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**INTERIM REPORT OF THE WORKING GROUP ON
SOCIO-ECONOMIC AUDIT OF THE CONSTITUTION OF
KENYA 2010**

MAY 2015

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List of abbreviations

CIC	Commission for the Implementation of the Constitution
CIOC	Constitutional Implementation Oversight Committee
CRA	Commission on Revenue Allocation
WG	Working Group
BAC	Budget and Appropriations Committee
CKRC	Constitution of Kenya Review
CoE	Committee of Experts
KANU	Kenya African National Union
KADU	Kenya African Democratic Union
KPU	Kenya Peoples' Union
CARB	County Allocation of Revenue Bill
DORB	Division of Revenue Bill
CDF	Constituency Development Fund
JSC	Judicial Service Commission
LSK	Law Society of Kenya
NLC	National Land Commission
CoB	Controller of Budget
CARPS	Capacity Assessment and Rationalisation of the Public Services
GDP	Gross Domestic Product
NSC	National Security Council
NSAC	National Security Advisory Council
KNHREC	Kenya National Human Rights and Equality Commission
CAJ	Commission on Administrative Justice
NGEC	National Gender and Equality Commission
TSC	Teachers Service Commission
MoE	Ministry of Education
MLHUD	Ministry of Lands, Housing and Urban Development
CORD	Coalition for Reforms and Democracy
EACC	Ethics and Anti-Corruption Commission
JSC	Judicial Service Commission
NCOP	National Council of provinces

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Foreword

On 26th February 2014 the National Assembly, through a resolution of the House established a Working Group (WG) to carry out a Socio-Economic Audit of the Constitution of Kenya 2010 under the auspices of the Auditor General. The team was subsequently gazetted on 15th August 2014 and commenced its work soon after.

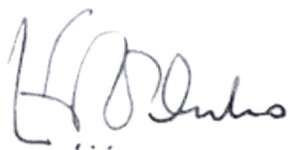
The Terms of Reference for the Working Group (WG) was to:

- Assess the impact of the implementation of the Constitution to the Nation's economy and in particular its public finances;
- Make a rapid assessment of the impact of the implementation of the Constitution on public institutions;
- Evaluate the social impact resulting from the implementation of the Constitution;
- Make recommendations to the National Assembly on potential measures that could enhance prudent management of the country's public resources;
- Investigate, determine and advise on any matter related to, relevant, consequential or incidental to the foregoing; and
- Consult as necessary the National Assembly through the Budget and Appropriations Committee.

Consequently, the WG reviewed existing documentation and held meetings and consultations with various stakeholders. The WG also received and reviewed memoranda from some stakeholders. Among the stakeholders consulted were experts involved in review of the constitution, senior officials in the Judiciary, National Assembly, National Executive, Independent Institutions, County Governments, leaders of political parties, professional societies among other stakeholders.

Though the WG committed itself to the work, despite initial financial challenges, and has produced this interim report.

A few steps remain before production of the final report. The WG will carry out further stakeholder consultation including a public consultation exercise in order to get public views regarding the Terms of Reference. These views will inform the final report. Much has gone into the exercise and I pay gratitude to the Budget and Appropriations Committee for their support in coming up with this report. I also thank members of the Working Group and the Secretariat for their commitment and hard work during the exercise. I count on you as we embark on the second phase of this exercise.



Edward Ouko, CBS

Chairman, Working Group on Socio-Economic Audit of the Constitution.

CHAPTER ONE

INTRODUCTION

1.1 Background

Kenya adopted a new Constitution in August 2010 which introduced fundamental changes to its state and governance structures. At the heart of the constitutional change was the desire to restore sovereignty to the people by identifying them as the basis of all state and public power. The spirit of these changes is reflected in the national values and aspirations that are identified in the Constitution as including: the rule of law, democracy and participation of the people, human dignity, equity, social justice, sharing and devolution of power, good governance, integrity, transparency, and sustainable development.

The aspirations and values have led to wide-ranging changes to state structures and governance systems. Executive powers that were previously concentrated in the Office of the President have been substantially reduced and the remaining power subjected to checks and balances. As a result, there is clearer separation of power among the arms and levels of government for greater accountability. A Bill of Rights incorporating civil, political, economic, social and cultural rights has been put in place to guarantee fundamental rights and freedoms. State resources have also been protected through a constitutional framework that espouses the principles of equity, affirmative action, redistribution, transparency, prudence and discipline in the use of state resources.

Significant time, effort and resources have been spent to transition from the previous Constitution to the current one over a period of almost five years since the new Constitution came into operation. However, because implementing the Constitution is a process that takes time some of the constitutional ideals, systems and structures envisaged will take time to be fully realised; a fact not lost on the drafters of the Constitution who suspended the operationalisation of some of the key provisions in order to allow for a smooth transition.

The Constitution provided timelines within which enabling legislations and legal frameworks were to be put in place¹. The timelines were to ensure that the will of the people, as expressed in the Constitution, is implemented with certainty. The Constitution and enabling legislation also provided for the establishment of institutions and bodies such as the Constitutional Implementation Oversight Committee (CIOC), Commission on Implementation of the Constitution (CIC), Commission on Revenue Allocation (CRA), Transition Authority (TA) among others to facilitate transition.

Most of the laws and institutions envisaged in the Constitution have been established at the national and county levels and public institutions have undergone or are currently undergoing restructuring and reorganisation in order to accord with the Constitution. Administrative and institutional arrangements have also been put in place and resources committed to support the new systems and structures.

Whereas all the actual benefits of the new constitutional dispensation may take time to be realised, emerging challenges and opportunities provide a basis for a preliminary assessment of the impact of the new Constitution. With this in mind, the National Assembly, through the Budget and Appropriations Committee made the decision to commission a socio economic audit of the Constitution with a view to enriching the benefits to be reaped from the new dispensation. The Audit was to be guided by the stated constitutional objectives which provide the general guidance and direction for the process of implementation and these form an appropriate yardstick against which the emerging challenges and opportunities can be assessed.

¹ Fifth schedule to the Constitution

1.2 Terms of Reference for Audit

The National Assembly, through a resolution of the House made on 26th February 2014, established a Working Group (WG) to carry out a Socio-Economic Audit of the Constitution of Kenya 2010 under the auspices of the Auditor General. The Terms of Reference for the audit required the WG to:

- Assess the impact of the implementation of the Constitution to the Nation's economy and in particular its public finances;
- Make a rapid assessment of the impact of the implementation of the Constitution on public institutions;
- Evaluate the social impact resulting from the implementation of the Constitution;
- Make recommendations to the National Assembly on potential measures that could enhance prudent management of the country's public resources;
- Investigate, determine and advise on any matter related to, relevant, consequential or incidental to the foregoing; and
- Consult as necessary the National Assembly through the Budget and Appropriations Committee.

Full Terms of Reference for the audit are contained in Appendix 1.

1.3 Methodology and approach

Audit framework

The audit was carried out by reference to guidance contained in International Standards on Auditing². Those standards require among other provisions that the auditor shall:

- Obtain a full understanding of the requirements of the audit and agree on the terms of engagement with the client;
- Apply procedures to ensure the highest quality of audit report. Those procedures include but are not limited to planning, resourcing, organizing and managing the work;
- Identify risks to the assignment and perform audit work to respond to those risks. Risks refer to factors that prevent the auditor from achieving objectives of the audit, i.e, responding to the Terms of Reference;
- Obtain and document sufficient and reliable evidence to support audit conclusions.

² International Standards on Auditing (2012 edition)

Affirmation of Terms of Reference and key audit questions

To obtain a better understanding of the objectives of the audit, the WG held consultative meetings with the Budget and Appropriations Committee (BAC), a committee of the National Assembly mandated to facilitate the audit. As a result of those consultations, the WG and BAC agreed upon an interpretation of the Terms of Reference that was framed in terms of the following key questions:

- What were the wishes and aspirations of Kenyans that informed the calls for a new constitution?
- Did the Constitution document respond to those wishes and aspirations?
- What are the social, political and economic impacts of implementing the Constitution? Are these consistent with the objectives that the Constitution set out to achieve?
- Specifically, what has been the impact of implementing the Constitution on the national economy (public finances) and public institutions?

Framing the audit questions in this way helped to build consensus around the parameters that were used to assess the impact of the Constitution as required in the Terms of Reference. In sum, the impact of the Constitution was assessed by reference to what informed Kenyans' quest for a new constitutional order.

Detailed Audit Approach

A secretariat was set up at the Auditor General's office to support the operations of WG. Early in the audit, a review was conducted to assess available expertise and determine how gaps, if any, were to be filled. As a result, two approaches were adopted to ensure that sufficient relevant expertise was deployed on the audit. First, senior experts in various fields were hired on short term contracts to supplement day to day capacity of WG members. Second, a panel of senior experts was set up to perform a peer review of the report prior to its finalization. The list of experts and peer reviewers is at Appendix 2.

Audit work comprised of two main tasks; that is, review of existing documentation and meetings and consultations with various stakeholders. Matters arising were recorded, collated and documented in the audit report.

With respect to review of existing documentation, extensive literature already exists which is relevant to the audit. This includes but is not limited to the Constitution of Kenya 2010, reports on constitutional review processes, drafts of constitutions prepared during prior review processes and reports prepared by various public institutions involved in implementing the constitution. The WG also received and reviewed memoranda from some stakeholders. Among the stakeholders consulted were experts involved in review of the constitution, senior officials in the Judiciary, National Assembly, National Executive, Independent Institutions, County Governments and leaders of political parties. The list of stakeholders consulted is at Appendix 3 of this report.

At this interim stage of the audit, stakeholder consultations have not been completed and the WG intends to carry out further consultations. Public views informed the process of constitutional review and the final document. The public is thus a key stakeholder in the audit process. Besides, the principle of public participation in this audit is an imperative as views gathered will be important in assessing the social, political, and economic impacts of the

Constitution. Accordingly, the WG has developed a strategy for public consultation which aims to achieve an acceptable threshold in order to ensure that adequate public input has gone into the final report.

This Report

This report presents the interim audit findings of the WG. This first chapter includes the introduction and discusses the mandate of the WG as well as the methodology and approach to the audit. The second chapter analyses the objectives of the constitutional review processes and answers to the question: "Why did Kenyans want a new Constitution?" The third chapter summarizes the nexus between Kenyans' wishes and the text of the Constitution. The rest of the chapters up to chapter eleven present preliminary audit findings on impact of the constitution.

Considerations in Interpretation of the Report

Kenya today is in transition not only with respect to the institutions and systems created by the Constitution but also the movement from the old constitutional order to the new. The uncertainty, conflicts and tensions characterising the implementation process point to the fact that the transition is not only about institutions but also transformation of our society. The transition therefore requires changes in attitudes, values, practices and mind sets in order to realize the objectives of the Constitution. Development of a new constitutional culture will also depend on whether there is genuine, collective and deliberate effort to transition to the new order.

The new constitutional dispensation seeks to transform a system that has been built over time and as experience has shown, change breeds resistance. Thus, current tensions, conflicts, and mistrust between the two levels of government and among public institutions are not unexpected. However, beyond narrow interests that could be informing tensions, there is a lack of common understanding of and clarity on some of the provisions of the new Constitution. Many aspects of implementation have no clear answers and this has led to contested meanings of the content.

The Constitution was implemented as part of the measures to address the root causes of violence and perennial tensions that are witnessed in the country. During the constitutional review process, various factors and competing interests influenced the pace and nature of the review and ultimately the content of the Constitution. Some provisions in the Constitution were the product of negotiations among politicians whose interests were at variance with documented views of the majority of Kenyans. Of more concern is the fact that some of the provisions that were negotiated and incorporated into the Constitution were not fully considered during the review process. As a result, some of the challenges of implementation emanate from the manner in which aspects of the review process were carried out.

Even with the desired political will to implement the new Constitution, the complexity involved in building institutions will pose a challenge and the changes in institutions and systems of governance introduced by the Constitution will take time to be fully effective. This audit is taking place at the initial phase of the implementation of the Constitution while the transition period is still running; roles are being clarified and many institutions are yet to operate at full capacity.

On the one hand, the above mentioned challenges are inevitable in the transition towards the new constitutional dispensation; on the other, because they stem from internal weaknesses of the Constitution and the implementation process, views have been that the implementation process can be made more effective by changing the Constitution or the approach to its implementation.

The audit examines the emerging impacts from implementing the Constitution and identifies possible lessons and recommendations to ensure more effectiveness of the new order.

CHAPTER TWO

WHY KENYANS WANTED A NEW CONSTITUTION

2.1 Introduction

The Constitution of Kenya 2010 was adopted as part of the long-term measures to address the root causes of the post-election violence witnessed in the country in 2007. However, the debate on and process of constitutional reform dates further back.

The Independence Constitution was negotiated between the emerging Kenyan African politicians and the colonial government and adopted under the stewardship of the departing British colonial government. Ordinary Kenyans did not play a significant role in the development of the Independence Constitution. Systematic amendments to the Constitution soon after independence served to further alienate the people from governance and consolidate state power and resources in the ruling elite. These events led to a growing resentment of the *status quo* and laid the basis for demands for constitutional reforms and overhaul of the state structure and governance system. The common aspiration was to have a constitutional system where the will of the people was the basis of authority and exercise of public power.

Throughout the constitutional review process, spanning over two decades, the various bodies in charge of the reviews documented, in great detail, the views and aspirations of Kenyans and how those views were reduced into various constitutional drafts. Accordingly, this audit relied on the reports and other documentation that emerged from those reviews. The reports of the Constitution of Kenya Review Commission (CKRC), the Committee of Experts (CoE) and other institutions and individuals who were engaged in recent constitutional reviews provided the most authoritative reference.

2.2 The historical context

Kenya's state structure and formal systems of governance are traceable to the onset of colonial rule. Although Kenya gained independence and full statehood in 1963, there was little change to the nature of state and governance structures. The main difference was that instead of the Governor General or Native Commissioner, Kenya had African leaders at the helm. Further, a review of Kenya's political and governance history throughout colonial and post-colonial rule reveals that state and governance structures were alienated from the people. The consistent desire to restore people's sovereignty informed all the pre and post-independence struggles to bring independence or reforms.

Colonial Rule and the March to Independence

The area that currently forms Kenya's territory was consolidated and brought under formal governance systems and structures through colonial rule. However, the colonial project was intended to serve the imperial (mainly economic) interests of the colonial power in which the objective of political and governance structures was to consolidate the territory and create conditions favourable to the pursuit of imperial interests. In these circumstances, as Ghai and McAuslan explain, the peoples' choices were not paramount.³

The colonial system of governance was centralised and hierarchical with the ultimate power of the territory vested in the Colonial Secretary in London. The Commissioner of the Protectorate (and later Governor General) exercised unfettered governmental power over the territory with

³ See Yash Pal Ghai & Patrick McAuslan *Public law and Political Change in Kenya* (1970) pp. 3-125 for a detailed discussion of the consolidation of the Kenyan territory by the British.

his rule only subject to the State Secretaries in charge of colonies in London. This colonial system left a legacy that endured through independence and into the post-independence Kenyan state. The most prominent manifestation of this legacy was the dominance of the executive organ of power over all other spheres of governance and public life.

Independence Period: Towards an All-Powerful Presidency

The Independence Constitution provided for a semi-federal system of government (popularly known as *Majimbo*) composed of 8 Regions and the Central Government; and a Senate to represent districts and protect and promote regional interests at the national level. With regard to the structure of the national executive and the national legislature, the Constitution created a Dominion Republic with the Queen of England as the Head of State, represented by the Governor General. The executive and legislative structures were modelled along the Westminster system with the Prime Minister as Head of Government and a Member of Parliament.

The two major parties: the Kenya African National Union (KANU) mainly composed of the Kikuyu and Luo, and the Kenya African Democratic Union (KADU) composed of smaller ethnic communities held differing views motivated by ethno-political considerations but justified as necessary for development and national unity in the political rhetoric of the leaders. KANU favoured a strong centralised system of government with an emphasis on protection of individual rights while KADU wanted a regional system of government that was adopted in the Independence Constitution (with some amendments). While KADU's proposals found their way into the Independence Constitution, KANU won the independence elections which were widely touted as a referendum over Regions. The victory of KANU in the independence elections was interpreted as a rejection of regionalism.

Amendments to the Independence Constitution by KANU (see Appendix 4 for chronology of amendments) gradually weakened the Regions, eventually abolishing them in 1968 and secondly, created a presidency with unchecked powers and control over all public institutions. The amendments achieved this by fusing the functions of Head of State and Head of Government functions that were separated in the Independence Constitution.

The ascendancy of presidential power led to a series of events which diminished democratic space, undermined other arms of government, led to patronage and misuse of resources, enhanced ethnic-based exclusion and led to inefficiency and decay of public institutions. These issues formed the basis for popular pressure to restore the peoples' sovereignty.

First was the closure of political space. After KADU was dissolved in November 1964, there was no formal political opposition. The systems and structures that were used for colonial control and repression such as laws, administrative machinery and security structures were used to crack down on political dissent. Accordingly, the President and the ruling party consolidated political power and left little space for political expression.

Second, presidential power was consolidated through subordination of other arms of government and critical public institutions to the President. As Head of State and Government, the President had control over the programme and activities of Parliament and virtually all appointments in the Judiciary. Further control was exerted by removal of security of tenure for public officers and a constitutional provision that expressly stated that the every public office holder served at the pleasure of the President.⁴

Third, personal rule of the President required resources to maintain the political networks and political patronage, and state and public resources became the inevitable target. This was achieved through using resources for political patronage or allowing individuals to "cannibalise"

⁴ Section 24 of the former Constitution, for instance, explicitly provided that "... every person who holds office in the service of the Republic of Kenya shall hold such office during the pleasure of the president"

state resources without consequence. A large number of financial and public scandals have been witnessed through successive regimes without punishment of the offenders.⁵

Fourth, presidential power was used through successive regimes to exclude and marginalise people on the basis of ethno-geographic considerations. State resources and opportunities were disproportionately directed to the home regions of successive Presidents in what has been described as "rigged development".⁶ This is confirmed by statistics that show ethnically skewed policies in development spending, appointments and other state-facilitated advantages.⁷

As a result of the ascendancy of presidential power after independence, many problems faced by Kenyans could be traced to the nature and extent of presidential power. Corruption led to a crisis in institutions meant to offer public services and thus affecting livelihoods, ethnically instigated political violence disrupted livelihoods, and land injustices led to deprivation of livelihoods and ways of life for communities who relied on land and land-based resources.⁸

2.3 Why Kenyans Wanted a New Constitutional Dispensation

Kenyans' desire for a new constitutional dispensation can be traced back to the effects of concentrating power in the presidency without attendant checks and balances.

Free Exercise of Democratic Will

KADU, the only opposition party immediately after independence, was weakened and finally wound up in November 1964. Institutions such as the Provincial Administration and the Police, inherited from the colonial government, were subsequently used to intimidate and harass individuals perceived to be dissidents and/or from opposition areas of the country.

In 1966 Kenya Peoples Union (KPU) was formed but banned in 1969 and its leaders detained. No other political party was formed for more than two decades thereafter. Political repression and unresolved murders were commonplace.⁹ In 1982, political dissidents attempted to register a political party and this prompted the Government to sponsor a constitutional amendment on 9 June 1982 that introduced the infamous Section 2A entrenching KANU as the only political party. The attempted coup of 1 August 1982 led to more repressive practices by the Government.¹⁰

Elections became rituals as opposed to a channel through which the democratic voice of the people could be heard. After the Section 2A amendment, anyone who fell out with KANU could not run for elective office. Party discipline was ruthlessly enforced and sometimes used to victimise targeted politicians. The repressive measures taken by the Government triggered popular dissent led by religious groups, opposition politicians, and civil society. The domestic and international pressure led the Government to repeal Section 2A in 1991 to pave way for multi-party elections in 1992.

⁵ Martini M 'Kenya: overview of corruption and anti-corruption' (U4 Expert Answer: Transparency International, Anti-corruption Resource Centre & CHR Michelsen Institute, 18 October 2012)

⁶ Phrase used by researchers Duncan Okello and Kwame Owino, quoted by Mutunga CJ in *Senate v National Assembly* [2014] eKLR at para. 168.

⁷ Chege M and Barkan JD 'District focus and the politics of reallocation in Kenya' (1989) 27 (3) *The Journal of Modern African Studies* 431-453

⁸ Kanyinga K 'The legacy of the White Highlands: Land rights, ethnicity and the post-2007 elections violence in Kenya' (2009) 3 *Journal of Contemporary African Studies* 327-344

⁹ Unresolved murders include those of Pio Gama Pinto (25 February 1965), Tom Mboya (5 July 1969), JM Kariuki (2 March 1975), Dr. Robert Ouko (12 February 1990) among others.

¹⁰ Ogot BA 'The Politics of populism' in Ogot BA & Ochieng WR (eds) *Decolonization and Independence in Kenya (1940-93)* (1995b) Eastern Africa series Athens: Ohio University Press 187-213

Curiously, introduction of multi-party politics coincided with the escalation of politically instigated ethnic violence. While ethnic conflict was not a new phenomenon in Kenya,¹¹ presidential elections after 1991 triggered deadly ethnic clashes in the Rift Valley and Coast Regions which were perceived as KANU strongholds. The political objective behind the clashes was said to be intimidation of communities perceived as opposition supporters. As it turned out, the displacements during the voting period disenfranchised voters. Local Authorities, the only local democratic voice of the people, were also subordinated to the Central Government and starved of resources, which rendered them incapable of representing and serving the people.

From these experiences, it became clear that multiparty politics, without broader political reform, was no guarantee for democratic space. The state had invented ways to subvert democratic will even within the context of multi-party politics. Kenyans wanted institutions through which repressive laws and practices were meted out such as the Provincial Administration either abolished or reformed and the Police Force turned into a Service for the people.

Strong, Independent, Accountable Government Organs and Public Institutions

Public institutions and arms government that played the role of checking executive and presidential power were targeted and systematically weakened. In 1986, a constitutional amendment removed the security of tenure for judges of the High Court and Court of Appeal.¹² During this period, the Judiciary was subordinated to the President and could not play its role of checking the exercise of presidential power.

In the absence of effective checks on the power of the executive, abuse of power and pilferage of public resources became rampant. Furthermore, recruitment into the Public Service was seen to be skewed to favour people from the president's ethnic community, thus enhancing exclusion.¹³

Kenyans wanted an *independent Judiciary* capable of exercising checks on other arms of Government and a *Parliament that was independent from the Executive* and which independently controlled its calendar and activities. Along with these institutional reforms, Kenyans wanted *political parties that reflected the diversity of the Kenyan people* and which promoted a political culture of democratic inclusion. Kenyans also wanted *reforms to the electoral process* and system to ensure a fair, competent, and transparent management of elections.

Measures Against Corruption, Political Patronage and Misuse of Public Resources

Through successive post-independence regimes Kenyans have witnessed mega financial scandals that have resulted to heavy losses to the public. Public procurement processes were replete with corruption to a level where it was once reported that almost one third of earmarked government expenditure was lost through corrupt public procurement deals. cite source as footnote However, individuals responsible for these public scandals have gone unpunished leading to a culture of impunity where those responsible for mega scandals could run for political protection from successive regimes.

This endemic corruption reached a level where it impacted negatively on the effectiveness of state institutions and particularly their ability to provide essential public services. The general decline of public services and ineffectiveness of public institutions, most of it traceable to endemic corruption, led Kenyans to question the *status quo* and added impetus for the clamour for reforms.

¹¹ Daniel Branch has documented instances where ethnic conflict was witnessed as early as immediately the *Majimbo* system was adopted. See Daniel Branch *Kenya: Between Hope and Despair (1963-2011)* at p. 87.

¹² Constitution of Kenya (Amendment) Act No. 20 of 1986.

¹³ Juma L 'Ethnic politics and the constitutional review process in Kenya' (2001-2002) 9 *Tulsa Journal of Comparative and International Law* 471-532

Quest for Inclusiveness

Despite the rhetoric of the independence government on the need to address the socio-economic disparities that existed at independence, post-independent patterns reveal a continuation of socio-economic disparities. The colonial racial segregation ensured that areas that had influence of the settler economy flourished while those untouched by settler development lagged behind.

Kenya's first development policy and blueprint named *African Socialism and its Application to Planning in Kenya* (popularly known as Sessional Paper No. 10 of 1965) was clear that public investment and development activity would be directed to areas of the country with "abundant natural resources, good land and rainfall, transport and power facilities, and people receptive to and active in development".¹⁴ In simple terms, areas that were previously excluded and were in most need would have to wait until there were returns on investments in productive areas with productive people.

These disparities transformed from a racial to an ethno-geographic dimension in the post-colonial period. It is no coincidence that the Central and the Rift Valley Regions have been the highest recipients of development expenditure since independence.¹⁵ Furthermore, the highest government positions (offices of ministers and permanent secretaries) were filled by persons from the communities where the President originated from.¹⁶ Additionally, regionally and ethnically skewed spending in vital sectors such as education, health, agriculture, roads and infrastructure produced a difference in the quality of life of Kenyans, based on their ethno-geographical location.

Among the issues identified as root causes of the 2008 elections violence was unequal access to state resources and opportunities and socio-economic development. A widely held notion was that an ethnic community had to capture presidential power in order to access opportunities and state resources leading to a deadly ethnic zero-sum game to win the presidency. The realisation that there is need to accommodate diversity and enhance national unity also informed the pressure for constitutional reform.

The quest for inclusiveness also touched on land and land-based resources. At independence, the hopes that lands taken by the settlers would be restored to the people were dashed with the policy of "willing buyer willing seller" that was declared by the Government. The policy locked out groups which did not have the means to buy white-owned farms. British Government support to the Kenyan Government to buy off departing settlers was not distributed equitably and resettlement carried out after independence disregarded claims of return of land by some communities. The land issue was at the heart of the ethnic-based clashes in 1992, 1997 and 2007 in parts of Rift Valley and coastal regions where grievances about land injustices have been most pronounced.

Inefficiencies in land management and administration have led to land fraud schemes. Millions of Kenyans have lost money or land as a result of corruption and inefficiencies in the land registries across the country. This deepened peoples' resolve to have a total overhaul of how land administration and management was carried out.

First, Kenyans wanted an independent institution that would ensure transparency, accountability, and efficiency in land administration and management. Second, Kenyans hoped for a lasting resolution of historical injustices related to land.

¹⁴ Republic of Kenya 'African Socialism and its Application to Planning in Kenya (Sessional Paper No. 10 of 1965) p.45.

¹⁵ Ryan Briggs 'Aiding and Abetting: Project Aid and Ethnic Politics in Kenya' (2014) 16 *World Development* pp. 194-205.

¹⁶ Karuti Kanyinga 'Ethnic politics in Kenya' in Ghai YP & Cottrell JG (eds) 2013 *Ethnicity, Nationhood and Pluralism: Kenyan Perspectives* (2013) Nairobi and Ottawa: Global Centre for Pluralism, Ottawa and Katiba Institute, Nairobi.

An Efficient Public Service that Delivers

With the centralisation of power and resources came inefficiency and bureaucracy in governance. The centralised system of governance stifled service provision and led to a decline in service delivery. The government responded to this by proliferating central government channels with field offices of central government ministries, the Provincial Administration, specialised funds, and later the parliamentary constituency level structures. While these multiple channels may have been intended to address service delivery, they contributed to further decline by fragmenting efforts and resources, creating confusion of roles and causing general inefficiency.

Other Issues that Informed the Search for a New Constitution

Kenyans also wanted a *change in the political culture*, from the politics of impunity and ethnic division to mature and more inclusive politics. Integrity and mature political leadership were part of the calls for reforms requiring a political and governance system based on integrity, transparency and competence.

