its recognition of health as a right. Second it recognizes that health is a devolved function. Third, the Act takes into account that the health care rights of children are an immediate (not progressive) obligation, and requires national and county governments to provide free, compulsory vaccination for under-fives. Finally, it recognises the reproductive health and rights of women, obliging national and county governments to provide free maternity care.

There are numerous other relevant laws including the Public Health Act, the Protection against Domestic Violence Act, Sexual Offences Act, the Pharmacies and Poisons Board Act, and the Kenya Medical Practitioners and Dentists Act that regulate different sub-themes of health. There are also various policies that govern different facets of the right to health, but here we focus on the Kenya Health Policy, 2014-2030 which provides strategic guidance on how to improve the overall status of health in Kenya.

Both the Acts and the policy try to use a 'rights based approach' to the progressive realization of the right to health – meaning that rights should be a framework for all efforts to provide better health and health services. But to some extent this is lip service because of lack of detail about how this will inform the realization of health.

Health in the courts

Post 2010, several court cases have challenged the scope and boundaries in health realization. *PAO and others v Attorney General* was the first case on the right to health. The court held that the right took precedence over intellectual property rights, and that the law that restricted access to generic (and therefore cheaper) drugs, especially for HIV, went against the Constitution.

MA and another v The Attorney General interrogated detention of women for failure to pay for maternity services, following a presidential directive that was issued in June 2013 declaring maternity services free, while *W J & Another v Astarikoh Henry*

Amkoah found that sexual violence was a violation of the right to health because of the significant physical and psychological consequences, and awarded compensation to affected school pupils.

The case of *Luco Njagi v Ministry of Health* however, illustrated the Court's unwillingness to interfere in how the State allocates its resources. The court found that the State had shown that it did not have the resources available to ensure access for kidney dialysis treatment for the petitioners, 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 allocated as between kidney and cancer patients. As evidenced in *Kenya Legal and Ethical Network on HIV & AIDS (KELIN v Cabinet Secretary Ministry of Health)*, there are also instances where the courts have cited separation of powers and intimated difficulties in directing the state to develop policies, especially if the parties supply no evidence of what policies might be suitable. Notably though, in *Daniel Ng'etich v Attorney General* the court declared it was unconstitutional to imprison TB patients who defaulted in taking their medication. The court further proceeded to direct that the State, in the absence of an isolation policy must develop one. This case shows the value of court orders compelling government departments to take action and report back to court. The Attorney General did in fact prepare an isolation policy and report back to court.

Health as a Devolved Function

Under the fourth schedule of the Constitution, one of the functions devolved to counties is health. Policy making and management of national health referral facilities fall within the ambit of the national government while county governments are responsible for health facilities and pharmacies, ambulance services, promotion of primary healthcare, licensing, cemeteries, veterinary services and refuse removal.

Disappointingly, while section 15(1) (c) of the Health Act elaborates the obligations of the National Government to ensure the implementation of the Bill of Rights on the right to health, reproductive health and emergency treatment, it says nothing about this obligation for the County Governments. The Constitution imposes duties to achieve the right to health on 'the State' and the counties are just as much part of the state as the national government.

In reliance of Article 185 of the Constitution, counties such as Laikipia and Marsabit have enacted their own stand-alone health laws while a number of counties includ-

ing Makueni, Kilifi and Kakamega have introduced Maternal, Newborn and Child Health Acts.

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'. As the State grapples with how to achieve UHC (with pilot implementation starting in Kisumu, Machakos, Isiolo and Nyeri) Makueni County remains the leading example of a devolved unit that has achieved this. Makueni, with about 870,000 people has, since October 2014, been offering its residents free healthcare across public health facilities. The county builds on the National Health Insurance Fund and the national government's free primary healthcare, and residents are required to pay KShs500 per household annually to access primary healthcare free at point of service.

Makueni, with about 870,000 people has, since October 2014, been offering its residents free healthcare across public health facilities.

From the 2017 strikes by medical staff, it became clear that there are misunderstandings on the role of devolution in the health sector both by the governments and the health sector. The people too, armed with minimal information, do not understand and thus do not demand their rights.

Other challenges to devolution include significant capacity gaps within county political and management structures. When resources were devolved, few counties possessed the administrative capability to absorb the available funding or plan for its use.

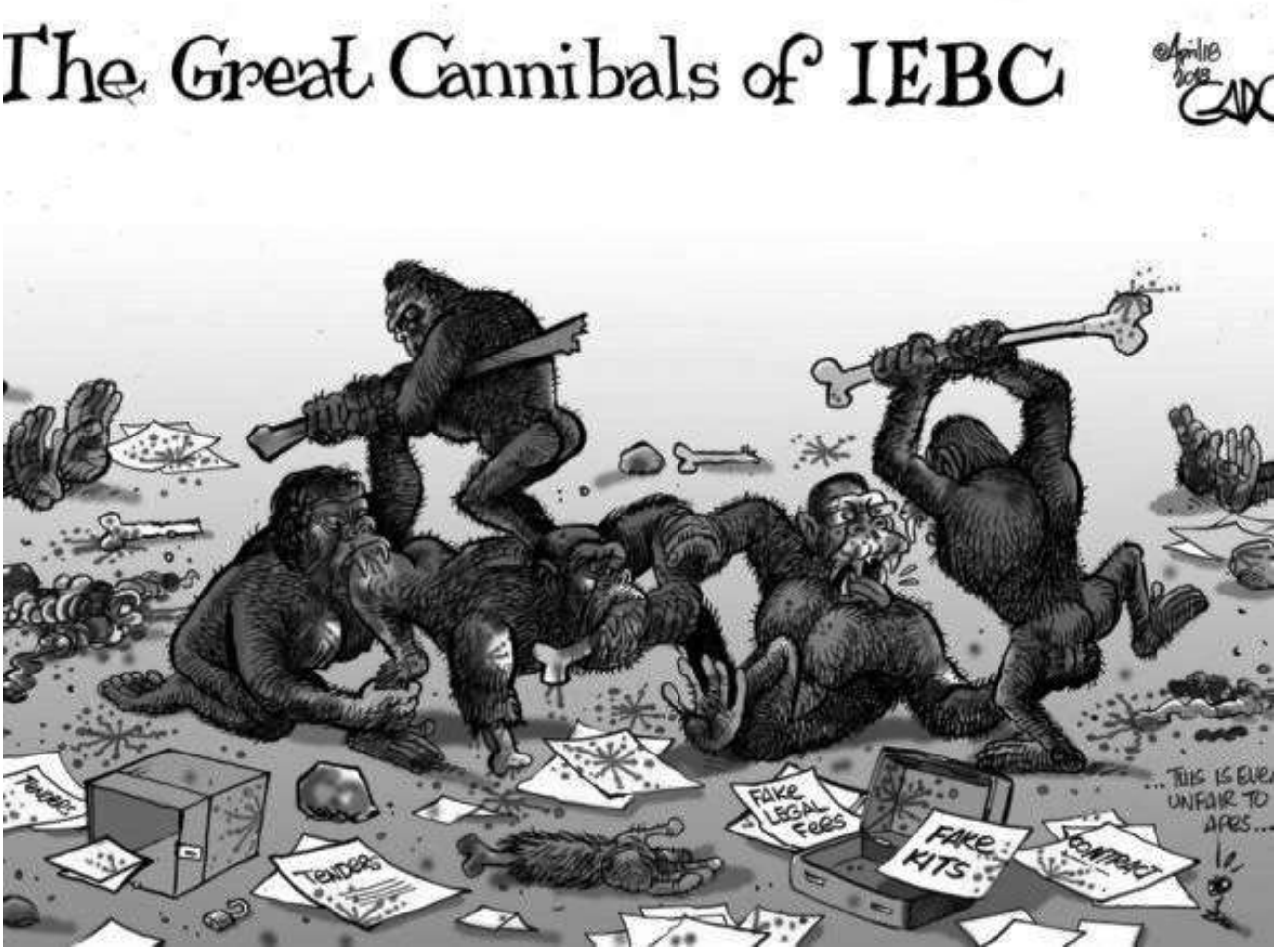
One of the main opportunities provided by devolution is the ability to localize and address health issues in a meaningful way. Health is the most expensive commitment counties have, and on average they have been spending about 25% of their budgets on health. This is a significant contribution to Kenya achieving 15% of its overall budget on health (as the Abuja Declaration commits it to). (We must not forget only about 20% of the entire national budget is allocated to counties.)

