

Kenya's 2010 Constitution

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On 27 August 2010, to domestic and international acclaim, President Kibaki of Kenya formally promulgated a new Kenyan constitution at a public ceremony in Nairobi attended by thousands of people. It is ambitious in every sense and many Kenyans see it as the basis of a complete transformation of law, economics and politics in Kenya. It imposes checks on the executive, which has up to now had enormous, unfettered power; it sets out principles of leadership and integrity that apply to all officers of the state; it introduces a system of devolved government with a new 'territorial' second chamber that resembles the Bundesrat in some ways; and it provides a framework for dealing with land, which has been a deeply contentious issue since independence. A new top court and a newly constituted judicial service commission are to contribute to the reform of the judiciary; all sitting judges are to be 'vetted' for their suitability to continue to serve; and an expansive Bill of Rights secures both civil and political and social and economic rights.

This constitution is the culmination of a long and troubled constitution-making process. Kenya was engaged in constitutional reform in one way or another from 1991 when the notorious provision declaring Kenya a one-party state was removed from the Constitution. In 2005, after a massive and costly process, a totally revised constitution was rejected at a referendum. President Kibaki responded by reconstituting his Cabinet to exclude members who had campaigned against the constitution, thereby increasing political tension. Despite the strong recommendation by a Committee of Eminent Persons¹ that the process of constitutional review should be restarted, nothing was done and attention soon turned to the 2007 elections. As is well known, when the Electoral Commission announced that Kibaki had won these elections, unprecedented violence broke out in which over 1 300 people lost their lives and 100 000s were displaced. Only after international intervention was calm restored, with a fragile 'Grand Coalition' government that placed Kibaki in the presidency and gave his main rival, Raila Odinga, the position of Prime Minister. Included in the Accord was an agreement that the constitutional review process would be revived. To the surprise of many, and despite considerable resistance in a variety of sectors, the new process was successful.

The Constitution has been highly praised.² Its thoughtful Bill of Rights sets new standards in the region and more widely and the chapter on leadership and integrity is a serious attempt to provide standards

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¹ "Report of the Committee of Eminent Persons (Kiplagat Report)" (Republic of Kenya, May 30, 2006).

² The Constitution of Kenya 2010 (http://www.kenyalaw.org/kenyalaw/klr_home/).

for public life that are practically enforceable. Most importantly, it sets out values for a new stage in Kenyan political life. It ambitiously provides an ethnical framework within which the State must operate and seeks to describe an inclusive nation. More than anything else in the Constitution, these provisions reflect the concerns and aspirations of the many Kenyans who participated in the constitution-making process over the past 15 years. But, the political context in which the constitution must be implemented remains very unstable. Many of the issues identified in the Accord as contributing to the post-electoral violence have not been finally resolved. Most important here for the political process are the International Criminal Court indictments of four senior Kenyan politicians for their involvement in the violence. In particular, one of those indicted, Uhuru Kenyata, is the presidential candidate supported by many Kikuyus who view his indictment as unfair.

So, there are many questions: Will the political elite, which has accepted the constitution with some reluctance, respect it? Will the renewed judiciary be able to resist the inevitable pressure from groups whose vested interests are threatened by the new order? What impact will the Constitution have on the highly politicized ethnic divisions in Kenyan society? Can the Constitution (indeed can any constitution) be the catalyst for the social and political changes many Kenyans demand? It is premature to speculate on these questions, and this article does not attempt to do so. Instead it seeks to provide a background to Kenya's new constitutional order by sketching the twenty-year long story of constitutional review in Kenya and describing the central provisions of the new constitution.

1. The constitution-making process

1.1 The background

Kenya's independence constitution of 1963 was, in the words of Ghai and McAuslan, 'based on two important principles – parliamentary government and minority protection'.³ The question of minority protection – for Europeans, Asians and certain indigenous groups – was particularly controversial. After difficult negotiations between the leaders of the two main Kenyan parties, it was dealt with by inserting various safeguards for minorities in the Constitution (provisions on citizenship; protection of a system of Khadi's courts; a Bill of Rights; etc) and by establishing a system of regional government.⁴ This agreement, which satisfied none of the Kenyan parties to the settlement, was short lived. In 1964, on the birthday of independence, a constitutional amendment made the independence Prime Minister, Jomo Kenyatta, the country's first President. A succession of constitutional amendments followed, ending regionalism, abolishing the Senate and strengthening the presidency. As Makau Mutua notes: 'It took just six years to dismantle the 1963 Lancaster House Constitution (the Independence Constitution),

³ Y.P. Ghai and J.P.W.B. McAuslan, *Public Law and Political Change in Kenya: A Study of the Legal Framework of Government from Colonial Times to the Present* (Oxford University Press, 1970), 180.

⁴ "Report of the Committee of Eminent Persons (Kiplagat Report)," para. 28.

a process that indigenized executive despotism and tore down the constitutional order imposed on the postcolonial state by the British.⁵

Under President Kenyatta's successor, Daniel Arap Moi, rule became increasingly centralized, intolerant and corrupt and, in 1982, what had become a de facto one-party state was converted into a de jure one-party state by yet another constitutional amendment.⁶ However, as pro-democracy movements elsewhere developed momentum, opposition in Kenya to Moi's government increased, and, particularly after the fall of the Berlin wall, international pressure increased as well.

In 1991, the constitutional provision decreeing that Kenya was a one-party state was repealed, paving the way for multi-party elections in 1992. This change was important but the Constitution still gave the government virtually unrestrained power, including broad powers to curtail human rights. Ethnic persecution, widely believed to be orchestrated by the government, attacks on the media and opposition parties, and other human rights abuses continued⁷ and civil society and opposition parties persisted in demands for fundamental constitutional reform.⁸ Minor reforms were enacted in 1997 and the first Constitution of Kenya Review Act was adopted, but only after another three years of intense political struggle was the Act revised sufficiently to meet the major demands of civil society and opposition parties. In June 2001, the Constitution of Kenya Review Commission (CKRC), headed by Yash Pal Ghai, started work.⁹

The Review Act established a three-stage process of constitutional review.¹⁰ First, the CKRC was to prepare a draft constitution; second, a National Constitutional Conference consisting of politicians from national and district level and representatives of other interest groups was to meet to consider the draft and agree to a new constitution;¹¹ finally, Parliament was to adopt the constitution approved by the Conference and the President was to sign it into law. Under the 'guiding principles' of the Act, the

⁵ Makau Mutua, *Kenya's Quest for Democracy: Taming Leviathan* (L. Rienner Publishers, 2008), 64.

⁶ 1963 Constitution of Kenya Article 2A.

⁷ See Human Rights Watch, "Kenya Old Habits Die Hard: Rights Abuses Follow Renewed Foreign Aid Commitments", July 1995, <http://www.hrw.org/legacy/reports/1995/Kenya.htm>.

⁸ Mutua, *Kenya's Quest for Democracy*, 99.

⁹ This does not do justice to the extraordinary process of civil society and opposition mobilization that forced constitutional change onto the political agenda. See Willy Mutunga, *Constitution-making from the Middle: Civil Society and Transition Politics in Kenya, 1992-1997* (MWENGO, 1999) and Mutua, *Kenya's Quest for Democracy* at 117ff for a description of the complex political struggles from 1990 and that surrounded the development of the law and the appointment of commissioners.

¹⁰ Constitution of Kenya Review Act, 1997 as amended by Act 6 of 1998, Act 5 of 2000 and Act 2 of 2001.

¹¹ Under s 27(2) of the Review Act, the Conference consisted of 628 members in total, the 29 members of the CKRC, all the members of the National Assembly (223), three representatives from each district (210), one representative from every registered political party (41), representatives of religious organizations, professional bodies, women's organizations, trade unions, NGOs and other interest groups as determined by the Commission (125). See *Final Report of the Constitution of Kenya Review Commission* (2005) p 362 and 581ff.

process was to 'be accountable to the people of Kenya' and to provide the public with a proper opportunity to participate. The outcome was to reflect 'the wishes of the people of Kenya'.¹²

No stage of the process ran smoothly. The CKRC remained contentious, particularly in the eyes of those who expected it to live up to the expectations of the Review Act, which anticipated an impartial body. Nonetheless, its work was impressive. As required by the Act, it presented a formidable programme of public education and held hearings in each of Kenya's 210 electoral districts with an overwhelming response.¹³ The CKRC published a draft constitution in September 2002. The National Constitutional Conference (NCC) was intended to follow immediately but it was delayed by the 2002 elections. These elections, which brought the first change of government since independence, saw Mwai Kibaki elected as president. As a result, the NCC, colloquially referred to as the 'Bomas' after the name of its venue, convened in May 2003 in a completely changed political landscape. Most significantly, a new constitution was no longer needed to dislodge President Moi. Instead, for some, constitutional reform had become a way of securing satisfactory power arrangements and positions for a new political elite. On two key issues, the system of government and devolution of power, agreement eluded the conference, and these differences precipitated the withdrawal of President Kibaki's supporters (and thus a substantial segment of the government) from entire process.¹⁴

Still quorate, the NCC concluded its work and adopted a draft constitution on 23 March 2004, but the Conference's robust devolution proposals and its creation of what was in essence a parliamentary system, with an elected President with limited powers and a strong prime minister, did not secure the support of a significant section of the governing elite. The absence of political consensus was fatal to the process. Parliament took over a year to make a decision and finally, on 21 July 2005, agreed to a fundamentally different draft to that approved by the Bomas. Two changes were particularly significant in the draft that became known as the 'Wako' draft, after the Attorney-General who introduced it in Parliament. First, executive arrangements were fundamentally altered with the Bomas proposal replaced by provisions which concentrated power in a President and which, in essence, created a hyper-presidential system. In addition, the draft had been meticulously edited to remove many of the checks on executive power that it had introduced. Second, the multilevel system of government supported by a Senate that was proposed by the Bomas draft, and that promised to disperse power and grant some autonomy to communities outside Nairobi, was largely undone. In the 'Proposed New Constitution' the Senate was removed and the powers of districts subject to national law.

In the meantime, a decision of the Kenyan High Court had changed the process in a major way: *Timothy Njoya & Others v CKRC and the National Constitutional Conference*¹⁵ held that the Kenyan Constitution

¹² Section 5.

¹³ Jill Cottrell and Yash Ghai, "Constitution Making and Democratization in Kenya (2000–2005)," *Democratization* 14, no. 1 (2007): 9.

¹⁴ Michael Chege, "Kenya: Back From the Brink?," *Journal of Democracy* 19, no. 4 (2008): 125–139.

¹⁵ *Njoya and others v Attorney-General and others* [2004] LLR 4788 (HCK) p 17.

could not be replaced without a referendum because, among other things, Section 47 of the Constitution allowed for the amendment of parts of the existing Constitution and their repeal, but not its complete replacement.

The judicially required referendum was held on 21 November 2005. With an unusually strong turnout (52%) the Constitution was rejected by 57% of the voters. Although many provisions of the draft were contentious, substantively the major political divide was on the system of government and devolution. The referendum was preceded by campaigns that, in Mutua's words, were 'waged on outright lies, misuse of state power, and nativist appeals to tribal hysteria'¹⁶ and that were sometimes violent. Although Kibaki and Odinga, respective leaders of the Yes and No campaigns, were members of the same Cabinet, they rejected any form of compromise. Political disagreements evident in the Bomas Conference deepened during the campaigning and Kenyans were mobilized to vote along ethnic lines.¹⁷

President Kibaki did not dispute the referendum results but the political consequences were immediate. He reshuffled the Cabinet, excluding members who had campaigned against the Constitution, and prorogued Parliament, not to reconvene it until March 2006. The December 2007 elections intervened before any changes to the existing Constitution were considered.

The 2007 general elections took place in the shadow of the failed constitution-making process and deep disappointment in Kibaki.¹⁸ They were hotly contested and both major parties played on ethnic fears. Polls suggested that the race between the two main presidential candidates, the incumbent, Kibaki, and Raila Odinga, was very close. But the true results of the presidential election were never to be known. Amid controversy about the conduct of the elections, the Electoral Commission of Kenya announced Kibaki the winner of the presidential election with, it said, 47% of the vote to Odinga's 44%.¹⁹ Kibaki was sworn in within an hour. Violence broke out immediately.

The Peace Accord brokered by Kofi Annan as head of a group of eminent Africans²⁰ provided for a Grand Coalition Government, with Kibaki as President and Odinga in the new position of Prime Minister and

¹⁶ Mutua, *Kenya's Quest for Democracy*, 228.

¹⁷ See, for instance, Bård Anders Andreassen and Arne Tostensen, "Of Oranges and Bananas: The 2005 Kenya Referendum on the Constitution" (Chr Michelsen Institute Working Paper WP : 13, 2006), 6, <http://www.cmi.no/publications/publication/?2368=of-oranges-and-bananas>.

¹⁸ For instance, the Kibaki government failed to act on a number of huge corruption scandals had rocked Kenya. See Daniel Branch, *Kenya: Between Hope and Despair, 1963-2011* (Yale University Press, 2011) and Michela Wrong, *It's Our Turn to Eat: The Story of a Kenyan Whistle-Blower*, Reprint. (Harper Perennial, 2010).

¹⁹ In the parliamentary election, Odinga's Orange Democratic Movement (ODM) party won securing 99 of 197 elected seats and, accordingly, 6 of 12 nominated seats. Kibaki's Party of National Unity (PNU) came second with 43 elected seats and three nominated ones. The rest were shared among smaller parties.

²⁰ For discussions of this process see Jeremy Horowitz, *Power-sharing in Kenya: Power-sharing Agreements, Negotiations and Peace Processes* (Oslo: Centre for the Study of Civil War, 2008); Roger Cohen, "How Kofi Annan Rescued Kenya," *New York Review of Books*, August 14, 2008, <http://www.nybooks.com/articles/archives/2008/aug/14/how-kofi-annan-rescued-kenya/?pagination=false>; Monica Kathina Juma, "African Mediation of the Kenyan Post-2007 Election Crisis," *Journal of Contemporary*

included constitutional review on the long term agenda.²¹ Most strikingly, although the agreement on constitutional review demanded popular support for a new constitution to be demonstrated in a referendum and required the people of Kenya to 'be consulted appropriately at all key stages', it clearly departed from the 'people driven' process that had been demanded for over a decade. It provided for a draft prepared by 'stakeholders' but Parliament was to have a decisive role in approving (or rejecting) the draft.²²

1.2 Resuming the constitutional review process

The members of the Grand Coalition proved to be reluctant partners and the new government dragged its feet on its commitments under the Accord. As a result, only in December 2008 were the constitutional amendment necessary for the complete replacement of the constitution without a break in legal continuity and a new Constitution of Kenya Review Act adopted.

