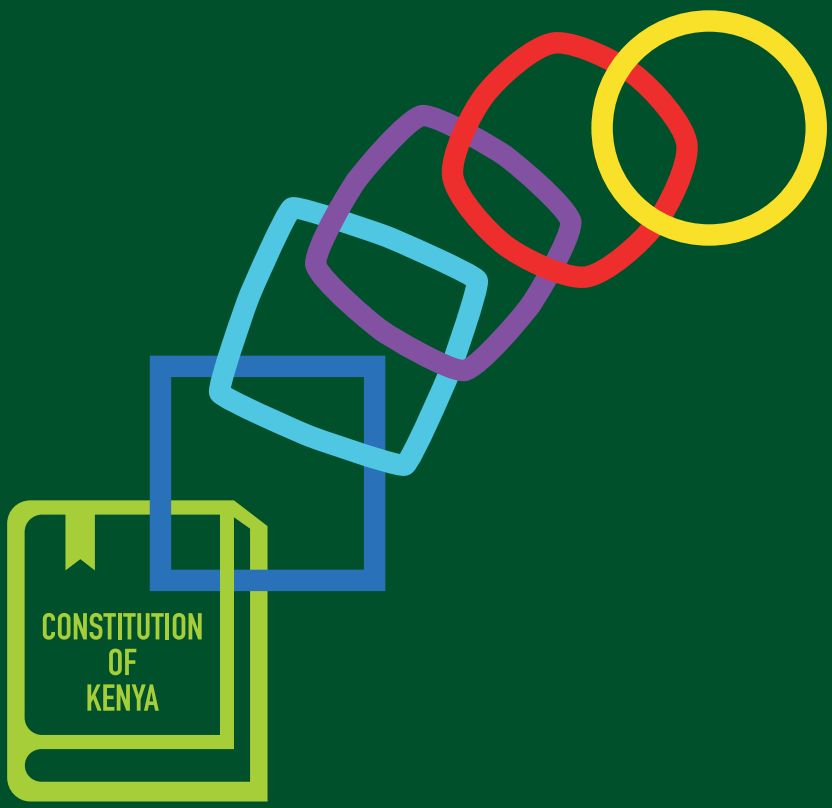
Kenya's Constitution:

An Instrument for Change

Yash Pal Ghai & Jill Cottrell Ghai

Second Edition



KATIBA Institute
Constitution as an Instrument of Change

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The Promise of the Constitution

This page was the first in the first edition of this book (2011). We have seen little reason to change it – just a few words have been altered, and one new sentence added. Nor have we changed the last page.

On the 5th August 2010 Kenyans adopted the new Constitution by the approval of nearly 70% of the voters in a referendum. On the 27th August the Constitution came into force. It is the result of the struggle of millions of Kenyans to bring about fundamental political, social and economic reforms. Many people paid a heavy price for this Constitution. They were tortured, beaten up, detained, separated from their loved ones. Numerous Kenyans were exiled. Some even paid for the Constitution by their lives, so others could have the chance to live in freedom and dignity. These atrocities were inflicted on the people by the order of our presidents and their associates, and politicians some of whom are still active in public life.

Inspired by a vision of unity, peace, inclusiveness, human rights, participatory democracy, social justice and integrity - and by their persistence - the people achieved a constitution based on these values. The Constitution aims at the equal rights of all Kenyans, especially for women, the disabled, and those marginalized in other ways. It promises everyone the basic necessities of life, such as food, health care, housing, water and clean environment, by their own efforts and with the assistance of the government. It makes the government accountable to the people—the source of all sovereign power. Cabinet Secretaries and other state officials, even the president, are there to serve the people, observe high standards of integrity and avoid corruption and favouritism.

Most politicians did not want this Constitution. They were able to change some provisions of the draft constitution that more fully reflected the recommendations of the people, but failed to derail it (as they had done the Bomas draft). But they did succeed in altering the proposed system of government, and in maintaining the centralization of power in the president which has been the cause of misrule and the misery of millions. Little has changed since August 2010: the government behaves as before—land grabbing, grand and petty corruption, tribal favouritism, oppression by the armed forces, and the continuation of impunity. The government, despite fine words, has used state institutions to frustrate the goals of the Constitution.

The lesson is that the people who gave themselves the Constitution must protect and promote it. This book seeks to explain the main provisions of the Constitution: its values and principles and the institutions through which reforms can be implemented. Fortunately the Constitution provides several opportunities for people to take direct responsibility to safeguard the Constitution. This book is in large part about what the people can do to achieve its values and vision. The book is more important now that there is discussion about changing the Constitution (referendum talk).

The National Anthem

O God of all creation

Bless this our land and nation.

Justice be our shield and defender

May we dwell in unity

Peace and liberty

Plenty be found within our borders.

Let one and all arise

With hearts both strong and true.

Service be our earnest endeavour,

And our Homeland of Kenya

Heritage of splendour,

Firm may we stand to defend.

Let all with one accord

In common bond united,

Build this our nation together

And the glory of Kenya

The fruit of our labour

Fill every heart with thanksgiving.

The Preamble of the Constitution

We, the people of Kenya—

ACKNOWLEDGING
the supremacy of the Almighty God of all creation:

HONOURING
those who heroically struggled to bring freedom and justice to our land:

PROUD
of our ethnic, cultural and religious diversity, and determined to live in peace and unity as one indivisible sovereign nation:

RESPECTFUL
of the environment, which is our heritage, and determined to sustain it for the benefit of future generations:

COMMITTED
to nurturing and protecting the well-being of the individual, the family, communities and the nation:

RECOGNISING
the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law:

EXERCISING
our sovereign and inalienable right to determine the form of governance of our country and having participated fully in the making of this Constitution:

ADOPT, ENACT
and give this Constitution to ourselves and to our future generations.

God Bless Kenya

CONTENTS

Part 2: Building the Nation

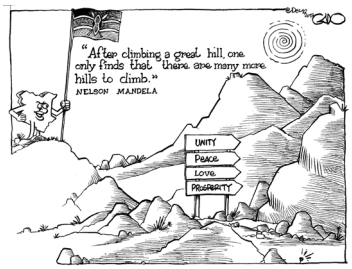
Part 3: Building the State

Part 4: Using the Constitution

List of cartoons

Kenya has a number of very skilled cartoonists. These come from the pens of two: **Gado and Vic Ndulo.**

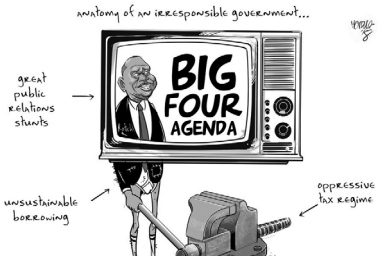
A cartoon is very much of the moment: usually the artist is called on to illustrate, and draw some ironic lesson from, some very recent event. Often it is just from the day before. Once the event has faded in people's memories, the cartoon's immediacy may be lost. But the message should not be. Here is a list of the cartoons in this book, with a very short prod to memories. As you look at the drawings themselves, watch out for the comments, express or implied. The continuity of corruption as reflected in Gado's ugly animal elites; the significance of Vic's vulture holding up the county budget; the burden of gender indicated by the sign for "woman" (♀) in a Vic cartoon.



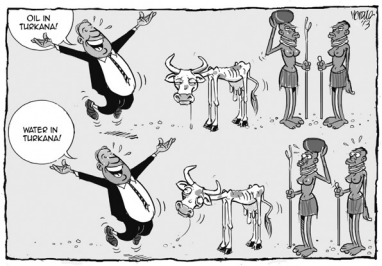
1. Gado portrays Mandela's statement about there always being another hill to climb.
- Page 12

2. The executive (and the animals that Gado uses to represent the corrupt elite) watch as the last Auditor General is burned on a bonfire comprising reports on various scandals.
- Page 20

3. Vic Ndulo asks what the impacts of the Women's Convention have been on the lives of women.
- Page 50



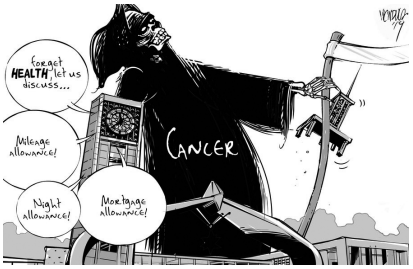
4. Vic Ndulo shows the Cabinet Secretary for Finance proudly speaking about the Big Four agenda, while out of sight he really has no clothes and the whole thing is supported by unsustainable debt and heavy taxes.
- Page 98



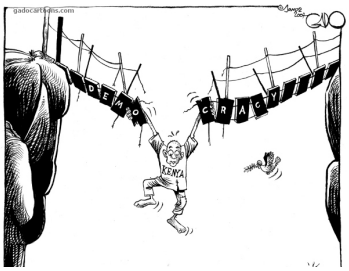
5. Vic Ndulo shows a wealthy (foreign) investor celebrating the discovery of oil and water in Turkana as the starving people and their cattle look on.
- Page 105

6. County budget focusses on benefits to officers, ignoring the issues of the people – as pictured by Vic Ndulo.
- Page 114

7. Chapter 6 (integrity), though not quite dead, is being buried and Kenyatta and Ruto are among the pall-bearers, while others bring more nails to ensure the coffin cannot be opened.
- Page 116

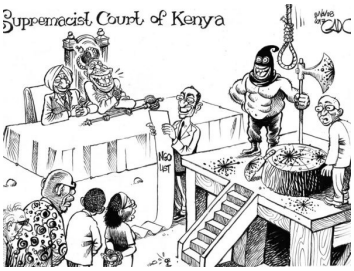


8. MPs discuss allowances while the country suffers – as shown by Vic Ndulo.
- Page 123



9. Gado shows Kenya (or Kenyans) desperately trying to hold together its fragile democracy.
- Page 133

10. The police claim (as Gado portrays them) to have followed the Constitution in conducing the gross injustice of locking up large number of people in Kasarani Stadium in 2014.
- Page 140



11. Gado pictures the trial and instant execution of civil society by the executive – you can see Gladwell Otieno, John Githongo and Yash Ghai lining up to have their heads chopped off.
- Page 142

Part One

Kenya's sad constitutional past, and the new beginning

Chapter 1

Background to 2010

This book is concerned with Kenya's 2010 Constitution and how the people of Kenya can use it. This chapter is just a background to the later chapters.

By the time you have read this chapter, you will have some understanding of what a constitution is, and how Kenya came to have a constitution at all – through the colonial period. You will understand how Kenya came to have the particular constitutional provisions that were in place by 2000, why they were a problem and why people strongly felt there was a need for a new constitution. Finally, we describe briefly how the new Constitution was prepared and became law.

What is a Constitution?

You might belong to an organisation or club that has a constitution. It will probably tell you who can become a member, what the main purposes of the club are, how the club's committee is elected, how meetings are organised, and perhaps how the constitution can be changed.

Modern states cannot function without a constitution. A country's constitution is a document that sets out various values and institutions which form the fundamental framework for the organisation and operation of government in the country. It will say how the power of governing the country is to be exercised, including imposing some limits on the powers of the government, and saying how government is accountable to the people.

Even very undemocratic countries have constitutions, but for countries that do want to be democratic, that democracy, and the rights of the people - and more broadly the unity, stability and prosperity of the country and its people - depend very much on the constitution. We are not saying that they depend only on the constitution – much more is needed.

The frequent changes of constitutions in Africa suggest that we have not been able to find the proper, effective and acceptable framework for the ways in which we organise our states and regulate their powers, protect the rights of the people, and promote social and economic development to meet their needs and aspirations. At least 18 sub-Saharan countries, apart from Kenya, have a constitution adopted since 2000. Kenyans chose their new Constitution in a referendum on 4th August 2010, after years of search and negotiations, in the hope that it would solve problems of corruption, ethnic conflicts, violation of human rights, and poverty and social injustices.

Unfortunately, these changes of constitution may show something else. Rather than faults with the constitution itself, they may show first that the constitutions as adopted have not been working in the way that people hoped or expected, and second that when difficulties arise there is a tendency to want to rush to change the constitution without analysing the real causes of the difficulties. We would argue that the fault is very often with the people – both those who assume positions in government and the citizens who put them there – rather than with the constitution itself. And that changing the constitution (again) will have little effect if the people, or the same sorts of people, and the same attitudes, prevail.

How constitutions developed

Some societies may be kept together by force, but this cannot last. Even before the age of constitutions, societies were kept together by values, rules and institutions. Any society will have

principles to decide who has the power to make and enforce rules and guidelines that govern relationships within the society. Rules would define the relationship between the state and citizens, and sometimes between the state and communities. There would usually be rules of some sort for the distribution of resources and the protection of property and other entitlements. Disputes are inevitable and effective methods of resolving them are essential if the community is to survive. Since few societies are completely self-contained, there may be rules governing the relations of the society with other groups, including trade.

Although we have used the word "rules", in some society there may be no formal method of making rules; instead there are understandings that have developed among members of the society on matters that are essential to their living together. These rules and understandings would vary from one community to another depending on the mode of existence, pastoralist or sedentary, kingly or egalitarian, fishing or agricultural, etc. On some matters, the whole community would make decisions, others would be left to a smaller group, perhaps the elders. The "rules" are based on understanding and knowledge, in most cases reflecting the culture and morals of the community.

As the geographical scale of a society expands or society becomes more complex, there arises the need for more formal understandings on how it should be organised, who makes rules, who decides disputes, who defends the community. If institutions of authority get separated from the general people, there would be rules, or at least understandings, on who can become the ruler or the elder, the priest or the judge.

These rules we call the constitution. They will not be written down in the early stages; even in some literate societies where many rules are written, these rules about how government is structured and what its powers are have not been written down, or not until recently.

Now almost all countries have a single document, or perhaps several documents, that they call their "Constitution". The constitution is a law, not just a set of traditions and understandings. And it is usually thought of as the "supreme law" – no other law that is inconsistent with the constitution can be valid.

Modern constitutions do more than set up a system of government and dispute resolution. They talk about the people and their rights, they set guidelines for proper behaviour for rulers, they may even set guidelines for government policy. Very importantly they limit what governments may do.

Politics and constitutions

In Kenya, the word "politics" is often used in a rather curious way. People think politics are only about elections, and only about the ambitions of individual politicians (with an assumption that the communities from which the politicians come will be affected by those politicians' success or failure). After an election you will often read of even politicians saying "The time for politics is over".

But politics are something much more, at least as political scientists use the word. They are not just about who gets into power, but how governmental power is used, and the process by which decisions are made about the use of that power. It is about the tussle for power and resources in a society. And political power is not exercised only through elections, important as these are. Politics are conducted through debate, media, demonstrations, strikes etc. as well. Politics in this sense can never stop.

A constitution is not the same as politics but constitutions affect politics, and politics affect the constitution. Constitutions affect politics, hopefully by constitutional values, and definitely by the rules for elections, the structure of government, the distribution of and restrictions on power, human rights, rules about land and resources. Politics affect the constitution through the role of political

parties, by the way the government and other state agencies interpret and use their constitutional power, and respect or ignore its provisions. Changes in the constitution, for political motives, can change the framework for elections, the distribution of power, the limits on power, abolish or create institutions, and so on. Mostly these changes are intended to affect how the government performs its functions and how the rights of the people are protected. Later in this chapter we show how the 1963 Constitution was changed, and what the effects were.

The relationship between politics and the constitution varies between countries. It depends on factors like the integrity of government officers, the independence and competence of the judiciary, the capacity of the people to protect their rights or influence government policies, the nature of political parties and political "culture". Political culture refers to the attitudes and practices of a particular society as far as politics are concerned, including the country's tradition of respect for the law, human rights and democracy. If the government disregards the law or the judges lose their independence through corruption or intimidation, the constitution becomes weak and fails to regulate the conduct of government or protect the rights of the people.

Colonialism and the constitution

When the British came to what is now Kenya, Africans were living in largely self-contained and self-regulating communities or "tribes", as anthropologists labelled them, with their own organisations and rules, occupying relatively well defined territory. Fortunes of communities depended on natural resources, rains, disease, the ebb and flow of trade, but also internal conflicts. Most communities had some contacts with neighbouring tribes, with exchanges, and perhaps raiding, between them. Among communities engaged in cultivation, there were abundant resources and so there was little conflict over resources; but this was not always true of pastoral communities. But there were no organisations or rules which extended beyond a tribe. Differences between tribes were settled through negotiations, perhaps leading to reparations, and sometimes by force.

All this changed under the impact of external traders, firstly and Arabs and Indians, then Europeans, who came in search of ivory and other goods, but most critically with the arrival of the Imperial British East African Company (IBEAC), established by the British government – with objectives going beyond trade. At first the IBEAC was given responsibility for the administration of the territory over which the British claimed jurisdiction (this claim was more directed at other European powers that were competing for territory in Africa than at the Africans over whom they assumed powers of administration). Later, the British government took over the direct administration of the territory (when the IBEAC ran out of money) to facilitate its broader objectives, including control of the Nile and exploitation of the territory's economic resources, especially land.

For our purpose, the significance of the arrival of the British was that it established a territory with defined boundaries (the current boundaries of Kenya were not fixed until 1926) within which were included the many tribes who had lived in their own lands for a long time. The British introduced the concept of the state and of the constitution. There emerged the beginnings of common rule over both these tribes and immigrants who made their way to the colony, for trade or other purposes. Traditional local ways of organising and regulating the community were gradually displaced by British regulations, and thus one system of governance was replaced by another, alien and powerful, which has become the basis of modern Kenya.

The British established institutions for their rule, but also relied on alliances with members of friendly tribes (though based on unequal bargaining power). Armed force played the most critical role at the beginning of the British assumption of authority. The police were established early, not to protect the people, but as an aggressive force that played a key role in the foundation of the structures of British administration—a role that has continued right up to the present. Vast areas of land were taken over by the colonisers, in disregard of local rules, justified by alien concepts

of ownership; and some peoples, specially the Maasai and other Rift Valley communities, were moved out of their traditional areas.

Any rules that did exist binding the European powers in their "scramble for Africa" were made by European states (which did not know much about Africa or Africans). Basically it was a question of the might of the European powers. Little regard was paid to the identity and nature of the peoples who were colonised, nor to the geographic rationality of the territory each country took over. Secondly, the state they established was of an alien people, based on organisational principles very different from those of the local people, which were community based. Thirdly, it was founded on violence and violations of the rights of communities.

However, as we mentioned earlier, no state can long survive on force and violence, and gradually the British set up a civilian administration, built on district officers and provincial administration, another foundation of the contemporary Kenya state. This required consideration of the legal foundations of the colony, and here comes in the idea of a constitution.

The early constitutions that the British made for Kenya were less to do with the people of Kenya than with how the British ruled over them.[1] Nor did the British seek the consent of the people of Kenya to taking control over them or for how they planned to govern. If any legal obstacles to British control were found, laws were passed in London to "regularise" the situation. The nature of this state power (existing outside the communities that were to be governed) was new to African communities, and more or less disempowered them completely. In fact, we can say that during the colonial period politics or more accurately, administration, was the constitution: the British gave extremely wide powers to the governor and, though he had to obey the law, it was he who, for most of the colonial period, made the law. The courts, whether in Kenya or Britain, refused to exercise any real control over the powers of the British administration in Kenya. As an English judge said (only 7 years before Kenya's independence), "The courts rely on the representatives of the Crown to know the limits of its jurisdiction and to keep within it." Courts thus abandoned, for the most part, attempts to ensure legality on the part of the government—another feature that also marked the post-independence period.

The role of the constitution expanded and changed over the long colonial period, as the institutions of colonial rule developed. Despite the steady expansion in the constitution, the overwhelming powers of the governor remained largely intact until the closing years of colonial rule. Though the governor was under the colonial government in London, distance and poor communications meant that control was not very strong.

However, the governor's powers to make law were transferred to a legislature, as early as 1905, as the result of pressure from European settlers (though the Governor could veto laws the Council passed). It was initially dominated by his officials, and the unofficial members were nominated by the government. Gradually the balance between official and unofficial members shifted, and by 1919 the law provided for elected European representatives (even European women having the vote). In 1919 the first Indian members appeared (initially nominated not elected), but the first African was not appointed to the Legislative Council until 1944 (until then Europeans had "represented" Africans). An African majority did not appear until self-government (Madaraka, only 6 months before independence)—and that majority promptly broke up into tribally oriented factions.

The primary task of the colonial constitution was the creation of the state to control local communities and set up the administration by the colonial power. It created a state which was much

1 You can read more in the first chapter of Ghai and McAuslan, *Public Law and Political Change in Kenya* (1970)).

more powerful than the society (or societies) it aimed to govern; certainly more powerful than any African community in Kenya had experienced. It deployed an awesome amount of armed force, without any accountability. It was highly bureaucratic, with little scope for democratic politics, which were suppressed by force. The colonial constitution gave the government legal powers and administrative capacity to extract resources from the local communities, including taxation, and to establish an economy in which many original owners of land became farm or urban workers, increasingly dependent on the markets as controlled by the bureaucracy. At the same time the state was the source of patronage, favours, and wealth; this meant the British could essentially "buy" local collaborators.

Given the vested interest of British settlers, the only way to challenge colonial power was by counter-force. There had been armed resistance throughout the colonial period, but the Land and Freedom Movement (or Mau Mau) of the 1950s is the best known. The excessive response of the colonial power to that counter-force exposed its moral bankruptcy and further undermined its rule in the eyes of the people, and ultimately led to independence.

The takeover of power, and its exercise by the British, affected also the social and economic structures of the African communities. The rhythm of their lives was seriously disrupted. Their self-sufficiency gave way to new forms of political economy, and although the colonial plan was to preserve a measure of traditional systems and to restrict movement of local people out of their traditional lands (except when those lands were seized for settlers of course), many political, social, and economic forces drove society in new directions. They led to uneven development of groups and regions. There was greater contact among communities, as well as competition among them for access to the newly developing economy and benefits from the state. The basis of traditional egalitarianism was destroyed by the market as well as by colonial administrative practices, leading to differences especially of wealth and influence among and within communities. These tendencies accelerated with the approach of independence, destroying trust within communities as well as between communities.

Negotiating the independence constitution

This was the context in which the independence constitution was negotiated. The fact that it was negotiated itself distinguished it from previous, externally imposed, colonial constitutions.

Independence did not come before a deal had been struck between the outgoing colonial power and the incoming local elite. That elite was shaped to a considerable extent by the outgoing power, so that independence was less an agreement among the people of Kenya than a deal between outgoing and incoming rulers.

Many people and communities feared that, with the departure of the British, state power would be abused by the larger tribes (organised as KANU, the Kenya African National Union) to discriminate against the smaller communities, whose land might be taken away, and other rights restricted. Because there was no trust among the tribal leaders, the smaller groups formed their own political party (KADU or Kenya African Democratic Union) and demanded that the independence constitution should protect their lands, rights, and ensure them a share of state power.

The negotiation of the constitution was between the leaders of the larger tribes and the smaller tribes, with significant European involvement, under the auspices of the British government. Most of the negotiations were held in London, chaired by British ministers, who favoured the demands of minority tribes and the European settlers. Some groups threatened to secede if their claims were not granted. Matters of particular concern to minorities were a measure of self-government at the provincial and local levels (which came to be called majimbo or regionalism); protection of their land; control over security forces, particularly the police; and a second chamber of parliament, the

Senate, which would protect their interests and the powers of the regions and districts. The actual settlement that was reached on these matters is described next, as well as the removal of many of its key elements soon after independence.

The 1963 Constitution

Kenyans expected that after independence the Constitution would become truly the fundamental law, with the government and politicians acting in accordance with its values and framework. After all, independence meant to many of us not merely the end of foreign rule, but the introduction of a democratic government which respected the rights of the people and ensured them just rule. This part of this chapter shows how those expectations were disappointed.

Democracy

There were indeed many democratic features of the 1963 Constitution:

- every citizen over 18 had the right to vote, and every citizen over 21 the right to stand in elections for parliament
- a fully elected parliament for the first time in our history
- legislative power was divided between two houses, one to represent regions
- executive power was exercised primarily by the cabinet, headed by the prime minister, and drawn from parliament, and certain functions to safeguard the Constitution were given to the Governor-General; the cabinet could be removed by a vote of no confidence passed by parliament
- a Bill of Rights to protect civil and political rights, ensuring in effect multi-party democracy
- an independent judiciary appointed not by the government but an independent commission.
- the public service, while implementing state laws and policies, was to enjoy considerable autonomy, with clear demarcation of responsibilities of the minister and the head of the department.

The separation of powers of the executive, legislature, public service and the judiciary was intended to prevent the concentration of power, unlike the powers of the colonial governor. Each of these institutions would to some extent act as a check on the other.

Minority protection

There were some provisions intended to protect property rights, and the rights generally of minorities. These included a bill of rights, with strong protection of property, and an "independent" attorney-general, with powers to prosecute people suspected of having committed crimes. There was a new system of regional governments with power to make laws, raise taxes and participate in the management of the national police service - which was given considerable operational autonomy, to prevent its use for purely political purposes. African community land, called trust land, was a responsibility of county councils, and so taken out of the control of the central government. The independent public service commission was to ensure that all regions were properly represented in the public service. Seven regions were to replace provinces which had been purely administrative

units, under the control of the governor. Nairobi was described as an "area" with fewer powers than the regions.

Regional governments were designed to give major ethnic communities a share in state power. The boundaries of regions and districts were based on the recommendations of a commission, which aimed at grouping together people from the same community within a region. Regions were to have their own legislature. There were no separate regional executives, but the executive work of a region was carried out by committees of the legislature, under the general supervision of the Finance and Establishment Committee—a form of collective leadership. Regions had the power to make laws on certain matters and raise taxes. They had some control of police stationed in their regions. However, the lack of trust by then among tribal leaders meant that the division of powers and resources was not fixed on the basis of clear and workable criteria (though they were significantly greater than the powers of the counties under the present Constitution). A Senate, with one member elected from each of the forty districts and Nairobi, was to protect the interests of the regions, and to share in the exercise of central powers. The Senate was to play a key role in the protection of the Constitution; some provisions of the Constitution could not be amended without the votes of 90% of Senate members, while others required 75% approval.

The independence Constitution was therefore intended to represent a radical departure from the colonial, executive dominated, highly centralised, system of government, without any guarantees of human rights. It was based, to a considerable extent, on the recognition of tribes, at least the large and medium sized tribes. Although in some respects it may not have pleased, in fact did not please, all the people, its emphasis on human rights, the independent exercise of many of the powers and functions of the state, and several of its democratic features, could have been the basis of fair and accountable government with adequate protection of human rights. However, it was not to last for long.

Dismantling the constitution

Jomo Kenyatta, the first prime minister of Kenya, wanted more power for himself and his associates (he said later that he only agreed to the independence Constitution because the British said that otherwise Kenya would not be granted independence). On the first anniversary of independence, and in the following few years, he changed or removed most of the provisions of the Constitution directed at democracy, power sharing and human rights. These amendments, along with those that his successor, Daniel arap Moi, made, returned the system of government in effect to the colonial system, with the vast powers of the governor now in the president, with decreasing accountability of the government, and in practice exploiting ethnic distinctions.

Kenyatta changed the system of government from parliamentary to presidential (see box on p. 19), combining the offices and powers of the governor-general and prime minister in the president, creating a powerful new post, with the effect also of weakening parliament. The second major change was the abolition of regional governments leading to a highly centralised government at the national level. The Senate was essentially bribed to participate in destroying itself, reducing checks on the administration. The land chapter was reduced to a few provisions on trust land, giving the national government increased control over land matters. Both the civil service and the police were brought under executive control.

Appeals from decisions of Kenyan courts to the Privy Council (sitting in London) were abolished in 1965. A few years later the East African Court of Appeals (which had been trying hard to develop relevant case law for East Africa) ceased to exist when the East African Community broke up. (That break-up was essentially engineered by a few Kenyan politicians.) This enabled the government to destroy the independence of the judiciary, not so much by constitutional amendment, but

by threats or bribes to judges, particularly by the first attorney-general, who worked closely with Kenyatta to dismantle many provisions directed at accountability and justice (and by politicising his own office). The dismantling of the democratic and accountability mechanisms generally continued under President Moi. He reduced Kenya to a one party state, and in 1988 formally abolished the security of offices of the judges, auditor-general, and attorney-general so that the president could dismiss them at will. Many amendments under both presidents were rushed through Parliament; often all stages were disposed of in one day. Fundamental rights were systematically violated, and courts provided no effective protection. In these ways the careful sharing and balancing of power and the safeguards of citizen's rights and freedoms were done away with, giving rise to destructive ethnic politics and sowing seeds of disunity.

More specifically, the major consequences of the dismantling of the independence Constitution were:

- Centralisation of power in the hands of one person, the president. This resulted in the lack of democracy and accountability, patronage politics, ethnicisation of politics (as each community focussed on this one important political prize).

- Lack of accountability of the government and the near impossibility of holding the president to lawful acts and procedures led to massive corruption, with impunity for him and his cronies. The corruption drained away billions of shillings which belonged to the state on behalf of the people and is a primary cause of the poverty under which the majority of Kenyans live.

- Concentration of power in the president enabled him and the attorney general to direct the judiciary as to how to decide cases in which the president or his friends had an interest. The attorney general's powers of prosecution, although meant to be exercised independently, were in practice used to further the interest of the president and his friends – an important aspect of the "culture of impunity".

- Repeal of the 1963 Constitution provisions on regional governments and the gradual removal of the administrative and financial powers of local government weakened democracy and participation at district and sub-district levels. Operating through the Provincial Administration, the president acquired control over much of the country in matters that properly belonged to provinces and districts.

- Control of land by the government and county councils, and in particular the president's power to grant land without any legal process or consultation, leading to massive abuse, illegal transfers of land and dispossession of many of their land; this began the division between rich and poor Kenyans and the ethnic bias in the allocation of land led to tensions between some ethnic communities.

- The deletion of parliamentary civilian control over the security forces leading to growth in numbers and in the quantity and quality of weaponry—and their abuse. The independence of the police was removed. The result was that the president and his government had complete control of the security forces, and often used them to repress the people. Consequently, the public lost confidence in the impartiality and competence of those forces.

- State policies and practices which became exclusionary and intensified ethnic discrimination and conflicts; this resulted quickly in the militarisation of politics, armed conflicts between tribes, resulting in numerous deaths and displacements of people, and the assassination of a few politicians committed to reform and social justice—all engineered by the governments of Kenyatta and Moi.

- Massive violation of the rights of Kenyans for which there was no redress judicially or administratively, while the people enjoyed little human security or the basic necessities of existence.

- Resultant distrust of government, and distrust and conflict among ethnic communities, as politicians played upon ethnic fears and promoted ethnic animosities. This has greatly weakened national solidarity and unity, threatening the very integrity of the country.

- The rule of law being unable survive the huge powers of the president, some technically under the law but many without any legal foundations; the impunity of the president and his associates became the licence for numerous acts of violence, corruption and thefts of state resources.

In 1969 a new document became the Constitution of Kenya, when changes made until then were collected together. Although this was called an "amendment" of the constitution it was really a new document, and we can say it was Kenya's second constitution. It bore very little relationship to the first. Further amendments followed.

The struggle for a new Constitution

In the 1990s, with the end of the Cold War and the loss of interest of the West in supporting Moi's regime, the movement for constitutional change gathered pace. It was largely a civil society led movement. Lawyers were prominent in it, and religious groups, among others.

Some of the constitutional changes of the previous quarter century were reversed, and some laws which had been used to harass and penalise the regime's political opponents, such as detention without trial, were amended or abolished. Judicial independence was theoretically restored in 1990, but in practice most judges continued to take instructions from the State House. The famous repeal of section 2A of the Constitution in 1991 reintroduced multi-party politics (s. 2A had made KANU the only party). But by now people had lost respect for the constitution and confidence in the political system. Few public institutions enjoyed legitimacy in the people's eyes and most lost the ability to resolve differences among the political parties or the people or develop consensus. There was little accountability of the president, ministers or senior civil servants. Rights continued to be violated, and corruption, which had started at the very beginning of Kenyatta's rule, continued to flourish.

People struggled for constitutional reform because they considered that only in this way could the negative consequences of the amendments under Kenyatta and Moi be removed. They wanted to restore the country to constitutional rule, based on national unity, integrity, democracy, human rights and social justice, which became the objectives of reforms agreed among numerous organisations engaged in political activism and which became the basis of the constitution review process starting in 2000.

Moi reluctantly conceded that a formal process for making a new constitution could begin. An official Constitution of Kenya Review Commission (CKRC) was appointed in late 2000, but could not really get going effectively until there was agreement to merge it with the civil society "People's Commission" that was also working on a new constitution.

From mid-2001 to September 2002 the CKRC worked first on educating the people about the process and what it was about (while many civil society organisations also carried out civic education). It set up an office in each district, and visited each constituency at least twice. It held public meetings to receive views on the constitution, and people could also submit written proposals, and sometimes closed-door meetings were held.

In September 2002 the CKRC produced a draft constitution and a report explaining the draft. There was then supposed to be a month for public comments, followed by the National Constitutional Conference to debate the draft in details and finalise the proposals. However, although Parliament could have continued until March 2003, President Moi decided to follow past practice and dissolved Parliament in time for there to be fresh elections at the end of the year. Because all MPs were members of the National Constitutional Conference (NCC), the conference had to be postponed.

After the election that brought Kibaki as president, the NCC finally convened at the end of April 2003 (meeting at the Bomas of Kenyan hence its nickname "Bomas). It had formally 629 members (three from each district, people from political parties and civil society plus all MPs). It met until March 2004. Towards the end of the NCC a section of the government boycotted the conference, because it opposed the idea of shifting to a parliamentary system (preferring a presidential system not so different from the one that had brought it into power).

After the conference, the government took over the draft, changed a number of important elements in it, including reintroducing a presidential system, and presented the changed version to the people in a referendum. It was soundly rejected. It seems that the dominant factor in voting was ethnicity and how far people supported the government. The outcome was that the old, discredited constitution remained in effect.

Despite repeated promises to revive a constitutional process, nothing concrete happened until after the post-election violence of 2007-8. There was a strong view that with a new constitution that violence might not have happened. Part of the peace accord brokered by Kofi Annan and other eminent Africans was for a renewed constitution making process, beginning where the last had ended. That new process began in 2009. The Committee of Experts (CoE) comprised six Kenyans and three foreigners, six men and three women. It produced its first draft in December 2009, heavily based on the Bomas draft; it was officially called the "Harmonised Draft". That was revised as the result of public comments.

The "Revised Harmonised Draft" had then to be submitted to a committee of Parliament. That committee proposed some major changes, most dramatic of which was from a parliamentary to a presidential system of government (basing the latter on the US system). The Committee of Experts, despite its own doubts, feared to reverse the changes that touched most on politics.

The CoE draft (including now some significant changes introduced by that parliamentary committee) was published in May 2010. The CoE conducted a good deal of public education on the draft. On August 4th the people voted on it in a referendum. By not far short of 70% they voted in favour.

On August 27th 2010 the President formally promulgated the Constitution in a ceremony before about half a million Kenyans in Uhuru Park.

Lessons from our constitutional history

When Britain annexed territory in eastern Africa, it found numerous self-sufficient communities, leading their lives separately, with their own systems of governance and economy. What it bequeathed to Kenyans was a country with these communities bound together by ties of political structures and economy devised for their subordination, but with the additional problems of finding and creating a common identity and destiny: a state without a nation.

We can draw various lessons from this history. Perhaps the most important is that it is very hard to restructure the colonial state to make it democratic and accountable. The primary function of the colonial state was to dominate and exploit the local communities and their resources, not to

promote their welfare. It authority was based on its coercive power, not the consent of the people. It was estranged from the people whom they tried to divide and rule. Democracy and rights were inconsistent with this kind of state and rule.

The ruling class managed to marginalise those positive features that did exist in our constitution. It relied on colonial devices. With huge armed forces compared to our needs, secrecy and other repressive laws, the structure of the bureaucracy, the appeals to ethnicity, the reluctance of the judges to upset the interests of the powerful groups, the ruling class found it easy to maintain the authoritarian and exploitative nature of the state. Unfortunately, our first president set a bad example, by corruption and ethnicisation of politics. And by his patronage style of politics, his close friends, particularly members of his own community, were rewarded at the expense of the welfare of the people. None of our presidents was a person with vision and the ability to provide good leadership. They promoted a style of politics and public service where their sole concerns seemed to be their own self-interest. Many, even a majority, of politicians have entered politics not to serve the people but to seek rewards and privileges for themselves. Most had a vested interest in maintaining the previous governmental system, including corruption, high salaries, preferential treatment, that could be sustained only by rejecting reform. They became an obstacle to reform. At this point in the first edition of this book, we said "and so Kenyans must be vigilant to see that they [the politicians] do not sabotage the objectives of the new constitution".

New constitutionalism

Kenya is not the only African country where the transition from colonial to independence regimes has been difficult, punctuated by ethnic violence and warlordism, corruption, wide scale repression of human and group rights, its unity and integrity under threat, decline in essential services, and the loss of legitimacy. Having abandoned their independence constitutions in favour of centralised power, almost all African countries, their governments threatened by the end of the Cold War, tried to address their political and social problems through constitutional engineering, introducing mechanisms to promote democracy and rights, integrity and accountability of state organs, social justice through human, especially socio-economic, rights, and redressing past injustices.

In our own case, the CKRC thought through ways of overcoming the logic of the colonial state, which still influenced, even determined, the exercise of power. Its draft did not escape unscathed by the Bomas Conference, the CoE and politicians through the parliamentary select committee, but enough did find its way into the new constitution.

The 2010 Constitution challenges the negative aspects of our colonial heritage, highlights the importance of social solidarity, national identity (even extolling patriotism), inclusiveness and social justice as the bedrock on which the logic of the colonial state must be broken. It incorporates a number of important values which seek to eliminate corruption, favouritism, negative ethnic politics and policies, promote rights and justice, and emphasis our diversity as well as unity. It provides for a reasonable system of separation of powers as well as checks and balances. It disperses state power so that we will not have the concentration of power that enabled massive breaches of the law with total impunity.

We believe that only the people can help to bring about reforms. The positive provisions of the Constitution will not mean much unless people take the responsibility for enforcing them. Throughout this book, we indicate the ways in which the people can ensure, or at least try to achieve, positive change in accordance with the Constitution. The first step is to read this book with great care, try to understand the Constitution, and work together with progressive forces to take the many measures recommended in this book.

Despite the setbacks of the past ten years, since the adoption of the Constitution, and the debates

that have begun about amending it (sometimes in ways that we would broadly support), we believe that the bright hopes of 2010 were justified, and that there is still a role for the people, and a prospect of a better Kenya and a happier people, under the Constitution, amended or not.

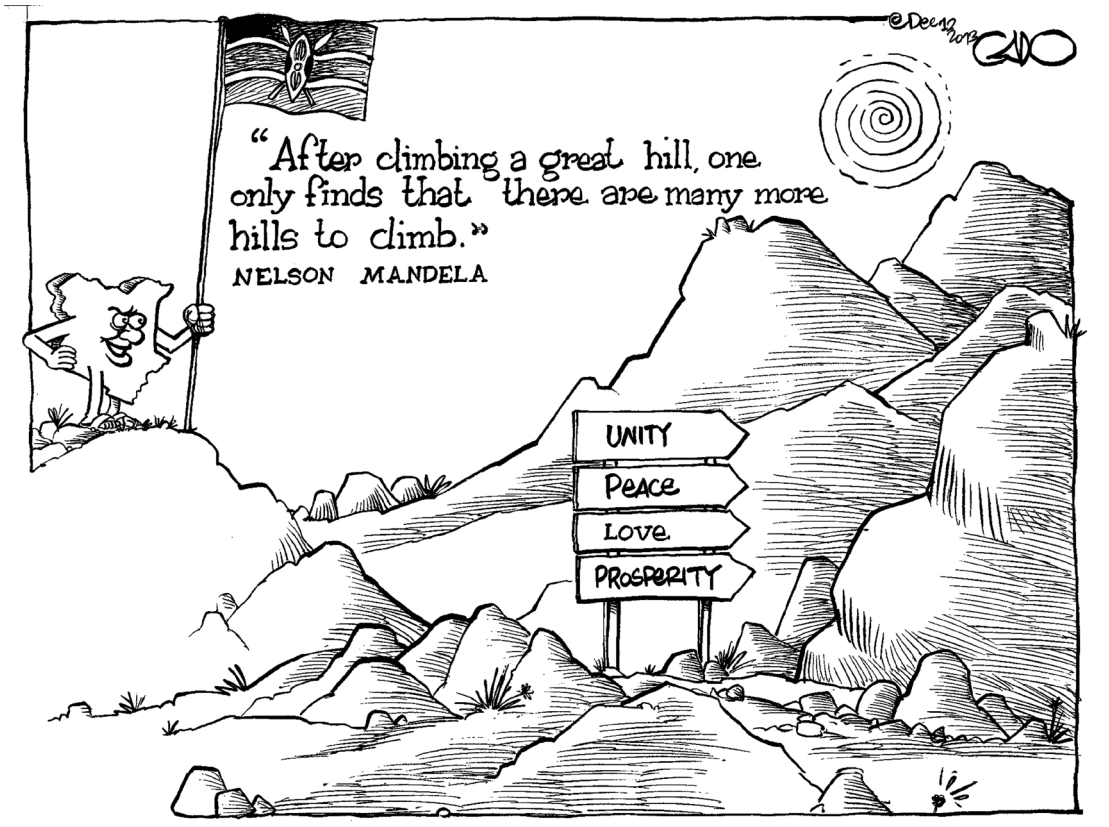
And if a serious debate about amendment is beginning, we believe it is important that the people understand the Constitution we have now.

Questions to think about

1. The colonial period shaped the attitudes of "leaders" towards power and responsibility. Do you think it also shaped the attitudes of the people?

2. Can the Constitution change those attitudes – on the part of the people at least? How can this process be strengthened?

3. Do you think it was important to have a detailed process of civic education, public input, and public debate, to develop our current (2010) Constitution? If so, how can we now avoid its being changed with less public understanding and awareness than accompanied that earlier process?