Conclusion

In recent years, the judiciary has demonstrated its willingness to give content to the right to health, and has given greater understanding to how this right can be fulfilled in Kenya. However, this has not always translated to meaningful realization of the right through policy and service delivery. However, one cannot understand what health means in a vacuum to what devolution and governance is.

According to the Global Corruption Report (2006), Kenya's health care system lacked accountability mechanisms, allowing abuse and misappropriation of funds. Common forms of irregularity in public health facilities include unjustified absence of staff, procurement mismanagement, theft of drugs or equipment, unauthorized use of equipment, facilities or supplies and unauthorized billing of patients. How do we define and quantify progressive realization? Can the courts take into account corruption when coming to a conclusion that the State has done enough?

Kenya has made great strides in giving content to the right to health post-2010. 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. However, as we continue the discourse we must appreciate that we are at a stage where formulating an understanding on how and who can be held accountable is vital for building a State that respects, promotes, protects and fulfils health related rights.



Electoral Integrity

Seema Shah is an independent researcher focused on electoral integrity and human rights. She was previously the Director of Research for the Kura Yangu Sauti Yangu civil society coalition in Kenya.

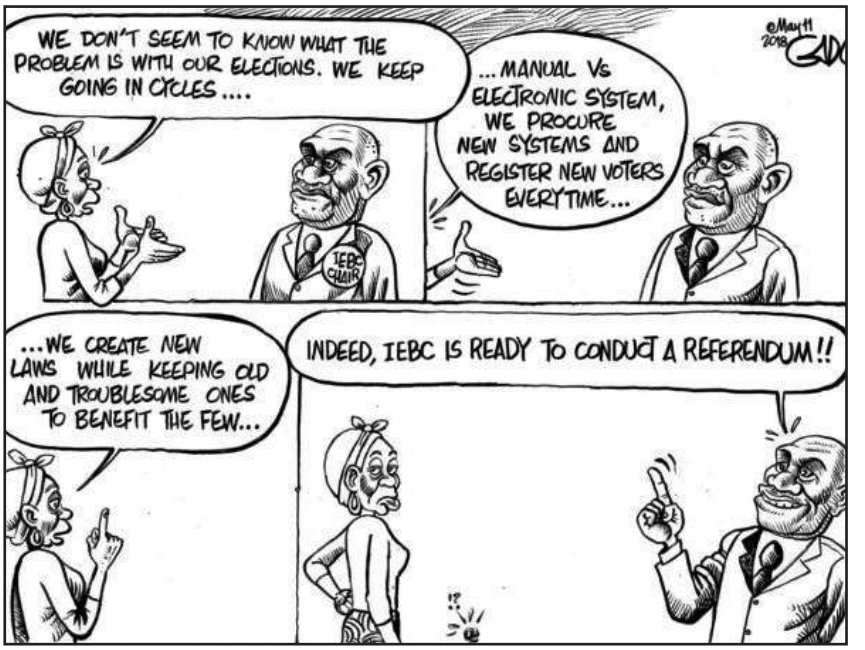
Introduction

Chapter Seven of the Constitution of Kenya, 2010 seeks to ensure ethical and independent electoral management, broad public participation, and transparent electoral administration through a robust legal framework. Unfortunately, poor implementation and enforcement of the Constitution (and implementing laws) have marred the credibility of all three national elections that have taken place since its promulgation.

While constitutional amendments may serve to strengthen some aspects of election administration, it is more urgent to sincerely enforce the current law and upend the opaque, non-verifiable and elite-driven status quo of Kenyan electoral processes.

The Electoral Vision of the Constitution

In their submissions to the CKRC, Kenyans expressed concern about elites' ability to use elective office for personal enrichment, the lack of representation for certain segments of the population, outdated electoral systems, the problems associated with linking residence and voting rights, and the need for a more vigilant electorate.



In response to such concerns, Chapter Seven of the Constitution – which is dedicated to elections -- is based on five key principles: participation, inclusion, accountability, independence and integrity.

Participation

Participation and democracy are fundamental values of the Constitution (Art. 10(2)(a) and Art. 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. The right to vote is bolstered by the lack of residency requirements for registration and by the requirement that voting be simple and transparent (Art. 82(2)). Restrictions to participation as a candidate are, in some cases, limited to certain educational and ethical requirements (See Chapter Six; Art. 99(1)(b) and 193(1)(b)).

Inclusion

The Constitution ensures broad based inclusion, with a special emphasis on certain historically marginalized groups, women, and the disabled. A critical aspect of the Constitution's vision of inclusion is to be seen in political parties, which must have a 'national character'. Parties must promote national unity, respect the rights of everyone to participate, including minorities and marginalized groups, and respect and promote human rights. They are explicitly forbidden from being founded along sectarian lines of any kind (Art. 91(2)(a)).

Notably, however, the principle of inclusion is limited by the use of first-past-the-post for presidential elections. The Constitution's reliance on this majoritarian, winner-take-all system promotes divisive politics, creating no incentive for candidates to seek support outside of their core support bases. It is also disappointing that the acts of observing and/or monitoring an election are not explicit rights.

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. Indeed, the IEBC is required to openly and accurately collate results and promptly announce them at the polling station level (Art. 86(a), (b) and (c)), ensuring a way for the IEBC and the public to cross-check results.

Accountability is also required within political parties, which – with the assistance and oversight of the IEBC - must hold democratic, free and fair internal elections and to have a democratically elected governing body accountable to party members.

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, the Constitution does not specify in any detail what is to be included in such reports.

Independence

Independence is a crucial part of the Constitution's vision for representation. Indeed, the Constitution's definition of a free and fair election rests partly on the requirement for an independent administration body, one that is not

subject to the direction or control of any authority and whose members cannot be removed other than for reasons of incompetence, bankruptcy, gross misconduct, serious violation of the Constitution, or incapacity to perform the functions of office (Art. 251(1)).

Integrity

Overall, the Kenyan constitution's vision of electoral integrity is centred on an easy to use and inclusive, publicly verifiable system (Article 81(e)). 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.

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.

Implementation of provisions on elections

Voter Registration, Voter Identification & Voting

Despite constitutional provisions requiring the government to facilitate simple voter registration; onerous registration processes and a Register of Voters marked by a multitude of errors and omissions have marred the credibility of elections. Evidence shows discriminatory (non-) issuance of national identity cards (required to register), ever-fluctuating registration figures, the lingering presence of over one million dead voters' records in the Register, the continued use of 'green books' in spite of expensive digital systems, and hundreds of thousands of erroneous entries in the final Register.