Ineffectiveness of state institutions such as the Immigration and the Police led to *escalating cases of insecurity* and the rise of organised criminal groups composed of desperate and vulnerable youth, hired by politicians for selfish ends. Kenyans understood that the large number of unemployed youth was a result of general state ineffectiveness and thus wanted a new dispensation where *youth empowerment* was on top of government priorities. Kenyans wanted a system where livelihoods were guaranteed and basic needs, especially of the most vulnerable sections of the society, taken care of. Kenyans also wanted the *silent forms of exclusion*, such as, the exclusion of women, persons with disabilities, and the youth from political and governance processes to be addressed in reforms.

Successive governments did not address the challenges above. As a result, constitutional reforms became the main avenue through which Kenyans could pursue their aspirations. Of course, there was also a desire by Kenyans to have a change of political leadership that would be more committed to addressing the common concerns of Kenyans.

CHAPTER THREE

THE CONSTITUTION'S RESPONSE TO KENYANS' ASPIRATIONS

3.1 Introduction

The aspirations of Kenyans can contextually be grouped into political, economic and social segments. These aspirations are captured in the national goals and values that the people wanted to be entrenched in the constitution.

This chapter presents an overview of how the Constitution responded to the aspirations of Kenyans. The Constitution contains provisions geared towards addressing the political, economic, and social aspirations that informed the push for a new constitutional dispensation.

3.2 Political Aspirations

Kenyans wanted recognition of their collective will as the source of public power and authority. They also wanted representative institutions to not only reflect their diversity but also their wishes. Beyond representation, the people wanted direct participation in decision-making and to be consulted in matters that affect them.

Restoration of Peoples' Sovereignty

The first article in the Constitution is about the sovereignty of people. The Constitution recognizes the people as the ultimate source of sovereign power and the basis of exercise of state authority. The power can either be exercised through democratically elected representatives or directly by the people. All institutions exercising public power and authority are, as such, accountable to the people.

The Constitution provides that sovereign power is delegated to the three traditional arms of government (the Legislature, Judiciary and Executive organs of Government), exercised at the national level and the county level and that these institutions exercise the delegated power in furtherance of constitutional objectives. Where this is not the case, the Constitution provides for various channels through which the people's sovereignty can be restored.

Democratic Representation

The Constitution provides that Kenya is a sovereign and "multi-party democratic state". The provision seeks to insulate the country's democratic space by ensuring availability of channels through which Kenyans can participate in electing their representatives. Further, the Constitution provides for measures to curb divisive politics and enhance inclusiveness for purposes of national unity.

Guaranteed Political Space

The Constitution contains an extensive Bill of Rights that encompasses a broad range of civil and political rights whose protection and entrenchment in the Constitution is a reflection of their being one of the cardinal pillars of the Kenyan state under the Constitution. The Constitution recognises the right of every citizen to make political choices and this includes the right to choose leaders.

Enjoyment of the rights protected by the Constitution can only be limited by law and only to the extent that the law is "reasonable and justifiable in an open and democratic society". Even in situations where fundamental rights and freedoms can be limited, the Constitution provides criteria for such limitation.

Democratic and Participatory Governance

Beyond election of leaders, the Constitution provides for channels through which people can participate in decisions affecting them by recognizing that people can exercise their collective sovereignty directly.

Accordingly, while representative institutions at the national and county levels are established to exercise power on behalf of the people, these institutions are required to regularly consult the people and ensure that public concerns and input are considered. Indeed, the duty to consult the public goes beyond elective institutions and offices and is entrenched as a constitutional principle that every institution or governance process must embrace.

3.3 Economic Aspirations

The Constitution of Kenya, 2010 sought to address socio-economic challenges in a number of ways. Elaborate measures are provided for to ensure that national resources and development are equitably managed. The Constitution also provides for affirmative action to redress past socio-economic exclusion. With regard to land management, the Constitution provides a broad framework for the management of land and land-based resources.

Equitable Allocation of Public Resources and Distribution of Social-Economic Development

The Constitution provides principles of public finance management to address the concerns of Kenyans regarding socio-economic inequalities which call for equity in three main areas: (1) An equitable share of the burden of taxation; (2) Revenue raised nationally should be shared equitably between the National and County Governments; and (3) Public expenditure should promote equitable development in the country. Treasury, Commission on Revenue Allocation (CRA), National Assembly and Senate each have distinct roles in ensuring equitable sharing of revenues between National and County Governments. With respect to county revenues, the Senate is required to periodically set the criteria for equitable sharing of revenues allocated to counties.¹⁷

The Constitution provides for a minimum 15 percent of revenues collected nationally to be allocated to County Governments. In addition, County Governments have been allocated certain

¹⁷ Article 201 CoK 2010.

service delivery functions in Part II of the Fourth Schedule, most of which are geared towards enhancing access to public services.¹⁸

Entrenchment of economic, social, and cultural rights in the Bill of Rights of the Constitution also addresses the challenges of inequalities.

Affirmative Action in the Allocation of Resources

The Constitution further establishes a fund known as the Equalization Fund whose main objective is to provide funding to previously marginalised and neglected areas. The Constitution provides that each year, 0.5 percent of revenue collected every year should be set aside and used for the provision of services in marginalised areas or communities. The Fund can either be used directly by the National Government to provide services or administered through County Governments.

Apart from the Equalization Fund, the Constitution provides that the public procurement process should be used to promote the interests of previously disadvantaged persons. The Constitution is specific that the public procurement process should create categories of preference in the allocation of government contracts and the priority should be given to categories of persons or groups previously disadvantaged by unfair competition or discrimination.

Public Participation in Public Finance Management

The Constitution emphasizes public participation in all processes that touch on public finance including planning and budgeting at national and county levels.

For example, the Commission on Revenue Allocation is established with the aim of enhancing the credibility and transparency of revenue allocation. While its main duty is to advise on sharing of revenue between the two levels of government as well as among counties, the open and participatory process through which it carries out its functions facilitates the realization of the principles of public participation. Furthermore, the Constitution requires public procurement to be carried out in an open and transparent manner in order to enable public accountability in the use of resources.

Equitable Access to Land and Land-based Resources

A number of measures were taken in the Constitution to address the long-standing and systemic challenges in the land sector. Founding provisions on land in the Constitution recognise people as the collective owners of land in Kenya. In this regard, the Constitution provides that laws and policies should be enacted to ensure that local communities benefit from investments in property, and land in particular.

Principles of land policy are expressly listed in the Constitution and these include: equitable access to land, security of land rights, sustainable and productive management of land resources, transparent and cost effective administration of land, sound conservation and protection of ecologically sensitive areas, elimination of gender discrimination in law, customs and practices related to land and property in land, and encouragement of communities to settle land disputes through recognized local community initiatives consistent with the Constitution.

In order to remedy the inefficiencies in the management and administration of land in the country, the Constitution creates the National Land Commission whose primary duty is land policy and management.¹⁹

¹⁸ Article 203 (2) CoK 2010.

¹⁹ Articles 60-68 CoK 2010.

3.4 Social Aspirations

The framework of the Constitution includes provisions that are intended to consolidate national unity and social cohesion.

The need for reconciliation and healing after the 2007/ 2008 violence led to provisions which require the President to go beyond political or ethnic affiliation and be a unifying symbol for the Kenyan people by promoting and respecting the diversity of the people and communities of Kenya. Consequently, the structure and composition of the cabinet and employment in public service are expected to reflect the face of Kenya. The President is further required to ensure the protection of human rights and fundamental freedoms and the rule of law.²⁰

The Constitution contains provisions on affirmative action that are meant to enhance social cohesion and inclusiveness with regard to groups who were previously excluded such as women, the youth, persons with disabilities, marginalised communities and ethnic minorities. The Constitution thus seeks to ensure that all Kenyans participate in the affairs of the society, pursue their personal development and realize their full potential.

3.5 National Values and Principles of Governance

The Constitution lists the national values and objectives under Article 10 which broadly respond to the concerns that Kenyans expressed. The principles apply to all persons and more specifically to people who exercise authority under the Constitution.

The intention behind the provisions is transformation of the Kenyan society to one which is based on these values and principles. The Constitution provides that the national values and principles bind all state organs, state officers, public officers and all persons.

3.6 Conclusion on Peoples' aspirations and the Letter of the Constitution

The text of the Constitution broadly responds to Kenyans' social, political and economic aspirations and the concerns that people wished to see addressed in a new constitutional dispensation. However, experience from implementation has surfaced challenges to achieving those aspirations in some areas due to inadequacies in the design and manner of implementation of the Constitution. These challenges can be attributed to a number of factors among them complexity of the transition, lack of clarity on roles and responsibilities of different institutions, and resistance by different stakeholders to the transformation required to achieve the objectives of the Constitution.

It is noteworthy that during debates preceding the promulgation of the Constitution, it was acknowledged that as much as the document responded to most of the aspirations of Kenyans, it was not perfect and some of its provisions would need to be reviewed with time. Secondly, the Constitution provides for consultation and cooperation in the performance of functions and this can assist in the alignment of institutional roles for overall effectiveness in implementation. The remaining sections of this report discuss the impact of the Constitution, highlight challenges arising from its design and implementation and present recommendations for consideration.

²⁰ Article 132 CoK 2010.

CHAPTER FOUR

DEVOLVED GOVERNANCE

4.1 Introduction

Devolved governance is one of the core transformative features of the Constitution of Kenya 2010. There exists a plethora of research and publications on the rationale for devolution and the desire of Kenyans for a change in the governance structures by devolving powers and resources. This report shall refer to the main socio-political and economic considerations so as to provide a basis for analyzing the impact of this new form of governance.

Similar to other major provisions in the Constitution, the objectives and goals of devolved government are as a result of specific challenges that Kenyans experienced in the past. The policy of centralisation of resources and power brought with it a myriad of challenges including inefficiencies associated with centralisation and undemocratic control of state structures and resources.

Devolution of power and resources was seen as a means of promoting and advancing democracy, participation and accountability. It would further enhance development, efficient and effective service delivery. It would also entrench equity and inclusiveness in development and access to services. Lastly, devolution was perceived as a means of enhancing the concept of good governance by incorporating vertical separation of powers and increasing the ambit of checks and balances.

Consequently, Kenyans' demand was for a devolved system of government where powers and resources from the centre were transferred to autonomous devolved units across the country. In turn, these powers and resources would enable communities to plan their priorities and development at the county level. It would be easier for communities to hold county leaders and officials to account as a result of their closer proximity to the people. The transfer of resources to the devolved units in a fair and equitable manner would ensure that previously neglected areas in the country would, through the counties, receive resources for development and provision of essential services. A most critical consideration was that Kenyans expected that a devolved system would deliver these benefits in a cost effective manner informed by more efficient use of resources.

From a political perspective, the devolution of power and resources was to enable Kenyans to participate effectively in county governance and thus enhance their perception of political inclusion, the lack of which had led to conflict. The division of powers and functions between the county and national governments, in tandem with the traditional separation among the three arms of government would further enhance accountability through checks and balances so as to guard against abuse of power in either sphere.

Devolution Design versus Kenyans' Aspirations

Devolution as enshrined in Chapter 11 of the Constitution creates two levels of government, a National and County level, which are distinct and interdependent and conduct their mutual relations on the basis of consultation and cooperation. The Constitution establishes 47 counties which can only be enhanced or reduced by constitutional amendment.

The Constitution assigns each level its own powers and functions and establishes political structures and institutions for each level, to which the citizens elect their leaders. At the county level, citizens can elect a County Assembly as a legislative arm and a County Executive as an executive arm. This has created room for democratic accountability for decision making at the

local level. County Executives and Assemblies have power to plan locally, identify local priorities, legislate, budget and implement accordingly. County Assemblies have oversight powers over County Executives and other County organs. Leadership and integrity principles outlined in Chapter Six apply to county officials. Shared institutions of the Auditor General and Controller of Budget have oversight over county finances. In their exercise of power, both county executive and legislative arms are required to facilitate participation and involvement of the citizens.

The Constitution divides and assigns various powers and functions to the two levels of government. While some of the functions are exclusive, others are concurrent necessitating a cooperative and consultative form of governance among the levels of government. This division of functions enhances the concept of separation of powers and checks and balances. Cooperative devolved government requires a collaborative and consultative approach to issues of mutual concern to the two levels of government, as opposed to an adversarial approach. Both levels of government are required to adopt consultation, negotiation and consensus building in the running of state affairs. Intergovernmental relationships between and among governments therefore is designed to be based on the principles of cooperative government. Intergovernmental structures have been operationalized through the Intergovernmental Relations and Public Finance Management Acts.

The Constitution outlines an elaborate framework for raising of revenue by each level of government and the equitable sharing of the revenue raised nationally. The Constitution also establishes institutions which introduce objectivity in the distribution of resources and development. An important institution in this process is the Senate which is meant to represent the counties and protect their interests. An elaboration on the Senate and its mandate is to be expressed hereafter.

In general terms, the constitutional design of devolution responds to the aspirations of Kenyans and creates a governance structure that delivers resolution to the political, social and economic concerns of centralism. However, there are some granular design aspects of the devolution governance structure that render challenge to the effective delivery of the vision. Similarly, various implementation features have exacerbated the challenges to efficient and effective delivery of devolution. These challenges are discussed below.

4.2 Design of the Devolved Government Structure

As indicated above, the design of the structure of devolution is to a large extent in line with the aspirations of Kenyans. There are however some areas in which the design structure itself has contributed to a misapplication of the devolution concept, and created challenges in its implementation.

Number of Counties

There has been public debate concerning the number and consequent viability and effectiveness of counties. One of the concerns is that counties are too many and this has increased the cost of implementation of the Constitution. The question of the cost of devolution and its economic impact is considered in greater detail under Chapter 11 of this report. On the face of it, 47 counties may appear too many as against the size, population and level of development of the country as compared to other jurisdictions. However, it is important to appreciate that the Kenyan Counties are a sort of hybrid combination of the regional and local levels. Kenya's devolved government structure is a departure from the common devolution system design which typically encompasses three levels of government – National, Regional and Local. The number of counties should be understood from a point of view that the design of 47 counties sought to trade off a regional level of government (whose core purpose is to constrain centralism) and the benefits of local government (small enough to accommodate diversity at the lowest level) and hence created a modified composition of the two.²¹ Consequently, and as expressed in Article

²¹ See the Final report of the Committee of Experts on Constitutional Review' (2010) pp. 60-75.

174, the principles of devolved government incorporate the object of provision of proximate, easily accessible services throughout Kenya; as well as enhancement of checks and balances and separation of powers.

Arguably, the current size and number of the counties set at 47 has helped address some of the real or perceived grievances of economic and political marginalization among smaller communities who now have control over powers and resources that have been devolved to the county level. Having the regional level would have meant that only a fewer of the larger communities would dominate the regional level. In this regard, the current structure has generally ensured that there is economic and political inclusion across communities in Kenya to whom powers and resources have been devolved. On the other hand, the current structure has also led to what can be referred to as “within-county” minorities. However, the emerging concern of minorities within counties can be addressed through proper inclusive policies at the county level which address the concerns of minorities at that level. The constitution requires county governments to recognize and accommodate diversity at the county level.

A serious and genuine commitment to accommodate all groups at the county level can address some of the concerns about county-level minorities. While there are concerns that the current devolved structures have led to added costs of running and maintaining public institutions, the benefits in terms of citizen satisfaction, equity and inclusivity, justify the added cost. Furthermore, and will be demonstrated in Chapter 11, the financial cost/ economic impact of devolved government is not as heavy as it has been portrayed to be.

Recommendation

It is clear that the current structures of devolved government have both benefits and risks. While there could be certain advantages in reducing or increasing the size or number of counties, the solution lies in ensuring that the existing structures are utilised optimally towards the realization of the stated objectives of devolved government. The 47 counties can address part of the challenges related to their size and number through inter-county cooperation in the execution of functions. Article 189 provides a mechanism for addressing this concern by joint authorities and collaborative inter-county engagements. The Intergovernmental Relations Act (2012) has established the Summit, the Council of Governors, and the Intergovernmental Relations Technical Committee (IGRTC) which lay a basis upon which cooperation and consultation between counties can be pursued. Counties with similar socio-economic and geographic factors can plan and execute functions jointly in order to overcome challenges related to their size and number. There are constitutional and legislative safeguards for the protection of minorities. The County Governments Act, for instance, promotes minority representation in the composition of County Executive Committees through Section 35(2). There is need for review and/or development of national legislation to secure the innovative enforcement of the relevant components of the Bill of Rights in securing and promoting the interests of minorities within counties.

Structure and Composition of County Assemblies

Article 177 of the Constitution, makes provision for the composition of the County Assembly, comprised of members elected by the registered voters of the wards, each ward constituting a single member constituency. It further provides for a number of special seat members necessary to ensure that no more than two-thirds of the membership of the Assembly is of the same gender, and a number of seats for marginalized groups, including persons with disabilities and the youth.

The objective of this provision is to secure, through affirmative action, the participation of previously marginalized groups in local governance. However, the implementation of the provision has resulted in a large number of nominated Members of County Assembly, thereby

compromising the principle of democracy and right to representation of the people and increasing the overall numbers and resource requirements for assembly operations.

This arises when the final tally in the number of elected members in the County Assemblies yields a result where one gender comprises more than 2/3 of the total elected members. Article 177(1)(b) requires that there shall be established “*the number of special seats necessary to ensure that no more than two thirds of the membership of the assembly are of the same gender*”. Consequently, and as a result of the patriarchal nature of Kenyan politics, very few women were elected to County Assemblies in the general election of 2013, resulting in the election of 1450 County Assembly members, and subsequently the nomination of a total of 774 (35%) women and marginalized groups representatives. Isiolo County Assembly has 50%, Taita Taveta County Assembly has 43%, and Samburu County Assembly has 42% nominated Members of County Assembly. Of the 774 nominated candidates nationally, 586 are women nominated on gender top up basis.

The resultant total composition of County Assembly members is positive with regard to the public participation of women in the governance of county affairs, but raises critical concerns about the undermining of the effective exercise of the citizens’ right to vote for its leaders. At the same time, there is no predictability as to the total final tally of Members of County Assembly, as the final numbers can only be determined after the election of ward representatives. The predictability of resource planning for these institutions is compromised in this regard, and in light of the results obtained in the last general election, the total operational cost for County Assemblies is likely to remain as is, or increase where women are not elected into County Assemblies.

Recommendations

The Political Parties and Elections Acts are possible avenues for ensuring that persons of either gender are elected into the County Assemblies and thereby reduce the total number and attendant maintenance costs of County Assembly members. Mechanisms to incorporate mandatory political party support and nomination of women to vie for County Assembly seats can be effected in these laws. In this regard, the laws could be amended to provide for the involvement of the Independent Electoral and Boundaries Commission in managing party primaries.

Political Party Funds can be designed with earmarked percentages as conditional grants to parties who have elected women County Assembly Members as an incentive. In addition, ring fenced financing of government programmes to support the political participation of marginalized groups can also be prioritized and guaranteed, to ensure that civic education for citizens, training and facilitation of candidates and other empowerment programmes are designated at both national and county level budgeting cycles.

The desire to claw back on the affirmative action gains for men and women as stipulated in the Constitution should be contained. The difficulties in meeting the 2/3 gender rule should not be the basis for which to abolish the gender provision. The benefits of encouraging equal participation of women and the building of cultural change and perceptions on women’s leadership should be pursued at all cost, especially at the local level of governance.

An alternative recommendation which would require a constitutional amendment would be: (1) Reduce the number of wards. (2) Retain a first-past-the-post electoral system but create two member electoral wards. Voters in each ward would then be required to elect a woman and a man as members of the County Assembly.

Functional Assignment between National and County Governments

The Constitution assigns functions to the two levels of government under the Fourth Schedule to the Constitution and outlines the functions of the National Government and County Governments. However, the Fourth Schedule requires further interpretation in order to clarify the specific functions of the national and county governments. A review of the constitutional framework for the assignment of national and county functions reveals a number of functions that require a common approach to implementation by both levels of government. For instance, the national government has a number of policy-making functions while the county governments have a responsibility to implement the policies. Accordingly, there is a need to have policy and operational backward and forward linkage require collaborative action. Furthermore, the Constitution recognises that there are some functions that can be performed concurrently by the two levels of government. This requires a collaborative approach to the performance of those concurrent functions.

The Constitution provides for a 3 year transition period within which mechanisms are to be put in place to ensure a smooth transition to county governance. The Transition to Devolved Government Act (TDGA) provides for the unbundling of functions in the Fourth Schedule, costing of the functions and the transfer of the powers and functions and resources. However, the transition process has faced many challenges: the establishment of the Transition Authority which has the mandate of managing the transition was delayed by almost a year. The TA has also raised a number of challenges including inadequate resources to perform functions, subordination to central government bureaucracy.²² There was a delay in the unbundling of national and county functions for both levels of government and there has been no comprehensive costing of national and county functions to guide resource allocation. Furthermore, while the TDGA provides for the audit of assets and liabilities, the TA has not been able to carry out this exercise citing lack of resources.²³ Some of the challenges in the actual implementation of devolution stem from the failure to implement the legislative framework for the transition to county governments.

For instance, in the Health Sector, there has been confusion in the division of health functions between the national and county governments. This confusion led to a court case on the division of health functions between the two levels of government.²⁴ In the case, the court emphasized the need for resolving issues regarding division of functions through mutual consultation and cooperation. One of the contentions in the Health Sector has been whether Level 5 Hospitals should be assigned to the National Government or County Government. It is important for the two levels of government to consult and come up with a comprehensive sectoral framework for the division of functions. The framework should be informed by the respective functions of the national and county government in the Fourth Schedule. The Constitution assigns to the National Government the function of national referral health facilities. The first step, perhaps, is to determine the criteria of what constitutes a national referral health facility which should be informed by the need for such facilities nationally. The framework should then inform the actual division of institutions between the two levels of government. In the Water Sector, county governments are responsible for county public works and services, including: storm water management systems in built-up areas and water and sanitation services.²⁵ The county governments are also responsible for implementation of specific national government policies on natural resources and environmental conservation, including "soil and water conservation".²⁶

²² Transition Authority 'The status of transition to devolved government: June 2012 – October 2014' pp. 119-122.

²³ Transition Authority 'The status of transition to devolved government: June 2012 – October 2014' p. 88.

²⁴ *Okiya Okioti Omtata and another v The Attorney General and 6 others*, High Court of Kenya (Constitutional and Human Rights Division) Petition No. 593 of 2013.

²⁵ Section 11, Part II of the Fourth Schedule.

²⁶ Section 10, Part II of the Fourth Schedule.

On the other hand, the national government is responsible for: the use of international waters and water resources.²⁷ The national government is also in charge of protection of the environment and natural resources with a view to establishing a durable and sustainable system of development, including, water protection, securing sufficient residual water, hydraulic engineering and safety of dams.²⁸

The transition in the water sector should be informed by the constitutional framework above. There are regional-based Water Service Boards (WSBs) which perform functions that have been allocated to the two levels of government. For instance, the WSBs carry out asset development and regulation of water services. These regional bodies serve more than one county and can thus not be handed over to one county. However, these institutions can be managed through a cooperative framework of counties premised on Article 189(2) of the Constitution which provides for formation of joint authorities and committees. The same approach, as proposed above, should be applied to all shared functional areas in the Constitution.

For the purpose of establishing a working solution on functional assignment, it is recommended that policy and legislation be guided by the following principles:

1. Development of common and objective criteria for determining the content for each function based on the role and responsibilities of the relevant level of government in the Constitution.
2. Outline of resourcing requirements including the financial, human, infrastructure resources that incorporates prudent, responsible and most efficient use of the resource in line with the function avoiding duplication.
3. Setting benchmarks and standards for the performance of functions in order to ensure realization of constitutional objectives

The debate on amount of resources for performance of functions should be informed by comprehensive criteria that include all the factors that are mentioned above.

Asymmetrical Transfer of Functions

While the Constitution and the TDGA envisage a gradual/ phased transfer of functions to counties based on an assessment of readiness of counties,²⁹ a decision was made in the first meeting of the National and County Coordination Summit to do away with the assessment of readiness of counties and instead adopt a “big bang” approach that will see powers transferred to counties. According to media reports, County Governments were of the view that citizens expected their counties to start offering much needed public services and a phased/ gradual transfer of functions would hinder counties from delivering promises to their electorate. Furthermore, it was felt that transferring functions and resources asymmetrically may actually perpetuate the very inequalities that the devolved system is meant to address since most of the poorer counties would not meet the criteria for immediate transfer. Consequently, a political settlement within the ambit of the Inter-Governmental Relations Act was arrived at in which the transfer of all functions under the Sixth Schedule was effected.

While there were some legitimate factors behind the adoption of the “big bang” approach, many county governments have had difficulty in marshalling capacity to operationalize their functions as provided in the Fourth Schedule. Accordingly, the low capacity of counties for public finance management, human resource management, county planning and budgeting, optimization and realization of own revenue bases have contributed to their slow uptake of functions.

While the National Government has a responsibility to provide capacity to counties, there has not been a comprehensive and clear programme for capacity building of counties. Interventions witnessed in the past have been ad hoc and mainly geared towards salvaging of crises such as

²⁷ Section 2, Part 1 of the Fourth Schedule.

²⁸ Section 22, Part 1 of the Fourth Schedule.

²⁹ Section 15(2)(c) of the Sixth Schedule to the Constitution and sections 23 and 24 of the Transition to Devolved Government Act.

the remuneration of health professionals by the National Government and secondment of staff of counties without a clear and sustainable plan.

Recommendation

The budgeting process should, as a priority, secure capacity building structures of both the national and county governments. A major component of the capacity building should be on how to develop and maintain intergovernmental relation structures that would facilitate consultation and cooperation. Furthermore, capacity building efforts should be long term and focused on professional and skill development as opposed to *ad hoc* trainings. Capacity building should also be linked with the rationalization of staff at the national and county levels. The frameworks and policies for capacity building should be developed in consultation with county governments as this will ensure a proper identification of capacity gaps.

Interdependent and Overlapping Functions

Another area that has compromised the implementation of functional clarity and delivery is interdependent and overlapping functions between the two levels of governments. For example, where the functional assignment divides a single service element in policy (for National Government) and implementation (by County Governments) terms, the tendency for either level of government is to establish structures and assign resources to features within their limited mandate.

In some cases, County Governments have allocated resources and implemented education bursary programmes and purchased police vehicles. National Government has also allocated resources for the purchase of medical equipment for county hospitals. In various other examples, the different levels of government have retained or established resources, both financial and human that are not related to their functions and thereby resulted in imprudent use of resources thus contributing to the perception of the Constitution being costly.

The National and County Assemblies are perpetuating the misnomer of allocating funding to functions in their respective levels of government that are not assigned to those levels of government and/or have not been transferred as envisioned by Articles 186 and 187 of the Constitution. By not undertaking elaborate scrutiny of programmes, objects and budget allocations presented in estimates, the legislative structures are facilitating County and National Government functional overreach, and thereby aiding the imprudent use of resources.

Recommendations

Respective National and County Government treasuries and legislative committees preparing and reviewing budget estimates should scrutinize programmes and expenditures to determine their functional correctness. The Controller of Budget in sanctioning withdrawals may include parameters that indicate the functional mandate of the funds to be withdrawn. The Auditor General's review of expenditures should seek to review the purpose for which expenditure was incurred and its jurisdictional propriety. In concert, these efforts would serve to ensure that functional overlaps are minimized.

All legislation emanating from National and County Assemblies should incorporate a schedule outlining the functions to be performed by each level of government and define to the lowest possible level the functions for the area under legislation, indicating exclusive functions for the National Government and County Government and concurrent functions. All the functions in the legislation should then be compiled into a compendium of assigned functions in a distinct legislation for the purposes of defining a comprehensive list.

Second Generation Transfer of Functions between Levels of Government

Articles 183(1)(b); 186(3); 187; and 189(b) envision opportunities for second generation assignment of functions to either level of government. This may be achieved by transfer of the

functions by agreement or legislation. The purpose of the provisions is to provide an opportunity for either level, having considered the most ideal implementation circumstances, to transfer the management of functions to the other level.

