


Constitutional Implementation in Kenya, 2010-2015: Challenges and Prospects

A study under the auspices of the Friedrich Ebert Stiftung (FES)
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Constitutionalism & Education Law
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CEO Sihanya Mentoring & Innovative Lawyering

October 2011; Revised 4/12/11; 5/12/2012



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List of Abbreviations and Acronyms

A-G	Attorney-General
CAJ	Commission on Administrative Justice
CIC	Commission for the Implementation of the Constitution
CID	Criminal Investigation Department
CIOC	Constitution Implementation Oversight Committee
CJ	Chief Justice
CKRC	Constitution of Kenya Review Commission (<i>functus officio</i>)
CoE	Committee of Experts (<i>functus officio</i>)
CREAW	Centre for Rights, Education and Awareness
DC	District Commissioner
DO	District Officer
DP	Deputy President
DPP	Director of Public Prosecutions
EACC	Ethics and Anti-Corruption Commission
ECK	Electoral Commission of Kenya
GSU	General Service Unit
HBC	House Business Committee
ICC	International Criminal Court
ICPC	International Centre for Peace and Conflict
IEACC	Independent Ethics and Anti-Corruption Commission (see also EACC)
IEBC	Independent Electoral and Boundaries Commission
IIEC	Interim Independent Electoral Commission (defunct)
ITPA	Indian Transfer of Property Act
JSC	Judicial Service Commission
KACC	Kenya Anti-Corruption Commission (defunct)
KCSE	Kenya Certificate of Secondary Education
KLRC	Kenya Law Reform Commission
KNCHR	Kenya National Commission on Human Rights
KRA	Kenya Revenue Authority
KRCS	Kenya Red Cross Society
MDAs	Ministries, Departments and Agencies
MOJNCCA	Ministry of Justice, National Cohesion and Constitutional Affairs
MP	Member of Parliament
MRC	Mombasa Republican Council
MUHURI	Muslims for Human Rights
NARA	National Accord and Reconciliation Act 2008
NCIC	National Cohesion and Integration Commission
NPM	New Public Management
NSIS	National Security Intelligence Service
NIS	National Intelligence Service
OCS	Officer Commanding (police) Station
PA	Provincial Administration
PC	Provincial Commissioner
PSC	Public Service Commission
PM	Prime Minister
PSC	Parliamentary Service Commission
RPP	Registrar of Political Parties
SLO	State Law Office
TNA	The National Alliance
TSC	Teachers Service Commission
TFDG	Task Force on Devolved Government
URP	United Republican Party
VP	Vice-President

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Centre for Rights Education and Awareness (CREAW) & 7 Others v. Attorney-General, Petition No. 16 of 2011 [2011] eKLR

Centre For Rights Education & Awareness (CREAW) & 8 Others v. Attorney General & Another [2012] eKLR.

Daniel Toroitich Arap Moi v. John Harun Mwau [1997] eKLR

Federation of Women Lawyers Kenya (FIDA-K) & 5 Others v. Attorney-General & Another [2011] eKLR

Jeanne W. Gacheche & 6 Others v. The Judges and Magistrate's Vetting Board & 2 Others [2012] eKLR.

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Joseph Vitalis Odera Juma v. Chief Justice of Kenya & 6 Others [2010] eKLR.

Justice Moijo Ole Keiwua & Justice J. V. Odera Juma v. In the Matter of Professor Yash Pal Ghai, the Chairman of the Constitution of Kenya Review Commission & 2 Others, High Court Miscellaneous Application Case No. 1110 of 2002 (*JV Juma case*)

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Njoya & 6 Others v. A-G & 3 Others Miscellaneous Civil Application (No. 2) (2004) KLR

Orengo v. Moi & 12 Others (No 3), Election Petition No 8 of 1993 High Court at Nairobi May 30, 1994

Patrick Ouma Onyango & 12 Others v. Attorney-General & 2 Others [2005] eKLR

Republic v. El Mann [1969] EA 357

Report and recommendation on Justice Nancy Makokha Baraza by the Tribunal to Investigate the Conduct of the Deputy Chief Justice and Vice-President of the Supreme Court of the Republic of Kenya, August 2012 (technically not a case; subject of Supreme Court litigation that was abandoned upon DCJ's resignation).

Trusted Society of Human Rights Alliance v. Attorney General & 2 Others [2012] eKLR.

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Constitution of Egypt, 1923 (amended 2011)

Constitution of Ivory Coast, 2000

Constitution of Kenya (Amendment) Act 2008 (incorporating National Accord and Reconciliation Act (NARA))

Constitution of Kenya (Amendment) Act 2008 (on constitutional review)

Constitution of Kenya 2010

Constitution of Kenya, 1963 (Independence Constitution)

Constitution of Kenya, Act No. 5 of 1969

Constitution of Nigeria, 1999

Constitution of the People's Republic of China, 1954

Constitution of South Africa 1996 (cf. Interim Constitution 1994)

Constitution of the US, 1787 (as amended)

Constitution of Uganda 1996 (as amended)

Constitutional Instruments of the United Kingdom

Act of Settlement 1701 (UK)

Act of Union 1707

Bill of Rights 1698 (UK)

Magna Carta 1215 (The Great Charter) (UK)

Petition of Right 1628

Human Rights Act 1998

Instruments devolving power to Scotland and Wales

German Basic Law, 1949 (as amended in 1994, 2002, 2006)

List of Statutes

Commission on Administrative Justice Act, No. 23 of 2011
Commission on Revenue Allocation Act, No. 16 of 2011
Contingencies Fund and County Emergency Funds Act, No. 17 of 2011
County Governments Act, No. 17 of 2012
Elections Act, No. 24 of 2011
Environment and Land Court Act, No. 19 of 2011
Ethics and Anti-Corruption Commission Act, No. 22 of 2011
Finance Act, No. 4 of 2012
Government Lands Act, Cap 280 (repealed)
Independent Electoral and Boundaries Commission Act, No. 9 of 2011
Independent Offices Appointment Act, No. 8 of 2011
Indian Transfer of Property Act (ITPA) 1882 (repealed)
Industrial Court Act, No. 20 of 2011
Judicial Service Act, No. 1 of 2011
Kenya Citizenship and Immigration Act, No. 12 of 2011
Kenya National Commission on Human Rights Act (KNCHR), No. 14 of 2011
Land Act, No. 6 of 2012
Land Registration Act, No. 3 of 2012
Land Titles Act, Cap 282 (repealed)
Leadership and Integrity Act, No. 19 of 2012
National Gender and Equality Commission Act, No. 15 of 2011
National Government Loans Guarantee Act, No. 8 of 2011
National Intelligence Service (NIS) Act, No 28 of 2012
National Land Commission Act, No 5 of 2012
Political Parties Act, No. 11 of 2011
Power of Mercy Act, No. 21 of 2011
Registered Land Act, Cap 300 (repealed)
Supreme Court Act, No. 7 of 2011
Urban Areas and Cities Act, No. 13 of 2011
Vetting of Judges and Magistrates Act, No. 2 of 2011

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Armed Forces (summary jurisdiction) Regulations, 1969 (under Cap 99, (repealed))

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Armed Forces Rules of Procedure 1969 (under Cap 99, (repealed))

Armed Forces (general) Regulations, 1969 (under Cap 99, (repealed))

Civil Procedure Rules 2010

Civil Service Code of Regulations, revised 2006

Judicial Service Commission Regulations, (under Public Service Commission Act, No. 13 of 2012)

Supreme Court Rules 2011

Parliamentary Standing Orders, 2008

Public Service Commission Regulations, 1965-1984 (under Public Service Commission Act, No. 13 of 2012)

Public Service Commission (Police Force) Regulations, 1965 (under Public Service Commission Act, No. 13 of 2012)

Public Service Commission (Prisons Service) Regulations, (under Public Service Commission Act, No. 13 of 2012)

Teachers Service Commission Code of Regulations 2005

Constitutional implementation in Kenya, 2010-2015: Challenges and prospects

Prof Ben Sihanya, JSD (Stanford)¹

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Argument

Deep seated interests pose three types of threats or challenges to the implementation of the Constitution of Kenya 2010. These interests seek to retain the *status quo*, reverse the gains, or manipulate the content, direction and pace of reform or implementation. Opportunities lie in focusing on the key agents of reform in the form of core institutions, agencies, organs, officials and individuals in Government, political process, the academy, the private sector, civil society and international community. The March 4, 2013 General Elections are essentially a referendum on fidelity to the Constitution, on the one hand, or the reversal or manipulation of the reform process.

1 Prolegomenon and research questions

“Full implementation of the letter and spirit of the constitution is crucial to realize the promise of a democratically stable and prosperous future for all Kenyans.”

Philip J. Crowley²

The Constitution of Kenya 2010 was ratified by Kenyans on the August 4, 2010 referendum and promulgated at Uhuru Park, Nairobi, on Friday August 27, 2010. Over 67% of Kenyans who voted during the referendum approved of the Proposed Constitution. The promulgation of the 2010 Constitution ushered in a new dispensation in Kenya's constitutional, social, political and economic order. Indeed, some have argued that this launched the Second Republic, the first having been launched at independence in 1963.³ Most argue that whether a new Republic has been launched depends on successful implementation of the Constitution. A report by the Commission for the Implementation of the Constitution (CIC) notes that:

“The promulgation of the Constitution of Kenya 2010 is regarded as the most significant achievement in governance in Kenya since independence in 1963.”⁴

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I am grateful to the following research assistants: Jeremy Okonjo, LL.M Candidate; Timothy Wafula, Bar Candidate, Kenya School of Law (KSL); Ndunge Wambua, James Mbugua and Yohana Gadafi, LLB students at the University of Nairobi. The first was a research associate while all others are research assistants and an intern, respectively, at Innovative Lawyering and Sihanya Mentoring.

2 Philip J. Crowley (2011) *Implementation of Kenya's New Constitution*, US Department of State Diplomacy in Action, at <http://www.state.gov/r/pa/prs/ps/2011/02/156826.htm> (accessed 8/10/2011). Mr Crowley is the US Assistant Secretary, Bureau of Public Affairs.

3 Mugo Kibati (2010) “Kenya: A vision of prosperity for the second republic,” *Daily Nation* (Nairobi), Thursday, 26/8/2011, at <http://www.nation.co.ke/A+vision+of+prosperity+for+the+Second+Republic+/-/1148/997504/-/12bta0h/-/index.html> (accessed on 8/10/2011)

4 Commission for the Implementation of the Constitution (CIC), Quarterly Report January – March 2011.

Significantly, implementation of the 2010 Constitution involves:

- (a) Interpreting and assigning meaning to specific constitutional provisions requiring implementation;
- (b) enactment of legislation as provided for by the Fifth Schedule of the Constitution;
- (c) alignment of the existing laws to the 2010 Constitution;
- (d) streamlining existing institutions to uphold and respect the spirit and letter of the 2010 Constitution;
- (e) restructuring institutions and organs of the Government including Parliament, the Judiciary, independent commissions and offices, and the public service, among other institutions;
- (f) creation of commissions, institutions, bodies, and structures;
- (g) restructuring the system of Government to a devolved system; and
- (h) crafting new policies and reviewing existing policies.

This paper reviews the implementation status of the 2010 Constitution, the challenges that implementation has faced so far, and prospects for the future. It specifically seeks to answer the following related research questions:

- (a) What is the status of the Constitution implementation process in Kenya?
- (b) What role have various institutions played in the implementation process?
- (c) What challenges has the implementation process of the 2010 Constitution faced since its promulgation?
- (d) What are some of the moving and impeding interests on the implementation process?
- (e) What opportunities need to be exploited to ensure that the gains in the Constitution are not lost as a result of the challenges?

The foregoing research questions may be merged into three thus: First, what has been achieved and what is the role of the key institutions in implementing the Kenya Constitution 2010? ((a) and (b)). Second, what interests undergird the constitutional implementation process and what are the core challenges? ((c) and (d)). Third, how can these challenges be addressed to secure the opportunities for constitutional implementation?

2. Constitutional implementation in Kenya since promulgation on 27/8/2010

There are at least four reasons why the 2010 Constitution has enjoyed tremendous support in Kenya and beyond. First, the 2010 Constitution introduces far reaching changes to Kenya's system of governance. It creates a decentralized (or "devolved?") system of government characterized by two levels of government, that is, the national government and the county governments. It should be noted that the centralized system of government is largely blamed for promoting and sustaining bad governance in Kenya. Yash Pal Ghai notes that:

"There was wide scale perception, which statistics support, that the centralised state has, for the last 50 years, singularly failed to promote economic and political development, and that only a few areas and a small elite had benefited from the policies of the government."⁵

Second, the Constitution seeks to fundamentally restructure the core institutions of governance. In this regard, the Executive, Parliament and the judiciary are to be fundamentally restructured and reformed. For instance, the Executive is to be restructured by reinforced checks and balances from other institutions. The imperial presidency is to be restructured. Brian Kennedy & Lauren Bieniek (2010) have remarked that:

"Although there will still be a strong Executive, the new reforms will significantly limit its power vis-à-vis the legislature and judiciary."⁶

5 Yash Pal Ghai (2008) "Devolution: Restructuring the Kenyan state," Vol. No. 2, *Journal of Eastern African Studies*, Routledge Publishers (originally a lecture at the African Research and Resource Forum, Kenyatta International Conference Centre (KICC), Nairobi, 23 November, 2007).

6 Brian Kennedy and Lauren Bieniek (2010) "Moving forward with constitutional reform in Kenya," A Report of the Center for Strategic and International Studies (CSIS), Africa Program, Washington, D.C., at http://csis.org/files/publication/101203_Kennedy_MovingForwardKenya_Web.pdf (accessed 23/9/2010).

Third, the 2010 Constitution seeks to protect and promote the rights of its citizens in a more elaborate manner. The Constitution in this regard introduces an extensive, elaborate and liberal Bill of Rights that seeks to protect and promote social, economic and political rights of Kenyans. The protection of socio-economic rights (also known as second generation rights) like the right to accessible and adequate housing, the right to clean and safe water, social security, emergency medical treatment, to be free from hunger, and to have adequate food, among others, is an important addition by the 2010 Constitution.⁷

Fourth, the 2010 Constitution introduces national values and principles of governance and further devotes a chapter on leadership and integrity.⁸ Absence of an adequate and enforceable code of ethics and normative standards for the public service has, since independence, created a public service weighed down by problems like rent seeking, corruption, poor governance, mismanagement of resources, tribalism, criminal conduct and impunity, among others.

The 2010 Constitution further seeks to deal with the problem of marginalization, the complex land question, and issues affecting nationality and citizenship, among others.

2.1 Constitutional implementation as a bridge to constitutional government in Kenya

Partly because of the foregoing provisions, the 2010 Constitution has rightly been lauded as a significantly progressive document that provides an elaborate framework for restructuring the state, and entrenching constitutional government as well as reconstructing or restructuring the state in Kenya. However, the most important process of restructuring the state in this sense is constitutional implementation.⁹

Constitutional implementation can be understood in two senses: first, the day-to-day process of fidelity to the text as well as principles that are legitimately derivable from the Constitution by all organs involved in the governance process; and second, operationalization of the Constitution 2010 during the transition period immediately after promulgation of that Constitution.

The constitutional implementation process in Kenya so far focuses on the second sense, and differs from the first meaning in a number of significant ways. First, constitutional implementation entails an initial, original, often rigorous debate on constitutional meaning or interpretation, relying on the constitutional text, structure, history and legal theory. Second, the framework for constitutional implementation is specifically provided for separately in the Constitution. Third, there is a specific, elaborate and limited timetable or timeframe for constitutional implementation. Fourth, specific *sui generis* (or special) constitutional organs are assigned the constitutional role of implementing the text. Fifth, specific legislation are outlined by the Constitution for enactment to implement specific constitutional provisions. And lastly, the Constitution provides for sanctions for failure to implement its provisions.

The constitutional implementation process is therefore crucial for ensuring that first, the Constitution is interpreted correctly, and assigned correct meaning. And second, that the correct constitutional meaning does not differ from constitutional implementation by way of legislative, policy, institutional and administrative practices that establish “constitutional practice.”¹⁰ This is especially significant in light of the patent and latent contradictions, ambiguities, overlaps and doctrinal and structural difficulties in the constitutional provisions, attributed primarily to the politically rather than the financially (or legally) negotiated nature of these provisions.

7 See Article 43 and generally Chapter IV of the Constitution of Kenya 2010. See also Ben Sihanya (2011) “The impact of the Constitution on Socio-economic and political rights and the role of civil society and faith-based organizations under the emerging constitutional dispensation,” presentation to Comboni Missionaries Mission Week, Friday 5/8/2011, Comboni offices, Ngong Road, Nairobi, on file at Sihanya Mentoring & Innovative Lawyering, Nairobi & Siaya.

8 See Art 10, and Chapter 6 if the Constitution 2010.

9 Yash Pal Ghai (2011) *Kenya’s Constitution: An Instrument for Change*, Clarion, Nairobi.

10 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, at <http://www.sidnet.net/docs/WP2.pdf> (accessed 28/11/2012).

For the above reasons, the constitutional implementation process in Kenya is a special constitutional process that demands a different academic and political approach, with regard to how the process is managed, and to the outcomes of the process.

The inclusion of the transitional provisions on constitutional implementation in the Constitution of Kenya 2010 may have been informed by the previous constitutional review process at the Bomas of Kenya (2002-04). The Bomas review process was challenged in court in the cases of *Njoya & 6 Others v. A.G & 3 Others*¹¹ and *Patrick Ouma Onyango & 12 Others v. Attorney-General & 2 Others*.¹² The petitioners questioned, *inter alia*, the ability of the Draft Constitution 2004 to transition itself. The petitioners particularly sought a declaration that:

“The current constitution not having any transitional provisions under which either the Presidency and/or the National Assembly can, as institution(s) make, participate in the making of a new constitution or promulgating a proposed new constitution to be the new constitution, any law, not being a law within the Constitution that gives the National Assembly or the Presidency such power or right to so make, participate in the making or promulgate a proposed new constitution to be the constitution is *ultra vires* the constitution and therefore null and void.”¹³

What has been achieved so far?

The Fifth Schedule to the 2010 Constitution outlines a five-year (2010-2015) timetable for implementing specific aspects of the Constitution.¹⁴ It lists key legislation that need to be enacted and the timeline for such enactment. Implementation of the 2010 Constitution will entail a significant introduction of legislation, institutions, policies, administrative processes and procedures as well as structures. Implementation also involves the formulation and reform of policies, institutions and legislation, among other related aspects. The Chairperson of Commission for the Implementation of the Constitution (CIC), Charles Nyachae, has stated thus:

“The implementation process entails the reform of policies, legislation, subsidiary law and general administrative practice in a manner that upholds the letter and spirit of the Constitution. This path began on 27 August 2010 by dint of Section 7(1) of the Sixth Schedule of the Constitution which brought the entire Constitution into force with immediate effect, save for the exceptions set out in Section 2 of that Schedule.”¹⁵

2.2 Constitutional implementation status

The Sixth Schedule of the Constitution brought the entire 2010 Constitution into force with immediate effect (i.e. after promulgation), save for the exceptions set out in section 2 of that Schedule. The Schedule further established two crucial implementation organs, i.e., the Commission for the Implementation of the Constitution (CIC) and the Constitutional Implementation Oversight Committee (CIOOC). These two organs have been leading the implementation process of the 2010 Constitution. CIC and CIOOC are expected to work closely with Parliament, the Attorney-General’s chambers, the Kenya Law Reform Commission (KLRC), and the Ministry of Justice, National Cohesion and Constitutional Affairs, among others.

This section reviews the legislation that has been enacted, the institutions created or restructured, the policies formulated or implemented, and the processes initiated or concluded during the first two years of the 2010 Constitution implementation process.

11 Miscellaneous Civil Application (No. 2) (2004).

12 High Court Miscellaneous Civil Application No. 677 of 2005, [2005] eKLR.

13 Declaration 7 *Patrick Ouma Onyango & 12 Others v. Attorney-General & 2 Others* [2005] eKLR, at 12.

14 The five year period may be extended using at least two formulae: extending the period within which a specific piece of legislation is to be enacted or an act performed; or extending the CIC’s life span.