Voter identification processes, which inexplicably depend on digital *and* manually created lists of registered voters, are unreliable and unverifiable. In spite of laws requiring simple and efficient identification, voters stand in abhorrently long lines only to face malfunctioning identification kits and/or inaccurate voter lists. Additionally, disabled voters, recognized by the law as requiring special attention at the polling station, continue to struggle to reach polling stations and to vote comfortably.

The complexity of these processes and the burdens they place on voters are in clear violation of Article 86(a) of the Constitution. Their longstanding nature highlights the dearth of political will for reform. Some legal amendments – including the expansion of acceptable forms of identification – would help, but enforcement of the current law would address the majority of the above issues.

Counting and Recording Results

The Constitution and electoral laws oblige the IEBC to promptly count, announce and publish hard copy and online results from polling station and constituency levels. In addition to forms characterized by a multiplicity of errors, alterations and missing forms, the 2017 cycle included the use of non-standard forms and 'official' results that differed from what had been shown to the

public. Electronic results transmission systems, tainted by corrupt procurement processes, have also proven unreliable and publicly unverifiable. In fact, the IEBC was held in contempt of court for refusing to open its servers to scrutiny during the August 2017 presidential petition.

The IEBC's refusal to comply with court orders is emblematic both of state capture of electoral processes and of the lack of political will to comply with the rule of law. 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 publicly driven ideas about what such a record would look like.

Political Parties

Despite constitutional guidelines and other electoral regulations that try to ensure that parties are broadly representative, the lack of enforcement means that political parties are still largely based on ethnic identity. Moreover, parties remain deeply undemocratic. Primaries are often chaotic and violent affairs, marked by opaque vote counting and candidates' purchase of nominations, sometimes in clear opposition to voters' wishes.

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. A strong Registrar who is committed to the law could ensure that parties establish and maintain high standards of democratic practice. To date, however, a permanent Registrar has not been appointed.

IEBC Independence and Integrity

The IEBC's independence has been questioned for a number of reasons, including commissioners' partisan statements and evidence of internal divisions based on political biases. The Commission's integrity has been tainted by multiple allegations of corruption related to procurement of electoral technology. In fact, a post-election audit report revealed that the costs of KIEMS kit preparation and technological project management were overpriced and unnecessary; companies were even engaged and paid without signed contracts.

Kenyan laws provide clear guidance for procurement as well as for the ethical standards expected of IEBC commissioners. Real change depends on strict enforcement of already strong law, which will free the IEBC from the State's influence and make it accountable to the people.

Conclusion

Kenyan elections are in dire need of reform, but it is unclear that constitutional amendment is an urgent priority. In fact, it is apparent that the bulk of reform for the most urgent issues lies in implementation of existing law. Voters are meant to be at the centre of electoral processes, and administrative procedures in relation to the vote must actively facilitate voters' roles in the entirety of the electoral process instead of conferring it as a privilege. Some very targetted constitutional change may be necessary in the long term, but the most critical priority now is how to breathe new life into the Constitution.

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

By Gitungo Wamere & Jessica Musila of Mzalendo Trust

Gitungo Wamere was Mzalendo's Program Officer during the 11th Parliament. He is presently on study leave pursuing a Master of Public Policy in University of Erfurt, Germany.

Jessica Musila has served as the Executive Director, Mzalendo Trust, a parliamentary monitoring organisation.

A key driver to enact the 2010 Constitution was the public demand to take back ownership of the nation from the power elite and re-establish a shared whole. 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. In ascribing to Parliament these lofty goals, Kenyans sought a departure from the tyrannical rule of the imperial presidency that had evolved from independence.

In March 2013, the 11th Parliament became the first in the new constitutional dispensation. Additionally, it was the largest and most inclusive Parliament in our history. Parliament now has a lot of powers which can be used for the good of the nation. Article 94(4) empowers the 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 in executing its oversight duties. Parliament is evidently the guard-

ian angel that ought to jealously protect the Kenyan dream.

Article 1 of the Constitution recognises that all sovereign power belongs to the people, then article 1(3) 'takes' those powers and vests them to Parliament to exercise in trust for the Kenyan people. In light of this, Kenyans legitimately place their many needs and aspirations before Parliament. The Constitution positions the 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 most favourite despite its inclusivity and diverse wealth of experience. The National Assembly was defined by gaffes that ranged from physical fights to passing pathetic laws. They gave credence to Parliamentary democracy pessimists like Vladimir Lenin, who wrote in his 1917 pamphlet 'State and Revolution', 'Parliamentarians are members of the oppressing class voted by the oppressed to go and repress them further'. The Senate on the other hand, spent most its time crying wolf and therefore there was nothing much to write home about.

Like its predecessor at independence, the Senate has sailed in controversy. Ideally, it is supposed to be the Upper House but the structure of the law has ensured that it remains an underdog. It is no surprise that debate on its importance 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 Senate had no business in legislating the Division of Revenue Bill – a function that primarily defines the roles and responsibility of the Senate.

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 its aloofness. The Senate didn't use its oversight powers to the maximum 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 Members of County Assembly (MCAs) were rudderless and uninformed on their roles. The Senate should have ensured proper capacity building of MCAs in order 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 the second one operates.

The bicameral Parliament was introduced as a remedy against the stronghold on power into which the imperial presidency evolved between 1966 and 2002, by imposing constitutional amendments and practices that rendered the other arms of government, especially Parliament, mere lackeys (see Society for International Development (SID), *The Presidency and Public Authority in Kenya's new Constitutional Order* (2011). It also infringed on the rights of the public. The 2010 Constitution therefore mandated Parliament to vet all Presidential appointees, oversee revenue and its expenditure, and oversee the Presidency and other State officers. Unfortunately, oversight of presidential appointees has been minimum, with Parliament being used as a mere conveyor belt.

Then again, 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 House (indeed is probably outside Parliament entirely). The opposition leader becomes an alternative centre of power with substantial power to weaken its authority from without e.g. Raila Odinga after both the 2013 and 2017 elections. If the opposition appointees serving as the leaders of minority within Parliament are weak, it compromises the entire oversight function in both chambers, as they may choose to trade off on some issues.

Self-governance through public participation is enshrined in Kenya's Constitution; however, Parliament is yet to actualize effective people's participation. Bureaucracy and poor communication by Parliament remain the major impediments to realizing the principle of public participation. Critical parliamentary information like reports

are often published late and calls for public input give very short notice. Consequently, rarely does the public get wholly involved in the legislative process.

The 11th Parliament, for instance, gave very short notices ranging from one day to a maximum of five days, as research by Mzalendo discovered. To include people in legislation, sufficient time must be given and information on Bills made easily accessible.

During the 11th Parliament, the ruling coalition - Jubilee - in many instances attempted to use Parliament to make 'partisan laws'. This could not be taken in good faith however well-intentioned the laws might have been. The majoritarian tyranny did not augur well for national cohesion and 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.

On the very rare occasions that Parliament has embraced the spirit of bipartisanship, it has 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. This is unfortunate because Parliament ought not to be an arena of combatants with irreconcilable interests. In the months following the annulled Presidential elections, Kenya sailed in unchartered waters and despite Parliament being in place, it made the situation worse.

Law and policy are closely intertwined; the process of making the first must be informed by the second. The post-2010 Parliament has been accused of not legislating quality laws. Some laws have been declared unconstitutional or even created 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 Parliamentarians lack the capacity. There is need to build the capacity of our Parliamentarians for them to exercise properly powers that are within their jurisdiction.

