

INTRODUCTORY NOTE ON KENYA

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I. Origins and Historical Development of the Constitution

The Constitution of Kenya was promulgated on 27 August 2010 after a period of more than twenty years in the making. The 2010 Constitution of Kenya marks the outcome of an arduous journey, necessitated by a constitutional development history that began during the pre-colonial period. Several issues have been a recurring theme, having found expression in the Independence Constitution; they underwent modifications during the ensuing years through amendments, resulting in dissatisfaction that eventually led to the demand for constitutional reform, culminating in the 2010 Constitution. These issues include ethnic divisions whose origins go back to pre-colonial times; the choice between parliamentary and presidential systems of government; devolution of power with a particular focus on minority protection; and the erosion of democracy and constitutional protections against the misuse of power. This section will discuss these issues in an historical context with a view to providing the background against which the 2010 Constitution was drafted, including the drafting history and, in subsequent sections, the substantive content of the Constitution.

The history of constitutions in Kenya dates back to the pre-colonial period (1887–1920), during which time the Sultan of Zanzibar, who ruled the Coastal Strip,¹ signed a fifty-year lease agreement with the Imperial British East African Company, which in 1890 was converted into a concession, giving the company power to administer the territory. In 1895 the British government took over the administration of the territory, changing Kenya's status into a protectorate. The East African Order in Council of 1897 provided the legislative basis for the exercise of authority in the territory, with subsequent Orders expanding legislative powers. Kenya was declared a British colony in 1920. During this period, the Legislative Council was dominated by European settler representatives with two nominated Indian representatives, one unofficial Arab nominated representative, and no African representatives. Increased agitation for direct representation by the African population led to some gains in political representation at the local level, but the predominant view until 1944 was that the African population lacked the necessary capacity to directly participate in the Legislative Council. In 1944, the first African representative to the Legislative Council was nominated. From then on, the intensity of Africans' demands for self-rule increased against a backdrop of increasing racial tension. The lack of constitutional response to the demands led to armed conflict in the form of the *Mau Mau*² uprising and the declaration of a state of emergency in 1952. As a result,

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¹ This section draws on the history of constitutional development in Kenya as discussed in detail in the Constitution Review Commission of Kenya (CKRC), *Final Report of the Kenya Review Commission* (2005) 18–34.

² A secret society predominantly of the Kikuyu, involved in oath-taking and violent campaigns against colonial settlers and those perceived as collaborators.

the colonial government sought to respond to the political demands through the Lyttleton and Lennox-Boyd Constitutions, so-named after the respective Colonial Secretaries who presided during the period of their drafting. Under the Lyttleton Constitution, eight African members were elected to the Legislative Council. The colonial government refused to meet other far-reaching demands by the African leaders and they in turn refused to take up their seats in the Legislative Council. The colonial secretary then called for the resignation of all the ministers, thus undermining the Lyttleton constitutional basis. The Lennox-Boyd Constitution replaced the Legislative Council with a Council of Ministers, while retaining the multi-racial representation principle. The number of African representatives was increased from eight to fourteen, equal to the number of European representatives, among other reforms. This Constitution still fell short of African demands for total control of government, given their numerical majority. Boycotts of the legislative proceedings by African leaders led to demands for a constitutional conference to discuss a constitution leading towards majority rule. The Lancaster House Constitutional Conference culminated in Kenya's Independence Constitution, which came into force on 12 December 1963.

Whereas the dominant theme during the colonial period was the equal representation of the different races in the political processes, the post-colonial period was marked by ethnic divisions and fears of domination of the smaller ethnic groups by the larger ones. Similarly, minority groups, such as the Asian and Arab populations, sought protection of their interests. These two issues were addressed during the Lancaster Conference through the establishment of a parliamentary democracy and the devolution of power to local levels.

Parliamentary democracy was based on the separation of the functions of head of state from those of head of government. The President headed the state while the Prime Minister presided over government together with a cabinet of ministers, all of whom were members of Parliament. The legislature consisted of two houses, the House of Representatives and the Senate. The House of Representatives represented constituencies while the Senate represented regions. In order to become law, bills had to gain approval of both houses.

Devolution of power was achieved through the '*majimbo*', or federal system, in which each region had a legislative assembly and executive, with certain powers and revenue. Regions had exclusive powers and powers shared with central government. Nevertheless, central government was required to consult and, in some cases, obtain the consent of regional authorities before taking some decisions, thus protecting against arbitrariness and facilitating consensus. Further, regional legislative assembly members had to have a genuine connection to the region, including being registered as a voter in the region.

The Independence Constitution, though formally in force (having never been abrogated) until the promulgation of the new 2010 Constitution, became a radically different document by virtue of the numerous amendments carried out over the years. The amendments eroded the democratic protections entrenched at independence and resulted in the consolidation of power in the office of the President, who became both head of

state and head of government. Other amendments abolished the bi-cameral legislature and entrenched a one-party system. The ensuing centralization of power in the presidency, and the suppression of all opposition to this state of affairs, only galvanized the clamour for constitutional reforms. During the 1990s, amendments to the Constitution attempted to revise the undemocratic trend that had been set in the first three decades of independence. There was, however, general dissatisfaction with the pace and effect of these amendments, which grew because the amendments did not translate into genuine democratic space for the exercise of power.

Demands for comprehensive constitutional review increased in the 1990s from various quarters, including opposition parties, NGOs, religious groups, and 'donor' organizations, among others. The repeal in 1991 of section 2A of the Constitution, which had made Kenya a single party state, was a significant milestone in the push for democratic reform. This mounting pressure took place in the global context of the end of the Cold War period, and received considerable support from the international community, which now had turned its attention to political and economic reforms in many countries.³ The minimal constitutional and legislative reforms agreed under the Inter Parties Parliamentary Group (IPPG) forum in 1997 provided the consensus through which the infrastructure for comprehensive review of the Constitution was established. The Constitution of Kenya Review Act (1997) established the legal basis for this exercise and provided the structure/vehicle (the Constitution of Kenya Review Commission, or CKRC) that would coordinate the endeavour. Due to dissatisfaction with the level of participation in the constitution-making process, interested parties lobbied for a more inclusive process. A period of disagreement over how CKRC commissioners should be nominated led to the existence of two parallel processes, one being the *Ufungamano* Initiative, spearheaded by religious groups and other civil society organizations, and the other a parliamentary process involving the ruling party and allied political parties. The Constitution of Kenya Review Act was amended a few times before the CKRC was finally established and commissioners appointed in 2000. The two parallel efforts at constitutional review merged to produce a unified process that enjoyed nationwide support.

An emphasis on participation and the inclusion of the views of a wide cross-section of Kenyans were the hallmarks of the Kenyan constitutional review process. This was evident from the Constitution of Kenya Review Act, as well as the institutions created to facilitate the review.⁴ The membership of these institutions was intended to represent the diversity of Kenyans regardless of socio-economic status, race, ethnicity, gender, religious faith, age, occupation, ability, or disability. Thus, the CKRC, as mandated by the Act, visited every constituency in Kenya to receive the views of the people,⁵ from which it would compile a draft bill. The draft bill was subject to public hearings and

³ JD Barkan and F Mtiangi, 'Kenya's tortuous path to successful legislative development', reprinted from J D Barkan (ed), *Legislative Power in Emerging African Democracies* (2009) 33–72, 9
<<http://www.africanlegislaturesproject.org/content/kenya-country-report>> (accessed 1 August 2012).

⁴ Constitution of Kenya Review Act, secs 2B, 2C.

⁵ Constitution of Kenya Review Act, sec 18(1)(a).

thereafter the National Constitutional Conference (NCC) was convened,⁶ membership of which included all members of the National Assembly, representatives of political parties, and representation from each district and the broader civil society. The process was to culminate in a referendum in which all eligible Kenyans had the opportunity to ratify or reject the product.

While the intentions were laudable, the execution of the plan was fraught with many obstacles. The emphasis on participation, though a means of legitimising and owning the resulting document, came at great cost financially and in terms of social cohesion.⁷ The rationale was to include the views of ordinary citizens while limiting the ability of the political elite to subvert the process and to this end, politicians constituted a numerical minority at the NCC, and the final adoption of the Constitution lay with the people through a referendum. Contrary to intentions, political wrangling and the vying of various interests for entrenchment in the Constitution characterized the process. The process suffered several hitches, including the dissolution of Parliament in anticipation of the 2002 elections, meaning that the NCC lost the members of Parliament.

The process also stalled when some delegates, disgruntled by the fact that the NCC could determine whether the draft bill was submitted to referendum, filed a case in the High Court, seeking submission of the draft constitution to referendum as an essential component of a people-driven process and an expression of the people's sovereignty (the *Njoya* case).⁸ In addition to the predication of a referendum on the NCC, the final enactment of the new Constitution was vested in Parliament as part of its legislative function, in line with the then constitutional provisions regarding amendments.⁹ The applicants argued, among other things, that the right of Kenyans to adopt and ratify a new Constitution was the centre-piece of a people-driven review process and fundamental to realising a comprehensive review of the Constitution, and could only be achieved through a constituent assembly or referendum. Amendments to the Constitution Review Act in 2002 were alleged to have strengthened the influence of political actors at the expense of the people's wishes as expressed to the CKRC. The applicants also took issue with substantive aspects of the draft, including the structure of government and the model of devolution proposed. They further challenged the representation at the NCC as being unfair, undemocratic, and unconstitutional.

Agreeing that sovereignty lies with the people and that Parliament, though having powers to amend the Constitution, was not mandated to enact a new Constitution, the court upheld the applicants' claim to a referendum in which Kenyans expressed their approval or disapproval of the proposed Constitution.¹⁰

⁶ Constitution of Kenya Review Act, sec 27(1)(c).

⁷ AL Bannon, 'Designing a Constitution-drafting process: Lessons from Kenya' (2007) 116 Yale Law Journal 1824–1872, 1842.

⁸ *Njoya & 6 others v Attorney General & 3 others* (No 2) (2008) 2 KLR (EP) 658.

⁹ Constitution of Kenya (Rev 2009), secs 3, 30, 47, 123(9).

¹⁰ *Njoya v Attorney General*, para 73. See also generally K Kindiki, 'The Emerging Jurisprudence on Kenya's Constitutional Review Law' (2007) 1 Kenya Law Review 153–187.

After the 2002 elections, a realignment of power whereby the erstwhile opposition bloc formed government meant that political interests had shifted. Although the National Rainbow Coalition (NARC) had promised to enact a Constitution within a hundred days of forming government, they showed reluctance to adopt the draft emerging from the NCC. Nevertheless, the NCC went ahead to produce a draft Constitution, popularly referred to as the Bomas draft (named after the venue at which the Constitutional Conference took place), which was adopted by the required two-thirds majority at the Conference. In order to give effect to the judgment in the case discussed above, the Constitution Review Act was amended to provide for a referendum.¹¹ In addition, Parliament was given the limited power to alter the Bomas draft submitted to it by a Parliamentary Select Committee after consensus building on contentious issues.¹² The government produced the Wako draft (as it was popularly known, named after the then Attorney General Amos Wako, in whose docket the bill was to be published).