Article 186(3) envisions assigning of a function by legislation while Article 187 provides for the transfer by agreement, a provision given further effect by Section 24 of the Inter-Governmental Relations Act. In addition, Article 183 (1) (b) and 189(b) provide an opportunity for County Governments to administer national legislation in the counties.

With the experience of implementation National and County Governments should conceptualize a review of functions as assigned and consider second generation transfers as may be appropriate. This recommendation would fit with the previous analysis on overlap areas and transition challenges, where both levels of government have sought to implement functions in each other's mandates. County Governments have experienced the practical reality of implementation. They are also facing citizen demands on delivery of frontline services which in the citizen's perspective, cannot be delineated into national or county government responsibility.

Each level of government may also be handling functions that they are unable to practically or efficiently deliver. Recent implementation experiences in the sphere of security management, health personnel and pandemics have demonstrated the latent need to reconsider the efficacy of the functional assignment, and incorporate additional parameters of concurrence or exclusive assignment.

Recommendations

Both levels of government under established inter-governmental platforms should review and consider assigning functions to the other by agreement or legislation. Priority should be made to functions whose practical implementation is best undertaken by either level based on experience and prudent use of resources.

Parliamentary and Assembly legislative processes should consider development and/or review of legislation that redefines the functions as set out, within the parameters of Article 187(2) (b) and assign functions from either level of government to either level of government where in its wisdom, the function would be best implemented. Components of the functions to be defined may be described at a granular level to guard against doubt or confusion.

Principle of Cooperative Government

The two levels of government are designed in a manner in which their cooperation and collaboration is not only necessary but mandatory for the effective performance of functions and delivery of services. Various articles including Article 6(2); Article 110(3); Article 124(2); Article 189(2); Article 217(2)(c) and 6(b); Article 220(2)(c); and Article 189 make provision requiring consultation, collaboration and joint engagement between the two levels of government and between organs within the levels of government.

Unfortunately, the principle of cooperative government and its non-application has rendered the greatest challenge in the implementation of devolution. The Senate and National Assembly contest over roles, mandates and procedures have resulted in an advisory opinion of the Supreme Court. There are other cases where disputes between different public institutions have ended up in the courts. There is a need to develop mechanisms through which these disputes can be settled through cooperation and consultation as prescribed in the Constitution.

The relationships among national, County Governments and transition entities can be described as one of suspicion, with County Governments openly sharing concern that the National Government is not fully supporting devolution. The perception prevails despite the

intergovernmental structures established under the Inter-Governmental Relations Act and Public Finance Management Act

Consequently, County Governments have filed court cases against the National Government's transfer of roads, the summoning of Governors, and the budget caps for county assemblies. Cooperative devolved government requires that society moves away from the adversarial approach to issues and embraces a system of consultation, negotiation and consensus building.

The Kenyan devolution structure in particular and the functional assignment design in the Fourth Schedule requires concerted efforts of cooperation and consultation in order to deliver on development objectives and service delivery. The necessity of cooperative government becomes more critical when one considers that globalization and its effects are directly impacting local structures. National Government has international commitments and reporting obligations for functions that have been assigned to County Governments and any sanctions for non-adherence would be to National rather than County Governments. On the other hand, County Governments bear the greatest responsibility for delivery of socio-economic rights provided for under Article 43 of the Constitution. The intersection of these rights with County Government functions transforms them into binding obligations of the County Governments.

The relationship between the two Chambers of Parliament has rendered the implementation of devolution unnecessarily difficult. According to public reports in print and electronic media, as well as stakeholder submissions attributed to representatives of both chambers, the two houses have often resisted the respect and enforcement of Article 110 in their operations, which requires consultation between the Speakers of both Houses before any Bill is considered by any House.

This is a major hindrance to the implementation of devolution as it has created unnecessary animosity and conflict between the Houses, and may have resulted in the enactment of laws that could lead to constitutional crises and conflicts. Neither the Constitution nor enabling legislation has an elaborate procedure dealing with the question of what happens when the two Speakers cannot jointly resolve whether a Bill concerns County Governments.

Article 113 provides for a Mediation Committee to be established to resolve disputes over the content of Bills. Concern has been raised that the process of mediation, which results in the death of a Bill in the event of non-agreement is not only protracted, but may compromise devolution and lead to constitutional crisis especially in the event that the Bills under mediation are the Division of Revenue and County Allocation of Revenue Bills.

At the same time, the Constitution provides the procedure for processing of Bills, but in certain circumstances does not outline the length of time Bills are to be considered. This lacuna becomes paramount in circumstances where one Chamber is processing Bills referred to by another. Article 217 for example, stipulates that the Senate is to consider the basis for sharing revenue but has no timeline for this consideration. Article 218 provides for the consideration and passing of the Division of Revenue and County Allocation of Revenue Bill but provides no clarity on the timelines for its consideration. Under the Public Finance Management Act, time begins to run after Senate consideration.

The import of a delay on subsequent processes that have constitutional timelines becomes plausible. For example, a delay in the Senate's consideration of the basis for revenue sharing, or passing of the Division of Revenue and County Allocation of Revenue Bills, can result in a delay in the submission and consideration of estimates. This was the situation in FY2014/15, when a delay in the approval of the County Allocation of Revenue Act, necessitated National Treasury bailout of Counties that had yet to prepare budget estimates and County Appropriation Acts.

Recommendation

Both levels of government should appreciate the principle of cooperative government and commit themselves to its application. It is further recommended that the legislative and judicial arms of government, as part of their oversight powers, enforce cooperative government and the settlement of disputes through alternative dispute resolution procedures before resorting to legal redress.

In addition, in judicial arbitration, courts should as a priority seek to satisfy themselves through evidence that efforts are made by parties to enforce consultation and cooperation as a precursor to adversarial claims. Surcharge of parties who undertake vexatious litigation before engaging in dispute resolution by alternative means should be legislated upon.

It is further recommended that legislation expounding the process under Articles 110 and 113 be developed, to guide the process of consultation between the two Speakers of Parliament and the determination of Bills concerning Counties. The legislation should be guided by court decisions and interpretations made thus far.

Legislation should also be enacted setting specific timelines for consideration of legislation in either House, especially for critical Bills such as the Division of Revenue and County Allocation of Revenue Bills.

Representation of counties at the national level

The primary role of the Senate as articulated in Article 96 of the Constitution is to “represent the counties, and serves to protect the interests of the counties and their governments”. Consequently, the Senate is meant to be the eyes and the voice, and embody the wisdom and will of the Counties. The Senate is expected to exercise surveillance over the National Assembly’s law-making power and ensure that public policy measures, regulations and legislation incorporate, promote and protect County interests. As a parliamentary forum, the Senate is the platform in which to scrutinize National Government obligations to Counties and monitor the implementation of mandates and commitments in line with constitutional responsibilities.

Unfortunately, the constitutional design of a directly elected Senate has inadvertently undermined this objective. There is a need to create stronger institutional links between the Senate and the counties in order to ensure a more effective representation of county interests at the national level. This may necessitate a review of the manner in which members of the Senate are selected and use of the avenues of consultation and cooperation to strengthen institutional links between the Senate and the county governments. These proposals and recommendations are discussed in more detail under Chapter 5 of this report which discusses the structure, role, and mandate of Parliament.

4.3 Fiscal Responsibility, Financial Accountability and Transparency

The Constitution puts in place several measures to ensure prudence, fiscal discipline and accountability at both national and county level. This was a response mechanism to the demands of Kenyans to ensure that public resources are used prudently, efficiently and effectively to deliver services.

Chapter Six of the Constitution, which outlines the principles of leadership and integrity, forms one of the distinct provisions that place on state and public officers the requirement of ethics and integrity in the performance of their functions. Article 212 aligns county borrowing to National Government guarantees. Article 226(5) of the Constitution further places a responsibility on all officers, including political officials to undertake their functions transparently and in an accountable manner by demanding that any direction or approval on the use of public funds that is contrary to law or instruction would render the official liable for any

loss arising thereof and surcharge for such loss. The provision specifically requires that the consequence is to apply whether the official remains in office or not.

In reference to County Governments, the Constitution has put in place mechanisms to secure the transparency and accountability of public finance management. Article 212 requires county borrowing to be buttressed by National Government guarantee. Article 225(2) anticipates legislation to ensure both expenditure control and transparency in all governments and establish mechanisms to ensure their implementation. This legislation is the Public Finance Act which spells out the procedures, structures and responsibilities for financial control and management at both national and county level. Article 226(2) requires an accounting officer of a national public entity to be accountable to the National Assembly and the accounting officer of a county public entity to be accountable to the county assembly respectively. Articles 228 and 229 establish the shared offices of the Controller of Budget and Auditor General to sanction withdrawal of funds and audit their expenditure respectively. The functions of these offices transcend the two levels of government.

As articulated above, the Constitution and enabling laws provide for the enforcement of transparency and accountability in the management of public resources. The capacity of counties to operate effective financial management systems, and adopt the principles of transparency and accountability in their operations has raised concern among public commentators, media and oversight agencies. The concern is particularly around the flagrant expenses of County Assemblies, misuse and misapplication of resources by County Executives and non-adherence to public procurement laws.

The Office of Controller of Budget, in its half year report for 2014, identified challenges that could hinder effective implementation of devolution. They include low absorption of development funds; underperformance in local revenue collections; inadequate technical capacity to support counties in the technical areas of budget preparation and legislation; insufficient use of Integrated Financial Management Systems (IFMIS); and, increasing wage bill. The Auditor General, in various reports on the operations of County Governments from January to June 2014, singled out mismanagement of funds and irregularities in procurement of goods and services in several counties.

The brief experience and review of performance of counties has clearly raised critical areas of reconsideration in the design and implementation of fiscal and financial management of devolved governance, addressed in measured form hereunder:

County Borrowing

Unregulated borrowing by County Governments can adversely affect macroeconomic stability. This concern was particularly evident in the crafting of Article 212 of the Constitution that deliberately entrenched National Government oversight over county borrowing through guarantees and the incorporation of legislative approval procedures.

Article 212 is elaborated in sections 58, 140 – 143 of the Public Finance Management Act. In general terms, National Government guarantee of loans is dependent on the fulfillment of conditions including inter alia, that the loans are for capital projects, the borrower demonstrates ability to repay the loan plus interest, parliamentary limits are not exceeded and the financial position forecast of the borrower is satisfactory. The Cabinet Secretary is bound to ensure that he/she takes into consideration the equity between National Government interests and County Government interests so as to ensure fairness in loan guarantees.

These provisions respond positively to address the risk of uncontrolled borrowing by County Governments, whose resource bases are limited, and who are thus dependent on inter-governmental fiscal transfers. The experience of unregulated sub-national borrowing by former local authorities undoubtedly formed the basis for the oversight structure created under this Article.

There is a need to develop a clear policy and regulations to guide county borrowing. There are macro-economic risks that can be associated with excessive borrowing of counties and this necessitated the approval for county borrowing. However, it is also important to ensure that the process of approving county borrowing is objective and balanced. Furthermore, the framework for county borrowing should allow flexibility and accommodate County Government innovation in design of borrowing instruments, while ensuring tight to ensure fiscal discipline by counties.³⁰

County Own Revenues

The primary source of revenue for the National and County Governments is taxation. The revenue raised nationally is shared equitably between National and County Governments with the equitable share for every financial year for County Governments being not less than 15% of the last approved audited accounts. Article 202 provides that County Governments may receive additional allocations either conditionally or unconditionally. Article 204 establishes an Equalization Fund which is 0.5% of total revenues raised annually to provide basic services to marginalized areas to bring them to a level enjoyed by other parts of the Nation.

Article 209(3) authorizes counties to collect property taxes, entertainment taxes and any other taxes authorized by an Act of Parliament, except the taxes that are collectable by National Government by virtue of Article 209(1). County Governments may also impose charges on services they provide. The sources of revenue for the County Governments are thus equitable shares of revenues raised nationally; own revenue collection; and borrowing which must be guaranteed by the National Government.

According to the Institute of Certified Public Accountants of Kenya (ICPAK) 2014 Baseline Survey on Devolution in Kenya with respect to Public Financial Management Systems, 37% of the counties sampled relied on single business permits as their core source of local revenues; 32% relied on user-fees with 31% of them relying on property rates. The study found that counties were facing serious challenges on own revenue collection with some counties collecting less than what the defunct local authorities, municipal and/or county councils used to collect when combined.

The challenge of own revenue collection is likely to result in further inequalities between counties, especially where the consequence is as a result of inefficient or ineffective revenue collection measures, corruption and mismanagement. The priority focus on intergovernmental transfers and the pressure for provision of additional resources should simultaneously be couched with demands for greater accountability by County Governments to collect own revenues. This does not necessarily demand enhancing the tax base but by increasing efficiency in revenue collection and sealing loopholes.

Recommendations

County revenue collection performance mechanisms should be entrenched, including requirements for automation of revenue collection systems. National Government conditional transfers premised on own revenue performance should also be encouraged, to incentivize County Governments.

Revenue potential and enhancement studies should be undertaken for all counties, in consultation with the Commission for Revenue Allocation to identify latent resources and the maximization of existing resources. In doing so, county revenue raising measures should guard against overreach into National Government tax bases as stipulated in Article 209(1), and should also seek to ensure they do not compromise or prejudice national economic policies, economic activities across county boundaries or the national mobility of goods, services, capital

³⁰ Economic and Administrative Implications of the Devolution Framework Established by the Constitution of Kenya, Institute of Economic Affairs

or labour as anticipated in Article 209(5). Similarly, National Government should not encroach on county sources of revenue.

In line with the above recommendation, inter-governmental engagement between the National Treasury and County Governments through the Inter-Governmental Budget and Economic Council (IBEC) should be undertaken as a priority to determine the parameters for balancing county own revenue raising measures for taxes outlined in Article 209(3) as against Article 209(5) considerations. These parameters should thereafter be legislated by Parliament to guard against non-adherence.

County Governments could optimize on provisions within the County Government Act that would facilitate their revenue raising measures such as setup of county corporations to offer competitive, professional services in core competence areas.

Determination of the Shareable Revenue Raised Nationally

Both Articles 201(b)(ii) and 202(1) establish the principle that ‘revenue raised nationally shall be shared equitably among the national and county governments’. Article 203 on the other hand, establishes criteria to guide the determination of the equitable sharing of such revenue. Since the election of the County Governments two years ago, what has been shared has not be all the revenue raised nationally. For example, while this year’s country budget is 1.8 trillion, the amount subjected to the vertical division of revenue is 1.2 trillion. This leaves out Shs. 600 billion raising the fundamental question of what is the meaning of the shareable revenue raised nationally.

The National Government argues that borrowed money or grants earmarked for specific projects cannot be included in the vertical sharing and that provision for debt repayment must be made before the balance is shared. It is also argued that money borrowed for national interest projects such as the Lamu Port—South Sudan-Ethiopia Transport Corridor Programme (LAPSSET) cannot be included in the vertical sharing of revenue raised nationally.

These arguments are faulted for a number of reasons. First, funds borrowed for specific projects can be included in the vertical division of revenue since such projects fall within the functional areas assigned to levels of government to avoid double allocation to such functions. The borrowed money will not be shared since it may be earmarked for the specific project but must be regarded as part of the share of the government under which the project falls as a function. For example, if money was borrowed or grants given for specific projects in the agriculture area, the money would be earmarked for those projects and regarded as part of the County Government equitable share since agriculture is a County Government function.

Secondly, national interest cannot be interpreted as being equivalent to the interests of national government. National interest must be informed by national priorities. If such priorities fall within the county functional areas such as agriculture, then that would be regarded as the national interest.

Thirdly, although the criteria under Article 203 which includes provision for debt repayment may be weighted differently, it is meant to be used cumulatively and cannot justify the deduction of any amount before the balance is shared. Provision for debt repayment must be included in the equitable share of National Government since national debt repayment is a function of national government. This would be important to avoid over-borrowing by National Government.

National Planning Priorities and County Mandates

The Constitution emphasizes that while the two levels of government are distinct, they are interdependent. The existence of common constitutional goals and objectives implies harmony in the manner in which the two levels of government conduct their affairs, including the common vision on development objectives, national interests and priorities. The National

Government has an overall policy-making and regulatory function in virtually all sectors of county governance, however, this function can only be carried out effectively in consultation with counties who have a duty to implement national policies and standards, but who similarly have a mandate of autonomy in planning, budgeting and implementing county programmes.

Cooperation and consultation must of necessity be entrenched so as to ensure that there is overall effectiveness at the national and county level with regard to performance of governmental functions. This is anticipated in section 106 of the County Government Act that demands cooperation in planning to be undertaken in the context of the law governing inter-governmental relations. The section further anticipates that county plans shall be based on the functions of the county governments as specified in the Fourth Schedule to the Constitution and on relevant national policies.

The County Government Act outlines an elaborate process of planning in Part XI. Section 104 specifically places an obligation on counties to plan for the county, providing that no public funds are to be appropriated outside a planning framework developed by the County Executive Committee and approved by the County Assembly and further binds all sub-county units undertaking developmental activities within a County. Section 113 thereafter requires all plans to provide clear input, output and outcome indicators which should conform to nationally applicable guidelines on the matter.

Recommendations

The constitutional and legal provisions on cooperative county planning are well entrenched. So far, County Governments have followed National Government guidelines in the preparation of their County Integrated Development Plans, which process was implemented for the first time in FY2013/14 and was fraught with challenges expected in a transition. The potential challenge that may arise, and that may be cured by amendment to the County Government Act, is the elaboration of a comprehensive process under section 106 to define the process for development of national plans that brings together national and county levels of government.

Vision 2030 is the economic blueprint, implemented through rolling five year plans. The development of the mid-term plans would of necessity, require the participation of County Governments in the development of Sectoral and general priorities towards the realisation of Vision 2030. Mutual consultation and cooperation in the development of priorities towards achievement of Vision 2030 will form a basis for a common pursuit of the Vision. Guidelines developed should ensure that mutually agreed priorities are part of the development plans for the national and county levels.

The county executive is required under section 47 of the County Government Act to report on the implementation of county plans to the county assembly. These reports should inform national reports on the realization of Vision 2030. This is the more reason why national and county plans should be harmonized through a consultative process to ensure a common approach to realization of national priorities.

CHAPTER FIVE

PARLIAMENT

5.1 Introduction

The Constitution acknowledges the people as the source of the legislative authority of Parliament and this recognition is in conformity with the national values and founding provisions of the Constitution that place the people at the centre of all public power. Both Chambers of Parliament (National Assembly and Senate) are required to exercise their respective powers in accordance with the Constitution and its structures and composition should reflect diversity of the Kenyan people and communities. Being an institution of democratic representation at the national level, it is important that Parliament has “the face of Kenya”. Only Parliament can exercise national legislative power and where this power is delegated to another state organ or state office or person of authority, a law enacted by parliament shall indicate the nature and extent of such delegation.³¹

The two Chambers of Parliament have full control of their own calendar and agenda in accordance with the wishes of Kenyans. Accordingly, the separation and independence of arms of governments is not only structural but also functional. During the constitutional review process, Kenyans called for a bicameral system of Parliament. Indeed, all past constitutional drafts (except for the Constitution Bill of 2005 popularly known as “Wako Draft”) proposed a bicameral legislature composed of two Chambers.

As the Chamber of popular representation, the National Assembly is composed of 290 members elected from single member constituencies across the country. Additionally, there are 47 women representatives who are chosen from the county constituencies and 12 members nominated to represent special interests which include: youth, persons with disabilities, and workers.

The Senate, unlike the National Assembly, is “a house of counties”. It represents and promotes the collective interests of counties at the national level. Accordingly, its structure, membership and decision-making processes are attuned to its primary role of promoting the interests of counties and their governments. Due to its territorial representation role (as opposed to popular representation), the Senate has fewer members relative to the National Assembly. The Senate is composed of 47 elected members from each of the 47 counties. The Senate is also composed of 16 women members who are nominated on the basis of party strength. In addition, the Senate is composed of four other members representing the youth (2 members composed of one woman and one man) and persons with disabilities (also composed of one man and one woman).

One of the concerns regarding nominations in the past was the use of positions of nominated members to reward supporters of the President and other party leaders who did not make it through the ballot.

Being part of the National Legislature, the National Assembly and Senate perform their primary functions through the legislative power. In turn, the legislative role is divided between the two Chambers with the Senate’s power limited to matters affecting counties. The National Assembly, on the other hand, has a general legislative mandate of all laws. The two Chambers have review and oversight powers over the executive. Like the legislative power, the oversight power is divided with the Senate having special review powers on specific matters which affect counties. There are, however, other oversight powers which are shared between the two Chambers.

The system of government adopted in the Constitution requires a strict separation of powers and functions among the three arms of government. The president and cabinet secretaries are no

³¹ Article 94 (6) CoK 2010.

longer in Parliament as was the case in the past. Parliament has also been split into the two Chambers and parliamentary functions shared between the two chambers. However, both changes are superimposed on a system that was previously a hybrid system and unicameral. Accordingly, the effectiveness of the new system depends on whether the previous culture and practices of the legislature (parliamentary/ mixed system, and unicameralism) will transition to what is envisaged in the current constitutional framework.

Under a pure presidential system such as the one adopted in the Constitution, MPs from the President's party or coalition are supposed to balance between two contradictory roles i.e checking the executive in the national interest and safeguarding their coalition's legacy for future elections. MPs from the minority party or coalition are also supposed to support the executive in the quest for the attainment of the national interest and oversight on the national executive.

In practice, though, Parliament has carried out its business with the collective mindset of a parliamentary or mixed system of government. The majority coalition sees itself as the government side while the minority side sees itself as the opposition. The current system of government envisages Parliament working cohesively to push the legislative agenda at the national level. The practice of positioning the Majority Leader as a "government spokesman" in Parliament while seeing the minority coalition as a "shadow cabinet" is, therefore, in dissonance with the system of government in the Constitution. In late 2014, the National Assembly also sought to amend its rules to provide for a "weekly question time" for cabinet secretaries before a committee of the whole house and this is a typical practice of the mixed system that the current Constitution seeks to move away from.

The nature of the system of government that was adopted in the Constitution requires fundamental changes to the approach and functioning of parliament. There is a need for political tolerance and structures that can enhance collaborative decision-making in Parliament. There have been talks about reversion to a parliamentary or mixed system of government. This may address some of the challenges emanating from the pure presidential system of government but it will require a constitutional amendment (including a national referendum). In the meantime, it is important that effort, time, and resources are dedicated to develop capacity for legislative effectiveness.

5.2 The Legislative Role of Parliament

Parliament exercises its legislative power through Bills passed by the prescribed procedures and assented to by the President. As mentioned above, this power is shared between the two Chambers.

While the National Assembly debates and considers all laws generally, the Senate has to also consider and pass laws which affect County Governments. As a result, any law debated and passed in the National Assembly which concerns counties has to be referred to the Senate for debate and approval before the President can assent to it.

Laws affecting counties are defined in the Constitution as those which touch on functions allocated to counties in Part II of the Fourth Schedule to the Constitution, a Bill that relates to elections of members of a county executive or legislature, or any Bill that touches on the finances of County Governments. All these laws must, as a constitutional requirement, be debated and passed by the Senate before presidential assent.

The Constitution further divides Bills affecting counties into ordinary and special Bills affecting counties. Special Bills are those which relate to election of members of a county assembly or county executive, and the County Allocation of Revenue Bill (CARB) which proposes how the equitable share of counties is divided among the 47 counties.

The National Assembly requires a higher threshold (two thirds) to overturn the decision of the Senate with regard to special Bills affecting counties. On the other hand, the National Assembly needs only a simple majority to overturn all other Bills (ordinary) affecting county governments. Furthermore, a Money Bill can only originate/ be introduced in the National Assembly first before it can proceed to the Senate, if it affects counties. A Money Bill is defined as a Bill that deals with taxes (excluding county taxes), imposition of a charge on a public fund, borrowing or guaranteeing a loan and connected matters.³²

The “Tagging”/ Filtering of Legislation

The Constitution provides that soon after a Bill is tabled before any Chamber, the Speakers of the two Chambers have to make a decision on whether the Bill affects counties or not. Where the two Speakers agree so, they must further agree on whether the Bill is a special Bill affecting counties, as defined above. Majority of laws that are sponsored by the national executive have been tabled in the National Assembly. In many cases, the laws tabled in the National Assembly have been tagged as not affecting counties. No clear parliamentary procedures have been adopted to ensure a clear process of "tagging" proposed laws as affecting counties or not. A report by the Commission on Implementation of the Constitution notes a total of 36 laws which should have been passed by both houses but which have been exclusively passed by the National Assembly.³³ These include the Water Bill (2014), the Mining Bill (2014) among other Bills where the Senate has been excluded.

In mid-2013, the Senate was excluded from the passing of the Division of Revenue Bill of 2013/14. While the Speaker of the National Assembly had earlier decided to pass on the Bill to the Senate, he rescinded the decision after the Senate decided to make amendments to the Bill. The Speaker of the National Assembly ignored the Senate amendments and passed on the Bill (as initially passed by the National Assembly) to the President for assent. Against the advice of the Commission on Implementation of the Constitution, the President assented to the Bill on the grounds that any further delay with the Bill would affect budget implementation. The Constitution provides that when there is a legislative deadlock between the two Houses, a Mediation Team composed of equal numbers from each Chamber is constituted in order to develop a consensus Bill.

The Senate took the matter to the Supreme Court for an Advisory Opinion and the Court ruled (with one judge dissenting) that the Division of Revenue Bill is a Bill affecting counties and the Senate has a role to debate and vote on it.³⁴ The Court followed its previous ruling on matters affecting counties in the case of *Re the Matter of the Interim Independent Electoral Commission*³⁵ where the Court noted that “...any national level activity that has a significant impact on county government would come within the purview of a matter concerning the county governments.” The Court therefore concluded that the Division of Revenue Bill is a Bill that affects county governments and should have been considered by the Senate. The Court advised that in the instant case, the proper procedure was for the two Chambers to form a Mediation Committee of equal numbers from each House to develop a consensus Bill, in an attempt to resolve the stalemate, as provided for in the Constitution.

³² Article 114 (3) Constitution of Kenya 2010.

³³ Commission for the Implementation of the Constitution 'Expectations versus progress: a scorecard for the National Assembly' at http://www.cickenya.org/index.php/resource-center/downloads/presentations/item/download/388_1b7382cc42df9b6c58c4c00a783c6ff3 (accessed 3 March 2015).

³⁴ Supreme Court Constitutional Application No. of 2013.

³⁵ Supreme Court Constitutional Application No.2 of 2011 (para.40).

Recommendations

Both Chambers should participate in the decision as to whether any law tabled in any of the two Chambers affects counties or not. The unilateral exclusion of one Chamber by the other is not intended by the Constitution. The existence of two separate Chambers of Parliament implies that there must be coordination of functions and business between the two Chambers in order to ensure a harmonious and effective pursuit of legislative priorities at the national level. The Constitution also provides for joint structures for cooperation and consultation in cases of different opinions by the two Chambers. Accordingly, while the two Chambers have distinct functions, they are required to carry out their functions in harmony and cooperation in accordance with the broader values and objectives espoused in the Constitution.

In order to ensure a harmonious process of tagging Bills, the following measures are proposed:

- The two Chambers should develop joint rules that will guide areas of common interest such as the tagging or filtering of legislation, mediation in case of disputes, and specific joint committees on specific matters that affect both Houses.
- While the Constitution provides that the two Speakers should make a decision on whether a Bill affects counties, the two Chambers could consider a “tagging committee” that will advise both Speakers on the nature of any Bill that is tabled before either Chamber
- The Senate has done a review of laws that have already been passed. It is important that both Chambers make a decision on remedial measures to be taken in view of the Senate’s concerns.

Encroachment by Use of Laws

There are occasions where the two Chambers have passed laws which go against the text and spirit of the Constitution.