Legislation is an exclusive 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. Research for quality law making has been missing and some laws from Parliament have been shallow and just cosmetic. This has led to laws and policies that are out of touch with reality, or wholly incompetent legislation.

Parliamentarians' fidelity to implementing the letter and the spirit of the Constitution has been sluggish. Eight years later, Parliament has never implemented the 'two-thirds gender rule' (Articles 27(8) and 81) yet the Supreme Court said it must be implemented by 2016. There is a window of opportunity for the 12th Parliament to salvage the bad image of Parliament by legislating this rule. One proposal is to have the 'rule' implemented by having enough extra women nominated to Parliament (as in county assemblies). Another is to make the obligation one of implementing the rule merely 'progressively'. The first option is more popular within civil society while the second one is favoured by those who fear for an escalating wage bill.

What is needed is a commitment to constitutionalism and the tenets of democracy. The bi-cameral 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 (e.g. Allan Savory, *Good Governance in Africa* (2007)).

The opportunity exists to change the constitution to regulate political party structures more firmly, reduce the size of Parliament and make the right of recall of elected representatives by the people explicit and operational in order to rein in the legislators and push them to be effective. The problem is that, before we get to the referendum, the issues go to Parliament itself.

The Institutional Transformation and Performance of the Judiciary after 2010

By Walter Khobe Ochieng

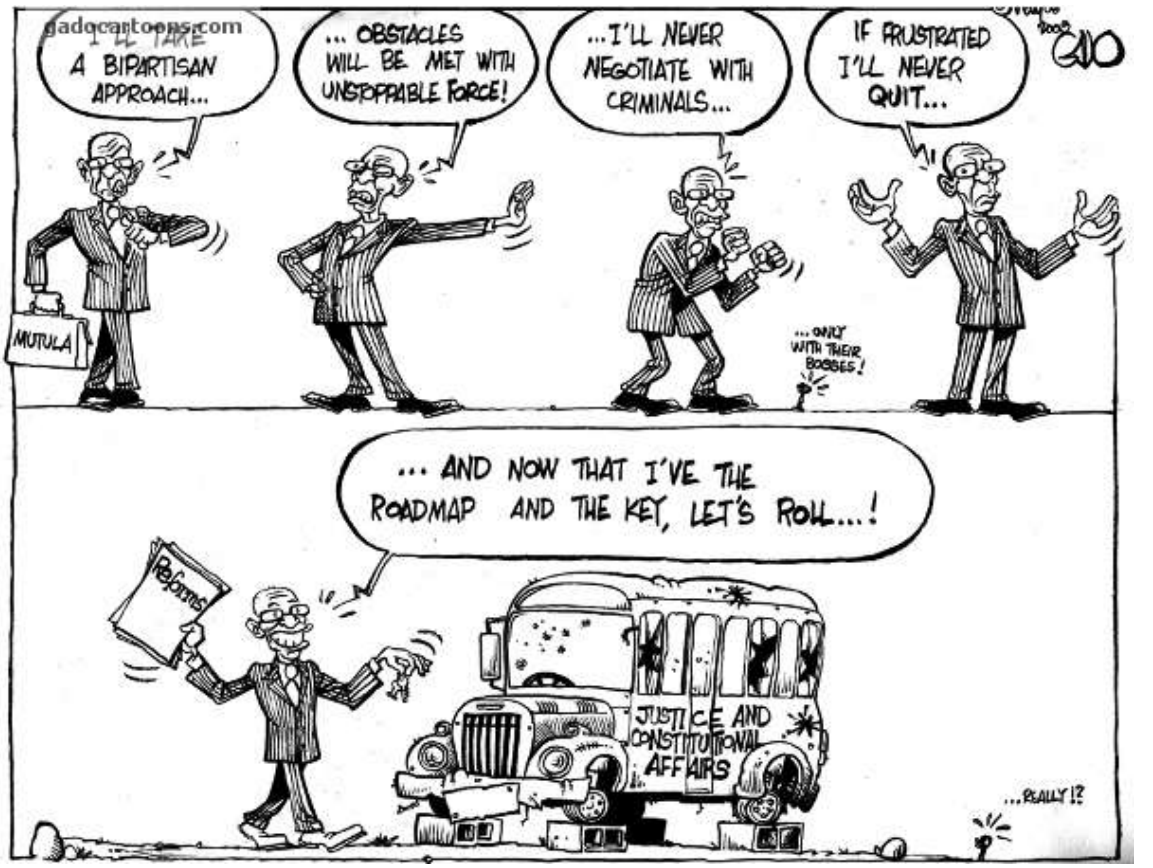
Walter Khobe, is a Lecturer at the Department of Public Law, Moi University and an Advocate of the High Court.

Introduction

The 2010 Constitution is committed 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 that must inform making and implementing all policies and laws, and the application, and interpretation of the Constitution. The rest of the Constitution elucidates how these goals will be achieved, including an independent judiciary.

Institutional Design and Inter-Branch Relationship

It is the role of the judiciary to act as a guardian of the Constitution, to uphold the rule of law and to exercise checks and balances over the other branches of government within the scheme of the separation of powers. To uphold the rule of law the



judiciary must be seen to be independent in order to ensure public confidence.

Before 2010, courts were highly deferential to the executive and legislature, and rarely curbed the efforts of either branch to pursue their authoritarian ends.

Article 160(1) provides that the judiciary is 'subject only to this Constitution and the law, and … not subject to control by any person or authority'. Other provisions to protect its independence include Article 160(4), providing that the remuneration of judges may not be reduced, while Article 168 ensures that judges are not removed on whimsical grounds.

Before 2010, the judicial appointment process was not transparent and no public input was canvassed. Appointment was undoubtedly influenced by political factors. Now the process starts with the Judicial Service Commission, (an independent body made up of representatives of judges, magistrates, and the Law Society of Kenya, plus two members of the public nominated by the President and appointed with the approval of the National Assembly), advertising vacancies in the judiciary in various media. The short-list is publicly announced for comment, after which public interviews are held. In this way, the constitution has helped to build public confidence in the independence of the judiciary.

However, while early drafts of the constitution included a provision that there must be adequate resources for the judiciary, this was removed before the constitution was passed. Article 173 of the Constitution provides that the Chief Registrar of the Judiciary prepares annual estimates of expenditures of the Judiciary; these must be approved by the National Assembly. After that, the money is paid to a Judiciary Fund administered by the Chief Registrar.

Sometimes the executive, or National Assembly, has slashed the budgetary allocation for the judiciary – first in 2015 apparently 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. Following the annulment of the August 8th 2017 presidential election, the executive decided to slash the budget of a number of independent constitutional offices. In the 2018-19 Budget, the Judiciary's own estimate of its needs were reduced by the Treasury, because of the need to economise, then further reduced by Parliament, leaving the judiciary with only KShs50 million for development.

This means that the process of budgetary allocation remains a political process. Turning the leadership of the Judiciary into supplicants to politicians carries with it an obvious risk to judicial independence.

While the judiciary has played its role within the separation of powers, it has been met with attacks from the executive, and, most alarmingly, non-compliance with court orders on the part of the state, particularly orders to pay compensation. One blatant example involved orders for the release of the detained, then deported, opposition politician Miguna Miguna. In another, the authorities ignored court orders to switch on spectrum for several television stations switched off by the Communication Authority of Kenya, because they had aired the mock swearing-in of opposition leader Raila Odinga as the 'people's president' on 30 January 2018.