This eventuality triggered another case in the High Court, seeking declarations that it was illegal for the National Assembly to alter the Bomas draft, and that in doing so the National Assembly had usurped the sovereignty of the people.¹³ The applicants in this case built on the judgment in the *Njoya* case by invoking the Court's finding that Parliament had no powers to make a new Constitution and/or to debate or alter the Bomas draft because it reflected the people's wishes through the NCC. The Court agreed that the constituent power emanates from the people, although it differed with the *Njoya* court that that power lay in the Constitution. The Court opined that constituent power was a primary power, assumed or presumed to exist and always vested in the people.¹⁴ The Court, however, was not persuaded that Parliament, by making proposals to alter the Bomas draft, had invalidated the draft to be put to referendum. Since the government had been voted in on the strength of, among other things, enacting a new Constitution, the government was within its mandate to facilitate this process, including making proposals to Parliament to amend the draft.¹⁵ The Court also refused to restrain any of the processes leading up to the referendum on the basis that only the people could choose to accept or reject any of the drafts, and any restriction to this power by the Court would be using judicial power to stifle democracy.¹⁶

The Wako draft therefore proceeded to referendum in November 2005, and was resoundingly rejected.¹⁷ Unfortunately, the referendum was also perceived as an indictment against the government, and aggravated ethnic divisions. The hostility, ethnic divisions, incitement, and animosity that developed during the referendum period also characterized the general elections held in 2007 and greatly contributed to the violence that erupted following the announcement of the disputed election results. Constitutional

¹¹ Constitution of Kenya Review Act, sec 28.

¹² Constitution of Kenya Review Act, sec 27.

¹³ *Patrick Ouma Onyango & 12 Others v Attorney General & 2 Others*, Miscellaneous Application No 677 of 2005, High Court of Kenya at Nairobi.

¹⁴ *Patrick Ouma Onyango & 12 Others v Attorney General & 2 Others*, 46–47.

¹⁵ *Patrick Ouma Onyango & 12 Others v Attorney General & 2 Others*, 55.

¹⁶ *Patrick Ouma Onyango & 12 Others v Attorney General & 2 Others*, 55–56.

¹⁷ 'No' votes amounted to 58% of votes cast: see Electoral Institute for the Sustainability of Democracy in Africa EISA <http://www.eisa.org.za/WEP/ken2005results.htm> (accessed 30 July 2012).

reform formed part of the agreement brokered and signed in February 2008 to end the post-election violence, under agenda item four.¹⁸ Two pieces of legislation were passed to facilitate the constitutional review process: the Constitution of Kenya Review Act 2008 and the Constitution of Kenya (Amendment) Act 2008. The Amendment Act entrenched the review process in the Constitution, and also subjected any amendments by the National Assembly of the draft submitted to it to a vote of not less than sixty-five percent of all members of the Assembly.¹⁹

The Review Act aimed at facilitating the completion of review of the Constitution of Kenya and, to this end, established the Committee of Experts (COE) as the review organ tasked with building on previous work done in the review process. The COE was made up of nine members, of whom three were non-citizens and six were citizens.²⁰

A key element of the COE's mandate was to identify contentious and non-contentious issues arising from previous drafts developed during the review process; to receive representations from the public and carry out consultations with interested groups on the contentious issues; to delineate the merits and demerits of various proposals to resolve the contentious issues; to recommend to the Parliamentary Select Committee resolutions to the contentious issues; and to prepare a harmonized draft Constitution for presentation to the National Assembly. The outcome of this process was a draft Constitution that was subjected to referendum on 4 August 2010 and was thereafter promulgated on 27 August 2010.

An important feature of this latter process was the establishment of an Interim Independent Constitutional Dispute Resolution Court (IICDRC), which had exclusive original jurisdiction to decide only matters arising from the constitutional review process. Nine judges were appointed to the Court, three of whom were non-citizens nominated by the Parliamentary Select Committee and six who were recruited through a competitive process.²¹ The IICDRC was distinct from the High Court, and it limited the High Court's original jurisdiction in so far as disputes around the review process were concerned.²²

Kenya adheres to the common law tradition. In drafting the Constitution, inspiration was sought from other jurisdictions and some of the provisions clearly mirror the foreign laws from which they were drawn. For example, the Bill of Rights clearly shows influences from the Constitution of South Africa with respect to a general limitations clause that contains similar wording;²³ also, decisions of the Constitutional Court of South Africa in

¹⁸ Kenya National Dialogue and Reconciliation (KNDR) Agenda Item Four – Long term issues and solutions, http://www.dialoguekenya.org/docs/Signed_Annotated_Agenda_Feb1st.pdf (accessed 10 May 2011).

¹⁹ Constitution of Kenya (Rev 2009), sec 47A(2)(a)&(b).

²⁰ Constitution of Kenya Review Act 2008, sec 8(4).

²¹ Constitution of Kenya (Rev 2009), sec 60A.

²² See *Mary Ariviza v Interim Independent Electoral Commission of Kenya and Another*, Miscellaneous Civil Application No 273 of 2010, High Court at Nairobi, 24 August 2010.

²³ Cf 2010 Constitution of Kenya 2010, art 24(1) and Constitution of South Africa 1996, sec 36(1).

respect of socio-economic rights were incorporated.²⁴ Inspiration was also drawn from the Constitutions of Ghana and Uganda, as evidenced in the CKRC reports.

II. Fundamental Principles of the Constitution

The 2010 Constitution of Kenya commences with a statement of the sovereignty of the people and the supremacy of the Constitution as some of the fundamental principles of the Constitution.²⁵ In relation to identifying the source of all political power as the people of Kenya, the 2010 Constitution improves on the previous Constitution, which was silent as to the role of the people. The explicit recognition of sovereignty is also not surprising in light of the disagreement in the two court cases discussed above. The *Njoya* court was of the opinion that sovereignty of the people could be derived from provisions in the then Constitution declaring Kenya a sovereign state. The court in *Patrick Ouma Onyango* declared such sovereign power inherent in the people, and not necessarily derived from the Constitution.

The people exercise their sovereign power directly or indirectly through democratically elected representatives and in accordance with the Constitution. State organs are required to exercise power in accordance with the provisions of the Constitution. The exercise of sovereign power is also concretised in provisions that subject amendments of certain matters to a referendum. These matters include the supremacy of the Constitution, the territory of Kenya, the sovereignty of the people, the Bill of Rights, and the term of office of the President, among others.²⁶

The Constitution is declared as the supreme law of the Republic and as binding on all persons and all state organs at national and county level.²⁷ Thus, action that conflicts with the provisions of the Constitution is invalid. This invalidity extends to any laws, including customary law, which are inconsistent with the Constitution.

Article 4(2) declares the Republic of Kenya to be a multi-party democratic state founded on specified national values and principles of governance.²⁸ Kenya's history with multi-party democracy has been a chequered one. At independence, several parties operated in the political realm. This freedom to function was gradually eroded, with the final blow being delivered in 1982 when Kenya became a *de jure* one-party state. This position was reversed in 1991 when section 2A of the Constitution, which declared Kenya a one-party

²⁴ Cf Constitution of Kenya 2010, art 20 and the judgments in *Government of the Republic of South Africa v Grootboom & Others*, 2001 (1) SA 46; 2000 (11) BCLR 1169 (CC) and *Minister of Health & Others v Treatment Action Campaign & Others*, 2002 (5) SA 721; 2002 (10) BCLR 1033 (CC), where the Constitutional Court of South Africa decided that for a programme to pass constitutional muster it must be appropriately resourced; balanced, flexible with appropriate provision for short, medium, and long-term needs, does not exclude a significant segment of society or those in desperate situation, and takes into account the degree and extent of denial of the right; the Court also made it clear that its role is not to substitute its opinion for that of the State.

²⁵ Arts 1 & 2.

²⁶ Art 255(1).

²⁷ Art 2(1).

²⁸ National values and principles of governance listed in art 10.

state, was repealed. In 1997 the Constitution was amended to establish Kenya as a 'multiparty democratic state'.²⁹

Although the 2010 Constitution acknowledges the supremacy of God in the Preamble, the Kenyan State is secular, with no state religion.³⁰ During the review process some sections of the public claimed that the continued entrenchment of the Kadhis' Courts could be interpreted as elevating one religion over others, and that the allocation of public funding to maintain these courts amounted to the unlawful establishment of a state religion.³¹ The Kadhis' Courts were a feature of the previous Constitution, having been historically a part of the agreement between the Sultan of Zanzibar and the Imperial British East African Company responsible for administering the territory of Kenya before independence. The establishment of the Kadhis' Courts during this time was confined to a 10-mile coastal strip and was meant to protect the interests of the minority Muslim community in this area. At independence, the Sultan of Zanzibar agreed to cede sovereignty over this area to Kenya, provided the continued existence of the Kadhis' Courts was guaranteed. Thus the COE, recognizing that these courts had a special status under these agreements, decided that they would be retained in the new 2010 Constitution.³²

In the 2010 Constitution, national values and principles of governance have been enshrined in Article 10. Although the previous Constitution incorporated values and principles, they were not explicitly stated as such but could be discerned from the provisions. Thus, values such as equity, equality, and non-discrimination can be identified in the Bill of Rights, while principles of governance such as democracy, human rights, and the rule of law are evident in other provisions. Nevertheless, the explicit articulation of values and principles of governance such as patriotism, national unity, sharing and devolution of power, participation of the people, human dignity, social justice, inclusiveness, good governance, integrity, transparency, accountability, and sustainable development, amongst others, plays an important role in making clear the underlying tenets of the Constitution.³³ The national values and principles of governance are binding on all state organs, state officers, public officers, and all persons when applying or interpreting the Constitution or any law, when enacting any law, and when making or implementing public policy decisions.³⁴

The explicit statement of national values and principles may be seen as a response to the deep-running societal cleavages and conflicts that are ultimately based on ethnicity, the

²⁹ Constitution of Kenya (Rev 2009), sec 1A.

³⁰ Art 8.

³¹ M Ngugi and B Siganga, 'The common ground in Kadhi Courts debate' (22 August 2009), <<http://allafrica.com/stories/200908240364.html>> (accessed 21 March 2011).

³² Other reasons include the legitimate expectations of those who had benefited from these courts that they would continue to enjoy the protection of entrenchment in the Constitution. Further, that the existence of these courts had not negatively affected the religious freedoms of others.

³³ Courts have already begun making reference to these guiding principles in their decisions: see eg *Susan Waihera Kariuki & Others v The Town Clerk, Nairobi City Council & Others*, Petition Case No 66 of 2010 [2011] eKLR.