The amendment responded to the *Njoya* decision by a provision which asserted that 'the sovereign right to replace this Constitution with a new Constitution vests collectively in the people of Kenya and shall be exercisable by the people of Kenya through a referendum, in accordance with this section'.²³ Second, it set out the process the National Assembly was to follow to replace the Constitution.²⁴ Third, it established the Interim Independent Constitutional Dispute Resolution Court 'which shall have exclusive original jurisdiction to hear and determine all and only matters arising from the Constitutional review process'. Three of the nine judges on the Court were to be non-citizens.²⁵

The Constitution of Kenya Review Act of 2008 fleshed out the process. It identified four 'organs' for the review of the Constitution: a committee of experts; a multiparty parliamentary committee; the National Assembly; and a referendum. Each of these organs had a specific role in a tightly timetabled process and, in different ways, each acted as a check on the other. In essence, the new constitution was to be batted back and forth between the experts and the politicians and, if it survived this process, the people would have the final say in a referendum. In addition to setting out a distinct role for each player, the Review Act attempted to constrain the substance of review process. Like its 1997 predecessor, it

African Studies 27, no. 3 (2009): 407–430 and Martin Griffiths, *The Prisoner of Peace: An Interview with Kofi A Annan* (Kofi Annan Foundation and Centre for Humanitarian Dialogue, 2009).

²¹ For the agreements see "The Kenya National Dialogue and Reconciliation", n.d., <http://www.dialoguekenya.org/agreements.aspx>.

²² 'Kenya National Dialogue and Reconciliation: Longer term issues and solutions: Constitutional review'.

²³ Constitution of Kenya s 47A (2)(a).

²⁴ Art 47.

²⁵ Art 60A (1) and (2) Constitution of Kenya. This extraordinary provision reflected the complete lack of confidence that Kenyans had in the judiciary. The parties to the Accord presumably anticipated a repeat of the persistent litigation that was brought in attempts to derail the first process and were not prepared to leave these decisions in the hands of the existing judges.

stipulated aims and goals of the process, but it also put a more concrete limit on the ambit of the process. The new process was to be geared to resolving the contentious issues that had caused the previous process to fail. All that had been agreed – and the received wisdom was that there was agreement among the previous drafts (the CKRC, Bomas and Wako drafts) on all but about 5% of their content – was to be retained and only issues identified as contentious were open for discussion. Most significantly, the use of a small group of experts and the emphasis on political decision making, together with an implicit deadlock-breaking mechanism provided in the constitutional amendment, were intended to secure the political agreement that had eluded Kenya in the earlier process.

The Committee of Experts (CoE) was established in February 2009.²⁶ Following the programme set out in the Review Act, it first identified the ‘contentious’ issues: the system of government; the form devolution should take; and how to implement a new constitution (the transitional issues relating to the life of the existing Parliament and the executive, the judiciary and other constitutional offices).²⁷ It then prepared a ‘harmonized draft Constitution’ in which, in the words of the Act, ‘the issues that are not contentious [were] identified as agreed and closed and the issues that are contentious [were] identified as outstanding’.²⁸ To do this, as the Review Act required, the CoE drew on the considerable archive of the CKRC’s public participation process, consulted a ‘Reference Group’ of representatives of civil society²⁹ and collected public views more generally. Overall the public engagement suggested that Kenyans were no closer to consensus than they had been in 2005.

The Draft proposed a resolution for each of the contentious issues, drawing heavily from the Bomas draft. So, it proposed a parliamentary system with a directly elected President and a Prime Minister drawn from Parliament who, with his or her Cabinet, would be dependent on retaining the confidence of the National Assembly. The President was to have more power than heads of state in the traditional Westminster parliamentary model, something along the lines of the Indian President, but practically executive authority lay with the Prime Minister and Cabinet.³⁰ The electoral system was linked to the question of the system of government and the Draft supplemented a system of single-member constituencies with a complex arrangement of special seats. On the criteria for delineating constituencies, the Draft required ‘approximate equality of constituency population’, departing from the

²⁶ It was composed of nine voting members, six Kenyans and three foreigners, chosen by the Parliamentary Select Committee on the Review of the Constitution, and two members without voting rights, the Attorney-General (a member of Cabinet) and the Director of the Secretariat of the Committee.

²⁷ Committee of Experts on Constitutional Review, “Final Report of the Committee of Experts on Constitutional Review” (Nairobi, Kenya, October 11, 2010), 45.

²⁸ Review Act section 30(2).

²⁹ Review Act section 31 and Schedule 4.

³⁰ The departures from a Westminster style parliamentary system in this model, particularly the direct election of the President and the allocation of some powers to that office, led many people (and the CoE’s Reports) to classify it as a hybrid system. However, as the President was to have no substantial administrative powers that could be exercised without consent of the Cabinet and, as the executive was required to retain the confidence of Parliament, the proposal is better understood as a parliamentary system.

post-Accord 2008 constitutional amendment that asserted the principle of equality of vote.³¹ On devolution the Draft proposed three levels of government intended to work together in a cooperative way. Seventy-four county governments would manage matters listed in a schedule. The middle, regional level would coordinate the counties. The national level retained significant power over the devolved governments through provisions that secured concurrent legislative power for the national government on all matters and imposed a difficult test for subnational laws to meet to prevail over conflicting national laws, and through the power to suspend regional or county governments 'in exceptional circumstances'. Presumably to compensate for the national government's legislative power over the subnational levels, a Senate with members selected by county assemblies acting as electoral colleges gave the subnational levels a voice at the centre.³² Overall, the Harmonized Draft sought a system in which power would be dispersed and in which ethnic divisions and marginalization would be addressed primarily by rights provisions and a weak form of devolution.

Transitional arrangements were set out in a schedule. To accommodate the interests of the current politicians without whose support the constitution would not be adopted in Parliament, the Draft proposed a staggered political transition with existing political arrangements, including the Grand Coalition government and Parliament, remaining in place until the next scheduled elections with the new devolved governments to be established only after those elections. More controversially, all sitting judges were to be 'vetted' for their fitness to hold office by a six-member commission consisting of two foreign judges and four Kenyans.

Each of the CoE's proposals on the contentious matters was changed substantially before the Constitution was finally adopted.

The process of 'harmonizing' the earlier drafts demanded decisions on other matters as well. Most significantly, the earlier drafts differed in relation to citizenship rights, the electoral system and the number of independent institutions that should be included in the constitution. By now it was also clear that the issues that had been formally designated 'contentious' were not to be the only contentious issues. In particular, the right to life and, specifically, abortion, sexual orientation, land rights (and a belief that the constitution would prescribe minimum and maximum land holdings) and the Khadis courts³³ received considerable public attention. On each of these matters and many others, of necessity the Harmonized Draft took a position.

³¹ See further in 2.2.1 below.

³² The design resembled the South African National Council of Provinces in many ways. In turn, the design of the South African National Council of Provinces was based on the Bundesrat. See Christina Murray 'NCOP: Stepchild of the Bundesrat' *50 Jahre Herrenchieser Verfassungskonvent 'Zur Struktur des deutschen Federalismus'* (herausgegeben vom Bundesrat 1999) 262 - 278.

³³ For a discussion of the issue see Committee of Experts on Constitutional Review, "Final Report of the Committee of Experts on Constitutional Review," 61.

The CoE published the Harmonized Draft Constitution for public comment in November 2009³⁴ and, within the prescribed month, received over 26 000 submissions.³⁵ It then undertook a major revision of the Draft. The arrangements relating to the executive and legislature remained substantially unchanged but three fundamental changes were made to the provisions on devolution of power. First, the three levels of government of the Harmonized Draft were replaced by two with fewer (47) counties. Secondly, indirect election of senators was replaced by direct election. Thirdly, the fiscal arrangements for the subnational units were revised, in particular by limiting the taxing power of counties and clarifying the process by which they would be granted an 'equitable share' of revenue raised nationally. The proposal on vetting judges remained unchanged.³⁶

On 8 January 2010, 21 days after the close of the period of public hearings, the CoE handed a revised draft³⁷ to the second organ of review, the multiparty Parliamentary Select Committee on Constitutional Review (PSC). The PSC included senior members the major parties represented in Parliament. At the end of the statutory 21-day period for this step in the process, agreement on the major issues was declared and the Draft, as amended by the Parliamentary Committee, was handed back to the CoE.³⁸ In terms of the Review Act, the CoE was now to revise it 'taking into account the achieved consensus'.³⁹

The crux of the political settlement in the PSC was agreement on a presidential system 'on the US model'. On the second formally contentious issue, devolution, the CoE's proposal of two levels of government with 47 counties making up the second level stood. But changes were made to provisions concerning the Senate and the Commission on Revenue Allocation was deleted. On the Transitional Arrangements the controversial proposal to 'vet' the judges and other judicial officers was deleted.

Predictably, the PSC did not restrict its attention to the provisions formally identified as contentious. It made liberal changes to most of the draft, deleting large parts. Some of these changes were significant:

³⁴ Committee of Experts on Constitutional Review, "Harmonized Draft Constitution of Kenya Published on 17th November, 2009 by the Committee of Experts on Constitutional Review Pursuant to Section 32(1)(a)(i) of the Constitution of Kenya Review Act, 2008.", n.d., <http://www.fankenya.org/downloads/Harmonisedconstitution.pdf>.

³⁵ Committee of Experts on Constitutional Review, "Final Report of the Committee of Experts on Constitutional Review," 46.

³⁶ A substantial number of submissions (63%) raised concerns about the vetting procedure proposed for the judiciary Ibid., 87.

³⁷ "Revised Harmonised Draft Constitution of Kenya As Reviewed by the Committee of Experts on Constitutional Review, Pursuant to Section 32(1)(c) of the Constitution of Kenya Review Act, 2008 and Presented to the Parliamentary Select Committee on Constitutional Review on 8th January 2010", n.d., <http://www.uraia.or.ke>.

³⁸ The agreement in the parliamentary committee met a mixed response. See "Draft Law: How 'miracle' deal was struck" *Daily Nation* 29 Jan 2010 <http://www.nation.co.ke/News/politics/-/1064/852318/-/wrt4cgz/-/index.html>; "Draft: Good job, but some areas need revisiting" *Daily Nation* 29 Jan 2010 <http://www.nation.co.ke/oped/Editorial/-/440804/852292/-/ofw7ifz/-/index.html>; "Fury As PSC 'Mutilates' Draft Law" *Nairobi Star* 21 January 2010 <http://allafrica.com/stories/201001210030.html>

³⁹ Section 33(1) Review Act.

in what was apparently a deal addressed the distorted size of many constituencies, it expanded the National Assembly, adding 80 constituency seats, and changed the formula for delineating constituencies; it resolved the rankling problem of the existence of two police forces by introducing an Inspector-General with command over both forces; and it deleted troubling provisions that established a separate constitutional bench (referred to as a Constitutional Court) at the level of the High Court.⁴⁰ Other changes introduced by the PSC were more controversial: for instance, it deleted entirely provisions relating to culture, language and the regulation of campaign finance; it introduced two provisions into the right to life clause stipulating, first, that 'life begins at conception' and, second, that 'abortion is not permitted unless in the opinion of a registered medical practitioner the life of the mother is in danger'; it deleted provisions setting out the mandate of the National Land Commission, leaving an empty shell and deleted the Ethics and Anti-Corruption Commission entirely; and it replaced the provision for the right to access to information with the statement that it should be dealt with in legislation.

The CoE received the amended draft from the PSC with a warning that the changes made by the politicians were 'deals', reached only after tough negotiations and closely interlinked. There was to be no meddling; the CoE was merely to ensure that the presidential system of government was incorporated in a way that secured accountability and that the entire draft was technically sound. Views in the media on this matter differed widely. Earlier, as rumours of the decisions taken by the politicians emerged from Naivasha, opinion writers argued that they had exceeded their brief which was limited to the contentious matters. Now the debate was about the legitimate role of the CoE: was it bound only by decisions on the three contentious areas?

Whatever the formal legal position, it was clear that the CoE could not disregard every change made by the politicians outside the contentious issues. The Draft needed the support of the politicians. The question was where to draw the line. Which revisions were essential to keeping all the political parties committed to the process and which could be adjusted to retain the integrity of the constitution and better reflect the outcome of the popular consultations which had started in 2001? The CoE generally sought to accommodate the changes proposed by the PSC while ensuring that the draft Constitution remained true to the Act. The draft that the CoE submitted to Parliament three weeks later was much leaner than its predecessors, something many people had hoped. But, the removal or editing of provisions that had a 'constitutive' function, such as those dealing with culture, changed the character of the Constitution removing from it the sense of urgency and hope that Kenyans at the Bomas Conference had captured in the text.

Now the existing Constitution gave the National Assembly just 30 days to consider the draft. Moreover, as noted above, any changes to the draft submitted to the Assembly required the support of 65 per cent of all members. Over 150 amendments were proposed but none was passed. Accordingly, on 1 April,

⁴⁰ This proposal, introduced by the CoE to ensure that there would be a specialized bench to deal with constitutional matters, was objected to partly for the number of additional judges it would mean, partly for a lack of clarity about its jurisdiction and partly, it appeared, because some people, including most judges, believed that the existing system was satisfactory.

2010, the new Proposed Constitution of Kenya was adopted by the Assembly and on 6 May, published by the Attorney-General. Three months later, on 4 August, it was approved by over 67 per cent of the votes cast in the referendum.⁴¹ As in 2005, campaigning was intense. Most controversy was generated not by the longstanding contentious issues (structure of government and devolution) but by religious and moral issues: the right to life and abortion; sexual orientation; freedom of religion; and Muslim courts dominated the debate.⁴² In addition, fears about the redistribution of land drew No voters. As in 2005, the campaigns on each side paid frequently misrepresented the proposed constitution. The critical difference from 2005 was that President Kibaki and Raila Odinga campaigned together in support of the new constitution. Although party structures were weak – the No campaign was led by a senior member of Odinga’s Orange Democratic Party and there were many credible rumours that support for the Constitution from some of Kibaki’s PNU colleagues was lukewarm at best, Kibaki and Odinga’s joint campaign drew in four of the five major ethnic groups and secured victory for the Yes vote.