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 constitutional checks and balances. Rule of law means both citizens and politicians respect the law and its institutions. Furthermore, judicial independence cannot be secured if judgments are only adhered to when politically expedient. If the court decisions are not obeyed, the 'bite' of the constitution will disappear and it will become a statement of largely meaningless words.

This lack of willingness to achieve the goals of the constitution cannot be remedied by constitutional design changes alone. It is clear that without wise political leadership, the Kenyan transition to a new democratic and accountable order might not succeed. It is perhaps time to call for a national recommitment to the vision of the 2010 constitution and its goals.

Jurisdictional Design

The most important new judicial institution is the Supreme Court, which is expected to serve as the ultimate guardian of the constitution. This new apex court was thought essential as allegiance of the then existing judges to the new constitutional order could not be guaranteed. The Constitution also created the Environment and Land Court, and the Employment and Labour Relations Court. The objectives were improved access to justice, development of judicial expertise, development of clear and effective jurisprudence, and more efficient disposal of cases.

All presidential election cases must be heard by the Supreme Court (Article 163). This is supposed to ensure that this divisive issue receives high level and prompt resolution in the court, and to discourage violence. There has been no repeat of the 2007-2008 post-election violence, as the Supreme Court has handled three presidential election petitions following the 2013 and 2017 elections. Generally, the political class and the general populace have accepted and abided by these court decisions even where they disagree with them. Thus, the Supreme Court as an innovation of the 2010 Constitution has played an important role in resolving political conflicts.

The Court also hears appeals from the Court of Appeal, and if the case involves the Constitution the right to appeal is automatic. The Supreme Court also has the power, enjoyed by no other court, to give an 'advisory opinion', which means even if there is no active dispute. This applies only if the issue concerns county governments, and if a state body brings the case.

Another question about jurisdiction concerns the fact that any higher court (not magistrates) can declare a law unconstitutional. The Working Group on Socio-Economic Audit of the Constitution recommended that the Constitution be amended to provide that any declaration of unconstitutionality by the High Court and the Court of Appeal could take effect until confirmed by the Supreme Court. This draws from the South African Constitu-

tion. However, there is every risk that this procedure would increase the perennial problem of backlogs in the Kenyan judicial system by creating an avalanche of suits to the Supreme Court, as well as increasing the cost of access to justice.

Guardianship role

In its role of ensuring that the constitution is respected, the courts have made many notable contributions. Apart from the case insisting (rightly in the author's opinion) that the Senate must be involved in passing the Act allocating money between national and county governments, courts have made important contributions to respect of the 'two-thirds gender rule', to protecting the independence of the judiciary, and to ensuring that the public can participate in important decisions such as law making.

Human rights recognised in Chapter Four have been the basis for many important decisions, including protecting freedom of expression; rights to fair administrative justice; to access to government information (vital for accountability); to protection from eviction and rights to be protected from violence.

Conclusion and Recommendations

The judiciary has much improved in efficiency, approachability and availability. Some problems do remain. Delays in some courts or some types of cases remain unacceptable. Not all judges have fully accepted the implications of the new Constitution. Rumours of bribery cannot be dismissed entirely.

And tensions between other branches of the government and the judiciary are getting if anything worse. The anti-corruption campaign of the President and Director of Prosecutions has given rise to tit-for-tat allegations between them and the judiciary. Even the President has used inexcusable language in criticising the judiciary.

However, even after our discussion of the constitutional architecture and design with respect to the Judiciary, we are making only a few recommendations. This suggests that the Constitution has, for the most part, been fit for the purposes it was meant to achieve.

Those recommendations for amendment are:

- to have a fixed minimum percentage of the national budget reserved for the judiciary, to minimise the need for negotiation between the judicial and political branches of government.

- to adopt the approach of the Constitution of Ghana (Article 2). This makes failure to comply with Supreme Court orders on the unconstitutionality of law or conduct a ground for removal of the President. It is a crime and conviction results in loss of eligibility for election or appointment to any public office.

Devolution:

Why People Wanted it, and What They Got

By Prof. Yash Ghai

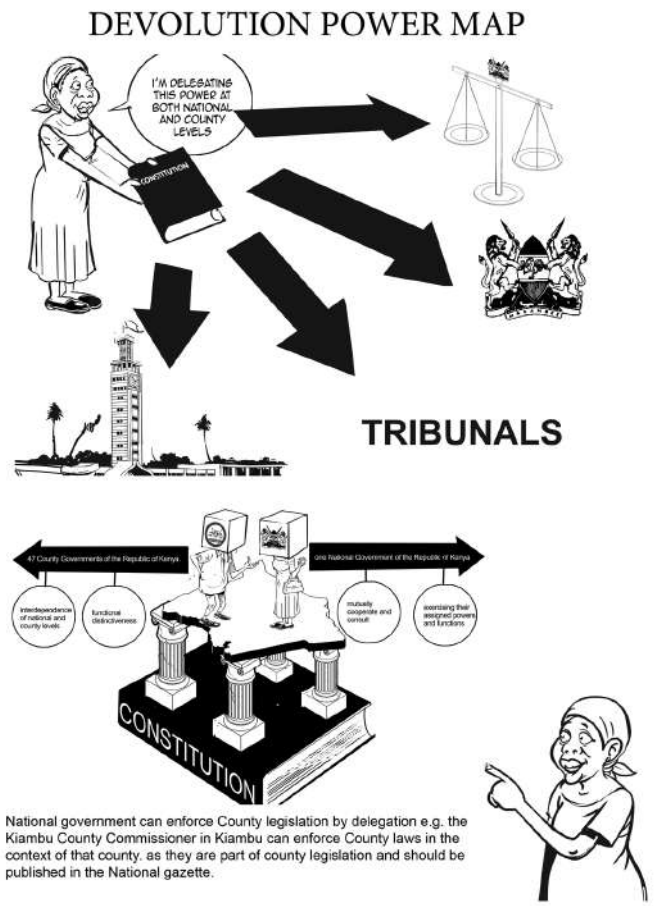
Prof Yash Ghai is a renowned constitutional guru. He has written extensively on human rights, advised and assisted NGO's on human rights law related initiatives and programmes. He has been the UN Secretary General's Special Representative on Human Rights. He also drafted the Asian Human Rights Charter that has been useful in promotiong human rights in the Asian continent.

I Hopes and plans

Some history

At independence time there was a feeling that too much power was concentrated in Nairobi (and in a few tribal communities), and decisions affecting people were made far away from them. The independence constitution transferred significant powers throughout the country. But a year later Jomo Kenyatta began bringing back wide and authoritarian powers to Nairobi—to himself that is.

The Constitution of Kenya Review Commission (CKRC - 2002) noted widespread feelings of alienation from government because of this concentration of power. People felt marginalised and neglected, deprived of their resources, and victimised for their political or ethnic affiliations. People felt that certain ethnic groups had been favoured, and others discriminated against. Decisions were made far away, including about land, and did not reflect their reality.



National government can enforce County legislation by delegation e.g. the Kiambu County Commissioner in Kiambu can enforce County laws in the context of that county. as they are part of county legislation and should be published in the National gazette.

Again the solution was felt to be devolving power closer to the people. In fact, devolution was adopted as an objective in the famous Safari Park national conferences in the 1990s.

Early drafts of the constitution had more than one level of government below the national. Bomas recommended 14 regions and 74 districts below them. The Committee of Experts eventually opted for a single lower level to avoid a 'complex system'.

2010 Constitution

County governments are bound by the constitutional principles in Article 10 and chapter 6 on integrity, good governance, people's participation, non-discrimination and protection of the marginalised.