³⁴ Art 10(1).

marginalisation of some groups and geographical regions, and the perception (and often the practice) that an ethnic community represented in high echelons of power is in a better position to benefit from national resources in terms of infrastructure, jobs, and social development, to mention a few. For example, in the past, holding the position of President meant that the incumbent controlled appointments to the public service, handing out positions in return for loyalty. Nepotism and patronage, lack of public accountability, corruption, erosion of the rule of law, and impunity were the norm.³⁵ The national values and principles of governance are required to be employed in interpreting the Constitution, ensuring that they are not merely words on paper.³⁶ The practical application of these provisions is seen in the public vetting of appointments to state and public office, for example, and to commissions and independent offices.³⁷

It has been argued that the norms espoused in the Constitution and entrenched institutions will require transformational leadership if they are to be meaningful in addressing the aspirations of Kenyans.³⁸ Kenya's search for good leadership is addressed in the innovative chapter on leadership and integrity.³⁹ The provisions of this chapter emphasise integrity, accountability, and transparency as key pillars of good leadership. Thus, state officers are expected to carry out their responsibilities in a way that prioritises service to the public over personal gain, fair and impartial decision-making with public accountability, honesty in the discharge of duties, and bringing dignity and promoting public confidence in the office they occupy. These values formed the basis of investigations into the conduct of the Deputy Chief Justice by a tribunal constituted by the President following allegations of gross misconduct by the judge.⁴⁰ The tribunal described the national values in the Constitution as being foundational, but they should be interpreted broadly to include values that are not necessarily explicit in written law, but reflect society's expectations.⁴¹

Chapter Thirteen of the Constitution deals with the public service, a sector (although not the only sector) that is plagued by corruption, encouraged by the culture of impunity.⁴² Corruption in the public sector is fortified by a number of factors, such as the flawed systems governing the procurement of goods and services by the government, allowing public servants to engage in private business leading to conflict of interest situations, and

³⁵ See J Kwaka and T M Mutunga, 'Contemporary Kenya and its Leadership', in J Kwaka, O Okombo et al (eds), *Challenging the Rulers: A Model for Good Governance* (2011) 1–37, 11–12, 25–26.

³⁶ Art 259.

³⁷ See generally J Kwaka, 'Vetting and Social Audit of Leaders', in J Kwaka, O Okombo et al (eds), *Challenging the Rulers: A Model for Good Governance* (2011) 236–258.

³⁸ See generally, H Indangasi, 'Introduction', in J Kwaka, O Okombo et al (eds), *Challenging the Rulers: A Model for Good Governance* (2011) xi–xvi.

³⁹ Arts 73–80.

⁴⁰ Report and recommendation of the tribunal to investigate the conduct of the Deputy Chief Justice and Vice-President of the Supreme Court of the Republic of Kenya, Tribunal Matter No 1 of 2012, 3 August 2012, paras 45–51.

⁴¹ Tribunal Matter No 1 of 2012, para 51 and schedule of values attached to the Report.

⁴² Arts 232–237.

rampant impunity where those officers are not held to account for the loss of public money or other property.⁴³

The Constitution begins to address the ills in the public sector through values and principles of public service that augment the values that underlie the leadership and integrity chapter. These are adherence to high standards of professional ethics; efficient, effective, and economic use of resources; responsive, prompt, effective, impartial, and equitable provision of services; participation of the people; transparency and timely provision of accurate information; a balance struck between appointments on the basis of fair competition and merit; representation of Kenya's diversity; and equality of opportunity for men and women, all ethnic groups, and persons with disabilities.⁴⁴ The Public Service Commission is entrusted with the responsibility of promoting the national values and principles of good governance and the principles of public service, and is required to report to the President and Parliament the extent to which the public service is complying with these values.⁴⁵

However, the solution to the problem of corruption in Kenya will not be found solely in enunciating and promoting positive values that should guide public service. Accountability for corruption and unethical conduct is an imperative. An independent ethics and anti-corruption commission is charged with the responsibility of ensuring compliance and enforcement of the chapter on leadership and integrity.⁴⁶ Unfortunately, the lack of prosecutorial powers, which has been a stumbling block to the efficient discharge of functions for previous commissions, is not resolved in the Constitution. The Constitution, however, insulates the office of the Director of Public Prosecutions (DPP) from political interference, making it a much more independent office than existed under the Attorney General's office.⁴⁷ The Ethics and Anti-Corruption Commission established pursuant to the Constitution is empowered to investigate and recommend to the DPP the prosecution of acts of corruption or violation of codes of ethics.⁴⁸ It is hoped that with the revamped office of the DPP there will be efficient prosecutions that will, in turn, make an impact on the levels of corruption and unethical conduct.

III. Fundamental Rights Protection

⁴³ A case in point is the Anglo-leasing scandal, where senior government officials were alleged to have entered into contracts on behalf of the government, for exorbitant amounts of money, but without any disclosure requirements or accountability to any other arm of government, ostensibly because they were security-related military contracts. The payments were made to non-existent companies that never delivered the services they were paid for. The money is believed to have been embezzled for personal gain. See a detailed discussion in JT Gathii, 'Kenya's long anti-corruption agenda – 1952-2010: Prospects and challenges of the Ethics and Anti-Corruption Commission under the 2010 Constitution', Legal studies research paper series No 35 of 2010–2011, Albany Law School 75–76, <<http://ssrn.com/abstract=1718620>> (accessed 4 August 2012).

⁴⁴ Art 232(1).

⁴⁵ Art 234(2)(c) and (h).

⁴⁶ Art 79.

⁴⁷ Arts 157–158.

⁴⁸ The Ethics and Anti-Corruption Act No 22 of 2011, sec 11(1)(d).

The Bill of Rights is contained in Chapter Four of the 2010 Constitution.⁴⁹ The Chapter is divided into five parts: general provisions relating to the Bill of Rights; rights and fundamental freedoms; the specific application of rights; state of emergency; and the Kenya National Human Rights and Equality Commission.

The Bill of Rights in the 2010 Constitution differs to a large extent from that in the previous Constitution in a number of aspects. Firstly, the 2010 Constitution provides for a wider range of rights than the previous Constitution, which only protected civil and political rights (and only a limited number of those rights) compared to the 2010 Constitution, which includes some new rights such as the right of access to information, fair labour rights, media freedom, and the right to fair administrative action, to mention a few. Social, economic, and cultural rights are now protected in the 2010 Constitution. Secondly, general provisions in relation to rights, such as who bears the obligations in relation to the rights, the scope of the rights and corresponding limitations, and the application of the Bill of Rights, amongst other provisions, were not apparent in the previous Constitution. The 2010 Constitution contains a general limitation clause and applies rights horizontally, which are innovative features. In fact, the sequence and positioning of protections of fundamental rights and freedoms in the previous Constitution, after chapters on the Executive, the legislature, and the judiciary, may be telling of the importance accorded to the Bill of Rights vis-à-vis the other contents of the Constitution, particularly those concerned with the distribution of power.

Part I on general provisions relating to the Bill of Rights covers the application, implementation, enforcement, and limitation of the rights protected in the Constitution. The Part commences by proclaiming that the Bill of Rights is integral to Kenya's democratic state and forms the framework for social, economic, and cultural policies. Thus, rights form the basis for state action and the exercise of power.⁵⁰ Also recognized is the relationship between the protection of human rights and the preservation of human dignity, the promotion of social justice, and the realization of human potential. Although the list of rights in the Constitution is fairly comprehensive, it is not considered to be exhaustive of all rights and fundamental freedoms, and room is made for the recognition of other rights as long as they are not inconsistent with the Bill of Rights.⁵¹ The Bill of Rights applies vertically and horizontally, binding all law, all state organs, and all persons.⁵² Courts had in some previous cases held that fundamental rights could only be enforced against the state and not private persons, who were covered under private law.⁵³

Every person is entitled to enjoy the rights and fundamental freedoms to the greatest extent consistent with the nature of the right.⁵⁴ 'Person' in the 2010 Constitution is defined to include a company, association, or other body of persons, whether incorporated or unincorporated.⁵⁵ Therefore, the scope of entitlement and the duty to

⁴⁹ Arts 19–59.

⁵⁰ Art 19.

⁵¹ Art 19(3)(b).

⁵² Art 20(1).

⁵³ See eg *Kenya Bus Service Ltd & 2 Others v Attorney General* [2005] KLR 788.

⁵⁴ Art 20(2).

⁵⁵ Art 260.

abide by the Bill of Rights is very broad, covering natural persons, juridical persons, and groupings of persons that might not have legal personality. Where the law does not give effect to a right or fundamental freedom, courts are required to develop the law in that respect and to interpret the law in a manner that favours the enforcement of a right or fundamental freedom.⁵⁶ When interpreting the Bill of Rights, courts, tribunals, and other authorities are required to advance ‘values that underlie an open and democratic society based on dignity, equality, equity and freedom’, and also ‘the spirit, purport and objects of the Bill of Rights’.⁵⁷ The duty bearer clearly identified in the Bill of Rights is the State, which has the responsibility to observe, respect, protect, promote, and fulfil the rights and fundamental freedoms.⁵⁸ Of particular importance is the duty to ensure that the needs of vulnerable and marginalized groups are addressed.

The question of availability and allocation of resources is a central one in relation to the realization of rights, particularly economic and social rights. The drafters of the Constitution were aware of the resource-related constraints associated with the implementation of rights and the tendency of duty bearers to cite these constraints as a conclusive excuse for the non-realization of rights, the scepticism associated with the justiciability of economic and social rights, including the separation of power concerns, and the lessons to be learnt from advances in the adjudication of these rights in other jurisdictions. In order to balance the legitimate concerns that availability of resources could become a convenient excuse, with the reality that resources are finite and applicable to a range of priorities, the burden to show that resources are not available is placed on the State, where it claims that this is so in relation to the rights to health, housing and sanitation, food and water, social security, and education.⁵⁹ The realization of these fundamental rights shall be prioritized in the allocation of resources, but the court, tribunal, or other authority adjudicating the matter may not interfere with a decision by the State concerning the allocation of resources simply because the tribunal would have made a different decision.⁶⁰ In addition to the concept of available resources, which is often used to distinguish responsibility for the realization of economic and social rights, the progressive realization concept acknowledges that these rights cannot be achieved in the short term. The State is therefore urged to take legislative, policy, and other measures to achieve economic and social rights progressively.⁶¹ Standard setting is identified as one of these measures, and it highlights the State’s responsibility to demonstrate progressive realization of rights.

All the rights and fundamental freedoms in the Bill of Rights are justiciable. Standing to institute court proceedings in relation to any right is granted to a wide range of persons, including those acting in their own interests, those acting on behalf of another person who cannot act in their own name, those bringing class actions, those acting in the public interest, and those acting in the interest of an association of persons.⁶² To facilitate

⁵⁶ Art 20(3).

⁵⁷ Art 20(4).

⁵⁸ Art 21(1).

⁵⁹ Art 20(5)(a).

⁶⁰ Art 20(5)(b) and (c).

⁶¹ Art 21(2).

⁶² Art 22(1) and (2).

litigation, the judiciary is required to make the court process accessible through a number of means, including the elimination of fees for commencing proceedings, the simplification of proceedings, and the creation of space for *amicus* briefs.