2. The new Kenyan Constitution

Kenya now has a new constitution that is significantly different both from its immediate predecessor and from the Kenyan Constitution as it was adopted at independence. By 2010, the often amended independence constitution was uninspiring. It was a purely legal document establishing institutions and listing rules. It had no preamble and, although in 1997 a clause asserting the principle of multiparty democracy was inserted in the first Article, it quickly moved on to elaborate, technical provisions about the executive and the structure of government. In a revision, the (heavily qualified) Bill of Rights had been moved from the beginning (it was initially chapter 2) to much further back, to appear only after wordy chapters on the executive, legislature and judiciary. The message was clear: Rights were out of sight and the executive was in control.

The new Constitution does the formal work a constitution is usually expected to do, establishing institutions, determining their mandates and their relationships, and prescribing the limits of their powers. But, in stark contrast to the old Constitution, these provisions are set in an explicit normative framework which commits Kenya to constitutionalism and the rule of law and which asserts social justice and inclusiveness as national values: ‘This Constitution is the supreme law of the Republic and binds all persons and all State organs.... Any law... that is inconsistent with this Constitution is void... and any act or omission in contravention of this Constitution is invalid’⁴³ and ‘The national values and principles of justice include ... participation of the people,... human dignity, equity, social justice, inclusiveness, equality...’⁴⁴ It is a constitution which seeks to reconstitute the nation in an inclusive

⁴¹ Independent Electoral and Boundaries Commission, “Final Referendum Results Are Gazetted | August 2010”, n.d., <http://www.iiec.or.ke/index.php/August-2010/final-referendum-results-are-gazetted.html>.

⁴² Joel D. Barkan and Makau Mutua, “Turning the Corner in Kenya,” *Foreign Affairs*, August 10, 2010, <http://www.foreignaffairs.com/articles/66510/joel-d-barkan-and-makau-mutua/turning-the-corner-in-kenya>.

⁴³ Article 2(1) and (4).

⁴⁴ Article 10(2).

political framework that recognizes Kenyans as active citizens and values their diversity. The basic values that it embraces in both statements of principle scattered through the text and the Bill of Rights are essentially those developed by the CKRC and the Bomas Conference between 2001 and 2004. The statements of principle were clipped by the politicians in the PSC but their general sense is retained and, together with other parts of the Constitution, they seek to provide the basis for the kind of democracy described in the Preamble: one in which, among other things, people are 'proud of [their] ethnic, cultural and religious diversity ... and [aspire to] a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law'.

The elements of the Constitution setting out values and aspirations have the support of ordinary Kenyans. However, the structure of the Kenyan State established in the Constitution does not command universal support. As the preceding part of this article describes, the presidential system and two levels of devolved government were agreed as part of an uneasy political settlement reached in a hurry with limited consideration of its full implications. This has consequences both for the effectiveness of the design (is it workable?) and for the way it is implemented (will reluctant bureaucrats and politicians implement it properly?).

Below, in an introductory description of certain key provisions, I elaborate on the multiple goals of the constitution and introduce some of the challenges that it faces. To do this I divide the discussion into four parts. I first discuss the framework of values including the Bill of Rights and the remarkable chapter on leadership and integrity. Second, in section 2.2, I describe the arrangement finally agreed upon for the system of government. Section 2.3 discusses the devolved state. Finally, I outline provisions dealing with the transition from existing constitutional structures to the new order.

2.1 Values, aspirations and rights, including principles governing land

2.1.1 Framing values

The Preamble introduces the Constitution as framework for a democratic system of government that adheres to the rule of law, values diversity, and respects human rights. Article 10(2) sets out the 'national values and principles of governance':

- (a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;
- (b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;
- (c) good governance, integrity, transparency and accountability; and
- (d) sustainable development.'

Most of these values are not likely to be directly enforceable. Instead, they indicate the way in which the Constitution should be implemented by politicians, policy makers and courts. Some, like equality and non-discrimination are reiterated and elaborated on in the Bill of Rights and so they will be enforced through the Bill of Rights. But the assertion of the principle of the rule of law in Article 10 imports a

concrete legal principle into the constitutional order and, one anticipates that, as in South Africa, it will be directly used as a source of the principle of legality.⁴⁵

These values are reasserted in many places in the Constitution. As already noted, the strong Bill of Rights gives concrete meaning to many; the Chapter on land opens with a statement of principles that emphasizes equity and transparency;⁴⁶ the principles underpinning the electoral system again underscore inclusiveness and transparency;⁴⁷ Parliament is expressly describes as ‘manifesting the diversity of the nation’ and an attempt is made to ensure its composition is diverse;⁴⁸ accountable government and recognition and protection of diversity are central in the list of the objects of devolution;⁴⁹ and public finance is to be managed in a way that is fair and equitable.⁵⁰ This sustained, consistent commitment to values of good governance and inclusiveness does not only provide democrats with useful political tools, but, in the hands of thoughtful judges, it will also provide the basis of a principled jurisprudence that does indeed secure the rule of law.

2.1.2 The Bill of Rights

The Bill of Rights is expansive, encompassing all the traditional civil and political rights as well as social, economic and cultural rights and environmental rights. It is consistent with international human rights law and draws inspiration from other recent Bills of Rights, most obviously South Africa’s. Although its overall conceptual structure is now familiar – a general limitation clause governs all the rights – the detailed attention it pays to some issues (like equality and freedom of expression) and the way in which it attempts to direct the application of certain rights (such as its provisions concerning the implementation of the social and economic rights) distinguishes it from other Bills of Rights.

Operational provisions

A set of ‘operational’ provisions frames the Bill. The opening Article asserts the centrality of the Bill of Rights in Kenya’s new constitutional order (‘The Bill of Rights is an integral part of Kenya’s democratic state and is the framework for social, economic and cultural policies’),⁵¹ and, echoing Article 10, puts dignity and social justice at the centre of the new rights dispensation stating:

⁴⁵ See for example *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC) at para 57 - 8.

⁴⁶ Article 60(1).

⁴⁷ Article 81.

⁴⁸ Articles 94(2), 97, 98 and 100.

⁴⁹ Article 174.

⁵⁰ Article 201.

⁵¹ Art 19(1).

‘The purpose of recognising and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings.’⁵²

Meticulous provisions which deal with the implementation of the Bill of Rights build on this, maintaining the emphasis on dignity and social justice both expressly and implicitly. Here the key provisions are Article 20 on the application of rights which gives rights horizontal application (they bind ‘all persons’), and Article 24, the limitation clause. The language and structure of these provisions suggests that they were informed by sections 8 and 36 of the South African Constitution but in both cases there are departures from the South African model.

On the application of rights, although Article 20 resembles the South African application provision in some ways, unlike its South African counterpart,⁵³ it appears to embrace direct horizontality:⁵⁴ Article 20(1) asserts that the Bill of Rights ‘binds ... all persons’. On its face, this suggests that even the social and economic rights protected in the Bill of Rights (such as the rights to water, housing and to be free from hunger) could be asserted against private people. Whether this reading will be maintained by the courts waits to be seen and it may be that Article 20(5)’s specific instructions concerning the role of the state in relation to social and economic rights will be read to limit direct horizontality. Nonetheless, the insistence that the Bill binds ‘all persons’ will surely receive attention from rights activists seeking ways of implementing those rights.

Article 20(1) is matched by an equally strong statement on the obligations of courts in interpreting law: Article 20(3) says: ‘[I]n applying a provision of the Bill of Rights, a court shall develop the law to the extent that it does not give effect to the right’. It is not immediately clear how the direct horizontal application of the rights and this strong form of indirect horizontal application will work together. However, if the courts do take the language of the Constitution seriously, this provision at least seems to demand that courts are less modest than usual in ‘developing’ the law. Compare, for instance, section 39(2) of the South African Constitution which states: ‘When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.’

On limiting rights, the Kenyan clause establishes a general test which applies to all but four of the rights in the Bill. The four exceptions – (i) freedom from torture and cruel and inhuman or degrading treatment or punishment; (ii) freedom from slavery or servitude; (iii) fair trial; and (iv) the right to an order of habeas corpus – may not be limited. The language of the general limitation clause is drawn

⁵² Art 19(2) and see Art 20(4)(a).

⁵³ South African Constitution, section 8.

⁵⁴ See, for a useful discussion of the terminology, Stephen Gardbaum, “The ‘Horizontal Effect’ of Constitutional Rights,” *Michigan Law Review* 102, no. 3 (December 2003): 387.

from the South African provision which, in turn, was drawn from the Canadian Charter.⁵⁵ Accordingly, it is likely that the Kenyan courts will apply the principle of proportionality. However, the Kenyan limitation clause deviates from its parent provisions. On the one hand, it curtails limitations in two ways. First, it requires legislation that limits rights to do so expressly. The limitation will not be valid unless ‘the legislation specifically expresses the intention to limit that right or fundamental freedom, and the nature and extent of the limitation’. Secondly, like the German Basic Law, it protects the ‘essence’ of all rights stating that no limitation may ‘limit the right or fundamental freedom so far as to derogate from its core or essential content’.⁵⁶

But, on the other hand, Article 26 also curtails rights. Clause (4) immunizes aspects of Muslim law from the full application of the Bill of Rights:

‘The provisions of this Chapter on equality shall be qualified to the extent strictly necessary for the application of Muslim law before the Kadhis’ courts, to persons who profess the Muslim religion, in matters relating to personal status, marriage, divorce and inheritance.’

This provision was included in the CKRC Draft and retained in all later drafts, apparently at the request of Muslim women for whom Kadhis’ courts ‘had become an important site for resisting the oppression experienced in marriage and in domestic circumstances in a traditionally patriarchal and male-dominated society’⁵⁷ and for whom recognizing and protecting the religious and cultural aspects of Islam was important. Its insistence that qualifications be ‘strictly necessary’ might be read to permit no greater invasion of the right to equality than is in any event permitted by clause (1) which allows reasonable limitations that are proportionate to their goals and its specific reference to the Kadhis’ Courts raises the question what happens when cases are appealed from those courts. Nonetheless, despite the assertion that it was consonant with what Muslim women requested and the fact that Kadhis’ courts have jurisdiction only if both parties agree, it strikes a jarring chord in the Constitution which, otherwise, is meticulous in its even-handed protection of dignity and equality.

⁵⁵ Article 24(1) states: “A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

- (a) the nature of the right or fundamental freedom;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and
- (e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.”

Paragraphs (a) to (e) are very close to the list in section 36 of the South African Constitution. In compiling the list of factors, South African constitution makers drew on the early Canadian Charter case: *R v Oakes* [1986] 1 SCR, 26 DLR (4th) 200.

⁵⁶ Art 26(2)(c).

⁵⁷ Constitution of Kenya Review Commission, “The Final Report of the Constitution of Kenya Review Commission”, 2005, para. 13.5.5; Ghai, Yash Pal and Cottrell Ghai, Jill, *Kenya’s Constitution: An Instrument for Change* (Nairobi, Kenya: Katiba Institute, 2011), 55.

Clause (5) is another jarring note. In essence, it seeks to remove a list of rights (privacy, association, assembly, labour relations, the economic and social rights, and rights on arrest) from members of the security forces: ‘Despite clause (1) [the limitation clause] and (2) [the elaboration of how limitations may be made], a provision in legislation may limit the application of the rights of fundamental freedoms ... to persons in the Kenya Defence Forces or the National Police Service.’ This clause was introduced by the parliamentary committee, apparently at the insistence of the military. An imaginative reading would state both that it is redundant because clauses (1) and (2) in fact permit limitations of the listed rights and that it does not effectively trump the many provisions of the Constitution that emphasize the binding nature of the Bill of Rights. But, its presence in the Bill clearly also provides a basis for a more formalistic argument along the lines that it is intended to reduce the scrutiny given to limitations on the rights of members of the forces.

The two key operational provisions for the Bill of Rights, dealing with its application and limitation, are supplemented by a number of other provisions. Thus, Article 20(4) sets out general principles for interpreting the Bill of Rights:

- ‘(4) In interpreting the Bill of Rights, a court, tribunal or other authority shall promote—
- (a) the values that underlie an open and democratic society based on human dignity, equality, equity and freedom; and
 - (b) the spirit, purport and objects of the Bill of Rights.’

The Constitution then turns its attention to the implementation of the social and economic rights protected in Article 43 and which include ‘the highest attainable standard of health’; housing; to be free from hunger; and clean and safe water; etc.⁵⁸ Article 21(2) is the starting point. It both underlines the enforceability of these rights by spelling out the State’s obligations and limits their scope by introducing the concept of progressive realization (drawn from the International Covenant on Economic, Social and Cultural Rights): ‘The State shall take legislative, policy and other measures, including the setting of standards, to achieve the progressive realization of the rights guaranteed under Article 43’. This, of course, raises questions: Are these rights that bind only the State? Is the right to access to emergency medical treatment subject to the progressive realization limitation and is it enforceable against the State alone? Is the State bound to provide at least a ‘minimum core’ of the Article 43 rights as articulated by the United Nations Committee on Social, Economic and Cultural Rights?⁵⁹

Article 20(5) addresses a perennial problem in enforcing social and economic rights: an argument by the State that it has insufficient resources. Under ordinary circumstances, claimants would have to demonstrate that resources are available. Clause (5) avoids this problem by spelling out the responsibility of the State in more detail. It says:

⁵⁸ Japhet Biegon and Godfrey M Musila, eds., *Social Enforcement of Socio-Economic Rights Under the New Constitution: Challenges and Opportunities for Kenya* (Nairobi, Kenya: Kenyan Section of the International Commission of Jurists, 2012).

⁵⁹ United Nations Committee on Social, Economic and Cultural Rights General Comment No 3 (5th session 1990) UN doc E/1991/23 para 10.