Both Chambers, for instance, enacted the County Government (Amendment) Act to establish County Development Boards and the National Assembly enacted the Constituency Development Fund (CDF) Act. The two laws were assented to by the President against the advice of the CIC and the CRA. The National Assembly’s implementation of the CDF has been declared unconstitutional by the High Court in: *Institute of Social Accountability & another v National Assembly & 4 others [2015] eKLR*. The Court declared that the continued implementation of the fund as was originally designed and structured “violates the doctrine of separation of powers between the executive and legislative functions”. The Court further declared that the fund “undermines some key national values and principles of governance including devolution of power, accountability and good governance.” The Court gave the government an opportunity to remedy the defects of the Act through new legislation or other means.

Recommendations

The review of law to remedy the defects in the CDF Act as recommended by the Court should be considered in light of the spirit of the Court’s findings. Establishment and implementation of a structure such as CDF, where members of Parliament do not participate and where it performs only national government functions may pass the constitutionality test. This would however, compromise the principle of efficiency, effectiveness and prudent use of resources.

The creation of a bureaucratic structure at the local level that is different from the county structures of administration, but one with resources to implement projects has its attendant costs. More importantly, it may create fertile ground for financial indiscipline and impropriety where the National Government executive structure has similar projects implemented centrally

through ministries. Similarly, the establishment of Ward Development Funds should follow this trajectory and be abolished for conflict with the principle of separation of powers.

The County Development Boards Act establishes a County Board with the Senator as chairperson, and Governor as vice chair to coordinate planning and development in the County. However, the Board as structured undermines democratic accountability by subjecting the development plans and decision of the county residents and Assembly to a Board chaired by a Senator. The framework for accountability is thus distorted as the accountability for delivery appears to lie with the Board rather than with the County Government. It also creates a situation where County Governments are expected to fund the costs of the board which amounts to creation of unfunded mandates.

Defining the Nature and Extent of the Legislative Role of Senate

The legislative role of the Senate lies in considering national legislation that affects counties. This is not tantamount to legislating for County Governments whose legislative power is vested in County Assemblies. In this regard, the role of the Senate is limited to reviewing enabling national legislation that is meant to set the broad national legislative framework that county governments are to operate under. There is an emerging concern that the Senate is attempting to develop legislation on issues which are clearly the legislative mandate of County Governments.

The Senate is currently considering 37 Bills, a few of which, on the face of the record, are within the legislative mandate of the counties under the principle of subsidiarity. A core example is the Potato Produce and Marketing Bill that establishes County Potato Committees in select counties (Nyandarua, Narok, Nakuru, Kiambu, Nyeri, Meru) whose function includes *inter alia*, the dissemination of information and guidelines for use by the potato fraternity in the county and representation of the interests of the potato industry fraternity in the affairs of the county.

A second example is the creation of an Office of County Printer, mandated to print county gazettes within stipulated timelines. Provisions of the County Government Act and best practice dictates that each county makes the decision as to whether it wants to establish an office in its county public service, and choose to do so either through statute or administrative action.

Recommendation

The High Court's interpretation of the Constituency Development Fund should act as a guiding principle to the Senate, and indeed the two Chambers, on how to define the role of the legislature. In paragraph 131, the Court emphasizes that:

The respective roles of the Houses of Parliament are clearly stated. The oversight role of the National Assembly and the role of the Senate in regulation of county government under the umbrella of legislative authority do not permit the National Assembly and the Senate to get involved in the administration and implementation of development projects in the counties. Members of Parliament cannot legislate on county laws, play oversight role over the county funds in the case of the senators, set policies on the counties and undertake and implement development projects at the constituency level without impinging on the county government function and the all-important principle of checks and balances.

Senate legislative outcomes should be cautious as not to overreach into County Assembly mandates. Legislative review should be undertaken to ensure that Bills with potential to infringe on the principle of subsidiarity are revised.

5.3 Parliamentary Oversight and Review Role

As a result of the ruling coalition's numbers in the National Assembly, the current practice of oversight over the executive has largely been a ritual as opposed to an objective exercise of "checks and balances". A case in point is the vetting for approval of Presidential appointees. The rationale behind the National Assembly's approval process is to ensure that there are proper and fit persons who are appointed to constitutional offices. The National Assembly represents the interests of the people and the approval process ensures that the persons nominated to office are approved by the "representatives of the people".

The National Assembly has power to summon members of the executive and require specific answers on issues. The Constitution specifically provides that a Cabinet Secretary shall attend before a committee of the National Assembly (or the Senate) when required to do so and answer any question concerning a matter for which the Cabinet Secretary is responsible. Accordingly, the legislative scrutiny of executive action is done through committees as opposed to the previous constitutional dispensation when ministers, who were parliamentarians, answered questions from other members during "question time".

In late 2014, the National Assembly sought to bring back the previous parliamentary system of "question time" through the back door. This was achieved by amending House Rules to provide for sessions which Cabinet Secretaries would attend every Tuesday to answer questions on the executive before a "Committee of the Whole House" amid protests by the National Executive.³⁶ The Commission for the Implementation of the Constitution (CIC) advised against this move on grounds that the system of government adopted in the Constitution precludes such arrangements which fall within parliamentary or mixed systems of government.³⁷

Recommendation

The problem here is not with the Constitution but in the institutional culture that is built around the previous constitutional order as well as the lack of enforcement of constitutional provisions and benchmarks. As earlier stated, the successful implementation of the Constitution requires a transition from the manner in which legislative business was carried out in the past to learning the changed roles of Parliament. Furthermore, there is need for laws and rules that will guide Parliament in its procedural and substantive decision-making. Specific recommendations include:

- Enabling legislation needs to be crafted to ensure nomination and approval of persons nominated for public office is based on educational and professional qualifications, moral and ethical considerations
- In passing this legislation, Parliament should raise the bar with respect to the caliber of individuals who can make it through vetting and to cure shortcomings witnessed in recent vetting activity.
- Similar to how the Senate participates in approval of the appointment of Inspector General, it should participate in approval of all other presidential appointments for the reason that the scope of responsibilities of the appointees is national, thus affects counties.

³⁶ Anthony Omuya, 'Uhuru hits out at House Teams over cabinet summons' *Business Daily* 7 November 2013.

³⁷ Commission for the Implementation of the Constitution (CIC) 'CIC Press statement on the violation of the Constitution by Parliament' 2 October 2014.

Senate's Oversight Role

The Senate has an exclusive role which emanates from its core mandate of representing and safeguarding county interests; the power to review the decision of the National Government to intervene in County Governments.

The Constitution provides that where a county fails to perform functions allocated to it or fails to operate a financial management system prescribed by national legislation, the National Government may intervene and take over the affairs of the county until there is compliance. Article 225 gives power to the National Government to stop the transfer of funds to a County Government subject to approval by each of the two Houses of Parliament. Furthermore, while the President can, subject to laid down procedures, suspend a County Government in situations of an emergency or in other exceptional circumstances, the Senate has the constitutional power to terminate the suspension at any time. The Senate also determines the impeachment of a county governor or deputy governor after impeachment proceedings have been instituted by the respective county assembly.³⁸ Lastly, under Article 96 of the Constitution, the Senate is given power to oversight on national revenue allocated to county governments.

There is a general lack of clarity on the nature and extent of the role of the Senate and this has led to confusion in the performance of the functions of Senate. While the Constitution confers on the Senate the power to oversight revenue that is allocated to counties, this role should be understood within the context of the Senate's broad mandate as part of the national legislature and the roles of other institutions. The Constitution, for instance, confers the County Assembly the role to oversight the County Executive. It is highly unlikely that the Constitution could have intended to confer a duplicate mandate on the Senate and the county assemblies. Accordingly, the Senate's role should be approached from the premise that it is a national organ that has the primary mandate to represent county governments at the national level.

Accordingly, the oversight role of the Senate on revenue allocated to counties can only mean an oversight on national level institutions that are involved in the determination or management of the county share. It is instructive, in this regard, that the Senate does not oversight powers over revenue that is raised locally by county governments. This approach complements the role of the Senate as the champion of county interests at the national level and also removes the potential conflict between the role of the Senate and that of county assemblies. Indeed, it would be impractical for the Senate to carry out detailed oversight work in all counties while at the same time attending to parliamentary business at the national level.

Recommendation

The role of the Senate, if correctly interpreted, would then require that the Senators, sitting as representatives and in defense of county governments undertake their oversight of national government in broad comprehensive terms including: Receiving reports on revenue disbursements ensuring that they are disbursed as allocated, without delay or deduction; Requiring that in the event of reallocation of funds (in cases of emergencies), that the county governments' shares are not inequitably affected; Reviewing laws passed by the National Assembly to ensure that there are no claw-back elements to functions as assigned; Consulting with county governments to ensure that county interests are incorporated in legislation etc. This function is currently being played by the Council of Governors, but which should ideally fall within the purview of the Senate.

This approach to the Senate's role fits with the principle applied in articles 190(5)(d) and 192(2) and (4) and 225 that empowers the Senate to terminate an intervention by national government, make determinations on the suspension of counties, the lifting of suspension as well as the approval of stoppage of transfers to county governments. In these circumstances, Senate is

³⁸ Section 33 County Government Act.

constituted to safeguard county autonomy during processes such as suspension of counties or interventions in county affairs. In the CDF case, the Court affirmed the role of the Senate as ensuring that "the county voice is heard and considered at the national forum and the interests of counties and their governments secured. This way, the sovereign power of the people is duly exercised through their democratically elected representatives"

The Structure and Composition of the Senate vis-à-vis its role

Under Article 98 of the Constitution, Senators are directly elected by county constituents and thereby are in direct mandate competition with Governors. There is a lack of clear linkages between the Senator and the County Government as envisioned in article 96(1) and no clear provisions exist, requiring consultation between the Senator and County Government. In some cases, a directly elected Senator and Governor may be representing opposing political parties and this further complicates the working relationship. Section 33 of the County Government Act confers upon the Senate the power to impeach a Governor. This provision has undermined the smooth and cordial relations that are expected between the county governments and the Senate. The weak institutional linkages have arguably impeded the effectiveness of the Senate and county governments.

The ideal situation would have been a Senate that comprises delegates of the counties, elected or appointed by the county government and therefore directly answerable to the county government. This would be consistent with the South African and German systems of devolution from which the Kenyan constitution largely borrowed.

In South Africa, members of the National Council of Provinces (NCOP), the equivalent of the Kenyan Senate, are composed of the executive and legislative organs of provinces. Indeed the provincial premier, the equivalent of the Governor, heads each province's 10 member delegation to the NCOP. In Germany, members of the *Bundesrat*, the equivalent of the Kenyan Senate, are representatives of the 16 *Länder* executives. In such an arrangement, the institutional linkages between the sub-national units and the second chamber are evident and the representative role of the second chamber is more apparent.

Recommendation

There is a need to create a stronger link between the institution of the Senate and the county governments in view of the former's integral role in representation and protection of county interests. There are a number of alternative approaches to addressing this anomaly.

Firstly, a purposive interpretation of the Senate mandate under Art. 96(1) read together with Article 259 of the Constitution can be used to imply an obligation on the part of the Senate to consult and cooperate with County Governments. This would be consistent with the concept of cooperative government established by Articles 6 and 189 of the Constitution.

Similarly, Article 118 requires parliament to facilitate public participation and involvement in its legislative business. This may be interpreted as requiring the Senate to consult with counties on proposed laws. This obligation should include a duty on the Senate to share with the County Governments any bills pending before it for comment and input before consideration, debate and passage.

Another alternative is to seek a constitutional amendment and do away with direct election of the Senators and instead have senators indirectly elected by counties. Some of the past constitutional drafts had provided for the indirect election of senators through regional assemblies.³⁹ would resolve the concern of having competitive statuses between Senate and Governors. The constitutional amendment would then incorporate the election of Senators by

³⁹ For instance both the CKRC Draft (popularly known as "Ghai Draft" and the Bomas Draft both provided for the indirect election of members of the second chamber.

County Assemblies who would then be the County Government's representatives at the Senate. Such an arrangement would fit within the aspirations of Article 96(1).

Finally, the role of impeaching governors that is given to the Senate by the County Government Act also conflicts with the Senate's fundamental role of representing counties. Senators are defenders of county interests at the national level and this is this should be the dominant purpose of the Senate. The impeachment role puts senators in the shoes of county assembly members. It is recommended that this provision is amended by removing any role of the Senate in the impeachment of governors. Impeachment of the President is done by a process that involves the two Chambers of Parliament. At the county level, however, there is only one assembly and this may have necessitated the involvement of the Senate in the process. It is suggested that the County Government Act is amended to provide for a threshold of public involvement (through a county referendum or other means) in the impeachment, in place of the Senate role. This will address the conflict of roles in the Senate and also ensure that voters who elected governors in the office are involved in processes seeking the governors' removal.

5.4 Parliamentary Accountability, Leadership and Organisation

Parliament has full control of its own calendar and the manner in which it organises its structures and systems to ensure effective legislative business. The Constitution provides for leadership of the two Chambers. The overall leadership is by the respective Speakers who are *ex officio* members of the respective Chambers. Parliament carries out its business through various committees established in the Senate and the National Assembly. The committees report to the full House on specific matters relevant to the roles of the committees.

Parliament is accountable to the people in the manner in which it carries out its business. The periodic parliamentary elections provide the people with a chance to choose persons who can represent their interests in Parliament. The expectation is that serving Members of Parliament will be judged on their performance during the election. Beyond elections, Parliament is required to ensure public participation and consultation when debating and considering Bills. Furthermore, the public has a right to petition Parliament on any matter.

Parliamentary Leadership

The Constitution provides that candidates cannot seek more than one elective office. In the past, the President was also a Member of Parliament and most unsuccessful presidential candidates became Members of Parliament. The decision to exclude presidential losers from parliamentary seats was partly as a result of the system of government which strictly separates the executive from the legislature. However, the reality of our politics is that this system locks out political leaders who contest election from any formal spaces of democratic representation. The net effect is that alternative national political leadership is locked out of political decision-making.

Recommendation

The challenge above can be addressed in two ways. First, there can be a change of the electoral process to provide for the staggering of the elections for president and other elections to allow a person to contest in both elections separately and relinquish one position for the other. The other alternative is to allow candidates to contest for the presidency and parliamentary seats and relinquish the parliamentary seat in case one wins the presidency. This will ensure that political leadership is in spaces where negotiations and political decision-making can take place.

While the Constitution provides for the position of Minority and Majority leaders in the National Assembly under Article 108, no similar position is recognised in the Constitution in the case of the Senate. Party leaders in both houses play an important role in negotiating settlements and all their positions and roles should be equally recognised and protected in the Constitution.

Parliamentary Accountability

The electorate's right to recall their non-performing Member of Parliament is one of the means of ensuring accountability provided for under Article 104 of the Constitution. The Article does not however, expressly provide grounds and procedures for effecting the right of recall, and instead through Sub Article 2 vests the power to determine and set grounds against which they can be recalled on the very Members of Parliament.

Parliament through the Elections Act of 2011 at section 45(3) sets out grounds and the procedures for recall. The time lines for an initiative to recall and the provision for the courts to affirm grounds before the recall process can start make for complex and impractical procedures that are unlikely to serve the purpose of the Constitution.

Recommendation

The procedure makes it difficult and impractical to recall a Member of Parliament. Sections 45 to 48 of the Elections Act make it impossible to recall a Member of Parliament. A review of these provisions to conform with the intentions of the Constitution to hold Members of Parliament accountable to the electorate is recommended.

Although the date of the general election is entrenched in the Constitution under Article 101(1), it is not among those provisions that would require a referendum to change and parliament could still misuse the date of elections. This means that whereas the constitution wanted to solve the challenge of the unpredictability of the elections, the problem remains because the president's powers were merely substituted with those of another arm of government (parliament).

Recommendation

To safeguard against the risk of abuse, provisions on the date of elections should be included in article 255(1) as among the issues that should only be amended through a referendum.

It is clear from the discussions above that there is a fundamental change to the structure and role of the national legislature under the Constitution of Kenya 2010. The mandate bestowed on Parliament under the Constitution requires parliament to develop new capacities such as budget-making, accountability and oversight, and legislative development. Parliamentary committees play a critical role in some of these functions and there is a need to ensure effectiveness through appropriate number and technical support to these committees. There is also a need to consider a threshold of qualifications for members to serve in certain committees whose roles are of a technical nature.

CHAPTER 6

THE JUDICIARY

6.1 Introduction

The Judiciary is central to the rule of law being the constitutionally mandated determinative interpreter of the Constitution and other laws, and arbiter of disputes. While the Judiciary existed under the replaced constitutional dispensation, it lacked independence as it had been weakened and compromised by the Executive.

Judicial appointments, a preserve of the President, were not based on principles of objectivity and integrity. The President appointed the Judges on the advice of the Judicial Service Commission (JSC) which was not binding on him and could easily be ignored. The JSC itself was composed of the Chief Justice, two Judges, and the Attorney General all of whom owed their offices to the President, making their role weak and ineffective.

From 1986 to 1990, security of tenure of Judges was stripped and this further compromised the independence of judges as they could be removed at will. Likewise, the Judiciary did not have financial independence since it directly depended on the National Treasury for its financial needs. This led to inadequate resources which compromised not only its operations but also its core function of fair and impartial administration of justice.

The net result was an ineffective and compromised Judiciary that could not serve the needs of the people, the demands of constitutionalism and the rule of law. According to the Constitution of Kenya Review Commission Report, the citizens had lost faith in the Judiciary's ability to dispense justice fairly, impartially and without fear sentiments which have been expressed by reports that have assessed the performance of the Judiciary in the past.⁴⁰

The Judiciary had thus become a widely discredited institution and the Kenyan people wanted it to be transformed. During the review process, Kenyans expressed desire for meritorious appointment of Judges who would treat fairly and equally all who would come before the courts. Kenyans demanded an open, transparent and accountable way of appointing judges. The public also called for the simplification of court procedures and expeditious determination of cases. They asked for an enforceable code of ethics for judicial officers incorporating disciplinary procedures and measures such as interdiction, dismissal, suspension, dismissal and prosecution. There was also demand for retention of Kadhi's courts to deal with matters of personal laws of Muslims, traditional mechanisms for conflict resolution and the establishment of local courts with jurisdiction over small claims. It was widely acknowledged that restoring confidence in the Judiciary entailed addressing these concerns.

6.2 Judicial Reforms under the Constitution of Kenya 2010

The Constitution introduces fundamental changes aimed at restructuring the Judiciary to secure its independence and ensure that there was no executive interference. The Constitution establishes an empowered and independent Judiciary that is to implement, enforce and offer

⁴⁰ Report Of The Advisory Panel Of Eminent Commonwealth Judicial Experts (17 May 2002); Report of the Committee on the Administration of Justice (1998) popularly known as the "Kwach Report".

authoritative interpretation of the Constitution⁴¹. First, judicial authority is expressed as emanating from the people, and the courts must use it to serve the people and promote constitutionalism and the rule of law. Judicial authority must be used to promote and ensure justice to all regardless of status. The courts must ensure efficiency and expeditious dispensation of justice. They must promote alternative forms of dispute resolution where appropriate and ensure that substantive justice is not defeated by undue regard to procedural technicalities. They must interpret the Constitution and laws in a manner that protects and promotes the values, objectives and purposes of the Constitution.

Secondly, the process of appointment of Judges has been fundamentally transformed to reduce the power and role of the President.

In respect of the Chief Justice and the Deputy Chief Justice, the President's role has been reduced to formal appointment of persons recommended by the JSC followed by approval by the National Assembly. In respect of other Judges, the President's power has been reduced to formal appointment of persons recommended by the JSC. The structure, role and composition of the JSC have been transformed to strengthen and enhance the independence of not only the JSC itself but also the Judiciary.

JSC is recognised as an independent commission whose primary role is to "protect the sovereignty of the people" and promote constitutionalism. The JSC is composed of the Chief Justice, one Judge of the Supreme Court, one Court of Appeal judge, a High Court Judge, and one Magistrate. Other members are the Attorney General, two Advocates who are elected representatives of the Law Society of Kenya (LSK), one nominee of the Public Service Commission, and two other persons (a man and woman) non-lawyers who are appointed by the President but approved by the National Assembly to represent the public. Members (excluding the Chief Justice) can only serve in the JSC for two terms only of five years each.

The independence of the JSC is crucial in view of the mandate that the Constitution bestows on it. In addition to recommending the appointment of the Chief Justice, Deputy Chief Justice and all other Judges, the JSC recommends the conditions of service for Judges and other Judicial Officers and Judicial Staff. It is also a disciplinary body and has power to investigate and take appropriate action against Registrars, Magistrates, and other Judicial Officers. It coordinates capacity building and training of Judges and generally advises government on ways of improving the efficiency of administration of justice. In the performance of its functions, the JSC is to be guided by competitiveness and transparency and promotion of gender equality.

Thirdly, the Constitution introduces financial independence of the Judiciary by providing for the establishment of the Judiciary Fund. The Judiciary Fund is administered by the Chief Registrar of the Judiciary and is primarily used for the administrative expenses of the Judiciary. Each year, the Chief Registrar is required to prepare financial estimates of expenditure for the following year for approval by the National Assembly. The approved funds are then charged on the Consolidated Fund and paid directly to the Judiciary Fund.

Fourthly, the Constitution enhances the independence of Judicial Officers by providing that in exercise of its powers and functions the Judiciary is only subject to the Constitution and the law and shall not be subject to the control or direction of any person or authority. Furthermore, the office of a Judge of a Superior Court shall not be abolished while there is a serving Judge. It further provides that remuneration and benefits payable to Judges shall be directly charged on the Consolidated Fund. Similarly, the remuneration and benefits of a Judge including retirement benefits cannot be varied to the disadvantage of a Judge while he or she is still serving. Finally, the Constitution provides absolute immunity to all members of the Judiciary in respect of anything done or omitted in good faith in the course of their duties.

⁴¹ Ben Sihanya (2011) "The Presidency and Public Authority in Kenya's New Constitutional Order," Constitution Working Paper series No. 2 Society for International Development (SID) Eastern & Central Africa, Nairobi. *op.cit.*

Judicial independence is important as a mechanism of checks and balances on the legislative and executive arms of government. In particular, the courts are charged with the responsibility of reviewing acts of the executive and the legislature to ensure compliance with the Constitution. The Supreme Court has the specific duty of determining presidential election disputes which can be politically sensitive. The courts have the duty of ensuring that the fundamental rights and freedoms of the people guaranteed by the Bill of Rights are respected, promoted, and fulfilled by all state organs and all persons. The adoption of a devolved system of government introduces a new dimension of judicial independence in terms of which the Judiciary must be independent not only from the legislative and executive branches of government but also from the two levels of government.

The Judiciary cannot be part of any one of the two levels of government since it plays a major role in the determination of disputes between them. Apart from the jurisdiction of the Judiciary generally to interpret the Constitution and to determine the powers and constitutional relationship between the levels of government, the Supreme Court has jurisdiction to render Advisory Opinions in matters concerning County Governments.

Fifthly, the Constitution has introduced a new structure of the court system comprising of superior courts and subordinate courts. The Superior Courts comprise of the Supreme Court, the Court of Appeal, the High Court and two Specialised Courts with equal status as the High Court to deal with matters of employment and labour relations; and matters on the environment and the use of and occupation of, and title to land. Subordinate courts comprise of the Magistrates Courts, Kadhi's Courts, Court Martials and any other court or local tribunal established by an Act of Parliament. The Constitution sets the criteria and qualification for the appointment of Judges and Magistrates to the various courts.

The transition provisions of the Constitution sought to rationalize the staff complement inherited from the old constitutional dispensation through a vetting mechanism whose objective included releasing officers who were unfit to serve under the new constitutional dispensation. The vetting process was protected from further litigation by providing for the finality of the decision by the Vetting Board.

6.3 Implementation of Judicial Reforms

The Judiciary stands out as one institution that has substantially embraced the transformative vision of the Constitution and its new architecture. It has adopted a culture and disposition that fits with the expectations of the Kenyan public and initiated reform programmes that have begun to bear fruit. The Chief Justice has developed the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules*, which have made the enforcement of the Bill of Rights an easy process.

The increased number of litigants prosecuting constitutional petitions or seeking the protection and promotion of human rights is testimony to the impact of the new Constitution. The courts in their dispensation of justice, have sought to hear and determine disputes on their merits, and have focused less on process technicalities that often defeated justice. The Judicial Transformation Programme spearheaded by the Chief Justice has sought to enhance access to justice through the provision of additional courts across the country. Recruitment of Judges and Magistrates, establishment of capacity building and training structures for Judicial Officers and Staff, enhancement of terms and conditions of service, automation of key services, and adoption of performance management are ongoing initiatives.

However, some challenges still exist. Some provisions in the Constitution intended to secure the independence of the Judiciary (such as the Judiciary Fund) have not been implemented. A lack of clarity in the appointment of judges (specifically the nature of the role of the President) has led to a stand-off between the Judicial Service Commission and the President. Furthermore, lack

of clarity on the nature and extent of the role and powers of the Supreme Court and specialized courts has also been a challenge to overall judicial effectiveness.

Judiciary Fund

The new Constitution provides for the establishment of the Judiciary Fund as an important aspect of securing the independence of the judiciary. While Article 173(1) establishes the Fund, Article 173(5) requires Parliament to enact legislation to provide for the regulation of the Fund. This Fund has however, not been operationalized.

Recommendation

It is recommended that the regulations which have been developed to operationalize the Judiciary Fund should be adopted and other administrative/ institutional measures taken to make the Judiciary Fund operational. This step will go a long way in assuring the independence of the Judiciary as required in the Constitution.

The Role of the President in the Appointment of Judges

Article 166 provides for appointment of Judges by the President on recommendation by the Judicial Service Commission. This provision has raised interpretation questions regarding the role of the President in the recruitment of Judges. While one school of thought contents that the role of the President has been reduced to a ceremonial and formal signing of the instruments of appointment of persons presented by the Judicial Service Commission, another school holds the contrary view that the President retains a role in determining who becomes a Judge and can reject names recommended by the JSC.

Interpretation should commence on the premise that the framers of the Constitution intended to reduce the powers of the President in the process of the appointment of Judges so as to enhance the independence of the Judiciary. The Constitution therefore provides for a process that has checks and balances that ensure that the President does not wholly control the process and outcome. The Constitution has denied the President the opportunity to originate candidates to be appointed as Judges. He must wait for the JSC to recommend names of persons to be appointed. He however, can reject a recommended person and when he does so, he must refer the matter back to the JSC to recommend an alternative person. The President cannot substitute the rejected person with a person of his own choice. In the case of the Chief Justice and the Deputy Chief Justice, the National Assembly can also decline to approve the persons appointed by the President. In such event, the matter must be referred back to the JSC to recommend other persons.

This interpretation is consistent with the approach in the United States of America where Judges are appointed by the President with the approval of Congress. The President nominates candidates for appointment as Judges while Congress vets and approves the persons for appointment. Under this system Congress can reject a nominated person and refer the matter back to the President to nominate another person. Congress cannot itself substitute the rejected person with a person of its own choice. Thus, while Congress is denied the opportunity to originate names of persons to be appointed Judges, it can reject those nominated by the President.

Recommendation

It is therefore recommended that provision be made in an Act of Parliament requiring the President to either appoint the candidates presented by JSC within a specified period from date of submission of names by JSC or signify in writing his rejection of any candidate setting out the reasons for such rejection. This would enable the JSC to commence the process of recommending alternative persons. Likewise, it would give an opportunity to the rejected person to seek redress for fair administrative action if he or she is of the opinion that the rejection was unfair.

Separation of Powers and Oversight

The separation of powers doctrine is at the centre of the Kenyan system of constitutionally divided and delegated duties to the three arms of government. The separation is not merely a matter of convenience or of a governmental mechanism. Its object is basic and vital, namely, to preclude a combination of these essentially different powers of government in the same hands.