The Bill of Rights specifies a non-exhaustive list of remedies that courts may provide, such as a declaration of rights, an injunction, a conservatory order, a declaration of invalidity of any law that is inconsistent with the rights and fundamental freedoms and is not justifiable under the limitations clause, an order for compensation, and an order for judicial review.⁶³

Rights in the previous Constitution were limited internally and were directed at ensuring that the exercise of rights of individuals did not prejudice the rights of others or the public interest.⁶⁴ By contrast, the 2010 Constitution, in a single clause that applies to all the rights, explicitly identifies how rights can be limited.⁶⁵ Limitations should be enacted by law; be reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom; and should take account of, amongst other things, the nature of the right or freedom, the importance of the purpose of the limitation, the nature and extent of the limitation, the rights and freedoms of others, and whether there is a less restrictive means to achieve the intended purpose. Legislation seeking to limit rights is subject to conditions set out in the Constitution, and in recognition of the application of Muslim law before the Kadhis' Courts, provisions on equality can be qualified to the extent that they are 'strictly necessary'. No direction is given on what the terms 'strictly necessary' would mean in this context. The freedom from torture, cruel, inhuman, or degrading treatment or punishment, freedom from slavery or servitude, the right to a fair trial, and the right to an order of *habeas corpus* shall not be limited under any circumstances.⁶⁶

In terms of substantive rights, the 2010 Constitution protects the rights to life, equality and non-discrimination, human dignity, freedom and security of the person, freedom from slavery, servitude and forced labour, privacy, freedom of conscience, religion, belief and opinion, freedom of expression, freedom of the media, access to information, freedom of association, freedom of assembly, demonstration, picketing and petition, political rights, freedom of movement and residence, the right to property, the right to fair labour practices, the right to a clean and healthy environment, rights to the highest attainable standard of health, adequate housing and reasonable standards of sanitation, freedom from hunger and adequate food, clean and safe water, social security and education, the right to language and culture, the right to family, consumer rights, the right to fair administrative action, the right of access to justice, fair trial rights, and rights of detained persons. This extensive catalogue of rights contains civil, cultural, economic, political, social, and solidarity rights. Together with the better-known rights, the Bill of Rights incorporates rights such as consumer rights that are not often found in human rights literature. Further, it is evident that an attempt has been made to elaborate the

⁶³ Art 23(3).

⁶⁴ Constitution of Kenya Rev 2009, sec 70.

⁶⁵ Art 24.

⁶⁶ Art 25.

content of some rights: for example, the right to the highest attainable standard of health is stated to include the right to health care services and reproductive health care services; the right to food incorporates freedom from hunger and adequate food of acceptable quality; the question of abortion is dealt with under the right to life. By contrast, other rights are fairly briefly stated, such as the right to education, which is not elaborated at all, notwithstanding its detailed description in international covenants.⁶⁷

Understandably, there has not been much jurisprudence issued in respect of the 2010 Constitution since its promulgation; nevertheless, the courts have addressed certain important issues.

Some of the rights that have immediately been invoked in courts are the rights of detained persons, such as the right ‘to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released’.⁶⁸ The previous Constitution distinguished between offences for which accused persons could be released on bail and those for which they could not.⁶⁹ Bail was not available for offences for which the penalty was death, such as murder, treason, robbery with violence, attempted robbery with violence, and for any drug-related offence.⁷⁰ Linked to this, arrested persons were required to be brought before a court as soon as reasonably possible but within twenty-four hours for other offences, but for offences punishable by death, a time period of up to fourteen days was allowed.⁷¹ The 2010 Constitution does not make any distinction with respect to the granting of bail, and arrested persons are entitled to be brought before a court as soon as reasonably possible, but not later than twenty-four hours after being arrested or the end of the next court day.⁷²

Despite these new provisions in the Constitution, courts are yet to harmonise their approach to the granting of bail and what constitute ‘compelling reasons’ not to grant bail. Specifically, courts have adopted different approaches as to how much weight should be accorded to the seriousness of the offence with which the accused is charged.⁷³ For example, in *Republic v Moses Kenu ole Pemba*, the High Court considered that the charge of murder was a serious one, and thus constituted a compelling reason why the accused should not be released on bail.⁷⁴ A subsidiary reason was that society did not condone the taking away of life and thus releasing the accused person could endanger his life and cause breaches of the peace. A different approach was taken in *Aboud Rogo Mohamed & another v Republic*, where the High Court considered that the applicants were innocent until presumed guilty, despite the seriousness of the allegations made against them, which if proven true would make it undesirable for them to be released on

⁶⁷ See eg International Covenant on Economic, Social and Cultural Rights, art 13.

⁶⁸ Art 49(1)(h).

⁶⁹ Constitution of Kenya Rev 2009, sec 72(5).

⁷⁰ Criminal Procedure Act Cap 75, sec 123(1).

⁷¹ Constitution of Kenya Rev 2009, sec 72(3).

⁷² Art 49(1)(f).

⁷³ M Murungi and A Halonyere, ‘Courts’ dilemma in bail applications for serious offences’, KLR Weekly Newsletter (18 March 2011).

⁷⁴ *Republic v Moses Kenu ole Pemba*, Criminal Case 60 of 2007 [2010] eKLR.

bail.⁷⁵ The applicants were charged with belonging to a proscribed organization alleged to be responsible for a suicide bombing of a bus in Nairobi on 20 December 2010. The Court held that although the respondent's (state) allegations were not baseless (as argued by the applicants), no compelling reasons had been adduced to warrant the refusal of bail. The courts have held that the most important factor in determining whether bail should be granted is whether or not the accused person will appear before the court on the date of trial,⁷⁶ and thus each case should be considered on its own merits.

In relation to the freedom of the media, the High Court has rejected an interpretation of Article 34(2)—which prohibits interference with the media by the State—as ousting the jurisdiction of the court to hear a suit against certain members of the media on allegations of defamation.⁷⁷ The defendants, raising the constitutional issue, argued that the 'state' as defined by the Constitution included the judiciary, and the non-interference envisioned included barring the judiciary from involving itself in matters concerning the media, including the determination of cases alleging defamation. They further argued that even if the court heard the case, it was precluded from delivering a judgment on damages because this would amount to penalising the media, which is prohibited in Article 34(2)(b).

The Court reiterated the constitutional provision that enumerates rights that shall not be limited, which does not include freedom of the media. Thus, freedom of the media is not an absolute right—it can be limited, particularly to prevent the infringement of the rights and fundamental freedoms of others. Further, the duty to safeguard justice, human dignity, equality, and equity was entrusted to the courts and this responsibility would be undermined by such an interpretation of the freedom of the media.

Socio-economic rights are for the first time included in the Bill of Rights in Kenya. The right to housing has been implicated in several cases. In an application for conservatory orders against the forced eviction of people living in informal settlements built on road reserves, the High Court deplored the fact that the applicants were only given one or two days' notice to vacate the land, the lack of reasons for this decision, and the subsequent forceful evictions and demolitions that took place.⁷⁸ The Court reiterated the State's responsibility to provide alternative housing to those facing evictions, and the necessity of developing a policy around evictions that takes account of the rights and dignity of those subject to evictions. The Court has on another occasion ordered the return of petitioners to land from which they were evicted and the rebuilding of reasonable accommodation, including the amenities that existed before the evictions or such as are mutually agreed upon.⁷⁹

⁷⁵ *About Rogo Mohamed & another v Republic*, Criminal Case 793/2010 [2011] eKLR.

⁷⁶ *Republic v Muneer Harron Ismail & 4 others* [2010] eKLR. The accused persons in this case were released on bail, although the case was decided before the new Constitution was promulgated. See also *Republic v Danson Mgunya & Another*, Criminal case 26 of 2008 [2010] eKLR.

⁷⁷ *Kwacha Group of Companies & Another v Tom Mshindi & Others*, Civil Suit 319 of 2005 [2011] eKLR.

⁷⁸ *Susan Waithera Kariuki & Others v The Town Clerk, Nairobi City Council & Others*, Petition Case 66 of 2010 [2011] eKLR.

⁷⁹ *Ibrahim Sangor Osman v Minister of State for Provincial Administration & Internal Security*, High Court at Embu, Petition No 2 of 2011, [2011] eKLR.

The High Court, in a case which challenged the definition of ‘counterfeit’ in the Anti-Counterfeit Act as being too broad as to include generic medicines, thus threatening the right to health, found that the State had the responsibility to promote conditions in which people can lead a healthy life. The State also has a negative duty not to interfere with existing access to essential medicines, such as legislation that would render such medicines unaffordable.⁸⁰ The Court found that it would be a violation of the petitioners’ right to health and life—which includes the right to access to affordable essential drugs and medicines, including generic medicines for HIV and AIDS—‘to have included in legislation ambiguous provisions subject to the interpretation of intellectual property holders and customs officials when such provisions relate to access to medicines essential for the petitioners’ survival’.⁸¹ The rights to health, life, and dignity of the petitioners were held to take precedence over the intellectual property rights of the patent holders. Nevertheless, the Court only issued declaratory orders and directed the State to reconsider the offending provisions, without making substantive suggestions of how an amendment might read.⁸²

Freedom of information is one of the newly enshrined rights in the 2010 Constitution, and has come up for interpretation in the courts. Article 35(1) protects the right of access to information in respect of citizens only. The High Court has held that for the purposes of this provision, a citizen is a natural person as defined in the chapter on citizenship in the Constitution, and does not include juridical persons.⁸³ Further, not even the public interest can alter this position.⁸⁴

Part III of the Bill of Rights protects the rights of certain groups of people, such as children, persons with disabilities, youth, minorities and marginalised groups, and older members of society. These groups were not explicitly provided for in the previous Constitution. The protected rights cover a wide range of areas affecting these particular groups, including the right of persons with disabilities to reasonable access to all places, public transport and information; to use sign language, Braille, or other appropriate means of communication; and the progressive implementation of the principle that at least five per cent of the public in elective and appointive bodies are persons with disabilities.⁸⁵ In relation to youth, minorities, and marginalised groups, the State’s duty is to take measures, including affirmative action, to advance the representation and participation of these groups in education and training, employment, and participation in political, social, economic, and other spheres of life.⁸⁶ Older members of society are protected against abuse and being relegated to the margins of society, and their right to

⁸⁰ *PAO & 2 Others v Attorney General*, High Court at Nairobi, Petition No 409 of 2009 [2012] eKLR para 66.

⁸¹ *PAO & 2 Others v Attorney General*, para 84.

⁸² *PAO & 2 Others v Attorney General*, para 88.

⁸³ *Famy Care Ltd v Public Procurement Administrative Review Board & Another*, High Court at Nairobi, Petition 43 of 2012, para 26.

⁸⁴ *Famy Care Ltd v Public Procurement Administrative Review Board & Another*, para 30.

⁸⁵ Art 54.

⁸⁶ Arts 55–56.

care and assistance is placed on their families and the State.⁸⁷ Courts have also re-affirmed the equality of men and women and the freedom from discriminatory treatment on the basis of cultural practices.⁸⁸

The protection of rights and fundamental freedoms is most crucial during times of emergency in the life of a state. It is therefore significant that in Kenya, under the dispensation of the previous Constitution, a state of emergency was in practice declared by the President, although it was subject to approval by the National Assembly, but could potentially be in force indefinitely, since revocation of the order was vested in the President.⁸⁹ The 2010 Constitution is explicit on when a state of emergency can be declared, who makes the declaration, how the declaration is made, and for how long.⁹⁰ The President may declare a state of emergency for no longer than fourteen days unless the National Assembly grants an extension of the declaration. The threshold majorities for the extension of a declaration of emergency are made progressively higher for subsequent extensions, and thus the first extension requires a majority approval of at least two-thirds of all members of the National Assembly, while subsequent extensions require approval of at least three-quarters of all members of the National Assembly.⁹¹ The Supreme Court is mandated with deciding the validity of a declaration of a state of emergency and incidental questions thereto. Rights may be limited as a consequence of a state of emergency, but only to the extent strictly required by the emergency and in accordance with international law obligations.⁹² Further, neither the State nor individuals can be indemnified against unlawful acts or omissions carried out during the emergency or as a consequence thereof.⁹³

IV. Separation of Powers

The question of separation of powers is one that loomed large during the constitution-making process. It was in fact one of the underlying reasons for constitutional reform. The previous Constitution had changed radically in character from what it was at independence, primarily because amendments were directed towards strengthening the Executive—more specifically, the office of President—to the detriment of other arms of government.