‘In applying any right under Article 43, if the State claims that it does not have the resources to implement the right, a court, tribunal or other authority shall be guided by the following principles—

- (a) it is the responsibility of the State to show that the resources are not available;
- (b) in allocating resources, the State shall give priority to ensuring the widest possible enjoyment of the right or fundamental freedom having regard to prevailing circumstances, including the vulnerability of particular groups or individuals; and
- (c) the court, tribunal or other authority may not interfere with a decision by a State organ concerning the allocation of available resources, solely on the basis that it would have reached a different conclusion.’

By demanding that the State prioritise the socio-economic rights and by shifting the burden of proof concerning resources to the State, clause (5) relieves claimants of a major evidentiary burden. It also authorizes courts to scrutinize the way in which the government spends. The well-known problems concerning a court’s ability to address budget issues remain, of course. But, even if courts remain cautious, the very process of requiring the State to justify its spending decision in the context of the Bill of Rights will both promote more open government and impose some pressure on government to take the Bill of Rights into account in all budgeting decisions. Moreover, although paragraphs (a) and (b) are drafted in terms that direct the State, they also suggest that, in crafting remedies for the infringement of the Article 43 rights, courts themselves must focus on the ‘widest possible enjoyment of the right’ and not simply on individual claimants.⁶⁰

The operational provisions of the Bill of Rights are completed by (i) a generous provision on standing that permits cases to be brought by individuals in their own interest, in the interests of another person, or a class or group of people or in the public interest;⁶¹ (ii) a provision securing the jurisdiction of the High Court to hear cases arising under the Bill of Rights, permitting Parliament to enact legislation that allows lower courts to hear Bill of Rights matters, and giving courts the jurisdiction to grant ‘appropriate relief’;⁶² and (iii) provisions carefully spelling out the obligations of the State in the implementation of rights, including obligations to protect vulnerable groups and to fulfill international human rights obligations.⁶³

Substantive rights

⁶⁰ Waruguru Kaguongo, “Reflections on the Complexities in Adjudicating Socio-economic Rights from the Perspective of Resource Allocation and Budgetary Issues,” in *Social Enforcement of Socio-Economic Rights Under the New Constitution: Challenges and Opportunities for Kenya*, ed. Japhet Biegon and Godfrey M Musila (Nairobi, Kenya: Kenyan Section of the International Commission of Jurists, n.d.), 31.

⁶¹ Art 22(1) and (2). This clause is drawn from the South African Constitution section 22.

⁶² Article 23.

⁶³ Article 21.

As already noted, the Bill of Rights is comprehensive and richly informed by international and comparative experience. But, in its emphases and through language and clauses that speak to the country's history, it is completely Kenyan.

The cluster of equality provisions provide an example of the way in which the Bill of Rights both does a legal job (securing the right to equality) and reinforces a sense of the Kenyan nation that embraces all the diverse groups that make up its people. Thus, the main equality provision, Article 27, guarantees equality before the law and every person's 'right to equal protection and the equal benefit of the law'. It then elaborates on what equality means: both direct and indirect discrimination by the State or individuals are outlawed; an open-ended list of grounds of forbidden discrimination includes race, sex, pregnancy, health status (a response to HIV Aids i.a.), age, religion, dress etc; and affirmative action is mandated as a way of achieving equality. Less conventionally, there is a limit on 'measures designed to redress ... disadvantage': any benefits must be based on need. In other words, rather than giving legislators and courts a free hand to use affirmative action to secure substantive equality, the Constitution seeks to direct its use. One assumes that the provision is a response to the widespread phenomenon of the 'creamy layer', a problem common to affirmative action programmes but particularly evident in India where a small elite in disadvantaged groups is believed to reap most of the benefits.⁶⁴ The question is whether a reference to need is the appropriate corrective to these problems of affirmative action. It is, for instance, unclear whose or what need it refers to. At first blush it may be taken to mean that individuals who are not personally disadvantaged should not benefit from affirmative action. Thus children of wealthy members of a disadvantaged group should not be eligible for special consideration in university admissions. Another reading, however, would simply require affirmative action to be genuinely required (needed). This reading would turn the provision into a form of necessity clause, heightening the bar for special programmes but it would, for instance, allow an affirmative action programme that gave access to the bench to individuals from minority groups who are not themselves 'needy' in the usual social and economic sense but whose presence on the bench would fill a social need for a representative judiciary.

Many drafters would consider these neutrally cast equality provisions adequate. However, where groups have been systematically excluded from meaningful participation in the life of the nation, an abstract assertion of equality does little to contribute to constituting an inclusive State. Accordingly, the Bill of Rights supplements the general right to equality. First, two clauses in Article 27 itself deal specifically with gender, making the implicit commitment to gender equality explicit: Clause (2) elaborates on the meaning of equality for women stating 'Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres' and Clause (6) stipulates that 'the State shall take ... measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender'.

Secondly, Article 27 which is in the main part of the Bill of Rights is supplemented by the provisions of Part 3 of the Bill which is entitled 'Specific Application of Rights'. Here, as the opening provision states,

⁶⁴ For a discussion of the 'creamy layer' issue in India see Ashwini Deshpande, "Does Caste Still Define Disparity? A Look at Inequality in Kerala, India," *The American Economic Review* 90, no. 2 (May 1, 2000): 322ff.

certain rights are elaborated 'to ensure greater certainty as to [their] application to certain groups of people'. Following this are Articles dealing specifically with children, persons with disabilities, youth, minorities and marginalized groups, and older members of society, each a group which has been disadvantaged in the past. Although they implicate other rights, these Articles are in essence an articulation of what substantial equality means. They movingly capture the experience of many members of the groups to which they refer. Thus, Article 54 entitles people with disabilities to be 'addressed and referred to in a manner that is not demeaning'. Article 57 requires the State, among other things, to take measures to ensure older people are able to 'live in dignity and respect and be free from abuse' and to 'receive reasonable care and assistance from their family and the State'. Article 55 requires youth to have 'access to relevant education and training' and to be 'protected from harmful cultural practices and exploitation' and so on. From a strictly legal perspective, each of these provisions may be redundant, but through them the Constitution expressly embraces the whole nation.

Like the equality provisions, provisions relating to religion, culture and freedom of conscience and belief in the Bill of Rights work both formally to structure and constrain State power and the behaviour of individuals, and more imaginatively to construct the new constitutional vision of the Kenyan nation. They provide strong protection for freedom of conscience, religion, thought, belief and opinion which extends to practice, teaching and observance of a day of worship. Similarly rights of individuals to 'use the language, and to participate in the cultural life of [their] choice' are protected,⁶⁵ reinforcing the obligations on the State to promote the diversity of languages in Kenya and 'recognize culture as the foundation of the nation' found in Chapter 2.⁶⁶ In addition, the State is expected to recognize traditional and religious marriages and systems of personal law provided that they do not conflict with the Constitution. Thus, not only are religious marriages permitted, but they are to be given State sanction.⁶⁷

None of these provisions on culture and religion is unique to Kenya. However, Kenya's political and social context gives them a particular resonance. As described above, religion was divisive during the process of constitution-making and in the lead up to the referendum. Culture, in so far as it is a proxy for tribe or ethnicity, is a marker of the most dangerous divides in Kenya. However, the inclusion of these rights in the Constitution was not contested in any way. The question is whether they can become the basis of a real tolerance of diversity and contribute to diverting Kenyans from identity based political competition and the destructive processes it has engendered.

There are, of course, other rights in the Bill of Rights that respond directly to Kenya's particular political, economic and social history. Of them, a number should be particularly noted. First, both the right to access to information, which extends to information held by individuals if that information is required to

⁶⁵ Article 44.

⁶⁶ Articles 7 and 11.

⁶⁷ The marriage of children would not be permitted but most current Muslim practices in Kenya are likely to be consistent with the Constitution, particularly taking into account Article 24(4)'s special protection of Muslim law.

protect rights,⁶⁸ and the right to fair administrative action⁶⁹ give people a concrete way of insisting on transparency and good governance and of translating the general principle, expressed in Article 10, that government should be transparent and accountable, into practice. Secondly, the Constitution supplements the right to freedom of expression with an elaborate provision protecting the ‘freedom and independence of the electronic, print and all other types of media’. This is perhaps the strongest example of a right that directly reflects and rejects Kenya’s authoritarian political history. It stipulates that the ‘State shall not exercise control over or interfere with any person engaged in broadcasting’ etc; broadcasting and other electronic media have freedom of establishment, subject only to limited licensing procedures that ‘are necessary to regulate the airwaves and other forms of signal distribution; and are independent of control by government, political interests or commercial interests’; and the State-owned media is to be free, impartial and to present divergent opinions. It also requires a body, ‘independent of control by government, political interests or commercial interests’ to set standards for the media.

Thirdly, however, are rights that are particular to Kenya’s context but that are not progressive examples of rights that build tolerance and respect diversity of views, culture and belief. As noted above, in perhaps the most controversial provision of the Constitution, the right to life refers expressly to abortion stipulating that ‘The life of a person begins at conception’ and that ‘Abortion is not permitted unless, in the opinion of a trained health professional, there is need for emergency treatment, or the life or health of the mother is in danger, or if permitted by any other written law’. The controversy at the time of the referendum lay in the words ‘or if permitted by any other written law’. Somewhat disingenuously, those supporting the draft answered the anti-abortion lobby by claiming empathically that the Constitution permitted abortion only if the life of the mother was endangered. This provision awaits judicial interpretation. A provision concerning marriage provoked responses very similar to those on abortion on the basis of the perception that it legalizes gay marriage. It states ‘Every adult has the right to marry a person of the opposite sex, based on the free consent of the parties’. Of course, like the abortion provision, it is ambiguous and it does not rule out gay marriage. But, the public debate did not touch on this point. Instead, on the basis of rumour, some claimed that the Constitution protected gay marriage. Others opposed the Constitution for its failure to do so.

Finally, there are provisions in this Bill of Rights that may set precedents for constitutions in countries that share Kenya’s history. So, the right to freedom and security of the person states expressly that corporal punishment is prohibited;⁷⁰ in response to State suppression of NGOs and other organs of civil society, the right to freedom of association expressly applies principles of fair administrative action to laws that require the registration of associations, stipulating that such legislation should provide that

⁶⁸ Article 35(1). This is taken from the South African Constitution section 32 but the Kenyan right adds two provisions: “Every person has the right to the correction of deletion of untrue or misleading information that affects the person” (clause (2) reflecting a history of malicious allegations against individuals in the media) and “The State shall publish and publicise any important information affecting the nation” (clause (3)).

⁶⁹ Article 47.

⁷⁰ Article 29(e).

registration should not be withheld unfairly and that associations should have a right to a hearing before registration is cancelled;⁷¹ the provision on access to justice adds that ‘if any fee is required it shall be reasonable and shall not impede access to justice’;⁷² and the right protecting people from the retrospective application of criminal law permits prosecution if an action was a crime under international law at the time it was committed even if it was not a crime in Kenya.⁷³

2.1.3 Leadership and integrity

Chapter 6 of the Kenya Constitution is entitled ‘Leadership and Integrity’. It sets out the responsibilities of leadership and what are perhaps best described as rules that apply to State officers (people holding elected office and other constitutional officers such as judges, Cabinet Secretaries, members of independent commissions, the defence force chief etc). The Chapter opens with a set of principles. For example: ‘Authority assigned to a State officer is a public trust to be exercised in a manner that is consistent with the purposes and objects of this Constitution...’;⁷⁴ and leadership and integrity include ‘objectivity and impartiality in decision making...; selfless service based solely on the public interest’;⁷⁵ and ‘discipline and commitment in service to the people’.⁷⁶ It is unsurprising that these statements should appeal to Kenyans who had grown to mistrust politicians and bureaucrats deeply and equally unsurprising that this Chapter suffered particularly badly in the hands of the PSC which deleted substantial parts including a requirement that State officers submit regular declarations of assets to an anti-corruption commission.⁷⁷ Nonetheless, it is not limited to general statements of principle. For instance, behavior that causes a conflict of interests subjects State officers to disciplinary procedures, they are not permitted to hold bank accounts outside Kenya except as authorized by Parliament, and may not hold other jobs. Further implementing provisions are found in other parts of the Constitution, including one disqualifying people from standing for political office if they have contravened any provision of chapter 6.⁷⁸

In some cases proper implementation of this Chapter depends on legislation, in others it will depend on honest courts. However, the attention that it is receiving from civil society means that it will be difficult for Parliament to pass laws that implement it in a half-hearted way or for dishonest officials to escape

⁷¹ Article 36(3).

⁷² Article 48.

⁷³ Article 50(2)(n).

⁷⁴ Article 73(1)(a)(i).

⁷⁵ Article 73(2)(b) and (c).

⁷⁶ Article 73(2)(e).

⁷⁷ See “Revised Harmonized Draft.” Art 97. Among others, the Ghanaian Constitution (Chapter 24) and the Ugandan Constitution (Article 233) impose such a requirement on officers of the state.

⁷⁸ For instance, Article 99 uses it as a basis for disqualifying people from standing for Parliament and, through Article 137, the presidency.

attention. It is also likely that the very broad standing provision in Article 258 of the Constitution which gives anyone acting in the public interest the 'right to institute court proceedings claiming that [the] Constitution has been contravened or is threatened with contravention' will be used by citizens determined to see the Chapter enforced.⁷⁹ It has already been put to use⁸⁰ and its importance to Kenyans is reflected in the fact that writing in 2011, not a year after the Constitution was brought into force, Ghai and Cottrell could already refer to the 'now well-known Chapter 6'.⁸¹

2.1.4 Land

'Undertaking land reform' was listed in the Accord as one of the long term issues needing attention for good reason. Colonial dispossession had been followed by post-independence resettlement projects that were resented by many ethnic groups. Accordingly, grievances concerning access to and ownership of land fuelled political tensions for decades and, some have argued, constitute 'the major structural factor underlying ethnically driven electoral and political violence in Kenya'.⁸² The CKRC and Bomas Conference paid considerable attention to the question of land and the provisions prepared in that process were left substantially unchanged in the Constitution presented to the referendum in 2005. But, unsurprisingly, the provisions were not unanimously accepted and land was at the centre of the No campaign with leaders asserting, among other things, that the Constitution would allow 'mass evictions' of people by those claiming to be the original inhabitants of certain parts of the country.⁸³

The provisions on land are relatively detailed and open up opportunities to end corruption in the system of land distribution and registration and the use of land as a political tool. In addition to the right to property, protected in the Bill of Rights,⁸⁴ Chapter 5 is dedicated to Land and Environment. The property right entitles people to own property and protects them from arbitrary deprivation of property. It stipulates that expropriation by the State must be carried out in accordance with the provisions of Chapter 5 or be for a public purpose. In the latter case, prompt payment of just compensation is required. Chapter 5 opens with a provision that requires land to be 'held, used and managed in a

⁷⁹ The question of course is whether it will be used by people with political interests to disable opponents and whether the requirement of "public interest" is adequate to avoid this.