The framers of the Kenyan Constitution adopted the principle and carefully spelled out the independence of the three branches of government: Executive, Legislature and Judiciary in Articles 94, 129 and 160 of the Constitution. At the same time, however, they provided for a system in which some powers should be shared: Parliament may pass laws, but the President can refer back with reservations, any laws passed by Parliament; the President nominates certain public officials, but the National Assembly must approve the appointments; and laws passed by the Legislature as well as Executive actions are subject to judicial review. The doctrine, though promoting the status of separate and distinct roles of the Executive, Legislature and Judiciary is not mechanistic, and the lines of demarcation between the branches of government must be viewed with a certain amount of pragmatism and cooperation. In recent years, the character of these relationships has changed significantly, both because of changes in governance and because of wider societal change.

Parliament and the Executive are both on record raising concern over what is perceived as judicial interference. Parliament's main concern is with regard to the Judiciary's halting of parliamentary business, especially in cases of impeachment of governors where these concerns have been most pronounced. The Executive has tabled its concerns with use of judicial mechanisms to halt and delay Executive programmes through the issuance of ex-parte injunctions.

These concerns should be understood and addressed in the context of various factors. First, the country is still in the process of transition from the old constitutional order into the new constitutional dispensation. The new Constitution makes it clear that the country now follows the system of constitutional supremacy under which all arms of government are creatures of the Constitution which they must respect and which must be determinatively interpreted and enforced by the Judiciary. While the Judiciary must respect the doctrine of separation of powers, it cannot abdicate its constitutional responsibility to interpret and enforce the Constitution and the principle of constitutional supremacy.

Secondly, the central constitutional principle governing the relationships between the Judiciary, the Executive and Parliament is that of the "independence of the judiciary". This is important for purposes of guaranteeing public confidence in the independence of the Judiciary. This does not mean that the Judiciary has to be isolated from the other branches of the State or that the Judiciary is exempt from scrutiny and general accountability. Like all other public institutions, the Judiciary is accountable for the general manner in which the court system serves the public. However, the methods of ensuring this accountability do not prejudice judicial independence. A distinction must be drawn between the judicial functions of the judiciary and the JSC which must be protected from interference by the legislature and the executive; and financial accountability for which the Chief Registrar of the Judiciary can be summoned by Parliament to account.

Role and Jurisdiction of the Supreme Court

The Supreme Court was established to be the final arbiter, to determine legal issues of public importance while developing jurisprudence in all branches of law. As the highest Court in the country, it is ideally supposed to play a key role in the interpretation of the Constitution. The Supreme Court should be in a position to quickly provide guidance and direction about the meaning of the new Constitution in order to avoid contradictory decisions by lower Courts.

However, the manner in which the Constitution confers jurisdiction upon the Supreme Court may not enable it to effectively play this role. The Supreme Court is established under Article 163 with the following listed areas of jurisdiction:

- a) Exclusive original jurisdiction to hear and determine disputes relating to the elections to the office of President arising under Article 140.
- b) Exclusive original jurisdiction to provide an advisory opinion at the request of the national government, any State organ, or any county government with respect to any matter concerning county government.
- c) Appellate jurisdiction to hear and determine appeals from the Court of Appeal and any other court or tribunal as prescribed by national legislation.

One major problem with the jurisdiction as outlined is that many matters concerning the interpretation of the Constitution can only reach the Supreme Court by way of appeals from the lower courts. Given the adversarial nature of the Kenyan legal system, many parties may find it expensive to pursue their cases from Magistrate's Courts through appeals in the High Court and Court of Appeal up to the Supreme Court.

The end result is that very few matters relating to the interpretation of the Constitution will reach the Supreme Court to enable it pronounce itself definitively about the meaning of various provisions of the Constitution. The risk then is that contradictory decisions by different judges of the High Court and the Court of Appeal remain in the country's jurisprudence for long thus causing confusion and stalling jurisprudential growth.

Thus, the vision that the Supreme Court will help in the expeditious development of Kenyan jurisprudence on constitutional matters is undermined. This very limited jurisdiction of the Supreme Court has made it appear under-utilized. As a result, the Court has interpreted its appellate jurisdiction in a very broad manner that has elicited criticism from the other Courts and lawyers.

Recommendation

To address this problem it is recommended that the Constitution be amended to provide that all declarations of unconstitutionality by the High Court and the Court of Appeal cannot take effect until they have been confirmed by the Supreme Court. This approach draws lessons from the South African Constitution which provides that although the High Court and the Supreme Court of Appeal have jurisdiction to interpret the Constitution and make declarations of invalidity, such declarations do not take effect unless confirmed by the Constitutional Court.

Qualifications of Supreme Court judges

Concerns have been expressed about the qualifications of Supreme Court judges as provided for in Article 166(3) of the Constitution.

To qualify for appointment as a Supreme Court Justice, a) persons must have at least fifteen years' experience as a superior court judge; or b) at least fifteen years' experience as a distinguished academic, judicial officer, legal practitioner or such experience in other relevant legal field; or c) held the qualifications mentioned in paragraphs (a) and (b) for a period amounting, in the aggregate, to fifteen years. This qualification is in addition to the requirements outlined in Article 166(2).

Recommendation

In view of the critical role anticipated of the Supreme Court, there is muted anxiety that the technical requirements for appointment as Supreme Court Judges may need to be elaborated

upon, so as to ensure that the caliber of Judges forming the Supreme Court panel can deliver the jurisprudence expectations of the Court. It is recommended that the suitability of prospective candidates should be assessed by reference to a range of clearly defined, transparent criteria covering the prospective nominee's legal ability, qualities of character, personal and technical skills. Legal ability should take higher consideration, and be discerned by reviewing additional parameters such as authoring of publications, review of writing or judgments, the capacity to discern general principles of law and to weigh competing policies and values. In addition, persons serving on this Bench should have a broad understanding of other disciplines other than law.

Specialized Courts

Article 162(2) establishes the Employment and Labour Relations Court and the Environment and Land Court as specialized courts with the status of the High Court. Article 165(5) excludes matters falling within the jurisdiction of the specialized courts from the High Court. The Industrial Court Act and the Environment and Land Court Act set out the jurisdiction of the specialized courts. The High Court (Organisation and Administration) Bill seeks to integrate the specialised courts with High Court.

The manner in which the Constitution provides for the establishment of these specialized courts suggests that they are different from the High Court although they have the status of the High Court. They thus fall outside its organizational purview and administrative arrangements, including requirements for transfer to other Divisions of the High Court. This has the potential of making a few Judges serve in these limited areas of law on a permanent basis, which may undermine the fair administration of justice. If such Judges were to become compromised by, for example, employers' organizations or the trade union organizations, other litigants may lose confidence in the specialized courts. Likewise, if the Judges develop a certain line of thought that may be wrong, the litigants would be permanently stuck with such Judges with no option for alternative views on the matters concerned. This becomes critical against the reality that under the current Constitution, Judges may serve up to age of 70 years.

Recommendation

It is recommended that Judges of the specialized courts should be regarded as part of the Judges of the High Court who should be subject to deployment and transfer across the different Courts in the same manner Judges of the High Court are deployed and transferred from one Division of the High Court to the other. This may be achieved through amendments to the laws setting up the two specialized courts on the basis that it is not the Judges who are special but the specialized Courts that exercise special jurisdiction.

Composition of the Judicial Service Commission

The new Constitution establishes a fundamentally transformed Judicial Service Commission drawing its membership from various sources and institutions with the intention of making it a highly independent commission. Given the very important functions and powers of the JSC, it is imperative that its members be persons of very high professional and moral integrity.

Recommendation

It is recommended that provision be made in an Act of Parliament to set criteria that must guide the institutions that contribute and/or have power to appoint members of the JSC to ensure that the process produces members of very high professional and moral integrity.

The contributing institutions which use elections as a mechanism for recruitment of the members must be required to precede the election process with a strict process of vetting of the candidates. Any candidate who uses malpractices at the elections must be disqualified and punished.

JSC should develop a code of conduct for its members to guard against conflict of interests and enhance the independence of judiciary.

CHAPTER SEVEN

NATIONAL EXECUTIVE

7.1 Introduction

The founding provisions on the National Executive in the Constitution are a fundamental departure from the past practice. The Constitution now provides that executive power shall be used for the benefit of the people while the old Constitution stated that any person who held public office in Kenya did so at the pleasure of the president.⁴² Instead of recognising the people as the source of all public power and authority, the retired Constitution subordinated public authority to the President and this led to veneration of presidents.

Kenyans sought to control the power and influence of the President by restructuring the National Executive and introducing democratic checks and balances. The Constitution provides that executive authority shall be exercised in a manner that is compatible with the service of the people and for their well-being and benefit. To this end, the Executive (which comprises of the President, Deputy President, and the Cabinet) should reflect the diversity of the people of Kenya.

The current system of government (pure presidential system) is a as a result of political bargaining during the constitution-making process. During the review process, majority of Kenyans expressed support for a mixed system of government with both features of parliamentary and presidential systems of government.⁴³ Past control and dominance of the Executive in Parliament led to calls for removal of the Executive from Parliament. There was a perception that the presence of the President in Parliament could compromise independence and separation of powers.

The Constitution requires a presidential candidate to garner 50% plus one of total cast votes and 25% of votes in at least half the total number of counties. This was in a bid to ensure that the person elected as President has broad support. However, this very requirement has also led to the formation of ethnic-based coalitions and counter-coalitions in a bid to capture the presidency. Thus, while the intended objective of the requirement is to have a President who appeals across the ethnic divide, the prevailing political culture embedded in ethnic balkanization, makes it difficult to truly consolidate national unity through this measure.

The experience with pure a presidential system of governance so far is a work in progress as most public institutions are still beholden to the previous institutional and political culture of a hybrid/parliamentary system of governance. The last minute consensus to adopt a pure presidential system of government meant that there was no effective debate on its merits. Indeed, many Kenyans including those in authority still consider the new constitutional dispensation from the prisms of the hybrid/parliamentary system. This is posing deadlocks to implementation of the Constitution by causing challenges such as overreaching of mandates and a “claw back” of roles in a polarized political system. There is need for a paradigm shift in public institutions to conform to the presidential system ethos and culture.

⁴² Section 24 of the repealed Constitution

⁴³ Public views during the constitution review process were in support of the creation of the position of Prime Minister as well as the direct election of president. Previous constitutional drafts provided for a directly elected President and a Prime Minister who share executive powers.

7.2 The National Executive under the Constitution of Kenya 2010

The National Executive has assumed a new character both functionally and in structure. First, unlike in the previous dispensation, the National Executive has been separated from the Legislature. The President and the members of the Cabinet are no longer Members of Parliament. The change was in response to the need to have strict separation of powers between the executive and the legislative arm of the government to avert executive domination in the legislative agenda of government. However, there is an attendant risk to the pure presidential system of government; where the President does not have effective support of the legislature, there may be paralysis of government business due to lack of support of the policies and laws of the executive in the legislature. Furthermore, parliamentary functions such as approval of appointments by the President may be affected where the President does not enjoy the support of the majority of the two Houses of Parliament.

7.3 The Functions of the National Executive

Executive powers have been vertically split between the national and county levels (See Annex 7 for a complete list). Accordingly, the functions of the National Executive have to be understood from the context of the Fourth Schedule which generally allocates functions between the two levels.

The management of national and county functions including the transfer of powers and transition to county governance was discussed under Chapter 4 of this report. In virtually all the sectors of service delivery, the National Government has a mandate to develop policies, set national standards and regulations for the delivery of services and ensure capacity building for County Governments.

Apart from the counties, the National Executive also shares some of the functions with independent institutions and offices established by the Constitution. These include institutions such as the Commission on Revenue Allocation, the National Land Commission, the Controller of Budget, among other institutions and offices whose roles have been analysed under Chapter 9 of this report. The rationale and background to the establishment of the independent institutions has also been discussed under Chapter 9.

Additionally, the Constitution sets the number of Cabinet Secretaries at a minimum of 14 and a maximum of 22.⁴⁴ This was in response to the desired lean and efficient government that is not costly to the tax payers. However, the expected reduction in cost and bureaucracies in the government is not apparent. Most of the new ministries are a fusion of a number of old ministries.⁴⁵ The Ministry of Devolution and Planning, for instance, is a fusion of seven previous ministries.⁴⁶

Recommendation

The National Executive should reorient its structures and systems to accord with the constitutional framework in order to reflect its mandate under the Constitution. This will specifically entail:

- Restructuring the institutions and agencies of the National Executive to perform the national executive functions envisaged under the Fourth Schedule

⁴⁴ Article 152 (1) (d).

⁴⁵ See the National Executive budget for 2012/2013 and 2013/2014

⁴⁶ local government, planning and national development and vision 2013, Northern Kenya and other Arid Lands, special programmes, public service and sections of former ministries of youth and gender.

- Facilitate the transfer of requisite capacities to County Governments from the National Executive
- Develop systems that will assist in tracking the achievement of commonly agreed national priorities and targets
- Develop (jointly with counties and relevant independent institutions) a comprehensive framework on consultation and cooperation which will assist in harmonizing the workings of various institutions at national and county levels.

7.4 Restructuring of the Provincial Administration

The Constitution provides for the restructuring of the Provincial Administration. Section 17 of the Sixth Schedule provides that:

"Within five years after the effective date, the national government shall restructure the system of administration commonly known as the provincial administration to accord with and respect the system of devolved government established under this Constitution"

The Provincial Administration under the old order included uniformed officers and officers deployed with responsibilities at provincial, district, division, location and sub-location levels in line ministries.

The provision in section 17 should be understood to have required restructuring not only the uniformed officers, but also other staff of line ministries at the different levels. In these structures exist a cohort of staff ranging from support to technical officers, all of whom needed to be rationalized and redistributed to counties and other national government agencies depending on which sectors and specific functions they were undertaking.

The restructuring of the Provincial Administration under the National Government Coordination Act has not been fully optimized as it restricts itself to the uniformed officers. There has been no clarity or consistency in the restructuring of provincial structures and personnel in the line ministries. In some cases, there has been a creation of parallel structures in line ministries e.g. health and agriculture, premised on coordination or monitoring of policy, but this has led to duplication and conflict with county structures.

There is no apparent coordination between the levels of government when organizing themselves to perform their functions. Indeed, Article 6(3) requires that national government organs ensure reasonable access to their services in all parts of the Republic, so far as it is appropriate to do so having regard to the nature of the service. Article 176(2) requires every County Government to decentralise its functions and the provision of its services to the extent that it is efficient and practicable to do so.

However, in view of the efficient, effective and prudent use of resources principle; the cooperative government principle; and the appreciation of interdependency of functions, it is necessary for both levels of government to design a structure or organization that is best fit, but facilitative of respective functional mandates.

The cost and inefficiency of running parallel structures is unduly expanded and adds strain to minimal financial resources. For example, national government coordination officers established under section 15(2)(a) of the National Government Coordination Act include County Commissioners in respect of counties, Deputy County Commissioners in respect of sub counties, Assistant County Commissioners in respect of every ward; a Chief in respect of every location; an Assistant Chief in respect of every sub-location; and any other national government administrative officer in respect of a service delivery unit. Comparatively, sections 50 to 53 of the County Government Act facilitates County Government establishment of administrative offices of Sub-County Administrator, Ward Administrator and Village Administrators.

Upon review, it is clear that national government coordination officers and the functions of county administration structures are more than likely to overlap in view of the restricted space of operation and similarity in object. National government coordination officers are to coordinate implementation of national government functions at the county levels. This would invariably include public participation, information sharing, and the service delivery aspects of national government functions. County government administrators are to ensure the same for county functions.

Recommendation

It is recommended that National and County Governments design a structure for administration that is best fit, but facilitative of respective functional mandates. A shared structure should particularly be encouraged from the sub-county administrator level and below to reduce citizen confusion and/or “forum shopping” when resolving community concerns. This measure can also reduce operational costs at both levels of government. Recently revised legislation such as the Chiefs Act (revised in 2012) should be reviewed again to ensure that National and County governments coordinate accordingly. Where possible, the National Government should hook into County Government structures to implement its programmes in counties; such a measure is recognised under Articles 6 (2) and 189 of the Constitution. Similarly National Government can avoid establishing duplicate structures by assigning to County Governments the function of implementing some of its programmes within the counties in terms of Article 183 (1) (b).

The ongoing Capacity Assessment and Rationalization of the Public Service (CARPS) programme that seeks to reorganize staffing and management of staff in the National and County Governments is laudable. However its conclusion and implementation should also target the human resource capacity of the restructured Provincial Administration.

7.5 The Public Service

The Constitution gives the values and principles that should form the basis for policies and administration of the public service. The values and policies include: high standards of professional ethics, efficiency and prudence in the use of public resources, equity in the provision of public services, public participation, accountability for decisions and actions taken, transparency, fair competition and merit in recruitment to the public service, representation of the diversity of the Kenyan people in the public service, equal opportunities for training and enhancement of skills in the public service including affirmative action measures. The principles and values of public service bind all state organs and public agencies at the national and county levels.

The problems which ailed the public service affected its effectiveness and compromised the role that it was to play. A number of public reports in Kenya have detailed the challenges which have afflicted the public service in Kenya. These range from: political interference and lack of independence of institutions to incompetence, corruption and mismanagement of public resources, inefficiency in provision of services, tribalism and nepotism.

The national Public Service Commission (PSC) is established as an independent national institution with all the powers and privileges of the independent institutions in the Constitution. The main functions of the PSC are to establish offices in the public service, recruit persons to those offices and exercise disciplinary measures. The mandate of the PSC does not, however, extend to state offices, diplomatic appointments and positions of service that are the mandate of other institutions (Parliamentary Service Commission, the Judicial Service Commission, Teachers Service Commission, the National Police Service Commission, and the County Public Service). The PSC is also in charge of developing human resource policies for the public sector as well as evaluating how the public service is ensuring compliance with constitutional objectives.

While the Constitution envisages a separate service for each county, there is an emphasis that county government powers over public service have to be exercised subject to "a framework of

uniform norms and standards prescribed by an Act of Parliament". In this regard, the PSC is required to "hear and determine appeals in respect of county governments' public service".

Recommendation

The power of the Public Service Commission (PSC) should be enhanced and rationalized and the PSC secured from control by the executive. Furthermore, the criteria for appointment, promotion, demotion of public servants should be transparently set and publicized. This is important in ensuring fairness and due process. The public service should also uphold the letter and spirit of the 2010 Constitution especially as regards integrity of persons considered for appointment to the public service.

Transition of staff from national to county governments should be effected in a manner that protects the terms of service and interests of such staff. Existing regulations on staff transition to counties should be formally legislated incorporating measures to guard against abuse of power by counties.

7.6 Office of the Attorney General

The Office of the Attorney General is established in the Constitution as the principal legal adviser to the Government. The Attorney General is also required represent the national government in court or in any other legal proceedings that the government is party except criminal proceedings. The Attorney General can also perform further functions as conferred by law or by the President. In performance of these functions, the Attorney General can, with the court's permission, appear as a friend of court in proceedings where the government is party. The Attorney General is also the defender of public interest.

The structure, nature and extent of mandate of the Attorney General need further clarification. First, while the Constitution is clear that the Attorney General is to represent national government, it is not at all clear whether, as principal legal adviser, the Attorney General has any role in county governments. The role of the Attorney General as defender of public interest is also not clear since county governments are involved in many issues which can be legitimately classified as public interest. The Office of the Attorney General Act (2012) elaborates further the role of the Attorney General.⁴⁷ However, the Act does not clarify the nature and extent of role of the Attorney General with regard to county governments.

Under the previous dispensation, the Attorney General was an *ex officio* member of the National Assembly and the role of the office was seen as cutting across the legislative and executive arms. However, the office of the Attorney General is now established under the national executive as a result of the pure presidential system of government. The addition of the county level as a distinct level of government has also created further uncertainty on the role of the Attorney General. The Constitution ambiguously bestows the role of advising government on the attorney general without specifying whether this role is limited to national government.⁴⁸ In the past, the Attorney General has proposed to play a role of hamonisation of national and county laws to avoid conflict of laws between the two levels of government. However, it is not clear whether the Attorney General can play this role

⁴⁷ Act No. 49 of 2012.

⁴⁸ The Office of the Attorney General is, however, established under the chapter on the National Executive in the Constitution.

Recommendation

The Office of the Attorney General Act should be amended to clarify the role of the Attorney General in county governments. As a defender of public interest, it appears that the Attorney General can participate in legal proceedings touching on public interest. However, there seems to be no role for the Attorney General with regard to legal advisory matters for the county governments. Accordingly, any involvement of the Attorney General in county legal matters will be on the basis of consent of the concerned county or counties.

Furthermore, there is need to ensure that the gap left by the removal of Attorney General from Parliament is addressed through establishment of a substantive office to cover the role that the Attorney General used to play as an *ex officio* member of parliament. Lastly, unlike most of the other constitutional office holders, the Attorney General does not have a security of tenure of office. The Office of the Attorney General Act merely provides that the President can remove the Attorney General from office on grounds listed in the Act. The established norm in the Constitution is to establish an independent mechanism for the removal of the Attorney General. The Constitution (or the Act) should be amended to provide for an independent process of removal of the Attorney General as well as security of tenure as is the case with related offices such as the Director of Public Prosecutions.

CHAPTER EIGHT

REPRESENTATION AND ELECTORAL SYSTEM

8.1 Introduction

Kenya's system of governance is premised on democratic representation of the people. This is in recognition of the people as the ultimate source of all public power and authority. Representation and the electoral system therefore provide a means through which the will of people can be reflected in state and governance structures. Governments at the national and county levels are composed of democratic representatives who are chosen by the people. It is therefore important that the electoral system and the structures of representation reflect the democratic will of the people.

Effective representation of the people, in turn, requires structures of representation to reflect the diversity of the people and an ideal numbers of representatives to ensure quality representation. The electoral system should also be designed in a manner that will facilitate free and fair elections. Political parties and political coalitions are the vehicles through which the power of democratic representation is sought. Political parties are, therefore, critical institutions in terms of enhancing effectiveness in democratic representation. This chapter analyses the institutions and processes established to ensure representation under the Constitution of Kenya 2010 and makes recommendations to enhance effective and democratic representation.

8.2 Size of Parliament

Under Articles 97 and 98 of the Constitution, the total membership in both Houses of Parliament stands at 426 from the previous 222. This has stretched the capacity of Parliament to effectively exercise its mandate while also increasing the attendant costs. The economic impact of the current numbers is dealt with in a more detailed manner under Chapter 11 of this report. While the economic impact of increased numbers in Parliament may not be that significant (see discussion in Chapter 11), the current numbers may make it difficult for the National Assembly to carry out its functions. The National Assembly, for instance, has a total of 349 members and this can make it difficult for all members to contribute effectively within the allocated timelines for parliamentary business. The numbers are likely to go further up with the two third gender rule under Article 81(b) of the Constitution.

The One-Third Gender Rule

Unlike the County Assemblies where the "two third gender rule" has been met, the Constitution does not provide a clear means through which the gender rule can be complied with in the National Assembly. In 2013, the Attorney General approached the Supreme Court for an advisory opinion on how to comply with the provision (In the matter of the principle of gender representation in the National Assembly and the Senate).⁴⁹ A majority of the Court held that realisation of the provision was progressive and provided the government time (until August 2015) to put in place a mechanism to meet the one third-gender rule. The Chief Justice who is also the President of the Supreme Court rendered a dissenting opinion in which he held that the

⁴⁹ Advisory No 2 of 2012

Constitution required immediate compliance with the two third gender rule. The representation of women in the National Assembly currently stands at 18.9% falling short of 30% to achieve the two third gender principle, while the Senate records 26.8% which is 3.2% short of the constitutional threshold of 30%. It is unlikely that this gap can be filled through the single member constituency vote due to male dominance in competitive electoral politics.

There are ongoing efforts by the National Gender and Equality Commission (NGEC) to ensure the realization of the one third-gender rule. Towards this end, there is a proposal to amend the Constitution to provide for a similar arrangement as exists in the County Assemblies where women representatives are “topped up” after the elections in order to meet the one-third gender requirement. This proposal will, as pointed out above, result in the increase of the number of parliamentarians. Even more critical is the fact that this measure may make the public to confine women candidates to nominated positions as opposed to elected positions in Parliament. Currently, 95% of elected County Assembly members are men and only 5 % are women. There is a risk that the same may happen if women seats are pegged on the male/female numbers in the National Assembly.

Recommendation

The one-third gender rule is a quest to ensure gender balance in representation. Years of male dominance in politics and public life led to affirmative action calls in order to ensure that the women’s voice is heard. The “top-up approach” that is used by County Assemblies under Article 177(b) seems to be the emerging consensus on how to go forward with the matter. While this may increase numbers in Parliament and corresponding costs, it is a political cost that Kenyans may have to bear for not electing more women candidates to Parliament. There should be measures to ensure that political parties field more women candidates. These include incentives such as pegging political funding on number of elected women candidates, and other related measures. Specific recommendations include:

- An amendment to the Constitution to incorporate provisions under Article 177(b) into Articles 97 and 98 which can be attained through a parliamentary initiative;
- Legislative review of the Political Parties Act to include political party funding threshold based on elected number of women in Parliament garnered by each parliamentary party. This incentive is to encourage political parties to embrace measures that promote women participation and therefore enhance progressive increase of women in Parliament through such measures as conducting civic education on the populace to promote women leadership; ensuring gender sensitivity in their nomination processes and offering campaign support to their women candidates such as training and funding resources;
- An amendment to the Elections Act to provide for a minimum threshold for professional qualifications for party list nominees to Parliament i.e. women and other special interest categories in order to ensure quality and effective participation of the nominated members;
- Alternatively, the Constitution can be amended to provide for a Mixed Member Proportional Representation to reserve a part of National Assembly seats for women representatives. This alternative will take the longer route of an amendment through a referendum as provided for under Article 255 of the Constitution.

vote in an election. In order to ensure effectiveness of the election, amendments to the Constitution should be made to make voting a civic duty. Mechanisms should be put in place (including penalties) to ensure that the civic duty to vote is performed by all eligible voters.

Voter Registration

The Constitution provides that any person who meets the criteria to vote is eligible for registration (in one voting centre) as a voter. The Constitution further requires that administrative processes should facilitate, rather than deny, the right to vote. The process of voter registration has been faced with a number of challenges.

First, while the law provides for the continuous registration of voters, the Independent Electoral and Boundaries Commission (IEBC) has perennially raised concerns about lack of funds to ensure continuous registration. As a result, voter registration has typically been done when the country is headed to an election.

Secondly, eligibility for registration as a voter is dependent on a person having a national identification card. The challenge with this requirement is that issuance of national identification cards is dependent on other agencies other than the IEBC. There have been complaints in the past that delayed issuance of national identification cards has led to disenfranchisement of voters.

Recommendation

In order to address this challenge, it is proposed that the updated population register that is established under the Kenya Citizen and Foreign National Management Service Act should be used to as the voters' register for purposes of elections. Neither the Constitution nor the Elections Act pegs registration as a voter on the national identification card. This proposal will require an amendment to section 4(1) of the Elections Act which creates a separate voter's register.

Concurrent National and County Elections

The Constitution provides that all elections at the national and county level should be held on the same day. Kenyan voters are, therefore, required to elect all the six representatives provided for in the Constitution (the President, the Senator, the Governor, Woman Representative, Member of County Assembly, and Member of the National Assembly).⁵⁰

The thrust of the provision above is that campaigns and elections for candidates for all elective offices are held at the same time. Under the immediate former constitutional order, presidential,

⁵⁰ Article 101, 136 of the Constitution of Kenya 2010.

time constraints as a challenge to the determination of disputes.

The Constitution provides for and secures the right of every eligible person to vote. Accordingly, the electoral system should facilitate the people to exercise their right to freely choose their leaders and representatives. The Constitution specifically provides that administrative arrangements for the registration of voters and the conduct of elections shall be designed to facilitate, and shall not deny, an eligible citizen the right to vote or stand for election.