There was, as such, the need to ensure sufficient checks and balances within government so that each arm of government functioned independently, but at the same time within defined parameters and spheres of operation, with appropriate oversight by the other arms. The deep dissatisfaction with the nature of the exercise of executive power was exemplified in that ninety-five per cent of the submissions received by the COE related to

⁸⁷ Art 57.

⁸⁸ *Lucy Kemboi v Cleti Kurgat & Others*, High Court at Eldoret, Civil Suit 7 of 2010 [2012] eKLR.

⁸⁹ Constitution of Kenya rev 2009, sec 85.

⁹⁰ Arts 132(4)(d) and 58.

⁹¹ Art 58(4).

⁹² Art 58(6).

⁹³ Art 58(7).

the nature of the Executive.⁹⁴ The submissions supported a clear delineation of powers between the State President and the Prime Minister, a chief executive who would be directly elected by the people, clarity on the functions of each of these offices, as well as a clear distinction between offices of state and offices of government.⁹⁵

A. The Executive

The 2010 Constitution enshrines a presidential system of government.⁹⁶ The President, the Deputy President, and the Cabinet exercise the executive authority derived from the people of Kenya.⁹⁷ The primary features of this system within the Constitution include the following:

- The President is the head of state and head of government, the commander-in-chief of the Kenya Defence Forces, and chairperson of the National Security Council.⁹⁸ The Deputy President is the principal assistant of the President, including in the execution of the presidential functions.⁹⁹
- The President is directly elected by registered voters in a national election, and in order to be declared elected as President, a candidate is required to have garnered more than half of all the votes cast in the election and at least twenty-five per cent of the votes cast in each of more than half of the counties.¹⁰⁰ If no candidate is thus elected, a run-off is envisioned within thirty days between the two candidates with the greatest number of votes.¹⁰¹ Given the events following Kenya's general elections held in 2007, in which election results were violently contested and the President was hurriedly sworn in, it is not surprising that the Constitution provides extensively for aspects concerning how the election process should be carried out, and when and how the President-elect¹⁰² and Deputy President-elect assume office.
- The key concerns of over-centralisation of power in the office of the President are addressed by ensuring checks on executive power through periodic reporting to the National Assembly;¹⁰³ the requirement for approval of the National Assembly for the appointment of Cabinet Secretaries, the Attorney General, Principal Secretaries, high commissioners, ambassadors, and diplomatic and consular representatives, amongst other state and public officers;¹⁰⁴ and the declaration of a

⁹⁴ COE Final Report, p 88.

⁹⁵ As above.

⁹⁶ See generally M Böckenförde, 'The Design of the Executive Branch', in M Böckenförde, N Helding, W Wahiu, *A Practical Guide to Constitution Building*, International Institute for Democracy and Electoral Assistance (International IDEA) (2011), 146–182.

⁹⁷ Arts 129 and 131(1)(b).

⁹⁸ Art 131(1)(a), (c), (d).

⁹⁹ Art 147(1).

¹⁰⁰ Art 136(1) and 138(4).

¹⁰¹ Art 138(5) and (6).

¹⁰² Arts 137–141.

¹⁰³ Including reporting in an address to the nation on the progress in achieving the realisation of national values and reporting to the National Assembly on progress in fulfilling the international obligations of the Republic.

¹⁰⁴ Art 132(2).

state of emergency and declaration of war.¹⁰⁵ The presidential term limit is set to two terms of five years each.¹⁰⁶ Further, executive power is devolved to the county level, with delineation of the functions of national government and county governments.¹⁰⁷

Departing from the practice before the promulgation of the 2010 Constitution, members of Cabinet are not members of Parliament.¹⁰⁸ Cabinet Secretaries are nominated by the President and appointed subject to approval by the National Assembly, and may be dismissed by the President.¹⁰⁹ Dismissal of Cabinet Secretaries may be proposed by a member of the National Assembly, supported by at least one quarter of all members of the Assembly, on grounds of gross violation of a provision of the Constitution or any other law, where there are serious reasons to believe that the Cabinet Secretary has committed a crime under national or international law, or for gross misconduct.¹¹⁰ On the proposal of such a motion the Assembly shall appoint a select committee to investigate the matter.¹¹¹ Cabinet Secretaries are accountable individually and collectively to the President, and are required to attend before a committee of Parliament to answer any question concerning matters within their responsibility, as well as to provide Parliament with full and regular reports concerning matters under their control.¹¹²

Other functions of the President extend to chairing Cabinet meetings, directing and co-ordinating the functions of government, including assigning responsibility for implementation and administration of legislation in accordance with any Act of Parliament, conferring national honours,¹¹³ and exercising the power of mercy.¹¹⁴

The President and Deputy President may be removed on grounds of incapacity¹¹⁵ or impeached for gross violation of a provision of the Constitution or any other law where there are serious reasons for believing that the President or Deputy President has committed a crime under national or international law, or for gross misconduct.¹¹⁶ A member of the National Assembly supported by at least a third of all members may propose a motion for impeachment. If such a motion finds the support of two-thirds of all

¹⁰⁵ Art 132(4)(d) and (e)

¹⁰⁶ Art 142(2).

¹⁰⁷ See section V below for a detailed discussion of devolution of powers.

¹⁰⁸ Art 152(3).

¹⁰⁹ Art 152(2).

¹¹⁰ Art 152(6).

¹¹¹ Art 152(7).

¹¹² Art 153.

¹¹³ Art 132(3), (4).

¹¹⁴ Art 133. Some of these powers are limited when the holder of the office of President is temporarily incumbent for a number of reasons, such as the absence or incapacity of the President. A temporary incumbent may not nominate or appoint judges of the superior courts, any other public officer whom the Constitution or legislation requires the President to appoint, Cabinet Secretaries or other state or public officials, high commissioners, ambassadors or diplomatic or consular representatives, or the exercise the power of mercy or confer national honours: see art 134.

¹¹⁵ Art 144.

¹¹⁶ Art 145(1). See art 150, which provides for a similar procedure in the case of impeachment of the Deputy President.

the members of the National Assembly, the Senate may by special committee investigate the matter and if at least two-thirds vote to uphold any impeachment charge, the President or Deputy President shall cease to hold office.¹¹⁷

B. The Legislature

Arguably, one of the pivotal moments in Kenya's democratic struggle was the return to multi-party politics in 1991. The elections in 1992 brought together a multi-party legislature and an expectation of more robust debate and holding government to account for policies and decisions taken. Nevertheless, the legislature did not emerge from the shadow of the Executive with the re-introduction of multi-party politics. The Executive still controlled the legislature by rewarding loyalty through appointments to ministerial positions and excluding critics.¹¹⁸ Another control tool was the appointment of a Speaker who would curb legislative independence. Although the Speaker was elected by MPs, in a National Assembly with a majority who were loyalist MPs, this was not difficult.¹¹⁹

A reform agenda to strengthen the legislature and provide a counterweight to executive power was seen to include the independence of Parliament within the legal framework, making the office of Speaker more accountable to members rather than to the Executive, Parliament setting its own budget, recruiting staff, and determining their terms of service, including salaries, and the ability to determine its own calendar.¹²⁰ Some of these objectives were achieved prior to the promulgation of the 2010 Constitution, but the Constitution entrenched these reforms.¹²¹ In particular, the independence of the legislature is guaranteed by the Constitution through the establishment of the Parliamentary Service Commission, which is responsible for preparing annual estimates of expenditure and submitting them to the National Assembly for approval and for exercising budgetary control over the service.¹²² In addition, the 2010 Constitution seeks to strengthen the legislature in its three broad roles of representation, law-making, and oversight.

The legislature comprises two houses, the National Assembly and the Senate.¹²³ The two houses represent different interests: the National Assembly represents constituencies and special interests, while the Senate represents the interests of counties and their governments.¹²⁴ Membership to the two houses results from direct election by registered voters in the respective electoral unit on the basis of the 'first past the post' system, and

¹¹⁷ Art 145(2)–(7).

¹¹⁸ JD Barkan and F Matiangi (n3) 33–72, 12.

¹¹⁹ Barkan and Matiangi (n3) 13.

¹²⁰ Barkan and Matiangi (n3) 21.

¹²¹ For example, the Constitution of Kenya (rev. 2009), secs 45A and 45B, were added to provide for parliamentary staff serving under a Parliamentary Service Commission, rather than the Public Service Commission, as had been the case prior to the amendment. No amendment was made in respect of Parliament's calendar: the President still maintained the power to prorogue or dissolve Parliament at any time – sec 59(1) and (2).

¹²² Art 127(6)(c).

¹²³ Art 93(1).

¹²⁴ Arts 95(1) and 96(1). For more on counties, see the section on devolution below.

nomination by political parties on the basis of proportional representation through party lists. Proportional representation in the Constitution is used for seats additional to those won on the basis of ‘first past the post’. The use of the two systems of representation ensures that both general and special interests are represented in Parliament. The use of two electoral systems also seeks to mitigate a situation where candidates with regional or ethnic majorities win electoral seats at the expense of the representation of minority candidates. Thus special seats are reserved for women, youth, persons with disabilities, and workers.¹²⁵ Broader representation of all segments of society in both the National Assembly and the Senate ensures that the ethnic tensions that led to violence such as that witnessed after the 2007 elections are diffused.¹²⁶

Both the National Assembly and the Senate have law-making functions. Any bill may be introduced in the National Assembly, which has the sole competency to consider legislation not concerning county government.¹²⁷ Money bills may only be introduced in the National Assembly.¹²⁸ Other roles in the domain of the National Assembly are the representation of issues that are of concern to the electorate of constituencies, the determination of the allocation of national revenue between the levels of government, the appropriation of funds for national government and national state organs, the oversight of national revenue and its expenditure, and state organs.¹²⁹

Bills concerning county government—that is, bills relating to their functions and powers, election of members of county assemblies or executives, and affecting county finances—may originate in either of the two houses.¹³⁰ Although the enactment of legislation concerning counties requires the participation of both houses,¹³¹ the primary role of the Senate in legislating on matters concerning the election of members of a county assembly or executive, and relating to the annual County Allocation of Revenue Bill, is particularly entrenched in the Constitution. The National Assembly may only veto or amend such bills with the support of at least two-thirds of the members of the Assembly. The Senate’s other functions are the allocation of national revenue among counties and oversight of national revenue allocated to county governments.¹³²

It is to be expected that where both the National Assembly and the Senate have competence over a matter, disagreements may arise. The Constitution provides mechanisms to resolve contentious issues through mediation committees made up of members of both houses.¹³³ The Speakers of both houses may also deliberate on questions relating to the designation of a bill as relating to counties or not.¹³⁴

¹²⁵ Arts 97(1), 98(1).

¹²⁶ M Akech, ‘Institutional Reform in the New Constitution of Kenya’, International Centre for Transitional Justice (2010) 22.

¹²⁷ Art 109(2) and (3).

¹²⁸ Art 109(5).

¹²⁹ Art 95.

¹³⁰ Art 110(1).

¹³¹ Art 96(2).

¹³² Arts 96(3), 217.

¹³³ Art 113.

¹³⁴ Art 110(3).