Chapter 2

Overview of the Constitution

When you have read this chapter, you should have a sense of the following general points about the Constitution:

- *the style in which it is written – with an effort to make it understandable for the people*
- *how it is organised*
- *what topics it deals with*
- *a summary of the government structure it sets out*
- *some basic constitutional ideas that it contains*

People-centred Constitution

Emphasising the importance of the people

The preamble, at the beginning of the Constitution (see page v), is the voice of the people. It says that "We the people of Kenya" have given themselves the Constitution "exercising our sovereign and inalienable right to determine the form of governance". How different from the days of British imperialism or our presidential imperialism! The Constitution is indeed the result of the struggle of the people against those in power who benefited from corruption, dispossession of the land of numerous communities and families, and from other forms of abuse of power. People played a key role in the preparation and enactment of the Constitution.

The very first Article of the Constitution acknowledges that all sovereign power belongs to the people (not to the Government) and must be exercised only in accordance with the Constitution. The Constitution embodies the values that people fought for. It underlines the dignity and human rights of Kenyans, making clear that they are not given to us by the state but are part of us all, as human beings. It provides many opportunities for people to influence decisions of the state and in several cases to participate in them. It values the diversity among our people, but envisages them united in common loyalty to the country, sharing fundamental values and aspirations.

The Constitution is the supreme law of the country. Everyone – government, Parliament, courts, people – is "bound" by it: they must follow it. All laws and policies must be consistent with it. Members of state institutions are constantly reminded that their powers come from the people (e.g., the president is reminded that executive authority comes from the people (Art. 129(1)), judges are reminded that judicial authority is derived from the people (Art. 159(1)). This is another way of acknowledging the sovereignty of the people.

Style

The Constitution regards the people as its primary audience, and is written in a language and style that ordinary people can understand if they make the effort, even if they don't catch all the nuances. All the previous constitutions were addressed primarily to lawyers who were expected to understand legal concepts and jargon.

It is useful first to understand the structure of the Constitution. On page 15 is a chart of the contents with a very brief indication of what each bit is about. In the table we have distinguished between

chapters that mainly deal with values, principles and rights and those that are mainly about institutions and how they work. The numbers of "values" chapters are in dark grey boxes, the "institutions" chapter numbers in light grey boxes, and the number of those chapters with a mixture are in white boxes.

Contents of the Constitution of Kenya 2010

Each chapter is divided into "Articles", short statements of rules or principles. [A decision was made to use the word "Article" rather than "section", which is the word used to describe the small bits of ordinary Acts of Parliament. It signals that the Constitution is different from ordinary laws. It also signals that this is not the old Constitution (which had "sections")]. The Articles are numbered right the way through, from 1 to 264. Many Articles are divided into smaller bits, which we call "clauses". At the end are some "schedules". These contain either supplementary material (like the National Anthem), very detailed material, or material that will not apply permanently (like Schedule Six about various things that had to happen soon after the Constitution became law).

The new Constitution is different from our previous constitutions in another way. They gave little guidance as to the purposes of the institutions they established: for example, the responsibilities as opposed to the powers of the executive, or principles that the judges should observe in interpreting the Constitution or dispensing justice, or - in the case of the independence constitution - why regional governments were established. None of them had even a preamble to remind the people why they had a constitution and what it was intended to achieve. The new Constitution does have a preamble—and it is inspiring (see p. v). It acknowledges the sovereignty of the people; it salutes our heroes; expresses pride in our ethnic and other forms of diversity and commitment to national unity; and recognises essential values by which we want to organise the behaviour of the state and of ourselves.

From the preamble

- "determined to live in peace and unity as one indivisible sovereign nation"
- "human rights, equality, freedom, democracy, social justice and the rule of law",
- "respectful of the environment"
- "nurturing and protecting the well-being of the individual, the family, communities and the nation".

In the most recent previous Kenyan Constitution, the first effective chapter was on the presidency, and was perhaps the longest chapter. Human rights did not appear until more than half-way through, followed by citizens! By contrast the current Constitution starts with the nation and the country, and gives prominence to citizenship – to the people (Kenya after all is not merely territory and government). It then goes on to discuss national values and human rights, integrity and honesty of state officials, essential policies on land and environment, and the representation of people, before turning to the system of government. This is meant to indicate the purpose and responsibilities that state institutions must carry out. And when it turns to the system of government, it places the more democratic institution, the legislature, before the executive. It is clear that priorities are now very different: people before government.

Contents of the Constitution

Preamble

The people's declaration that they adopt this Constitution and why

Chapter **1** Declares that the Constitution is based on the sovereignty of the people, and that all laws must be based on the Constitution

Chapter **2** Declares the nature of the Republic, the national values, national language and symbols

Chapter **3** Says who is a Kenyan or entitled to be a Kenyan, deals with dual nationality

Chapter **4** The Bill of Rights: recognises the rights of citizens and others, says when rights may be limited, and creates procedure for protection of rights

Chapter **5** Creates the framework for land: who may own land, emphasises rights of communities, protects public land and says past grant of public land must be reviewed, creates National Land Commission. Lays down framework for protecting environment

Chapter **6** Sets out the principles of conduct for state officers to combat and prevent corruption; lays down requirements to be able to hold state office

Chapter **7** Rules and principles on who can vote, on fair elections, and political parties; creates Electoral and Boundaries Commission

Chapter **8** Creates Parliament with National Assembly and Senate. Says what their powers are and how they are to operate including public participation

Chapter **9** Creates executive presidency system, with powers of and limits on President, rules for forming government, procedures for control and impeachment

Chapter **10** Sets out system of courts including new Supreme Court; says how judges are appointed and dismissed, and how judicial independence is protected

Chapter **11** Sets up system of county government: institutions of government, powers and responsibilities

Chapter **12** Says how public money is controlled, who approves taxes and spending, procedures for checking on how it is spent; provides for fair sharing

Chapter **13** Sets out the values of public service, and how public service is organised

Chapter **14** Sets out principles and values of national security, sets up the main institutions to protect national security

Chapter **15** Says how various commissions must be established and how there are to operate independently

Chapter **16** Says how Constitution can be changed – making it difficult

Chapter **17** Has rules for interpreting the Constitution

Chapter **18** Deals with how the new Constitution is implemented

Schedules

Provide details on powers of national government and counties (4) and how Constitution is implemented (5 and 6)

The role of the people

One important aspect of the Constitution is the place of the people in government, or governance. "Participation of the people" is one of the values, and this does not mean just electing a lot of people once every 5 years. We discuss in Chapter 12 how the Constitution tries to encourage the active involvement of the people in decision making – through rights of association, through duties of parliament to facilitate popular participation in government, and so on.

Why is the Constitution so long?

You may feel that a constitution intended for the people ought not to be so long! True, it is long. The reason is that it deals with more issues than traditional constitutions, which focus on structures of the state, principally the executive, legislature and judiciary, and to an extent the relationship betweenthe state and citizens. Some of things that make our constitution longer are:

- statement of values and principles of governance and the high standards of integrity of state officials and leaders of political parties;
- an extensive bill of rights, including socio-economic rights for basic needs of all'
- its broad social and economic agenda: land reform, protection of the environment, redress of past injustices, complex systems of representation of minorities in elected and appointed bodies etc.;
- more state institutions: in addition to the three main branches of the state, a number of independent commissions and offices, serving a variety of functions: to ensure fair and free elections (in defining electoral boundaries and the fair and honest administration of voting and counting), independent appointment of civil servants, judges, and protection of human rights and of minorities, prudent management of resources, including natural resources, and the environment, audit of government financial accounts, and fair and independent prosecution.

The Constitution sometimes also deals with the relationship between an individual and their ethnic or religious community, or the state and community, or even between communities. This is both to acknowledge Kenya's social and cultural diversity, but also to facilitate the social, economic and political advancement of special groups like women, minorities, and marginalised communities.

There is considerable detail on some issues - much more so than in the older constitutions (but not much longer than some other modern African, Asian or Latin American constitutions). To a very large extent this is because people have little trust in politicians and state institutions, and do not expect that they would actually pass policies and laws to implement constitutional reform agenda.

Interpreting the Constitution

Most words in the constitution are used in their ordinary meanings. A few words may have a special technical meaning; some are defined in Article 260 – e.g. "adult" and "disability". You should not read one Article by itself: it is common for one Article to affect the meaning of others. For example, Article 24 explains when rights found in other Articles can be limited. An alert reader may sometimes find an Article unclear, or having more than one possible meaning, in which the principles or objectives of the constitution (see later in this chapter) may help. We are told that the Constitution must be interpreted so as to fulfil its purposes and principles, protect human rights and good governance (Art. 259(1)) – but this cannot change the clear meaning of a provision. There are principles that lawyers use to deal with contradictions. Of course, if something which is unclear affects you personally, for example, in negotiations or a court case, it would be desirable to consult a lawyer.

A lengthy constitution is not necessarily a problem. But a constitution will not include a lot of details about how every idea in the constitution will be brought into effect. These details are left for policy and legislation. You elect governments to do most of that, and other bodies like the courts also have important roles. The constitution will provide general principles, giving flexibility to allow for changing circumstances. Our Constitution prescribes a timetable for implementation of many provisions.

Judges on interpreting constitutions

Judges are human beings, not machines, and they will have different approaches to their tasks. But they will all wrestle with understanding the Constitution and what it means, especially in the light of its overall values and principles. Here are a few quotations from Kenyan cases:

"[a holistic interpretation means] contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what the Constitution must be taken to mean in the light of its history, of the issues in dispute, and of the prevailing circumstances." (Supreme Court 2014)

"A constitution therefore must be capable of growth and development over the time so as to meet new social, political and historical realities often unimagined by its framers. … It is a house with many rooms and doors, conservative enough to protect the past but flexible enough to advocate new issues and the future. Finally, it is also necessary to consider the historical, textual, structural, doctrinal and ethical models while giving meaning to the provisions of the Constitution. (Court of Appeal 2015)

Values and principles

Values, principles and rights are the subject of the chapter that follows this. Here we just want briefly to explain the main points. You will find that many of the chapters in the Constitution deal with values. In fact most of them have some provisions on values, even if they are mainly concerned with rules and bodies – as we show in the chart on page 15.

The main values are set out in Article 10. And this says that the values "bind" all state bodies and public officers, and even individuals when they apply the Constitution or the law or make "public policy decisions". A public policy decision will mean not a decision in a particular case, but one about how government will act on a particular issue in the future.

Article 10

(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.

Courts often refer to constitutional values (see box for examples). They do play an important role in the task of the courts on interpreting the Constitution. It is the value of participation that has been most often used to lead to particular results in court (See Chapter 12)

Judges using values

"when making appointments to public office, every selecting, appointing and nominating authority must take into account these values and principles" (High Court 2012)

"I agree … that to subject a presidential candidate to only seek support from those who belong to his party would be inimical to principles of national unity and inclusiveness which are some of the national values and principles of governance in Article 10 of the Constitution as it would mean that a person seeking such office who, under Article 131(1)(e) of the Constitution is a symbol of national unity, is pigeonholed and cocooned within his or her corner of supporters. " (High Court 2017)

"Both on policy and good governance, which is one of the values and principles of governance in Article 10 of the Constitution, …, omnibus amendments in the form of Statute Law Miscellaneous legislations ought to be confined only to minor non-controversial and generally house-keeping amendments" (High Court 2018)

Other value statements will be harder to enforce, except in a political way. The State is told that it must "promote all forms of national and cultural expression through literature, the arts, traditional celebrations, science, communication, information, mass media, publications, libraries and other cultural heritage". Maybe a court would not enforce this alone, but taken together with other provisions it may help to show how the state ought to behave. And other official bodies looking at the law and any need for change should take this into account, and the people can also do so by using their political power through voting, or their voice through public participation.

Human rights are a form of values, and they are given legal "teeth" – the courts, as well as the human rights commission, can accept complaints based on failure to respect the rights, and the courts can even rule that a law is unconstitutional for this reason.

Values in chapters of the Constitution mainly concerned with institutions are often applying the general values and rights to a specific situation. Values of a fair election, values to be observed by the police and security forces, values to be respected by the President or the judiciary, all underline the basic principles and values laid down in the Preamble, Article 10 and the Bill of Rights (Chapter 4). But these provisions are useful in reminding the office holders of what they are there for, and encouraging citizens to insist that constitutional values are respected. Chapter 6 – on integrity in public office – has very specific values, and rules, applying to the way public office holders fulfil the trust that the public places in them.

In the following chapter, we discuss more what has been done and what could be done to ensure that the values are respected and used.

The Structure of Government: an Outline

Here we simply outline what institutions the Constitution sets up, and what powers they have. We discuss the important questions of the relationship between the various bodies, and how they check each other, in Chapter 6.

Executive

The Executive is what we often call "the government" – the President and the Cabinet Secretaries in our system now. They do not only carry out the laws and policies, they usually play the major role in drawing up those laws and policies. (We used to call Cabinet Secretaries "Ministers"; the new phrase comes from American practice and for some reason was thought by the MPs who changed the system of government to a presidential one, rather similar to the American, to be also appropriate.)

People often talk of "systems of government" mostly concerned with the relationship between the executive and the law making body (Parliament for us). Three major types of system are briefly outlined in the box.

At independence, Kenya had a parliamentary system, but it was soon changed to a different system, but still with some features of a parliamentary system. Under the system until 2013, the President was directly elected by the people, but also had to be a Member of Parliament. And all the Ministers had to come from Parliament. But the 2010 Constitution sets up a true presidential system. Now the President is not an MP, and Cabinet Secretaries cannot be MPs; this is supposed to make it easier to choose them for their expertise (though political considerations are clearly there). CSs do not have to spend time on constituency responsibilities. The Cabinet is not as big as usually in the past – it cannot be larger than 26 Cabinet Secretaries. There is Deputy President, but elected as a "running mate" of the President – as in the USA.

Parliamentary or Presidential?

A parliamentary system is one where the people elect their MPs to parliament and the way they vote decides who will become the head of government – the Prime Minister. That person will be either the head of the largest party, or elected by the MPs. The government is usually formed from the Parliament, and can usually be removed by Parliament. There is normally a head of state (monarch or president) with certain powers, often largely formal and ceremonial. Britain, most of Europe, Australia, India, Canada, Japan, and Ethiopia are examples.

A presidential system is one where the head of government is also the formal head of state, and is usually elected directly by the people. He or she is not a member of Parliament and usually ministers are also not. The process to remove the government is usually harder than in a parliamentary system. The USA, Philippines and Nigeria are examples.

Mixed systems are found in some countries, with combinations of features of each of the first two systems. France has both a President directly elected by the people, and a Prime Minister who is leader of the largest party/coalition of parties in the French Parliament. Each has certain powers of government.

Parliament

Parliament has two houses: the National Assembly and the Senate. Most members of the National Assembly are elected from geographical constituencies. There are 290 constituencies that are smaller than counties, and the 47 counties are the constituencies for women county members. There are also 12 members to represent special interests (see Chapter 10).

The Senate has 47 members (one from each county) plus 16 women and 2 youth and 2 persons with disability (see Chapter 10).
The Senate has particular functions in connection with the system of county government – especially in passing laws that affect counties and in deciding how money is to be divided between the national government and the counties (see Chapter 8). The Senate and the National Assembly both scrutinise the work of the government through committees.

No members can be Cabinet Secretaries (so all members ought to have plenty of time to take care of their constituencies). Elections for the president and parliament are on the same day, which makes it very likely that the president will usually have majority support in the National Assembly at least at the beginning of his or her term.

Courts and the legal system

Courts are vital for the fulfilment of the promise of the Constitution: justice for all, an end to impunity, the rule of law. The Constitution tries to guarantee that the courts are independent and competent in five ways:

- providing that all existing judges had to be "vetted", and required to leave office if found to fail a test of competence or lack of integrity
- a better system for appointing judges in future, that is not dominated by government
- making it very clear in the Constitution that judges must be independent
- creating a new court – the Supreme Court – at the top of the system to set a new, higher, standard
- giving the judicial system considerable control over its budget.

People were very concerned about impunity: that prominent, well connected or rich people were able to commit crimes, including corruption, and get away with it. The Constitution takes away from the government's legal adviser (the attorney-general) any power of prosecution of criminal cases. A new, independent office – the director of public prosecutions ("DPP") – was created. The DPP is not appointed by government and is not accountable to government. He or she cannot withdraw cases without the approval of the court (because in the past withdrawal of cases started against powerful or wealthy people was a major cause of impunity).

Commissions and independent offices

All countries, including Kenya, have a system for auditing the accounts of government departments to ensure that money is spent in the way that was intended. The officer reports to Parliament. In fact, though auditor generals have been a brave breed in many countries, and uncovered many scandals, including in Kenya, they have often had little impact. This is sometimes because parliamentarians and other people to whom the office reports are themselves corrupt, or because the power of parliament to do anything is limited, even if it is willing.

The Constitution tries to improve financial control by creating the office of Controller of Budget – so that no money is spent without advance checks on whether it ought to be spent in this way.

A number of commissions are set up by the Constitution:

- the Kenya National Human Rights and Equality Commission (Article 59)
- the National Land Commission (Article 57)
- the Independent Electoral and Boundaries Commission (Article 88)
- the Parliamentary Service Commission (Article 127) – to assist Parliament to do its work effectively
- the Judicial Service Commission (Article 171) – to appoint and discipline judges and magistrates
- the Commission on Revenue Allocation (Article 215) – to advise on allocating money to counties
- the Public Service Commission (Article 233) – to regulate and appoint the public service
- the Salaries and Remuneration Commission (Article 230) – to fix salaries etc. of public officers, so that they cannot fix them for themselves, as happened with MPs in the past
- the Teachers Service Commission (Article 237) – to appoint teachers in public schools; and
- the National Police Service Commission (Article 246) – to appoint senior police officers.

There must also be an Anti-Corruption Commission (see Article 79).

Why Commissions?

- To ensure that a body that reports on public office holders is not controlled by them
- To insulate decisions from political direction or even interference
- To have competent decision making especially in technical areas
- To represent various interests - that may not be represented in particular existing institutions, like parliament
- To have non-bureaucratic decision making
- To avoid problems of disputes ("turf wars") between governments departments
- To have decisions made on the basis of a timetable that is not dependent on the parliamentary and political timetable.

The idea of all these bodies is to take away from politicians decisions that there is reason to fear they may abuse, and to introduce professional expertise (see box). Of course it also means a reduction in democratic control. A decision had to be made about what topics ought to be left with elected politicians and ministries. That is why pressures to have a Health Commission or a Culture Commission were resisted; it is not because these topics are unimportant.

Devolution – county government

We explain devolution in more detail in Chapter 9. The main elements of county government are the governor, the executive and the assembly. It is quite similar to the national government system.

County executive

The governor is described as the "chief executive" (Art. 199), and is directly elected by the voters registered for that county. No person may have more than two terms as governor (Art. 180). A governor can be removed for misconduct, violation of the Constitution or incapacity, but the procedures was fixed by national legislation (Art. 181), and is similar to that for removing the president (County Governments Act).

The members of the county executive committee are appointed by the governor, with the approval of the county assembly. Members of the executive are answerable to the governor, who can also dismiss them (this is not explicitly stated); we discuss briefly in Chapter 9 whether there are limits on this power of the governor. Although this places the governor in a pre-eminent position within the executive committee, it is clear that other members are not there in an advisory capacity only, but are the decision makers.

County legislature

The county assembly is an elected body, with representatives from wards, and members of marginalised groups (Art. 177). It must have no more than two thirds men or two thirds women members. This is actually achieved by the use of list members: The assembly's main work is to make laws on matters within the powers of the county, to approve plans for management of county's resources and infrastructure, and to exercise oversight of the executive (Art. 185).

The division of powers between the national and county governments is set out later in this book. But our general comment is that county powers are rather limited. These rather limited powers are somewhat at odds with the rather elaborate institutional arrangements, including the Senate at the national level for the protection of county interests. There is scope for transfer of additional functions.

Implementation: the official tasks and the role of citizens

The main emphasis of this book is on what the people can do to realise the promise of the Constitution. Here we want to explain briefly what has to be done at the official level, and shall end with how the people can affect even this.

Official implementation

The Constitution has a long list of topics on which laws were required to implement it (Schedule 5). Sometimes there was already a law that served the purpose, or required only some minor changes. On the other hand, far more topics actually require new laws than are listed in Schedule 5. Sometimes the courts change the law – they have the power to hold that a law is unconstitutional (Art. 22(3)(d)). In the first eight years after the Constitution was adopted at least 70 laws passed clearlv related to the Constitution, not including financial laws, while many other laws were amended because of the Constitution. Some, such as the Criminal Procedure Code, still need to be amended to ensure that they comply with the Constitution.

There has been too much emphasis on the laws – what comes first is a policy: what is needed or does the Constitution require? Often there will be a number of ways in which a constitutional requirement could be fulfilled. A law cannot be prepared until there is a clear sense of direction. Sometimes a policy will not require a law – an administrative direction may be enough (an example might be fulfilling the obligation of public officers, under Article 21(3)), to address the needs of all sectors of society). Sometimes what is really required is a change of attitude – which will lead to a change in practice. This has been a weakness. So has the rush in which some laws have been prepared and passed, and sometimes positive obstruction by law makers to realising constitutional provisions.

"[T]he quality of legislation is not so much a function of the technical difficulties inherent in the translation of constitutional intent into legislative outcomes as a result of, to simplify, lack of sustained political goodwill."
Kenya Law Reform Commission[2]

The main responsibility for putting new policies into final shape is the government's. The Law Reform Commission helps in this. The wording of new laws is the responsibility mainly of the Law Reform Commission and the Attorney General's Department (State Law Office). The Commission on Implementation of the Constitution coordinated the work of the various bodies, made its own input and generally ensure that the Constitution was in fact implemented. But it was wound up after five years when it could have been extended and done some more useful work.

The Constitution came into effect gradually. The system of government and parliament did not change until the first election under the Constitution in 2013; nor did the system of county government come into existence until then.

The role of the people in the official implementation

It would be a mistake for the people to think that implementation is purely a technical affair. Though the Constitution gives directives, it is all too easy for those in government and Parliament who are either not really familiar with the Constitution, or have no sympathy with its values, to develop policies and pass laws that do not really meet the needs of the Constitution and the nation.

What happens if implementation is delayed or ineffective?

For many laws there was a deadline: between 1 and 5 years (Schedule 5). In "exceptional circumstances" the National Assembly could extend the deadline once for any particular topic (Art. 261). It did this many times. If it exceeds the time limit an application may be made (by anyone – that means you) to the High Court. The Court could grant an extension, setting a new deadline. If the new deadline is not met, the Chief Justice must advise the President to dissolve Parliament (call a general election), and the President must do so.

This ingenious idea produced a sense of urgency (and sometimes contributed to the rushed process of law making.) The only issue over which there seemed any possibility of Parliament being dissolved was the two-thirds gender rule. In fact in 2020 the Chief Justice did "advise" the President to dissolve parliament for this reason.

Citizens should take an interest in the process of implementation (which is a continuing process). The Constitution lays great stress on participation. People can organise themselves to have an input into discussions on the new laws and policies through their MP and civil society. They should watch, criticise, comment. Sometimes an aspect of implementation will be an issue in elections – so take account of it in the way you vote.

2 "Implementing the Total Constitution: Towards a Normative Approach: A Report on the Status of Constitutional Implementation to the Kenya Law Reform Commission" (2015)

How can the Constitution be changed?

A constitution should last for quite a long time. But few constitutions remain without any change. The important point is that a constitution that the people have adopted after a lot of discussion should not be changed easily. Unfortunately, in Kenya in the past, as well as in other countries, constitutions have been changed too quickly. The Kenyan Constitution is now hard to change. But the people can actually start a process of changing it. And even if parliament begins the process of change, certain changes would have to be submitted to the people in a referendum. We look at how the Constitution might be changed in a little more detail in the last Chapter (13).

Some questions to think about:

1. Is it important that the people should be able to understand the Constitution and feel that they can make use of it? Do you find it easy to understand the Constitution? How can people be persuaded to think of the Constitution in this way?

2. What do you understand by the supremacy of the Constitution and why is it important?

3. Do you agree with the idea of creating various bodies that are not controlled by politicians (like commissions and courts) even if this means that they are not subject to democratic control?

4. In Kenya who do you think are trusted by the people:

   Politicians?

   Courts?

   Commissions?

Some important constitutional ideas

Separation of powers: each section of government (especially the executive), the legislature (Parliament) and the judiciary has its own powers and the other branches of government must not interfere with them. In fact, the Kenyan Constitution does not say much about this – except in connection with county government – but the truth is that there is a considerable degree of separation. And the courts have used the idea.

Checks and balances: this goes with separation of powers – each branch of government has a responsibility and a power to keep the other branches from acting unconstitutionally and beyond its powers (we discuss this in Chapter 7)

Rule of law: the idea that everyone is under the Constitution and the law, including the president. Impunity for the powerful is a complete negation of the rule of law. There is another idea that is usually thought of as being part of the rule of law: that it is not any rule that will satisfy the rule of law, just because it is passed by the correct procedure; to meet the standard, a law must satisfy basic criteria of human rights and justice.

Sovereignty of the people: historically most states emerged from kingdoms (sovereigns were their rulers, really their owners!). Sovereignty as an idea was extended to the state even if there was no king. Now constitutions (including the Constitution of Kenya) often state that the real sovereignty lies not with kings or presidents but with the people – whether this means anything depends on many things including how seriously the people themselves take it.

Participation: used often to mean not just the right of people to elect their government but to have a more active role – being consulted, putting their views, removing non-performing officials, even having a say on what laws should be passed. A national value under our Constitution.

Citizenship: has two aspects or meanings; one is the legal idea of nationality – having a passport, legally "belonging". The other is that of having rights, and participating as a full member of the society that forms the particular country. When our Constitution uses the word, it means the technical legal sense. But the other idea underlies the whole Constitution.

Part Two

Building the Nation

Chapter 3

Nation, People and Values in the Constitution

When you have read this chapter you will

- *understand how the Constitution deals with the question "who is a Kenyan?"*
- *have some knowledge of the values that the Constitution recognises and encourages*
- *understand something of what is meant by the phrase "human rights".*

Values and principles

In older countries, where society and communities developed over a long period, common social and moral values emerged, knitting the country together. So, it was usually unnecessary to state these values in the Constitution—and if they were breached, the voters took care of it at the following elections. In many newer states, including Kenya, created by colonialism or internal conquests, out of widely differing peoples, there may be several, often conflicting systems of values, and the primary loyalties have often been communal rather than national. This has created a number of problems, including that the people do not identify with the state or share in its political and moral mandate—and therefore see it is a fair target for plunder and theft (the state is "them" not "us"). It also means that we are so pre-occupied by our own "community" however we define it, that we do not reach out to members of other communities. Experience shows that it is very difficult to run a country if there are competing loyalties, and a weak sense of commitment to the common cause and values. Those who take control of the state are tempted to use it to further their personal or tribal interests, marginalising others. Among the people there is little commitment or obedience to state laws or procedures—and the state is tempted to rely increasingly on coercion rather than persuasion.

In these situations, the tasks of the Constitution are to both enable the emergence of common values and identity, and set up the structure and institutions of the state. The values in Kenya's Constitution also respond to our past experiences of corrupt, exclusionary and authoritarian government. These values appear in the preamble (see page v), and most clearly in Article 10. Articles 4(2) and 10 (2) make the values the foundation of Kenya, and make it clear that they are legally binding, particularly on the state. On page 28 we look at how the various values have been explained and used since 2010.

The Constitution recognises culture "as the foundation of the nation and as the cumulative civilisation of the Kenya people and nation". A particularly important principle is integrity among state officials; a whole chapter is devoted to it (Chapter 6). Most importantly, we find values in the Bill of Rights which provides an elaborate vision of Kenya and Kenyans.

For most institutions the Constitution sets out their precise purposes and responsibilities, and the values that should guide them. For example, it explains the principles of the electoral system (who votes, how and for whom), defines the role of parliament, and therefore of parliamentarians, tells us about the reasons for land policies that the state must implement, prescribes how and for what purposes state power is to be exercised, and states the objectives of devolution. This not only tells institutions how power is to be exercised, but provides valuable education to the people about democracy, human rights, accountability, national integration and social justice. Judges are told that justice must be done to all, whatever their status, it must not be delayed and should be administered without undue regard to procedural technicalities (Art. 159). The president is told that executive authority should be exercised consistently with service to the people, their well-being and benefit (Art. 129(2)). Security forces are reminded that national security must be pursued in accordance with the law and with "utmost respect for the rule of law, democracy, human rights and fundamental freedoms" (Art. 238 (b)). On integrity, the Constitution insists that a state officer has the responsibility to "serve the people, rather than the power to rule them" (Art. 73(1)(b)). State officers must serve the people honestly, and avoid situations of conflict of interest (73(c)). Appointment to state

service must be made on the basis of personal integrity, competence and suitability, impartial decision making ruling out nepotism, favouritism, or other improper or corrupt practices (Art. 73(2)(b)). And the chapter on the public service (Chapter 13) begins with the principles of public service (see page 94). There are principles of public finance in Article 201, including using public money in a prudent and responsible way.

These principles and purposes also help the people to assess the performance of institutions, and to demand accountability. They form the basis of liability for misconduct, and disqualifications from holding public office (Art. 73(5)). The courts are responsible for interpreting the law in ways that enhance the achievement of these goals, forcing the judges to reflect on the objectives of the Constitution.

Ensuring that values and principles are respected

There are four main ways in which the constitutional values and principles can be made more than fine words on paper.

Accountability institutions

We often tend to look to the courts. And there have been several cases in which courts have insisted that values should have been applied (see especially on participation Chapter 12). It is interesting to note that in a case about the impeachment of a governor, which can be for limited reasons including "gross violation of the Constitution", the Court of Appeal said that "Gross violation of the Constitution includes violation of the values and principles".

But the courts are only one of a number of accountability institutions. The Auditor General and the human rights commissions (the Kenya National Commission on Human Rights (KNCHR), the National Gender and Equality Commission (NGEC) and the Commission on Administrative Justice – or Ombudsman) are all important way of ensuring constitutional principles are respected. Indeed, their very existence is closely associated with values such as human rights, accountability and integrity. The KNCHR, for example, published a Scorecard for the Government for 2013 – 17. The NGEC also produced a report on Status of Equality and Inclusion in Kenya in 2016.

The courts have more "teeth" than the commissions, or even more than the Auditor General.

External guidance

Accountability institutions, and other bodies that are not part of the government structure (in the sense they are not part of the executive or legislatures) may give guidance on how to achieve the values and principles. So the National Gender and Equality Commission has produced a guide for business on mainstreaming equality and inclusion (both national values). And when the accountability institutions comment on what has gone wrong, they make concrete suggestions for improvement also.

Commitment of government itself

The truth is that values and principles, in order to have any impact on the way government works, must be embraced by government itself.

Government actually drafted a law, the Public Service (Values and Principles) Act. This describes the values in more detail, especially on public participation. It requires every service commission (the Public, the Teachers, and the Police Service Commissions) to produce an annual report on what has been done to promote the values, what has been achieved and what the challenges are). It requires each of those commissions to have a register of complaints made about officers' failures to respect those values.

In 2013 Government prepared a Sessional Paper (a policy) on Values and Principles that was adopted by Parliament. This is the vision of that document:

> … enhanced sense of national identity, empowered citizens, increased labour productivity, ethnic harmony, adoption of a national culture, enhanced political and social stability, equitable distribution of resources and opportunities, reform of public institutions to respect human rights and fundamental freedoms, enhanced fiscal discipline in the management of public resources, optimal utilization of state resources, prudent management of land and natural resources, increased food security, enhanced personal discipline and higher life expectancy. Enhanced transparency, accountability, integrity, good governance, adherence to the rule of law and public participation are other outcomes expected. It is expected that the implementation of this policy will lead communities and organizations to establish mechanisms to nurture and develop value-based leadership.

Within the Office of the President, there is a Directorate of National Cohesion and Values. It has produced a number of documents of guidance for government agencies on achieving the national values.

This network of efforts and publications backs up the President, who is given a duty under the Constitution to make an annual address to the nation on the realisation of the national values and principles. The report for 2017 was over 200 pages long. You might query the value of this, because it is inevitably a document of self-praise.

The people

Handbooks and addresses to the nation, and even accountability bodies' reports, are all good and necessary. But it is all too easy for the public service to slip back into old ways of doing things, especially if the old ways are in their interests, or simply less trouble. The people must insist, and - to insist - they need to understand what is supposed to happen.

They can work collectively as organized CBOs and CSOs, and by reporting what they see as failures of values and principles to the relevant bodies such as the public service commissions and the human rights commissions.

After making some positive remarks in its Scorecard about what government had done, the KNCHR went on to say, "However, implementation of these policies and laws remains largely poor. This is coupled by absence of cogent monitoring and evaluation on the implementation of national values and principles of government."

Human rights

Human rights in a constitution are a way to give legal force to the idea that we have certain rights as human beings; they are not the gift of government. They protect the individual and groups against discrimination and oppression by the state which has so much political, economic and military power. They guarantee a space within which the people can carry out their work and other activities without prohibition and interference by the state. For example, human rights protect our family life, the exercise of our beliefs or religion, enable us to acquire and enjoy property, to form associations and work with others who share our values. Many other rights, such as the freedoms of expression, education and privacy help us to fulfil our potential as human beings. Human rights are also the foundation of democracy, because they ensure to us the right to vote and to choose, and sometimes remove, state officials.

The Constitution says that the Bill of Rights is an integral part of Kenya's democratic state and "the framework for social, economic and cultural policies" (Art. 19(1)). The essential purpose of human rights is to "preserve the dignity of the individuals and communities and to promote social justice and the realisation of the potential of human beings" (Art. 19)2)). Most of the rights belong to everyone in Kenya, although a few, like the right to vote (Art. 38), are restricted to adult citizens.

The rights are to be protected not only against the state but against "all persons", so for example employers have to behave towards their workers and the landlords towards their tenants in a manner that respects their rights. Commercial companies have become very powerful, employ millions of workers and sell their products and services to millions of consumers, and, if they were not required to respect human rights, social justice would become unattainable. The duties of companies and citizens to respect human rights do not work exactly in the same way as those of the state; it will be for the court in each case to decide whether a non-state actor had the duty to respect particular rights.

The Kenya Bill of Rights has been praised inside and outside Kenya as comprehensive and well crafted, with a strong mechanism for enforcement of rights. Specific rights are discussed later in this book; here we mention only that many kinds of rights are protected, not only civil and political as in the previous constitution. Particularly important, given that so many Kenyans live in poverty, are socio-economic rights: health, education, food, housing, water and social security (Art. 43(2) – see p. 60). And since we are a multi-cultural state, the rights of each community to its language and culture are protected (Art. 44 – see pp. 71-2). So is the right to liberty, including release on bail and a fair trial (Arts. 49-51). The Constitution gives special rights to specific groups, addressing their particular problems (women, youth, elderly, children, minorities and marginalised communities, and the disabled) (see chaps. 4 and 5). In some instances, this will require the state to take affirmative action to assist them; this is not a denial of equal treatment, but rather ensuring real equality (see pp. 42-4, 52).

The Constitution assures the right to justice. Judges have special responsibilities for protecting rights, with rules to facilitate the discharge of these responsibilities. The Kenya Human Rights and Equality Commission was established by the Constitution to promote and protect human rights, and "develop a culture of human rights in the Republic" (Art. 59 – see p. 139). However, as the Constitution allows, it was replaced by three Commissions: the Kenya National Commission on Human Rights, the National Gender and Equality Commission and the Commission on Administrative Justice.

A few important new laws on human rights

A number of new laws have been passed to give more detailed protection to human rights, including:

- Rights of Persons Deprived of Liberty Act
- Access to Information Act
- Fair Administrative Justice Act
- Consumer Protection Act
- Legal Aid Act

Most rights may be limited by law provided that "the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors" (Article 24). But any limitation on rights must be no more than is necessary to achieve the purpose, and the purpose itself must be justified. For example, it would not be right to restrict people's freedom of expression in order to save embarrassment to anyone, or to prevent public demonstrations because they may cause litter.

"We can find no rational connection between the limitation on publication contemplated by [the Act that provided that it was a crime to publish images of dead or injured persons which are likely to cause fear and alarm to the general public or disturb public peace] and the stated object of the legislation, national security and counter terrorism. It is our view, therefore, that [the new section of the Penal Code] is an unjustifiable limitation on freedom of expression and of the media and is therefore unconstitutional." High Court in the Security Laws Amendment case in 2015.

Citizenship: defining ourselves

Kenya is not merely a territory, a geographical space. Kenya is essentially about its people: a political community and organisation, to which Kenyans are tied in several ways. A person's special relationship with their country is often defined in terms of citizenship: membership of the country, with duties and rights, and expectations, on both sides. The main rules about who is or can be a Kenyan are:

- A person either whose father or whose mother was a Kenyan when the person was born is a Kenyan – or can choose to be a Kenyan, whether born in or outside the country (Art. 14(1)); under the old Constitution if a person was born outside Kenya they could only be a Kenyan if their father was Kenyan.
- A man who marries a Kenyan woman has the same right to become a citizen as a woman who marries a Kenyan man; the old constitution was unfair and did not give this right to a foreign husband.
- A child found in Kenya who seems to be under 8 years old and whose nationality and parents are unknown, is presumed to be a citizen (Art. 14(4)). Some people have been afraid that this will encourage foreigners to dump their children in Kenya – but why would they do that? Their child would be a Kenyan citizen only if the parent is unknown, so the parent would not benefit. It is to benefit children who are abandoned, perhaps at a church door.
- A child adopted by a citizen has a right to become a citizen (Art. 15(3)).
- Other foreigners may apply to become citizens when they have lived in the country for 7 years – but other conditions can be required by an Act of Parliament (Art. 15 (4)). Law has been passed that introduced, for example, conditions including having an adequate knowledge of Kenya, being able to understand and speak Kiswahili or a local language, and not having been convicted of a serious crime.
- For the first time a Kenyan may acquire citizenship of another country without losing their Kenyan citizenship (Art. 16) (this is a slightly complicated provision, and probably not all Kenyans can benefit).
- A person who was born a Kenya citizen but lost citizenship on acquiring another nationality can regain Kenyan citizenship (Art. 14(5)).
- The law must provide for a new status – that of "permanent resident" – a person with a close connection with the country, who has the right to live and work though not a citizen. That law has been passed.

The Constitution is fairer in gender terms than the old one, and the provisions about having more than one nationality, and about permanent residents are common in the modern world to encourage international business, and help families who have members in more than one country.

Citizenship in the non-legal sense

Citizenship is not merely a technical matter, even if it gives rise to rights and obligations. It is also an emotional and psychological matter, which can give a sense of belonging, even pride, an identity that links us to others. For these reasons the Constitution also includes the national flag and the national anthem - important symbols of the nation (Schedule 2). And it says that the president is to be also a "symbol of national unity" (Art. 131(1)(e)).

The word "citizenship" has social as well as legal meanings; your citizenship is related to where you belong, in which society. Citizenship in this sense is about your opportunities and entitlements in the social and economic system. It is also about your obligations. When we talk about "being a good citizen" we are not talking about law, but about the obligation side of belonging to a community.

Even "equal" citizenship may be very unequal, for one's position in society is left not to the law but wealth, connections, and history. They cannot entirely be separated from the legal dimension, but they depend on the structure of both state and social authority and the place of various groups in them.

The Constitution removes most distinctions between different categories of citizenship, but the right to contest presidential elections is restricted to citizens by birth. In the past, many citizens had great difficulty in obtaining passports or identity cards (ID), mostly on religious or tribal grounds (especially Muslims and particularly Somalis), and were denied these and other citizenship rights. For these reasons, the Constitution now specifies that every citizen is entitled to "the rights, privileges and benefits of citizenship" and to passport and ID card (Art. 12). However, some members of these groups still face difficulties.

The rights to which all citizens are entitled have been greatly expanded, as we have mentioned. The effect will be that the gap between the well off and the poor should be narrowed, as access to basic needs will be more assured. Another factor which will reduce differences in social citizenship is the overarching constitutional commitment to inclusiveness and special remedial measures to help disadvantaged and marginalised groups.

All these provisions of equal citizenship are part of the wider project of nation building. The path to statehood in Africa was very different from that in Europe, although the European state was imposed on us, as we discussed earlier. Kenya had a full blown state when Kenyans were still divided, fragmented, fearful of becoming the victims of state power, if the state passed into the hands of other tribes. Even those people who have acquired control of the state and benefit most from it have no emotional attachment to it or concern about its constitutional mandate. They have seen plundering the state resources as a perfectly proper project (unlike perhaps the resources of the tribe). In these ways the state is unsuited to the circumstances of the country. Some countries have tried to redesign the state through the constitution but this cannot easily solve the problems of a multi-ethnic but divided society. In order to make the state functional, it is necessary to generate among its different communities a sense of belonging to a common political community, a people with a common destiny. To a considerable extent this is the mission of the Constitution.

The word "nation" appears several times in the Constitution; some examples have already been given. Of particular interest is the reference in the Preamble to the well-being of "the individual, the family, communities and the nation"—the nation being the broadest and perhaps the highest form of association, amidst other identities. Article 10(2) commences with patriotism as the first of the national values and principles. A nation is more than a random collection of people; it is a people with common values, a shared history, and sense of solidarity. The Constitution recognises Kenyans as belonging to different tribes and races, cultures and religions, and acknowledges that a common identity, and national integration, must accommodate this diversity. A great deal of the Constitution is about striking the balance between the general (Kenyan) and the particular (tribe, religion, language, region). Elsewhere in this book we discuss how amidst this diversity the Constitution seeks to promote national integration (see p. 36).

Some questions to think about

1. What points in the Preamble appeal to you?
2. What are the qualities of a good Kenyan citizen?
3. How do you think it is possible to develop in Kenya a "culture of human rights", in which the state respects the rights of the citizens, and the citizens respect the rights of their fellows?
4. How can the values in Article 10 of the Constitution be developed in young people?

Chapter 4

Unity, diversity, equality and fairness I: Groups

Almost all countries can be called "diverse": they have people with different languages, religions and tribes or races. If the society is fair, and everyone feels they have an equal chance and are respected and included, diversity need not be a cause of division. In fact, a diverse country is a country with many strengths, and variety. But Kenya is a society divided by race, tribe and religion, which has been a major cause of worry for many Kenyans.