Article 174 sets out the specific objectives of devolution: diversity, national unity, democracy and accountability, and economic and social development. It places special emphasis on self-government, particularly the rights of minorities and marginalised communities, and other groups, to manage their own affairs and development. Article 175 requires the promotion of gender equity and equality in counties. Article 6 (2) commits both county and the national government to their distinct status, but also recognises their inter-dependence. They must conduct their mutual relations on the basis of 'consultation and co-operation'.

II Implementation

Do the actual design of the Constitution, and its implementation so far, work to achieve the objectives?

Counties' functions

The Fourth Schedule of the Constitution lists national and county functions—with much greater allocation to the former. The principal county functions are agriculture (including fisheries); county health services; county transport; cultural activities; animal control and welfare; trade development and welfare; county planning and development; implementing some items of national government on natural resources; firefighting; and county public control of drugs and pornography. They can make law on these topics, and carry out the functions, where appropriate. This is not a huge list and has considerable ambiguity, perhaps deliberately to ensure the dominance of the national government - to which everything else belongs.

Finance

At least 15% of revenue raised by the national government is to go to the counties (Art. 203(2)), allocated among them on the basis of formulae developed by the Commission on Revenue Allocation (Art. 216). The Equalisation Fund, (0.5% of all national government revenue (Art. 204)) is distributed to be used for basic services in marginal areas/communities 'to the level generally enjoyed by the rest of the nation, so far as possible'. Counties can make some money from rates, otherwise their taxing power is very limited. They can make various small charges, such as for licences. In reality, most fail to raise what they target, and overall get about 90% of their revenue through the national allocation.

How is the machinery of devolution working?

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

The national executive and Parliament (especially Senate) have not fully accepted the idea that county governments are not just local authorities. Recent examples are the County Wards (Equitable Development), and County Early Childhood Education Bills, introduced in the Senate. When both national and county governments pass overlapping laws on subjects within their powers, the courts may have to decide whether there is good reason for a national rather than a county law (Article 191).

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

There is an elaborate mechanism for liaison between national and county governments. It includes dispute resolution procedures, which have sometimes been ignored, but would not anyway apply if the actual dispute is not between governments, even if the subject is county powers.

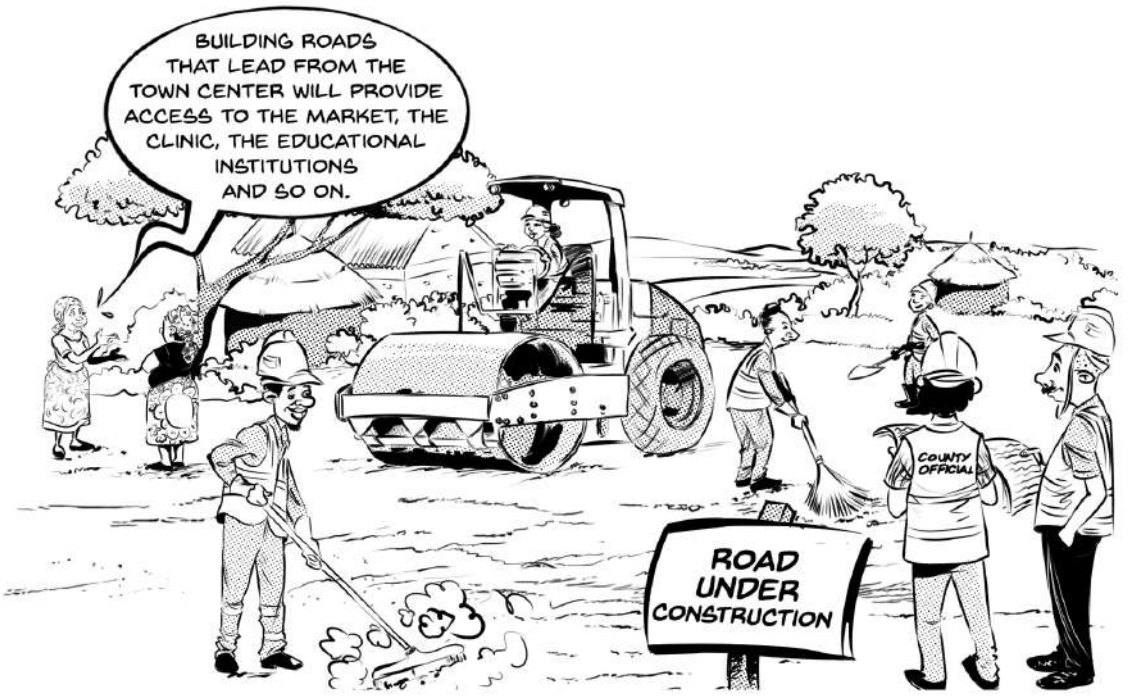
The final arbiter of disputes - the courts - have protected counties against some attempts to subordinate them to the Senate, and also held some taxes raised by counties, and some county laws, unconstitutional.

III Realising the objectives?

Diversity

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 and can make policies on matters of immediate relevance to them. Leaders of these communities are engaged in various national matters, especially through the Council of Governors.

Small minorities within counties may be less benefitted. The Constitution provides that ethnic diversity should be reflected in the county assembly and county executive, and minorities protected. Special membership is granted in the county assembly to people belonging to marginalised groups, including those with disability and the youth (Art. 177). But some minorities feel that they are still excluded.



174 f) to promote social and economic development and the provision of proximate, easily accessible services throughout Kenya;

A somewhat crudely crafted rule says that at least 30% of county appointments must be filled by candidates not from the dominant local ethnic community (County Government Act). However, one study showed that, in 2013-17, in about half the counties, all county executive members came from one ethnic community. The pattern is not very different when looking at the county public services.

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

Democracy

For many years there was no meaningful local democracy; democracy operated only in the choice of President and MP. It could be said democracy is deepened by the multi-centres of power. And more reflection of diversity is clearly more democratic. The impact is weakened by the limited powers of counties and their small size.