The legislature exercises its oversight role in a number of ways. As mentioned above, the appointment of certain members of the Executive is subject to approval by the National Assembly. In addition, Parliament is required to consider for approval the appointment of certain office bearers in the judicial arm, such as the Chief Justice and Deputy Chief Justice.¹³⁵ This was affirmed by the High Court in *Centre for Rights Education and Awareness (CREAW) and Others v The Attorney General*, where the applicants challenged as unconstitutional the President's nomination of certain individuals to the offices of Chief Justice, Attorney General, Director of Public Prosecutions, and Controller of Budget.¹³⁶ The applicants alleged that the basis of unconstitutionality was, *inter alia*, the unequal treatment of men and women, since the nominees were all men. Referring to the role of the National Assembly, the Court stated that it cannot restrain the National Assembly from carrying out its duty to approve the nominees. Nevertheless, where such approval would constitute perpetuating an unconstitutional act, the Court was bound to make an appropriate declaration and bring such unconstitutionality to the attention of the National Assembly.¹³⁷ In this way, the Court exercises oversight of the National Assembly, even where the National Assembly itself is exercising the oversight responsibility of the Executive.

The National Assembly has the power to initiate impeachment proceedings against the President, the Deputy President, and other state officers.¹³⁸ This power is shared with the Senate, which also participates in the oversight of state officers by considering and determining any resolution to remove the President or the Deputy President from office.¹³⁹ The National Assembly approves declarations of war and extensions of states of emergencies.¹⁴⁰

In keeping with the notion that legislative authority is derived from the people, and that members of the house are there as representatives of the people, the Constitution provides the electorate with a right to recall the member of Parliament representing their constituency before the end of the term of the relevant house.¹⁴¹ In this way, oversight of the legislature vests in the people who elected members to Parliament.

C. The Judiciary

The judicial system consists of superior courts—the Supreme Court, the Court of Appeal, the High Court, and courts of similar status—and subordinate courts.¹⁴² The Supreme

¹³⁵ Art 166(1)(a). See also arts 156, 157, and 228 on the nomination and appointment of the Attorney General, Director of Public Prosecutions, and Controller of Budget, respectively.

¹³⁶ *Centre for Rights Education and Awareness (CREAW) and Others v The Attorney General*, Petition 16 of 2011 [2011] eKLR.

¹³⁷ *Centre for Rights Education and Awareness (CREAW) and Others v The Attorney General* [2011] eKLR 16.

¹³⁸ Art 95.

¹³⁹ Art 96(4).

¹⁴⁰ Art 95(6).

¹⁴¹ Art 104(1).

¹⁴² Art 162.

Court, which is the highest court, has both original and exclusive jurisdiction to hear and determine disputes arising out of presidential elections and appellate jurisdiction with respect to appeals from the Court of Appeal and other courts and tribunals as may be stipulated by law.¹⁴³ The Supreme Court has, in addition to contentious jurisdiction, advisory jurisdiction, which it exercises on request by the national government or by any state organ or county government in relation to county matters.¹⁴⁴ The Supreme Court consists of the Chief Justice, the Deputy Chief Justice, and five other judges.¹⁴⁵

The Court of Appeal possesses only appellate jurisdiction and comprises not less than twelve judges.¹⁴⁶ The High Court has unlimited original jurisdiction in criminal and civil matters, and on questions related to the realization of the rights and fundamental freedoms in the Bill of Rights.¹⁴⁷ The High Court is also the court mandated to hear any questions related to the interpretation of the Constitution, and has appellate jurisdiction over tribunals appointed under the Constitution to consider the removal of a person from office, except those constituted to impeach the President and Deputy President.¹⁴⁸ The judiciary therefore plays a role in the election of persons to the office of President in terms of deciding disputes arising from presidential elections, but is not involved in the removal of the President, which is a role that Parliament plays.

The Constitution also provides for the establishment of courts with the same status as the High Court to decide on employment and labour matters, and land matters.¹⁴⁹ Industrial courts have been held to be competent to interpret the Constitution and to adjudicate on matters relating to fundamental rights and freedoms in disputes within their sphere of competence.¹⁵⁰

The independence of the judiciary is protected by, *inter alia*, providing that only the Constitution directs and controls the exercise of judicial authority.¹⁵¹ In terms of administration of the judiciary, the Judicial Service Commission is established to oversee the independence of the judiciary and the efficient, effective, and transparent administration of justice.¹⁵² Financial autonomy is ensured through the Judiciary Fund, which is a charge on the Consolidated Fund. Rather than the Treasury or the Ministry of Finance, the Chief Registrar prepares annual estimates of expenditure and presents them to the National Assembly for approval, providing the judiciary with control over its own budget and ensuring that the Executive has no control over the judiciary's funds.¹⁵³ The independence of the judiciary is further guaranteed in terms that judicial authority is not

¹⁴³ Art 163(3).

¹⁴⁴ Art 163(3).

¹⁴⁵ Art 163(1).

¹⁴⁶ Art 164.

¹⁴⁷ Art 165(3)(a), (b).

¹⁴⁸ Art 165(3)(c).

¹⁴⁹ Art 162(2).

¹⁵⁰ *United States International University (USIU) v Attorney General*, Petition 170 of 2012 High Court of Kenya at Nairobi, ruling of 3 August 2012, para 45.

¹⁵¹ Art 160(1).

¹⁵² Art 172.

¹⁵³ Art 173.

subject to control by any person or authority, but only to the Constitution and the law.¹⁵⁴ Judges are immune from legal action or suit in respect of anything done or not done in good faith in the exercise of their judicial function.¹⁵⁵

The process by which judges are selected, appointed, and removed, as well as the duration of their terms, is also indicative of the level of independence that can be expected of the particular judiciary.¹⁵⁶ The Chief Justice and the Deputy Chief Justice are appointed by the President on the recommendation of the Judicial Service Commission and subject to the approval of the National Assembly.¹⁵⁷ The President, in accordance with the recommendation of the Judicial Service Commission, also appoints judges to the High Court.¹⁵⁸

Judges of the superior courts hold office until the age of seventy years unless they elect to retire at any time after attaining sixty-five years of age.¹⁵⁹ They can only be removed from office on grounds of incapacity resulting in inability to carry out functions, breach of the judicial code of conduct, bankruptcy, incompetence or gross misconduct, or misbehaviour.¹⁶⁰ Removal of a judge may be set in motion by the Judicial Service Commission on its own motion or by petition by any person in writing and setting out the alleged facts supporting such a removal.¹⁶¹

Allegations initiating the removal of a judge are subjected to investigation by a tribunal appointed by the President on recommendation by the Judicial Service Commission.¹⁶² The role of the Commission when acting on a petition is simply to establish that the petition *prima facie* discloses a cause of action before passing the same on to the President with the recommendation to establish a tribunal if indeed grounds of removal are present.¹⁶³ Where it is inquiring into the conduct of a judge on its own motion, the Commission is entitled to evaluate the allegations levelled against a judge to determine whether they disclose grounds for removal, a process that is distinguished from that which a tribunal investigating such conduct would take.¹⁶⁴ The tribunal has the mandate to conduct an in-depth inquiry that determines the veracity of the allegations and whether the judge should be removed. The President is bound to act on the recommendations of

¹⁵⁴ Art 160(1).

¹⁵⁵ Art 160(5).

¹⁵⁶ N Hedling, 'The Design of the Judicial Branch', in M Böckenförde, N Helding, W Wahi, *A Practical Guide to Constitution Building*, International Institute for Democracy and Electoral Assistance (International IDEA) (2011), 222–287, 235–241.

¹⁵⁷ Art 166(1)(a).

¹⁵⁸ Art 166(1)(b).

¹⁵⁹ Art 167(1).

¹⁶⁰ Art 168(1). See also Report and recommendation of the tribunal to investigate the conduct of the Deputy Chief Justice and Vice-President of the Supreme Court of the Republic of Kenya, Tribunal Matter No 1 of 2012, 3 August 2012.

¹⁶¹ 168(2), (3).

¹⁶² Art 168(2)–(10).

¹⁶³ *Nancy Makokha Baraza v Judicial Service Commission & Others*, Petition No 23 of 2012, [2012] eKLR, para 71.

¹⁶⁴ *Nancy Makokha Baraza v Judicial Service Commission & Others*, para 72.

the Commission to appoint a tribunal, and similarly the subsequent recommendations of such a tribunal to remove or retain a judge.

The composition of a tribunal to inquire into the matter of the removal of the Chief Justice differs from that of other judges, including the Deputy Chief Justice.¹⁶⁵ This differentiation has been held to be a deliberate distinction by the drafters of the Constitution between the office of the Chief Justice and that of the Deputy Chief Justice, and does not amount to discrimination.¹⁶⁶

Subordinate courts consist of the magistrates' courts, the Kadhis' Courts, courts martial, and any other courts established by an Act of Parliament.¹⁶⁷ The jurisdiction and functions of these courts are determined by an Act of Parliament, but nevertheless, the Kadhis' Courts are only mandated to determine questions of Muslim law relating to personal status, marriage, divorce, or inheritance where all the parties are Muslim and where they submit to the jurisdiction of the Kadhis' Courts.¹⁶⁸

V. Federalism/Decentralisation

The devolution of government is dealt with in Chapter Eleven of the 2010 Constitution. The centralisation of power has always been one of the major areas of concern in Kenya and there existed a deep dissatisfaction with the way power was exercised at lower levels. The Independence Constitution provided for devolution, but this was eroded over time during the ensuing years, resulting in a highly centralised government. Although decentralisation was envisioned through provincial and local government, the citizens were not satisfied with the minimal opportunities afforded to participate in governance or to influence development of their communities. The question of devolution was, therefore, contentious during the review process, with debate on various aspects of devolution, such as the type of devolution, the levels of government, the units of devolution, and the relationship between the central government and the units of devolution, amongst other issues.

In the end, better participation in governance is achieved by devolution to two tiers of government—national and county government. Given the history of the exercise of governmental authority at both national and sub-national levels, the Constitution explicitly stipulates the objects and principles of devolution of government as including the promotion of democracy and accountability in the exercise of power; the fostering of national unity by recognising diversity; providing for self-government and participation in the exercise of power; the management of own affairs and development; the protection of the interests and rights of minorities and marginalised communities; effective service delivery; equitable sharing of resources; enhancing checks and balances; and the

¹⁶⁵ Art 168(5).

¹⁶⁶ *Nancy Makokha Baraza v Judicial Service Commission & Others*, paras 83, 87.

¹⁶⁷ Art 169.

¹⁶⁸ Art 170(5).

separation of powers.¹⁶⁹ The principles of devolution include an emphasis on gender representation.¹⁷⁰

The model of devolution entrenched in the Constitution affords units broad autonomy administratively, politically, and financially. The county represents the unit of devolution and consists of a county assembly—the legislative arm—and a county executive, vested with executive authority.¹⁷¹ Government structure at the county level, therefore, mirrors the structure at the national level. The rationale for the county assembly reflects that of the National Assembly in some ways, primarily as the legislative authority of the county, and also in the exercise of oversight of the county executive, in this way enhancing the system of checks and balances in the exercise of power.¹⁷² Participation and self-government by all sectors of the community is achieved through direct elections of members of county assemblies with the representation of gender and marginalised groups being accommodated through nomination by political parties in proportion to the seats received during elections.¹⁷³

County executive committees also reflect to some extent the role of the national executive in that they are mandated to implement legislation—both county and national legislation as necessary—and to manage the administration of the county.¹⁷⁴ The county governor, who is directly elected by the registered voters in the county during general elections, heads the county executive committee.¹⁷⁵ Like the size of the Cabinet, the size of the county executive committee is clearly stipulated.¹⁷⁶ The terms of county government are fixed: the county assembly serves for five years,¹⁷⁷ while the county governor and deputy governor can only serve for two terms of five years each.¹⁷⁸

The Constitution provides for a delineation of functions and powers and how they may be transferred between the two tiers of government.¹⁷⁹ National government takes responsibility for international relations; national defence and security services; standard-setting in various areas such as labour, consumer protection, social security, and education; and policy-making, such as economic policy, monetary policy, education, housing, health, agriculture, and tourism, amongst other functions. County governments are allocated functions including agriculture, county health services, cultural activities, trade development and regulation, and county planning and development, amongst other functions. That this list is not exhaustive is contemplated by providing that a function or

¹⁶⁹ Art 174.