⁸⁰ Kenfrey Kiberenge, "Chapter Six of the Constitution Has Left a Trail of Casualties," *The Standard*, February 5, 2012, <http://www.standardmedia.co.ke/politics/InsidePage.php?id=2000051461&cid=4>.

⁸¹ Ghai, Yash Pal and Cottrell Ghai, Jill, *Kenya's Constitution: An Instrument for Change*, 141.

⁸² Peter Kagwanja and Roger Southall, "Introduction: Kenya - A Democracy in Retreat?," *Journal of Contemporary African Studies* 27, no. 3 (2009): 268 citing Marcel Rutten and Sam Owuor, "Weapons of Mass Destruction: Land, Ethnicity and the 2007 Elections in Kenya," *Journal of Contemporary African Studies* 27, no. 3 (July 2009): 305-324; Karuti Kanyinga, "The Legacy of the White Highlands: Land Rights, Ethnicity and the Post-2007 Election Violence in Kenya," *Journal of Contemporary African Studies* 27, no. 3 (July 2009): 325-344 and Prisca Mbura Kamungi, "The Politics of Displacement in Multiparty Kenya," *Journal of Contemporary African Studies* 27, no. 3 (2009): 345-364.

⁸³ See, for example, Lucas Barasa, "No Group Threatens to Evict Communities," *Daily Nation On the Web* (Nairobi, Kenya, June 10, 2010), <http://allafrica.com.ezproxy.uct.ac.za/stories/201006101139.html>.

⁸⁴ Art 40.

manner that is equitable, efficient, productive and sustainable’ and sets out seven principles that apply to the State and individuals alike in their use of land. These include ‘equitable access to land;’ ‘sustainable and productive management of land resources;’ and ‘elimination of gender discrimination in law, customs and practices related to land’.⁸⁵ Chapter 5 continues, in deceptively simple terms, to categorize land as public, private or communal; to prohibit possession of land by foreigners for anything greater than a 99-year lease;⁸⁶ and to establish an independent land commission to, among other things, manage public land, deal with historical injustice concerning land, assess taxes on land and do research.

Although these arrangements require attention to be paid to historical abuses as well as an overhaul of the system of land management, they are complicated by a number of things. For instance, public land is divided into 14 categories. Public land in certain categories is vested in the counties to be ‘held ...in trust for the people resident in the county’ by the relevant county. The rest is vested in the national government, to be held in trust for the people of Kenya. But public land may not be ‘disposed of or otherwise used’ except in accordance with an Act of Parliament.⁸⁷ In other words, although certain public land is formally identified as falling under county control, counties have no legislative power over it. In fact, they may not even determine its use. Similarly, the provision restricting ownership of land to Kenyan citizens is not unusual but its insistence that a body corporate is a citizen only if its entire shareholding is by Kenyans may have unintended consequences on the flow of investment into the country, transparency in share holdings and the valuation of companies.⁸⁸ The implications of giving the Land Commission the massive role that it has are also unclear.⁸⁹ The decision to remove management of land from government was presumably a response to the tendency of Presidents Kenyatta and Moi to treat public land as personal property and other forms of corruption. However, inevitably an independent body is less accountable than a government and there is no guarantee that, for instance, corruption in the deeds office, allocation of land to family and friends and other abuses of power will be eliminated by giving a commission control over land.

The provision requiring the Land Commission to investigate historical injustices relating to land is particularly important. This essential but immense task has been on the agenda for some time. The 2007 National Land Policy commits the government to establishing ‘suitable mechanisms for restitution, reparation and compensation of historical injustices and claims’ and provides some more detail for

⁸⁵ Art 60.

⁸⁶ Art 65.

⁸⁷ Art 62(4).

⁸⁸ Art 65(3).

⁸⁹ The Land Commission may have been modeled on the Ugandan Commission (Constitution of Uganda, 1995, article 238) but in the case of Uganda, “district land” is managed by district land boards (art 240) that are not subject to the control of the national Land Commission so the mandate of the national Commission is rather narrow.

dealing with specific problems such as those related to pastoral land and vulnerable groups.⁹⁰ But, neither the Constitution nor the Land Policy provide any concrete guidance about what the process will be.

2.2 The national government

2.2.1 The electoral system

When the members of the CoE sat down in 2009 to reconsider the earlier proposals concerning the electoral system, the violence of the last elections was at the forefront of their minds. The new system had to provide a framework for a better electoral process. The ineffectiveness (or corruption) of the Kenyan Electoral Commission; the prevalence of fraud; and general 'electoral lawlessness,' to use the words of the Independent Review Commission on the Elections,⁹¹ had to be ended. Moreover, although it was clear that the real problems lay deep in Kenyan political, economic and social life, the unfairness of the electoral system itself, reflected in gross disparities in the size of constituencies, the failure of the system to provide representation in Parliament for many groups in Kenyan society (there were only 22 women in the Kenyan Parliament elected in 2007⁹²), and the ability of a President to secure election with a small percentage of the vote all contributed to the problems that the new Constitution was expected to address.

Not unexpectedly, then, fairly detailed constitutional provisions set out a framework for running elections. They require Kenya to meet generally accepted standards for free and fair elections emphasizing openness and accountability and stipulating, among other things, that elections must be by secret ballot, free from violence and intimidation and administered in an impartial way;⁹³ that an Independent Electoral and Boundaries Commission (IEBC) determines constituency boundaries for national and county elections and manages elections;⁹⁴ and that all candidates and parties must comply with a code of conduct.⁹⁵ As in other parts of the Constitution, further provisions respond directly to specific problems Kenya has encountered in the past. Thus, Article 86 states expressly that votes must be counted and announced at each polling station, Article 88 requires the IEBC to regulate the process by which parties nominate candidates, and independents are permitted to stand provided that they have not been members of a party within three months of the election.⁹⁶ Capture of the IEBC by the

⁹⁰ Ministry of Lands, *National Land Policy* (Nairobi, Kenya, May 2007), para. 363ff.

⁹¹ *Report of the Review Commission on the General Elections Held in Kenya on 27th December, 2007 (Kriegler Commission)* (Nairobi, Kenya, September 17, 2008) p 10.

⁹² Kenyan Women's Parliamentary Association <http://www.kewopa.org/members.php>.

⁹³ Art 81.

⁹⁴ Art 88.

⁹⁵ Art 84.

⁹⁶ Art 85.

President is intended to be avoided by an appointment process that allows legislation to prescribe how members should be identified and requires approval of nominees by the National Assembly.⁹⁷

On the electoral system itself, the CKRC reported that people were dissatisfied with a system that allowed the President to be elected on a plurality of the vote and so proposed that to win, a presidential candidate should receive a majority of the vote with a run-off if necessary. It also proposed retaining the requirement that the President receive 25 per cent of the vote in five of the eight provinces.⁹⁸ The new Constitution follows these proposals but, as provinces are no longer formally recognized, a presidential candidate must secure 25 per cent of the vote in more than half the counties.⁹⁹

Decisions about the electoral system for Parliament and the county assemblies were more difficult. Kenya has had a system of single-member constituencies since before independence and MPs play a prominent (if not always constructive) role in public life. Working under another system was inconceivable to most Kenyans. Accordingly, the electoral system for the national Parliament is primarily a single-member constituency system. The 350-member National Assembly is composed of 290 'general' members; 47 women elected in single-member constituencies (the 47 counties constitute the constituencies for the seats reserved for women); 12 members representing 'special interests' including 'the youth, persons with disabilities and workers' nominated by parties in proportion to the seats won in the election; and a Speaker. The pattern in the 68-member Senate is similar. Here 47 directly elected members are complemented by 20 members nominated by parties and a Speaker. Of the 20 nominated members, 16 are to be women and two are to represent the youth (a man and a woman) and two to represent people with disabilities (again one man and one woman).

The most controversial part of this arrangement was not the special seats or the failure to embrace some elements of proportional representation (as had been proposed by the CKRC).¹⁰⁰ It was the increase of the number of constituency seats in the National Assembly from 210 to 290, which was viewed by the public as a shameless exercise by politicians to secure their positions and those of their friends. But, this was one part of a political deal concluded in response to the gross level of constituency boundary manipulation of the past.¹⁰¹ The formal inequality of vote in the system was exacerbated by

⁹⁷ Art 250. Some electoral commissions deliberately include party representatives but the Kenyan Electoral Commission does not. It may not include anyone who has been a member of Parliament or a county assembly or an office holder in a political party within the past five years. For the procedure for appointing commissioners see the Independent Electoral and Boundaries Commission Act 9 of 2011 First Schedule.

⁹⁸ Article 5(3)(f) Constitution of Kenya 1963.

⁹⁹ Art 138(4).

¹⁰⁰ Constitution of Kenya Review Commission, "Constitution of the Republic of Kenya 2002 (Draft)", September 27, 2002. See also Constitution of Kenya Review Commission, *The People's Choice: The Report of the Constitution of Kenya Review Commission (Short Version)* (Nairobi, Kenya, September 18, 2002), 39ff.

¹⁰¹ Joel D. Barkan and Robert E. Henderson, *Toward Credible and Legitimate Elections in Kenya: Part II IFES Assessment Report*, May 1997, 17 and Joel D. Barkan, Paul J. Densham, and Gerard Rushton, "Space Matters: Designing Better Electoral Systems for Emerging Democracies," *American Journal of Political Science* 50, no. 4

the fact that opposition parties were based in the most populous electoral districts.¹⁰² The substance of the deal was to introduce a commitment to equality of vote under which constituencies would have equal numbers of inhabitants¹⁰³ – the IEBC is instructed to work towards this ‘progressively’.¹⁰⁴ Seen in this context, the increase in the number of seats was a device to secure the support of MPs for the change by reducing (or eliminating) the danger that entire constituencies would be eliminated in a process of equalization. (To drive this point home, the PSC inserted a clause in the Schedule of transitional arrangements stating that the ‘first review of constituencies ... shall not result in the loss of a constituency’.¹⁰⁵) However, the commitment to equality of vote itself is significantly watered down by a provision allowing a deviation from the quota of 40 per cent each way in sparsely populated areas and cities and 30 per cent elsewhere. In other words, under the Constitution, the population of some city constituencies may be 80 per cent higher than that in some rural constituencies.

Although the disparity in constituency size was a major concern for certain blocks of MPs, many civil society groups were focused on the failure of the system to ensure that diverse groups in Kenya were properly represented. The special seats are intended to begin to address this. As noted above, at the moment there are only 22 women in the Kenyan Parliament. The new Constitution sets out to change this – in provisions that are at best ambiguous and, at worst, contradictory. First, as already noted, it stipulates that of 350 members of the National Assembly, 47 will be women. In addition, the party lists from which the 12 special members of the National Assembly are to be chosen are to alternate between men and woman. In the Senate, there will be 18 women. But, second, Article 81 of the Constitution,

(October 1, 2006): 926–939. In “Space Matters”, Barkan et al report that in 1997 the least populous Kenyan constituency had just 3 635 inhabitants and the most populous 301,538 (Figure 2 p. 932).

¹⁰² Barkan et al “Space Matters” p 932.

¹⁰³ The issue was first dealt with in the Accord in 2008 and then the 1963 Constitution was amended to introduce the concept of equality of vote. Article 42(3) of the 1963 Constitution had stated:

“All constituencies shall contain as nearly equal numbers of inhabitants as appears to the Commission to be reasonably practicable, but the Commission may depart from this principle to the extent that it considers expedient in order to take account of –

- (a) the density of population, and in particular the need to ensure adequate representation of urban and sparsely-populated rural areas;
- (b) population trends;
- (c) the means of communication;
- (d) geographical features;
- (e) community of interest; and
- (f) the boundaries of existing administrative areas....”

The 2008 amendment, incorporated as Article 41C, replaced the chapeau with a provision that required delimitation of constituencies to be on the basis of equality of votes. The list of factors was retained. The Bomas Draft had steered a middle course, using the (rather vague) words ‘approximate equality of constituency population’. Disregarding the 2008 settlement, the CoE followed the Bomas language but the PSC reverted to the 2008 wording.

¹⁰⁴ Art 89(5) - (7).

¹⁰⁵ Sixth Schedule section 27(4).

setting out the 'general principles for the electoral system' states that 'not more than two-thirds of the members of elective public bodies shall be of the same gender'. Under the provisions allocating seats, the Senate is close to this target (22 women are required) but the National Assembly is far from the 116 women members required to reach a target of one-third and it is extremely unlikely that the difference will be made up by women elected in single-member constituency seats. The current proposal is to amend the Constitution to provide for additional seats, filled by parties in proportion to the seats won in the election, to make up the gender quota.¹⁰⁶ The proposed amendment is controversial for two reasons: first, many people are resistant to any amendment whatsoever, as they feel it will simply open the door to the kind of self-interested constitutional amendments that politicians supported in the past; second, there is a general concern that it will lead to a bloated Parliament.