Enforcement of the Right (and Duty) to Vote

Every person who meets the criteria in the Constitution of this state has both a duty and right to

of the announcement of the election result. The Supreme Court has a maximum of 14 days within which to hear and determine the dispute. Where the Court annuls the election, another election has to be held within the next 60 days. During the hearing of the presidential election petition arising from the 2013 general election, the Supreme Court pointed out the constitutional timelines as the main reason for rejection of a supplementary affidavit submitted by the candidate for the Coalition for Reforms and Democracy (CORD). Similarly, the election courts that were set up to determine matters related to the other election processes also cited

8.3 Augmenting the Right (and Duty) to Vote

civic, and parliamentary elections were held on the same day. One of the reasons for retention of the concurrent elections could be the cost efficiency argument of holding all elections in one day. It is likely that staggered elections can raise the overall cost of managing elections. However, one disadvantage of this process is the risk that the legitimate county government election agenda is lost or drowned into national political issues.

In practice, presidential candidates usually dominate the political campaigns and agenda. It is easy for candidates who are not necessarily the legitimate choice of the people to make it to county elective offices by simply associating with presidential candidates who have dominant support in a particular area. The overall effect is that the distinctness of the local agenda is lost. Most importantly, the arrangement constrains the voters from making informed choices by relying on national political dynamics to choose leaders for other local/ national elective positions.

Recommendation

Articles 101, 136 and 177 of the Constitution should be amended to provide for separate elections for the national and county elections.

Tallying of Presidential Election Results

One of the general principles for the electoral system in the Constitution is that elections should be administered in an impartial, neutral, efficient, accurate and accountable manner. The Elections Act provides that the IEBC shall declare and publish elections results immediately and may announce provisional results. In the past, the IEBC has established a process of voter tallying that is composed of constituency-based tallying centres and the national tallying centre. The process usually involves the transmission of votes from constituency-based tallying centres across the country to the national tallying centre in Nairobi for the final tallying and announcement of the presidential result. In the past, this has proved a challenge and raised controversy with major political sides claiming rigging of elections during the tallying stage of election results.

Recommendation

- Vote tallying and the process of final confirmation of election results should be devolved to the county level. Each of the 47 counties should have tallying centres where the votes will be counted, tallied and final results announced.
- The national tallying centre should only be limited to totaling the final results of counties in order to determine the presidential election result.

Hearing and Determination of Presidential and other Election Disputes

The Constitution provides that a person may petition a presidential election result within 7 days

Recommendation

The Constitution should be amended to provide for more time for the determination of election disputes. There is a proposal to increase the time for considering presidential election disputes to one month. In the case of the presidential election, the outgoing President should be allowed to be in office until such a time that the substantive election dispute is determined by the Supreme Court.

8.8 Political parties

The constitution establishes Kenya as a multiparty democratic state and recognises the role of political parties in enhancing representative democracy. Political parties are required to be "national in character" and the Constitution prohibits formation of political parties along regional, ethnic or religious lines. Political parties are required to reflect diversity in their formation and are also required to observe the principles of good governance. The 2010 constitution seeks to transform political parties into progressive and viable institutions that advance democratic political organization and expressions in the society. This is to be achieved through the promotion of national unity, gender equality, democracy, integrity, and the rule of law. Article 92 provides for the establishment of political parties fund in order to ensure that there is transparency and objectivity in political party funding. The political parties Act also sets out a regulatory mechanism to ensure to ensure compliance to the aspirations of the constitution.

However, concerns have been raised regarding many political parties in the country and their ability to facilitate democratic representation. For instance, election of more women candidates through parties would address the two third gender constitutional requirement, however, political parties have not actively mobilized for the nomination of women candidates in their party primaries.

Recommendation

Section 25 of the Political parties Act should be reviewed to allow more parties with substantial representation in national and county legislatures to benefit from political party funding. This will support upcoming political parties will ensure a wider support for political parties and nurture democracy. There should be a review the election Act to provide for stringent compliance with article 10 provisions of National values and principle in the organization and activities of political parties by designing strict sanctions for lack of compliance. Specifically, there should be a criteria based on Article 10 of the Constitution as a condition to assist political party funding.

Revise section 25 (2) (b) of political parties Act, to provide for the actual number of women elected in parliament and county assemblies. This will become an incentive to political parties to invest in measures that increases the number of women in elective leadership positions. Finally, the appointment of the political parties' registrar which has been pending since the coming into effect of the Political Parties Act should be finalized to ensure the full implementation of provisions in the Act.

CHAPTER NINE

CONSTITUTIONAL COMMISSIONS AND INDEPENDENT OFFICES

9.1 Introduction

Apart from the two levels of government, the Constitution establishes a number of institutions and offices with specific mandates. During the constitution review process, Kenyans called for the establishment of independent institutions to take care of roles that could not be entrusted to the two levels of government. The CKRC report noted at the time that comparative constitutional practice and trends tended to establish independent public institutions that would take care of politically sensitive public matters such as electoral boundaries, management of elections, allocation of public resources, public prosecution and other matters that required independent processes insulated from undue political interference.⁵¹ Furthermore, these institutions were to carry out the general role of checking the performance and effectiveness of the Executive.

The Constitution provides that these institutions are not subject to the direction or control of any person on the manner in which they perform their functions. To this end, the Constitution requires Parliament to allocate adequate funds to enable independent commissions and offices to discharge their respective mandates effectively.

There are 10 independent commissions and two independent offices which are expressly listed in the Constitution. The 10 commissions are:

- 1) The Kenya National Commission on Human Rights and Equality Commission⁵²
- 2) The National Land Commission
- 3) The Independent Electoral and Boundaries Commission
- 4) The Parliamentary Service Commission
- 5) The Judicial Service Commission
- 6) The Commission on Revenue Allocation
- 7) The Public Service Commission
- 8) The Salaries and Remuneration Commission
- 9) The Teachers Service Commission
- 10) The National Police Service Commission

The two independent offices listed in the Constitution are:

- 1) The Auditor General; and
- 2) The Controller of Budget

It is instructive to note that the institutions and offices listed under Article 248 of the Constitution are not exhaustive. The Constitution provides under Article 79 that Parliament shall enact legislation to establish an independent ethics and anti-corruption commission which should have the same status as that of independent commissions and offices. Similarly, the Commission for the Implementation of the Constitution (CIC) has the same status and protection as all the other independent commissions. Furthermore, there are statutory institutions and offices which have been established whose role and mandate is similar to that of the independent institutions and offices recognised in the Constitution. These include institutions such as the Transition Authority, the Independent Police Oversight (IPOA) and the Commission on Administrative Justice (CAJ). All appointments to independent institutions are

⁵¹ CKRC

⁵² Later split into the National Gender and Equality Commission (NGEC) and the Commission on Administrative Justice (CAJ).

to be approved by the National Assembly and members who serve on a full-time basis are expressly prohibited from taking additional tasks.

The Constitution also provides for the organisational capacity and resources to enable the independent institutions and offices to perform their functions. All the institutions and offices have power to conduct investigations on their own motion or upon receiving a complaint. Additionally, the National Land Commission, the Judicial Service Commission, the Kenya National Human Rights and Equality Commission, and the Auditor General have powers to issue summons to a witness to assist in their investigations. In order to enhance transparency, all institutions and offices are required to submit periodic or special reports (upon request) to the President, National Assembly and the Senate.

While the independent institutions have an important “niche” in the governance process, a number of challenges have emerged from implementation. The addition of new institutions in areas which were traditionally managed by central government departments has introduced vagueness in the division of roles between the new institutions and departments of government. Secondly, there is a multiplicity of institutions performing related roles and this has led to duplication of roles. Thirdly, while the role to be performed by some of these institutions and offices is clear, the mandate is not matched with the capacity and resources required to perform the functions that are vested in the institutions. Lastly, there are concerns that rather than enhance effectiveness, some institutions are actually impeding the effectiveness of the National Executive in some sectors.

9.2 Vagueness and confusion of Roles

The National Land Commission and the Ministry of Lands, Housing and Urban Development

Continued conflict between the Ministry of Lands, Housing and Urban Development (MHULD) and the National Land Commission (NLC) threatens the operations of the Land Sector. During the constitution review process, Kenyans specifically called for the establishment of the NLC to oversee land management and administration. Among the other things that Kenyans wanted the NLC to address are: overseeing title registration, land tenure and change, efficient and optimal use of land, addressing historical land injustices, among other issues.⁵³ The NLC is mandated to manage land on behalf of the National and County Governments, recommend land policy, and measures to address historical injustices, among other functions.⁵⁴ Accordingly, all the constitutional drafts included provisions on a national land commission. The functions that are given by the Constitution to NLC generally reflect the wishes of Kenyans.

The functions of the NLC are further spelt out in enabling legislation for the land sector that was enacted after 2010. The NLC Act (enacted in 2012), for instance, gives additional roles to the NLC. The Act provides that the NLC shall alienate public land (with consent of the respective level of government), hold and administer unregistered “trust land”.⁵⁵ The NLC Act also vests in the Commission a power to establish a land management information system, and to develop and encourage alternative dispute resolution to land conflicts.

The MLHUD is the national ministry that is in charge of the land sector at the national level. Accordingly, the Ministry is in charge of formulation of standards and regulation of land professionals. The MLHUD also has the responsibility of overall land policies including review of sector performance. However, some of the functions that are vested in both the ministry and the NLC appear to overlap, causing confusion between the two institutions. The institutions appear to have shared functions in policy-making, registration of titles, developing and

⁵³ Final Report of the Constitution of Kenya Review Commission (2005) at p. 281.

⁵⁴ Article 67(2) COK.

⁵⁵ The Constitution uses the phrase “community land” and the NLC Act uses the phrase “trust land” and this introduces further confusion.

prescribing regulations, allocation of public land, reserving of public land, and settlement schemes.

The lack of clarity on the nature and extent of functions of the two institutions has led to clashes that have almost crippled the sector's operations. In 2014, the NLC approached the Supreme Court for an advisory opinion to clarify the responsibilities of the two institutions. While noting the vagueness of the constitutional framework, the Supreme Court asked the two parties to negotiate and reach a settlement on the functions.⁵⁶

It is important that the confusion and wrangling between the NLC and the MLHUD is resolved so as to ensure smooth operations in the sector. While the constitutional framework is vague, the enabling laws on the land sector introduced further vagueness that needs to be resolved. The recommendation by the Supreme Court to negotiate a settlement by the parties is in line with the constitutional requirement for consultation and cooperation. It is important that institutions reach a common agreement on mutual functional areas.

Recommendation

The following recommendations are made with regard to the NLC and the MLHUD:

- The two institutions should clearly identify the separate roles envisaged in the Constitution
- Share tasks in shared functional areas in the Constitution. Shared areas include: the registration function, alienation and allocation of public land, developing and adopting policy, among other functions. There should be a common but differentiated approach to performance of these functions that reduces conflict and competition and enhances mutual and complementary performance of sector functions
- The agreed framework for functional division should then inform the content of the laws that manage the sector. Currently, the three main laws (the Land Act, Land Registration Act, and the National Land Act) introduce confusion between the roles of the NLC and those of the MLHUD and should be revised in line with the proposed functional framework.

Ministry of Education and the Teachers Service Commission

The Ministry of Education (MoE) and the Teachers Service Commission (TSC) share critical functions in the education sector. Unlike the NLC above, the TSC has been in operation for a longer period and its structure and role was recognised and entrenched in the Constitution.

The TSC is primarily in charge of teacher management in the education sector and this entails recruitment, promotions and discipline, capacity building, and the management of retired teachers.⁵⁷ Article 237 of the Constitution provides that the TSC's role is to register, recruit, assign, promote, transfer and discipline teachers. Article 237(3) states that the TSC shall review the standards of training of teachers and, the demand for and supply of teachers and advise the National Government on matters relating to the teaching profession.

The many years of co-existence between the two institutions may have ensured that there is a separation of functions through experience. However, there still exist tensions and conflict of roles between the two institutions. In April 2015, the TSC and the Kenya National Union of Teachers (KNUT) protested the Basic Education Act Regulations (2015) which were gazetted by the Minister. Section 6 (3) and (4) of the Regulations titled "The Basic Education Regulations, 2015"⁵⁸ empower the Cabinet Secretary to require the replacement of the head of a basic education institution where there has been an impropriety. Both the TSC and KNUT contend that this is the role of the TSC and the Cabinet Secretary does not have the power to discipline heads of basic education institutions.

⁵⁶ *National Land Commission v Attorney General and 5 others* (Supreme Court of Kenya, Reference no. 2 of 2014)

⁵⁷ Ministry of Education and Ministry of Higher Education, Science and Technology (Sessional paper, 2012) p. 66 refers to three levels of teacher management entry, maintenance, and exit

⁵⁸ Legal Notice No. 39 of 2015

The proposed role of the Cabinet Secretary is justified on the basis that he/she is the accounting officer of the ministry. Before the rules were gazetted, the Ministry of Education did not have any direct role in teacher management as this was exclusively handled by the TSC. However, there is a need to rethink this Commission in line with the policy shift taken by the PSC where public servants have been brought under the direct supervision of the Cabinet Secretaries.⁵⁹ Additionally, the Cabinet Secretary, being the Ministry's accounting officer, has a role to play in the management of heads of institutions who are also the accounting officers at that level.

Recommendation

The role of the TSC should be re-aligned to provide the Cabinet Secretary space to intervene in specific matters of human resource management. This will include: sharing aspects of human resource management between the TSC and the Ministry, allowing the ministry to take over the aspects of discipline and control with regard to financial matters and integrity in the use of public resources in schools, etc.

The alternative is to scrap the TSC and have its roles reassigned to the Ministry and the Public Service Commission. Specific aspects such as capacity building for teachers can be done within special departments in the Ministry of Education. The proposed measures will in our view reduce institutional conflict and enhance efficiency and quality control in the education sector.

9.3 Proliferation of Independent Institutions

While the Constitution has 12 independent commissions and offices, the list is not exhaustive and space is envisaged in the Constitution for creation of other independent offices and institutions. Article 59 of the Constitution which establishes the Kenya National Human Rights and Equality Commission (KNHREC), for instance, provides under Article 59(4) that "Parliament shall enact legislation to give full effect to this part, and any such legislation may restructure the Commission into two or more separate commissions". Accordingly, while the Constitution created one institution to monitor the implementation of human rights protected in the Constitution, it recognises the possibility of more institutions with the same mandate.

In 2011, Parliament enacted the Commission on Administrative Justice (CAJ) Act and the National Gender and Equality Commission (NGEC) Act to take care of administrative and gender justice respectively. A general observation from the three laws creating the institutions is that there is a general overlap of mandate. The KNHREC Act, for instance, provides that the function of the Commission is to promote the protection and observance of human rights by private and public institutions.⁶⁰ The Commission on Administrative Justice Act (CAJA) also has a primary mandate to ensure the protection and observance of rights by public institutions including administrative justice.⁶¹ While NGEC's role is on gender justice, the NGEC Act broadens its mandate to other aspects of equality. Section 8 (m) of the NGEC Act, for instance, requires NGEC to monitor the realization of the right of "special interest groups" such as marginalised communities, persons with disabilities, women, youth and children. The KNHREC has the general mandate of monitoring, investigating and reporting on the observance of human rights in all aspects of life in the republic.⁶²

There is a legislative attempt to delimit the respective mandates of the institutions in order to create a distinct role for each of the three commissions. Section 8 (d) p the KNHREC Act, for instance, states that one of the mandates of the Commission is to "receive and investigate complaints about alleged abuse of human rights, except those relating to the violation of the principle of equality and freedom from discrimination under the gender and equality commission". However, it is difficult, in practical terms, to tell where the institutional mandate of the KNHREC ends and where the NGEC takes over.

⁵⁹ Public Service Commission, 'Policy on decentralisation of human resource management in the civil service' (May 2014).

⁶⁰ Section 8 (b) KNHREC Act 2011.

⁶¹ Section 8 CAJA 2011.

⁶² Section 8 (c) KNHREC Act 2011.

There are a number of challenges. All these commissions receive reports on various human rights violations and a review of the commission reports shows that they deal with common complaints. It is even more difficult for the public to tell the narrow and technical distinction of mandates of the three institutions. The fact that the CAJ and the NGEC laws were enacted at around the same time is also a general indication that not much thought went into the distinction of roles before the two institutions were carved out. The NGEC pre-existed the 2010 Constitution and there were attempts to merge the institutions as envisaged in the Constitution. However, the two institutions failed to reach an agreement and a decision was made to keep them separate.

Recommendation

While the Constitution allows the creation of more institutions with a mandate to monitor realization of rights, this option has to be based on a clear rationale. There is no study or policy which informed the splitting of the KNHREC as envisaged in the Constitution of Kenya 2010. Needless to say that maintaining separate institutions adds to the overhead costs borne by the public. The following recommendations are proposed with regard to the KNHREC, CAJ, and NGEC:

- A review of their roles is undertaken to ascertain whether there is a need for their separate existence.
- Subject to the outcome of the review, merge the institutions into one and establish the institutional functions as departments or programmes of the KNHREC.

9.4 Over-reach by Constitutional Commissions and Independent Offices

Constitutional Commissions and Independent Offices have also been seen to over-reach in exercise of their jurisdictional mandates with regard to County Governments.

A High Court judgment declared the revenue ceilings set and enforced by the Commission on Revenue Allocation and the Controller of Budget unconstitutional. In its findings, the Court was of the opinion that the role of the Controller of Budget in particular, in seeking to approve county budgets is ultra vires, due to the fact that budget making is within the purview of the County Executive, County Treasury and County Assemblies that are charged with the responsibility of ensuring accountability and transparency in utilization of County resources.

The oversight agencies had alleged untidy spending habits of County Governments and alleged claims of misuse of public funds as well as the need to ensure prudent utilization of public funds. The Court observed that though these actions were grounded on good faith and meaningful intentions, the same were “worthless if those objects and designs are constitutionally and statutorily objectionable”.

Auditor General

The office of the Auditor General is established with the primary role of ensuring accountability, efficiency and prudence in the use of public resources. OAG is the independent provider of assurance to the Kenyans through parliament. It is the functional instrument to parliament in discharging its overall oversight responsibility to Kenyans. The 2010 constitution gave the OAG independence in order to make it effective in its support to parliament with the mandate clearly spelt out under article 229 (4). Accordingly, the Auditor General has a constitutional mandate to audit and report on the accounts of both the national and county governments as well as all public institutions at the national and county levels. The role of the auditor also extends to the accounts of independent institutions and offices, the accounts of courts, Parliament (Senate and National Assembly) and even political parties.

In the performance of his or her mandate, the Auditor General is required to determine whether the resources committed to these institutions have been applied lawfully and in an effective way. Thereafter, the Auditor General is required to submit audit reports to Parliament or to county

assemblies respectively. County assemblies and Parliament are required to take appropriate action after receiving reports from the Auditor General.

In order to ensure effectiveness, a number of measures need to be put in place to ensure that the Office of the Auditor General effectively delivers on its mandate. These measures include capacity and resources required to enable the office to discharge its functions, measures to guarantee independence of the office of the Auditor General, and measures of implementing or ensuring compliance with recommendations of the Auditor General.

Recommendation

There is an increase in the number of public institutions at the national and county level whose accounts should be audited. This, in turn, requires the decentralization and expansion of the office of the Auditor General in order to effectively monitor and report on expenditure by these institutions. The budgetary needs of the office of the Auditor General have increased since the new county governments came into place against a growing short fall of the actual funds availed to the Auditor General. The OAG budget is lumped up with other sectors budget thereby limiting allocations to the office. This affects the operations of the office making it difficult for the office to meet the statutory reporting timelines. The expanded role of the Auditor General should be matched with corresponding resources and capacity for effectiveness to deliver.

The nature of the office of the Auditor General also requires an independent means of determining the resource needs of the Auditor General. The Auditor General audits the accounts of critical institutions such as the Treasury and Parliament. Measures should be put in place to insulate the office of the Auditor General and resources required to execute its mandate. One mechanism is to have commonly agreed budgetary levels for the Auditor General in order to ensure sustainability and proper planning.

Lastly, while reports of the Auditor General are tabled in Parliament and the National Assembly, there is need for measures to implement the findings in the reports. It is proposed that the national Parliament and the Senate should, through their respective committees, develop measures to implement the recommendations of the Auditor General. Relevant agencies such as the Ethics and Anti-Corruption Commission, the DPP's office, and other agencies should be involved in the strategies and measures to implement the findings of the Auditor General.

CHAPTER TEN

CROSS-CUTTING ISSUES

10.1 Introduction

While the Constitution establishes institutions and their respective mandates in the Constitution, there are issues of a cross-cutting nature which touch on institutions at the national and county levels. This Chapter looks at issues of security, leadership and accountability, and civic education and public participation. These are important themes which cut across the roles of the two levels of government and other public institutions.

10.2 Security

The issue of security is a currently a major concern after a number of terrorist related activities in the country as well as many cases of communal violence witnessed in parts of the country. Reform of the security sector was one of the major concerns during the constitution review process. Challenges which have been facing the security sector have often been traced to the colonial policies and approach to security.

During the colonial era, security was conceived in terms of effective control of territory and specifically securing colonial establishments and areas of white settlement and keeping order in the native reserves. As a result, a narrow approach to security was adopted and applied over the years.

Minimal structural reforms were undertaken in the sector after independence. The “control approach” to security was retained but this time applied to perceived (mainly political) enemies of the State. Over the years, the need to broaden the meaning and approach to security led to calls for reforms in the Sector.

Historical background

During the colonial era, the colonial government established two separate internal security forces. Kenya Police Force (initially with military roots) to secure “colonial urban space” and the Tribal Police to keep peace in native reserves. The military structures were kept along the same parallel lines to supplement the police. While some reforms (such as de-racialisation of the top police leadership) were undertaken at independence, the basic internal security structure remained the same. In the face of independence and post-independence politics, internal security forces were used for political ends by the ruling political elite. Security forces were used to crack down on political dissent and enhance political oppression.

Growth of population, joblessness among the youth, and failure of government social policies led to growth in crime and other security concerns. The overall effect was that the state security machinery was not able to contain the growing situation. While successive governments identified a need to build the capacity of state structures to tackle the emerging concerns, projects that were conceived to deal with the situation were used as conduits for siphoning funds meant to grow the security sector. The security sector was neglected while factors which contributed to insecurity grew.

The lack of coordination among the various internal security agencies was obviously an added challenge to the security sector. Incidents have been mentioned where lack of coordination of security functions between the military and the police, and between the different police structures and lack of accountability has led to uncoordinated responses to insecurity incidences. The Kapedo and Baragoi massacres are easy examples of an uncoordinated response to internal security threats.

During the constitution review process, Kenyans called for recognition of principles and values that would guide the security sector institutions. These included the changing of the orientation of the institutions from a force to service to reflect the changed approach to security management.⁶³ The public called for retention of the then existing organs: the Kenya Police Force, National Security Intelligence Service, and the Administration Police. The people were emphatic that no other security organs could be formed except by law. The people also called for the formation of a National Security Council to be in charge of the overall policy and coordination of the Security Sector.

The Security Sector under the Constitution of Kenya 2010

The Constitution subjects the exercise of powers and functions in the sector to the Constitution. The Constitution, in turn, requires national security objectives and policies to be set and implemented in accordance with the broader constitutional objectives and purposes. Accordingly, national security is subject to the authority of the Constitution and Parliament. This is a fundamental shift from the past when national security was at the behest of the ruling political elite.

The Constitution further provides that national security shall be pursued in compliance with the law, democracy, human rights and fundamental freedoms. The composition of national security agencies shall ensure the recognition of the diversity of the Kenyan people and should respect this diversity in the execution of national security duties. In this regard, the Constitution provides that national security organs are subordinate to civilian authority.

At the apex of the institutional structure is the National Security Council which is chaired by the President and charged with the mandate of overall supervision of security agencies and overall coordination of international and domestic security matters. The Council consists of representatives of the major security agencies and senior government officials from public sectors that are relevant to the national security. The Council has a further duty of assessing the security situation in the country, recommending appropriate measures, and reporting to Parliament on measures to ensure state of security. The Council also approves the deployment of national forces outside Kenya and foreign forces inside Kenya.

The Constitution provides for three national security organs which operate under the National Security Council: the Kenya Defence Forces, the National Intelligence Service, and the National Police Service. These organs are required to operate in accordance with the principles and objectives of national security that are provided for in the Constitution.

The Kenya Defence Force consists of three further institutions: the Kenya Army, the Kenya Airforce, and the Kenya Navy. The Constitution establishes a Defence Council composed of persons from the three Forces and other representatives who offer leadership to the Defence Forces and is responsible for the coordination and performance of functions prescribed by

⁶³ Main report of the Constitution of Kenya Review Commission (2005) 247.

national legislation to the Defence Forces. The National Intelligence Service is established as one of the national security organs and its primary purpose is to gather intelligence that is useful for the enhancement of national security in accordance with the Constitution.

The Constitution makes a number of changes to the Police Service. First, the Constitution has separated the administrative and operational structures and systems of the Police Force. This has been done by establishing the National Police Service Commission separate from the office of the Inspector General of Police. The National Police Service's primary role is "human resource management" for the Police Service. The Constitution provides that the National Police Service Commission is meant to recruit, promote and transfer officers in the Service. The Commission is composed of a senior lawyer, 2 ex-police officers, 3 members of the public, the Inspector General and the two Deputy Inspector Generals of Police. The formation of the National Police Service Commission means that some of the functions that were initially performed solely by the former Commissioner of Police have been vested in the Commission. The Inspector General of Police is, on the other hand, appointed by the President with the approval of Parliament and has command and operational powers over the entire police service. The Inspector General works under the policy direction of the Cabinet Secretary responsible for police services.

While the Constitution provides for one police service under the command of the Inspector General of Police, the Constitution maintains the dual pre-2010 structure of the police consisting of the Kenya Police Service and the Administration Police Service. Each of these two sections of the police service is headed by a Deputy Inspector General. While the Inspector General of Police is under the policy direction of the responsible Cabinet Secretary, the Inspector General operates independently in the performance of his or her functions relating to investigations, enforcement of the law. There are shared roles between the Inspector General and the National Police Service Commission related to the employment, assignment, promotion or suspension of a member of the National Police Service. The Constitution lists grounds under which the Inspector General may be removed from office. The President may remove the Inspector General from office on grounds of serious violation of the Constitution, gross misconduct, incompetence, incapacity, or any other justifiable cause.

Effectiveness of the Security Sector Reforms

There is a need to have a broadened meaning and approach to security. The approach to security requires that factors such as economic, societal, political, environmental factors are taken into account. Secondly, these factors have to be understood at different levels: individual, community, institutional, state, regional and international levels. A broadened approach to security will take care of factors such as youth unemployment and joblessness that are a real underlying threat to security. New forms of insecurity such as cybercrimes and terrorism that are borderless require a different approach to security. The ever porous borders also require coordination between the external and internal security forces for effective response. Between October 2011 and June 2014 more than 66 terror incidents had been recorded accounting for an estimated kill record of 300 persons. Between June 2014 and April 2015, Alshabaab and its local and regional affiliates have executed four spectacular attacks accounting for the death of at least 300 people.

Recommendations

Development of a Policy on National Security

Part of the current security crisis is rooted in the fact that the National Security Council has not evolved a National Security Policy. The net effect of this is that the various internal and external

security institutions do not have a shared understanding of their respective operational mandates. This has been manifested in the lack of coordination between the various security agencies in situations that require rapid response. The National Security Policy will set the patterns of commitments to a plan of action outlined by the State including the organizational infrastructure and actors critical to delivery of effective security to the citizens.

Among the specific issues that the National Security Policy will address include:

- Provide an overall policy, administrative, and institutional framework which will provide a basis for other frameworks in specific areas. E.g. external security, internal security, etc.
- Provide guidance on sector re-alignment and ensure that Provincial Administration accords with the new county structures.
- Provide direction with regard to the policy of decentralization of security structures and broaden the approach to security in order to ensure that County Governments participate in the management of county security
- Provide guidance on the restructuring of the police and the re-alignment of various elements of policing.
- Provide direction on a proper training for security officials on the comprehensive approach to security. The same should extend to security service providers that are outside the state security machinery
- Provide a workable approach and direction towards realization of economic and social rights as per Article 43 of the Constitution in order to address underlying issues of insecurity.
- Other issues relevant to the delivery of the constitutional objectives with regard to national security

Additionally, Parliament through legislation should resolve the conflict between the National Police Service Commission and the Inspector General of Police by defining clear distinct roles for each.