¹⁷⁰ Art 175.

¹⁷¹ Art 176(1).

¹⁷² Art 185 (1)–(3).

¹⁷³ Art 177.

¹⁷⁴ Art 183.

¹⁷⁵ Art 180(1).

¹⁷⁶ Cf art 152(1)(d) and art 179(3).

¹⁷⁷ Art 178.

¹⁷⁸ Art 180(7).

¹⁷⁹ Arts 186–7; Fourth Schedule.

power not assigned by the Constitution or national legislation to a county is to be exercised by the national government.¹⁸⁰

A county government may be suspended by the President in case of an emergency arising out of internal conflict or war and in any other exceptional circumstances.¹⁸¹ It is not clear what is envisioned by the term ‘exceptional circumstances’, but nevertheless a suspension for these reasons is subject to investigation by an independent commission of inquiry and authorisation by the Senate.¹⁸²

The effective exercise of the functions and powers by the county is dependent on the availability of the necessary resources. County governments may raise revenue through the imposition of property rates, entertainment taxes, and any other tax subject to authorisation by an Act of Parliament.¹⁸³ Revenue may also be raised through service charges.¹⁸⁴ Nevertheless, it is to be expected that such revenue will not be enough to carry out all the functions incumbent on counties. Thus provision is made for the equitable sharing of revenue raised by the national government. The national government raises revenues through, *inter alia*, income tax, value-added tax, customs duties, and excise tax.¹⁸⁵ In determining the equitable share of revenue, a number of principles are set out relating to factors such as economic disparities, developmental needs, and positive measures in respect of disadvantaged areas and groups, among others. In any case, the equitable share of revenue raised nationally that is allocated to counties should not fall below fifteen per cent.¹⁸⁶

The views expressed by the public during the constitutional review process to a large extent reflected a need by the people to participate in governance and to be able to influence the exercise of power and authority in matters that affected them. This need for participation and influence extended to the way resources were distributed and used.¹⁸⁷ These concerns are addressed through the county governments, whose members are directly elected by the electorate of the counties, the participation of the public in the determination of revenue sharing by the Senate, and generally in the accessibility of county assembly business to the public.¹⁸⁸ In addition, the representation of particular interests, such as gender, cultural and community diversity, and the protection of minorities, is taken into account.¹⁸⁹

VI. Constitutional Adjudication

¹⁸⁰ Art 186(3).

¹⁸¹ Art 192(1).

¹⁸² Art 192(2).

¹⁸³ Art 209(3).

¹⁸⁴ Art 209(4).

¹⁸⁵ Art 209(1).

¹⁸⁶ Art 203(2).

¹⁸⁷ CKRC Final Report 2005, pp 234–236.

¹⁸⁸ As discussed above. See art 196 for public participation in county assembly business.

¹⁸⁹ Art 197.

As discussed above, the judicial arm of government consists of superior courts—the Supreme Court, the Court of Appeal, and the High Court—and subordinate courts. The Supreme Court is the highest court, presided over by the Chief Justice. The High Court has the jurisdiction to determine any question concerning the interpretation of the Constitution, including questions as to the consistency of any law or of any action carried out under the authority of the Constitution; allegations of violation of rights or fundamental freedoms in the Bill of Rights; appeals from tribunals constituted to impeach persons from office (except a tribunal constituted to remove the President); matters relating to constitutional powers of state organs in respect of county governments and questions relating to the relationship between levels of government; and questions relating to conflict of laws.¹⁹⁰ Specialised courts, such as industrial courts dealing with employment and labour disputes, may determine questions of interpretation of the Constitution and enforcement of fundamental rights and freedoms within their area of competence.¹⁹¹ With regard to the rights and fundamental freedoms in the Bill of Rights, the Chief Justice is empowered to make rules facilitating standing before the courts, simplifying and minimising procedural formalities and technicalities, and the elimination of fees for commencing proceedings.¹⁹²

The Court of Appeal has jurisdiction to hear appeals from the High Court, while the Supreme Court has exclusive jurisdiction to hear disputes arising from presidential elections and appellate jurisdiction over decisions of the Court of Appeal.¹⁹³ On any question relating to the interpretation or application of the Constitution, an appeal lies as of right from the Court of Appeal to the Supreme Court.¹⁹⁴ The Supreme Court has both contentious and advisory jurisdiction.¹⁹⁵

Locus standi to seek enforcement of the Constitution is granted to everybody, whether they are acting in their own interests or on behalf of another person or in the interest of a class of persons or in the public interest. Associations may institute proceedings on behalf of their members.¹⁹⁶

A variety of cases has been instituted on constitutional matters. In many of these cases, judges advert to the guidance of Article 259 on interpreting the Constitution.¹⁹⁷ Interpretations of the Constitution should take account of its purposes, values, and principles, and interpretations should advance the rule of law, human rights, development, and good governance. Courts have clarified that constitutional interpretation is not the sole preserve of the judiciary, but in the event of differing

¹⁹⁰ Art 165(3)(d).

¹⁹¹ See generally *United States International University (USIU) v Attorney General*, Petition 170 of 2012 High Court of Kenya at Nairobi, ruling of 3 August 2012.

¹⁹² Art 22(3).

¹⁹³ Arts 164(3)(a) and 163(3)(a) and (b)(i).

¹⁹⁴ Art 163(4)(a).

¹⁹⁵ Art 163(3).

¹⁹⁶ Art 258.

¹⁹⁷ See eg *Famy Care Ltd v Public Procurement Administrative Review Board & Another*, para 19.

interpretations, the judiciary provides the authoritative interpretation.¹⁹⁸ The separation of powers entails checks and balances of each arm of government on the other arms. As such, the judiciary is not involved in the detailed running of government. The Executive and legislature should be in a position to apply constitutional provisions, and refer to the courts when necessary.

The Constitution provides the courts with much room to fashion appropriate remedies in cases brought before them.¹⁹⁹ Courts may as such award declaratory orders, mandatory orders, injunctive relief, conservatory orders, compensation, and judicial review.

VII. International Law and Regional Integration

The 2010 Constitution declares that the general rules of international law form a part of the law of Kenya.²⁰⁰ In addition, any treaty or convention ratified by Kenya becomes part of the law of Kenya under the Constitution.²⁰¹ The implementation of obligations under treaties ratified by Kenya is the role of the Executive. The President is responsible for ensuring the fulfilment of international obligations through the Cabinet Secretaries, and is also required to report to the National Assembly on the progress made in fulfilling these obligations.²⁰²

These provisions mark a departure from the position under the previous Constitution, where treaties were domesticated through an Act of Parliament. The previous Constitution was silent on the issue of treaty ratification, and in practice this role fell to the Executive. The legislature was involved only during the domestication process, at which point the State was already bound by the act of ratification to the provisions of the treaty. It was not clear how decisions to become a state party to a treaty were made, since the process was not transparent or participatory.

The judiciary took the view that international law was not a part of the domestic law and would be useful where legislation was in abeyance or to resolve ambiguities in domestic laws.²⁰³ The 2010 Constitution transforms Kenya into a monist state, in which the act of ratification brings into application a treaty within domestic realms. This position has been recognised by the courts, explicitly taking account of international norms and standards to interpret and enforce domestic laws.²⁰⁴

VIII. Financial Provisions

¹⁹⁸ *Jayne Mati & Another v Attorney General & Another*, High Court at Nairobi, Petition 108 of 2011, [2011] eKLR, paras 31–35.

¹⁹⁹ Art 23(3).

²⁰⁰ Art 2(5).

²⁰¹ Art 2(6).

²⁰² Arts 132(5) and 132(1)(iii).

²⁰³ See detailed discussion in JO Ambani, 'Navigating past the 'dualist doctrine': The case for progressive jurisprudence on the application of international human rights norms in Kenya', in M Killander (ed), *International Law and Domestic Human Rights Litigation in Africa* (2010) 25–35, 30.

²⁰⁴ See eg *In Re The matter of Zipporah Wambui Mathara*, Bankruptcy Cause 19 of 2010, High Court at Nairobi (Milimani Commercial Courts) para 9.

The Chapter on Public Finance in the 2010 Constitution of Kenya represents advancement in the management of revenue and expenditure in Kenya relative to the previous Constitution.²⁰⁵ Openness, accountability, participation, prudence, responsibility, equitable sharing of benefits and burdens of the use of resources (including taxation, expenditure, and public borrowing, also in relation to future generations), and clarity in fiscal reporting are explicit guiding principles for all aspects of financial management.²⁰⁶ The devolution in government, discussed above, brought about new concerns over how to raise revenue and the allocation of such revenue equitably between the two tiers of government.

The Constitution establishes a Commission on Revenue Allocation, whose primary function is to make recommendations concerning the basis of equitable sharing of revenue between the national government and county governments and among county governments.²⁰⁷ Recommendations for equitable sharing are to be based on criteria that include the availability of resources, the needs of counties, the capacity of counties to raise revenue, and the interests of disadvantaged areas and groups.²⁰⁸ The Senate is responsible for determining the basis for allocation of revenue among counties once every five years, taking account of criteria listed in Article 203(1), recommendations by the Commission on Revenue Allocation, consultations with county governors, the Cabinet Secretary responsible for finance, and submissions by the public.²⁰⁹ A resolution of the Senate in this regard requires the approval of the National Assembly.²¹⁰ Recommendations by the Commission on Revenue Allocation are not to be taken lightly, since the Division of Revenue Bill and the County Allocation of Revenue Bill to be introduced to Parliament each financial year has to explain any significant deviation from the Commission's recommendations.²¹¹ Once allocated, funds to county governments shall be transferred to the county without undue delay and without deduction, except where there is material breach of expenditure control and transparency legislation and subject to procedural requirements attendant to stopping a transfer.²¹²

The Commission, which was appointed in 2011, has developed a formula for the allocation of revenue amongst counties that takes account of the size of the population in each county, levels of poverty, geographical area, basic/equal share (fixed expenditures that do not vary with population size, land area, or poverty index) of the county, and fiscal responsibility. The population size criterion carries a weight of sixty per cent on the basis that the cost of service provision is dependent on the number of people, and that

²⁰⁵ Arts 201–231.

²⁰⁶ Art 201.

²⁰⁷ Arts 215–216. See also www.craKenya.org.

²⁰⁸ Arts 215(3); 203(1).

²⁰⁹ Art 217(1)–(2).

²¹⁰ Art 217(4)–(9).

²¹¹ Art 218.