The other special seats (for youth, persons with disabilities and workers) are also in the hands of parties, also to be filled from lists in proportion to seats won and, as there are very few of them, these seats are weighed heavily in favour of larger parties. But, what is most striking about the arrangements is that they do not provide for 'ethnic representation'. The only provisions concerning the representation of ethnic minorities are 'soft': Article 100 requires Parliament to enact legislation promoting the representation of 'ethnic and other minorities; and marginalized communities' along with women, persons with disabilities and youth and Article 90(2) requires the IEBC to ensure that party lists for filling the small number of special seats 'reflect the regional and ethnic diversity of ... Kenya'. Clearly, any requirement that special seats be set aside for minority ethnic groups would be difficult to implement from both a political and an administrative perspective and would constitutionalize ethnic politics. Nonetheless, this arrangement is a shift from the original CKRC proposal of a mixed system with 90 of 300 seats to be elected on lists which were to 'take into account the need for representation of ... minorities' and to 'reflect the national character'.¹⁰⁷

These provisions on the electoral systems and conduct of elections are supplemented by a set of 'requirements' for political parties. Of these the most important – and most difficult to implement – stipulate that every political party should have a 'national character'¹⁰⁸ and should not be founded on 'a religious, linguistic, racial, ethnic, gender or regional basis'. Similar provisions are found in many African constitutions but their effect is difficult to assess. As Bogaards, Basedau and Hartmann put it,¹⁰⁹ on the one hand they are a serious attempt to respond to a real problem and make competitive politics work; on the other hand, they can clearly be misused, both by governments and individuals seeking to eliminate competition. The new Kenyan Political Parties Act deals with the constitutional requirement of 'national character' by requiring that, for registration, a party must have recruited at least 1 000 members from each of more than half the counties, that these members must reflect 'regional and ethnic diversity, gender balance and representation of minorities and marginalized groups' and that

¹⁰⁶ *Constitution of Kenya (Amendment) Bill*, 2011.

¹⁰⁷ Art 107(5) CKRC Draft.

¹⁰⁸ Art 91(1)(a) and (2)(a).

¹⁰⁹ Matthijs Bogaards, Matthias Basedau, and Christof Hartmann, "Ethnic Party Bans in Africa: An Introduction," *Democratization* 17, no. 4 (2010): 613.

similar diversity must be reflected in the party's governing body.¹¹⁰ This clearly favours larger parties but it is not clear what its implications will be for the development of party politics in counties in which there is not an ethnically diverse population.

The importance of the electoral arrangements – both the electoral system and process – is obvious. If elections are not fair and perceived to be fair, the new constitutional dispensation will fail at the starting posts. For this, the newly-constituted IEBC carries enormous responsibility but much also depends on whether or not the other political arrangements introduced by the Constitution are successful in dispersing power, thus distributing political prizes more broadly, and are accepted by the powerful elites that dominate Kenyan public life. This is the subject of the next section.

2.2.2 The executive and legislature: balancing and controlling power

As the earlier discussion of the constitution-making process shows, decisions about the design of the three principal components of the national government, the executive, legislature and judiciary, proved the most intractable of all. The debate focused on the executive but the institutions are clearly closely interlocked and each branch was controversial.

The 1963 Constitution had been amended over the years to centralize power in the executive. Some of the most egregious provisions had been repealed in the early 1990s, but Parliament and the courts remained weak and the President retained enormous power.¹¹¹ Although the President was limited to two five-year terms (the provision which had forced President Moi to step down in 2002), he appointed all members of the electoral commission which demarcated electoral districts, registered voters and ran elections.¹¹² Similarly, he had control over the judiciary with the independent power to appoint the Chief Justice; the power to identify all members of the Judicial Service Commission which selected other judges; and the power to set up and appoint members to a tribunal to remove judges from office. Virtually all other significant appointments – including that of the Attorney-General, the Commissioner of Police, and, of course, members of Cabinet – were in the gift of the President. Reflecting the parliamentary origins of the constitutional arrangements, Cabinet members were to be drawn from Parliament. This simply served to secure the President's power over MPs who aspired to Cabinet positions. And the President held the power to dissolve and prorogue Parliament.¹¹³ Moreover, an extremely broad interpretation of what a money bill was in effect gave the President full control over virtually all legislation.¹¹⁴ Together with a powerful system of patronage and weak political parties, until

¹¹⁰ Act 11 of 2011 section 7(2).

¹¹¹ See Constitution of Kenya Review Commission, "Final Report," 27 for an excellent outline of the amendments to the Constitution between 1963 and 1990.

¹¹² Art 41(1)

¹¹³ Arts 58 and 59. The power to dissolve Parliament was constrained by the fact that dissolution of Parliament led to presidential elections.

¹¹⁴ Article 48 of the former Constitution was interpreted to require the President to approve any Bill that anticipated spending.

very recently these provisions made Parliament readily subservient to the President. Overall, the Constitution provides a framework for governance within which ethnic politics could be fostered and corruption flourished.

The parliamentary system proposed by the CKRC, the Bomas Conference and the CoE was intended to disperse power and, by bringing an end to presidential elections, to remove the most dangerous, winner-takes-all aspect of democratic politics in Kenya. In these proposals, the salience of ethnicity in politics was addressed through provisions requiring ethnic inclusiveness in the executive, including Cabinet and the bureaucracy. The provisions seeking to secure the representation of all ethnic groups in public administration were retained in the final Constitution, but as recounted above, the PSC rejected a parliamentary form of government and chose instead a presidential system with, it hastened to emphasize, proper checks and balances on the US model. The new Constitution secures such a system of limited government to some extent¹¹⁵ in lengthy provisions on the national executive and legislature. However, in accordance with the transitional arrangements that permit the current President and Parliament to complete their terms, implementation of these provisions was delayed until after the first elections under the new Constitution.¹¹⁶

A number of provisions clearly limit the power of the President. First, on the classic model of presidential systems, the President and Parliament have fixed terms – the President may not prorogue Parliament. Second, the President no longer has a free hand in the most significant government appointments. Cabinet Secretaries (ministers), the Attorney-General and Chief Justice, the Electoral and Judicial Service Commissions, the Inspector-General of the National Police Service etc are nominated by the President but their appointment must be confirmed by the National Assembly or Parliament. Third, presidential candidates must announce their proposed Vice President (running mate) before the election, thus avoiding the situation in which, in order to garner support, presidential hopefuls promised many people from different sectors and tribes the Vice Presidency. Fourth, the size of the Cabinet is restricted to 25,¹¹⁷ limiting the ability of the President to extend patronage and quell opposition by drawing many people into a huge cabinet. Moreover, Cabinet members may not be MPs. Fifth, executive/presidential control over the budget is removed. And, finally, the two-term rule is retained.

At the same time, Parliament is strengthened so that it can provide a check on the executive. Consistent with the US model of presidentialism chosen by the PSC (and in stark contrast to the past), Bills must be introduced by members of Parliament (thus members of the executive need to find sponsors for legislation they want to put through);¹¹⁸ the executive is to be consulted on money Bills but cannot block their passage;¹¹⁹ Parliament's budget is dealt with separately from that of the executive,¹²⁰ and, to

¹¹⁵ See generally, Chapter 9.

¹¹⁶ Sixth Schedule section 2.

¹¹⁷ Article 152(1). The total of 25 includes the President, Deputy President and the Attorney-General.

¹¹⁸ Article 109.

¹¹⁹ Articles 109 and 114.

ensure Parliament retains its law making authority, delegation of law making is constrained (the enabling statute must 'expressly specify the purpose and objectives for which that authority is conferred, the limits of the authority, the nature and scope of the law that may be made, and the principles and standards applicable to the law made under the authority').¹²¹

But, these classic arrangements for checking power offer little reassurance to many Kenyans for whom, as Yash Ghai has eloquently explained, 'the key operators and, one may say, the beneficiaries of democracy, politicians and political parties, are ... the most dangerous enemies of democracy'.¹²² Indeed, the history of the Kenyan Parliament is not distinguished. Accordingly, following a pattern increasingly seen in newer African constitutions and in Asia, in addition to strengthening the court system, the Constitution seeks to define the roles of various constitutional office holders more clearly; secure the independence of certain offices; establish independent institutions to, in the language of the South African Constitution, 'support constitutional democracy'; ensure fair representation of all sectors of Kenyan society in public office; and provide opportunities for the public to hold government to account between elections.

Prosecutions are no longer directly under the control of the President through his Attorney-General. Again, Yash Ghai explains the problem well. In the past, he says, the Attorney-General 'triumphed over the separation of powers'.¹²³ On the Westminster model, the Kenyan Attorney-General was a member of Cabinet, the heart of partisan politics, and, among other things, controlled all prosecutions. This model has been the subject of controversy in many places.¹²⁴ In Kenya, successive Attorneys-General have for decades shielded people implicated in corruption scandals as well as police and others suspected of human rights abuses from prosecution. In 2006 this led the US Ambassador, Mark Bellamy, to report to the State Department that 'Wako [the Attorney-General] is the main obstacle to successful prosecutions of any kind in Kenya'.¹²⁵ Under the new Constitution responsibility for prosecution is vested in a separate Director of Public Prosecutions whose appointment must be approved by Parliament, who serves for a fixed term and may be removed from office on limited grounds only, and

¹²⁰ Articles 127(6) and 221.

¹²¹ Article 94(6).

¹²² Yash Ghai, "Journey Around Constitutions: Reflections on Contemporary Constitutions," *South African Law Journal* 122 (2005): 815.

¹²³ Yash Ghai "Victory for the People: Let us abolish the Attorney General!" *Nairobi Star* (date unknown).

¹²⁴ See for a discussion of prosecuting authorities in Africa in a comparative context, Philip Stenning, "Prosecutions, Politics and the Law: The Way Things Are," in *Accountable Government in Africa:: Perspectives from Public Law and Political Studies*, ed. Danwood Chirwa and Lia Nijzink (Cape Town, South Africa: University of Cape Town Press, 2012), 104.

¹²⁵ Branch, *Kenya*, 225. *Wrong, It's Our Turn to Eat*.

who 'shall not be under the direction or control of any person or authority'.¹²⁶ The Attorney-General continues as 'principal legal adviser to the Government' and as a member of the Cabinet.¹²⁷

Secondly, independent institutions are used to curtail the executive's control over the (vast) public service: a Public Service Commission controls the establishment of offices in the public service and appointments, and the Teachers Service Commission and newly established National Land Commission have roles in managing and overseeing the administration of education and land. The independence of each of these commissions from government interference is intended to be secured by provisions that control the appointment and tenure of commissioners, assure them adequate budgets and give them the power to conduct investigations on their own initiative. An independent Salaries and Remuneration Commission is also to deal with the habit of Kenyan politicians of increasing their own salaries (the salaries of Kenyan MPs are among the highest in the world in relation to the country's GDP per person).¹²⁸ It will set the salaries of all State officers, including MPs and judges.

Thirdly, other independent offices and commissions including the Office of the Auditor-General and the Kenya National Human Rights and Equality Commission have oversight roles. Each of these institutions, as well as the IEBC, is protected by the general provisions governing commissions mentioned above. Currently, because Parliament is divided, its control of appointments to all these institutions ensures that those appointed are drawn from a relatively wide spectrum of Kenyan society. Although, predictably and as elsewhere, it appears that some form of political deal is struck in determining to whom positions should be given, appointments are also protected by the intense public scrutiny to which they are subjected¹²⁹ and so it is likely that the independent institutions will increase accountability in government.

The formal institutional arrangements described above are primarily geared to constraining the power of the presidency and introducing accountability. They are complemented by provisions on the legislature, executive and public service that seek to prevent power being exercised in a manner that excludes all but those of the President's tribe and other tribes in the governing alliance from public positions. Now, in addition to the requirement that political parties may not be organized along ethnic lines and must have a 'national character', the composition of the cabinet must 'reflect the regional and ethnic diversity of the people of Kenya';¹³⁰ the public service and security services must offer equal

¹²⁶ Article 157.

¹²⁷ Article 156.

¹²⁸ Art 230. See also "Kenyan MPs Vote to Give Themselves £2,000 Monthly Pay Rise," *The Guardian*, July 1, 2010, sec. World news, <http://www.guardian.co.uk/world/2010/jul/01/kenyan-mps-pay-rise>.

¹²⁹ Peter Opiyo, "Speaker Rules MPs Didn't Approve Matemu, Just Rejected Report," *The Standard* (Nairobi, Kenya, February 22, 2012), <http://www.standardmedia.co.ke/InsidePage.php?id=2000048751&catid=4&a=1>. A particularly intense debate surrounded the appointment of the Director of Public Prosecutions. See the contribution by Yash Pal Ghai, "Keriako Tobiko 'Not Fit for DPP's Post'," *Kenya Stockholm Blog*, May 19, 2011, <http://kenyastockholm.com/2011/05/19/keriako-tobiko-not-fit-for-dpp-post/>.

¹³⁰ Art 130

opportunities to people of all ethnic groups;¹³¹ and the composition of the independent commissions and offices ‘taken as a whole’ must reflect the ‘regional and ethnic diversity of Kenya’.¹³²

Finally, the Constitution relies on an active citizenry and provides multiple opportunities for the public to hold the government to account. The rights to vote, free speech, free media and access to information constitute the foundation. These are complemented by the Constitution’s commitment to transparency and accountable government which is first asserted in the statement of principles in Article 10 and then reiterated in relation to the management of land, running elections, the administration of the judicial system and public finance.¹³³ The broad standing provision discussed above gives civil society access to the courts if it is feared that the Constitution will be or has been breached. The public may also lay complaints with the independent commissions¹³⁴ and the Constitution requires provision to be made for the recall of MPs.¹³⁵ In the context of the Kenyan government’s secretive and unaccountable past, each of these provisions is important and each signifies a step towards substantive democracy. Nonetheless, their primary function is to provide an opportunity for Kenyans to react to abuses. At least as important are provisions that open up opportunities for citizens to engage in government and the process of policy making.¹³⁶ Of these the most important may be Article 118(1) which states:

‘Parliament shall—

- (a) conduct its business in an open manner, and its sittings and those of its committees shall be in public; and
- (b) facilitate public participation and involvement in the legislative and other business of Parliament and its committees.’

This provision is drawn from the South African Constitution.¹³⁷ The requirement that parliamentary committees be open to the public has the potential to change fundamentally the way in which the Kenyan Parliament operates. Currently, leaked information fuels political debate in Kenya, often in counter-productive ways. When these provisions come into force, this practice should lose its grip and Kenya’s vibrant press and civil society are likely to follow committee proceedings avidly and to pay particular attention to the way politicians carry out their oversight role.¹³⁸ But, politicians may find

¹³¹ Arts 232(1)(i) 238(2)(d), 241(4), and 246(4).

¹³² Art 250(4).

¹³³ Arts 60(1)(d), 81, 172(1) and 201.

¹³⁴ Art 252(2).