15 Charles Nyachae, Chairman CIC, “Implementing Kenya’s Constitution: Status, Achievements and Challenges,” Speech Presented at the “Friend Roundtable” – Berlin, Germany, 12/5/2012.

2.2.1 Legislation enacted under the 2010 Constitution

Upon the promulgation of the 2010 Constitution, the entire Constitution came into force save for certain exceptions provided by the Sixth Schedule. The operation of some Articles remained suspended until the enactment of supportive legislation or the occurrence of certain events as provided for by the Constitution. A major example under the second typology is the first General Elections under the 2010 Constitution which are expected on March 4, 2013.

There was need for supportive legislation for two main reasons. First, such legislation would provide specificity to the constitutional text. This connotes provision of an elaborate and more detailed account of the constitutional text. It should be appreciated that in many instances the Constitution only provides a general framework in terms of rules and guiding principles and leaves the rest to legislation.¹⁶ And the legislation should be consistent with the Constitution and respect its text, letter and spirit or intendment.¹⁷ Second, such legislation would play the important role of operationalising some provisions of the Constitution. Schedule 6 to the Constitution suspends the operation of certain provisions of the 2010 Constitution until the occurrence of certain acts which include enactment of legislation following the timeline indicated in the Fifth Schedule.¹⁸

The Fifth Schedule to the 2010 Constitution lists legislation that should be enacted in order to fully implement the Constitution. The timeline for enactment of the legislation is also provided. In the first two years, the Fifth Schedule gives an estimated total of 39 pieces of legislation to be enacted. These have all been enacted though some were enacted after the deadline date of August 27, 2012. Some of the laws that have so far been enacted, which we discuss below, are on the presidential power of mercy, appointment to independent offices, the Supreme Court, judicial service, vetting of judges and magistrates, boundaries and Electoral Commission, human rights and revenue allocation.

2.2.1.1 The Judicial Service Act, No. 1 of 2011

This statute is crucial to judicial restructuring and reforms. The Act makes provision for judicial services and the administration of the Judiciary; membership and structure of the Judicial Service Commission (JSC); the appointment and removal of judges and the discipline of other judicial officers and staff; the regulation of the Judiciary Fund; and the establishment, powers and functions of the National Council on Administration of Justice.¹⁹

2.2.1.2 The Vetting of Judges and Magistrates Act, No. 2 of 2011²⁰

The judiciary has been under scrutiny because of allegations that some judicial officers conducted themselves unethically or without integrity. These impeded the fair and impartial dispensation of justice. In order to cure the judiciary of such unethical officers and staff, it was deemed appropriate that they should undergo thorough vetting before they could be allowed to serve in the restructured judicial system.²¹ A legislative framework for this process necessitated the enactment of the Vetting of Judges

16 See the debate at Bomas and after; relevant Bomas reports; relevant Committee of Experts Reports.

17 Article 2 Constitution of Kenya 2010.

18 See Sixth Schedule of the Constitution.

19 Preamble Judicial Service Act (No. 1 of 2011), and the text of the relevant provisions.

20 See also paragraph 5.2.4 below.

21 Numerous reports have dealt with this issue, including Committee on the Administration of Justice (1998) *Report of the Committee on the Administration of Justice*, Republic of Kenya, Kenya (Kwach Report); Government of Kenya (2003) *Report of the Integrity and Anti-Corruption Committee of the Judiciary of Kenya* (Ringera Report); Kenya Constitutional Review Commission (2002) *Report of the Advisory Panel of Eminent Commonwealth Judicial Experts* (Report of Judicial Experts), Kenya Constitutional Review Commission, Nairobi, Kenya. It was also a major issue in the Bomas talks. George Kegoro, the Executive Director of the Kenyan Section of the International Commission of Jurists (ICJ-Kenya), is reviewing judicial reforms in this series. The vetting of judicial officers was a compromise between two extremes: firing all judicial officers and requiring them to apply afresh as proposed by the Bomas constitutional review process; and keeping the judicial officers and stopping constitutional and related reforms affecting the Judiciary, as preferred by most of them.

See Eric Mutua (2012) "LSK's issues with Mutunga aren't personal," October 20, 2012 *The Daily Nation Website* at <http://www.nation.co.ke/oped/Opinion/LSKs-issues-with-Mutunga-arent-personal/-/440808/1538198/-/hikciwz/-/index.html> (accessed 20/11/2012); *Joseph Vitalis Odero Juma v. Chief Justice of Kenya & 6 Others* [2010] eKLR.

and Magistrates Act 2011. The Act provides for the vetting of judges and magistrates pursuant to section 23 of the Sixth Schedule to the Constitution. Section 23 provides:

“within one year after the effective date, Parliament shall enact mechanisms and procedures for vetting, within a timeframe to be determined in the legislation, the suitability of all judges and magistrates who were in office on the effective date to continue to serve in accordance with the values and principles set out in Articles 10 and 159.”

The said Act provides for the establishment, powers and functions of the Judges and Magistrates Vetting Board.²²

The vetting of Superior Court judges has been conducted under the Act. A number of judges have been declared unsuitable. Four Court of Appeal Judges; Riaga Omolo, Joseph Nyamu, Emmanuel O’Kubasu, and Samuel Bosire as well as High Court Judge Jeanne Gacheche sought the High Court’s intervention following the decisions of the Vetting Board. A five judge bench of the High Court ordered that these judges should not be degazetted, the High Court having declared that it had jurisdiction over the decisions of the Vetting Board.²³ There is debate regarding the Court’s verdict.

The Law Society of Kenya (LSK) as well as some members of the public and civil society organisations argue that the High Court has no power to estop the President from removing judges who have been declared incompetent through a constitutional process. LSK Chairman, Eric Mutua, has argued that this set a bad precedent because other judges who will be declared unsuitable to hold office will rush to court for reinstatement. He pointed out that the ruling was like telling the Board to continue with their work but that the ultimate power on who to retain and who to send home would rest with the court.²⁴ The LSK through lawyer Charles Kanjama sought a stay of the orders issued by the High Court to enable them proceed to the Court of Appeal to contest the decision.²⁵

There are weighty arguments on both sides. I have also argued elsewhere that the Vetting Board cannot hide behind the clause that they claim makes its decision final and totally ousts the jurisdiction of the courts. The rules and practice of administrative justice require that decisions are only final if they comply with the doctrines of validity and legitimacy in terms of substance and procedure.²⁶ Some have also argued that there has been a failure to incorporate citizen participation in judicial monitoring in the relevant context. They argue that public interest is not sufficiently represented in the composition and the processes of the Vetting Board whose decisions have become controversial.

2.2.1.3 The Supreme Court Act, No. 7 of 2011

Article 163 (1) establishes the Supreme Court. Article 163 (9) mandates Parliament to enact legislation to make further provision with respect to the operation of the Supreme Court, thus the Supreme Court Act 2011. In addition, the Supreme Court Rules to guide the operation of the Court have been formulated and gazetted.

2.2.1.4 The Independent Offices Appointment Act, No. 8 of 2011

This Act provides for the procedure for identification and recommendation for appointment of holders of independent offices and for connected purposes.²⁷ These offices include: the Auditor-General and

22 Preamble Vetting of Judges and Magistrates Act, No. 2 of 2011, and the text. This Act is a compromise since the Bomas Draft Constitution had recommended automatic vacancy in judicial offices.

23 *Jeanne W. Gacheche & 6 Others v. The Judges and Magistrate’s Vetting Board & 2 Others* [2012] eKLR (per Justices John Havelock, Joseph Mutava, Pauline Nyamweya, E. Ogola and Alfred Mabeya).

24 Koome Kimonye “LSK threaten to boycott courts,” Citizen News 5/11/2012, at <http://www.citizennews.co.ke/news/2012/local/item/5425-lsk-threaten-to-boycott-courts> (accessed 8/11/2012).

25 In November-December 2012, MPs are considered a draft Bill to amend the Vetting of Judges and Magistrates Act (VJMA) so that whenever the Vetting Board finds a Judge or Magistrate unsuitable to serve, such a judicial officer would stand suspended. See Njeri Rugene & Pamela Chepkemei (2012) “Judges vetting case stopped,” *Daily Nation* 7/11/2012. at 6.

26 See Paul Craig (2008) *Administrative Law*, Sweet & Maxwell, London (sixth ed).

27 Preamble to Independent Offices Appointment Act, No. 8 of 2011.

the Controller of the Budget.²⁸ The idea is to strengthen budgetary processes and expenditure of public funds; and to keep the two offices separate, with appropriate checks and balances.²⁹

2.2.1.5 The Independent Electoral and Boundaries Commission Act, No. 9 of 2011

This Act makes provision for the appointment and effective operation of the Independent Electoral and Boundaries Commission (IEBC) established by Article 88 of the Constitution. It is structured and expected to deliver free, fair and credible elections, unlike the defunct Electoral Commission of Kenya (ECK) whose conduct precipitated the 2007-08 post election violence (PEV). Some relevant rules and regulations have also been passed to facilitate March 4, 2013 General Elections.³⁰ After numerous challenges, IEBC embarked on crucial administrative and logistical preparations for the 2013 General Elections in late 2012, including through biometric (electronic) voter registration (BVR).³¹

2.2.1.6 Political Parties Act, No. 11 of 2011

This Act gives effect to the constitutional provisions relating to political parties. The registration, regulation, and funding of political parties are provided for under Parts II and III of the Act.³² It also links the office of the Registrar of Political Parties (RPP) to IEBC. Section 3 and 26 provide that the IEBC is to register, regulate, monitor, investigate and supervise political parties to ensure compliance with the Act.³³ The RPP thus deals with preliminary party requirements before parties move on to the next stage where they will deal with the IEBC. Some of the persistent questions on the eve of the General Elections of 2013 include mass defections from political parties, without any legal consequences. There was also the clamour by some politicians and parties associated with Uhuru Kenyatta's The National Alliance (TNA) and William Ruto's United Republican Party (URP) to delay the December 4, 2012 date by which parties must submit their coalition agreements to the Registrar of Political Parties (RPP).

2.2.1.7 Kenya Citizenship and Immigration Act, No. 12 of 2011

This Act makes provision for the acquisition, loss and regaining of citizenship, duties and rights of citizens; issuance of travel documents; entry, and residence and exit out of Kenya. Some of the main concerns addressed in the Constitution is enabling Kenyan women to pass citizenship to foster children.

2.2.1.8 Urban Areas and Cities Act, No. 13 of 2011

This Act gives effect to Article 184 of the Constitution. It provides for the identification, classification, governance and management of urban areas and cities and the criteria of establishing urban areas and cities. It would thus fill the gap that would otherwise exist in terms of whether the national or county government is responsible for urban areas and the three cities of Nairobi, Mombasa and Kisumu.

2.2.1.9 Kenya National Commission on Human Rights Act, No. 14 of 2011

This Act establishes the Kenya National Human Rights Commission (KNHRC) pursuant to Article 59 of the Constitution. It provides for the functions and powers, qualification of, and appointment procedure for members of the Commission. This is in the light of the fact that KNHRC has been upgraded from a statutory to a constitutional commission.

2.2.1.10 National Gender and Equality Commission Act, No. 15 of 2011

This Act establishes the National Commission on Gender pursuant to Article 59 of the Constitution. It also provides for the functions and powers, qualification of, and appointment procedure for members of the Commission and connected purposes.

²⁸ See Art 248(3), Constitution of Kenya, 2010.

²⁹ The two offices used to be one: the Controller and Auditor-General under the 1969 Constitution.

³⁰ These include: Election (Voter Registration) and Election (Voter Education) Regulations, 2012, Supplement No. 160; Election (General) Regulations, 2012, Supplement No. 161 .

³¹ The challenges include the election date, sundry procurement intrigues, political intrigues within or affecting IEBC, and the procurement of voter registration technologies and materials. Vitalis Kimutai (2012) "Voter registration begins in November, says IEBC," *Standard Digital*, September 29, 2012 at <http://www.standardmedia.co.ke/?articleID=2000067213> (accessed 25/11/2012). See more detailed discussion in Part 2.2.5.2.

³² Sections 3-8 of Part II of the Act deal with Registration; sections 9-22 address regulation; and sections 23-31 contains provisions governing the funding and accounts of political parties.

³³ Political Parties Act, 2012.

2.2.1.11 Commission on Revenue Allocation Act, No. 16 of 2011

This Act makes further provision regarding the functions and powers of the Commission on Revenue Allocation, the procedure for appointments to the Commission and connected purposes. Commission on Revenue Allocation (CRA) is crucial for realisation of equity in resource distribution. It has provided revenue sharing formulae which have been keenly debated in the media and other fora.³⁴

2.2.1.12 Contingencies Fund and County Emergency Funds Act, No. 17 of 2011

The Act provides for the effective operation of the Contingencies Fund and County Emergency Funds established by County Governments, and for connected purposes. There may be need to expand public funds to address an appropriate contingency or emergency situation. It will however have to be keenly monitored to ensure it is not misappropriated as is the current one.³⁵

2.2.1.13 National Government Loans Guarantee Act, No. 8 of 2011

The Act provides for the transparent, prudent and equitable management of the authority to guarantee loans conferred on the National Government under Article 213 of the Constitution, and for connected purposes. There have been concerns that Government loans are not sufficiently regulated. One of the main challenges has been the fact that it is only the Executive branch that participates in loan negotiations and commitments. And in many cases, Kenya has been overcommitted even on burdensome or odious debts.³⁶ Moreover, there have been arguments that richer counties may negotiate integrative financial arrangements while poorer one may not.

2.2.1.14 Environment and Land Court Act, No. 19 of 2011

This statute establishes a Superior Court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land pursuant to Article 162(2) (b) of the Constitution. It also provides for the court's jurisdiction and functions and for connected purposes. It will replace the Land and Environment Law Division of the High Court which had been established administratively by the Chief Justice. How does the court relate to the High Court? Some argue that it has limited jurisdiction and thus is inferior to the High Court. Moreover, some argue that the details are found in statute rather than the Constitution.³⁷ And security of tenure could be tenuous. The 16 judges of the Environmental and Land Court were appointed and sworn in September 2012.³⁸

2.2.1.15 Industrial Court Act, No. 20 of 2011

This is an Act of Parliament that establishes the Industrial Court as a superior court of record; and confers jurisdiction on the Court with respect to employment and labour relations.³⁹ The statute repeals Part III of the Labour Institutions Act, 2007.⁴⁰ Arguments have been advanced regarding this court that are similar to those on the Environment and Land Court above.⁴¹

34 Kevin Watkins (2012) "Financing for a fairer, more prosperous Kenya," at <http://www.brookings.edu/research/opinions/2012/07/11-kenya-public-spending-watkins> (accessed 20/11/2012)..

35 In 2011, it was reported that Members had struck a deal with the treasury to compensate them extra tax they paid with money from the contingency fund. See Alphonse Shundu (2011) "Secret deal to settle MP's tax," Nation Media 12/8/2012, at <http://www.nation.co.ke/News/Secret+deal+struck+to+settle+MPs+tax/-/1056/1217992/-/yloby5/-/index.html> (accessed 5/12/2012)

36 Peter Kiragu (2012) "Kenya's public debt rises to Sh1.6 trillion," in The Star, Tuesday, 24/7/2012, 2012, at <http://www.the-star.co.ke/news/article-9177/kenyas-public-debt-rises-sh16-trillion> (accessed 1/12/2012). See also Kenya National Bureau of Statistics (2012) "Public Debt," in *Kenya Facts And Figures 2012* at <http://knbs.or.ke/downloads/pdf/Kenyafacts2012.pdf> (accessed 1/12/2012). Cf. Sammy Adelman & Abdul Paliwala (1993) *Law and Crisis in the Third World*, Hans Zell Publishers, London.

37 See George Kegoro (2011) "The New Constitution: Judicial Reforms one year later," A study under the auspices of the Friedrich Ebert Stiftung (FES) and University of Nairobi's Department of Political Science & Public Administration, Nairobi, presented at the FES and UoN workshop, Nairobi Safari Club, November 2011.

38 Lordrick Mayabi (2012) "16 nominated to serve on Environmental Land Court," 22/9/2012 at <http://www.capitalfm.co.ke/news/2012/09/16-nominated-to-serve-on-environmental-land-court/> (accessed 1/12/2012).

39 Preamble, Industrial Court Act (No. 20 of 2011).

40 Section 31 Industrial Court Act (No. 20 of 2011).

41 See also Ben Sihanya (2012) "Equitably compensate education and health workers," at <http://www.innovativelawyering.com/blogs> (accessed 18/9/2012).

2.2.1.16 Power of Mercy Act, No. 21 of 2011

This is an Act to make further provision with respect to the presidential power of mercy under Article 133 of the Constitution. It also provides for the procedure for the appointment of other members of the Advisory Committee on the Power of Mercy and their tenure; the rules and procedures of the Committee; the criteria for formulating its advice; and for connected purposes.⁴²

2.2.1.17 Ethics and Anti-Corruption Commission Act, No. 22 of 2011

The Ethics and Anti-Corruption Commission Act establishes the Independent Ethics and Anti-Corruption Commission (IEACC) pursuant to Article 79 of the Constitution. It further provides for the functions and powers of the Commission, the qualifications and procedures for the appointment of the Chairperson and members of the Commission, and for other connected purposes.⁴³ The Commission is the successor to the Kenya Anti-Corruption Commission (KACC).

2.2.1.18 Commission on Administrative Justice Act No. 23 of 2011

This Act establishes the Commission on Administrative Justice (CAJ) (the Ombudsman Commission) pursuant to Article 59 of the Constitution. It provides for the functions, powers, qualification of, and appointment procedure for members of the Commission; and for other connected purposes.⁴⁴ It will thus replace the ombudspersons who were appointed to deal with specific issues. It has the potential to strengthen the administration of justice under Article 47 and other provisions of the Constitution.⁴⁵

2.2.1.19 Elections Act No. 24 of 2011

The Elections Act provides for the conduct of elections to the office of the President, the National Assembly, the Senate, women's representatives, county governor and county assemblies. It also provides for the conduct of referenda and election dispute resolution. It has already been amended several times to address political expediency.⁴⁶ The Act also regulates coalitions among political parties and provides that coalition agreements be deposited with the Registrar of Political Parties.⁴⁷

2.2.1.20 County Governments Act, No. 17 of 2012

This Act provides for County Governments' powers, functions and responsibilities to deliver services and for connected purposes. It has been debated in the context of controversy regarding the role and future of the provincial administration (PA) that includes Provincial Commissioners (PCs), District Commissioners (DCs), District Officer's (DOs), Chiefs and Assistant Chiefs.⁴⁸

2.2.1.21 Finance Act, No. 4 of 2012

This statute was enacted to amend the law relating to various taxes and duties as well as other matters incidental thereto.⁴⁹

2.2.1.22 Land Act, No. 6 of 2012

This statute was enacted under Article 68 of the Constitution. Its objective is to revise, consolidate and rationalize land laws; to provide sustainable administration and management of land and land based

42 Preamble, Power of Mercy Act No. 21 of 2011.

43 Preamble, Ethics and Anti-Corruption Commission Act.

44 Preamble, Commission on Administrative Justice Act No. 23 of 2011.

45 Cf. Ben Sihanya (forthcoming 2012) *The Presidency and Administrative Bureaucracy in Kenya, 1963-2013, op.cit.*

46 See Charles Nyachae (2012) "CIC's position on matters relating to the current Statute Law (Miscellaneous Amendments) Bill on the floor of the House (Parliament) to amend: The Elections Act, 2011; and (b) the Political Parties Act, 2011," at <http://cickenya.org/news/cics-position-matters-relating-current-statute-law-miscellaneous-amendments-bill-floor-house> (accessed 20/11/2012). See also Lordrick Mayabi (2012) "Kibaki now signs amendments law," at <http://www.capitalfm.co.ke/news/2012/07/kibaki-now-signs-amendments-law/> (accessed 20/11/2012). The main amendments related to deletion of clauses disallowing party hopping and a mandatory degree for Members of Parliament.