²¹² Art 219; art 225.

equity in society should be achieved on a per capita basis.²¹³ The parameters of equal share, poverty index, land area, and fiscal responsibility carry a weight of twenty per cent, twelve per cent, six per cent, and two per cent, respectively.

Criticism has been levelled against the formula used by the Commission to allocate revenue among county governments.²¹⁴ Allocations based on the formula resulted in the more well-off counties receiving a larger proportion of the revenue compared to marginalised areas. The Constitution does provide for an Equalisation Fund, into which half a per cent of all the revenue collected by the national government is solely for the provision of basic services, including water, roads, health facilities, and electricity to marginalised areas, to bring them up to par with the rest of the nation.²¹⁵ The Fund is therefore in the nature of ‘affirmative action’ in favour of marginalised areas and is projected to lapse after twenty years unless the National Assembly extends its existence.²¹⁶ The Commission on Revenue Allocation recommends that allocations to the Fund begin to be disbursed in the financial year 2013/2014, directly through the counties, which will be fully operational by this time. In the meantime, allocations for the financial years 2011/2012 and 2012/2013 should be carried forward to 2013/2014.²¹⁷

The establishment of the two independent positions of Auditor General and Controller of Budget enhances public finance management in the 2010 Constitution. The previous constitutional dispensation established the Controller and Auditor General as one office.²¹⁸ These functions were compromised by several factors, such as the delay of at least two years in the audited reports, and the focus of budget control oversight on the legality of disbursements, thus failing to ensure the reasonableness of expenditure.²¹⁹ The 2010 Constitution favours an emphasis on the control function of budget oversight to the legality of withdrawals from public funds.²²⁰ It remains to be seen how the guiding principles envisioned by the Constitution are to be enforced. One way this could have been done was by explicitly giving the Controller of Budget the power to make qualitative judgments on the expenditure of public money. It is arguable, however, that implicit in provisions requiring the Controller of Budget to approve withdrawals of public funds it is contemplated that such approval may be withheld, presumably based on the unreasonableness or imprudence of the intended expenditure.²²¹ The Auditor General is required to produce audit reports within six months of the end of the financial year, thus

²¹³ See Commission on Revenue Allocation, ‘Recommendations on sharing of revenue raised by the national government between the national government and county governments and among county governments’, available at www.crakenya.org/publications/ (7 May 2012).

²¹⁴ S Makwale and G Wekesa, ‘MPs poke holes in county revenue allocation plan’, *The Standard* (27 April 2012).

²¹⁵ Art 204.

²¹⁶ Art 204(7)–(8).

²¹⁷ Commission on Revenue Allocation, ‘Interim recommendations on the marginalisation policy and criteria on the Equalisation Fund’ (April 2012), available at www.crakenya.org/publications/ (7 May 2012).

²¹⁸ Constitution of Kenya Rev 2009, sec 105.

²¹⁹ B Maina, ‘Public finance management in Kenya: A review of the Draft Bill of the Constitution of Kenya Review Commission’, in K Kindiki & O Ambani (eds), *The Anatomy of Bomas: Selected Analyses of the 2004 Draft Constitution of Kenya* (Nairobi, Claripress, 2005) 127–158, 130.

²²⁰ Art 228(5).

²²¹ B Maina (n219) 148.

responding to the problem of delayed auditing of public expenditure. Audit reports should confirm whether or not public money was applied lawfully and in an effective way.²²²

IX. Independent Institutions

Independent institutions enhance democracy through the roles they play in monitoring and oversight of government functions, as well as providing an avenue through which the citizenry can express its views. The independence of the Independent Electoral and Boundaries Commission (IEBC) and other commissions and independent offices²²³ is protected in the 2010 Constitution by subjecting their members only to the Constitution and the law.²²⁴ Parliament is directed to provide adequate funds to enable these institutions to perform their functions; membership to the institutions is subject to the specific qualifications set out in the Constitution and to the approval of the National Assembly.²²⁵ The terms of the members of the Commissions and holders of the Independent Offices are fixed.²²⁶ Any person may present to the National Assembly a petition for the removal from office of a member of a commission or holder of an independent office based on listed grounds, including violation of the Constitution, gross misconduct, and incompetence. Nevertheless, the National Assembly is required to satisfy itself that the petition discloses a legal ground for removal before forwarding it to the President, who then appoints a tribunal to investigate the matter.²²⁷

The significance of the role of the Electoral Commission was brought to prominence in Kenya during the elections held in 2007. It will be recalled that the then Electoral Commission of Kenya was largely responsible for the election crisis that engulfed the country at that time. Some of the deficiencies that led to the chaos that characterised the post-election period included the Commission's lack of independence, capacity and functional efficiency, incompetence, and bad planning, which resulted in a badly-managed election with fraud, irregularities, and delays in the announcement of the results, fuelling misconceptions, speculation, suspicion, and anger about the outcome of the elections.²²⁸

²²² Art 229(4), (6).

²²³ Commissions include: The Kenya National Human Rights and Equality Commission (which in accordance with art 59(4) of the Constitution has been restructured, assigning some of its functions to the National Gender and Equality Commission); the National Land Commission; the Parliamentary Service Commission; the Judicial Service Commission; the Commission on Revenue Allocation; the Public Service Commission; the Salaries and Remuneration Commission; the Teachers Service Commission; and the National Police Service Commission. Independent offices are the Auditor-General and the Controller of Budget. Commissions not envisioned by the Constitution also have the status and powers set out in Chapter fifteen, eg the Commission on the Administration of Justice: see Cap 23 Commission on Administrative Justice sec 4.

²²⁴ Art 249(2).

²²⁵ Arts 249(3), 250.

²²⁶ The Controller of Budget and Auditor-General hold office for 8 years each and are not eligible for re-appointment: see arts 228(3) and 229(3).

²²⁷ Art 251.

²²⁸ Report of the Independent Review Commission on the General Election held in Kenya in December 2007 (Kriegler report) (2008), 8–10.

The IEBC, established in the 2010 Constitution, responds to the need for independence by barring from membership persons who have within the preceding five years held office or stood for election to Parliament or a county assembly, who hold membership of the governing body of a political party, or who hold any state office.²²⁹ Further, the responsibilities of the IEBC are clearly set out, with guidelines as to how the important function of delimiting electoral units should be achieved.²³⁰ This reduces the discretion permitted to the Commission and thus the opportunities for gerrymandering, as was commonplace under the previous Constitution.²³¹

Measures to ensure that the voting process is efficient, transparent, and accurate are also enshrined in the Constitution, seeking to eliminate shortcomings, including those experienced in the 2007 elections. These measures include the use of a voting system that is simple, accurate, verifiable, secure, accountable, and transparent; the prompt announcement of the results of vote-counting by the presiding officer at each polling station and, similarly, the results of polling stations by the returning officer; and the institution of structures and mechanisms to eliminate electoral malpractice.²³²

X. Constitutional Amendment

Considering the history of constitutional amendments in Kenya during the previous constitutional dispensation, it is not surprising that the 2010 Constitution has sought to make the amendment process rigorous. In addition, public debate around the proposed amendments is explicitly provided for. Certain matters in the Constitution are subjected to a referendum in order for the amendment to be enacted; that is, the supremacy of the Constitution; the territory of Kenya; the sovereignty of the people; national values and principles of governance; the Bill of Rights; the presidential term of office; the independence of the judiciary, constitutional commissions, and independent offices; the functions of Parliament; and the provisions of the chapter regulating amendment of the Constitution.²³³ A proposed amendment is approved by referendum if at least twenty per cent of registered voters in at least half of the counties vote in the referendum and a simple majority of these voters support the amendment.

Constitutional amendments may be instituted in two ways: by parliamentary initiative or by popular initiative.²³⁴ Rigour in parliamentary initiative is exacted by requiring an amendment bill to proceed through the stages of hearing in both the National Assembly and the Senate, to be passed in both second and third readings by not less than two-thirds of the members of each house, and thereafter if the amendment involves any of the matters mentioned above, the bill should be subjected to a referendum. A bill proposed

²²⁹ Art 88(2), (3).

²³⁰ Art 89.

²³¹ LM Mute, 'Proportional representation: An option for electoral reform in Kenya?', in M Odhiambo, JO Ambani and W Mitullah (eds), *Informing a Constitutional Moment: Essays on Constitution Reform in Kenya* (2005) 136.

²³² Art 86.

²³³ Art 255.

²³⁴ Arts 256, 257.

by popular initiative should be supported by the signatures of at least one million registered voters. The signatures are subject to verification by the IEBC, after which the bill is sent for consideration by county assemblies. Approval by a majority of the county assemblies and subsequently by a majority of the members of each house entitles the bill to be enacted into law. In addition to the instances mentioned above, a referendum shall also be resorted to if either house fails to pass the bill. Presidential assent completes the enactment process.

XI. Conclusion

The 2010 Constitution of Kenya addresses the major issues that Kenyans have grappled with since independence, including corruption, ethnicity, marginalisation, violations of rights and fundamental freedoms, perennial land disputes,²³⁵ and more. The Constitution has also gone full circle in some of the ways it speaks to some of these issues: for example, through federalism and a bi-cameral Parliament. It is innovative in many ways, too, elaborating values and principles of governance, ethics, and integrity, a broader tableau of rights, and more independent institutions to support democracy.

The enactment of the Constitution has spurred citizen participation, as is evidenced by numerous cases filed in the courts to challenge the constitutionality of government action, and by interventions of interested parties and *amicus curiae*, among other indicators. All these developments point to a greater awareness by the public in general of the transformational potential of the 2010 Constitution. Processes such as the reform of the judiciary and the public vetting of applicants to key public service posts all inspire confidence that the 2010 Constitution will facilitate the achievement of Kenyans' aspirations on the civil and political as well as economic, social, and cultural fronts.

Nevertheless, there are challenges to be overcome. The transitional provisions in the 2010 Constitution set out a timetable by which Parliament should enact legislation required by the Constitution. In the event that Parliament fails to enact the legislation, the judiciary may be petitioned to order compliance, failing which the Chief Justice may advise the President to dissolve Parliament.²³⁶ So far, Parliament has succeeded in enacting legislation within the allowed time limits. The Commission for the Implementation of the Constitution has played a central role in monitoring, facilitating, and overseeing the implementation of the Constitution, including liaising with the Attorney General and Parliament in respect of enactment of legislation.²³⁷ The Commission has highlighted some challenges with the enacted legislation, including that it is unlikely that service delivery will improve as a result of the laws, or that constitutionalism will be promoted, since some of the laws violate the letter or the spirit of the Constitution and are neither based on policy nor supported by administrative procedures.²³⁸

²³⁵ See Chapter Five on Land and Environment.

²³⁶ Art 261.

²³⁷ The Commission for the Implementation of the Constitution Act No. 9 of 2010, sec 4.

²³⁸ See Commission for the Implementation of the Constitution Quarterly Report, October to December 2011 p 50.

Kenya faces the first elections under the 2010 Constitution in 2013. It is noteworthy that the ambiguity surrounding the date of this first election was appropriately referred to the judiciary to resolve. Nevertheless, the practical challenges of ensuring that the voting process does not result in the kind of chaos experienced in 2007 are daunting. The supreme law may have changed, but the political class appears to be reluctant to adapt itself to the new realities. It remains to be seen how prepared the electorate is to exercise the sovereign power it possesses, to elect a government, and to hold it to account in accordance with the 2010 Constitution.

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