¹³⁵ Art 104.

¹³⁶ For instance, in reviewing constituency boundaries, the IEBC must consult all interested parties (Art 89(7)) and in determining the division of revenue among counties, the Senate must invite submissions from the public (Art 217(2)(d)).

¹³⁷ Section 59.

¹³⁸ The Speaker may exclude the public in ‘exceptional circumstances’ if ‘justifiable reasons’ for the exclusion exist (Art 118(2)).

paragraph (b) even more demanding. In South Africa, the Constitutional Court has interpreted it as imposing a justiciable obligation on each house of Parliament to engage with the public on each Bill an appropriate way depending on the context. The South African Parliament has considerable leeway in determining both what sectors of society have an interest in a particular piece legislation and the best way involve the public. But, nonetheless, in South Africa, a failure to ‘facilitate public participation’ has led to laws being declared unconstitutional on procedural grounds.¹³⁹ To the surprise of many South Africans, this provision, unnoticed when the Constitution was first adopted, has changed the way Parliament behaves. Committee hearings are held on many Bills all over the country giving civil society a constructive way of engaging with laws when they are adopted. Article 118 of the Kenyan Constitution has not come into force yet because, like other provisions relating to the legislature and executive it is suspended until after the next elections. When it does, there is a strong chance that, as in South Africa, the Kenyan law making process will become more accountable.

2.3 Courts

The slogan ‘Why hire a lawyer if you can buy a judge?’ may not have been coined in Kenya but it captures the state of the Kenya judiciary over the past thirty years or so. The problems in the judiciary are well documented.¹⁴⁰ In 2003, a committee established by the newly-appointed Chief Justice, attempted to quantify the level of corruption in the judiciary and estimated that 50 per cent of judges and 30 per cent of magistrates were implicated in corruption.¹⁴¹ Many reports seek to identify the causes of the high levels of corruption. Clearly their findings are speculative but there seems to have been agreement in Kenya that, although a substantial part of the problem lay in the President’s manipulation of judicial appointments and control over the judiciary and the sheer dishonesty of judicial officers, issues relating to the poor terms of service, overload and bad management of the courts contributed to the problem.¹⁴² Constitution-makers were thus concerned with securing a relationship between the judiciary and the other branches of government that controlled executive influence over the judiciary, ensured that corruption in the judiciary could be tackled and allowed institutional arrangements to be put in place that would strengthen the ability of courts to operate properly.

¹³⁹ *Doctors for Life International v Speaker of the National Assembly and Other* 2006 (6) SA 416 (CC) (overturning laws on basis that National Council of Provinces had failed to consult the public properly). See also *Matatiele Municipality and Others v President of the Republic of South Africa and Others* 2007 (6) SA 477 (CC); *Merafong Demarcation Forum and 10 Others v President of the Republic of South Africa and 15 Others* 2008 (5) SA 171 (CC) (upholding constitutional amended on grounds that consultation by provincial legislature was adequate); *Poverty Alleviation Network and Others v President of the Republic of South Africa and Others* 2010 (6) BCLR 520 (CC) (upholding constitutional amendment on grounds that consultation by both provincial and national legislatures had been adequate).

¹⁴⁰ See, for example, *Report of the Advisory Panel of Eminent Commonwealth Judicial Experts* (Nairobi, 2002: Constitution of Kenya Review Commission, May 17, 2002) and many reports of the Commission of Jurists, Kenya branch (‘ICJ-K’). Jan van Zyl Smit, “The Kenyan Judiciary, Corruption, Vetting and Reform: History and Present Challenges”, 2011, provides a good synopsis of the problems facing the judiciary.

¹⁴¹ *Report of the Integrity and Anti-corruption Committee of the Judiciary of Kenya* (Nairobi, Kenya, September 2003), 31, http://www.marsgroupkenya.org/Reports/Government/Ringera_Report.pdf.

¹⁴² *Ibid.*, 13.

Under the new Constitution, judicial independence is protected¹⁴³ and judges (that is judicial officers serving on a superior court) are to be selected by an 11-member, independent Judicial Service Commission (JSC). The Chief Justice chairs the JSC and four other judges are elected to membership of the JSC by their peers. Other members include the Attorney-General, two lawyers chosen by the association of lawyers, a person nominated by the Public Service Commission and two members of the public, nominated by the President and confirmed by the National Assembly.¹⁴⁴ The JSC's choice of Chief Justice and Deputy Chief Justice is subject to confirmation by the National Assembly but in all other cases its choice is final. Judicial tenure is secure until retirement at 70 years of age and a procedure involving the JSC and a tribunal must be followed before a judge may be removed.¹⁴⁵ These provisions end the direct control of the executive over judicial appointments.¹⁴⁶

But the executive also exercised control over the judiciary more indirectly. The many problems related to the operation of the judiciary (bad management, low salaries etc) reflected decades of what seemed to be deliberate underfunding. Thus, the Advisory Panel of Commonwealth Judicial Experts commissioned by the CKRC recommended that the judiciary be able to draw up its own budget and engage directly with the relevant government officials on it. The Constitution implements this recommendation and establishes a Judiciary Fund which is managed by the Chief Registrar of the Judiciary (also a constitutional position). The annual budget for the judiciary is not incorporated into the national budget prepared by the executive but submitted directly to the National Assembly¹⁴⁷ and, as already noted, the Salaries and Remuneration Commission determines judicial salaries. Although this does not allow the judiciary to determine its budget on its own as some members of civil society demanded, it does bring transparency to the process of budgeting and, with a determined and legitimate bench, should lead to significant changes.¹⁴⁸

These new constitutional arrangements bring Kenya into line with international standards concerning the independence of the judiciary but they do not address the existing corruption in the judicial system. So-called 'radical surgery' carried out in 2003 after President Kibaki's election purged the judiciary but it was widely (and validly) criticized on many grounds including for flouting principles of due process and providing inadequate opportunity for participation by people outside the judiciary and executive.¹⁴⁹

¹⁴³ Art 159.

¹⁴⁴ Art 171 and see *Judicial Service Act* 1 of 2011.

¹⁴⁵ Arts 166, 167 and 168.

¹⁴⁶ For previous situation see *Constitution of Kenya*, 1963, Articles 61 and 65(5).

¹⁴⁷ Art 173.

¹⁴⁸ Changes are already apparent. See Irene Ndungu, "Cautious Optimism Over Judicial Reforms," *allAfrica*, February 21, 2012, <http://allafrica.com/stories/201202211501.html>.

¹⁴⁹ Jan van Zyl Smit, "The Kenyan Judiciary, Corruption, Vetting and Reform: History and Present Challenges," (unpublished paper, March 2011) 9 citing International Commission of Jurists, *Kenya: Judicial Independence, Corruption and Reform* (April 2005), <https://www.icj.org/dwn/database/Kenya-JudicialIndpCorruption&reform-April2005report.pdf>.

Nonetheless, despite the problems surrounding the 2003 process and the PSC's resistance, the new Constitution requires Parliament to establish a process to 'vet' all judges and magistrates for their 'suitability'.¹⁵⁰ After much debate, Parliament finally settled on a process run by a tribunal on the model of those set up under the Accord, consisting of six Kenyans (three of whom must be lawyers) and three foreign, Commonwealth judges.¹⁵¹ Section 5 of the Vetting of Judges and Magistrates Act requires the tribunal to 'be guided by the principles and standards of judicial independence, natural justice and international best practice'. Clearly, the process will not be easy and the tribunal will face both political pressure and legal challenges.¹⁵² There is limited international experience to guide it and it faces difficult questions such as the adequacy of evidence against judges and the standard to be applied. Although the vetting process is protected by a constitutional provision that expressly exempts it from the constraints of the provisions on the independence of the judiciary and the protection of the tenure of judges, it is obviously important that due process is scrupulously adhered to, not only because the Constitution and the Act require it but also because, as a process that will be central to the founding of the judiciary under the new constitutional order, it needs to provide an example of how justice should be done.

As noted, provisions requiring judges to be vetted were met with political resistance but they generally secured popular support. On the other hand, the continued inclusion of the Kadhis' Courts in the Constitution was not of particular concern to the politicians but it was one of a handful of issues around which the No campaign rallied and which provoked intense public debate. Among other things, the institutionalization of religious courts was argued to be in direct conflict with the description of Kenya as a secular state and some groups protested that, if Kadhis' courts were to be included, Christian courts should also be recognized. The underlying interests of the leaders of the No campaign were always unclear but it was clear that Kadhis' Courts provided a way to draw support by playing on ethnic and religious prejudice – made easier by the regional and international climate at the time. This itself was one of the reasons that it was important to retain the Courts in the Constitution. Like provisions dealing expressly with children, the youth and other disadvantaged groups, the continued protection of the Kadhis' Courts had a symbolic as well as formal legal role. Provision had been made for the Courts in the 1963 Constitution. Politically, to remove constitutional protection from them would have heightened the sense of victimization and exclusion many Kenyan Muslims feel and added impetus to the secessionist movement in the coast region.¹⁵³ Legally, to remove the Kadhis' courts from the

¹⁵⁰ Sixth Schedule section 23(1).

¹⁵¹ Vetting of Judges and Magistrates Act 2 of 2011 sections 7 and 9.

¹⁵² The first legal challenge to the process (arguing, among other things, that the entire process was unconstitutional for violating internationally recognized principles) was launched before the tribunal was constituted (*Dennis Mogambi Mong'are v Attorney General & 3 Others* [2011] eKLR). The vetting was initially suspended but the ban was lifted in February 2012. See "Appeal Court Lifts Ban on Judges Vetting," *The Standard* (Nairobi, Kenya, February 21, 2012), <http://www.standardmedia.co.ke/InsidePage.php?id=2000052571&cid=4&>.

¹⁵³ Hassan Omar Hassan, "Kenya: Rights Abuses Mobilised Muslim Support for New Laws," *Daily Nation*, August 26, 2010, <http://allafrica.com/stories/201008270374.html>. And see for a discussion of the secessionist movement Rasna Warah, "Pambazuka - It Might Be More Useful to Engage with Secessionists", February 2, 2012, <http://www.pambazuka.org/en/category/features/80353>.

Constitution would have been to go back on an undertaking given at independence by the Kenyan government to the Sultan of Zanzibar to protect them in exchange for control over the coastal strip of Kenya.¹⁵⁴ Accordingly, Chapter 10 of the Constitution lists the Kadhis' Courts presided over by Muslims, as subordinate courts with jurisdiction limited to Muslims who submit to their jurisdiction.

2.3 Devolution: Diffusing power; recognizing diversity

As noted in the introduction, the system of regionalism introduced at independence was intended to diffuse power but it was rapidly dismantled and, instead, the colonial system of provincial and district administration was retained, giving the President control over the entire country through loyal administrators deployed from Nairobi. By 2000 many Kenyans were dissatisfied. Yash Ghai describes the experience of the CKRC:

'Wherever the CKRC went, it noted widespread feeling among the people of alienation from central government because of the concentration of power in the national government, and to a remarkable extent, in the president. They felt marginalised and neglected, deprived of their resources; and victimised for their political or ethnic affiliations. They considered that their problems arose from government policies over which they had no control. Decisions were made at places far away from them. These decisions did not reflect the reality under which they lived, the constraints and privations under which they suffered.... As their poverty deepened, they could see the affluence of others: politicians, senior civil servants, cronies of the regime. They felt that under both presidential regimes, certain ethnic groups had been favoured, and others discriminated against.'¹⁵⁵

In this context, devolution seemed to promise Kenya's many communities more control over their own affairs and it would possibly reduce the salience of ethnicity at the national level.¹⁵⁶

The new Constitution establishes 47 counties. The boundaries are those of administrative districts established under the 1992 Districts and Provinces Act although, since then, the number of districts had increased to over 250.¹⁵⁷ The choice of 47 counties creates units with less capacity than usually associated with regions that form a second tier of government but that are larger than most local governments – they often include a number of towns.

¹⁵⁴ Kadhis' courts have been part of Kenya society since at least the time the Sultan of Zanzibar agreed that the '10 mile coastal strip' could be administered by the British as part of the Kenyan Protectorate in the late 19th century. That agreement included an agreement that the Kadhis' courts would continue to exist. When Kenya received independence from Britain in 1963, a further agreement was concluded, now by the British government, the new Kenyan government and the Sultan of Zanzibar, in which the Kenyan government undertook to preserve the jurisdiction of the Khadis. See Committee of Experts on Constitutional Review, "Final Report of the Committee of Experts on Constitutional Review," 61ff.

¹⁵⁵ Yash Ghai, "Devolution: Restructuring the Kenyan State," *Journal of Eastern African Studies* 2, no. 2 (2008): 215.

¹⁵⁶ *Ibid.*, 9.

¹⁵⁷ Act 5 of 1992.

The institutional arrangements for counties mirror those at the national level. Each county is to have a county assembly and a directly elected Governor who will govern with an executive committee. Neither the Governor nor the members of the executive committee may be members of the county assembly or, for that matter, of the national Parliament. The Governor and assemblies have fixed terms and elections will be held every five years on the same day as national elections.

The division of powers and institutional arrangements regulating the relationship between the national government and the new counties reflect the persistence of fears, first articulated at independence, that regionalism would divide the country. A fully-fledged federal system was not ever contemplated. Instead, drawing on the South African model (which in turn drew heavily from the German system), the Constitution establishes an integrated, cooperative model of devolution that gives relatively little autonomy to the counties and requires ongoing collaboration among governments rather than competition: The national and county governments must respect each others' 'functional and institutional integrity, ... constitutional status and institutions of government'; they must 'assist, support and consult' each other; and must liaise to exchange information, coordinate policies and information, and enhance capacity.¹⁵⁸

The constitutional commitment to interdependent rather than divided government is equally clear in the way in which powers are allocated. Following a traditional pattern, Schedule 4 sets out the distribution of functions between the national and county governments in two separate lists. But the matters on the county list give counties relatively limited powers. They include matters usually allocated to local governments, such as animal control, primary health care, the licensing of businesses, water and sanitation services etc as well as certain matters more often associated with a middle tier of government such as roads, county planning and agriculture. But, the authority of counties over the more significant matters in the county list is circumscribed by the fact that, in many instances, the national list gives the national government control over policy. Thus, while county health services are a county matter, health policy is a national matter. Similarly, agriculture and housing are allocated to counties, but agricultural policy and housing policy are national matters. Moreover, with one exception, the national government is given legislative authority over all matters. The exception is the counties' power to tax. In other words, the only exclusive county power is their very limited power to impose taxes, discussed below. All other county powers are concurrent.¹⁵⁹

The national legislative power is constrained in two ways: Article 189 (Cooperation between the national and county governments) demands that each level of government respects the integrity of the other; and Article 191 (Conflict of laws) states that when a county and national law conflict, the county law prevails unless the national law fulfils certain conditions set out in the Article (for example setting uniform national standards, necessary for national security, economic unity etc). When a county law prevails over national legislation, the national legislation will remain in force in counties where there is not a conflict and would 'revive' if the county law were repealed.