Fairness is not just about tribe, language or religion. Other groups within society find that they are treated with less than full respect – somehow not as full human beings. Finally, Kenya is a very unequal society, even within groups.

When you have read this chapter you will

- *have reflected on the causes of inequality and the nature of diversity in Kenya*
- *understand how the Constitution tries to ensure fairness between communities*
- *understand the concept of "discrimination" including "indirect discrimination"*
- *understand how the Constitution tries to ensure fair distribution of resources within the country*
- *understand the concept of affirmative action.*

The main focus of this chapter is on fairness and inclusiveness between groups in society. In the next chapter we shall look at situations of fairness and equality between individuals – though of course individuals also belong to groups of people with similar characteristics. That chapter deals with issues of gender, disability, age and the position of prisoners.

Diversity, Divisiveness and Inequality

Everyone in Kenya is a member of a minority! But some minorities feel that being a minority has meant that they suffer from discrimination or neglect, while members of other communities, even if technically also minorities, are generally thought of as being "dominant" and even privileged. The situation is very complicated – because Kenya is a very unequal society, even within groups, and the "dominant" groups include many who are poor and neglected. And within many areas – including the counties – there are people who are minorities, even if they are members of groups that are dominant elsewhere in the country.

The CKRC said, "You might almost say that the Commission found a marginalized nation." It pointed out that for different reasons whole communities felt marginalised and alienated from national life. Some religious groups had suffered discrimination. Kenyans with disabilities were

marginalized physically and in other ways. Women, the elderly and youth were all not full and equal participants in the nation.

Like many other countries, Kenya has a dilemma: how can the fact that there are many different communities in the country, all of whom demand and are entitled to recognition and respect, be reconciled with the need to develop a sense of "Kenyan-ness" – of national unity? The dilemma has been made more acute by the negative uses of ethnicity, especially by politicians. But it would make all of us poorer if we were to pretend we were all the same and suppress cultures, languages and ways of life. We would not be poorer financially, but some of the richness of individual and national life would be lost.

Negative ethnicity

Kenyan politics have become largely the politics of ethnicity. Politicians find that stirring up ethnic loyalties on one hand, and ethnic animosities on the other are easy ways to build support. They promise "their tribe" development and other benefits if they have their vote. Sometimes they incite "their people" against other tribes, with the results we saw in 2008. People may respond to these ethnic appeals because they feel vulnerable; the market economic system, with its competitiveness, even greed, and the state, have fundamentally disrupted the rhythm of people's traditional lives, and exposed them to forces they neither control nor understand. Negative ethnic feelings then spill over into other spheres of life.

Tribal politics are based partly on patronage which is one cause of corruption, whether in the form of money payments, grants of land, contracts, evasion of bureaucratic procedures, or jobs for relatives, friends and political supporters. Corruption has led to the abuse of the electoral process, bussing in voters from outside, using state agencies to rig elections or declare fraudulent "results". The obsession with ethnicity means that it becomes the sole criterion for judging people. Very little attention is paid to social, economic and environment policies (other than on how they impact on one's tribe). Some people are all too eager defend their ethnic "leaders" against even well founded allegations of corruption or violence; and in this way the question of illegality is transformed into an issue of "harassment" or "guilt" of tribe", weakening the whole concept of guilt and accountability.

Inequality

Kenya is a poor country, but it is also a very unequal country - see box. This was true in 2010, and it is still true today. Inequality is partly a consequence of government policy, and partly a consequence of other factors. Inequality is not just a matter of wealth, of course. Kenya is unequal in terms of access to food, education, healthcare, housing and in many other ways.

Inequality in Kenya

The gap between the richest and poorest has reached extreme levels in Kenya. Less than 0.1% of the population (8,300 people) own more wealth than the bottom 99.9% (more than 44 million people). The richest 10% of people in Kenya earn on average 23 times more than the poorest 10%.

The number of super-rich in Kenya is one of the fastest growing in the world. It is predicted that the number of millionaires will grow by 80% over the next 10 years, with 7,500 new millionaires set to be created.

The Constitution: Attacking divisiveness

So how does the Constitution help the various groups that have felt marginalized and suffer from inequality, and others, within Kenyan society, to feel part of that society? It goes about this in various ways: through prohibiting discrimination, requiring special action to bring true equality for certain groups, and by emphasising the rights of certain specific groups – and therefore their full membership of the nation.

Values and unity

We noticed in Chapter 2 how the Constitution appeals to the heart, and to the people's sense of values. The Preamble talks of "pride in our ethnic, cultural and religious diversity" and of determination to "live in peace and unity as one indivisible sovereign nation", the two ideas requiring that national identity and other personal and communal identities must be balanced. We saw that patriotism and national unity are also among the national values.

The Constitution tries to make the president not someone who represents just one party, still less one ethnic group, but is a "Symbol of national unity". The voting system tries to ensure that the president has wide support within the nation (see p. 131). And the Constitution says that the president has the duties to "promote and enhance the unity of the nation".

This language about the president as symbol of unity comes from earlier drafts of the Constitution, when the president would have been the head of state but not of government, with very few governmental powers. When the president is the elected head of government, being a true symbol of unity is hard. Parties, and individuals, fight hard to win this one great prize of the presidency. But this is the system we have and we must try to make it work. The people – you as voters – should focus on electing someone who will serve the nation as a whole. The president has in theory far fewer powers under the new Constitution than presidents did under the old to make appointments and in other ways to behave in a divisive manner.

Political parties are not supposed to be founded on the basis of religion, language, race, tribe, gender or region. In fact, they are to have a "national character" (Article 91). The Political Parties Act says that parties must have members reflecting regional and ethnic diversity, gender balance and representation of special interest groups.

The Constitution makes it clear that behaviour that tries to divide people, and induce hatred on the basis of difference, is unacceptable. Though there is generally freedom of speech, there is no constitutional protection for "incitement to violence", "hate speech" and any sort of communication that tries to stir up hatred based on ethnicity or gender, disability or religion (Art. 33(2)). This means that any law that makes hate speech a crime cannot be attacked because it is against free speech. So there is constitutional backing for the work of the National Cohesion and Integration Commission, and the law that set up the commission and makes hate speech a crime (the National Cohesion and Integration Act).

The diversity principle

The president has a special responsibility under the Constitution to promote respect for Kenya's regional and ethnic diversity. But the Constitution goes further, providing that the country's diversity must be reflected in the make-up of the national executive (the cabinet), the civil service, the Defence Forces, the National Security Intelligence Service and the Police. The same principle applies to the county governments. The responsibility for ensuring that the principle is respected

will rest with different bodies – Parliament has to approve members of the cabinet, but recruitment to the forces and the police is the responsibility of other bodies. Citizens should also be watchful to see that this important principle is respected. Monitoring is something that the National Cohesion and Integration Commission is responsible for. In fact, the National Cohesion and Integration Act – passed before the Constitution – says that "No public establishment shall have more than one third of its staff from the same ethnic community". To achieve these changes will need "affirmative action" – see later pp. 42-4.

> "The study indicated that in over 36.8% of the parastatals, the ethnic group of the largest number of employees is similar to that of the chief executive officer. Kenya Building Research Centre has a CEO from the Kikuyu community and has 9 out of the 15 employees from the same ethnic group - 60%. The Council of Legal Education (CLE), has a Luhya CEO, and the institution is staffed with 17 employees, 6 being from the Luhya community. The Lake Basin Development Authority, apart from being headquartered in Kisumu, has a Luo CEO, and has recruited 53.5% of its employees from the Luo community."
>
> NCIC Report on Ethnic Audit of Parastatals (2016)

County government and unity

We discuss the county government system in Chapter 9. The constitution drafters were aware that there are risks in such a system – risks that the country will be pulled apart by competing claims of the various counties. Something that was supposed to strengthen unity while recognising diversity may have the opposite effect. Various constitutional provisions are intended to counteract any tendency of this sort. These include:

- the right to freedom of movement (Art. 39(1)) - on the other hand there is also:
- the requirement that a law must ensure that investments in property benefit local communities and their economies (so that people do not feel their local resources are being stolen by people from other parts of the country and foreigners) (Art. 66)
- the idea that governments at the various levels should think of themselves as "inter-dependent" and relate to each other "on the basis of consultation and cooperation" rather than confrontation (Art. 6(2)).

These various provisions are really common sense – and should be taken seriously.

Language and unity

The Constitution says that English and Kiswahili are both official languages (Art. 7(2); this is no different from the old Constitution – having one or more languages that <u>everyone</u> speaks is an important factor in developing national unity. Kiswahili is given a particular status as "national language" (Art. 7(1)). Although this does not have any special constitutional significance, its symbolic status could be important (it underlines the failure of the educational system shown by poor exam results in Kiswahili). The ability of everyone to communicate with their fellow citizens is obviously important to unity – including for the deaf and the visually impaired, so the Constitution also says that government must promote Braille and Kenyan Sign Language and other forms of communication (Art. 7(3)(b)), and says that people have the right to use these forms of communication (Art. 54).

Because people have the right to use their own language, they may want to insist that public institutions - especially county ones - are able to communicate with them in that language. The Constitution does not say anything about official languages at the county level. But the County Governments Act says that the official languages in counties are also Kiswahili and English. It is the national government that has the responsibility to promote local languages (Schedule 4), but counties should also be responsive to local language issues, and some counties have policies to promote local languages. But language should not be allowed to be a divisive issue between counties –and the Constitution does not encourage this. (On language and culture see pp. 71-3).

Inclusion

What is really divisive in a society is not the awareness of difference but a sense of injustice and exclusion. The most important way in which the Constitution tries to promote national unity is by preventing this type of divisiveness. It tries to ensure that people from all communities and sections of society can be involved in the national life, and that everyone, and all groups and communities, are treated equally and with respect. It also tries to ensure that services offered by the national government are equally available to all. "A national State organ shall ensure reasonable access to its services in all parts of the Republic, so far as it is appropriate to do so having regard to the nature of the service" (Art. 6(3)). But this is not really a right – rather an objective. Another provision intended to prevent some groups feeling that others receive special treatment is the one that says there must be no state religion (Art. 8) (if you are wondering about the controversy about Kadhi courts in the Constitution, you can go to pp. 43 and 49).

Representation and inclusion

Diversity of elected representatives is also an important principle. It is mainly intended to ensure not so much justice to individuals but a sense in all groups in the country that they have a voice where laws and policies are made. These provisions are intended to promote inclusive representation:

- when an election is conducted through party lists (which include elections for special seats for youth, workers and person with disability in the National Assembly and for women, youth and persons with disability in the Senate) the list of each party must reflect the country's ethnic and regional diversity (see pp. 107 and 129)

- political parties must respect the right of everyone, including minorities and marginalised groups, to participate in politics

- Art. 100 requires Parliament to make laws to promote the legislative representation of ethnic, minority and marginalised communities.

There are more provisions about representation of particular groups.

Women

The provisions about gender are the best known and the most extensive. The main ones are:

- special seats for women in the Senate (16, plus one woman representing youth and one representing persons with disability) (Art. 98(b), (c) and (d)
- special seats for a woman from each county in the National Assembly (Art. 97(b))
- special seats in county assemblies to ensure that at least one third of the members are women (and at least one third men) (Art. 177(b))
- a certain number of women in the Parliamentary Service Commission (at least 4 out of the 11 members – Art. 127(2)); this body supports Parliament in various ways, providing administrative and research staff
- at least 3 women among the 11 members of the Judicial Service Commission (Art. 171(2)) – this body recommends names of people to be appointed as judges
- the Judicial Service Commission must be "guided" in its work by the principle of gender equality (Art. 172(2))
- the State must implement "the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender" (Art. 27(8))
- equal opportunities in the public service for men and women in appointment, training and advancement (Art. 323(1))
- national security organs must "reflect the diversity of the Kenyan people [including gender] in equitable proportions" (Art. 238).

The impact of the provisions about elections and gender

The provisions guaranteeing 47 seats for women in the National Assembly (one per county) is similar to provisions in Rwanda and Uganda (Rwanda has one of the highest proportion of women in parliament in the world). But this provision, and the one about list members in the National Assembly to present special interests, which usually include at least four women, do not guarantee anything like one-third women overall. Indeed, the very fact that there are some "women only" seats has tended to discourage parties from putting women up as candidates in regular constituencies. However, in 2017 the total proportion of women elected (including in all three types of National Assembly seats) was 21.5% - 23 women were elected for the regular constituencies (or 7.9%).

The position of the 47 women county representatives is not easy. They have larger constituencies – a bigger area to campaign in, and a much bigger area to "take care of" as constituency member.

And they tend not to be treated really equally by their parties (that think "those are just women's seats"). On the other hand – they are elected by all the voters of the county, so if they do a good job they should be respected by all. It does mean that they must work hard not just for the women in their county, but for all the voters.

In the Senate there are guaranteed to be at least 18 women out of a total of 67 (26.7%). Again this is not as many as one-third, but, though no women were elected as county senators in 2013, three were in 2017, so that the Senate is now 31.3% female. The position of the 18 guaranteed women is perhaps even more difficult than that of the 47 women in the National Assembly. They sit in a body that has power mainly over matters related to counties. They cannot force any position on their county representatives – they are only required to be consulted about how the county vote is to be cast.

In 2012 the Supreme Court decided that if, in 2013, Parliament did still have more than two-thirds male members it would not be unconstitutional. But Parliament should pass law to achieve the "two-thirds gender rule" by 2015. However, by early 2019 that had not been done: MPs were simply uncooperative, to use this law to pressurise the President to sign an (unconstitutional) law about MPs' allowances.

The situation in the county assemblies is perhaps easier for women. Right from the beginning there were one third women. And in the smaller assemblies (some with fewer than twenty members) the women members may find it easier to play an equal, or more effective, role than men. But the peculiar rule about special seats in county assemblies - to ensure that no more than two-thirds of the members are of the same sex - means that, for some time to come, one third women is the maximum number of women. Indeed, there is perhaps a risk that it will delay full equality for women – because parties know that there will be special seats for women they are reluctant to nominate women for regular seats.

There is also a problem about the whole position of list members. How many people are taken from a party's list depends on how many seats the party has won, So, in theory, voters ought to think about a party's list when voting for their MP, Senator or MCA. The lists should be published, and widely publicised, before election day. But in reality voters do not think about the lists, and often think that list members are "nominated" by parties after the election.

Appointments

The State is supposed to take active steps to ensure that no more than one-third of appointive state bodies are of the same gender. This includes commissions and even the national and county governments. It is part of the responsibility of the National Gender and Equality Commission to monitor this issue. Commissions have generally been composed in a way that respects the gender rule (though the KNCHR has actually had too many women!). A court in 2017 held that the national Cabinet was not properly constituted because it did not have enough women, but since an election was coming the judge made no order. The issue has not yet come back to court – though the Cabinet in 2018 was also too male-dominated: six out of 24 (including in the Cabinet the President and Deputy, and Attorney General as the Constitution does).

In the case of the judiciary the Judicial Service Commission must be "guided by" gender equality. You might argue this means they should aim at having 50% women judges. On the other hand, it might be interpreted to mean equality of opportunity. But, as Article 27, says "Equality includes

the full and equal enjoyment of all rights and fundamental freedoms" - and equality of opportunity for those who have been persistently discriminated against is not enough to achieve full equality, or not for many years. This is why affirmative action is permitted, indeed sometimes required. In fact, the judiciary has been generally successful in becoming more gender balanced overall. But the Supreme Court has only two women out of seven (or 71.4% men).

Representation for other groups

It is often hard for people with disabilities to get their voices heard, and even harder for them to be elected to sit in parliament or be appointed to public office. The Constitution ensures that there will be persons with disability in the National Assembly, the Senate and in the county assemblies:

- there are 12 special seats in the National Assembly including persons with disability, workers and youth (Art. 97)
- there are two special seats for persons with disability in the Senate – one for a woman and one for a man (Art. 98)
- a law must ensure that county assemblies include persons with disability (Art. 177)
- a law must be passed to "promote" the representation of persons with disability in Parliament (Art. 100).

The law about elections, including the procedure, must take account of the needs of persons with disability (Art. 82).

The persons with disability in the National Assembly, the Senate and the county assemblies are elected through party lists – we discuss how this procedure works later, see pages 107 and 129.

Earlier draft constitutions for Kenya included a principle that all public elected or appointed bodies should have at least 5% persons with disability. This has been changed in the Constitution to say that 5% of the members of the public in any elected or appointed body should be persons with disability (Art. 54(2)). This is perhaps because, apart from members of the public, the members will be usually ex officio – in the body because of their official opposition. And it would be hard to ensure that a body composed of representatives of different organisations had at least 5% of persons with disability. But nor is it easy to ensure that it has not more than two-thirds of either gender.

How has this worked out?

On elections, there were some gains in 2017. However, about 20 counties have no members with disability in their assemblies. And sometimes list members who are supposed to represent persons with disability are not themselves such persons. And list MPs complain that they are handicapped because they are not eligible to be allocated constituency development fund money.

Inclusion of persons with disability in appointed public bodies has shown some improvement. But numbers are often still very small. In late 2015 the National Gender and Equality Commission reported that only just under one per cent of members of boards of state corporations were persons with disability, and only 0.65% of chairs.

Equality between groups and communities

The starting point for fairness in any country must be equality. The Constitution has very clear provisions on equality; it mentions equality as an important national principle at several points, but it also makes these provisions clear and effective in a legal sense.

Generally, equality provisions will be used on behalf of individuals who feel they are or will be discriminated against. But the Constitution also requires equal and fair treatment of groups.

Equality of financial burden and benefit and in terms of resources

We find that the chapter on Public Finance has several provisions about equality of this sort:

- the burden of taxation must be shared "fairly" (Art. 201(b))
- government revenue raised at the national level must be shared "equitably" among the national and the county governments – this is closely connected to the system of county government (Art. 202(1))
- there is a special, though small, fund for providing services for parts of the country that are deprived (Art. 204)

Another provision may also be relevant to equality in terms of resources: "Parliament shall enact legislation ensuring that investments in property benefit local communities and their economies" – this is intended to prevent investment, whether in mining, tourism development or industry, for example, - benefiting only people from other parts of the country (or foreigners) (Art. 66). Also relevant is the emphasis on "sustainable development" – see box.

Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs. It contains within it two key concepts:

- the concept of needs, in particular the essential needs of the world's poor, to which overriding priority should be given; and
- the idea of limitations imposed by the state of technology and social organization on the environment's ability to meet present and future needs.

From International Institute for Sustainable Development http://www.iisd.org/sd/

Equality is not enough?

The Constitution also deals with the fact that people who have been discriminated against over the years may need more than "equal" treatment now to put them on a level with others who have benefited from being treated unjustifiably well in the past – to give the former "full and equal enjoyment". The Constitution requires the state to have policies of "affirmative action" (Art. 27(6)). But only measures needed to overcome the consequences of past discrimination, including affirmative action, must be taken – they should not benefit people who really do not need special treatment (Art. 27(7)). In India it has become clear that almost every group that is generally disadvantaged has some members who have done well – often called "the creamy layer". It is not fair if schol-

arships and training programmes are monopolised by these people – and our Constitution tries to prevent this happening.

Art. 56 requires affirmative action for minorities and marginalised groups in respect of participation in state affairs, access to education, economy and employment, basic needs, and their culture. And the provisions about "procurement" – the state acquiring goods and services – say that there must be law to improve the position of groups disadvantaged in the past by discrimination (Art. 227(2) (b)). There is now law for this: there are regulations about reserving certain contracts for business of "disadvantaged groups" which includes groups who have suffered from exclusion, bias or prejudice, including women, youth and persons with disabilities. Various countries have programmes involving positive efforts to benefit groups and individuals who have been disadvantaged. Sometimes these involve just extra effort to involve those groups, sometimes financial support, sometimes quotas and sometimes favourable treatment, as you can see from the examples in the box below.

The word "equity" is used quite often in the Constitution. This is relevant to affirmative action. It means a sort of fairness that may not be achieved by treating everyone just the same.

Minorities, "marginalised groups" and marginalised communities"

The Constitution protects the rights of all minorities; in fact this means protecting the rights of everyone, because everyone is a minority. Many people are members of more than one minority: of an ethnic group and a religious group, for example. Everyone has the right to practise their religion, and practise their culture. This is not restricted to minorities – but is usually more of a problem for members of minorities. Like other rights, the state must not only respect the right itself, but protect it from interference by others and promote it. We say a bit more about language and culture in Chapter 6.

The Constitution has three concepts about disadvantaged sections of society: minorities, marginalised groups and marginalised.

Minorities

Minorities are not defined in the Constitution – perhaps a good thing. The most important principle is that of equality, as we have seen. But we have also seen affirmative action is a right for those minorities that need it. There are a few examples in the Constitution of special care for minority groups. Special recognition is given to Muslim law. The Kadhi courts have existed since the colonial period or before. When the 10 mile strip along the coast became part of Kenya (it used to belong to the Sultan of Zanzibar) the government of the newly independent Kenya agreed to keep the courts used by the Muslims there. The new Constitution retains these. Some people have objected to this (most Kenyans do not seem bothered about this, and many have little idea about the Kadhi courts).

All communities in Kenya have their own systems of law and justice. These days, laws about land are perhaps the most important of these, while some people still get married under customary or religious law. Article 45 recognises personal law under religious or customary systems - mostly matters about marriage family, children, and inheritance of land. As the Constitution required, Parliament passed a law to make this recognition of different systems of marriage and. the new Marriage Act covers all types of marriage. All law, including Muslim law (Sharia) and customary law must meet the requirements of the Constitution about human rights. There is a limited exception that Muslim law in Kadhi courts is exempt from the requirements of the equality provision.

Examples of affirmative action from other countries

- Grants to help poor communities to acquire land for settlement (South Africa)
- Government schemes for allocation of land at preferential rates for housing for people with disabilities (India)
- Quotas for the various disadvantaged groups, under which their members can enter institutions of higher education with lower examination grades (India)
- Businesses certified to be run by socially and economically disadvantaged persons receiving contracts up to a certain amount without being exposed to the normal competitive processes (US)
- Requiring service providers to indigenous communities to give priority for contracting of services to Aboriginal individuals and organisations (Australia)
- Flexible hours and vacation arrangements for women and others with family responsibilities (Australia)
- "Employment equity" Act provisions for first nations (aboriginal peoples), women, visible minorities and persons with disabilities, including that all government agencies must review their representation, identify barriers to equitable employment, and develop a plan to achieve it (Canada)
- Law permitting programmes encouraging recruitment from an under-represented community (Northern Ireland)
- Making reasonable arrangements for people from disadvantaged groups to ensure that they enjoy equal opportunities and are equitably represented in the workforce of a government, or employers who employ more than 50 people or are otherwise fairly large (South Africa)
- Buses, trains or vehicles bought after a certain date must satisfy standards laid down by the government agency concerned with disability (US).

Marginalised groups and communities

A "marginalised group" is a group of people disadvantaged by discrimination on one or more of the grounds listed in the Constitution like disability, gender and ethnicity. Some Articles pick out certain specific groups, especially women, persons with disability and youth, as well as marginalised communities, particularly when talking about fair representation in the democratic system (see Article 100 for example). A "marginalised community" is a narrower idea (see box).
In fact, there is no clear distinction between the rights of these various groups – nor between the definitions. A group could be a marginalised group and a marginalised community, even just "marginalised", and of course, a minority. If the underlying objectives of fairness and respect are borne in mind, this slight uncertainly should not cause problems.

A marginalised community could be (see Article 260):

- a community that has not been able to take full part in Kenyan life (because it is very small or for some other reason)
- a traditional community that has not participated fully in the life of the nation because it wants to preserve its unique culture and identity
- an indigenous community that has retained and maintained a traditional lifestyle and livelihood based on a hunter or gatherer economy
- a pastoral community, which may be nomadic or though settled is geographically isolated.

Obviously some communities would fit more than one description – the Ogiek probably fit each of the first three, for example.

Some questions to think about

1. Do you think that Kenyans support the idea of affirmative action? Who might not support it and why? By what arguments can you get them to support affirmative action?

2. What do you think of a notice in a government office that says “Speak only national language here”?

3. Imagine a small community that has never had any member of parliament, which is rather isolated because the roads to its area are poor, and with very poor schools. Do you think the Constitution will help them?

4. How many ways does this chapter identify in which the Constitution tried to make every Kenyan feel part of the nation?

5. Do you think that people in Kenya feel more part of Kenya since the Constitution?

Chapter 5

Unity and diversity II Individuals

When you have read this chapter you will understand how the constitutional provisions about equality, unity and inclusion should affect individual, particularly those belonging to the following groups:

- *women*
- *persons with disability*
- *children*
- *youth*
- *elderly*
- *sexual minorities*
- *prisoners*

This chapter continues the theme of the preceding chapter, but in the context where individuals rather than groups and sections of society will be claiming their rights.

The idea of Equality

The Constitution says:

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

What is the difference? It means that not only must the law say that everyone is equal – but that law must be applied in a way that ensures they are equal. It goes on to say that the law, and the way it is applied, must not discriminate – that is it must not treat people differently because of some irrelevant factor. Though it may not be unfair to provide separate toilets for men and women (because sex is not irrelevant here) there is usually no justification for treating men and women differently, or Luos and Kikuyus differently, when it comes to giving them a job.

There is a long list of possible reasons that people might use as excuses for discriminating – and for which they are not allowed to discriminate:

> race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth (Art. 27(4)).

Even though there is this long list, no other irrelevant personal characteristic may be used to discriminate between people. And it does not matter whether the discrimination is intended or not – the point is whether there was in fact discrimination (see box on "indirect discrimination"). Everyone has the right to be treated equally – and we all have the duty to treat everyone equally.

Indirect discrimination

Even if a rule or practice is not worded on the basis of a forbidden characteristic, it will be prohibited if its effect is to discriminate, whether this was intended or not, "No beards" – excludes more Muslims and Sikhs. "Vegetarians only" favours Hindus more than others.

In particular situations these requirements might be excused (for hygiene reasons in the case of beards or because someone is looking for another person (maybe a lodger) who would share their kitchen in the case of vegetarians).

Gender

Driven by a sense of past injustice and exclusion, women were very active in the constitution review process. And they have made important gains in this Constitution. It is of course also important to remember that there may be some instances in which laws or practices work against men rather than against women (like different retirement ages as used to be the case in many countries with women able or required to retire earlier than men).

Equality and non-discrimination

The most basic of all rights for groups that experience discrimination is the right to equality. The old Constitution used language that was itself discriminatory about women – it never used "she", but always "he", and so on. This old fashioned way of writing laws does really suggest that women presidents, judges and MPs are unusual! The Constitution now avoids this, and says "the person" instead– e.g. "Every person has the right to the correction or deletion of untrue or misleading information that affects the person" (Art. 35).

Although discrimination on the basis of any personal characteristic is forbidden, some of the grounds that are specially mentioned in the Constitution are particularly relevant to women. Apart from banning sex discrimination, the Constitution mentions pregnancy and marital status (whether a person is married or not – it is more likely that a woman will face discrimination because she is not, or maybe is, married than a man). "Dress" is also mentioned; this was because while the Constitution was being made there were cases of women being discriminated against because of what they were wearing. There must also be no discrimination on the grounds of "birth" (this refers particularly to whether a person's parents were married to each other, and can also cover the place or other circumstances of a person's birth) or health status (that would refer to being HIV positive) (Art 27). The Constitution also emphasises that women have the right to equal treatment including rights to equal opportunity in the fields of politics, economy, culture and society (Art. 27), in equal rights to marry, during the marriage and in the case of divorce (Art. 45). There are also equal rights to pass citizenship to children and to become a citizen or have one's spouse become a citizen (Arts. 14 and 15).

Much discrimination against women comes from society and not the state. It is important therefore that everyone is supposed to respect the rights (Art. 20), and also that the state must protect the rights against interference (Art. 21). Land policy should include elimination of gender discrimi-

nation (Art. 60); gender discrimination is probably particularly found in customary law, and there is also a provision that customary law must be consistent with the Constitution, which also covers human rights (Art. 2(4)).

Protective measures for women

In various ways the state and its organs must protect the interests and rights of women, including:

- the right to health care includes the right to reproductive health care (Art. 43 – see box)
- there is a duty on the State to have programmes (including affirmative action) for groups disadvantaged by discrimination (Art. 27(6)), which would include women
- land legislation must recognise and protect matrimonial property including the family home, and the protection of dependants of deceased persons including those in actual occupation of land – who will often be women (Art. 68)

Reproductive health

[R]eproductive health ... implies that people are able to have a satisfying and safe sex life and that they have the capability to reproduce and the freedom to decide if, when and how often to do so. Implicit in this last condition are the right of men and women to be informed and to have access to safe, effective, affordable and acceptable methods of family planning of their choice, as well as other methods of their choice for regulation of fertility which are not against the law, and the right of access to appropriate health care services that will enable women to go safely through pregnancy and childbirth and provide couples with the best chance of having a healthy infant.

... Reproductive health includes sexual health, the purpose of which is the enhancement of life and personal relations, and not merely counselling and care related to reproduction and sexually transmitted diseases.

Programme of Action, International Conference on Population and Development

Abortion (medical termination of pregnancy)

It is important that we are straightforward and honest about this emotional issue. The Constitution mentions it under the right to life (Article 26). It says that life begins when a baby is conceived. These words are used in several constitutions to try to make it difficult to permit medical abortions. But the Kenyan Constitution goes further and says that generally abortion is not permitted, but there are exceptions. If an abortion is carried out to save the life or the health of the mother, or if there is a need for emergency treatment, it would not be a crime. Parliament could pass a law to make abortions possible in other situations (for example if the pregnancy is the result of rape). In fact, the current law of Kenya is very similar to the Constitution.

In 2019 the High Court decided that the Constitution means just what it says: generally medical termination is not allowed, but if the health or life of the mother was at risk it was permitted. It also said that it was wrong of the Ministry of Health to have withdrawn guidelines on how to conduct safe abortion when it is permitted.

There are two aspects of the abortion provisions that have caused some puzzlement. The first is that to be legal a "trained health professional" must approve the abortion. This was included to deal with the possibility that in a rural area a doctor might not be available. It does not mean that a person trained in first aid could approve an abortion. The mention of "emergency treatment" is probably intended to cover treatment that is not intended to harm the foetus but that would have the side effect of causing or necessitating an abortion. In some countries with strict abortion laws, women suffering from cancer have been denied treatment because it would damage the foetus they are carrying – thus almost certainly condemning the women to death, without necessarily saving the unborn child.

Land

Removing gender inequality in connection with land does not mean that someone who chooses to leave land only to sons in a will cannot do so. But it will mean that there must be no laws that disadvantage women (or men). Existing laws that do that are mainly customary laws (see below).

Since the Constitution, some laws have improved the property rights of women. The family home must not be mortgaged or leased to someone else without the agreement ("informed consent") of both parties to the marriage (Matrimonial Property Act and Land Act). And if a couple divorce the property should be shared between them, taking account of the contribution that each made (and the contribution is not just a financial matter but would include management of the home, child care, companionship, management of family business or property, and farm work – most of which are probably contributions of the woman). There was disappointment that the Act did not provide for automatic 50:50 sharing, but the High Court held that the Constitution did not require this.

On family and custom

Marriage is now prohibited for young people under eighteen. Female circumcision (FGM or cutting) was already unlawful under the Children Act, but was not a crime– a person might have to pay compensation but could not be imprisoned for doing this to a girl. But soon after the Constitution was passed, a new Act, the Prohibition of Female Genital Mutilation Act, was also passed. The Board under the Act focusses a good deal on training and persuasion. Communities are often resistant to what they see as an assault in their culture, and a case is before the High Court on whether, for adult women, the Act infringes their right to practice their culture.

On Muslim law

The human right to equality does not apply to Muslim law relating to "personal status, marriage, divorce and inheritance", if that law is applied in Kadhis' courts. This is mainly of importance to women – because the issues likely to arise are things like favouring the father in custody of children over a certain age, the limited provision for maintenance of wives after divorce, and the difference in inheritance by women and men under Muslim law, as well as polygamy. It is important to realise that this provision was inserted (as long ago as the CKRC draft) because Muslim women said they wanted it.

The African Charter on Human and People's Rights – Women's Rights

A supplement to the African Charter was adopted in 2003 to provide specifically for women's rights. It took Kenya a long time to decide whether it was going to accept to be bound by this document – known as the Maputo Protocol. But in late 2010 it did accept and ratify it, thus joining the majority of African states. Under the Constitution this has important consequences – because any international agreement that Kenya ratified becomes part of Kenyan law (unless it conflicts with the Constitution) without any need for the Kenyan Parliament to pass a new law. Exactly how the new provision about international agreements being part of Kenyan law has still not been fully worked out.

It becomes very important to understand what the Maputo Protocol says. Its most important provisions are:

- about violence against women
- requiring that all marriages, including polygamous, be recorded in writing and registered in order to be valid (the Marriage Act of 2014 now requires all marriages to be registered)
- when a couple divorce, joint property from the marriage must be shared equitably (a Kenyan court has held that it does not have to be shared equally)
- women have the right to control their fertility and have family planning education.

Some other provisions do not add much to the existing law or the Constitution. But three provisions in particular are worth thinking about. First is that countries that have accepted the protocol must take appropriate and effective measures to enact and enforce laws to prohibit all forms of violence

against women including unwanted or forced sex whether the violence takes place in private or public. This must surely mean that it should no longer be possible for men to argue that it is not possible for a man to rape his wife – on the argument that, by marrying, a woman agrees to sexual intercourse in all situations. But so far the issue has not come to the Kenyan courts.

The second is about divorce requiring a court order. Men can still divorce their wives under Sharia law by saying "I divorce you" three times (the triple talaq). The Marriage Act just says divorce is decided by Sharia law. This seems to go against the Maputo Protocol – but this is a complicated question that we can't go into here.

The third provision is that medical abortion should be possible in cases of sexual assault, rape, and incest. BUT, Kenya did not accept that provision. It made what is called a reservation (basically – "We don't accept this bit to apply to our country").

Violence against women

As we just saw, the Maputo Protocol says "States Parties shall take appropriate and effective measures to enact and enforce laws to prohibit all forms of violence against women". Does the Constitution respond to this? Violence against women is largely a matter of society's attitudes and practices, as well as the vulnerability of women, including in economic terms. There is a limit to what laws can achieve. But the Constitution is, we suggest, relevant to issues of women's empowerment and protection against violence in several ways:

- it explicitly recognises the right of all to be free from violence (Art. 29(c)) – which means that everyone is bound by the duty to respect this right, and the state must protect the right (and of course not violate it itself)

- it says that all public bodies must address the needs of all sections of society including women (Art. 21(3)) – which means they must take the necessary steps to understand those needs – and this would include police who understand how to deal with victims of violence

- the police and other security forces must respect human rights (see Chapter 6)

- the various provisions to strengthen the judiciary and the prosecution system should reduce bribery and the use of influence to defeat justice (see for example Art. 166(2)(c) for judges and Art. 157(30)).

- women's rights to land (see above) and to equality generally should empower them in economic terms, giving them more choices, including that of not staying in abusive relationships (though things are, of course, more complex than simply economics).

  Since the Constitution, the Protection Against Domestic Violence Act was passed. This is mainly about protection orders: court orders to someone who has committed violence against another person in a family or other close relationship. The order will instruct the person not to commit various acts of violence etc against the victim, and possibly also to stay away from the victim, even if they usually live in the same place.

Equal pay for equal work?

This phrase usually refers to the pay gap between men and women. The idea is that if two people do the same job, they should receive the same pay – at least in the same organisation. Other groups also often suffer pay inequality: persons with disability are an example.

A weakness in the concept was revealed when study showed that certain jobs are consistently performed by women in many societies. This makes it hard to compare what women earn with what men earn. So sometimes you will see a rewording: "equal pay for work of equal value".

The Constitution of Kenya uses neither expression. However, "equal pay for work of equal value" does appear in ordinary law, and also in an international agreement (on Elimination of Discrimination Against Women) that, under the Constitution, is now part of Kenyan law.

Two issues still arise here: the first is are women actually able to take up work of equal value, or does discrimination prevent them? And the second is that of valuing work so as to know what is "of equal value". The Salaries and Remuneration Commission has committed itself to the principle, and for this and other reasons has conducted job evaluations.

Disability

The exact number of people in Kenya who have some form of disability is unknown. It may be as high as about 10% of the population. People with disability have been very much excluded from society, sometimes even hidden by their families. Among the particular issues in Kenya are people who are HIV positive, and persons with albinism. Neither condition actually disables people from doing anything, but both are unfortunately grounds for discrimination by some people.

The Constitution

The previous constitution did not include "disability" among the grounds on which the government could not discriminate between citizens. But the new Constitution does provide that there must be no discrimination on the grounds of disability (Art. 27(4)). It goes further and says that there must be no discrimination on the basis of "health status" (which would include being HIV positive). And there is also a general statement about people being equal before the law.

Being treated without discrimination is an important step towards true equality, but more is needed, especially when groups of people have been discriminated against and disadvantaged in the past. There is recognition of this in the Constitution, firstly by provisions emphasising that true equality means the full enjoyment of all rights. And Article 27 goes on to provide that there must be affirmative action programmes for groups that have suffered from discrimination in the past – which would surely include persons with disability.

There is a specific Article (54) that shows how equality should be achieved for people with disabilities. It stresses that they

- must be treated with respect
- have a right to access to education

- are entitled to reasonable access to all public places and transport and to information and communications

- are entitled to use of sign language, Braille etc. and Kenyan Sign Language is to be an official language of Parliament (Art. 120).

The Constitution says that the state must not only respect all the rights but must protect them, and fulfil them. In other words, doing nothing to protect persons with disability from abuse and discrimination by others is a violation of the state's obligations (Art. 21(1)). And, like other rights these are not just rights against the government, but also against fellow citizens – who are unfortunately often the main source of discrimination against those living with disabilities. The right of reasonable access (Art. 54 (c)) means that private transport must try to accommodate people who find it hard to get into ordinary buses, and the government, at various levels, must include access to buildings into its building plans and urban planning, and also should include reasonable requirements to ensure that even private buildings, especially those open to the public, are accessible. It is unfair to people with disabilities if they cannot get into a cinema or a stadium for example.

The right to education stresses that children with disability should be educated in the same schools as other students – unless this is not the interests of the children with disabilities (Art. 54 (1)(b)).

The government also has a duty to encourage the various means of communication for persons with disability (Art. 7(3)).

Children

Some people or cultures find the idea of "rights of the child" rather hard to accept. But Kenya agreed years ago to accept the idea of these rights, by becoming a party to the Convention on the Rights of the Child, and without any reservations. On the other hand, it has not ratified the addition to the Convention (a "protocol") on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography.

The main points of the Constitution about children are (Art. 53):

- Children have the right to a name and to a nationality

- Children have the right to basic education that is both free and compulsory (this we discuss in Chapter 6)

- Children have the right to basic nutrition, shelter and health care

- Children have the right to be protected from abuse, neglect, harmful cultural practices and from all forms of violence, inhuman treatment and punishment, and hazardous or exploitative labour

- Children have the right be protected and cared for by their parents

- Children must not be detained, unless there is no way of avoiding this, and if they are detained it must be for the shortest possible time, be held separately from adults, and the conditions in which they are held must be suitable.

Finally, there is a general principle that "A child's best interests are of paramount importance in every matter concerning the child" (Art. 53(2)). "Paramount" means most important. This provision has been used by the courts in deciding cases on issues like child maintenance and custody of children.

The duty of parents to care for children applies equally to the father and the mother, and regardless of whether they are married (Art. 531(1)(e)).

These various rights and responsibilities, used with the Children's Act, offer a good basis for children to be protected, allowed to grow up with the chance of education, the ability to make their own decisions, and be useful and satisfied members of society. To get a full picture of the rights of children, though, it is also useful to look at the international Convention, which adds some other rights that are important including the right of a child "who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child".

Youth and age

Old and young both feel excluded from society. The young feel that they do not get the chances in life – education and jobs especially – that they need, while many old people find that they are abandoned by their families, or have no independence. The Constitution contains one provision that benefits both groups: no-one – the state or private bodies or citizens – must discriminate on the basis of "age". This means, for example, that employers must not insist on employees being of a certain minimum age – or even having a certain number of years' experience – unless there is a good reason for this requirement. It also means that they must not insist that people retire at a certain age – again unless there is a good reason. Perhaps youth and age may have rather incompatible concerns! But if older workers have been able to work to ensure that they can retire and still live reasonably, it may be reasonable to require them to retire to make way for younger workers. Provision for social security – which is also mentioned, though not in detail, in the Constitution (Art. 43 (1) (e)) is also relevant.

The key provision in the Constitution, for the older and the younger members of society, as well as those in between, is the one that says everyone has the right to live with dignity. Most of what people want can be brought under this article – which must be respected by us all, and which the state must not only respect, but must protect and take reasonable steps to fulfil.

But there are special provisions on youth and older members of society that spell out the nature of the state's responsibility to protect and fulfil the rights.

Under the Constitution "youth" includes anyone who is not a "child" but has not reached 35. In fact, over 70% of Kenyans are under 35. The Constitution says the state must ensure that youth can get access to "relevant" education and training, that they can participate in all aspects of life, can get access to employment, they are not exploited, and are not subject to "harmful cultural practices" (Art. 55). Youth unemployment in Kenya is very high, and the state cannot work miracles. But the Constitution does not mean that the government has to employ the youth itself. Making it possible for other organisations to create jobs and employ youth, not imposing unreasonable obstacles in the way of those who want to set up their own businesses, and providing useful training programmes, are all ways that government can help reduce unemployment without actually employing large numbers. Efforts to improve vocational training are among the relevant initiatives.

There is no point in defining the "elderly" (though in fact the Constitution does so, saying they are those over 60); the point of the provision is when people get older they should not be consigned to some dust-heap of society. Article 57 says that the state must "take measures" to ensure the older

members can enjoy their rights to participate in society fully, to pursue their personal development, to be free from abuse, and to receive reasonable care and assistance from their families and the state.

Sexual minorities

The real test of a tolerant society ought to be how it treats the unpopular groups in society, or those that people tend not to understand.

Most people probably grow up with the notion that humans are divided into male and female, that there is complete clarity about that, and that the natural tendency of one sex is towards sexual intimacy with some of the other sex. Press reports about people who are born with both male and female organs have rightly caused sympathy not outrage.