The Role and Effectiveness of the National Security Council

- Article 240 (6)(a)(b) envisages the creation of infrastructure at strategic operation and tactical levels to support the National Security Council. They include the National Security Advisory Committee (NSAC) right below the NSC. The NSAC is to have relevant resource persons who will support the NSC and the NSAC will have the basic task of design and preparation of national strategy and contingency plans, monitoring and the provision of early warnings on matters of national security.
- The NSC should strengthen both its secretariat and joint operational centers (National and County) with requisite staff to enhance threat appreciation, coordinated response and overall management of security and disasters.
- The NSC should exercise its supervisory control over national security organs as per Article 240(3) and subsequently as per Art 240 (6(b) to “assess and appraise objectives and risks to the public in respect of actual and potential national security capabilities” before subsequently engendering security sector transformation. This should be with the objective of undertaking a security sector institutional capacity – threat appreciation. This should ensure serious vetting, professionalization and discipline, equipment and resource realignment
- As part of its grand strategic roles, of aligning and coordinating instruments of power, NSC should lead the process of helping variegated security organs to evolve Standard Operating Procedures (SOPs) for joint operations, determination of lead agency, best practices including standardized intensity of threat appreciation/valuation and grading that can be shared with and used to mobilize the public in matters of security.
- Parliament should exercise its constitutional oversight roles to ensure that NSC mediates a paradigm shift on the broad notion of policing to embedment in the society. This will include

shifting from the current tendency to barrack security officers away from society to include housing them within communities. This has to be complemented with evolution of good practices and processes that mediate recruitment, promotion, firing and retirement. Core here is the issue of leadership with its traits of character, competence, trust and duty.

- The NSC should also coordinate governmental institutions to operationalise Chapter 4 (the Bill of Rights) of the Constitution while responding to historical injustices.
- The NSC should lead the process of complying with the Constitution to delink the Administration Police from the Provincial Administration under the auspices of the Ministry of Interior and Coordination of National Government. Together with this, it should ensure independence of the Inspector General and a shift in the policing paradigm from anti-people violence oriented force to a people friendly service by ensuring the evolution and operationalization of a new doctrine, development of institutions that support security and the intellectual capacity and infrastructure, budget allocation defined by mission and size, requisite oversights and accountability mechanism that oversee budgetary behavior at one level, including adherence to established practices and processes of how rank and file are promoted, transferred, fired and retired based on merit.

Parliamentary Oversight on Security issues

- Parliament should exercise its roles under Chapter 14 that include oversight, watchdog, and approval to demand for, approve and ensure implementation of a national security. Specifically, Parliament should, through its oversight structures, press for the development and implementation of the relevant policy frameworks such as defence and internal security policy.
- The NSC is required to report to Parliament annually on the state of security. This is an important avenue to keep check on whether the institutional and policy arrangements in the sector are in line with broader constitutional objectives. In this regard, Parliament needs to evolve rules and procedures to mediate reporting processes from the NSC in compliance with Article 240(7) of the Constitution
- Parliament needs to ensure compliance with constitutional provisions with regard to approval of appointments in order to ensure that appointments are made objectively and in accordance with constitutional requirements such as diversity, integrity, and qualifications.

Coordination of Police Services

- While the Constitution envisages a unified police service, there are two police services headed by a Deputy Inspector General each. The two deputies are in charge of operational matters in their respective service. Additionally, there is a National Police Service Commission that handles all disciplinary matters, promotions, transfers and recruitment. The net effect of this is that the Inspector General of Police has no control over crucial tools to ensure efficiency in police services. Human resource management (including the power to discipline) is an inherent tool in the management of police services.
- The retention of the two separate services with an identical and overlapping mandate has led to institutional conflict between the two services and lack of unity of command leading to inefficiency. A unified police structure, on the other hand, will ensure uniformity in administrative and operational procedures, a common understanding in policing doctrine, and coordination of available resources, in-service training and the avoidance of duplication. Already, the lack of coordination between the two police services can be seen in the competition by the two police structures to appoint different officers as county police commissioners.

10.2 Leadership and Accountability

The Constitution has instituted measures of holding leaders to accountability through provisions for impeachment, right of recall, right to petition and entrenchment of a periodic election. Article 73 of the Constitution envisages leadership accountability in the exercise of delegated authority from the hindsight that the sovereign power belongs to the people who can exercise it either directly or through delegation to their representatives.

The Constitution therefore expects state officers exercising the delegated authority to do so in the best interest of the people who are the source of power. Persons charged with state responsibilities are therefore expected to show respect to the people and conduct themselves in a manner that brings honour to the Nation while upholding the integrity of the office in which they serve. They are also expected to offer servant leadership as opposed to ruling the people. These measures are geared towards restoring people's trust and authority in state offices which had waned owing to prevalence of massive corruption, impunity and inefficiencies in service delivery.

The Constitution has committed a whole Chapter 6 on leadership and integrity to emphasize the concerns of integrity in the Kenyan leadership and to also give grounds for compliance. Consequently all leaders both elected and appointed are bound to the provisions of Chapter 6. This is a major departure from the past where appointed leaders and the Head of State together with members of the Cabinet could only be removed from office under a vote of no confidence in Parliament. However the enforcement of this Chapter has proved challenging to the effect that cases of integrity and corruption in the public sector are on the rise. This to a large extent is due to weak legislation passed on leadership and integrity that undermines the enforcement of Chapter 6.

Weak Legislation on Leadership and Integrity

Parliament in response to Article 80 of the constitution enacted the Leadership and Integrity Act in 2012. However this Act has come under criticism for being weak and lacking in stringent sanctions that deter non-compliance such as barring persons found to have breached the provisions from holding public office and the removal of those already in public office.

The moral and ethical requirements as stipulated in Chapter 6 form part of the qualification requirements of elected leaders and other state officers. However, the Act does not expressly provide for the sanctions of failure to comply with the strict moral and ethical standards envisaged by the Constitution. Therefore without stringent sanctions for incompliance, the Leadership and Integrity Act does not serve its intended purpose as required by the Constitution.

Article 79 gives Parliament the power to pass legislation for the establishment of the Ethics and Anti-Corruption Commission. This Commission is the key custodian of the standards set by Chapter 6 of the constitution. However, the form and character of the Commission undermines its capacity to carry out its functions effectively. While the Commission is established to look into issues of both integrity and financial accountability, its main focus has been on issues of financial accountability. The Commission is not a repository of criminal records and therefore cannot effectively carry out the vetting of individuals seeking appointment to public offices without reference to other bodies such as the Criminal Investigations Department. This

dependence has exposed the commission to possible interference from the legislature and the executive.

Recommendations

Review the Leadership and Integrity Act to beef it up with explicit provisions that bar persons who do not comply with the provisions of Chapter 6 from holding public office and for the removal of those already in office.

Include the requirement of public participation in the vetting of election nominees in accordance with Article 99(b). This can be achieved by incorporating provisions which compel the IEBC to publish the names of election candidates for public scrutiny

Institute a clear legal framework for linkages between EACC and institutional actors such as Criminal Investigation Department, Director of Public Prosecutions to strengthen the enforcement process

Review the Act to also provide for lifestyle audit of state officers as a means of enforcing the provisions of Chapter 6 to facilitate early detection of incompliance.

While the Act sets the integrity standards for all public and state officers, the relevant provisions of the Act do not provide for penalties and consequences for failure to comply with the ethical and moral standards set out in the Act. The Act failed to provide for clear procedures and mechanisms through which the Ethics and Anti-Corruption Commission can enforce compliance with Chapter Six as envisaged under Article 79

While the overall objective of the Act is to set a minimum threshold of standards for election to public office (based on personal integrity, competence and suitability), the Act does not establish a proper vetting process for the same. Section 13 (2) of the Act merely provides that candidates should fill out and submit prescribed forms to the EACC prior to elections

10.3 Civic education and public participation

The 2010 constitution is a document that culminated from the views of the people collated across the country. Indeed throughout the constitutional process, there were consistency calls for a people led constitution. The constitution right from its preamble, acknowledges the right of the people to participate in the governance process.

Public participation is a constitutional principle under article 10, which is specially entrenched and is emphasized in the text especially in regard to legislative processes both in parliament (Article 118) and county assembly; in determination of public finance, public service, management of natural resources and access to public information among other areas.

Devolution which is a key feature of the constitution is predicated on the wheels of public participation. Article 174 (c), gives power of self-governance to the people to enhance their participation in the exercise of the powers of the state and their participation in making decisions affecting them. Therefore the involvement of the public in decision making process is about giving them a platform as people to determine their needs and priorities.

However, lack of civic education and a proper framework for structuring public engagements undermines the value of public participation as envisaged in the constitution. According to CIC⁶⁴ most Kenyans are yet to internalize the provisions of the constitution due to lack of civic education. This therefore hampers effectiveness of their participation in decisions making and also in safeguarding their constitution.

The institutional capacity such as parliament and county assemblies to respond accordingly to views raised by the public within limited time frames, serves to disenfranchise public participation. For instance parliamentary committees are still not well resourced to collate and process all the views from the public within the limited parliamentary time frame. Lack of enforcement also deters public participation.

Recommendations

Public institutions are required to consult the public in decision-making, especially on issues which have an impact on the livelihoods of people. However, there is no overarching policy framework to guide public participation. There is a need for a policy framework to provide the elements and threshold for public participation. Ultimately, every institution should be required to develop its own benchmarks for public consultation based on the nature of their roles.

There is need for a comprehensive National civic education programme to educate the populace on the constitution provisions and enhance their participation in governance processes.

⁶⁴ See CIC 2014 Annual report

CHAPTER ELEVEN

IMPACT OF THE CONSTITUTION ON THE ECONOMY

11.1 Introduction

This Chapter presents an analysis of the impact of implementing the Constitution on the Nation's economy including public finances. In interpreting the data and findings, it should be noted that implementation of the Constitution has been under way substantively for only two years; the first devolution budget was prepared for fiscal year 2013/14. The implication is that effects of the Constitution have not fully worked their way through the economy. However, even at this early stage, it is possible to determine the trajectory of impacts and respond accordingly.

To determine the impact of the Constitution on the economy, the audit sought to answer a number of questions in five parts as follows:

- (1) What impact has the Constitution had on overall public expenditure?
- (2) What impact has the Constitution had on the public wage bill? This question involved analyses of several facets of public expenditure including size and cost of national executive and restructuring and rationalization of the civil service including provincial administration.
- (3) What impacts has implementation of devolved government had? This question involved analyses of whether more money is going to the grassroots, what sector priorities counties are spending money on, viability of counties and whether citizens are getting value for money.
- (4) What are the implications on public expenditure of implementing the new system of legislature?
- (5) What are the implications on public expenditure of operating the Independent Commissions and offices introduced under the Constitution?

11.2 Impact on public expenditure

There is no evidence of a significant impact of the new Constitution on overall public finance. Government expenditure increased marginally from 24.6% of GDP in 2012/13 to 25.7% of GDP in 2013/14, the first year of implementation of devolution. The transfer to the counties amounted to 4% of GDP. It should be noted that the expenditure ratio for the two years represents a significant drop from a ratio of 29% in the preceding three years. Expenditure is projected to rise to 29% of GDP in the current financial year (FY 2014/15). This jump is attributed to a very large increase (67%) in the national government's development budget.

Public Wage Bill

There has been debate about the affordability and sustainability of the public wage bill informed in part by concerns about the expansion of Government on account of the Constitution. Overall, there is no evidence of a significant impact of the implementation of the Constitution on the wage bill. The core government wage bill to GDP ratio (national + county) rose marginally from 6.6% of GDP in 2012/13 to 7% in 2013/14. It is projected to fall back to 6.6% in the current fiscal year and remain at 6.6% in 2015/16. This is in line with the international benchmark of

7% of GDP. The overall public wage bill (including parastatals) also rose marginally from 9.6% of GDP in 2012/13 to 9.9% in 2013/14, but is projected to decline to 9.2% of GDP this year (FY 2014/15) and further to 8.6% of GDP in 2015/16. These ratios are in line with international norms.

However, while the overall wage bill level is assuring from a macroeconomic perspective, there are some issues of concern.

Devolution saw a significant number of the national government workforce transferred to the counties. This is reflected in the increase of the wage bill of the counties by Ksh. 49.7 billion from Ksh. 21.6 billion in 2012/13 to Ksh. 71.2 billion in 2013/4. A corresponding reduction in the wage bill of the National Government would have been expected. This is not evident.

The wage bill of the National Government increased from Ksh. 274.4 billion to Ksh. 281.2 billion. Adjusted for the transferred workforce, this translates to a 25% increase in the National Government wage bill which implies either a significant upward revision of pay, or an equally significant increase in hiring. It is not evident that either is the case.

Size and Cost of the National Executive

Much of the country's attention on the size and cost of government has focused on the new structures and offices created by the Constitution. The implications on the National Government, which are just as significant have not received as much attention.

In terms of assignment of functions, with the exception of security, education and foreign affairs, the National Government is assigned policy and regulatory functions while counties are assigned service delivery functions. There are also concurrent functions, notably infrastructure, where the National Government is responsible for national components and counties are responsible for the local components.

The potential implications of these changes on the size, structure and cost of running the National Government are significant. By virtue of the principles of distinctness and interdependence espoused in the Constitution, the supervisory powers previously exercised by the National Government on local authorities have been abolished, meaning in turn that the National Government no longer requires the institutional infrastructure that was in the Ministry of Local Government. Ministries whose functions were fully devolved, notably health and agriculture contained administrative functions that should of necessity be rationalized. One of the largest headquarter functions in these ministries was personnel.

Restructuring and Realignment of the Provincial Administration.

The Constitution requires the Provincial Administration to be restructured and re-aligned with the devolved structure of government. To date, the system remains largely in place as it was before, with only change of names of the positions. Whether this constitutes the restructuring as envisaged by the Constitution and is in accordance with the wishes of Kenyans is debatable.

It is difficult to see how the entire administrative strength that the government had before devolution can continue to be fully employed following devolution. It is not contestable that the National Government needs a presence to coordinate its functions at the county level. The question is what size of presence would be both effective and financially prudent. From the county level downwards, the administration has five layers [county, sub-county (district), division (DO level), location and sub-location]. Are all the layers necessary? Are there some functions that the National Government could delegate to the county administration to avoid duplication and reduce cost? Article 183 (1) (b) envisages that National Government can assign implementation of aspects of its programmes to County Governments.

There are no clear answers to these questions and we acknowledge that this is the prerogative of the National Government. However, the Constitution requires public resources to be used prudently and responsibly, and the National Government is duty bound to demonstrate that the choices it has made are prudent and constitute value for money for Kenyans.

Impact of Restructuring and Rationalizing the Civil Service

The single largest economic and financial risk which adoption of the Constitution portends is failure of the National Government to rationalize and downsize consistent with functions and structures mandated in the Constitution. Whereas figures are not available on how many employees would be made redundant if rationalization is carried out, a rationalization exercise is underway and figures to the order of 60,000 people have been mentioned. The average national government wage cost per employee in 2013 was Ksh. 442,000. This translates, indicatively to an annual wage cost of Ksh. 26.5 billion.

This assertion begs the question as to how such significant over establishment can be consistent with a sustainable wage cost. There are two dimensions to this.

First, the government has managed to maintain a macro-economically sustainable wage cost by suppressing pay. In other words, there may be too many underpaid civil servants. This also manifests itself in inordinately large wage differentials between the top and the bottom ranks of the civil service. The impact is therefore not to be seen on the macroeconomic plane but in the low productivity and poor performance of the civil service.

The second dimension has to do with the skills mix. Over-establishment in government is driven by pressure to create jobs, usually of labour market entrants, who are seldom the skilled workers that are required, but rather unskilled school leavers and college graduates who are employed in administrative jobs. Indeed one of the challenges that the National Government has encountered in redeployment of staff to the counties is that the counties put a premium on front line service delivery staff (health workers, agricultural extension workers, engineers, technicians, etc) while the National Government is seeking to redeploy office workers.

The implications are clear. The restructuring imperative impinges on the National Government and its capacity to deliver. The opportunity costs of failing to downsize are understaffing and poor pay for essential national government services such as education and security, crowding out of Operations & Maintenance and investment expenditures (e.g. infrastructure) and excessive borrowing.

11.3 Impact of Devolved Government on the Economy

The Constitution makes specific provisions with respect to financial matters of counties. Impacts of some of these provisions are summarized below.

Is More Money Going to the Grassroots?

The available data does not provide definitive evidence that more money is going to the grassroots under devolution than before. The equitable share for the year which year? was Ksh. 229 billion. The counterfactual suggests that under the old system, the National Government would have spent Ksh. 125 billion on the devolved health and agriculture functions. Local authorities would have received a block transfer of Ksh. 26 billion as LATF, making for a total of 151.4 billion. This amounts to 66% of the equitable share. This leaves a residual Ksh. 78 billion from the equitable share for all the other devolved and shared functions. The residual translates to 16% of the combined outlays from the national budget on these functions.

It seems implausible that the share of national budget spent at the local level before devolution was 16% or less, or put differently, that 84% of the budget was spent on what are now national government components of these functions. If, as is likely, the pre-devolution share spent locally was substantially higher than 16%, it would imply that the share of budget spent on devolved functions has declined.

The table below provides an indicative analysis comparing the budget for the current year FY 2014/15 against a counterfactual of what it might have been under the old system. In terms of sectoral allocation it was only possible to analyze health, agriculture and “other devolved” sectors lumped together as agriculture and health are the only sectors where there is correspondence between county and national budget.

The counterfactual allocations are computed using the 2012/13 budget allocations for agriculture and health, and the estimates of the baseline cost of devolved functions published by the CRA. The share of health and agriculture in the national budget were 6.5% and 3.8% respectively while the baseline costs were estimated at 78 percent and 64 percent respectively (i.e. the devolved components accounted for 78 percent and 64 percent of the health and agriculture budgets respectively). The analysis yields the following observations.

Table 1 - Actual vs Counterfactual Budget Comparison for FY 2014/15

	FY 2014/15 Budget		
	Actual	Counterfactual	Difference , %
Health	114.1	108.4	5.3
National	47.4	23.8	98.8
County	66.7	84.5	(21.1)
Agriculture	59.0	63.3	(6.8)
National	36.2	22.8	58.8
County	22.8	40.5	(43.7)

Source: National Treasury. Budget Review and Outlook Paper 2014 and authors computations.

Sectoral Priorities

From a review of allocations to the two key sectors, that is, agriculture and health, a more definitive conclusion can be drawn. The total health allocation is marginally higher, by 5.3%, than it would have been under the old system, but the agricultural allocation is 6.8% lower. However, given the assumptions, these differences are not significant. It is fair to say that devolution has not yet translated into substantial shifts in the overall sectoral composition. However, in terms of composition between devolved and national government, the change is significant.

The analysis suggests that the counties have allocated less to these functions than would have been spent on the devolved functions under the old system, while the national government is spending significantly more than would have been the case. The national government’s health allocation is double the counterfactual while the counties’ allocation is 21% less. And the national government’s agricultural budget is 59% more while the county budgets are 44% less than the counterfactual.

This observation begs the question as to what the county priorities are. These are summarized in Table 1 below which shows that health is the counties top priority, accounting for 21% of the counties’ budgets. There are however, disparities across counties. Infrastructure is the top

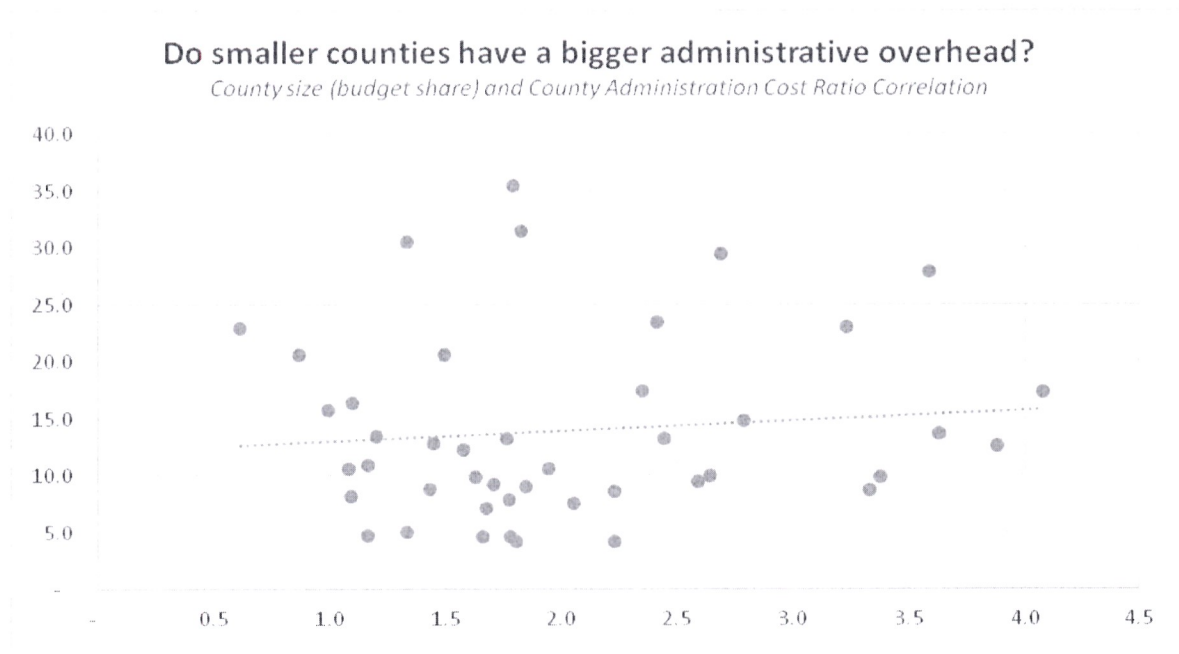
priority in a number of counties including Mandera, Wajir, Tana River, Uasin Gishu and Nairobi, while water and agriculture are the top priorities in Garissa and Muranga respectively.

Table 2 - County Budget by Sector FY 2014/15, % of budget

	Budget Share, %	Highest, %	Lowest, %
Health	20.9	41.1	5.1
County Administration	15.9	55.5	4.1
Public Works, Transport, Infrastructure	13.2	28.2	1.1
County Assembly	10.5	33.5	4.8
Finance & Economic Planning	9.8	39.0	1.7
Education, ICT and Social Affairs*	9.4	24.5	2.9
Agriculture & Livestock Development	7.2	18.6	1.3
Water, Energy, Env. & Natural Resources	5.8	22.8	
Trade, Industry & other Commercial	4.3	11.0	-
Physical Planning, Lands & Housing	3.1	8.3	-
* Labour, Youth Affairs, Sports, Culture & Social Services			

Source: National Treasury

Economic and Administrative Viability of Counties



Source: National Treasury county budget data

Are Citizens Getting Value for Money?

This is a difficult question as it requires specific in depth studies. It is even more difficult to answer for the counties given that they have only completed one year of budget execution. That said, there is anecdotal data from media reports on the performance of counties. On one hand, there is information indicating that devolution is being felt on the ground. This includes counties where people are seeing their first tarmac road. Press reports on county purchases of ambulances, both positive and negative suggest that access to emergency medical services has expanded. Mandera County has been making news with irrigation, while Garissa County made news by building 21 maternity units in its first year of operation. Significant rural roads improvement is reported throughout the country.

Though impressionistic, these reports suggest that citizens are getting value for money. This is all the more significant in light of the observation made above of no increase, and probably a reduction in the proportion of budget spent on devolved functions. This would not be a new experience as it would be similar to the CDF experience.

Following this Interim Report, further investigations will be conducted in counties to analyze the impact of devolution on communities.

11.4 The Economic Impact of Parliament

There are concerns regarding the cost implications of the expansion of Parliament from a single Chamber with 210 members to a bi-cameral Parliament with 418 members. These concerns are motivated in part by the view that the earnings of Members of Parliament are exorbitant and out of proportion with the country's means.

Is Parliament Too Large?

In terms of representation, the current Parliament translates to an average of 120,000 constituents per MP and 100,500 including the Senate.⁶⁵ This is lower than the global average of 146,000 constituents per MP, but higher than the African average of 83,450 per MP. The global norm corresponds to a parliament of 290, and the African average to one of 500 members. In view of the fact that ours is in between the two, we are inclined to conclude that it is not anomalous.

In terms of cost, the budget for Parliament is to the order of 2% of the national budget, against a global average of 0.57% (for countries with population of 10-50 million), in effect more than three times the global average. However, in terms of cost of per citizen, our parliament budget for 2014/15 translates to Ksh. 550 per person, against a global average of Ksh. 1,670 per person.

The question of MPs pay is important in its own right as well as in relation to its contribution to the overall cost of parliament. Are Kenyan MPs overpaid? What explains the high cost of parliament relative to the budget?

Data on MPs pay in 29 countries recently published by The Economist shows large disparities between countries, ranging from US\$ 200,000 in Australia to US\$ 3,500 in Pakistan. Even in high income countries with comparable cost of living, the disparities are quite large. Australia's MPs earnings amount to double those of Sweden (US\$ 99,000 p.a.) and more than four times the pay of Spanish MPs (US\$ 44,000).

Kenyan MPs rank 19th out of the 29 countries compared, with an annual salary of US\$ 74,500 per annum. But this should be looked at in the context of the wide variance in cost of living as well as the economic diversity of the countries in the sample. Table 2 below provides a comparison of the developing countries in the sample, with the figures having been adjusted for cost of living differences using Purchasing Power Parity exchange rates and are reported in Kenya shillings for ease of comparison.

As the table shows, Nigeria where MPs earn an equivalent of Ksh. 1.2 million a month is an outlier on the high end, while Pakistan, Bangladesh and Sri Lanka are outliers at the other end of the scale with very low pay for MPs. The norm would seem to be the range from Ghana at Ksh. 333,000 to Brazil at Ksh. 707,000. Kenya is in the middle of the pack. Based on this, we are inclined to conclude that the pay of MPs in Kenya is not out of line with international norms. We note however that Kenya is the poorest country in that group. Our closest comparators economically are Ghana and India, where MPs earn 60% and 25% respectively of what Kenyan MPs are paid.

With regard to the overall cost outlay, the 2014/15 budget of parliament at Ksh. 23 billion translates to Ksh. 55 million per member. The MPs salary amounts to only 12% of the budget. It cannot be said that the salaries are a key driver of the high cost ratio.

⁶⁵ UNDP/Inter Parliamentary Union, *Global Parliamentary Report 2012*.

Table 3: Comparison of MPs salaries in selected countries

	MPs Salary, Ksh/Month	GDP Per Capita, US\$
Nigeria	1,180,480	3,006
Brazil	706,663	11,208
South Africa	649,403	6,886
Indonesia	605,013	3,475
Kenya	558,750	1,246
Thailand	364,583	5,779
Ghana	333,876	1,858
Malaysia	187,262	10,538
India	135,422	1,498
Sri Lanka	50,606	3,280
Pakistan	42,202	1,275
Bangladesh	41,147	958
Average	404,617	4,251
Source: <i>The Economist</i> , World Bank Economic Databases and authors computations		

11.5 Constitutional Commissions and Independent Offices

Independent Commissions and Offices budget for 2013/14 was a total of Ksh. 3.34 billion, equivalent to 0.34 percent of ministerial budgets. It translates to Ksh. 80 per citizen, compared to a cost of parliament of Ksh. 550 per citizen. In view of the relative importance of their constitutional mandates, the outlay is not significant.