47 See also the discussion on the Political Parties Act, 2011, and the IEBC Act, 2011, at Part 2.2.1.5 above.

48 Kenya Human Rights Commission (2012) "Provincial administration stifles ministries, departments and agencies (MDAs)," at <http://www.khrc.or.ke/blog/provincial-administration-stifles-ministries-departments-and-agencies-mdas.html> (accessed 20/11/2012). See also Mohamed Ali (2012) "Kibaki missed the point in rejecting County Government Bill 2012," in *Sunday Standard*, 11/3/2012 at <http://www.standardmedia.co.ke/?id=2000053798&cid=15&articleID=2000053798> (accessed 20/11/2012).

49 Preamble, Finance Act, 2012.

resources, and for other connected purposes.⁵⁰ As a statute on the law of property in land, its impact or success will largely be evaluated in terms of its ability to clarify Kenya's complex property law in particular and agrarian law in general. More importantly, the statute will be assessed in terms of its ability to address historical injustices regarding access to land, especially in the Rift Valley as well as in the Coastal and Central Kenya.⁵¹

2.2.1.23 Land Registration Act, No. 3 of 2012

The aim of this Act is to revise, consolidate and rationalize the registration of titles to land, to give effect to the principles and objects of devolved government in land registration, and for connected purposes.⁵² Previously, there were numerous laws relating to land which made it hard for the lay person and even lawyers to effectively utilise the legal provisions relating to land registration in particular and land administration in general.

2.2.1.24 National Land Commission Act, No. 5 of 2012

This Act made further provisions on the functions and powers of the National Land Commission, qualifications and procedures for appointment to the Commission. It was enacted to give effect to the objects and principles of devolved government in land management and administration, and for connected purposes.⁵³

2.2.1.25 Leadership and Integrity Act, No. 19 of 2012⁵⁴

This Act of Parliament was passed to give effect to, and establish procedures and mechanisms for the effective administration of Chapter Six of the Constitution; to promote ethics, integrity and servant leadership among State officers; to provide for the extension of the application of certain provisions of Chapter Six of the Constitution and for connected purposes.

The Act has been contested. There are claims that the Cabinet and Parliament adulterated the Leadership and Integrity Bill that had been drafted and approved by the Constitution Implementation Commission, among other agencies. According to some commentators, the following are part of the key alterations:

“The original Bill created by CIC had put in place stringent vetting measures for individuals seeking elective posts (presidency, senatorship, governorship etc....). The vetting agencies included National Intelligence Service, Kenya Revenue Authority, Chief Registrar of the Judiciary, the Commission for Administrative Justice, Higher Education Loans Board, professional agencies, commercial organizations and any individual or institution as prescribed by the Bill. Thereafter, the Ethics and Anti-Corruption Commission would issue a Certificate of Compliance with Chapter 6 which would then clear them to vie. This provision was however removed by Cabinet which cited time constraints and impracticability of the proposed vetting process as being among the reasons for the amendment.”⁵⁵

But it is also arguable that some of the institutions, such as the Kenya Revenue Authority (KRA) and the Ethics and Anti-corruption Commission (EACC) have serious shortcomings. KRA has been viewed to suffer serious constraints to the extent that most of the Commissioners and staff have the same ethnic origin. Moreover, KRA has sometimes pursued taxes and related matters on political grounds. And EACC does not have a substantive Director yet vetting and related activities require such an office.⁵⁶

50 Preamble, Land Act, 2012. This Act repeals the following statutes: the Wayleaves Act, Cap 292 and the Land Acquisition Act, Cap 295.

51 Cf. HWO Okoth Ogendo (1991) *Tenants of the Crown* ACTS Press, Nairobi; HWO Okoth Ogendo (2008) “Managing the agrarian sector for environmental sustainability,” in C.O. Okidi, P. Kameri-Mbote, & Migai Akech (eds) *Environmental Governance in Kenya: Implementing the Framework Law* East African Educational Publishers Ltd, Nairobi.

52 Preamble, Land Registration Act, 2012. The following laws are thus repealed the Indian Transfer of Property Act (ITPA) 1882, the Government Lands Act, Cap 280, the Registration of Titles Act, Cap 281, the Land Titles Act, Cap 282 and the Registered Land Act, Cap 300.

53 Preamble, National Land Commission Act, 2012.

54 Cf. part 2.2.2.1.4 (structural reforms in the Judiciary, below.)

55 Francis Mureithi (2012) “Cabinet dilutes Bill on integrity,” *The Star*, Nairobi, 7/8/2012, at <http://www.the-star.co.ke/news/article-7181/cabinet-dilutes-bill-integrity> (accessed 25/11/2012)

56 Bernard Namunane (2012) “Diluted Integrity Bill opens door to corrupt leadership,” Nation Media, 14/8/2012, 2012 at <http://www.kenyacentral.com/general/47888-diluted-integrity-bill-opens-door-to-corrupt-leadership.html?print> (accessed 25/11/2012).

This amendment was unconstitutional because according to Chapter Six, state officers (elected leaders included) are supposed to meet appropriate standards of integrity, ethics, and morality. Article 80 of the Constitution provides that Parliament should enact legislation establishing procedures and mechanisms for the effective administration of Chapter Six. It further tasks Parliament with making relevant laws for ensuring the promotion of the principles of leadership and integrity and for the enforcement of the Chapter.

The vetting process was one of the best mechanisms for ensuring that leadership and integrity requirements are met in the election of leaders. Replacing the mandatory vetting with a permissive one beats the purpose of the Constitution and the Bill. This is because although the constitutional requirement regulating integrity remains in place, the statutory mechanism by which this integrity is to be ensured and effected has been removed. This can be construed as a ploy the politicians are using to protect themselves from being vetted out of viability for electoral candidacy.⁵⁷

Moreover, the original Bill made declaration of income, assets and liabilities of all State officers mandatory. Cabinet watered this down to a provision for an optional declaration of assets and liabilities.⁵⁸ This is an impediment to having all state officers accountable for their wealth and hinders discovery of fraudulent gain of personal wealth.

The Cabinet's amendments have also made it permissible for State Officers to engage in other gainful employment while in office. This is in blatant contravention of Article 77(1) of the Constitution which provides that a full-time State Officer shall not participate in any other gainful employment. This constitutional provision is important because it ensures State Officers are completely committed to the proper execution of their prescribed jobs.

One of the major test cases for Chapter 6 of the Constitution, and the Leadership and Integrity Act, 2012 is the suit regarding the suitability of The National Alliance's (TNA's) Uhuru Kenyatta and United Republican Party's (URP's) William Ruto to run for presidency.⁵⁹ The initial suit filed against the duo was withdrawn but a day later a fresh case was filed by the International Centre for Peace and Conflict (ICPC). Significantly, Uhuru Kenyatta and Ruto have used the indictment for crimes against humanity in the 2007-08 post election violence (PEV) as a political platform. They have argued that the 4/3/13 general elections and especially the presidential election is a referendum on the International Criminal Court (ICC).⁶⁰ They have argued that who becomes President is for Kenyan to decide, not ICC processes, nor the US, Germany, UK or any "tourists" (referring to former Secretary General Kofi Annan who led the mediation of Kenya's crisis following the fraudulent elections in 2007).

2.2.1.26 National Intelligence Service Act, No 28 of 2012

It provides for the functions, organisation and administration of the National Intelligence Service (NIS) pursuant to Article 239 of the Constitution. It also provides for the establishment of oversight bodies as well as for connected purposes. Significantly, the National Security Intelligence Service (NSIS) has been crucified for incompetence and bias in terms of handling important security challenges in Kenya following the post-election violence (PEV) of 2007/2008, and numerous security flaws. The latter security challenges include the crisis represented by the actions of the Mombasa Republican

57 Koome Kimonye (2012) "CIC now challenges validity of integrity Act," at <http://www.citizennews.co.ke/news/2012/local/item/4546-cic-now-challenges-validity-of-integrity-act> (accessed 20/11/2012).

58 Bernard Namunane (2012) "Diluted Integrity Bill opens door to corrupt leadership," *Nation Media*, August 14, 2012, at <http://www.kenyacentral.com/general/47888-diluted-integrity-bill-opens-door-to-corrupt-leadership.html?print> (accessed 25/11/2012).

59 See Paul Ogemba (2012) "Court approves new integrity case against Uhuru, Ruto" *Nation Media* 3/12/2012, at <http://www.nation.co.ke/News/politics/Court-approves-new-integrity-case-against-Uhuru--Ruto/-/1064/1635450/-/4yjogb/-/index.html> (accessed 5/12/2012).

60 Makau Mutua (2012) "Why the Uhuru-Ruto alliance is a ticket to nowhere," *The Sunday Nation* (Nairobi), 2/12/2012, at <http://www.nation.co.ke/oped/Opinion/Uhuru-Ruto-alliance-is-a-ticket-to-nowhere/-/440808/1634378/-/aybilq/-/index.html> (accessed 5/12/2012); cf. Ralph A. Austen (1986) "Social bandits and other heroic criminals: Western models of resistance and their relevance to Africa," in Donald Crummey (ed) *Banditry Rebellion & Social: Protest in Africa* James Currey, Oxford.

Council (MRC), Tana Delta, Kisumu, Suguta Valley (Samburu), reported assassination plots, political intimidation, banditry, militia activities, human trafficking, counterfeit trade, drug trafficking, as well as numerous serious explosions in Garissa and Nairobi.⁶¹

Like other institutions, NIS is expected to be effective after the other institutions in security and governance are operationalised or strengthened.

2.2.2 Institutions restructured under the 2010 Constitution

The Judiciary is one of the main institutions which have been restructured or reformed in the context of constitutional implementation.

2.2.2.1 The Judiciary reforms under the Constitution

Judicial restructuring is but one of the structural and governance changes that the 2010 Constitution seeks to introduce. Other institutions of Government to be restructured include the Executive, and Parliament. The fundamental changes to the Executive and Parliament are to be done after the General Elections due on March 4, 2013.

The Constitution of Kenya 2010, once fully implemented, should usher in numerous changes to Kenya's judicial and juridical structure and system. Numerous laws, policy and administrative instruments⁶² have been enacted and appointments effected while others are due. The institutional and structural changes are expected to usher in efficient and effective operations and service delivery through the Judiciary. Further, the structural change is aimed at ensuring that the functional or operational independence of the Judiciary is achieved.⁶³

Judicial restructuring is regarded as urgent in the constitutional implementation process. This restructuring is in line with calls for judicial reforms to curb some of the challenges that Kenya has faced since independence in 1963. These include lack of confidence in judicial independence and competence, which largely led to the post election violence (PEV) of 2007/2008. Significantly, the fraudulent presidential elections of December 2007 and the historical injustices could not be addressed and adjudicated equitably and effectively by the courts. It is recognized that the "radical surgery" of the Judiciary in 2004 did not sufficiently address these problems and challenges which included limited human, financial and physical resources, corruption, inefficiency, delays, political patronage, ethnicity and nepotism, manipulation and interference, and backlog of cases, among others.⁶⁴

Ahmednasir Abdullahi states that the decision to immediately address the shortcomings of the judiciary after the promulgation of the Constitution was deliberate.⁶⁵ He gives two reasons why the drafters of the Constitution saw it fit to reform the judiciary ahead of the other two arms of Government:

"First, the Constitution, having reformed the judiciary, intends the judiciary to oversee the reform programme. This guardian angel role for the judiciary has a textual constitutional underpinning. It empowers the judiciary to look into the very constitutionality of the proposed amendments.

61 See Part 6.6.2 below.

62 Republic of Kenya (2012) *Judicial Transformation Framework 2012-2016: Laying the foundations for the Transformation of the Kenyan Judiciary*, the Judiciary, Republic of Kenya, Nairobi.

63 Ben Sihanya (2011) "Constitutional Supremacy and the rule of law: The separation of powers model in Kenya; the role of the judiciary in promoting constitutionalism," presentation to the Kenya National Commission on Human Rights (KNHCR) Stakeholders' consultative forum on the role of the judiciary in the implementation of the constitution at KSMS, Saturday, 19/3/2011.

64 "Radical surgery" was an early Kibaki administration's project based on the "findings" of Rtd Justice Aaron Ringeera's Committee. It turned out to be based on rumour and prejudice. Most judges who challenged the Ringeera report in Court succeeded. See Report of the Integrity and Anti-Corruption Committee of the Judiciary of Kenya, 2003, (Ringeera Report). Some regarded the project an ethnic or political purge; part of Kibaki's McCarthyism. Cf. Criticisms of the Ringeera Report, including essays in Ben Sihanya & Philip Kichana (eds) (2004) *Judicial reform in Kenya, 1998-2003*, Kenyan Section of the International Commission of Jurists, Nairobi.

65 Ahmednasir Abdullahi (2010) "Politicians should let judiciary deal with law reforms," *Sunday Nation*, Nairobi, October 2, 2011, at <http://www.nation.co.ke/oped/Opinion/Politicians+should+let+judiciary+deal+with+law+reform+ms+/-/440808/1246222/-/k9gy2uz/-/index.html> (accessed 3/10/2011).

Second, the new Constitution has entrusted the fate of Kenya and its people to the law and not men.”⁶⁶

It should be noted that the 2010 Constitution constructs a juridically, administratively and politically empowered and independent judiciary that is to implement, enforce and offer an authoritative interpretation of the Constitution.⁶⁷ In this role, the judiciary will be instrumental in adjudicating the constitutionality and legality of executive, parliamentary, and even judicial⁶⁸ processes and the exercise of power. The constitutional provisions creating normative benchmarks for the exercise of state power, for example, require interpretation by the courts, as the process of implementing the Constitution unfolds.⁶⁹

Notably, aspects of the following have so far been done regarding judicial restructuring: judicial independence, appointment of judicial officers, and operationalisation of the Supreme Court.

2.2.2.1.1 Judicial independence

Judicial independence consists of two broad typologies: institutional independence of the judiciary from the Government’s other organs, business and other agencies; and decisional independence of every judge or magistrate from any form of influence.

First, the 2010 Constitution has been implemented to give the judiciary relative administrative, political and financial independence. Administrative independence of the judiciary has been partially achieved through the Judicial Service Commission (JSC), the related administrative bureaucracy in the judiciary and a measure of financial autonomy of the judiciary from the executive. Political autonomy has been partly achieved by vesting in a reconstituted and empowered JSC the power to nominate judicial appointees. For example, in April 2011, after the President withdrew his nomination of Justice Alnasir Visram as the Chief Justice, and deferred to the JSC, the Commission conducted public interviews of the candidates short-listed for the offices. And the President consulted the Prime Minister as required by the Constitution and nominated Dr Willy Mutunga⁷⁰ and Ms Nancy Baraza⁷¹ to the posts of Chief Justice and Deputy Chief Justice, respectively.

In what some regard as constitutional implementation in terms of the rule of law and the role of Judicial Service Commission, Ms Nancy Baraza resigned following an incident during which she was found to have engaged in misconduct. In early 2012, Rebecca Kerubo, a security guard at the Village Market, initiated claims against Ms Baraza. She alleged that Ms Baraza had assaulted and threatened to shoot her. Ms Kerubo had been trying to inspect a reportedly intoxicated Ms Baraza who was entering the Village Market. Ms Kerubo’s claim led to the suspension of then Deputy Chief Justice Nancy Baraza.⁷² The Tribunal appointed by President Kibaki, on the recommendation of the Judicial Service Commission (JSC), to probe into the matter found Ms Baraza liable for gross misconduct and misbehaviour because of having mishandled herself during the incident she had with Ms Kerubo.⁷³

66 Ahmednasir Abdullahi (2010) “Politicians should let judiciary deal with law reforms,” *op. cit.* He is a member of JSC, representing LSK. He is a former chair of LSK, a former lecturer at the University of Nairobi Law School, and has been consistent in criticizing the judiciary for what he terms as (intellectual) incompetence and corruption.

67 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.*

68 For example, through review and appeal functions, the higher judiciary checks the exercise of (Judicial) power by the lower judiciary.

69 Ben Sihanya (2011) “The Presidency and Public Authority in Kenya’s New Constitutional Order,” *op. cit.*

70 Dr Mutunga is a former Programme Officer at Ford Foundation Kenya East Africa; a former Director of the KHRC, a former detainee during the presidency of Daniel Arap Moi, and a former commercial law lecturer at the University of Nairobi Law School.

71 Ms Baraza is a former Vice Chair of Kenya Law Reform Commission (KLRC), a former lecturer at Kenyatta University School of Law, and the Kenya School of Law, and a former FIDA official.

72 Sam Kiplagat (2012) “Kerubo to sue Nancy Baraza for damages,” in *The Star*, Nairobi, on August 6, 2012 at <http://www.the-star.co.ke/news/article-7337/kerubo-sue-nancy-baraza-damages> (accessed 20/11/2012).

73 Report and recommendation on Justice Nancy Makokha Baraza by the Tribunal to Investigate the Conduct of the Deputy Chief Justice and Vice-President of the Supreme Court of the Republic of Kenya, August 2012.

Ms Baraza resigned on October 18, 2012 and is yet to be replaced.⁷⁴ The Deputy Chief Justice's office has been advertised.⁷⁵

2.2.2.1.2 Appointment of judicial Officers

Second, appointment of most constitutional office holders of judicial offices has been conducted. A Chief Justice (CJ), Deputy Chief Justice and the judges and magistrates were appointed after a more rigorous, thorough, competitive and transparent recruitment process. However, it should be noted that while the appointments were made simultaneously with that of the Director of Public Prosecutions (DPP), the DPP is not a judicial officer, but rather an independent office.⁷⁶ The DPP's appointment came into sharp focus partly because of the political trade-off that President Kibaki engaged in at the time whereby he purported to nominate the Chief Justice, Attorney-General, DPP and Controller of Budget at the same time.⁷⁷ The Judicial Service Commission (JSC) conducted interviews from May 3-12 2011 to nominate persons for the positions of the Chief Justice, and the Deputy Chief Justice. These interviews were conducted in the open and aired live by the media. In line with the 2010 Constitution, the public participated in the process by sending their questions, comments and opinions to the interview panel who then posed such questions or comments to the interviewees.

The substantive and procedural aspects of the JSC vetting process raised important constitutional, juridical, policy, ethical and administrative questions. Some of the questions relate to the following: the scope of juridical and administrative innovation (e.g., open interviews as a basis for recommendations, approval and appointment of senior judicial officers under Article 166); the proper limits of judicial independence (Articles 160 and 161); and the relevance of personal status, socio-cultural preferences or character under Chapter 6 (on leadership and integrity). The second set of questions relates to the tension between judicial ideology and competence,⁷⁸ on the one hand, and the fact that section 129 of the Evidence Act,⁷⁹ stipulates that judges and magistrates should not be subjected to processes that may undermine the confidentiality of the judicial function and their judicial offices before the public. Lessons have been learnt through the process.⁸⁰ Appointment of Supreme Court judges, additional High Court Judges and the Chief Registrar of the Judiciary went through a similar process.

The appointment of the Chief Justice is particularly important as he is to be instrumental in spearheading judicial reforms. He is the Head of the Judiciary, the President of the Supreme Court, and the Chair of the Judicial Service Commission (JSC).⁸¹ In the period that the CJ has been in office, he has received praises for putting in place mechanisms to improve access to justice, and to his office.⁸² He effected changes in the judiciary by redeploying High Court judges and creating new judicial divisions to ensure the effective and

74 Lydia Matata (2012) "Nancy Baraza resigns," in *The Star* on October 18, 2012, at <http://www.the-star.co.ke/news/article-91785/nancy-baraza-resigns> (accessed 20/11/2012).

75 Simon Ndonga (2012) "Post of Kenya's Deputy CJ advertised," 8/11/2012, at <http://www.capitalfm.co.ke/news/2012/11/post-of-kenyas-deputy-cj-advertised/> (accessed 20/11/2012).

76 Stephen Makabila "Office of DPP set to become independent," Sunday, November 18, 2012, at http://www.standardmedia.co.ke/?articleID=2000070870&story_title=Kenya-Office-of-DPP-set-to-become-independent (accessed 20/11/2012).

77 The Standard Team "Kibaki appoints Justice Visram as CJ, Prof Muigai AG," Friday, January 28, 2011, at <http://www.standardmedia.co.ke/?id=2000027752&cid=4&articleID=2000027752> (accessed 20/11/2012).