The Constitution prohibits discrimination on the ground of "sex". It is clear that it is wrong to discriminate against people whose biological sex in unclear – who are usually called "intersex" people. Yet they are often discriminated against. However, the KNCHR, and also one of the MPs representing "special interests" have been prominent in pushing for the rights of this group. There is a provision about intersex prisoners in the Persons Deprived of Liberty Act. And a government Task Force has been looking at their situation.

The situation of those who change their sex tends to attract less sympathy. But the courts have been of some assistance to them, notably holding that a person who has undergone a transition and changed their name can have their examination certificate changed to include their new name. The constitutional provision on dignity played a part in the court's reasoning.

Hardest of all has been the situation of those who are gay or lesbian. Research shows that as between 4 and 10% of any population may be sexually attracted to the same sex (though naturally figures are hard to find). It is not some sort of western perversion. Indeed, in many societies in the world it was not viewed as anything particularly strange or wrong until western churches introduced the idea that it was sinful.

Our concern here is not with rights and wrongs but to ask what the Constitution of Kenya actually says about it. The Constitution explicitly deals only with the issue of "gay marriage" – that is marriage between people of the same sex. It says that everyone has the right to marry a person of the opposite sex. This means that if the ordinary law restricts marriage to people of the opposite sex it cannot be challenged on the basis that it is unconstitutional. But it would not be unconstitutional for Parliament to pass a law making it possible for people of the same sex to marry each other or to enter into a "civil partnership" similar to marriage.

Most clearly the Constitution does not allow anyone, including gay and lesbian people, to be treated as lesser human beings. Like anyone else, they have the right to associate with others, and to form and register an organisation to support their interests.

> "An interpretation of non-discrimination which excludes people based on their sexual orientation would be in conflict with the principles of human dignity, inclusiveness, equality, human rights and non-discrimination."
>
> The High Court in *Gitari v NGO Registration Board* (upheld by the Court of Appeal)

The Constitution does not make sexual relationships between people of the same sex a criminal offence. The Penal Code does that as far as men are concerned– it does not make simply having a sexual orientation towards the same sex a crime. The High Court in 2019 decided that this provision is not unconstitutional.

Prisoners and those accused of crime

This is another group of people to whom generally the public are not very sympathetic. It is easy to fall into an assumption that a person accused of a crime must be guilty. And many people would assume that a prisoner is not a full citizen and has limited rights, though most people these days would probably not believe in physical abuse of prisoners.

But "every person" is entitled not to be discriminated against. In addition, there are special provisions about criminal trials and the treatment of those who are for any reason detained.

There are provisions designed to ensure a fair trial. These are very common in constitutions. An important aspect of this is the "presumption of innocence" - a person is innocent until proved guilty. Some of the important specific points are:

- a person arrested is entitled to be released on bail unless there are "compelling reasons";
- everyone who is arrested must appear in court within 24 hours (unless no court will be sitting when this period expires);
- anyone who is arrested must be told why, and they must be allowed to communicate with a lawyer or anyone else whose assistance is needed;
- no-one should be compelled to confess (such "confessions" are very unreliable);
- trials must usually be in public.

People are still sometimes denied bail for no good reason. There are now guidelines, prepared by the judiciary, on when bail should be permitted, and the conditions that may be imposed. The most obvious reason for denying bail is that the person will not turn up for trial, but if there is good reason to believe that they will interfere with investigations it can also be refused. An old police practice that seems to have survived is arresting people on Friday, which means they will be held for much more than 24 hours. The Director of Public Prosecutions complains that the courts too readily release suspects, and they are allowed to go back to work. This is a rather complicated matter that we cannot get to the bottom of here – except to note that some courts have been granting bail on condition that accused persons in prominent positions do not go to their places of work while awaiting trial.

From the Persons Deprived of Liberty Act (2014)

Section 5(1) A person deprived of liberty shall at all times be treated in a humane manner and with respect for their inherent human dignity.

S. 10(1) A person deprived of liberty shall not be subjected to an unreasonable body search.

S. 12(1) A person deprived of liberty shall not be confined in crowded conditions.

S. 13(1) A person deprived of liberty shall be entitled to a nutritional diet approved by competent authorities

S. 14(1) A person deprived of liberty shall be provided with beddings sufficient to meet the requirements of hygiene and climatic conditions.

S. 15 A person detained, held in custody or imprisoned is, on the recommendation of a medical officer of health, entitled to medical examination, treatment and healthcare, including preventive healthcare.

S. 17(1) Nothing in this Act may be construed as limiting the right to freedom of conscience, religion, belief and opinion of any person deprived of liberty, except to the extent that the right or freedom is incompatible with the fact that the person is deprived of liberty.

S. 20 The Cabinet Secretary shall take such reasonable and practical measures to ensure the establishment of recreational and cultural facilities in all institutions in which persons deprived of liberty are held for the benefit of their mental and physical health.

People who are in custody, whether they are waiting to be tried or have been convicted, also have rights. In fact, they have all the rights of any citizen except those that are "clearly incompatible" with their being in custody. They have the right not to be subjected to violence (prison deprives one of liberty, it is not intended to be a violent place). And law must provide for humane treatment of prisoners, in accordance with international "human rights instruments". By using this phrase, rather than "treaties" the Constitution brings in a wide range of international documents, such as the Standard Minimum Rules for the Treatment of Prisoners.

Can they vote? Prisoners were able to vote in the referendum on the Constitution. And they have been able to vote in ordinary elections. The High Court went a bit further than saying that they were allowed to vote (see box).

[The Constitution] imposes on the IEBC a duty to take positive or affirmative steps to ensure that the right to vote is for all Kenyans is realised. The mere fact of providing registration centres for prisoners cannot be adequate to "facilitate the right to vote." … prisoners are vulnerable persons in society. They do not have access to information, documentation and means to voluntarily register as votes like other free citizens let alone access to websites and other electronic media. The duty to facilitate voting means that the IEBC must co-ordinate with other institutions to ensure that the right to vote is realised at least within the context of what can be realised within the realm of prison."

High Court in *Kituo cha Sheria v IEBC*

Prisoners (at least in four prisons) did vote in 2017. They could vote only for the President because we have no way for people to vote away from where they live, other than travelling. Prisoners have no particular interest in voting for the local Governor, MP or MCA where the prison is. Yet they might, if they voted in large numbers, affect the choice of local voters.

Conclusion

The primary significance of the Constitution for Kenyans in all their diversity must be that every individual and every group is treated with equal respect. No tribe, no religion, no age group, no gender and no way of life are to be treated as worth more than any other. Some groups should be able to benefit from positive programmes of affirmative action to remedy past discrimination or disadvantages that result from isolation, geography or climate.

The Constitution has given Kenyans an opportunity to release energy—everyone can contribute to the nation without being excluded. The county government system also gives more opportunity for

everyone to be involved in government, or at least in holding government accountable. The courts, and commissions such as the Human Rights Commissions and the National Cohesion and Integration Commission are there when government and others place obstacles in the way. The right to vote, and the hope that elections will be fairer and politics more inclusive, clearer rights to organise, to express views and to have input into public decision making, are also among the most important ways to make the Constitution really effective and a means of uniting, not dividing, the nation.

Some questions to think about

1. Are there any justifications for treating some groups of people differently from the general body of citizens?

2. Have any groups that suffer discrimination or oppression been left out of consideration in the Constitution?

3. If a girl had a complaint of discrimination by the Ministry of Education, what kind of remedies are open to her under the Constitution, and how could she seek to obtain those remedies?

Chapter 6

A satisfactory and fulfilling life for all

When you have read this chapter you will:

- *understand more the idea of "economic and social rights"*
- *understand how the Constitution tries to ensure that those rights are protected*
- *have some idea of how the Constitution tried to protect the security of the people*
- *have reflected on the importance of language and culture to a decent life, and on what a Constitution may do to foster and protect them*
- *have an understanding of the relationship between the Constitution and religion.*

Introduction

Most people want the chance to live a decent life, able to work (ideally at something that gives them satisfaction) to support themselves, not forced to fear hunger or homelessness. They want to be free to follow the lifestyle that suits them, including to practice a religion if they are believers, to associate with their friends, to enjoy their children, and even to have some fun. They want to be free not just from want but also from fear – including from fear of violence and of crime. They want to be treated with respect. Most people would hope, much of the time, to be reasonably happy. Exactly what you want varies at different stages of your life.

What does all this have to do with a constitution? Most sensible people do not expect governments to feed them and clothe them or provide them with fun. But they do think that the government has some responsibility to educate them, to protect them from crime and war, and to provide an environment in which they can satisfy their other needs and desires.

In later chapters we look at how the citizen can use the Constitution. We look at:

- voting and standing for office (see p. 131)
- petitioning (see p. 135)
- asking for information held by a public body (see p. 141)
- presenting one's views (see p. 141)
- when citizens can be involved in active decision making (see with p. 137-9)

- making use of the official mechanism for complaints (see p. 140)
- the national and international human rights procedures (see p. 144)
- going to court (see p. 1).

These are ways in which citizens can mobilise the rights and other provisions discussed in this chapter.

The value of "equality"

We are just going to look at some rights which the state has undertaken to fulfil – but often only "progressively" and taking account of resources. But the Constitution says that everyone is equal. And that is not something that should be achieved "progressively" – we are all equal NOW!

It is therefore unconstitutional for a government to spend more money on certain groups in the country, unless this is affirmative action needed to achieve true equality for groups marginalised or discriminated against in the past, or to treat women, or persons with disability unfairly. While courts may sometimes find it hard to say that a government must spend more money on certain types of programme, they do have an obligation to ensure that the equality provisions are respected.

Education, health, food, water, and housing

These rights are often described as "economic and social rights". To achieve them fully is likely to involve a lot of money, and it will take time, even if the country makes the necessary efforts. The Constitution makes this clear, but it puts it less clearly than the International Covenant of Economic Social and Cultural Rights (we call this the ICESCR later in the chapter), which is one of the treaties that the Constitution says are now part of Kenyan law (see Article 2). So to understand the Constitution better we can also read the Covenant. The Covenant says "Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means".

The Constitution includes an important idea: that the state must take the necessary stops to achieve these various rights, progressively as the Covenant also says, but that it should also set standards. "Standards" should include benchmarks – standards to achieve over certain timeframes, so that it is possible to see whether progress is really being made towards eliminating hunger, achieving health for all etc.

You will see that the Covenant does say that "progressive realisation" must be "to the maximum of [government's] available resources". The Constitution does not use this expression, because at Bomas the National Constitutional Conference delegates thought this would make it too easy for government to escape responsibility. Like them, you may be thinking that the government will always say that they do not have resources to achieve these rights. However, the Constitution does say that if government makes this argument about resources it has to show the court that it is true (Art. 20(5)). And "progressive" does not mean government can drag its heels over even starting

to meet the needs to satisfy the right (see box). But so that the courts do not take over the role of making important policy decisions that are the responsibility of the elected government and parliament, the Constitution also says that a court cannot hold that the state is in breach of its obligations just because the court would have made a different decision about how resources should be used.

These are rights of everyone. But because they cannot be achieved all at once for everyone, the Constitution insists that "in allocating resources, the State shall give priority to ensuring the widest possible enjoyment of the right or fundamental freedom having regard to prevailing circumstances, including the vulnerability of particular groups or individuals" (Art. 20(5)). In other words, the most in need should have priority.

The Constitution says that all rights must be respected, protected, promoted and fulfilled by the state. "Respecting" rights should not be something to be achieved progressively – a state that ignores the rights of its citizens and takes positive steps that endanger the rights is failing to respect the rights. Respecting the rights is less likely to need resources. To take the right to health: a state that banned the import of important drugs for no good reason would be failing to respect the right to health.

A state may "protect" the right to health of the people by, for example, having laws against drugs and pollution and by restricting the use of alcohol and tobacco. Even this may need resources – the police and other authorities must enforce the law. Promoting can include public education about rights issues – like public health education. It can include tax arrangements that encourage healthy life-styles (for example taxing tobacco heavily). "Fulfilling" means actually providing what is necessary for the rights, such as schools and health care. This will be the most expensive.

We should also note that everyone – not just the state – is bound to observe the rights. It will be easier to insist that non-state bodies and people must respect rights, rather than arguing that they must spend their money to provide other people with the rights.

> "Article 21 and 43 require that there should be "progressive realization" of socio- economic rights, implying that the state must begin to take steps, and I must add be seen to take steps towards realization of these rights"
>
> High Court in *Mitubell Welfare Society v. The Attorney General*

Education

Are you a young person wanting to go to university, a child who can't get a place in secondary school, or even an adult who never had the chance to learn how to read? Most societies have accepted that educating their citizens is a public responsibility.

The Constitution states clearly that everyone has the right to education (see Article 43) – and specifically makes promises about primary education for children similar to that in the Covenant (see Article 53). Free and compulsory primary education should be provided immediately – not progressively. The right to education generally, however, is something that Kenya is supposed to achieve progressively (see Article 21). This means that the Constitution recognises that the government does not have the resources to provide education at all levels to everyone.

The promises that Kenya made when it signed the ICESCR have not been completely fulfilled. Tuition is now free for public primary and secondary schools. But "free" education is not free – parents have to pay fees of various sorts, even if not for tuition. Government has promised that all students who finish primary school will get a place in secondary school, but again many are boarding schools

so not free. Higher education in Kenya, like other countries, has become increasingly more expensive. Finally, Kenya also promised that "fundamental education" would be available for those who could not complete primary school.

The necessary effort has not been put into the quality of education. Whereas in many countries (Germany for example) children who go to private schools generally do worse than those in state schools, in Kenya the reverse is the case.

What sort of education?

Education "shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms" - ICESCR.

The 4As of education:

Availability – that education is free and government-funded and that there is adequate infrastructure and trained teachers able to support education delivery.

Accessibility – that the system is non- discriminatory and accessible to all, and that positive steps are taken to include the most marginalised.

Acceptability – that the content of education is relevant, non-discriminatory and culturally appropriate, and of quality; that the school itself is safe and teachers are professional.

Adaptability – that education can evolve with the changing needs of society and contribute to challenging inequalities, such as gender discrimination, and that it can be adapted locally to suit specific contexts.

Health

No-one can be promised that they will always be healthy. The Constitution takes a sensible approach – based on international law – and says that everyone has the right to the "highest attainable" standard of health. What is attainable is bound to be affected by the individual, and his or her genetic make-up, and also by the resources available. What the Constitution says about resources means that if anyone complains about failure of the state to provide healthcare, it is for the state to convince the court that it did not have the resources. The courts have been perhaps a bit lenient on government. They are very reluctant to tell government that it has failed, even if it has not provided much information about its efforts to provide services. Nor are they able realistically to tell government that, if it used public money more wisely, and stole less, it would have more resources available. But it is true that the courts cannot interfere with priorities, unless they are clearly unreasonable. People must remember that the rights are not just to be enforced by legal action, but must also be a political commitment.

The Constitution also says that no-one may be refused emergency medical treatment. Since rights must be respected by everyone, this presumably applies to private hospitals that offer emergency care, not just state hospitals. To achieve this in reality is a struggle for poor countries. And poor Kenyans struggle to obtain such treatment although the Health Act says that

7. (1) Every person has the right to emergency medical treatment.

(2) For the purposes of this section, emergency medical treatment shall include—

(a) pre- hospital care;

(b) stabilizing the health status of the individual; or

(c) arranging for referral in cases where the health provider of first call does not have facilities or capability to stabilize the health status of the victim.

(3) Any medical institution that fails to provide emergency medical treatment while having ability to do so commits an offence and is liable upon conviction to a fine not exceeding three million shillings.

The Constitution also says that everyone has the right to "reproductive" health and health care. This is not just about abortion as some people may think (there is a special clause about this anyway). It refers to being able to have healthy children, and to choose not to have children or to space children, as well (see p. 48).

Going to court on the right to health

The Constitutional Court of South Africa *(Ministry of Health v Treatment Action Campaign)* held that the government must provide anti-retroviral drugs to women over the period of giving birth to prevent transmission of HIV to their babies. The programme had been planned, the money was ready and there was no reason not to make it nationwide.

Road accidents

Road accidents do not get enough publicity in Kenya. Its road accident rate is higher than most other countries. In 2018, 3,146 people lost their lives on the roads, of whom 1,201 were pedestrians. But it seems fairly certain that the figures are seriously underreported, especially in rural areas.

Efforts have been made to improve the safety record in recent months.

Food, Water and Sanitation

The Constitution says that everyone has the right to be free from hunger, to have adequate food of acceptable quantity, and to clean and safe water in adequate quantities. It is well-known that at present many Kenyans do not enjoy these. We should approach these ideas in a similar way to the right to health: the government is not obliged to provide food and water to everyone. But it must not take away food and water that is needed (this is a failure to respect the rights), and it must protect the people's rights from interference by others. And for water it is necessary to have considerable infrastructure, usually a matter for government. Passing and carrying out laws on food and water safety will protect the rights, policies about food production will promote the right to food, as will building roads so that farmers can get their produce to market. Feeding the starving in time of drought may sometimes be necessary – and is fulfilling the right. Though there have been considerable improvements in water supply, with a population of 46 million, 41 percent of Kenyans still rely on unimproved water sources, such as ponds, shallow wells and rivers, while 59 percent of Kenyans use unimproved sanitation solutions.

When pressurising government to take the necessary steps, it may be helpful to know that various international bodies have produced guidelines for making the necessary laws to achieve rights, and on how to evaluate whether progress is being made. In connection with food, the Food and Agriculture Organisation of the UN (www.fao.org) has useful material.

Housing

Knowing that many people in Kenya live in slums or in poor housing, the right to adequate housing is a matter of interest to most people. Housing is of course expensive and the sensible citizen will realise that it is not possible for everyone who needs housing to be provided with it by the government. But government, and private sector, efforts to provide housing have been woefully inadequate over the decades, despite various policy plans and statements. However, the government's Big Four programme includes housing, though time will tell how successful it will be. The right to housing has been important in various cases about evictions. However, evictions still continue. And the cases that have succeeded have rarely gone further than to say that people ought to be evicted in a humane way.

A right to what?

The right to housing should not be interpreted in a narrow or restrictive sense which equates it with, for example, the shelter provided by merely having a roof over one's head or views shelter exclusively as a commodity. Rather it should be seen as the right to live somewhere in security, peace and dignity. …As both the Commission on Human Settlements and the Global Strategy for Shelter to the Year 2000 have stated: "Adequate shelter means ... adequate privacy, adequate space, adequate security, adequate lighting and ventilation, adequate basic infrastructure and adequate location with regard to work and basic facilities - all at a reasonable cost".

UN Committee on Economic Social and Cultural Rights (General Comment 4)

The familiar analysis applies: the state must take reasonable steps to satisfy the right to housing, and must respect, protect and fulfil the right, but progressively. Evicting people so that they will not have a roof over their heads is a failure to respect the right in many circumstances. The state must protect people from unreasonable eviction and harassment in housing by others, and it should have programmes for dealing with slums and homelessness.

The courts in South Africa have dealt with many cases of eviction, especially under their Constitution. And they passed a special law soon after it was adopted on prevention of illegal evictions – but this was particularly inspired by the fact that the Constitution says no-one is to be evicted from their homes without a court order. The Constitution of Kenya does not say this.

The Special Rapporteur on the Right to Adequate Housing

…recommends that the Government further review existing programmes as well as policies and laws being developed, in order to orient them towards the poorest, vulnerable or marginalized segments of the population, such as indigenous peoples, persons living with HIV/AIDS, disabled persons, the Watta community,19 other formerly or currently destitute pastoralists, and forest dwellers. The Special Rapporteur recommends that the Government establish an emergency assistance programme for extreme cases of humanitarian crisis, such as the community in Huruma village in Kieni forest, who are being denied the right to adequate housing.

Report on Visit to Kenya, 2004

Work

The International Labour Organisation (ILO) says "Decent work sums up the aspirations of people in their working lives – their aspirations for opportunity and income; rights, voice and recognition; family stability and personal development; and fairness and gender equality." "Decent work" is not a phrase used in the Constitution of Kenya. However, the International Labour Organisation did work with COTU and Kenyan employers to produce a Decent Work programme for the country.

The Constitution does not include an explicit "right to work", but it does say that everyone has the right to life – and in various countries the right to life has been interpreted by the courts as including the right to livelihood. The Constitution does say that everyone has the right to fair practices at work, including fair pay and working conditions, the right to join a union and the right to strike. For more information on what fair working conditions are we can look at the international agreements that Kenya has agreed to, especially those under the main international organisation dealing with work-related issues, the International Labour Organisation (ILO). Kenya is a party to 37 active ILO agreements, including

Right to Organise and Collective Bargaining Convention, 1949 (No. 98)

Equal Remuneration Convention, 1951 (No. 100)

Minimum Age Convention, 1973 (No. 138)

Worst Forms of Child Labour Convention, 1999 (No. 182)

The ILO has its own procedures for monitoring the way in which countries respect the conventions. Those ILO procedures have repeatedly criticised Kenya over various aspects of its labour relations law. But the ILO is not concerned simply to criticise, but offers guidance and assistance in fulfilling countries' obligations.

Poverty – and Development

"Poverty means not just insufficient income and material goods, but also a lack of resources, opportunities, and security which undermines dignity and exacerbates the poor's vulnerability. Poverty is also about power: who wields it, and who does not, in public life and in the family. Getting to the heart of complex webs of power relations in the political, economic and social spheres is key to understanding and grappling more effectively with entrenched patterns of discrimination, inequality and exclusion that condemn individuals, communities and peoples to generations of poverty."

Louise Arbour

"Basic human rights – the right to a decent standard of living, to food and essential healthcare, to opportunities for education or decent work, or to freedom from discrimination – are precisely what the world's poorest need most."

Kofi Annan

From the perspective of these distinguished commentators, it would be obvious that a Constitution would be very relevant. The Constitution of Kenya is, like all constitutions, about power. But ours is designed to prompt a significant shift in distribution of power. Devolution – bringing government closer to the people – a more equal electoral system, more seats for women in Parliament, more equal allocation of resources, fairer use of land and more accountable government are all ways of moving power away from those who have traditionally wielded it to the ordinary person. These are all discussed in other chapters. As we discuss there, it is precisely because power would shift that we can expect the ruling classes, both political and economic, to resist strongly, indeed fiercely.

Development as a right

The Constitution is also about rights – and the rights we have looked at in this chapter are especially relevant. You may have heard of the Right to Development.

Right to Development

The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.

UN Declaration on the Right to Development Article 1

Poverty is perhaps the gravest obstacle to the true development of the human person and of societies. Development is really another side of the same coin as realisation of rights, especially socio-economic rights.

We can also view rights as a way to achieve the Sustainable Development Goals, to which Kenya has committed itself.

It is often argued that the best way to achieve development is not merely by respecting rights, but by adopting a "rights-based approach" to development. This means putting rights at the centre of policy, making rights the starting point of policy making. The Constitution could be said to adopt

this philosophy. It says that: "The Bill of Rights … is the framework for social, economic and cultural policies". To make this a reality requires not only that citizens understand their rights, but that politicians and all public servants have a good understanding of rights.

The 17 sustainable development goals (SDGs) to transform our world:

GOAL 1: No Poverty
GOAL 2: Zero Hunger
GOAL 3: Good Health and Well-being
GOAL 4: Quality Education
GOAL 5: Gender Equality
GOAL 6: Clean Water and Sanitation
GOAL 7: Affordable and Clean Energy

Affirmative action

If certain groups of people have been left behind for a long time – in terms of education for example – it is going to take more than equality of opportunity to enable them to be really equal. A positive effort in terms of extra resources and other forms of help may be needed. The Constitution recognises this. In fact, it goes further than saying that putting in something extra is not discrimination – it says that the government must take steps necessary to bring groups, and individuals up if they are otherwise going to be stuck in a disadvantaged position because of discrimination in the past (see also pp. 42-4.).

This idea can be used politically – to evaluate social programmes (is special care being taken to deal with problems of disadvantage?) and even perhaps legally.

Environment

The environment is the physical context in which we live: the air we breathe, the water not in taps but in the sea and the rivers, the living plants and animals that live around us. Kenya's environment has deteriorated severely. The major challenges are:

- many natural water courses are seriously polluted and water scarcity is grave
- forests have been depleted by logging, transformation of forest land into other uses, and charcoal production
- the air in town is polluted by poorly maintained vehicles
- land is eroded because of deforestation
- waste disposal is inadequate, causing pollution and disease, with little formal but much informal recycling – with risk to health of those involved.

The Constitution tackles the issues in a number of ways. It recognises that everyone has the right to "a clean and healthy environment". This right brings in responsibilities of the state set out in the chapter on land – such as

- the sustainable use of environmental resources
- working towards having 10% of Kenya's land surface covered with trees (Kenya Forestry Service claims it is now 6.99% covered)
- encouraging public participation in environmental protection
- protecting biological diversity
- using procedures for the protection of the environment such as environmental impact assessment.

The strategies of action discussed earlier are relevant to environmental protection. There is no environmental right precisely protected in human rights treaties (except for the rather narrow idea of "environmental hygiene" under the right to health in the ICESCR). But Kenya is a party to the Convention on Biological Diversity and it reports to the Conference of Parties to the Convention through the National Environmental Management Agency. This is not like a human rights treaty – there is no scrutiny and comment by an international body. Other treaties include the Ramsar Treaty on Wetlands (under which the Rift Valley lakes are supposed to be protected).

From these reports you can learn a good deal about what ought to be done to protect Kenya's environment, and about plans and laws. You will also learn a good deal about what is not being done – plans not implemented.

The Indian courts have dealt with a number of environment cases, some of them with huge implications. The Supreme Court ordered that all Delhi buses be changed from diesel to compressed natural gas. Another case ordered 127 tanneries closed because they polluted the River Ganges. Implementation can sometimes be a problem though – many of the tanneries just moved downstream. But the Delhi buses did change.

Air in Kenya may not be as polluted as some places (but data is limited). However, some estimates put outside air in Nairobi at 70% above the WHO recommended level of fine particulates (microscopic but damaging bits of matter that damage lungs). And indoor air pollution is about three times as bad as recommended levels – in informal settlements, where people cannot afford safe fuels and where ventilation is bad.

Land

Land is important for the economy, politics, livelihood, culture, and development of the people. Almost everyone attaches importance to the idea of owning their own land. And security of land rights (not necessarily ownership, but at least a sense that you will not be kicked out without reason and without notice) is very important for social justice, and for government policies like food security. Land policies have been the single most important factor in the shaping Kenya's history and caused many problems, including:

- under colonialism, many communities were dispossessed of their land
- since independence, much land has been taken over illegally by a few families and individuals, much of it uncultivated
- many families have no land or such small parcels that they cannot sustain even subsistence
- thousands of families have been displaced from their homes and farms, often victims of politics
- many people live in informal settlements, without legal title
- land rights of many others are disregarded or under threat, particularly minorities like the Nubians, forest dwellers and pastoralists
- laws on land law are voluminous, complicated and unfair, open to abuse
- land administration is highly centralised, grossly inefficient and corrupt
- the quality of land has deteriorated and the environment been degraded.

Fundamental reform of land legislation is necessary to solve these problems. Chapter 5 of the Constitution sets out the principles and framework for reform.

Principles of land policy

There are seven major principles (Art. 60), aiming at

- equitable access to land
- security of land rights;
- sustainable and productive management of land resources
- transparent and cost effective administration
- sound conservation and protection of ecologically sensitive areas
- elimination of gender discrimination in law, customs and practices related to land and property in land; and
- the settlement of land disputes through recognised and fair local community initiatives.

Categories of land ownership

Land is divided into three categories: public, community and private, under the fundamental principle that "All land in Kenya belongs to the people of Kenya collectively as a nation, as communities and as individuals" (all freehold owned by non-citizens is now supposed to be for 99 year leases, and all their leases, if now longer, are reduced to 99 years (Art. 65) - presumably from the date of the Constitution). Public land is land held by a state institution, land designated as such by the Constitution itself (such as rivers, lakes, specified roads, and the continental shelf) or by legislation, for the public good.

A county government will hold public land within its boundaries that is not held by the national government or national state bodies, and hold community land that is not registered in trust for the community in question.

The land held by the national government includes government forests other than community forests, government game reserves, national parks, water catchment areas, water bodies, and specified roads. All minerals and mineral oils also belong to it.

Has the Constitution led to improvement in land law and rights?

All the major land laws have been changed and the new Community Land Act was passed in 2016. Here we look at a few of the land issues. Among the positive developments are:

Community land

Community land is a new category. Most of it is what used to be called "trust land". The concept of "trust land" was established shortly before independence, covering particularly land which was still governed by customary land law. The land was held by county councils, for the benefit of persons ordinarily resident on that land, and was governed by community law. However, it was possible for the councils to convert trust land to another type of land holding system, or set it aside for another use, for the benefit of the community. The president also could set aside trust land for similar purpose.

The effect was that the community control over its land passed effectively to counties or the central government (and customary rights were disregarded). There was widespread abuse of the law, much land being disposed of illegally by county councils or the president.

The objective of the Constitution is to return ownership and control of this land to the relevant communities. However, the transition to the community control will take time, as communities entitled to land are identified and the multiple interests of all land users are taken into account.

The conversion to community land can solve some pressing land issues. It could be used to restore ancestral land and land traditionally occupied by communities such as the Ogiek and coastal communities, and cover communally managed forests and grazing areas. Land disputes could be resolved through traditional methods. Community land cannot be disposed of or used without regard to the rights of members of the community. People also hoped that land that had been lost to communities through past injustices could be recovered by the Land Commission and become community land.

Community Land Act:

- Various types of community may hold community land, including - groups with common ancestry (like clans or families), those with similar culture or unique mode of livelihood, socio-economic or other similar common interest, those sharing a geographical space or an "ecological space" or sharing ethnicity.
- The form of ownership of the land can be customary, freehold or leasehold
- Customary land rights have equal status in law with freehold or leasehold rights
- The idea is that the land should eventually be registered
- Meanwhile, if it is not registered, the county government will hold it in trust, but must not part with it unless it is compulsorily acquired for public purposes, in which compensation must be paid to the owners once the land is registered
- A community that wishes to hold land under the Act must register, and have a management committee, and a community assembly of all the adults
- A process must be set up for adjudication of community land for registration
- Customary rights of occupancy of land are recognised
- There must be no discrimination in the use of and rights in customary land.

This is quite a complicated law. But some NGOs have a programme to help communities to comply with it.

> "Guidelines on practical matters and problem solving are needed, improved over time as experiences accumulate. These should go beyond providing guidance on how to make by-laws, into more thorny matters such as fairly deciding community membership at the outset, deciding whether community members resident in towns for most of the year should have the same voting rights as resident members, devising workable land sharing agreements across boundaries in especially pastoral communities, handling contradictory tenure aspirations within communities, overcoming customary norms limiting the rights of women and other presently land-disadvantaged groups, operating the Community Assembly as genuinely the ultimate decision-maker, raising quorum requirements as necessary, including achieving a reasonable gender balance."
>
> Liz Alden Wily[3]

National Land Commission

A very important part of reforming the land system is played by the National Land Commission (NLC), one of the independent commission under the Constitution. Its functions include the management of public land on behalf of the national and county governments, to ensure efficiency and integrity. It has important advisory functions and other administrative responsibilities, and general oversight of land use planning. Given the distribution of responsibility over land between the national and county governments, it has a key co-ordinating role. (Art. 67). It has faced problems, especially in its relationship with the Ministry of Lands, as well as with allegations of corruption of improper conduct internally.

It has been involved in some important functions under the Constitution. One is the taking of land for public purposes (one example is for the Standard Gauge Railway and other projects). The Constitution provides that land must be taken only for genuinely public good, and by a fair process.

The Commission has reviewed many allocations of public land, and revoked a large number of titles.

Redressing historical injustices

In keeping with the general objectives of the Constitution, Chapter 5 addresses the question of historical injustices regarding land. Some communities (especially the Maasai and the coastal people) were deprived of their ancestral lands, first by colonialists and then by well-placed families and individuals. Land was taken over illegally by leading politicians and civil servants (and granted to their friends). These developments have caused bitterness among communities, loss of critical economic resources to families and communities, brought poverty to thousands of people—and led to the consolidation of the ruling class.

The NLC has responsibility for this process also. It was a long time before the necessary legal framework was in place, and it was only able to start this process in 2017. And it can only make recommendations.

3 https://www.mdpi.com/2073-445X/7/1/12/pdf.

Rights of special groups

The Constitution specifically recognises the rights of people who have occupied land in good faith and legally but without title (as is not uncommon) by providing that they must be compensated if their land is acquired compulsorily (Art. 40(4)).

It also protects the legitimate interests of marginalised communities, like Nubians, forest people and pastoralists, as mentioned above. Equitable access for all to land is to be ensured.

Women are special beneficiaries of the Constitution, including in connection with land (See Chapter 5). But women still own a tiny proportion of the land.

Natural resources

The Constitution requires the state to ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and the equitable sharing of the benefits (Art. 69). Parliament has to approve all agreements for the exploitation of any natural resources (Art. 71). Unfortunately, it is not clear whether natural resources include land. And Parliament, which had to pass a law specifying which transactions require its approval, only included transactions concerned with minerals, water, wildlife and forests.

Implementation of the land provisions face additional problems because the way they are written is not always clear. Some provisions seem to go beyond what is necessary to achieve the policies, others are ambiguous, while some lack firm and robust language to provide adequate authority for the necessary action. There have been major changes in the land law since the Constitution, and many improvements (including that the President may no longer give away public land). But many problems remain.

Culture

"Culture" is a word that arouses strong emotions. People complain that practices are "against their culture", or that they are not allowed to "practise their culture". Culture has been defined as "The system of shared beliefs, values, customs, behaviours, and artefacts that the members of society use to cope with their world and with one another, and that are transmitted from generation to generation through learning". It can include food, dances, rituals and art that are physical manifestations of culture, as well as language. And it includes structures of society and attitudes, and religious and other beliefs.

Culture has another, if related, meaning: the products of the intellects and imaginations of people, including literature, music and visual arts.

Culture in the first sense tends to be an issue when people feel threatened, especially in danger of marginalisation. It can also be manipulated politically – you can see it in countries where people are encouraged to voice fears about threats to their cultures, when their real fear is of the unknown (people of a different colour) or even of economic threats. The challenges for any society where there are people with more than one culture (any society these days) are to enable people to feel secure in their own communities and cultures, but not hostile to others, and to persuade them not to use their culture as a form of shelter, but as a springboard. And the position of women and minorities within cultures often offers a particular challenge. How can right to culture be fully compatible with the full range of human rights?

The Constitution deals with culture in various ways.

Community culture

No-one may discriminate against on the basis of their culture – or their dress (Art. 27(4)). And everyone has the right to practise their culture, and to form cultural associations (Art. 44). Another Article says that the state must promote culture including traditional celebrations and "cultural heritage" generally (Art. 11).

But culture is a matter of choice; people have a right not a duty to observe their culture. No-one may compel anyone else to take part in any cultural practice (Art. 44(3)), and this is repeated and strengthened in connection with children: every child has the right to be protected from harmful cultural practices (it would not be possible to argue that a child had consented). This probably refers mainly to physical practices (like FGM).

There may be other negative aspects to community culture – both in relation to members of other communities, and to members of the community itself. Treatment of women and persons with disability is sometimes an area of disagreement. The Constitution is firm that tradition must be subject to the Constitution (including the human rights provisions).

"the failure by the Government to draw up a Management Plan to preserve Lamu Island as a UNESCO World Heritage Site despite various declarations by UNESCO that it does so amounts to a violation of the right to culture of the Petitioners and the local Lamu Community"

High Court in *Mohamed Ali Baadi and others v Attorney General* (LAPSSET case)

Artistic and scientific creativity and learning

Creativity is perhaps always partly a matter of culture. But in modern societies it is often viewed as an individual matter – signed by the creator. Scientific advances, especially in agriculture and traditional medicine, in developing societies particularly, are very often a product of community efforts over centuries, and no individual can be credited with them. And styles of artistry – such as the "dot paintings" of the aboriginal peoples of Australia, or the beadwork of the Maasai - are thought to belong to the community and there is sometimes resentment if outsiders use the technique. The Constitution does deal with these issues in several ways by providing that the State:

- must promote all forms of cultural expression, traditional and others, including literature and the arts
- must support, promote and protect the intellectual property rights of the people of Kenya (this appears under the right to property, but also under the Culture article, which has a less clear legal status)
- must ensure that communities are compensated for the use of their culture and cultural heritage
- protect ownership of indigenous seeds and plant varieties (this implies preventing commercial concerns from patenting plants nurtured and adapted by communities) (Art. 11).

There are dilemmas about traditional and communal creativity: how to prevent the artistic creations of communities being used for the benefit of commercial concerns, without any benefit to the community, while not making the most of the creativity of humanity, as an asset of mankind. Languages are among the most important creations of communities – but it is not conceivable that the Swahili people would demand to be compensated because their language has been used by all the other peoples of Kenya!

There are international treaties, to which Kenya is a party, that are dealing with issues of cultural heritage protection. And we mentioned earlier that international law like this is to be viewed as part of Kenya's law. The Convention for the Safeguarding of the Intangible Cultural Heritage has machinery for listing cultural practices that are in need of protection. In 2018 there were added to this list three male rites of passage of the Maasai community which "educate young boys about a man's role in society, transmit indigenous knowledge to the younger generation and induct them into moranhood, then into the category of young elders, and finally into senior elder status". These are threatened by changes in Maasai lifestyle.

An Act of Parliament – the Protection of Traditional Knowledge and Cultural Expressions Act – was passed in 2016.

Language

No-one may be discriminated against because of the language they speak. Everyone has the right to use the language of their choice. Since language is a means of communication, and Kenya is a country of at least 60 languages, it is clearly not possible for everyone to expect to use their own language in all circumstances. A law that limits anyone's right to use their own language must satisfy the test of the Constitution of being reasonable and serving a good purpose.

The national language of the Kenya is Kiswahili and the official languages Kiswahili and English (Art. 7). There is no precise legal significance of "national" or "official" language. The state must protect and fulfil the right to use one's own language – as with any other right – and this is reinforced by the statements that the state must protect and promote the diversity of Kenya's languages, and must especially promote indigenous languages (Art. 7(3)). What these provisions precisely mean will have to be worked out over time.

The right to use a language of a community is reinforced by the statement that everyone has the right – with the other members of the community – to use their language and to join associations based on language (Art. 44). But a political party based on language affiliation is not allowed.

A particular issue in many countries is the language used in schools. Educational research is clear that children learn better if they do so first in their mother tongue. Kenya does not always achieve this – and not all parents or teachers are convinced. Issues may well come up, even in court, involving provisions in the Constitution about the best interests of the child, promoting languages and availability of resources.

A National Language Policy is in the process of being developed.

Religion

Religion raises particular issues as an aspect of cultural heritage and in other ways. On the whole Kenya has been relatively free of religious tension, and the drafters of the Constitution were keen to keep things this way.

There is to be "no State religion" (Art. 8). A number of countries do have official religions. The Anglican Church is the state church in England. Thailand is officially Buddhist. Exactly what having "no State religion" means will have to be worked out over time – if people feel strongly enough to take the matter to court. Otherwise it may well be that nothing much changes.

The Constitution says that no-one may be discriminated against on the basis of their religion or belief (Art. 27). And there is a very specific provision saying that no-one can be denied access to any institution or to employment or any facility (like a hospital) because of their religion, whether these are private or public ((Art. 32(3)). Reasonable exceptions are possible as usual: churches are not forced to have Hindu priests! Everyone has the right to freedom of religion – and may practise and manifest (make clear) their religion, including in public, by worship or teaching or other form of observance (Art. 32). The obvious issue comes when people want to actively convert others, which is a form of religious duty for some. The state is probably free to regulate this, reasonably, to prevent it being offensive or causing conflict.

There are a few other points about religion: no-one must be forced to do anything that is contrary to their religion – for example to eat beef if they are Hindu, or pork if they are Jewish or Muslim. A right to a day of worship is also particularly mentioned.

Cases have been brought to court on whether school children should be allowed to wear variants on school uniform to comply with their religion, like a hijab or a turban. And other cases have raised the issue of whether workers can be compelled or students to attend class on holy days of rest.

We mentioned earlier that Islamic personal law in the Kadhi court is not subject to the equality clause of the Bill of Rights.

Finally: the whole Constitution should be read in the light of the general principles set out in the Preamble:

> PROUD of our ethnic, cultural and religious diversity, and determined to live in peace and unity…

Security

The Universal Declaration of Human Rights was passed in 1948 to ensure for people, among other things, Freedom from Fear – in the words of the Preamble. The sources of fear in Kenya are well known, including:

- cattle theft in pastoral areas
- rape and domestic violence
- political violence especially at election time

- Terrorist violence (something that has become prominent since the first edition of this book)
- gangs
- robberies, etc.
- even travelling by road induces fear – Kenya's road accident rate is very high (see p. 63)

In addition, there are assaults by citizens upon others and deaths in police custody and in shootouts. And there is a good deal of evidence that certain elements in the police are involved in some of the "ordinary" crimes.

Inequality

There is reason to suppose that the causes of insecurity include inequality. Evidence shows that social problems are worse in unequal societies, and Kenya is very unequal.

Overall government policies contribute to inequality – but so also do some factors that are beyond government control. It is unrealistic to assume that a constitution can solve all these problems. But there are some ways in which the Constitution of Kenya may help to reduce inequality:

- by rights to education, health, food and housing - discussed earlier in this chapter
- by the system of county government that should, if properly implemented, bring more control of government, and more resources for government, closer to the people.
- by its stress on equality that runs through the document
- by generally enhancing democracy e.g. if 50% of Kenyans are poor, and they use their votes wisely to elect those who genuinely have the interests of the poor at heart, and the capacity to carry out policies to benefit them (and not just those who shout loudest about the poor)

Violence in society

Political violence does not just happen. Mostly it is instigated by people with something to gain. The Waki Commission was clear that political violence was linked with, indeed caused, more general violence in society:

> ….the growing politicization and proliferation of violence in Kenya over the years, specifically the institutionalization of violence following the legalization of multi-party democracy in 1991. Over time, this deliberate use of violence by politicians to obtain power since the early 1990s, plus the decision not to punish perpetrators has led to a culture of impunity and a constant escalation of violence. … What this means in practice is that violence is widespread and can be tapped for a variety of reasons, including but not exclusively to win elections
>
> (Waki Commission of Inquiry into Post-Election Violence Report, Chap. 2).