APPENDICES

Appendix 1: Terms of Reference of the Working Group

- (i) To access the impact of the implementation of the Constitution of Kenya 2010 to the nation's economy and in particular its public finances;
- (ii) To make rapid assessment of the impact of the implementation of the Constitution of Kenya 2010 on public institutions;
- (iii) To evaluate the social impact resulting from the implementation of the Constitution of Kenya 2010;
- (iv) To make recommendation to the National Assembly on potential measures that could better enhance prudent management of the country's public resources.
- (v) To investigate, determine and advise on any matter related to, relevant, consequential or incidental to the foregoing; and
- (vi) To consult as necessary with the National Assembly through the Budget and Appropriations Committee.

Appendix 2: List of Experts and Peer Reviewers

Prof. P.L.O Lumumba

Dr. Katumanga Musambayi

Dr. Mutakha Kangu

Major General Muhammed Hussein Ali (Rtd)

Dr. Mbui Wagacha

Dr. Adams Oloo

Dr. David Ndi

Dr. Conrad Bosire

Appendix 3: List of Persons and Institutions Consulted Institutions

Council of Governors

Judiciary

Transitional Authority

Constitutional Implementation Oversight Committee

Commission on Revenue Allocation

Ministry of Devolution

National Gender and Equality Commission

Kenya Human Rights Commission

Memoranda Received

Commission on the Implementation of the Constitution

Independent Electoral and Boundaries Commission

Kenya Private Sector Alliance

Law Society of Kenya

Persons consulted

Hon. Raila Odinga	CORD Coalition Leader
Hon. Kalonzo Musyoka	CORD Coalition Deputy Leader
Hon. James Orengo	Senator Siaya County
Ms. Atsango Chesoni	Executive Director Kenya Human Rights Commission
Prof. Yash Pal Ghai	Director Katiba Institute
Prof. PLO Lumumba	Director Kenya School of Law
Hon. Abdikadir Mohammed	Advisor Constitutional & legal affairs to the President
Hon. Prof. Githu Muigai	Attorney General
Hon. Mutava Musyimi	Chair Budget and Appropriations Committee
Hon. Aden Barre Duale	Majority Leader National Assembly
Hon. Francis Nyenze	Minority Leader National Assembly
Hon. Dr. Willy Mutunga	Chief Justice and Head of Judiciary

Ms. Anne Waiguru	Cabinet Secretary for Devolution and Planning
Mr. Justin Bundi	Clerk of National Assembly
Hon. Isaac Ruto	Chairman Council of Governors
Hon. Njoroge Baiya	Chairman Constitution Implementation Oversight Committee
Hon. Jakoyo Midiwo	Deputy Minority Leader National Assembly

Appendix 4: Chronology of Key Events

YEAR	KEY CONSTITUTIONAL EVENT/MILESTONE	SUMMARY
1982	Repeal of Section 2A of the Constitution	<ul style="list-style-type: none"> • Officially made Kenya a one party state and ushered in a one party state. • Limitation of political options to one party sowed seeds for constitutional agitation.
1985 – 1988	End of cold war	<ul style="list-style-type: none"> • Global geo-political changes resulted in the end of the cold war. • The fall of Berlin wall and the collapse of the Soviet Union resulted in a wind of change that swept across Africa. • It triggered increased constitutional reform agitation, with disaffection on the one party dictatorship reaching fever pitch. • Key players included the church, civil society and political pressure groups.
1988	Flawed Mlolongo elections of 1988	<ul style="list-style-type: none"> • The flawed mlolongo elections saw the rise in voices seeking constitutional reform. • A sizeable part of the citizenry became totally disaffected with the country's political and constitutional landscape. • The flawed electoral system provided a clear evidence for the one party dictatorship excesses. • Described as the watershed period that triggered clamor for constitutional change
1988	Constitutional amendment removing security of tenure of judges and other	<ul style="list-style-type: none"> • Interpreted as the Government's affront to judicial independence and the independence of

	officials	constitutional offices.
1990	Saba Saba Riots	<ul style="list-style-type: none"> • It increased the urgency for constitutional reform • Political pressure groups led by Matiba, Rubia and Raila declared for the holding of Saba Saba meeting on July 7 1990. The Saba Saba rally is attributed to the political murders of Robert Ouko and Bishop Alexander Muge. • The death of Bishop Muge can be directly attributed to his incessant demand for constitutional reforms and multi-partyism. • The resultant arrests of the leaders, riots and deaths played a key role in the clamour for multi-partyism and constitutional reforms.
1990-91	The Saitoti Review Committee	<ul style="list-style-type: none"> • Tasked with investigating KANU's internal electoral and disciplinary conduct. • Recommended cessation of party members' expulsion but instead sought short suspension. • Opened the doors for political reforms, more critically, setting the stage for the return of multi-partyism.
1991	Tribal clashes	<ul style="list-style-type: none"> • The politically motivated tribal clashes drew condemnation and heightened demand for constitutional reform.
	Heightened pressure and Increased number of players	<ul style="list-style-type: none"> • Violence was seen as government's attempt to forestall clamour for multi-partyism and constitutional change. • The twentieth sixth Amendment, Act No. 10 of 1991 increased the number of constituencies to a minimum of 188 and

1991	Restoration of multi-partyism	<p>a maximum of 210, without any input whatsoever of the ECK. Resulted in the joining of forces by NGOs, religious and secular organisations and political pressure groups to fight the KANU onslaught on constitutionalism.</p> <ul style="list-style-type: none"> • Key players included, NCCK, Episcopal Conference of Catholic priests, LSK, ICJ (K), KHRC and FORD. • Foreign ambassadors further weighed in, most notably the then American ambassador Smith Hempstone, adding their voice to the reform clamour. • 27th Amendment, Act No. 12 of 1991 restored Kenya as a multi-party state and restricted presidential term to two five-year terms.
1992	Demand for comprehensive reforms before elections & first multi-party elections	<ul style="list-style-type: none"> • Democratic space opened up and thus emboldening the pro-reform brigade. • Opposition leaders demanded comprehensive reforms as a pre-condition for participating in 1992 elections • The church prevailed upon them to relent and allow elections.
August 1997	The IPPG Initiative	<ul style="list-style-type: none"> • President Moi won albeit with a 33% vote. • Established through the Constitution of Kenya (Amendment) Act No. 9 of 1997. • Number of ECK commissioners rose from 12 to 22, where the opposition parties would nominate 10. • Nomination of MPs pegged on the parties' strength. • The constitution amended to officially

1998 – 2000	<ul style="list-style-type: none"> • Constitution of Kenya Review Commission Act. • Ufungamano Review initiative. 	<p>state that Kenya was a multi-party State.</p> <ul style="list-style-type: none"> • Enacted to oversee the review process. • Review process spearheaded by the PSC chaired by Raila Odinga. • The clergy withdrew from the process and formed their own review process dubbed Ufungamano Review Initiative. • Ufungamano published the 'People's Draft'.
2001- 02	Constitution of Kenya Review Commission	<ul style="list-style-type: none"> • Formed to spearhead the review process and headed by Prof Yash Pal Ghai. • Merger of the CKRC and Ufungamano Initiative. • Collection of views by CKRC and preparation of a new Constitution draft. • Convening of a delegates' conference to debate and ratify the draft but the conference aborts due to parliament's dissolution.
2003 – 2004	BOMAs Delegates Conference	<ul style="list-style-type: none"> • NARC victory quickly ushered in convening of the BOMAs talks. • The CKRC draft of 2002 formed the basis of the talks. • Political fallout in NARC spilled over to the BOMAs process. • Defeat of the government side where the draft was approved by delegates.
2005	<ul style="list-style-type: none"> • Kilifi Draft • 2005 Referendum 	<ul style="list-style-type: none"> • Wako prepares the Kilifi draft using the BOMAs draft as a basis. • The Kilifi/Wako draft subjected to the referendum and it is defeated through a popular vote in August 2005.
2006	Kiplagat-led Committee of Eminent Persons	<ul style="list-style-type: none"> • Tasked with collecting public views on how to move the process forward.

2008	<ul style="list-style-type: none"> • Multi Sectoral Review Forum on Constitutional Review • National Accord and Reconciliation Agreement. • Agenda Four • Constitution of Kenya (Amendment) Act, 2008 • Constitution of Kenya Review Act, 2008 	<ul style="list-style-type: none"> • Constitution of Kenya Review Bill drafted to jumpstart review process. • Bore no results before the 2007 General Elections. • Post-election violence resulting from disputed presidential elections. • Signing of a National Accord Agreement providing under Agenda Four the need to institute Constitutional Review as a long term peace solution. • Enactment of the Constitution Review Act establishing the Committee of Experts to spearhead the review process. PSC, National Assembly & Referendum were the three other critical organs in the process as outlined by the Act. • COE prepares a Harmonized draft Constitution and a Report from the previous drafts: CKRC draft, BOMAs draft & Wako draft. • Harmonized draft made public for debate.
2009	Revised Harmonized Draft	<ul style="list-style-type: none"> • COE collected public views on the harmonized draft as well views from all public interest groups. • COE incorporates amendments in line with the collected views and produces the RHDC accompanied with a report.
2010	Revised Harmonized Draft after PSC Naivasha meeting	<ul style="list-style-type: none"> • The PSC retreated to Naivasha to consider the RHDC and made significant recommendations. • COE considered the recommendations albeit

2010

Proposed Constitution

Referendum

- not incorporating all the proposals.
- A new revised draft presented to parliament for debate and consideration.
- Draft approved without amendment.
- The approved draft published as the Proposed Constitution.
- Proposed draft approved by the citizens in a referendum.

Appendix 5: List of Constitutional Amendments (1963 to 2010)

The Constitution of Kenya (Amendment) Act No 28 of 1964

- Made Kenya a Republic
- Created office of the President and made him both Head of State and Government
- Executive Authority of regional governments highly eroded
- President to be elected by House of Representatives constituted as Electoral College

The Constitution of Kenya (Amendment) (No 2) Act No 38 of 1964

- Transfer of powers to alter regional boundaries from regional governments to Parliament
- Independent sources of revenue to regions stopped, making them entirely dependent on Central Government
- Regional Presidents designated as mere Chairmen
- Appointing authority of Judges given absolutely the President's and requirement for consultation with at least 4 Regional presidents before appointing CJ removed

The Constitution of Kenya (Amendment) Act No 14 of 1965

- Ex-Officio MPs lost their voting power in National Assembly
- Constitution amendment threshold reduced from 90% to 65% in Senate, and 75% to 65% in the National Assembly
- Executive power of regions deleted completely
- Abolished appeals to privy councils and Supreme Court replaced with High Court
- Approval of Emergency increased from 7 to 21 days and threshold reduced from 65% to simple majority

The Constitution of Kenya (Amendment) Act No 16 of 1966

- Removed provisions concerning control of Agricultural land transactions from the Constitution
- Required MPs who had not attended National Assembly for over 8 sittings or imprisoned for over 6 months to lose their seats
- Minister in charge of citizenship

**The Constitution of Kenya
(Amendment) (No 2) Act No 17 of 1966**

**The Constitution of Kenya
(Amendment) (No 3) Act No 18 of 1966**

**The Constitution of Kenya
(Amendment) (No 4) Act No 19 of 1966**

**The Constitution of Kenya
(Amendment) Act No 4 of 1967**

**The Constitution of Kenya
(Amendment) Act No 16 of 1968**

**The Constitution of Kenya
(Amendment) (No 2) Act No 16 of 1968**

given discretion to grant Citizenship to Commonwealth citizens residing in Kenya for over 6 months

- Increased powers to rule by decree in North Eastern Province
- National Youth Service included in disciplined forces
- Required for an MP to seek re-election upon defection to another party
- Period of National Assembly review of Emergency orders increased from 2 to 8 months
- Greater and wider derogations of Fundamental right and freedoms permitted. Provision calling for reasonable justification for such derogations removed
- Dissolution of the Bicameral legislature to form a Unicameral Legislature comprising only the National Assembly
- Increased constituencies by 41 to accommodate new MPs, formerly Senators of the Upper House
- Quorum of National Assembly fixed at 30
- Speaker of National Assembly made Chair of ECK assisted by two Presidential appointees
- References to Senate deleted and life of National Assembly extended to end in June 1970 instead of 1968
- Meant to clear doubt over Section 42A (Turn Coat Rule)
- Backdated the effect of the Fifth Amendment to 1963
- Abolished Provincial Councils
- Deleted from the constitution any references to the provincial and district boundaries
- Election of President made to be by Universal Suffrage
- Every party required to nominate a Presidential Candidate
- Ballot paper made to pair President and MP from same party
- Independent candidates barred from contesting
- Qualifications for presidency introduced

**The Constitution of Kenya
(Amendment) Act No 5 of 1969**

- President empowered to appoint members of Parliamentary Service Commission and nominate 12 MPs
- Altered provisions of presidential succession and removed parliamentary approval for state of emergency declaration
- Consolidated all the Constitutional amendments as at February 1969 resulting in a revised Constitution for Kenya in one document which was declared to be the authentic document
- Membership of ECK altered by making all members Presidential appointees
- Reduced the age of voting from 21 to 18

**The Constitution of Kenya
(Amendment) Act No 10 of 1974**

- Made Kiswahili one of the official languages of the National Assembly

**The Constitution of Kenya
(Amendment) Act No 5 of 1974**

**The Constitution of Kenya
(Amendment) Act No 1 of 1975**

- Provided that all financial resolutions and written laws be presented to the House shall be written in English, and all other issues would be debated in Kiswahili
- Extended the Presidential prerogative to include annulling disqualifications arising out of a ruling of the Elections Court (Ngei Amendment)

**The Constitution of Kenya
(Amendment) Act No 13 of 1977**

- Established the Court of Appeal
- Abolished the right to directly remit compensation for acquisition of property abroad without complying with foreign exchange regulations
- Provided for use of English as an alternative Parliamentary language
- Proficiency in Kiswahili made a prerequisite for qualification for people seeking parliamentary office
- Specified period within which a civil servant must resign to seek office, 6 months prior to preliminary elections

**The Constitution of Kenya
(Amendment) Act No 1 of 1979**

**The Constitution of Kenya
(Amendment) Act No 5 of 1979**

- Introduced Section 2A that changed Kenya from a *de facto* to *de jure* one

**The Constitution of Kenya
(Amendment) Act No 7 of 1982**

**The Constitution of Kenya
(Amendment) Act No 6 of 1986**

**The Constitution of Kenya
(Amendment) Act No 14 of 1986**

**The Constitution of Kenya
(Amendment) Act No 20 of 1987**

**The Constitution of Kenya
(Amendment) Act No 8 of 1988**

**The Constitution of Kenya
(Amendment) Act No. 10 of 1991**

**The Constitution of Kenya
(Amendment) Act No 12 of 1991**

The Constitution of Kenya (Amendment) Act
No. 6 of 1992

The Constitution of Kenya (Amendment) Act
No. 9 of 1997

- party state making Kenya a one-party state by Law
- Turn coat rule (Fifth Amendment) repealed
- Definition of a Political Party deleted
- Method of nominations for General Elections amended making them a preserve of KANU
- Repealed Section 89 which provided for automatic Citizenship for people born in Kenya after Dec 1963. Henceforth, either of your parents must be Kenyan
- Removed Security of Tenure of AG and Auditor & Controller General
- Abolished office of Chief Secretary
- Provided for a minimum of 168 and maximum of 188 Constituencies
- Made all Capital offences non-bailable
- Torture of Political prisoners entrenched in the Criminal Justice system
- Legalized detention of Capital offenders for 14 days without trial allowing for time to torture
- Removed security of tenure of Constitutional office Holders
- Returned the Security of tenure of Constitutional office Holders
- Provided for a maximum of 210 and minimum of 188 Constituencies
- **Repealed Section 2A of the Constitution hence ending the *de jure* one-party rule in Kenya**
- **The Turn Coat Rule (Fifth Amendment) was reintroduced**
- **Set the presidential term limit to two.**
- **Provided that for one to be declared President, he/she must garner the majority votes in addition to attaining at least 25% of votes in five of the eight provinces.**
- **Provided framework for minimum constitutional reforms under the IPPG format.**

The Constitution of Kenya (Amendment) Act
No. 10 of 1997

- **Introduced section 1A which effectively defined Kenya as a multi-party state.**
- **Allowed the President to form government from members of other political parties.**
- **Role of nominating members of parliament transferred to political parties.**
- **Constitutional matters could be appealed at the Court of Appeal.**
- **Established the Parliamentary Service Commission and Parliamentary Service.**
- **Created the Grand Coalition government after the disputed 2007 elections.**
- **Established the office of Prime Minister and two Deputy Prime Ministers.**

The Constitution of Kenya (Amendment) Act
No. 3 of 1999

The Constitution of Kenya (Amendment) Act
2008

Appendix 6: Legislative Timelines under the Fifth Schedule

ARTICLE	LEGISLATION	TIMETABLE	IMPLEMENTATION	COMMENT
Article 11(3)- Culture		Five years	Not enacted	
Article 18 - Citizenship	The Kenya Citizenship and Immigrations Act, 2011	One year	Enacted	
Article 34 - Freedom of Media	Kenya Information and Communications (Amendment) Act, 2013	Three year	Enacted	
Article 45 - Family	The Marriage Act, 2014	Five years	Enacted	
Article 46 - Consumer Protection	Consumer Protection Act, 2012	Four years	Enacted	
Article 47- Fair administrative action	The Fair Administrative Action Bill, 2014	Four years	Not enacted.	Undergoing review.
Article 50 - Fair hearing	Fair Hearing Bill	Four years	Not enacted.	Undergoing review
	The Victim Protection Act, 2014		Enacted	
Article 51- rights of persons detained, held in custody or	Persons Deprived of Liberty Bill, 2014	Four years	Enacted	

Article 71- Agreements relating to natural resources	The Mining Bill, 2014	Five years	Passed by parliament. Awaiting presidential assent.
Article 72 - Legislation regarding environment	The Environmental Management and Co-ordination (Amendment) Bill, 2014	Four years	Passed by parliament. Awaiting presidential assent.
Article 79 - Ethics & Anti- corruption Commission	The Ethics and Anti-Corruption Commission Act, 2011	One year	Enacted
Article 80 - Legislation on leadership	The Leadership and Integrity Bill, 2012	Two years	Enacted
Article 82- Legislations on elections	The Elections Act, 2011	One year	Enacted
Article 87 - Electoral disputes	The Elections Act, 2011	One year	Enacted
Article 88- Independent Electoral and Boundaries Commission	The Independent Electoral and Boundaries Commission Act, 2011	One year	Enacted
	Election Campaign Financing Act, 2013		Enacted

Article 92- Legislation on political parties	The Political Parties Act, 2011	One year	Enacted
Article 100 - promotion of representation of marginalized groups		Five years	Not enacted
Article 103- Vacation of office of member of Parliament	The Political Parties Act, 2011	One year	Enacted
Article 104- Right of recall	The Elections Act, 2011	Two years	Enacted
Article 105- Determination of questions of membership of Parliament	Elections Act, 2011	Two years	Enacted
Article 119- Right to petition Parliament	The Petition to Parliament (Procedure) Act, 2012	Two years	Enacted
Article 133- Power of mercy	The Power of Mercy Act, 2011	One year	Enacted
Article 141- Assumption of office of President	The Assumption of the Office of the President Act,	Two years	Enacted

	2012.		
Article 162 - System of courts	The Industrial Court Act, 2011.	One year	Enacted
	The Environment and Land Court Act, 2011.		Enacted
Article 168 - Removal from office	Judicial Service Act, 2011	One year	Enacted
Article 173- Judiciary fund	Judicial Service Act, 2011	Two years	Enacted
Sixth schedule, Section 23- Vetting of judges and magistrates	The Vetting of Judges and Magistrate Act, 2011	One year	Enacted
Article 178 - Speaker of County Assembly	The County Governments Act, 2012	One year	Enacted
Article 184 - Urban areas and cities	The Urban Areas and Cities Act, 2011	One year	Enacted
Article 190- Support for county governments	Public Finance Management Act, 2012	Three years	Enacted
Article 181- Removal of county	The County Governments Act, 2012	18 months	Enacted

governor

Article 194- Vacation of office of member of county assembly	The County Governments Act, 2012	18 months	Enacted
Article 196 - Public participation and county assembly powers, privileges and immunities	The County Assemblies Powers and Privileges Bill, 2014	Three years	Not enacted
Article 197 - County assembly gender balance and diversity	The County Governments Act, 2012	Three years	Enacted
Article 200 & Sixth Schedule, section 15 - Legislation to effect Chapter eleven	The Transition to Devolved Government Act, 2012.	18 months	Enacted
	The Intergovernmental Relations Act, 2012.		Enacted
	The County Government Act, 2012.		Enacted
Article 207 - Revenue Funds for county	The Public Financial Management Act, 2012	18 months	Enacted

governments

Article 208 - Contingencies Fund	Contingencies Fund and County Emergency Funds Act, No. 17 of 2011	One year	Enacted
Article 213 - Loan guarantees by national government	National Government Loans Guarantee Act, No. 8 of 2011	One year	Enacted
Article 225 - Financial control	The Public Financial Management Act, 2012	Two years	Enacted
Article 226- Accounts and Audit of public entities	Accounts and Audit of Public Goods and Services Bill Public Finance Management Act, 2012	Four years	Not enacted Enacted
Article 227- Procurement of public goods and services	The Public Procurement and Asset Disposal Bill, 2014	Four years	Not enacted
Article 232 - Values and principles of public service	Public Service (Values and Principles) Bill, 2014	Four years	Not enacted. Published and awaiting parliamentary debate.
Article 239 - National security organs	National Intelligence Service Act, 2012.	Two years	Enacted

	National Security Council Act, 2012.		Enacted
	Kenya Defence Forces Act, 2012		Enacted
Article 245 - Command of the National Police Service	National Police Service Act, 2011	Two years	Enacted
Any other legislation required by this Constitution		Five years	
Article 215 & 216	The Commission on Revenue Allocation Act, 2011.		Enacted
Article 162	The Independent Offices (Appointment) Act, 2011.		Enacted
Article 237	The Teachers Service Commission Act, 2012.		Enacted
	The Public Service Commission Act, 2012.		
	Legal Aid Bill,		Enacted

	2013	
Article 48	The National Sovereign Wealth Fund Bill, 2014	Not enacted. Under review and stakeholder consultations.
Article 201	The Controller of Budget Bill, 2011	Not enacted. Under review and stakeholder consultations.
	Access to Information Bill, 2013	Not enacted
Article 228	The County Early Childhood Education Bill, 2014	Not enacted
Article 35	The National Government Co- ordination Act, 2013	Not enacted
Article 53 & Part 2 of the Fourth Schedule	The Intergovernmental Relations Act, 2012	Enacted
Article 131 & 132	The Treaty Making and Ratification Act, 2012	

Article 189	Commission for the Implementation of the Constitution Act, 2010	Enacted
Article 2(6)	Salaries and Remuneration Commission Act, 2011	Enacted
	Judicature (Amendment) Act, 2012	
Sixth schedule, section 5	Office of the Director of Public Prosecutions Act, 2013	Enacted
	Office of the Attorney-General Act, 2012	
Article 230	Social Assistance Act ,2013	Enacted
	National Honours Act, 2013	
Article 165 & 166	The Parliamentary Powers and Privileges Bill,	Enacted

	2014	
Article 157	Persons with Disability (Amendment) Bill, 2013	Enacted
Article 156	The County Industrial Development Bill, 2014	Enacted
Article 43	The Public Appointments (County Assemblies Approval) Bill, 2014	Enacted
Article 132		Enacted
Article 117	The Public Appointments (County Assemblies Approval) Bill, 2014	Not enacted
Article 154	The Reproductive Health Care Bill, 2014	Not enacted
Article 110		Not enacted

Not enacted

Article 43 &
110

Not enacted

Not enacted

Appendix 7: National and County Government functions

NATIONAL GOVERNMENT

1. Foreign affairs, foreign policy and international trade.
2. The use of international waters and water resources.
3. Immigration and citizenship.
4. The relationship between religion and state.
5. Language policy and the promotion of official and local languages.
6. National defence and the use of the national defence services.
7. Police services, including—
 - the setting of standards of recruitment, training of police and use of police services;
 - criminal law; and
 - Correctional services.
8. Courts.
9. National economic policy and planning.
10. Monetary policy, currency, banking (including central banking), the incorporation and regulation of banking, insurance and financial corporations.
11. National statistics and data on population, the economy and society generally.
12. Intellectual property rights.
13. Labour standards.
14. Consumer protection, including standards for social security and professional pension plans.
15. Education policy, standards, curricula, examinations and the granting of university charters.
16. Universities, tertiary educational institutions and other institutions of research and higher learning and primary schools, special education, secondary schools and special education institutions.
17. Promotion of sports and sports education.
18. Transport and communications, including, in particular—
 - road traffic;
 - the construction and operation of national trunk roads;

COUNTY GOVERNMENT

1. Agriculture, including—
 - crop and animal husbandry;
 - livestock sale yards;
 - county abattoirs;
 - plant and animal disease control; and
 - Fisheries.
2. County health services, including, in particular—
 - county health facilities and pharmacies;
 - ambulance services;
 - promotion of primary health care;
 - licensing and control of undertakings that sell food to the public;
 - veterinary services (excluding regulation of the profession);
 - cemeteries, funeral parlours and crematoria; and
 - refuse removal, refuse dumps and solid waste disposal.
3. Control of air pollution, noise pollution, other public nuisances and outdoor advertising.
4. Cultural activities, public entertainment and public amenities, including—
 - betting, casinos and other forms of gambling;
 - racing;
 - liquor licensing;
 - cinemas;
 - video shows and hiring;
 - libraries;
 - museums;
 - sports and cultural activities and facilities; and
 - County parks, beaches and recreation facilities.
5. County transport, including—
 - county roads;
 - street lighting;
 - traffic and parking;
 - public road transport; and
 - Ferries and harbours, excluding

- standards for the construction and maintenance of other roads by counties;
 - railways;
 - pipelines;
 - marine navigation;
 - civil aviation;
 - space travel;
 - postal services;
 - telecommunications; and
 - Radio and television broadcasting.
19. National public works.
 20. Housing policy.
 21. General principles of land planning and the co-ordination of planning by the counties.
 22. Protection of the environment and natural resources with a view to establishing a durable and sustainable system of development, including, in particular—
 - fishing, hunting and gathering;
 - protection of animals and wildlife;
 - water protection, securing sufficient residual water, hydraulic engineering and the safety of dams; and
 - Energy policy.
 23. National referral health facilities.
 24. Disaster management.
 25. Ancient and historical monuments of national importance.
 26. National elections.
 27. Health policy.
 28. Agricultural policy.
 29. Veterinary policy.
 30. Energy policy including electricity and gas reticulation and energy regulation.
 31. Capacity building and technical assistance to the counties.
 32. Public investment.
 33. National betting, casinos and other forms of gambling.
 34. Tourism policy and development.
- the regulation of international and national shipping and matters related.
6. Animal control and welfare, including—
 - licensing of dogs; and
 - facilities for the accommodation, care and burial of animals.
 7. Trade development and regulation, including—
 - markets;
 - trade licences (excluding regulation of professions);
 - fair trading practices;
 - local tourism; and
 - Cooperative societies.
 8. County planning and development, including—
 - statistics;
 - land survey and mapping
 - boundaries and fencing;
 - housing; and
 - Electricity and gas reticulation and energy regulation.
 9. Pre-primary education, village polytechnics, homecraft centres and childcare facilities.
 10. Implementation of specific national government policies on natural resources and environmental conservation, including—
 - soil and water conservation; and
 - Forestry.
 11. County public works and services, including—
 - storm water management systems in built-up areas; and
 - Water and sanitation services.
 12. Fire-fighting services and disaster management.
 13. Control of drugs and pornography.
 14. Ensuring and coordinating the participation of communities and locations in governance at the local level and assisting communities and locations to develop the administrative capacity for the effective exercise of the functions and powers and participation in governance at the local level