78 Cf. US Senate process, including the vetting of Robert Bork, Clarence Thomas (both controversial), and the more recent non- or less controversial processes including John Roberts (CJ), and Sonia Sotomayor. See CNN Politics, "I come with 'no agenda,' Roberts tells hearing," September 13, 2005 at http://articles.cnn.com/2005-09-12/politics/roberts.hearings_1_roberts-nomination-day-of-confirmation-hearings-chief-justice?_s=PM:POLITICS (accessed 1/12/2012).

79 Cap 80, Laws of Kenya.

80 See also Ben Sihanya (2011) "The Presidency and Public Authority in Kenya's New Constitutional Order," *op. cit.*

81 The CJ thus has judicial, administrative, and policy making role. Cf. the CJs in the US, UK, South Africa, Nigeria, Egypt and Uganda.

82 George Kegoro (2011) "Mutunga's first 100 days in office," *Daily Nation online*, at <http://www.nation.co.ke/News/politics/Mutunga+first+100+days+in+office+/-/1064/1244192/-/p6xw65/-/index.html> (accessed on 3/10/2011); Makau Mutua (2012) "Why Law Society is fighting the Chief Justice," Sunday Nation, October 14, at <http://www.nation.co.ke/oped/Opinion/Why-Law-Society-is-fighting-the-Chief-Justice/-/440808/1532424/-/tjai7g/-/index.html> (accessed 5/12/2012).

timely dispensation of justice. Further, the CJ appointed a Chief of Staff for the Judiciary.⁸³ The Chief of Staff is responsible for coordinating relations with Government departments, the private sector and non-governmental organisations; acting as the ombudsman and receiving complaints and feedback from the public and other arms of Government; and managing support staff and looking into their welfare.⁸⁴

But some have also criticized the CJ arguing that the CJ's office has not focused on the core issues. For instance, the Chief Justice has been criticised for leading the change of the dress code for judges; for allegedly planning the procurement of a house for the CJ at about KES 400 million; for reportedly planning the procurement of a helicopter for the judiciary; and for supporting JSC decision to procure Mercedes Benz vehicles for judges.⁸⁵ The LSK has also criticised the CJ for recommending that lawyers be vetted and for allegedly delaying to approve the proposed Advocates Remuneration (Amendment) Order.⁸⁶

Relatedly, an Attorney-General (A-G)⁸⁷ and Director of Public Prosecutions (DPP)⁸⁸ have also been appointed in accordance with the provisions and timelines of the 2010 Constitution. The appointment of the Attorney-General was reported by the press to have been a compromise among the key players or interests in the constitutional and political process especially the President and Prime Minister.⁸⁹ Significantly, due process was followed and the appointee vetted by Parliament as required by the 2010 Constitution.

2.2.2.1.3 Operationalisation of the Supreme Court

Third, the Supreme Court was made operational after the appointment of the Supreme Court judges. The Supreme Court Rules 2011 were gazette in October 2011. They establish a reasonably liberal framework for access to the highest court by litigants,⁹⁰ litigators⁹¹ and experts.⁹²

The introduction of the Supreme Court is particularly important because of the role assigned to it. Article 163(3) of the 2010 Constitution gives the Supreme Court exclusive original jurisdiction to hear and determine disputes relating to the elections to the office of President arising under Article 140. Determination of presidential election disputes has been problematic and subject of a lot of controversy in the past.⁹³

The Supreme Court will be instrumental in cases concerning the interpretation or application of the 2010 Constitution; matters certified to be of general public importance. It will also be crucial in giving of

83 Mr Duncan Okello, Regional Director of Society for International Development (SID) was appointed the Judiciary Chief of Staff in October 2011. Like the CJ, he has identified the need to address structural, human resources and related administrative challenges in the Judiciary. Personal communication with author, Nairobi, October 20, 2011. For instance, the CJ's office needs a lot of administrative support, and an appropriate administrative bureaucracy, in addition to the limited human resources it has had in the past: the Registrar of the High Court, the Secretary, and security personnel.

84 Paul Ogemba (2011) "Mutunga appoints first chief of staff," Daily Nation online, October 4, 2011n <http://www.nation.co.ke/News/Mutunga+appoints+first+Chief+of+Staff/-/1056/1248096/-/5t6o1e/-/index.html> (accessed on 10/10/2011).

85 See generally Sunday Standard team "The real issues behind judges' cars saga," The Sunday Standard, Nairobi, 11/11/2012, at <http://www.standardmedia.co.ke/?articleID=2000070400> (accessed 21/11/2012);

86 Eric Mutua (2012) "LSK's issues with Mutunga aren't personal," *op. cit.*;

87 The A-G has the mandate to litigate in the Government's or public interest. The AG is the titular head of the Bar.

88 The DPP leads public prosecution process which is important for judicial reforms.

89 This was particularly significant because of the problems associated with the first attempt to fill the A-G's office. See part on consensus in this paper.

90 An example is the advisory opinion, discussed elsewhere in this study.

91 There had been talk of having only senior advocates of at least years appear before the court. Others argue that this would limit access to Justice – under the Constitution. Litigants should be represented by advocates of their own choice. Cf. US Constitutional law and practice on audience.

92 There is room for *amicus curiae*. Cf. the US Supreme Court Regulations on *amicus*.

93 See *Kenneth Stanley Njindo Matiba v. Daniel Toroitich Arap Moi* Civil Application No. NAI. 241 of 1993 (NAI. 103/93 UR) Unreported); *Orengo v. Moi & 12 Others* (No 3), Election Petition No 8 of 1993 High Court at Nairobi May 30, 1994; *Mwai Kibaki v. Daniel Toroitich Arap Moi* Civ. App 172 of 99 1999, Court of Appeal at Nairobi; *Daniel Toroitich Arap Moi v. John Harun Mwau* [1997] eKLR at http://www.kenyalaw.org/CaseSearch/view_preview1.php?link=35455832947063763507059 (accessed 20/11/2012).

advisory opinions at the request of the national government, any State organ, or any county government with respect to any matter concerning county government, among other functions.

The inaugural Supreme Court judges are (Mr) Philip Kiptoo Tunoi, Justice (Prof) Jackton Boma Ojwang', Justice (Mr) Mohamed Ibrahim, Justice (Dr) Smokin Wanjala and Justice (Ms) Njoki Ndung'u. These five joined Chief Justice (Dr) Willy Mutunga and Deputy Chief Justice (Ms) Nancy Baraza. However, the Judges and Magistrates Vetting Board claimed that Mr Mohamed Ibrahim was unfit to serve.⁹⁴ This matter was the subject of High Court decision regarding the ouster of the High Court's review power. The five judge bench stayed the degazettement of the judges who had been found unfit. A court has ruled that Mr Mohammed Ibrahim and Court of Appeal Judge Roselyn Nambuye be re-vetted.⁹⁵ The decision concerning his incompetence was made on July 20, 2012. Ms Nancy Baraza has also since resigned following claims of misconduct against her as discussed. The Court now has only five judges, which is the constitutional bare minimum.

2.2.2.1.4 Structural reforms in the Judiciary

The Courts have reformed to the extent of boldly questioning executive (and Parliamentary) decisions. The quintessential example here is the *Matemu* judgement.⁹⁶ Mr Mumo Matemu was appointed Chairman of the Ethics and Anti-Corruption Commission (EACC). The High Court stated that Parliament and the Executive had overlooked integrity issues raised about Matemu while working at the Agricultural Finance Corporation as the legal officer and nullified the appointment. The decision reviewed the powers of the Judiciary toward the actions of Parliament and Executive demarcating the separation of powers of three arms of State; asserted role of courts in reviewing appointments made by the Executive and Parliament; and seems to settle the integrity or suitability standards to hold public office. The judgement raises fundamental questions about the watered down Leadership and Integrity Act 2012 passed by Parliament. The judges strongly indicted Parliament and the Executive for not being judicious or rigorous and thorough in the performance of public duty.

2.2.3 Administrative and related processes concluded under the 2010 Constitution

There are certain processes that have already been concluded regarding the implementation of the 2010 Constitution. Some processes involving judicial reforms, for example, appointment of certain judicial officers and the composition of the Supreme Court have already been concluded as discussed earlier.

Other processes that are crucial to implementation that have either been concluded or are in the process of being implemented relate to: first, harmonization of existing laws to be in line with the 2010 Constitution. Second, designing blueprints to implement certain provisions of the 2010 Constitution, especially those that require complete restructuring of institutions, processes, policies, and systems, among others. In this regard, several task forces have been set up with specific mandates which have a common theme of either proposing how to harmonize existing institutions or legislation to the provisions of the 2010 Constitution, or how to implement certain Articles of the 2010 Constitution.

2.2.3.1 Task Force on Devolved Government

The Task Force on Devolved Government (TFDG) was established by the Deputy Prime Minister and Minister for Local Government, Musalia Mudavadi, on the October 22, 2010 through Gazette Notice 12876 dated October 25, 2010. It was chaired by Mutakha Kangu.⁹⁷

The purpose of the Task Force was to work on the implementation of the devolution process and advise the Government on policy and legal frameworks for devolving power, resources and responsibilities to

94 Lordrick Mayabi (2012) "Supreme Court judge Ibrahim 'unsuitable'," on July 20, 2012 at <http://www.capitalfm.co.ke/news/2012/07/supreme-court-judge-ibrahim-unsuitable/> (accessed 20/11/2012).

95 African Centre for International Youth Exchange (ACIYE) and 2 Others v. The Judges and Magistrate's Vetting Board, Petition 326 of 2012, High Court at Nairobi. See also Lydia Matata (2012) "Vetting board reinstates judges," 21/9/2012 at <http://www.the-star.co.ke/news/article-1319/vetting-board-reinstates-judges> (accessed 20/11/2012).

96 *Trusted Society of Human Rights Alliance v. Attorney General & 2 Others* [2012] eKLR.

97 Mr Kangu is a Moi University Law Lecturer and former member of the Constitution of Kenya Review Commission (CKRC).

the people of Kenya for effective local development. Among other things, the Task Force was to make recommendations on implementing the devolution process as well as an appropriate civic education programme on devolution.⁹⁸

2.2.4 Policies formulated under the 2010 Constitution

It is arguable that the Constitution 2010 embodies policy guidance in various provisions. These include the preamble, principles of governance, national values and even the rules-focused provisions. Second, some of the legislation already enacted state the relevant rules of law as well as policies. Third, the various line ministries and task forces have formulated relevant policies to guide legislative, policy, institutional and administrative reforms.

2.2.5 Institutions (being) created under the 2010 Constitution

There are certain key institutions that the 2010 Constitution required to be created. Those already created or in the process of being created include the Judicial Service Commission (JSC), the Supreme Court, the Commission on Administrative Justice (CAJ), and Independent Electoral and Boundaries Commission (IEBC).

Some institutions have been fundamentally restructured by the Constitution and are therefore technically “new.”

2.2.5.1 The Judicial Service Commission

The Judicial Service Commission (JSC) was created for the important role of leading judicial reforms. JSC derives its mandate from Article 171 of the 2010 Constitution.

JSC was formed to enhance the independence of the judiciary. It is composed of at least 11 commissioners as provided for by Article 171(2) of the 2010 Constitution. The Chief Justice is the Chair of the Commission.⁹⁹ JSC has been instrumental in constitutional implementation in at least three ways: First, JSC did lead the process of recruiting a new Chief Justice, Deputy Chief Justice, and Chief Registrar in Kenya. JSC further led in nominating additional judges to the High Court. Both nomination processes were competitive, transparent and open to the public. Second, JSC also facilitated public participation in the recruitment processes as required by the 2010 Constitution.

Third, JSC is leading judicial reforms. As an institution it is seeking to restore the independence of the judiciary and especially through judicial appointments. Previously, judicial appointments were made by the President after recommendation by the then Judicial Service Commission. This recommendation, according to many scholars, commentators and political pundits, was largely ignored or nonexistent. JSC reportedly rarely met. Most decisions were reportedly taken by the President and his informal advisors, or with the A-G, or the CJ.¹⁰⁰ The executive took it upon itself to make the appointments either for political reasons, or to reward players in the patrimonial or patron-client system, or sycophants. The process was not competitive, open nor transparent; there were clear set criteria for conducting nominations or appointments; and the positions filled were never advertised.

Ahmednasir Abdullahi, a member of JSC, notes:

“Gone is the era when the Executive would announce the appointment of candidates to high offices through mystical rituals that were difficult to rationalise. Gone is the era when the only consideration for the government was the tribal or political affiliation of the candidate. Gone is the era when appointments were used as a rewarding tool for the loyalty a community shows to the President.”¹⁰¹

98 Republic of Kenya, Office of the Deputy Prime Minister and Ministry of Local Government (2011) *Final Report of the Task Force on Devolved Government*, Volume I: A Report on the Implementation of Devolved Government in Kenya.

99 Under the 1969 Constitution, JSC consisted of the CJ as Chairman.

100 Justice Isaac Lenaola addressing a judges and magistrates meeting in 2011. The author presented at that conference. See Ben Sihanya (2011) “Constitutional Supremacy and the rule of law,” *op. cit.*

101 Ahmednasir Abdullahi (2010) “Vetting requirement a major win from new laws,” *Sunday Nation* 28/8/2011, at <http://www.nation.co.ke/oped/Opinion/Vetting+requirement+a+major+win+from+new+laws+/-/440808/1226184/-/10me0wtz/-/index.html> (accessed 3/10/2011).

The reconstituted Judicial Service Commission (JSC) has in line with the 2010 Constitution adopted a transparent, open and competitive approach to the nomination of judicial officers. It advertised the positions, conducted the interviews in a transparent manner while allowing for public participation before forwarding the names of successful candidates for appointment by the President.¹⁰²

2.2.5.2 The Independent Electoral and Boundaries Commission

The Independent Electoral and Boundaries Commission (IEBC) is established by section 88 of the 2010 Constitution. The functions of this Commission are set out in Article 88(4) of the 2010 Constitution. These include being responsible for conducting or supervising referenda and elections to any elective body or office established by the Constitution, and any other elections as prescribed by an Act of Parliament.

The Commission will be responsible for the following 11 sets of functions: first, the continuous registration of citizens as voters. Second, the regular revision of the voters' roll. Third, the delimitation of constituencies and wards. Fourth, the regulation of the process by which parties nominate candidates for elections. Fifth the settlement of electoral disputes, including disputes relating to or arising from nominations, but excluding election petitions and disputes subsequent to the declaration of election results.¹⁰³ Sixth, the registration of candidates for election. Seventh, voter education. Eighth, the facilitation of the observation, monitoring and evaluation of elections. Ninth, the regulation of the amount of money that may be spent by or on behalf of a candidate or party in respect of any election. Tenth, the development of a code of conduct for candidates and parties contesting elections. And eleventh, the monitoring of compliance with the legislation required by Article 82(1)(b) relating to nomination of candidates by parties.

The Independent Electoral and Boundaries Commission Act, 2011¹⁰⁴ that makes provisions for the appointment and effective operation of the Commission has been enacted. The recruitment of the Commissioners and Chair of the IEBC was concluded in October 2011. The recruitment was conducted by an Independent Electoral and Boundaries Commission (IEBC) Selection Panel established under section 35(1) of the IEBC Act, 2011. The Selection Panel had been appointed through consultations between the President and the Prime Minister, and on the recommendation by the Constitution Implementation Oversight Committee (CIOC). It was then endorsed by the whole House. The panel was chaired by Dr Ekuru Aukot, the former Director of the Committee of Experts (CoE)¹⁰⁵ that led the drafting of the 2010 Constitution.¹⁰⁶

The selection process, especially the short listing of candidates, was the subject of controversy. Some politicians claimed that the process was political especially after some former Interim Independent Electoral Commission (IIEC) Commissioners were not shortlisted. Others were of the view that since the Panel was created through extensive consultations and in accordance with the law, it should be left to do its work and it might not necessarily please everyone. The panelists, especially through the Chair, emphasized that they were independent and transparent, and gave the details on the statutory and administrative procedures they had adopted.¹⁰⁷

3. Pending institutional restructuring under the 2010 Constitution

The constitutional implementation process is scheduled to take at least five years (August 27, 2011 – August 26, 2015). Two years have passed since the promulgation of the 2010 Constitution. A lot of issues

102 There were some criticisms. For instance, some lawyers, especially from the Mt Kenya Branch of the Law Society of Kenya (LSK) argued that a lawyer whose name was allegedly not in the list initially was interviewed.

103 Electoral disputes are adjudicated by courts as discussed above.

104 Independent Electoral and Boundaries Commission Act, 2011, No. 9 of 2011.

105 Dr Aukot is a former Executive Director of Kituo cha Sheria, the Legal Advice Centre.

106 Other Members included Prof Marion Wanjiku, Mwanyengela Ngali, Rosa Akinyi, Justice Isaac Lenaola, Emily Ominde, Irene Cheptoo, Charles Wambugu, Dr William Okelo and Sophie Moturi.

107 Dr Aukot made a presentation on the issues and lessons learnt from the IEBC composition process, at the Law Society of Kenya's (LSK's) Annual Conference on Integrity & Leadership: Managing the Electoral Process at Leisure Lodge Beach & Golf Resort, August 15-19, 2012, Mombasa.

are yet to be addressed, including restructuring the higher executive, and the public service (especially the administrative bureaucracy); reforming Parliament; restructuring the Judiciary; and restructuring the provincial administration.

3.1 Public service reforms under the 2010 Constitution

The 2010 Constitution makes new provisions that will have an effect on how the public service will be organized and operate. For example, Chapter Six of the Constitution on leadership and integrity contains core principles that ought to govern the organization and operation of the public service. And Article 10 of the Constitution outlines national values and principles of governance that ought to govern the delivery of public service. There is thus a need to restructure the public service to be in line with the Constitution of Kenya 2010.

The restructuring of the public service ought to be done to secure at least three objectives: First, ensure that the power of the Public Service Commission (PSC) is enhanced and rationalized and that PSC is secured from inefficient and inequitable control by the higher executive bureaucracy. Second, establish standards, criteria and rules on appointment, promotion, transfer, demotion and related discipline etc, of public servants. This is important in ensuring transparency, fairness and due process. Third, ensure that the public service upholds the text or letter and intent or spirit of the 2010 Constitution especially as regards competence and integrity of persons before being appointed to the public service.

A Public Service Commission Act, 2012 was enacted in early 2012. It is important for two reasons. First, the Act has the potential to influence the course of public service delivery, public administration and administrative justice in the emerging constitutional dispensation. Whether the Act will ensure managerial efficiency, public participation, and juridical due process in public service delivery and access to resources is a question for determination.¹⁰⁸

Second, the statute is a good step towards removing the public service from the grip of the presidency and related administrative bureaucracy. The presidency, through the Permanent Secretary in the Office of the President, Secretary to the Cabinet and Head of Public Service, has greatly influenced the operations of the public service. Jobs and appointments to the public service became a patrimonial reward scheme¹⁰⁹ and historically lip service was paid to efficient and effective service delivery.¹¹⁰ The Commission which is to constitute of independent officials is charged with establishing and abolishing offices in the public service as well as the appointment of persons to hold or act in those offices. The Commission is in charge of oversight of the Public Service and hence is also tasked with disciplinary control and human resource management.¹¹¹

There are at least two major challenges under the Public Service Act, 2012. First, the Act does not sufficiently integrate public service, public administration and administrative justice. The links among the civil service proper, the Judicial Service Commission (JSC), Parliamentary Service Commission (PSC), and the Teachers Service Commission (TSC), among other bureaucracies, should be clearer. Second, reference should be made to other values and principles, for instance, the principles of executive authority (Article 129 of the Constitution).

108 See Ben Sihanya (forthcoming 2013) *Presidentialism and the Administrative Bureaucracy in Kenya, 1963-2013*, op. cit.

109 Cf Yash P. Ghai (1993) "Constitutions and governance in Africa; A prolegomenon," in Sammy Adelman & Abdul Paliwala (eds) *Law and Crisis in the Third World*, Hans Zell Publishers, London, pp. 51-75 (Chap. 3).

See also Ben Sihanya (2011) "The Presidency and Public Authority in Kenya's New Constitutional Order," op. cit.; Kempe Ronald Hope, Sr. (2001) "The new public management: context and practice in Africa," Vol.4, pp 119-134; and Thomas H. Hammond & Jack H. Knott (1996) "Who controls the bureaucracy?: Presidential power, congressional dominance, legal constraints, and bureaucratic autonomy in a model of multi-institutional policy-making," 12 *Journal of Law, Economics, & Organization* 1 Vol. 12, No. 1, (Apr., 1996), pp. 119-166.