Impunity we discuss next. Instigated violence has two sides – the instigators and those who allow themselves to be manipulated. It is understandable - if not excusable - that young poor people with no prospects find it hard to resist the lure of a little money and more than a little excitement. It is less understandable that men of some wealth, status in society and mature years can reconcile themselves to ruining, even ending, the lives of their fellow citizens for personal gain. It is regrettable that responsible citizens would vote for them.

Impunity

Preaching, however, is not what constitutions are about. Unfortunately, the law has to assume that some people will not have the moral strength to do what is right, and must ensure that those who do not are punished. In the past that has hardly ever happened. The police can be bribed. The system seemed reluctant to prosecute "big fish" – big financially or big politically, though money can buy political influence anyway. Police we discuss next. The Constitution also tries to tackle impunity by providing for an independent prosecution system, taking away from the Attorney-General the ability to stop prosecutions (see p. 93). Strengthening the independence of the judiciary, and creating a new court, the Supreme Court, to give leadership to the entire judiciary are also relevant to impunity.

These changes are part of an important role of the Constitution – to try to restore some faith in public institutions in Kenya. Faith in the police, the system of prosecutions and the courts had been at a very low level (along with faith in parliament, government and politicians). These institutions are the framework of the state, and without them being effective, people are inclined to think that public morality does not matter – forgetting perhaps that lack of public morality hurts private people.

Policing

Kenyan police have been too few, poorly paid and resourced, poorly led, poorly trained (especially in the use of firearms or restraint in their use) undisciplined, not always politically neutral, and many of them only hold office because they have bribed their way into the service.

Among the rights in the Constitution are rights:

- not to be subjected to any form of violence from either public or private sources
- not to be subjected to torture or to cruel, inhuman or degrading treatment (Art. 29).

Most acts of violence and torture are already offences under the law, but recognising rights not to be victims in the Constitution does offer some other possible approaches. The State has the obligation to protect rights. If the police fail to provide protection, with the result that a community is terrorised by cattle thieves or gangs, for example, they might consider legal action against the State, even though they cannot identify their tormentors – who would have no resources to compensate them anyway. And "torture or to cruel, inhuman or degrading treatment" covers a wide range of mistreatment. And, says the Constitution, they can never be justified (Art. 25).

There are a number of important principles in the Constitution about the security services including the police:

- they must respect human rights (Art. 244)
- they must respect the diversity of Kenya, and recruitment to the forces must reflect the national diversity – so that the security forces cannot become a tool for one section of the community to oppress another (Art. 238(2)(d))
- they are subject to civilian authority (Art. 239(5))
- they must be politically neutral (Art. 239(3)).

The Constitution created a new National Police Service Commission with the responsibility to appoint and promote members of the police service, and to exercise discipline over them (Art.246). The members are formally appointed by the President. However, the Act of Parliament says the President must set up a selection panel. This advertises for applicant, interviews and submits three names to the President for the position of chair, and one each for the other members. The Constitution says that the members of the Commission must all be approved by the National Assembly.

The appointment of the Inspector-General of Police, must also be approved by Parliament. In law passed soon after the Constitution a process for identifying candidates for IGP was set up the National Police Service Commission recruited the IGP, and the choice of the President limited. However, that law was amended, and the President now selects the individual, who must then be approved by Parliament. But Parliamentary approval is rarely an effective control over the President's choices, since a majority of MPs are from his party. The High Court rejected an objection to this change in the law, saying the law now corresponded to the Constitution. The IGP is to be independent, and no Cabinet Secretary may give instruction about particular investigations or appointments. However, the Commission makes most senior appointments to the police, and identifies the heads of the National Police Service and the Administration Police, whom the President must then formally appoint.

The NPSC is also responsible for police discipline. It has been "vetting" police officers and retiring some for various reasons, though it does not have enough resources to conduct this operation as it should.

As mentioned earlier, violence from the police themselves is a major concern. Soon after the Constitution a new law was passed on the police, with a number of good provisions, including limiting, in a sensible way, police use of firearms. But this law was changed again a few years later. A case is before the courts, arguing that the current law is unconstitutional, giving too little control over police use of violence.

An important development was not a requirement of the Constitution, but is very much in line with the Constitution's emphasis on accountability. That is the Independent Police Oversight Authority. There has been some disappointment that it has led to very few convictions of police officers for killing and other abuses of power. But at the end of 2019 IPOA said that 75 cases against police were before the courts.

Terrorist activities have been a serious worry to the public and to the government, including the security services. They have also encouraged the use of increased surveillance over the public and increased control over their activities. The courts have held that some changes in the law were unconstitutional because they went too far in limiting rights.

"the fight against terrorism must be conducted in strict adherence to the letter and spirit of the Constitution, and the law, that is the rule of law"

High Court in *Muslims for Human Rights v Inspector-General of Police*

The people of the North Rift region have been suffering from considerable insecurity. A Kenya National Commission on Human Rights report made connection with the Constitution. It said that contributory factors to the situation included:

- historical and cultural factors
- political incitement
- manipulation of historic boundary uncertainty
- discovery of minerals
- exclusion of some communities.

They found in their inquiry that "The violators of human rights in North Rift are the KDF, NPS, Government Officers, the Pokot, Turkana, Il Chamus, Marakwet, Tugen Samburu and regional countries bordering the region"

And their recommendations show how a wide variety of constitutional provisions can be relevant to this sort of situation. They included:

- Failure to respect the rights to health and education needed to be remedied
- The Equalization Fund (see Article 204) should be under the control of the County Governments
- There is need for an elaborate civic education programme to sensitize people of North Rift on the relevant provisions of the Constitution including: how boundaries are determined, who determines them, being a Kenyan and particularly the Bill of Rights and the fundamental human rights

They also recommended various changes to policing and security practice in the area.

Who is responsible – the national government or the county?

We have emphasised that protection of rights is not just something for the State. We are all responsible. But realistically in many situations, even if the State has not committed a positive violation it will be to government that people will look for fulfilment of their rights. It is important to understand where the responsibility lies.

Under the system of county government certain things are the responsibility of the national government and others of the county. Educational issues will be mainly the responsibility of the national government, and health of the counties. It is best to try to target the government with the responsibility.

But there are only national human rights commissions, not county ones (though the commissions have set up some local offices). And the national government still holds the main purse strings and it also has the power to pass laws on any topic – and it should do so to ensure that human rights are respected, and that standards are equal across the country.

Some questions to think about:

1. Do you think there can be a serious problem of culture clashing with human rights?

2. Do you think it is important to protect languages from dying out? How should this be done?

3. Violence against women is a serious problem in Kenya (and many other societies). Can you see ways in which the provisions of the Constitution may help to deal with this problem?

4. How might the system of human rights play a role in making government and other state agencies more accountable?

5. The values of the Constitution go directly contrary to some attitudes shown especially in politics. Democracy, tolerance, respect, justice, equality and unity: are there any of these do you not agree with – and which of these supports violence against your neighbour?

6. What does "impunity" mean? How does impunity for politicians and some wealthy and powerful people affect the lives of the poor people? What steps can people take to reduce impunity?

Part Three

Building the State

Chapter 7

The Executive and the Legislature

This is the first of two chapters about state institutions – the offices and bodies that the Constitution creates. This chapter is about the core governing institutions: the "executive" which means the president and the cabinet, and parliament – or legislature, the law making body which consists of the National Assembly and the Senate. This chapter focusses on the elected element in national government.

When you have finished this chapter you will:

- *understand how the executive is made up under the Constitution*
- *understand the relationship between the President and Parliament*
- *understand why countries might choose a presidential system or a parliamentary system, and which system Kenya has chosen*
- *have thought about how stable the new system is, how effective the government, and how accountable to the people.*

Why do you need to know about how the state works?

Many people think of the institutions of the State as "them" – they rule the country, they tell us what to do (if we don't like it, we may try to get away with disobeying, but realise we may not succeed) and once every five years we have a chance to vote for at least the politicians. Cynicism about parties and politicians is widespread – and not just in Kenya. Participation in voting has fallen in most of the world, and many people feel that voting is a waste of time: it makes no difference, all politicians are basically the same. In Kenya no more than two-thirds of those who could vote actually do so: the table below shows the turnout in the last four parliamentary elections: column 2 shows the percentage of registered voters who turned out, and column 5 the percentage of people of voting age (many people had not even registered). Of course a small proportion of the population are not citizens and so not entitled to vote. Many may not have IDs so cannot register.

Year *1*	Voter Turnout *2*	Total vote *3*	Registration *4*	VAP Turnout *5*	Voting age population (VAP) *6*
2017	79.51%	15,593,050	19,611,423	62.74%	24,849,931
2013	85.91%	12,330,028	14,352,533	63.35%	19,461,360
2007	69.09%	9,877,028	14,296,180	54.49%	18,126,573
2002	57.18%	5,976,205	10,451,150	38.51%	15,517,826

The authors don't believe that voting can't change anything. We also believe that voters ought to understand something about why they are voting, and what the people they vote for are supposed to do.

But it is true that there are other ways in which government may be influenced. And the Constitution places a lot of emphasis on active public involvement. It is helpful for anyone who wants to be an active citizen, involved in decisions, making their views known, to know how government decisions are made, so that they understand where their views are likely to have the most impact-

Main features of the Kenyan State

The Constitution emphasises that Kenya is:

- a republic
- multi-party - and
- democratic.

It is founded on the values and principles which we have already noted (see Chapter 3). The national language is Swahili and the official languages Swahili and English. But as Kenya is a multi-cultural society, the state must promote and protect the diversity of language of its people (Art. 7). And also because Kenya is a multi-religious society, its official status is secular; Article 8 says, "There shall be no State religion"; we discussed what this means in Chapter 6. It does not mean that the Constitution is opposed to religion. Quite the contrary: the Preamble ends GOD BLESS KENYA!

What does "republic" mean? A technical sense is that Kenya does not have a king or queen. There is a slightly extended meaning of the word, that elaborates the idea that the authority to govern comes from the people and not (as in a monarchy) from the right of a monarch. As a member of the CKRC said at Bomas, "authority comes from the people, it is exercised by others as representatives and those who exercise do so during the pleasure of the people and during their good behaviour." This is also essentially what Article 1 of the Constitution says when it talks of the "sovereignty of the people".

Different levels

How many levels of government the Kenya state should have has long been controversial. Kenya was ruled for most of its history as a unitary state, with all powers belonging to the central government. We explained in Chapter 1 how the system of regional government was abolished soon after independence.

After that there was widespread discrimination by the central government against some ethnic communities and the districts they lived in. Rural areas were neglected, and much of the development took place in Nairobi and a few other urban areas. Services in rural areas declined, and in any case were often not close to many people. Many people migrated to cities, even when they had no jobs there—and led miserable lives in slums. During the constitution reviews many groups demanded the decentralisation of powers to provinces and districts, so they would be responsible for social services and the economic development of their areas.

There are now 47 counties which follow the boundaries of districts soon after independence. The powers and functions of counties (the process of giving powers to lower levels of government is called "devolution") are discussed in Chapter 9. At this stage we just want to say that the establishment of county government opens up new avenues for participation and local choices, with multiple centres for decision making, which can either be vehicles of constructive policies, participatory politics, and clean administration or dens of corruption and irresponsibility which have characterised the central government.

Two important principles for devolution are stated in Article 6: relations between the national and county governments must be based on inter-dependence and be consultative and co-operative; and delivery of services by the national government must be reasonably accessible in all parts of the Republic. These principles are elaborated in other parts of the Constitution, particularly chapters 11 and 12.

Structures of government

The provisions on structures of government are about state building. They tell us about the distribution of the powers of the state; and how the institutions which are given these powers are composed (e.g., who are represented and how), and the rules and procedures by which these powers must be exercised (e.g., after proper consultation, in a transparent manner). They are also about the relationship between institutions - like whether there is overlap, as there was between the president and parliament in the previous constitution, or whether one institution checks another (e.g., the National Assembly approving appointments made by the president). The way that these institutions relate to the people is also significant (e.g., the Constitution gives the courts a special responsibility to protect human rights, even if the person starting the case does not follow formal legal procedures, and gives the voters in a constituency to right to recall their MP for neglect of duties, and the obligation of the legislature to facilitate people's participation in law making).

Ideally, the structures of government should work in ways that achieve national values and objectives. Unfortunately, this cannot be guaranteed. Even if the institutions are designed very carefully to be consistent with those national values, they may actually operate in unexpected ways. This is often due to forces outside the Constitution (we can take the example of parliamentary approval of appointments, which tends to be very much affected by politics outside parliament – see Chapter 4). Stating national values explicitly, and providing strong sanctions for their breach - exactly what the Constitution tries to do – is of some importance. Whether it succeeds will depend on whether we can remove our deep rooted culture of corruption and impunity. So far progress has been disappointing, though there are some signs of authorities taking corruption seriously.

There is another reason why the values and the institutions may not match: some people are interested in and focus on values (concerned with national unity, democracy and social justice), while others are focussed on institutions (concerned with power and access to it). The former pay little attention to institutions and the latter little to values. As the CKRC went round the country collecting views, most recommendations it received concerned livelihood issues, land, better protection of rights, and more accountability from officials. Most submissions from civil society organisations focused on human rights, occasionally group rights - as with those speaking for indigenous peoples. Politicians or political parties did not make many submissions, but when they did, the focus was on state powers and institutions. The same pattern was repeated in 2010 with civil society pushing for human rights and social justice, while the Parliamentary Select Committee at Naivasha, politicians concerned with power, tore into the CoE proposals on structure of government (which echoed much of the Bomas draft), introducing an executive presidency - disregarding the arguments for a more collective executive as more suitable for a multi-ethnic society, as well as more accountable.

National Executive

We now discuss the structure of government, especially at the national level. The head of government and his or her relationship with the legislature is at the heart of the various systems of government.

The choice of system

This was perhaps the most controversial issue at Bomas and during the 2009-10 process. We summarise the difference between parliamentary and presidential systems at the end of this chapter. Why choose one or the other? The main arguments for a parliamentary system are that it is potentially more inclusive (since executive power is exercised by a cabinet which can be drawn from different communities and regions, rather than by one person); it is more accountable as ministers sit in the legislature and can be questioned on policy and administration; it is more democratic

since the government can be removed by a vote of no confidence, and the parliamentary system encourages the rise of well organised and vibrant political parties. Deadlocks between the executive and the legislature can be resolved by the dissolving of the legislature and having a general election – this is different from the presidential system where the president is less likely to have a majority in the legislature, which leads to more deadlock situations, and where early dissolution is not possible as the executive and the legislature have a fixed tenure. In these ways the parliamentary system comes closer to the Kenyan constitutional objectives.

The arguments in favour of the presidency are that it provides a stable government (unlike the parliamentary system where the executive can be removed several times during the life of the legislature). It is argued that the president is a strong leader, able to both hold the country together and promote economic development. And the system is said to be more democratic and accountable since there is a greater separation of powers and better checks and balances.

Readers will realise that arguments of this sort about systems and how they work in theory may bear little relationship to how they work in a real live country.

During the CKRC/Bomas process there was majority support for parliamentary system (but the government did not like it and the "Wako draft" – a mutilated version of Bomas – returned to the presidential system). In the 2009-10 process the people's view was less clear, and it seems that they shifted somewhat to favouring the presidential system, perhaps due to squabbles in the coalition government, which people associated with the parliamentary system. The CoE at first followed the Bomas proposals (basically parliamentary) but the PSC came out unanimously for a presidential system—and the CoE gave in. So now we have a presidential system – the main features of that system have been summarised in Chapter 2. One important point is that the president and the legislature have identical fixed tenures, designed to ensure stability – assuming that a majority of members of parliament will support the president.

Is ours the American system?

The presidential system most people are probably most conscious of is the US system – and the Parliamentary Select Committee based its ideas on that system. But there are some differences – and naturally it will work differently in Kenya, because of the different political culture and other factors (especially a very different party system).

The main points of similarity (*) and difference (§) are:

* In both countries, who is President does not depend on which party has the largest number of seats in Parliament, but on an election among the people for the President

* President and cabinet secretaries are not members of the legislature in either system

§ The Kenyan President and Parliament are elected at the same time and there is no "mid-term election" part way through the life of Parliament that can change its party make-up (as happened in the US in 2018)

§ The Senate in Kenya has a less extensive role than in the US – where it has to debate every law, and has full powers to supervise government

§ *Appointments (such as Cabinet Secretaries) in both have to be approved by a house of the legislature but in the US have to be approved by Senate and not the House of Representatives while in Kenya it is by the National Assembly.

The President

At each level the government is headed by a chief executive – the President at the national level and the Governor in the counties. The president is elected directly; to win the elections a candidate must receive the votes of more than 50% of those voting, and at least 25% of the votes cast in at least half of the counties. If no candidate obtains these votes, the two top candidates will compete in elections to be conducted within a month; at this stage the candidate with most votes wins (Art. 138). The term of the president is five years, and no person may have more than two terms. The president cannot be removed before the expiry of the term of office except on grounds of incapacity (Art. 144) or by impeachment (Art. 145). The election of the governor is much simpler: the person who gets the largest number of votes wins, even if this is less than half.

The president is the Commander-in-Chief of the Defence Forces—quite what this implies is not clear. The president no doubt has a major say on defence matters as the highest executive authority and as chair of the National Security Council (Art.240). No provision is made for the appointment of the Commander of the Defence Forces, leaving it to the president. The president also appoints the Inspector-General of the Police (Art. 245 (2)), but this must have the approval of Parliament.

The fundamental purpose of the exercise of executive power is service to the people of Kenya, and "for their well-being and benefit" (Art. 129(2)). The president is given various tasks about nation building: to symbolise national unity; respect, uphold and safeguard the Constitution, safeguard Kenya's sovereignty, promote and enhance the unity of the nation, promote respect for the diversity of the people of Kenya, and protect human rights and the rule of law (Art. 31). But whether a president succeeds in doing depends on the moral authority of the individual and the ability to rise above pre-occupations with ethnicity.

The Cabinet

Each chief executive heads a sort of committee: the Cabinet at the national level (Art. 130), chaired by the president, and the county executive committee chaired by the governor in the case of counties (Art. 199) and the members of each are appointed by the president or the governor.

Article 131 (1) (b) says that the president "exercises the executive authority of the Republic", although with the "assistance" of the cabinet, which consists of the deputy president, attorney general and no more than twenty-two Cabinet Secretaries (we shall usually call them just "CSs"). They are appointed and may be dismissed by the president but their appointments have to be approved by the National Assembly (Art.152). The president must dismiss a CS if the National Assembly passes a resolution based on a finding of gross misconduct or violation of the law (Art. 152(6)). There is little doubt that the real executive power is with the president, who chairs the cabinet meetings; directs and co-ordinates the functions of ministries and departments; and assigns responsibilities to cabinet secretaries (Art. 132(3)).

There are far fewer CS than there used to be ministers. Of course, ministries should now have rather less work overall because of the county system.

CSs need political skills which are not guaranteed by their being professionally qualified. They will need to explain and defend their policies before parliamentary committees, answer questions and persuade the members to support government policies. These tasks require skills of negotiation and persuasion, understanding the constraints under which MPs operate, and ability to make compromises. They also need to establish rapport with the public. And remember that the National Assembly can effectively remove a CS.

President's relationship with the cabinet

The president could appoint a CS from Parliament but that person would have to resign his or her seat. The president cannot dismiss the deputy president who is a running mate at the elections.

The assumption behind the rule about non-parliamentary CSs is that they would probably be drawn from outside the circle of politicians. The CKRC's original draft included such non-MP ministers. Its reasons for this rule were to ensure (a) the total separation of the executive from the legislature, (b) full time ministers, unburdened by constituency matters (and without the tensions that being both MP and minister generates), and (c) ministers qualified for their portfolios, to induce a spirit of professionalism in the conduct of responsibilities of the executive (in the past most ministers had little qualification for or interest in their portfolios).

This line of reasoning requires that cabinet secretaries are professionals, as well as satisfying the other Chapter Six criteria (requiring a record of integrity). A professionally qualified CS may be able to develop good relations with the principal secretary (previously called "permanent secretaries") and other staff—and be likely to resist overtly political directives from the president. If CSs are individuals who have been successful in their careers, and without political ambitious, they are less likely to be tempted to engage in corruption, and less obsessed about keeping their ministries, than ministers in the past.

In reality, President Kenyatta has appointed some CSs with background in the substance of the ministry to which they are appointed. An example at the time of writing is Margaret Kobia, former Chair of the Public Service Commission is now CS for the public service. And Monica Juma, CS Foreign Affairs, (now Defence) was an ambassador. But most of the rest are not in ministries that they have particular expertise for. In fact, the president quite often "reshuffles" the Cabinet – moving a CS from one Ministry to another (as Amina Mohammed began in Foreign Affairs, later was in Education and is now in Sports and Heritage), which suggests he does not much value their professional expertise. A good number are appointed to reward to ensure political support of communities or parties. Some are perhaps people the president trusts. Incidentally, American presidents may sack cabinet secretaries but rarely move them to a different department.

National Legislature

The national legislature (Parliament) has two houses: the National Assembly and the Senate. Those houses are elected for fixed terms – five years – and there cannot be any earlier dissolution of Parliament (except in one situation - see p. 23) and general election. This is something that some people still do not understand, as you read of people, even MPs, saying that Parliament should be dissolved.

The more important is the National Assembly, as it is responsible for most law making, it reviews the conduct of the national executive, and has power to remove cabinet secretaries, is responsible for the national budget, and approves declarations of war and extensions of states of emergency (Art. 95). The Senate exists primarily to represent counties and protect their interests, especially with regard to the distribution of funds earmarked for counties, participates in making of laws relevant to counties, and determines issues of impeachment of the president (Art. 96). We have described the makeup of each house (p. 130) and discuss the implications of the election system (p. 133).

The National Assembly approves a number of appointments, including cabinet secretaries (whom it can also remove as we mentioned earlier), the Chief Justice and deputy, the Attorney-General, the Director of Public Prosecutions, and members of independent commissions (for a discussion of whether this is a good system see p. 118). Removal of the president, by the process known as impeachment, involves both houses (see box on p. 88)

The fact that MPs cannot be CSs may affect the quality of people who want go into parliament—the governorship of their county is another appealing possibility. On the positive side, being an

MP might become a "profession" or a career (as in many democracies), devoted to the business of looking after constituents' interests, taking committee work seriously, scrutinising legislative proposals carefully, grappling with policy proposals, and presenting their own bills for new laws. Certainly a number of MPs have presented their own Bills.

Active engagement in the work of the legislature, and for the constituency, should enhance a member's standing in the eyes of the public. It should also be appreciated by their political party (if they are party members). But in 2017 a good number of MPs were not re-elected (as was the case in the past), but it is not clear how far this is to do with their performance or other factors in the political circus.

A county has only one vote in the Senate – cast by the directly elected Senator, after consulting the other members from the county. This make the role of the extra Senators, representing women, youth and persons with disability rather odd (some may not even be from the same party as the directly elected Senator from their county – on the election system for the Senate see p. 140) . County representatives should share a common interest in enhancing the power and authority of county governments, pushing the national government to transfer more powers and resources than the minimum provided in the Constitution. Unfortunately, sometimes the relationship between the Senators and the county Governors has been one of rivalry rather than cooperation.

The Constitution says little on procedure in Parliament, other than to establish offices of the "majority leader" (leader of the largest party or coalition) and "minority leader" (leader of the next largest party or coalition) only in the National Assembly (Art. 108). In Kenya the majority leader introduces government Bills into the National Assembly.

In the US the Speaker of the House is elected, and will be from the majority party, and does not pretend to be neutral - the current Speaker of the House is Democrat Nancy Pelosi - while the Speaker of the US Senate is always the national Vice-President. In Kenya we have retained the parliamentary notion that a speaker is a neutral presider.

President's relationship with the legislature

There are various points of contact or interaction between president and legislature prescribed in the Constitution:

- the National Assembly approves of presidential nominations to various state offices, including cabinet secretaries;
- budgetary proposals must be approved by the National Assembly;
- the president can send back bills passed by parliament, but parliament can insist on a bill becoming law by voting with a two-thirds majority to pass it (Art. 115);
- presidential declarations of state of emergency must be approved by the National Assembly (Art. 58) (under a state of emergency the executive gets certain unusual powers including to bypass some human rights, in order to deal with the emergency situation)
- both chambers' approval is needed for a declaration of war (Art. 132(4)(e));
- removal of a CS by the National Assembly (see p. 121);
- the obligations of CSs (but not of the president it seems) to answer questions from parliamentary committees and to keep them informed of matters under their control (Art. 153);
- and the impeachment of the president (where both chambers play a role – see box).

Impeaching the President

"Impeachment" involves conducting a sort of trial of senior state officials and removing them from office if they are found guilty. Under the Constitution the National Assembly can pass a resolution if it suspects or believes that the President has committed a "gross violation" of the Constitution or law, or has been guilty of a crime under international or national law. This resolution will only pass if two thirds of all the MPS vote in favour. The resolution is reported to the Senate, which discusses the matter and if it decides to proceed must appoint a committee to look into the allegations. If the committee reports that the President is guilty, the Senate must give the President a chance to be heard, and if then the Senate votes by two thirds in favour of removing the President on the basis of the charges, the President ceases to old office. The Deputy President would take over – there would be no fresh presidential election.

We explained earlier that the election timetable is designed to try to ensure that the president has a majority in parliament; but various circumstances might derail this assumption. If the president did not have a majority, particularly in the National Assembly, the president's proposals for policies and legislative bills and the appointment of his nominees might be held up for long periods. Sometimes there is no easy way to resolve differences, leading to deadlocks that could paralyse the government - as the president cannot dissolve parliament and the parliament cannot remove the president except by a cumbersome process (see box on impeachment) and only for reasons which may nothing to do with the differences between them. Thus checks and balances, which are intended to enhance responsibility and accountability, may be manipulated to embarrass the government and to strike deals on unrelated matters. If this were to happen, the aim of strong leadership, which is the justification for executive presidency, would be frustrated. The president would need to be a skilled negotiator. The president would also need to have moral authority, which our presidents have tended to lack. And our parliamentarians are skilled in the art of blackmail, which they could deploy to greater effect since they enjoy immunity from dissolution.

On the other hand, if the president has a majority in parliament, particularly the National Assembly, the president may be too powerful. Safeguards and checks and balances would not work. So scholars sometimes say that the best outcome of elections is when the president has a thin majority in the legislature, so that he or she will need to negotiate with MPs to push the presidential agenda. (We say a bit more about the voting system and the main alternative to it in Chapter 11.)

One thing that is harder for presidents than in the past is promising impunity to those who are suspected of abuse of office – because the president should not control prosecutions (see p. 93), and cannot grant pardons, but has to act on the advice of a committee consisting mostly of people quite independent of the government (Art. 133).

How is this system working?

On the whole the various parts of the system have worked according to the Constitution. But sometimes the courts have had to be involved to remind officers and institutions of how they are supposed to work. The National Assembly was reluctant to involve the Senate in law making, and even since court cases the relationship between the houses is not as smooth and cooperative as it ought to be.

The National Assembly has not been above putting its own interests before those of the nation. This was very noticeable in 2018 when MPs would not cooperate in passing the Bill to ensure that Parliament had not more than two-thirds of either gender, in order to pressurise the President to approve law they were passing to give them power to fix their own allowances.

Generally, the President has been able to get government proposals through Parliament. But the greater independence of mind on the part of Parliament that that some hoped the new system would bring has not really led to careful scrutiny of government and a good system of checks and balances

between executive and legislature. Several times Parliament has passed law that the President has sent back, with his own suggestions. Not once has Parliament been able to bring as many as two thirds of its members to reject the President's suggestions. Why is this? Is it that the President does not pay enough attention to the laws going through Parliament? Is it that Parliament is not well advised about what laws make sense and will work well? Is it that Parliament does not study the laws it is passing carefully enough? Is it that Parliament does not care enough about what it passes to defend it?

Of course there are individual MPs and Senators who are committed and efficient legislators. But there are many occasions (as there were under the old Constitution) when there are not enough MPS in the House for business to continue.

The President has shown a tendency to make pronouncements and give directives even to agencies that are supposed not to take directions. Occasionally a court has held a presidential directive has no force. Some have just caused confusion. Are buses supposed to be allowed to be decorated or not – the President says 'Yes', sometime later the relevant CS says 'No'.

The main problems facing the system have related to the way politics Kenyan-style dominates. This means the focus is so often on who is in power not on what is done with power for the benefit of the nation. During the first term in office the President is worried about re-election. In the second term the President is concerned about a legacy. But everyone else is worried about "succession" – as though the President is a King. Each election begins to be fought the moment the previous one is over.

Questions to think about

1. Do you think that because the single office of President is still the "Big prize" in Kenyan elections, there is still a risk that violence will break out around elections, as they did after the 2007 elections?

2. Have relationships between the President and Parliament been productive?

3. If you have voted: why did you vote for the particular individual(s) – because they had done a good job for the country or for some other reason?

Appendix: Comparing systems of government

	Presidential	***Parliamentary***	***"Semi-presidential"*** NB – there is a wide variety of possible designs
Role of Head of State	Is head of government also	In most, President is head of state but not of government. Most powers formal only.	Will have formal head of state functions.
Does Head of State have any other personal powers?	Has many – though with checks and balances	May have a few, many are merely formal. May be limited to advice.	In addition may have certain ministerial type functions, e.g. foreign affairs. May be member of Cabinet
Who chooses Head of State	Direct election by people	Could be direct election, most often by legislature, or various legislative bodies together.	Directly elected by people
Role of Head of Government	Is President	Is sometimes hereditary monarch. Prime Minister - chairs Cabinet, is in theory a first among equals.	Often chairs Cabinet. Chooses, or recommends, Ministers. Functions may be limited e.g. to domestic (not foreign policy) issues
Who chooses Head of Government?	No separate one	Either immediately elected by legislators, or is clear leader, or may be negotiations between parties if no clear winner	Usually head of largest party/coalition in parliament.
Members of Executive	Usually not members of legislature. Chosen and dismissed by Head of State.	Usually must be members of legislature chosen by head of government. Chosen and dismissed by Head of Government.	May be MP; may have to give up seat in Parliament while Minister. Usually chosen by PM.
Can Head of state be removed?	Usually by impeachment	May be impeachment process – removal by legislature	May be removable by legislature
Can Head of government be removed?	_____	By vote of no confidence; usually just simple majority of MPs. May be restrictions on when this can take place.	Parliament can vote no confidence. In some the President can remove.
Who can dismiss Ministers?	Can dismiss	Can dismiss	PM may usually dismiss, but in some systems the President can also dismiss.
Can Head of State reject law?	Yes, but is procedure for overriding veto.	May be impossible, or may be possibility of referring to court on constitutional issues.	Usually Yes.
Is the Head of State a unifying force?	Is partisan, so less unifying.	Figure chosen may be apolitical or unifying. Depends on national traditions.	The more political the appointment and the more the roles the less unifying the President is likely to be.

Chapter 8

Other Institutions and Processes

The previous chapter focussed on the President and Cabinet, and Parliament (especially the National Assembly) and the relationship between them. We saw how they work to limit each other's power – but also how this may not work well, or may even lead to deadlock and government unable to do anything.

When you have read this chapter you will have some understanding of:

- *the important role of the courts*
- *other aspects of the legal system – especially how criminal cases get to court and how impunity can be ended*
- *other independent bodies such as commissions (like the election commission)*
- *the public service, including security services*
- *control of finances.*

Judicial and legal system

Courts play an important role in the administration of justice generally; the proper settlement of disputes between the people and the government or between the people is essential to the smooth running of the political, social and economic systems—indeed for the security, harmony and stability of society. Courts are critical for the interpretation of the constitution, clarifying its meaning, and harmonising its provisions. Courts protect the constitution, help to develop its rules, and enforce its provisions. It is essential that judges are, on the one hand, competent in the science of law, honest, and committed to the rule of law, and on the other hand, are independent. Independence means they resist possible pressures, whether from the president or other state officials and groups in society (like their fellow tribes-people or wealthy people or political parties).

From Article 159

(a) justice shall be done to all, irrespective of status;

(b) justice shall not be delayed;

(c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, …

(d) justice shall be administered without undue regard to procedural after technicalities

There are various types of courts. Very many cases go to the magistrates' courts. They deal with almost all criminal cases, and many non-criminal cases (we call them civil cases) on matters like smaller land cases, debts, some family matters. The High Court deals with bigger cases, including murder trials, and civil cases that involve complex law or large sums of money as well as constitutional cases and other cases about government. The Constitution said there must be two other courts, of equal status with the High Court: the Land and Environment Court and the Employment and Labour Relations Court.

There will almost always be the possibility of taking a case to a higher court if a person is not satisfied with the first court's decision. Magistrate's decisions can be appealed to the High Court. High Court and the Land and Environment and Employment and Labour Relations Courts appeals go to the Court of Appeal. And Court of Appeal decisions can be taken to the Supreme Court (see below).

The Constitution also encourages the use of other ways of resolving disputes. Arbitration (deciding cases not by judges but usually by experts in the subject matter outside the courts), and mediation and conciliation (trying to resolve disputes in a less confrontational, and less expensive, way by agreement) are also to be encouraged. And traditional methods as used in various communities are also to be promoted. The judiciary is working on making these ideas a reality, while ensuring that fairness is maintained.

The courts were a major disappointment to Kenyans in the past. Judges used to take bribes, do the bidding of the government, regardless of the law, and twist the law to benefit the rich or the powerful. Their legal reasoning was often weak, and there was hardly a Kenyan decision that had been used in other countries. This degeneration of the judiciary was principally due to interventions and directions of presidents and their attorneys-general, their tendency to appoint less than distinguished lawyers as judges, and the general culture of corruption. Of course, not every judge was weak, corrupt or subservient to government.

The dilemma for the CKRC and subsequent constitution making bodies was how to build a strong judicial system when so many sitting judges were corrupt or incompetent. The CKRC proposal - that every judge should be vetted for integrity and competence when the new Constitution came into effect, and removed if the judge failed the criteria - survived. That process was carried out by a special Vetting Board, and the result was that 44% of the Court of Appeal Judges were found unsuitable to continue to serve, seven High Court Judges were removed and 14 magistrates.

To help judges maintain their independence, they should not be appointed because of favouritism, bribery or politics; it should be hard to dismiss them; and it should not be possible to punish them for deciding cases against the government. Under the Constitution, judges are appointed by a more independent Judicial Service Commission than before; the president has no say, though he or she appoints two members of the commission to represent the public (Art. 166). Judges' salaries and benefits, including pensions, cannot be reduced while they hold office (Art. 160). Safeguards against politically motivated removal are now strong. Judges of the High Court level and above can only be removed for grave incompetence or misbehaviour, and through an elaborate procedure involving the Judicial Service Commission and a tribunal appointed by the president.

Another important reform was the establishment of the new Supreme Court (Art. 163); the hope was that it would set new standards of competence for the entire judiciary and give a lead especially on constitutional matters. It hears appeals from lower courts, but certain cases can go straight to the Supreme Court: matters connected to presidential elections, or references for advisory opinion from organs of the state, but only on matters connected with devolution (Art. 163(6)).

Inspired by the Constitution and its vision of justice for all, the first two Chief Justices appointed after 2010 embarked on major developments of the judicial system. There are now courts in many more places than in the past, including benches of the Court of Appeal in at least five towns outside Nairobi, and High Court benches and those of the two courts of the same status in many towns. Court Users' Committees are helping to improve services, there is a judicial ombudsman for complaints, judicial training has been improved, courts are more people-friendly, and internal organisation and management has been improved.

Throughout this book there are references to some of the important cases that the courts have decided on the Constitution. There have been some very courageous decisions, including that on

the August 2017 presidential election, very much based on the Constitution. Court decisions have upheld rights to fair trial, and many other rights, and have insisted that institutions including the executive and Parliament, follow constitutional procedures.

Parliament has been unhappy about some court decisions that it believes interfere with the work of the legislature. It has argued that there is a principle of "separation of powers" that should prevent the courts doing this. But the courts have insisted, rightly in our view, that the Constitution gives the courts a vital role in ensuring that other bodies respect the Constitution. They are the ultimate guardians of the Constitution. They recognise that they should not interfere with decisions made by others just because they, the courts, would have made a different decision. They should interfere only if there is a violation of the Constitution. They do not declare a proposed law unconstitutional, but wait to give parliament the opportunity to pass the law constitutionally, only interfering if Parliament fails to do so.

The Attorney General

We discussed briefly in Chapter 1 the ways in which attorneys general (AGs) – the government's legal advisers – were able to subvert the constitution in the past. Most abuses were in connection with prosecutions, or failure to prosecute, for crimes – the problem of impunity.

Impunity

Impunity means, in everyday speech, "getting away with something" – not being penalised for something you have done wrong.

> "Too many governments still allow wrongful imprisonment, murder or 'disappearance' to be carried out by their officials with impunity" –
>
> Peter Benenson, founder of Amnesty International

The office of the AG is now significantly different from that under the previous constitution. Though still legal advisor to the government, the AG is no longer a member of Parliament, although still a member of the cabinet. And the AG is no longer almost "unsackable" – as judges are.

Director of Public Prosecutions

The Director of Public Prosecutions (DPP) post was created (Art. 157), to prevent the sort of abuse of prosecution powers and process experienced in the past. The DPP, appointed by the President with the approval of the National Assembly (Art. 157(2)), is supposed to exercise the powers of prosecution independently. He or she cannot take over a prosecution begun by another person or authority without their permission. Nor can the DPP withdraw a prosecution (which used to happen) without the consent of the court. The DPP is an independent office and no-one, not even the President, can direct him or her on what cases to prosecute. It is still in theory possible for a private citizen to begin a criminal case, but the courts have said this can only be allowed if the DPP refuses to do so.

Lawyers for the poor?

The Constitution places great emphasis on the rule of law (Art. 10 (2) (a)), access to justice (Art. 48), and fair hearing (Art. 50). The overwhelming majority of Kenyans will not have the benefits of any of these unless they have easy, and in most cases free, access to legal advice and representation. Early drafts of the Constitution included the independent office of the Public Defender, funded by the state, would provide free or subsidised legal assistance to those unable to afford it. It is unfortunate that the neither the parliamentary select committee nor the CoE considered the office worth keeping. The only assistance under the Constitution is in a criminal trial if the court thinks that without legal representation substantial injustice would result (Art. 50(2)(h)).

A Legal Aid Act was passed in 2016, but is not yet really in full operation, so there is not much official support for poor people going to court.

A small number of NGOs do provide legal advice and representation, but their resources are severely limited and in any case they would not be able to supply the legal services necessary to ensure fair play and a level playing field in litigation, protection of human rights and other benefits conferred by the Constitution and laws.

Public Services

While the national and county governments decide on policy and draft legislation, parliament and county assemblies pass law and the courts interpret and enforce the law, the bulk of the responsibilities and functions of the state are carried by various public services. Of all the state organs, the public services are the ones that people come most in contact with, and depend on for services (whether to get their ID or passport, or licences for various purposes and activities, to report thefts or other breaches of the law, for admission to educational institutions, registration of land, assessment and payment of taxes, and so on). The Constitution establishes and regulates these services (the public service, the teachers' service, the police, the judicial service, intelligence service and the defence force etc.), and gives independent commissions and officers rights to recruit and manage their own staff.

Except for the defence force and intelligence service, appointments to these services are made by independent commissions, who also exercise disciplinary control, including removal (they must ensure they give any accused member of a service a fair hearing). Each commission must ensure that the composition of the service reflects the diversity of Kenyan people, with special attention to the participation of women and persons with disabilities, and subject to this, make appointments on the basis of merit and competition (Art. 232 (g), (h) and (i)).

The largest and the most important is the public service which comes under the Public Service Commission (PSC). Counties have their own public services, within a "framework of uniform norms and standards" (Art. 235). However, the national PSC decides appeals from county staff about their appointment, discipline, and removal of staff, etc. (Art. 234(2)(i)). Teachers in counties fall under the authority of the national Teachers Service Commission (Art. 235(2)).

Article 232 sets out the values and principles of service which apply to "(a) all State organs in both levels of government; and (b) all State Corporations". Among others, it requires high standards of professional ethics, efficient, effective and economic use of resources, responsive, prompt, effective, impartial and equitable provision of services, transparency, accountability and involvement of the people in policy making. There are other provisions for specific services: the police for example must prevent corruption and promote and practice transparency and accountability and comply with constitutional standards of human rights and fundament freedoms (Art. 244 (b and (c)).

We discuss what used to be called "Provincial Administration" – the service that carries out national government policy at the local level – in the next chapter.

Relationship between the government and public services

Most public services perform their functions on behalf of the executive; so the relationship of the executive authorities to those public services is critical. The Constitution prescribes their duties to the people; and of course they may owe some accountability to the legislature – parliament may debate their performance, carry out investigation through committees, and it is parliament that approves their funding allocation.

These services should be somewhat independent of the executive, so that public servants do not come under pressure from Cabinet Secretaries, or even the president, to pursue party or ethnic objectives, and are able to resist corrupt deals that CSs would like to make. There is here an important distinction between policy matters (which belong to the cabinet, under the relevant secretary) and administration of policies (which belong to the public services, under the departmental principal secretary). This distinction became blurred in the past; ministers ignored this division of responsibilities; they wanted principal secretaries from their own tribe; and there was considerable collusion between ministers and public servants in the pursuit of illegal objectives, including fixing contracts involving kickbacks, in disregard of prescribed procurement procedures.

The Constitution tried to improve the situation: each State department is under the administration of a principal secretary who is appointed by the president with the approval of the National Assembly, from a list provided by the Public Service Commission (Art. 155). It would seem that a CS has no role in the assignment of the principal secretary to her or his ministry.