¹⁵⁸ Art 189(1).

¹⁵⁹ Art 186. The taxing power of counties is in Art 209(3).

These arrangements mean that the system may be one (like South Africa) under which much (if not most) legislation emanates from the national Parliament and the main role of counties will be to implement national laws.

As in Germany and South Africa, compensation for the likely dominance of national laws in the counties is provided by giving the counties a collective role in the national Parliament. However, unlike Germany and South Africa, it is not county executives or legislatures that are represented in the Senate. Instead, on the modern American model, one Senator is directly elected by the voters in each county. The direct elections are intended to avoid the corruption that Kenyans believe inevitable in a process through which county governments chose their representatives to the Senate but this arrangement makes the link between the county governments and the national government very weak and it is not clear what incentives Senators will have to advance the interests of county governments, to facilitate cooperation between county governments and the national level or to ensure that county interests are reflected in the national laws that they will be required to implement.

The Senate's role is largely limited to county matters. It considers only amendments to the Constitution¹⁶⁰ and Bills that 'concern county government'¹⁶¹ (these are Bills on matters listed in the county list in Schedule 4, county financial matters and county elections).¹⁶² Usually, if the two Houses disagree on a Bill, it goes to a mediation committee which is mandated to propose a version that will satisfy both Houses. If agreement cannot be reached, the Bill lapses.¹⁶³ Two types of Bill are treated differently: Bills concerning county elections and the annual Bill dividing the county share of national revenue among the counties. Once approved by the Senate, the National Assembly requires a two-thirds majority to amend or veto such a Bill.¹⁶⁴

Despite the control the Senate has over electoral laws and the division of revenue among the counties, the national government clearly has considerable legislative power over counties. The dominant position of the national government extends into the financial arena as well. The revenue raising power of counties is limited to property taxes (rates on property), entertainment taxes,¹⁶⁵ the imposition of user charges for services,¹⁶⁶ and certain licensing powers (for trading, liquor and food).¹⁶⁷ In essence, the

¹⁶⁰ Art 256.

¹⁶¹ Art 109.

¹⁶² As occurred in South Africa in the mid-1990s, there is likely to be contestation about what Bills concern counties. See for a very wide interpretation Task Force on Devolved Government, *Final Report of the Task Force on Devolved Government* (Office of the Deputy Prime Minister and Ministry of Local Government, Nairobi, Kenya, 2011), 18.

¹⁶³ Art 113.

¹⁶⁴ Arts 110 and 111.

¹⁶⁵ Art 209(3).

¹⁶⁶ Art 209.

national government has a virtual monopoly of revenue raising power and county interests are protected by a constitutional entitlement to a share of the national revenue through a system of fiscal equalization: there is a single pool of revenue from which the national government and counties are entitled to an 'equitable share'; collectively the counties are entitled to at least 15 per cent 'of all revenue collected by the national government'.¹⁶⁸ The distribution – both horizontally between the two levels of government and vertically among the 47 counties – must take into account a wide variety of criteria, including the national interest and the needs of the national government, the ability of the provinces to perform their tasks, and the need to combat economic disparities. The independent Commission on Revenue Allocation (CRA) makes recommendations on the distribution of revenue¹⁶⁹ and both the National Assembly and the Senate must approve the Bill dividing the revenue between the two levels of government. The division of the counties' share of the revenue among the counties is in the hands of the Senate, as mentioned above, but, the decision is usually to be made only every five years when the Senate, determines 'the basis' for allocating the share allocated to the county level among the counties.¹⁷⁰

Overall, then, the formal powers of the new counties are relatively limited. Nonetheless, expectations are high that devolution will serve to curb the excesses of centralized executive power of the past, ease ethnic tensions and correct Kenya's distorted distribution of wealth, bringing development to undeveloped parts of the country.¹⁷¹ The political attention that is being paid to the legislation necessary to establish the new system and the interest that many politicians have shown in standing for the position of governor indicate that the goal of dispersing power might be realized.

The likely impact of devolution on ethnic politics is more difficult to gauge. The county system promises to reconfigure politics, both by offering new arenas of political contestation and by breaking up the regionally-based ethnic powerbases. However, inevitably the territorial divisions raise new challenges. For instance, many counties are composed of a dominant tribal group and some smaller groups, a matter of considerable concern to the smaller groups.¹⁷² Attempting to address this concern at county level, the Constitution expects county assemblies to represent all members of the county. Art 197(2) says: 'Parliament shall enact legislation toensure that the community and cultural diversity of a county is reflected in its county assembly and county executive committee'. But minority

¹⁶⁷ Schedule 4.

¹⁶⁸ Art 202 and 203.

¹⁶⁹ Art 216.

¹⁷⁰ Art 217.

¹⁷¹ See, for example, Task Force on Devolved Government, *Final Report of the Task Force on Devolved Government*, 14.

¹⁷² See, for instance, AhmednasirAbdullahi, "Do Not Turn Counties into Incubators of National Hatred," *Nairobi Law Monthly*, October 2011, http://www.nairobilawmonthly.com/index/cms/modules/frontpage/php/fullview_content.php?mode=0&multi=0&type=0&pos=0&limit=0&id=118&.

representation in an assembly is unlikely to allay the concerns of tribes or subtribes that feel vulnerable, especially if they live in an area with district status in the past. The formal constitutional answer to these concerns lies in the Bill of Rights which is enforced by the nationally run court system. The practical answer is for the national government to ensure that resources and services are indeed fairly distributed using the considerable legislative and executive powers that the Constitution gives it over county government.

How quickly devolution can lead to a better distribution of resources and development is not clear. The World Bank's December 2011 *Kenya Economic Update* movingly cites Kenyans who believe that the Constitution, in general, and devolution, in particular, will change their lives, bringing development and a more equitable distribution of wealth.¹⁷³ But, the Bank also describes considerable challenges that Kenya faces in implementing the system. In addition to the concerns mentioned above, the Bank notes that corruption will not necessarily be reduced under governments elected more locally and that the management of national priorities will become more difficult. Secondly, Kenya's particular constitutional arrangements raise challenges: devolution is being undertaken at speed – the first elections for the new county governments are to coincide with the national elections which will be held in 2013; it involves both the devolution of national functions to the counties and the consolidation of functions of many smaller local governments in the new county governments; many new counties have very limited capacity; and so on. Thirdly, the national politicians and bureaucrats who are responsible for putting the system in place have some fundamental disagreements about how it should be done, most of which are a complex mix of genuine administrative concerns and more self-interested or historically-based political concerns.

Transitional provisions in the Constitution anticipated some of the short-term problems of implementing the system. It requires the process of devolution to be managed under an Act of Parliament and to be 'phased', based on the capacity of the new governments. It also assumes an asymmetrical devolution of functions. But, in yet another reflection of mistrust of the executive, two special bodies are set up to monitor the transition. They are discussed below.

2.4 Transitional provisions: the beginning of the really difficult part

The third contentious issue identified by the CoE under the Review Act was the way in which the transition to a new constitutional order would be managed. This had two aspects: the political transition, in other words the change of government and legislature, and the reform of the judiciary, both of which are discussed above. But, clearly, transitional arrangements in a constitution like the new Kenyan Constitution are important in other ways too. They must provide a legal bridge from the old constitutional order to the new, and must usually preserve existing law and institutions. When new laws are needed, new institutions established and new expectations placed on existing institutions and offices, transitional provisions must provide for the way in which, and when, the new takes over from the old.

¹⁷³ World Bank, *Navigating the Storm, Delivering the Promise with a Special Focus on Kenya's Momentous Devolution*, Kenya Economic Update, December 2011, 22, http://siteresources.worldbank.org/KENYAEXTN/Resources/KEU-Dec_2011_Full_Report.pdf.

These arrangements are found in Chapter 18 and Schedules 5 and 6 of the new Kenyan Constitution. Article 261 answers the difficult question ‘How can Parliament’s constitutional obligation to pass laws be enforced?’ Its answer is that, ultimately, the Chief Justice can require Parliament to be dissolved if the laws are not passed. Schedules 5 and 6 set out more detailed arrangements for the transition. Schedule 5 provides a time table for the enactment of laws necessary for the full implementation of the Constitution and, in addition to formal provisions ensuring legal continuity, Schedule 6 sets up institutions and procedures for implementing the Constitution and deals with the technical matters related to establishing new institutions and so on. However, despite the apparently technical nature of much of Schedule 6, the process of implementation raises many political and policy questions. As discussed below, nowhere is this clearer than in the process of putting the new system of devolved government in place.

Reflecting continuing distrust in elected politicians and the bureaucracy, two bodies are allocated the function of overseeing the implementation of the Constitution: a select committee of the National Assembly (the Constitutional Implementation Oversight Committee (CIOC)) and an independent Commission for the Implementation of the Constitution (CIC).¹⁷⁴ The nine-member CIC has a difficult job, compounded by a lack of clarity in the relationships between it and other institutions involved in the transition (the government, Parliament, the CIOC, the Attorney-General and the Law Reform Commission, among others), the tight timelines within which the new order must be established and the fact that often there is underlying political disagreement about the new constitutional arrangements.¹⁷⁵ The starkest examples of the latter are a dispute about the date of the first elections under the new Constitution¹⁷⁶ and the process of establishing the county governments. In the case of devolution, longstanding differences on what degree of devolution is appropriate and how much responsibility the national government can exercise over the new counties are central to the implementation disputes and the divided nature of the coalition government makes it difficult to reach agreement within government.¹⁷⁷ Discussion about devolution is frequently acrimonious with accusations by the CIC that

¹⁷⁴ Sixth Schedule sections 4 and 5.

¹⁷⁵ For the CIC’s discussion of the challenges see Commission for the Implementation of the Constitution, *4th Quarterly Report* (Nairobi, Kenya, January 2012) Chapter 3 “One Year On: Lessons Learnt, Emerging Issues, Challenges And Impediments” p 49ff.

¹⁷⁶ *John Harun Mwau v Attorney General* [2012] eKLR.

¹⁷⁷ The lines are fairly clear: The Ministry of Finance, headed by Uhuru Kenyatta, a member of President Kibaki’s Party of National Unity, is at best cautious about devolution. The Ministry of Local Government, headed by Musalia Mudavadi, a member of Prime Minister Odinga’s Orange Democratic Movement, is much more enthusiastic.

the government is by-passing it and is deliberately blocking change¹⁷⁸ and a dispute between the Attorney-General and the CIC that became so intense that Parliament intervened to settle it.¹⁷⁹

Nonetheless, an enormous amount was achieved in a short time. The 4th *Quarterly Report* of the CIC, compiled just 15 months after the Constitution was promulgated, states that 19 Acts had been adopted and a further 23 were in the pipeline.¹⁸⁰ A number of the completed Acts were relatively straightforward but a number, like the Urban Areas and Cities Act,¹⁸¹ were technically difficult and politically contentious.

3 Conclusion

The Constitution promulgated on 27 August 2010 is not anyone's perfect document. For those who had struggled against Moi's regime, it changes too little. For the governing elite and its supporters, it changes too much. It also leaves considerable space for institutions and their relationships with one another to develop. The courts might be cautious or ambitious; the executive may or may not respect them; Parliament may develop its oversight role energetically or MPs may act opportunistically; the counties might assert authority or be subordinated to the national government, they may be honest and drive development or simply an exercise in decentralizing the problems currently experienced at the national level and so on. More likely, the new system will be a bit of all these things.

The Constitution is being implemented in an environment of uncertainty and change. The political landscape has been changed fundamentally by the new political configuration created by the establishment of county governments and by the International Criminal Court proceedings against four prominent Kenyans. But, there is little indication that the salience of ethnicity in politics has been reduced. Indeed the ICC indictments may further strengthen ethnically based loyalties. The economic climate is uncertain too. After a spurt of strong growth after Kibaki's election in 2002, Kenya experienced a serious devaluation of the Kenyan shilling and high inflation, compounding the effects of rising economic inequality. More recently, the security situation deteriorated and the Kenyan army was deployed to Somalia in an attempt to contain the terrorist group, Al Shabaab, stretching the country's resources and deepening people's sense of insecurity.

¹⁷⁸ See, for example, Alphonse Shiundu, "House and Executive Clash over County Law," *Daily Nation* (Nairobi, Kenya, February 28, 2012) and Goeffrey Irungu, "CIC Faults Plan to Alter Deadline for Enacting Key Bills," *Daily Nation* (Nairobi, Kenya, February 23, 2012), <http://allafrica.com.ezproxy.uct.ac.za/stories/201202240049.html>.

¹⁷⁹ See, for example, Maxwell Masava, "Don't Supervise Me, Githu Tells Nyachae," *Nairobi Star* (Nairobi, Kenya, December 24, 2011), <http://allafrica.com.ezproxy.uct.ac.za/stories/201112270191.html> and George Murage, "Githu, Nyachae Agree to End War of Words," *Nairobi Star* (Nairobi, Kenya, January 2012), <http://allafrica.com.ezproxy.uct.ac.za/stories/201201130272.html>.

¹⁸⁰ Commission for the Implementation of the Constitution, *4th Quarterly Report*, 62.

¹⁸¹ Act 13 of 2011.

But the tale of the determination of Kenyans in pursuing constitutional change may give some indications of the future. It is a tale of the astonishing persistence and commitment of democrats in Kenya and the energy with which Kenyans have monitored the implementation of the Constitution in the first year after its promulgation suggests that that determination has not abated and that many Kenyans will use the Constitution as a basis on which to build a strong democratic order.