110 National Cohesion and Integration Commission (NCIC) Report (2011).

111 Art 234 (2) of the Constitution of Kenya 2010.

3.2 Executive restructuring under the 2010 Constitution

The Constitution 2010 pegs fundamental restructuring and reform of the executive and administrative bureaucracy on the first election after the promulgation. The composition of the executive is, for example, set to change after General Election of March 4 2013. The national executive will thus be composed of the President, Deputy President, and the Cabinet.¹¹² With the introduction of the county governments, which are also required to have their own executives, the role of the national executive will be greatly reduced.

The “devolved” government will have a great impact on the traditional powers of the President in a number of ways, including reducing the power to determine the distribution of resources and positions to different geographical and ethnic constituencies in Kenya. This power has been used to prop up patrimonial rule. In addition, because the executive power in a county government is vested in the Governor, the President’s influence over the county executive officials will be minimal.

Significantly, there is a change in nomenclature from President and Commander-in-Chief of the Armed Forces¹¹³ to President and the Commander-in-Chief of the Kenya Defence Forces;¹¹⁴ Vice President to Deputy President (DP); and Cabinet (of Ministers) to Cabinet, consisting of the President, Deputy President (DP), Cabinet Secretaries, and Attorney-General (A-G). Their powers and functions will be different. There is greater separation of powers and checks and balances. None of these Cabinet members will sit in Parliament unlike under the 1969 Constitution that embodies the Westminster model.¹¹⁵

Thus, the implementation of devolved governments will lead to the entry into force of a national executive with ambivalent powers, sanctions, rights, and privileges. That ambivalence is repeated in the role of the provincial administration under the 2010 Constitution.

3.3 Provincial administration restructuring under the 2010 Constitution

The provincial administration is to be restructured to respect the rules and intentment or spirit of “devolution.” Section 17 of the Sixth Schedule on the Transitional and Consequential Provisions of the 2010 Constitution provides a framework to be adopted in dealing with the provincial administration¹¹⁶. Section 17 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 the Constitution.”

Some Kenyans have expressed the opinion that the provincial administration ought to be scrapped.¹¹⁷ This is because there was the feeling that the provincial administration has been an impediment to Kenya achieving an effective decentralization design.¹¹⁸ Ben Sihanya has noted that:

112 Article 130.; Article 156 and 157 respectively provide that the A-G and DPP are also part of the Executive.

113 Section 4 of the Constitution of Kenya 1969.

114 Article 131(1)(c) of the Constitution of Kenya 2010.

On the role of the Commander-in-Chief in the exercise of presidential powers in the US, see Arthur M. Schlesinger (1973) *The Imperial Presidency* Mariner Books USA, Massachusetts.

115 Yash P. Ghai & J.P.W.B. McAuslan (1970) *Public Law and Political Change in Kenya*, OUP, Nairobi; HWO Okoth-Ogendo. (1999) “Constitutions without constitutionalism: reflections on an African political paradox,” in Issa Shivji (ed) (1991) *State and Constitutionalism: An African Debate on Democracy*, Southern Africa Political Economy Series (SAPES) Trust, Harare, pp. 3-26 (also in Douglas Greenberg, et al. q.v.; Vicky Jackson & Mark Tushnet (eds), q.v.; Arthur M. Schlesinger (1973, 2004) *The Imperial Presidency* Mariner Books USA, Massachusetts.

116 The Sixth Schedule derives its authority from Chapter 18, on Transitional and Consequential Provisions, and particularly Article 262, on Transitional and Consequential Provisions. Article 262 provides: “The Transitional and Consequential provisions set out in the Sixth Schedule shall take effect on the effective date.”

117 That was the general attitude of the opposition in the 2002 General Elections. It informed the Bomas Draft Constitution adapted on March 15, 2004.

118 This view was very strong in the run-up to the 2002 transitional elections (from President Daniel Arap Moi’s Kenya African National Union (KANU)); and during the Bomas process on comprehensive constitutional review (2002-2004). The debate has been revisited in 2010 and 2011.

“one of the glaring legacies of the system is that it does not allow for public participation and has been referred to as the ‘...antithesis of people’s right to govern themselves...’”¹¹⁹

A second category of Kenyans wanted the provincial administration retained as it is, and an agent of the national Government in the grassroots. That group supports President Kibaki’s appointment in 2012 of County Commissioners even though there is no constitutional or legal basis for such appointment.¹²⁰ In fact, those appointments have not been revoked even though High Court Judge Mumbi Ngugi declared President Kibaki’s appointments unconstitutional.¹²¹

3.4 Parliamentary reforms under the 2010 Constitution ¹²²

The bi-cameral Parliament will commence operations after the March 4, 2013 General Elections. This Parliament will consist of the Senate and the National Assembly. The bicameral House will be a restructured one in that there will be wider representation of major interest groups in the House. Further, unlike the Parliament under the 1969 Constitution, the bicameral Parliament has largely been delinked from executive control and given powers to vet all presidential appointees, impeach the President, and oversee and investigate cabinet secretaries and other state officers. Parliament also has its own administrative bureaucracy to facilitate its daily operations.¹²³

However, there has been contention on some aspects of the new Parliament, like the gender composition. Under Article 27(7) of the Constitution, the State is to take legislative and other measures to implement the principle that “not more than two thirds of the members of elective or appointive bodies are the same gender.” The Constitution 2010 tries to ensure representation by women in the National Assembly by providing for elective 47 seats for them.¹²⁴ The manner in which the one third gender concept will be implemented has stirred debate. Article 97 of the Constitution envisions a National Assembly with 350 members (290 elected in constituencies; 47 elected women and; 12 nominees and an *ex-officio* Speaker). For the one third gender concept to be realized, there should be at least 117 MPs from either gender.

The issue has generated contentious debate ahead of the March 4, 2013 General Elections, particularly on how the number will be achieved. The A-G has sought an advisory opinion from the Supreme Court on whether the one-third gender rule should be implemented in the 2013 General Elections or whether it is progressive to be implemented gradually.¹²⁵ The Court’s opinion is awaited. Meanwhile, some view the one third concept as a value or principle to be implemented progressively and in a manner that does not compromise the more specific rules of democratic choice.¹²⁶ Some would also argue that the doctrine

119 Ben Sihanya (2011) “Executive II” Teaching Points for LLB I, Constitutional Process Class, University of Nairobi Law School on file at Innovative Lawyering, Nairobi & Siaya.

120 See Obuya Bagaka (2011) “Restructuring the provincial administration: an insider’s view,” Constitution Working Paper series No. 3 Society for International Development (SID) Eastern & Central Africa, Nairobi Printed by The Regal Press Ltd, Nairobi; Obuya Bagaka (2012) “Debate on county chiefs informed by partisan interests, not common sense,” The Daily Nation June 12, <http://www.nation.co.ke/oped/Opinion/Debate-on-county-chiefs-informed-by-partisan-interests/-/440808/1426200/-/16hxnv/-/index.html> (accessed 5/12/2012);

121 *Centre For Rights Education & Awareness (CREAW) & 8 Others v. Attorney General & Another* [2012] eKLR. In a move of desperation to justify the appointments, Kibaki’s supporters told Parliament that he had the power under *ss. 23 and 24* of the 1969 Constitution even when these specific provisions have been repealed and replaced by Article 29(2) of the Sixth Schedule to the 2010 Constitution that provides that the President may only make appointments after consultation with the Prime Minister and with the approval of the National Assembly quite accurately

122 Dr Adams Oloo is addressing the questions regarding representation, parliament and elections in this series. He is the Chair, Department of Political Science and Public Administration and law student at the University of Nairobi.

123 One major reason why the Executive, and especially the presidency, dominated Parliament and the Judiciary was because these latter two also relied on the administrative bureaucracy (in the executive or presidency) for their day to day operations.

124 Constitution of Kenya, 2010 Article 97(b).

I prefer calling it the one third rule to cast it as a positive and not a negative doctrine. The relevant agencies should have “at least on third” of each gender.

125 Paul Ogemba (2012) “Supreme Court to hear petition on gender rule” *Daily Nation*, Nairobi, 8/11/2012, at <http://www.nation.co.ke/News/politics/Supreme+Court+to+hear+petition+on+gender+rule+/-/1064/1615582/-/9khssbz/-/index.html> (accessed /12/2012).

126 See Article 38 of the Constitution.

is not limited to one agency; that the Government should audit all appointive and elective positions and ensure that the one third doctrine applies, on balance. The pundits argue that for instance, some agencies' offices have only room for one (the presidency or CJ) or two officers.¹²⁷

4. Implementation institutions, organs, and agencies

The core implementation institutions include the Constitution Implementation Oversight Committee (CIOOC), Commission for the Implementation of the Constitution (CIC), Ministry of Justice, National Cohesion and Constitutional Affairs (MOJNCCA), the Kenya Law Reform Commission (KLRC), the Office of the Attorney-General, the higher executive and related bureaucracy.

4.1 Constitutional Implementation Oversight Committee (CIOOC)

CIOOC is established by section 4 of the sixth schedule to the 2010 Constitution. It is a parliamentary committee whose overall mandate is overseeing the implementation of the 2010 Constitution.

4.2 Commission for the Implementation of the Constitution (CIC)

The Commission for the Implementation of the Constitution (CIC) is established under section 5 of the Sixth Schedule to the Constitution and the Commission for the Implementation of the Constitution Act, 2010. The functions of CIC are monitoring, facilitating, coordinating and overseeing the implementation of the Constitution. It has the duty of reporting quarterly to the President, Prime Minister, the Parliamentary Select Committee for the Implementation of the Constitution and to the People of Kenya.¹²⁸

Other key implementation institutions include, first, Parliament that is key in enacting legislation. Second, the relevant executive agencies (especially ministries or departments) that provide the policy framework. And third, the presidency that assents to Bills. Fourth, the Kenya Law Reform Commission (KLRC) has a role in proposing legislation and drafting some of them. Fifth, relevant ministries or departments also propose legislation to be enacted, policies to be reviewed or reformed as well as providing consultative forums. Seventh, the office of the Attorney-General (in the structural and administrative context of the State Law Office) publishes Bills, presents proposed legislation to the Cabinet for discussion and approval, and forwards the legislation to the Government Printer, among other functions.¹²⁹

5 Challenges facing constitutional implementation

There have been significant challenges to the implementation of the Constitution of Kenya 2010.

5.1 Contextualizing challenges facing constitutional implementation

Implementation of the Constitution is a daunting process that will always be faced by challenges and risks. Effective implementation requires that the institutions dealing with implementation comply with the Constitution. There is always the danger that vested interests may affect legislation, administration and other aspects of constitutional implementation. The main danger always revolves around political manipulation, political sabotage or political frustration of the process for personal, partisan, sectarian, and selfish gains. Brian Kennedy & Lauren Bieniek have noted that:

“Implementation risks being co-opted by narrow interests. Political negotiations were prominent throughout the Constitution-making process, as politicians jockeyed to secure the best possible

127 See also Part 5.2.2 below.

128 Commission for the Implementation of the Constitution (2011) *Quarterly Report for the period January - March 2011*, Commission for the Implementation of the Constitution, Nairobi, Kenya.

129 See Art. 156 Constitution of Kenya; (on AGs functions); Revision of Laws Act---; Kenya Law Reform Commission Act---; Presidential Circular No. 1/2008 on the Organization of the Government of the Republic of Kenya;

arrangement for themselves and their constituents. These tendencies are likely to be repeated in the implementation stage as well. If the status quo is to change, individual politicians must not be allowed to co-opt the substantive demands of the Kenyan people. Broad-based civil society has a role to play in this regard.”¹³⁰

On its part, the Commission for the Implementation of the Constitution (CIC) in its second quarter report noted the following as the main challenges it had faced:

“...selective reading and misinterpretation of provisions of the Constitution by implementing agencies, deliberate misinformation to members of the public by some members of both the Executive and the Legislature, a lack of guidance from the Office of the Attorney-General in the process of implementation of the Constitution, political risk, and the increasing trend by the Executive and some members of the Legislature to create grey areas regarding the interpretation of the Constitution. All these have the unfortunate propensity to create confusion and to delay the implementation of provisions of the Constitution.”¹³¹

This paper discusses four challenges that the implementation of the 2010 Constitution has faced. First, challenges in the interpretation of the Constitution; second, cooperation challenges; third, litigation challenges; and fourth, political challenges.

5.2 Challenges in interpretation of the 2010 Constitution

Full and effective implementation of the 2010 Constitution largely depends on its proper and accurate interpretation. The judiciary is the final authority in interpretation of the 2010 Constitution as the process of implementation unfolds. Other arms of Government, like Parliament and the Executive also have a mandate to interpret the Constitution but need to seek the intervention of the court where a problem of interpretation arises.¹³² The same applies to all public bodies, authorities, commissions, and institutions, among others. A problem arises where these organs, bodies, institutions, arms of Government, and commissions choose to interpret the Constitution in their own way without seeking the guidance of courts. This specifically applies to potentially controversial interpretations that these organs or bodies make and which adversely affect other organs.

Interpretation of any legal text, and especially the Constitution, is based on the view that words, terms or phrases have imprecise meaning and hence need to be defined, interpreted, construed and translated. This is done with a view to discovering and implementing meaning.

The 2010 Constitution has faced a number of interpretation challenges. These include presidential nominations; one-third gender rule (already an issue being addressed in the Supreme Court as indicated above); and the date of the next General Election (eventually set at March 4, 2013 only after litigation took place); and the Procedure on constitutional amendment.

5.2.1 Presidential nominations under the 2010 Constitution

A problem of interpretation and implementation arose when President Mwai Kibaki nominated Justice Alnasir Visram as the new Chief Justice on January 29, 2011 without involving the Prime Minister and the Judicial Service Commission (JSC). The nomination was rejected by, among others, Prime Minister Raila Odinga, House Speaker Kenneth Marende, the Commission for the Implementation of the Constitution (CIC), and the Judicial Service Commission (JSC) (which included Attorney-General

130 Brian Kennedy & Lauren Bieniek (2010) “Moving forward with constitutional reform in Kenya,” A Report of the Center for Strategic and International Studies (CSIS) Africa Program, Washington, DC, at http://csis.org/files/publication/101203_Kennedy_MovingForwardKenya_Web.pdf (accessed 23/9/2010).

131 The Commission for the Implementation of the Constitution (CIC) (2011) *Second Quarterly Report on the Implementation of the Constitution* (CIC), Nairobi, June 2011. The tension among the key Constitution implementation agencies is discussed above.

132 That intervention may be through ordinary litigation or through the problematic advisory jurisdiction. The Supreme Court ruled that it has jurisdiction to give advisory opinion regarding the date of the next General Elections. It declined to give an opinion in the instant case, stating that the High Court was already seized of the matter. See *John Harun Mwau & 3 Others v. Attorney-General & 2 Others* [2012], HC Constitutional Petition No. 65 of 2011 eKLR.

Amos Wako and the then Chief Justice Evan Gicheru). One of the interpretive issues was whether interpretation of section 24 of the Sixth Schedule of the Constitution, which the President had relied on, envisaged JSC's role.

Politicians, policy makers, administrators, scholars and legal experts were of the view that the Judicial Service Commission (JSC) should have been fully involved in the nomination process. Former Justice Minister Martha Karua was of the opinion that:

“For a position like the Chief Justice's, the recommendation must be made by the Judicial Service Commission through a competitive process after which the names are tabled in Parliament for debate and only when a candidate is agreed upon, does the President make the appointment.”¹³³

In the same context, controversy arose regarding the meaning of the term “consultation” as provided for by section 24(2) of the Sixth Schedule to the 2010 Constitution. Section 24 (2) states:

“A new Chief Justice shall be appointed by the President, subject to the National Accord and Reconciliation Act, and after consultation with the Prime Minister and with the approval of the National Assembly.”

The Prime Minister had come out openly to dispute the allegation or assumption that the President had consulted the PM. The arguments were constitutional, juridical, administrative and political with the Constitution's and Prime Minister's supporters' arguing that “consultation” meant discussion or “concurrence” while those on the President's side arguing that “consultation” may mean informing but does not necessarily mean securing “concurrence.” Ahmednasir Abdullahi, then a member of JSC, noted that:

“It must also be appreciated that ‘in consultation with the prime minister’ must be construed to mean concurrence of the two principals and nothing less.”¹³⁴

The present author published the opinion that there are four parameters that give consultation meaning: the constitutional value of advice and advisory opinions; consultation in the narrow sense of rough consensus; consultation as agreement and concurrence; and consultation as compromise. As regards the consultation in the constitutional text, the author noted:

“The National Accord and Reconciliation Act, a constitutional text, at promulgation and through practice in various appointments, envisages consultation between President Kibaki and Prime Minister Raila Odinga as a device for power-sharing. Where, in a power-sharing agreement, one party still retains the sole powers to make unilateral decisions, that power-sharing agreement [may be rendered] null, void and unnecessary. In the context of the National Accord, consultation was deemed as a device for ceasefire and to inculcate a sense of inclusiveness between the literally warring protagonists, ODM and PNU supporters.”¹³⁵

Later on, the courts declared the nominations unconstitutional on gender equality and related grounds: the three nominees by the President were all male. Justice Daniel Musinga stated in his ruling that:

“I am satisfied that the nominations were in breach of Article 27(3) of the Constitution that guarantees fundamental rights and freedom of women and men to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.”

The President, for political and related reasons, withdrew the nomination and deferred the matter to the Judicial Service Commission (JSC).

133 *Sunday Nation* Team (2011) “Kibaki judiciary nominees spark new round of clashes,” *Sunday Nation* online, 29/1/2011, at <http://www.nation.co.ke/News/politics/Kibakis+judiciary+nominees+spark+new+round+of+clashes+/-/1064/1098038/-/item/1/-/b5ynujz/-/index.html> (accessed 3/10/2011).

134 Ahmednasir Abdullahi (2011) “Serious consultations cannot be done by SMS,” *Daily Nation* online, January 29, 2011, at <http://www.nation.co.ke/oped/Opinion/Serious+consultations+cannot+be+done+by+SMS+/-/440808/1097888/-/xd1cptz/-/index.html> (accessed 3/10/2011).

135 Ben Sihanya (2011) “Consultation should be a device for ceasefire between warring political parties,” *The Standard Newspaper* (Nairobi), 26/02/2011, at <http://www.standardmedia.co.ke/InsidePage.php?id=2000030048&catid=15&a=1> (accessed on 3/10/2011); also at <http://www.innovativelawyering.com/blogs> (accessed 27/12/2012).

The interpretation, application, administration and implementation of the Constitution were the main issues in this matter. The President, Prime Minister, Parliament, the then A-G, among others, applied their interpretations of the relevant provisions. Such confusing and varied interpretations of the constitutional text may still arise, because of various reasons. One is that at these early stages of the 2010 Constitution, all these individuals and agencies have a mandate to interpret the Constitution. Ultimately, the courts would be asked to provide clear interpretation and precedents that are binding on any controversial text of the 2010 Constitution.

Clearly, the judiciary should be conscious of its new and significant role in constitutional interpretation, construction, translation, implementation and development, and should then develop jurisprudence that does not fetter or overzealously surpass its mandate.¹³⁶

5.2.2 One third gender concept

There is also controversy regarding the application of the one third gender rule; the relevant (public) bodies must have at least one third of each gender. This is our positive restatement of the two thirds doctrine.¹³⁷ The 2010 Constitution, in a bid to promote gender equality, makes provisions to the effect that not more than two thirds of members of elective or appointive bodies should be of the same gender. This is a fundamental right entrenched in Article 27 of the 2010 Constitution which is on equality and freedom from discrimination.

Article 27(8) states:

“In addition to the measures contemplated in clause (6), the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.”

The gender controversy has played out in at least four contexts.

The first instance involved the controversial presidential nominees to the office of the Attorney-General (A-G), Chief Justice (CJ), Director of Public Prosecutions (DPP) and Controller of Budget.¹³⁸ The President had controversially nominated Prof Githu Muigai to be the A-G, Justice Alnasir Visram to be the CJ, Mr Kioko Kilukumi to be the DPP and Mr William Kirwa to be the Controller of Budget.¹³⁹ These nominees were of the male gender. Justice Musinga ruled that the nominations were unconstitutional since they breached Article 27 (3) of the Constitution.