National Security Services

National security services are different in important respects from other state services. They deal with both internal and external threats to "Kenya's territorial integrity and sovereignty, its people, their rights, freedoms, property, peace, stability and prosperity, and other national interests" (Art. 238(1)). Secondly, some are armed, have the capacity to invade the rights of the people, and to intimidate them (which historically in Kenya they have done all too often); their powers can too easily be abused, with impunity. Thirdly, there has been an aura of secrecy about their operations, budgets, and recruitment, though less so for the police. Ethnic minorities, particularly Muslims, have suffered greatly from the excesses of the armed forces. And then there is the people's suspicion that either the executive connives with the security forces in the violation of people's rights or of integrity principles, or is simply unable to bring them under civilian control. Except for the short lived independence constitution, there was previously no constitutional regulation of these forces. The 2010 Constitution at least partly fills that gap.

It sets out some operating principles: "the authority of this Constitution and Parliament"; "compliance with the law and with the utmost respect for the rule of law, democracy, human rights and fundamental freedoms"; respect for the "diverse cultures of the communities within Kenya"; and recruitment which reflects "the diversity of the Kenyan people in equitable proportions" (Art. 238(2)). The services must not favour any a political party or cause, or act in a way that damages any political interest or cause (Art. 239 (3)). However, except for the police, the Constitution does little to regulate rules or procedures for their recruitment, or the operation of their activities, or precise forms of accountability. But the use of Kenya troops abroad and the deployment of foreign forces in Kenya require the approval of Parliament (Art. 240(8))

"Gross misconduct"

This phrase is used in many constitutions. Precisely what it means will depend on the office involved. The Supreme Court of Nigeria said in one case:

> "It … means generally in the context atrocious, colossal, deplorable, disgusting, dreadful, enormous, gigantic, grave, heinous, outrageous, odious and shocking. All these words express some extreme negative conduct. … Whether a conduct is gross or not will depend on the matter as exposed by the facts."

The position about the relationship between the political and administrative officers in the areas of defence and police is somewhat more complex, as each service has a professional head, in addition to the principal secretary of the relevant ministry. There are also the National Security Council, dominated by political appointees, (Art. 240) and the Defence Council, dominated by military, (Art. 241) which have policy, operational and supervisory mandate over the armed forces.

Unlike the other security forces, where the executive plays a directing and supervising role, in respect of the police the emphasis is the independence of the Inspector-General (who is appointed by the president with the approval of Parliament). The Inspector-General has operational command of the police (Art. 245(2)), but the relevant cabinet secretary may give directions on "policy", (Art. 245(4)); this is a bit unclear (is a decision to crack down on out of hours drinking a policy, for example?), but it is clear that there can be no direction on an individual case or employee. The Constitution retains the Administration Police, which has a history of repression, used for partisan purposes by those in power, and whose abolition was recommended by the CKRC, but is now to be an integral part of the national police, under the Inspector-General. In late 2018 measures were announced to integrate the Kenya Police and the Administration Police Services further, leaving the latter mainly concerned with border security.

Independent Commissions and Offices

We listed reasons for having independent commissions earlier – see box on p. 21. The various commissions and offices are to be independent from the executive and parliament. They are subject "only to this Constitution and the law"; otherwise they are "independent and not subject to the direction or control of over any person or authority" (Art. 249(2)). Members of the commissions, or office holders, cannot be removed except for serious violations of the Constitution or law, gross misconduct, incapacity, incompetence or bankruptcy, after the findings of an independent tribunal (Art. 251. Another dimension of the commissions' independence is that parliament has to allocate them adequate funds (Art. 249) (3)).

The Constitution identifies three (general) objectives for commissions: "protect the sovereignty of the people"; "secure the observance by all State organs of democratic values and principles"; and "promote constitutionalism" (Art. 249 (1)). Most commissions also have more specific responsibilities related to their fields of operation. The National Land Commission for example has the responsibility to re-shape land policies and to investigate "present or historical land injustices" (Art. 67) and the Salaries and Remuneration Commission has to ensure that the total bill for public sector salaries etc. is "fiscally sustainable" (Art. 230(5) (a)). Some commissions are principally for appointments to and management of state services (as with the public, judicial and police service commissions). The idea here is that these services should be independent of the executive, as explained above something that has never been achieved in the past.

Some commissions are appointed to ensure neutral bodies to make decisions that should not be influenced by the executive or another interested party: an example is the Commission on Revenue Allocation, which advises on how state funds should be divided between the national and county governments, and as between the counties themselves (see the section on devolved government for more on this). The Salaries and Remuneration Commission followed complaints that politicians and senior public servants gave themselves huge salaries and numerous tax free benefits without any accountability. It fixes the salaries and other benefits of "State Officers" (members of the executives, legislatures, judges and magistrates and members of commissions and a few other major positions). And it advises national and county governments on the salaries etc. of "all other public officers" (Art. 230).

Another independent financial institution, although not mentioned in Chapter 15, is the Central Bank of Kenya (Art. 231). Its responsibilities include monetary policy and issuing currency. "Monetary policy" refers to keeping a county's currency stable – reducing inflation by adjusting interest rates, for example. The Constitution specifies that the Bank must not be under the direction or control of any person or authority. One reason for its independence is to prevent the government using the bank for its partisan interests, such as when Moi issued a huge number of notes to finance his and his party's election in 1992 causing high inflation and nearly the collapse of the economy. Another reason is ideological, based on the belief in the free market, and the fear that governments would intervene unreasonably disturbing the "autonomy" of the market. However, the Bank is also supposed to "support the economic policy of the Government, including its objectives for growth and employment". But it must give limiting inflation and "liquidity, solvency and proper functioning of a stable market-based financial system" priority. The Governor is appointed by the President but after a competitive process, and must be approved by Parliament. The same is true of the Chair of the Board of the Bank.

A later chapter (see chapter 10) discusses briefly the Auditor-General (Art. 229) and a new post of Controller of Budget (Art. 228), which are independent officers, the former for the audits of the accounts of all state organs and the latter to oversee the implementation of the budget and for approval for withdrawal of money from official funds. Another example of the importance of neutrality is the Electoral and Boundaries Commission: it is critical for democracy, fairness and even national harmony that the electoral process is insulated from political parties (as we learnt from the 2007 electoral fraud and the post-election violence).

The three Human Rights Commissions (Art. 59) are examples of commissions with independence because they stand between the state and the citizens (like the courts) – because rights are primarily protection against the state. In Chapter 11 we discuss what these Commissions do – how people can use them to protect their rights – and rights of others. Similarly, the electoral commission (IEBC) sometimes has to protect the rights of voters against political parties (possibly dominant in the government) which use intimidation or violence.

A most critical body, given constitutional value of integrity, is the Ethics and Anti-Corruption Commission (Art. 79); its main responsibility is to ensure compliance with Chapter 6 of the Constitution, on leadership and integrity. An independent commission against corruption (KACC) already existed but it was replaced by the new commission. This commission needs to be independent because most of its activities target important and powerful people in government and their powerful associates in the private sector.

Commissions have a very mixed record. Some have worked reasonably well. The IEBC has struggled to inspire confidence in the people of Kenya in its management of elections, and to present a cohesive front. Successive anti-corruption commissions have been unimpressive, although the current one seems to be doing a bit better. The National Land Commission has also faced difficulties internally and externally, again perhaps because of its corruption-prone field of operation. The various service commissions have been less controversial in the public eye, perhaps because they are dealing with less obviously politically and financially sensitive issues.

Finance

The state needs money to run the government, provide services, ensure law and order, promote the economy by building the infrastructure, etc. One function of the Constitution is to ensure that the various state organs receive the resources, principally financial, to discharge their responsibilities and functions, and also that those functions are discharged as efficiently and honestly as possible. So it deals with how the state raises the money (mostly from various forms of taxation and other charges), how this is allocated to the various state organs, how it is spent and how they account to the people for the expenditure of the money. How these things are done under the Constitution is explained later in this book – see Chapter 10 on integrity and accountability and Chapter 9 on the money side of devolution.

Conclusion

The Constitution is an ambitious attempt to restructure the state as well as society. Its emphasis on integrity and accountability as well as the programme of social justice undoubtedly upset the political and bureaucratic class. The implementation of the Constitution faces many challenges, both political and technical. The institutions discussed in this chapter are absolutely key to that implementation.

Questions to think about:

1. Why is it important that judges are independent? Who must they be independent of?
2. Do you think that the state should pay for lawyers for people?
3. What can the people do to ensure that people who hold public office and powers – including the police, the military and the judges – do not abuse the powers?
4. How successful do you think so-called independent commissions have been in (i) being independent and (ii) being competent? How can they be improved?

Chapter 9

Devolution: Self-government and local responsibility

This chapter introduces you to a new element of governance in the 2010 Constitution: devolution. It begins with the objectives of devolution. It then examines the division of powers and responsibilities between the national government and the counties, before moving to the structures of county government, the resources available to them, and their relationship with the national government.

When you have read this chapter

- *you will understand what "devolution" means and what is it intended to achieve in Kenya*
- *you will have some knowledge of what powers counties can exercise and what resources they have*
- *you will know in general terms how the government at the county level works*
- *you will know something about the relationships between different governments, including how far the national government may be able to control or influence county governments*
- *you will be able to assess the likelihood of the success of the objectives of devolution.*

Objectives of devolution

When most people in Kenya think of devolution, they think only of county government. But to focus on this alone limits our understanding of the wider constitutional system within which county government operates. That wider framework covers not only what happens in the county, but also the role of the national government in counties, the role of the county at the national level, the relationship of the county with the national, and other county, governments, the rules for the distribution of resources, and for the settlement of disputes. It is within this broader framework that county government is discussed here.

The objectives of devolution are set out in Article 174 of the Constitution, (see box for the most important).

These objectives are elaborations of the national values and principles—and show the importance of devolution to the whole system of government. An essential purpose of devolution is to spread the power of the state throughout the country, reducing the centralisation of power that was at the root of so many of our problems—of authoritarianism, marginalisation of various communities, disregard of minority cultures, lack of accountability, failure to provide services to people outside urban areas and not even there.

Main objectives of devolution

- 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 (Article 174(c));
- the right of communities to manage their own affairs and to further their development (clause (d));
- to promote democratic and accountable exercise of power (clause (a));
- to foster national unity by recognising diversity;
- to protect and promote the interests and rights of minorities and marginalised communities (clause (e));
- to promote social and economic development and the provision of proximate, easily accessible services throughout Kenya; and
- to ensure equitable sharing of national and local resources throughout Kenya.

Experience in other countries shows that systems that bring government "closer to the people" can have a lot of beneficial results. The 2003 Human Development Report *(Millennium Development Goals: A compact among nations to end human poverty)* included some conclusions about the impacts of decentralization (our devolution is one form of decentralization, meaning not leaving all powers to be exercised in the national capital):

- often reduces absenteeism among government employees in local schools and health clinics
- provides bureaucrats with early warnings of potential disasters
- encourages local people to find solutions to their everyday problems
- provides people with a much stronger voice in public policy decisions that affect their lives.
- has increased representation among women

And:

- local authorities tend to act more in line with local preferences and conditions, and no longer have to wait for permission from higher levels before acting
- decentralization of government spending is closely associated with lower corruption among bureaucrats
- reallocating resources ensured a more equitable distribution of national funds to regions previously neglected by dominant groups at the centre.

The 47 counties correspond to the numbers and boundaries of the districts at soon after independence. All presidents had courted popularity by creating more districts – so more district headquarters, more jobs, and less distance from government offices. By 2010 there were about 350 districts. The Committee of Experts wanted to give the new powers to divisions of the country that were small enough to bring government and services noticeably closer to the people, but were big enough to have the ability to manage the powers. The old provinces were too big; the new districts too many and too small. The number and size of counties are important for how effective they are in exercising the powers given to them.

We should add that the Bomas draft constitution (2004) had a slightly different scheme. There would have been about 70 districts, but between them and the national government would have been 14 regions. The regions would have had powers to coordinate the work of districts, provide services better provided at the regional level and develop regional policies and standards. Regional governments would have been elected by district governments.

Powers of county government

The heart of a system of devolution is the powers allocated to the lower level governments (county governments in our case). There are several ways in which other federal or devolved systems distribute powers to make law between the different levels of government. Some constitutions have two lists of powers, one belonging to the national and the other to the regional ("county") governments, with the unlisted (or "residual") powers given to one or the other level. Some have a single list of powers given to either the national or county government, while all other powers are for the other government. Some constitutions have, in addition to one or two lists of powers, a third one of "concurrent" powers – that is powers for both levels of government; the constitution in such a country specifies which law prevails when the laws of the national government and a lower level government on a concurrent subject conflict.

Kenya has two lists, one for each level of government. The scheme for the distribution of powers is however complicated. Some topics appear in both lists: usually the power of the national government will be over "policy" and the power of the counties over carrying out policies, or only part of the topic (for a few examples see the bulleted list below). While counties can make law only on matters in the county list, the national government can do so on any matter whatsoever. If there is a national law on a "county topic", and it conflicts with a county law, which of them prevails will be resolved by a complicated set of rules. Article 191 give the reasons that would justify the national government making law on a county topic. These include the need for national standards or policies, national security, economic factors like free movement of goods, protecting equal access to opportunity of government services, and environmental protection. We discuss later how disputes between the national government and counties are supposed to be resolved.

Turning now to the actual distribution of legislative powers: the box on page 101 lists county powers. But let's now look at a few topics:

- The national government deals with agricultural policy; the counties deal with agriculture including some specific topics, such as arable and animal farming, animal and disease control, and fisheries.

- The national government deals with health policy and national referral health institutions (like Kenyatta National Hospital) and the counties with county health services, "health facilities", pharmacies and ambulance services being mentioned especially.

- The national government deals with national trunk roads and the counties with county roads.

- The national government deals with most aspects of education, while counties deal with pre-primary education and village polytechnics.

- The national government deals with water protection and dams, and the counties carry out national policies on water conservation and are responsible for local water and sanitation services.

- County governments are responsible for local planning of towns and villages.

Many of these things are important to communities, and to the lives of people. But the list does not contain all the powers that a county government might wish to have. For example, it has no authority over manufacturing industry, which it might wish to have in order to attract industry. Perhaps it can still provide incentives for investors by improving general conditions in the county: better roads, more efficient administration. And the powers over local planning are important. Nevertheless, it might legitimately complain, for example, that its powers over education are severely limited.

What does it mean to say that a county has a power (or function)? First, it may regulate the activity. This is what it can do about air pollution, for example, or markets. This can involve passing a law, or administering a relevant national law.

Second it can offer services – like building a road, or running a clinic.

Thirdly it may promote an activity – like local tourism.

Whenever needed to carry out a function it can pass a law. But if there is a national law covering the same ground then Article 191 must be considered.

And the county can spend money needed for the activity. It can also charge for services.

Powers additional to those in the county list may be transferred to counties by the national government (and county powers to the national government) if such transfer will result in better administration (Art. 187). The constitutional responsibility for the power transferred will remain with the government to which the Constitution assigns the functions, which presumably means a government that has transferred powers can take them back again.

There were, still are, already national laws on many topics. In fact, many counties have not made many new laws.

What can counties do?
Administer (and make necessary laws about):

- Agriculture, including farming, livestock sale yards; abattoirs; disease control; fisheries.
- County health services, including local facilities and pharmacies; ambulance services; promotion of primary health care; licensing and control of food outlets; veterinary services; cemeteries etc., refuse removal and disposal.
- Control of air and noise pollution, public nuisances and outdoor advertising.
- Various cultural and entertainment activities.
- County roads and transport.
- Animal control and welfare.
- Local markets, tourism, cooperatives, etc.
- County planning and development, including statistics; land survey and mapping; boundaries, housing. Education at pre-primary level, village polytechnics and childcare.
- Implementation of national government policies on natural resources and environmental conservation.
- County public works and services, including water and sanitation services.
- Police and fire services and disaster management.
- Control of drugs and pornography.

There have not been many disputes over the functions of counties. Some counties seem to doing more than the Constitution allows. While a county may legitimately provide a local water plant, it seems that a reservoir or lake with water that is used for water supply belongs to the nation, not the county (Article 62(1)(i) and Water Act s. 5)). County governments that talk of "our water" and threaten not to allow other counties to use it are exceeding their powers.

There is some doubt over Mombasa Port. Some in Mombasa would claim that it does or ought to belong to Mombasa County. The Constitution says that counties have the function of harbours, but not the regulation of shipping, while the national government has responsibility for marine navigation. If "harbours" does not include a port, that is a national matter, but the language is not perfectly clear.

It took a court decision to decide on responsibility for Level Five hospitals. And the uncertainties that have not got to court include what responsibilities for housing the national and county governments have, precisely who does what in connection with agriculture, and various other issues.

Resources of counties

Giving powers to a government is of little consequence unless it has not only the capacity, but also the resources to exercise them. A fundamental principle of devolution is that "county governments shall have reliable sources of revenue to enable them to govern and deliver services effectively" (Art. 175(b). By "reliable" we understand that the resources must be predictable, guaranteed, and sufficient. How should this be assured, and to what extent is it assured in Kenya?

Some experts say that it is desirable that governments at each level should raise the revenue that they have to spend (as this makes them more careful and accountable to their tax payers and constituents—and makes them independent of the national government). The Kenyan approach is different: most of the revenue that the counties receive is raised by the national government and then paid to the counties according to a constitutional formula. The justification is that it is more economical and efficient to have a central revenue collection authority and more likely to ensure that resources are shared equitably between counties which are uneven in the present state of their economic and social development ("equitable sharing" being a constitutional requirement). Nairobi produces just over 20% of the country's gross domestic product (according to the National Bureau of Statistics Gross County Product Report). If counties were left to collect taxes, either Nairobi county would be far wealthier, and able to do far more, than other counties, or Nairobi would have to give up a lot of what it collected. An important question is how to ensure that the national government does not make the counties dependent on it.

For counties there are two principal sources of revenue: taxes and charges raised by the county itself, and the transfer of money from the national revenue. The only taxes a county can impose are property rates and entertainment—and any other tax authorized by national law (Art. 209 (3)). "Rates" are a form of land/building tax raised by local authorities and depending on the size of the land or its value. A county may also impose charges for services it provides (if it charges more than a reasonable amount for services this would probably be unconstitutional – it would be a tax). However, all these powers are limited by the rule that they must not prejudice "national economic policies, economic activities across county boundaries or the national mobility of goods, services, capital or labour" (Art. 209 (5)).

> "The County Government of Baringo … has no constitutional authority to impose a tax called cess or by any other name for the forest produce harvested from state forests in the County. … The supremacy of the Constitution must prevail over any noble desires to raise revenue for the provision of services in the County. The respondents must only act within their constitutional authority."
>
> High Court in *Raiply Woods (K) Ltd v Baringo Count*

So the main source of finance for counties is the national revenue. The independent Commission on Revenue Allocation (CRA) proposes the equitable sharing of revenue between the national and the county levels, and between the counties (Arts. 215 and 216). At least 15% of the revenue collected by the national government will be allocated to county governments (Art. 203(2)). In fact, it has been usually over 20%. However, the precise situation is not clear. First, though the Constitution says that counties must get not less than 15% of "national revenue" the government seems to have a concept of "shareable revenue"- what is left after some national government purposes have been met. Secondly, the 15% is not of the current year's revenue but of the revenue for the last year that audited accounts have been approved by Parliament. In 2018 that was as long ago as 2013-14.

Factors for allocating funding between national and county governments (and between counties):

- the national interest, national obligations and needs of the national government
- need to ensure that county governments can perform the functions allocated to them
- fiscal capacity and efficiency of county governments
- developmental and other needs of counties
- economic disparities within and among counties
- need for affirmative action for disadvantaged areas and groups
- providing incentives for each county to optimise its capacity to raise revenue
- desirability of stable and predictable allocations of revenue
- need for flexibility in responding to emergencies and other temporary needs

Constitution Article 203

To understand how this scheme works we need to examine the nature of the Commission and the Senate, and the procedure. The majority of CRA members are nominated by political parties, according to their size in the National Assembly (2 members) and the Senate (5 members), and the principal secretary in the finance ministry, with the president appointing the chair (Art. 215). Although the members must have "extensive experience in financial and economic matters", it is likely, as in the past and now, that political considerations will prevail in appointments. The Commission sends its proposals to the Senate. Once every five years the Senate must consider these recommendations, as well as consulting the counties, the public and the Cabinet Secretary for Finance. It will then propose to the National Assembly how money is to be shared between the national government and the counties – and between the counties – over the next 5 years. The National Assembly can only change this recommendation by a vote of two-thirds of its members. This places the Senate in a strong position: the National Assembly may well find it hard to mobilise enough support from its own members to overrule the Commission.

The CRA uses a fairly broad brush approach. Unlike the Indian equivalent body, which looks at the plans of individual states, the CRA uses a formula. Its most recent proposals would reduce the money for some of the poorer counties, but a deal reached by the Senate means that until 2025 no county wil get less than it did in 2019-20.

For at least 20 years there is also an "Equalisation Fund": 0.5% of the national revenue to be used by the national government, or given to the counties, to provide basic services for marginalised areas, on criteria determined by the Commission (Art. 204). The Commission's first approach was

to identify certain counties as marginalised. But its second focussed more on the people, taking sub-locations as the unit. Marginalisation was measured on the basis of "a deprivation index developed using five social economic parameters: namely; primary education, secondary education, water, electricity, and sanitation".

Additional grants (conditional or unconditional) may be made, and have been made, by the national government (Art. 202(2)).

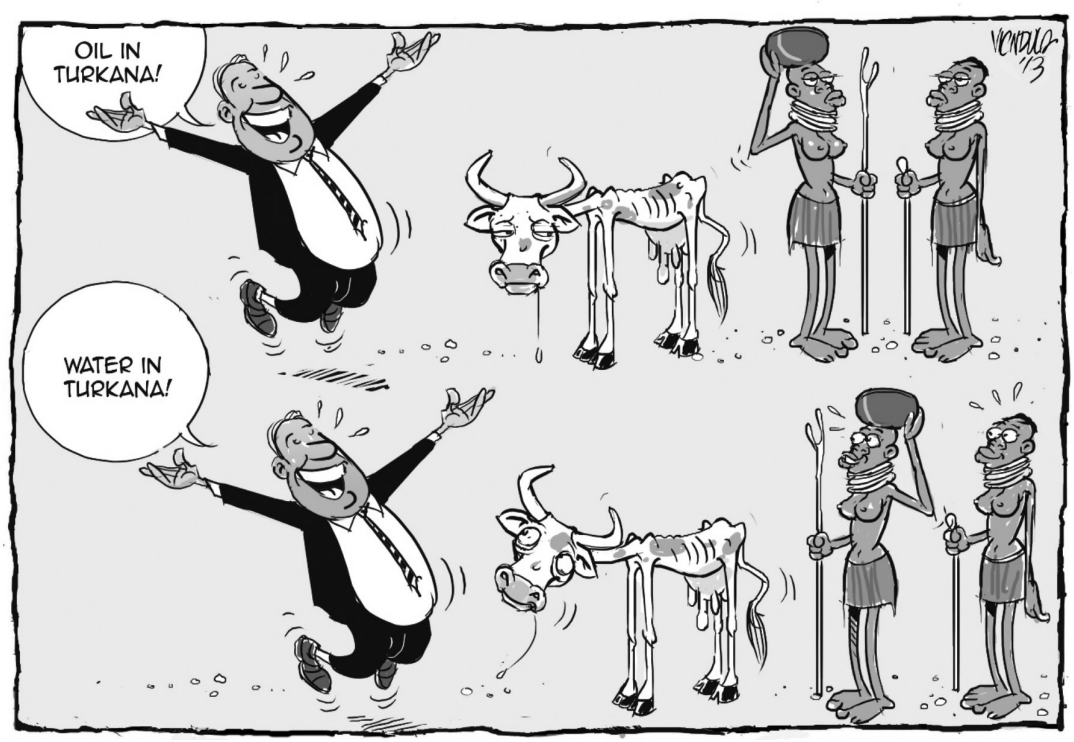
If the national government transfers a function to a county, it must provide it with the necessary resources (Art. 187(2)).

How about the CDF?

Previously there were many funds from national government to constituencies or local authorities.

The CDF (Constituency Development Fund) was continued, and a similar fund for women MPs introduced. The First CDF law was found unconstitutional by a court because (among other reasons) it allowed CDF money to be used for matters that were the responsibility of counties. The law was changed to restrict the CDF to national functions. (The cases are very confusing and not yet concluded). One problem is whether it is right for MPs to be involved in spending money when they are supposed to supervise government spending of money.

The possibility of a county raising money by loans is limited by the rule requiring the consent of the national government (Art. 212). This would apply to borrowing of any sort, whether for bank loans, by issuing bonds or any other way.



Natural resources

Within county boundaries there are various types of natural resources: land, water, perhaps minerals. How much control a county have over these resources? The answer is "not a great deal". This is because of the following provisions of the Constitution:

- certain types of "public land" is held by the counties, in trust for their people, but is administered by the National Land Commission
- most types of "public land" are to be held by the national government (and administered by National Land Commission): including minerals, most government forests, national parks and government game reserves and roads – as defined by an Act of Parliament
- "public land" held by the national government includes rivers, lakes and other bodies of water "as defined by an Act of Parliament", and the sea, including the sea bed below the high water mark; the Water Act says that all "water resource' means any lake, pond, swamp, marsh, stream, watercourse, estuary, aquifer, artesian basin or other body of flowing or standing water, whether above or below ground"

Some counties have begun to claim that they should have far more control over resources within their boundaries. It may be hard to argue for full control in view of the constitutional rules. But the national government should remember that its relationship with counties is supposed to be of cooperation – that surely should extent to resources within counties. Other relevant provisions of the Constitution are those about law to ensure that investments in property benefit local communities and their economies (Art. 66(2)), and that devolution is supposed to "ensure equitable sharing of national and local resources throughout Kenya" (Art. 174 (g)) – can "equitable" sharing mean that a county just loses its local resources entirely? And public participation is, of course, a right in connection with government decisions of all sorts.

Structure of county government

According to Article 175(a), county governments must "be based on democratic principles and the separation of powers". A county government consists of a legislature (the county assembly) and an executive (executive committee). Counties do not have their own courts. The national court system, as set out in the Constitution, serves the entire country. There is no requirement that a High Court be established in each Kenyan county, but the judiciary has been moving in that direction.

There are no county police forces – or at least there is no provision for them in the Constitution. All police forces must be under the command of the national head of police. This means that law and order within counties will be the responsibility of the national police. However, the structure of the police takes county government into account, and the police have a county level commander, and there are supposed to be county policing authorities (under the National Police Service Act, not the Constitution), bringing together county and national officers, though these have not yet been created.

Legislature

The county assembly is directly elected, with one member for each ward, special seats – if needed - to ensure gender balance, and for persons with disability, and youth and other marginalised groups. Each party competing for ward seats in the county also puts forward a list of men and women (in case needed for gender balance, youth, persons with disability and other marginalised group members) (Art. 90). Voters will vote for their preferred ward member – and in voting they should take account of the way the parties have made up their lists of extra members. The box shows how it should work.

Elections for the county assemblies

The Elections Act provides that for elections in a county, every party that has candidates for wards must put forward a list of eight candidates for the four special seats. The list must give priority to a youth, a person with disability and a marginalized group member, and must alternate male and female names. There must also be a gender list.

We can see how it worked in a particular county (Turkana) in 2017. Jubilee won 14 ward seats and ODM 13; Wiper won 1 and there were two independents. One was a woman.

The extra members are distributed on the basis of seats won by parties in the wards. Only Jubilee and ODM received these seats: meaning that each has two men and two women in the "marginalized" category. Oddly of the four, three are "youth". This means that Jubilee gave the top two places to youth, which is unfair to persons with disability and other marginalized groups. So now there were three women out of a total of 34 MCAs. Enough women had now to be chosen from the party lists to meet the gender requirement. In this case, to get one third women overall, it was necessary to pick 13 women from party lists (making an assembly of 47 – 6 women and 31 men). Jubilee got 7 of these seats and ODM 6.

All this assumes there are not enough women who get ward seats. In the two elections so far, no county has elected women for one third of the wards, and some have elected none!

The assembly makes county laws, passes the county budget, and supervises the work of the county executive. Members should also take a special interest in the concerns of the wards from which they are elected. The "extra" women, youth and persons with disability do not have their own wards, but have a special responsibility to represent the interests of their sections of society.

Executive

The executive committee consists of a directly elected governor, and deputy, and members appointed by the governor from among people who are not members of the county assembly, and approved by the assembly. The size of the executive committee cannot exceed one third of the members of the assembly, and never more than 10 (Art. 179(3)). The relationship between the governor and the executive committee, and the assembly is not defined in the same detailed way as that between the president and the parliament. But the County Governments Act does this. The Governor may be impeached: the county assembly starts the process, and can recommend the governor's removal to the Senate. The governor can be removed only for breach of the Constitution or any other law, or gross misconduct, a crime under national or international law, or incapacity. Like the national president, a county governor will serve only two terms. Both the assembly and the governor have terms of office of 5 years.

In a case about impeaching a Governor, the Court of Appeal held that:

- Removal of Governors can only take place if there are good grounds as laid down in the Constitution
- There must be a genuine opportunity for the public to make an input into the decision of the County Assembly on the impeachment
- Governors must have a fair hearing including that those making the decisions about impeachment should not be or appear to be, biased, and that accused Governors must have a chance to put their own case.

The Governor may dismiss any CEC members, and the county assembly may also pass a motion requiring that a member be dismissed. However, courts have occasionally held that a CEC member had been wrongfully dismissed.

Staff

The responsibility of establishing public offices, appointing, and disciplining or removing staff is that of each county but an Act of Parliament must set a framework of uniform standards. However, the Public Service Commission deals with appeals from county public servants who are disciplined. At least thirty percent of the posts at entry level in a county must filled by candidates who are not from the dominant ethnic community there (County Governments Act s. 65(1)(e)). This is a very rough guide because many counties have more than 30% non-dominant community residents. Studies have shown that some counties have not achieved this.

In addition to staff appointed by the county, there are national public servants in the county performing national government functions. How they are organized is discussed in a section below on "provincial administration".

Local government

In most federal or devolved countries either local government – at the very local level - would be set out in the constitution (India and South Africa are examples) or it would be a matter for the state/county governments. Our Constitution says very little about this. There must be a system of "governance and management of urban areas and cities" (Art. 184(1)). Secondly a county must "decentralise its functions and the provision of its services to the extent that it is efficient and practicable to do so" (Art. 176). But decentralising functions does not necessarily mean creating lower levels of government – having local offices of the county government is enough to satisfy the Constitution. Counties also have a function that may relate to local government – namely to coordinate community and location participation in "governance at the local level", and help those communities develop the capacity for participation (Schedule 4 about county powers). Finally, the provision about cooperative relations between governments mentions the need to respect the "constitutional status and institutions" of government at different levels, including "in the case of county government, within the county level" (Art. 189) (1(a)).

The Urban Areas and Cities Act does not provide for real local government. These areas are to be administered by the county, specifically by a manager appointed by the county. There is also to be a management board combining people appointed by the county, and individuals elected by and representing various interests in the area. For towns (smaller urban areas) there is just the administrator.

Outside the urban areas there are to be administrators for sub-counties, wards and villages. A council of village elders is to be appointed by the village administrator with the approval of the county assembly to advise the village and other authorities (County Governments Act). Some counties have actually appointed this network of administrators.

Relationship between the county and the national governments

Rules, institutions and procedures in the Constitution or in ordinary law must deal with how the powers of the various levels of government are defined, intersect and are co-ordinated, and how disputes between them are resolved. Some aspects of the relationship are embedded in the structure of the national government, such as the Senate which represents the counties and participates in decision making at the centre. A mechanism for the presence of the national government in counties is necessary to perform its responsibilities in the county.

The Constitution describes in some detail the relationships between the different, and the same, levels of government. What we have said earlier makes it clear that a good deal of what the counties do is to carry out national government policies (this especially true of health, housing, agriculture, energy and environment). And the Constitution also says that the national government is obliged to provide reasonable access to services in "all parts of the Republic". This need not involve the county systems; there are national government local offices for some functions in the counties – such as county and regional education coordinators. On the other hand, decentralisation of national government organs and functions is one of the objectives of devolution (Art. 174) – presumably this means in collaboration with the county governments. Otherwise why is it an objective of devolution?

Relationships between the various levels of government are intended to be based on cooperation and not competition. Article 6 (2) in Chapter 2 on the Republic says that the "governments at the national and county levels are distinct and inter-dependent and shall conduct their mutual relations on the basis of consultation and co-operation". These relationships must be based on recognition that each level of government is distinct, with its own responsibilities, on respect for the status and laws of each level, on assistance in the implementation of all laws, and involve co-operation in exchanging information, co-ordinating policies and administration, and enhancing capacity (Art. 189(1)). Governments at different levels, or the same level, may set up joint committees and authorities (Art. 189(2)); this may be useful to enhance the bargaining power of counties with the national government or to deal with an issue, a need or a resource common to a group of counties. Some counties have formed regional economic blocs (e.g. Lake Region bloc, the North Rift, and *Jumuia ya Kaunti za Pwani)*.

The Constitution has a strong emphasis on the need for lower levels of government to develop capacity to carry out their functions (wise in view of the problems with local government in the past). We see this in the requirement that counties develop capacity at lower levels (Schedule 4), and in the provisions for when the national government can interfere in county government – see below. However, provisions for gradual transfer of functions did not work as intended because counties insisted on having almost everything at once.

Disputes are inevitable; they may be over resources, or over the law making powers of different levels. These must be resolved through mediation not confrontation (Art. 189(3) and (4)). As the relationship is constitutional, the judiciary plays an important role in resolving disputes—and it is possible for any state organ including a county government to seek the legal ("advisory") opinion of the Supreme Court on matters of devolution, to enable all of them to act in the spirit and text on devolution (Art. 163(6)). But going to courts is supposed to be the last resort. Often a disagreement over powers of a level of government may be raised not by a government but by a citizen. For example, someone might argue that a prosecution under a law is unconstitutional, because the government that passed the law had no constitutional power to do so. That would be dealt with as part of the criminal case.

When direct disputes do arise, there is a mechanism to resolve them. The Intergovernmental Relations Act sets up the Co-ordinating Summit with the President and all the governors. It is a forum for consultation and co-operation, evaluating the performance of national or county governments, providing advice, monitoring the implementation of national and county development plans, considering issues relating to intergovernmental relations referred by a member of the public and making recommendations, harmonizing the development of county and national governments policies, and co-ordinating the transfer of functions between levels of government. The Act also provided for the Council of Governors, which has been an important forum of and voice for the counties.

There are some institutions that are common to the national and the county governments: the National Human Rights and Equality Commission – indeed all the constitutional commissions, as well as the Auditor General, the Controller of Budget, the police and the other security forces. This county aspect of their work does not seem to have been fully appreciated by the constitution drafters. The Task Force on Devolution suggested that appointments should be approved by the Senate as well as the National Assembly – but this does not seem possible because the Constitution almost always says "approved by the National Assembly".

Realities of national/county relations

It is clear that relationships between the national government and counties are not always as smooth as the Constitution envisaged. Sometimes this is a result of rivalry, sometimes a matter of capacity. A few of the issues are:

- "In overall terms however there appears to be no clear collaborative framework between the national and county governments for implementation of strategic government projects" (Parliamentary Budget Office on the "Big Four").

- The Senate tried to pass law setting up "County Development Boards" on which Senators would serve. "This, we reiterate, not only undermines devolution, but is a direct threat to the principle of separation of powers which is one of the cornerstones of our new, democratic dispensation" *(*High Court in *Council of Governors v Senate)*.

- "My understanding of Article 96 of the Constitution is that the Senate has no oversight role on county legislation." *(*High Court in *County Government of Kiambu v Senate Council of Governors & 3 others v Senate)*

Counties at the national level

At the national level, the Senate has the main function of representing the interests of the counties. Each county elects a member. And there are some extra members to increase inclusiveness – 16 extra women, allocated according to the number of seats each party wins, 2 persons with disability (1 man and one woman) and 2 youth (1 man and one woman)

All national laws, taxation and expenditure must be approved by the National Assembly, while any law that concerns the counties must also be approved by the Senate. If the National Assembly and the Senate disagree on any proposed law concerning counties, a mediation committee tries to resolve the differences. In the case of a law or other matter affecting the interests of the counties as such, each county has one vote. The person to decide on how to vote is the directly elected county member, but he or she must consult any other members from the county – maybe a person with disability or a youth or one or more of the 16 holders of women seats (Art. 123) The role of the Senate in the allocation of funds to the counties has already been explained above.

Each county has another voice in Parliament: one woman member of the National Assembly elected by each county, by all the electors. Her constituency is the whole county. And she, like other members of the National Assembly, votes on all laws, not just those that affect the counties as such.

There is no link of a formal nature between a Senator (or county woman representative) and their home county government. This is different from some other countries (like South Africa and Germany). Unfortunately, the relationship between Senators and Governors has sometimes been one of rivalry.

National government in the counties

"Provincial administration"

The national government does not participate in county government institutions directly. But its influence on county government and administration is great (especially if we include the roles of independent bodies, on elections, auditing, etc.). We have already noted some ways in which the national institutions are involved in county matters in the section on relationships (including financial and security matters). Moreover, as the national government has responsibility for many matters throughout the country, it has its public servants in counties. In the past the "provincial administration" was a national government presence in the country. It was linked directly to the President's Office.

The roots of this system (now referred to as National Government Coordination) are deep, and of great value to the government. It was very much "top down" and had long been an instrument of control by the central government. People became suspicious of this system, and it was accused of being not just an arm of the government but an arm of the party in power. And there was no democratic control over the provincial administration, at least not from the people in the area concerned. They did not choose their PCs, DCs, DOs and chiefs; these officials are not accountable to the people.

The CKRC proposed abolishing provincial administration to make room for county government. Under pressure from politicians, the CoE draft was amended to provide for "restructuring" rather than abolition of provincial administration within five years.

However, it was not really restructured, just adjusted to the fact of 47 counties, and rebranded. There are now regional coordinators (at the old provincial level) and commissioners for counties, deputy county commissioners for sub-counties, assistant county commissioners for wards and also chiefs and assistant chiefs. The system is still ultimately responsible to the Office of the President, through the Ministry of Interior and Coordination of National Government.

Under the old constitution, the Administration Police were controlled by Provincial Administration, giving "teeth" to the system. The current Constitution puts the Administration Police under the Inspector General of Police.

National control or influence over county government

In certain circumstances the national government could intervene in the affairs of a county, including taking over responsibility for some county functions (Art. 190). This may be because of incompetence, especially financial mismanagement. In a case like this the intervention of the national government must be limited to what is needed, and be directed towards assisting the county government to operate properly. The whole thrust of this Article is to support not to penalise county governments.

The other possibility is that the national president may suspend a county government for up to 90 days (Art. 192). This is only if there is war or internal conflict or after a commission of inquiry has found that allegations of misconduct by the county government are justified. In each case of national government intervention the Senate (which you remember is made up of county representatives) may bring the intervention to an end. If the suspension is not ended, the county government will

be dissolved and governor and assembly elections held. One effort was made to bring this about. But the President decided not to act on a report made under Article 192, which did recommend suspension of the Makueni government.

Article 190, as commented, envisages the national government supporting counties. Among the steps that have been taken is drafting various model laws that counties can use or adapt as they please,

Relations between counties: co-operation and competition

The Constitution says little about the relations between counties, other than the desirability of co-operation and co-ordination, and forming of joint bodies. A county is free to plan joint activities with other counties, particularly neighbouring counties, for example on major infrastructural projects, agricultural research, or medical facilities, which a county may be unable to afford on its own.

There is also the question of competition among counties to attract investments and other development activities. One idea underlying this system is that the counties will compete with each other to attract business and development, create jobs, and give a good life to their people.

You can see from what we have said that the counties cannot do much about education. They cannot set up primary or secondary schools or universities (unless agreed with the national government), but they might be able to encourage private schools to set up by use of their planning powers. It is not entirely clear whether they are even right to award bursaries to county students.

The national capital

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.

Nairobi is a city county. The important place of Nairobi in national life does cause some problems in relationships between national and county government. Some people have suggested the Constitution should be changed on this point. But precisely why and how is not very clear.

The National Government has taken over some Nairobi functions (supposedly by agreement, using Article 287 of the Constitution). This whole matter is before the courts.

They have more opportunities with health. Some counties have been establishing universal health programmes, and the national government, for whom this is a priority, is now planning to work with counties to achieve it.

How much they can encourage industry and other forms of business is a challenge for the counties. They seem to have no powers to regulate industry. But they do issue trade licences and levy charges and fees; and they can improve roads and communications—areas where some competition is possible. They have some power to plan where electricity networks will go, and limited power over water. They can make life more or less pleasant by the use of their powers about entertainment and recreation facilities, street lighting, and environmental conservation.

There are risks in counties competing with others to attract business. If they want to do so by reducing property taxes that business must pay, they may have less money to offer services. If they want to be lax in issuing business licences or to save money on rubbish collection, people will suffer. But this sort of "race for the bottom" is not inevitable.

How has devolution worked?

Devolution is still something new in Kenya, so, perhaps more than any other area, comments on how it has been working have to be tentative. However, there have been some studies that can give us some idea of how it is working and how Kenyans feel about it. One of the most thorough studies of the new Constitution was that conducted in 2016 by the office of the Auditor General. Its main conclusions about devolution included:

- In all the counties, there is improvement in delivery of services
- The county governments have not enhanced participation of the people
- The county governments as presently constituted are favourable for ethnic and social inclusion
- The national survey reveals that 80 percent of the respondents believe that corruption is rife in their respective county government.
- Excessive conditions on county spending (in the form of conditional grants) can erode the ability of counties to address and prioritise local needs
- There are concerns about inadequate cooperation and consultation between the two levels of government.
- There is no mechanism by which the county governments and their interests are adequately represented at the national level (particularly because of the way the Senate is elected).

Devolution has become part of Kenya. But there are still many challenges.

Some questions to think about

1. Are the powers given to county government sufficient to make a difference to the lives of county people? If not, what additional powers should be given to it?
2. What qualifications would you look for in members of the assembly and the executive?
3. What should county governments do to protect minorities and promote their participation in county affairs?
4. Should there be a system of elected local bodies below the county government level?
5. Some politicians have argued that a much higher percentage of national revenue should be allocated to counties. Do you agree? If so, what extra powers should they have?