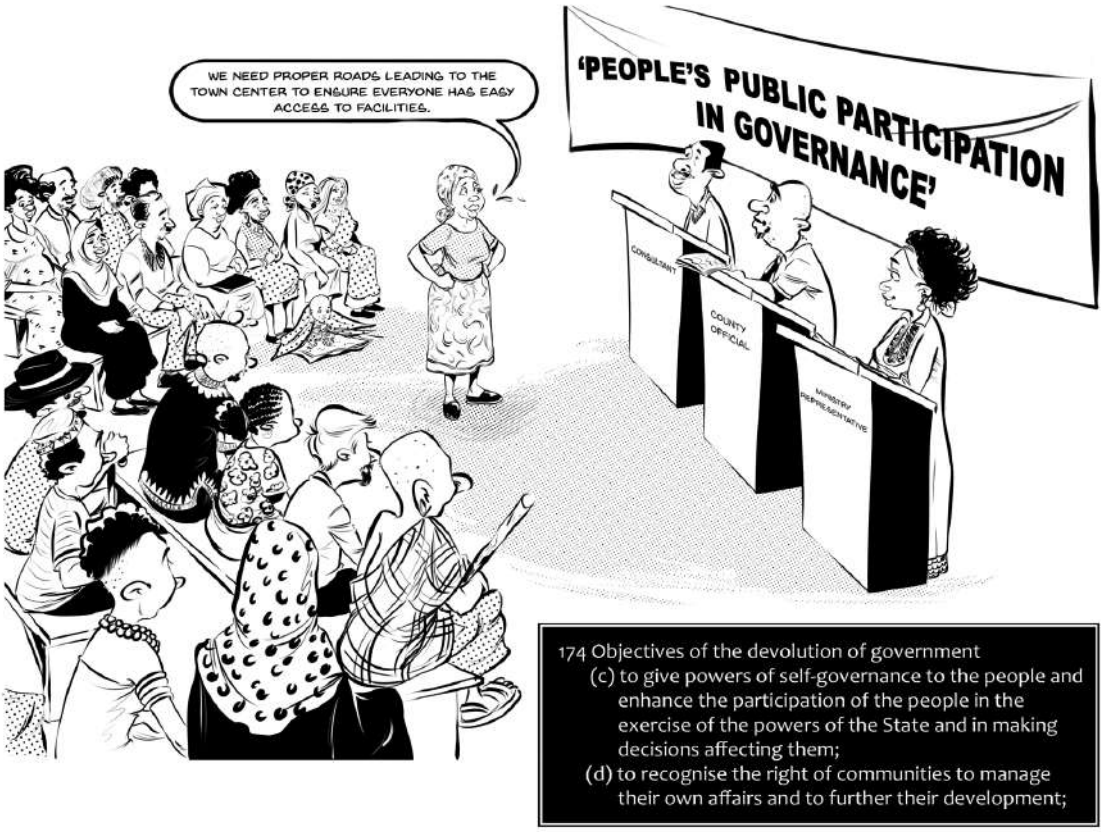
Arguably a wider range of parties indicates more democratic choice. While at national level a few parties (in reality ethnic alliances) dominate, in 2017, 39 parties won seats (mostly in county assemblies).

Participation

There is a plethora of guidance for counties on how to conduct participation – in the County Governments Act, in Guidelines produced by the Ministry of Devolution, and in counties' own Public Participation Acts. Some counties have made participation a reality. Makueni County, particularly, has institutionalised civic education and public engagement. It has trained 990 trainers on public participation and there is a structure of forums from the village to county level.

However, courts have declared a number of pieces of legislation in other counties unconstitutional for lack of participation.

A 2016 report by the Intergovernmental Technical Relations Committee said, '… very little has been done to operational-



ize the [county] legislation by developing regulations, setting up relevant institutions/offices, systems, guidelines and procedures or providing adequate budgetary provisions for public participation.'

Accountability

There is some evidence that people find it easier to complain to county officials than to national ones. Attempts so far to impeach governors have been unsuccessful (either because not accepted by the Senate or found to have been improperly conducted by the courts).

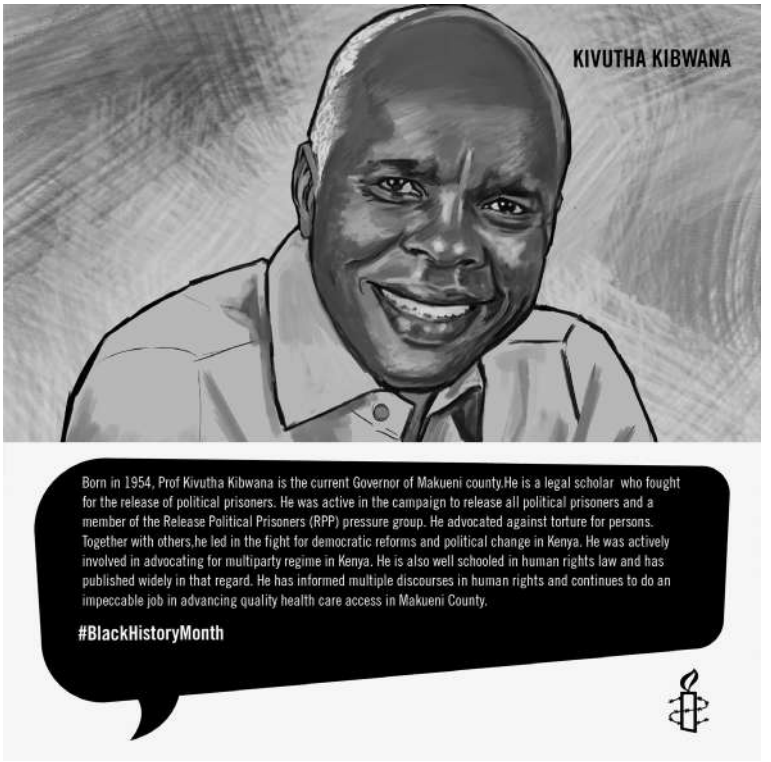
The principal agents of accountability, as for the national government, are the Controller of Budget and the Auditor General – whose reports have been scathing on the whole. Recent reports have found many counties not giving adequate information to enable a complete audit, and many irregularities were detected. But implementation of these reports, at any level, seems limited. It is not clear that democratic accountability through elections is any more effective than at the national level.

Promoting economic and social development....

When the new, devolved system of governance began, the economy was expected to improve. A recent KNBS 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 a county government. Industrialisation would be mainly a national function.

Significant numbers of counties, especially those hitherto marginalised, have seen definite benefits, with tarred roads and medical services beyond what they had ever seen. But too many counties spend less than the minimum 30% that law requires them to spend (over time) on development, and more than the 35% they should spend on salaries, etc. Some problems arise with delayed sending of money to counties by the national Treasury.

Some groups of counties are forming regional economic blocs that promise well



for future development; and may lead to similar associations in other parts of the country.

National unity

Groups that now have their 'own' government, with funding from the national government, and significant resources are being more integrated into the rest of the country. 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 generate some disharmony. There are several conflicts between counties about their boundaries. And the imminent census has awakened counties to the significance of their population size, and some governors are trying to 'poach' residents of other counties by asking them to register in their 'home' counties on census registration night.

Corruption

Some anticipated that local accountability would be effective; others feared that corruption would be devolved. The pessimists seem to have been proved right.

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. This corruption escalates as the President emphasises integrity.

Conclusion

Various published reports identify 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 coast counties.

Reports also tend to indicate that counties are learning and improving. And it is hard to say that counties perform much worse than national institutions.

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.

Motion without Movement.

An Insider's Reflection on Policing Reforms

Tom Kagwe is a political scientist having graduated from the University of Nairobi, both in 1997 and thereafter in 2002, with both BA and MA respectively. He has researched in the fields of governance, especially constitutionalism, public policy, human rights, security, electoral process and such governance areas.

Introduction

The Constitution of Kenya was met with much optimism. It provides for a different security system from that in colonial or even post-independence Kenya, envisaging wide-ranging transformation of the policing, intelligence, and military sectors. Many have questioned why reforms have not yielded the yearned-for fruits.

Envisaged Reforms

Civilian oversight, but operational autonomy

The principles of the Constitution include their subjection to civilian authority, (Article 239(5)), including the President as the Commander-in-Chief. The three security services (police, Kenya Defence Forces (KDF) and National Intelligence Service (NIS)) were to be independent in their management.

The path towards institutional capture by President Uhuru Kenyatta started in 2013. Under the former President, Mwai Kibaki, whose attitude was to wait, see and then seldom act; institutions had more leeway to work independently. In 2011 legislation (the National Police Service Act, section 12) provided that the Inspector-General of Police (IG) would be appointed by the President, but only following a process of open recruitment by the National Police Service Commission (NPSC), involving public interviews. A short list of at least three was then to be submitted to the President for his final selection, subject to Parliamentary approval. But this was amended in 2014 to appointment by the President alone, subject to parliamentary approval. A court

challenge failed – the provision mirrors the Constitution closely.