The second instance involved Supreme Court appointees. The Judicial Service Commission (JSC) conducted relatively open and transparent nominations of persons to be appointed Supreme Court justices. The Commission forwarded five names to the President for nomination in consultancy with the Prime Minister. These were Njoki Ndung’u, Smokin Wanjala, Justices Jackton Ojwang’, Philip Tunoi and Justice Mohamed Ibrahim.¹⁴⁰ In total the Supreme Court would have seven judges, the other two being the Chief Justice Willy Mutunga and Deputy Chief Justice Nancy Baraza.¹⁴¹ A petition was filed in court challenging the five nominations and seeking the “correct” interpretation, full tenure, meaning and effect of Article 27 of the Constitution of Kenya 2010 and the proper approach to the interpretation of the Constitution.¹⁴²

136 Sihanya (2011) “The Presidency and Public Authority in Kenya’s New Constitutional Order,” *op. cit.* There are some concerns about an “activist” judiciary. For instance, some critics point to the award of KES 2 billion and 11 billion by Justices David Majanja, and Roselyn Nambuye, respectively, in October 2012 to a group of engineering students and Orbit Chemicals company respectively. There are also judges who exercise judicial restraint or are activist in favour of the Kibaki faction of the Grand Coalition Government.

137 See Part 3.4 above.

138 Discussed as a general constitutional interpretation problem above.

139 These appointments reflected Kibaki’s support of the G 7 (formerly KKK inter-ethnic) alliance of a selected elite led by Uhuru Kenyatta, William Rutto and Kalonzo Musyoka. The candidates were drawn from (perceived) supporters of Kibaki and the other politicians.

140 See also above, under reforms to the judiciary especially the Supreme Court.

141 See Part 2.2.2.1 (a) (on the Judiciary) above.

142 *Federation of Women Lawyers Kenya (FIDA-K) & 5 Others v. Attorney-General & Another* [2011] eKLR, at http://kenyalaw.org/CaseSearch/view_preview1.php?link=51964294183092468398984 (accessed 4/10/2011).

The petitioners alleged that JSC in making its recommendations to the President violated the Constitution and fundamental rights and freedoms of women in not taking into consideration the correct arithmetic or mathematics of the constitutional requirements on gender equity.¹⁴³ The Court opined that in exercise of its powers, JSC had a constitutional duty and administrative discretion and that in exercise of its constitutional duty, JSC had no discretion other than to comply with the provisions of Article 27 and 172 of the Constitution.¹⁴⁴

The court dismissed the petition starting that:

“The purpose of Article 27(8), in our view, is to provide or place a *future obligation* upon the State to address historical or traditional injustices that may have been encountered or visited upon a particular segment of the people of Kenya.

The Court added that:

“It is the responsibility of the Government by designing policies and programmes and seeking the intervention of Parliament through legislation to provide an appropriate and just remedy to an individual whose guaranteed rights or freedoms have been infringed or denied. We think that the rights under Article 27(8) have not crystallized and can only crystallize when the State takes legislatives [sic: legislative] or other measures or when it fails to put in place legislative or other measures, programmes and police [sic: policy] designed to redress any disadvantaged within the time set by the Fifth Schedule to the Constitution 2010.”

It further opined that:

“The Government may proceed step by step and if an evil is particularly experienced in a particular area, it is required to address it through policies, programmes and legislative process... It is also our view that Article 27 as a whole or in part does not address or impose a duty upon the Judicial Service Commission in the performance of its constitutional, statutory and administrative functions. We think any claim on Article 27 can only be sustained against the Government with specific complaints and after it has failed to take legislative and other measures or after inadequate mechanisms by the State. To say Article 27 gives an immediate and enforceable right to any particular gender in so far as the two thirds principal [sic: principle] is concerned is unrealistic and unreasonable. The issue in dispute remains *an abstract principle* which can only be achieved through an enabling legislation by Parliament. *We cannot in our estimation give what is not contained or found or intended by the drafters.*”¹⁴⁵

This case was important since it comprehensively dealt with the equality and freedom from discrimination provisions (i.e. Article 27 etc) of the 2010 Constitution. To some, it gave an authoritative and clear interpretation of the provisions. There are three aspects of the judgment that are debatable at various levels: the decision, decree or judgment itself; the reasoning, rationale, or *ratio decidendi*; and the *obiter dicta* (or by-the-way statements). The courts need to continue working on clear guidance on interpreting controversial constitutional text, structure, and history, practice or tradition.

In this case, the judges further provided an important test in interpreting the Constitution. They capture important principles of interpretation and construction, including the judicial function in the process:

“The Constitution is a flexible and adaptable instrument; some of its provisions are highly specific giving us Judges unmistakable instructions. But others are no more than a broad outline which means that their construction is essential to fill in the details. The Constitution may be read restrictively sometimes but other times loosely. We must adapt a growth from the seeds which the drafters planted. We must be cautious because that [sic] we cannot afford to wrap a poison in a bill of sweet and sonorous pontification in order to accede to the arguments of a particular party. Perhaps we should also avoid a route which can result in serious and dangerous inroads upon the limitations of the Constitution which can be achieved through policy, programs and legislative actions.”

143 See Chapter Four of the Constitution: The Bill of Rights (Arts 19-59).

144 Article 172 provides for the functions of the JSC.

145 Justice John Mwera, Justice Philomena Mwilu and Justice Mohammed Warsame in *Federation of Women Lawyers Kenya (FIDA-K) & 5 Others v. Attorney-General & Another* [2011], *ibid*.

The court added:

“In interpreting the Constitution we must not be bewildered travelers lost in the woods, wandering in a circle thinking that it was a straight line. In our view the Constitution has a consistent and not contingent meaning. It does not mean one thing at one time and an entirely different thing at another time. In our understanding the provisions of the Constitution must be upheld when they pinch as well as when they comfort. We would be second to none in extending help when such help is needed.”¹⁴⁶

A third controversy which remains unsolved is the application of the gender rule in the composition of Parliament. It has been argued that it would be difficult to design a formula that shall ensure that the next National Assembly complies with the two-thirds gender rule as provided for by Articles 27, 81, and 97. Article 97 restricts the membership of the National Assembly to 290 members whereas Article 81 states that not more than two-thirds of the members of elective public bodies should be of the same gender.

There have been arguments that the Constitution should be amended in order to formulate a workable design. An Amendment Bill, the Constitution of Kenya (Amendment) Bill 2011, was approved by the Cabinet and tabled in Parliament. The Bill sought to amend Article 97 by allowing nomination of a “number of special seat members necessary to ensure that no more than two-thirds of the membership of the National Assembly are of the same gender.” This would thus effectively mean that the number of members of the National Assembly will have no maximum. Those opposed to the move argued that Parliament should just devise a workable mechanism instead of rushing to amend the Constitution.

This proposed amendment was supported by CIC which argued that the move might save the country from a repeat election in case the gender doctrine was not met in the next general elections:

“The amendment will prevent the possibility of a constitutional challenge on the composition of the national assembly where the mandatory provisions of Article 81(b) of the Constitution are not met.”¹⁴⁷

The Attorney-General stated that: “Failure to address the issue will see the country experience a constitutional crisis of unparalleled proportions and hence the need to address the rule.”¹⁴⁸

This is a matter of interpretation that ought to be decided through consultation through the political process among the relevant agencies of Government, or litigation as the last resort. There are lingering questions: Can the relevant agencies or the courts secure an optimal outcome? Would the amendment require a referendum or only parliamentary debate and adoption? Should Parliament increase the number of members of the House to an infinite number? The pending Supreme Court opinion on this matter should provide guidance on the issue.

5.2.3 The elections date conundrum

The date of the first General Elections under the Constitution 2010 is the third interpretation debate.¹⁴⁹ The date has been so controversial that a faction of the Grand Coalition Government even drafted a constitutional amendment. The Constitution of Kenya (Amendment) Bill 2011 sought to change the

146 Justice Mwera, Justice Mwilu and Justice Warsame in *Federation of Women Lawyers Kenya (FIDA-K) & 5 Others v. Attorney-General & another* [2011]. Cf. *Njoya & 6 Others v. Attorney General & 3 Others*, Miscellaneous Civil Application No. 82 of 2004 (the *Njoya* case); the *Yellow Movement Case, Republic v. El Mann* [1969] E.A. 420 at page 360 (the *El Mann* case), etc. Cf. Justice David Onyancha (----) -----unpublished LLM Project Paper (Thesis), University of Nairobi Law School. cf. Muthomi Thiankolu (----) unpublished LLM Project Paper

147 *Nation Reporter* (2011) “Parliament can amend gender rule, says CIC” *Daily Nation* online, August 24, 2011, at <http://www.nation.co.ke/News/politics/Parliament+can+amend+gender+rule+says+CIC/-/1064/1224750/-/5tr7o9/-/index.html> (accessed 4/10/2011).

148 *Standard Digital* (2012) “One third gender rule has Parliament baffled,” September 25, 2012, at http://37.188.98.230/?articleID=2000066915&story_title=one-third-gender-rule-has-parliament-baffled (accessed 23/11/2012).

149 There are many more constitutional interpretation debates, some of which are beyond the scope of this study.

election date set in the Constitution of Kenya 2010. Articles 101, 136, 177 and 180 set the election date to be the “second Tuesday in August,” or to a date that allows the tenth Parliament to exhaust its “unexpired time” as at August 2012. The Bill sought to amend these provisions so that the General Election could be on the “third Monday in December.”

The main argument in favour of that date was that August 2012 was too soon and the Government would not be prepared legally, administratively, financially, logistically, and in other aspects. The CIC has opposed the move and asked that the Supreme Court provide guidance on the matter. Mr Nyachae, CIC Chairman was quoted as saying:

“We support the suggested amendment on gender representation, but we are encouraging Kenyans to resist any attempts by Parliament to change the election date to serve largely political and sectarian interests.”

In the meantime, an anxious IEBC met President Kibaki even as Kibaki announced in his backyard that elections would be in 2013. IEBC then announced that the elections would be March 4, 2013 even without consulting other officers or agencies with the relevant mandate, like the Prime Minister.¹⁵⁰ There are at least two readings of these developments: that like the defunct Electoral Commission of Kenya (ECK) some IEBC officials do not exercise institutional and decisional independence. Second, the imperial presidency erected by Jomo Kenyatta (1963-78), nurtured by Moi (1978-2002) and sustained by Kibaki (2002-) was fighting back, also least by trying to manipulate the date of the General Elections.¹⁵¹ Eventually the matter was taken to the High Court for adjudication, upon which the date was set at March 4, 2013. The Court of Appeal later affirmed March 4, 2013.¹⁵²

5.2.4 The vetting of judges and magistrates¹⁵³

Many of these challenges to constitutional implementation can be addressed through consultations, coordination and cooperation (as well as concurrence where appropriate) among the various constitutional agencies charged with reform, and especially the Presidency, Parliament, Judiciary, and the administrative bureaucracy.

5.3 Challenges regarding cooperation among stakeholders in constitutional implementation

Implementation of the Constitution requires cooperation and collaboration among the different implementation organs. The past two years have witnessed some degree of cooperation but also wrangles and limited collaboration among key implementation institutions.

In the first year, there were continued and persistent wrangles between CIC and the office of the Attorney-General, for instance. These reduced somewhat in the second year. CIC routinely accused the A-G’s chambers (and the A-G) of inordinate delays in publication of bills and their presentation to the Cabinet and Parliament. CIC Chair, Charles Nyachae, was quoted complaining of the alleged delays by the A-G’s chambers in the presentation of the Bills. He stated:

“The continued delay is obviously prejudicial to the implementation process, and jeopardises

150 Standard Group (2012) “Pressure piles on IEBC to review announced election date,” *Standard Digital* 19/3/2012, at <http://www.standardmedia.co.ke/?articleID=2000054367&pageNo=1> (accessed 5/12/2012).

151 Kivutha Kibwana (1988) *Legal Restraints on Presidential and Parliamentary Elections in a One Party State: A Comparative Analysis of Kenya, Tanzania and Zambia* SJD Dissertation, George Washington University Law Centre; Githu Muigai (2004) “Jomo Kenyatta & the rise of the ethno-nationalist state in Kenya,” in Bruce Berman, Dickson Eyoh & Will Kymlicka (eds), *Ethnicity and Democracy in Africa*, James Currey, Oxford & Ohio UP, Ethens pp 200-217 (Chap 12); Peter Anyang’ Nyong’o (1989) “State and society in Kenya: the disintegration of the nationalist coalitions and the rise of presidential authoritarianism,” *African Affairs*, London, Vol. 88, No. 351, pp. 229-251.

152 *John Harun Mwau & 3 Others v. Attorney-General & 2 Others* [2012], HC Constitutional Petition No. 65 of 2011, eKLR. But there has been a lot of talk of plans by members of a faction of the Government to postpone the General Elections to December 2013 or August 2013. See Kennedy Kimanthi, Oliver Mathenge & Philip Bwayo (2012) “Raila, Kibaki accused of power tricks,” *Nation Media* (Nairobi), 24/7/2012, at <http://www.nation.co.ke/News/politics/Raila-Kibaki-accused-of-power-tricks/-/1064/1462768/-/bp1xwbz/-/index.html> (accessed 1/12/2012).

153 See also part 2.2.12 above.

consequential imperatives such as establishment of the Commission and preparation for the General Election.”¹⁵⁴

Further, CIC blamed the A-G for allegedly forwarding two Bills to the Cabinet for review and approval without consultations. The Commission proceeded to file a case in court to stop Parliament from debating the two Bills, namely the National Government Loans Guarantee Bill, and the Contingencies Fund and County Funds Emergency Bill.¹⁵⁵ Parliament had already discussed and passed the Bills, and the matter stayed that way.

And in Parliament, and the political process, inter-party wrangles between the Orange Democratic Movement (ODM) and the Party of National Unity (PNU) resulted in the disbandment of the Justice and Legal Affairs Committee also delayed the enactment of some bills as well as the engagement of Supreme Court Judges. The wrangles between CIC and Parliament, and Parliament and the Government Printer continued into the second year (2012).¹⁵⁶

Another leading challenge is that most of the MPs are not conversant with the many issues in the Constitution and are misinterpreting some clauses, either through ignorance or deliberately to serve their political and related partisan or sectarian interests. This is trickling down to the masses.¹⁵⁷

There have also been wrangles between CIC and the administrative bureaucracy especially the Office of the Head of Public Service and Treasury, among others.¹⁵⁸ Such wrangles pose a serious challenge to Constitution implementation.

5.4 Litigation challenges to constitutional implementation

There have been remarkable litigation challenges to the implementation of the Constitution.¹⁵⁹ A three pronged typology is emerging in this regard. First, some cases question the constitutionality of the relevant provisions e.g. the cases on gender equality and election dates. The focus is on what is claimed to be textual infidelity to what is regarded as superior constitutional texts or deep constitutional principles or values. Some litigants and commentators claim there is no ambivalence – the text is clear. Others claim the question is beyond debate because a constitutional provision cannot be unconstitutional.¹⁶⁰ And then they state that even if a text is unconstitutional, only a referendum may resolve the problem. Second,

154 Lucianne Limo (2011) “Wako accused of stalling new laws,” *The Standard*, (Nairobi) 23/6/2011, at <http://m.standardmedia.co.ke/headlines.php?id=2000038056> (accessed 3/10/2011).

155 Capital FM News (2012) “CIC won’t let financial Bills row rest,” 24/8/2011, at http://www.capitalfm.co.ke/news/2011/08/cic-won%E2%80%99t-let-financial-bills-row-rest/?wmp_switcher=mobile (accessed 24/11/2012).

156 Some of the wrangles were simply bizarre. For instance, CIC and MPs traded accusations about excessive remuneration enjoyed by the other.

See Aaron Ochieng’ (2012) “CIC hits out at MPs,” Standard Digital (Nairobi), 8/10/2012, at http://www.youtube.com/watch?feature=player_embedded&v=zPS8eu6-1SI (accessed 2/12/2012);

Moses Njagi (2012) “Marende warns against cutting MPs’ pay” Standard Digital August 24, 2012, at http://www.standardmedia.co.ke/index.php/videos/business/InsidePage.php?articleID=2000064688&pageNo=2&story_title=m (accessed 24/11/2012).

157 Fred Oluoch (2011) “Kenya: new Constitution faces implementation challenges,” *News From Africa* at <http://www.afronline.org/?p=9100> (accessed 24/11/2012).

158 Most of these wrangles related to remuneration for CIC Commissioners, and some to some extent perceived power grab by other agencies in the constitutional implementation.

159 In a sense, this part merely emphasizes issues that all belong to other controversies on constitutional implementation, the entry point being the adjudication as the site of struggle.

160 s. 2A of the 1969 Constitution provided that Kenya was to be a *de jure* single-party state by abolishing multi-partism. This contravened the constitutional provisions on freedom of conscience; expression; association; and assembly, among others. S2A was also inconsistent with constitutionalism and the rule of law. It was thus unconstitutional. And the Ugandan case dealt with the constitutionality of an entire Constitution (the Obote Constitution of 1966). Martha Karua, the Gichungu MP, presidential aspirant and former Minister for Justice, National Cohesion and Constitutional Affairs, among others, have claimed that a constitutional provision cannot be unconstitutional. Cf. Benjamin Obi Nwabueze (1974) *Presidentialism in Commonwealth Africa*, St. Martin’s Press, New York; Benjamin Obi Nwabueze (1973) *Constitutionalism in the Emergent States*, C. Hurst & Co., London; HWO Okoth-Ogendo, (1999) “Constitutions without constitutionalism: reflections on an African political paradox,” *op.cit.*; Okoth-Ogendo (1999) “The quest for constitutional government,” in Goran Hyden, Dele Olowu & Okoth-Ogendo (1999) *African Perspectives on Governance*, Africa World Press, Trenton, pp. 33-59.

some cases raise issues about the interpretation or better view of constitutional text (eg one version of election date...). In some cases, there is a claim that the text is ambivalent. The third category of cases focus on what some regard as deliberate malfeasance or nonfeasance by the relevant Government agency, organ or official. The criticism on the vetting processes which pits the LSK against the JSC, CJ and judges, is one example.¹⁶¹ *MUHURI*¹⁶² and *CREAW*¹⁶³ which questioned presidential interpretation and conduct are another set of examples.

6. Presidency and administrative bureaucracy as a challenge, 1963-2013

The presidency and the administrative bureaucracy provide important opportunities and challenges to constitutional implementation.

6.1 From imperial presidency to ambivalent presidency

There are about four reasons why the presidency poses a big challenge to constitutional implementation. First, the presidency has been the key reform question and (it is perceived that) it stood to lose most of its imperial powers, functions and privileges.¹⁶⁴ The 2010 Constitution introduces reinforced checks and balances on the presidency. (It is perceived that) other institutions have been empowered at the expense of the presidency. The presidency may make certain key decisions only after consultative processes or with the approval of these institutions. Most presidential appointees will need Parliament's approval before they assume office.¹⁶⁵ Further, the requirement of public participation in many processes constrains the President to follow consultative channels in appointments, or in executing the functions of their offices.¹⁶⁶

Second, there are omissions or loopholes regarding who is to perform certain functions. In that case, the presidency may step in to fill the vacuum. This might pose a serious challenge where the presidency exploits the vacuum with authoritarian, partisan and related suboptimal consequences.

The third challenge relates to the powers and functions of the presidency. What powers does the presidency have on the implementation process?

Fourth, there is ambivalence regarding the role of the presidency. The ambivalence is rooted in the constitutional text, structure and history, as well as the practice of actors such as the occupant of the office, state bureaucrats, advisors and politicians.¹⁶⁷ While the presidency enjoys some traditional presidential powers under the 1969 Constitution and its administrative structures, some of the 2010 Constitution's provisions, e.g., on parliamentary independence, have been put into operation. For example, in March 2011, some members of the House Business Committee (HBC), some MPs and some Kenyans reportedly expected President Kibaki to recall Parliament, which was then in recess.