Appendix: Some important words connected to devolution

Autonomy: the power to make one's own decisions; can be used about people, but here it would refer to the power of counties to make certain decisions of their own, not directed by the national government.

Devolution: a situation where power is transferred from one level of government to a lower level, not necessarily by a constitution - it could be by an ordinary law.

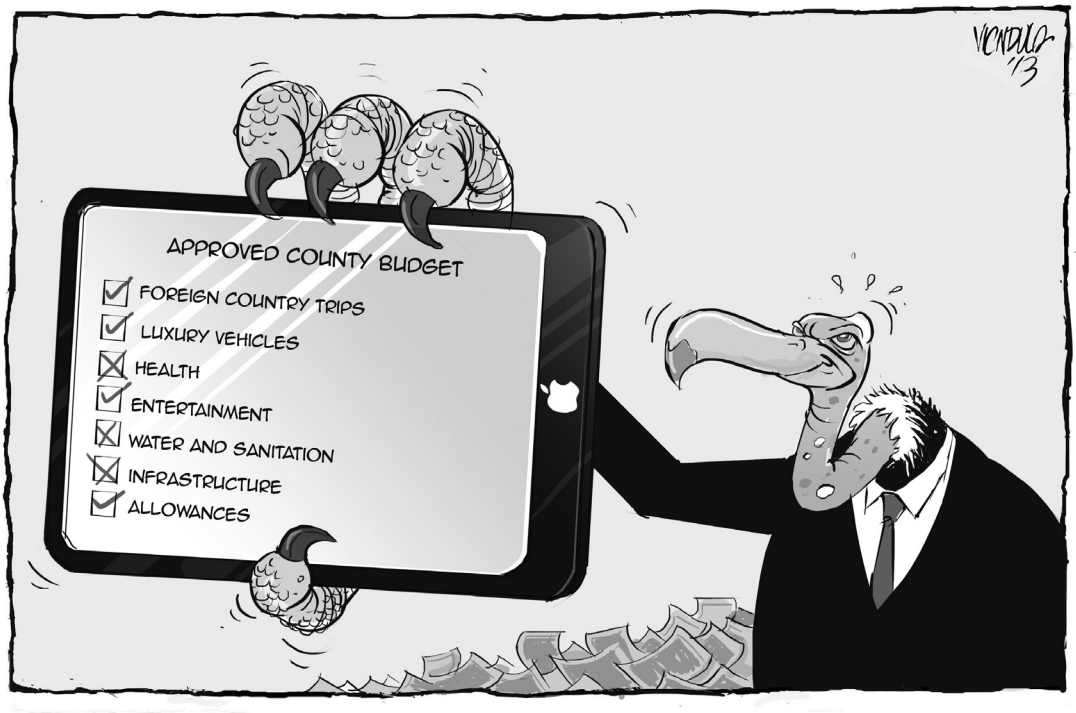
Federalism: a system under which a county is divided into geographical areas (maybe called states, provinces or regions), with a national government with certain defined powers, but the states also have defined powers, and over quite significant areas of life; the government of each level is elected and responsible to its electorate; the powers of each level are set out in the constitution and cannot be easily changed.

Decentralisation: activities of a government are carried out not just in the seat of government; can also refer to decision making; the arrangements can be by law, or though administrative procedures.

Concurrent: used in this context to mean power that can be exercised by more than one level of government.

Residual: used to refer to powers not mentioned in the constitution – so there has to be some rule about which level of government has those powers; in the case of Kenya it is the national government.

Exclusive: used to refer to powers that can be exercised only by a particular level of government.



Chapter 10

Integrity, Transparency and Accountability

When you have read this chapter you will:

- *understand the basic principles of integrity set out in Chapter 6 of the Constitution*
- *know in broad terms how appointed state officers are appointed and may be removed*
- *understand the outlines of the system of control of public finances.*

From the Constitution

73. (1) Authority assigned to a State officer—

a) is a public trust to be exercised in a manner that—

i) is consistent with the purposes and objects of this Constitution;

ii) demonstrates respect for the people;

iii) brings honour to the nation and dignity to the office; and

iv) promotes public confidence in the integrity of the office; and

b) vests in the State officer the responsibility to serve the people, rather than the power to rule them.

"The responsibility to serve the people, rather than to rule them" is a key concept of the Constitution. Holders of public office, elected or appointed, whether career civil servants, politicians or independent office holders, are paid from the taxes that ordinary people pay, or from other money that is intended for the benefit of the Kenyan people.

Apart from the language of Article 73, and the national values (from which the title of this chapter is taken), the Constitution has various provisions intended to ensure that those who hold any sort of public office are both competent and honest, as well as being accountable. Some also have to be politically neutral. For politicians the most important form of accountability is the ballot box – if they don't perform you don't vote for them next time, and may even be able to get rid of them during their term. Here we are concerned with legal forms of accountability.

Are you a taxpayer?

Almost certainly, you are. Even if you do not earn enough to pay income tax, almost everything you buy will have an element of tax in the price. A lot of Kenya's tax is raised through Value Added Tax – tax on goods and services paid ultimately by the consumer. And the price of almost everything you buy will be affected by tax on fuel (petrol/diesel). And your use of your mobile phone is also taxed. Through your taxes you pay the leaders!

Qualifications

There are no formal qualifications in the Constitution to establish the competence of holders of elected office, though a law would be able to add some qualifications – including educational and moral ones (Art. 99). The Elections Act now says that in order to stand for election as President, Deputy President, Governor or Deputy, MP, Senator or Member of a County Assembly a person must hold a university degree. Judges have disagreed over whether these requirements are justified and constitutional, at least for legislators. There is no minimum age qualification for any office (except that a person must be registered as a voter, which means they must be at least 18 – Art. 99).

Qualifications for a few major public offices are clearly set out – including judges, the Auditor General and the Controller of Budget. For others, specific laws may prescribe qualifications. The Constitution has some very important provisions on integrity issues. Many of these are contained in the now well-known "Chapter 6" (see "Conduct" below).

No-one who has been removed from any state office for breach of the principles of Chapter 6 on integrity (which would include corruption) can ever hold state office again (Art. 75(3)). It should be interpreted widely: a person who is removed or who "steps aside" to use the current peculiar terminology, because they are suspected of having violated the chapter, should be ineligible to hold public office again if the allegations are ultimately confirmed, even though it could be argued that they were not actually removed because of a proved contravention.

No person can stand for elected office if they are serving a prison sentence of over 6 months at nomination or election time (Art. 99(2)(g)). No-one can register as a voter (or stand for election) for 5 years after being convicted of a crime in connection with elections (Art. 83(1)(c).

Applying Chapter Six has not been easy however. First, it says that "The guiding principles of leadership and integrity include—(a) selection on the basis of personal integrity, competence and suitability, or election in free and fair elections". This seems to suggest that for elections "free and fair elections" are enough - personal integrity, competence and suitability are only relevant for appointments. And a court refused to accept the proposal that candidates for election should be compelled to disclose to the electorate if they were under investigation or even charged for a criminal offence. Courts are very concerned that individuals are treated as innocent until they are providing guilty, and fearful that criminal procedures might be used to ensure that some candidates could not stand.

Even for appointments the courts have not been as concerned to protect the integrity of the process as courts in some countries. In one case, the High Court said of an appointee to the Anti-Corruption Commission that he faced "unresolved questions about his integrity. The allegations which he is facing are of a nature that, if he is confirmed to this position, he will be expected to investigate the very same issues which form the gist of the allegations against him. It requires no laborious analysis to see that this state of affairs would easily lead many Kenyans to question the impartiality of the Commission or impugn its institutional integrity altogether." But the Court of Appeal decided that the High Court was wrong to hold that the appointment should not have been made.

The result is that Chapter Six has been something of a disappointment.

A certain individual was charged with some serious offences, yet was nominated to an independent Commission.

> "The nomination … raises serious questions on the due diligence carried out on individuals before being nominated for public office. The nominating authority, in this case, the President, failed to ensure that only persons without serious questions of integrity are nominated. …In this appointment process, the nominating authority, the candidate nominated as well as Parliament individually and collectively undermine Chapter 6 of the Constitution. A candidate with unresolved questions of integrity cannot bring the honour and dignity required of state office under our Constitution."
>
> Transparency International Kenya 2018

Appointments processes

There are at least two stages to the process for many appointments. One stage may be more concerned with professional competence, and the other stage with acceptability of the appointee, with some elements of politics and some of integrity.

The head of the police, the Inspector-General, is appointed by the president without any constitutional requirement of any input from anyone else, but Parliament must approve the appointment (Art. 245). The heads of the two police forces, Kenya Police and Administration Police, must be appointed "in accordance with" the recommendation of the Police Service Commission (Art. 245(3)) – this means the Commission makes the decision, which must be followed

Cabinet Secretaries' appointments must be approved by the National Assembly (Art. 152(2)). The same is true of the Auditor General and the Controller of Budget, ambassadors, and the Public Service Commission, and generally other independent commissions (see Chapter 8 and below).

Role of Parliament

Parliament (almost always the National Assembly) is given the role of approving quite a lot of appointments. Is this a good idea?

The best known use of this idea is in the Constitution of the USA under which various officers, including Supreme Court justices, ministers and ambassadors are appointed "with the advise and consent of the Senate". The Senate comprises equal representation from each state. Its members hold office for longer, must satisfy a higher minimum age requirement, and were expected to offer stability and experience and to counteract the inexperience and populism of the other house, or even possible abuses by the executive.

In 1793 the idea of an independent commission to appointing judges, was unknown. It seems a bit odd to set up an independent mechanism for appointing judges only for the highly political parliament to be able to reject its choice. But this is what the Kenyan Constitution does for the Chief Justice and Deputy Chief Justice

A number of countries have parliamentary scrutiny of some appointments. In Ghana there have been comments that instead of MPs being able to exercise their individual judgment, the party whip is used.

Parliamentarians are subject to temptation to misuse this power. When the former chair of the Salaries and Remuneration Commission (whose power to fix their remuneration MPs have bitterly resented) was before the House for approval of her appointment as ambassador, one MP said, "I was shocked to learn that Sarah Serem could not even understand the role of an MP. I am happy today that she knows the role of an MP - that an MP can give or deny you a job."

Conduct

The Constitution lays down general principles for conduct in public office. They are not just a guide for office holders, but the people should also be aware of them – to know what they have a right to expect of their public servants. The main point is to prevent any conflict between a person's personal interest and duty (Art. 75(1)). Violations of this basic principle would include:

- receiving any bribe or other favour to carry out one's duty
- receiving any bribe or other favour not to do one's duty
- favouring a relative, friend or other person when making a decision (in other words not making the decision based on the correct criteria of merit, need etc).

To ensure that such violations do not take place the Constitution says that if a state officer receives any gift on an official occasion it is to be treated as a gift to the State (Art 76(1)). This was (sensibly) expanded in the Leadership and Integrity Act. Gifts received in an officer's "official capacity" are covered. A gift not in actual money worth up to KShs20,000 does not have to be declared, unless the officer thinks that the motive of the gift was to affect the officer's integrity or impartiality or create a conflict of interest. Any gift worth more than KShs20,000 must be handed over to the officer's unit. This is still not very satisfactory: who judges if the gift was "in an official capacity"? Is KShs20,000 a reasonable limit? Which officer will say that a gift was intended to affect his or her integrity?

No holder of a full-time state office must have any other "gainful employment" (Art. 77(1)). This too is a bit problematic. Among the officers the drafters clearly had in mind were MPs. Unlike the past, they were to be full-time. The Leadership and Integrity Act waters down the constitutional provision by redefining "gainful employment" to mean something that is not within its plain meaning: it means "work that a person can pursue and perform for money or other form of compensation or remuneration which is inherently incompatible with the responsibilities of the State office or which results in the impairment of the judgement of the State officer in the execution of the func-

tions of the State office or results in a conflict of interest in terms of section 16". There are other uncertainties - Does it include writing novels as a hobby, or farming?

The Constitution prevents members of Parliament finding themselves with conflicts of interest over their salaries: they no longer fix their own salaries, because this is done by the Salaries and Remuneration Commission (Art. 230). And even if a law is passed giving members of Parliament some financial benefit not enjoyed by the public generally, that law cannot come into effect until after the next election (Art. 116(3)). MPs still resent this, and in 2018 were trying to pass law (quite unconstitutional) to allow them to fix their allowances.

Sometimes, to prevent conflicts of interest, there are restrictions on what a person may do even after ceasing to hold a public office. So a retired state officer who has a pension must not receive any other money from public funds except as a chair, director or employee of a state organ or state company. And he or she must not hold more than one such position (Art. 77(3)). This may be a bit restrictive – it seems to prevent someone being a consultant to the state (because this is not "an employee").

The land law of Kenya used to permit to presidents a major type of conflict of interest – they had the power to allocate land to anyone, and did so in a way that was a grave abuse of office. Now, following the Constitution, allocation cannot be done by presidents.

Transparency

A very important way of enforcing honesty is through the use of openness or transparency (one of the values of the Constitution). The Americans have a nice expression: "Sunshine laws" – laws letting the light in so we can see what is happening. The Constitution requires transparency in a number of ways that will be useful to keep corruption and favouritism under control.

AU Convention on Combating Corruption

Article 7: State Parties commit themselves to

1. Require all or designated public officials to declare their assets at the time of assumption of office during and after their term of office in the public service.

Note: Kenya has signed and ratified this and it is in force; it is therefore part of Kenyan law because of Article 2(6) of the Constitution.

Chapter 6 says that declaring any personal interest that may conflict with public duties is a principle of integrity – but it does not say how this is to be done (but violation would be a ground for removal from appointed office under the chapter). MPs must not vote on any matter in which they have a financial interest – or if they do vote that vote will not be counted (Art.122(3)). Actually, Parliament's own rules say that a member must state before speaking if he or she has a personal interest in the matter; it is a pity the Constitution does not include this.

The current law, not the Constitution, also says that all holders of public office must annually declare their assets (this is the Public Officers Ethics Act). Unfortunately, the Parliamentary Select Committee removed from the draft constitution a provision that would have made this a constitutional obligation, and the Committee of Experts apparently lacked the courage to reinstate it (but the AU Convention does include it – see box). In other countries such declarations are public – why not in Kenya?

Declarations of assets in other countries

Many countries require their senior officials to declare their assets regularly. It is a minority of countries that make these declarations public. But countries that do (either on request or automatically) include Argentina, the USA, South Africa (not all information), Philippines, South Korea. The UK publishes a register of MPs interests (over a certain amount).

The passing of Freedom of Information law has led to previously private declarations being made public in some countries (including to some extent in India).

Rules protecting people from "self-incrimination", as under Article 50(2)(l) of the Constitution, may mean this information cannot be used as the basis for a criminal prosecution.

The Leadership and Integrity Act added provisions for "state officers" (legislators, executive members, national and county, judges, commission members etc.). There must be a register of interests, and state officers must declare interests such as "gainful employment" (but that is a limited notion as we have seen), shares, land and other factors. The law does have a rather unclear provision about registers of interest being open to the public. Kenyans must be watchful to see that there is no attempt to protect public figures by repealing the law.

Enforcement and penalties

The advantage of having a parliamentary approval system is that it makes the final stage of appointments transparent. If you have any reason to object to the appointment of a person to an office, this is an opportunity to make representations to Parliament to make members aware of your issues. If you do not supply any reliable information that you have to bodies that can investigate, do you have a right to complain if a corrupt person is appointed?

Another route for assisting in the enforcement of Chapter 6 is through the anti-corruption commission.

We discussed earlier (above) the fact that individuals dismissed because they breach Chapter 6 cannot hold office again. This is a severe punishment, and hopefully a deterrent. There is a risk that officers will take care to resign before they can be removed, to avoid this consequence.

We have discussed earlier the problem of "impunity" and how the Constitution tries to prevent this in future by setting up an improved system for prosecuting crimes (see Chapter 5). A more professional and independent police service – which the Constitution is designed to achieve - would help also.

There are special rules to make members of Parliament accountable – other than through the electoral accountability we mentioned earlier. If they miss a number of meetings of Parliament itself or committees without any good reason they are liable to lose their seats (Art. 102(1)(b)). A similar rule existed under the old Constitution, without anyone ever losing their seat! But the new rules may be more effective: members have to miss fewer sittings before they risk losing their seats. But making the rule work will require the Speaker to be tough and not accept weak excuses for absence. This is something the media and the people ought to keep an eye on. We discuss the possibility of voters "recalling" their MPs – a form of accountability to the voters – in Chapter 11. We also discuss briefly the fact that an MP who leaves their party, or joins a party when they were elected as an "independent" loses his or her seat (see p. 129).

Parliament is an important means to hold other state officers accountable. Accountability of the president is by what is called "impeachment" (see box on p. 88).

Cabinet Secretaries may be dismissed by the president (Art. 152(5)(b)), but the National Assembly can set up a committee to look into the behaviour of a Cabinet Secretary, and if the committee reports that the Cabinet Secretary has violated the Constitution or a law, committed a crime or been guilty of "gross misconduct" the president must dismiss the Cabinet Secretary ((Art. 152 (6) - (10)).

Members of independent Commissions (such as the human rights commissions, the Electoral and Boundaries Commission and the Public Service Commission) can be removed only for serious misbehaviour, incompetence, illness, or being bankrupt. The procedure involves the National Assembly, which would send a report to the president who would have to set up an independent tribunal to look into the case. If it found the allegations against the commissioner justified, it would report to the President, who must accept its recommendations and act promptly (Art. 251). A similar procedure applies to the Auditor General and the Controller of Budget.

There is a special procedure for dismissing judges that involves the Judicial Service Commission and the president, in a similar way (Art. 168). And the Director of Public Prosecutions is subject to a similar process, but it involves the Public Service Commission and the President. The first Deputy Chief Justice was removed in this way.

In all these cases, citizens may start the process for removal by complaining to the National Assembly or the relevant service commission about the commission member or officer in question.

Land grabbing

One of the worst forms of abuse has been the grabbing of public (and sometimes private) land by office holders and other well-connected people. The land chapter in the Constitution (Chapter 5) requires a process to be set up to enable the review of all grants of public land to see whether they were legal and proper (Art. 68(c)(v)). Some land has in fact been taken back – but land grabbing has not unfortunately stopped.

Public finance

Public money is the money raised by taxes from Kenyans, and also money given to the government, or lent, by international bodies and governments. It should not be stolen, it should not be wasted, it should be used in a cost–effective way, and it should be used only for the purposes which have been approved by the elected representatives of the people (or by the "donors" if the money comes from outside). And the people ought to know how their money is being used. The Constitution tries to achieve all these things, but we must not overlook a number of laws that affect the management of public money, many of them passed in the last few years.

The two main national annual laws are the Finance Act, which is about taxes, and the Appropriation Act which is about spending money (budgeting).

Purposes (and amounts) must be approved

Like most constitutions, the Constitution of Kenya says that no public money can be spent unless it has been approved by Parliament (Art. 206(2), (3)).

In the past the budget for a financial year was not even considered until after the financial year had begun (Kenya's financial year begins on July 1). The Constitution, and new laws, try to improve the scrutiny by parliament of the budget by increasing the amount of time that parliament has to study it, and by requiring the budgeting process to begin much earlier. The Public Finance Manage-

ment Act (passed after the Constitution) sets out a timetable for the budget process, giving plenty of time for public participation, and consideration of previous years' performance before decisions are made. Under the Constitution itself, the detailed budget proposals for raising and spending money must be presented to the National Assembly at least two months before the previous financial year ends (Art. 221(1)).

Once the Ministry of Finance has submitted the budget, the National Assembly must refer it to a committee. Not only must the committee consider the estimates of expenditure and revenue, but it must invite public comment and take public submissions into account when it prepares its recommendations (Art. 221(4), (5)).

Budget Timetable[4]

- August 30: Circulars to government departments on how to prepare budgets
- September 1: Counties table the Annual Development Plan which guides the budget-making process for the year. The plan is made public within 7 days.
- October 21: After cabinet approval, the national and county Budget Review and Outlook Papers tabled in the national and county legislatures.
- January 1: Deadline for Commission of Revenue Allocation to submit recommendations on division of revenue
- February 15: The Budget Policy statement and the division of revenue and county allocation of revenue bills submitted to parliament.
- February 28: The Budget Policy statement to be approved by parliament. County Fiscal Strategy Paper is tabled in the county assembly.
- March 14: County Fiscal Strategy Paper to be approved by county assembly.
- April 30: National budget proposal submitted to parliament, and county budget proposal submitted to county assembly.
- May, national and county assembly budget committees must hold public hearings.
- June 30th end of the financial year; national and county appropriation Bills should have been approved.

There is now also a Parliamentary Budget Office which is supposed to enhance the ability of parliament to carry out its responsibilities of scrutinising public expenditure issues.

Making sure the money is spent on the approved purposes

The Constitution tries to go further by creating a new post –the Controller of Budget – whose office has the responsibility to ensure that no money is actually spent from public funds unless it is being used for a purpose approved in the budget that Parliament has approved (Art. 228). The Controller will also point out to departments if they are not spending the money that has been allocated to them.

"The key challenges identified by the Office as hindering effective budget execution by County Governments included; high expenditure on personnel emoluments, delay in submissions of financial reports to the Office of the Controller of Budget by County Treasuries …, under-performance of own source revenue collection when compared to annual target, …, and delay by the National Treasury to disburse the equitable share of revenue raised nationally"

Controller of Budget on counties

4 Abbreviated from https://openinstitute.com/the-kenya-budget-calendar/; derived from International Budget Partnership.

After the financial year ends, all public bodies have to submit their accounts to the Auditor General, who must report to parliament. The Auditor General has a constitutional duty to make the report within 6 months after the end of the financial year (Art. 229(4)). Oddly, there is no constitutional deadline for the various bodies to present their accounts – which may present the Auditor General with an impossible task. There is a deadline of three months given in the relevant ordinary law – but government bodies often fail to submit their accounts on time.

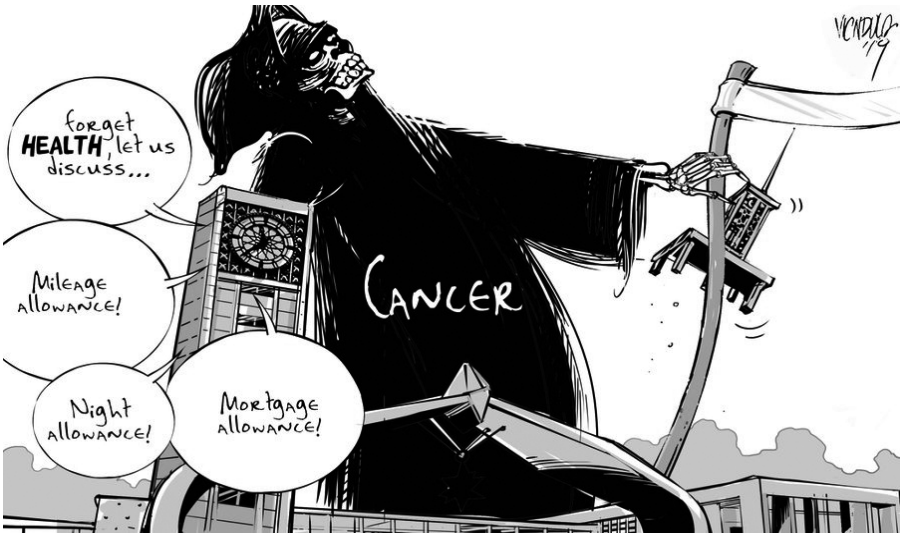
The Constitution then gives three months for parliament (or the county assembly if it is a county government body that is involved) to consider the Auditor-General's report and "take appropriate action" (Art. 229(8)). In the past parliament was very behind in this part of its work, but has recently performed somewhat better. But though the Auditor General and the parliamentary committee may identify many problems, it is not clear they have much impact.

Procurement

Prevention, they say, is better than cure. The Constitution tries to prevent misuse of public funds by the provisions of chapter 6 (see above) and also by the regulation of public procurement – when government buys goods or services. The Constitution says there must be a law that is designed to produce a system that is fair, transparent, competitive and cost-effective, that provides for affirmative action for disadvantaged groups and penalises contractors who have not performed well or those who have been guilty of corruption, evasion of taxes or reaches of employment law (Art. 227). A procurement board set up by law to achieve these objectives has been in existence for some time. Members of the public should be alert to see that obvious abuses do not occur, and be prepared to report them to the authority if they detect them.

MPs salaries and allowances

Kenyan MPs, we have been told, are some of the highest paid in the world. The Constitution prevents MPs assessing their own pay. The Salaries and Remuneration Commission fixes state officers' salaries and makes recommendations on all other public sector salaries (Art. 230). This is not a commission that must be approved by the National Assembly – so they do not have the chance to appoint people they hope will be generous to them.



The Constitution also says that state officers must not be excused from paying tax (Art. 210(2)). This is aimed particularly at MPs – who in the past received far more in non-taxable allowances than in taxable salaries.

Role of the People

What can people do about this highly technical subject? There are organisations that study the budget and prepare information for the public to help them understand it. Civil society can try to understand the issues, and have an input into the process the Constitution requires.

Government bodies very often do not spend all the money allocated to them (despite the amount that gets stolen!). The people should keep a watch on what governments do in relation to what they were supposed to do.

The reports of the Auditor General are not hard to understand. In many, especially developing, countries, these reports are routinely ignored. Parliament and county assemblies have a duty to respond to them – but this is much more effective if the people know what is in the reports. You can get some assistance in understanding them from various sources.

The Constitution says that anyone responsible for misuse of public funds shall make good the loss (Article 226(5)). This "surcharging" mechanism sounds as though it ought to be an important deterrent. But no mechanism is provided in the Constitution – and the Auditor General does not have any under law, though there are possibilities of surcharging local government and state corporation staff. There seems little evidence that many people have actually had to pay back money on this basis.

Use your MPs. We no longer have a system of parliamentary questions to ministers/CSs. But committees continue to have the power to carry out investigations. What parliament may not have the power to do is to ask specific questions on issues, not part of a broader investigation.

Watch your MPs (as we emphasise in Chapter 12). Are they representing the interests of Kenyans or their own?

Some questions to think about

1. It is said that one-third of the revenue collected by the Kenya Revenue Authority is stolen. This does not seem to have changed since the new Constitution. Why do you think this is and what additional rules and mechanisms would you propose?

2. The EACC has often complained that its recommendations for prosecution are frequently disregarded by the DPP. The EACC has often asked to be given this power. Do you think that the EACC should be given this power? Discuss how such a power (in addition to its powers of investigation) would fit into the values and schemes of the separation of powers and of constitutionalism.

3. Should MPs be required to study the principles and practices of accounting before assuming office?

4. What is the proper role of the media in exposing irregular practices in state offices? How well do the Kenya media perform this role? If not, why not?

5. Should politicians or political parties be able to buy or own media houses?

Part Four

Using the Constitution

Chapter 11

Electoral democracy

The real future of the Constitution depends on the people. This is always true, but particularly so in a country like Kenya where there is resistance from many of the organs of the state and the political elite. This is the people's Constitution – and the people have to make it work. That is why we have called this chapter "using" the Constitution not "implementing" it. There is a tendency to assume that implementing the Constitution is about laws, and is a matter for the government (and we have outlined this process in Chapter 2). We are concerned here with how the people can use the Constitution and thus implement it.

You may have heard democracy defined as "Government of the people, by the people, for the people". Yet, generally speaking, the involvement of most people most of the time in most countries is limited to voting for their government once every four or five years. Here we want to show how active your involvement as a citizen can be under the Constitution. Even if you are not interested or active enough to do more than vote, at least it is good to understand the system.

In this and the following chapter we make some suggestions about how the people of Kenya can be actively involved and have an impact on decision making. No doubt there are many other ways, and various sections of society have their own ways of making an impact on authorities, or organising themselves and helping their communities move forward. In this chapter we look at the ways in which the Constitution can be used with the skills and experience of groups and individuals especially through voting, and standing for election, campaigning and exercising oversight over elected officials.

By the time you have read this chapter you will understand:

- *how elections should make it possible for your voice to be heard;*
- *how the system of democracy through representation should work;*
- *have reflected on why a person (maybe you?) might want to become an active politician, including if they are not in a party, and what the implications are;*
- *have an understanding of the role of political parties and what the Constitution says about them.*

In the following chapter we continue with the theme of democracy by looking at how people can be involved and make an impact between elections. We can call this "direct democracy". The box quotes from the very first Article in the Constitution.

Sovereignty of the people

1. (1) All sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution.

(2) The people may exercise their sovereign power either directly or through their democratically elected representatives.

First: understanding the Constitution

Fundamental to all the ways to implement and protect the Constitution is that you have a clear understanding of the values and structure of the Constitution, your rights as well as the authority and responsibilities of state organs. You must learn how those who commit violations of the Constitution can be held accountable. You must follow the realities of the exercise of power by these organs, particularly the executives and the legislatures. You must look out for violations committed by them as well as non-state actors, and take steps to rectify the violations.

There are a large number of non-governmental organisations, some well-funded, some less so, which have the task of "civic education". Their mission in many cases is precisely to ensure that Kenyans understand the Constitution and their rights. You should not only take advantage of what they can offer, but insist that they understand what you and your community need to understand the Constitution better.

Right to vote

The Constitution gives people considerable power and authority to secure the implementation of the Constitution, particularly its values. We have seen (see box above) that the Constitution roots democracy in the sovereignty of the people; this is not merely rhetoric. The most important of the democratic rights is the right to choose legislators and the executive authority, at both the national and county levels. Every citizen, the Constitution says, is free to make political choices, including the right to form a political party, and participate in its activities, to campaign for political causes, to be registered as a voter and to vote (Art. 28). But this right can make a difference only if people use their vote in an informed and responsible way. They need to understand the policies that candidates are offering, their qualifications for the posts the candidates are competing for, and most importantly, their past record of integrity and public service. Remember the new standards of integrity established by Chapter 6 (see Chapter 10) and many other parts of the Constitution. Candidates may not help you to assess their merits, for they rarely mention policies, and generally appeal to your ethnic support (and this unfortunately does not seem to change). A major failure in the system of representation and voting has been the widespread tendency to vote along ethnic lines. This almost always means that voters do not think of policies and the past record of the candidates. The votes of many people are bought by candidates. This means that people rarely choose the best candidates - rather, corrupt politicians who seek to create conflict among Kenyans.

Who can vote? Only citizens have the right to vote and they must be "adult" which means 18 or over (Art. 83). To be able to vote everyone must register. The Constitution says that law must "progressively" provide for registration of citizens overseas and for their right to vote. So far only Kenyans in a few other countries can vote, and only for the president. Extending it to other polls is problematic: it would be logistically difficult to distribute diaspora votes around the country. And it would probably be constitutional for the law to limit the right of those overseas to vote to people who have lived in Kenya, and probably to those who have done so within a certain length of time. Now that people born overseas can be citizens if either parent is a Kenyan (Art. 14), and they can keep their Kenyan citizenship even if they are also citizens of another country (Art. 15), there is some risk that people with no real connection with the country would want to vote.

A person cannot register to vote if they have been found guilty of a criminal offence in connection with elections during the previous 5 years (Art. 83(1)(c)). This would include things like taking or giving a bribe, pretending to be another voter or trying to vote more than once.

How do people vote? There has been talk of introducing electronic voting (people press a key on a computer keyboard or a sign on a screen rather than putting a ☒ or a ☑ or another mark on a paper). There is nothing in the Constitution to prevent or require this. The Constitution does insist that voting methods must be simple and "transparent" (Art. 82(2)) and 86(a)). "Transparent" is funny – originally the word was there in drafts of the constitution referring to transparent ballot boxes,

which have been used in recent elections to defeat fraud. Now there is no mention of transparent boxes. The law about voting must take account of the needs of groups with special needs including persons with disability. Regulations allow a voter with a disability to bring someone of their choice to accompany them, or they will be assisted by the officer presiding at the polling station. "Simple" may be hard to achieve: voters have to vote for 6 people on the same day: the president, their local constituency MP, their county woman member of the National Assembly, their senator, their county governor and their county assembly member! And their votes are also relevant for the election of "extra" members of various bodies such as 16 women for Senate, and youth, persons with disability and others on party lists (see pp. 130 and 132).

Who runs elections?

The Independent Electoral and Boundary Commission (IEBC) has the job of running elections. It must do this fairly, and in a way that ensures that everyone can actually exercise their right to vote. The Commissioners must be people who have not been members of a legislature for 5 years, nor held any office in a political party during that time. This should help to ensure their independence.

The IEBC is also given some very precise instructions. Among the points stressed by the Constitution to make elections fair are:

- it must be possible to register as a voter at any time, not just for short periods
- election procedures must be simple and clear as possible
- there must be regulation of how much a candidate or party may spend on elections
- arrangements must be made for elections to be observed and monitored
- votes must be counted at the polling stations – to avoid the risks of tampering associated with moving full ballot boxes, especially by night.

The last does have a disadvantage: if there are very few voters at a polling station it may be impossible to respect the secrecy of the voting.

What can you expect of your MP?

The Constitution does not say anything about the role of individual MPs. Your MP is to represent you – but this does not mean he or she must simply put forward the view of the majority in the constituency. That view should be taken seriously, but the MP must become familiar with the technicalities and difficulties of policy issues. MPs are lawmakers for the whole country not just their constituencies.

But an MP should be prepared to take up issues of importance to the people of the constituency generally, and even of individual constituents who have not been able to get satisfaction otherwise.

MPs should keep in contact with their constituencies – regularly, not only before elections.

You should not expect your MP to give you handouts – this is a form of corruption. Most of all you should not take any sort of bribe to vote for anyone, or not to vote; this is a criminal offence, and both you and the bribe payer are guilty.

If you want to learn something about the role of a member of the US Congress, and have internet access, you can read about a day in the life of a congressman at https://bringmethenews.com/news/what-is-a-typical-day-like-for-your-congressman. And there is similar material at https://inews.co.uk/news/politics/what-mps-actually-do-day-in-the-life-typical-backbencher/.

Some Members of Parliament in many countries "tweet" – send out messages on Twitter (see for example http://tweetminster.co.uk/mps/) – or have Facebook pages, designed to keep the public up to date with what they are doing. A number of Kenyan MPs do, too.

The right to stand

Another important democratic right is the right to offer yourself as a candidate for public office – and the Constitution says just that (Art. 39(3)(b)). A previous chapter has shown the great power and influence which members of the legislatures and executives exercise. Unfortunately, few of our past or current politicians believe in public service; most enter politics only to make money. So in one sense the biggest challenge of the Constitution is for honest and public spirited people to contest for public office so that they can protect the Constitution and promote its values. Unfortunately, politics and politicians have become so discredited that many honest people are reluctant to enter the field. In this way we have left key positions in government to people of limited moral virtue.

Independent candidates

For a long period, during the "one-party rule", Kenyans had no choice – they could only be represented by a KANU MP. Even after the return of multi-party democracy in 1992, everyone who wanted to be an MP had to stand as a candidate for a party. Now a person can stand as an "independent" (Art. 85). This is not possible for someone who has been a member of a party within three months before the election – this is to prevent a person who has failed to get adopted as a candidate by a party standing as an independent.

Standing as an independent (non-party) candidate is possible for President, MP for a geographical constituency, woman MP for a county, Senate member for a county, Governor, and county assembly member for a ward. But the list members only come in through parties.

Once elected as an independent a person cannot join a party – or they have to resign and contest a by-election (Art. 103(1)(e)). It is not easy for independents to stand: they have to get the support of a significant number of people (1000 voters for a candidate for MP – Art. 99). They will have to bear the costs of campaigning (but parties do not do much to help their members anyway). In 2017 there were more independent candidates, including more women, and a few were elected: one County Woman Member, 12 MPs (one a woman), one Senator, one Governor, and over 80 MCAs (four women).

Anyone interested in standing, whether as independent or party candidate, should study carefully not only "What can you expect of your MP?" (above) but the Constitution, the issues that affect the place where they want to stand, so that they can have a position on possible policies.

The National Parliament

The National Assembly:

290 individuals elected from constituencies each of which must be close in population size to the population of the country as a whole, divided by 290

47 women – one from each county, elected by all the voters of the county

12 members, on party lists (see next page) to represent "special interests including the youth, persons with disability, and workers"

The Senate:

one member from each county elected by the voters of the county

16 women elected on party lists

2 members to represent youth – one man and one woman

2 members to represent persons with disability – one man and one woman

Who will represent you (in Parliament)?

Most people will never stand for election themselves. The point of the election system is to ensure that all citizens can be represented in the bodies that make law, and as far as possible everyone is equally represented. In Kenya, in the past, representation was not very fair: constituencies were very uneven in size, numbers of women, as well as of some communities, and persons with disability, were small. Parties – which are the most important way in which people organise to participate in politics, including getting elected have not been very democratic. The Constitution deals with these issues in various ways:

- constituencies must be more even in size (not as even as they are in many countries, but the great discrepancies that existed in the past should no longer be possible, so each citizen's vote will be worth about the same)
- there is special provision for seats for women, and also for persons with disability, youth and – in the National Assembly there must be some seats for "workers", though it is not clear exactly what this means
- political parties must be more democratic (see p. 132).

Explaining party lists

There are various "extra" members (in italics in the box above), who are to represent particular groups in society, but who come into the Senate and the National Assembly through "party lists". It works like this:

- Before the elections parties will publish their lists of youth, persons with disability, workers and women, in order of preference. Unless the list is of one gender only, a party must alternate men and women (zipped or zebra list).
- Voters vote for their preferred constituency member – and in voting they could take account of the way the parties have made up their lists of extra members.
- When the results are announced for the constituency members, it will be clear what proportion of those seats the various parties have won.

Parties that have won enough seats will then get extra seats from their lists – in proportion to the seats they have won in the constituencies. We can see how it works for the Senate in the box – and in the chapter on Devolution there is another example for Turkana county assembly.

Seats in the Senate in 2017

When the results were in for the Senate county seats it was clear that:

Jubilee had won 24 seats ODM had won 13 seats

WIPER, ANC and KANU had won 2 seats each

Three other parties had won 1 seat each and there was one independent

The 16 seats for women were allocated in proportion to the county seats won, as were the 2 youth and the 2 disability representatives.

So: Jubilee had won just over 50% of the county seats while ODM had 27.7%. Jubilee got 8 or half of the women seats, and ODM got five. The three parties that got 2 county seats each, got one list woman seat each.

Jubilee and ODM each got one of the youth seats and one of the persons with disability seats.

The result is that Jubilee's total was 34 (72.3%) and ODMs total was 20 (42.6%). In other words, the result of the allocation of lists seats on the basis of seats won (not votes won) very much boosts the total seats of the larger parties. This happens in the counties, too. In the Senate it is less important, because individuals rarely vote as such (the county delegations have the votes). But in a county assembly the result might be significant.

Recall

The third democratic right is the right of the voters in a constituency to recall their member of the National Assembly or the Senate (Art. 104) if they do not perform as they ought; for reasons not explained by the CoE, the rule does not apply to members of county assemblies (but extended to them in an Act of Parliament). Recall has long been resisted by politicians (and was taken out of the CKRC draft by them at Bomas, but reintroduced by the CoE). This right was not available immediately, as parliament was required to specify the grounds and the procedure for recall, within two years from promulgation.

When Parliament came to pass the law that the Constitution required, it made it almost impossible to succeed in recalling an MP (or MCA). And if the law did make it possible it added nothing to other law. The law was challenged in the High Court and the Court held that it was not good enough. For example, the law was vague. And it limited too much who could bring a petition for recall. The result of the case was to leave Kenya with no law in the subject. But since there is a right to recall, anyone who wishes to start a process to recall and MP or MCA should not feel prevented by the lack of a precise law.

The CKRC proposal on Recall

Reasons: physical or mental incapacity to do the job, serious misconduct, persistent neglect of the electorate without reasonable cause.

Procedure: petition to the Speaker, setting out the reasons, signed by at least thirty per cent of the registered voters of the constituency, Electoral Commission to conduct a public inquiry and report to the Speaker; Speaker declares seat vacant if Electoral Commission finds the allegations valid; by-election held.

On the other hand, there is the danger that the rule might be used by political opponents of the sitting MP, using ethnic differences, bribing of voters etc to get enough signatures to start the process of recall. So people have to be alert not only to the way in which the MP performs her or his duties, but also to resist ill motivated attempts at recall. For the Constitution to work properly, citizens must have enough discretion and responsibility to deal with both these situations—illustrating the general approach of the Constitution which requires informed, alert and responsible citizens to operate it according to its values and procedures.

Voting for the President

There are 290 constituency MPs, plus 47 "county women" – but there can be only one President. Because the Constitution tries to make the President a national figure – not a tribal one - to win the initial presidential election, a person must get more than half of the votes cast and 25% of the votes in more than half of the counties. If no candidate achieves this, there must be a second election between the top two, and then the person who gets the largest number of votes wins. There is a risk of tension between the first and second election. But Kenya survived the difficult period between the first (invalidated) and second presidential election in 2017 (after the Supreme Court declared the first election invalid).

Political parties (and politicians)

The role of political parties in the national democracy (in the CKRC Draft)

86. (1) Political parties are civil society organisations the functions of which are the fostering of democratic processes in government and the country and the participation of people in the political process by means which include:

(a) mobilizing public opinion on matters of national interest, and fostering national values and outlook;

(b) organize people with similar views and interests for political activities;

(c) providing channels to bring public opinion to bear on the policies of the Government and hold the Government accountable to legislative bodies and the people; and

(d) ensure that cohesion and discipline in the conduct of public affairs is maintained.

In many countries political parties are membership organisations; members pay subscriptions and play a part in deciding on policies and choosing candidates for election. In Kenya political parties are more like fan clubs for prominent politicians, especially among the politicians' "own" people. And people are not so much members as clients of the parties – hoping for the occasional handout.

In the draft constitution prepared by the CKRC there was an article setting out what political parties are, or should be, for (see box). This disappeared between BOMAS and the "Wako Draft" – on which Kenyans voted in 2005. But the new Constitution does still emphasise the importance of internal democracy in parties: they must have a democratically elected governing body, promote and practise democracy through regular, fair and free elections within the party and respect and promote human rights and fundamental freedoms and gender equality and equity (as well as not being sectarian or exclusive) and promote the objects and principles of the Constitution and the rule of law.