The Constitution was crystal clear about the role of the security agency heads. The role of the civilian authorities, particularly the President, in deciding who would be the leaders of these agencies was camouflaged. Then the mode of appointment, involving the National Assembly, is weak, as the Jubilee party rarely contradicts the President's preferred choices (unless members' personal interests are involved).

Another issue is the political expediency and patronage, and picking unsuccessful politicians and aspirants to head the various security dockets. And an omnipresent factor is appointing persons to offices based on ethnicity, usually from either Kalenjin or Kikuyu. These tendencies have completely undermined the Constitution, Chapter Six of which established principles about the qualifications for office, and the associated, albeit rather weak, legislation.

Internal operation

The Constitution carefully sets out the objectives and functions of the police (Article 244): striving for the highest standards of professionalism and discipline, competence and integrity, prevention of corruption, transparency and accountability, compliance with human rights, and fostering relationships with the broader society. Appointments, transfers, and promotions must be on merit, and reflect the regional and ethnic diversity of Kenyans (Art. 246 (3)). That role is to be supervised by the independent NPSC (Art. 249)), which also deals with disciplinary matters, requiring cooperation with the police itself.

More reforms were to be carried out within the police. They were to prepare the Service Standing Orders (SSOs), within 12 months, (National Police Service Act). The first Inspector General failed. The serving IG, Joseph Boinnet, launched the SSOs, but they remain on paper, with abysmal, if any, implementation.

Civilian oversight

The civilian authority, the Independent Policing Oversight Authority (IPOA), created by legislation not by the Constitution, was to be important in the achievement of the constitutional principles.

The Constitution also envisaged reforms of the other security agencies in accordance with the principles of protection of both territorial integrity and human rights. Unfortunately, all three services have failed, and have continued to fail to understand this doctrine.

Illustratively, the military was enlisted in October 2014 to restore peace in the former Northern Frontier District (NFD); according to the KDF Act, they were to report to the IG, and were subject to IPOA oversight as they were undertaking policing functions. But IPOA records and reports filed, show that the military did not respect the chain of command as provided in the law, nor were they penalized for violating human rights.

Reforming from Outside
The NPSC, IPOA and the Ministry of Interior and Coordination of National Government (MICNG), were supposed to work together in achieving reforms, within the letter and spirit of the Constitution. Unfortunately, they have signally failed.

These institutions were bedevilled by institutional turf wars. For example, the police recruitment case in 2014, showed the NPSC at loggerheads with IPOA; the latter petitioned the High Court to quash the former's recruitment exercise. The judgment held that the recruitment was in violation of the Constitution which was designed to negate discrimination and nepotistic tendencies. IPOA faced both internal and external challenges. These included the lack of strategic leadership at police levels, particularly their inability to comprehend the mandate of IPOA. Lack of co-operation by the police contributed immensely to the lack of fulfilment of the entire mandate of the IPOA.

Reforming the security sector from outside is next to impossible. Inept leadership, and the difficulty that civilians have in understanding the nature of security work, contribute to this. The hierarchical nature and respect for insignia (mysterious to outsiders) are also factors. However in reality, civilians, especially Human Rights Defenders (like the civil society-led Police Reforms Working Group), are more knowledgeable about security issues than the officers imagine.

The sad reality is that neither internal-led nor external-led reforms have been successful.

NPSC vetting
The NPSC vetting hearings' focus was on finances (corruption) but rarely was any question asked about the human rights record of the officer. And the 'vetters' were themselves not above suspicion, some facing criminal or malpractice charges.

Failure from the Inside
Issues from inside included leadership challenges, lack of strategic focus and a failure to comprehend the simple logic of external oversight responsibility. Police were inconceivably anti-reform. And they prioritized housing, budgets, police posts and uniforms as reforms over accountability.

The culture of the police favours the use of police for political ends. In their perspective, police are part of the executive. Article 245 says that the Cabinet Secretary may lawfully give a direction (in writing) to the IG - on policy, and not about the investigation of any particular offence, enforcement of the law against any particular person or employment of any member of the service. But, by not disputing the role of the executive in setting policy choices, the police became subservient to the executive. Scenes of a Cabinet Secretary threatening politicians with arrest or purporting to illegalize public demonstrations are common: all contrary to the express provisions of the Constitution.

Systemic and structural problems afflicting the police have been deliberate and with the condonation or even support of the leadership. Frustrations of police reforms cannot be overcome by shuffling police officers, from one posting to another: some officers must exit the service.

An outsider IG, maybe from civilians with relevant strategic and policy management and practice, is needed to lead the reforms. Reforms cannot be left to conservatives or insiders. Police officers currently at the helm would rather pass the buck to either 'a few rotten apples' as they say, or to external accountability institutions such as IPOA. It seems clear that the Presidency has eroded the potential and actual independence of the NPS, which therefore is a shell of what

Kenya does not need new taskforces, reports, or methodologies, but rather to implement what is already there.

the Constitution provided for. The Constitution has not been amended; but what the political elite in Parliament failed to change in the Constitution has been achieved through ordinary legislation, and actions.

Kenya does not need new taskforces, reports, or methodologies, but rather to implement what is already there.

Moving Forward

There are several areas of dialogue that require attention: first, the future of the Kenya Police Service and the Administration Police as separate entities (something that the recently announced changes will partially address). This split is counterproductive. There have been problems of double procurements, double administration, double beat-and-patrol, and other overlapping functions.

A second point is whether Kenyans want to renegotiate the Constitution of Kenya, to include constitutional establishment of the IPOA.

While this author believes that the NPSC definitely is needed, the personnel and the commissioners require re-examination. The cat-fights pitting NPSC commissioners against the police leadership were unwarranted.

Constitutional provisions - including 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 Kenya only with the approval of the Assembly - need to be considered, and strengthened. Under both Presidents Kibaki and Uhuru, Article 241 has been violated. Under Uhuru, the military have been deployed haphazardly to deal with local or community policing matters, leading to wanton violation of human rights. It is a constant cause of the problems facing Kenyans, particularly the youth – with enforced disappearances especially. Other issues that Kenyans should debate include whether we need to recruit over 10,000 police officers annually, bringing problems for the training curriculum, and accommodation at police colleges.

IPOA's report on police housing showed that, when police are living within communities, community policing is helped, and crime is less likely. This view seems to have been adopted – but without the police being given enough money to rent adequate housing.

All organs of the State are supposed to be transparent in their dealings, such as the procurement of goods and services, but in reality are not. In purchases of security equipment, millions of US dollars are stolen. The Auditor-General's reports over the years point to wanton waste of public financial resources. Opening up these dealings to public scrutiny could save the country lots of public funds.

Discussion of sanctions that may be imposed on police and other security agencies, by both their internal accountability mechanisms and external mechanisms, such as IPOA or NPSC, including for those who violate human rights require to be seriously discussed. Whereas courts have issued orders, including requiring the Cabinet Secretary to appear in court or even jailing senior officers in the Interior Ministry, none can be arrested since the police report to that ministry, at least in practice (despite the supposed constitutional independence). Stiffer constitutional penalties would assist in the professionalization process, rather than politicizing the police.

Conclusion

Evidently, police reforms, and the wider security sector reforms, as envisaged in the Constitution, are like a docked boat, showing motion, but no movement. Perhaps through some constitutional and legislative amendments, and changes of attitude, Kenyans could remove the anchor in the ocean that holds back the movement towards true transformation, and at last jumpstart it. Then this current generation (or at least their children) may reap the fruits of the Constitution they promulgated.