However, the Speaker of the National Assembly, Kenneth Marende, indicated to President Kibaki that under the 2010 Constitution the President could not recall Parliament. The main reason was that technically, because of the omission from the 2010 Constitution, the President also did not have the power to wind up the last session. The Speaker then relied on the Parliamentary Standing Orders to recall Members by way of a Gazette Notice.¹⁶⁸

161 Koome Kimonye "LSK threaten to boycott courts" *Citizen News* 5/11/2012 at <http://www.citizennews.co.ke/news/2012/local/item/5425-lsk-threaten-to-boycott-courts> (accessed 8/11/2012).

162 *Muslims for Human Rights (Muhuri) & 2 Others v. Attorney-General & 2 Others* [2011] *op. cit.*

163 *Centre For Rights Education & Awareness (CREAW) & 8 Others v. Attorney General & Another* *op. cit.*

164 Sihanya (2011) "The Presidency and Public Authority in Kenya's New Constitutional Order," *op. cit.*

165 See above.

166 See Walter O. Oyugi, E.S. Atieno Odhiambo, Michael Chege & Afrifa K. Kitonga (eds) (1988) *Democratic Theory and Practice in Africa*, Portsmouth, NH, USA & Heinemann, London.

167 These include presidential handlers and advisors of various inclinations and hues.

168 Sihanya, (2011) "The Presidency and Public Authority in Kenya's New Constitutional Order," *op. cit.*

6.2 From ambivalent administrative bureaucracy to ambivalent administrative bureaucracy

The administrative bureaucracy is as crucial to the constitutional implementation process as it was in the years of extreme repression, primitive accumulation, exploitation and exclusion. Some of the challenges include the fact that the functions of the administrative bureaucracy are not clearly spelt out. This is partly because of two related reasons: first, constitutional ambivalence on the role of the administrative bureaucracy, including of the provincial administration (PA). And second, the relevant rules and regulations under the Constitution and relevant public service laws are yet to be reformed.¹⁶⁹ Remarkably, presidential powers have been exercised by the technocracy or the higher administrative bureaucracy.

6.3 Impeding interests and the impact of political dynamics on constitutional implementation

Probably one of the key challenges is identifying the character, nature and extent of the various interests in the constitutional implementation process. Who is interested in what contested, ambivalent, or seemingly clear and innocuous issues? There is need to develop a typology of such interests. What is the impact of such interests in the constitutional implementation process, including the March 4, 2013 General Elections?

6.4 Clarifying whose mandate it is to deal with the arising challenges

In order to optimize the opportunities and address the challenges to constitutional implementation, there is need to further clarify the mandates, roles and strategies of key actors. Of course some of these are becoming and will become clearer in the context of the struggle and process of constitutional implementation. Some of the key issues include: what is the role of the (semi)presidency (i.e. presidency and premiership, up to the next presidency) in constitutional implementation? How can that office facilitate implementation? How can the administrative bureaucracy be reoriented to support implementation and a culture of constitutional government?

When is an implementation issue a constitutional question to be resolved first by the “political” branches (the Executive, Parliament, and the party process) before the Judiciary may adjudicate? How can the mainstream Executive and Parliament work with the Commission for the Implementation of the Constitution (CIC) and related organs for optimal constitutional implementation?

6.5 Constitutional amendment as implementation?

The Constitution provides for a two-pronged formula or methodology for amendments. Some clauses may be amended by Parliament while others must be through referendum.¹⁷⁰ The Constitution also provides for different formulae depending on whether it is Parliament or the referendum processing the amendment. It is arguable that a constitutional amendment may be critical in some cases to secure optimal implementation. But in some cases amendment may be a manipulative strategy or tactic.

6.5.1 Election date

The March 4, 2013 General Elections are key to restructuring the Executive. The elections will usher in a reconstructed presidency, and a new deputy presidency. There will also be cabinet secretaries, principal secretaries which will replace Cabinet ministries and Permanent Secretaries in terms of mandate and

169 These include the Civil Service Code of Regulations, the Teachers Service Code or Regulations, Civil Procedure Rules 2010, Judicial Service Commission Regulations, Parliamentary Standing Orders 2008, Public Service Commission Regulations, Public Service Commission (Police Force) Regulations, Public Service Commission (Prisons Service) Regulations and the Police Standing Orders. Cf. Armed Forces (summary jurisdiction) Regulations, 1969 (under Cap 99, (repealed)), Armed Forces (board of inquiry) Regulations, 1969 (under Cap 99, (repealed)), Armed Forces Rules of Procedure 1969 (under Cap 99, (repealed)) and Armed Forces (general) Regulations, 1969 (under Cap 99, (repealed)).

170 See Article 255.

style. Moreover, the elections will usher in county governments that will qualify the local government structure, and the administrative scope of the Ministry of Local Government.¹⁷¹ The elections and county government will have an impact on the provincial administration. As much as a final election date has been set, there is still the fear that some politicians, bureaucrats or technocrats may engage in mischief leading to electoral fraud similar to the 2007 presidential elections.¹⁷²

There are about three ways of dealing with the debate on constitutional amendment: First, amend. Second, do not amend because the date is clear or the political process can resolve the apparent stalemate. Third, do not amend because the political and administrative process can resolve the ambivalence now and in the future.

6.5.2 Addressing ambivalence to amend the Constitution

How do Kenyans deal with ambiguity in constitutional implementation? There are at least four types of ambivalence or ambiguity in Kenya's constitutional implementation process. First, there is textual ambivalence. Certain clauses may yield different interpretations, constructions, or results. Second, there is institutional- and especially executive- ambivalence. The key decision makers (in the Executive, Parliament, the Judiciary, and the Commission and Independent Offices) have conflicting interests and perspectives on text and process. These interests may be institutional, social, or even personal. Third, there is ambivalence among the administrative bureaucracy: the state bureaucrats, politicians, and formal as well as informal advisors. Some of these officials are now called state or public officers, handlers, "boffins," or even "mandarins."

The fourth type is ambivalence in the body politic. All these forms of ambivalence may be explained by the fact that the Constitution was a delicate compromise especially on major contested issues. A lot therefore depends on the *bona fides* (or good faith) of the key actors; and eternal vigilance among the public.

6.6 Security challenges under the emerging constitutional dispensation

Security is one of the key functions of any constitutional or legitimate government. And Article 29 guarantees the right to freedom and security of the person. This includes the right not to be:

- “(a) deprived of freedom arbitrarily or without just cause;
- (b) detained without trial, except during a state of emergency, in which case the detention is subject to Article 58;
- (c) subjected to any form of violence from either public or private sources;
- (d) subjected to torture in any manner, whether physical or psychological;
- (e) subjected to corporal punishment; or
- (f) treated or punished in a cruel, inhuman or degrading manner.”

6.6.1 Role of the National Police Service under the emerging dispensation

In early September 2012 after intrigues (or *fitina*) and a long delay, President Kibaki nominated a Chair and 5 members to the National Police Service Commission (NPSC) in consultation with Prime Minister Raila Odinga. He then appointed them in a Gazette notice issued on Friday September 28, 2012 following the approval by Parliament. The following are the appointees: educationist Mr Johnstone Kavuludi as the Commission Chairman. The members are Mr Ronald Musengi, Ms Esther Chui-Colombini, Mr Murshid Mohammed, Mr Muiu Mutia and Ms Mary Awuor.¹⁷³

171 Cf. the Local Government Act, Cap 265; County Governments Act, No. 17 of 2012.

172 Eugene Wamalwa, the Minister for Justice, National Cohesion and Constitutional Affairs and IEBC, among others, claimed in October 2012 that delays in procuring biometric voter registration (BVR) equipment was being caused by the Ministry of Finance or Treasury and the Attorney-General's Office, among others.

See Koome Kimonye (2012) "IEBC: bring BVR kits by November 5th, or else..." *Citizen News*, at <http://www.citizennews.co.ke/news/2012/local/item/5103-iebc-bring-bvr-kits-by-5th-nov-or-else> (accessed 25/11/2012).

173 Cyrus Ombati (2012) "Kibaki appoints Police Service Commission nominees," *Standard Digital*, at http://www.standardmedia.co.ke/?articleID=2000067714&story_title=kibaki-appoints-police-service-commission-nominees (accessed 22/10/2012).

The next reform-related task is for the newly appointed commissioners to organize for the choosing of an Inspector General to replace Police Commissioner Matthew Iteere whose term constitutionally expired on August 27, 2012. The Commission has sought to fill in the vacant posts of Inspector General and two deputies. The slots were advertised in the dailies on October 15, 2012. Applications were to be made by October 29, 2012. The interviews were commenced on Friday, November 9, 2012, with the Commission promising that the Inspector General of Police would be in office by December 2012. The

Commission's other priority is to recruit a new CID Director and hire 7000 police officers.¹⁷⁴

In early September 2012, just before the appointments were made, two people, Albert Mulindi and Samwel Ng'ang'a, have through their lawyer John Khaminwa moved to the High Court seeking orders that the appointment of Inspector General of the Police be postponed until after the 2013 General Elections. They claimed the appointments would compromise state security because with only six months to elections, a new officer would not be placed to appreciate and handle the security challenges during a period of political volatility. Justice George Odunga heard the unsuccessful case. Commenting on the case, Imenti Central MP Gitobu Manyara claimed there was a hidden hand seeking to scuttle police reforms and the fight against impunity.¹⁷⁵

As has been noted, elections remain a main trigger of violence and insecurity, and security forces (regular police, administrative police, military) play a key role in electoral processes. In the light of the 2007 General Elections, the discussion continues on how to provide and organize security during electoral processes, and how to make sure that the involvement of the security forces does allow for free and fair elections.

Section 24 of the National Police Service Act, 2011 provides for an array of functions that relate to administration of security. The following are some of the general functions of the police:

- (a) Provision of assistance to the public when in need;
- (b) Maintenance of law and order;
- (c) Preservation of peace;
- (d) Protection of life and property;
- (e) Investigation of crimes;
- (f) Collection of criminal intelligence;
- (g) Prevention and detection of crime;
- (h) Apprehension of offenders;
- (i) Enforcement of all laws and regulations with which it is charged; and
- (j) Performance of any other duties that may be prescribed by the Inspector General under this Act or any other written law from time to time.

It is expected that the National Police Service will diligently perform their duties during national elections to ensure a peaceful transition. Collaboration of the police service with the Independent Electoral and Boundaries Commission (IEBC) is key to achieving security during the March 4, 2013 and future elections. We have noted that elections are a process and not an event. Therefore, the security apparatus needs to closely monitor the electoral process to prevent criminal conduct or conduct that may compromise security.

Relatedly, section 5 of the National Intelligence Service Act provides that the National Intelligence Service (NIS) shall be responsible for security intelligence and counter intelligence to enhance national security. It is tasked with an array of duties. Those that relate directly to security during elections include: detecting and identifying any threat or potential threat to national security; advising the President and the Government of any threat or potential threat to national security (eg political or ethnic violence);

174 Benard Momanyi (2012) "Wanted: Inspector General of Kenya Police," *Capital FM News*, at <http://www.capitalfm.co.ke/news/2012/10/wanted-inspector-general-of-kenya-police/> (accessed 23/10/2012).

175 Lucianne Limo (2012) "Court to rule on police boss appointment" *Standard Digital* September 13, 2012, at http://www.standardmedia.co.ke/index.php/mag/sports/videos/?articleID=2000066063&story_title=Court-to-rule-on-police-boss-appointment (accessed 25/10/2012).

and safeguarding and promoting national security, national interests, sovereignty and the economic wellbeing of the Republic and its citizens within and outside Kenya. If it performs the foregoing duties well, NIS will effectively ensure that there is peace and security during elections.¹⁷⁶

Section 4 of the National Security Council Act tasks the National Security Council (NSC) with addressing both internal and external aspects of national security. Election related unrest is a threat to internal security and if the statute is effectively implemented, the National Security Council will be expected to liaise with other security organs to prioritize the programs, projects and activities that address the internal interests on the national security of the Republic.

6.6.2 Security flaws: Tana Delta, Kisumu, MRC, Suguta Valley, Garissa, Nairobi (the grenade attacks), etc...

Kenya has faced and is continuing to face critical security challenges, most of which seem related to the March 4, 2013 General elections. These include security problems in the Tana Delta, Kisumu, the Coast Region (MRC), Baragoi Valley, and Nairobi (the grenade attacks).

6.6.2.1 Security in the Tana Delta

Clashes erupted in the Tana delta region in May 2012. The ethnic violence which has existed between the Orma and Pokomo communities has continued to escalate and reached its peak in September 2012. Hundreds were killed or injured and a lot of property was lost. In a press statement, Danson Mungatana, the Garsen MP, blamed the Government's inaction for the escalation of violence between the Orma and Pokomo communities. He stated:

“If the regular police were there; if Administration Police was there; if the General Service Unit was there and (yet) their equipment was stolen, there is no other better time than this for the military to be engaged on the ground to pacify the area.”

The Garsen MP further pointed out that the National Intelligence Service and Criminal Investigations Department had failed to act on information given to them seven months before, regarding the arming of militias in the region. The question is, how could a few people who were armed and camping in a forest be allowed to unleash terror on citizens?¹⁷⁷

After the failure of Kenyan police to ensure security in the area, citizens were taken by further surprise when the intervening General Service Unit (GSU) officers blocked the Kenya Red Cross Society (KRCS) officials from accessing a village in Tana Delta. KRCS was delivering humanitarian aid to families affected by the attacks. The media had similarly been barred from the area after houses were razed in Ozi area. There have been reports that the officers could have torched the houses as they combed the area to flush out those with illegal firearms and the MP wanted to know who issued the directive and if the reports are true. Mungatana suggested that police officers with Cushitic leanings be removed from the group dispatched to the area to dispel fears that the operation could be lopsided.¹⁷⁸

In August 2012, then acting Internal Security Minister, Yusuf Haji, called a “peace” meeting involving the Government and representatives of the Orma and Pokomo communities.¹⁷⁹ Galole MP, Dhadho Godhana refused to attend the meeting stating that the convener of the meeting (Hon Haji) was an interested party in the Tana Delta crisis and therefore was not placed to call and chair a meeting aimed at solving the disputes in the region.¹⁸⁰ He claimed the Minister, who is the MP for neighbouring

176 CfE.S. Atieno Odhiambo (2004) “Ethnic cleansing and civil society in Kenya 1969-1992,” 22:1 *Journal of Contemporary African Studies*, 29-42.

177 “Tana Delta MPs want army sent to quell violence” Capital News 10/9/2012 at <http://www.capitalfm.co.ke/news/2012/09/tana-delta-mps-want-army-sent-to-quell-violence/> (accessed 8/11/2012).

178 “Mungatana claims GSU razed houses in Tana,” *Standard Digital* 19/9/2012, at <http://www.standardmedia.co.ke/?articleID=2000066449> (accessed 8/11/2012).

179 Zaddock Angira (2012) “Mr Godhana arrested over Tana clashes” Saturday Nation, November 24, 2012 at <http://www.nation.co.ke/News/Minister+Godhana+arrested+over+Tana+clashes/-/1056/1505024/-/gongf5cz/-/index.html> (accessed 24/11/2012).

180 Cyrus Ombati & Philip Mwakio (2012) “12 killed in renewed Tana River clashes,” *Standard Digital* 7/9/2012 at http://www.standardmedia.co.ke/index.php/videos/business/ktn.php?articleID=2000065649&pageNo=1&story_title=

Ijara constituency, had engaged in an expansionist agenda aimed at controlling the Tana River region. Specifically, Godhana claimed that the Minister's house, Yusuf Haji Secondary School (named after him), Shurie Secondary School (named after his father) and a number of other Ijara district offices are now in Tana River, instead of Garissa County.¹⁸¹ Godhana has since been charged with incitement. Haji has testified in the case.¹⁸²

6.6.2.2 Insecurity in Kisumu

There were protests in Kisumu in late October 2012 due to a surge in insecurity and violent crime that climaxed in the murder of Kisumu Town West Constituency ODM chairman, Shem Kwegu. He was killed by armed thugs and the shootings happened in broad daylight. His wife sustained serious injury. The gang is reported to have driven away in a previously hijacked vehicle. The shooting incident sparked off a wave of protests by local residents. They marched in the streets led by assistant Minister Prof Ayiecho Olweny, demanding action.¹⁸³

This incident occurred only a few days after an HIV/Aids researcher was murdered in Kisumu. Dr Joseph Odhiambo of the Centre for Disease Control (CDC) was killed by three gangsters in Tom Mboya Estate on Saturday, October 27, 2012.¹⁸⁴ The third person to be killed in similar circumstances was a security guard at Kisumu Central Nyanza Seventh Day Adventist Church. The robbers who killed him ran away with the church offertory as well.¹⁸⁵ There were allegations that two rival groups, "China Squad" and "American Marines", caused the mayhem and that the conduct of some of them reflected the practices and tradition of militias elsewhere, especially the Mungiki.¹⁸⁶ These three incidents raise questions as to the ability of the Government, and expressly the Kenya Police, to enforce citizens' right to security. Some semblance of normalcy resumed after the Prime Minister addressed rallies in Kisumu and instructed that the Kisumu Officer Commanding Station (OCS) which had just been transferred, be returned to Kisumu.¹⁸⁷

6.6.2.3 Insecurity around Suguta Valley

The Suguta Valley terrain facilitates the continuance of the rustling between the Turkana and Samburu communities, since the terrain is unfavourable even for security officers. In fact, police officers posted to the lawless border regions between Turkana and Samburu Counties say Suguta Valley, where 42 police officers were killed in a bandit attack on November 10, 2012 is among the areas they do not enter due to the risk of lethal aggression from locals.¹⁸⁸ The police were reportedly killed when Turkana

(accessed 24/11/2012).

- 181 Mosoku Geoffrey (2012) "Godhana counter: accuses Haji over Tana," *The Star* (Nairobi) 15/8/2012, at <http://www.the-star.co.ke/news/article-4788/godhana-counter-accuses-haji-over-tana> (accessed 24/11/2012).
- 182 Alphonse Mungahu (2012) "Minister Haji testifies in Godhana incitement case," *The Star* 22/11/2012, at <http://www.the-star.co.ke/news/article-96604/minister-haji-testifies-godhana-incitement-case> (accessed 2/12/2012).
- 183 Mangoa Mosota (2012) "Protests over insecurity in Kisumu," *Standard Digital* 29/10/2012, at http://www.standardmedia.co.ke/?articleID=2000069501&story_title=Kenya-Protests-over-insecurity-in-Kisumu (accessed 24/11/2012).
- 184 Mangoa Mosota (2012) "Top AIDS researcher murdered," *Standard Digital* 29/10/2012 at http://www.standardmedia.co.ke/?articleID=2000069480&story_title=Kenya-Top-Aids-researcher-murdered (accessed 24/11/2012). See also Justus Wanga (2012) "Crime wave in town linked to 'Kisumu Mungiki,'" 4/11/2012, at <http://www.nation.co.ke/News/Crime+wave+in+town+linked+to+Kisumu+Mungiki/-/1056/1611026/-/vxo90k/-/index.html> (accessed 5/12/2012); Daily Nation (2012) "Mungiki-type gangs in Kisumu," 30/10/2012, at <http://www.nation.co.ke/oped/Letters/Mungiki-type-gangs-in-Kisumu-Political-sponsors-behind-killings/-/440806/1607326/-/1m8lvyz/-/index.html> (accessed 5/12/2012).
- 185 The Standard Group (2012) "Rising gang attacks leave Kisumu in panic," *Standard Digital* 30/10/2012, at <http://www.standardmedia.co.ke/index.php/index.php?articleID=2000069512&pageNo=2> (accessed 5/12/2012).
- 186 Mungiki has largely been associated with Central Kenya politicians and the Rift Valley. There have been allegations that Mungiki has enjoyed patronage from high ranking politicians and security officers in the Moi and Kibaki administrations. Some politicians like Uhuru M. Kenyatta have declared such links. Cf. Kagwanja, Peter Mwangi (2003) "Facing Mount Kenya of facing Mecca? The *Mungiki*, ethnic violence and politics of the Moi succession in Kenya, 1987-2002," *African Affairs* 25-24.
- 187 At first, officials at Police Headquarters argued that the PM had no powers on police transfers. Constitutionlists argued that the Prime Minister has such a mandate because he had the power to supervise and coordinate Government functions, including ministries, under the Constitution and the National Accord and Reconciliation Act (NARA).
- 188 Joe Kiarie (2012) "Suguta Valley is every law enforcer's nightmare," *Standard Digital* 17/11/2012 at http://www.standardmedia.co.ke/?articleID=2000070815&story_title=Suguta-Valley-is-every-law-enforcer%E2%80%99s-nightmare (accessed 2/12/2012).

raiders attacked them to counter police attempts to recover livestock they had allegedly rustled from the Samburu. It is said that the cattle rustlers had hidden in the thick Baragoi forest. It was noted that this tragedy should provide a turning point in how the society sees the role of police officers and must prompt a review of the whole architecture of managing the police force. This is necessary if security is to be realized across the country.¹⁸⁹

6.6.2.4 Mombasa Republican Council

The Mombasa Republican Council (MRC) is a secessionist group based in the Kenya's coastal region. Security agencies blame the MRC for violence. MRC's slogan is, *Pwani si Kenya* (Coast is not a part of Kenya). Their leader, Omar Mwamnuadzi Kombani, was arrested on October 15, 2012. A few hours later, Salim Shomba, Assistant Chief in Kwale, was hacked to death. Police stated that they thought his death was planned by MRC faithful since he was thought to be a traitor.¹⁹⁰

There were also reports that MRC had threatened to disrupt the ongoing Kenya Certificate of Secondary Education (KCSE) examinations and General Elections due on March 4, 2013. The Independent Electoral and Boundaries Commission wants a constitutional court to strike out an application by Mombasa Republican Council (MRC) seeking to stop the General Election in Coast region.¹⁹¹ Numerous MRC leaders were arrested and arraigned in Court. But the faction of the Grand Coalition Government that controls the financial architecture of resources and security is yet to address the greatest cause of unrest in Kenya: historical and contemporary dispossession.