But if you should not support a particular party because it represents "your" people or is led by your hero, why should you support it? The only really good reasons are because it has plans and policies that you believe are good for the nation or because its candidates are people who will make good leaders for the nation – of course it's best if a party has both good policies and good leaders.

Thinking about your votes

At a general election you cast a lot of votes! But as you vote you should think carefully about not only the sort of people you are electing, but how they will work together. You want the best person for president. And you want a good local MP. You could think about these quite separately. But you ought also to perhaps think about how the person you want as MP (and his or her party, if any) would relate to the president. It is good to have MPs who will hold the government to account. But it may make no sense to vote for a president who favours, for example, a national health insurance scheme, and MPs who would vote against such a scheme. Similar thoughts may be relevant when considering your vote for the county governor and your vote for an assembly member.

The Constitution does assume that when people vote for a candidate one relevant factor is the party they belong to, or even the fact that the candidate has no party. Members of Parliament may lose their seats if they leave the party which supported their candidacy – or join a party when they were an independent candidate (Art. 103(1)(e)). There was a similar provision in the old Constitution – and it was never used. Now that the majority in parliament does not have quite the same importance as before, maybe parties will be less indulgent towards members who really abandon them.

Another voting system

Kenyans are used to the idea that an election is about choosing a person who will (supposedly) represent the people of a particular geographical area – called a constituency. And that the person who wins is the one who got the most votes – they do not need to have had the support even of a majority of the voters. This is not an uncommon system (it is used in the UK, India, Canada and the USA for example).

One of the problems about this system is that the overall result may not really reflect the way popular support works. A simple example is that if people with a particular political view are very widely scattered they may never be able to vote in anyone who thinks the same way that they do. In every constituency they are not more than 10% of the voters. Overall in the country they might be 8% of the voters, but they might never get a single MP elected.

There are other ways of organising voting. The easiest to understand is a list system of proportional representation. Each party puts forward a list of candidates. People vote for the list of their preferred party, not for an individual. If the party gets 30% of the votes, it gets 30% of the seats. Those members selected (taking them from the top of the party's list) do not represent the people of a particular area. South Africa is a country that uses a system like this.

Conclusion

Many MPs who stand for re-election in Kenya fail. But in between elections, citizens have had very little say in what government does, and during their 5 years in office MPs have been able to do a good deal of damage.

The Constitution envisages a far more active citizenry. "Participation of the people" is one of the national values. There are also some practical ways in which the Constitution makes participation possible. We look in the next chapter at how citizens can play a part in making decisions, or influencing decisions that affect their lives and the nation, apart from by voting.

Some questions to think about

1. The basic system of voting is like that under the old Constitution – using the "first past the post" system. This means that, as in the past, the composition of Parliament (and county assemblies) does not reflect the way the people have voted (see also p. 133). Having 30% of the national votes does not mean 30% of the seats in the National Assembly. Do you think it would be better to have a system that does reflect the national vote – even if it meant not having a particular constituency MP?

2. Would you be prepared to vote for a candidate who does not have a party?

3. How can we stop candidates and parties bribing the voters? How can we stop voters being prepared to take bribes for their vote?

Chapter 12

Using the Constitution: Participating, organising and protesting

This chapter looks at some of the other ways of protecting rights and good governance, some of which are provided directly by the Constitution.

When you have finished this chapter you should have some idea of:

- *what the Constitution says about participation by the people*
- *ways in which active participation in decision making is possible*
- *bodies that are established by the Constitution to which you can take complaints about public service, about violations of rights, and injustice*
- *what the Constitution says about citizens organising, protesting and even demonstrating (peacefully of course)*
- *other ways to bring violations of rights and of the Constitution to the attention of Kenyans and the wider community.*

The Constitution on participation

The Constitution supports active citizen participation in governance in a number of ways:

- Parliament, including its committees, must sit in public unless there is very good reason – so that people know what is going on (Art. 118)
- It must positively facilitate public participation in its work (Art. 118), including in "the legislative and other business of Parliament"
- There are similar provisions about the county assemblies (Art. 197)
- "Public participation in the management, protection and conservation of the environment" must be encouraged by the state (Art. 69)
- Any person may present a petition to Parliament (Art. 119) public authorities generally (Art. 37)
- Public participation is also to be encouraged in issues of public finance (Art. 201) and in management of the environment (Art. 69)
- Amending the Constitution sometimes requires a referendum – in other words the change to the Constitution cannot be made without the people's approval.

Petitioning

The idea of petitioning the authorities is very old – it was possible even in the days of autocratic kings. Now the Constitution says that everyone has the right to present petitions to public authorities (Art. 37). You can petition parliament to consider any matter within its authority, including to enact, amend or repeal any legislation (Art. 119). Government departments ought to make it clear

how the right to petition can be exercised – where you would submit petitions and what information you ought to give. And they should ensure that anywhere in the country you can submit a petition to the national government. Parliament changed its own rules of procedure –to fit with the Constitution. The procedure for petitioning is outlined in the box.

A good number of petitions are presented to Parliament, by individuals, groups and NGOs. But it is unclear what the impact of them has been.

Standing Orders (National Assembly) – on Petitions

- A person may send a petition personally, or do so through an MP
- The Clerk of the National Assembly must check within 7 days whether the petition complies with the rules about form etc., and if not must say how it should be changed. The rules about form include:
    - A petition may be handwritten, printed or typed;
    - It may be in English or Kiswahili
    - It must be written in "respectful, decorous and temperate language";
    - It must say if efforts have been made to get the issue resolved through other authorities
    - It must say if there is a court case on the issue
    - It must be clear about what is wanted
    - There is also a simple template for petitions in Schedule 3 of the Standing Orders
- Discussion in the House must be no more than 30 minutes (usually there seems to be no discussion)
- The petition will be sent to the relevant House committee
- The Committee must respond to the petitioner within 6 days, sending the report it will give to the House
- The House may not debate the report at length; just 20 minutes are allowed for comments.
- Within 15 days of the House decision, the petitioner must be informed.
- There must be a register of petitions, open to public inspection.

Referendums

A referendum involves asking the people to vote on a decision that has to be made. Sometimes a referendum just "advises" the government about the people's views: the government does not have to act on that advice. Sometimes the referendum is conclusive: what the people have voted for must be done. Both are forms of "direct democracy" – the binding referendum a stronger version. Kenya has had two referendums – both about the Constitution. In both cases the government had to accept what the people decided.

In some countries big decisions are often sent to the people through a referendum, and in a few the people can insist on having certain matters referred to them. Under the Constitution of Kenya the only situation where there must be a referendum is in connection with amending the Constitution, and even then there does not always have to be a referendum. We summarise the system at the beginning of Chapter 13.

Whether use of the referendum is always wise is another question. Many important decisions that have to be made in a country require a lot of careful investigation and negotiation, and all this might be upset by a referendum during which people behave irresponsibly or simply do not understand the issues. We saw some of this during the two referendum campaigns in Kenya, and you may remember how the people of Switzerland voted to ban minarets – something that cannot have improved relations with Muslims in the country. And the UK "Brexit" referendum is still highly controversial, and there is a strong sense that many people had little idea of the issues.

"Facilitating public participation"

Public participation is an aspect of the Constitution that many people are aware of. Many meetings are held, although it is not always clear how well organised they are, or how prepared members of the public are to take part.

"….public participation call for significant mental shifts in our mode of consultation, communication, learning, and accommodation of the views of ordinary Kenyans."

Chief Justice Mutunga in the Supreme Court

The South African Parliament, working under a Constitution that is rather similar to Kenya's on this topic, has developed some strategies for reaching out to the people. It is setting up a Parliamentary Democracy Office in each Province "to reach out and serve communities in the provinces, particularly in the rural, under-serviced, and under-resourced areas, and to facilitate their involvement and participation in the legislative and other processes of parliament".

The National Council of Provinces (equivalent of our Senate) has a "Taking Parliament to the People" scheme under which once a year it spends a week in part of the country to listen to people's concerns.

And it

- provides information on how to make submissions and present petitions
- publishes dates of committee meetings on-line
- publishes fact-sheets on various aspects of Parliament
- publishes basic information in all 11 official languages
- it has produced various radio and TV programmes and material for school curriculums.

So far the only example of a parliamentary sitting (other than retreats at some expense to consider matters that could well be discussed in Nairobi) has been a Senate visit to Eldoret in 2018. Committees also held meetings and visited relevant institutions.

Participation in law making

Some cases in Kenya have held that county legislation was unconstitutional because of lack of public participation. In one case a national law (Contempt of Court Act) suffered the same fate. The High Court has been very critical of the practice of introducing major changes to the law through "Miscellaneous Amendments" Bills that make it hard to know what is being changed.

In fact, Parliament's record in participation is not strong: often little notice is given to the public about law that is about to be passed.

Participation generally

At a more local level, participation includes attending meetings of bodies – such as education boards, responding to requests for input into laws, being or supporting members of parent-teacher associations and committees. There are many opportunities for participation at local, and for most people, meaningful levels. And most counties have passed laws on conducting public participation.

However, at this level also participation is not always very well organised.

> "In my view to huddle a few people in a 5-star hotel on one day cannot by any stretch of imagination be termed as public participation for the purposes of meeting constitutional and legislative threshold. Whereas the magnitude of the publicity required may depend from one action to another a one-day newspaper advertisement in a country such as ours where a majority of the populace survive on less than a dollar per day and to whom newspapers are a luxury leave alone the level of illiteracy in some parts of this country may not suffice for the purposes of seeking public views and public participation."
>
> High Court *in Gakuru v Governor Kiambu County*

Apart from laws, a number of decisions have been declared invalid because of lack of public participation, including the renaming of a local post office, a resolution of a County Assembly to move the county seat, and the initiation of impeachment of a county governor by the county assembly

Human rights and participation

We discussed human rights in a bit more detail in Chapter 5. Here we want to highlight the rights that are especially relevant to political participation (using participation here to mean not only party politics and elections but a wider sort of involvement in politics). These are:

- freedom of conscience, belief and opinion
- freedom of expression
- freedom of association
- freedom of assembly and the right to demonstrate
- the right to vote and stand for election (see preceding chapter)
- right to information.

All these can be found in the Constitution. Freedom of expression is perhaps the core participation right. Democracy is based on the assumption that truth and wise policies will emerge best if a variety of views can be expressed. No-one should be penalised for the peaceful expression of views. In modern society most political communication goes on through the media – newspapers, radio and television, and the internet. There is a special article in the Constitution that protects freedom of expression through the media (Art. 34).

A single voice is rarely effective. To have an impact people need to organise – to demonstrate or march or hold a protest meeting or to form longer lasting organisations. The freedoms of association and assembly (including the right to demonstrate and to picket – to stand outside premises with placards or speaking to people planning to enter, usually used in industrial disputes – are essential protection for these democratic rights. Any restrictions must satisfy the strict requirements of the Constitution (see Art. 24 and p. 30).

How to Participate

Take an interest – don't just vote and then leave everything to the MPs, or county assembly members

Join a political party – you may not like the parties, but they will not get better unless people get involved

Join meetings organised by NGOs about issues like the budget and law making into which public input is possible

Attend meetings organised by Parliament, assemblies and councils (and if they don't organise meetings join others in putting pressure on them to do so)

The commissions do not have to wait to receive complaints – they can take up issues on their own initiative. And anyone can bring a complaint – for example if someone sees another person or community being treated in a way that violates their human rights, they can complain to the commission even if they are not affected personally.

Because human rights are a matter not just of the citizens against the state, but between citizens (because the chapter on human rights in the Constitution must be respected by "all persons") complaints about behaviour of private companies or even private citizens could be taken to the Commissions if they are violations of human rights.

Human rights bodies

The Constitution creates various independent commissions (see Chapter 8) some of which are set up precisely so that people can complain to them and even receive some remedy. The most important of these are the National Gender and Equality Commission, and the National Commission on Human Rights (KNCHR). They can receive complaints, and investigate them and take steps to secure "adequate redress" for violation of human rights. They may use publicity, persuasion or can even go to court on behalf of others. The Commission on Administrative Justice (CAJ) deals with a particular right: to fair administrative justice (Article 47) (see below). It is also concerned with the right of access to information – if you seek information, usually from a government agency, and it is not given you may appeal to the CAJ.

In 2016-17 the KNCHR reported that it had received 4,852 petitions. 63.7% were about economic, social or cultural issues, and most of those were work related. Most of the rest were on civil and political rights, access to justice being the most common Their approaches to processing the complaints included providing legal advice, referral to partners with more relevant mandate, "low level" alternative dispute resolution methods, conducting field investigations on admitted complaints, holding strategic meetings with state and non-state actors, and offering psycho-social support services to petitioners.

There are also other, non-official bodies, such as the Kenya Human Rights Commission, to whom it is worth taking issues about human rights violations.

Police and security forces and human rights

Unfortunately, security forces are sometimes a source of violation of rights – instead of being the people's protectors. The Constitution is very firm that the national security organs are subordinate to civilian authority (Art. 238): the security organs are the police, the armed forces and the National Intelligence Service. And it also stresses that national security must be in accordance with the law and "the utmost respect for the rule of law, democracy, human rights and fundamental freedoms". An important body to achieve this was set up by ordinary law rather than by the Constitution. This is the Independent Police Oversight Authority (IPOA).

Ombudsman – and right to fair administrative action

You may have heard of the idea of an "ombudsman" – which is a Swedish word for an office with the responsibility to receive complaints from the public about violation of the law or fairness by public bodies. The idea is that of an approachable body that doesn't need a lawyer or a lot of money. Actually a human rights commission is very like an ombudsman. Kenya now has the Commission on Administrative Justice (which is also called "the Ombudsman"). The phrase "fair administrative action" is borrowed from the South African Constitution - and there they created a special office called the "Public Protector".

Examples of the sorts of cases that that CAJ have dealt with are

- A student who had been neglected by his supervisor
- Rural Electrification Authority allowing an MP to override a decision about the route for its cables that had been agreed and was acceptable to the community
- delay of ten years in finalising the case of an employee suspended for suspected misconduct.

Negotiating

It is not right to assume that someone else will always want to deny you your rights. Discussion and negotiation are often more effective than confrontation. Perhaps discussion would make it possible to resolve the issue. Aggressively insisting that "this is my right" before you have said "I should like to discuss this" may be counter-productive.

"We must appreciate as a nation that the right to access information is not a fringe right to other rights in the Bill of Rights. It is integral to the democracy conceptualized by our Constitution, in that it encourages public participation, abhors secrecy in governance and above all seeks to ensure that public power delegated to leaders is not abused."

High Court in *Katiba Institute v Presidential Delivery Unit*

Right to information

An important tool in the hands of the public and the press to detect corruption and mismanagement is the right to information and a duty on the state to make public matters that are of public importance. The Constitution says:

35. (1) Every citizen has the right of access to—

(a) information held by the State; and

(b) information held by another person and required for the exercise or protection of any right or fundamental freedom.

A law was passed in 2016 to set out the procedures for seeking information. Gradually people are beginning to use the law. It enables you (provided you are a Kenyan) to get information that will enable you to monitor how public money is spent, and how government generally is behaving. There are limits on what can be obtained – particularly government bodies may refuse to disclose information that would affect national security.

It is important that people make use of this right. It is not just a matter of individual cases, but of developing a new attitude to information – that what government knows is not somehow its private property, but belongs to the people of Kenya, and should be available to them unless there are very good reasons.

Asking for Information: a few tips

- If you are asking a government agency, you do not have to give reasons
- They do not have to supply information already in the public domain
- There is no fee for asking, but there may be for putting the information together for you
- If there is no designated officer for this purpose, address your request to the CEO
- The request must be for information "held". They do not have to find information government does not already hold.
- Be clear about what you want
- They don't have to supply information that would undermine national security, infringe someone's privacy, damage commercial interests; but a court can override the objections in certain circumstances
- If you get no response within a few weeks, or the response is unsatisfactory, you can go to the Commission on Administrative Justice, or the courts.

Pressurising and publicising

Public opinion can be powerful. If reason fails – but you are convinced reason and justice are on your side – there may come a point at which you feel the only thing to do is to "take to the streets". The Constitution protects the rights to "assemble, to demonstrate, to picket". This is not incitement to violence – the right is only to do these things "peaceably and unarmed" (Art. 37).

Using the press can be valuable – an essential adjunct to other activities. Writing letters to the editor, ensuring that the press is aware of meetings about political issues, learning the skills of informing the press of your demands are all useful. Again the Constitution recognises everyone's rights to freedom of expression, and protects a free media (Arts. 33 and 34).

"The Constitution allows every person to picket, demonstrate, assemble and present petitions. Picketing and demonstrations themselves invite the right to express opinions. The opinions may be controversial. The opinions may appear contrary to the law. The opinions may not find favour with others. Yet the Constitution anticipates and expects that such unpopular opinions howsoever expressed be respected. Even if they invite disagreements and counter-demonstrations."

High Court in *Waititu & 4 others v Attorney General*

"The actions by the police to violently break a peaceful demonstration were unconstitutional and an infringement of the petitioner's rights under article 37 of the Constitution. …Thus the police actions were unreasonable and unwarrantedly executed. The action was an assault on the very basic democratic values enshrined in our Constitution."

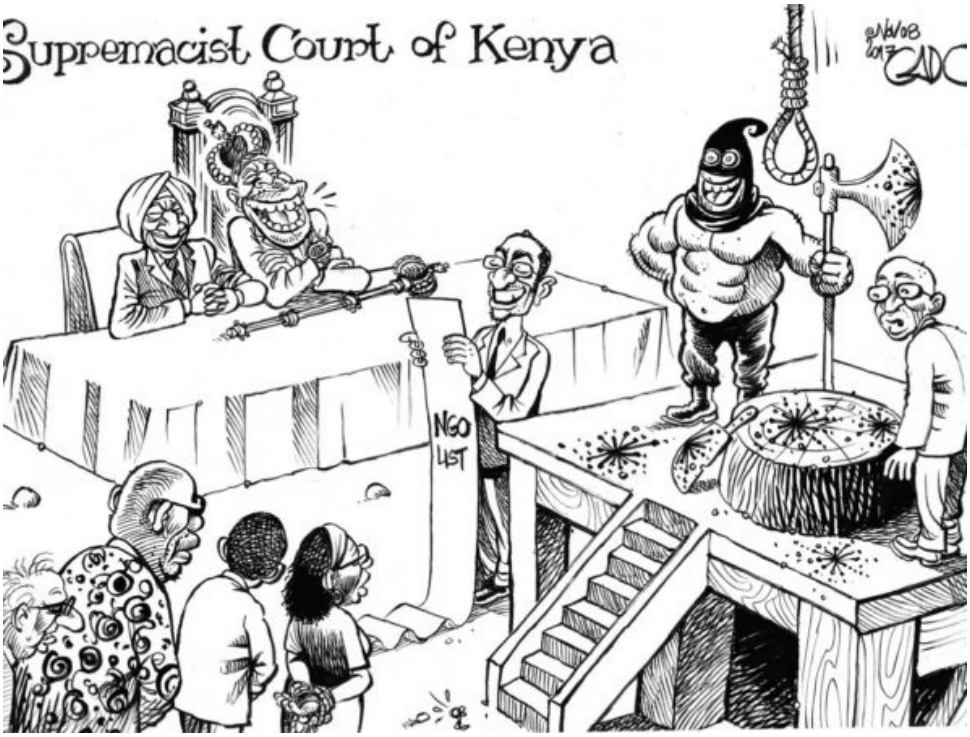
High Court in *Olal & 5 others v Attorney General*

Organise

A single person can often achieve a lot, but often it helps to work together with others. A campaign focussing on an issue for some time can have more impact that one person complaining. There are many organisations already in Kenya concerned with human rights and other issues concerned with quality of life. And there are many small grass-roots organisations concerned with issues of particular areas. If there is no existing organisation it may be worth considering starting one. Under the Constitution if the law requires an organisation to be registered, "registration may not be withheld or withdrawn unreasonably" (Art. 36(3)(a)).

"All workers including those in the informal economy, who are largely in hidden or precarious employment relationships, must not be denied their right to freedom of association."

High Court in *Dominic Ngolo & 7 others [Suing on their behalf and on behalf of the proposed Kenya Bodaboda, Tuktuk and Taxi Workers Union] v Registrar of Trade Unions*



"We are watching you"

Every word that an MP says in the main house of the National Assembly is published (this published report is on the Parliament website (go to http://www.parliament.go.ke/ and click on "Hansard" – or use the website of the NGO Mzalendo at http://info.mzalendo.com/hansard/). The national budget must now be published further in advance, and there should be more opportunity to scrutinise it (see Chapter 9). The right to information in the Constitution (Art. 35) makes it much easier to get information about what government and those in the public service are doing or have done (see above). Those who are entrusted with positions of responsibility and "leadership" should be aware that they are operating under the glare of publicity. The people can organise to monitor their activities and to make them public. Among the possible activities are:

- election monitoring (much better carried out by the people than by foreigners who often come at the last minute and do not understand the local methods for cheating)
- budget watch – studying the budget to see that it does not conceal fraud and that enough money is given for the important functions under the Constitution, including the Kenya National Commission on Human Rights; there is a lot of experience in many countries of "participatory budgeting"
- reading Hansard to see what the MPs you elect actually do
- finding out how many times MPs attend the house, and committee meetings (the website of Mzalendo is helpful on this, too).

Litigate – go to court

It is important to realise that the Constitution does not just make a promise: it gives you rights. And they are legal rights, which means among other things that you can go to court to claim your right. Your reaction may be: "Someone like me can't go to court!"

The Constitution has tried to make it unnecessary to think "People like me can't go to court" – though it is quite right to think going to law can be time consuming, confusing and often uncertain. It would be unrealistic of course for every child or student unable to study to go to court to enforce their right to education; you would be quite right to think "There are millions of children in Kenya who should be in primary school and are not; obviously they can't all go to court – the system could never cope!" In part to deal with this difficulty, the Constitution authorises the bringing of legal action by even one person or organisation on behalf of a group of people for the recognition and enforcement of their rights (Art. 22). Often the best strategy is not for a single person to go to court, but for a case to be brought for the benefit of a large number of people who are not getting their rights. That way the cost and the pain are shared, and more people can benefit. One big case that involves a lot of people can also lead to the government taking its responsibilities generally more seriously. Sometimes this kind of litigation is called public interest litigation (PIL).

In a number of countries there is now a good deal of experience of taking to court cases involving large numbers of people, to protect their human rights. India and South Africa are among those countries. In India the Supreme Court has many times ordered the government to enforce the law that it has passed! This strategy might well be the one to urge on the courts in Kenya – there are many good laws passed in Kenya that have not been properly implemented. And there are all sorts of government policies that have been prepared at great expense of time and money but remain on paper.

Various bodies have brought cases. They include Katiba Institute, and various other NGOs. Also sometimes individuals have brought cases that concern a wider public.

Experience shows that going to court can be a more effective strategy if combined with others – not because the courts will be pressurised by political activity but because it is important to get public support and understanding of the court proceedings, especially if public support will be needed to ensure that the court decisions are actually carried through. Such strategies and litigation also promote social solidarity and public awareness of constitutional issues.

Why PIL cases may lose

- Litigants (people who take the case to court) sometimes do not make it really clear what their complaint is. They need to clarify what has happened, or – if they are complaining that there is a risk of violation of rights – what is likely to happen.
- They need to show to the court the connection between what has happened/may happen, and the Constitution. Which specific provision of the Constitution is involved, and how their complaint shows a violation?
- If they are challenging a law that they say wrongly allows their rights to be restricted, it is the task of the government, or whoever wants to support the law, to convince the court that the law satisfies Article 24 (see page 30). However, the challenger to the law must be prepared to argue how and why the justification is wrong.

"I find that it was not enough for the petitioner to merely claim that there was no public participation. The petitioner was required to demonstrate that indeed, public participation was not observed in the entire process of the enactment of the impugned rules that governed the marking of the contested examinations. In achieving this, nothing would have been easier than for the respondent to either obtain documentation or an index from parliament to ascertain this contention. In this case, no material was placed before me to prove that there was no public participation and I therefore find that the claim was not proved to the required standards or at all."

High Court in *Okiya Omtatah Okoiti v Kenya National Examinations Council.*

Use the international human rights machinery

When an African country becomes a party to an international human rights treaty it usually agrees to make regular reports in its own performance to a UN or African Union committee. What is the use of this? It gives even the government an incentive to examine its own performance. It gives other sectors of society a chance to examine the government's performance and make their own submissions. The government may receive helpful advice on how to fulfil the responsibilities it has undertaken to fulfil rights. And it may be embarrassing for the government to be criticised by a high-powered UN body in public. Most of these purposes will not be served if the process is unknown to the people of Kenya.

- Citizens can participate with other organisations in preparing reports (sometimes known as "shadow reports") that give an alternative to the government view.
- They can lobby MPs to use the information that the official and unofficial reports reveal in their work of supervising government.
- They can make sure the media know about the reporting process and persuade them to give space to the committee's reactions.

The Committee [on the Rights of the Child] recommends that Kenya:

Take all measures to fully guarantee freedoms of expression, association and peaceful assembly for boys, girls and adolescents, as provided under the Constitution and the Convention, including through raising the awareness and building the capacity of families, teachers and government officials to respect these freedoms of children. (2016)

Another sort of UN machinery is "special rapporteurs" – who write reports often on particular countries. Usually the country has to invite them to come. This procedure produces a more detailed analysis of the achievements and problems of the country, and suggestions. Some special rapporteurs will try to investigate specific cases and issues brought to the attention even if they do not visit the country.

Special Rapporteurs who have visited Kenya include those on the Right to Housing (2004), on Extra-Judicial Killings (2009), on the situation of human rights and fundamental freedoms of indigenous people, (2006) and on the human right to safe drinking water and sanitation (2015).

Some human rights treaties – including the Covenant on Economic Social and Cultural Rights – have a special procedure under which individuals and organisations can bring a special complaint to the relevant committee. But the procedure under this Covenant is not yet in force, because not enough countries have signed and ratified it. Kenya has not even signed it. Citizens could work together to pressurise the government to sign and ratify this "Optional Protocol".

The human rights machinery of the African Union is another avenue (under the African Charter of Human and People's Rights). Countries make reports to the Commission on Human Rights, and individual or community complaints can also be brought.

And there is also the African Court of Human and People's Rights, as well as the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) which monitors the implementation of the African Charter on the Rights and Welfare of the Child, and heard complaints about violations. Cases against the government of Kenya have been brought in both of these bodies.

ACERWC recommends "that Kenya take all necessary legislative, administrative, and other measures to ensure that children of Nubian decent in Kenya that are stateless, acquire Kenyan nationality and the proof of such a nationality at birth" *(The Nubian Community in Kenya v The Republic of Kenya 2011).*

Some questions to think about

1. How do you think that you and your friends can influence the way laws are made and decisions arrived at?
2. Do you think it is easier to influence the way decisions are made at the county level rather than the national level?
3. Can you think of information that is held by government bodies that you would like to get access to in order to be able to hold the bodies accountable?
4. Can you think of ways in which the reports of international bodies (the UN, the African Commission etc.) might be used to have an effect on policies in Kenya?
5. Suppose you have reason to feel you have been unjustly treated by a government official – discriminated against and not given a fair chance, perhaps for a job or a place at a public school: what would be the various ways you might complain or take action? Can you list them, and assess how much trouble each might take, how much money might be involved, which would be quickest, and which most likely to have an impact?

Chapter 13

Changing the Constitution

As we write, there is a good deal of discussion going on about changing the Constitution, principally from the presidential system to some sort of parliamentary system. At Bomas there had been considerable support from all categories of its members for a parliamentary system – after about 50 years of an oppressive presidential system. But when leaders of political parties met exclusively with the CoE at Naivasha in 2010 there was unanimous support for the presidential system. Raila Odinga, at Bomas an active supporter of a parliamentary system as well as of a significant federal (or devolved) system, was the first to argue for changing the parliamentary system recommended in the draft to the present system. Now some similar discussion is taking place because of the Building Bridges Initiative set up after President Kenyatta and Mr Raila Odinga shook hands in early 2018. Some other groups, but by no means all, have also come out for a sort of shift from the presidential system. There has also been, though on a lesser scale, discussion about the forms and extent of devolution. The scale of discussions of both these issues is rather limited, confined almost completely to politicians, contrast from Bomas when politicians were in minority. Nor has there been so much interest in these issues among the public as at the time of Bomas.

How can the Constitution be changed?

Changes to the Constitution must usually go through parliament like any other law. But certain changes need the approval of the people as well in a referendum (see Chap. 11). And while most laws only need parliament (usually the National Assembly – see Chapter 6) to approve, a change to the Constitution needs the approval of two thirds of both the National Assembly and the Senate (Art. 256). Changes cannot be rushed through, and public discussion must be encouraged. There must be a 90-day period between when the Bill to change the Constitution is introduced into Parliament and the first debate in Parliament.

The changes that need a referendum include any change relating to the fundamental parts of the Constitution including the sovereignty of the people; the national values, the Bill of Rights, the term of office of the president, the independence of the Judiciary and devolved (county) government (Art. 255). To be passed by the people, the Bill to change the Constitution in these ways must get the support of half of all those who vote, and at least 20% of the voters in at least half of the counties must actually vote. There are some difficulties in understanding these provisions. What does "relating to" mean? Clearly, if an amendment was to say "delete 'sustainable development' from Article 10", that would need a referendum. But suppose a change was to say something about exploitation of water that would clearly harm the interests of future generations, is that something that would need a referendum?

The popular initiative

A "popular initiative", supported by the verified signatures of at least one million voters, and approved by at least half the county assemblies, can compel Parliament to move on the question of amendment (this time by a majority of all the members of both the National Assembly and the Senate). The same referendum requirements apply. Parliament gets the first chance to vote, if 24 or more counties agree, but if they do not support it, it goes to a referendum.

The popular initiative idea is a powerful political one. An effort was made with the Okoa Kenya movement in 2014-15. But that effort failed because not enough of the signatures were valid. But it also showed the problems about the whole mechanism.

Okoa Kenya prepared a booklet listing just five issues, and people could sign underneath:

a. Increase revenue and budget allocation to county governments and strengthen devolution

b. Strengthen the role of the NLC and the role of and benefits for communities in natural resources

c. Electoral reforms to strengthen the electoral system to ensure free, fair, transparent, efficient, accurate and accountable

d. To make provisions for the enforcement of ethic inclusivity, equity and diversity in public appointments and increased representation of women, youth, and people living with disability

e. Strengthening of public institutions and constitutional commissions.

So anyone who signed the Okoa petition was said to support 5 short propositions. But on the basis of these statements a long Bill to change the Constitution was prepared. What people signed is so general that it was impossible to say what they were asking for.

We think that this cannot have been what the Committee of Experts had in mind. The Constitution speaks of this method for "an amendment". We believe this means a single change in the Constitution, not a long Bill with 20 or more.

A second popular initiative – the Punguza Mizigo Bill – failed in a different way. It got to the county assembly stage, but all but two assemblies rejected it. Its sponsors argued that MCAs had not read the Bill (and they may be right).

Current debates

Our purpose in writing this book, and in producing a revised edition, is mainly to enable Kenyans to understand the Constitution as it is. We have sometimes shown how it has worked, and sometimes suggested that there might be a weakness in the document. But there is no way that we could here give a full analysis of what might be reconsidered. In fact, a sister volume that goes into more depth on what has happened since 2010 should appear around the same time as this book.

Parliamentary system? Power sharing?

Among the various comments about a "referendum" - which seems to have become another way to say "amending the Constitution" – there are suggestions about sharing of offices among various communities. The debate tends to focus particularly on somehow avoiding the sense that some parts of the country are excluded from government. Some suggestions have included many "jobs for the boys" (mostly not women): President, two Deputy Presidents, a Prime Minister and two Deputy Prime Ministers. The responsibilities of these posts are unclear. The distribution by parties of such positions on this ethnic basis goes beyond the spirit of the Constitution (see Article 91).

This would be done by changing the system from a presidential one to a parliamentary system (see the chart explaining the difference on page 90) or perhaps a semi-presidential one.

Some people have argued that parliamentary systems are necessarily more inclusive than our present system. In fact, this was one reason why a parliamentary system was proposed in the various constitution drafts, until changed by the MPs at Naivasha in 2010. In a parliamentary system, power is mostly with the Cabinet, among whom the head of the government, the Prime Minister, is in theory a first among equals. The collective cabinet can be more representative of the nation, so

much more inclusive than the system we have now with one "big boss" in the form of the single, directly elected, executive President. Also, a broad ranging party might be more inclined to support a leader from a minority group (though in Kenya it seems more likely that leadership would go to whoever brought in the most voters, thus again focussing on larger ethnic groups).

But there are still winners and losers, and few losers will be found in positions of power. In most countries, if a government includes people from other political parties than the Prime Minister, it will usually be because the Prime Minister's party had not won enough seats in Parliament to govern alone. But to govern alone is usually the ambition of parties contesting parliamentary system elections. Some countries, it is true, make a virtue of forming government of a number of parties, and having something of a national consensus. There is for example often a big difference between the political cultures of a country like Sweden, and the countries where one party is likely to emerge with an overall majority.

But even in Sweden, people have ideological differences, and there may not be much enthusiasm for having all points of view in the government. In 2018-9 it took months to form a government in that country because both big parties refused to partner with the anti-immigration party that had won 20% of the seats.

In other words, in a parliamentary system, even a proportional representation system (as Sweden has), parties want to form government with a majority, of course, but with as few people as possible from parties that have very different ideologies and programmes, so that they do not have to give up too much of their own programmes as the price for getting into office.

And to get support they may also have to give up powerful government positions to rivals, as Mrs Merkel in Germany had to appoint as Finance Minister a member of the party that supported her to get into office as Chancellor (Prime Minister).

It may work differently if an election is won by a massive coalition of forces among whom offices are planned to be shared. A bit like a one-party state – which Kenya and other countries moved away from in the 1990s.

Power sharing governments are those where not just the election winners and their friends are in government. Sometimes this sort of arrangement is precipitated by a crisis, as with the *nusu mkate* government in Kenya: the government with Kibaki as President and Raila Odinga as Prime Minister as the result of the National Accord, after the 2008 post-election violence.

Sometimes the law requires it. In Fiji, under its 1997 Constitution, any party that got 10% or more of the seats in Parliament was entitled to a proportionate share of the seats in the Cabinet. The resistance that this sort of idea faces is shown by what followed. Each main party won one of the next two elections. Each also, when it did not win, had enough seats to be entitled to sit in Cabinet. Yet the leader of each winning party used technicalities to prevent that happening. A famous, and very different, example is Lebanon where the president is always a Maronite Christian, the prime minister a Sunni Muslim and the Speaker of Parliament a Shia Muslim. Ministerial posts are also shared between Christians and Muslims. The process of agreeing who should hold how many posts in the government has proved so difficult that a new government was not formed until nine months after the last general election. Interestingly, recent demonstrations in Lebanon have been emphasising national unity and rejecting sectarianism.

Zanzibar recently adopted a power sharing model, because of a history of electoral violence. This involves the First Vice President being from the party that gets the second largest number of seats, and the Second VP can be from the President's Party. The President may appoint Ministers in proportion to the seats won by parties. But this does not seem to have worked very smoothly. The difficulties Zanzibar has faced make one wonder whether the real problem was differences between parties or lack of trust in the electoral system. They also show that people are desperately keen to win even in power-sharing situations.

Other countries with elements of power sharing include Nigeria, where the Cabinet must include someone from each of the 36 states. Clearly this is inclusive in one sense. But it is of limited help to minority groups within states. Nigerians are divided on how effective it has been in enhancing inclusion. Would it help in Kenya? Certainly Kenyan cabinets have not been very inclusive. And "Uhuru's 2013 cabinet was the least balanced since independence, … Kikuyus and Kalenjins, … were disproportionately overrepresented, together with Somalis."[5]

There has been mention of having a "rotational presidency". A rare example is Malaysia where the headship of state is rotated around the traditional rulers of the Malay states. But this is a formal headship with very few powers.

Constitutional arrangements based on assumed alliances of different ethnic groups are sometimes called "consociationalism". Iraq had partial implementation of consociationalism from 2003 to 2014, and the result was said to be "neglect of minority communities, and no stability, peace, or sustainability."[6]

Clearly power sharing is a very complex topic, and cannot be fully analysed here. But clearly it would not be easy to create a workable long-term system in Kenya, with its many communities and shifting alliances.

In the end the proposal that emerged from Kenyan discussion and is going to Parliament is not really a parliamentary or even a semi-presidential system. It includes a Prime Minister, it is true. But the powers of that office are unclear, and those of the President are not formally altered. It has something in common with the Tanzanian system, of which it has been said, "The 1977 Constitution provides for a strong presidential system....The Prime Minister and the Cabinet form the government, are appointed by the President and are responsible to him."[7]

Reorganising devolution?

Among the suggestions is to introduce another layer of government between the national and the county.

The Bomas draft constitution, in 2004, proposed a four–tier system. Below the national government would have been 14 regions with their own governments (one was Nairobi in a rather special position). Below them would have been the districts (74 of them), then locations – with elected councils. The districts would have had less power to make laws, and would have been more concerned with administering laws made by other levels. A good deal of detail was left to be worked out, but it is reasonable to assume that 14 regions would have been more powerful in relation to the national government than our counties now. And the districts and their governments would almost certainly have been less puffed-up and self-important, and perhaps less extravagant than counties are now.

In a curious way, however, it is harder for the centre to deal with 47 small entities dependent on the centre than dealing with about 14 entities with considerably greater resources and power would have been.

5 Patrick O. Asingo, "Ethnicity and Political Inclusivity in Kenya: Retrospective Analysis and Prospective Solutions" in Ethnicity and Politicization in Kenya. (Kenya Human Rights Commission, 2018) p. 108

6 Ibrahim Aziz, Consociationalism in Iraq after 2003 (PhD thesis, University of Reading, 2017) (http://centaur.reading.ac.uk/77158/1/21813253_Aziz_thesis.pdf)

7 https://constitutionnet.org/country/tanzania-country-constitutional-profile.

A process for review?

Think back to the making of the Constitution: we had the CKRC draft, then Bomas debated it and changed it. Then the Committee of Experts largely adopted the Bomas draft, but changed that in the light of comments. Not everything in the Constitution, by any means, is perfect. Some of the worst bits result from the hasty changes by MPs at Naivasha, many of which the CoE felt compelled to accept. But most issues had been thought about over a number of years.

What is happening now is very different. Where is the public debate? Where is the analysis of the problems and the consideration of alternative solutions?

Fulfilling the promise of the Constitution

We hope that you have been inspired by the vision in the Constitution of what Kenya could be—peaceful, people of diverse tribes and races, belonging to different religions and beliefs, co-operating constructively to promote our cultures and build the nation, cherishing our identity as Kenyans, enjoying our rights as citizens to speak freely, exchange ideas and form associations to pursue common goals, at the same time looking after the weak and the vulnerable. A government that exists to serve the people, not oppress it, or steal from those who are already impoverished. A Kenya where ethnic conflicts, rampant corruption and massive impunity are matters of the past, and the economy flourishes, its fruits shared equitably, providing security and employment for all.

We have discussed how the vision could be achieved. But we have also pointed to the resistance from well entrenched interests, abusing the powers of the state they still control. So we have emphasised the responsibility of the people, of all of us, to ensure the vision is fulfilled-- difficult, but not impossible.

Study the Constitution carefully - and discuss it with friends. Try to understand how it distributes power and the institutions which exercise that power. We can learn how to influence those institutions, even bring them under the control and direction of the people and their representatives who are honest, committed and dedicated. Above all, study and exercise your rights and those of your communities. Learn in particular your rights as against the police and other institutions, and government's obligations to you to ensure your security against violence and other unlawful acts (like land grabbing!). Learn too how you can obtain remedies if your rights are violated, including through the courts and independent commissions.

Remember you are citizens, wananchi, of a free country, not subjects as during colonialism. Make a commitment to live by the values of the Constitution. Take an active interest in national policies, for example, those relating to education, health, housing, food, water, agriculture, and the environment. Participate in public affairs. Vote sensibly and responsibly to choose competent and honest legislators. Follow their performance, and use the recall provisions for those who fail in their duties.

Above all, try to understand the reasons why millions of Kenyans live in misery while a few are so rich. How did the few acquire their wealth? Why has there been so much ethnic conflict? Is it because politicians and their associates have stolen public properties, and to hide this (and their common interests as politicians), have made us hate fellow citizens, under the guise of ethnicity, making tools of their own tribespeople. What can you do about it?

Kenya's Constitution:

An Instrument for Change

The authors

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This book is mainly for the ordinary citizen who wants to understand the Constitution that became law on 27August 2010. It focuses especially on the ways in which citizens can use the Constitution – to be more involved in decision making, to assert their rights, and to contribute to realising the vision of a new Kenya that they find in the Constitution. It considers the formal structures of government, explains how the system of county government should work, sets out the rights of citizens – explaining not just how they are the rights of all, but how special groups within society, including women, persons with disability, minorities and various marginalized groups, should be able to play their full part in society through the realisation of their rights. It will help the reader understand how the Constitution offers the hope of a new Kenya: with more transparency and accountability, more integrity, less impunity, more participation, with a hope of a decent life for all. This is the second edition (the first was published in 2011 soon after the Constitution was adopted). It looks not just at what the Constitution says but how it has worked, and sometimes not worked as intended. In many ways the story has not been a happy one. But the book also shows the gains that Kenya has made as a result of the Constitution. And it is still based on the hope that Kenyans themselves will make more use of their instrument for change. It is enlivened by cartoons from two of Kenya's most talented artists.

The Katiba Institute

KI is an NGO based in Nairobi, founded in early 2011, with the mandate of contributing to the full implementation of the 2010 Constitution of Kenya, so that it is genuinely an instrument for change. A major part of its work is public interest litigation – to protect the constitutional rights of people and to try to ensure that the Constitution is in all its aspects obeyed and fulfilled. KI carries out research, publishes both popular and more academic publications, comments on draft legislation to implement the Constitution, and conducts civic education and some other training projects. It collaborates closely with other organisations both public and in civil society.
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