6.6.2.5 Insecurity in Nairobi (grenade attacks), etc

Numerous grenade attacks have been reported in Nairobi area in 2011 and 2012. The attacks increased when the Kenya Defence Forces (KDF) crossed into Somalia following a spate of kidnappings suspected to have been masterminded by Al-Shabaab.¹⁹² But there has been debate regarding the perpetrators and the motives. The facilities or areas that have been attacked include the Anglican Church of Kenya St Polycarp Parish on Juja Road in Pangani area. A nine year old boy was killed in the Juja Road attack.¹⁹³ This raises questions as regards the ability of Kenya's security agencies, including the NSIS, Criminal Investigation Department (CID), Police, and Administration Police, to ensure security and curb internal terrorist attack.

6.7 County administration

There are many questions regarding how the 47 county governments will relate with the provincial administration as well as the national government. The national government will still have a security role but where will the county government come in? The national government is constitutionally barred from intruding in the county government's role under the Fourth Schedule, except in certain cases which may require Parliament's approval (Articles 191 and 192). The national government has a role at the county level and may perform all the other functions that are not assigned to the county government as listed on the Fourth Schedule (Part 1). Will the county governments have sufficient human, financial, and technical resources to undertake all required responsibilities?

Article 235 states that a county government is responsible, within the framework of uniform norms and standards prescribed by an Act of Parliament for establishing and abolishing offices in its public service; appointing persons to hold or act in those offices; and exercising disciplinary control over and removing

189 *The Saturday Nation* (2012) "Baragoi tragedy should provide a turning point," *Nation Media*, 17/11/2012, at <http://www.nation.co.ke/oped/Editorial/Baragoi-tragedy-should-provide-a-turning-point/-/440804/1623006/-/item/0/-/221rpf/-/index.html> (accessed 24/11/2012).

190 "Two killed, MRC leader arrested in dawn gunfight," *Nation Media*, 15/10/2012, at <http://www.nation.co.ke/News/MRC+leader+arrested+following+gunfight/-/1056/1533332/-/afgwkaz/-/index.html>

191 Willis Okech (2012) "IEBC asks Court to dismiss MRC case," *Standard Digital*, 7/11/2012, at http://www.standardmedia.co.ke/?articleID=2000070093&story_title=iebc-asks-court-to-dismiss-mrc-case (accessed 24/11/2012).

192 Cyrus Ombati (2012) "KDF kill 73 Al Shabaab Militants in Somalia," *Standard Digital*, 16/8/2012, at http://www.standardmedia.co.ke/?articleID=2000064191&story_title=kdf-kill-73-al-shabaab-militants-in-somalia (accessed 2/12/2012).

193 Vincent Agoya (2012) "Boy killed as blast hits Nairobi church," *Nation Media*, 30/9/2012, at <http://www.nation.co.ke/News/Child-killed-in-Sunday-school-terror-bombing/-/1056/1521354/-/o1u1ad/-/index.html> (accessed 24/11/2012).

persons holding or acting in those offices. According to the Transition to Devolved Government Act, county public service is to be established by November 2012. How will the county public service relate with the national public service? What will be their specific powers and functions? How will they cooperate? How will they address administrative conflicts? How will they relate to the provincial administration?

Remarkably, chiefs recently clamoured to be given assurance about their posts.¹⁹⁴ Section 17 of the Sixth Schedule to the Constitution provides that within five years after the effective date the national Government is to restructure the system of administration to accord with and respect the system of devolved government. How will this be done? Which offices will be deployed and to what offices or roles? Which offices will be scrapped and how will power and responsibility be shared without strife?¹⁹⁵

7. Prospects for constitutional implementation, 2012-2015

There are crucial measures that need to be taken in the five years following promulgation or three years from this writing.

7.1 Mapping out the next phase of constitutional implementation

Some success has been registered in constitutional implementation and reform. Some challenges persist. The relevant institutions have a duty to ensure implementation.

7.1.1 Judiciary's role in constitutional implementation

There are four crucial roles the Judiciary should play in constitutional implementation and in promoting constitutionalism and the rule of law in Kenya. First, the Judiciary should interpret the Constitution faithfully considering its text (or letter), structure and history, practice or tradition. Thus the Judiciary is expected, while interpreting the Constitution, to ensure that its supremacy is not compromised and further to declare void any legislation or conduct that is inconsistent with the Constitution.¹⁹⁶

Second, the Judiciary can play a major role in implementation and promote constitutionalism by enforcing the Constitution 2010 through decisions or orders where there has been blatant disregard or neglect in enforcing the Constitution, and more importantly, in enforcing the Bill of Rights.

Third, the Judiciary can be instrumental in promoting constitutionalism through constitutional implementation, which overlaps with interpretation. Can the Judiciary move *suo moto* where the other organs of Government have failed or are intransigent or recalcitrant?¹⁹⁷ What is the import of a declaratory order under Article 261(5)-(7)? Can the Judiciary order institutions like Parliament to pass an important implementation Bill if Parliament fails or refuses to do so?

Fourth, the Judiciary can play a major role in implementation through a judicious interpretation, construction or translation of the text, structure and history in the context of the social, economic,

194 Naftal Makori (2012) "Chiefs demand assurance on job security," *Standard Digital*, 30/8/2012, at http://www.standardmedia.co.ke/?articleID=2000065060&story_title=Chiefs-demand-assurance-on-job-security (accessed 25/11/2012).

195 See Part 3.1.3 on Provincial Administration above.

196 Articles 2 and 159. The Judiciary's policy, programmatic, strategic, and even tactical approach to constitutional implementation is contained in Republic of Kenya (2012) *Judicial Transformation Framework 2012-2016: Laying the foundations for the Transformation of the Kenyan Judiciary*, *op. cit.*; Willy Mutunga (2012) Speech at the University of Nairobi Taifa Hall, on the launch of at the commencement of 'The Judicial Marches Week' countrywide on August 21, 2012, on the launch of the Judiciary Week.

197 In some cases, judges have been litigants. But this is not a *suo moto* action. The fundamental doctrine is that the judiciary essentially plays an umpire role. Cf the *JV Juma* case, the *Jean Gacheche*, *Joseph Nyamu*, *Riaga Omollo* case and other cases: *Justice Moiwo Ole Keiwua & Justice J. V. Odero Juma v. In the Matter of Professor Yash Pal Ghai, the Chairman of the Constitution of Kenya Review Commission & 2 Others*, High Court Miscellaneous Application Case No. 1110 of 2002 (*JV Juma* case), *op. cit.*
Jeanne W. Gacheche & 6 Others v. The Judges and Magistrate's Vetting Board & 2 Others [2012] eKLR, *op. cit.*

technological, cultural or political question before it. There are constitutional issues that will be brought before the courts that are not just rule-based but are largely social or political. For example, the President's nomination of the Chief Justice, Attorney-General, Director of Public Prosecutions and Controller of Budget was largely a political issue. Justices Daniel Musinga and Mohammed Ibrahim ruled that the nominations were unconstitutional for want of compliance with the gender rule and consultation in the political branch (between the two Principals in the Grand Coalition Government).¹⁹⁸

7.1.2 Independent constitutional commissions in constitutional implementation

While proponents of the classical division of powers had envisioned a neat typology of three arms of Government, some argue that a fourth arm is emerging in Kenya's constitutional framework. Article 248 of the 2010 Constitution establishes nine commissions and independent offices. These include the Kenya National Human Rights and Equality Commission, the Independent Electoral and Boundaries Commission, the Commission for Revenue Allocation, the Parliamentary Service Commission, the Judicial Service Commission, and the Public Service Commission. These commissions differ from commissions in the 1969 Constitution because they have an express provision outlining their independence from other arms of Government and they are textually (although not practically), administratively and financially delinked from the executive. Who will regulate the regulators and guard the guardians? Is it desirable to have agencies that are completely independent and not subject to the checks and balances that have been developed for constitutional government over the years?¹⁹⁹

7.1.3 Civil society organisations in constitutional implementation

A prominent, albeit subtle, check and balance on the exercise of presidential and public authority in Kenya is the sovereignty of the people as proclaimed in the opening phrase of the Preamble to the 2010 Constitution: "We, the people...". The Constitution then clearly lays out the people's sovereignty in Article 1, which vests all sovereign power in the people of Kenya, and in Articles 10, 129 and 232, which provide for the participation of the people in all facets of law execution, including in policy making.²⁰⁰ This is a departure from the emphasis on the sovereignty of the state under the 1969 Constitution. "The people" in the 2010 Constitution is largely embodied in civil society. But, the presidency and administrative bureaucracy may use welfare and security of the people as an excuse to abrogate the rule of law and administrative justice (cf. Article 129).

7.2 Opportunities for constitutional implementation despite challenges

There are important issues which keep recurring. Some of them were articulated at the Bomas as contentious or, later, as contested issues. They provide an opportunity for constitutional implementation, under the doctrine of *pacta sunt servanda* (agreements should be served or implemented in good faith). These include the powers and roles of the presidency and administrative bureaucracy, devolution, representation, and the Judiciary.

7.2.1 "Devolution" — local government and finance

The Constitution 2010 enacts a compromise on devolution. This is, in terms of decentralized powers (only aspects of executive and legislative); levels of devolution (national, County);²⁰¹ and the relations between the national and county governments. Remarkably, there has been a lot of debate on how county and local governments will operate in the context of the powers and functions reserved for the national government. How will the provincial administration be restructured? How will the devolved

198 Sihanya (2011) "The judiciary and constitutionalism under the 2010 Constitution," op. cit.

199 See: Lawrence Lessig & Cass Sunstein (1994) "The President and the Administration," 12 January, *Columbia Law Review* : 1–123; Harold H. Bruff (2010) "Presidential power meets bureaucratic expertise," *University of Pennsylvania Journal of Constitutional Law* 461–77; Ben Nwabueze (1974) *Presidentialism in Commonwealth Africa*, St. Martin's Press, New York; David Rosebloom, Richard Clerkin & Robert Kravchuk (2008) *Public Administration: Understanding Management, Politics and Law in the Public Sector* Mc Graw-Hill Companies, USA.

200 D. Krasner (2004) "Sovereignty: New institutions for collapsed and failing states," 29(2) *International Security*, 85–120.

201 The Bomas constitutional negotiations had proposed four levels, namely: the national government, regional government, district government and locational government. See Preston Chitere, Ludeki Chweya, Japhet Masya, Arne Tostensen, Kamotho Waiganjo (2012) *Kenya Constitutional Documents: A Comparative Analysis*, Chr. Michelson Institute, Bergen, Norway.

government, especially county governments be financed? What will be the role of the Ministry of (or department responsible for) Finance? While the Ministry of Finance has undermined devolution, some new legislation and parliamentary relationships have given hope on the implementation of devolved government.²⁰²

7.2.2 Participation and representation²⁰³

The question of participation and representation is proving to be a complex issue in constitutional implementation.²⁰⁴ Some of the key issues relate to gender, ethnicity, youth and persons with disability. There are also interests such as the civil society and the private sector. The High Court has adjudicated on the gender dimension.²⁰⁵ And the presidency, premiership, National Cohesion and Integration Commission (NCIC), and others have addressed the ethnic issue from different perspectives and with varied consequences.²⁰⁶

7.2.3 Judiciary and implementation challenges and prospects

Some of the issues regarding the role of the Judiciary in constitutional implementation include the vetting of judges and magistrates; the establishment and operationalisation of the divisions of the High Court; and the operationalisation of the administrative bureaucracy in the Judiciary – at all the levels. Some may be symbolic but equally important like the dress code. In late 2011, the Chief Justice through the Circular (No. CJ 90) communicated a change in judicial dress code and address.

The alteration was the product of a consensus at a Judges Colloquium also attended by the Judicial Service Commission (JSC). The following are among the changes that have been made:²⁰⁷

- (a) Wigs were discarded with immediate effect. Those who had them were instructed to either keep them as souvenirs or hand them over to the Chief Registrar; no head gear of any type will be worn except by the Kadhis;
- (b) There will be two robes for each court, one ceremonial, one functional;
- (c) Each court will deliberate on the material and colours of robes it would wish to wear;
- (d) Magistrates will through their association deliberate on whether or not they want to wear robes;
- (e) All judges, magistrates and Kadhis will be addressed as YOUR HONOUR/MHESHIMIWA instead of “My Lady” or “My Lord” as was before.
- (f) Each court is to determine the dress code of the members of the Bar appearing before it.

7.2.4 Prospects for administrative justice and an empowered administrative bureaucracy

A challenge which may endure beyond the five year transition period is the establishment or reorientation of the administrative bureaucracy throughout the country. The new presidency, the county governments, the Commission on Administrative Justice (CAJ) and a restructured provincial administration will be crucial in this regard. The mandate of the CAJ is to investigate any conduct in state affairs, or any

202 Abdikadir Sugow (2012) “Legal challenges threaten transition to new order,” *Standard Digital*, 2/12/2012, at http://www.standardmedia.co.ke/?articleID=2000071947&story_title=Kenya-Legal-challenges-threaten-transition-to-new-order (accessed 5/12/2012)

203 Adams Oloo (2011) “Elections, representations and the New Constitution,” Constitution Working Paper series No. 7 Society for International Development (SID) Eastern & Central Africa, Nairobi Printed by The Regal Press Ltd, Nairobi.

204 Participation has always been a core issue in constitution making, constitution review and constitutional implementation. For some perspectives on the issue see Willy Mutunga (1999) *Constitution Making from the Middle: Civil Society and Transition Politics in Kenya, 1992-1997*, Mwendu, Harare.

205 See Part 3.1.4 above. I have embarked on a comprehensive study on participation, representation and public interest lawyering under the auspices of Innovative Lawyering (IL) and Sihanya Mentoring (SM). See Ben Sihanya “Public participation and public interest lawyering under the Kenyan Constitution: theory, process and reforms” (forthcoming in *LSK Journal*)

206 Ben Sihanya (2012) “Administering and regulating education for national integration in Kenya,” presentation to the National Cohesion and Integration Commission (NCIC) People’s Conference on Diversity, Ethnicity and Race, Kenyatta International Conference Centre (KICC), Nairobi, March 12-13, 2012; National Cohesion and Integration Commission, “Towards national cohesion and unity in Kenya: ethnic diversity and audit of the civil service,” at <http://www.cohesion.or.ke/images/downloads/ethnic%20diversity%20of%20the%20civil%20service.pdf> (accessed 25/11/2012).

207 Michael Murungi (2011) “Chief Justice issues circular on new judicial dress code and address,” *Kenya Law Reports*, September 2011, at <http://www.kenyalaw.org/kenyaLawBlog/?p=190> (accessed 25/11/2012).

act or omission in public administration by any State organ, State or public officer in National and County Governments that is alleged or suspected to be prejudicial or improper or is likely to result in any impropriety or prejudice. It is also tasked with investigating complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct within the public sector.²⁰⁸ Moreover, CAJ is expected to facilitate the setting up of, and build complaint handling capacity in, the sectors of public service, public offices and state organs. It is also charged with recommending compensation or other appropriate remedies against faulting persons or bodies.²⁰⁹

7.3 Rationalizing the content of laws

There are omissions, contradictions, ambivalence and overlaps among numerous laws. Two main reasons account for this. First, regarding the laws enacted before the Constitution of 2010 came into force, there was no reliable organizing principle to undergird the statutes, the 1969 Constitution having been delegitimized over the years. Second, regarding the statutes enacted after August 2010, there were cases in which statutes were passed largely without sufficient stakeholder consultation, to comply with the deadline. The organising principle or intendment was not necessarily to test the constitutionality or juridical quality of the Act.

7.4 Consolidating laws dealing with similar issues

Some issues are scattered in numerous laws. Examples include questions regarding the (mainstream) administrative bureaucracy which are in the Service Commissions Act (substantially replaced by the Public Service Act, 2011), the TSC Act, Cap 212 (replaced by the TSC Act 2012), and the Independent Offices Appointment Act 2011. There is a case to consolidate the content (eg through appropriate cross referencing), and even the titles.

7.5 Securing the constitutionality of all laws generally

The constitutional implementation process is principally guided by the Sixth Schedule. Once the panic mode is over (or avoided) there is need to review the new laws; those enacted under that Schedule; as well as all other laws to test their constitutionality and juridical quality. Rules regulating bye-laws and administrative procedures also ought to be reviewed.²¹⁰ The contribution of these laws, rules, regulations and administrative procedures to the presidency and administrative bureaucracy should also be reviewed to assess their compliance with the standards of the new public management (NPM), among others, including technical efficiency, political participation and representation, and juridical due process or administrative justice.²¹¹

8 Conclusion: Sustaining constitutional implementation

The 2010 Constitution has consolidated gains from the reform process that began in the 1960s (and in earnest in the late 1980s). But in other respects, the Constitution has introduced new normative, structural, institutional, policy and administrative standards. It thus provides important opportunities for fundamental reform, but has to face numerous challenges to . CIC has thus remarked, in this context:

“Constitutional building as well as constitutionalism requires positive reaction and response

208 An inquiry regarding the Suguta Valley death of about 42 police officers has been initiated. See Cyrus Ombati (2012) “Kibaki gives nod to inquiry on Baragoi killings,” *Standard Digital*, 24/11/2012, at http://www.standardmedia.co.ke/?articleID=2000071358&pageNo=2&story_title=Kenya-Kibaki-gives-nod-to-inquiry-on-Baragoi-killings-- (accessed 2/12/2012). See also Part 6.6.2.3 above.

209 Section 8, Commission on Administrative Justice Act. Act No. 23 of 2011. The Chair is Mr Otiende Amolo and the Vice Chair is Dr Regina Mwatha; commissioners are Ms Saadia Mohammed and Mr Leonard Ngaluma.

210 Prof Winnie Mitullah, a political science scholar at the University of Nairobi Institute of Development Studies (IDS) informs me that she is auditing the local government bye-laws. Personal communication, Machakos, December 2, 2012.

211 Sihanya (2011) “The Presidency and Public Authority in Kenya’s New Constitutional Order,” *op. cit.* See also Ben Sihanya (forthcoming 2013) *The Presidency and Administrative Bureaucracy in Kenya, 1963-2013, op. cit.*

from every citizen. The absence of good values from the citizenry and government officials is a significant challenge to the implementation process.”²¹²

Clearly, the presidency and the administrative bureaucracy have a much bigger role to play in constitutional implementation than has been acknowledged in the past. Kenyan(ist)s must confront the challenges and seize the opportunities for optimal constitutional implementation.

212 Commission for the Implementation of the Constitution (CIC) 2nd Quarter Report, 2011.

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